Nos. 09-533 and 09-547

JAN 11 2010

In The Supreme Court of the United States

CROPLIFE AMERICA, *et al.*,

Petitioners,

v.

BAYKEEPER, *et al.*,

Respondents.

AMERICAN FARM BUREAU FEDERATION, *et al.*,

Petitioners,

v.

BAYKEEPER, *et al.*,

Respondents.

On Petitions For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

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COUNTER STATEMENT OF QUESTIONS PRESENTED

Was the Sixth Circuit correct in concluding that the Clean Water Act disallows an administrative rule purporting to exempt from the Act's permitting scheme certain point source discharges of pesticides directly to or over waters of the United States, in light of the plain language, purpose, structure, and history of the Act?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondents Baykeeper, et al., with the exception of Saint John's Organic Farm, state that they are all nonprofit corporations that have no parent corporations or publicly held stock. Saint John's Organic Farm states that it has no parent corporations or publicly held stock.

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COUNTER STATEMENT OF THE CASE

Although Petitioners CropLife America, *et al.*, ("CropLife") and American Farm Bureau Federation, *et al.*, ("AFBF") labor mightily to characterize the Sixth Circuit's opinion below as worthy of review, this case has none of the important indicia of one meriting a grant of *certiorari*.

The case involves a straightforward issue of federal statutory construction – the meaning of "discharge of a pollutant" under the Clean Water Act ("CWA" or "the Act") – and whether this phrase clearly indicates that the direct release of potentially toxic pesticides into waters of the United States is to be governed by the Act's permitting program. In answering this question, the court below did not "flout" the *Chevron* doctrine, AFBF Pet. 13, ignore "contextual evidence or legislative history," CropLife Pet. 15, or "trample[] settled principles of judicial review," AFBF Pet. 20. Rather, it looked to the Act's own definitions of the key terms, interpreted the words in those definitions in accordance with their ordinary meaning, and then confirmed that the result was consistent with the purpose, structure, and history of the Act. Using this approach, the Sixth Circuit found that the Act's definition of "pollutant" plainly includes the excess and residual chemical and biological pesticides at issue, that these substances are added to water from the outside world by identifiable "point sources," and that the Environmental Protection Agency ("EPA") rule insulating such discharges from the Act's permit program was inconsistent both

with the plain language of the statute and with its underlying purpose.

The Sixth Circuit's opinion is perfectly in line with more than 35 years of federal jurisprudence addressing the purview of the Act's permit program generally, and its specific holding that certain point source pesticide discharges to waters of the United States are subject to the Act's permitting requirements is in accord with the holdings of three separate panels of the Ninth Circuit. Moreover, the Sixth Circuit's primary analysis is consistent with all but one of the statutory interpretations offered by EPA in the preamble to the rule. And on that one interpretation, as the court noted, EPA had departed not only from the plain language of the statute, but also from what the agency itself had recently characterized as "EPA's longstanding position." CropLife Pet.App. 23a.

Accordingly, although the pesticide industry argued vigorously below for *en banc* rehearing, EPA did not seek rehearing, and not a single judge on the Sixth Circuit – a forum chosen by the pesticide industry itself to hear this case – called for a vote on rehearing. CropLife Pet.App. 64a. Petitioners' suggestion that the case must now be remanded in light of *Burlington Northern and Santa Fe Railway Co. v. United States*, 129 S.Ct. 1870 (2009) – a case they thought not important enough to call to the attention of the Sixth Circuit while their petition for rehearing was pending – does not bear up under even casual scrutiny.

Petitioners also are wrong in suggesting that EPA has held a consistent position on this issue since 1972. In 1999, the agency stated formally that, in line with its "consistent" historical interpretation, "[aquatic] pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit." Res.App. 14. And while EPA did not itself issue permits for aquatic pesticide applications, it characterized this as a matter of "enforcement" discretion (not legal interpretation) as late as 2002. JA 91.[1] It was only after a strenuous lobbying effort by the pesticide industry that EPA took the position it did in the 2006 exemption rule. Tebbutt Decl. Supp. Envtl. Pet. Mot. Dismiss ¶¶ 2-3 (5/1/07).

Rather than seeking rehearing or petitioning for *certiorari*, EPA sought, and was granted, a two-year stay of the mandate so it can develop an effective CWA permitting program for aquatic pesticide applications. As EPA noted, this two-year stay will "allow EPA and authorized permitting authorities sufficient time to develop and issue Clean Water Act permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States." CropLife Pet.App. 108a-109a.

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[1] Citations to documents not in appendices to briefs to this Court are to the Joint Appendix (cited as "JA") used in the Sixth Circuit wherever possible, otherwise cites are to the document in the Sixth Circuit docket.

Petitioners' contention that this will be the "greatest" or "most dramatic" regulatory expansion in CWA history, AFBF Pet. 13; CropLife Pet. 29, is, at best, a vast exaggeration. The number of annual discharges that will be brought into the permitting fold under pesticide applicator permits is likely to be no larger than that associated with any of the scores of industrial categories already regulated under the Act's permitting scheme. Moreover, the Sixth Circuit opinion – like the EPA rule that it set aside – pertains only to discharges to or over waters. Not only are terrestrial (land-based) pesticide applications outside the scope of this opinion, but *agricultural* runoff and return flow (about which Petitioners profess to be particularly concerned) are statutorily exempted from the Act's permitting requirements altogether.

Petitioners' further claims that requiring permits for aquatic pesticide applications will promote disease, imperil the nation's food supply, and compromise national security are demonstrably false. Four states – California, Nevada, Oregon, and Washington – had implemented CWA permitting programs for aquatic pesticides prior to EPA's 2006 regulation, all without calamity. California urged EPA *not* to exclude aquatic pesticides from the Act's permitting requirements, noting that over one quarter of the state's waterways were already impaired by pesticide constituents. JA 142-43.

Finally, Petitioners' suggestion that an aquatic pesticide exemption from the CWA's permitting program should be *implied* from the existence of the

Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.*, is fundamentally inconsistent with the language and structure of the two statutes. As EPA stated in 1999, "[n]othing in FIFRA or the CWA remotely suggests that compliance with FIFRA also means compliance with the CWA." Res.App. 11. Rather, FIFRA is a screening statute that determines whether a pesticide may be introduced into commerce. It "does not occupy the field of pesticide regulation in general or the area of local use permitting in particular," and "certainly does not equate registration and labeling requirements with a general approval to apply pesticides." *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 613-14 (1991).

