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Brief for Industry Plaintiffs - Appellants: 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 INDUSTRY PLAINTIFFS - APPELLANTS

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JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. § 1331 (2000) because this is a civil action arising under the laws of the United States, specifically, the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (2000). In this action, Industry Plaintiffs seek reversal of a final agency action of EPA under the actions reviewable provision of the APA, 5 U.S.C. § 706 (2000).

This appeal of the final decision of the U.S. District Court is brought as a matter of right under 28 U.S.C. § 1291 (2000). Industry Plaintiffs filed this appeal in a timely manner on September 5, 2007 in accordance with Fed. R. App. P. 4(a)(1).

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether Environmental Plaintiffs have standing to challenge the Pesticide Rule.

2. Whether the challenges to the Pesticide Rule should have been brought directly in the Court of Appeals pursuant to 33 U.S.C. § 1369(b)(1) (2000), precluding district court jurisdiction over any challenge to the Pesticide Rule.

3. Whether, if this Court determines these cases should have been commenced in the Court of Appeals, the Court should equitably toll the 120 day statute of limitations of § 1369(b)(1).

4. Whether Industry Plaintiffs' challenge is ripe under the doctrine of *Abbott Laboratories v. Gardner*.

5. Whether the Pesticide Rule's exemption of specified pesticide application activities from the CWA permitting program was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

6. Whether the failure of the Pesticide Rule to include within its exemption pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

STATEMENT OF THE CASE

In this case, two sets of plaintiffs each challenge the scope and validity of the Pesticide Rule issued by Environmental Protection Agency ("EPA") on November 27, 2006 which adopts an amendment to 40 C.F.R. § 122 adding an exemption to National Pollutant Discharge Elimination System ("NPDES") permitting requirements under the Clean Water Act ("CWA") in two circumstances.

On February 23, 2007, Laconic Baykeeper, Inc., Ima Fisher, and Sam Schwimmer ("Environmental Plaintiffs") filed their complaint in No. 07CV1015. On February 24, 2007, New Union Farmers Institute, Union of New Union Pesticide Applicators, Happy Valley Farm Inc., and Wiccillum Copters, Inc., ("Industry Plaintiffs") filed a complaint in No. 07CV1016. Thereafter, the cases were consolidated and the district court held trial proceedings.

The district court granted partial summary judgment in favor of Environmental Plaintiffs declaring the Pesticide Rule to be null and void to the extent that it exempts biological pesticides and non-aquatic pesticides from NPDES requirements, and granted summary judgment dismissing Industry Plaintiffs' complaint for lack of ripeness. On September 5, 2007, Industry Plaintiffs and Environmental Plaintiffs both appealed in No. 07-1001 and 07-1002. EPA cross-appealed asserting that the district court lacked jurisdiction.

STATEMENT OF THE FACTS

On November 27, 2006, in response to several judicial decisions addressing the question whether the discharge of pesticides registered under the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA") to waters required a separate permit under the CWA, EPA amended the Code of Federal Regulations to exempt

two categories of pesticide application from the permitting requirements of 33 U.S.C. § 1342 (2000). R. at 4, 6-7. The Pesticide Rule exempts 1) application of pesticides directly to water to control pests in water and 2) application of pesticides over or near water to control pests over or near water that result in pesticides being discharged to water. R. at 4-5.

Environmental Plaintiffs included Laconic Baykeeper, Inc. ("LBK"), Ima Fisher ("Fisher"), and Sam Schwimmer ("Schwimmer"). R. at 5. LBK, a not-for-profit environmental organization whose members were various recreational and commercial users of Laconic Bay, opposed the use of pesticides in or near Laconic Bay. R. at 5. Fisher and Schwimmer were members of LBK and submitted affidavits describing their use of Laconic Bay and its surrounding tributaries and their concern for possible impacts to them from the use of pesticides. R. at 5.

Industrial Plaintiffs included the New Union Farmers Institute ("NUFI") – a trade association representing the farming industry in New Union; the Union of New Union Aerial Pesticide Applicators ("UNUAPA") – a trade association representing aerial pesticide applicators in New Union; Happy Valley Farm – a corn grower; and Wiccillum Copters – a UNUAPA member that served farmers surrounding Laconic Bay and had a conditional contract with the City to conduct mosquito control operations. R. at 5-6.

The City of Progress developed the Mosquito Control Plan ("Plan") to combat the spread of the West Nile Virus in the event that a significant number of infected mosquitoes or birds were identified. R. at 6. The Plan included application of BTI, a non-chemical biological mosquito larvicide, to tidal salt marshes adjacent to Laconic Bay. R. at 6. BTI was a bacterium generally considered safer for aquatic life than chemical larvicides. R. at 6.

The Plan also included application of Anvil 10 + 10, a chemical adulticide, from helicopters flying directly over the Laconic Bay saltmarshes. R. at 6. The active ingredient of Anvil 10 + 10 was resmithrin, a synthetic chemical that mimics pyrethrin, a naturally occurring chemical insecticide that can be extracted from chrysanthemum flowers. Pyrethroids, including resmithrin, were toxic to fish. R. at 6.

At the time of filing, the City had not yet applied either pesticide to Laconic Bay's salt marshes. R. at 6. Still, Environmental Plaintiffs submitted affidavits claiming adverse impacts of these applications in other cities. R. at 6. In July 2007, the City identified infected birds and mosquito populations in tidal marshes on

Laconic Bay and planned to shortly commence pesticide operations according to its Plan. R. at 7.

SUMMARY OF ARGUMENT

The Constitution provides that federal courts may only resolve actual cases or controversies. In the present case, Environmental Plaintiffs have failed to qualify for standing because at the time of filing it was wholly speculative whether they would suffer an actual or imminent injury, and because a judgment in their favor will not force EPA to require the City of Progress to obtain an NPDES permit for its Mosquito Control Plan.

The CWA provides for exclusive Court of Appeals jurisdiction for certain claims. However, jurisdiction in the district court was proper in the present case because the Pesticide Rule is neither an effluent limitation, nor an action in issuing or denying a permit.

