No.

In the Supreme Court of the United States

CROPLIFE AMERICA, *et al.*,

Petitioners,

v.

BAYKEEPER, *et al.*,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since Congress enacted the Clean Water Act ("CWA") in 1972, the Environmental Protection Agency ("EPA") has never subjected the use of pesticides in, over, or near waters to permitting under the CWA's National Pollutant Discharge Elimination System ("NPDES") program. In 2006, EPA issued a Final Rule ratifying that settled practice and establishing that pesticides applied in accordance with the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") are exempt from the CWA's permitting requirements in two specific circumstances. Petitions challenging that Rule were filed in eleven different circuits and consolidated before the Sixth Circuit. The Sixth Circuit held that the CWA unambiguously foreclosed EPA's interpretation and invalidated the Final Rule. Its decision not only reverses more than 35 years of administrative practice, but mandates the greatest expansion of the NPDES program since the CWA was enacted. The questions presented are:

1. Did the Sixth Circuit erroneously conclude—in conflict with the decisions of this Court and other circuits—that the CWA unambiguously forecloses EPA's Rule?

2. Did the Sixth Circuit improperly substitute its judgment for that of the expert agency charged with administering the CWA?

3. Should the Court grant the petition, vacate the decision below, and remand for consideration in light of *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009)?

LIST OF PARTIES

1. Industry Petitioners/Intervenors were Agribusiness Association of Iowa, American Farm Bureau Federation, American Forest & Paper Association, BASF Corporation, Bayer CropScience, CropLife America, Delta Council, Eldon C. Stutsman, Inc., FMC Corporation, Illinois Fertilizer and Chemical Association, The National Cotton Council of America, Responsible Industry for a Sound Environment, Southern Crop Production Association, and Syngenta Crop Protection, Inc.

2. Environmental Petitioners were Baykeeper, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, Environment Maine, National Center for Conservation Science and Policy, Oregon Wild, Peconic Baykeeper, Inc., Saint John's Organic Farm, Soundkeeper, Inc., Toxics Action Center, and Waterkeeper Alliance.

3. The Environmental Protection Agency was the respondent.

RULE 29.6 STATEMENT

Agribusiness Association of Iowa. Agribusiness Association of Iowa has no parent corporation and no publicly held corporation owns 10% or more of its stock.

BASF Corporation. BASF Corporation is the wholly owned subsidiary of BASF Americas Corporation, which in turn is 100% owned by BASFIN Corporation, which in turn is 100% owned by BASF Aktiengessellschaft.

CropLife America. CropLife America has no parent corporation and no publicly held corporation owns 10% or more of its stock.

FMC Corporation. FMC Corporation has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Responsible Industry for a Sound Environment. Responsible Industry for a Sound Environment is a standing committee of CropLife America and is not a separate legal entity. Responsible Industry for a Sound Environment has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Southern Crop Production Association. Southern Crop Production Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

Syngenta Crop Protection, Inc. Syngenta Crop Protection, Inc. is a wholly owned subsidiary of Syngenta Seeds, which in turn is 100% owned by Syngenta Corporation, which in turn is 100% owned by Syngenta Participations Ag, which in turn is 100% owned by Syngenta AG.

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OPINION BELOW

The court of appeals' opinion is reported at 553 F.3d 927 and reproduced at Pet.App.1a.

JURISDICTION

The court of appeals had jurisdiction pursuant to 33 U.S.C. §1369(b). The court of appeals filed its opinion on January 7, 2009, and denied petitioners' timely petition for rehearing and rehearing en banc on August 3, 2009. Pet.App.1a; Pet.App.64a. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Clean Water Act, 33 U.S.C. §§1251-1387, are set forth in the Appendix at Pet.App.75a.

STATEMENT OF THE CASE

In the more than 35 years since Congress enacted the CWA, pesticides used for their intended purpose have never been subjected to the CWA's demanding permitting requirements. The Sixth Circuit's decision in this case reverses that long-standing EPA practice and calls for the biggest expansion of the NPDES program in the history of the CWA. Several courts of appeals' decisions in recent years had generated uncertainty among the regulated community, state and local regulators, and the general public over the scope of the CWA's permitting requirements in the context of pesticide applications, and prompted EPA to issue the regulation at issue here (the "Rule") to eliminate the confusion and ratify the longstanding agency practice of not subjecting such applications to permitting. The Rule was issued following notice and comment and addressed specific circumstances in

which the use of pesticides on, over or near waters in accordance with all relevant requirements of FIFRA is not a "discharge of a pollutant" to waters of the United States.

Timely petitions for review of EPA's Rule were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, and were consolidated by the Judicial Panel for Multidistrict Litigation for review before the Sixth Circuit. In the decision below, the Sixth Circuit invalidated EPA's Rule, finding that—notwithstanding the more than 35 years of administrative practice supporting the Rule—the Rule was categorically barred by the terms of the CWA. That decision cannot be squared with a commonsense reading of the CWA and conflicts with the decisions of this Court and other circuits interpreting similar statutory provisions, including this Court's intervening decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009). More fundamentally, the Sixth Circuit's decision conflicts with the decisions of this Court and other circuits on the deference owed to administrative statutory interpretations. A more concrete circuit split is not possible because petitions for review filed in *ten* other circuits were consolidated for review before the Sixth Circuit in this case. Indeed, the fact that the Sixth Circuit's decision in this case effectively speaks for ten other federal circuits makes the need for this Court's review here all the more imperative.

Absent review by this Court, the Sixth Circuit's decision will require the most sweeping expansion of the NPDES program in the history of the CWA. As EPA has acknowledged, the decision "will cause

significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States without NPDES permits and now, as a result of the [Sixth Circuit]'s decision, will need to obtain permits in order to continue doing so consistent with the [CWA]." Pet.App.106a-07a. Such a profoundly misguided and devastatingly disruptive decision warrants this Court's review. At a minimum, however, the Court should vacate the decision below and remand for consideration in light of this Court's decision in *Burlington Northern*.

