

No. 06-4630 (and consolidated cases)

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NATIONAL COTTON COUNCIL OF AMERICA, *et al.*

Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

Respondent.

On Petition For Review of Final Action
of the United States Environmental Protection Agency

**FINAL BRIEF OF
RESPONDENT UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**

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STATEMENT REGARDING ORAL ARGUMENT

The United States Environmental Protection Agency believes that oral argument may assist the Court in understanding the parties' distinctly different views regarding the scope of the Clean Water Act in the context of pesticides applied, consistent with relevant requirements of the Federal Insecticide, Fungicide, and Rodenticide Act, directly to or over waters of the United States to control pests. Accordingly, the United States Environmental Protection Agency requests oral argument.

JURISDICTIONAL STATEMENT

On November 27, 2006, Respondent United States Environmental Protection Agency (“EPA”) issued a final rule entitled “Application of Pesticides to Waters of the United States in Compliance with FIFRA,” 71 Fed. Reg. 68,483 (the “Final Rule”); Joint Appendix (“JA”) 1-10. “FIFRA” is the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136, *et seq.* EPA promulgated the Final Rule pursuant to its authority under the Clean Water Act, 33 U.S.C. § 1251, *et seq.*

This Court has subject matter jurisdiction over the eleven petitions for review of the Final Rule pursuant to Sections 509(b)(1)(E) and (F) of the Clean Water Act, 33 U.S.C. §§ 1369(b)(1)(E) and (F).^{1/} All Petitioners timely filed their petitions for review. *See* 33 U.S.C. § 1369(b). The eleven petitions for review were consolidated in this Court by a Consolidation Order issued by the Judicial Panel for Multidistrict Litigation.

^{1/} The Environmental Petitioners moved to dismiss the petitions for review for lack of subject matter jurisdiction on May 1, 2007. The Court, by its Order filed July 24, 2007, denied the motion to dismiss at that time based upon its finding that “a sufficient showing has been made to permit these cases to proceed.” The Court referred the jurisdictional issue to the merits panel.

STATEMENT OF ISSUES

1. Whether the Clean Water Act vests exclusive jurisdiction over challenges to the Final Rule in the federal courts of appeals.
2. Whether Congress directly spoke in the Clean Water Act to the regulation of pesticides applied directly to waters to control pests or applied to control pests over, including near, such waters when neither the statutory language nor the legislative history addresses this specific issue.
3. Whether EPA reasonably interprets the Clean Water Act's definition of "pollutant" not to include pesticides applied, consistent with all relevant requirements under FIFRA, either directly to waters to control pests or to control pests over, including near, such waters where a portion of the pesticides will unavoidably be deposited to waters in order to target the pests effectively.
4. Whether this Court should defer to EPA's statutory interpretation made following formal notice-and-comment rulemaking pursuant to the Administrative Procedure Act.

STATEMENT OF THE CASE

I. Nature of Case

Since the enactment of the Clean Water Act in 1972, EPA has not required persons applying pesticides directly to or over waters of the United States for the purpose of controlling pests in or over those waters to obtain a Clean Water Act National Pollutant Discharge Elimination System (“NPDES”) permit.^{2/} This position reflected a general understanding that Congress did not intend to regulate under the Clean Water Act properly applied pesticides to control pests in or over waters when those pesticides had been approved by EPA for such use under the pesticide regulations.

During the past few years, several decisions of the federal courts of appeals have addressed the issue of application of pesticides to waters of the United States. These decisions created uncertainty among the regulated community, regulators and the general public regarding the scope of Clean Water Act regulatory requirements in the context of pesticide applications. As a result, EPA drafted guidance, and subsequently proposed and issued the Final Rule. The Final Rule contains EPA’s interpretation of the Clean Water Act’s definition of “pollutant”

^{2/} An NPDES permit is required before a pollutant may be discharged to waters of the United States. 33 U.S.C. § 1342.

as it relates to certain pesticide applications. The Final Rule identifies two circumstances in which the application of pesticides consistent with all relevant requirements under FIFRA is not the discharge of a pollutant to waters of the United States.

The two circumstances identified by EPA reflect a reasonable interpretation of the statutory definition of “pollutant” that conforms to a common sense understanding of that term. The first circumstance is the application of pesticides directly to waters of the United States to control pests. This circumstance includes pesticides applied to waters to control mosquito larvae, aquatic weeds or other aquatic pests. The second circumstance is the application of pesticides to control pests that are present over, including near, waters of the United States where a portion of the pesticides will unavoidably be deposited into the water in order to target the pests effectively. This second circumstance includes insecticides aerially applied to a forest canopy where a water of the United States may be present below the canopy. As a result of EPA’s interpretation, persons applying pesticides in these two circumstances and consistent with all relevant requirements of FIFRA do not need to obtain a Clean Water Act NPDES permit to engage in their pesticide applications.

These petitions for review focus on the Clean Water Act’s definition of

“pollutant,” which is defined as 16 items including “chemical wastes” and “biological materials.” Because Congress did not directly address whether pesticides applied directly to waters of the United States or applied to control pests over, including near, waters of the United States are “pollutants,” EPA has offered its interpretation to fill the statutory gap. EPA’s interpretation addressing the two limited circumstances in the Final Rule is reasonable, is entitled to deference and should be upheld.

II. Statutory and Regulatory Background

A. The Clean Water Act.

Congress enacted the Clean Water Act “to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.” 33 U.S.C. § 1251(a). Section 301(a) of the Clean Water Act provides that “the discharge of any pollutant by any person shall be unlawful” unless the discharge is in compliance with certain other sections of the Act. 33 U.S.C. § 1311(a).

The Clean Water Act defines “discharge of a pollutant” as “any addition of any pollutant to navigable waters from any point source” Section 502(12), 33 U.S.C. § 1362(12). A “point source” is a “discernible, confined and discrete conveyance.” Section 502(14), 33 U.S.C. § 1362(14).