Should this Court find that jurisdiction in the district court was not proper, equitable tolling applies to the Industry Plaintiffs' suit since their challenge is similar to claims against private parties, and because no good reason exists to believe that Congress intended otherwise. In addition, the purpose of the statute of limitations under § 1369(b)(1) would not be served by denying Industry Plaintiffs judicial access since Industry Plaintiffs had already placed EPA on notice of its challenge by timely filing their complaint in the district court.

Industry Plaintiffs' challenge is purely a legal one ripe for judicial review; not an abstract disagreement over an EPA policy. Industry Plaintiffs present a legal challenge to the determinations made by EPA in its final rule. These determinations create a hardship for Industry Plaintiffs in that the plaintiffs risk violation of the CWA permitting requirements when applying terrestrial pesticides.

EPA did reasonably act within its authority to exempt certain pesticide applications from the CWA permitting requirements because its interpretation is consistent with the CWA's definition of "pollutant." Aquatic chemical pesticides applied in compliance with relevant FIFRA requirements are not within the ordinary meaning of "chemical wastes" and therefore, are not pollutants subject to NPDES permitting requirements. Non-aquatic chemical pesticides are also not pollutants under the CWA since they are not "chemical wastes" at the time of discharge, which is what the Act seeks to regulate under its NPDES program. In addition,

because the plain meaning of the term "biological materials" is ambiguous, EPA's interpretation of its meaning in light of the CWA's goals and legislative history is reasonable and should be accorded deference by the courts.

Finally, the Pesticide Rule's failure to exempt pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water was arbitrary and against the clearly expressed intent of Congress because FIFRA provides extensive regulation of pesticide use.

STANDARD OF REVIEW

This Court reviews the district court's grant of summary judgment de novo and must determine whether the district court correctly applied the relevant substantive law. *Southeast Alaska Conservation Council v. U.S. Army Corps of Engr's*, 486 F.3d 638 (9th Cir. 2007). De novo review of a district court judgment concerning a decision of an administrative agency means the court views the case from the same position as the district court. *Id.* (citations omitted). Judicial Review of administrative decisions under the CWA is governed by section 706 of the APA. Under the APA, a court may set aside an agency action if the court determines that the action was arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. *Id.* (citations omitted). This Court reviews issues of statutory interpretation de novo. *Res. Invs., Inc. v. U.S. Army Corps of Eng'rs,* 151 F.3d 1162, 1165 (9th Cir. 1988).

ARGUMENT

I. Environmental Plaintiffs Do Not Have Standing To Challenge The Pesticide Rule Because Their Alleged Injury Was Not Imminent At The Time Of Filing And Is Not Redressable By A Favorable Judgment.

The "case or controversy" requirement of Article III of the Constitution establishes an "irreducible constitutional minimum of standing" required for both constitutional and statutory claims. *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992). To qualify for standing, a plaintiff must show: 1) it has suffered an "injury in fact" that is (a) concrete and particularized, and (b) actual or imminent, as opposed to conjectural or hypothetical; 2) the injury must be fairly traceable to the challenged action of the defendant;

and 3) it must be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision. *Id.* In addition, when a federal agency's action forms the basis of the complaint, to obtain judicial review under the APA, "the plaintiff must establish that the injury he complains of . . . falls within the 'zone of interests' sought to be protected by the statutory provision whose violation forms the legal basis for his complaint." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 883 (1990); 5 U.S.C. § 702 (2000).

In the present case, Environmental Plaintiffs have failed to establish standing because they have not alleged an imminent injury that is capable of redress by a federal court.

A. At the time of filing, Environmental Plaintiffs had not suffered an actual or imminent injury in fact because it was wholly speculative whether the City would ever apply pesticides to Laconic Bay.

To satisfy the "injury in fact" requirement, the asserted injury must be actual or imminent. In *Defenders of Wildlife*, the Court stressed that the imminence standard "cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes." 504 U.S. at 565 n. 2. Similarly, in *Whitmore,* the Court declared, "[a]llegations of possible future injury do not satisfy the requirements of Art[icle] III. 495 U.S. at 158.

The policy behind the "actual or imminent" requirement is based on the recognition that "[w]ere all purely speculative increased risks deemed injurious, the entire requirement of actual or imminent injury would be rendered moot, because all hypothesized, non-imminent injuries could be dressed up as increased risk of future injury." *NRDC v. EPA*, 464 F.3d 1, 6 (D.C. Cir. 2006). Moreover, the requirement that a plaintiff show that the particularized injury is at least "imminent" reduces the possibility that a court might unconstitutionally render an advisory opinion by "deciding a case in which no injury would have occurred at all," *Defenders of Wildlife,* 504 U.S. at 564 n. 2.

In the present case, the district court's reliance on *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973), *see* R. at 9, to disregard the above reasoning is misplaced. *SCRAP* has been severely limited to its particular facts by subsequent decisions, and has been found to be useless in the context of a motion for summary judgment. *Nat'l*

Wildlife Fed'n, 497 U.S. at 889 ("The *SCRAP* opinion . . . has never since been emulated by this Court, and is of no relevance here, since it involved not a Rule 56 motion for summary judgment but a Rule 12(b) motion to dismiss); *also* SIERRA CLUB V. PETERSON, 185 F.3d 349, 361 n. 13 (5th Cir. 1999) ("*Lujan I* likely eviscerated certain prior cases [e.g. *SCRAP*] that afforded . . . standing where the three-part test was not met.").

In applying the standing doctrine, the courts have held that "standing is determined as of the date of the filing of the complaint . . . [and] [t]he party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing." *E.g.*, *Kitty Hawk Aircargo, Inc. v. Chao,* 418 F.3d 453, 460 (5th Cir. 2005); *see also Defenders of Wildlife,* 504 U.S. at 570 n. 4 (holding that "[t]he existence of federal jurisdiction ordinarily depends on the facts as they exist when the complaint is filed," and rejecting the argument that events which occur after filing "retroactively create [] redressability (and hence [] jurisdiction) that did not exist at the outset.").

