

Nos. 06-4630; 07-3180-3187; 07-3191; 07-3236

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In the  
**United States Court of Appeals**  
for the Sixth Circuit

LEONARD GREEN, *Clark*

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

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,  
*Respondent,*

and

AMERICAN FARM BUREAU FEDERATION, *et al.*,  
*Intervenor-Respondents.*

On Petition for Review of U.S. Environmental  
Protection Agency Final Rule

FINAL BRIEF OF INTERVENOR-RESPONDENTS AMERICAN FARM BUREAU  
FEDERATION, AMERICAN FOREST & PAPER ASSOCIATION, CROPLIFE  
AMERICA, RISE (RESPONSIBLE INDUSTRY FOR A SOUND ENVIRONMENT),  
ILLINOIS FERTILIZER & CHEMICAL ASSOCIATION, SOUTHERN CROP  
PRODUCTION ASSOCIATION, THE NATIONAL COTTON COUNCIL OF  
AMERICA, DELTA COUNCIL, BASF CORPORATION, FMC CORPORATION,  
SYNGENTA CROP PROTECTION, INC., BAYER CROPSCIENCE, L.P.,  
AGRIBUSINESS ASSOCIATION OF IOWA, AND ELDON C. STUTSMAN, INC.

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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.

U.S. Environmental Protection Agency, No. 06-4630 and consolidated cases.

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, American Forest & Paper Association  
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

  
*Signature of Counsel*

November 6, 2007  
*Date*

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

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v.

U.S. Environmental Protection Agency, No. 06-4630 and consolidated cases.

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, American Farm Bureau Federation

*Name of Party*

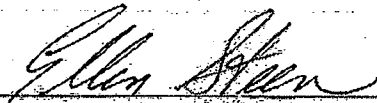
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No.

  
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*Signature of Counsel*

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*Date*

**UNITED STATES COURT OF APPEALS  
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National Cotton Council of America, et al

v.

U.S. Environmental Protection Agency, No. 06-4630 and consolidated cases

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Agribusiness Association of Iowa

*Name of Party*

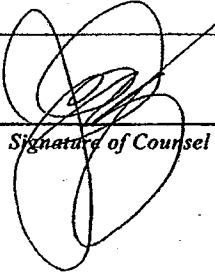
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No

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No

  
\_\_\_\_\_  
*Signature of Counsel*

May 16, 2007

*Date*

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.

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, BASF Corporation  
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

BASF Corporation is a corporation organized under the laws of the State of Delaware. BASF Corporation is the wholly owned subsidiary of BASF Americas Corporation, which in turn is 100% owned by BASFIN Corporation, which in turn is 100% owned by BASF Aktiengesellschaft.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.



~~Signature Council~~  
David P. Schneider



**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

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Bayer CropScience, LP

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes.

General Partner is Bayer CropScience Holding, Inc., and Bayer CropScience Inc. who is a limited partner, both of whose parent is Bayer CropScience Holding SA, whose parent is Bayer CropScience AG, whose parent is Bayer AG. Bayer CropScience LLC is a limited partner whose parent is Bayer Corp., whose parent is Bayer AG.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

U.S.D. J.  
*Signature of Counsel*

17 May 07  
*Date*

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

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, CropLife America

*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

No.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

  
*Signature of Counsel*

May 17 2007  
*Date*

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al.

Petitioner,

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY  
and STEPHEN JOHNSON, Administrator,

Respondents.

Docket No. 06-4630 (and consolidated cases)

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Delta Council

*Name of Party*

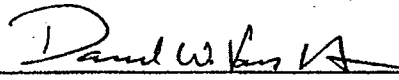
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2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

  
\_\_\_\_\_  
*Signature of Counsel*

5/17/07  
\_\_\_\_\_  
*Date*

**UNITED STATES COURT OF APPEALS  
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National Cotton Council of America, et al

v.

U.S. Environmental Protection Agency, No. 06-4630

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Eldon C. Stutsman, Inc.  
*Name of Party*

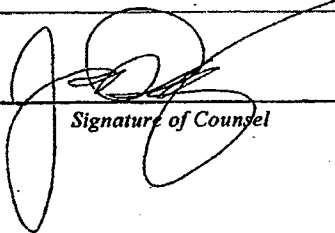
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No

  
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*Signature of Counsel*

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UNITED STATES COURT OF APPEALS  
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National Cotton Council of America, et al.,

v.

