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Plain Language Interpretation Gone Awry: The New Paradigm of Pesticides, Water Pollution, and the Inefficient, Ineffective Overlap of Statutory Schemes

*National Cotton Council of America v. EPA*¹

I. INTRODUCTION

Water, a relatively straightforward molecule that consists of one part oxygen and two parts hydrogen, has an unquantifiable value that belies the simplicity of its chemical structure. However, despite the fact that water is essential to the survival of all known forms of life, humankind often mistreats and takes for granted perceived abundant sources of this valuable substance. Yet, “[w]hen the well’s dry,” as Benjamin Franklin aptly stated, “we know the worth of water.”²

In the late 1960’s, our “well” – the Nation’s navigable waterways – while not dry, was severely polluted. In 1969, an oil spill off the coast of Santa Barbara, California and the heavily polluted Cuyahoga River catching fire as it flowed through Cleveland, Ohio, thrust the state of the Nation’s waterways into the national spotlight.³ In 1970 and 1971, due to increasing public environmental awareness, the Subcommittee on Air and Water Pollution, under the Senate Committee on Public Works, began public hearings to address the need to overhaul the existing Federal Water Pollution Control Act of 1948.⁴ These efforts culminated into the Federal Water Pollution Control Amendments of 1972 – more commonly known today as the Clean Water Act (hereinafter “the CWA”).⁵

This note investigates the scope of the CWA and whether it extends National Pollutant Discharge Elimination System (hereinafter “NPDES”) permitting requirements to pesticides, which are separately regulated under the Federal Insecticide, Fungicide, and Rodenticide Act

¹ 553 F.3d 927 (6th Cir. 2009).

² BENJAMIN FRANKLIN, POOR RICHARD’S ALMANACK 14 (Skyhorse Publ’g 2007).

³ JOEL M. GROSS & LYNN DODGE, CLEAN WATER ACT 6 (2005).

⁴ *Id.* at 6-7.

⁵ See Federal Water Pollution Control Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816 (codified as amended at 33 U.S.C. §§ 1251-1387 (2006)).

(hereinafter "FIFRA"). In the face of mounting confusion concerning the possibility of statutory overlap,⁶ the Environmental Protection Agency (hereinafter "EPA"), which administers both statutes, issued a rule concluding that pesticides applied in accordance with FIFRA are exempt from the CWA's permitting requirements (hereinafter "Final Rule").⁷ Yet upon review, the United States Court of Appeals for the Sixth Circuit held that EPA's Final Rule ignored the plain language of the CWA, and consequently vacated the rule.⁸

The significance of this decision demands critical review. While under a plain-meaning analysis of the relevant provisions, the court was likely correct, its decision conspicuously lacked any statutory contextual analysis that may have been warranted and could have led to an alternative outcome. Furthermore, while a victory for environmentalists, this decision will certainly have negative ramifications for human health and, ironically, the environment.

II. FACTS AND HOLDING

On November 27th, 2006, under EPA's authority to promulgate regulations consistent with the mandates of the CWA, EPA implemented its Final Rule.⁹ Timely petitions for review were filed by two groups of petitioners, "Industry Petitioners" and "Environmental Petitioners."¹⁰ A third group, "Industry Intervenors," filed a motion to intervene in the action in support of EPA's Final Rule.¹¹

Environmental Petitioners challenged the legitimacy of the following aspects of EPA's Final Rule: 1) that EPA exceeded its authority under the CWA when it issued its Final Rule excluding pesticides; 2) that

⁶ See discussion *infra* Part III.B., para. 1.

⁷ See Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68,483 (Nov. 27, 2006).

⁸ *Nat'l Cotton Council*, 553 F.3d at 940.

⁹ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,483.

¹⁰ *Nat'l Cotton Council*, 553 F.3d at 932. These petitions were filed in the First, Second, Third, Fourth, Fifth, Sixth, Seventh, Eighth, Ninth, Tenth, and D.C. Circuits, but were consolidated in the Sixth Circuit by order of the Judicial Panel on Multidistrict Litigation under 28 U.S.C. §§ 1407 and 2112(a)(3) (2006). *Id.*

¹¹ *Id.*

EPA exceeded its authority by characterizing excess pesticide and pesticide residue as a “nonpoint source pollutant”; and 3) that EPA may not exempt applications of pesticides that are compliant with FIFRA from the permitting requirements of the CWA.¹² Industry Petitioners, on the other hand, claimed that the Final Rule is arbitrary and capricious because it treats FIFRA-compliant applications of pesticides as non-pollutants, but treats the very same pesticides as pollutants if applied in violation of FIFRA.¹³ Upon review, the Sixth Circuit held 1) that the Final Rule properly characterizes excess chemical pesticide and chemical pesticide residue, rather than all chemical pesticides, as “pollutants” under the CWA; 2) that the Final Rule improperly excludes biological pesticides from coverage as “pollutants” under the CWA; and 3) that the Final Rule’s mandate that excess pesticide and pesticide residue are “nonpoint source pollutants” and, therefore, exempt from NPDES permitting requirements, is improper.¹⁴ Since the court found that the CWA foreclosed the Final Rule, the court declined to address the Industry Petitioner’s petitions; and for the foregoing reasons, the court vacated the Final Rule.¹⁵

III. LEGAL BACKGROUND

A. *Statutory and Regulatory Framework: The Clean Water Act and the Federal Insecticide, Fungicide, and Rodenticide Act*

When Congress enacted the CWA, it outlined an initiative to restore and preserve the chemical, physical, and biological composition of the Nation’s waterways.¹⁶ To achieve this end, the CWA employs a blanket prohibition against the “discharge of any pollutant.”¹⁷ The Act defines “discharge of any pollutant” as 1) the addition of any pollutant¹⁸

¹² *Id.* at 934.

