

No. 06-4630 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL COTTON COUNCIL OF AMERICA, et al.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents,

and

CROPLIFE AMERICA, et al.,

Intervenors.

PETITION FOR REVIEW OF ENVIRONMENTAL PROTECTION AGENCY
FINAL RULE

**FINAL OPENING BRIEF OF ENVIRONMENTAL PETITIONERS
BAYKEEPER, CALIFORNIANS FOR ALTERNATIVES TO TOXICS,
CALIFORNIA SPORTFISHING PROTECTION ALLIANCE, NATIONAL
CENTER FOR CONSERVATION SCIENCE AND POLICY, OREGON
WILD, SAINT JOHN'S ORGANIC FARM, ENVIRONMENT MAINE,
TOXICS ACTION CENTER, WATERKEEPER ALLIANCE, PECONIC
BAYKEEPER, and SOUNDKEEPER.**

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**UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

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NATIONAL COTTON COUNCIL OF AMERICA, et al.,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

Baykeeper, Californians for Alternatives to Toxics, California Sportfishing
Protection Alliance, National Center for Conservation Science and Policy,
Oregon Wild, and Saint John's Organic Farm

Pursuant to 6th Cir. R. 26.1,

Name of Party

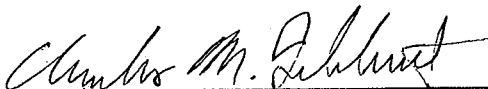
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Signature of Counsel

9/18/2007

Date

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST

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Charles Caldwell / By CMT
Signature of Counsel

9/18/2007

Date

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.

**DISCLOSURE OF CORPORATE AFFILIATIONS
AND FINANCIAL INTEREST**

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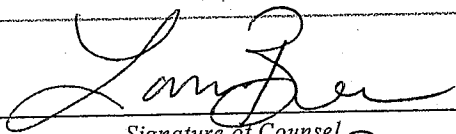
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9/18/2007

Date

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ADDENDA

Excerpts of Brief of the United States as Amicus Curiae in Support of Appellants, Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001) . 20,51

Excerpts of Brief of the United States as Amicus Curiae in Altman v. Town of Amherst, No. 01-7468 (2d Cir. 2002) 53

STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

Environmental Petitioners maintain that this case should be dismissed for lack of appellate jurisdiction as it does not fit within the statutory bases for direct appellate review under the Federal Water Pollution Control Act (“Clean Water Act”), specifically 33 U.S.C. § 1369(b)(1). Environmental Petitioners filed a Motion to Dismiss or Otherwise Transfer on April 30, 2007. The matter was fully briefed by all parties. The motions panel deferred the issue of jurisdiction to the merits panel, and denied the alternative request to transfer. See Order dated July 24, 2007 (“the jurisdictional issue is referred to the merits panel”).

Environmental Petitioners provide the merits briefing in this matter with the understanding that the jurisdictional issue remains squarely before this Court based on the briefing previously submitted. Environmental Petitioners suggest that the merits be reached only if the Court denies the pending motion to dismiss for lack of jurisdiction and finds that it has original jurisdiction.

STATEMENT OF ISSUES FOR REVIEW

1) Do the appellate courts have original jurisdiction over this matter pursuant 33 U.S.C. § 1369(b)(1)(E) or (F)?

2) Did EPA exceed its statutory authority under 33 U.S.C. § 1251, *et seq.*,

by excluding pesticides from the definition of “pollutant” under 33 U.S.C. § 1362(6)?

3) Did EPA exceed its statutory authority under 33 U.S.C. § 1251, *et seq.*, by classifying pesticide residuals admittedly applied from point sources as “non-point sources”?

4) Does compliance with FIFRA obviate the need to comply with the Clean Water Act when the two statutes are intended to perform separate functions?

STATEMENT OF THE CASE AND RELEVANT FACTS

This case involves an interpretation by EPA of the Clean Water Act (the “Act” or “CWA”), 33 U.S.C. § 1251, *et seq.*, the principal statutory mechanism by which our nation’s waters are protected from harm. The “most important facet” of the Act is its National Pollution Discharge Elimination System (“NPDES”) permit program for point source discharges which Congress saw as the primary regulatory tool for achieving the Act’s substantive goals. H.R. Rep. No. 92-911, at 125 (March 11, 1972); see also Weinberger v. Romero-Barcelo, 456 U.S. 305, 319 (1982) (NPDES program is “the key” to the Act). An NPDES permit may be issued to regulate “the discharge of any pollutant,” 33 U.S.C. § 1342(a), which occurs when a “pollutant” is added to navigable waters from a “point source” (*i.e.*, any discrete conveyance). The central point of contention in this case is the proper

interpretation of these statutory terms. EPA and the pesticide industry argue that these terms can be read to exempt from the NPDES program the application of pesticides and their residues (including those toxic to aquatic life) to the nation's waters, so long as this discharge is done in compliance with the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136, *et seq.* Environmental Petitioners strongly disagree.

The present controversy began with the 1998 filing of a CWA citizen suit against an irrigation district for discharging an herbicide, Magnacide H, directly into irrigation canals for the purpose of killing aquatic weeds. Because the herbicide is toxic to fish, it killed almost 100,000 juvenile steelhead salmon when it flowed from the canals into an adjacent creek. That case was ultimately resolved in March 2001. Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001). In Headwaters, the court ruled that the discharge of the herbicide to surface waters is unlawful unless done pursuant to an NPDES permit. Relying in part on an *amicus* brief submitted by EPA, the court rejected the defendant's position that it was shielded from liability by FIFRA.