In the present case, the district court held that Environmental Plaintiffs' alleged injury was "sufficiently imminent to support standing" despite the fact that "the City of Progress has not yet discharged pesticides into Laconic Bay." R. at 9. Instead, the court based standing on the City's announcement of "its intention to do so." R. at 9. However, while Environmental Plaintiffs commenced their action in February 2007, the City did not announce its intent to commence pesticide applications until July 2007. *See* R. at 7, 9. Thus, the district court based its reasoning on a statement which did not occur until four months after Environmental Plaintiffs filed their lawsuit.

Moreover, at the time of filing, Environmental Plaintiffs failed to allege an "injury in fact" that was "actual or imminent." The City's Mosquito Plan calls for the application of pesticides to Laconic Bay only "in the event that significant numbers of infected mosquitoes or birds are found." R. at 6. However, at the time of filing the City had not yet applied pesticides to Laconic Bay, nor had it expressed any intent to do so. R. at 6. In addition, the record at the time of filing contains no evidence indicating whether the numbers of infected mosquitoes or birds necessary to initiate the Plan would ever be found. *See* R. at 6. Therefore, when Environmental Plaintiffs filed the present suit, it was wholly speculative whether the City would ever apply pesticides to

Laconic Bay. Thus, the alleged injury to Environmental Plaintiffs was neither "actual" nor "imminent."

B. Environmental Plaintiffs alleged injury is not fairly traceable to EPA and capable of redress by a federal court because overturning the Pesticide Rule's exemptions will not force the City to obtain an NPDES permit for the Mosquito Plan.

The causation and redressability components of standing are interrelated. ALLEN v. WRIGHT, 468 U.S. 737, 753 (1984). The "fairly traceable" component of constitutional standing examines the causal connection between the assertedly unlawful conduct and the alleged injury, whereas the "redressability" component examines the causal connection between the alleged injury and the judicial relief requested. *Id.* However, "when a plaintiff's asserted injury arises from the government's allegedly unlawful regulation (or lack of regulation) of *someone else*, . . . causation and redressability ordinarily hinge on the response of the regulated (or regulable) third party to the government action or inaction." *Defenders of Wildlife*, 504 U.S. at 562. Thus, "when the plaintiff is not himself the object of the government action or inaction he challenges, standing is . . . 'substantially more difficult' to establish." *Id.* In *Defenders of Wildlife*, the Court applied this rule and found that the plaintiffs in that case could not show redressability because a decree on their behalf would not likely yield their desired result. *See id.*

Similarly, Environmental Plaintiffs seek review of a government action regulating a third party – the City. Thus, causation and redressability in the present suit hinges on the "responsiveness" of the City to EPA's action or inaction. *See Defenders of Wildlife*, 504 U.S. at 562. Environmental Plaintiffs claim that the Pesticide Rule injures them by allowing the City to apply pesticides without first obtaining an NPDES permit. *See* R. at 7. However, Environmental Plaintiffs allegation fails to account for the fact that "[i]n the more than 30 years that EPA has administered the CWA, the Agency has never issued an NPDES permit for the application of a pesticide to or over water to target a pest that is present in or over water." EPA Pesticide Rule, 71 Fed. Reg. 68,483, 68,483 (Nov. 27, 2006) (to be codified at 40 C.F.R. pt. 122). Furthermore, EPA has "[never] stated in any general policy or guidance that an NPDES permit is required for such applications." *Id.* Therefore, even if the Court grants standing and

strikes down the Pesticide Rule, EPA would not require the City to obtain a NPDES permit. As such, this Court will be unable to redress Environmental Plaintiffs alleged injury, and Environmental Plaintiffs therefore do not have standing to maintain the present lawsuit.

II. The District Court Properly Exercised Subject Matter Jurisdiction Over The Present Challenge To The Pesticide Rule Because The Exemption Is Neither An "Effluent Limitation Or Other Limitation" Nor An Action "Issuing Or Denying A Permit."

Section 1369(b)(1) of the CWA authorizes federal courts of appeals to review final actions taken by the administrator, "(E) in approving or promulgating any effluent limitation or other limitation," or "(F) in issuing or denying any permit." 33 U.S.C. § 1369(b)(1). The courts of appeals lack power to review actions of the EPA over which § 1369(b)(1) does not specifically grant review. *See* CITY OF BATON ROUGE v. EPA, 620 F.2d 478, 480 (5th Cir. 1980). In addition, the courts construe the scope of authority granted by § 1369(b)(1) narrowly to reflect the specificity of the CWA. *See League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1190 n.8. (9th Cir. 2002) (counseling against expansive application of § 1369(b)). Construction of § 1369(b)(1) reveals Congress' intent to apply the section narrowly. *See* LONGVIEW FIBRE CO. v. RASMUSSEN, 980 F.2d 1307, 1313 (9th Cir. 1992) ("[t]he complexity and specificity of section 1369(b) in identifying what actions of EPA under the FWPCA would be reviewable in the courts of appeals suggests that not all such actions are so reviewable."). Indeed, if Congress had intended for an expansive application of § 1369(b)(1), "it could have simply provided that all EPA action under the statute would be subject to review in the courts of appeals, rather than specifying particular actions and leaving out others." *Id.* Moreover, "[n]o sensible person accustomed to the use of words in laws would speak so narrowly and precisely of particular statutory provisions, while meaning to imply a more general and broad coverage than the statutes designated." *Id.* In the present case, the facts do not warrant § 1369(b)(1) direct appellate review.

A. The Pesticide Rule is not an "effluent limitation or other limitation" under § 1369(b)(1)(E).

The Pesticide Rule is not an "effluent limitation or other limitation" because it does not "limit" or "restrict" quantities of pollutants. Under accepted canons of statutory interpretation, a court must interpret statutes as a whole, giving effect to each word. *E.g.,* BOISE CASCADE CORP. v. U.S. EPA, 942 F.2d 1427 (9th Cir. 1991). "Limitation" is generally defined as, "[t]he act of limiting" or "a restriction." BLACK'S LAW DICTIONARY (8th ed. 2004). Under the CWA, "effluent limitation," means, "any restriction established by a State or the Administrator on quantities, rates, and concentrations of chemical, physical, biological, and other constituents which are discharged from point sources into navigable waters." 33 U.S.C. § 1362(11) (2000). The courts have also interpreted effluent limitation to mean, "a set of standards restricting the quantities of pollutants that enterprises in a given industry may discharge." *E.g., E. I. du Pont de Nemours & Co. v. Train*, 430 U.S. 112, 126-137 (1977); *also* CROWN SIMPSON PULP CO. v. COSTLE, 599 F.2d 897, 902 (9th Cir. 1979) (rev'd on other grounds).