¹³ *Id.*

¹⁴ *Id.* at 940.

¹⁵ *Id.*

¹⁶ 33 U.S.C § 1251(a) (2006).

¹⁷ *See id.* § 1311(a).

¹⁸ The CWA defines “pollutant” as including, but most relevant here, “chemical wastes,” and “biological materials.” *Id.* § 1362(6).

by a point source¹⁹ to navigable waters,²⁰ or 2) “any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.”²¹ However, if an entity wishes to discharge a pollutant in a manner that would bring the discharge within the purview of the CWA, EPA, or a state agency that has received EPA authorization, it may be able to do so through the issuance of a NPDES permit.²² Such a permit may be granted if EPA determines that the discharge of the pollutant in question is conducted in a manner consistent with the provisions of the CWA.²³

Under EPA’s regulatory framework, the NPDES permitting process may be conducted on an individual, case-by-case basis.²⁴ Initially, if EPA tentatively decides to accept a permit application, it will issue a draft permit.²⁵ The permitting process is then subject to a thirty-day period for public comment, as well as a potential public hearing in the event that there is a “significant degree of public interest” in the draft permit at issue.²⁶ When EPA reaches a decision, that decision becomes effective after 30 days unless review is requested.²⁷ If a review is requested, the effect of a contested permit is stayed pending EPA action on the appeal.²⁸

¹⁹ The CWA defines “point source” as “any discernible, confined and discrete conveyance” *Id.* § 1362(14).

²⁰ The CWA defines “navigable waters” as “the waters of the United States, including the territorial seas.” *Id.* § 1362(7). EPA provides a definitional list of seven categories of “waters of the United States.” *See* 40 C.F.R. § 122.2 (2008). Yet, while Congress intended the term “navigable water” to be given “the broadest possible constitutional interpretation unencumbered by agency determinations,” S. REP. NO. 92-1236, at 144 (1972) (Conf. Rep.), *reprinted in* 1972 U.S.C.C.A.N. 3776, 3822, discharges of pollution into groundwater do not fall within the purview of the CWA, *Exxon Corp. v. Train*, 554 F.2d 1310, 1329 (5th Cir. 1977).

²¹ 33 U.S.C § 1362(12).

²² *Id.* § 1342(a).

²³ *Id.*

²⁴ 40 C.F.R. § 124.1(f).

²⁵ *Id.* § 124.6(c).

²⁶ *Id.* §§ 124.10(b), 124.12(a)(1).

²⁷ *Id.* § 124.15(b).

²⁸ *Id.* §§ 124.16, 124.19.

NPDES permits may be granted on a general basis as well. General permits are designed to cover one or more categories or subcategories of discharges produced by covered sources within a specified area.²⁹ In general, the same rules governing the issuance, modification, revocation, and termination of NPDES individual permits also apply to general permits.³⁰

FIFRA, the second statute that is relevant for the purposes of this note, is the authority under which EPA regulates the sale, distribution, and use of pesticides.³¹ For a pesticide to be registered under FIFRA, EPA must consider the potential effects of the pesticide, specifically, whether it achieves its function through conventional usage without an unreasonable adverse effect on the environment.³² For pesticides that are registered, FIFRA employs a uniform pesticide labeling system that indicates the specified uses of a particular pesticide that has received government approval.³³ Furthermore, under FIFRA, even once a pesticide has been registered, a registrant has a duty to report any adverse effects of a pesticide that come to the registrant's attention.³⁴

B. *The Regulation at Issue: EPA's Final Rule Regarding the Application of Pesticides to Waters of the United States in Compliance with FIFRA*

According to EPA in its Final Rule, the confluence of the CWA and FIFRA regulatory schemes has led to confusion among the regulated community regarding permit requirements for pesticides applied to United States' waterways.³⁵ This confusion is underscored by the holdings of a handful of Ninth Circuit cases. On one hand, the court in *Headwaters, Inc. v. Talent Irrigation District*³⁶ and *League of Wilderness Defenders v.*

²⁹ *Id.* § 122.28(a)(1)-(a)(2).

³⁰ *See id.* § 122.28(b)(1).

³¹ *See* 7 U.S.C. § 136a (2006).

³² *Id.* § 136a(c)(5).

³³ *Id.* § 136a(c)(9), (d).

³⁴ *Id.* § 136d(a)(2).