United States Environmental Protection Agency.

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, FMC Corporation  
*Name of Party*


makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

FMC Corporation is a publicly held corporation organized under the laws of the State of Delaware. FMC Corporation does not have a parent corporation and there are no publicly held companies that own 10% or more of FMC Corporation's stock.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

  
~~CONFIDENTIAL~~  
David P. Schneider

5/08/07  
~~CONFIDENTIAL~~

UNITED STATES COURT OF APPEALS  
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NATIONAL COTTON COUNCIL OF AMERICA, et al.,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Illinois Fertilizer & Chemical Association  
*Name of Party*

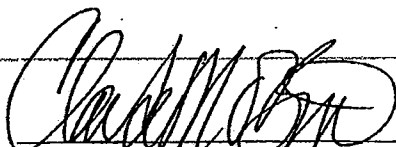
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No.

  
*Signature of Counsel*

May 17, 2007  
*Date*

UNITED STATES COURT OF APPEALS  
FOR THE SIXTH CIRCUIT

THE NATIONAL COTTON COUNCIL OF AMERICA, et al.

Petitioner,

v.

U. S. ENVIRONMENTAL PROTECTION AGENCY  
and STEPHEN JOHNSON, Administrator,

Respondents.

Docket No. 06-4630 (and consolidated cases)

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, The National Cotton Council of America

*Name of Party*

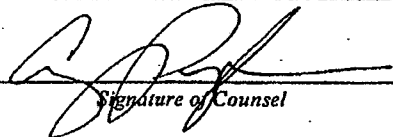
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\_\_\_\_\_  
*Signature of Counsel*

5.17.07  
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UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, RISE (Responsible Industry for a Sound Environment)  
*Name of Party*

makes the following disclosure:

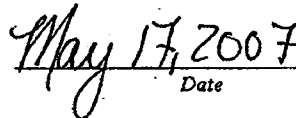
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*Signature of Counsel*

  
*Date*

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v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST

Pursuant to 6th Cir. R. 26.1, Southern Crop Production Association  
*Name of Party*

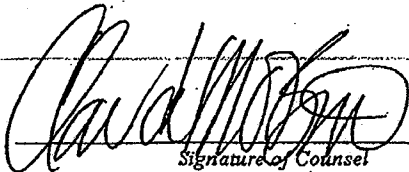
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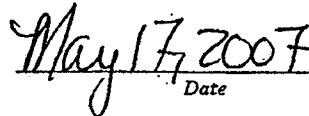
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No.

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No.

  
*Signature of Counsel*

  
*Date*

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

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v.

**DISCLOSURE OF CORPORATE AFFILIATIONS  
AND FINANCIAL INTEREST**

Pursuant to 6th Cir. R. 26.1, Syngenta Crop Protection, Inc.  
*Name of Party*

makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

Yes. Syngenta Crop Protection, Inc. is a 100% owned indirect subsidiary of Syngenta AG, a corporation under the laws of Switzerland, that is publicly traded and listed on the UK and Swiss stock exchanges and whose American Depository Rights are listed on the New York Stock Exchange.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

*Vincent Alvarado*  
*Signature of Counsel*

5/8/07  
*Date*

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## **STATEMENT OF JURISDICTION**

Respondent-Intervenors adopt the Statement of Jurisdiction in the brief of Industry Petitioners.

## **STATEMENT OF ISSUES**

(1) Did EPA in the CWA Pesticide Rule lawfully interpret the CWA term “pollutant” – which is defined by statute to “mean” any of a specifically enumerated list of materials, including “chemical wastes” but not “chemicals” – to exclude pesticide products being applied to or over waters for their intended purpose, provided the application is in accordance with relevant requirements of FIFRA?

(2) Did EPA lawfully determine that the application of pesticide product to control pests is not a discharge of pesticide “waste” from application equipment even if some pesticide may miss its target or remain in the environment after use?

## **STATEMENT OF THE CASE**

Section 301(a) of the Clean Water Act (“CWA” or “Act”), 33 U.S.C. § 1311(a), prohibits the “discharge” of any “pollutant” from a “point source” into waters of the United States, except in compliance with certain enumerated provisions. One of these provisions is § 402, 33 U.S.C. § 1342, which establishes the National Pollutant Discharge Elimination System (“NPDES”) permitting program. Under that program, the U.S. Environmental Protection Agency (“EPA”) or an authorized State agency may issue NPDES permits for certain pollutant

discharges in accordance with specified terms and conditions. Pollutant discharges subject to NPDES requirements, and for which a permit has not been obtained, are subject to severe civil and criminal enforcement penalties. 33 U.S.C. § 1319(c), (d), (g).

