No. 09-

IN THE
Supreme Court of the United States

AMERICAN FARM BUREAU FEDERATION,
AMERICAN FOREST & PAPER ASSOCIATION, AND
NATIONAL COTTON COUNCIL,
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

ELLEN STEEN
Counsel of Record
CLIFTON S. ELGARTEN
JESSICA A. HALL
CROWELL & MORING LLP
1001 Pennsylvania Ave., NW
Washington, DC 20004-2595
(202) 624-2500

Counsel for Petitioners

OF COUNSEL

JULIE ANNA POTTS
AMERICAN FARM BUREAU FEDERATION
600 Maryland Ave., SW
Suite 1000W
Washington, DC 20024

WILLIAM R. MURRAY
AMERICAN FOREST & PAPER ASSOCIATION
1111 - 19th Street, NW
Suite 800
Washington, DC 20036

WILLIAM A. GILLON
GILLON & ASSOCIATES, PLLC
1163 Halle Park Circle
Collierville, TN 38017

QUESTIONS PRESENTED

1. Did the Sixth Circuit err in holding that the "plain language" of the Clean Water Act precludes an EPA rule, consistent with 35 years of agency practice, that the application of a useful pesticide for its intended purpose and in accordance with relevant requirements of EPA's pesticide regulatory program is not a "discharge of a pollutant"?

2. In reviewing an agency regulation under *Chevron*, may a court reject the agency's interpretation by declaring a "plain meaning" that departs from the common understanding of the controlling statutory provisions, without considering statutory context, the simultaneous enactment of a different statute more specifically addressing the subject matter, or the agency's contemporaneous interpretation, all of which support the agency's interpretation?

PARTIES TO THE PROCEEDING

Respondents are:

Environmental petitioners before the Sixth Circuit: 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, Inc.;

Environmental Protection Agency, respondent before the Sixth Circuit; and

Industry petitioners before the Sixth Circuit: Agribusiness Association of Iowa; Bayer CropScience, LP; BASF Corporation; CropLife America; Delta Council; Eldon C. Stutsman, Inc.; FMC Corporation; Illinois Fertilizer & Chemical Association; and Responsible Industry for a Sound Environment; Southern Crop Production Association; and Syngenta Crop Protection, Inc.

RULE 29.6 STATEMENT

American Farm Bureau has no parent corporation and no publicly held corporation owns 10% or more of its stock.

American Forest & Paper Association has no parent corporation and no publicly held corporation owns 10% or more of its stock.

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

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully submit this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINION BELOW

The court of appeals' opinion is reported at 553 F.3d 927. App., *infra*, 1a.

JURISDICTION

The court of appeals filed its opinion on January 7, 2009, and denied petitioners' timely filed petition for rehearing and rehearing en banc on August 3, 2009. 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. §§ 1257-1387, are set forth in the Appendix, *infra*, at 31a-64a.

STATEMENT OF THE CASE

This petition arises from the Sixth Circuit's reversal of more than three decades of United States Environmental Protection Agency ("EPA") practice and policy in administering the Clean Water Act ("CWA" or "the Act"). Since Congress enacted the CWA in 1972, EPA has never subjected the use of pesticides in, over, or near waters to CWA National Pollutant Discharge Elimination System ("NPDES") permitting. A series of citizen lawsuits beginning in the late 1990s generated several Ninth Circuit decisions that created confusion and concern among pesticide users regarding the interpretation of the CWA with regard to pesticide use. In response, EPA issued guidance and ultimately undertook

rulemaking to clarify and formalize the agency's interpretation. The resulting regulation (the "Rule") clearly defines specific circumstances in which the use of pesticides in accordance with all relevant requirements under the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA") is not a CWA "discharge of a pollutant," explaining in detail the rationale for the agency's interpretation.

Environmental groups, as well as farm and pesticide industry groups, filed petitions for review of the Rule in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits. The petitions were consolidated in the Sixth Circuit, which held that the CWA precludes EPA's interpretation. The court reached this conclusion based solely on the "plain meaning" of the provisions at issue and the statute's general policy goals – which do not specifically address pesticides – and without regard to statutory and historic context that show Congress's clearly expressed intent not to regulate pesticide use under the CWA. The result, absent review by this Court, will be the most sweeping expansion in the history of this important regulatory program.

A. Statutory Background

Section 301(a) of the CWA prohibits the "discharge of a pollutant" by any person except in compliance with certain enumerated provisions. 33 U.S.C. § 1311(a), App. 40a. The Act defines "discharge of a pollutant" to mean the "addition of any pollutant to navigable waters from any point source." *Id.* § 1362(12), App. 62a. It defines "pollutant" to mean several specifically listed categories of materials, including "chemical wastes" and "biological materials." *Id.* § 1362(6), App. 61a-

62a. EPA is charged with the general administration of the Act and is authorized to "prescribe such regulations as are necessary to carry out [its] functions under [the Act]." *Id.* §§ 1251(d), 1361(a), App. 31a, 61a.

A central goal of the CWA is the elimination of all point source "discharges" of pollutants into navigable waters. *See id.* §§ 1251(a)(1) (establishing "the national goal that the discharge of pollutants into the navigable waters be eliminated by 1985"), App. 31a; 1311(a) (discharge prohibition), App. 40a; 1342 (establishing the National Pollutant Discharge Elimination System), App. 58a-60a. Under the NPDES program, however, EPA or an authorized State agency may, after public notice and an opportunity for public hearing, issue a permit for the "discharge of a pollutant" if certain terms and conditions are met.[1] *Id.* § 1342(a)-(b), App. 58a-60a.

NPDES permits must include "effluent limitations" to restrict the "quantities, rates, and concentrations" of constituents in the effluent discharge.[2] *Id.* §§ 1362(11), App. 62a; 1311(e), App.

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[1] Discharges of "dredged or fill material" are addressed under a separate program pursuant to CWA Section 404, administered by the U.S. Army Corps of Engineers. *See Coeur Alaska, Inc. v. Se. Alaska Conservation Council*, 129 S. Ct. 2458, 2463 (2009).

[2] The standard that governs effluent limitations for most pollutants is set forth at Section 301(b)(2)(A), which requires "the best available technology economically achievable ...[which] shall require the elimination of discharges of all pollutants if the [EPA] finds ... that such elimination is economically achievable ...." 33 U.S.C. § 1311(b)(2)(A), App. 41a-42a.