Under the plain meaning of § 1369(b)(1), regulations which exempt certain discharges from the NPDES permitting process cannot be considered effluent limitations because they are not "restrictions," or "limitations on the discretion of industry." *See* ENVTL. PROT. INFO. CTR. v. PAC. LUMBER CO. (*EPIC*), 266 F.Supp.2d 1101, 1118 (N.D. Cal. 2003) (holding that a regulation exempting certain sources of pollution from permitting requirements was not subject to Court of Appeals' original jurisdiction). To the contrary, exemptions such as the Pesticide Rule actually give greater discretion to industry by wholly excluding it from relevant requirements. *See* BLACK'S LAW DICTIONARY (8th ed. 2004) (defining "exemption" as, "[f]reedom from a duty, liability, or other requirement; an exception.").

In *EPIC*, the court considered whether it had jurisdiction to determine the validity of an EPA regulation which provided exemptions from NPDES permitting requirements. *EPIC*, 266 F.Supp.2d at 1118. The court found that the provision at issue was not "'a limitation. . . [or] a restriction on the untrammeled discretion of the industry.'" *Id.* The court explained that "[d]efining a . . . source as a nonpoint source does not restrict industry." *Id.* Instead, the court held that provision "exempts sources of pollution" CWA requirement . . . [and] "neither [plain-

tiff's] nor [defendants] ha[ve] cited any cases that find [such] a provision . . . to be a 'limitation.'" *Id.*

In the present case, the Pesticide Rule is not an "effluent limitation or other limitation" because it does not "restrict" or "limit" quantities of pollutants. Instead, its interpretation of "pollutant" exempts certain discharges from NPDES requirements. *See* EPA Pesticide Rule, 71 Fed. Reg. at 68,485. Thus, the Pesticide Rule does not "limit" or "restrict" pollutants. Instead, the Pesticide Rule is a "categorical exemption," which is "permissive in nature," and "cannot in any sense of the word be considered an 'effluent limitation or other limitation.'" R. at 9.

B. The Pesticide Rule is not an action "issuing or denying any permit" under § 1369(b)(1)(F).

EPA's attempt to bring this case within § 1369(b)(1)(F) is unavailing. Section 1369(b)(1)(F) confers appellate jurisdiction over EPA actions "in issuing or denying any permit under § 1342." 33 U.S.C. § 1369(b)(1)(F) (2000). Section 1342, in turn, establishes the NPDES permitting system. 33 U.S.C. § 1342.

Under the ordinary meaning of "issue" and "deny," the Pesticide Rule is not an "action issuing or denying" a permit. The term, "issue," generally means "to send out or distribute." BLACK'S LAW DICTIONARY (8th ed. 2004). Meanwhile, "denial" is generally defined as, "[a] refusal or rejection." *Id.* Thus, § 1369(b)(1)(F) may be triggered by either the distribution or rejection of a permit. In the present case, the Pesticide Rule involves neither the "issuance" nor the "denial" of a permit, because it is neither a distribution nor a refusal of a permit. Rather, the Pesticide Rule passively exempts certain discharges from CWA permit obligations. *See* EPA Pesticide Rule, 71 Fed. Reg. at 68,483. Thus, EPA's regulatory exemption of certain discharges of pesticides NPDES controls is not the issuance or denial of a permit.

C. The Pesticide Rule is not a rule regulating the underlying NPDES permit procedures.

EPA's argument that § 1369(b)(1)(F) to "rules that regulate the underlying permit procedures" does not apply to the Pesticide Rule. *NRDC v. EPA*, 966 F.2d 1292, 1296-97 (9th Cir. 1992). In extending § 1369(b)(1)(F), the court in *NRDC* intended to avoid the "perverse situation" whereby it "will be able to review the grant or denial of the permit, but will be without authority to re-

view directly the regulations on which the permit is based." *EPIC,* 266 F. Supp. 2d at 1114 (quoting *NRDC v. EPA,* 656 F.2d 768, 775 (D.C. Cir. 1981)).

However, the Pesticide Rule is not a rule regulating permit procedures. Instead, its terms ensure that NPDES permit procedures will never be required for certain discharges. *See* EPA Pesticide Rule, 71 Fed. Reg. at 68,485. Thus, the rationale for subsection (F) jurisdiction is absent. *See EPIC,* 266 F. Supp. 2d at 1115 ("Because EPIC challenges a decision that in effect excludes sources from the NPDES program, the circuit courts will never have to confront the issuance or denial of a permit for these sources."). Equally unhelpful is the district court's reliance on *American Mining Congress v. EPA* (*AMC*), 965 F.2d 759 (9th Cir. 1992), which contained no direct analysis of § 1369(b)(1)(F). *See AMC*, 965 F.2d 759-763. Accordingly, the Pesticide Rule is not a provision regulating the underlying permit procedures.

D. Judicial efficiency does not justify granting exclusive Court of Appeals review.

EPA's argument that judicial efficiency would be better served by having review of CWA regulations in one court of appeals rather than in the district courts is unpersuasive. Responding to the same policy based arguments, the court in *EPIC* refused to stretch the language of § 1369(b)(1) to include a similar exemption because § 1369(b)(2) "bars judicial review of any action that falls within section [§ 1369(b)(1)] 'in any civil or criminal proceeding for enforcement.'" *EPIC,* 266 F. Supp. 2d at 1114. The court emphasized that the Ninth Circuit has counseled against broad construction of § 1369(b)(1)(F), noting the "peculiar sting" of section § 1369(b)(2). *Id.* (citing *Longview Fibre,* 980 F.2d at 1313.). Thus, the district court in the present case correctly dismissed this argument.

In conclusion, the district court properly exercised subject matter jurisdiction in the present case.