The term “pollutant” is defined as “dredged spoil, solid waste, incinerator

residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, silt, and industrial, municipal and agricultural waste discharged into water.”

Section 502(6), 33 U.S.C. § 1362(6).

The primary way that a person may discharge a pollutant without running afoul of the Clean Water Act’s prohibition is to obtain a permit pursuant to Section 402, 33 U.S.C. § 1342. In Section 402, Congress established the Clean Water Act’s National Pollutant Discharge Elimination System (NPDES). Under Section 402(a), EPA “may, after opportunity for public hearing, issue a permit for the discharge of any pollutant, or combination of pollutants, notwithstanding section 1311(a)” upon certain conditions required by the Act. 33 U.S.C. § 1342(a).

EPA is authorized to establish regulations to administer the NPDES program. 33 U.S.C. § 1361(a). Congress also authorized EPA to approve qualifying applications from States to run NPDES permitting programs for discharges into waters within their jurisdiction. 33 U.S.C. § 1342(b). In accordance with that provision, EPA has approved 45 States and the U.S. Virgin Islands to administer the NPDES permitting programs under state or territorial

law.³⁷ In the handful of remaining States, Territories and Indian country, EPA administers the NPDES program. NPDES permits must contain technology-based limits (which EPA can standardize through rulemaking) and “any more stringent limits, as necessary to meet State water quality standards.” 33 U.S.C.

§ 1311(b)(1)(C). States are not precluded from operating a program with a greater scope of coverage than required under the NPDES State program regulations, but if an approved State program has such greater scope of coverage, that additional coverage is not part of the federally approved NPDES program. *See* 40 C.F.R. § 123.1(i)(2).

B. Sale, Distribution and Use of Pesticides Under FIFRA.

Under FIFRA, EPA regulates the sale, distribution, and use of pesticides through a licensing or registration program. EPA may not issue a registration for a pesticide that causes “unreasonable adverse effects on the environment.” *See* 7 U.S.C. §§ 136a(c)(5) & (7). This phrase is defined to include “any unreasonable risk to man or the environment” or “a human dietary risk from residues that result from a use of a pesticide in or on any food inconsistent with the standard under [Section 408 of the Federal Food, Drug and Cosmetic Act].” 7 U.S.C. § 136(bb).

³⁷ Once a State is so authorized, “the Administrator shall suspend the issuance of permits . . . as to those discharges subject to such program” except in certain specified circumstances. 33 U.S.C. § 1342(c).

A new pesticide must undergo a rigorous registration procedure under FIFRA during which EPA assesses a variety of potential human health and environmental effects associated with use of the product. *See* 7 U.S.C. § 136a; 40 C.F.R. Parts 152 and 158. In addition, FIFRA contains requirements that EPA re-examine existing pesticide registrations to ensure that they meet current standards for registration. 7 U.S.C. § 136a-1.

Under FIFRA, EPA is required to consider the effects of pesticides on the environment by determining, among other things, whether a pesticide “will perform its intended function without unreasonable adverse effects on the environment,” and whether “when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment.” 7 U.S.C. § 136a(c)(5). In performing this analysis, EPA examines the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies for human health and environmental effects and exposures. *Id.* § 136a(c); 40 C.F.R. Parts 152 and 158.

C. Application of Pesticides to Waters of the United States.

Since 2000, several courts of appeals have addressed the question of whether the Clean Water Act requires NPDES permits for pesticide applications.^{4/} In one of these cases, the Second Circuit observed that “[u]ntil the EPA articulates a clear interpretation of current law – among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits . . . – the question of whether properly used pesticides can become pollutants that violate the Clean Water Act will remain open.” *Altman v. Town of Amherst*, 46 Fed. App’x. 62, 67 (2d Cir. 2002). These cases resulted in some confusion among the regulated community and other affected citizens about the applicability of the Clean Water Act to pesticides applied to waters of the United States.

This regulatory uncertainty prompted EPA, in August 2003, to address administratively the applicability of the NPDES permit program to pesticide applications. *See* 68 Fed. Reg. 48,385 (Aug. 13, 2003); JA 103. In an Interim Statement and Guidance, EPA identified two circumstances in which pesticides

^{4/} The court decisions include: *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005); *League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Altman v. Town of Amherst*, 47 Fed. App’x. 62 (2d Cir. 2002); and *Headwaters, Inc. v. Talent Irrigation District*, 243 F.3d 526 (9th Cir. 2001). All of these cases are discussed, *infra*.

applied to waters of the United States consistent with all relevant requirements of FIFRA are not “pollutants” under the Clean Water Act and, therefore, do not require an NPDES permit. 68 Fed. Reg. at 48,387; JA 105. The first circumstance was the application of pesticides directly to waters of the United States to control pests. *Id.* The second circumstance was the application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticides being deposited to waters of the United States. *Id.*

EPA solicited public comment on the Interim Statement and Guidance before determining a final agency position. 68 Fed. Reg. at 48,385; JA 103. After considering the public comments, EPA issued a final Interpretive Statement on January 25, 2005, which confirmed its position that the two circumstances identified in the Interim Statement do not involve “pollutants” and therefore do not require an NPDES permit. 70 Fed. Reg. 5093, 5095-96 (Feb. 1, 2005); JA 134, 136-37. At the same time, EPA published notice of a proposed rulemaking to incorporate the substance of the Interpretative Statement into EPA regulations, and solicited public comment on the proposed rulemaking. 70 Fed. Reg. at 5093; JA 134.