³⁵ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68,483, 68,485 (Nov. 27, 2006).

³⁶ 243 F.3d 526 (9th Cir. 2001).

*Forsgren*³⁷ held that NPDES permits are required for the application of herbicides and pesticides to control gypsy moths, respectively.³⁸ These rulings prompted some Ninth Circuit states, such as California, Nevada, Oregon, and Washington, to issue general NPDES permits, while others have continued the established practice of not issuing such permits to those who apply pesticides in compliance with FIFRA.³⁹ Further ambiguity arose when the court held in *Fairhurst v. Hagener*⁴⁰ that pesticides meant to eliminate non-native fish from a lake, and applied in a manner not resulting in residue or unintended effects, are not pollutants under the CWA.⁴¹

In an effort to dispel such ambiguity, EPA issued an Interim Statement that outlined the agency's position that pesticides applied to waters of the United States in accordance with FIFRA are not pollutants under the CWA.⁴² This guidance was followed by EPA's Final Rule that revised 40 C.F.R. § 122.3⁴³ to exclude applications of pesticides, which are applied consistently with the requirements of FIFRA, from NPDES permitting requirements.⁴⁴ To reach this conclusion, EPA opined that pesticides can neither be defined as "chemical waste" nor as "biological materials" for the purposes of the CWA.⁴⁵ However, the Final Rule did

³⁷ 309 F.3d 1181 (9th Cir. 2002).

³⁸ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,485.

³⁹ *Id.* For example, four months after the Headwaters decision, the state of California granted General Permit No. CAG990003 to authorize the application of aquatic pesticides for pest management, which, according to the California State Water Resources Control Board, was issued on an emergency basis "[b]ecause of the serious public health, safety and economic implications of delay" Statewide General National Pollutant Discharge Elimination System (NPDES) Permit for Discharges of Aquatic Pesticides to Surface Waters of the United States (General Permit), Order No. 2001-12-DWQ, 2001 Cal. ENV LEXIS 12, at *1 (Cal. State Water Res. Control Bd. July 19, 2001).

⁴⁰ 422 F.3d 1146 (9th Cir. 2005).

⁴¹ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,485.

⁴² *Id.*

⁴³ See 40 C.F.R. § 122.3(h) (2008).

⁴⁴ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,485.

⁴⁵ *Id.* at 68,486-87.

not make such an exception for pesticide residuals, which, EPA conceded, comprise wastes of the pesticide application process.⁴⁶ Nonetheless, EPA contends that pesticide residue is a “nonpoint source pollutant” and is, therefore, like pesticides generally, not subject to NPDES permitting requirements under the CWA.⁴⁷

C. *Procedural Framework: The Chevron Doctrine and the Administrative Procedure Act*

In the instant case, the court is required to review EPA’s Final Rule under the doctrine promulgated in *Chevron U.S.A., Inc. v. NRDC*.⁴⁸ Under this doctrine, a reviewing court must first determine whether Congress has directly addressed the particular question under review.⁴⁹ If the intent of Congress is clear, then the reviewing court, as well as the agency, must give effect to the will of Congress.⁵⁰ However, if Congress has promulgated an ambiguous statute, an express delegation of authority to the agency results, unless under the second step of the *Chevron* doctrine the court determines that the agency’s interpretation constitutes an impermissible construction of the statute in question.⁵¹

To determine whether an agency’s interpretation of an ambiguous statute is permissible, the court must look to the standards provided in the Administrative Procedure Act.⁵² The Administrative Procedure Act requires courts to invalidate agency actions, findings, and conclusions that are ruled to be “arbitrary, capricious, an abuse of discretion, or otherwise

⁴⁶ *Id.* at 68,487.

⁴⁷ *Id.*

⁴⁸ *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 933 (6th Cir. 2009) (citing 467 U.S. 837 (1984)).

⁴⁹ *Chevron*, 467 U.S. at 842.

⁵⁰ *Id.* at 842-43. To determine the intent of Congress, a reviewing court should not consider a particular statutory provision in isolation, but should elicit meaning by reviewing the provision in context. *Nat’l Ass’n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007).

⁵¹ *Chevron*, 467 U.S. at 843-44.

⁵² *See* 5 U.S.C. § 706(2) (2006).

not in accordance with law.”⁵³ The Supreme Court has interpreted agency decisions as “arbitrary and capricious” when:

[T]he agency has relied on factors that Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency experience.⁵⁴

Ultimately, an agency must show that it has examined relevant data in its interpretation and presented a satisfactory explanation for its decision that includes a rational link between the facts and the choice made.⁵⁵

IV. INSTANT DECISION

A. *Pesticides Qualify as “Pollutants” Within the Meaning of the CWA*

In response to Environmental Petitioners’ first argument that EPA exceeded its authority under the CWA by promulgating a rule excluding pesticides from the “pollutant” definition under the Act, EPA contended that the CWA’s definitional scheme is ambiguous as to pesticides.⁵⁶ However, of the sixteen items characterized as pollutants within the CWA, EPA conceded that “chemical wastes” and “biological materials” are the only likely candidates that *could* encompass pesticides.⁵⁷ Therefore, under *Chevron*, the court attempted to analyze the plain meaning of these listings in an effort to determine whether Congress’s intent was clear in regards to pesticides.⁵⁸

⁵³ *Id.* § 706(2)(A).