45a. In addition to technology-based limits, the permit must impose any more stringent limits "necessary to meet water quality standards." *Id.* § 1311(b)(1)(C), App. 41a. The maximum civil penalty for any unauthorized pollutant discharge or violation of permit conditions is $37,500 per violation, per day.[3] *See id.* § 1319(d), App. 55a; 40 C.F.R. § 19.4 (2009). Violations may be enforced by EPA or any interested citizen. *See id.* §§ 1319(b), 1365(a), App. 55a, 63a.

Not all sources of water pollution are regulated under the CWA. Sources not defined as a "discharge of a pollutant" but that nevertheless affect water quality are broadly categorized as "nonpoint sources."[4] Nonpoint sources are addressed through a variety of non-regulatory, mostly State-controlled programs. The CWA water quality standards program, for example, broadly applies to all sources of water pollution, whether or not they are subject to NPDES permits. *See id.* § 1313. Under that program, States establish water quality goals, identify waters where those goals are not being attained, and establish a "continuing planning

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[3] The original maximum civil penalty was $10,000. *See* Pub. L. 92-500, § 309(d), 68 Stat. 860 (1972).

[4] The term "nonpoint source" is not defined in the CWA, but generally encompasses every source of water pollution that is not a regulated point source discharge. *See Ctr. for Native Ecosystems v. Cables*, 509 F.3d 1310, 1331 (10th Cir. 2007); *Thomas v. Jackson*, 581 F.3d 658, 661 n.4 (8th Cir. 2009). Agricultural activities in particular have traditionally been viewed as nonpoint sources and have been targeted by Congress for specific exclusions from "point source" regulation. *See* 33 U.S.C. §§ 1288(b)(F), 1362(14), App. 62a.

process," subject to EPA approval, applicable to all navigable waters. *Id.* § 1313(c), (d), (e), App. 45a-54a.

The Section 208 program also addresses nonpoint sources, calling for area-wide waste treatment management plans developed by state or local entities. *Id.* § 1288(b), App. 33a-40a. Such plans must be applicable to "all wastes generated within the area involved," including control of "agriculturally and silviculturally related nonpoint sources" *Id.* § 1288(b)(F), App. 36a. In addition, CWA Section 104(p) requires "a comprehensive study and research program to determine new and improved methods ... of preventing, reducing, and eliminating pollution from agriculture." *Id.* § 1254(p), App. 33a.

Section 104(l) is (and was in 1972) the only CWA provision that refers to the water quality impact of pesticides. That provision required: (1) that EPA develop and issue by 1973 information on the effects of pesticides in water, and (2) that the President investigate the "methods to control the release of pesticides into the environment [including] examination of the persistency of pesticides in the water environment and alternatives thereto." *Id.* § 1254(l)(1)-(2), App. 32a-33a. The Act directed the President to report to Congress on his investigations "together with his recommendations for any necessary legislation." *Id.* § 1254(l)(2), App. 32a-33a.

Three days after Congress enacted the CWA, it passed comprehensive amendments to FIFRA, the statute that regulates the sale, distribution, and use of pesticides. *See* 7 U.S.C. §§ 136-136y; Pub. L. No. 92-516, 86 Stat. 973 (1972). Recognizing that pesticides "have important environmental effects,

both beneficial and deleterious," Congress found that "wise control based on a *careful balancing of benefit versus risk* to determine what is best for man is essential." S. Rep. No. 92-838, at 4 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3996 (emphasis added). Accordingly, in the 1972 FIFRA amendments, Congress created a scheme in which EPA would assess the adverse environmental effects of registered pesticides and approve label restrictions to ensure that pesticide use would not cause "unreasonable adverse effects on the environment."[5] *See* 7 U.S.C. § 136j(a)(2)(G), 136a(c)(5), App. 67a, 66a.

To regulate pesticide application by end users such as farmers or commercial applicators, the FIFRA amendments prohibited the use of a registered pesticide "in a manner inconsistent with its labeling." *See id.* § 136j(a)(2)(G), App. 67a. Any such use was made subject to maximum civil penalties of $5,000 (now $7,500) for commercial applicators, or $1,000 (now $1,100) for private applicators. Pub. L. No. 92-516, § 14(a)(1)-(2), 86 Stat. 992-93 (1972); 40 C.F.R. § 19.4 (2009).

B. Litigation Leading to the Rule

Allegations that pesticide use should be regulated as a CWA "pollutant" discharge were first asserted in a series of citizen enforcement suits in the Ninth and Second Circuits in the late 1990s. *See*

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[5] Congress also broadened FIFRA's previous registration requirement, so that all pesticides sold or distributed in any State, with certain narrow exclusions, must be registered. *See* S. Rep. No. 92-838, at 1 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3993, 3994.

App. 75a-77a. These lawsuits generated several appellate decisions before EPA initiated the rulemaking at issue here.

In *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526, 532-33 (9th Cir. 2001), the Ninth Circuit held that an unlawful discharge occurred where the defendant had applied a pesticide to an irrigation canal, and treated water leaked through a "waste gate" into a natural, fish-bearing stream (contrary to pesticide label instructions), reasoning that residual pesticide remaining after application is a "chemical waste" and therefore a "pollutant." *Id.* at 528, 530, 532-33. In *League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren*, 309 F.3d 1181, 1183-85 (9th Cir. 2002), the Ninth Circuit held that aerial spraying of pesticide to a forest canopy directly over streams was a "discharge of a pollutant" requiring an NPDES permit.[6] By contrast, in *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005), the Ninth Circuit found no CWA pollutant discharge and no NPDES permit requirement where aquatic pesticides were applied in compliance with FIFRA requirements, left no residue, and had no "unintended effects." *Id.* at 1151.