EPA issued the Final Rule on November 27, 2006. 71 Fed. Reg. 68,483; JA 1. The Final Rule revises EPA’s NPDES regulations to add a paragraph to the

list of discharges in 40 C.F.R. § 122.3 that are excluded from NPDES permit requirements. *See* 71 Fed. Reg. at 68,485, 68,492; JA 3, 10. The Final Rule interprets the definition of “pollutant” not to include applications of pesticides to waters of the United States consistent with all relevant requirements under FIFRA in two specific circumstances:^{5/}

1. The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.
2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

71 Fed. Reg. at 68,492 (codified at 40 C.F.R. 122.3(h)); JA 10. EPA determined that pesticides applied under these two circumstances are not pollutants and

^{5/} EPA considers “relevant requirements of FIFRA” to mean those FIFRA requirements relating to water quality. 71 Fed. Reg. at 68,486; JA 4. These include requirements governing application rates, concentrations and locations, buffer zones, intended targets, temperature and other application requirements that concern the amounts, concentrations and viability of substances that may potentially end up in waters of the United States. *Id.* In contrast, requirements related to an applicator’s protective clothing are not requirements relevant to water quality. *Id.*

therefore are not subject to NPDES permitting requirements. *Id.* at 68,486; JA 4.

SUMMARY OF ARGUMENT

Jurisdiction to review the Final Rule is proper in this Court under Section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), relating to the issuance or denial of a Clean Water Act permit, and Section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), relating to effluent limitations or other limitations.

Congress did not speak directly to the precise issue of whether pesticides applied in the two circumstances described in the Final Rule are pollutants. The Clean Water Act as a whole and its legislative history do not reflect a clear congressional intent on this issue. For purposes of this case, the key term in the definition of “pollutant” is “chemical wastes.” The ordinary meaning of “waste” does not clearly include or exclude pesticides applied to control pests in or over, including near, waters of the United States. Because congressional intent is not clear regarding this specific issue, the Court must evaluate whether EPA has reasonably interpreted the definition of “pollutant” in the context of these pesticide applications.

EPA reasonably interpreted the phrase “chemical wastes” not to encompass pesticides applied, consistent with all relevant FIFRA requirements, directly to waters to control pests or applied to control pests over, including near, such waters

where a portion of the pesticides will unavoidably be deposited to waters in order to target the pests effectively. This interpretation is consistent with the ordinary meaning of “waste” and conforms with relevant court of appeals decisions. A pesticide that is applied in or over waters of the United States may become a pollutant some time after it is applied (after the product has served its intended purpose), but an NPDES permit is not required for its application because it is not a pollutant at the time of its discharge. This treatment of residual products is also consistent with prior relevant case law.

The Final Rule reasonably refers to those pesticide applications that are consistent with all relevant FIFRA requirements because this indicates that the pesticide being applied is not a pollutant. Both the Environmental Petitioners’ and Industry Petitioners’ arguments that FIFRA compliance is irrelevant fails to give effect to both FIFRA and the Clean Water Act.

Finally, this Court should defer to EPA’s interpretation of “pollutant” in the Final Rule. This Court and others have recognized that such deference is appropriate when EPA interprets Clean Water Act definitions. The Environmental Petitioners’ attempts to lessen judicial deference fail for numerous reasons: EPA’s fundamental position has not changed in more than 30 years; prior allegedly inconsistent EPA statements relied upon by the Environmental Petitioners were

made in the context of litigation, not rulemaking; and the prior statements are not inconsistent with the interpretation offered in the Final Rule.

ARGUMENT

I. Standard of Review.

Petitioners must show that EPA's promulgation of the Final Rule is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). This narrow, deferential standard prohibits a court from substituting its judgment for that of the agency and presumes the validity of agency actions. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43-44 (1983).

Judicial deference also typically extends to an agency's interpretation of a statute it administers. *United States v. Mead Corp.*, 533 U.S. 218, 227-31 (2001); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 842-45 (1984); *Greenbaum v. EPA*, 370 F.3d 527, 533-34 (6th Cir. 2004). Questions of statutory interpretation, including those involving the definitions under the Clean Water Act, are governed by the familiar two-step test set forth in *Chevron*. See *Chevron*, 467 U.S. at 842-45; *B.P. Exploration & Oil, Inc. v. EPA*, 66 F.3d 784, 791 (6th Cir. 1995); *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 584 (6th Cir. 1988). Under the first step, the reviewing court must

determine “whether Congress has directly spoken to the precise question at issue.” *Chevron*, 467 U.S. at 842. If Congress’ intent is clear from the statutory language, “that intent must be given effect.” *Chevron*, 467 U.S. at 842-43. However, “if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency’s answer is based on a permissible construction of the statute.” *Id.* at 843. “To uphold EPA’s interpretation of [the Clean Water Act], the Court need not find that it is the only permissible construction that EPA might have adopted but only that EPA’s understanding of this very complex statute is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA.” *Greenbaum*, 370 F.3d at 534 (construing Clean Air Act) (internal quotation marks and citations omitted); *Michigan Dep’t of Env’tl. Quality v. Browner*, 230 F.3d 181, 184 (6th Cir. 2000) (the court “shows great deference to the statutory interpretation given by EPA”).

II. This Court Has Subject Matter Jurisdiction Over the Petitions for Review.

The Clean Water Act vests in the federal courts of appeals jurisdiction over these petitions seeking judicial review of the Final Rule. Clean Water Act Section 509(b)(1), 33 U.S.C. § 1369(b)(1), identifies certain EPA actions that are reviewed exclusively in the courts of appeals. Jurisdiction to review the Final Rule is

proper in this Court under Section 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), relating to the issuance or denial of a Clean Water Act permit, and Section 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), relating to effluent limitations or other limitations. EPA respectfully refers the Court to EPA's Memorandum in Opposition to Motion to Dismiss or to Transfer to the Ninth Circuit, filed May 22, 2007, for its argument in support of this Court's jurisdiction.

III. This Court Should Deny the Petitions for Review Because EPA Reasonably Interpreted the Definition of "Pollutant," Which Is Ambiguous in the Context of Pesticide Applications to Control Pests In or Over, Including Near, Waters of the United States.