Unhappy with the Headwaters decision, pesticide industry groups lobbied EPA for a more lenient rule.¹ Their efforts soon bore fruit. A guidance document

¹ The American Mosquito Control Association submitted a petition for rulemaking to EPA asking for virtually the same result that the Rule provides. See

was first published for comment by EPA about eight months after the industry rulemaking request. See 68 Fed. Reg. 48385 (Aug. 13, 2003), JA 103. On February 1, 2005, EPA published for comment a broader proposed rule and interpretive statement. 70 Fed. Reg. 5093 (Feb. 1, 2005), JA 134. EPA took final agency action by issuing a rule entitled “Application of Pesticides to Waters of the United States in Compliance With FIFRA, Final Rule.” 71 Fed. Reg. 68483-68492 (Nov. 27, 2006) (“the Rule”), JA 1. This Rule, codified at 40 C.F.R. § 122.3(h), states that an NPDES permit will not be required (1) for “the application of pesticides directly to waters of the United States in order to control pests,” or (2) for “[t]he application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively.” 71 Fed. Reg. 68483/1, JA 3. It is the challenge to this Rule that is presently before this Court.

Industry Petitioners first filed for review, seeking an even *broader* exemption from the NPDES program for even more types of pesticide applications

Declaration of Charles M. Tebbutt In Support of Environmental Petitioners’ Motion to Dismiss, ¶¶ 2-3 (AMCA Petition dated 1/16/03 and “White Paper on the Exclusion of Application of Pesticides from NPDES Requirements,” authored by, *e.g.*, Kenneth Weinstein of Latham & Wadkins (counsel for Seventh, Tenth, and D.C. Circuit Industry Petitioners)).

than the Rule allows. See EPA's Notice to the Judicial Panel on Multidistrict Litigation of Multicircuit Petitions for Review, filed January 9, 2007, p. 2 n.1. Because of the Industry Petitions, Environmental Petitioners felt compelled to file in the circuit courts. The Environmental Petitioners noted in their Petitions for Review that they believed original jurisdiction rested with the district courts. See, e.g., Petition for Review of Petitioners Baykeeper, et al., 06-75612, JA 15.

Accordingly, many of the Environmental Petitioners herein also filed a complaint in district court seeking review of the Rule under the Administrative Procedure Act. See Baykeeper, et al., v. EPA, C 07-0725 (N.D. Cal. filed Feb. 5, 2007). The district court case has been stayed pending resolution of the jurisdictional issues in this case.

SUMMARY OF ARGUMENT

The Rule goes beyond EPA's authority under the Clean Water Act by exempting certain types of pesticide applications from the definition of "pollutant" and by redefining the pesticide residuals from those applications, acknowledged by EPA to be pollutants, as coming from non-point sources. The Clean Water Act requires that any discharge of any pollutant from a point source have a permit under section 402, 33 U.S.C. § 1342. The only exceptions to this requirement have been spelled out by Congress in the statute. The Rule promulgated by EPA

is well outside these legislative exceptions and thus is due no deference.

The Act prohibits the type of discharges EPA purports to allow under the Rule. Furthermore, as EPA itself acknowledges, FIFRA does not, and never was intended to, displace the level of scrutiny of discharges to the nation's waterways required by the Clean Water Act. The Clean Water Act is strict and explicit in directing EPA to carry out its mandates, and the agency has ignored that directive here. For these reasons, the Rule should be declared invalid.

ARGUMENT

A. EPA's Rule is Contrary to the Unambiguously Expressed Intent of Congress.

1. Standard of Review

Under the interpretive scheme set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, 467 U.S. 837 (1984), a reviewing court's statutory analysis begins with a determination of whether "Congress had an intention on the precise question at issue." Id. at 842. The court does this by "employing traditional tools of statutory construction," id., as the Chevron doctrine does not alter the fundamental role of the judiciary to say what the law is, see id. at 843 n.9 ("The judiciary is the final authority on issues of statutory construction ..."). Nor does it invite the court to find ambiguity in a statute where none exists. See

OfficeMax, Inc. v. U.S., 428 F.3d 583, 592 (6th Cir. 2005) (“[T]he question whether a statute is ambiguous arises after, not before, a court applies traditional canons of interpretation ...”). The meaning of a statute “is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.” Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997); see also Dole v. United Steelworkers of America, 494 U.S. 26, 35 (1990) (“Our ‘starting point is the language of the statute,’ ... but ‘in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.’”) (citations omitted). Further, where necessary, courts examine the legislative history for assistance in divining the statute’s meaning. See INS v. Cardoza-Fonseca, 480 U.S. 421, 449 (1987).

“If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.” Chevron, 467 U.S. at 842-43; see also, Walton v. Hammons, 192 F.3d 590, 601 (6th Cir. 1999) (refusing to *consider*, much less defer to, agency’s interpretation where statute and legislative history made Congressional intent clear). Only if the intent of Congress is not clear does a court then proceed to Chevron step two: determining “whether the agency’s answer is based on a

permissible construction of the statute.” Chevron, 467 U.S. at 843.²

As Environmental Petitioners set forth in Parts A and B, *infra*, the language, history, and purpose of the Clean Water Act all make clear that Congress intended for pesticides applied to, over, or near the waters of the United States to be regulated as “pollutants” under the NPDES permit program, regardless of whether those discharges are in compliance with FIFRA. Accordingly, this Court need not reach the question of whether EPA is entitled to deference under step two of the Chevron doctrine; it need only apply the statute in rejecting EPA’s interpretation.

2. The Application of Pesticides and Their Residues to the Waters of the United States Constitutes the Discharge of Pollutants Within the Plain Meaning of the Clean Water Act.

The central questions facing this Court are whether pesticides and their residues are “pollutants” under the CWA, and whether the application of those pesticides and residues to waters of the United States constitutes a “discharge” from a “point source.” To make these determinations the Court need look no further than the language of the statute, Gwaltney of Smithfield, Ltd. v.

