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Brief for Stephen Johnson, Administrator, U.S. Environmental Protection Agency, Appellee: Twentieth Annual Pace National Environmental Law Moot Court Competition

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MEASURING BRIEF*

Civ. App. No. 07-1001

Civ. App. No. 07-1002

UNITED STATES COURT OF APPEALS FOR THE TWELFTH CIRCUIT

LACONIC BAYKEEPER, INC., IMA FISHER,
and SAM SCHWIMMER, Appellants—Cross-Appellees

v.

STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection Agency,
Appellee—Cross Appellant.

NEW UNION FARMERS INSTITUTE, UNION OF NEW
UNION PESTICIDE APPLICATORS, HAPPY VALLEY FARM,
INC., and WICCILLUM COPTERS, INC., Appellants

v.

STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection Agency,
Appellee—Cross Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW UNION

Brief for STEPHEN JOHNSON, ADMINISTRATOR,
U.S. Environmental Protection Agency, Appellee

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* This brief has been reprinted in its original form.

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JURISDICTIONAL STATEMENT

It is the position of the Environmental Protection Agency ("EPA") that under CWA § 509(b)(1), judicial review of the regulation at issue lies exclusively in the U.S. court of appeals. Appellants, Laconic Baykeeper, Inc., Ima Fisher, and Sam Schwimmer ("Baykeepers") and New Union Farmers Institute, Union of New Union Pesticide Applicators, Happy Valley Farm, Inc., and Wiccillum Copters, Inc. ("Farmers"), erred in filing their original suits in U.S. district court, thus both actions before this Court should be dismissed with prejudice. Should this Court determine that district court jurisdiction was not improper, the Court would have jurisdiction to hear all claims presented in this appeal. Absent a statutory directive like that found under CWA § 509(b)(1), federal district courts have the general authority to hear "all civil actions" arising under the laws or treaties of the United States. 28 U.S.C. § 1331 (2007).

Federal district courts also have the authority to hear "all other claims" that "form part of the same case or controversy." 28 U.S.C. § 1291 (2007). Therefore, if district court jurisdiction was proper, this appeal of right, timely filed by Baykeepers and Farmers, taken from a final judgment rendered in a federal court, supplies this Court with jurisdiction. 28 U.S.C. § 1291 (2007).

STATEMENT OF THE ISSUES

I. Whether Baykeepers lack standing to challenge the Pesticide Rule.

II. Whether district court jurisdiction over any challenge to the Pesticide Rule is precluded because such challenges should have been brought directly in the court of appeals pursuant to CWA § 509(b)(1).

III. Whether the Court should equitably toll the 120-day statute of limitations of CWA § 509(b)(1) if it determines that these cases should have been commenced in the court of appeals.

IV. Whether Farmers' challenge is not ripe under the doctrine of *Abbott Labs. v. Gardner*.

V. Whether the Pesticide Rule's exemption of specified pesticide application activities from the CWA permitting program was in accordance with law.

VI. Whether the Pesticide Rule's exclusion from exemption of pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water was in accordance with law.

STATEMENT OF THE CASE

Two groups of plaintiffs, Baykeepers and Farmers, filed separate suits in the United States District Court for the District of New Union against defendant EPA, challenging the scope and validity of the recently-adopted rule entitled "Application of Pesticides to Waters of the United States in Compliance with FIFRA" ("Pesticide Rule"). 71 Fed. Reg. 68,483 (Nov. 27, 2006) (to be codified at 40 C.F.R. pt. 122); (R. at 1, 4.) The Pesticide Rule adopted an amendment to 40 C.F.R. § 122, adding an exemption to permitting requirements under CWA § 402 under two circumstances: (1) where aquatic pesticides are discharged directly into water, in compliance with pertinent Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") requirements, to kill pests that are present in water; and (2) where non-aquatic pesticides are discharged over or near water, in compliance with pertinent FIFRA requirements, to kill pests that are present over or near water. (R. at 1-2, 4-5.) EPA designed this regulation in order to clarify their formal interpretation of the term "pollutant" under CWA § 502(6) as it relates to pesticides in the aforementioned circumstances. (R. at 2.) Baykeepers challenged EPA's authority to adopt any exemption from Clean Water Act ("CWA") permitting requirements for

pesticides discharged into waters of the United States. (R. at 2.) Farmers challenged the limited scope of the exemption, and sought a declaration that pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water should all be exempted from CWA permitting requirements as well. (R. at 2.)

The district court held that Baykeepers had standing to challenge the Pesticide Rule (R. at 9), and granted Baykeepers summary judgment in part, ruling that EPA acted contrary to the intent of Congress when it exempted certain biological (i.e., non-chemical) pesticides and non-aquatic pesticides applied over or near water from CWA permitting requirements. (R. at 2.) Baykeepers appealed the district court's ruling, which upheld the validity of the Pesticide Rule in regards to chemical pesticides. (R. at 2, 13.) The district court held that Farmers had standing to challenge the Pesticide Rule, but further held that Farmers' challenge was not sufficiently ripe for judicial review. (R. at 5, 10.) Thus, the district court did not consider the merits of Farmers' challenge, and instead granted summary judgment against Farmers, which Farmers then appealed. (R. at 2, 10-11.) The district court rejected EPA's contention that both plaintiffs' actions were precluded by CWA § 509(b)(1), which provides for exclusive court of appeals jurisdiction of challenges to specified EPA regulatory actions. EPA cross-appealed in both cases maintaining the position that their interpretation of the ambiguous term "pollutant" was reasonable and in line with Congress's intent in the CWA and FIFRA. EPA here reasserts that the district court lacked jurisdiction to consider challenges to the Pesticide Rule.

Summary judgment is subject to *de novo* review. *Keystone Land & Dev. Co. v. Xerox Corp.*, 353 F.3d 623, 626 (9th Cir. 2003). *De novo* review is also appropriate where judicial proceedings are brought to enforce certain administrative actions. *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 415 (1971). This Court may conduct an "arbitrary and capricious" review, which would require the court to use the "hard look" doctrine. *Id.* at 416. While this is a demanding standard of review, courts have, for good reason, been reluctant to find an abuse of discretion when an agency has acted in accordance with the authority vested in it by Congress. *Chevron v. NRDC*, 467 U.S. 837, 843-44 (1987). The focal point for *de novo* review is the administrative record, and this Court must determine whether the lower court's holdings

were reasonable and proper in light of that record. *Camp v. Pitts*, 411 U.S. 138, 143 (1973).

STATEMENT OF RELEVANT FACTS

In order to respond to an increase in public concern over West Nile Virus in recent years (which, along with other avian viruses, is primarily transmitted to humans by mosquitoes), EPA sought a means by which mosquito control activities could be implemented without running afoul of the pertinent CWA regulations. EPA took this action in an attempt to balance the need to protect human health and life with the CWA's express intent of protecting the integrity of the Nation's waters. (R. at 8.) EPA recognized that absent clarification as to the term "pollutant," any aerial application of pesticides (even FIFRA-registered pesticides) to combat mosquitoes could be restricted under the guidelines of a CWA-required National Pollutant Discharge Elimination System ("NPDES") permit. (R. at 6.) The CWA requires a NPDES permit when an activity 1) discharges 2) a pollutant 3) to navigable waters 4) from a point source. (R. at 6.) In the applications EPA was anticipating, the only disputed element is the meaning of the word "pollutant." (R. at 7.)