The application of a pesticide from a point source to waters of the United States requires an NPDES permit only if it constitutes the discharge of a "pollutant," as defined by the Clean Water Act. Congress did not express a clear intent regarding whether and under what circumstances pesticides applied to control pests are pollutants. In the Final Rule, EPA interprets the statutory term "pollutant" in the context of applications of pesticides consistent with all relevant requirements of FIFRA in the two circumstances identified in the Final Rule. 71 Fed. Reg at 68,486; JA 4. EPA's interpretation is reasonable, is entitled to deference, and should be upheld.

A. Congress Has Not Directly Spoken to Whether Pesticides Applied to Control Pests In or Over, Including Near, Waters of the United States Are Pollutants.

The plainness or ambiguity of a statute is determined by reference to the language itself, the context of the statute as a whole and, when necessary, its legislative history. *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997); *Broadcast Music, Inc. v. Roger Miller Music, Inc.*, 396 F.3d 762, 769 (6th Cir. 2005) (courts may look to legislative history of a statute only if the statutory language is unclear). Congress' intent regarding whether pesticides are pollutants when applied directly to waters to control pests or applied to control pests over, including near, such waters is not clear from the language of the Clean Water Act. Further, neither the Act as a whole nor its legislative history evinces a clear intent regarding this issue. Both the Environmental Petitioners and Industry Petitioners argue that Congress has directly spoken to the issue, yet each argues that a clear intent supports their opposing views of the statute. Both sets of Petitioners fail to show that the congressional silence on the specific issue addressed in the Final Rule clearly supports their interpretation.

Congress defined the term "pollutant" in the Clean Water Act to mean one of 16 specific items. *See supra* at 5-6. None of the 16 items clearly encompasses pesticides applied to waters, consistent with relevant regulatory requirements, to

control pests. Congress' use of "chemical wastes" and "biological materials" does not clearly include or exclude the application of pesticides to waters of the United States under the circumstances addressed in the Final Rule.

With respect to the term "chemical wastes," the ordinary meaning of "waste" precludes an argument that Congress directly spoke to pesticides applied in the two circumstances identified in the Final Rule. Statutory words will be interpreted as taking their ordinary, contemporary, common meaning. *U.S. v. Plavcak*, 411 F.3d 655, 660 (6th Cir. 2005) (the ordinary meaning of language employed by Congress accurately expresses its legislative purpose); *see The Limited, Inc. v. Comm'r of Internal Revenue*, 286 F.3d 324, 333 (6th Cir. 2002) (when a word is not defined by statute, courts construe the term in accord with its ordinary or natural meaning). The term "waste" ordinarily means that which is "eliminated or discarded as no longer useful or required after the completion of a process." *The New Oxford American Dictionary* 1905 (Elizabeth J. Jewell & Frank Abate eds. 2001). Two court of appeals decisions interpreting this Clean Water Act definition have used the *American Heritage Dictionary* definition of waste, which is "any useless or worthless byproduct of a process or the like; refuse or excess material." *Northern Plains Resource Council v. Fidelity Exploration and Dev. Co.*, 325 F.3d 1155, 1161 (9th Cir. 2003); *Fairhurst*, 422 F.3d at 1149. In

contrast, pesticides applied consistent with relevant FIFRA requirements are products that EPA has evaluated and registered for the purpose of controlling target organisms, including controlling pests through application of the pesticide to water. *See* 7 U.S.C. § 136a(c)(5). They are designed, purchased and applied to perform that purpose. *See Fairhurst*, 422 F.3d at 1150. Congress' use of the phrase "chemical wastes" does not directly speak to chemically-based pesticides applied consistent with relevant requirements of FIFRA.

Contrary to Environmental Petitioners' argument, Env'l Pet. Br. at 19, the listing of certain pesticides or their ingredients as toxic pollutants under other legal provisions does not reflect a clear congressional intent to classify pesticides as wastes when applied in the two circumstances identified in the Final Rule. Congress defined "toxic pollutants" as "those pollutants, or combination of pollutants" that will cause certain harmful conditions to public health. 33 U.S.C. § 1362(13). Therefore, toxic pollutants are a subset of pollutants, and materials that are not pollutants under the Clean Water Act's definition cannot be toxic pollutants. The listing of pesticides as toxic pollutants addresses circumstances

other than the two identified in the Final Rule.⁶

On the other hand, Congress' definition of "pollutant" in the Clean Water Act does not, as argued by Industry Petitioners, clearly evince an intent to exclude all pesticides applied for the purpose for which they were manufactured. *See* Brief of Industry Petitioners ("Industry Pet. Br.") at 12-13. The term "chemical wastes" could include certain pesticide applications in some circumstances. A definition of waste previously utilized by courts includes "excess material." *See supra* at 18. Congress never directly spoke to the situation in which, for example, pesticides are applied in amounts exceeding FIFRA requirements or at locations beyond FIFRA-imposed restrictions.

The term "biological materials" is similarly ambiguous in the context of biological-based pesticides applied to control pests in or over waters of the United States. Congress did not directly speak to this specific issue. Moreover, the Clean Water Act is "ambiguous on whether 'biological materials' means *all* biological matter regardless of quantum and nature." *Ass'n to Protect Hammersley, Eld and*

⁶ In certain circumstances, pesticides may be pollutants as well as toxic pollutants under the Clean Water Act. EPA has adopted effluent limitations for certain toxic pollutants, including pesticides, that apply to those materials when present in waste streams. *See* 40 C.F.R. part 129. Therefore, although pesticides may be toxic pollutants as well as pollutants in some circumstances, they are not when they are applied in the two circumstances described in the Final Rule.

Totten Inlets v. Taylor, 299 F.3d 1007, 1016 (9th Cir. 2002) (emphasis in original).