A. Statutory Background

1. *The Clean Water Act*

Along with other more general programs designed "to restore and maintain the chemical, physical and biological integrity of the Nation's waters," 33 U.S.C. §1251(a), the statute includes a permitting program that prohibits the "discharge of any pollutant" from a "point source" into navigable waters unless EPA (or a delegated state) issues an NPDES permit. *Id.* §§1311(a), 1342. The Act defines "discharge of a pollutant" to mean the "addition of any pollutant to navigable waters from any point source." *Id.* §1362(12). It defines "pollutant" to mean several specifically listed categories of materials, including "chemical wastes" and "biological materials." *Id.* §1362(6).

The Act imposes significant civil (and potentially criminal) penalties for any unauthorized pollutant discharge or violation of permit conditions—up to $37,500 per violation, per day. *See id.* §1319(b), (c); 40 C.F.R. §19.4 (2009).

The only CWA provision that specifically refers to pesticides is Section 104(l), which required EPA to develop information on the effects of pesticides in water and methods to control releases of pesticides into the environment, and to make "recommendations for any necessary legislation" to implement those methods. 33 U.S.C. §1254(*l*)(2).

2. *The Federal Insecticide, Fungicide and Rodenticide Act*

Three days after Congress enacted the CWA, it passed comprehensive amendments to FIFRA. *See* 7 U.S.C. §§136-136y; Pub. L. No. 92-516, 86 Stat. 973 (1972). Under FIFRA, all pesticides sold in the United States must be registered with EPA, which will accept such registration only if it finds that the chemical "when used in accordance with widespread and commonly recognized practice ... will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. §136a(c)(5)(D). EPA issues a "label" for each registered chemical, setting forth the manner in which it may be used; the statute makes it unlawful "to use any pesticide in a manner inconsistent with its labeling." 7 U.S.C. §136j(a)(2)(G).

Under FIFRA, EPA conducts a rigorous evaluation of the potential impact of pesticides on water quality. Unlike the CWA, FIFRA requires actual testing of pesticides (lasting years and involving numerous layers of review), before a registration can be issued, to determine the pesticide's toxicity to fish and aquatic organisms and the anticipated levels in

natural water bodies and drinking water supplies.[1] EPA bases its registration decisions on a detailed assessment of a pesticide's potential effects on human health and the environment, imposing restrictions in the registration where necessary to ensure that pesticide concentrations in water from authorized uses are safe.[2] Before a FIFRA registration can be approved, the Federal Food Drug and Cosmetic Act ("FFDCA") also requires proof to a "reasonable certainty" that pesticide levels in drinking water resulting from authorized use will be safe to humans.[3] (Indeed, most pesticides never make it to market in part because of FIFRA's rigorous standards.)

B. CWA Litigation Over Pesticide Applications

The possibility of regulating pesticide use as a CWA "pollutant" discharge was first raised in a series of citizen suits brought in the Ninth and Second Circuits in the late 1990s. *See* Pet.App.27a. These lawsuits generated several decisions in different courts

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1 *See, e.g.*, 40 C.F.R. §158.630 (identifying studies required to determine effects on terrestrial and aquatic non-target organisms); 40 C.F.R. §158.1300 (identifying environmental fate and effects studies required to assess potential exposure to pesticide residues, including in water).

2 *See, e.g.*, 7 U.S.C. §136a(a); EPA, *Water Quality Data Submissions: OPP Standard Operating Procedures: Inclusion of Water Quality & Impaired Water Body Data in OPP's Registration Review Risk Assessment & Management Process*, *available at* http://www.epa.gov/oppsrrd1/registration_review/water_quality_sop.htm (last visited Nov. 2, 2009).

3 21 U.S.C. §346a(b)(2)(A)(ii).

of appeals that produced confusion regarding the application of the CWA's permitting requirements to the use of pesticides.

In *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 528, 530, 532-33 (9th Cir. 2001), the Ninth Circuit held that residuals that remained after application of a pesticide to an irrigation canal constituted a "chemical waste" and therefore a "pollutant." In *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183-85 (9th Cir. 2002), the Ninth Circuit similarly held that aerial spraying of pesticide to a forest canopy directly over streams was a discharge of a pollutant requiring an NPDES permit. In *Fairhurst v. Hagener*, 422 F.3d 1146, 1150-51 (9th Cir. 2005), however, the Ninth Circuit found that a pesticide application was not a "discharge of a pollutant" where it was applied in compliance with FIFRA, did not leave residue, and had no "unintended effects."

Two citizen suits in the Second Circuit also sought to impose CWA permitting on pesticide applications, but in neither case did the court address the merits in its decision. In *Altman v. Town of Amherst, N.Y.*, 47 Fed. Appx. 62, 66-67 (2d Cir. 2002), the court specifically called on EPA to resolve the uncertainty over such pesticide applications and reversed the lower court's dismissal of a suit over mosquito-control spraying, holding that discovery should have been allowed on the circumstances of the application. Additionally, in *No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602, 605-06 (2d Cir. 2003), the court held that pesticide use in substantial compliance with FIFRA did not in and of itself render the CWA citizen suit provision inapplicable, but specifically did not

address the "complex question" of whether a pesticide application constitutes a CWA discharge of a pollutant.

C. EPA's Final Rule

The citizen suits described above resulted in considerable uncertainty among forest landowners, public health officials, and others regarding whether (and under what circumstances) the application of pesticides triggered NPDES permitting requirements. Following notice and comment and codifying more than 35 years of state and EPA practice, EPA issued the final Rule to clarify that certain pesticide applications made in compliance with relevant FIFRA requirements on, over or near navigable waters were not subject to NPDES permitting requirements. Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed.Reg. 68,483 (Nov. 26, 2006), Pet.App.23a-55a.

The Rule focused on the two specific types of pesticide applications that had been the primary target of the citizen suits: (1) those made directly to waters, and (2) those made to control pests that may be present over or near waters, where a portion of the pesticide application will unavoidably be deposited to waters in order to target the pests effectively.[4] Pet.App.55a. So long as the pesticide application is made in compliance with relevant FIFRA requirements, the Rule found

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[4] In the preamble, EPA clarified that the Rule addressed only these two limited types of pesticide applications, and was not intended to cover terrestrial pesticide applications where there might be "drift over and into waters of the United States." Pet.App.37a.

that those applications would not constitute a "discharge of a pollutant."