The litigation also generated two Second Circuit decisions that did not reach the merits of the question addressed in the Rule, but that suggested a

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[6] The Ninth Circuit mistakenly assumed that the defendant U.S. Forest Service did not dispute that the pesticide was a CWA "pollutant." *See* 309 F.3d at 1184 n.2; App. 75a. Thus, the court's analysis focused entirely on whether aerial spray equipment used in forest pest control is a "point source." *Id.* at 1185

need for EPA's interpretive guidance. In *Altman v. Town of Amherst, N.Y.*, 47 Fed. Appx. 62, 66 (2d Cir. 2002), the Second Circuit vacated the dismissal of a suit challenging mosquito-control spraying in a wetland area, finding that the lower court should have allowed further discovery on the circumstances of the application.[7] And in *No Spray Coalition, Inc. v. City of New York*, 351 F.3d 602, 605-06 (2d Cir. 2003), the court vacated a district court ruling that the CWA citizen suit provision is inapplicable to claims involving pesticide use in substantial compliance with FIFRA, but did not address the "complex question" of whether such pesticide use is a CWA discharge of a pollutant. *Id.* at 606.

C. The Rule and Its Rationale

As the litigation continued, concern and confusion grew among farmers, forest landowners, and public health officials, prompting EPA to issue guidance and ultimately undertake rulemaking to clarify its interpretation of the CWA as applied to pesticide use. The final Rule, 71 Fed. Reg. 68,483-68,492 (Nov. 27, 2006), is the culmination of a three-year participatory rulemaking process that began with an interim interpretive statement in 2003 and involved two rounds of public comment. *See id.*, App. 68a-111a; 68 Fed. Reg. 48,385-48,388 (Aug. 13, 2003); 70 Fed. Reg. 5,093-5,100 (Feb. 1, 2005) (final interpretive statement and notice of proposed rulemaking).

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[7] The court noted that, "[u]ntil the EPA articulates a clear interpretation of current law ... the question of whether properly used pesticides can become pollutants that violate the CWA will remain open." *Id.* at 67.

The Rule broadened the reach of the CWA relative to EPA's historic practice of *never* subjecting pesticide use to CWA regulation. Under EPA's formal interpretation, the application of pesticides may be deemed a CWA pollutant discharge if the application is not in accordance with all relevant FIFRA requirements. However, the Rule provides that pesticide use in compliance with FIFRA requirements is not a "discharge of a pollutant" in two circumstances: (1) application directly to waters, and (2) application to control pests that may be present over waters, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters in order to target the pests effectively. App. 110a-111a.

EPA reasoned that the use of chemical pesticides under the circumstances set forth in the Rule is not the discharge of a "pollutant." *Id.* 82a. Such pesticides are not "chemical wastes," but products being used for their intended purpose. *Id.* EPA further found it unlikely that Congress intended to categorize biological pesticides differently than chemical pesticides, particularly given that biological pesticides were uncommon when the CWA definition was enacted and that modern biological pesticides are typically "reduced-risk products." *Id.* 83a. For this reason, EPA concluded that interpreting "biological materials" to include biological pesticide applications would be inconsistent with the purposes of the statute. *Id.*

EPA concluded that excess or residual pesticides remaining after pesticide use are "pollutants," but that the application *itself* is not a "discharge of a pollutant" because there is no "pollutant" at the time of the application. *Id.* 86a (application in such

circumstances would "not meet both statutory prerequisites (pollutant and point source) at the time of its discharge into the water"). Thus, EPA concluded that excess or residual pesticide present in waters as a result of pesticide use in accordance with the Rule is nonpoint source pollution to be addressed through CWA and State programs other than the NPDES permitting program.[8] *Id.* 87a.

D. The Decision Below

The Rule was challenged in eleven courts of appeals and consolidated in the Sixth Circuit, which vacated the Rule as contrary to the plain language of the CWA.[9] App. 2a. The court agreed with EPA that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical, but ruled that any useful chemical containing portions that *will become* waste must itself be regulated under the CWA as a "chemical waste." *Id.* 18a-19a. Pointing to the Ninth Circuit's decision in *Fairhurst*, the court concluded that all chemical pesticides must be regulated as "chemical wastes" unless they are intentionally applied to waters and will leave no

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[8] EPA explained that where pesticide residues are discharged "from a point source" – such as in industrial wastewater discharges or regulated stormwater discharges from municipal or industrial sources – such point source discharges are subject to NPDES permit requirements. App. 85a.

[9] Industry and farm 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.

excess or residual after performing their intended purpose. *Id.* 18a.

With regard to biological pesticides, the Sixth Circuit found that the plain language of the CWA requires that "matter of a biological nature, such as biological pesticides" be deemed a pollutant. *Id.* 21a. Thus, *any* biological pesticide, regardless of whether it will leave any excess or residual after performing its function, must be deemed a CWA "pollutant." The court rejected EPA's conclusion that Congress should not be presumed to have intended different treatment for chemical and biological pesticides. *Id.* 22a. Instead, the Sixth Circuit 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." *Id.*

The Sixth Circuit also concluded that "pesticide residue or excess pesticide – even if treated as distinct from pesticide – is discharged from a point source." *Id.* 26a. The court ruled that the CWA phrase "*from* a point source" can only mean "*by* a point source." *Id.* 26a-27a. Further, pollutants are discharged "by" a point source whenever the point source is a "but for" cause of the addition of pollutants to navigable waters; the substance need not be a "pollutant" *at the time* it comes "from" the point source. *Id.*

Accordingly, the court vacated the Rule, concluding that "dischargers of pesticide pollutants are subject to the NPDES permitting program." *Id.* 27a-28a.

E. EPA's Response to the Decision

Although EPA vigorously defended the Rule before the Sixth Circuit, it has acquiesced to the court's decision under a new Administration. The United States did not seek rehearing and, instead took the position that further review was not warranted because EPA and the NPDES-authorized state agencies can manage permitting for pesticide use through the device of "general permits" authorized under EPA rules. *See* App. 116a-117a; 40 C.F.R. § 122.28 (2009).

EPA has not, however, disavowed the policy and legal determinations made in the Rule. Moreover, the agency has acknowledged the dramatic change and threat of substantial harm that the Sixth Circuit's ruling will produce. Indeed, EPA has argued that the unavailability of permits would cause "serious disruption of public health initiatives, agriculture and other activities." App. 128a. EPA also described the substantial administrative burdens and resource demands associated with general permit issuance, while also highlighting the severe ($700,000,000 to $1 billion) budget shortfall already faced by State NPDES permitting agencies. *Id.* 142a, 147a-161a. EPA successfully urged the Sixth Circuit to stay its mandate to allow *two years* for EPA and the 46 authorized State agencies to attempt to develop "general permits" to authorize at least some of the estimated *5.6 million* pesticide applications annually that will now need permit coverage. *See* App. 124a, 131a.