Viewing the Clean Water Act as a whole fails to aid either Environmental Petitioners or Industry Petitioners in their search for clear congressional intent. As Environmental Petitioners correctly point out, Congress enacted the Clean Water Act in order to restore the chemical, physical and biological integrity of the nation's water. However, Congress did not define "pollutant" as any substance that alters the chemical, physical or biological integrity of the nation's water. Congress differentiated "pollutants," which generally may not be discharged from point sources, from "pollution," which Congress defined as the "man-made or man-induced alteration of the chemical, physical, biological or radiological integrity of water." 33 U.S.C. § 1362(19). If Congress had wanted to regulate all sources of pollution through the NPDES permit program, "it would easily have chosen suitable language, *e.g.*, all pollution released through a point source." *National Wildlife Federation v. Consumers Power Company*, 862 F.2d 580, 586 (6th Cir. 1988) (quoting *National Wildlife Federation v. Gorsuch*, 693 F.2d 156, 176 (D.C. Cir. 1982)). Congress' choice of different definitions for pollutant and pollution undercuts the clear intent argument proffered by Environmental

Petitioners based upon the broad goals of the Clean Water Act.⁷¹

While the Environmental Petitioners argue for an unambiguous overly broad reading, Industry Petitioners incorrectly argue that the definition of “pollutant” reflects a clear congressional intent to exclude any item not explicitly enumerated under one of the 16 items in the definition. Industry Pet. Br. at 16. As this Court previously held, no such clear intent can be gleaned from the Act. See *United States v. Hamel*, 551 F.2d 107, 111 (6th Cir. 1977). In *Hamel*, this Court observed that Congress intended to encompass within the definition of “pollutant” those items covered under the Refuse Act of 1899, which was directed at all waste materials. *Id.* at 110-11. Thus, even though oil and gasoline are not items clearly identified in the definition of “pollutant,” these items fall within the definition

⁷¹ The Fifth Circuit’s discussion in *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.* 73 F.3d 546, 565 (5th Cir. 1996), does not reach as far as Environmental Petitioners would take it. In *Sierra Club*, the court noted the breadth of many items in the list of “pollutants,” but also noted that the list “endorses an understanding of a pollutant as a resource out of place.” *Id.* Pesticides intended for application to or over waters are not “out of place.” Further, the Fifth Circuit in *Sierra Club* based its determination that produced water was a “pollutant” on the terms in the Act’s definition of “pollutant,” not on the question of whether the material results in “pollution.” *Sierra Club*, 73 F.3d at 568 (produced water from an oil and gas well was a “chemical waste” and “industrial waste”). Other cases cited by Environmental Petitioners that discuss “pollution” also base their holdings on the terms in the definition of “pollutant,” not on water quality impacts, and this Court should do so as well. See, e.g., *Northern Plains Research Council*, 325 F.3d at 1160-61 (groundwater derived from extraction of coal bed methane was “industrial waste”).

when discharged into waters of the United States as discarded material. *Id.*,⁸ *see National Wildlife Federation v. Gorsuch*, 693 F.2d at 174 n.56 (“the haphazard nature of the listed pollutants . . . makes us reluctant to conclude that Congress intended to preclude EPA from adding unlisted items to the definition.”)

Finally, the legislative history cited by the two groups of petitioners fails to elucidate a clear congressional intent in favor of either of their positions. Neither set of petitioners identifies any statement from a congressional report or from a legislator during debate that addresses pesticides discharged from a point source directly to or over waters to control pests in or over, including near, those waters. Environmental Petitioners rely on legislative history that reveals that Congress was concerned about damage to the aquatic environment “caused by pesticides from *nonpoint* runoff.” Env’l Pet. Br. at 18 (emphasis added). This concern arises primarily from the presence of residual pesticides in runoff from agricultural operations. Such concerns do not speak directly to the regulation of pesticides applied through point sources consistent with relevant FIFRA requirements to control pests in or over waters. Moreover, the legislative statements referring

⁸ However, contrary to Environmental Petitioners’ argument, Env’l Pet. Br. at 20-21, pesticides applied to water in the two circumstances identified in the Final Rule, unlike the discharge of oil or gasoline to waters, are not reasonably classified as “refuse matter.”

generally to the adverse aquatic impacts of pesticides cannot be read to impute to Congress a clear intent to require the two pesticide applications identified in the Final Rule to obtain NPDES permits.

Industry Petitioners, on the other hand, identify as “legislative history” congressional silence on the issue since the Clean Water Act’s enactment in 1972 notwithstanding amendments to other sections of the statute during this period. Industry Pet. Br. at 32-33. Industry Petitioners do not identify any legislative history associated with passage of the Act in 1972 that addresses application of pesticides directly to or over water of the United States. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 114 (1989) (the views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one). They attempt to glean a legislative intent from congressional acquiescence, but the issue of pesticide applications to waters of the United States was never expressly raised in subsequent legislative debates and does not establish that Congress has spoken directly to the issue. *See Solid Waste Agency of Northern Cook County v. United States Army Corps of Engineers*, 531 U.S. 159, 169 (2001) (judicial recognition of congressional acquiescence to administrative interpretations must be done with extreme care); *cf. United States v. Sheffield Bd. of Comm’rs*, 435 U.S. 110, 134 (1978) (noting that legislative history reflected express approval of longstanding

administrative interpretation). When legislative history is silent, it is a neutral factor and “simply confirms the obvious, namely, that Congress did not consider the issue.” *Small v. United States*, 544 U.S. 385, 393 (2005); *United States v. Wells*, 519 U.S. 482, 496 (1997) (it is “at best treacherous to find in congressional silence alone the adoption of a controlling rule of law”).

