

No. 06-4630 (and consolidated cases)

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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

v.

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

and

CROPLIFE AMERICA, et al.,

Intervenors.

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PETITION FOR REVIEW OF ENVIRONMENTAL PROTECTION AGENCY  
FINAL RULE

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**FINAL REPLY 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,  
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BAYKEEPER, and SOUNDKEEPER.**

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Environmental Petitioners submit this reply to the Briefs of Respondent EPA ("EPA Br."), and Intervenor-Respondents ("Intervenors") ("Int. Br.").

Environmental Petitioners join EPA's request for oral argument.

**I. Subject Matter Jurisdiction Has Not Been Established**

Nothing in EPA's or the Industry parties' briefs supports jurisdiction under Clean Water Act ("CWA") § 509(b)(1)(E) or (F). The Final Rule does not constitute the issuance or denial of a permit under subsection (F). Nor does it set an effluent standard or limitation under subsection (E). In fact, it does the opposite – it removes the possibility of setting an effluent standard or limitation by exempting a category of discharges from all discharge requirements.

It is also evident from Intervenors' Brief that the Industry Petitioners lack standing to challenge the Rule. All of the Industry Petitioners have joined with the two other Intervenors to argue that EPA's Rule should be upheld in full. Int. Br. at 4, 5, 33. Thus, Industry Petitioners have not demonstrated that their own petitions present a real "case or controversy" under Article III. Rather, those petitions were filed in an attempt to control the venue of the anticipated challenge to the Rule from Environmental Petitioners. As Environmental Petitioners noted in their petitions, which were filed in response to the first-filed Industry petitions, the

issues in this case should first be heard by the district courts.<sup>1</sup>

## II. The Rule Violates the Clean Water Act.

EPA admits most of the elements necessary to strike down the Final Rule. Only one element is not directly admitted: that the residues generated by the point source pesticide applications covered by the Rule were discharged by those applications. While EPA concedes that pesticide residues and non-target applications constitute wastes, and therefore “pollutants,” the agency suggests that these pollutants should be treated as if they had come from a nonpoint source. This position directly conflicts with the language, legislative history, and intent of the CWA, and must be rejected under Chevron step one.<sup>2</sup> Moreover, even if this Court were to proceed to Chevron step two, EPA’s nonsensical explanation – that the pollutants were at some magical moment transformed from point source pollution to nonpoint source pollution – does not pass the straight face test, much less present a sufficiently rational explanation for this Court to sustain the Rule.

Industry Intervenors endorse the agency’s departure from the statutory text, and also resort to scare tactics. They intimate that the application of the NPDES

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<sup>1</sup> Furthermore, Industry Petitioners have failed to provide any evidence of harm to support standing.

<sup>2</sup> Because pesticide *residues* are pollutants, the Rule must be set aside even if one accepts EPA’s argument that the pesticides themselves are not (a position with which Environmental Petitioners disagree, Env. Pet. Br. at 9-22).

program to pesticide applications would effectively place a ban on pesticides.<sup>3</sup>

However, as the experience from Ninth Circuit states demonstrates, the relief sought by Environmental Petitioners would not ban aquatic pesticide applications, but rather would apply the Act's permitting processes to protect our nation's waters. This case is most decidedly *not* about a choice between clean water and pestilence, but rather is about controlling pests in ways that minimize or eliminate adverse effects on water quality and aquatic life. These goals- the heart of the Clean Water Act - will be attained only if EPA gives effect both to the requirements of that Act and to the requirements of FIFRA, as it is required to do by law.

**A. EPA and Intervenors Ask This Court to Forego a Proper Analysis Under Chevron Step One.**

EPA suggests that the absence of a specific reference to the Rule's two classes of pesticides in the CWA's enumerated list of "pollutants" evinces a Congressional intent to leave a gap for EPA to fill. EPA Br. at 17-18. Intervenors go much further, equating the absence of the term "pesticide" in § 502(6) with a deliberate Congressional choice to *exclude* such substances from NPDES coverage, and arguing that "Congress delegated to EPA" – *not* the federal courts – "the

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<sup>3</sup> Although Intervenors suggest that a parade of horrors will befall the public if aquatic pesticides are so regulated, Int. Br. at 52-53, they offer no examples, despite an invitation to do so. See Env't. Pet. Br. at 57.

authority to ... interpret the CWA.” Int. Br. at 40, 33. Both positions misconceive the proper role of the judiciary under step one of the interpretive scheme set forth in Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984). Under EPA’s or Intervenors’ (collectively, “Respondents”) view, reviewing courts would jump to Chevron step two (and thus to agency deference) whenever a regulatory statute does not, *in so many words*, bar the interpretation proffered by the regulatory agency. This is not the law.

Under Chevron, it is not the agency, but rather the courts, that are charged in the first instance with interpreting federal statutes and determining the intent of Congress. Id. at 843 n.9. If the intent of Congress is clear, there is “no gap for the agency to fill.” National Cable & Telecomms. Ass’n v. Brand X, 545 U.S. 967, 982-83 (2005).<sup>4</sup> The Chevron doctrine does not alter the longstanding interpretive means by which courts divine Congressional intent, and only if these traditional tools of statutory construction fail to yield such insight do courts even consider whether the agency’s view is reasonable. Walton v. Hammons, 192 F.3d 590, 601 (6th Cir. 1999). Moreover, the meaning of a statute’s words are to be “enlightened by their context and the contemporaneous legislative history,” as

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<sup>4</sup> Thus, any suggestion that 33 U.S.C. § 1361(a), which grants the agency broad rulemaking authority, somehow cuts short the Chevron analysis is mistaken. Compare EPA Br. at 42 and Int. Br. at 43 with Fullenkamp v. Veneman, 383 F.3d 478, 481 & n.2 (6th Cir. 2004).

well as the 'historical context of the statute.'" Hammons, 192 F.3d at 594 (citation omitted). As the Fifth Circuit has noted, "because of the strictures of its first step, Chevron is not quite the 'agency deference' case that it is commonly thought to be by many of its supporters (and detractors)." Mississippi Poultry Ass'n, Inc. v. Madigan, 31 F.3d 293, 299 n.34 (5th Cir. 1994) (en banc).

EPA proffers two reasons why it should be granted special deference in this case, but neither holds water. First, EPA notes that both Environmental and Industry Petitioners offer conflicting readings of § 502(6). Of course, environmental and industry groups often find diametrically-opposed fault with EPA's rulemaking efforts, yet courts nonetheless rule that the statute is clear and that EPA's interpretation is wrong. See, e.g., Riverkeeper, Inc. v. EPA, 475 F.3d 83, 100 & n.13 (2d Cir. 2007). Second, EPA suggests that it should be afforded greater deference because its interpretation was "expressly invited" by the Second Circuit. EPA Br. at 44. But the Second Circuit did not perform a Chevron step one analysis to determine the meaning of the statute, nor did it say that *whatever* interpretation EPA came back with should be blindly obeyed.