In November 2006, EPA promulgated a final rule to clarify when NPDES permits are required, and when they are not required, for pesticide use by interpreting the term “pollutant” (defined at CWA § 502(6)) as it applies to the application of pesticides. *See* 71 Fed. Reg. 68,483 (Nov. 27, 2006) (hereinafter “the Rule”); Joint Appendix (“JA”) 1-10. The Rule establishes that the application of pesticides to control pests located in or over waters of the United States – if conducted in compliance with all “relevant requirements” of the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y (“FIFRA”) – is not a discharge of “pollutants” under the CWA. Parties representing both pesticide users and registrants (“Industry Petitioners”)<sup>1</sup> and environmental groups opposed

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<sup>1</sup> Agribusiness Association of Iowa, BASF Corporation, Bayer Cropscience, Ltd., CropLife America, Delta Council, Eldon C. Stutsman, Inc., FMC Corporation, Illinois Fertilizer & Chemical Association, National Cotton Council of America, RISE (Responsible Industry for a Sound Environment), Southern Crop Production Association, and Syngenta Crop Protection, Inc.

to pesticide use (“Environmental Petitioners”)<sup>2</sup> filed petitions for review of the Rule, and those cases have been consolidated before this Court under 28 U.S.C. § 2112(a). The American Farm Bureau Federation, American Forest & Paper Association, and Industry Petitioners intervened as respondents in opposition to the claims of the Environmental Petitioners.

### **STATEMENT OF FACTS**

Respondent-Intervenors adopt the Statement of Facts set forth in the brief of Industry Petitioners.

### **SUMMARY OF ARGUMENT**

Environmental Petitioners ask the Court to invalidate the statutory interpretation of the agency charged by Congress with the administration and interpretation of the CWA. They ask this not on the basis of statutory text contrary to EPA’s interpretation, but entirely on the basis of their view of the “broad, remedial purposes” of the CWA. Essentially, Environmental Petitioners ask the Court to make law, not apply it.

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<sup>2</sup> Baykeeper, Californians for Alternatives to Toxics, California Sportfishing Protection Alliance, National Center for Conservation Science and Policy, Oregon Wild, Saint John’s Organic Farm, Waterkeeper Alliance, Inc., Peconic Baykeeper, Inc., Soundkeeper, Inc., Environment Maine, and Toxics Action Center.

The petition should be denied and the Rule upheld because the plain language of the CWA unambiguously excludes pesticide products in use from regulation under the NPDES permitting program. The NPDES program specifically applies only to the discharge of a “pollutant” – and “pollutant” is explicitly defined to mean only several specifically listed categories of materials. None of those categories can be reasonably construed to include pesticide products in use for their intended purpose. In particular, because the definition of pollutant includes “chemical wastes,” but not “chemicals” or “chemical products,” it cannot rationally be interpreted to encompass chemical pesticides in use (i.e., pesticides that are not “wastes”). Moreover, while the pollutant definition also includes “biological materials,” standard tools of statutory construction dictate that this term be construed as limited to “biological wastes” and therefore to exclude biological pesticides in use. Therefore, although pesticides under some circumstances *after* application may become “wastes” and therefore “pollutants,” the release of useful pesticides from application equipment for their intended purpose cannot be deemed a discharge of “pollutants” under the CWA.

To the extent that the Court finds any ambiguity in the statute on this question, it should defer to EPA’s reasonable interpretation. Congress specifically contemplated that EPA would have the authority to define and apply statutory terms such as “pollutant,” with the effect of including or excluding particular

activities or sources from NPDES regulation. EPA has done so many times, and its determinations have received deference from the courts. Here, EPA's interpretation has been formalized after decades of consistent practice, followed by years of analysis and formal rulemaking, with a reasoned explanation grounded firmly in the statutory text. This is precisely the kind of agency action that deserves deference from the Court.