REASONS FOR GRANTING THE WRIT

Left undisturbed, the decision of the Sixth Circuit will overturn more than three decades of EPA practice and bring about the greatest expansion of the NPDES program since the CWA was enacted in 1972. It will sweep into that program an estimated 5.6 million pesticide applications annually. The affected pesticide users include local governments that apply pesticides to control mosquitoes to protect public health, farmers who use pesticides to save crops, foresters who use pesticides to protect timber, and even federal entities like the U.S. Coast Guard and U.S. Department of Agriculture ("USDA"). App. 115a, 129a. Few decisions in the history of the CWA have had such a far-reaching and disruptive impact. The decision thus has dramatic implications for the administration of an important federal regulatory program and for our nation's health and welfare.

The Sixth Circuit found that the CWA *unambiguously* requires the regulation of pesticide use as a "pollutant" discharge. To reach this result, the court flouted the teachings of this Court in *Chevron v. Natural Resources Defense Center*, 467 U.S. 837 (1984), and dozens of subsequent decisions up through *Coeur Alaska,* 129 S. Ct. at 2463, this past Term. The court preemptively substituted its own "plain" reading of the governing statutory provisions in place of EPA's patently reasonable interpretation. Then, having declared the text of the governing provisions "plain," the court looked no further, ignoring statutory and historic context that make quite clear Congress's decision *not* to require CWA permitting for pesticide use.

The Court should grant the petition to restore EPA's reasonable interpretation of this complex statutory scheme and maintain the proper scope of this important federal regulatory program. Absent review in this case, there will be no further opportunity for review before CWA liability and permitting requirements are imposed on virtually all pesticide use in, over, or near waters. Review should also be granted to reinforce this Court's requirement of a meaningful inquiry into Congress's expressed intent as a prerequisite to invalidating an agency rule. There is room enough for error when courts employ the "traditional tools" of statutory construction to discern the meaning of Congress's words. When courts ignore those tools, the process of judicial review loses integrity and both agencies and the regulated public are left at the whim of judicial policy-making.

I. THE BROAD REACH AND HARMFUL IMPACT OF THE SIXTH CIRCUIT'S DECISION MAKE THIS A CASE OF EXCEPTIONAL IMPORTANCE.

Under the Sixth Circuit's decision, hundreds of thousands of individuals, businesses, and government entities will, for the first time, be prohibited from using pesticides in, over, or near waters unless they obtain authorization to do so under an NPDES permit. The newly regulated entities will perhaps double, perhaps far more than double, the size of the NPDES permitting program. The affected pest control activities – now to be deemed unlawful absent an NPDES permit – protect our public health, our homes and communities, and the croplands and forestlands vital to our nation's food supply, security, and economy. They control

"mosquitoes, which transmit infectious diseases such as encephalitis and West Nile Virus; gypsy moths, which defoliate forests causing growth loss or the death of trees; algae and weeds, which can clog irrigation canals reducing the amount of water available to irrigate crops; and invasive species such as zebra mussels, which attach to and block water intakes for municipal water supplies and hydroelectric plants." App. 145a. The Sixth Circuit's decision sweeping these vital pest control activities into the onerous liability and permitting regime of the NPDES program threaten dire consequences, particularly in the areas of mosquito control and crop protection.

A. The Decision Overturns Three Decades of EPA Practice and Will Dramatically Expand the Scope of the NPDES Program.

In more than 35 years of administering the CWA, 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* App. 73a. By sweeping pesticide use into the CWA ban on "pollutant" discharges, the Sixth Circuit's decision will single-handedly expand the universe of NPDES permittees by nearly double – perhaps by many times more. *See id.* 141a-142a.

In general, EPA estimates that the number of non-stormwater discharges regulated under NPDES permits has been relatively stable at around 100,000 facilities since the 1970s, until a recent Ninth Circuit decision required the addition of roughly 70,000 vessel (shipping) discharges. *Id.* 141a. Since the 1990s, the program has also included certain

regulated stormwater discharges, which today account for roughly 353,500 permitted facilities each year. *Id.* 141a-142a. Thus, the combined number of facilities permitted within the current program is roughly 520,000. 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."[10] *Id.* 145a.

The impact on the scope of the permitting program could be far greater than even these figures suggest. EPA's current figures do not include, for example, pesticide application to water-dependent crops, such as rice, or to terrestrial cropland where drainage ditches or "wetland" areas are within or adjacent to cropped areas. The 5.6 million applications per year included in EPA's current projections, therefore, are likely the tip of the iceberg – even under a narrow reading of the court's ruling.

Of course, many advocates will urge a far broader reading of the Sixth Circuit's decision that, if adopted, would again multiply the number of pesticide uses covered. While EPA's current plans are limited to pesticide application in, over, and

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[10] EPA's estimate of the number of affected "applicators" presumably refers to commercial applicators. Yet the entity responsible for securing permit coverage will more likely be the farmer, forest landowner, county, etc. who makes the decision to use pesticide. Petitioners are aware of no estimate of the total number of entities needing permit coverage under the court's decision.

"near" waters, other uses often result in the "drift" of miniscule amounts of pesticide into waters. Such "drift" is arguably within the scope of the Sixth Circuit's flawed reasoning and will certainly be the subject of the next wave of citizen lawsuits.

B. The Decision Threatens Essential Activities That Protect Our Nation's Public Health and Food Supply.

1. Worldwide, "[m]osquitoes cause more human suffering than any other organism – over one million people die from mosquito-borne diseases every year."[11] In the United States, pesticides play a critical role in controlling the mosquito population. More than a thousand local government entities apply pesticides to, over, or near waters to control mosquito populations in the United States. *See* App. 145a. Simply put, anything that significantly curtails the use of pesticides in, over, and near waters threatens public health with outbreaks of West Nile virus, encephalitis, Dengue fever, and other mosquito-borne diseases. There is no vaccine or cure for these diseases, which are controlled only by controlling mosquito populations.