Indeed, as EPA acknowledges, its own interpretation must give way to a court's reading of the statute under Chevron step one. EPA Br. at 32. As the Supreme Court confirmed in Brand X, this is true even if the later agency

interpretation is a formal one. See 545 U.S. at 982-83.<sup>5</sup> Although EPA argues both that the Rule is not inconsistent with Ninth Circuit precedent and that those decisions were not based on the plain language of the statute, EPA Br. at 32-33, the agency is wrong on both counts. As discussed *infra* in section B.3., the Ninth Circuit referred directly to the CWA's definition of "pollutant" in all three cases – Headwaters, Forsgren, and Fairhurst – to hold that the discharge of a chemical pesticide that leaves residues requires an NPDES permit. In Fairhurst, the court reached this conclusion *after* reviewing the EPA guidance document that was the precursor to this Rule. Fairhurst v. Hagener, 422 F.3d 1146, 1148-51 (9th Cir. 2005); see also League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1185-86 (9th Cir. 2002)(rejecting federal government's interpretation of "point source" in favor of the "unambiguous" language of the Act).

**B. The Rule Violates the CWA's Plain Language.**

Respondents attempt to draw attention away from the plain language of the CWA by mischaracterizing Environmental Petitioners' argument as resting chiefly on the Act's definitions of "pollution" and "toxic pollutant," and its broad remedial purpose. EPA Br. at 19-22; Int. Br. at 12-13, 16-21, 41-42. While all of these

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<sup>5</sup> Although EPA suggests that a court's interpretation will trump its own only where the court reasons from the unambiguous terms of a statute, Brand X makes clear that *any* Chevron step one interpretation forecloses a contrary agency interpretation.

factors do weigh against the interpretation proffered by EPA in the Rule, the crux of the deficiency in EPA's position lies with the plain language of the Act's definition of "point source," "pollutant," and "discharge of a pollutant."<sup>6</sup>

**1. The Portion of a Chemical Pesticide That Does Not Reach the Target Species is a "Chemical Waste".**

EPA concedes that the ordinary meaning of "chemical waste" encompasses both "excess material" and the "useless or worthless byproduct of a process," and that the Ninth Circuit has applied both of these definitions in its analysis of whether chemical pesticide residues are pollutants under the CWA. EPA Br. at 18 (citing Fairhurst, 422 F.3d at 1149). The portion of a pesticide application that does not reach the target species comes within both of these definitional categories. It constitutes "excess material" because it is *in addition to* the portion that does what it was designed to do (*i.e.*, harm the targeted plants or animals). It constitutes "useless byproduct" because it is an unwanted and undesirable side-effect of the pesticide application process; instead of reaching the target species, it reaches other portions of the water body, where it harms other species whose harm is neither sought nor desirable.

Accordingly, the Ninth Circuit held that the residues of a chemical pesticide applied directly to the water to kill aquatic pests are "chemical waste" within the

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<sup>6</sup> EPA concedes that the various devices used in the types of pesticide applications at issue are point sources. 71 Fed. Reg. at 68,487, JA 5.

meaning of the CWA. Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526, 532-33 (9th Cir. 2001). Conversely, the Ninth Circuit also held that a chemical pesticide applied directly to the waters to control aquatic pests is not a waste if it neither leaves any excess nor has any unintended consequences. Fairhurst, 422 F.3d at 1149-1151. A similar analysis demonstrates that the residues of chemical pesticides applied “over, including near” the water for the purpose of killing non-aquatic plants or animals are also chemical wastes, and therefore pollutants under the CWA. In fact, *all* amounts of such pesticides entering the surface waters are, by definition, residues, because the target species does not reside in the water.

Although it does not dispute any of this, it is clear that EPA would prefer to limit the definition of waste to that which is eliminated or discarded “after the completion of a process.” EPA Br. at 18. Apparently, EPA prefers this definition because it allows the agency to suggest that the residue does not become a waste until sometime after it has been discharged. Id. at 30-32.<sup>7</sup> As discussed below, this is of no consequence under the CWA; the residues are still “discharged” by the point source applicator even if they do not become residues until after reaching the water. Moreover, the agency’s position on this point is illogical. In the case of

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<sup>7</sup> See also id. at 29-30 (“[I]f there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose has been completed, the residual materials *are pollutants* because they are substances no longer useful or required after the completion of a process.”) (emphasis added).

pesticides directly applied to water to kill aquatic pests, the portion of the application that does not reach the target species is “excess” and “byproduct” the moment it enters the water, even as the remainder of the application contacts its target. Similarly, in the case of pesticides applied “over, including near” the water to kill non-aquatic pests, the portion falling to the water is residue as soon as it is clear that it will not reach its (non-aquatic) target.

EPA’s focus here on the “completion” of a process conflicts with its interpretation of “waste” in other CWA contexts. For example, EPA routinely requires an NPDES permit for all chemicals discharged to water by chemical manufacturing plants, regardless of where or when in the process they are generated, and not necessarily at its “completion” (*e.g.*, leaks). Similarly, all chemical substances generated by a pesticide application that do not find their way to the target species are “pollutants.”

Intervenors posit a distinction between intentionally applying a pesticide and “dumping unused product” and argue that, while the latter is the discharge of a pollutant, the former is not. Int. Br. at 14-15. This ignores the fact that the pesticide applicator *is* discharging “unused product” to the extent that the pesticide does not reach the target species. Intervenors may argue that the pesticide application is a special case because the *intention* is that all of the pesticide reaches the target, but this would be wrong for two reasons. First, as EPA admits, “a

discharger's intent is irrelevant to the definition of pollutant." EPA Br. at 39.

Second, because it is well known that a significant portion of most pesticide applications do not reach their target,<sup>8</sup> the application of the pesticide residuals cannot be said to be unintentional.

Respondents also suggest that the discharge of pesticide residues during a pesticide application may be a special case because, they allege, such discharge is "necessary" to ensure that sufficient quantities of the pesticide reach the target. 71 Fed. Reg. at 68,486, JA 4. In other words, the argument is that the residues are an *unavoidable* byproduct of the pesticide application. Even assuming this is true (and there has been no showing that it is), this does not make the residues any less a "waste." Given existing technology, the production of chemical residues is considered an unavoidable part of many industrial processes, yet the discharge of those residues to the water must be done in accordance with an NPDES permit, as must the discharge of pesticide residues. And if such regulation has the effect of stimulating the development of "cleaner" industrial technology – or more efficient ways to design and apply pesticides – then it is serving the purpose that Congress intended. NRDC v. EPA, 859 F.2d 156, 208-09 (D.C. Cir. 1988) ("Congress had ... a firm conviction of need for technology-forcing measures.").