EPA concluded that chemical pesticides used as set forth in the Rule are not "pollutants" because they are not "chemical wastes," but products being used for their intended purpose. Pet.App.33a. In contrast, the preamble to the Rule concluded that excess or residual pesticides remaining after use could be considered "pollutants." But because the application of the pesticide for its intended purpose did not involve the intentional discharge of excess or residuals (*i.e.*, all of the pesticide was applied for the purpose of targeting pests in, over or near waters), there was no "pollutant" at the time of discharge and the application therefore did not constitute the "discharge of a pollutant." Pet.App.36a. In CWA parlance, therefore, the excess or residual pesticide would be considered "nonpoint source" pollution, which is addressed under CWA programs separate from the NPDES permitting program. Pet.App.37a.[5]

The Rule suggests, however, that where an application of a pesticide was *not* made in conformance

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[5] Although the CWA definition of "pollutant" includes both "chemical wastes" and "biological materials," EPA found that biological pesticides should be treated comparably to chemical pesticides under the Rule. Pet.App.33a-34a. EPA based its conclusion on the fact that biological pesticides were uncommon when the CWA definition was enacted—such that the different statutory language would not have evidenced any Congressional intent to treat biological pesticides differently—and that modern biological pesticides are typically "reduced-risk products," which Congress could not have intended to subject to more onerous requirements than chemical pesticides. Pet.App.33a-35a.

with relevant FIFRA requirements, that application could be deemed the "discharge of a pollutant" and subject to NPDES permitting requirements. Pet.App.43a-44a. In this regard, the Rule actually extended CWA permitting beyond what had ever been imposed before, as EPA had never previously subjected to CWA permitting any application of pesticides for their intended purposes.[6]

D. The Sixth Circuit's Decision

The Rule was challenged in eleven different courts of appeals and consolidated in the Sixth Circuit, which vacated the Rule, holding that it was unambiguously foreclosed by the CWA. Pet.App.2a. Although the court agreed with EPA that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical, it ruled that any useful chemical containing portions that *will become* waste must itself be regulated as a "chemical waste." Pet.App.14a-15a. Pointing to the Ninth Circuit's decision in *Fairhurst*, the court concluded that chemical pesticides "must be regulated" as "chemical wastes" unless they are "intentionally applied to the water and ... leave[] no excess portions after performing [their] intended purpose." Pet.App.14a-16a.[7] The Sixth Circuit

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[6] Some industry petitioners challenged EPA's interpretation that noncompliance with relevant FIFRA requirements may cause pesticide use to be deemed a CWA pollutant discharge. Petitioners are not seeking review of the denial of those claims.

[7] The Sixth Circuit also concluded that "if we are to give meaning to the word 'waste' in 'chemical waste,' we must recognize Congress's intent to treat biological and chemical pesticides differently," such that the plain language of the CWA (continued...)

reached this conclusion on the ground that the CWA is susceptible to no other reasonable interpretation and thus rejected EPA's argument that the CWA was ambiguous on the question presented.

The Sixth Circuit went even further, however, concluding that "chemical pesticide residuals" added to water necessarily come from point sources that must be permitted under the Act. Pet.App.21a. In so doing, the court not only disregarded the considered interpretation of the expert agency charged with administering the CWA and more than 35 years of administrative practice, but created its own "but for" test that has no footing in the statute, and that goes far beyond anything endorsed by EPA or other courts. Specifically, the Sixth Circuit 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. *Id.* ("[B]ut for the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a 'point source.'").

Accordingly, the court held that "dischargers of pesticide pollutants are subject to the NPDES permitting program," and that "the statutory text of the [CWA] forecloses the EPA's Final Rule." Pet.App.21a-22a.

(continued)
requires that "matter of a biological nature, such as biological pesticides" be deemed a pollutant, whether or not it leaves any residue or excess. Pet.App.16a-17a.

E. EPA's Response to the Decision

Although EPA vigorously defended the Rule before the Sixth Circuit, EPA has sent mixed signals in the wake of the decision and the change in Administrations. On the one hand, EPA has not disavowed the policy and legal determinations made in the Rule. Indeed, in characterizing the court's decision, EPA has stated that the Sixth Circuit "did not defer to EPA's interpretation of th[e] *ambiguous* statutory term" "pollutant," Pet.App.169a (emphasis added), indicating that EPA has not abandoned its position that the Act is ambiguous. On the other hand, the United States did not seek rehearing of the court's decision and, instead, took the position—without addressing the merits of the Sixth Circuit's decision—that further review was not warranted because it and the NPDES-authorized state agencies can manage permitting for pesticide use through the device of "general permits" authorized under EPA rules. *See* Pet.App.105a-23a; 40 C.F.R. §122.28 (2009).

Significantly, however, EPA acknowledges the dramatic changes and substantial risks the Sixth Circuit's ruling has produced. Indeed, EPA has argued that the Sixth Circuit's decision will not only seriously impede important public health initiatives, but also result in "substantial disruption to the regulated program and the regulated community." Pet.App.110a. EPA admits that the Sixth Circuit's decision will increase the scope of the NPDES permitting program (currently at approximately 46,000 individual permits and 466,000 general permits), Pet.App.130a-31a, by 365,000 new permittees and ***5.6 million pesticide applications*** per year. Pet.App.126a-27a. And EPA urged the Sixth Circuit to stay its mandate for *two*

years—which EPA concluded was the bare minimum amount of time necessary for it to attempt development of "general permits" to cover these pesticide applications. But while EPA has bought itself time to attempt to implement the decision below, the question remains whether the Sixth Circuit properly held that the CWA mandated that extraordinarily burdensome and far-reaching regulatory undertaking.

REASONS FOR GRANTING THE WRIT

The decision below overturns more than three decades of EPA practice and mandates the greatest expansion of the NPDES program since the CWA was enacted in 1972. It will engulf into that program an estimated minimum of 5.6 million pesticide applications annually that have never before required permits and were never envisioned to be within the NPDES program—by either the government or the statute. Thus, the decision below will—in the words of EPA—"cause significant disruption among the hundreds of thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States without NPDES permits and now, as a result of the [Sixth Circuit]'s decision, will need to obtain permits in order to continue doing so consistent with the [CWA]." Pet.App.106a-07a. The affected pesticide applicators include local governments that use pesticides to control mosquitoes to protect public health, farmers who use pesticides in certain operations, foresters who use pesticides to protect timber, and even federal entities such as the U.S. Coast Guard, which uses pesticides to kill insects that interfere with the maintenance of navigation devices. Pet.App.107a. Few decisions in the history of the

CWA have had such a far-reaching and disruptive impact.