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. As EPA has explained, the potential unavailability of permits when needed would "result in increased threats to public health because most efforts to control

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[11] Mosquito-Borne Diseases, American Mosquito Control Association, *available at* http://www.mosquito.org/mosquito-information/mosquito-borne.aspx.

mosquitos [sic], which transmit several debilitating diseases, will cease or risk CWA enforcement." App. 189a. Even in the event that EPA and the 46 NPDES-authorized State permitting agencies ultimately manage to issue "general permits" to cover many pesticide application scenarios – and then successfully defend those permits in litigation – there is an irreconcilable tension between an NPDES program focused narrowly on eliminating (or at least minimizing) the "pollutant" discharge and the needs of mosquito abatement programs focused on eradicating (or at least minimizing) mosquito-borne disease. If pesticide application is curtailed, public health officials will lose their best tool, mosquito populations will multiply, and mosquito-borne disease in the United States will spread.

2. The injection of NPDES permitting requirements into the highly precise and science-based process of modern crop protection also poses a substantial threat to the nation's supply of food and fiber. *See* App. 194a. Farmers use pesticides to protect food and non-food crops from infestation and loss due to weeds, insect pests, and disease. Even slight delays in application can result in less effective crop protection, the spread of pests and disease, and significant crop loss. *Id.* As USDA Secretary Thomas Vilsack explained in urging EPA to pursue review of the Sixth Circuit decision, delays due to NPDES permitting requirements "could cripple American farmers' emergency pest management efforts and hamper their ability to respond quickly to new infestations or threats of

infestations, thus increasing the risk of crop losses."[12] *Id.* 203a.

The risk of delay goes beyond farmers' pocketbooks and threatens national security and food supply. As EPA has explained, "federal agencies, working with state partners and growers must maintain the ability to respond immediately by application of pesticides, including aerial application if necessary, to deliberate or inadvertent introductions of new pests or diseases which may threaten the biosecurity of the United States. For example, a sudden large-scale introduction of Foot and Mouth disease, wheat rust or soybean red leaf blotch could threaten the U.S. food supply." App. 171a.

Effective crop protection also depends on farmers' ability to use carefully prescribed products and combinations of products at appropriate rates based on the particular crop, pest, and site-specific conditions at issue. *See id.* 194a-196a. NPDES permitting would add to this calculus a further layer of restrictions aimed squarely at minimizing (indeed, eliminating) the "pollutant" discharge, without

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[12] Fears of permitting delays are well founded based on the history of NPDES permitting. *See* Backlog Reduction, NPDES Program Basics, *available at* http://cfpub.epa.gov/npdes/permitissuance/backlog.cfm. Moreover, the theoretical possibility that EPA and 46 State permitting agencies may issue general permits offers little reassurance that permit coverage will be readily available. Environmental interest groups claim that *site-specific* control measures and water-quality impacts must be subject to agency review and public participation. *See, e.g., Waterkeeper Alliance, Inc. v. Envtl. Prot. Agency*, 399 F.3d 486, 503 (2d Cir. 2005).

regard for the essential function to be served by the so-called "pollutant." The result is that the rate and manner of pesticide application that most effectively controls crop infestation and disease likely *will not* coincide with the rate and manner of application prescribed under an NPDES permit.

II. THE DECISION BELOW TRAMPLES SETTLED PRINCIPLES OF JUDICIAL REVIEW AND CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

The Rule reasonably establishes that the intentional application of pesticides in accordance with all relevant FIFRA requirements is not a discharge of a "pollutant ... from a point source" under the CWA – based largely on the CWA's definition of "pollutant" to include "chemical wastes," but not useful chemical products. The Sixth Circuit's decision runs roughshod over the statutory scheme and EPA's patently reasonable interpretation to declare its "plain language" ruling. The decision ignores settled rules of statutory interpretation and cannot be reconciled with this Court's precedents.

A. The Sixth Circuit's Reading of "Chemical Wastes" and "From a Point Source" Overrides the Common Meaning of Those Terms.

1. The Sixth Circuit found that "chemical waste" must be read to include *chemical products in use* for their intended purpose if the use of the product will result in waste. App. 19a-20a. Essentially, the court held that "chemical waste" unambiguously encompasses chemicals *that will*

become waste. *Id.* The court based this conclusion on plain language, notwithstanding: (a) its agreement with EPA that the common meaning of "chemical waste" is "discarded," "superfluous," or "excess" chemical, and (b) the Rule's focus on pesticides *intentionally* applied to, over, or near water in order to perform their purpose (the control of pests located in, over, or near water). *Id.* 18a, 110a-111a. The court apparently viewed chemical products in use for their intended purpose as *indistinct* from the chemical wastes that may remain after their use.[13] The court concluded that any chemical containing portions that *will become* waste must itself be regulated as a "chemical waste." *See id.* 20a ("If, on the other hand, a chemical pesticide is known to have lasting effects beyond the pesticide's intended object, then its use must be regulated under the Clean Water Act.")

The court's interpretation of "chemical wastes" stretches logic and English usage past the breaking point. No common understanding of the term "chemical wastes" would encompass all chemicals containing portions that *will become* waste. Yet the Sixth Circuit reached its interpretation on the basis of those words alone – citing nothing in the CWA or its history to suggest that Congress intended such a result. *Id.* 19a-20a. Even if the words "chemical wastes" could plausibly be construed to include

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[13] *See id.* 20a (when pesticides are intentionally applied to control pests in water, "both non-waste aqueous pesticide and pesticide residual are applied to the water at the same moment"); *id.* 26a ("pesticide residue or excess pesticide – *even if treated as distinct from pesticide* – is a pollutant discharged from a point source") (emphasis added).

products that have immediate value but that *will become* waste, those words can also reasonably be construed to *exclude* chemicals being used for their intended purpose. EPA's reasonable interpretation therefore must be upheld under this Court's precedents. *See Entergy Corp. v. Riverkeeper, Inc.*, 129 S. Ct. 1498, 1506 (2009) (rule upheld where statute does not "unambiguously preclude" EPA's interpretation).