Chesapeake Bay Foundation, Inc., 484 U.S. 49, 56 (1987), giving effect to the

² During this second step, the court will defer to the agency’s interpretation only to the extent it is a reasonable one. Chevron, 467 U.S. at 843; Singh v. Gonzales, 451 F.3d 400, 405, 409 (6th Cir. 2006) (finding statute to be ambiguous, but nonetheless rejecting agency interpretation as unreasonable). As discussed in section B, *infra*, EPA’s interpretive rule on pesticide applications is not reasonable.

canon of statutory construction that all the terms of a statute must be read together and analyzed consistently to determine its overall meaning and intent. See, e.g., Robinson v. Shell Oil Co., 519 U.S. at 341. Upon such a reading, EPA's position that the application of known poisons to waters is outside the scope of the NPDES program is revealed as an *ultra vires* contortion of a clear statute.

a. The Regulation of Point Source Discharges of Pollutants Through the NPDES Permit Program Is Central to the Act's Broad Remedial Purpose.

In order to achieve the "objective" set forth in the opening passage of the CWA – "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters," 33 U.S.C. § 1251(a) – Congress specified that "the discharge of *pollutants* into the navigable waters" was to be "*eliminated* by 1985," 33 U.S.C. § 1251(a)(1)(emphases added). As this and other courts have held, Congress intentionally cast this net widely, with a broad definition of both "pollutant" and "pollution." To spur the ultimate achievement of the zero discharge goal, Congress also included the clear strictures of section 301: "[e]xcept as in compliance with [certain enumerated provisions of the act] the discharge of *any* pollutant by any person *shall* be unlawful." 33 U.S.C. § 1311(a) (emphases added).

One of those enumerated provisions is section 402, 33 U.S.C. § 1342, which authorizes EPA to issue NPDES permits allowing “point source” discharges. See Milwaukee v. Illinois, 451 U.S. 304, 310-311 (1981) (“[I]t is illegal to discharge pollutants into the Nation’s waters except pursuant to a permit”); Natural Resources Defense Council (“NRDC”) v. Costle, 568 F.2d 1369, 1374 (D.C. Cir. 1977) (“[T]he legislative history makes clear that Congress intended the NPDES permit to be the only means by which a discharger from a point source may escape the total prohibition of s[ection] 301(a).”). The NPDES permit program for point source discharges is the central feature of the Act’s regulatory system. NRDC v. Train, 510 F.2d 692, 695 (D.C. Cir. 1975) (The CWA “relies primarily on [the] permit program for the achievement of effluent limitations ... to attain its goals.”).

As discussed below, EPA acknowledges in the preamble that pesticide applications subject to the Rule come from a point source. See 71 Fed. Reg. 68,487/2, JA 5 (“the discharge of the pesticide is from a point source (generally a hose or an airplane)”). In an attempt to skirt the requirements of the NPDES program, however, EPA argues that pesticides and pesticide residues are not pollutants at the time of their application from the point source to waters of the United States. Id. Rather, the agency argues, pesticide residues become pollutants later, once they are in the water, and thus they must be considered the result of

nonpoint source pollution, which is largely unregulated under the Act. 71 Fed. Reg. 68,487/2-3, JA 5. The absurdity in this position is clear both from an application of the relevant statutory provisions and common sense.

b. All of the Pesticides and Residues Covered by this Rule Are Discharged to Waters from a Point Source.

Congress defined the term “point source” broadly, and intended it “to be broadly interpreted.” Community Ass’n for Restoration of the Env’t v. Henry Bosma Dairy, 305 F.3d 943, 955 (9th Cir. 2002) (citing Dague v. City of Burlington, 935 F.2d 1343, 1354 (2d Cir. 1991)); see also United States v. Earth Sciences, Inc., 599 F.2d 368, 373 (10th Cir. 1979) (“[I]t contravenes the intent of [the Act] and the structure of the statute to exempt from regulation *any activity* that emits pollution from an *identifiable point*.”) (emphasis added).

The Act defines point source generally as “any discernible, confined, and discrete conveyance,” and the definition lists various types of mechanisms from or through which pesticides are likely to be applied, such as a “container,” “rolling stock,” or “vessel or other floating craft.” 33 U.S.C. § 1362(14). Thus, the courts have had no difficulty concluding that pesticide applications are done from point sources. See, e.g., League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1185 (9th Cir. 2002) (it is “clear and unambiguous” that “the statutory definition

of point source ... encompasses an aircraft equipped with tanks spraying pesticides ... over covered waters.”); Headwaters, 243 F.3d at 528 (applications directly to waters for killing vegetation came from the hoses of tanks mounted on vehicles, and were point sources); No Spray Coalition v. City of New York, 2005 WL 1354041, at *5 (S.D.N.Y. 2005) (helicopters and trucks can constitute point sources under the CWA). Indeed, Forsgren directly rejected the suggestion that the Forest Service’s application of insecticides to the forest canopy above navigable waters resulted in “nonpoint” pollution. Noting that EPA does not have the authority to “refine” the definitions of point source and nonpoint source pollution in a way that contravenes the CWA, the Court held that “EPA may not exempt from NPDES permit requirements that which clearly meets the statutory definition of a point source by ‘defining’ it as a nonpoint source.” 309 F.3d at 1190. Yet this is precisely what the agency has done in the Rule at issue.

A point source is subject to the Act’s NPDES program if it “discharges” pollution to the navigable waters, and “discharge” is defined as “the addition” of a pollutant to the waters. 33 U.S.C. § 1362(13). A point source “adds” a pollutant when it “introduces” a pollutant to the waters “from the outside world.” Catskill Mountains Chapter of Trout Unlimited v. City of New York, 273 F.3d 481, 491 (2d Cir. 2001) (citing National Wildlife Fed’n v. Gorsuch, 693 F.2d 156, 165 (D.C.