⁵⁴ *Motor Vehicle Mfrs. Ass’n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

⁵⁵ *Id.*

⁵⁶ *Nat’l Cotton Council of Am. v. EPA*, 553 F.3d 927, 934 (6th Cir. 2009).

⁵⁷ *Id.* at 934-35.

⁵⁸ *Id.* at 935.

1. Chemical-Based Pesticides as “Chemical Waste”

In its attempt to define “chemical waste,” the court first turned to several dictionary definitions⁵⁹ of “waste,” which included source material from *The New Oxford American Dictionary*, *Black’s Law Dictionary*, and *The American Heritage Dictionary*.⁶⁰ From these definitions, the court concluded that “chemical waste” includes “discarded” chemicals, “superfluous” chemicals, or “refuse or excess” chemicals for the purposes of the CWA.⁶¹ Therefore, if a chemical pesticide is intentionally applied to water in order to perform a useful purpose and does not leave any excess upon completion of its purpose, then it is not “chemical waste” and does not require an NPDES permit.⁶²

As for situations where excess pesticide and/or pesticide residue persist after a given pesticide has run its intended course, EPA conceded that such pesticide remnants meet the definition of “waste” and that EPA’s Final Rule reflects this interpretation.⁶³ Under this standard, the court noted that chemical pesticides may qualify as pollutants under the CWA in the following two situations: 1) when pesticide is applied in a non-aquatic setting, but finds its way into the navigable waters of the United States; and 2) when pesticide is applied directly and purposefully to navigable waters to serve a beneficial purpose and pesticide residue remains in the water after the completion of the pesticide’s purpose.⁶⁴ According to the

⁵⁹ Citing canons of construction, the court noted that a word in a statute should be given its “ordinary, contemporary, common meaning, absent an indication Congress intended [it] to bear some different import.” *Id.* at 936 (citing *Grand Traverse Band of Ottawa & Chippewa Indians v. Office of U.S. Attorney*, 369 F.3d 960, 967 (6th Cir. 2004)).

⁶⁰ *Id.* The court noted that “waste” has been defined as “eliminated or discarded as no longer useful or required after the completion of a process,” *id.* (quoting *THE NEW OXFORD AMERICAN DICTIONARY* 1621 (2001)); “[r]efuse or superfluous material, esp. that after a manufacturing or chemical process,” *id.* (quoting *BLACK’S LAW DICTIONARY* 1621 (8th ed. 2004)); and “any useless or worthless byproduct of a process or the like; refuse or excess material,” *id.* ((quoting *N. Plains Res. Council v. Fidelity Exploration & Dev. Co.*, 325 F.3d 1155, 1161 (9th Cir. 2003) (quoting *THE AMERICAN HERITAGE DICTIONARY* 1447 (1979))).

⁶¹ *Id.*

⁶² *Id.* (citing *Fairhurst v. Hagener*, 422 F.3d 1146, 1149 (9th Cir. 2005)).

⁶³ *Id.*

⁶⁴ *Id.* at 936-37.

court, the second situation presents a regulatory quandary where both non-waste aqueous pesticides, which are not subject to CWA limitations, and pesticide residue, which meet the CWA's "pollutant" definition, are applied to water at the same moment.⁶⁵ However, according to the court, this kind of situation does not pose much of a practical problem because EPA and industry experience with chemical pesticides is sufficient to devise a regulatory scheme for pesticides that result in chemical residue.⁶⁶

2. Biological-Based Pesticides as "Biological Materials"

As with "chemical waste," the court continued its analysis by determining whether the plain meaning of "biological materials" as listed within the CWA encompassed biological pesticides.⁶⁷ Again, citing dictionary references,⁶⁸ the court concluded that the text of the statute is unambiguous.⁶⁹ However, EPA disagreed with the court's conclusion, citing precedent that the term "biological material" had been found ambiguous and that some biological material, specifically, mussel shells and mussel byproducts, had been judged as not constituting pollution under the CWA.⁷⁰ In response, the court noted that the precedent cited by EPA, while distinguishable, applies to a definitional analysis of the "outermost bounds" of "biological materials" rather than to the more

⁶⁵ *Id.* at 937.

⁶⁶ *Id.* For example, the chemical antimycin leaves no residue after completing its intended function and, therefore, does not need to be regulated under the CWA. *See Fairhurst v. Hager*, 222 F.3d 1146, 1149 (9th Cir. 2005).

⁶⁷ *Nat'l Cotton Council*, 553 F.3d at 937-38.

⁶⁸ The court refers to WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY OF THE ENGLISH LANGUAGE, UNABRIDGED 1392 (1993), which defines "material" as "of, relating to, or consisting of matter" and "the basic matter from which the whole or the great part of something is made"; and the Oxford English Dictionary Online – material, adj., n. and adv. (Draft Revision June, 2009), <http://dictionary.oed.com> (search for "material"), which defines "material" as "that which constitutes the substance of a thing (physical or nonphysical); a physical substance; a material thing." *Id.* at 937.