In 2003, EPA commenced the regulatory process that ultimately led to adoption of the Pesticide Rule. (R. at 6.) Under the "interim guidance" document published in 2003, which expressed the view adopted by the final rule, pesticide applications directly to water, and applications directly over water, are not the discharge of "pollutants" so long as they are done in compliance with relevant FIFRA requirements, including label restrictions. (R. at 6.) EPA then solicited comments, which afforded all interested parties an opportunity to present evidence and suggestions as to the potential environmental impacts of this rule and the needs of the regulated community. (R. at 6.) EPA issued a "final guidance" document in 2005 and the completed Pesticide Rule on November 27, 2006. (R. at 7.) EPA made sure to note at each stage of the process that this regulation related only to the two circumstances provided, and that it was studying related issues, like pesticide drift, and may engage in rulemaking as to those issues in the future. (R. at 6, 10.)

The Pesticide Rule does not impose new restrictions or requirements on the regulated community; rather, it provides very specific exemptions to the NPDES permitting requirements by interpreting the disputably ambiguous term "pollutant" in the CWA

to exclude biological aquatic pesticides and chemical aerial pesticides used in compliance with FIFRA. (R. at 2.) The Pesticide Rule does not make using or applying pesticides in violation of FIFRA a crime: FIFRA does that under its own authority. (R. at 8.) Nor does the Pesticide Rule require permits for pesticide applications: the CWA does that. (R. at 4.)

The city of Progress created a “mosquito control plan” that incorporated the use of a biological larvicide which would be permitted under the Pesticide Rule and a chemical aerial pesticide which would not be permitted because applying that pesticide over water is in direct conflict with its FIFRA labeling. (R. at 6.) Baykeepers filed their claim against the Pesticide Rule before pesticides were applied, or results from such pesticides were present, and even before any infected mosquitoes that were the prerequisite for the implementation of the “mosquito control plan” were found in the area. (R. at 7.) Farmers, who had a conditional contract to provide the services needed for the “mosquito control plan” brought their action at the same time. (R. at 5.) Farmers had never been the subject of any enforcement action, nor was such an action ever threatened against them. (R. at 5-7.)

SUMMARY OF THE ARGUMENT

Baykeepers lack standing under Article III of the Constitution to bring this action. Baykeepers failed to establish an injury in fact, which is an essential element under *Defenders of Wildlife*. In order to establish an injury in fact, Baykeepers were required to provide evidence showing that their injury is concrete and particularized as well as actual or imminent.

The Pesticide Rule amounted to the approval or promulgation of an effluent limitation or other limitation. According to *Montgomery Evtl. Coal. V. Costle*, “effluent limitations” are technical specifications of the quantities of various polluting substances that may lawfully be discharged by point sources. Effectively, the Pesticide Rule implements an industry-wide regulation for point sources that discharge FIFRA-registered pesticides and/or insecticides in efforts to control pests in and near water. Following *Weyerhaeuser Co. v. Costle*, jurisdiction to review industry-wide regulations for existing point sources is conferred upon the courts of appeals by CWA § 509(b)(1). Thus, Baykeepers and Farmers erred in filing their original suits in U.S. district court.

Because these cases should have been commenced in the court of appeals, the 120-day statute of limitations of CWA § 509(b)(1)

should not be tolled. CWA § 509(b)(1) provides that application for review of the Administrator's action after 120 days can only be made if such application is based solely on grounds which arose after such 120th day. There are no new grounds in this case. The challenges of Baykeepers and Farmers are the same as those brought immediately following the issuance of the Pesticide Rule.

Farmers' claim that the Pesticide Rule should include additional pesticides is not ripe because it fails both parts of the test established in *Abbott Labs*. The issue is fact specific and potentially influenced by current agency research, so it could benefit both the agency and the court to defer. These benefits are not outweighed by Farmers interests because they have failed to prove immediate and practical hardship. As set forth in *Eagle-Picher*, a mere potential for future harm is not enough to sustain an allegation of hardship, and Farmers have no proof of existing hardship and no new burdens placed on them by the Pesticide Rule.

EPA's interpretation of the CWA is permissible because Congress did not directly address pesticides in the definition of "pollutant." Under *Chevron*, if Congress has not directly addressed the issue at hand, then the court should determine whether the agency's interpretation is permissible, and if so, give deference to that agency. Both Baykeepers' and Farmers' challenges should fail because the language of the CWA regarding the term "pollutant" is ambiguous, and EPA's action is in line with the congressional intent expressed in the CWA. Further, the Pesticide Rule is reasonable because EPA thoroughly evaluated the CWA before issuing the rule and based its decision on reasonable research and reporting relating to the balancing of the goals of protecting the nation's water and protecting human health and life. Thus, EPA's construction of the Pesticide Rule deserves full deference.

ARGUMENT

I. Baykeepers lack standing under Article III of the Constitution to challenge the Pesticide Rule because Baykeepers have failed to demonstrate an injury in fact.

This Court should grant summary judgment in favor of EPA because Baykeepers lack standing under Article III of the Constitution to bring this action. Article III limits the jurisdiction of federal courts to "cases" and "controversies." U.S. Const. art. III, § 2. Further, the doctrine of standing identifies those cases that

should be resolved through the federal judicial process. *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). The Supreme Court has interpreted the doctrine of standing to contain the following three elements: (1) the plaintiff must have suffered an injury in fact; (2) the plaintiff's injury must be causally connected to the challenged action of the defendant; and (3) it must be likely that the plaintiff's injury will be redressed by a favorable decision of the court. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). It is the burden of the plaintiff to set forth facts that satisfy all three of these elements. *Whitmore*, 495 U.S. at 155. In this case, Baykeepers have failed to meet the element of "injury in fact." The Supreme Court has defined "injury in fact" as "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Defenders of Wildlife*, 504 U.S. at 560.

A. Baykeepers have failed to demonstrate a "concrete and particularized" injury in fact.

This court should dismiss Baykeepers' claim because Baykeepers have failed to demonstrate a concrete and particularized injury in fact. When evaluating whether an injury is concrete and particularized the Supreme Court requires that the plaintiff provide specific testimony showing substantial injury. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990). Further, the plaintiff should provide sworn statements documenting damages. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167, 183 (2000). If a plaintiff fails to provide evidence supporting an injury in fact, then that plaintiff lacks standing and should be dismissed on summary judgment.

Testimony demonstrating injury in fact requires more than generalized allegations. *Nat'l Wildlife Fed'n*, 497 U.S. at 882. In *Nat'l Wildlife Fed'n*, the Federation assailed the Bureau of Land Management's program covering millions of acres, alleging that the program illegally opened up public lands to mining activities. *Id.* at 879. The defendants moved for summary judgment, challenging the plaintiff organization's standing to initiate the action. *Id.* at 889. The Supreme Court held that the plaintiff could not survive the summary judgment motion merely by offering "averments which state only that one of [the organization's] members uses unspecified portions of an immense tract of territory, on some portions of which mining activity has occurred or probably will occur by virtue of the governmental action." *Id.*

The evidence must show that the injury is to the plaintiff not to the environment. *Laidlaw*, 528 U.S. at 181. Plaintiffs adequately aver injury in fact when they present affidavits and testimony that show how the defendant's actions directly affected their recreational, aesthetic, and economic interests. *Id.* at 183-84. In *Laidlaw*, plaintiffs filed a citizen suit against the owner of a hazardous wastes incinerator facility claiming noncompliance with the NPDES permit and sought relief. *Id.* at 176-77. Defendants moved for summary judgment on the grounds that plaintiff lacked standing under Article III. *Id.* at 177. Plaintiffs submitted affidavits and testimony of conditional statements that if not for the defendant's actions they would enjoy the environmental resource for recreational purposes. *Id.* at 184. The Supreme Court affirmed the district court's finding that "by the very slimmest of margins" the plaintiffs had standing to bring the suit. *Id.* at 177.