Finally, Environmental Petitioners' policy arguments against the Rule are unpersuasive. Contrary to Environmental Petitioners' contention, the imposition of NPDES permitting requirements would seriously constrain the beneficial use of pesticides, as there is no reliable mechanism by which public health authorities, resource agencies, and landowners can efficiently obtain permit coverage for essential pesticide use. Moreover, Environmental Petitioners would have the Court shackle pesticide users specifically to impose the same degree of agency oversight and public scrutiny on pesticide use that Congress established for the discharge of "chemical wastes" – notwithstanding that FIFRA provides exactly the degree of agency and public oversight that Congress intended for the beneficial use of registered pesticides.

## ARGUMENT

### I. STANDARD OF REVIEW

In reviewing the Rule, the Court employs the analysis articulated by the Supreme Court in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984). *Chevron* first requires the Court to “determine whether Congress has directly spoken to the precise question at issue” (“Chevron step one”). *Littriello v. United States.*, 484 F.3d 372, 377 (6th Cir. 2007) (internal quotations omitted). “To determine legislative intent, a court must first look to the language of the statute itself,” and, if clear, “a court must give effect to this plain meaning.” *Broad. Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769 (6th Cir. 2005). Courts may also “employ[] standard tools of statutory construction” to “determine [whether] Congress’s intent is clear.” *Pak v. Reno*, 196 F.3d 666, 675 (6th Cir. 1999). Where, as here, Congress has “unambiguously expressed [its] intent,” that is “the end of the matter,” and the inquiry concludes at Chevron step one. *Harris v. Olszewski*, 442 F.3d 456, 466 (6th Cir. 2006).

If the Court finds that the statute is silent or ambiguous with respect to the specific issue, it “must decide if the agency’s action under the statute is based on a permissible construction of the statute” (“Chevron step two”). *Citizens Coal Council v. EPA*, 447 F.3d 879, 889 (6th Cir. 2006). If the agency’s rulemaking is reasonable, then it “is entitled to deference from a reviewing court.” *Gould v.*

*Shalala*, 30 F.3d 714, 719 (6th Cir. 1994). At Chevron step two, “the [C]ourt must accord considerable weight to the agency’s construction of the statute and it may not substitute its own construction of the statute for the agency’s reasonable interpretation.” *Citizens Coal Council*, 447 F.3d at 889. The “ultimate standard of review” at this stage “is a narrow one.” *Id.* at 890.

## **II. THE PLAIN LANGUAGE OF THE CLEAN WATER ACT UNAMBIGUOUSLY EXCLUDES FROM NPDES PERMITTING REQUIREMENTS PESTICIDE PRODUCTS IN USE FOR THEIR INTENDED PURPOSE**

### **A. The NPDES Program Does Not Govern All Activities That May Affect Water Quality, but Applies Only to the “Addition” of a “Pollutant” to “Navigable Waters” from a “Point Source”**

CWA § 301(a) prohibits “the discharge of any pollutant by any person” except in compliance with certain enumerated provisions of the Act. 33 U.S.C. § 1311(a). The “discharge of a pollutant,” in turn, is defined by statute as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). CWA § 402 establishes the National Pollutant Discharge Elimination System (“NPDES”) program, which authorizes the issuance of permits for the

discharge of certain pollutants in accordance with specified conditions.<sup>3</sup> NPDES permits may be issued by the United States Environmental Protection Agency (“EPA”) or by authorized State agencies. *See* 33 U.S.C. § 1342.

*All five* elements of a the statutory “discharge” prohibition must be present for any particular pollution-causing event or activity to be subject to the § 301 ban and the § 402 NPDES program: “(1) a *pollutant* must be (2) *added* (3) *to navigable waters* (4) *from* (5) *a point source*.” *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 165 (D.C. Cir. 1982). If any one element is absent, then any pollution associated with the event or activity falls outside the ban, is not subject to NPDES permitting, and instead is addressed pursuant to other CWA provisions concerning *nonpoint* source pollution or water quality generally. *Nat’l Wildlife Fed. v. Consumers Power Co.*, 862 F.2d 580, 587 (6th Cir. 1988) (“Although an essential element in a national effort to control water pollution, the NPDES permit program stands alongside of the system controlling ‘nonpoint sources’ of pollution, i.e., all water pollution not subject to § 402.”). “Nonpoint source” pollution is not

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<sup>3</sup> Discharges of dredged or fill material may be permitted pursuant to a separate program under CWA § 404.