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<sup>8</sup> See, e.g., JA 57, 111-12, 115 (missing targets and showing persistence of residuals).

Finally, while Respondents do not dispute that Congress intended the term “chemical waste” to be given a broad reading under the CWA, see, e.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., 73 F.3d 546, 565-66 (5th Cir. 1996), their crabbed reading of the term would frustrate that intent. As the Fifth Circuit noted, the Act’s definition of pollutant “endorses an understanding of pollutant as a resource out of place.” Id. at 565. EPA argues that “pesticides intended for application to or over waters are not ‘out of place,’” EPA Br. at 22 n.7, but it cannot fairly deny that pesticide *residues* in waters *are*. In fact, the agency has long taken the position that pesticide residues in public waters are pollutants. See, e.g., 64 Fed. Reg. 46,012, 46,017 (Aug. 23, 1999), JA 371 (“chemical contaminants that may be discharged to waters of the US (*e.g., ... pesticides*) fall under the term ‘chemical wastes’”).

**2. “Biological Materials” Come Within the CWA’s Definition of Pollutant Regardless of Whether They Are Also Wastes.**

As EPA notes, biological pesticides “include microbial entities such as bacteria, fungi, viruses, and protozoans,” EPA Br. at 27 n.9, and all of these constitute “biological materials” as that term is used in the Act’s definition of pollutant, 64 Fed. Reg. at 46,017, JA 371 (“all microbial contaminants that may be discharged to waters of the U.S. (*e.g., bacteria, viruses and other organisms*) fall under the term ‘biological materials’”). Nonetheless, Respondents argue that

biological pesticides are not pollutants. Ironically, they do this by departing from the list of materials enumerated by Congress in the definition of pollutant, even though they argue elsewhere that strict fealty must be given to those listed items.

EPA suggests that “in certain circumstances it may be appropriate when determining whether a substance is a ‘biological material’ to consider whether that substance is a waste,” EPA Br. at 28, although it does not identify what those circumstances are, or how this approach could be squared with the language and history of the statute. Intervenors argue more broadly that *all* of the items listed in the definition of pollutant must be read as if Congress had specified that these items are pollutants only if they are also wastes. Int. Br. at 33-35.<sup>9</sup> Intervenors make this argument even though, as they themselves stress, Congress had at one time appended the limiting phrase “and other waste” to the end of § 502(6)’s definition of pollutant, but chose to remove that phrase in the final version. This strongly suggests that Congress did *not* intend to limit the definition to materials that are “waste.” See id. at 38-39.<sup>10</sup>

That Congress used the broader term “biological materials” deliberately is also supported by other interpretive canons. A plain reading of § 502(6) reveals

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<sup>9</sup> Elsewhere, however, Intervenors acknowledge that “EPA has never suggested that the CWA *only* regulates the discharge of wastes.” Id. at 24 n.10.

<sup>10</sup> Even if Congress *had* chosen to limit the term “biological materials” to materials that are also wastes, the biological *residues* of biological pesticides would fall within that term, as they are wastes.

that other items on the list B such as rock, sand, and munitions – are also not necessarily wastes. Thus, munitions fired from U.S. naval planes during training exercises are pollutants – and are thus subject to the Act’s NPDES program – despite the fact that they are (like biological pesticides) discharged to the water to serve their intended purpose, because “munitions” (like “biological materials”) are specifically listed in the definition of pollutant. See Weinberger v. Romero-Barcelo, 456 U.S. 305, 308-09 (1982).

The common feature among the terms in the list is not, as Intervenors would have it, that all are wastes. Rather it is that *all may impair water quality*, a feature that pesticides share. Thus, the canon of *noscitur a sociis* – that a term is known by the company it keeps – undermines, not supports, Respondents’ position.<sup>11</sup>

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<sup>11</sup> The Ninth Circuit’s opinion in Association to Protect Hammersley, Eld, and Totten Inlets (“APHETI”) v. Taylor Resources, Inc., 299 F.3d 1007 (9th Cir. 2002), see EPA Br. at 28-29; Int. Br. at 34-35, is not materially to the contrary. APHETI invokes the canon of *ejusdem generis*, see id. at 1016, but does not mention or discuss those more specific items in § 502(6) that are *not* wastes. Indeed, APHETI’s focus was not on wastes *per se*, but on pollutants produced by “a transforming human process.” Id. at 1017. Since the mussels, shells, feces, and other natural substances at issue there were not “released in concentrations significantly greater than would otherwise be found in the waters” they were not “pollutants.” Id. at 1017 n.9. Biological pesticides, on the other hand, comprise artificially concentrated populations of bacteria, fungi, viruses, and/or protozoans not ordinarily found in water bodies. Moreover, APHETI found it relevant that the mussels did “not add any identifiable harm,” id. at 1016, a holding emphasized in subsequent Ninth Circuit cases. See Northern Plains Resource Council v. Fidelity Exploration and Dev. Co., 325 F.3d 1155, 1161-62 (9th Cir. 2003) (“[B]y allowing the degradation of the quality of receiving waters,” defendant’s interpretation would occasion “a result that APHETI was careful to avoid.”).

Moreover, the definition of “pollution” as “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water,” 33 U.S.C. § 1362(19), has been held to inform a proper understanding of what is a “pollutant,” *i.e.*, a substance with the propensity to impair water quality.<sup>12</sup> See Env. Pet. Br. at 16.