2. The Sixth Circuit's interpretation of the CWA phrase "*from* a point source" is also fundamentally flawed. App. 23a-27a. As interpreted by EPA in the Rule, "pollutant ... from a point source" means that the substance at issue is a "pollutant" when it comes "from" the point source conveyance. App. 86a. This follows the common understanding of "from." One cannot spray ice "from" a hose, even though water sprayed from a hose may later become ice. Nor can one squeeze butter "from" a cow. Likewise, pesticide *waste* is not discharged "from" application equipment during pesticide use, even if some portion of the pesticide may subsequently miss its target or leave residue in the environment. At the very least, this reading is permissible and must therefore be upheld.[14]

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[14] The Sixth Circuit observed that EPA "offer[ed] no direct support for its assertion that a pesticide must be 'excess' or 'residue' at the *time of discharge* if it is to be considered as discharged *from a 'point source.'*" App. 24a (emphasis in original). Yet the only "support" needed by the agency is the statute itself, which plainly allows (if not dictates) EPA's interpretation. As explained in *Entergy*, 129 S.Ct. at 1507, the mere fact that a statute does not explicitly *require* a particular construction does not mean that such an interpretation is

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The Sixth Circuit, however, held that EPA's construction was categorically foreclosed by CWA. According to the court, the CWA phrase "*from* a point source" can only mean "*by* a point source." App. 26a-27a. Thus, in the court's view, pesticide waste is discharged "from" a point source if it is added to waters "by" a point source. *Id.* The court then reasoned that pollutants are added "by" a point source whenever the point source is a "but for" cause of the addition of pollutants to navigable waters. *Id.*

The Sixth Circuit arrived at its unlikely interpretation with absolutely no discussion of the common understanding of the word "from" or of the plausibility of EPA's construction. App. 24a-27a. Instead, the court relied on a separate EPA rulemaking and an Eleventh Circuit decision concerning a completely unrelated issue. *Id.* 25a-27a. Both of these authorities addressed whether the transfer of polluted waters from one waterbody into another is an "addition of any pollutant to navigable waters from any point source." *See* 73 Fed. Reg. 33,697, 33,701 (June 13, 2008); *Miccosukee Tribe of Indians v. Fla. Water Mgmt. Dist.*, 280 F.3d 1364, 1368 (11th Cir. 2002), *vacated,* 541 U.S. 95 (2004). Neither authority remotely bears on whether pollutants are discharged "from" a point source when the substance is not yet a "pollutant" at the time of

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precluded. The Sixth Circuit lost sight of this distinction when if found EPA may not interpret the CWA to require all elements of a "discharge of a pollutant" to be present at the same time unless the statute spells that out. The practical result of the court's approach is that ambiguity weighs *against* the agency, not in its favor as *Chevron* dictates.

the purported discharge. These extraneous materials shed no light on Congress's intent regarding NPDES permitting for pesticide use and have no place in a "plain language" decision vacating the Rule.

3. Aside from its dubious "plain language" assertion, the Sixth Circuit identified only two sources of support for its interpretation in all of the CWA and its legislative history: the general statutory purpose to protect water quality, and legislative history purportedly reflecting a desire to control pollutants "at the source whenever possible." App. 25a. Such general policies – which do not address the precise question at issue – cannot foreclose a reasonable reading of ambiguous statutory terms. In fact, this was exactly the error that this Court reversed in *Chevron*, rejecting an appellate court's attempt to invoke the general "purpose of the [Clean Air Act] permit program ... to improve air quality" to invalidate an agency interpretation. *See* 467 U.S. at 841-42. This Court found that such general purposes were not probative of the "actual intent of Congress" on the precise question at issue. *Id.* at 861-62. So too here. The Sixth Circuit's recasting of the "from a point source" limit cannot be reconciled with this Court's admonition that judges interpret the words of statutes, not rewrite them to better serve the court's notion of the statutory purpose.

The Sixth Circuit's overbroad construction of such common terms as "waste" and "from" suggests that when a statute has a general beneficial purpose, the plain meaning of its terms is whatever meaning achieves the broadest possible reading. But beneficial purposes do not dictate that common

words be given their broadest possible reach; common language admits of reasonable limits in accordance with ordinary usage and common sense. *See Burlington Northern & Santa Fe Railway Co. v. United States*, 129 S. Ct. 1870, 1879 (2009)(statutory terms may not be read to extend liability beyond the "ordinary meaning" – not the broadest possible meaning – of those terms). Notwithstanding the broad goals of the CWA, "chemical waste," in common parlance, means chemicals that *are* waste – not chemicals that *will become* waste. "Pollutants ... *from* a point source," in common parlance, means pollutants *coming out of* a point source – not pollutants *caused by* a point source. The words and their natural reading are fairly simple. The Sixth Circuits pursuit of statutory goals took them too far.

B. The Decision Contravenes This Court's Precedents by Disregarding Statutory Context and History That Support the EPA Rule.

The Sixth Circuit's decision omits any meaningful inquiry into congressional intent with regard to permitting requirements for pesticide use. By prematurely declaring the statute's plain meaning at the outset, based on the court's intuition about what was intended and without consideration of the statute's context, the decision pretermits an essential part of judicial review and departs from the settled teachings of this Court. *Chevron* and many other cases of this Court demonstrate that premature declarations of plain meaning are not appropriate if they serve to cut off real inquiry and insight into whether Congress actually addressed the issue in question.

1. The Sixth Circuit purported to reject the Rule based on what has become known as *Chevron* "Step One," determining whether Congress has "directly spoken to the precise question at issue." *Cf. Chevron*, 467 U.S. at 842 ("First, always, is the question whether Congress has directly spoken to the precise question at issue."). Yet the court declared the statutory language clear based on an incomplete analysis, with no consideration of contextual evidence of Congress's intent on the question of permit requirements for pesticide use. In this respect, the Sixth Circuit's pre-emptive "Step One" analysis based on plain language fails to meaningfully address whether Congress has "directly spoken to the precise question at issue." In so doing, the court's approach also eliminates entirely any inquiry into whether the agency's interpretation of the statute is consistent with the congressional commands and therefore "permissible" under *Chevron* Step Two.[15] By simply declaring the provisions at issue to be plain – when those provisions surely were susceptible, at a minimum, to two different interpretations – the Sixth Circuit cut

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[15] Because the Sixth Circuit purported to stop at *Chevron* "Step One," it entirely omitted any "Step Two" inquiry into whether EPA's interpretation is permissible. *Chevron*, 467 U.S. at 843 ("if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute"). Of course, the court could have skipped the "supposedly prior inquiry" of *Chevron* "Step One" by proceeding directly to "Step Two." *Entergy*, 129 S.Ct. at 1505, n.4 (explaining, "if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable"). What the court may not do, however, is fail to meaningfully address *either* inquiry.

off the analysis at the threshold, without *ever* examining the statute as a whole and in context, either as part of *Chevron* Step One or *Chevron* Step Two.