⁶⁹ *Id.*

⁷⁰ *Id.*; *see Ass'n to Protect Hammersley, Eld & Totten Inlets v. Taylor*, 299 F.3d 1007, 1016 (9th Cir. 2002) (noting that the CWA is "ambiguous on whether 'biological materials' means *all* biological matter regardless of quantum and nature").

limited analysis of its ordinary meaning.⁷¹ According to the court, interpreting the ordinary meaning of “biological material” to exclude biological pesticides would be contrary to the intent of Congress, which purposefully drafted the CWA to include “material” following “biological” as opposed to a more limited term such as “waste” as is used to signify pollution of a chemical nature.⁷²

Furthermore, to bolster its interpretation, the court cited precedent of its own that, while not addressing issues regarding biological pesticides, supported the court’s contention that biological pesticides constitute “biological material.”⁷³ Ultimately, the court reasoned that like the material at issue in these prior cases, biological pesticides, in addition to meeting the definition for “biological material,” result in effects consistent with the following general definition for “pollutant” found within the CWA: “the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.”⁷⁴ The court concluded that, consistent with this definition, biological pesticides undeniably alter the biological integrity of water.⁷⁵ Therefore, biological pesticides constitute a type of aqueous pollution; specifically, “biological materials,” under the CWA.⁷⁶

⁷¹ *Nat’l Cotton Council*, 553 F.3d at 937-38.

⁷² *Id.* at 938.

⁷³ *Id.*; see *National Wildlife Federation v. Consumer Power Co.*, 862 F.2d 580, 583 (6th Cir. 1988) (“Millions of pounds of live fish, dead fish and fish remains annually discharged in Lake Michigan . . . are pollutants within the meaning of the [CWA], since they are ‘biological materials.’”); *United States Pub. Interest Research Group v. Atl. Salmon of Me.*, 215 F. Supp. 2d 239, 247 (D. Me. 2002) (citing *Higbee v. Starr*, 598 F. Supp. 323, 330-31 (D. Ark. 1984)) (“[S]almon feces and urine that exit the net pens and enter the waters are pollutants as they constitute ‘biological material’ or ‘agricultural wastes.’”).

⁷⁴ *Nat’l Cotton Council*, 553 F.3d at 938.

⁷⁵ *Id.*

⁷⁶ *Id.*

B. *Chemical Pesticide Residuals are Added to Waterways by "Point Sources"*

EPA's second argument in defense of its Final Rule that pesticides should not be regulated under the CWA was that excess pesticide and pesticide residue are not discharged from a "point source."⁷⁷ EPA reasoned that excess and residual pesticide is not discharged from a "point source" because upon discharge there is only pesticide.⁷⁸ According to EPA, since excess and residual pesticides do not exist until after discharge, such pesticides should be treated as emanating from "nonpoint sources."⁷⁹

The court disagreed, stating that the CWA does not include a temporal requirement that a discharged chemical pesticide must immediately cause harm to be characterized as coming from a "point source."⁸⁰ According to the court, EPA's interpretation ignored the CWA's directive to protect water quality by omitting discharges from the permitting program that are innocuous at the time of discharge, but are extremely harmful at a subsequent point.⁸¹ Rather, the court noted that all that is required for a pollutant to be considered as emanating from a "point source" is that the discharge comes from a "discernible, confined, and discrete conveyance."⁸²

V. COMMENT

A. *Biological Versus Chemical Pesticides: Is the Statutory Distinction Nonsensical?*

Given the broadness of the terms "biological material" and "chemical waste" found within the CWA's definition for "pollutant," and the Sixth Circuit's reliance on the dictionary definitions of the terms, it

⁷⁷ *Id.* at 938-39.

⁷⁸ *Id.* at 938.

⁷⁹ *Id.* at 938-39.

⁸⁰ *Id.* at 939.

⁸¹ *Id.*

⁸² *Id.* (citing 33 U.S.C. § 1362(14) (2006)).

was likely difficult for the court to reach a conclusion other than that pesticides fall within the mandates of the CWA. However, the court's interpretation of the CWA peculiarly defines biological pesticides - in all manifestations - as "pollutants," while chemical pesticides only meet the definition if applied in an excess or residual manner.⁸³ Did Congress intend this distinction? Does it even make sense?

In its Final Rule, EPA cited this abnormality in defense of its decision not to generally classify pesticides as pollutants.⁸⁴ It is debatable whether it was likely when the CWA was drafted in 1972 that Congress considered biological pesticides in drafting its definition for "pollutant."⁸⁵ Yet, whether intended or not, such a distinction in regulatory schemes that burden the dischargers of biological pesticides more than those of chemical pesticides "would not make sense" considering that biological pesticides are widely considered to have fewer adverse environmental consequences than chemical pesticides.⁸⁶ In addition, biological pesticides do not enjoy the widespread use of chemical pesticides.⁸⁷ With these considerations in mind, the burdensome imposition of more stringent

⁸³ See discussion *supra* Part IV.A.1-2.