Remarkably, the Sixth Circuit reached the conclusion that Congress *unambiguously* intended that astonishing result and thus foreclosed the issuance of EPA's Rule ratifying more than 35 years of administrative practice recognizing that the pesticide applications at issue are not subject to NPDES permitting requirements. The Sixth Circuit's decision not only defies common sense, it defies a fair reading of the Act's terms, the history of the Act, and longstanding agency practice. More fundamentally, in substituting its judgment for that of the expert agency charged with administering the CWA, the Sixth Circuit flouted the teachings of this Court in *Chevron v. Natural Resources Defense Council* 467 U.S. 837 (1984), and dozens of subsequent decisions up through *Entergy v. Riverkeepers*, 129 S. Ct. 1498 (2009) and *Coeur Alaska, Inc. v. Southeast Alaska Conservation Council*, 129 S. Ct. 2458, 2463 (2009) this past Term, regarding the deference owed to an agency's considered interpretation of a statute that it administers. Importantly, the Sixth Circuit's decision also conflicts with the decisions of this Court and other circuits construing similar statutory provisions, including the Court's intervening decision in *Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870 (2009).

Certiorari is warranted to review the Sixth Circuit's decision in this case. Indeed, absent review in this case, there will be no further opportunity for review by this Court on the questions presented before CWA liability and permitting requirements are imposed on virtually all pesticide use in, over, or near

waters. At a minimum, however, the Court should grant the petition, vacate the decision below, and remand this case to the Sixth Circuit for further consideration in light of the Court's intervening decision in *Burlington Northern.*

I. THE DECISION BELOW IS PROFOUNDLY MISGUIDED AND CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS

The Sixth Circuit's decision in this case effectively binds the *ten* other federal circuits from which petitions for review were transferred and consolidated by the Judicial Panel on Multidistrict Litigation and constitutes the final say—absent further review by this Court—on the validity of one of the most significant and most-anticipated rules promulgated by EPA in years. That decision, however, is fundamentally flawed and conflicts with the decisions of this Court and other federal circuits in several important respects.

A. The Sixth Circuit's Decision Disregards Settled Principles Governing The Deference Owed To Agency Statutory Interpretations.

The Sixth Circuit ruled that "chemical waste" unambiguously includes useful chemical pesticide *products* that may ultimately leave some small amount of residue, Pet.App.15a, even where the applicator does not *intend* to dispose of the pesticide. The court did not dispute that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical. Pet.App.13a-14a. Nor did the court dispute that the Rule applies *only* to pesticide *products* that are *intentionally* applied to, over, or near water to perform their *intended* purpose of controlling pests in,

over, or near water, or that pesticide products are thoroughly regulated under FIFRA and applied for an intended and beneficial use. Pet.App.5a-6a. Yet the court nevertheless concluded that the product being applied for its intended purpose is indistinguishable from any future excess or residue that might remain after use. *See* Pet.App.16a. And what is perhaps most remarkable, the court concluded that the CWA was susceptible to no other interpretation and thus rejected EPA's forceful defense of its Rule.

In concluding that the CWA unambiguously foreclosed EPA's Rule, the Sixth Circuit seriously misconstrued the statutory provisions at issue and reached a conclusion that conflicts with the decisions of this Court and other circuits construing analogous statutory provisions. *See infra* at 14-19. Even more fundamentally, however, the court seriously departed from the teachings of this Court on the deference owed agency statutory interpretations and improperly substituted its judgment for that of the expert agency charged with administering the CWA. The court's failure to heed this Court's teachings infected its entire statutory analysis.

The Sixth Circuit began its decision with a perfunctory recitation of the *Chevron* standard of review, Pet.App.8a-9a, and purported to reject the Rule based on what has become known as *Chevron* "Step One." Yet the court's invalidation of the Rule relies exclusively on its own interpretation of general statutory terms and general statutory purposes, *see, e.g.*, Pet.App.19a-20a, with no consideration of contextual evidence or legislative history regarding Congress's intent on the specific question at issue. In this respect, the Sixth Circuit's "Step One" analysis

omits any meaningful consideration of whether Congress has "directly spoken to the precise question at issue," and pretermits the basic determination of whether the agency's interpretation of the statute is permissible. *Cf. Chevron*, 467 U.S. at 842. By prematurely declaring the provisions at issue to be capable of only *one* interpretation—when they surely were susceptible, at a minimum, to two different interpretations—the Sixth Circuit effectively cut off the *Chevron* analysis at the threshold and deprived the agency of the deference owed to its statutory interpretations under the second step of the *Chevron* inquiry.

The Sixth Circuit's *Chevron* analysis directly conflicts with the decisions of this Court. As *Chevron* and many other decisions of this Court make plain, in determining whether a phrase is ambiguous, the court must look not only at the particular provision at issue, but should employ all the traditional tools of statutory construction. *Id.* at 843 n.9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."); *accord Regions Hosp. v. Shalala*, 522 U.S. 448, 456 (1998) ("If, by 'employing traditional tools of statutory construction,' we determine that Congress' intent is clear, 'that is the end of the matter.'"). Thus, as this Court stressed in *National Association of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007), "[i]n making the threshold determination under *Chevron*, 'a reviewing court should not confine itself to examining a particular statutory provision in isolation'" and, instead, should make that determination by looking at the statutory terms "in context." When the statutory provisions at issue are

viewed in this light, there is considerable evidence that Congress *did* consider the subject of pesticide use in connection with the CWA and chose *not* to subject pesticide use to NPDES permitting. But at a bare minimum, as EPA argued in the court of appeals, *see* EPA Br. 17-25 (filed Dec. 19, 2007), there is sufficient ambiguity to trigger an inquiry into whether EPA's Rule was reasonable. *See infra* at I.B., I.C.

B. The Sixth Circuit's Decision Conflicts With The Decisions Of This Court And Other Circuits Construing Similar Statutory Provisions.

When it comes to the text of the CWA, the Sixth Circuit's interpretation of the provisions at issue not only defies common sense, it directly conflicts with the decisions and analysis of this Court and other circuits construing analogous statutory provisions. This Court's decision in *Burlington Northern*—which was issued after the Sixth Circuit's decision in this case—is particularly instructive.