III. This Court Should Equitably Toll The 120 Day Statute Of Limitations Because A Presumption Of Equitable Tolling Applies And Industry Plaintiffs Actively Pursued Their Judicial Remedies By Filing Their Pleading During The Statutory Period.

Even if Industry Plaintiffs should have brought their challenge directly in this Court of Appeals pursuant to 33 U.S.C. § 1369(b)(1), the timely filing of their complaint in the district court is justification for equitable tolling of the 120 day statute of limitations.

A presumption in favor of equitable tolling applies to suits against the EPA. *See United States v. Brockamp*, 519 U.S. 347, 350 (1997). Moreover, equitable tolling has been allowed in situations where the claimant has actively pursued his judicial remedies by filing a defective pleading during the statutory period. *Irwin v. Dep't of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). Industry Plaintiffs filed their complaint within the statute of limitations period, but in the wrong court. It would be unfair to now preclude them from pursuing their rights because of this defective pleading.

A. Industry Plaintiffs' suit against EPA has a presumption in favor of equitable tolling.

The same rebuttable presumption of equitable tolling applicable to suits against private defendants applies to suits against the United States, but the government may rebut the presumption by demonstrating that the claims at issue are dissimilar to claims against private parties or by showing that there is good reason to believe Congress did not want the equitable tolling doctrine to apply. *Brockamp,* 519 U.S. at 350.

In this case, the government cannot rebut the presumption because claims against private parties are similar to suits under § 1369(b)(1). The critical issue in looking for analogous suits among private parties is whether a private suit exists which asserts rights against a private defendant similar to the rights asserted, pursuant to the federal statute, against the government. *Four Rivers Inv., Inc. v. United States,* 77 Fed. Cl. 592, 597 (Fed. Cl. 2007). In *Irwin*, the Court concluded that because private defendants could be sued under the federal statute in issue, and because the applicable time limitation could be equitably tolled in

lawsuits between private litigants, Congress must have intended for the time limitation to be equitably tolled in lawsuits against the government. 498 U.S. at 95. Similarly, the CWA allows for civil suits by any citizen against any alleged violator, including the government, of the CWA or against the EPA for failure to perform any nondiscretionary act or duty. 33 U.S.C. § 1365 (2000). Thus, because private defendants could also be sued under the CWA, Congress must have intended for the time limitation to be equitably tolled in lawsuits against the government as well.

Furthermore, there is no good reason to believe Congress did not want the equitable tolling doctrine to apply to § 1369(b)(1). In *Brockamp*, the statute at issue set forth its time limitations in unusually emphatic form. 519 U.S. at 350. The limitations were set forth in a highly detailed technical manner that, linguistically, could not easily be read as containing implicit exceptions. Moreover, the limitations were reiterated several times in several different ways. *Id.* However, unlike the statute in *Brockamp*, § 1369(b)(1) uses fairly simple language that can plausibly be read as containing an implied equitable tolling exception.

Section 1369(b)(1) also provides for an application after 120 days "only if such application is based solely on grounds which arose after such 120th day." 33 U.S.C. § 1369(b)(1). However, this provision should not be read as a limitation. By including this provision, Congress did not intend to make the equitable tolling doctrine unavailable for any and all other applications past 120 days. Rather, to ensure fairness and equity, Congress provided for this extended period in the event that the grounds for a plaintiff's claim did not arise until after the expiration of 120 days. Nothing in this language excludes an equitable tolling exception.

Thus, because Industry Plaintiffs' claims are similar to claims against private parties, and because there is no good reason to believe Congress did not want the equitable tolling doctrine to apply, the presumption of equitable tolling applies to Industry Plaintiffs' claims.

B. Equitable tolling should apply because Industry Plaintiffs actively pursued their judicial remedies by filing their pleading during the statutory period.

Statutes of limitations are primarily designed to assure fairness to defendants. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965). Moreover, the courts should to be relieved of the bur-

den of trying stale claims when a plaintiff has slept on his rights. *Id.* (citation omitted.)

However, this policy of repose designed to protect defendants is frequently outweighed where the interests of justice require vindication of the plaintiff's rights. *Id.* Thus, courts have allowed equitable tolling in situations where the plaintiff has actively pursued his judicial remedies by filing a defective pleading during the statutory period. *See id.* (plaintiff timely filed complaint in wrong court); *Herb v. Pitcairn,* 325 U.S. 77 (1945) (same); *Am. Pipe & Constr. Co. v. Utah,* 414 U.S. 538 (1974) (plaintiff's timely filing of a defective class action tolled the limitations period as to the individual claims of purported class members).

Similarly, Industry Plaintiffs did not sleep on their rights but brought an action within the statutory period in the district court of competent jurisdiction. Industry Plaintiffs failed to file their action in the court of appeals solely because they believed their action in the district court was sufficient. EPA could not have relied upon the policy of repose embodied in the statute of limitation, for it was aware that Industry Plaintiffs were actively pursuing their judicial remedy.

Thus, if this Court determines that Industry Plaintiffs' claims should have been commenced in the Court of Appeals, Industry Plaintiffs respectfully ask that this Court equitably toll the 120 day statute of limitations.

IV. Industry Plaintiffs' Claim Is Fit For A Judicial Decision Because It Is A Legal Challenge To A Final Rule By Epa And Withholding Court Review Would Be A Hardship For Industry Plaintiffs Who Would Run Civil And Criminal Risks.

The ripeness doctrine does not preclude judicial review of Industry Plaintiffs challenge.

> The basic purpose of the ripeness doctrine is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements over administrative policies, and also to protect the agencies from judicial interference until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties.

Abbott Labs. v. Gardner, 387 U.S. 136, 148-149 (1967). But the challenge here is not an abstract disagreement over an EPA policy. Rather, Industry Plaintiffs challenge a rule that EPA has made final. R. at 7. As a result of EPA's Pesticide Rule, Industry Plaintiffs risk violation of the CWA when applying terrestrial pesticides.

The ripeness doctrine of *Abbott Laboratories* requires the court to evaluate the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. *Id.* at 149. To do so, the court must consider: (1) whether delayed review would cause hardship to the plaintiffs; (2) whether judicial intervention would inappropriately interfere with further administrative action; and (3) whether the courts would benefit from further factual development of the issues presented. OHIO FORESTRY ASS'N, INC. v. SIERRA CLUB, 523 U.S. 726, 733 (1998).