In contrast to the plaintiffs in *Laidlaw*, Baykeepers have not given testimony showing how the Pesticide Rule has directly affected their current activities. Unlike the conditional statements provided by the plaintiffs in *Laidlaw*, Baykeepers' testimony claims only an apprehension of possible future injury. Ima Fisher's affidavit states that she has concerns about the application of pesticides because it may cause fish kills and reduce reproduction of finfish and crab in the salt marshes where she fishes commercially. (R. at 5.) However, the only affidavit addressing fish kills states that the pesticides have had an effect on fish in freshwater lakes. (R. at 6.) Thus, Fisher's concern about fish kills is not supported by the evidence, because there is no testimony that her fishing activities occur in fresh water, only that she fishes in the brackish water of the estuary. (R. at 6.) In addition, Fisher gives no testimony as to her economic reliance on crab populations, and Baykeeper has failed to provide any concrete numbers or evidence with regard to the effect that declining crab populations would have on Fisher. (R. at 5.)

Like the plaintiffs in *Nat'l Wildlife Fed'n*, Baykeepers have presented mere general averments about the affects of the Pesticide Rule. Sam Schwimmer's affidavit has no factual basis. The affidavit presented by Baykeepers makes no mention of how pesticides would affect birds in the marshlands or humans swimming in the area. (R. at 6.) Furthermore, Schwimmer gives no indication that the Pesticide Rule has actually affected his recreational use of Laconic Bay; rather, Schwimmer expresses concern about possible future effects. (R. at 5.)

Overall, Baykeepers have failed to present concrete and particularized testimony sufficient to show injury in fact. The testimony provided by Fisher and Schwimmer provides little more than speculative allegations about potential injury. Further, the affidavits provide no evidence of how the Pesticide Rule has negatively affected Baykeepers. Baykeepers do not have standing, even “by the very slimmest of margins.” Accordingly, this Court should dismiss Baykeepers’ claim for lack of standing.

B. Baykeepers have failed to show actual or imminent injury.

This Court should grant summary judgment in favor of the EPA because the affidavits submitted by Baykeepers fail to show actual or imminent injury. The Supreme Court has concluded that if a plaintiff has not suffered an actual injury, then the alleged injury must be imminent. *Defenders of Wildlife*, 504 U.S. at 564. When determining whether an injury is imminent the Supreme Court has considered whether the threat is realistic. *Los Angeles v. Lyons*, 461 U.S. 95, 107 (1983). Thus, the plaintiff must show that the injury complained of would, in the near future, negatively affect the plaintiff.

In order to show injury in fact, plaintiffs must provide more than speculative apprehensions about the future. *Defenders of Wildlife*, 504 U.S. at 564. The Supreme Court has “insisted that the injury proceed with a high degree of immediacy,” so as to reduce the possibility of deciding a case in which no injury would have occurred at all. *Id.* at 564. In *Defenders of Wildlife*, plaintiffs filed suit against the Secretary of the Interior seeking interpretation of the Endangered Species Act. *Id.* at 557. The Supreme Court determined that defendant’s motion for summary judgment should have been affirmed by the circuit court because the plaintiffs failed to establish all three prongs required for standing. *Id.* at 568. “Although ‘imminence’ is concededly a somewhat elastic concept, it cannot be stretched beyond its purpose.” *Id.* at 564. The Court found that the concept had “been stretched beyond the breaking point, when, as here, the plaintiff alleges only an injury at some indefinite future time.” *Id.*

The Supreme Court also interpreted standing to require a “real and immediate” likelihood that plaintiffs will be injured. *Lyons*, 461 U.S. at 102. In *Lyons*, the plaintiff lacked standing to seek an injunction against the enforcement of a police chokehold policy because he could not “credibly allege that he faced a realis-

tic threat from the policy." *Id.* at 106 n.7. Thus, if the plaintiff's alleged injury is unreasonable, then the court should dismiss the claim. *Id.* at 107.

Like the claim in *Lyons*, Baykeepers' claims are unreasonable. Schwimmer's affidavit provides no evidence to support his claim that the Pesticide Rule will result in his inability to enjoy Laconic Bay for recreational purposes. (R. at 5.) Baykeepers' affidavits do not provide information about adverse affects of pesticides on birds or humans. (R. at 6.) Furthermore, like the plaintiffs in *Defenders of Wildlife*, Fisher alleges indefinite injuries. She provides no fixed or precise indication of how the Pesticide Rule will injure her. (R. at 5.) Rather, she expresses a general concern over the use of pesticides. (R. at 5.) In addition, the Baykeepers' concern is a reaction to the proposed use of Anvil 10+10 in the Mosquito Control Plan, not the Pesticide Rule. (R. at 6.) The Pesticide Rule would not condone the application of Anvil 10+10 to Laconic Bay because such a use would be in violation of the pesticide's FIFRA label. (R. at 6.)

Accordingly, this Court should dismiss Baykeepers' claims due to lack of standing. Baykeepers have failed to provide any evidence that they have suffered an injury in fact, and the affidavits submitted express only hypothetical claims and concerns. Without a showing of injury there can be no standing. Thus, this Court should grant summary judgment in favor of EPA.

II. All challenges to the Pesticide Rule should have been brought directly in the court of appeals because the Pesticide Rule amounts to the approval or promulgation of an effluent limitation.

This Court should grant summary judgment in favor of the EPA because both Baykeepers' and Farmers' challenges to the Pesticide Rule should have been brought directly in the court of appeals pursuant to CWA § 509(b)(1). 33 U.S.C. § 1369(b)(1). Under CWA § 509(b)(1), judicial review of the regulation at issue lies exclusively in the court of appeals. Appellants Baykeepers and Farmers erred in filing their original suits in U.S. district court, thus both actions before this court should be dismissed with prejudice. In the 1972 amendments to the CWA, Congress substantially overhauled the nation's system of water pollution control, authorizing the Administrator of the EPA to promulgate and enforce standards for the discharge of pollutants. 33 U.S.C.A.

§§ 1251 *et seq.* The amendments strengthened the Act by adding several enforcement and jurisdictional provisions, among them CWA § 509(b)(1), which provides for *direct court of appeals review* of six specified actions taken by the Administrator: (A) promulgating any standard of performance under CWA § 306; (B) making any determination pursuant to CWA § 306(b)(1)(C); (C) promulgating any effluent standard, prohibition, or pretreatment standard under CWA § 307; (D) making any determination as to a State permit program submitted under CWA § 402(b); (E) *approving or promulgating any effluent limitation or other limitation* under CWA §§ 301, 302, 306, or 405; (F) issuing or denying any permit under CWA § 402; and (G) promulgating any individual control strategy under CWA § 304(l). 33 U.S.C. § 1369(b)(1). EPA no longer asserts that the issuance of the Pesticide Rule was equivalent to the issuance or denial of a permit under CWA § 402. EPA does, however, maintain its contention that the issuance of the Pesticide Rule amounted to the approval or promulgation of an effluent limitation or other limitation, and, accordingly, that the only proper context for judicial review was in the court of appeals.