At root, Petitioners' real complaint is that pesticide applicators now face systematic regulation under the Act. This fact, however, places them in no different position from all of the other private and public entities who have had to learn to live with – and ultimately prosper under – CWA regulation since the permit program was introduced in 1972 to clean up our nation's waters.

REASONS FOR DENYING THE PETITIONS

The petitions for a writ of *certiorari* should be denied because the Sixth Circuit's opinion conflicts with no opinion of this Court or of any court of appeals, and because it is faithful to the statute and to governing principles of statutory construction.

Moreover, the practical effect of the opinion will be no different from that of dozens of other circuit court decisions defining the regulatory reach of the CWA.

I. THE SIXTH CIRCUIT'S OPINION IS HARMONIOUS WITH FEDERAL APPELLATE JURISPRUDENCE INTERPRETING THE CWA.

The central regulatory feature of the CWA's program to protect the waters of the United States is the National Pollutant Discharge Elimination System ("NPDES") permitting system. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 319 (1982). An NPDES permit is required for "the discharge of any pollutant," 33 U.S.C. § 1342(a)(1), and the "discharge of a pollutant," in turn, is defined as "*any* addition of *any* pollutant to navigable waters from *any* point source," *id.* § 1362(12) (emphases added). *See generally Department of Housing & Urban Dev. v. Rucker*, 535 U.S. 125, 131 (2002) ("the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'") (citation omitted). The Act defines "point source" to mean "any discernable, confined[,] and discrete conveyance," and its definition of "pollutant" includes, *inter alia*, "chemical wastes" and "biological materials." 33 U.S.C. §§ 1362(6) & (14). The Act itself explicitly exempts certain discharges from the NPDES requirement, and EPA has no general authority under the statute to grant further exemptions. *See Natural Res. Def. Council ("NRDC") v. Costle*, 568 F.2d 1369, 1377 (D.C. Cir. 1977).

The Sixth Circuit opinion here is wholly consonant with a long line of federal appellate decisions interpreting the scope of the NPDES program broadly to achieve the Act's substantive goals. *E.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 565-66 (5th Cir. 1996); *cf. Rapanos v. United States*, 547 U.S. 715, 723 (2006) ("the discharge of a pollutant" and "pollutant" are "defined broadly").[2]

The opinion is also consistent with multiple appellate court holdings that Congress intended water pollution to be controlled through "point source" regulation whenever feasible, *e.g., United States v. Earth Sciences, Inc.*, 599 F.2d 368, 373 (10th Cir. 1979); that a point source "adds" a pollutant when it "introduces" that pollutant to the waters "from the outside world," *e.g., Catskill Mountains Chapter of Trout Unlimited v. City of New York*, 273 F.3d 481, 491 (2d Cir. 2001); *cf. South Fla. Water Mgmt. Dist. v. Miccosukee Tribe of Indians*, 541 U.S. 95, 103 (2004); and that there is no implied NPDES exemption for discharges made for allegedly beneficial purposes, *e.g., Minnehaha Creek Watershed Dist. v. Hoffman*, 597 F.2d 617, 627 (8th Cir. 1979).

Further, the Sixth Circuit's specific holding that NPDES permitting is required for the discharge of chemical pesticides that include excess or residual

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[2] As the Sixth Circuit noted, however, it "need not consider the . . . breadth" of the term "pollutant," since "§ 1362([6]) [is] unambiguous as to pesticides." CropLife Pet.App. 15a.

chemicals, and for the discharge of biological pesticides, is exactly the same conclusion reached by the only other court of appeals to address the issue. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 533 (9th Cir. 2001) (NPDES permit is required for aquatic pesticide discharge because "residual" chemical pesticide left in water after aquatic application "qualifies as a chemical waste"); *Fairhurst v. Hagener*, 422 F.3d 1146, 1150-51 (9th Cir. 2005) (chemical pesticides that "produce no residue or unintended effects" are not pollutants, but aquatic pesticide application that will produce excess or residue requires a permit); *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1185 (9th Cir. 2002) (biological pesticides are pollutants and their application over waters requires a permit).

Despite the unanimity of federal appellate jurisprudence supporting the Sixth Circuit's decision, Petitioners claim that "[a] more concrete circuit split is not possible," CropLife Pet. 2, because petitions for review of EPA's rule were filed in numerous circuits before being consolidated randomly in the Sixth Circuit. But many (if not most) challenges to EPA rulemaking efforts under the CWA are brought in multiple circuits, and there is no indication that Congress, by enacting the venue-determination provisions in 33 U.S.C. § 1369(b) and 28 U.S.C. § 2112(a)(3), meant for all such challenges to be resolved by this Court. Further, it is highly speculative to suggest that any of the other circuits in which petitions were filed would have come to a

conclusion different from that reached by the Sixth Circuit. Finally, given that the Ninth Circuit decisions discussed above implicated precisely the same legal propositions at issue in EPA's rule, a circuit split was indeed "possible" – it just did not materialize.[3]

Nor does this Court's opinion in *Burlington Northern* conflict with the Sixth Circuit's ruling, much less compel a remand. Although Petitioners emphasize that this "highly analogous" opinion was "issued after the Sixth Circuit's decision," CropLife Pet. 17, they omit that it was issued *before* the Sixth Circuit unanimously denied their then-pending petition for rehearing *en banc*. Petitioners could have called *Burlington* to the lower court's attention at that time (as they did two other intervening opinions, *see* Rule 28(j) Resp. (6/15/09); Rule 28(j) Resp. (7/13/09)), but chose not to do so.

In *Burlington Northern*, this Court rejected EPA's attempt to impose retroactive financial liability on a pesticide *seller* under a different federal statute – the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") – when a third party distributor stored and carelessly spilled that pesticide elsewhere. 129 S.Ct. at 1875. Contrary to Petitioners' assertion, the Court did not address the question of whether a pesticide can be a "waste" when "serving its intended purpose." CropLife Pet. 18.