Withholding court review would impose a hardship on Industry Plaintiffs who currently run civil and criminal risks for applying pesticides without an NPDES permit. Moreover, judicial intervention would not interfere with further EPA action since the Pesticide Rule is final. Finally, further factual development proposed by EPA on the issue of pesticide drift will not benefit the court since it does not relate to whether pesticide drift constitutes a "pollutant" under the CWA.

A. Industry Plaintiffs' claim is a legal challenge to a final rule by EPA.

The district court found that the question whether particular pesticide applications involve discharges to water subject to CWA permitting is highly fact bound, and therefore, not fit for judicial review. But Industry Plaintiffs' claim is a legal challenge to EPA's interpretation of the term "pollutant" under the CWA. Specifically, EPA determined that residual materials from pesticide applications as well as applications that are not in compliance with FIFRA requirements are "pollutants" under the CWA. EPA Pesticide Rule, 71 Fed. Reg. at 68,489. Since both parties moved for summary judgment in the district court, and, as explained below, further administrative proceedings are unlikely, the issue in this case is purely a legal one. *See Abbott Labs.*, 387 U.S. at 149.

The finality element required for a case to be fit for judicial review is interpreted in a flexible and pragmatic way. *Abbott Labs.*, 387 U.S. at 149-150. In *Frozen Food Express v. United States*, 351 U.S. 40, 41 (1956) the Interstate Commerce Commis-

sion issued an order that specified commodities that were not "agricultural" within the meaning of the agricultural exemption under the Interstate Commerce Act. The Commission listed those commodities that fell within the agricultural exemption and those that did not. *Id.* at 42. Frozen Food Express, a motor carrier transporting numerous commodities that it believed fell within the agricultural exemption but which the Commission ruled were not, filed suit to enjoin the Commission's order. *Id.* The Court found that the order of the Commission was final in that it was in substance a declaratory order which touched vital interests of carriers and set the standard for shaping the manner in which an important segment of the trucking business will be done. *Id.* at 44.

In this case, EPA's Pesticide Rule, as a final agency action, is even more dispositive of a final decision than the Commission's order in *Frozen Food.* As in *Frozen Food,* EPA's Pesticide Rule touches the vital interests of Industry Plaintiffs and sets the standard for shaping the manner in which pesticides will be applied, if at all, by them.

With respect to pesticide drift, the district court found that since EPA is currently studying the problem and may engage in rulemaking in the future, examination of Industry Plaintiffs challenge was better deferred to a specific enforcement action or rulemaking. R. at 10-11. However, any such action is speculative. Moreover, the goals of EPA's Spray Drift workgroup do not relate to whether such pesticide drift is a pollutant under the CWA. Rather, they relate to minimizing such drift. Such goals could be met even without a determination as to whether pesticide drift should be exempted from the permitting requirements of CWA, making a future ruling an unlikely outcome of the Spray Drift workgroup.

EPA's current ruling that it will continue to follow its long-standing practice of not requiring NPDES permits for agricultural pesticide applications conducted in compliance with relevant FIFRA requirements, *see* EPA Pesticide Rule, 71 Fed. Reg. at 68,487, is, pragmatically speaking, a final ruling that pesticide drift is not a pollutant under the CWA. Surely EPA would not have a long-standing practice of allowing pollutants to be discharged into waters without an NPDES permit. This logic runs contrary to the very purpose of the NPDES permitting program under the CWA. Yet, EPA refuses to include pesticide drift that occurs even when pesticides are applied in compliance with

FIFRA as an exemption in its Pesticide Rule. This disconnect leaves Industry Plaintiffs in a dilemma.

B. Withholding court review would cause a hardship to Industry Plaintiffs.

Like the motor carriers in *Frozen Foods*, Industry Plaintiffs are left in a quandary in which they must choose either to change their manner of applying pesticides, pursue costly compliance with NPDES permitting requirements (which may be practically impossible for many individual farmers), or continue their usual pesticide activities in risk of violating the NPDES permitting requirements. Thus, withholding court consideration would be an incredible hardship to Industry Plaintiffs.

EPA need not explicitly require Industry Plaintiffs to comply with the CWA in order for Industry Plaintiffs to fall within the Act's ambit. By purporting to allow Industry Plaintiffs to continue their use of pesticide applications while simultaneously determining that pesticide residues are pollutants, and leaving pesticide drift vulnerable to this interpretation as well, EPA places Industry Plaintiffs in a state of substantial uncertainty as to whether they are subject to the CWA permitting requirements. This state of uncertainty is exasperated by recent case law in which courts have found pesticide applicators in violation of the CWA. *See Forsgren*, 309 F.3d at 1190 (holding that application of pesticides from a plane without a NPDES permit, that result in incidental water contamination, amounted to a CWA violation); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 532-533 (9th Cir. 2001) (holding that residual chemical left in the water after its application qualifies as a chemical waste product and thus as a "pollutant" under the CWA).

Because EPA has not subjected Industry Plaintiffs to enforcement for their activities, the district court found that Industry Plaintiffs had not experienced a hardship. However, Industry Plaintiffs are still vulnerable to suits by citizens under 33 U.S.C. § 1365. In light of EPA's Pesticide Rule which determines that pesticide residue and pesticides applied in violation of FIFRA are "pollutants" under the CWA, and explicitly does not exempt pesticide drift as a "pollutant," citizens, including environmental groups that rigorously oppose pesticide applications, have an even stronger argument that Industry Plaintiffs' pesticide applications require NPDES permits. Industry Plaintiffs should not have to wait to be sued in order to resolve the legal question of whether

their pesticide applications constitute a "pollutant" under the CWA.

In addition, there is a genuine threat of enforcement by EPA if Industry Plaintiffs continue their pesticide applications which may violate FIFRA requirements or result in pesticide residue. If Industry Plaintiffs do not undergo costly compliance with NDPES permitting requirements, they will be subject to civil and criminal penalties under 33 U.S.C. § 1319 (2000) for these applications. It is this type of hardship that court consideration will relieve.