Cir. 1982)). Logically, whether a pesticide is being applied directly to navigable waters or is being applied to flora or fauna “above” or “near” those waters, it is that point source application that is introducing the pesticide to the waters “from the outside world.”³

The same is true from the pesticide *residues* (i.e., those portions of the applied pesticide that do not reach the target organism) that enter or remain in the water from the pesticide application. Under EPA’s tortured interpretation, the residues magically come from some amorphous nonpoint source. This interpretation is sophistry. The residues were “introduced” by the action of the point source application of the pesticide. This is true even if one were to assume (as discussed *infra*, counterfactually) that the excess pesticide does not become a residue until after it has entered the water. A “pollutant” is added from a “point source” at the time of discharge even where the substance in question is a product that has not yet performed its intended function. See, e.g., Long Island Soundkeeper Fund v. New York Athletic Club, 1996 U.S. Dist. LEXIS 3383, at *44 (S.D.N.Y. 1996) (lead shot fired at clay targets over river); United States v.

³ See No Spray, 2005 WL 1354041, at* 5 (“The spraying of pesticides into navigable waters can constitute ‘an addition’ under the CWA. The definition of an addition is simple and plain. An addition is ‘the action or process of adding something to something else.’ *The New Oxford American Dictionary*, 18 (Elizabeth J. Jewell & Frank Abate eds., 2001).”).

Schallom, 998 F.2d 196, 199 (4th Cir. 1993) (excess “shotcrete” sprayed on bridge that then fell into creek).

c. The Act’s Definition of Pollutant Is Intentionally Broad, and Covers Those Substances That May Alter the Chemical, Physical, or Biological Integrity of the Nation’s Waters.

EPA’s attempt to interpret the statutory term “pollutant” so narrowly as to exclude chemical and biological pesticides ignores the breadth of its definition and the extensive judicial precedent confirming the broad scope of this term.

i. Like the Refuse Act of 1899, on which it was modeled, the NPDES program applies to the discharge of any foreign substance.

The Clean Water Act’s definition of “pollutant” establishes a long list of generic terms that evince an intent to encompass all materials (except those explicitly exempted) that may harm the nation’s waters. See 33 U.S.C. § 1362(6). As the Fifth Circuit noted, “the breadth of many of the items in the list of ‘pollutants’ tends to eviscerate any restrictive effect.” Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 565 (5th Cir. 1996). Rather, in defining pollutant, “[t]he congressional purpose was to identify expansively and anticipate all the physical ‘stuff’ that could end up in the wrong place to the detriment of water quality.” Id. at 565-66 (quoting 2 William H. Rodgers, Jr.,

Environmental Law: Air and Water 144 (1986)).

As this Court has recognized, the prohibition on nonconforming discharges in § 301(a) of the CWA is based on a similar prohibition in the Refuse Act of 1899, 33 U.S.C. § 407. U.S. v. Hamel, 551 F.2d 107, 111 (6th Cir. 1977) (citing S. Rep. No. 92-414 (1971)) (Congress “expressly intended that the definition [of pollutant] would at least be as broad as the coverage of the Refuse Act.”). The Refuse Act, in turn, applies to “all foreign substances” not explicitly exempted from coverage. Id. at 111, n.4 (citing United States v. Pennsylvania Chemical Corp., 411 U.S. 655, 671 (1973)). Thus, in a criminal prosecution under the CWA, this Court rejected the argument that gasoline cannot be considered a pollutant because it is not specifically listed in the Act’s definition of that term:

It is, of course, true that in hindsight the entire controversy might have been solved by the single addition of the term ‘petroleum products’ to the definitional section. We do not, however, read the failure to do so as an intent to exclude these materials from the Act. On the contrary, we conceive the employment of the broad generic terms as an expression of Congressional intent to encompass at the minimum what was covered under the Refuse Act of 1899.

Id. at 110.

This broad reading of the term “pollutant” is buttressed by the Act’s broad definition of the companion term “pollution.” The functional link between “pollutant” and “pollution” is confirmed by the Act’s opening section, which

declares that the “goals” of the Act are “to be met through the control of both point and nonpoint sources of *pollution*.” 33 U.S.C. § 1251(a)(7). The program for the control of point source *pollution*, of course, is the NPDES program governing the discharge of *pollutants*. “Pollution” is defined as “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,” 33 U.S.C. § 1362(19), which relates directly back the Act’s overriding objective: “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a), and indicates Congress’ intent to regulate the wide variety of foreign substances that can compromise the health of aquatic ecosystems. See, e.g., Cedar Point Oil, 73 F.3d at 566 (“That the definition of ‘pollutant’ is meant to leave out very little is confirmed by the statutory definition of ‘pollution’”); Northern Plains Resource Council v. Fidelity Exploration and Dev. Co., 325 F.3d 1155, 1161-62 (9th Cir. 2003) (fact that discharged substance affects water quality, and thus is consistent with definition of “pollution,” supports its treatment as a pollutant); Association to Protect Hammersley, Eld, and Totten Inlets v. Taylor, 299 F.3d 1007, 1016-17 (9th Cir. 2002) (considering harm to environment in defining “pollutant”).⁴

⁴ This is not to suggest that a showing of environmental harm is *required* before a substance may be found to be a pollutant. Committee to Save the Mokelumne River v. East Bay Mun. Util. Dist., 13 F.3d 305, 309 (9th Cir. 1993); Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d 617, 627 (8th Cir. 1979). If a

Pesticides obviously affect the integrity of the receiving waters: their sole purpose is to kill living organisms and they inevitably kill or maim beyond their targets.⁵ See generally H.R. Rep. No. 92-911 (1972), at 76 (“[T]he word ‘integrity’ ... refers to a condition in which the natural structure and function of

substance *does* cause such harm, however, Congress surely did not intend that it be discharged it into public waters outside of the protections of the NPDES program.