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[3] As Petitioners note, the Second Circuit did not rule on the question. CropLife Pet. 6; AFBF Pet. 7.

Indeed, the case did not address the meaning of "waste," and it involved no pesticide *use* at all (as discussed below, *infra* 25, CERCLA explicitly exempts applicators of FIFRA-registered pesticides from liability).

The question of intent arose solely in the context of whether the seller "*arranged* for disposal . . . of hazardous substances," so as to be jointly liable for the third party's spills under 42 U.S.C. § 9607(a)(3) (emphasis added). 129 S.Ct. at 1878. To answer that question, this Court employed precisely the same interpretive method applied by the Sixth Circuit here: because CERCLA does not define "arrange," the Court looked to dictionary definitions, and construed the term in accordance with its ordinary meaning. Noting that "the word 'arrange' implies action directed to a specific purpose," the Court concluded that an entity *arranges* for disposal "when it takes intentional steps to dispose." *Id.* at 1879.

Burlington Northern is not remotely analogous to this case. The meaning of "arrange" under CERCLA has nothing to do with the meaning of "waste" under the CWA. Moreover, the Sixth Circuit did not hold that pesticide *sellers* could be liable as "dischargers of pollutants" under the CWA for pesticides later applied to water by third parties. Rather, it held that pesticide *applicators* must obtain coverage under NPDES permits before they may legally discharge pollutants to or over water.

Petitioners' further contention that the ruling below is "flatly inconsistent" with *Cordiano v. Metacon Gun Club, Inc.*, 575 F.3d 199 (2d Cir. 2009), CropLife Pet. 20-21, likewise misses the mark. There, the only interpretation of "waste" came under the Resource Conservation and Recovery Act ("RCRA"). Although the term "waste" is not defined in the CWA, "solid waste" is narrowly defined in RCRA to mean "discarded material" that has been "abandoned." 42 U.S.C. § 6903(27); 40 C.F.R. § 261.2(a)(2)(i)(A), (b). Accordingly, the Second Circuit held in *Cordiano* that the operators of a gun club need not obtain a "hazardous waste disposal" permit under RCRA because spent ammunition from their firing range did not meet that narrow definition. 575 F.3d at 206-07.

Despite the differences between the two statutes, Petitioners argue that RCRA's definition of "solid waste" should determine the meaning of "chemical waste" and "biological materials" under the CWA, so as to preclude NPDES coverage for the discharge of "materials put to their ordinary, intended use." CropLife Pet. 20. EPA squarely disagrees. In a 1995 amicus brief, EPA stated that spent rounds and skeet targets from firing ranges *are* "pollutants" under the CWA even though they are *not* "solid waste" under RCRA. *See Long Island Soundkeeper Fund v. New York Athletic Club*, 1996 WL 131863, at *9, *14-*15 (S.D.N.Y. 1996) (adopting EPA's construction). Similarly, in its 2006 preamble to the pesticide exemption, EPA specified that "today's discussion of the terms 'chemical waste' and 'biological materials' *applies only*

for CWA purposes and is *not intended to address the use of those terms or similar terms under any other statutes the Agency administers*." CropLife Pet.App. 42a (emphases added).

II. THE COURT'S *CHEVRON* ANALYSIS WAS CORRECTLY PERFORMED.

To determine whether EPA's regulation exempting pesticide applications "to" and "over" surface waters was consistent with the CWA, the Sixth Circuit employed and properly conducted the familiar *Chevron* analysis. *See*, *e.g.*, CropLife Pet.App. 10a (citing *Chevron USA, Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984), and *National Ass'n of Home Builders v. Defenders of Wildlife*, 127 S.Ct. 2518, 2534 (2007)); *id.* 14a (citing additional cases).

Appropriately, the court relied primarily on a careful reading of the statutory language. *E.g., City of Chicago v. Environmental Def. Fund*, 511 U.S. 328, 339 (1994) ("It is not unusual for legislation to contain diverse purposes that must be reconciled, and the most reliable guide for that task is the enacted text."). The Sixth Circuit was aided in its textual analysis by the fact that two of the operative terms in the definition of "discharge of a pollutant" – "pollutant" and "point source" – are themselves separately defined in the statute. 33 U.S.C. § 1362(6) & (14). This generous degree of statutory guidance easily distinguishes this case from *Entergy Corp. v. Riverkeeper, Inc.*, 129 S.Ct. 1498 (2009), on which

Petitioners rely, CropLife Pet. 22 n.11, 25-26; AFBF Pet. 22, 26 n.15, as *Entergy* addressed a terse provision of the CWA found to be "silent . . . with respect to all potentially relevant factors." 129 S.Ct. at 1508.

Where terms in the statutory definitions were not themselves specifically defined, the Sixth Circuit gave them their "ordinary, contemporary, [and] common meaning," CropLife Pet.App. 15a (quoting *Williams v. Taylor*, 529 U.S. 420, 431-32 (2000)), and then tested that meaning against the structure, purpose, and history of the statute. Finally, the court looked to the longstanding interpretations given to these terms by the principal regulatory agency, EPA.

Petitioners chide the Sixth Circuit for not simply deferring to all of the interpretations offered by EPA in the rule itself, arguing that the court's approach thus "renders agency interpretive rules vulnerable to the subjective interpretations and policy making of judges." AFBF Pet. 27. Petitioners overlook the critical function of the *Chevron* Step One analysis: to guard against wholesale legislating by unelected executive branch employees. So long as a court's analysis is, like the Sixth Circuit's here, faithful to the language drafted by Congress, the court is not itself making policy, but rather is giving effect to the policies of Congress. *E.g., City of Chicago*, 511 U.S. at 339 (setting aside EPA hazardous waste exemption for municipal fly ash because it conflicted with the plain language of RCRA). Such adherence to the plain statutory language is essential to the preservation of

the separation of powers between the legislative and executive branches.

A. The Court Properly Held That Pesticide Applications That Result in Discharge of Chemical Waste Directly to Waters Are Subject to CWA Permitting.

As EPA recognizes, and as Petitioners apparently concede, the airplanes, trucks, and the like used to apply pesticides "to" and "over" water are "point sources" within the meaning of 33 U.S.C. § 1362(14). CropLife Pet.App. 21a. The Sixth Circuit's determination that residual and excess pesticide materials are "chemical wastes" that are "discharged" from these point source pesticide applications follows directly from the language of the CWA, and is consistent with the purpose of the statute, with logic, and with longstanding precedent.