Because Industry Plaintiffs' claims involve a legal challenge to EPA's interpretation of "pollutant" under the CWA, and because the Pesticide Rule is a final rule impacting the manner in which Industry Plaintiffs will apply pesticides, this claim is ripe under the doctrine of *Abbott Laboratories*.

V. The Pesticide Rule's Exemption Of Specified Pesticide Applications Is Valid Because It Is Consistent With The CWA's Definition Of Pollutant And EPA's Reasonable Interpretation Of The Ambiguous Term "Biological Materials" Is Entitled Deference By The Court.

Although EPA was arbitrary in its decision to limit its Pesticide Rule to two categories of pesticide applications, EPA did reasonably act within its authority to exempt those applications because its interpretation is consistent with the CWA's definition of "pollutant."

The CWA defines the term "pollutant" to mean, among other things, chemical wastes and biological materials. 33 U.S.C. § 1362(6) (2000). It should be generally assumed that Congress expresses its purpose through the ordinary meaning of the words it uses. *Escondido Mut. Water Co. v. La Jolla Band of Mission Indians*, 466 U.S. 765, 772 (1984). The district court looked to the dictionary meaning of "waste" and found permissible EPA's interpretation that an aquatic chemical pesticide that is designed, registered, and intended to be applied to water to kill pests living in the water is not a chemical waste when it is so applied. R. at 12. However, the district court erred when it found that non-aquatic chemical pesticides constitute a pollutant because such pesticides are not a waste at the time of discharge.

The district court also erred when it determined Congress's use of the term "biological materials" unambiguously includes bio-

logical pesticides. The court inexplicably presumed that Congress had the use of biological pesticides in mind when it chose the word "materials" over "wastes." The court's reasoning involved a limited comparison of only two of the more than ten listed pollutants, and it therefore failed to analyze whether the term "biological materials" was ambiguous. Because the term "biological materials" *is* ambiguous, the question for the court is whether the agency's interpretation is based on a permissible construction of the CWA. *See Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984). EPA's interpretation should be given controlling weight unless it is arbitrary, capricious, or manifestly contrary to the statute. *Id.* at 844.

A. Aquatic chemical pesticides, applied in compliance with relevant FIFRA requirements, do not constitute a "pollutant" under the CWA because the pesticides are not "chemical wastes."

The exemption of a chemical pesticide applied in compliance with relevant FIFRA requirements is not contrary to Congress' definition of a pollutant under the CWA. Rather, EPA's exemption of this category is in harmony with the statute.

It is well established that statutory construction must begin with the language employed by Congress and the assumption that the ordinary meaning of that language accurately expresses the legislative purpose. *Engine Mfrs. Ass'n v. South Coast Air Quality Mgmt. Dist.*, 541 U.S. 246, 252 (2004) (citation omitted). EPA reasons that a pesticide applied consistent with relevant FIFRA requirements cannot constitute a chemical waste if, at the time it is discharged into the water, it serves a useful purpose. EPA Pesticide Rule, 71 Fed. Reg. at 68,486. This is consistent with the plain meaning of the word "waste" which is defined as that which is "eliminated or discarded as no longer useful or required after the completion of a process." R. at 12.

Pesticides applied consistent with relevant FIFRA requirements are products that EPA has evaluated and registered for the purpose of controlling target organisms, and are designed, purchased, and applied to perform that purpose. EPA Pesticide Rule, 71 Fed. Reg. at 68,486 (citing *Fairhurst v. Hagener*, 422 F.3d 1146, 1150 (9th Cir. 2005)). The pesticide application that EPA exempted serves a useful purpose by controlling mosquito larvae, aquatic weeds, or other pests that are present in the water.

Therefore, such pesticide application is not a waste under the CWA.

An agency's construction of a statute it is charged with enforcing is entitled to deference if it is reasonable and not in conflict with the expressed intent of Congress. *U.S. v. Riverside Bayview Homes, Inc.*, 474 U.S. 121, 131 (1985) (citing *Chem. Mfrs. Ass'n. v. NRDC, Inc,* 470 U.S. 116, 125 (1985); *Chevron U.S.A. Inc.*, 467 U.S. at 842-845). Pursuant to 33 U.S.C. § 1251(d) (2000), the Administrator of EPA is in charge of administering the CWA, and should be accorded deference in its reasonable interpretation that specific categories of applications do not involve the discharge of a pollutant into water. In harmony with Congress' expressed intent, it is wholly permissible that EPA exempted aquatic chemical pesticides applied in accordance with applicable FIFRA requirements from the NPDES permitting requirements of the CWA.

B. Non-aquatic chemical pesticides, applied in compliance with relevant FIFRA requirements, do not constitute "pollutants" under the CWA because the pesticides are not "chemical wastes" at the time of discharge.

The non-aquatic chemical pesticides described in the Pesticide Rule are not within the ambit of the NPDES permitting program. The CWA states that the "discharge of any pollutant by any person shall be unlawful" unless such discharge is in compliance with certain provisions of the act. 33 U.S.C. § 1311(a) (2000). The term "discharge of a pollutant" means any addition of any pollutant to navigable waters from any point source. 33 U.S.C. § 1362(12) (2000). Thus, *at the time of discharge*, the addition to water must be a pollutant. As explained above, a chemical pesticide used to control pests and administered in accordance with relevant FIFRA requirements is not a chemical "waste" under the CWA. Since it is not a chemical waste, it is not a pollutant. And since the application of the chemical pesticide does not equate the discharge of a pollutant, the CWA is not triggered.

In the absence of an actual addition of any pollutant to navigable waters from any point, there is no point source discharge, no statutory violation, no statutory obligation of point sources to comply with EPA regulations for point source discharges, and no statutory obligation of point sources to seek or obtain an NPDES permit in the first instance. *Waterkeeper Alliance, Inc. v. U.S. EPA*, 399 F.3d 486, 505 (2d Cir. 2005).

The district court reasoned that non-aquatic pesticides that fall into water after being used to kill pests that are not present in water are within the dictionary definition of materials that are "eliminated . . . as no longer useful." R. at 12. However, this reasoning is flawed because it fails to analyze the material at the time of discharge. In addition, the district court incorrectly applied an ambient approach rather than the "end-of-pipe" discharge approach to determine that an NPDES permit is required.