Because Congress did not speak directly to the issue of application of pesticides to waters of the United States to control pests in or over, including near, those waters, this Court must proceed to the second step of *Chevron* and determine if EPA’s answer is based upon a permissible construction of the Act. As explained in the next section, EPA reasonably interpreted the definition of pollutant in the context of the two circumstances identified in the Final Rule.

B. EPA Reasonably Interprets the Term “Pollutant” Not to Include Pesticides Applied, Consistent with the Requirements of FIFRA, Directly to or Over Waters of the United States to Control Pests.

The Final Rule contains EPA’s interpretation of the statutory definition of “pollutant” in the context of two specific circumstances that result in the presence of pesticides in waters of the United States. The definition of “pollutant” includes 16 categories. EPA identified two categories – “chemical wastes” and “biological materials” – that potentially could encompass the types of pesticide applications addressed in the Final Rule.

EPA reasonably interprets the term “chemical wastes” in the definition of pollutant not to include pesticides applied consistent with all relevant FIFRA requirements in the two circumstances described in the Final Rule. As explained above, the ordinary meaning of the term “waste” means something that is no longer useful following completion of a process or is an excess material. *See supra* at 18. A pesticide applied consistent with relevant FIFRA requirements to address pests in or over, including near, waters is not a waste as that word is ordinarily or commonly used.

EPA’s focus on whether the pesticide is a waste is supported by Congress’ specific use of the term “chemical wastes.” Congress could have chosen to define pollutants more inclusively to encompass “chemicals” instead of “chemical wastes,” but it did not do so. All words in a statute are presumed to serve a useful purpose. *Walker v. Bain*, 257 F.3d 660, 667 (6th Cir. 2001) (every word in a statute is presumed to have meaning, and this Court will give effect to all the words to avoid an interpretation that would render words superfluous). Accordingly, the word “wastes” should be given effect. Thus, EPA’s interpretation reasonably draws a distinction between “chemicals” and “chemical wastes” in the context of pesticides applied consistent with FIFRA to perform their intended purpose of controlling pests.

The Ninth Circuit, in *Fairhurst*, found this interpretation of “chemical wastes” to be “reasonable and not in conflict with the expressed intent of Congress.” *Fairhurst*, 422 F.3d at 1149-51. In *Fairhurst*, the plaintiffs challenged a pesticide application directly to waters to kill non-native fish where the facts indicated no residual pesticide was left in the water after its application. *Id.* at 1148-49. The court, relying on the dictionary definition of “waste,” held that a pesticide that is intentionally applied to a water and leaves no excess portion is not a “chemical waste,” and thus not a pollutant. *Id.* at 1149. In reaching this conclusion, the Ninth Circuit reviewed EPA’s interpretation of “chemical wastes” (at that time, set forth in the Interim Statement and Guidance) and found it reasonable. *Id.* at 1150. EPA’s similar interpretation in the Final Rule should be upheld.

EPA also reasonably interprets the term “biological materials” not to include pesticides applied consistent with relevant FIFRA requirements in the two circumstances described in the Final Rule.²⁷ This interpretation is consistent with congressional intent and supported by relevant case law.

Congress’ use of the ambiguous phrase “biological materials” does not

²⁷ Biological pesticides include microbial entities such as bacteria, fungi, viruses, and protozoans, but not biochemical pesticides. *See* 40 C.F.R. § 158.65.

reflect an intent to include biological pesticides applied consistent with relevant FIFRA requirements within the Clean Water Act's definition of "pollutant." Biologically-based pesticides, like the chemically-based pesticides discussed above, that are applied consistent with relevant requirements adopted by EPA under FIFRA are EPA-evaluated products designed and purchased to control target organisms. Although more biological pesticides have been developed since Congress legislated the definition of "pollutant" in 1972, the greater current role of biological pesticides does not justify expanding the reach of the Clean Water Act. Congress did not evince any intent to treat the biological, as opposed to chemical, constituents of pesticides differently under the Clean Water Act. *See Good Samaritan Hosp. v. Shalala*, 508 U.S. 402, 417 (1993) (where agency's interpretation is at least as plausible as competing ones, there is little, if any, reason not to defer to its construction).

Although the term "biological materials," like the term "pollutant," is not explicitly limited to substances that are wastes, in certain circumstances it may be appropriate when determining whether a substance is a "biological material" to consider whether that substance is a waste. For example, in *Ass'n to Protect Hammersley, Eld and Totten Inlets v. Taylor*, 299 F.3d 1007, 1016 (9th Cir. 2002), the Ninth Circuit addressed whether mussel shells and other mussel byproducts

were “biological materials” and, in doing so, reasonably considered whether they were wastes. This consideration was necessary, in the Ninth Circuit’s view, because the court determined that not all biological materials are pollutants and, thus, whether a material is a waste is relevant to the statutory analysis. *Id.* at 1015, 1017. Consistent with this analysis, EPA’s interpretation of “biological materials” in the context of biological pesticides appropriately considered whether those pesticides are wastes in light of the factors discussed in the prior paragraph: (i) both biological and chemical pesticides are applied consistent with the relevant requirements of FIFRA; and (ii) it does not make sense to treat biological pesticides differently from chemical pesticides under the Clean Water Act.

EPA’s interpretation of “pollutant” does not preclude applications of a pesticide from being a waste and therefore falling within the definition of “pollutant” in circumstances other than the two described in the Final Rule. For example, pesticides applied to land but later contained in a waste stream, including storm water regulated under the Clean Water Act, could trigger the requirement of obtaining an NPDES permit if the pesticides are discharged into a water of the United States from a point source. In addition, if 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 that are no longer useful or required after the completion of a process. *See supra* at 18.