⁵ A report by the President’s Council on Environmental Quality inserted into the legislative record by Senator Muskie during the 1971 Senate hearings concluded:

Pesticides and other toxic materials are a major cause of fish kills in fresh water. Although there are few recorded fish kills in the ocean resulting from pesticides, pesticide concentrations are rising every year. They reduce the size and strength of mollusk shells. Reduced growth rate and reproductive activity in fishes exposed to sublethal doses of pesticides and copper have also been shown. Pesticides endanger higher predators because of biological concentration. For example, pesticides amplified through the food chain damage birds’ reproductive capability and in some cases seriously reduce their populations.

See Hearings on Bills Amending the Federal Water Pollution Control Act and other Pending Legislation Relating to Water Pollution Control Before the Senate Committee on Public Works, 92nd Cong., 1st Sess. (1971), 92 Cong. Senate Hearings 1971, at 1965, 1986 (“Ocean Dumping: A National Policy. A Report to the President prepared by the Council on Environmental Quality, October 1970”). The legislative history leaves no doubt that Congress considered pesticides as one of the primary pollutants threatening the nation’s water quality and aquatic ecosystems.

ecosystems [are] maintained.”).⁶ The pesticides covered by the Rule can kill or injure non-target organisms, often on contact, and thus violate the integrity of the waters into which they are discharged. An aerially sprayed pesticide that is known to be toxic to non-target organisms (e.g., fish, other aquatic life, or even humans) falls squarely within the category of materials viewed by Congress as impairing the “structure and function” of aquatic ecosystems. In addition, residues from pesticides, both in the form of metabolites or weakened half-life versions of the original constituents, remain in the water and in animal tissues for hours, days, months, or longer, depending upon the product and ambient conditions, thus further degrading the integrity of the aquatic environment.⁷

Indeed, the legislative history of the 1972 Act reveals that Congress was especially concerned about the damage to the aquatic environment caused by pesticides from nonpoint runoff.⁸ Given this concern, it is hardly likely that

⁶ The 1972 House Report explains that “[a]ny change induced by man which overtaxes the ability of nature to restore conditions to ‘natural’ or ‘original’ is an unacceptable perturbation.” H.R. Rep. No. 92-911, at 77.

⁷ For example, acrolein has a half-life of from ten hours up to 20 days, depending upon situational conditions. Comments of Western Environmental Law Center, et al., October 14, 2003 at 2, JA 109.

⁸ In supplemental comments to the Senate report, Senator Dole explained:

The chief hazard of pesticide use lies in the long-lasting properties possessed by many of them. Some, such as DDT, retain their potency for

Congress meant to countenance the point source discharge of many of these same pesticides directly into our nation's waters. See Earth Sciences, 599 F.2d at 373 ("It is clear from the legislative history Congress would have regulated so-called nonpoint sources if a workable method could have been derived").

Moreover, a chemical that is a pollutant under other legal provisions, such as EPA's list of "toxic pollutants" in 40 C.F.R. § 401.15, is a "pollutant" for purposes of the CWA. See, e.g., Cedar Point Oil, 73 F.3d at 568 (benzene, naphthalene, and zinc); U.S. PIRG v. Atlantic Salmon of Maine, LLC, 215 F. Supp.2d 239, 248 (D. Me. 2002) (copper); Dague v. City of Burlington, 732 F. Supp. 458, 469-70 (D. Vt. 1989) (lead).⁹ Many active and inactive ingredients in

virtually unlimited periods after application, *their residues are introduced into the complicated food chains at work in nature*, and, ultimately, they become concentrated at levels which are hazardous to both animal and human life.

...pesticide residues in water are picked up at low levels by certain marine organisms which result in relatively high concentrations being reached in organisms at the top of the food chain.

S. Rep. No. 92-414, at 98-100 (1971) (emphases added).

⁹ In its *amicus* brief submitted to the Ninth Circuit in Headwaters, the United States itself suggested that the herbicide at issue was a pollutant because one of its constituents, acrolein, is both a "hazardous substance" under 40 C.F.R. § 116.4 and an "organic toxic pollutant" under 40 C.F.R. Part 122, App. D. See EPA Headwaters Brief at 3 n.1, JA 40. Acrolein is intended to kill unwanted vegetation in the water, but is toxic to fish and other aquatic organisms at levels at and below the application rates prescribed by the manufacturer and allowed under FIFRA.

aquatic pesticides, insecticides, and other pesticides are toxic pollutants. As the Ninth Circuit concluded (albeit in dicta) after examining the status of pesticides under the Clean Water Act, “it would seem absurd to conclude that a toxic chemical directly poured into water is not a pollutant.” Headwaters, 243 F.3d at 532-33.

Nonetheless, EPA and the pesticide industry argue that the pesticides covered by the Rule cannot be considered pollutants because they are useful products being applied toward a beneficial purpose. This is reminiscent of the argument rejected by the Supreme Court in a Refuse Act opinion that informed this Court’s reasoning in Hamel. See 551 F. 2d at 111. The defendant in that case had contended that the Refuse Act’s prohibition against the discharge of “refuse matter” did not encompass the discharge of “valuable” products such as aviation fuel. Noting the broad coverage of the Refuse Act, the Supreme Court held otherwise:

Oil is oil and whether useable or not by industrial standards it has the same deleterious effect on waterways. In either case, its presence in our rivers and harbors is both a menace to navigation and a pollutant.

Id. (quoting United States v. Standard Oil Co., 384 U.S. 224, 226 (1966)).