defined by statute, but is generally viewed as any water pollution source other than a point source discharge of pollutants. *Id.*

Although the NPDES program applies only where there is a point source discharge of pollutant, other programs and provisions of the CWA apply to all sources of “pollution” or to nonpoint sources in particular. *See id.*, at 587-88 (discussing role of various CWA programs). CWA § 303, for example, provides for the establishment and implementation of “water quality standards” by the States. *See* 33 U.S.C. § 1313. Under this program, States identify and periodically revise the water quality goals or “designated uses” of all navigable waters within the State (*e.g.*, recreation, drinking water, fish and wildlife propagation, etc.), as well as the “water quality criteria” necessary to attain those uses. *See id.*

§ 1313(c). States must also develop and implement a “continuing planning process” under § 303(e), creating plans to control both point source and nonpoint sources of pollution, and develop nonpoint source management plans under § 319. *See id.* § 1313(e) (requiring effluent limitations and schedules of compliance for point sources, “total maximum daily loads,” area-wide waste management plans, and basin plans), *id.* § 1329 (requiring nonpoint source management plans). The establishment of these other programs alone shows that Congress designed and intended a *variety* of programs, not only the “pollutant” discharge ban and the § 402 NPDES program, to address the wide range of “pollution” sources. *See S.D.*

*Warren Co. v. Maine Bd. of Env'tl. Prot.*, 126 S. Ct. 1843, 1850 (2006) (contrasting CWA § 401 program for “discharges” generally with § 402’s “more specific focus” triggered “not [by] the word ‘discharge’ alone, but ‘discharge of a pollutant,’ a phrase made narrower by its specific definition requiring an ‘addition of a pollutant to the water”).

For this reason, it is a fallacy to contend – as Environmental Petitioners do – that pesticide application to control pests in or over waters must be subject to the NPDES program merely because it can (although it typically will not) affect water quality. Rather, the Court must determine whether EPA reasonably concluded that the application of pesticide products under certain circumstances is not a discharge of “pollutants” within the meaning of the CWA. If it did, then the plain terms of § 301 and the NPDES program do not apply to such application activities and any resulting water quality impacts are to be addressed solely through other CWA programs. That is the expressed will of Congress, and it cannot be overcome by the wish of Environmental Petitioners that all potential sources of “pollution” be regulated under the NPDES program.

**B. “Pollutant” Is Defined To “Mean” Any of Several Specifically Listed Categories of Materials, None of Which Encompasses Pesticide Products in Use**

**1. The meaning of “pollutant” must be discerned on the basis of its statutory definition, not irrelevant legislative history and inapplicable provisions**

Despite arguing (at 8) that “the Court need look no further than the language of the statute,” Environmental Petitioners fail to actually quote the definition of “pollutant” at any point in their brief.<sup>4</sup> Yet Congress has expressly and precisely defined “pollutant” in the CWA, and this definition unambiguously excludes pesticide products in use. *See, e.g., Litriello*, 484 F.3d at 377. The definition provides that:

The term “pollutant” *means* dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6) (emphasis added).

Congress did not include any non-limiting language or catch-all category that would permit the agency or the Court to read into the definition pesticides in use or any other material not subsumed within one of the specific categories listed.

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<sup>4</sup> The Brief of Environmental Petitioners is cited herein as “EP Br.”

The list of “pollutant” categories identified in the statute is exhaustive, and no material is a “pollutant” unless it is encompassed within one of these explicitly identified categories. *See United States v. Hamel*, 551 F.2d 107, 110 (6th Cir. 1977); *Gorsuch*, 693 F.2d at 171-72 (“means” in pollutant definition evidences congressional intent to exclude any meaning not expressly stated). While a number of the categories are quite broad (*e.g.*, “industrial, municipal, and agricultural wastes”) – and so, therefore, is the definition – courts have consistently recognized that any given material must fit within *at least one* listed category to be a CWA “pollutant.” *See, e.g., Sierra Club, Lone Star Chapter v. Cedar Point Oil Co., Inc.*, 73 F.3d 546, 565 (5th Cir. 1996) (noting breadth of many of the terms within definition, but agreeing with the D.C. Circuit that the word “means” “manifests an intent to restrict the definition of pollutant to the terms listed”); *Gorsuch*, 693 F.2d at 172.