Finally, EPA repeats its argument that it would “not make sense” to treat biological pesticides as pollutants because the agency has already determined that it will not treat chemical pesticides as pollutants. EPA Br. at 29. This, of course, begs the issue of whether the agency’s approach to *chemical* pesticides can be squared with the plain language and purpose of the statute. See Env. Pet. Br. at 26-27. EPA now asserts that its position is consistent with congressional intent, EPA Br. at 28, but the best indication of congressional intent is the language of the

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<sup>12</sup> Respondents’ assertion that these two terms have little to do with one another, EPA Br. at 21; Int. Br. at 16-17, is contradicted by the longstanding principle that a provision’s terms should be read in tandem with other provisions, and with an eye on the statute’s policy goals, see Env. Pet. Br. at 7; Greenbaum v. EPA, 370 F.3d 527, 535-36 (6th Cir. 2004). This Court did not reach a contrary ruling in National Wildlife Federation v. Consumers Power Co., 862 F.2d 580 (6th Cir. 1988). Rather, that case held that the pollutants at issue (including live fish, a “biological material” that is not a waste) were not “added” to water simply by virtue of passing through a dam. Id. at 584-85. This conception of “added” is consistent with the regulation of aquatic pesticides under the NPDES program, as these pesticides and their residues are undeniably introduced to water “from the outside world.” Id. Moreover, this Court found *explicit* support in the CWA for the proposition that “pollution problems caused by dams...[are] generally to be regulated by means other than the NPDES permit program.” Id. at 587 (citing 33 U.S.C. § 1314(f)(2)(F)). In contrast, § 304(f) does *not* mention aquatic pesticides.

statute, and Congress has clearly and deliberately specified that “biological materials” are to be treated as pollutants. EPA has simply chosen, for its own result-driven reasons, not to give effect to that intent.

### 3. The Pesticide Residues Are “Added” to the Water By Point Sources.

EPA argues that the residues of pesticide applications are not “discharged” by the point source applicator. All of the pesticide applied, EPA argues, is *product* when it is discharged, and becomes *waste* only after discharge. Of course, the product/waste distinction has no bearing on the status of biological pesticides under the Act, since biological materials are pollutants regardless of whether they are wastes. Moreover, it is ludicrous to suggest that the residues of a pesticide application are not discharged during that application, even if it *were* true that none of the pesticide became residue until after it entered the water.

It is telling that this is *not* an interpretation long held by EPA, but rather is a last-minute position adopted by the agency in an effort to preserve its proposed pesticide exemption. EPA did not assert this interpretation until after it determined that it could not lawfully assert that pesticide residues are not wastes, as it had done in the preamble to the proposed rule. Thus it first published this “discharge” interpretation contemporaneously with the Final Rule.<sup>13</sup> A more careful review of

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<sup>13</sup> See Env. Pet. Br. at 56. Intervenors argue that an agency’s shifting position is not a valid reason to give it reduced deference under Chevron step two. Int. Br. at

the law would have indicated to the agency that this interpretation is no more tenable than its earlier suggestion that pesticide residues are not wastes.

**a. The Discharge of a Product That Becomes a Waste is the Discharge of That Waste.**

EPA's current interpretation is logically flawed: If the pesticide residues are not added to the water by the point source applicator, how do they get there? They neither appear in the water through spontaneous generation, nor come from any other source. Rather, the pesticide applicator is also the pesticide *residue* applicator. The appropriate analysis was recently described by the Eleventh Circuit as follows:

“[F]or an addition of pollutants to be from a point source, the relevant inquiry is whether - but for the point source - the pollutants would have been added to the receiving body of water. We, therefore, conclude that an addition from a point source occurs if a point source is the cause-in-fact of the release of pollutants into navigable waters.

Miccosukee Tribe of Indians v. South Florida Water Management Dist., 280 F.3d 1364, 1368 (11th Cir. 2002), vacated and remanded on other grounds, 541 U.S. 95, 103 (2004) (quote cited by Supreme Court with apparent approval). There is no doubt that, in the situations covered by the Rule, the point source application is the “cause-in-fact” of the release of pesticide residues to the waters. This is true

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51 n.18 (citing Brand X). This is untrue: an agency must “adequately explain[] the reasons for a reversal of policy.” Brand X, 545 U.S. at 981. EPA does not even *acknowledge* that its position in the Final Rule is different from the proposed rule.

regardless of how one conceptualizes the point at which product becomes waste – whether it is at the moment of discharge, the moment the pesticide begins to drift off target, the moment the pesticide misses its target, the moment the pesticide application has ended, or the moment the portion of the pesticide that reaches the target species ceases its operative effect on that species. The exact moment at which the material becomes waste is beside the point, because the material that becomes waste is discharged by the point source applicator *at the time of application*.<sup>14</sup> Furthermore, as discussed above, in all of the pesticide applications covered by the Rule at least a portion of the pesticide will be waste *before it enters the water*. In short, there is no doubt that the point source pesticide applicator adds waste material to the water.

This is perfectly consistent with the manner in which the CWA has been applied in other situations. The discharge of waste materials is covered by the NPDES program regardless of whether those materials are “product” at the time of discharge. Thus, the Ninth Circuit upheld an injunction governing the aerial discharge of cleaning solution and paints at a marina, even though these substances are discharged as product. NRDC v. Southwest Marine, Inc., 236 F.3d 985, 990

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<sup>14</sup> EPA materials indicate that the transformation happens at or near the moment of application. EPA defines pesticide spray drift as “the physical movement of a pesticide through the air *at the time of application or soon thereafter*, to any site other than that intended for application (often referred to as off target).” JA 113 (emphasis added).

(9th Cir. 2000). The portions that fall to the water via “spills” and “overspray” are “wastes and pollutants” covered by the marina’s NPDES permits.<sup>15</sup> *Id.* (describing copper cleaning solution “that is conveyed on streams of compressed air”). Similarly, targets lofted into the air at a gun club are pollutants when they reach a waterway, even though they are “put to beneficial use or their intended use” when discharged. Long Island Soundkeeper Fund v. New York Athletic Club, 1996 U.S. Dist. LEXIS 3383 at \*44, \*46 (S.D.N.Y. 1996).

Although Respondents maintain that other cases cited by Environmental Petitioners are to the contrary, EPA Br. at 31-32; Int. Br. at 22-23, 35-36, this is incorrect. In Hudson River Fishermen’s Association v. New York, 751 F. Supp. 1088 (S.D.N.Y. 1990), *aff’d*, 940 F.2d 649 (2d Cir. 1999), the court did not find that there had been a “discharge of a pollutant” at the moment the defendant added chlorine and alum to a public water system only because this addition occurred in a “deep man-made” aqueduct that was not a “navigable water.” *Id.* at 1094. However, the court found both chemicals to be “pollutants” at the time of insertion, *i.e.*, *before* they performed their intended water purification functions. *Id.* at 1101 (chlorine is pollutant “even though its intended use is a beneficial one” because it

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<sup>15</sup> The permits covering the marina were tailored to the nature of the discharges, much like the permits for pesticide discharges. *Id.* at 991 (permits require compliance with “Best Management Practices” rather than “numerical effluent limitations”).