See Headwaters, 523 F.3d at 532. The Act specifically states: “it is the national policy that the discharge of toxic pollutants in toxic amounts be prohibited.” 33 U.S.C. § 1251(a)(3).

Similarly, a pesticide is a pesticide, and whether it is used for its intended purpose or discharged maliciously it can have the same deleterious effects on the biological and chemical integrity of the waters. Either way, it is a pollutant within the meaning of the Clean Water Act.

EPA is also more generally bound by the extensive and longstanding judicial precedent rejecting attempts to exclude materials from the Act's definition of "pollutant" because they were applied to a waterbody for a beneficial purpose. See Minnehaha Creek Watershed Dist. v. Hoffman, 597 F.2d at 627 (there is "no justification in the Act for the ... determination that whether the discharge of a particular substance listed in § 502(6) constitutes the discharge of a 'pollutant' ... depends on the purpose for which the discharge is made"); Hudson River Fishermen's Ass'n v. New York, 751 F. Supp. 1088, 1101 (S.D.N.Y. 1990) ("It is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been.") aff'd, 940 F.2d 649 (2d Cir. 1991); U.S. PIRG v. Heritage Salmon, Inc., 2002 WL 240440, at *9 (D. Me. 2002) ("[T]he classification of a substance as a 'pollutant' does not involve consideration of the intended use of the substance nor the reason for which it was released into the waters.") (recommendation of Kravchuk, M.J.). If a pesticide otherwise qualifies as a "pollutant," it is

immaterial whether the purpose of the discharger is noble or nefarious.¹⁰

ii. Chemical pesticides and their residues are chemical wastes within the meaning of 33 U.S.C. § 1362(6).

Pesticides applied to waters also come within one of two specific terms listed in the statute's definition. Chemical pesticides and their residues are "chemical wastes" within the broad, remedial meaning of the Clean Water Act. See, e.g., Hudson River, 751 F.Supp. at 1101 (characterizing the use of "chemical wastes" in 33 U.S.C. § 1362(6) as a "broad generic term" in light of "the underlying goal of the Clean Water Act"). EPA argues for a narrower reading, however, under which the pesticide *product* is not a waste, but the pesticide *residue* is.¹¹

¹⁰ EPA attempts to distinguish the holdings of Minnehaha and Hudson River through further sophistry: "EPA is not concluding that the question of whether a substance is a pollutant depends on the specific purpose for which it is discharged. Rather, EPA is interpreting what specific terms in section 502(6) mean in the context of certain pesticide applications." 71 Fed. Reg. at 68,490/1, JA 8. EPA's present position is inconsistent not only with positions taken in earlier United States amicus briefs, see, e.g., Long Island Soundkeeper Fund v. New York Athletic Club, 1996 U.S. Dist. LEXIS 3383 at *44, but also with the agency's longstanding regulatory treatment of beneficial discharges of "fill" material under CWA section 404, 33 U.S.C. § 1344, as "pollutants." 67 Fed. Reg. 31,129, 31,131 (May 9, 2002) (noting that EPA has held same basic interpretation since 1975). EPA acknowledged the latter point in its 2003 Interpretive Statement and 2005 proposed rule, see 70 Fed. Reg. at 5,099/3 n.8, JA 140, but appears to have changed its mind in the final rule, see 71 Fed. Reg. at 68,490/2, JA 8.

¹¹ See 71 Fed. Reg. 68,487/2, JA 5 ("these residual materials are also pollutants under CWA section 502(6) because they are wastes of the pesticide application.

The second prong of this proposition is consistent with the position taken by the Ninth Circuit. See Headwaters, 243 F.3d at 532-33 (“[W]e agree with the district court that the residual acrolein left in the water after its application qualifies as a chemical waste product and is thus a ‘pollutant’ under the CWA.”). The first prong, however, would be consistent with Ninth Circuit jurisprudence only if it also specified that the pesticide product had no unintended effects. See Fairhurst v. Hagener, 422 F.3d 1146, 1151 (9th Cir. 2005) (chemical pesticide applied to creek for purpose of killing pest species not found to be a “chemical waste” where there was no allegation either that any residue remained in the water or that the pesticide “had any unintended effects”). Moreover, even if one accepts the agency’s narrow reading of the term “chemical wastes,” the fact remains that almost all pesticides applied to waters *will* leave residues.¹² In arguing that no

Such residuals include excess amounts of pesticide that do not reach a target organism and materials that remain after the application has completed its intended task.”). Although EPA suggests at one point that “waste” is that which remains after a process is completed, *id.*, this narrow definition is inconsistent with the agency’s own acknowledgement that “excess amounts of pesticide that do not reach a target organism” also are waste. See also Fairhurst v. Hagener, 422 F.3d 1146, 1149 (9th Cir. 2005) (“waste” includes “excess material”). It is also inconsistent with the common understanding of the term. Certainly, for example, chemical byproducts discharged during the *intermediary* steps of a manufacturing process are wastes every bit as much as those discharged at the *completion* of the process, and, EPA treats these intermediary wastes as pollutants under the Act.

¹² For example, EPA has estimated that *less than 1%* of the quantity of terrestrial insecticides applied actually reaches its target organism. See U.S. Congress,

NPDES permit is necessary for the application of these residues to the waters of the United States, EPA has taken a position directly contrary to established Ninth Circuit precedent.