In *Burlington Northern,* the Court reviewed a Ninth Circuit decision that used highly analogous reasoning to that employed by the Sixth Circuit below in finding Shell Oil Company liable under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA") for "arrang[ing] for disposal" of a hazardous substance where Shell sold and delivered a pesticide to an agricultural chemical distribution company and some of the pesticide spilled during transfer. 129 S. Ct. at 1875, 1877. This Court reversed, holding that Shell Oil could not be held liable under CERCLA for "arrang[ing] for disposal" of a hazardous substance because Shell did not *intend* to dispose of the pesticide. *Id.* at 1880. The

Court looked to the "ordinary meaning" of the term "arrange for," and found that "under the plain language of the statute, an entity may qualify as an arranger ... when it takes intentional steps to dispose of a hazardous substance." *Id.* at 1879. Therefore, the Court concluded "knowledge [of spillage of the product] alone is insufficient to prove that an entity 'planned for' the disposal, particularly when the disposal occurs as a peripheral result of the legitimate sale of an unused, useful product." *Id.* at 1880.

The Sixth Circuit below committed the same basic error as the Ninth Circuit in *Burlington Northern*. The court glossed over the ordinary meaning of "waste"—finding the pesticide applications at issue to be "chemical waste" because a small portion of the pesticide applied for its intended use may eventually result in excess pesticide deposited on water. *See* Pet.App.15a. But a pesticide applied for its intended beneficial purpose is not a "waste"—just as the pesticide product sold in *Burlington Northern* was not "waste." In both instances, the pesticide at issue was a valuable product serving its intended purpose (in this case even more so, as the Rule applies to the pesticide's actual use), and it is implausible that these products were intended for disposal. The term "waste," like the term "arrange for disposal," implies an *intention* to discard, not the use or sale of a beneficial product. *See Burlington Northern*, 129 S. Ct. at 1879 ("In common parlance, the word 'arrange' implies action directed to a specific purpose.... impl[ies] intentional action.").[8]

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[8] Indeed, this case follows *a fortiori* from *Burlington Northern*. As the Ninth Circuit found in *Burlington Northern*, (continued...)

Thus, as in *Burlington Northern*, any small amount of excess pesticide that might reach navigable waters would be the "peripheral result" of the legitimate application of a useful product. (Indeed, here the pesticide is being applied for its intended purpose, rather than being accidentally spilled during transfer, as was the case in *Burlington Northern*.) And as in *Burlington Northern*, knowledge that this legitimate application may result in some pesticide reaching navigable waters should be insufficient to render the pesticide at the time it is applied a "chemical waste" within the meaning of the CWA—particularly in light of the fact that EPA accounts for potential human health and environmental impacts from any such excess pesticide when it evaluates whether that pesticide meets the registration standard under FIFRA. *See supra* at 4-5.[9] The Sixth Circuit's flawed statutory analysis is directly contrary to this Court's intervening decision in *Burlington Northern*.

The Sixth Circuit's flawed interpretation of "chemical waste" also conflicts with the Second

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(continued)
CERCLA's definition of "disposal" included examples of *unintentional* acts such as "spilling" and "leaking." 129 S. Ct. at 1877. Yet, this Court still concluded that the term "arrange for disposal" implies an *intention* to discard. *Id.* Because none of the statutory provisions at issue in this case explicitly refer to unintentional acts like "spilling" and "leaking" the conclusion that Congress was focused on intentional acts is even stronger.

9 The Sixth Circuit, however, found just the opposite when it rejected EPA's position that "at the time of discharge [*i.e.*, the pesticide application], the pesticide is a nonpollutant, and the excess pesticide and pesticide residues are not created until later." Pet.App.19a.

Circuit's recent decision in *Cordiano v. Metacon Gun Club*, 575 F.3d 199, 206-07 (2d Cir. 2009). In that case, the Second Circuit held that the discharge of lead shot as part of the normal and intended use of that product on a shooting range does not render the lead "abandoned by being disposed of" within meaning of the Resource Conservation and Recovery Act ("RCRA") regulations defining "solid waste." Contrary to the Sixth Circuit below, the Second Circuit held that EPA's interpretation "that materials put to their ordinary, intended use are not 'abandoned' under the regulatory definition of solid waste ... is consistent with the RCRA." *Id.* at 208.

The Second Circuit's approach of considering whether a product is put to its normal and intended use when determining whether it is regulated as "solid waste" is consistent with this Court's decision in *Burlington Northern* and is fully supported by the statutory language of RCRA and EPA's implementing regulations. *See* 42 U.S.C. §6903(27) (defining "solid waste" as "discarded material ... resulting from industrial, commercial, mining, and agricultural operations, and from community activities ...."); 40 C.F.R. §261.2(b)(1) ("Materials are solid waste if they are abandoned by being: ... [d]isposed of ....").[10] The

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[10] Thus, EPA has clarified that "it does not have statutory authority under RCRA to regulate materials which are products and not wastes," 60 Fed. Reg. 25,492, 25,532 (May 11, 1995), and EPA does not regulate pesticides under RCRA until they are "discarded." 40 C.F.R. §261.2(a)(1); *see also* 40 C.F.R. §261.2(c)(1)(ii) (commercial chemical products "are not solid wastes if they are applied to the land and that is their ordinary manner of use").

Second Circuit's approval of EPA's logical interpretation of RCRA—in which lead shot that is used as it is intended is not considered waste simply because it may end up on the ground as a peripheral result of its use—is flatly inconsistent with the Sixth Circuit's interpretation of the Clean Water Act, in which beneficial product that is used as it is intended is considered "waste" simply because it may result in a small amount of excess pesticide being deposited on the water.