“inhibits much of the life in the aquatic food chain”); *id.* at 1102 (“alum starts to be a waste product and a pollutant *from the minute it is injected into the river water*” flowing through aqueduct) (emphasis added). In U.S. PIRG v. Atlantic Salmon of Maine, LLC, 215 F. Supp.2d 239 (D. Me. 2002), the court’s analysis of “discharge of a pollutant” was necessarily influenced by the plaintiffs’ characterization of the pertinent “point source” discharge as the outflow of waste material *from* the defendants’ fish farm operations, and not the introduction of pollutants *into* the farms (which were located in “navigable waters”). *Id.* at 248 n.5. Moreover, the court held that copper used to keep the fish farms’ containment nets from being “fouled” by algae is a pollutant “added” by defendants because they “physically introduce” the copper-coated nets *into* the water.”<sup>16</sup>

Accordingly, the Ninth Circuit has squarely held that the application of a chemical pesticide to the water is the discharge of a pollutant if the application leaves chemical residues. Headwaters held that the residues of an aquatic herbicide

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<sup>16</sup> EPA’s citation to the No Spray cases does not further its argument. EPA Br. at 31-32. As EPA concedes, the Second Circuit found that aerial pesticides were not “solid wastes” under the Resource Conservation and Recovery Act (“RCRA”), but did *not* find that they were not “pollutants” under the CWA. *Id.* at 32 n.11. The district court’s subsequent conflation of RCRA and the CWA conflicts with the Second Circuit’s earlier holding – which the district court neglected to cite, much less distinguish – that a substance may be a pollutant under the CWA even if it is not a waste under RCRA. Connecticut Coastal Fishermen’s Ass’n v. Remington Arms Co., 989 F.2d 1305, 1313, 1316 (2d Cir. 1993). Intervenors make a similar mistake. Int. Br. at 25-26.

were “chemical waste product” and thus pollutants, 243 F.3d at 532-33, and that these pollutants were “discharged” within the meaning of the CWA *at the time of the pesticide application*. Id. at 533.

Intervenors attempt to soften the impact of this decision by suggesting that the court may instead have concluded that the “discharge” occurred when the canals drained into nearby waters through a gate. Int. Br. at 31-32. There is no merit in this suggestion. Headwaters, 243 F.3d at 529 (“[T]he claimed violation of the Clean Water Act is the continuing discharge of the herbicide *into the canals* without a permit, regardless of whether the herbicide continues to cause environmental damage to any of the numerous streams with which the canals exchange water.”) (emphasis added). The defendant in Headwaters disputed every aspect of the plaintiffs’ case save one: “that [the pesticide] flowed from a ‘point source,’ *the hose that delivered the herbicide to the canals*.” Id. at 532 (emphasis added).

If there were any doubt as to the holding in Headwaters, that doubt was resolved by the Ninth Circuit’s subsequent Fairhurst decision. There, the court characterized Headwaters as having held “that the CWA required an entity desiring to dispense *a chemical that leaves residue* in the waters to obtain an NPDES permit for discharge, even where the chemical bears a FIFRA label.” Fairhurst, 422 F.3d at 1149 (emphasis added). Thus, the pesticide discharge is subject to the NPDES

program because it is also the pesticide residue discharge. As the court in Fairhurst did not find that the pesticide in question left any residue, it held that no NPDES permit was required. Id. at 1150-51 (“[P]esticides that *produce no residue or unintended effects*, are not ‘chemical wastes’ and thus are not ‘pollutants’.”) (emphasis added).<sup>17</sup>

**b. EPA May Not Avoid the NPDES Requirement By Treating the Residues As If They Arose From “Nonpoint Source” Pollution.**

Although EPA fully acknowledges that pesticide applications come from point sources, it suggests that “because the pesticide did not meet the definition of pollutant at the time of discharge from a point source,” EPA Br. at 30, all of the residual from such applications “should be treated as a nonpoint source pollutant.” Id. at 30 n.10. EPA insists that this position is not inconsistent with Forsgren, EPA Br. at 32, but the inconsistency is readily apparent. The principal issue was whether the planes from which insecticides were applied were point sources. Forsgren, 309 F.3d at 1184. Purporting to rely on an EPA regulation and guidance document, the U.S. Forest Service argued that this was nonpoint source pollution,

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<sup>17</sup> Thus, EPA’s citation to Fairhurst for the proposition that “[t]he Ninth Circuit ... held that a pesticide directly applied to waters was *not* a pollutant,” EPA Br. at 32 n.12, is, at best, incomplete. Further, while the Forest Service conceded in Forsgren that the insecticides in that case were pollutants, the court nonetheless made its own finding that “the insecticides at issue meet the definition of ‘pollutant’ under the Clean Water Act” in holding that an NPDES permit was required. 309 F.3d at 1185.

but the court held that the “clear and ambiguous” language of the statute foreclosed this interpretation. Id. at 1185-86 (applying Chevron step one test ); see also id. at 1190 (EPA cannot “refine’ the definition of point source and nonpoint source in a way that contravenes the clear intent of Congress.”)

Similarly, the plain language of the statute forecloses EPA’s nonpoint source argument here. EPA’s attempt to use a tortured interpretation of the term “discharge” to transform point source discharges into nonpoint source pollution is a “refinement” that cannot be squared with the language and intent of the statute.

Indeed, as courts have consistently recognized, where a pollutant can be traced to an identifiable point source, Congress intended for such discharges to be covered by NPDES permits.

The touchstone of the regulatory scheme is that those needing to use the waters for waste distribution must seek and obtain a permit to discharge that waste, with the quantity and quality of the discharge regulated. The concept of a point source was designed to further this scheme by embracing *the broadest possible definition of any identifiable conveyance* from which pollutants might enter waters of the United States.

Dague v. City of Burlington, 935 F.2d 1343, 1354-55 (2d Cir. 1991) (emphasis added) (citation omitted). Accord United States v. West Indies Transport, Inc., 127 F.3d 299, 309 (3d Cir. 1997); Parker v. Scrap Metal Processors, Inc., 386 F.3d 993, 1009 (11th Cir. 2004). EPA itself has acknowledged and applied this policy in its NPDES stormwater regulations:

EPA intends to embrace the broadest possible definition of point source consistent with the legislative intent of the CWA and court interpretations to include any identifiable conveyance from which pollutants might enter the waters of the United States.

JA 280, 287.