According to *Montgomery Envtl. Coal. v. Costle*, 646 F.2d 568, 574 (D.C. Cir. 1980), “effluent limitations” are technical specifications of the quantities of various polluting substances that may be lawfully discharged by point sources. Further, in *Weyerhaeuser Co. v. Costle*, 590 F. 2d 1011, (D.C. Cir. 1978), the court stated that jurisdiction to review industry-wide regulations for existing point sources is conferred upon the court of appeals by CWA § 509(b)(1). The Pesticide Rule is an agency action with respect to “an effluent limitation or other limitation,” because it technically specifies the quantity of FIFRA-registered pesticides and/or insecticides that may be lawfully discharged over or near water without a NPDES permit by exempting such pesticides from the permitting requirement so long as the dispersal is in compliance with FIFRA standards. (R. at 8.) Further, the effect of the Pesticide Rule is to implement an industry-wide regulation for point sources that discharge FIFRA-registered pesticides and/or insecticides in efforts to control pests in and near water. While the practical effect of the regulation is to de-regulate a class of potential pollutants and polluters, the Pesticide Rule nevertheless functions to assert EPA’s statutory authority as a regulator—here, with regard to allowing a limited class of point-source dischargers to operate without NPDES permits. Thus, the proper jurisdiction for a

challenge of the scope and validity of the Pesticide Rule was the court of appeals.

Section 704 of the Administrative Procedure Act (“APA”) provides that “final agency action *for which there is no other adequate remedy* in a court [is] subject to judicial review” in the district courts. 5 U.S.C. § 704. (emphasis supplied) In *Garmon v. Warner*, 358 F Supp 206, 208 (W.D. NC 1973), the court held that the 5 U.S.C. § 704 provision for court review of administrative decisions is a jurisdictional statute “to the limited extent of conferring jurisdiction for review of administrative decisions in federal court *where such review cannot be predicated on other jurisdictional statutes.*” (emphasis supplied) Furthermore, in *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988), the Supreme Court held that 5 U.S.C. § 704 does not provide additional judicial remedies for review of federal agency action in situations where Congress has provided “special and adequate” administrative review procedures.

In this case, review of the challenge to the Pesticide Rule was predicated on a jurisdictional statute from within the very law that formed the basis for the challenge. Both Baykeepers and Farmers had at their disposal the “special and adequate” administrative review procedures detailed in CWA § 509(b)(1)—a clear directive that any challenge to the agency actions described in the section are subject to review by the court of appeals. The intent of Congress in enacting CWA § 509(b)(1) was to streamline decision making and insure prompt high level judicial review of the enumerated acts of the Administrator. *Shell Oil Co. v. Train*, 415 F. Supp. 70, 76 (N.D. Cal. 1976). This indicates a congressional determination to vest jurisdiction over all discharge regulations in the court of appeals. *Shell Oil*, 415 F. Supp. at 76. There is a strong presumption against the availability of simultaneous review in both district courts and courts of appeals. *Sun Enter., Ltd. v. Train*, 532 F.2d 280, 287 (2d Cir. 1976) (citing *Oljato Chapter of Navajo Tribe v. Train*, 515 F.2d 654 (D.C. Cir. 1975)). Furthermore, absent extraordinary conditions, review of agency action under CWA § 509(b)(1) is exclusive to the court of appeals. *Id.* Courts have consistently held that where there is ambiguity as to whether jurisdiction lies with a district court or with a court of appeals, that ambiguity should be resolved in favor of review by a court of appeals. *Denberg v. U.S. R.R. Ret. Bd.*, 696 F.2d 1193, 1197 (7th Cir. 1983). Thus, inasmuch as the Pesticide Rule consti-

tutes agency action under CWA § 509(b)(1), the only proper context for a challenge of its scope and validity is the court of appeals.

In *E. I. DuPont de Nemours & Co. v. Train*, 430 U.S. 112 (1977), the Supreme Court held that review of the EPA Administrator's action in promulgating "effluent limitations guidelines" was in the court of appeals under CWA § 509(b)(1)(E). The Supreme Court rejected DuPont's limiting of CWA § 509(b)(1)(E), finding that such a construction would produce a perverse situation in which the court of appeals could review individual actions issuing or denying permits but would have no power of direct review of the regulations governing those actions. *Id.*; see also, *NRDC v. EPA*, 673 F.2d 400, 405-06 (D.C. Cir. 1982). The Supreme Court regarded CWA § 509(b)(1)(E) as unambiguously authorizing court of appeals review of any EPA action promulgating effluent limitations. *Id.* It also noted that since those limitations are typically promulgated in the same proceeding as new source standards, Congress intended that review be in the court of appeals—the forum in which agency actions of national import may be reviewed with the most economy and to the greatest judicial effect. See *id.* at 137. Overall, in *DuPont*, as in other cases, the Supreme Court ascribes to CWA § 509(b)(1) a practical rather than a cramped construction. *Id.*; See also *Crown Simpson Pulp Co. v. Costle*, 445 U.S. 193 (1980).

In this case, EPA has promulgated a rule that functions as "effluent limitation guidelines," by which a set class of effluents (FIFRA-registered pesticides discharged into, over, and/or near water) is granted a limited exemption from the NPDES permitting requirement for point-source discharges. (R. at 6-7.) An effluent limitation guideline may set a numerical limit for the discharge of a pollutant, but a guideline may also set a limit by terms that are not quantifiable. In this case, the effluent "limitation" is defined by the standard of certification and legal use under FIFRA.

A pesticide not certified by FIFRA would not be exempt under the Pesticide Rule; equally, a pesticide not legally used under FIFRA would not be exempt under the Pesticide Rule. Thus, the guideline in limiting the discharge of pesticides into protected waters is whether the discharge is consistent with the standards set through the FIFRA certification and labeling process; only discharges that meet those limiting standards will be exempt from NPDES permitting. Following the Supreme Court's reasoning in *DuPont*, such an "effluent limitation guideline" as the Pesticide Rule should be reviewed in the court of appeals. Furthermore,

given the procedural posture of this case, it is absurd that the court of appeals should be limited to a review of the district court's decision without the benefits of its own full and robust judicial inquiry, especially when the impact of the Pesticide Rule will be felt nationwide. Thus, the initial review of the Pesticide Rule should properly be in the court of appeals.

In *NRDC v. EPA*, the D.C. Circuit directly addressed the importance of circuit court review of new CWA regulations. 673 F.2d at 405; *see also*, *NRDC v. EPA*, 656 F.2d 768 (D.C. Cir. 1981); *VEPCO v. Costle*, 566 F.2d 446, 451 (4th Cir. 1977). The court found that national uniformity, an important goal in dealing with broad regulations, is best served by initial review in the court of appeals. *Id.* The court held that in considering challenges to Consolidated Permit Regulations ("CPRs") issued by the EPA, the court of appeals had jurisdiction, since the CPRs were an "effluent limitation or other limitation" within the meaning of the CWA. *NRDC*, 673 F. 2d at 405. The court held that CWA § 509(b)(1) vested initial authority to review the challenged regulations in the courts of appeals. *Id.* at 402. The court further asserted that the case for first-instance judicial review in a court of appeals is stronger for broad, policy-oriented rules than for specific, technology-based rules. *Id.* at 405. The court found that a fair reading of an earlier *NRDC* opinion issued by the same court, alongside the *VEPCO* opinion from the Fourth Circuit, showed that neither decision was based on the technical characteristics of the rules. *Id.* Indeed, the court's review in the 1981 *NRDC* case was largely an application of legal standards to the EPA's policy judgments, not its technical determinations. *Id.*; *NRDC*, 656 F.2d at 776-86.