By declaring statutory language to be plain when, at best, it can be viewed as such only by ignoring all statutory and historic evidence to the contrary, the Sixth Circuit's approach renders agency interpretive rules vulnerable to the subjective interpretations and policy making of judges. That is not what *Chevron* seeks to accomplish.

Chevron's two-step process was intended to structure the inquiry into Congress's intent, not truncate that inquiry. 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 must employ all the traditional tools of statutory construction. *Chevron*, 467 U.S. 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."); *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("[t]he meaning – or ambiguity – of certain words or phrases may only become evident when placed in context.... It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citing *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33 (2000)) (internal quotation marks omitted); *Zuni Pub. School Dist. No. 80 v. Dep't of Educ.*, 550

U.S. 81, 98 (2007) ("statutory '[a]mbiguity is a creature not [just] of definitional possibilities but [also] of statutory context.'") (quoting *Brown v. Gardner*, 513 U.S. 115, 118 (1994)).

Had the Sixth Circuit examined the statutory provisions in context, it would have found 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. As discussed below, that evidence is found in the CWA's specific references to pesticide use and other agricultural activities in other sections of the statute. It is also found in the context provided by the radically different FIFRA scheme enacted by the same Congress specifically to address the environmental effects of pesticide use. And finally, it is found in the contemporaneous interpretation of EPA, shortly after enactment of both statutes, at a time when EPA officials had a strong basis for understanding congressional intent concerning pesticides use.

2. Within the CWA, Congress specifically sought to avoid a collision between beneficial pesticide use and water quality protection by keeping agricultural activities, including pesticide use, outside the CWA's regulatory programs. Congress explicitly considered the water quality effects of agricultural pesticide use and purposefully established non-regulatory mechanisms to develop the information and tools necessary to reduce those impacts without impairing the use of pesticides for the production of abundant food and fiber. *See supra* page 5.

The Act required EPA to research "new and improved methods and the better application of

existing methods of preventing, reducing, and eliminating pollution from agriculture, including the legal, economic, and other implications of the use of such methods"). 33 U.S.C. § 1254(p), App. 33a. CWA Section 208 required the establishment of "areawide waste treatment management plans," to be developed by state or local organizations, which must identify "agriculturally and silviculturally related nonpoint sources" and "procedures and methods (including land use requirements) to control to the extent feasible such sources." *Id.* § 1288(b)(F), App. 36a. These decidedly State-driven, cost-sensitive programs belie any suggestion that Congress intended wide-spread NPDES permitting requirements for agricultural pesticide use.

Section 104(l) specifically addresses the water quality impact of pesticides, but does not characterize them as "pollutants." To the contrary, it directs the President to investigate "methods to control the release of pesticides into the environment" and to report back to Congress on those investigations "together with his recommendations for any necessary legislation." 33 U.S.C. §§ 1254(l)(1)-(2), App. 32a-33a. Such tentative measures show Congress did not treat pesticide use in, over, or near waters as a "discharge of a pollutant" subject to the NPDES permitting requirements.[16] Indeed, despite Congress's specific

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[16] Contemporaneous statements in the Congress also reflect that understanding. For example, commenting on these provisions, Senator Dole explained that they would "*place responsibility on the States* for instituting and expanding the control of water pollution related to agriculture." S. Rep. No. 92-414, 90, *as reprinted in* 1972 U.S.C.C.A.N 3668, 3759 (continued...)

focus on pesticides in Section 104(l), the term is notably absent from the definition of "pollutant." "Pesticides" appears nowhere in the laundry list of materials that are pollutants. *See* 33 U.S.C. 1362(6) (pollutant means, *inter alia*, "solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions ... chemical wastes, biological materials, ... and industrial, municipal, and agricultural waste").

Thus, nowhere in the text or legislative history of the Act is there any hint that Congress viewed pesticide use as a "discharge of a pollutant" subject to NPDES permitting. Given the importance and widespread use of pesticides for food and fiber production and other beneficial purposes, it is inconceivable that Congress would have required NPDES permitting for pesticide use without *some* discussion reflected in the legislative history. *See Brown & Williamson*, 529 U.S. at 147 ("Given the economic and political significance of the tobacco industry at the time, it is extremely unlikely that Congress could have intended to place tobacco within the ambit of the [Food Drug and Cosmetic Act]

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(supplemental views) (emphasis added). He noted the *non*point source nature of most agricultural pollution sources – including pesticide use. *Id.* at 3760. And he further emphasized that "[p]esticides provide substantial benefits to mankind by protecting plants and animals from pest losses." *Id.* at 3760. In light of these benefits, Senator Dole explained 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." *Id.*

absent any discussion of the matter.") As this Court has observed, Congress "does not hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'n*, 531 U.S. 457, 468 (2001).

Reading the "pollutant" definition and its reference to "chemical wastes" in the context of other CWA provisions thus makes plain that Congress considered the water quality impact of pesticide use and established non-regulatory mechanisms to address those impacts. At the very least, this history and context precludes the Sixth Circuit's conclusion that Congress *unambiguously required* the regulation of pesticide use as a CWA pollutant discharge.

3. The overall statutory scheme provides further support for the Rule. The NPDES program at its core 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. *Supra* pages 3-4. To find that Congress intended to deem pesticide use to be a "discharge of a pollutant," one must conclude that Congress intended in 1972 to eliminate the use of pesticides (or at least the use of pesticides in or over waters, including wetlands), preferably by 1985. *See* 33 U.S.C. § 1251(a)(1), App. 31a. Yet that conclusion cannot be reconciled with the CWA provisions and statutory context demonstrating Congress's recognition of the vital role of pesticides in the protection of our nation's health and welfare and its specific intent to address the water quality impact of pesticide use through State-driven non-regulatory programs. *See supra* pages 4-5.

4. The historical context of the CWA's enactment further demonstrates congressional intent regarding pesticide use. Indeed, three days after passing the 1972 CWA, the same Congress enacted major FIFRA amendments to "regulate the use of pesticides to protect man and his environment." S. Rep. No. 92-838, at 1 (1972), as reprinted in 1972 U.S.C.C.A.N. at 3993. *See* Pub. L. 92-516, 86 Stat. 973. The dramatically different scheme crafted specifically to address the environmental effects of pesticide use leaves no room for doubt that Congress did not intend to regulate pesticide use through NPDES permitting. *See Brown & Williamson*, 529 U.S. at 133 ("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").