Conversely, EPA regulations provide that “[n]onpoint source pollutants” are those that “are *not* traceable to a discrete identifiable origin.” 40 C.F.R. § 35.1605-4 (emphasis added); see also Sierra Club v. El Paso Gold Mines, Inc., 421 F.3d 1133, 1140 n.4 (10th Cir. 2005). Similarly, EPA characterizes nonpoint source pollution as that which is “not *introduced* into a receiving stream from a specific outlet.” EPA, Draft Handbook for Developing Watershed Plans to Restore and Protect Our Waters, at Glossary-3, (Oct. 2005) (emphasis added), attached hereto. Thus, “point and nonpoint sources are *not* distinguished by *the kind of pollution they create* or by *the activity causing the pollution*, but rather by whether the pollution reaches the water through a confined, discrete conveyance.” Trustees for Alaska v. EPA, 749 F.2d 549, 558 (9th Cir. 1984) (emphases added).

In the circumstances covered by the Rule, there can be no doubt that the pesticides, including all excess and residual amounts, are introduced to navigable waters by a discrete conveyance, not some fictional “nonpoint” origination.

**C. The Legislative History Provides Further Indication that Congress Intended Aquatic Pesticides to Be Governed By the NPDES Program.**

Respondents suggest that if this Court finds the Act's plain language to be ambiguous with respect to the regulation of aquatic pesticides under the NPDES program, then it must proceed directly to Chevron step two and defer to any reasonable EPA interpretation. EPA Br. at 15; Int. Br. at 6. This omits a crucial aspect of the step one analysis: whether the statute's legislative history reveals any congressional intent that the statute's language does not. Walton v. Hammons, 192 F.3d at 598; Int. Br. at 37. Here, Congress plainly indicated that all potentially hazardous substances should be covered by the NPDES program to the extent that they come from an identifiable source and are not otherwise exempted.

First, as EPA concedes, Congress intended generally for "all foreign substances" falling under the purview of the Refuse Act of 1899 to be deemed "pollutants" under the CWA. United States v. Hamel, 551 F.2d 107, 111 (6th Cir. 1977) (citation omitted); EPA Br. at 22 (everything covered by the Refuse Act is a "pollutant").<sup>18</sup> Supreme Court precedent is clear that the Refuse Act, despite its

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<sup>18</sup> Intervenors assert that Congress meant to foreswear this intention by eliminating the phrase "but is not limited to" found in the Senate bill, Int. Br. at 15-16, 38-39, but this ignores several points: (1) the House bill contained the same language, suggesting that the House agreed with the Senate's understanding of "pollutant"; (2) the Conference Report gave no explanation for the change; and (3) the haphazard nature of the items enumerated in § 502(6) tends to suggest an illustrative, rather than exclusive, listing of regulated substances. Cedar Point Oil,

name, covers more than wastes; rather, the touchstone is the propensity to cause harm. United States v. Standard Oil Co., 384 U.S. 224, 227-29 (1996) (Refuse Act covers, *inter alia*, “acid, or any other matter of any kind other than [runoff from streets and sewers]” – “More comprehensive language would be difficult to select.”).<sup>19</sup>

Second, contrary to EPA’s contention, EPA Br. at 23, the Act’s legislative history is not silent about the regulation of pesticides specifically. Congress was gravely concerned about the harm caused by pesticides, including cumulative impacts. *Env’t. Pet. Br.* at 17 n.5, 18 n.8. While Congress nonetheless made the policy decision to exempt certain agricultural pesticide flows from the purview of the NPDES program, it did not exempt pesticides generally. Moreover, EPA wrongly implies that Congress had no intention about the interplay between the regulation of pesticides under the CWA and FIFRA. EPA Br. at 23-24. Given that FIFRA’s nationwide pesticide registration scheme does not address cumulative impacts, *id.* at 45-47 & n.27 – a fact of which Congress was well aware when it passed both statutes – it is implausible that Congress meant for FIFRA compliance to eliminate the added protections of the NPDES program.

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73 F.3d at 565.

<sup>19</sup> Intervenors contend that this case should be limited to its facts, *Int. Br.* at 13-14, thus urging a “narrow, cramped reading” the likes of which the Standard Oil court would not have countenanced. 384 U.S. at 226.

Finally, the statement by Senator Muskie during the CWA floor debates that “[s]ometimes a particular kind of matter is a pollutant in one circumstance, and not in another” actually cuts against Respondents’ position. EPA Br. at 44-45; Int. Br. at 43-44. The “circumstance” deemed relevant by Senator Muskie was not whether the substance in question is a product performing its intended purpose, EPA Br. at 18-19, 28, or is adequately covered by a different regulatory regime, *id.* at 34, but rather its propensity to cause harm in a particular water body. 117 Cong. Rec. 38,838 (“[I]t depends on where it is discharged.”). Senator Muskie was not granting EPA general discretion to interpret the terms “pollutant” or “discharge” in a manner inconsistent with the Act’s object and policy, nor could he. A statement by a lone member of Congress – even a statute’s principal author – cannot trump the intent of the full Congress. *See, e.g., Isle Royale Boaters Ass’n v. Norton*, 330 F.3d 777, 784-85 (6th Cir. 2003). That no such intention was present here is bolstered by the *express* inclusion of discretionary language in the Act’s definition of “toxic pollutants.” *See* 33 U.S.C. § 1362(13) (toxicity determination based on “information available to the Administrator”); *Rybachek v. EPA*, 904 F.2d 1276, 1283 (9th Cir. 1990) (“Whether a pollutant should be considered toxic has been left to the discretion of the EPA.”).<sup>20</sup> Moreover, Senator Muskie’s concern about

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<sup>20</sup> In fact, the specific point Senator Muskie was addressing (a question raised by Senator Stevens about ocean discharges) was resolved *not* by reference to EPA discretion, but to the CWA’s definitions relevant to “navigable” waters. 117 Cong.

site-specific impacts runs directly counter to EPA's view that an aquatic pesticide discharged in accordance with FIFRA, a statute that *cannot* account for such impacts, is exempt from the NPDES program.

**D. It Is EPA, not Environmental Petitioners, Whose Interpretation of the CWA and FIFRA Fails to Give Proper Effect to Both Statutes.**

EPA purports to agree with Environmental Petitioners that "FIFRA should not displace the Clean Water Act," and that "FIFRA compliance does not satisfy NPDES permit requirements because, in part, FIFRA and the Clean Water Act serve different purposes." EPA Br. at 35-36. Nonetheless, EPA would exempt aquatic pesticides from the NPDES program precisely *because* they are regulated by the FIFRA registration and labeling scheme. *Id.* at 34. Simply cloaking this analysis in the cloth of interpreting § 502(6) does not change the fact that EPA is attempting to accomplish indirectly exactly what it *concedes* it cannot do directly.