The agency's position also is contrary to logical analysis. The Rule covers two broad types of pesticide applications: aquatic pesticides, which are applied directly to the water to address waterborne species; and terrestrial pesticides applied "above" or "near" the waters, such that portions of the application necessarily make their way into the water. In the first case – the application of aquatic pesticides – the "product" and "residue" are discharged in the same effluent, and are inextricably intertwined: there is no way of knowing at the time of discharge which portion will reach the target species and which portion will be residue. The only way to place NPDES limitations on the discharge of the "residue" – which EPA acknowledges is a chemical waste – is to require a permit for the entire discharge. In the second case – the application of terrestrial pesticides "above" or "near" waterways – *all* of the pesticide entering the water is

Office of Technology Assessment, "Beneath the Bottom Line," at 106 (OTA-F-418, Nov. 1990) (citing EPA study) (available at http://www.wws.princeton.edu/ota/disk2/1990/9006_n.html). EPA has also acknowledged that "some degree of drift of spray particles will occur from nearly *all* applications." EPA Health and Safety Fact Sheets: Spray Drift of Pesticides, EPA 735F99024 (Dec. 1999) (available at <http://www.epa.gov/pesticides/factsheets/spraydrift.htm>).

“residue” (because the target species are not in the water).¹³ By EPA’s own logic, then, this is the discharge of a “chemical waste,” and thus requires an NPDES permit.

iii. Biological pesticides and their residues are biological materials within the meaning of 33 U.S.C. § 1362(6).

Biological pesticides come within the term “biological materials,” as do their residues. Although EPA suggests that only those materials that are also *wastes* have been considered pollutants within the meaning of 33 U.S.C. § 1362(6), see 71 Fed. Reg. at 68,487/1, JA 5, the language of that section is not so limited (it lists “biological materials,” not biological *wastes*), and the courts have applied that language as written. For example, this Court has held that live fish passing through hydroelectric turbines, which are not “wasted,” come within the statutory definition. See National Wildlife Fed’n v. Consumers Power Co., 862 F.2d 580, 583 (6th Cir. 1988) (“Millions of pounds of live fish, dead fish and fish remains annually discharged into Lake Michigan [...] are pollutants within the meaning of the CWA, since they are ‘biological materials.’”); see also Atlantic

¹³ Part of EPA’s rationale for not regulating these discharges is that it is “unavoidable” that some portion of the sprayed pesticide will not reach its terrestrial target. 71 Fed. Reg. 68,486/1, JA 4. By the same rationale, the agency could just as easily decide not to regulate the discharges from, say, steel manufacturing, because the discharge of a certain amount of waste is an “unavoidable” part of the steel-making process.

Salmon of Maine, 215 F. Supp.2d at 247 (live, non-native farmed salmon are biological materials within the Act's definition of pollutant).¹⁴

The term "material" means "the basic matter from which the whole or the greater part of something physical is made." *Webster's Third New International Dictionary* (Gove ed., 1993). The basic matter from which biological pesticides such as microbial or bioengineered insecticides are made is undeniably biological in nature. Indeed, it is by harnessing biology that these pesticides are able to kill or otherwise harm animals and plants in nature.

EPA's principal argument for excluding the specified applications of biological pesticides from the NPDES program is the agency's own contrived conclusion that similar applications of chemical pesticides are so excluded. See 71 Fed. Reg. at 68,486/3, JA 4 ("treating them differently under the Clean Water Act is not warranted"). Arguing that biological pesticides "have a narrower range of potential adverse environmental effects compared to many chemical pesticides,"¹⁵ EPA proffers that it "would be inconsistent with the goals of the Clean Water Act" to require NPDES permits for applications of biological

¹⁴ Further, as EPA itself noted in its 2003 Interpretive Statement incorporated into the proposed rule, fill material – which often is *not* a waste – is a pollutant under the Act. See 70 Fed. Reg. at 5,099/3 n.8, JA 140.

¹⁵ It is not necessarily true that all biological pesticides pose a smaller environmental risk. See, e.g., Fairhurst, 309 F.3d at 1183.

pesticides “when chemical pesticides have no such requirement.” Id. at 68,486/3-68,487/1, JA 4-5. Not only is this conclusion based on a flawed premise (that the application of chemical pesticides and their residues to waters is not subject to NPDES requirements), but it reveals a fundamental misunderstanding of the goals of the Clean Water Act. The overriding objective of the Act, as discussed above, is to restore the natural integrity of the nation’s waters. Given this goal, it is far more logical to conclude that Congress intended the discharge of both biological pesticides *and* chemical pesticides to be governed within the protections of the NPDES program.¹⁶

d. EPA Has No Authority to Exempt Classes of Dischargers or Pollutants From the NPDES Program.

In the preamble to the Rule, EPA disavows any intent to exempt any class of point source discharges from the NPDES program, and purports to be doing nothing more than statutory interpretation. See 71 Fed. Reg. at 68,488/2, JA 6 (“EPA is exercising its authority to interpret a term in a statute it administers.”)

¹⁶ EPA also points to the fact that biological pesticides were not well known when the Act was passed in 1972. See 71 Fed. Reg. at 68,486/3, JA 4. Congress may not have foreseen the growth of the biological pesticide industry, the resulting combinations of such materials, or the myriad applications that would develop, but in its wisdom, in accordance with the stated purpose of the Act, it chose an expansive term that was most certainly intended to regulate the discharge of substances, like biological pesticides, that can disrupt the integrity of the nation’s waters.

Obviously, EPA could not implement the Clean Water Act, or any other statute it administers, without engaging in some statutory interpretation. The agency does not, however, have leave to “interpret” statutory terms in ways that contravene the language or intent of the statute itself. This Rule effectively exempts a whole class of pesticide applications from the NPDES program. And, in fact, EPA has placed this Rule squarely within its regulations pertaining to exemptions from the NPDES program.