Environmental Petitioners focus most of their “plain meaning” argument on irrelevant excerpts of legislative history that contradict the language of the statute as enacted, as well as the inapplicable statutory definition of “pollution.” On this basis, they contend – not withstanding the language of the “pollutant” definition – that this Court should construe the term to mean (unambiguously) “any foreign substance” and “those substances that may alter the chemical, physical, or biological integrity of the nation’s waters.” *See* EP Br. at 14 (argument headings).

Neither definition applies, however, and neither can override the plainly contrary meaning of the “pollutant” definition itself.

Environmental Petitioners’ “any foreign substance” definition of pollutants is drawn from cases interpreting the Refuse Act of 1899, 33 U.S.C. § 407. *See* EP Br. at 15, 20-21 (citing *Hamel*, 551 F.2d at 111, and *United States v. Standard Oil Co.*, 384 U.S. 224, 226 (1996)). Environmental Petitioners cite *Hamel* and a Senate Report relied on by *Hamel* for the proposition that the CWA definition of “pollutant” was intended to “at least be as broad as the coverage of the Refuse Act.” They further argue that the Refuse Act applies to “all foreign substances” and, therefore, so must the CWA term “pollutant.” This argument fails for several reasons.

First, the *Standard Oil* case (cited by Environmental Petitioners and by the court in *Hamel*) considered only whether the Refuse Act applies to commercially valuable material (in that case, aviation gasoline) that is *accidentally spilled* into water, or whether “refuse” instead encompasses only material that was worthless or unusable (even before it was spilled). *See Standard Oil*, 384 U.S. at 224-25. In this context, the Supreme Court concluded that the Refuse Act makes “no distinction between valuable and valueless substances.” *Id.* at 228.

The crux of the *Standard Oil* analysis was whether spilled gasoline (which was commercially valuable before it was spilled) constitutes waste. *See id.* at 229-

30. And although the Court used the words “all foreign substances and pollutants,” it did so specifically in the context of endorsing the formula articulated by the Second Circuit: “The word ‘refuse’ in that setting [good oil spilled into a waterbody] ... ‘is satisfied by *anything which has become waste*, however useful it may earlier have been.’” *Id.* at 229 (quoting *United States v. Ballard Oil Co.*, 195 F.2d 369, 371 (2d Cir. 1952)). Nothing in the Court’s analysis, however, suggests that the Refuse Act might apply to *non-waste* – i.e., useful products that *are being used* in the environment, which are neither valueless, useless, discarded, or spilled.

Second, the court in *Hamel* drew from *Standard Oil* to conclude that commercially valuable gasoline *willfully dumped* from a dispenser into a lake is a CWA “pollutant.” The court never considered, however, whether *non-waste* – useful products that *are being used* in the environment – would be so classified. Thus, there is nothing in either *Hamel* or *Standard Oil* to suggest that pesticides in use for their intended purpose should be deemed either “refuse” under the Refuse Act or “pollutant” under the CWA. The most that the two opinions might suggest is that useful pesticide product accidentally or willfully spilled or dumped (*e.g.*, a tanker spill, or a pesticide applicator dumping unused product) would be deemed

“refuse” under the Refuse Act and CWA “pollutant.”<sup>5</sup> Such circumstances are not encompassed by the rule at issue here and presumably would be deemed by EPA to involve CWA “pollutants” in accordance with the agency’s interpretation of “chemical wastes” and “solid waste.”

Third, the premise of Environmental Petitioners’ argument – that the CWA term “pollutant” was intended to be at least as broad in coverage as the Refuse Act – is erroneous.<sup>6</sup> Although the court in *Hamel* did draw this inference, it did so in reliance on a 1971 Senate Report that concerned Senate Bill 2770, which was never enacted and which contained a substantially broader “pollutant” definition than the one ultimately enacted. S. Rep. No. 92-414, at 52 (1971). Senate Bill 2770 provided that: “The term ‘pollutant’ means, *but is not limited to*, dredged spoil .... *and other waste.*” See S. 2770, 92d Cong. § 502(f) (as passed by Senate, Nov. 2, 1971) (emphasis added). The final enactment of the Clean Water Act, a year later on Oct. 18, 1972, *omitted* the language “but is not limited to” and “and

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<sup>5</sup> Our research has revealed no enforcement of the Refuse Act against the application of pesticides in the more than 100-year history of that statute.