Moreover, EPA misapplies the well-established rule that "where two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed Congressional intention to the contrary, to regard each as effective." United States v. 57,261 Items of Drug Paraphernalia, 869 F.2d 955, 959 (6th Cir. 1989) (subsequent history omitted).<sup>21</sup> EPA does not dispute that FIFRA and the CWA reach some distinct regulatory cases and that, where they overlap, the agency could

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Rec. 38,839.

<sup>21</sup> This rightly constitutes part of this Court's Chevron step one analysis. *Id.* at 959.

give effect to the more stringent of the two. However, EPA appears to believe that its interpretation satisfies the “co-existence” rule because pesticide residues will remain subject to CWA provisions relating to nonpoint source pollution, EPA Br. at 30-31 n.10, and because discharges in violation of FIFRA may trigger more rigorous CWA remedies. *Id.* at 39. But the pertinent question is not whether EPA’s interpretation gives the CWA *any* effect; it is whether it gives the CWA its *full* effect. *Env’t. Pet. Br.* at 38.<sup>22</sup> The fact that the two statutes were enacted contemporaneously does not suggest that one was meant to supersede the other. See, e.g., Erlenbaugh v. U.S., 409 U.S. 239, 244-45 (1972).

**E. EPA’s Rule Cannot Survive Chevron Step Two.**

Even assuming, *arguendo*, that the language, history, and purpose of the statute do not provide sufficiently clear indication of congressional intent, EPA’s interpretation must be “sufficiently rational” if it is to be given any deference under Chevron step two. Greenbaum, 370 F.3d at 533-34 (citations omitted). EPA is only entitled to deference if its construction of a statute “is not inconsistent with the language, goals, or operation of the Act.” Our Children’s Earth v. EPA, 506 F.3d 781, 778 (9th Cir. 2007) (citation omitted).

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<sup>22</sup> For instance, in Monongahela Power Co. v. Marsh, 809 F.2d 41, 51-52 (D.C. Cir. 1987), the construction of a dam was held to require a CWA permit even though (a) the facility had already undergone federal environmental review and licensing and (b) pollution from dam construction can be regulated as nonpoint source pollution. See generally 33 U.S.C. § 1314(f)(2)(F).

EPA's central position here – that pollutants deposited into the water by a point source are not “discharged” by that source – is not only irrational, but conflicts fatally with the language, goals, and operation of the Act. With this Rule, EPA eliminates obvious categories of point source discharges from regulation, despite the clear intent of the CWA to cast a wide net so as to bring under point source regulation “any” discharge traceable to an identifiable discrete conveyance.

Further, EPA does not contest that FIFRA offers less protection of water quality than the CWA.<sup>23</sup> Env. Pet. Br. at 41-49; Brief of the United States as Amicus Curiae in Headwaters, at 11, JA 48. Although EPA argues that it will still be able to seek remedial relief under the CWA, compliance with the NPDES program is, unlike FIFRA, designed to *prevent* the need for remedial relief by controlling discharges in the first instance.<sup>24</sup> Moreover, while EPA now alleges that it has “never stated in any general policy or guidance that an NPDES permit is required” for aquatic pesticides, EPA Br. at 46, this is not accurate. In 1993, EPA

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<sup>23</sup> Indeed, to force progress toward elimination of pollution, NPDES permit terms are not to exceed five years, 33 U.S.C. § 1342(b)(1)(B), whereas review of FIFRA registrations set only a *goal* of review every fifteen years. 7 U.S.C. § 136a(g)(1)(A).

<sup>24</sup> For similar reasons, EPA's reliance on the Act's “TMDL” program is misplaced. EPA Br. at 30-31 n.10 (citing 33 U.S.C. § 1313(d)). Obviously, a central purpose of the CWA is that the nation's waters not *become* impaired to begin with. As California's permitting agency indicated in its comments opposing the Rule, over *one quarter* of that state's water bodies are already impaired by pesticide constituents. JA 142-43.

stated that it did, at least from 1977 to 1984, specifically require NPDES compliance for FIFRA regulated pesticides in a broad array of uses. See Pesticide Regulation (PR) Notice 93-10 (citing EPA's Policy and Criteria Notice 2180.1, June 16, 1977) ("Do not discharge into lakes, streams, ponds or public waters unless in accordance with an NPDES permit.") (JA 410).<sup>25</sup>

Similarly, EPA's attempt to distance itself from the strong proclamations in its Headwaters Amicus Brief, EPA Br. at 48-49, falls flat.<sup>26</sup> There, EPA provided a detailed discussion of the differences between FIFRA and the CWA, starting with the declaration that "[n]othing in FIFRA or the CWA remotely suggests that compliance with FIFRA means compliance with the CWA." JA 47-50. The agency unequivocally stated that "EPA approves pesticides under FIFRA with the knowledge that *pesticides containing pollutants* may be discharged from point sources into the navigable waters *only* pursuant to a properly issued CWA permit." JA 49 (emphases added). As EPA admits today, pesticides *do* contain pollutants –

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<sup>25</sup> Contrary to Industry Petitioners' representation, Ind. Pet. Br. at 26 n.13, the term "waste" was not included in the notice.

<sup>26</sup> EPA's characterization of its Headwaters amicus brief as a mere litigation position, EPA Br. at 46-47 (citing Bowen v. Georgetown University Hospital, 488 U.S. 204 (1988)), is wrong. Amicus views, unlike litigation positions in which the agency is a party, are "in no sense a 'post hoc rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack." Auer v. Robbins, 519 U.S. 452, 462 (1997) (distinguishing Bowen). Especially where (as in Headwaters) EPA offered a broad policy position *of its own accord*, "[t]here is simply no reason to suspect that the interpretation does not reflect the agency's fair and considered judgment on the matter in question." Id.

the residues that do not reach the target – yet the agency now seeks to exempt their discharge from permitting requirements.

The 1977 label requirements and the 1999 amicus brief provide a consistent, rational explanation of the interplay between FIFRA and the CWA. It is the Final Rule and EPA's present litigation arguments that lack the rationality to be accorded deference.

### CONCLUSION

Should the Court find it has jurisdiction, EPA's Final Rule should be set aside as contrary to the terms of the Clean Water Act.

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Respectfully submitted,



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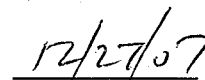
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Brief Format Certification Pursuant to Circuit Rule 32-1.

I hereby certify that this Final Reply Brief of Environmental Petitioners proportionally spaced, has a typeface of 14 points, and contains 8,143 words.