Unlike the CWA NPDES program, the FIFRA scheme at its core is a program to regulate beneficial activities – the sale, distribution and use of pesticides – that also can have adverse environmental effects. In FIFRA, Congress created a scheme in which EPA would assess the adverse environmental effects, including the effects on water,[17] of registered pesticides and approve label restrictions to ensure that the use of the pesticide would not cause "unreasonable adverse effects on the environment."[18] *See* 7 U.S.C. §§ 136j(a)(2)(G),

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[17] FIFRA defines "environment" to include "water." 7 U.S.C. § 136(j).

[18] "Unreasonable adverse effects on the environment" means "any unreasonable risk to man or the environment, (continued...)

136a(c)(5), App. 67a, 66a-67a. To regulate the use of pesticides by end users such as farmers or commercial applicators, FIFRA prohibited the use of a registered pesticide "in a manner inconsistent with *its labeling*." 7 U.S.C. § 136j(a)(2)(G), App. 67a. Yet, in contrast to CWA pollutant discharge requirements, there was no FIFRA requirement that pesticide users seek advance government authorization to use pesticides and thus no delay in pesticide use while awaiting government approval of application at a particular location.

Given Congress's specific focus in 1972 on mitigating the environmental effects of pesticide use through the FIFRA amendments, as well as its careful attention to limiting pesticide use only upon careful balancing of risks versus benefits, it is highly improbable that Congress intended simultaneously to subject pesticide use to the far more inflexible scheme of the CWA NPDES program. It is all the more unlikely that Congress would have done so without any discussion in the context of enacting either the CWA or FIFRA amendments.

5. Finally, the regulatory history supports EPA's interpretation. Immediately after enactment of these two contrasting statutory schemes and for more than three decades afterwards, EPA implemented them to regulate pesticide use under FIFRA and not under the NPDES permitting program. EPA's original, *contemporaneous*

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taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." *See id.* § 136(bb), App. 65a (emphasis added).

interpretation is entitled to weight. *See, e.g., Davis v. United States*, 495 U.S. 472, 484 (1990) ("[W]e give an agency's interpretations and practices considerable weight where they involve the contemporaneous construction of a statute and where they have been in long use.") (citations omitted); *Guardians Ass'n v. Civil Serv. Comm'n of the City of New York*, 463 U.S. 582, 618 (1983) ("As a contemporaneous construction of a statute by those charged with setting the law in motion, these regulations deserve substantial respect in determining the meaning of [the statute].")[19] At the very least, this context – along with ambiguity in the text and the absence of any contrary indication of congressional intent – precludes the Sixth Circuit's conclusion that Congress has unambiguously required the regulation of pesticide use as the "discharge of a pollutant."

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[19] The Sixth Circuit did not acknowledge EPA's repeated statements throughout this proceeding that the agency has never required or issued an NPDES permit for pesticide use. Instead, the court cited only EPA requirements that pesticide labels indicate that pesticide may not be "discharge[d] into lakes, streams, ponds, or public waters unless in accordance with an NPDES permit." App. 6a. These references suggest that the court misconstrued EPA's historic position. The required label statements simply pertain to pesticide waste that may be contained in industrial effluent or other waste streams, which is not implicated by the Rule. *Id.* 85a. They have no relevance to EPA's 35-year practice of not requiring NPDES permitting for pesticide use.

C. The Sixth Circuit's Reading of "Biological Materials" Disregards Statutory Context and Conflicts With Decisions of This Court and the Ninth Circuit.

The Sixth Circuit's neglect of statutory context also led to its erroneous interpretation of "biological materials." Focusing exclusively on the text of the provision, the Sixth Circuit found that the "plain, unambiguous nature of this language compels this Court to find that *matter of a biological nature*, such as biological pesticides, qualifies as a biological material and falls under the [CWA]." App. 21a (emphasis added). Again ignoring all evidence of Congress's intent *not* to regulate pesticide use as a CWA "pollutant" discharge, the Sixth Circuit did opt to consider statutory context in just one respect. Placing great weight on the contrast between Congress's reference to "chemical *wastes*" and "biological *material*," the court found this contrast dictated even *more expansive* regulation of biological pesticides. *Id.* 22a. As the court explained, apparently without irony, "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." *Id.* The court thus decided that EPA must regulate *all* biological pesticides in use – *regardless* of whether they will leave any residue after their use is complete. *Id.* 23a.

Contrary to the Sixth Circuit's reading, however, both this Court and the Ninth Circuit have found that the term "materials" in the CWA pollutant definition (*e.g.*, "biological materials" and "radioactive materials") does *not* unambiguously

include all "matter." *Train v. Colo. Pub. Interest Research Group*, 426 U.S. 1, 23-25 (1976) ("*Colorado PIRG*"); *Ass'n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Res., Inc.*, 299 F.3d 1007, 1016-18 (9th Cir. 2002). Indeed, in *Colorado PIRG*, this Court reversed the Tenth Circuit's ruling that "radioactive materials" includes *all* radiological materials where the lower court declined to consider legislative history indicating a narrow meaning was intended. 426 U.S. at 9-10. The Court cautioned, "[w]hen aid to construction of the meaning of words, as used in the statute, is available, there certainly can be no 'rule of law' which forbids its use, however clear the words may appear on 'superficial examination.'" *Id.* at 10 (quoting *United States v. Am. Trucking Ass'n*, 310 U.S. 534, 543-44 (1940)).

Likewise here, the Sixth Circuit cannot properly disregard the statutory and historic context that demonstrates Congress's intent *not* to regulate pesticide use under the CWA. *Supra* pages 4-6. Read in the light of that context, the CWA is at least ambiguous as to whether biological pesticides in use are "pollutants." This is particularly true given Congress's inclusion of "chemical *wastes*" but not "chemicals" or "chemical products" and the likelihood that Congress gave no thought at all to the existence of the far less common *biological* pesticides. App. 83a. Reading all the relevant CWA provisions in context, as any member of Congress would have read them in 1972, one cannot conclude that the CWA unambiguously requires NPDES permitting for pesticide use – biological or chemical.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Ellen Steen
Counsel of Record
Clifton S. Elgarten
Jessica A. Hall
CROWELL & MORING LLP
1001 Pennsylvania Ave. NW
Washington, DC 20004-2595
(202) 624-2500

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