EPA recognizes that courts have "counseled against the expansive application of [§ 509(b)]." *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 (9th Cir. 2002). However, in this case, Baykeepers' and Farmers' challenges are clearly to a rule that effectuates an "effluent limitation or other limitation"—albeit a limitation that is somewhat different than those typically implemented under the NPDES permitting regime. Neither Baykeepers' nor Farmers' challenges addressed any technical characteristic of the rule; rather they addressed whether EPA could legitimately interpret the term "pollutant" to exclude a limited class of pesticides applied into or over water in accordance with FIFRA requirements. (R. at 1-2.) National uniformity would best be served by reviewing the policy implications of the Pesticide Rule in the court of appeals. These policy implications were

clearly understood by both appellants at the time that they filed their complaints in the District Court. Indeed, their complaints were a mere disagreement with EPA's policy judgment that by modifying the regulation of effluent limitations to accommodate the lawful use of pesticides in controlling aquatic pests, the objectives of the CWA would still be met, and the need to protect human health would be provided for. Accordingly, this Court should find that both Baykeepers' and Farmers' challenges to the Pesticide Rule should have been brought directly in the court of appeals pursuant to CWA § 509(b)(1), precluding district court jurisdiction over any challenge to the Pesticide Rule, and the challenges should be dismissed.

III. This court should not toll the 120-day statute of limitations of CWA § 509(b)(1) because these cases should have been commenced in the court of appeals.

The CWA provides that application for review of the Administrator's action "shall be made within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). Thus, direct appellate review in the courts of appeals under CWA § 509(b)(1) carries with it "a peculiar sting" for potential challengers: any agency action reviewable under its provisions *must be challenged within 120 days*, unless based on new "grounds" arising after the expiration of that time frame, and cannot thereafter be challenged in any "civil or criminal proceeding for enforcement." 33 U.S.C. § 1369(b); *Narragansett Elec. Co. v. EPA*, 407 F.3d 1, 11-12 (1st Cir. 2005). (emphasis supplied) There are no new grounds in this case; indeed, the challenges before this Court are the same challenges that Baykeepers and Farmers brought immediately following issuance of the Pesticide Rule.

The short time allowed for challenging agency action under CWA § 509(b) clearly reflects Congress's effort to protect both EPA's and the public's interests in finality in certain matters, particularly in regards to rulemaking with substantial significance and scope. *Narragansett*, 407 F.3d at 12. In contrast, the standard statute of limitations for APA actions is six years. *See Trafalgar Capital Assocs., Inc. v. Cuomo*, 159 F.3d 21, 34 (1st Cir. 1998). Since some but not all of the actions that EPA can take under the CWA are listed with considerable specificity in CWA § 509(b), not

all EPA actions taken under the CWA are directly reviewable in the court of appeals. *See, e.g., Friends of the Earth v. EPA*, 333 F.3d 184, 189-90 (D.C. Cir. 2003); *Bethlehem Steel Corp. v. EPA*, 538 F.2d 513, 518 (2d Cir. 1976). Yet, because EPA has demonstrated that the matter before this Court is just such a specific case, reviewable under the provisions of CWA § 509(b), Baykeepers and Farmers must be bound to the statutorily-limited 120-day period in which to file their challenge. Because this period has expired, and because Baykeepers and Farmers did not follow correct procedure, this Court should dismiss their challenges with prejudice.

Baykeepers and Farmers had ample opportunity to participate in the regulatory rulemaking process that ultimately led to the adoption of the Pesticide Rule. The development of the Pesticide Rule occurred over several years, during which the public was regularly apprised of EPA's position, and the status of the rule in development. (R. at 6-7.) When EPA first published its "interim guidance" document in 2003, it expressed the view adopted by the final rule—that pesticides applied directly to water and over water are not discharges of "pollutants" so long as they are done in compliance with relevant FIFRA requirements. 68 Fed. Reg. 48,385 (Aug. 13, 2003); (R. at 6.) After soliciting comments on its interim guidance document, EPA issued a "final guidance" document in 2005. 70 Fed. Reg. 5093 (Feb. 1, 2005); (R. at 7.) At the same time, EPA issued the proposed rule that is the basis of this lawsuit. (R. at 7.) Before issuing the final rule, EPA received many comments. (R. at 7.) Though the record is silent as to the roles that Baykeepers and Farmers played in the rulemaking process, it is clear that the point of ingress was open, and that the final Pesticide Rule was a product of the cumulative efforts of many interested parties.

EPA and the parties that it regulates share a significant interest in the finality of rulemaking, particularly in regard to pest control. The implications of leaving the Pesticide Rule open to challenges after local governments have begun reasonably to rely on the rule in implementing aerial application of pesticides into and over water would be untenable considering the public health import to the Pesticide Rule. Though the class of potentially affected parties is large, the Court need look only to City of Progress as one example of a municipality that could potentially suffer a public health crisis if it is not allowed to act in reasonable reliance on the EPA's authority in issuing the Pesticide Rule. Accordingly,

this Court should hold that because these cases should have been commenced in the court of appeals, and because both Baykeepers and Farmers were afforded the opportunity to participate in the development of the Pesticide Rule, the 120-day statute of limitations of CWA § 509(b)(1) should not be tolled.

IV. Farmers' challenge is not ripe for judicial review at this time: the issues are not fit for judicial decision, and deferral would not cause an outweighing hardship.

This Court should uphold the ruling of the district court in this case and find that Farmers' challenge is not ripe for judicial review under the two-prong test established by the United States Supreme Court. *Abbott Labs v. Gardner*, 387 U.S. 136, 148 (1967). This test requires an evaluation of "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Id.* at 149. To satisfy the first ("fitness of the issues") prong of this test, the questions presented must be purely legal and not fact-specific, a postponement of review must not provide the court with the possibility of greater understanding of the issue, and there must be a hardship to the appellants that can be weighed against the benefit of postponement. *Better Gov't Ass'n v. Dep't of State*, 780 F.2d 86, 92 (D.C. Cir. 1986).

To satisfy the second ("hardship of the parties") prong, the "immediate and practical impact" on those seeking relief from the agency's actions must outweigh the competing interest in deferring the judicial involvement. *Eagle-Picher Indus. v. EPA*, 759 F.2d 905, 916 (D.C. Cir. 1985). Analyzing ripeness in the context of judicial review of an agency's action is an attempt by the court to balance competing interests: a petitioners' concern over allegedly unlawful activity by the agency, the agency's interest in acting free from judicial interference until their action is complete, and the court's interest in waiting to decide issues until they are at their final stage. *Consolidation Coal v. Fed. Mine Safety*, 824 F.2d 1071, 1077 (D.C. Cir. 1987) (citing *State Farm Mut. Auto. Ins. Co. v. Dole*, 802 F.2d 474, 479 (D.C. Cir. 1986)). Farmers' challenge fails both prongs of this test.

A. Farmers' challenge is not fit for judicial review because it is fact-specific and potentially influenced by current agency research.

This Court should uphold the ruling of the district court in this case and find that Farmers' claim is not ripe because the issues are not fit for judicial review. In a "fitness of the issues" analysis, the question must be a purely legal one so as to provide an assumption that judicial involvement would be suitable. *Eagle-Picher*, 759 F.2d at 916. When an action is being applied against a regulated community, an isolated question of whether an agency action was undertaken in accordance with law is a purely legal one. *Id.* In *Eagle-Picher*, the industry petitioners asked the court to find that the ranking methodology established by the Hazardous Ranking System was unlawful and so should not be used to place them on the National Priorities List ("NPL"). *Id.* at 908. The action in the case had already been applied to the industry petitioners by using a ranking methodology to determine that they should be placed on the NPL. *Id.* at 911. At the time of filing, the EPA had not yet engaged in an enforcement action against the industry petitioners, and even at the time prior to the publication of the NPL, the action was already being applied to the petitioners in a manner that would expose them to a heightened potential for liability in the future. *Id.* at 912.