1. Excess and Residual Pesticide Materials Are "Chemical Wastes" Within the Meaning of the CWA.

To determine the ordinary meaning of "waste," the court consulted three authoritative dictionaries and concluded that among the common meanings of the term are "superfluous" and "excess" materials, materials that are "no longer useful," and "worthless byproduct[s]." CropLife Pet.App. 15a-16a. Thus, the court found, while chemical pesticides applied to

water for a beneficial purpose are not themselves waste, "excess pesticide and pesticide residue meet the common definition of waste." *Id.* 16a. This interpretation hardly "stretches logic and English usage past the breaking point." AFBF Pet. 21. Rather, it is precisely the same conclusion reached by EPA, both in the preamble to the rule at issue here, CropLife Pet.App. 41a ("residual [pesticide] materials are . . . pollutants"), and in its longstanding practice of treating pesticide materials in point source storm water discharges as pollutants, *id.* 40a-41a; *see also* 55 Fed. Reg. 47,990, 48,019-20 (Nov. 16, 1990) (JA 309-10).

While Petitioners concede that excess and residual chemicals fall within the common meaning of waste, CropLife Pet. 14 ("the common meaning of 'chemical waste' is 'discarded,' 'superfluous,' or 'excess' chemical"), they argue that pesticide materials cannot be pollutants because pesticide applicators do not treat them as waste, *id.* 18 ("'waste' . . . implies an *intention* to discard"). It is curious that those who counsel agency deference would take this position, as it is diametrically opposed to EPA's own interpretation of the Act. EPA has long rejected the notion that the need for an NPDES permit turns on a discharger's intent. *E.g.,* EPA Sixth Cir. Merits Br. 39 (11/6/07). If intent were the key, EPA and the Corps of Engineers could not regulate fill material as the discharge of a pollutant when it is added to waterways for the (beneficial) purpose of changing their bottom elevations, yet they have long done so, with the

blessing of the federal courts. *E.g., Rapanos,* 547 U.S. at 760.

Moreover, it is hardly noteworthy that pesticides are not specifically mentioned in the "laundry list" of substances included in the Act's definition of "pollutant." AFBF Pet. 30. Machine oil, paint, and industrial solvents also are not listed, yet all clearly can be pollutants, because "chemical waste" *is* specifically listed. *See Pittston Coal Group v. Sebben*, 488 U.S. 105, 115 (1988) (no ambiguity where the statute "plainly embraces criteria of more general application").

2. The Excess and Residual Pesticide Materials Are Added to Waters "From" Point Sources.

The only aspect of EPA's reasoning here that the court found inconsistent with the statute was the agency's illogical position that the excess and residual pesticides placed in waters by point source pesticide applications are not discharged by those point sources. EPA took this position only at the very end of its rulemaking, when it realized that a previously articulated rationale for the pesticide exemption was untenable.[4] *Compare* 70 Fed. Reg. 5,093, 5,099 (Feb.

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[4] In its explanation for the proposed rule, EPA had stated that pesticide residues from lawful pesticide applications are not pollutants. It dropped this rationale after receiving comments noting that this was inconsistent with its own longstanding

(Continued on following page)

1, 2005) (JA 140), *with* CropLife Pet.App. 41a-42a. As the Sixth Circuit noted, EPA's new position was fundamentally inconsistent not only with the language and purpose of the Act, but with what the agency itself had recently characterized as "EPA's longstanding position . . . that an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source." CropLife Pet.App. 23a (quoting 73 Fed. Reg. 33,697, 33,701 (June 13, 2008) (final rule defining phrase "addition of any pollutant" in 33 U.S.C. § 1362(12)). Certainly, the excess and residual pesticide is "introduced into the water from the outside world" by the point source applicator.

Petitioners' argument to the contrary – that "[o]ne cannot spray ice 'from' a hose," or "squeeze butter 'from' a cow," AFBF Pet. 22 – misses the point. Those examples rely on a transformative intermediary (a temperature drop and the butter churn, respectively), while pesticides become waste material with no transformation whatsoever. CropLife Pet.App. 21a ("excess and residue pesticides have *exactly the same chemical composition* and are discharged from the *same* point source *at exactly the same time* as the original pesticide") (emphases added). Further, as the Sixth Circuit found, all "excess" or "residual" pesticide deposited to the water from aerial applications to

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interpretation that such residues *are* pollutants when they reach waterways (*e.g.*, in stormwater).

pests *over* water is "necessarily" waste before it enters the water. *Id.* 17a. All of the "excess" pesticide from applications *to* the water – the portion that does not reach the target – is also waste at the point of discharge.[5] *See also id.* ("both non-waste aqueous pesticide and pesticide residual are applied to the water at the same moment").

Indeed, even if one were to assume that none of the pesticide became waste until *after* discharge to the water, there would be nothing remarkable about the conclusion that the discharge to the water of something that inexorably *becomes* a pollutant shortly after discharge is the discharge of that pollutant.[6] EPA itself has long held this position. *See supra* p. 11 (skeet targets used at firing range).

Petitioners' further suggestion that the statute is ambiguous because it uses the simple term "from," AFBF Pet. 22-23, is preposterous. Indeed, as Petitioners later acknowledge, "[t]he words and their natural reading are fairly simple." *Id.* 25. The ordinary meaning of "from" is "a function word to indicate

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[5] Petitioners tend to emphasize pesticide "residue," while downplaying the court's finding that "excess" pesticide is also waste, in an attempt to obscure this fact. AFBF Pet. 10, 20-23; CropLife Pet. 9, 10.