⁸⁴ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. 68,483, 68,486-87 (Nov. 27, 2006).

⁸⁵ Compare *id.* at 68,486 ("[A]t the time the [CWA] was adopted in 1972, chemical pesticides were predominant. It is therefore not surprising that Congress failed to discuss whether biological pesticides were to be covered by the Act.") with Final Opening Brief of Environmental Petitioners at 14-15, *Nat'l Cotton Council*, 553 F.3d 927 (No. 06-4630), 2007 WL 5117920 ("[T]he congressional purpose was to identify expansively and anticipate all the physical 'stuff' that could end up in the wrong place to the detriment of water quality." (quoting *Sierra Club, Lone Star Chapter v. Cedar Point Oil Co.*, 73 F.3d 546, 565-66 (5th Cir. 1996))).

⁸⁶ Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,486. According to EPA, biological pesticides, which are derived from natural materials including animals, plants, bacteria, and certain minerals, are less toxic, better at affecting the target pest, and are more effective in avoiding pollution issues than chemical pesticides. EPA.gov, What are Biopesticides?, <http://www.epa.gov/pesticides/biopesticides/whatarebiopesticides.htm> (last visited Sept. 3, 2009).

⁸⁷ In 2004, it was estimated that twenty-six billion dollars is spent per year on chemical pesticides while only 300 million is spent on biological pesticides. Daniela Muhawi, *Safe Pesticides?*, ECOWORLD, June 25, 2004, <http://ecoworld.com/features/2004/06/25/safe-pesticides/>.

permitting requirements on users of biological pesticides would be inconsistent with the goals of the CWA because it would encourage the use of more environmentally deleterious chemical pesticides.⁸⁸

In contrast, EPA's administration of FIFRA employs a logical registration scheme that rewards biological pesticide use. According to EPA, since biological pesticides pose fewer risks than chemical pesticides, less technical data is needed for registration, which results in shorter registration periods than for chemical pesticides.⁸⁹ Furthermore, EPA encourages the use of biological pesticides through the Pesticide Environmental Stewardship Program, which provides assistance and funding opportunities to pesticide users who reduce pesticide risk through methods including, but not limited to, the use of biological pesticides.⁹⁰

In light of the benefits of biological pesticides, EPA's incentives under FIFRA make sense. Not only does the CWA offer no such incentives, but also it irrationally penalizes the use of biological pesticides by providing no NPDES permit exception for use not resulting in excess. Regardless of the plain language of the CWA, Congress could not possibly have intended or envisioned the Sixth Circuit's interpretation of the "pollutant" provision of the CWA and the Sixth Circuit should have taken this into account in its statutory interpretation.⁹¹ If the court, realizing the incongruous result of its interpretation, took extra-textual factors into account, it may have instead found that the CWA is ambiguous as to

⁸⁸ See Application of Pesticides to Waters of the United States in Compliance with FIFRA, 71 Fed. Reg. at 68,486-87.

⁸⁹ What are Biopesticides?, *supra* note 86. Specifically, while it takes chemical pesticides on average more than three years to obtain registration, biological pesticides are often registered in less than a year. *Id.*

⁹⁰ EPA.gov, About PESP, <http://www.epa.gov/oppbppd1/pep/about.htm> (last visited Sept. 3, 2009).

⁹¹ See, e.g., Final Brief of Respondent United States Environmental Protection Agency at 44, Nat'l Cotton Council of Am. v. EPA, 553 F.3d 927 (No. 06-4630), 2007 WL 5117921 (quoting 117 CONG. REC. 38,839 (1971)) ("Senator Muskie, one of the primary sponsors of the [CWA], when asked whether a particular discharge would be regulated under the [CWA], stated: "we get back to what a 'pollutant' is under a particular set of circumstances. I cannot interpret all of the circumstances. The Administrator can do so."").

whether “pollutant” was meant to include pesticides.⁹² This analysis would, of course, lead the court to the second step of the *Chevron* analysis.⁹³ EPA would likely have passed that step as it has shown that the CWA would characterize biological and chemical pesticides irrationally and that this observation is rationally related to the exclusion of pesticides from CWA coverage in certain circumstances.

B. The Requirement of NPDES Permits for Certain Pesticide Applications: A Cumbersome and Potentially Dangerous Regulatory Scheme

While the incongruity of the CWA and FIFRA’s permitting requirements should be addressed, the Sixth Circuit’s opinion raised an even more fundamental question concerning the regulation of pesticides. From a policy standpoint, are two separate permitting schemes necessary, or even advisable, for the management of pesticides affecting our Nation’s waters? Considering that pesticides are utilized to combat everything from pests that have the potential to spread disease, such as West Nile Virus, to pests that can decimate our food supply, the short answer is “no.” The concern over such detrimental environmental and human health consequences was one of the primary reasons that EPA sought to clarify the issue.⁹⁴ Such apprehension centers on the consequences of a dual-permitting scheme that could substantially limit the use of pesticides to control disease-spreading insects, pests that infest forests and promote

⁹² See *Public Citizen v. U.S. Dept. of Justice*, 491 U.S. 440, 455 (1989) (quoting *Boston Sand & Gravel Co. v. U.S.*, 278 U.S. 41, 48 (1928)) (“Looking beyond the naked text for guidance is perfectly proper when the result it apparently decrees is difficult to fathom or where it seems inconsistent with Congress’ intention, since the plain-meaning rule is ‘rather an axiom of experience than a rule of law, and does not preclude consideration of persuasive evidence if it exists.’”).