Although this Court's decision in *Burlington Northern* interpreted CERCLA and the Second Circuit's decision in *Metacon Gun Club* interpreted RCRA, the similarities in terminology, statutory framework and Congressional intent support application of the Court's reasoning to this case. CERCLA and RCRA focus on the regulation of "waste," or materials being "disposed of"—as did the Sixth Circuit's interpretation of "chemical waste" in this case. "Waste" like "arrange for disposal," implies an intent to dispose of rather than the use or sale of a beneficial product. *See Burlington Northern*, 129 S. Ct. at 1879. Likewise, the RCRA definition of waste—"discarded material" or material that is "disposed of"—also implies such an intent. *Cf. Metacon Gun Club*, 575 F.3d at 208 (finding that lead shot is not "disposed of" when put to its *intended* use). These interpretations are entirely consistent with the primary statute for regulating pesticide use—FIFRA—because FIFRA defines pesticides as substances "intended" for pesticidal purposes. 7 U.S.C. §136(u). Moreover, these cases illustrate that the

analogous provisions of the CWA are at the very least subject to more than one interpretation.[11]

C. The Sixth Circuit's Decision Belies The Text, Structure, And History of the CWA, As Well As EPA's Longstanding Interpretation Of The Act.

Numerous additional considerations belie the Sixth Circuit's holding that the CWA *unambiguously* forecloses EPA's Rule allowing the use of pesticide applications in the circumstances at issue.

1. Contrary to the Sixth Circuit's apparent belief, the NPDES program is not the *only* mechanism for achieving the Act's goals. Rather, the Act includes many nonpoint source programs focused on, among other things, addressing water quality impacts from agricultural activities (which presumably would include pesticide use). *See, e.g.*, 33 U.S.C. §1329 (nonpoint

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[11] Similarly, the Sixth Circuit's conclusion that "'biological materials' cannot be read to exclude biological pesticides or their residuals" also warrants this Court's review. Pet.App.16a-17a. Both this Court and the Ninth Circuit have found that the term "materials" in the CWA pollutant definition (*e.g.*, "biological materials" and "radiological materials") does *not* mean all matter. *See, e.g., Train v. Colo. Pub. Interest Research Group, Inc.*, 426 U.S. 1, 23-25 (1976); *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016-18 (9th Cir. 2002). Moreover, there must be some limiting principle on the term "biological materials" to avoid absurd results—such as NPDES permitting for a worm on the end of a fisherman's line. For these reasons, the meaning of "biological materials" is not unambiguous on the face of the statute. It is in precisely this situation that courts must defer to the authorized agency's reasonable interpretation. *See Entergy v. Riverkeepers*, 129 S. Ct. 1498, 1505 (2009).

source management programs); *id.* §1288(b)(2)(F) (process for identifying appropriate controls for agricultural and silvicultural nonpoint sources); *id.* §1254(p) (study and research program to reduce pollution from agriculture). And as noted above, Section 104(l) is the only CWA provision that refers to the water quality impact of pesticides. That provision does not characterize pesticides as "pollutants" and requires only investigation of "methods to control the release of pesticides into the environment" and "recommendations for any necessary legislation"—language that, at a bare minimum, does not unambiguously mandate regulation of such pesticide applications under the NPDES program.[12] *Id.* §1254(*l*).

2. Moreover, the Sixth Circuit's reading of the CWA conflicts with the Act's history and fails to account for FIFRA. Three days after passing the 1972 CWA, Congress enacted major amendments to FIFRA, creating a radically different statutory scheme. Unlike the CWA NPDES program, which is fundamentally a program to eliminate pollutant

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[12] Consistent with this understanding, in comments on these provisions, Senator Dole emphasized that "[p]esticides provide substantial benefits to mankind by protecting plants and animals from pest losses," and that "[t]he use of pesticides and other agricultural chemicals will undoubtedly retain a high level of importance in agriculture for the foreseeable future. In the meantime efforts at both State and Federal levels are paying off in securing the registration [pursuant to FIFRA] and adherence to recommended usages." S. Rep. No. 92-414, at 92 (1971), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3760.

discharges from wastewater,[13] FIFRA is designed to regulate beneficial activities (pesticide applications) that may also have adverse environmental effects. Congress mandated that under FIFRA, EPA is to assess the adverse environmental effects, including the effects on water,[14] of registered pesticides and impose restrictions where necessary such that the pesticide usage will not cause "unreasonable adverse effects on the environment." *See* 7 U.S.C. §§136j(a)(2)(G), 136a(c)(5)(C). Not only does EPA evaluate the effect of pesticides on water quality through "impacts on both human health from the presence of pesticides in drinking water, and on aquatic resources (*e.g.*, fish, invertebrates, plants, and other species in fresh water, estuarine, and marine environments)," Pet.App.42a, EPA also considers water quality when it determines how pesticides may be applied and dictates conditions regarding "application rates, active ingredient concentrations and dilution requirements, buffer zones, application locations, intended targets, times of day, temperature or other application requirements, [concerning] ... the amounts, concentrations, and viability of substances that may potentially end up in

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[13] *See, e.g.*, EPA, Office of Wastewater Management, *Water Permitting 101*, at 2, 5 *available at* http://www.epa.gov/npdes/pubs/101pape.pdf (last visited Nov. 2, 2009) (The CWA "created the system for permitting *wastewater* discharges (Section 402), known as the National Pollutant Discharge Elimination System (NPDES).... [T]he primary focus of the NPDES permitting program is municipal and non-municipal (industrial) direct dischargers.") (emphasis added).

[14] FIFRA's definition of "environment" includes "water." 7 U.S.C. §136(j).

waters of the United States ...." Pet.App.32a. Pesticide users must comply with the requirements imposed by EPA and reproduced on the label, *see* 7 U.S.C. §136j(a)(2)(G), but need not seek advance government authorization to use those pesticides.

Reading the term "chemical waste" in the context of these other provisions, therefore, demonstrates that Congress considered the impacts of pesticide use in enacting the CWA and determined they should not be addressed through the NPDES program. At the very least, as the government forcefully argued before the court of appeals, this history and context precludes the Sixth Circuit's conclusion that Congress *unambiguously required* the regulation of pesticide use as a CWA pollutant discharge. *See* EPA Br. 12, 42-45; *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) ("the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand").