All of those other regulatory exemptions, however, are simply administrative explications of existing *statutory* exemptions. See 40 C.F.R. § 122.3. This is because the statute *already* specifies the kinds of activities Congress meant to exempt from the NPDES program. From the broad definition of “pollutant,” Congress specifically exempted sewage from certain types of vessels and certain substances relating to oil and gas production.¹⁷ See 33 U.S.C. § 1362(6). From the broad definition of “point source,” Congress specifically exempted agricultural stormwater discharges and return flows from irrigated

¹⁷ The Supreme Court has also recognized an exemption for source, byproduct, and special nuclear materials, despite section 502(6)’s inclusion of the term “radioactive materials,” in light of clear and persuasive evidence from the Act’s legislative history that Congress “inten[ded] to preserve the pre-existing regulatory plan” for those materials under the Atomic Energy Act of 1954. Train v. Colorado Public Interest Research Group, Inc., 426 U.S. 1, 16-17 (1976). There is no similar legislative history evidencing the intent to exclude pesticide applications.

agriculture. 33 U.S.C. § 1342(14). And from the NPDES program itself, Congress specifically exempted return flows from irrigated agriculture and stormwater runoff from oil, gas, or mining operations. See 33 U.S.C. § 1342(1). Thus, where Congress intended to exclude certain categories of discharges from the Act, it did so explicitly, and pesticide applications are not among these exemptions.¹⁸

The only room Congress left in the statute for additional exemptions comes in two carefully defined areas. The Act expressly grants the President plenary power over discharges from federal facilities, including the discretionary authority to exempt federal facilities from the NPDES program so long as they comply with all of the Act's discharge limitations pertaining to toxic pollutants and new sources. See 33 U.S.C. § 1323(a). The Act also expressly grants EPA the discretionary authority to modify the usual NPDES requirements for discharges associated with aquaculture projects. See 33 U.S.C. § 1328(b).

In short, Congress has clearly defined the authorized exemptions from the NPDES program, and EPA has no discretionary authority to exempt other types of discharges. This has been settled law for thirty years. In 1977, the D.C. Circuit

¹⁸ As discussed *infra*, certain other environmental and public health statutes *do* exempt pesticides from their purview, demonstrating that Congress well knows how to include an exclusion when it wants to do so.

addressed the question of whether EPA has the discretionary authority to exempt from the NPDES program certain categories of discharges that are not explicitly exempted by the statute itself. Citing the administrative difficulties it anticipated in endeavoring to implement the full scope of the Act, the agency had issued regulations exempting certain classes of discharges, such as point source discharges associated with silvicultural activities. In a strongly worded decision, the D.C. Circuit struck down these regulations as inconsistent with the Act:

The wording of the statute, legislative history, and precedents are clear: the EPA Administrator does not have authority to exempt categories of point sources from the permit requirements of § 402. Courts may not manufacture for an agency a revisory power inconsistent with the clear intent of the relevant statute.

NRDC v. Costle, 568 F.2d at 1377. The court stressed that Congress fully and knowingly intended the Clean Water Act to be “a tough law” that requires full and faithful implementation, id. at 1375, and noted that EPA has a variety of practical tools at its discretion, such as general permits, to ease the administrative burden of such implementation, id. at 1380-81.¹⁹ See also Waterkeeper Alliance, Inc. v. EPA, 399 F.3d 486, 496-98 (2d Cir. 2005) (EPA lacks the authority to exempt certain discharges from concentrated animal feeding operations from NPDES permitting requirements); Northwest Env'tl. Advocates v. U.S. E.P.A., 2005 WL

¹⁹ As discussed *infra*, states within the Ninth Circuit have used general permits to address the discharge of aquatic pesticides.

756614, at *9 (N.D. Cal. 2005) (EPA lacks the authority to exempt discharges of ballast water from NPDES permitting requirements).

Well aware of these precedents, EPA attempts to avoid their force by characterizing the Rule at issue as interpretive rather than substantive.

Policymaking by any other name, however, is still policymaking. See Forsgren, 309 F.3d at 1190 (“Allowing the EPA to contravene the intent of Congress, by simply substituting the word ‘define’ for the word ‘exempt,’ would turn Costle on its head.”). EPA’s principal function is to implement the policies chosen by Congress, not to second-guess those policies. Where, as here, the agency issues a rule that conflicts with the policies it purports to serve, that rule must be set aside.

As the Supreme Court has noted, “Congress’ intent in enacting the [1972 Act] was clearly to establish an all-encompassing program of water pollution regulation,” under which “[e]very point source discharge is prohibited unless covered by a permit.” Milwaukee v. Illinois, 451 U.S. at 318 (emphasis in original; footnote omitted). Indeed, “congressional views on the comprehensive nature of the legislation were practically universal.” International Paper Co. v. Quellette, 479 U.S. 481, 492 (1987) (describing the Act as “pervasive regulation”). It is profoundly inconsistent with the Act’s “all-encompassing nature” and “pervasive regulation” to imply a broad exemption for toxic, frequently-used

chemicals whose use has serious implications for the water quality concerns at the core of the statute.

3. Compliance with FIFRA Is Irrelevant to Determining Compliance with the CWA.

EPA asserts that it “is not arguing that registration under FIFRA or compliance with FIFRA requirements replaces or satisfies an otherwise applicable requirement under the CWA to obtain an NPDES permit,” 71 Fed. Reg. at 68,488/2, JA 6, and that it is simply taking the position that

[p]esticides applied consistent with relevant FIFRA requirements are not ‘wastes’ as that term is commonly defined – on the contrary, they are products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose.

Id. at 68,486/3, JA 6. This is a distinction without a difference: the *effect* of EPA’s interpretation is to remove pesticide discharges from coverage under the NPDES permit program precisely *because* they are covered by the FIFRA registration program. Indeed, EPA concedes that its aim is to avoid duplication: “Rather than interpret the statutes so as to impose overlapping and potentially confusing regulatory regimes on the use of pesticides, this interpretation seeks to harmonize the CWA and FIFRA.” 70 Fed. Reg. at 5,100/1, JA 141. But EPA is not “harmonizing” the statutes- it is ignoring one of them.