[6] *E.g.*, *NRDC v. Southwest Marine, Inc.*, 236 F.3d 985, 990 (9th Cir. 2000) (aerial discharge of cleaning and paint products during use at marina); *Hudson River Fishermen's Ass'n v. City of New York*, 751 F. Supp. 1088, 1101-02 (S.D.N.Y. 1990) (chlorine and alum injected to waterway as purification agents), *aff'd*, 940 F.2d 649 (2d Cir. 1991).

a starting point of a physical movement." Merriam-Webster Online Dictionary, first definition (emphasis added), *available at* http://www.merriam-webster.com/dictionary/from. If the excess and residual pesticide does not come "from" the point source, from where *does* it come? In Petitioners' view, apparently, it arises spontaneously.[7]

As the Sixth Circuit observed, its holding on this point is also fully consistent with legislative history indicating the Act's intent that water pollution be controlled through "point source" regulation when feasible, and with the Act's central purpose of protecting surface waters through the NPDES permitting program. CropLife Pet.App. 14a-15a, 22a-23a (citing S.Rep. No. 92-414, at 76-78 (1971)), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742-44.

3. Petitioners' Professed Concerns About the Reach of This Holding Are, at Best, Substantially Overblown.

Imagining catastrophe, Petitioners argue that the Sixth Circuit's opinion will sweep into the Act's permitting program a variety of activities Congress

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[7] Petitioners offer the following analysis: "'Pollutants . . . *from* a point source,' in common parlance, means pollutants *coming out of* a point source – not pollutants *caused by* a point source." AFBF Pet. 25. Even if there is a meaningful difference between these two phrasings, there can be no question that excess and residual pesticide "comes out of" the point source pesticide application.

did not intend to regulate. These arguments either misread the court's opinion or ignore other portions of the statute. At best, they suggest that this case warrants review because other courts may mistakenly extend the Sixth Circuit's analysis beyond the opinion's holding. This is not the standard for *certiorari*.

For example, Petitioners argue that the court "created its own 'but for' test" and thereby "found that the 'plain language' of the CWA *mandates* a holding that there is a 'discharge of a pollutant' subject to NPDES permitting *whenever* a pesticide residue makes its way to navigable waters." CropLife Pet. 10 (second emphasis added). This is patently untrue. The Sixth Circuit's application of a "but for" analysis to pesticides discharged *directly into or over* surface waters was simply a means of demonstrating that excess and residual pesticide materials are "added" to the surface waters from these point source applications, and the court's opinion (like the EPA rule it addresses) is limited to that set of facts. The opinion does not purport to transform the eventual runoff to surface waters from pesticides applied *on the land* into point source discharges.

Nonetheless, Petitioners suggest that the Sixth Circuit's reasoning *could* be extended that far, requiring, for example, NPDES permitting for "farmers who use pesticides to save crops." AFBF Pet. 13. But the Act itself explicitly *exempts* "agricultural stormwater discharges and return flows from irrigated agriculture" from the definition of "point source" – and thus from NPDES permitting requirements –

even when it reaches the water through a discrete conveyance that would otherwise be classified as a point source. 33 U.S.C. § 1362(14). Where non-agricultural additions of pesticide residues to water come from diffuse "nonpoint sources" (such as sheet runoff from golf courses or residential areas), they will continue to be outside of the Act's permitting program as well. *See generally Appalachian Power Co. v. Train*, 545 F.2d 1351, 1373 (4th Cir. 1976) (NPDES program does not regulate "unchanneled and uncollected surface waters"). No NPDES permit is required for diffuse pesticide runoff because the pesticide residues do not *enter the water* directly "from" the point source pesticide application.

Petitioners also express concern that airborne pesticide "drift" to surface waters from aerial spraying on land may be subject to NPDES permitting, another topic not addressed by the opinion below. CropLife Pet. 29-30; AFBF Pet. 16-17. When it issued the pesticide exemption, EPA specifically declined to extend the exemption to such situations, noting that it is "continuing to consider the applicability of the CWA to . . . [the] drift of pesticides applied aerially over land."[8] CropLife Pet.App. 43a-44a. Review of the Sixth Circuit's opinion to address this inchoate, ancillary issue is not warranted.

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[8] One focus of the multi-stakeholder advisory committee EPA has established to study the issue is "minimizing both the occurrence and potential adverse effects of pesticide spray drift." *Id.* 44a.

B. The Sixth Circuit Properly Held That Biological Pesticides Are Biological Materials.

No one disputes that biological pesticides *are*, in fact, biological materials. EPA describes them as "microorganisms, including bacteria, fungi, viruses, and protozoa," and as being "derived from plants, fungi, bacteria, or other non-man-made synthesis."[9] Under *Chevron*, this ends the analysis. The statutory language is clear, and the substances in question plainly come within that language.

Petitioners endeavor to inject "ambiguity" into the plain statutory language with two arguments. The first is that Congress could not possibly have meant what it said. As the Sixth Circuit noted, however, "Congress purposefully included the term 'biological materials,' rather than a more limited term such as 'biological wastes.'"[10] CropLife Pet.App. 19a. Although Petitioners seek support for a contrary reading from *Train v. Colorado Public Interest Research Group*, 426 U.S. 1 (1976), *see* CropLife Pet.

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[9] EPA, *Pesticides: Glossary*, *available at* http://www.epa.gov/pesticides/glossary; *see also* 64 Fed. Reg. 46,012, 46,017 (Aug. 23, 1999).

[10] This was not a result of careless drafting: Congress *did* append the term "waste" to five of the other enumerated "pollutants" in 33 U.S.C. § 1362(6). Moreover, that list includes six other items that also are not necessarily "wastes." *Id.* ("munitions," "radioactive materials," "heat," "rock," "sand," and "cellar dirt").

22 n.11; AFBF Pet. 35-36, that case illustrates the kind of exceptional circumstances that must be present before the courts may disregard the plain text of a statute. There, this Court found clear and unequivocal evidence in the legislative history of the CWA that Congress did not intend the Act to regulate the nuclear byproduct materials covered by the Atomic Energy Act. Thus, the Court held that the unqualified inclusion of "radioactive materials" in the Act's definition of pollutant had been, in effect, a scrivener's error. 426 U.S. at 11-24. As discussed below, there is nothing in the legislative history stating that Congress did not intend the Act to cover pesticides.

Petitioners' second argument is that a plain reading of the statute could lead to absurd results, "such as NPDES permitting for a worm at the end of a fisherman's line." CropLife Pet. 22 n.11. This is not a serious possibility. Several circuit courts have found an implied exemption in the Act for *de minimis* situations of that nature,[11] and this Court has reversed a contrary decision on that very issue, *Arkansas v. Oklahoma*, 503 U.S. 91, 96, 110-12 (1992).