<sup>6</sup> We hasten to add that the *Hamel* court did not use the Refuse Act line of reasoning to expand beyond the categories of “pollutant” explicitly listed in the CWA. Instead, the court drew from that history to interpret the listed categories (“biological materials” and “chemical wastes”) to encompass gasoline dumped into a lake. See 551 F.2d at 110-11.

other waste.” *See* 92 Cong. Public Law 500 § 502(6), 86 Stat. 816 (1972).

Because the statements in the 1971 Senate Report pertain to a substantially different definition than the one ultimately enacted, they shed little if any light on the scope of the “pollutant” definition. Even if one assumes that the Refuse Act might define pesticides in use for their intended purpose as “refuse” – an invalid assumption without support in any decision cited by Environmental Petitioners’ – that could not justify stretching the CWA “pollutant” definition beyond its plain terms.

Environmental Petitioners’ other formulation of the “pollutant” definition – which likewise deviates from the statutory text – is “those substances that may alter the chemical, physical, or biological integrity of the nation’s waters.” *See* EP Br. at 14. This language derives, however, from the entirely distinct CWA definition of “pollution:” “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 33 U.S.C. § 1362(19). That definition, according to Environmental Petitioners, “indicates Congress’ [sic] intent to regulate the wide variety of foreign substances that can compromise the health of aquatic ecosystems.” EP Br. at 16.

Contrary to Environmental Petitioners’ suggestion, the Court should follow the law as enacted by Congress and apply the distinct – and substantially different – definition of “pollutant.” The CWA *does* seek to address – through a variety of

programs in addition to the NPDES permitting program – any “man-induced alteration of the chemical, physical, biological, and radiological integrity of water” (i.e., all sources of “pollution”). Yet it deliberately limited the scope of the § 301 discharge prohibition and the § 402 NPDES program to the “addition of any *pollutant* to navigable waters from any point source,” 33 U.S.C. § 1311(a) (emphasis added), and it specifically defined “pollutant” to “mean” any of several listed categories of materials, *id.* § 1362(12). *See Gorsuch*, 693 F.2d at 172-73 (rejecting argument that “pollutants” are anything that causes “pollution” because “under usual rules of statutory construction, use of two different terms is presumed to be intentional, especially when the legislation specifically defines both terms”) (citations omitted). If Congress had meant to define “pollutant” as any substance that causes or may cause “pollution,” it could easily have said so: *See Consumers Power Co.*, 862 F.2d at 586 (“Had Congress wanted to use CWA § 402 [the NPDES permitting program] to regulate all sources of pollution, ‘it would easily have chosen suitable language, e.g., all pollution released through a point source.’”) (quoting *Gorsuch*, 693 F.2d at 176).

Environmental Petitioners (at 16) cite several decisions in support of the argument that “pollutant” includes all substances that can cause “pollution,” none of which bolsters their claim. The Fifth Circuit in *Cedar Point Oil*, for example, found that wastewater from oil and gas drilling operations (“produced water”) was

“clearly subsumed by the phrases ‘chemical wastes’ and ‘industrial waste,’” in part based on regulatory guidance from EPA. 73 F.3d at 568. The court cautioned that in “more difficult cases” where EPA has *not* found a particular substance to be a pollutant, “courts should exercise restraint to avoid stretching the term ‘pollutant’ too far.” *Id.* at 569, n.37. Likewise, the Ninth Circuit in *N. Plains Res. Council v. Fid. Exploration and Dev. Co.*, the court found that wastewater generated during extraction of coal bed methane (also called “produced water”) was a “pollutant” because it was within the ordinary meaning of “industrial waste.” *See* 325 F.3d 1155, 1160-61 (9th Cir. 2003). And in *Ass’n to Protect Hammersley v. Taylor Res., Inc.*, the court found that “mussel shells, mussel feces and other biological materials” emitted from mussel harvesting rafts were not “biological materials” within the meaning of the “pollutant” definition because they were not “waste material of a human or industrial process.” 299 F.3d 1007, 1016 (9th Cir. 2002). Although the Ninth Circuit in both of the latter opinions found *additional support* for its conclusion in the fact that the discharge at issue did, or did not, result in pollution, nothing in either decision or in *Cedar Point Oil* remotely suggests that substances may be deemed “pollutants” simply because they cause “pollution.” *See N. Plains Res. Council*, 325 F.3d at 1161-62; *Hammersley*, 299 F.3d at 1017.