3. The regulatory history of the CWA also starkly belies the Sixth Circuit's interpretation. For the entire 35-year period since enactment of these two statutes, EPA has regulated pesticide use under FIFRA and not under the NPDES permitting program—an interpretation that is a logical result of harmonizing these statutes. *See* EPA Br. 34-41. EPA's interpretation of the statutory scheme gives effect to FIFRA's role in regulating the impact of pesticides on water quality when used as intended while the Sixth Circuit's holding ignores the framework established by Congress by, in effect, interpreting the NPDES program as nullifying aspects of FIFRA regulation. EPA's contemporaneous—and

consistent—interpretation warrants deference. *See, e.g., Entergy v. Riverkeeopers*, 129 S. Ct. 1498, 1509 (2009) ("While not conclusive, it surely tends to show that EPA's current practice is a reasonable and hence legitimate exercise of its discretion ... that the agency has been proceeding in essentially this fashion for over 30 years."); *Barnhart v. Walton*, 535 U.S. 212, 220 (2002) ("[T]his Court will normally accord particular deference to an agency interpretation of 'longstanding' duration."); *see also Coeur Alaska*, 129 S. Ct. at 2477.

4. Moreover, over the period during which EPA clearly signaled that pesticide applications were not subject to NPDES permitting, the CWA underwent two major reauthorizations—and during both of these reauthorizations, Congress clarified its intentions with respect to the scope of coverage of the NPDES program. Congress in the 1977 CWA amendments modified specific statutory language to negate the effect of a federal court decision that would have required NPDES permits for return flows from irrigated agriculture and exempted such discharges from NPDES coverage. *See* 33 U.S.C. §§1342(*l*)(1), 1362(14). In its decision, Congress explicitly acknowledged that implementing the NPDES program was very resource intensive for EPA and the states which had assumed the program and declined to impose the significant and unnecessary resource burden that would be required if the NPDES program were applicable to agriculture. Senate Committee on Environment and Public Works, 95th Cong., *Legislative History of the Clean Water Act of 1977*, Serial No. 95-14, at 318 (1978).

In contrast, in the 1987 amendments to the CWA, Congress explicitly *expanded* the applicability of the

NPDES program, mandating that EPA develop NPDES permits for discharges of industrial and municipal stormwater—discharges which had not been generally regulated by EPA under the NPDES program. *See* 33 U.S.C. §1342(p). Recognizing once again the resource-intensive nature of the NPDES program, Congress provided a schedule for the development of the program, with deadlines for EPA regulations, permit applications, and the issuance or denial of stormwater permits. *See* 33 U.S.C. §§1342(p)(4)(A)-(B), (p)(6). When given the opportunity to include pesticides within the NPDES regime, however, Congress—which is presumed to be aware of EPA's practice of *not* subjecting pesticide applications to NPDES permitting during this period—once again declined.

The fact that Congress did not signal any disagreement with EPA's practice in not subjecting pesticides to NPDES permitting when it acted to clarify the scope of the NPDES program with respect to other types of discharges provides strong indication that Congress agreed with EPA: pesticides being applied for their intended purpose are not wastes, and thus do not fall within the scope of the term "pollutant" or of the NPDES program. As the Supreme Court held in *Chisom v. Roemer*, 501 U.S. 380, 396 & n.23 (1991), "we are convinced that if Congress had such an intent, Congress would have made it explicitly in the statute, or at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history .... Congress' silence in this regard can be likened to the dog that did not bark."

5. Indeed, it is implausible (if not absurd) to conclude that Congress required EPA to subject pesticide applications to NPDES permitting without saying so explicitly. As this Court has admonished, Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001); *Brown & Williamson Tobacco*, 529 U.S. at 160 ("[W]e are confident that Congress could not have intended to delegate a decision of such economic and political significance to an agency in so cryptic a fashion."). And yet, notwithstanding the far-reaching public health and economic ramifications of subjecting pesticide applications to NPDES permitting (discussed next), there is no evidence whatsoever in the legislative record of the CWA or its amendments that Congress considered this issue, much less unambiguously commanded EPA to subject pesticide applications to NPDES permitting, as the Sixth Circuit held.

In sum, the ambiguous statutory language, the statutory context, and subsequent legislative enactments all serve to negate the Sixth Circuit's conclusion that Congress has unambiguously required the regulation of pesticide use as the "discharge of a pollutant."

II. THE SWEEPING PRACTICAL IMPACT OF THE DECISION BELOW UNDERSCORES THE NEED FOR THIS COURT'S REVIEW

The questions presented are of undeniable national importance. Indeed, the dramatic practical impact of the Sixth Circuit's decision sweeping pesticide usage into the onerous liability and permitting regime of the NPDES program underscores the need for this Court's review.

A. The Sixth Circuit's Decision Represents The Most Dramatic Expansion of the NPDES Program Since Enactment Of The CWA.

Since the CWA's inception, EPA has never issued an NPDES permit for the application of a pesticide or issued any policy interpretation or guidance indicating that such permits were required. *See* Pet.App.26a. EPA has concluded that the Sixth Circuit's decision will single-handedly expand the universe of NPDES permittees by nearly double—and perhaps by many times more. *See* Pet.App.130a.

The combined number of stormwater and non-stormwater discharges within the current program is roughly 520,000. *See* Pet.App.130a-31a. EPA calculates that under a *narrow* reading of the Sixth Circuit's decision, and estimating pesticide applications from only eight categories of pesticide use patterns (*e.g.*, "insecticides used in wide-area insect suppression programs"), the decision will require NPDES permits for roughly ***5.6 million pesticide applications*** per year, by roughly 365,000 "applicators." Pet.App.127a.

The effect of the Sixth Circuit's decision on the scope of the permitting program could be far greater. Many advocates will urge a considerably broader reading of the Sixth Circuit's decision that, if adopted, would multiply even more the number of pesticide uses covered by permit requirements. While EPA's current plans are limited to pesticide application in, over, and "near" waters, other uses can result in the "drift" of miniscule amounts of pesticide into waters. Such "drift" may well be argued by advocates to be within the scope of the Sixth Circuit's flawed reasoning and will certainly be the subject of the next wave of citizen

lawsuits. The 5.6 million applications per year included in EPA's current permitting efforts, therefore, is a number that may be eclipsed by the actual number of permits that will need to be obtained by individuals, governments and other entities that have never been required before to do so.