⁹³ See discussion *supra* Part III.C., para. 2.

⁹⁴ See *Application of Pesticides to Waters of the United States in Compliance with FIFRA*, 71 Fed. Reg. 68,483, 68,485 (Nov. 27, 2006) (stating that the prospect of pesticides requiring NPDES permits in addition to FIFRA permits elicited fear and uncertainty among public health officials and natural resource managers concerning the impact of such a requirement on their abilities to adequately protect human health and the environment).

forest fires, noxious weeds that disrupt irrigation, and potentially devastating weed and insect infestations that threaten our food supply.⁹⁵

Given the administrative hurdles required to obtain an NPDES permit, such trepidation appears justified.⁹⁶ Protracted regulatory requirements will result in states or EPA taking up to several months to issue an NPDES permit for a single pesticide application.⁹⁷ Furthermore, as the permit review process presently stands, EPA and the states are not equipped to handle the increase in permits that will result if or when NPDES permits begin to be filed for the use of pesticides.⁹⁸ For the foregoing reasons, individual NPDES permitting requirements, if imposed upon pesticide users, would prove unviable under the current regulatory framework.

An alternative espoused by Environmental Petitioners in their opening brief is the ability of states and EPA to devise generalized NPDES permitting schemes.⁹⁹ This suggestion is strengthened by the fact that a handful of states have issued a few general permits for the use of aquatic pesticides.¹⁰⁰ However, while this may be a viable option, concern has been expressed that recent court decisions – including *Waterkeeper Alliance, Inc. v. EPA*¹⁰¹ and *Environmental Defense Center, Inc. v. EPA*¹⁰² – have weakened the ability of general permits to be viable mechanisms to ensure regulatory approval of pest control activities.¹⁰³ By invalidating NPDES regulations for failure to require agency approval and public participation, these cases threaten the ability of a permitting agency

⁹⁵ Final Brief of Intervenor-Respondents at 53, *Nat'l Cotton Council*, 553 F.3d 927 (Nos. 06-4630, 07-3180-3187, 07-3191, 07-3236), 2007 WL 5117922.

⁹⁶ See discussion *supra* Part III.A., para. 2.

⁹⁷ See Final Brief of Intervenor-Respondents, *supra* note 95, at 54.

⁹⁸ *Id.* To put this issue into perspective, as of 2005, EPA had an NPDES permit backlog of 1,120 major permits and 9,386 minor permits. *Id.* (citing OFFICE OF INSPECTOR GEN., U.S. EPA, EVALUATION REPORT: EFFORTS TO MANAGE BACKLOG OF WATER DISCHARGE PERMITS NEED TO BE ACCOMPANIED BY GREATER PROGRAM INTEGRATION, REPORT NO. 2005-P-00018, at 5 (2005), available at <http://www.epa.gov/oig/reports/2005/20050613-2005-P-00018.pdf>).

⁹⁹ Final Opening Brief of Environmental Petitioners, *supra* note 85.

¹⁰⁰ See *supra* note 39 and accompanying text.

¹⁰¹ 399 F.3d 486 (2d Cir. 2005).

¹⁰² 344 F.3d 832 (9th Cir. 2003).

¹⁰³ Final Brief of Intervenor-Respondents, *supra* note 95, at 56-59.

to establish broad operational requirements without time intensive agency and public review, which will thereby threaten to postpone the ability of a discharger to gain timely coverage.¹⁰⁴ Furthermore, these cases may be the opening act in a jurisprudential trend that could invalidate the essential traits of NPDES general permitting that makes such permits an efficient alternative to individual permits.¹⁰⁵

C. *The Hazards of Pesticides in Our Nation's Waters: Is FIFRA Enough?*

Opponents of an NPDES permitting requirement for pesticides not only decry its potential adverse consequences for human health and the environment, but also assert that FIFRA is sufficiently capable of effectively regulating pesticides that end up in the Nation's water supply.¹⁰⁶ However, despite FIFRA registration requirements, why are there dangerous levels of pesticides in our Nation's waters? According to a survey conducted by EPA, the herbicide atrazine was the second most frequently detected pesticide in drinking water wells and is often found in concentrations above safe levels, as determined by EPA as three parts per billion, in several states, including Delaware, Illinois, Indiana, Iowa, Kansas, Michigan, Minnesota, Missouri, Nebraska, and New York.¹⁰⁷ Recent studies have linked atrazine, among other herbicides and pesticides found in water supplies, to various health and environmental problems.¹⁰⁸

¹⁰⁴ *Id.* at 58.