Another inapplicable provision on which Environmental Petitioners rely is EPA’s regulatory list of “toxic pollutants,” promulgated pursuant to CWA

§ 304(a)(4). EP Br. at 19-20. Environmental Petitioners argue that any substance identified in EPA's list of "toxic pollutants" must be deemed a "pollutant" as defined at § 502(6). Because some ingredients of some pesticide products have been identified by EPA as "toxic pollutants," Environmental Petitioners appear to suggest that all pesticides under all circumstances must be pollutants.<sup>7</sup> This reasoning cannot withstand scrutiny.

The definition of "pollutant" at CWA § 502(6) and the categories of substances listed therein (*e.g.*, solid waste, garbage, sewage, chemical waste, industrial waste, etc.) control the meaning of that term. Absent from that definition is any reference to "substances identified by EPA as 'toxic pollutants.'" *See* 33 U.S.C. § 1362(6). EPA therefore cannot by its list of "toxic pollutants" expand the universe of "pollutants" beyond any reasonable interpretation of the pollutant categories listed in § 502(6).

This is made plain by the CWA definition of "toxic pollutant," which establishes that any substance deemed a "toxic pollutant" must first be a

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<sup>7</sup> It is unclear from Environmental Petitioners' brief whether they contend that EPA's rule is unlawful as to *all* pesticides because some pesticide ingredients are listed as "toxic pollutants" – or whether they contend that the rule is invalid only as to those products containing ingredients listed as "toxic pollutants." EP Br. at 19-20. For the reasons explained below, their logic fails in either case.

“pollutant.” *See id.* § 1362(13) (“The term ‘toxic pollutant’ means those *pollutants*, or combinations of *pollutants*, including disease-causing agents, which ... on the basis of information available to the Administrator, cause death, disease, ... or physical deformations ....”). Therefore, *only* if a substance listed as a “toxic pollutant” itself is a “chemical waste,” “industrial waste,” etc. under the circumstances at issue – or if it is a constituent of a “chemical waste,” “industrial waste,” etc. – may the substance be deemed a “pollutant” for purposes of § 502(6), the § 301(a) discharge prohibition, and the § 402 NPDES permitting program. Two of the cases cited by Environmental Petitioners fully support and illustrate this proposition, as they involved listed “toxic pollutants” that were specifically found to be within the scope of a waste category listed in the § 502(6) “pollutant” definition. *See Cedar Point Oil*, 73 F.3d at 568 (noting that benzene, naphthalene, and zinc were components of “produced water,” which itself was “chemical waste” and “industrial waste”); *Dague v. City of Burlington*, 732 F. Supp. 458, 469-70 (D. Vt. 1989) (“chemical waste” seeping into water from landfill included multiple listed toxic pollutants).<sup>8</sup>

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<sup>8</sup> In the third case cited, *U.S. Pub. Interest Research Group v. Atl. Salmon of Me.*, the district court did not specify whether the listed “toxic pollutant” (copper)

(continued...)

Moreover, it would make no sense to conclude that EPA's decision to list a particular substance as a "toxic pollutant" under CWA § 502(13) subsequently constrains the agency's authority to interpret "pollutant" to exclude those listed substances in specified circumstances. EPA has delegated authority to list "toxic pollutants" *and* to interpret the term "pollutant." Implicit within this authority is the power to define substances as "toxic pollutants" and "pollutants" in certain circumstances (*e.g.*, when they are "chemical waste") and as non-pollutants in others (*e.g.*, when they are part of a registered pesticide in use for its intended purpose). EPA has done nothing more here, and its Rule is fully within the scope of its CWA authority.

Environmental Petitioners claim (at 20-21) that EPA lacks authority to exclude listed "toxic pollutants" or anything else from the definition of

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(continued)

released into water from nets was a "solid waste" or other category within § 502(6). *See* 215 F. Supp. 2d 239, 248 (D. Me. 2002). Several other substances identified as "pollutants" by the court, however, were explicitly found to be within the scope of "chemical waste" or another listed pollutant category. *See id.* at 247-48. Moreover, nothing in decision suggests that this was the only rational interpretation of the statute in the court's view, such that any contrary EPA interpretation might be called into question. The decision thus in no way undermines EPA's own authority to interpret "chemical waste" or "biological materials" to exclude one or more listed "toxic pollutants" in particular circumstances.