When an agency action has taken its final form and is being used as the ultimate guidance on the issue it addresses, there is little to no likelihood that a postponement of review would provide the court with any greater understanding of the issue. *Better Gov't Ass'n*, 780 F.2d at 93. In *Better Gov't Ass'n*, the agency had specifically stated "that the action in question governs and will continue to govern its decisions. . ." and that this action was a final decision as to the matter. *Id.* The regulation in question had been in existence for over two years and there had been no indication that any additional development would be expected in regards to this rule. *Id.* The court recognized that other courts had taken a flexible and pragmatic approach to the question of finality, and that this approach is oriented around how the agency treats that action and the communication provided to the regulated community (not to the court) as to the action's finality. *Id.* (referencing *Abbott Labs*, 387 U.S. at 149-50).

Unlike the purely legal analysis in *Eagle-Picher*, this Court is being asked to force an agency to expand the scope of its action to include additional activities. (R. at 2-3.) While Farmers are chal-

lenging the legality of the rule passed, they are doing so with the intent not of declaring the rule invalid or inapplicable, but rather declaring that other applications of pesticides be exempted from CWA permitting requirements as well. (R. at 2.) This request seems to go outside a purely legal analysis, because whether or not other applications of pesticides would even be related to, much less regulated by, CWA permitting requirements is purely an issue of fact. (R. at 5-6, 10.) This is different from the challenge in *Eagle-Picher* because that regulation was exposing the industrial petitioners to the potential for heightened liability—this regulation is simply exempting certain pesticide applications from permitting requirements that Farmers may or may not be engaged in. (R. at 5.) The factual nature of this issue makes it unfit for judicial review at this time; as the lower court states, any decision on this matter would be better deferred to a later rule or enforcement action. (R. at 11.)

As opposed to the finality of the action in *Better Gov't Ass'n*, the Pesticide Rule, as it may potentially apply to pesticide drift, terrestrial applications of pesticides, and pesticide residue, is still under review. (R. at 10.) There has been no statement that the Pesticide Rule is the final rule regarding these applications; in fact, the opposite is true: within the Pesticide Rule itself is a discussion of EPA's intent to "continue to consider the applicability of the CWA to situations other than those addressed by [this] action. . ." Pesticide Rule, 71 Fed. Reg at 68,483; (R. at 10.) Here we have a regulation barely a year old that contains within it the establishment of a workgroup with the sole purpose of addressing some of the concerns raised by Farmers. Pesticide Rule, 71 Fed. Reg at 68,483. This contrasts specifically with the treatment of the action by the agencies in *Abbott Labs* and *Better Gov't Ass'n* as the final and governing rule on the matter. EPA has been clear from the moment this regulation was issued that the applicability of this action to other applications of pesticides that may have an impact on water quality was still being researched and that it may make rules to that effect in the future. (R. at 10.) With that in mind, the current Pesticide Rule is not in its final form in regard to the challenges raised by Farmers and so should not be subject to judicial interpretation at this time.

B. The deferral of Farmers' challenge will not pose an immediate and practical impact rising to the level of hardship.

This Court should uphold the ruling of the district court and find that Farmers' claim is not ripe because the impact to Farmers does not rise to the level of hardship. In a "hardship to the parties" analysis, courts have looked as to whether the action's impact is "immediate, direct, and significant" on the regulated party. *Abbott Labs*, 387 U.S. at 152. In *Abbott Labs*, the affected party was immediately, directly, and significantly affected; it was put in a position where it had to comply with a rule that imposed extensive new burdens—or risk prosecution. *Id.* Any interest that an agency or court may have in deferring review may be outweighed by a substantial hardship. *Consolidation Coal*, 824 F.2d at 1078. In *Consolidation Coal*, the affected party showed injury to the extent that they were exposed to greater civil fines and the potential for harsher penalties later because they had been found in violation of the rule. *Id.*

The allegation that the action imposes a hardship will not be sustained if the hardship reflects a "mere *potential* for future injury." *State Farm*, 802 F.2d at 480 (quoting *Alascom, Inc. v. FCC*, 727 F.2d 1212, 1217 (D.C. Cir.1984)) (emphasis in original). This was found to be the case in *State Farm*, where a proposed rule regarding automobile safety devices was going to supplant the existing regulations in favor of the new rule; because of the implausibility of the rule, the court found that the potential for future injury did not rise to the level of a hardship. *Id.* In *State Farm*, the court found the "institutional interest in avoiding speculative controversies" outweighed any potential hardship when the action proposed was unlikely to ever itself be used as a tool to control the actions of the petitioners. *Id.* at 481.

The Pesticide Rule is not what subjects Farmers to the risk of prosecution if they apply pesticides in violation of FIFRA; FIFRA does that under its own authority. (R. at 8). The Pesticide Rule does not require Farmers to obtain a NPDES permit before taking action that may have an impact on water quality; if and when such a permit is required, the CWA requires it. (R. at 4.) Any hardship to the parties is not a result of the passing of the Pesticide Rule; it is a result of long-standing and well-established environmental regulations. (R. at 7-8.) When the city of Progress developed its Mosquito Control Plan, (contracting conditionally with Farmers to provide those services) it did so knowing that its

intended use of Anvil 10+10 would be in violation of FIFRA. (R. at 6.) While the EPA has every intention of providing steps by which communities can protect themselves against the threat of water-borne insects, actions must still be taken to avoid unnecessary environmental consequences. (R. at 8.) If the City of Progress wants to proceed with its initial plan, instead of switching to pesticides in full compliance with the Pesticide Rule and the CWA, it would only have to file for a NPDES permit. (R. at 13.)

Unlike the imposition of new burdens on the party in *Abbott Labs*, the Farmers face no new requirements—if they continue operating in the way they have in the past, the Pesticide Rule will have no impact on them greater than the existing environmental regulations. (R. at 4, 7-8.) Unlike the injury demonstrated in *Consolidation Coal*, no heightened risk of prosecution or enforcement action results from the current refusal of the Pesticide Rule to provide exemptions for the pesticide usages and applications referred to by Farmers. The risk is the same as it has always been. Like the implausibility of the rule being used against the petitioners in *State Farm*, the Pesticide Rule is not likely ever to be used as a tool to control Farmers' actions. (R. at 11.)

This Court should uphold the ruling of the district court and find that Farmers' challenge is not ripe for judicial review under the two-prong test established by the Supreme Court. The question of whether the failure of the Pesticide Rule to include additional exemptions is in violation of law is not a purely legal one, nor is the rule at its final and complete state such that postponement could not provide additional help to the court in deciding this matter. The interest of postponing, until such a time as relevant factual determinations are made and EPA has conclusively addressed Farmers' concerns, outweighs any potential hardship to the regulated parties, especially since any hardship that is present is not a result of the Pesticide Rule but rather a result of preexisting environmental regulations. For these reasons, this Court should sustain the ruling of the district court as to this issue.

V. This Court should find EPA's reasonable construction of the ambiguous language in the Clean Water Act permissible and give full deference to it.