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\_\_\_\_\_  
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CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2007, I served a true and correct copy of the foregoing on the following parties via U.S. Mail, postage-paid, addressed as follows:

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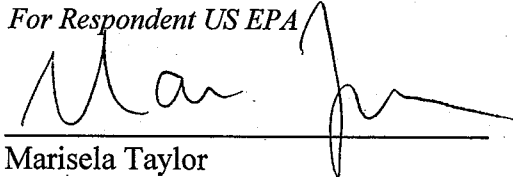
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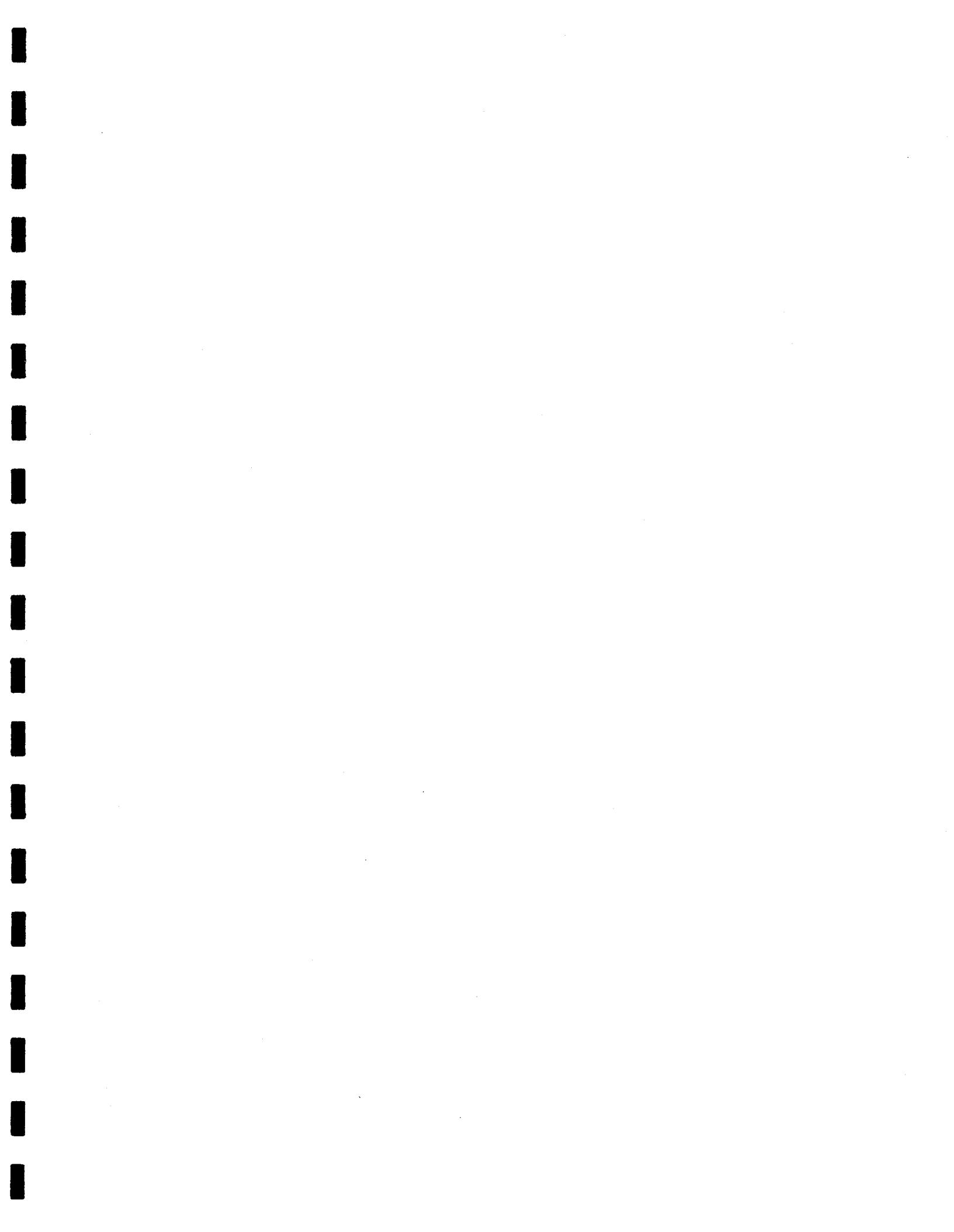
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# *Handbook for Developing Watershed Plans to Restore and Protect Our Waters*

## **Glossary**

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<b>Maximum (statistics)</b>	The highest data value recorded during the period of record.
<b>McNeil core</b>	A streambed sample collected with a McNeil core sampler and used to characterize the composition of the substrate.
<b>Mean</b>	The sum of all data values divided by the number of samples. The mean is strongly influenced by "outlier" samples (extremely high or low samples), with one outlier sample possibly shifting the mean significantly higher or lower.
<b>Measure of central tendency</b>	Measure that identifies the general center of a dataset.
<b>Measure of range</b>	Measure that identifies the span of the data from low to high.
<b>Measure of skewness</b>	Measure that shows whether a dataset is asymmetrical around the mean or median and suggests how much the distribution of the data differs from a normal distribution.
<b>Measure of spread</b>	Measure of the variability of the dataset.
<b>Median (<math>P_{0.50}</math>)</b>	The 50th percentile data point; the central value of the dataset when ranked in order of magnitude. The median is more resistant to outliers than the mean and is only minimally affected by single observations.
<b>Mesotrophic</b>	Describes reservoirs and lakes that contain moderate quantities of nutrients and are moderately productive in terms of aquatic animal and plant life.
<b>Minimum (statistics)</b>	The lowest data value recorded during the period of record.
<b>Model</b>	A representation of an environmental system obtained through the use of mathematical equations or relationships.
<b>Model application</b>	The use of a model or models to address defined questions at a specific location.
<b>Modeling system</b>	A computer program or software package that incorporates a model and input and output systems to facilitate application.
<b>Narrative criteria</b>	Nonnumeric descriptions of desirable or undesirable water quality conditions.
<b>National Pollutant Discharge Elimination System (NPDES)</b>	A provision of the Clean Water Act that prohibits the discharge of pollutants into waters of the United States unless a special permit is issued by EPA, a state, or, where delegated, a tribal government on an Indian reservation.
<b>Nine minimum elements</b>	Components that EPA has identified as critical for achieving improvements in water quality. EPA requires that these nine elements be addressed for section 319-funded watershed plans and strongly recommends they be included in all watershed plans that are intended to remediate water quality impairments.
<b>Nonpoint source</b>	Diffuse pollution source; a source without a single point of origin or not introduced into a receiving stream from a specific outlet. The pollutants are generally carried off the land by stormwater. Common nonpoint sources are agriculture, forestry, urban areas, mining, construction, dams, channels, land disposal, saltwater intrusion, and city streets.