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[11] *E.g., Kentucky Waterways Alliance v. Johnson*, 540 F.3d 466, 483, 491 (6th Cir. 2008) (citing cases); *cf. United States v. Plaza Health Labs., Inc.*, 3 F.3d 643, 647 (2d Cir. 1993) (passerby flinging candy wrapper into river or swimmer urinating is not violating the Act). EPA recognizes this principle as well. *E.g.*, 58 Fed. Reg. 45,008, 45,020 (Aug. 25, 1993) (no "dredge and fill" permit required under 33 U.S.C. § 1344 for *de minimis* additions to waters).

The potential harm from biological pesticides, on the other hand, cannot reasonably be characterized as *de minimis*. Biological pesticides are designed to cause harm to certain species, and can harm others as well. Thus, while the Ninth Circuit has applied the *de minimis* principle in holding that native mussels taken from one part of Puget Sound and deposited to another are not "pollutants" under the Act, *Association to Protect Hammersley, Eld, & Totten Inlets ("APHETI") v. Taylor Res., Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002), it has also held that biological insecticides "meet the definition of 'pollutant' under the [CWA]," *Forsgren*, 309 F.3d at 1185, noting that "[t]he record reveals a number of harmful side effects" to their use, *id.* at 1183.[12]

Moreover, the Sixth Circuit was careful to note that it was not endeavoring to "define[ ] the outermost bounds of 'biological materials'" within the meaning of the Act's definition of pollutant. CropLife Pet.App. 19a. Rather, the court simply held that, whatever those limits might reasonably be, biological pesticides come within them.

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[12] The common feature among the items listed as "pollutants" is that *all may impair water quality*, a feature that biological pesticides share. *See Northern Plains Res. Council v. Fidelity Expl. & Dev. Co.*, 325 F.3d 1155, 1162-63 (9th Cir. 2003) (clarifying that the *APHETI* holding turned on whether there was "degradation of the quality of receiving waters").

C. The CWA Does Not Exempt Pesticides From Its Purview.

Alternatively, Petitioners argue that the Sixth Circuit should have ruled that the CWA *impliedly* exempts pesticide materials from NPDES permitting requirements. Such a ruling would have been particularly unwarranted, given that Congress has already included an *express* NPDES exemption for some agricultural pesticide discharges, 33 U.S.C. §§ 1362(14), 1342(l)(i), but not for pesticide use generally. *See Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 188 (1978) (applying maxim of *expressio unius est exclusio alterius* to reject implied exemption under similar circumstances). Congress has plainly demonstrated elsewhere that it knows how to exempt pesticide use when it wants to. *E.g.*, 42 U.S.C. § 9607(i) (exempting applicators of FIFRA-registered pesticides from CERCLA liability); *cf. City of Chicago*, 511 U.S. at 338 ("Congress knew how to draft a waste stream exemption in RCRA when it wanted to.").

None of Petitioners' arguments on implied exemption has merit. That the legislative history of the 1972 Act does not discuss the permitting of pesticide discharges, AFBF Pet. 30, is unavailing. *See Moskal v. United States*, 498 U.S. 103, 111 (1990) ("This Court has never required that every permissible application of a statute be expressly referred to in its legislative history."). Moreover, there is nothing in the legislative history to indicate that Congress intended to exempt pesticide use from the Act's provisions but forgot to do so. Petitioners cite statements from

Senator Dole, AFBF Pet. 29-30 n.16; CropLife Pet. 23 n.12, regarding the general benefit of pesticides – which are similar to statements made by other members of Congress about the benefit of industry generally – but they fail to mention Senator Dole's pointed observation that some pesticides "retain their potency for virtually unlimited periods after application, their residues are introduced into the complicated food chains at work in nature, and, ultimately, they become concentrated at levels which are hazardous to both animal and human life." S.Rep. No. 92-414, at 99.

That Congress chose in 1977 to exempt *some* pesticide discharges by adding an exemption for certain agricultural flows, CropLife Pet. 26, simply makes the point that they were not exempted previously. There would have been no *need* for this limited exemption if, as Petitioners argue, all pesticide discharges had *already* been exempted in the 1972 Act.[13]

Moreover, there was no "contemporaneous interpretation" by EPA that pesticide discharges were exempt. AFBF Pet. 33-34; CropLife Pet. 25-26. EPA made various statements from 1977 through 1996

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[13] The pertinent legislative history indicates that Congress specifically meant for the 1977 exemption to extend to "pesticides" as one of the harmful constituents of agricultural runoff (based on the usually "diffuse" nature of those discharges). S.Rep. No. 95-370, at 37 (1977), *as reprinted in* 1977 U.S.C.C.A.N. 4326, 4353.

indicating that pesticides may be "discharged" to water only "in accordance with an NPDES permit," CropLife Pet.App. 5a, stated in a 1999 amicus brief that "EPA approves pesticides under FIFRA with the knowledge that pesticides containing pollutants may be discharged from point sources into the navigable waters only pursuant to a properly issued CWA permit," Res.App. 14,[14] and published policy guidance documents in 2001 and 2002 characterizing the application of aquatic pesticides as a "low *enforcement* priority," JA 91 (emphasis added). At most, at the time EPA published its final rule in 2006, the agency had a 30-year track record of *not enforcing* the CWA against unpermitted pesticide applications made to water – "a sort of 30-year adverse possession" marked by the agency's "disregard of statutory text." *Rapanos*, 547 U.S. at 752. Because this practice was not formally announced – and because EPA's public statements suggested that permitting *was* occurring – Congress would have had no reason to know about it. *See Demarest v. Manspeaker*, 498 U.S. 184, 190 (1991).

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[14] EPA's brief in *Headwaters*, *see supra* p. 8, stated that the Act was *unambiguous* on this point. Alternatively, EPA sought deference for its position under Chevron Step Two based on its "consistent" historical interpretation. *Id.* 18-21. Agency amicus briefs are not mere "litigation positions." Especially where, as here, the agency offers a broad policy position of its own accord, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." *Auer v. Robbins*, 519 U.S. 452, 462 (1997).