B. The Sixth Circuit's Decision Threatens Essential Activities That Protect Public Health.

If the Sixth Circuit's decision stands, CWA liability and citizen suit enforcement will serve as a serious impediment to pesticide applications to control mosquito-borne diseases. *See, e.g.*, Pet.App.107a. Mosquito control is critically important to public health. Pet.App.135a. Worldwide, mosquitoes cause more human suffering than any other organism—over one million people die from mosquito-borne diseases every year.[15] Mosquito-borne diseases are still present in the United States, including West Nile Virus and various forms of encephalitis. Pet.App.120a. There is no known vaccine or effective cure for any of these diseases; they are prevented only by controlling mosquito populations.

Spraying for mosquito control has been widely demonstrated as an effective public health intervention,[16] is recommended by the Centers for

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[15] American Mosquito Control Association, *Mosquito-Borne Diseases, available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx (last visited Nov. 2, 2009).

[16] *See, e.g.*, Pet.App.161a; Ryan M. Carney et al., *Efficacy of Aerial Spraying of Mosquito Adulticide in Reducing Incidence of West Nile Virus, California, 2005,* 14 Emerging Infectious (continued...)

Disease Control and Prevention ("CDC") and state health departments[17] and has been confirmed to be safe by EPA and the CDC when used according to the pesticide labels.[18] EPA estimates that more than a thousand local government entities apply pesticides to, over, or near waters to control mosquito populations in the United States. *See* Pet.App.135a.

If the Sixth Circuit's ruling stands and FIFRA-approved application of pesticides are subject to NPDES permitting, local mosquito control organizations will likely be substantially impeded from performing their vital public health function of suppressing mosquito-borne diseases. Preparation and issuance of an individual NPDES permit takes months,

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(continued)
Diseases 747 (May 2008), *available at* www.cdc.gov/EID/content/14/5/pdfs/747.pdf.

17 *See, .e.g.*, CDC, *Epidemic/Epizootic West Nile Virus in the United States: Revised Guidelines for Surveillance, Prevention, and Control* (2003), *available at* www.cdc.gov/ncidod/dvbid/westnile/resources/wnvguidelines2003.pdf; California Department of Public Health, *2009 California Mosquito-borne Virus Surveillance and Response Plan* (Apr. 2009), *available at* www.westnile.ca.gov/resources.php.

18 Extensive reviews of mosquito control pesticides by EPA and CDC in recent years have confirmed their safety. In fact, the majority of the mosquito adulticides routinely used in the U.S. were fully reregistered by EPA between 2006 and 2008, after exhaustive risk assessments, and in all cases, the materials were approved for mosquito control activities over or near water. *See* EPA, *Pesticide Reregistration Status*, *available at* http://www.epa.gov/pesticides/reregistration/status.htm (last visited Nov. 2, 2009).

at a minimum. *See* 40 C.F.R. Part 124 (requiring a detailed permit application; draft permit; fact sheet setting forth the rationale for the permit conditions; minimum 30 day comment permit; opportunity for public hearing; final permit and fact sheet; EPA review and approval; and opportunity for appeal); Pet.App.112a. Nor are general permits a panacea. Monitoring requirements can be extremely expensive—thus taking away funding that mosquito control districts otherwise would use for controlling pest outbreaks. Moreover, environmental groups have challenged many general permits, claiming they provide insufficient opportunity for comment on individual applications and site-specific conditions. *See, e.g., Waterkeeper Alliance, Inc. v. EPA*, 399 F.3d 486, 489-500, 503-504 (2d Cir. 2005); *Envtl. Def. Ctr., Inc. v. EPA*, 344 F.3d 832, 852-58 (9th Cir. 2003), *cert. denied*, 541 U.S. 1085 (2004). Added to the foregoing is the continued threat of further citizen suit litigation, with its attendant costs of defense, coupled with the potential for fines and attorneys' fee awards.[19] Thus, the threat of CWA liability could seriously hinder—or effectively halt—mosquito control efforts in the United States, which in turn could result in death and serious illness for thousands of people from mosquito-borne illnesses such as West Nile Virus.

Other critical functions also will be jeopardized by the Sixth Circuit's ruling. EPA has noted that the Forest Service relies on pesticides to prevent

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[19] In a period of only weeks following the Sixth Circuit decision invalidating the Final Rule, forty-five local mosquito control agencies in California alone were served with notices of intent to sue for using pesticides without an NPDES permit.

significant outbreaks of pests, such as gypsy moths, in our nation's forests. Pet.App.115a, 157a. The Animal and Plant Health Inspection Service also needs pesticides to prevent or control devastating pest outbreaks, while the U.S. Coast Guard uses pesticides to control pests that interfere with navigational devices. Pet.App.107a, 165a-66a. Pesticides are also necessary to combat algae, weeds and other vegetation in irrigation canals, and to control outbreaks of invasive species such as zebra mussels. Pet.App.115a, 126a-27a.

In sum, the sweeping scope and potentially dire public health consequences of the decision below underscore the need for this Court's review. Although EPA has sought to stave off those consequences by securing an extraordinary *two-year* stay of the decision below, the fact that EPA secured a stay provides no reason to decline consideration of the question whether the Sixth Circuit properly concluded that the CWA unambiguously mandates that EPA embark on this exceptionally burdensome and highly risky administrative undertaking at all.

III. AT A MINIMUM, THE COURT SHOULD GVR THE CASE FOR CONSIDERATION OF THE COURT'S INTERVENING DECISION IN *BURLINGTON NORTHERN*

The Sixth Circuit's decision invalidating EPA's Rule warrants plenary review for the reasons discussed above. At a bare minimum, however, the Court should grant the petition, vacate the decision below, and remand for consideration of this Court's intervening decision in *Burlington Northern.*

In *Lawrence v. Chater*, 516 U.S. 163, 167 (1996), this Court held that, "[w]here intervening developments, or recent developments that we have

reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate." That standard is met here.

As explained above, this Court's decision in *Burlington Northern* fatally undercuts the statutory interpretation undergirding the Sixth Circuit's conclusion that the CWA unambiguously forecloses EPA's Rule. *See supra*, at pp. 14-19. The Sixth Circuit did not have the benefit of the guidance provided by *Burlington Northern*, however, because the Court's decision in *Burlington Northern* was issued months after the Sixth Circuit's decision in this case. Given the misguided nature of the Sixth Circuit's decision and the sweeping practical ramifications of that decision, this Court should at a minimum order the Sixth Circuit to reconsider its decision in light of *Burlington Northern* before that misguided decision is allowed to stand once and for all.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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