However, pesticides applied in the two circumstances described in the Final Rule and consistent with the relevant requirements of FIFRA do not require NPDES permits even if the application leaves residual materials which later become a “pollutant” in waters of the United States. This result follows from the fact that the pesticides are not “pollutants” at the time of the discharge. The Clean Water Act prohibits the “discharge of a pollutant” except in compliance with certain provisions of the Act. 33 U.S.C. § 1311(a). The “discharge of a pollutant” is defined as “any addition of any pollutant to navigable waters from any point source.” 33 U.S.C. § 1362(12). In the two circumstances addressed in the Final Rule, the pesticide is not a pollutant at the time of the discharge for the reasons explained above. *See supra* at 25-29. The pesticide may become a pollutant at a later time (*e.g.*, after the pesticide product has served its intended purpose), but a NPDES permit is not required for its application because the pesticide did not meet the definition of pollutant at the time of its discharge from a point source into the water.¹⁰

¹⁰ Instead, the residual should be treated as a nonpoint source pollutant, potentially subject to Clean Water Act programs other than the NPDES permit program and to state regulation, both of which provide effective means of

This interpretation of residuals is consistent with relevant case law, which has not based Clean Water Act liability for residual materials on the initial release of the material into the water. In *U.S. PIRG v. Atlantic Salmon of Maine*, 215 F. Supp. 2d 239, 247 (D. Me. 2002), the plaintiffs challenged operations of a salmon farm that included the release of antibiotics, pharmaceuticals, and food containing chemicals and pigments from the salmon pens. The court held that the excess or uneaten residual food and drugs that flows out of the pens *after their use* fell within the category of waste. *Id.* at 247-48. The court did not find that the initial release of food and pharmaceuticals into the water was the discharge of a pollutant from a point source that required an NPDES permit. Similarly, in *No Spray Coalition v. City of New York*, 351 F.3d 602 (2d Cir. 2003), the Second Circuit, in interpreting the concept of waste, held that “pesticides are not being discarded when sprayed into the air with the design of effecting their intended purpose:

addressing water quality problems from pesticides. For example, the Clean Water Act requires that States identify waters that do not meet applicable water quality standards. 33 U.S.C. § 1313(d). Therefore, States must continue to identify waters that exceed applicable standards where a pesticide causes or contributes to that exceedance, except in those limited circumstances in which a pesticide application covered by the Final Rule leaves no residue and is the sole cause of the exceedance. Once a water is identified as exceeding water quality standards, the State must develop a Total Maximum Daily Load for the pollutant causing the impairment (*e.g.*, pesticide residue or runoff from land applications of pesticides) as appropriate in order to achieve water quality standards for the water.

reaching and killing mosquitos and their larvae.” *Id.*, 252 F.3d 148, 150.¹¹ See also *Headwaters*, 243 F.3d at 533 (“the residual acrolein left in the water after its application qualifies as a chemical waste product and thus as a ‘pollutant’”).¹²

Contrary to Environmental Petitioners’ argument, EPA’s interpretation is not inconsistent with the Ninth Circuit’s decision in *Forsgren*. Env’l Pet. Br. at 12, 31. In *Forsgren*, the court did not interpret “pollutant” because the parties to that case did not dispute that the insecticides at issue in *Forsgren* met the definition of pollutant. 309 F.3d 1181, 1184 n.2. Instead, the issue before the Ninth Circuit in *Forsgren* was whether spraying the assumed pollutant from an aircraft was point source pollution or nonpoint source pollution. *Id.* at 1184. The Ninth Circuit held the aerial spraying was a point source. *Id.* at 1190. The Final Rule offers no interpretation of point source or nonpoint source, and so does not address the issue addressed in *Forsgren*. Rather, EPA’s interpretation, which is

¹¹ The Second Circuit offered this interpretation in the context of the Resource Conservation and Recovery Act’s definition of solid waste. The district court, on remand, applied it to the spraying of pesticides under the Clean Water Act. *No Spray Coalition, Inc. v. City of New York*, 2005 WL1354041 at *7 (S.D.N.Y. 2005).

¹² Although the Ninth Circuit remarked, in *Headwaters*, that “it would seem absurd” to conclude that a toxic chemical poured directly into water is not a pollutant, the court did not decide that issue. 243 F.3d at 532-33. The Ninth Circuit subsequently held that a pesticide directly applied to waters was *not* a pollutant. *Fairhurst*, 422 F.3d at 1149.

consistent with *Forsgren's* determination of point source, is that at the time of aerial spraying, the pesticide is not a pollutant.

Even if the Final Rule's interpretation was inconsistent in some manner with Ninth Circuit precedent, such precedent does not override EPA's interpretation in the Final Rule. A court's prior construction of a statute trumps an agency construction otherwise entitled to *Chevron* deference only if the prior court decision holds that its construction follows from the unambiguous terms of the statute and thus leaves no room for agency discretion. *National Cable & Telecommunications Ass'n v. Brand X Internet Services*, 545 U.S. 967, 982 (2005). This Supreme Court maxim follows from *Chevron*, because agencies, not courts, should fill statutory gaps; allowing a judicial precedent to foreclose an agency from interpreting an ambiguous statute would impermissibly allow a court's interpretation to override an agency's. *Id.* at 982-83. Neither *Headwaters* nor *Forsgren* held that the Clean Water Act *unambiguously* requires the court's interpretation offered in those cases. *See Headwaters*, 243 F.3d at 533 (court agreed with the district court that the residual qualifies as a chemical waste); *Forsgren*, 309 F.3d at 1184 (stating that the insecticides met the definition of pollutant based on its understanding that the parties did not dispute the question). Therefore, neither case precludes EPA's interpretation in the Final Rule.

C. EPA's Interpretation Reasonably References Compliance with FIFRA as an Appropriate Means of Giving Effect to Both FIFRA and the Clean Water Act.

When two federal statutes address the same subject, both should be given effect. *See Morton v. Mancari*, 417 U.S. 535, 551 (1974); *Trollinger v. Tyson Foods, Inc.*, 370 F.3d 602, 609 (6th Cir. 2004). Both FIFRA and the Clean Water Act address the application of pesticides to waters of the United States. Therefore, the proper approach "is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963).