Nor is section 104(l) of the Act supportive of an implied pesticide exemption. That provision – which *no party* thought important enough to cite to the Sixth Circuit, but which Petitioners now offer as a central point in their argument – directs EPA to study (1) the fate and effect of pesticides in waterways, (2) "methods to control" pesticide releases, and (3) "alternatives" to pesticides. 33 U.S.C. § 1254(l). This provision, if anything, suggests that Congress believed that pesticides *are* within the purview of the CWA. It is certainly not inconsistent with NPDES permitting for pesticide pollutants, and evinces no intent to override later sections of the Act that actually *address* the question of when an NPDES permit is required.[15] Indeed, other subsections of section 104 direct EPA to also study *other* substances that are undisputedly regulated under the NPDES program. *Id.* § 1254(m) (waste oil), § 1254(o) (sewage).

Petitioners' further suggestion that FIFRA should be read to imply an intent to exclude pesticides from the CWA is flatly inconsistent with the language of the statutes and the decisions of this Court. Petitioners point to no language in the text or history of either statute to indicate a clear intent that the CWA stand down in favor of FIFRA, and it is a bedrock principle of statutory construction that "where two statutes are capable of coexistence, it is the duty of

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[15] The same is true of section 208, 33 U.S.C. § 1288, a provision of general application on which Petitioners now purport to rely.

the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1018 (1984) (internal quotes omitted) (reading FIFRA narrowly to avoid conflict with the Tucker Act). In the field of federal environmental law, overlapping protection by multiple statutes is the norm, not the exception, *e.g.,* Res.App. 10-11, 16-20 (citing examples); *Monongahela Power Co. v. Marsh*, 809 F.2d 41, 53 (D.C. Cir. 1987), and this Court has already held that FIFRA is not the final regulatory word on pesticide use, *Mortier*, 501 U.S. at 613-14. As EPA has noted, the CWA and FIFRA serve different purposes, use different risk management approaches, and employ different – but not inconsistent – control strategies. Res.App. 10-21; *see also Headwaters*, 243 F.3d at 531-32; *cf. Erlenbaugh v. United States*, 409 U.S. 239, 244-48 (1972) (refusing to apply the canon of *in pari materia* "to introduce an exception to the coverage of [a broad, remedial statute] where none is now apparent").

Finally, Petitioners' claim that "the overall statutory scheme" supports its interpretation because the NPDES "is not a program to regulate beneficial activities that also can have adverse environmental effects, but a program to eliminate pollutant discharges seen as serving no societal good," AFBF Pet. 31, is demonstrably untrue. Pest control activities are no different in this respect from steel mills or military installations, both of which provide an obvious social good, yet are nonetheless regulated by the NPDES program to control their adverse effects.

III. THE PRACTICAL EFFECT OF THE SIXTH CIRCUIT OPINION WILL NOT BE UNDULY DISRUPTIVE, AND WILL BENEFIT THE ENVIRONMENT AND PUBLIC HEALTH.

A. Petitioners Vastly Overstate the Disruption That May Be Occasioned by NPDES Permitting for Aquatic Pesticides.

Relying largely on a quote taken out of context from EPA's brief in support of the stay of the mandate, Petitioners argue that there will be "significant disruption" to pesticide use. CropLife Pet. 2-3, 12; AFBF Pet. 12. But EPA did not, as petitioners suggest, state that subjecting pesticide discharges to NPDES permitting would be inherently disruptive. Rather, EPA stated that the decision would be disruptive *unless stayed*, but that granting the two-year stay would eliminate the disruption by "allow[ing] EPA and authorized permitting authorities sufficient time to develop and issue [CWA] permits containing appropriate terms to govern the discharge of pesticide pollutants to waters of the United States." CropLife Pet.App. 108a-109a. Until the permits are issued, pesticide applicators are allowed to continue practices as usual without threat of CWA enforcement.

Any future disruption to food production or disease control is purely speculative. The vast majority of the nation's agricultural activities were unaffected by the rule in the first place and will remain

unaffected by the decision below, both because the Act exempts agricultural stormwater and irrigation return flows from NPDES regulation and because most agricultural pesticide use does not involve discharges "to" or "over" waters.

Nor have Petitioners offered any concrete examples of increased threats to public health resulting from NPDES permitting. Recent history shows this fear to be unfounded. Four states – California, Oregon, Washington, and Nevada – issued general NPDES permits covering many pesticide applications to waters after the 2001 *Headwaters* decision. CropLife Pet.App. 31a. And, as EPA has noted, "twenty-three states have developed permits to cover some types of pesticide discharges." *Id.* 149a. In none of these situations were pest control efforts substantially impeded, or a public health threat caused, by the imposition of a permitting requirement.

Petitioners premise the bulk of their arguments on the false assumption that they face a stark binary choice between ceasing their activities and violating the CWA. Yet there are many ways to avoid discharging pesticides into waters – such as the use of buffer zones around waterways, or using means of control other than pesticides – that would obviate the need for CWA permitting altogether. Should these options not be available, obtaining and complying with NPDES permits would render necessary discharges legal.

Under the Sixth Circuit's stay, EPA is moving forward with the development of a "model" general permit, which it expects to serve as a template to ease administrative burden on state and tribal permitting agencies, as well as on pesticide applicators. CropLife Pet.App. 115a-116a, 118a-119a; *see generally Miccosukee Tribe*, 541 U.S. at 108 n.* (noting efficiency of general permit approach). The use of general permits is not merely a "theoretical possibility." AFBF Pet. 19 n.12. EPA is proceeding under this approach precisely because it believes that most aquatic pesticide applications will, in fact, be covered under that general permit (or a state equivalent). In those instances where pesticide use is "safe" (as Petitioners maintain is often the case), permitting should be relatively easy.