¹⁰⁵ *See id.* at 59.

¹⁰⁶ *See, e.g.,* Meghan Rhatigan, *Legislation Overlap: Should the Clean Water Act or the Federal Insecticide, Fungicide and Rodenticide Act Prevail when Pesticides End Up in U.S. Waters?*, 79 NOTRE DAME L. REV. 2183, 2206-08 (2004).

¹⁰⁷ Consumer Factsheet on: Atrazine, <http://www.epa.gov/safewater/pdfs/factsheets/soc/atrazine.pdf> (last visited Sept. 3, 2009). Approximately seventy-six million pounds of atrazine is discharged in the United States per year. Edward Walsh, *EPA Stops Short of Banning Herbicide*, WASH. POST, Feb. 1, 2003, at A14.

¹⁰⁸ For example, a recent study found a correlation between the poor semen qualities of men residing in Boone County, Missouri (relative to men living in the urban centers of New York, Los Angeles, and Minneapolis) and exposure to pesticides, including atrazine, in local drinking water. Shanna H. Swan et al., *Semen Quality in Relation to Bio-markers*

This data suggests that FIFRA registration does not adequately protect against disruptive amounts of pesticide water contamination. In fact, some commentators have suggested that FIFRA requires revision because of its focus on economic efficiency as opposed to a focus on reducing environmental and human risks.¹⁰⁹

However, even though FIFRA may be deficient, the imposition of NPDES permitting requirements on pesticide users will not necessarily cure this problem. The unsettling reality is that the CWA does not cover all types of water sources.¹¹⁰ Significantly, the CWA's "navigable water" coverage does not include ground water, which is a common source of pesticide contamination.¹¹¹ As a result, fifty percent of the Nation's drinking water is not covered by the CWA.¹¹² Of even greater consequence, in the Nation's agricultural areas where pesticides are most often used, as much as ninety-five percent of the population relies on ground water.¹¹³ In light of these facts, NPDES permits are not the right solution to the problem of the accumulation of deadly pesticides, like atrazine, in the water supplies that humans use and enjoy on a daily basis.¹¹⁴

of Pesticide Exposure, 111 ENVTL. HEALTH PERSPECTIVES 1478, 1478 (2003), available at <http://www.ehponline.org/members/2003/6417/6417.html>.

¹⁰⁹ E.g., Mary J. Angelo, *The Killing Fields: Reducing the Causalities in the Battle Between U.S. Species Protection Law and U.S. Pesticide Law*, 32 HARV. ENVTL L. REV. 95, 138-39 (2008).

¹¹⁰ See *supra* note 20.

¹¹¹ See generally USGS.gov, Pesticides in Ground Water, <http://ga.water.usgs.gov/edu/pesticidesgw.html> (last visited Sept. 3, 2009) ("Pesticides can reach water-bearing aquifers below ground from applications onto crop fields, seepage of contaminated surface water, accidental spills and leaks, improper disposal, and even through injection waste material into wells.").

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ This comment is not meant to suggest that pesticides do not find their way into bodies of water that are covered by the CWA. On the contrary, such contamination is quite common. For example, a 2002 assessment of the water quality of the Great Lakes found that ninety-nine percent of the 50,866 square miles of Great Lakes open waters that were surveyed are impaired as to one or more of their designated uses, such swimming, fishing, et cetera. EPA, NATIONAL WATER QUALITY INVENTORY: REPORT TO CONGRESS, 2002 REPORTING CYCLE 19 (2007), available at

VI. CONCLUSION

At first blush, the *National Cotton Council of America v. EPA* decision, issued at a time of transition to an arguably more environmentally friendly Administration, stands as a repudiation of the notoriously pro-industry stance of the Bush-era EPA. Yet, as noble as protecting the sanctity of our Nation's waters may be, as the old cliché goes, the road to hell is often paved with good intentions. Regardless of the impetus behind EPA's Final Rule, it is clear that Congress did not intend to impose NPDES permitting requirements on pesticide dischargers and that, unfortunately, the costs of such an imposition outweigh any possible benefits.

The classification of pesticides as "pollutants" under the CWA has problems; specifically, biological pesticides always satisfy the definition, while more environmentally destructive chemical pesticides only meet the definition when applied in amounts sufficient to produce excess. In the event that the *National Cotton Council* decision stands, the CWA should be amended to correct this irregular outcome. Even in the event that the disparity mentioned above is corrected in the CWA, the requirement of subjecting pesticide dischargers to a potentially slow NPDES permitting process may have unfortunate results when human health or the environment is at stake. Furthermore, the CWA does not cover groundwater – a major source of pesticide contamination. If the problems involving pesticides are to be addressed, let it be achieved through FIFRA, which applies to all pesticides regardless of the context of application. While FIFRA may be amended to make it more effective with regards to pesticides in the Nation's waterways, NPDES permits will only serve to increase the administrative burden while accomplishing very little.

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<http://www.epa.gov/305b/2002report/report2002305b.pdf>. Pesticides were cited as one of the top three causes of such impairment. *Id.* at 19.