EPA's interpretation of the CWA is permissible because Congress did not directly address pesticides in the definition of "pollu-

tant.” A court must answer two questions when reviewing an agency’s interpretation of a statute. *Chevron*, 467 U.S. at 843. First, the court must determine whether Congress has directly spoken to the precise question at issue. *Id.* If the intent of Congress is clear, then the court and the agency must give effect to the expressed intent of Congress. *Id.* If, however, the court recognizes that Congress has not directly addressed the issue at hand, then the court should determine whether the agency’s interpretation is a permissible construction of the statute. *Id.* If the court finds that the agency’s interpretation is permissible, then the court must give deference to the agency even if the agency’s reading differs from what the court believes is the best statutory interpretation. *Id.*

Here, the CWA lacked a clear congressional intent as to whether certain pesticides fall under the definition of pollutant and thus require a NPDES permit. The overarching congressional intent of the CWA is protection of the integrity of the nation’s waters by prohibiting the discharge of any pollutant into water without a NPDES permit. 33 U.S.C. §§ 1251(a), 1311(a), 1342(a). However, as regards to more specific intent, Congress provides a list of substances that constitute pollutants but does not inform this list with specific definitions. 33 U.S.C. §1362(6). The EPA interpreted the definition of the term “pollutant” to exclude certain pesticides and issued a regulation stating that the application of a pesticide in compliance with relevant requirements of FIFRA does not require a NPDES permit in two specific circumstances. Pesticide Rule, 71 Fed. Reg. at 68,483. The first circumstance is when the pesticide is applied directly to the water in order to control aquatic pests. *Id.* The second is when the application of a pesticide is made to control pests that are over or near waters of the United States. *Id.* In both circumstances, the EPA’s interpretation is consistent with congressional intent. Therefore, this Court should give deference to the EPA and reverse the district court’s grant of summary judgment.

In analyzing the EPA’s interpretation of the word “pollutant,” this Court must look first at whether that term is ambiguous or if it expresses clear and certain congressional intent. Looking at the record and arguing against the claims of both Baykeepers and Farmers, the actions of EPA in exempting specific pesticide applications and not exempting others was done based on reports and information linking EPA’s interpretation of the word “pollutant” with its desire to uphold the goal of the CWA to protect the integ-

urity of the nation's waters and its desire to protect and preserve human health and life. For these reasons, this Court should rule in favor of EPA by: (1) overturning the summary judgment for Baykeepers entered in the lower court; and (2) finding Farmers' challenge to be unsupported and void.

A. The Clean Water Act is ambiguous with respect to whether certain pesticides constitute pollutants.

The District Court erred in finding that the language of the CWA regarding the term "pollutant" is unambiguous. When evaluating whether a statute's language is clear or ambiguous, courts use the traditional tools of statutory interpretation including the text of the statute, its legislative history, and the overall purpose of the statute. See *Chevron*, 467 U.S. at 843. When considering the text, courts may also utilize other sources such as dictionaries. *MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 240 (1994). In addition, when determining the intent of a congressional act through its plain meaning, the court must look at the language at issue as well as the language as a whole. *K-Mart Corp. v. Cartier*, 486 U.S. 281, 291 (1988). Further, if the statute contains a term that has acquired a settled meaning under either equity or common law, then the court must infer that Congress intended to use that established meaning. *NLRB v. Amax Coal Co., Div. of Amax*, 453 U.S. 322, 329 (1981). Thus, when determining whether a statute's language is ambiguous, a court should employ the traditional tools of statutory interpretation as well as the meaning established by the common law.

Interpretation of statutory language and legislative history assists courts in determining whether a statute's language is clear or ambiguous. *Chevron*, 467 U.S. at 859-64. In *Chevron*, the Supreme Court relied on the language and congressional intent of the Clean Air Act in determining whether the EPA's interpretation of the term "stationary source" was a reasonable construction of the statute. *Id.* at 866. The Court found that the legislative history did not reveal a clear congressional intent, thus, it relied on the language of the statute. *Id.* at 864. The court concluded that the statute did not explicitly define stationary source even though it did define "major stationary source." *Id.* at 860. Overall, the court found that the language of the statute did not compel any given interpretation of the term "source." *Id.* at 859.

If a statute fails to provide a clear meaning of terms, then courts may consider the ordinary meaning of the term. *MCI*, 512

U.S. at 225. In *MCI*, the Supreme Court considered whether the plain meaning of the term “modify” included basic or fundamental changes. *Id.* The Court considered many dictionary entries for the term and concluded that its prevalent meaning was confined to moderate changes. *Id.* In addition to plain meaning, the court must look at the language as a whole. *K-Mart*, 486 U.S. at 291. In *K-Mart*, the court found that while the congressional language clearly banned importation of gray-market goods, the ambiguity in the phrase “owned by,” which contributes to the definition of gray-market goods, was enough to authorize agency interpretation and action. *Id.* at 292.

After considering the language of the statute and its plain meaning, the court may look to the common law for established meaning. *See NLRB*, 453 U.S. at 329. In *NLRB*, the court held that employer-selected trustees of a trust fund created under the Labor Management Relations Act (“LMRA”) are not “representatives” of the employer within the meaning of the LMRA. The Court relied on the use of terms long established in the court of chancery in deciding that Congress intended to impose traditional fiduciary duties on trustees.

1. Baykeepers’ challenge should fail because the district court erred in finding that the language of the CWA regarding the term “pollutant” is unambiguous.

As the EPA in *Chevron* instituted a practical definition of “stationary source” in interpreting its regulations, in this case, EPA determined that the term “pollutant” could not be equated with a pesticide that is used in compliance with relevant FIFRA requirements. The CWA is intended to protect the waters of the United States. (R. at 7.) EPA decided to exclude certain pesticides from NPDES permitting in accordance with the CWA because FIFRA labeling requires that registered pesticides be used for their intended purposes “without unreasonable adverse effects on the environment.” (R. at 8.)

In addition, the language of the CWA does not explicitly include pesticides under the definition of pollutant. The definition of the term “pollutant” includes “chemical wastes” and “biological materials.” Like the Court’s approach in *MCI*, EPA first considered the plain meaning of the term “chemical waste” as defined in a common dictionary. Pesticide Rule, 71 Fed. Reg. at 68,486. EPA concluded that pesticides applied consistent with FIFRA require-

ments could not constitute wastes because they are not chemicals that are eliminated or discarded as no longer useful. *Id.* at 68,487. Similarly, biological pesticides cannot be deemed pollutants because they are put to the same uses as chemical pesticides. While the plain meaning of biological material would seem to include all biological material, consideration of the statute's language as a whole would lead to ambiguity. Indeed, biological pesticides are less likely to have adverse affects on the nation's waters than chemical pesticides. *Id.* at 68,486. Thus, it would be inconsistent with the intent of Congress to exclude biological pesticides from the exemption while including chemical pesticides.

Furthermore, like the Court in *NLRB*, EPA looked to the common law for established meanings of "pollutant." EPA found that courts interpreted biological materials to be pollutants when they are waste materials discharged from point sources. To date, no court has found that products applied for their intended purpose consistent with EPA requirements constitute pollutants. EPA does not dispute that pesticides may become pollutants after they have been applied for their intended purposes. The difference is that at the time the pesticide is applied to waters is cannot be deemed a pollutant and thus should not require a permit.

Overall, EPA finds that the term "pollutant" is ambiguous. EPA used standards consistent with the Supreme Court's rulings in determining that the language of the CWA allows for the pesticides exception. Pesticides used in compliance with relevant FIFRA requirements do not constitute pollutants because they are not wastes. Further, the Pesticide Rule is consistent with congressional intent to maintain the chemical and biological integrity of the nation's waters. Thus, this Court should reverse the district court's grant of summary judgment for Baykeepers.

2. Farmers' challenge should fail because even if the language is not ambiguous, EPA's action is in line with the congressional intent expressed in the CWA.

If this Court finds that Farmers' challenge is ripe for judicial review, then this Court should further find that EPA's refusal to modify the Pesticide Rule to exempt additional pesticide uses and applications is not arbitrary, capricious, or in violation of law under the tests provided. If this court finds, as the case law warrants, that the term "pollutant" in the CWA is ambiguous in regard to the status of pesticides, then EPA's reasonable

interpretation of that term should be given deference. The Pesticide Rule is not intended to provide exemptions for the classified list of pollutants set forth by Congress in the CWA, nor is it intended to supplant the protections to the environment provided by FIFRA. Pesticide Rule, 71 Fed. Reg. at 68,488. It is instead intended to clarify that certain pesticides, when applied consistently with FIFRA regulations, are not pollutants because of the nature of their usage and their necessary application techniques.