B. The Permitting of Aquatic Pesticides Does Not Constitute "the Greatest Expansion" of the NPDES Program.

Petitioners' contention that the decision below constitutes the "greatest" or "most dramatic" regulatory expansion in CWA history, AFBF Pet. 13; CropLife Pet. 29, is pure fantasy. In fact, several times prior to the Sixth Circuit's ruling (most recently two years ago), federal appellate courts struck down illegal attempts by EPA to exempt point source

discharges from the NPDES program.[16] Each of these was at least as "dramatic" as this one. Moreover, Petitioners greatly understate the scope and complexity of the *existing* NPDES permitting program. At present, that program includes 57 effluent limitation guideline categories, with roughly 450 subcategories, *see* 40 C.F.R. Subchapter N (Parts 405-471); aquatic pesticides will be just one more category, with eight proposed subcategories. Permits in most of these other categories are far more complex than will be required for routine pesticide applications.[17]

Furthermore, an examination of EPA's estimate of the potential universe of aquatic pesticide permitting demonstrates both that the agency's projections are likely to be exaggerated and that the overwhelming majority of permitted applications will

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[16] *E.g., Costle*, 568 F.2d at 1372-73 (certain silviculture, agricultural, and stormwater discharges); *Northwest Envtl. Advocates v. EPA*, 537 F.3d 1006 (9th Cir. 2008) (ballast water from ships).

[17] EPA estimates that over 115,000 facilities are presently covered by NPDES permits, of which over 45,000 have individual permits, and 6,700 of which are "major" facilities (*e.g.*, oil refineries, chemical manufacturing facilities, power plants). EPA, *Facilities and Enforcement Activities Related to the [CWA's NPDES] Program, available at* http://www.epa.gov/oecaerth/data/results/performance/cwa/index.html#1. A single "major" facility often has numerous outfalls discharging dozens, if not hundreds, of different pollutants on a near-continuous basis. Aquatic pesticide applications, by contrast, tend to involve the infrequent discharge of one or a few pollutants from a single discharge point.

have nothing to do with insect-borne disease. EPA acknowledges that its projections (done to support the April 2009 stay motion) were assembled quickly, and without peer review, from secondary sources and through the use of generalizing assumptions. Res.App. 22. Almost all of the estimated annual applications are for weed and aquatic vegetation control, and the estimated numbers for these applications are based on expansive assumptions.[18] Applications for mosquito control represent *less than one percent* of the assumed total. *See id.* 23.

C. NPDES Permitting Will Have Substantial Real-World Benefits, Consistent with the Act's Protective Goals.

Although Petitioners strive to characterize it as regulation for regulation's sake, EPA believes that requiring NPDES permits for aquatic pesticide applicators has significant, demonstrable benefits for human and ecological health. *See* Res.App. 12-14 (citing protections afforded by CWA, but not by FIFRA).[19] Unlike the CWA, FIFRA imposes no

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[18] Over 90% of of the total number of estimated applicators are for *assumed* applications to irrigation "ditchbanks," with no indication of how many of these potential applicators *actually* apply (or need to apply) pesticides or whether application to the banks of these ditches would *actually* reach navigable waters.

[19] The agency recently reiterated that "[p]ermit requirements go[ing] beyond the FIFRA label" will yield "environmental benefits." EPA, *CWA Permitting of Discharges from Pesticide*

(Continued on following page)

requirements for site specific analysis of the presence of endangered species, or of whether certain waterways need special protections because of extraordinarily pure conditions (*e.g.*, in wilderness areas) or because they are already polluted at levels toxic to fish and wildlife.[20] Thus, the State of California, in its comments opposing EPA's rule, noted that 27% of its waters were impaired by pesticides and that permitting gave it an important tool to address point source discharges of pesticides. JA 142-43.

Implementation of EPA's permitting program should lead both to the development of newer aquatic pesticides that do their work without leaving residues and to increased reliance on less toxic means of pest control. This is wholly consonant with the Act's "technology-forcing" focus. *NRDC v. EPA*, 859 F.2d 156, 208-09 (D.C. Cir. 1988). Indeed, in the 1971 CWA Senate Report, Senator Dole emphasized the importance of "develop[ing] *alternative means* of pest, weed and fungal control," reducing "[o]ff-target applications," and developing "pesticides which *degrade after*

Applications (Oct. 14, 2009), at 5, *available at* http://www.epa.gov/pesticides/ppdc/2009/october/session-1a.pdf.

[20] In one nationwide study, "[m]ore than one-half of agricultural and urban streams sampled had concentrations of at least one pesticide that exceeded a guideline for the protection of aquatic life," despite regulation by FIFRA, with most samples containing multiple pesticides. U.S. Geological Survey, *The Quality of Our Nation's Waters, Nutrients and Pesticides* (USGS Circular 1225, 1999), at 6, *available at* http://pubs.usgs.gov/circ/circ1225/pdf.

application and *leave no toxic or hazardous after-products*." S.Rep. No. 92-414, at 99 (emphases added).

Two cases illustrate how NPDES permitting can spur the effective use of non-pesticide alternatives. After the Ninth Circuit's 2001 *Headwaters* decision, the Talent Irrigation District switched from a chemical herbicide to mechanical means for controlling aquatic vegetation, thus avoiding the need for an NPDES permit while simultaneously producing improvement in the environmental quality of the waterway. *See* Graham Decl. Supp. Pet'r Opp'n EPA Mot. Stay Mandate ¶¶ 4-8 (5/8/09).[21] And, after a challenge to its unpermitted aquatic pesticide use, Idaho's Gem County Mosquito Abatement District eliminated the direct discharge of chemical pesticides to water, implemented programs to reduce mosquito habitat, and significantly reduced pesticide use overall. *See* Dill Decl. Supp. Pet'r Opp'n EPA Mot. Stay Mandate ¶¶ 6-7 (5/8/09). This approach has proven successful in controlling pests and insect-borne disease: Gem County has experienced a *decrease* in the incidence of West Nile virus. *Id.* ¶ 7.

Petitioners offer no reason why public and environmental health will not be best served by mandating compliance with the provisions of both

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[21] *Headwaters* also illustrates the serious potential harm from aquatic pesticide use: one application of chemical herbicide to control aquatic weeds killed over 92,000 juvenile steelhead along a five mile stretch in Bear Creek, a tributary to the famous Rogue River fishery in Oregon. *See* 243 F.3d at 528.

FIFRA and the CWA. There is nothing unsound about the proposition that the use of potentially toxic pesticides should be conducted as safely as possible. The only major potential disruption here appears to be to the pesticide manufacturers' sales, which places these entities in no different position from the myriad other commercial enterprises regulated under the Act.

CONCLUSION

The petitions for *certiorari* should be denied.

Respectfully submitted,

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