EPA references compliance with relevant FIFRA requirements solely as an indication that the pesticide being applied is not a waste and, hence, not a pollutant. Under FIFRA, EPA receives applications from persons who wish to sell and distribute pesticides. EPA may approve and issue a registration for a product if EPA determines that the product will not cause "unreasonable adverse effects on the environment," which is defined as "any unreasonable risk to man or the environment, taking into account the economic, social and environmental costs and benefits of the use of [a] pesticide . . ." 7 U.S.C. § 136a(c)(5). As part of FIFRA registration, EPA may establish requirements, which are typically contained on the label for the pesticide, to ensure that when used, it will not cause

unreasonable adverse effects on the environment, including the aquatic environment. Thus, the registration and use of a pesticide in accordance with its approved labeling or other relevant FIFRA requirements indicates that a pesticide is a product intended to be used for a beneficial purposes that is authorized by EPA, and is not a waste. *See* 71 Fed. Reg. at 68,488; JA 6.

Both Environmental Petitioners and Industry Petitioners contend that compliance with FIFRA should be irrelevant to determining compliance with the Clean Water Act. The Environmental Petitioners argue, essentially, that FIFRA should not be considered when interpreting the Clean Water Act in the context of application of pesticides. In contrast, Industry Petitioners argue that *compliance* with FIFRA should not be considered, with the result that a discharge to waters that is illegal under FIFRA would have no consequences under the Clean Water Act. EPA's interpretation properly gives effect to both statutory programs.

1. The Environmental Petitioners' objections to the role of FIFRA are flawed.

Many of the Environmental Petitioners' objections to EPA's consideration of FIFRA compliance are based upon a misinterpretation of EPA's final action. Environmental Petitioners challenge the Final Rule based upon an argument that FIFRA should not displace the Clean Water Act. *Env'l Pet. Br.* at 33-37. EPA

agrees with Petitioners, and stated so in the preamble to the Final Rule. 71 Fed. Reg. at 68,488; JA 6 (“EPA is not expressly or by implication repealing any provision of the CWA in today’s action, nor is it arguing that FIFRA registration preempts CWA section 301(a) or section 402(a)”). Environmental Petitioners argue that the Clean Water Act must co-exist with FIFRA and each statute be given effect. Env’l Pet. Br. at 37-39. EPA agrees. 71 Fed. Reg. at 68,488; JA 6. Environmental Petitioners next argue that FIFRA compliance does not satisfy NPDES permit requirements because, in part, FIFRA and the Clean Water Act serve different purposes. Env’l Pet. Br. at 39-43. EPA agrees again. 71 Fed. Reg. at 68,488; JA 6 (“EPA is not arguing that registration under FIFRA or compliance with FIFRA requirements replaces or satisfies an otherwise applicable requirement under the CWA to obtain an NPDES permit”).

Further, contrary to Environmental Petitioners’ arguments, Env’l Pet. Br. at 27-31, EPA is not exempting from the Clean Water Act any category of pollutants. Pesticides applied in the two circumstances identified in the Final Rule are not and never have been pollutants. The Final Rule is not an exemption because it is not excluding from NPDES permit requirements a pollutant that at one time was or should be subject to such requirements. Although EPA placed the Final Rule in 40 C.F.R. § 122.3, which is the regulatory section entitled “Exclusions,” EPA did

so for administrative convenience. Response to Public Comments at 555; JA 213. By placing the Final Rule in this section, the various discharges not requiring NPDES permits are located in one place. *Id.* In over 30 years, EPA has never required pesticide applicants to obtain NPDES permits, because they were not covered under the Act. The formalization of that position in the Final Rule is not the adoption of an exemption.

Environmental Petitioners' argument questioning the adequacy of EPA's pesticide program is inapposite. *See* Env'l Pet. Br. at 43-49. EPA is using consistency with the relevant requirements of FIFRA solely to support its determination that the application of pesticides in the two circumstances identified in the Final Rule are not "chemical wastes" or "biological materials" for purposes of the definition of "pollutant" under the Clean Water Act. The *adequacy* of EPA's FIFRA program, however, does not pertain to that legal interpretation. *See* 71 Fed. Reg. at 68,488; Response to Public Comments at 343, JA 212 ("EPA's legal authority under FIFRA and its efforts to implement that authority do not provide the basis for today's action").

EPA's interpretation properly gives effect to both FIFRA and the Clean Water Act. Contrary to Environmental Petitioners' argument, Env'l Pet. Br. at 18-19, the existence of FIFRA at the time Congress adopted the Clean Water Act's

definition of “pollutant” makes it reasonable to assume that Congress recognized that pesticides may be discharged directly into the nation’s waters in certain circumstances consistent with the previously enacted pesticide regulatory program. *See Jones v. St. Louis-San Francisco Ry. Co.*, 728 F.2d 257, 262 (6th Cir. 1984) (when Congress enacts a new statute, it is presumed to be aware of all previously enacted statutes pertaining to the same subject). EPA’s interpretation recognizes the congressional intent reflected in both statutes and does not conflict with the policies chosen by Congress. *Cf. Env’l Pet. Br.* at 31.

2. Industry Petitioners’ argument that compliance with FIFRA is irrelevant fails to give effect to the Clean Water Act.

Industry Petitioners incorrectly argue that applications of registered pesticides directly to or over waters of the United States to control pests should never give rise to a violation of the Clean Water Act. *Industry Pet. Br.* at 21-29. EPA cannot conclude that such applications could never constitute a discharge of a pollutant. For example, applications of chemical pesticides in quantities exceeding relevant FIFRA requirements or to locations prohibited by relevant FIFRA requirements could, in certain circumstances, be deemed the discharge of a chemical waste. Discharges of chemical wastes without an NPDES permit can create liability under the Clean Water Act.