Even if this court finds that the language is unambiguous, Farmers' challenge should still fail because the exclusion of exemptions for additional pesticide applications from the Pesticide Rule is in line with the congressional intent expressed in the CWA to protect the integrity of the nation's waters by reducing the discharge of pollutants. (R. at 7.) FIFRA provides a defense against "unreasonable adverse affects on the environment" and looks at "generic environmental impact." (R. at 8, 12.) To expand the Pesticide Rule to include additional uses and applications of pesticides without further research into the potential detrimental effects of these uses and applications on water quality would be both irresponsible and contrary to the stated intent of Congress in the CWA and FIFRA.

B. This Court should find EPA's construction permissible because it was reasonable.

In determining whether an agency's construction is permissible, the court is to inquire as to whether the agency's construction is "sufficiently reasonable." *Fed. Election Comm'n v. Democratic Senatorial Campaign Comm.*, 454 U.S. 27, 39 (1981). The Supreme Court in *Fed. Election* clarified this point by saying that this standard does not require that the agency's construction be the only or best one, simply that the reasoning used to create it was thorough, valid, and consistent. *Id.* at 37. In *Fed Election*, the commission interpreted ambiguous terms of a congressional act in a way that proscribed certain forms of campaign financing. *Id.* at 36. The lower court found that the commission did not provide enough reasoned and consistent explanation for this interpretation, but the Supreme Court overruled saying that the commission had produced consistent reports that linked their interpretation with the goal of the act. *Id.*

When an agency's construction is reasonable, a court must give deference to that construction and cannot supplant its own judgment for that of the agency. *Chevron*, 467 U.S. at 844. The

Supreme Court in *Chevron* expressed the reason for this deference in that the interpretation at issue involved a complex and technical regulatory scheme that had been considered in great detail by the agency. *Id.* at 865. The court's deference reflects the fact that an agency charged with the administration of a rule is especially able and in the best position to interpret that rule. *Id.* A court may not impose its own interpretation onto an agency's construction, rather, if an agency's construction is found to be unreasonable, the court must find it in violation of the law and send it back to the agency for further review. *See id.* The Supreme Court in *Chevron* drew a distinction between judging the reasonableness of an agency's interpretation and interpreting the act on its own authority, finding that the role of the court in these matters is to determine the reasonableness of the agency's interpretation. *Id.* at 845.

Intentionally and properly applied and performing pesticides are not pollutants. *Fairhurst v. Hagener*, 422 F.3d 1146, 1150 (9th Cir. 2005). In *Fairhurst*, the court considered the reason for which the pesticide was applied and whether the application was in accordance with its FIFRA label in making the determination that the pesticide used was not a pollutant. *Id.* This decision influenced the EPA's construction of the Pesticide Rule: in *Fairhurst*, "the court considered the plain meaning of the term "chemical waste" and noted that its analysis was in accord with EPA's interpretation of the term in its July 2003 Interim Statement, and that EPA's interpretation is "reasonable and not in conflict with the expressed intent of Congress." *Id.*; Pesticide Rule, 71 Fed. Reg. at 68,489.

1. Baykeepers' challenge should fail because EPA's interpretation of the CWA's language is reasonable and therefore full deference should be given to the agency's action.

EPA's construction of the Pesticides rule is reasonable because EPA thoroughly evaluated the CWA before issuing the rule. EPA responded to uncertainty among the public as to how the CWA applies to pesticides that have historically been properly used for their intended purposes. Pesticide Rule, 71 Fed. Reg. at 68,485. EPA first issued an Interim Statement after deliberate consideration through the administrative process. *Id.* EPA followed through all of the steps under the APA, examining the rule

at every stage, and afforded all interested parties the opportunity to contribute to the rule.

The final rule is reasonable because it is consistent with the intended purpose of the CWA. The Pesticide Rule only exempts those pesticides that are in compliance with relevant FIFRA requirements. (R. at 2.) The relevant FIFRA requirements are those that relate to water quality. Pesticide Rule, 71 Fed. Reg. at 68,486. Thus, the Pesticide Rule seeks to maintain the nation's waterways, but without requiring a permit for applications of pesticides that are already deemed not to cause unreasonable adverse impacts on the environment. *Id.* at 68,485.

Overall, EPA's Interim Statement and final rule consistently report the thoroughness of EPA's consideration in issuing the Pesticide Rule. Further, EPA's interpretation of the CWA is reasonable and in accordance with the goals of the CWA because the Pesticide Rule promotes the maintenance of the nation's waters. Thus, because the rule is sufficiently reasonable this Court should give deference to EPA's construction of the rule.

2. Farmers' challenge should fail because the EPA's refusal to include additional pesticide applications is reasonable.

EPA's creation of the Pesticide Rule was based upon reasonable research and reporting relating to the balancing of the goals of protecting the nation's waters and protecting human health and life. Farmers had an opportunity to make their case as to the reasonableness of exempting additional pesticides and applications during the notes and comments period. (R. at 6.) EPA considered comments made regarding the expansion of the scope of the Pesticide Rule and, as a response, created a workgroup under the Pesticide Program Dialogue Committee to address the potential implications of pesticide drift on the current Pesticide Rule. Pesticide Rule, 71 Fed. Reg. at 68,488. In line with the court's requirement in *Fed. Election Comm'n*, the EPA has remained consistent in excluding pesticide drift and pesticides used in violation of FIFRA from the first interpretive statement through to the final rule. (R. at 6-7.)

EPA's decision not to include pesticides outside of the scope provided was based on the need for additional research into the potential harmful impacts of pesticide residue and drift. EPA did not wish to work against congressional intent to prohibit unsafe applications of pesticides in FIFRA by condoning uses or applica-

tions in violation of that act. (R. at 8.) As with the pesticides in *Fairhurst*, the pesticides exempted from NPDES permitting by the Pesticide Rule are intentionally applied (not residue, runoff, or drift) and properly performing (consistent with FIFRA registration and regulations) and therefore are not “pollutants.” (R. at 1-2.)

If this Court does determine either that EPA’s action was unreasonable or that it was contrary to express congressional intent, the Court should send the rule back to the agency for review. Farmers are asking this court to declare that pesticides and pesticide applications other than those directly addressed by the rule be exempted from NPDES permitting requirements. (R. at 2.) As the court found in *Chevron*, there is a distinction between judging the reasonableness of an agency’s interpretation and the court interpreting the act on its own authority. If the current form of the Pesticide Rule is exposing regulated parties to a hardship, the Court’s response should be to abolish the rule on its face or as it is applied to the party, not to rewrite the rule to include the demands of the regulated party.

CONCLUSION

The procedural flaws in the Petitioners’ claims preclude a decision on the merits in this case. Baykeepers lack standing and Farmers’ claim is not ripe. The district court’s ruling should be vacated because the case should have been brought directly in the court of appeals. If this Court chooses to decide this case on its merits despite these problems, this Court should rule in favor of EPA by: (1) overturning the summary judgment for Baykeepers entered in the lower court; and (2) finding Farmers’ challenge to be unsupported and void. EPA’s construction of the Pesticide Rule is based on a reasonable and permissible interpretation of the ambiguous term “pollutant” in the CWA, and the limited scope of the rule reflects EPA’s desire to ensure adequate protection of both water quality and human health and life.