The pre-1972 legislation employed ambient water quality standards as the primary mechanism for water pollution control. MAIER v. U.S. EPA, 114 F.3d 1032, 1048 (10th Cir. 1997) (citations omitted). The 1972 Amendments deliberately ended this approach. *Id.* Congress declared as the new national goal of the program that the discharge of pollutants into the navigable waters be eliminated. *Id.* Consistent with this end, the CWA substituted technology-based, generally-applicable effluent limitations for water quality-based regulatory approaches. *Id.*

In light of this history, it is apparent that, *under the NPDES*, Congress focused on regulating the material being discharged from point sources; not, as in the ambient approach, on the effect of pollution on water quality. Thus, to trigger the NPDES, at the time of discharge the material in the discharge must be both a pollutant, and from a point source. *See* EPA Pesticide Rule, 71 Fed. Reg. at 68,487. Since the non-aquatic pesticide is not a chemical waste at the time of discharge, it is not a pollutant, and therefore, not subject to NPDES permitting requirements.

The district court found that the pesticide transforms into a chemical waste once it falls into the water since it is no longer being used to kill pests. R. at 12. However, even assuming this is so, the NPDES does not seek to regulate discharges that may later become pollutants. This issue of transformation is addressed using the ambient approach. As EPA points out, the residual should be treated as a nonpoint source pollutant, potentially subject to CWA programs other than the NPDES permit program. *See* EPA Pesticide Rule, 71 Fed. Reg. at 68,487.

Finally, the district court's reliance on *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club,* 1996 WL 131863, at *13 (S.D.N.Y. Mar. 22, 1996) as well as *Hudson River Fisherman's Ass'n v. City of New York,* 751 F.Supp. 1088, 1101 (S.D.N.Y. 1990), *aff'd*, 940 F.2d 649 (2d Cir. 1991) is misplaced. In *Long Island* the court found that spent shot and target fragments conveyed into the United States waters constituted pollutants within the mean-

ing of the CWA. 1996 WL 131863, at *14. However, unlike the pesticides at issue in this case, the spent shot and target fragments were wastes *at the time of discharge*.

In *Hudson River* the court found that a chlorine residual, *when discharged* into navigable waters is regarded as a pollutant, even though its intended use is a beneficial one. *Hudson River*, 751 F.Supp. at 1101 (emphasis added). Unlike the pesticides in this case, the chlorine residual served no purpose *at the time of discharge* and, therefore, constituted a chemical waste.

C. EPA's interpretation of the ambiguous term "biological materials" as excluding biological pesticides is reasonable and should be accorded deference under the Chevron doctrine.

Without explanation, the district court presumed that the term "biological materials" was unambiguous. R. at 12. However, whether the language of a statute is plain or ambiguous is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.,* 519 U.S. 337, 341, (1997).

The word "material" is defined as "the matter from which a thing is or can be made." The New Oxford American Dictionary 1054 (Elizabeth J. Jewell & Frank Abate eds., 2001). The word "biological" is defined as "of or relating to biology or living organisms." *Id.* at 167. Thus, in its plain language, "biological materials" means anything made of something relating to biology or living organisms. As EPA pointed out, taken to its literal extreme, such an interpretation could arguably mean that activities such as fishing with bait would constitute the addition of a pollutant. *See* EPA Interim Statement, 68 Fed. Reg. 48,385, 48,388 (Aug. 12, 2003). Surely Congress did not intend such a broad and far-reaching meaning.

Although, as the district court found, Congress presumably had a reason to classify "chemicals" as pollutants only if they were wastes, while classifying all "biological materials" as pollutants, R. at 12, it does not necessarily follow that Congress intended to include biological pesticides.

> Considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative

> interpretations has been consistently followed whenever decision as to the meaning or reach of a statute has involved reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations.

Chevron, 467 U.S. at 844. Thus, the court need only find "that EPA's understanding of this very 'complex statute' is a sufficiently rational one to preclude a court from substituting its judgment for that of EPA." *Chem. Mfrs. Ass'n v. Natrual Res. Def. Council, Inc.*, 470 U.S. 116, 125 (1985). It is not the role of the court to decide which policy choice is the better one, for it is clear that Congress has entrusted such decisions to EPA. *Arkansas v. Oklahoma*, 503 U.S. 91, 114 (1992).

It is plausible that Congress decided to use the term biological "materials" instead of "wastes" in order to capture aquaculture discharges, such as escaped fish from fish farms. In fact, the cases that the district court cites found that such biological materials constitute pollutants. *See U.S. Pub. Interest Research Group v. Atl. Salmon*, 215 F. Supp. 2d 239, 247-49 (D. Me. 2002) (non-native fish, and salmon feces and urine from salmon farm enclosures are biological materials); *Nat'l Wildlife Fed'n v. Consumers Power Co.*, 862 F.2d 580, 585 (6th Cir. 1988) (fish and fish parts released from hydro-electric facility's turbine are biological materials).

However, those biological materials are very different in character and nature from biological pesticides applied consistent with relevant FIFRA requirements. Biological pesticides are used under FIFRA in such a way as to target pests without posing "unreasonable adverse effects" to the environment. *See* 7 U.S.C. § 136a(c)(5) (2000). In fact, the biological insecticide to be used under the City's Plan is generally considered safer for aquatic life than chemical larvacides. R. at 6.

Moreover, the legislative history of the CWA indicates that EPA's interpretation of the term "biological material" is consistent with the goals of the CWA. The maintenance of the natural chemical, physical and biological integrity of water require that any changes in the environment resulting in a physical, chemical or biological change in a pristine water body be of a temporary nature, such that by natural processes, within a few hours, days or weeks, the aquatic ecosystem will return to a state functionally identical to the original. S. REP. No. 92-414, at 76 (1972), *as reprinted in* 1972 U.S.C.C.A.N. 3668, 3742. Because FIFRA re-

quires that no unreasonable adverse effects result, a biological pesticide applied in accordance with FIFRA requirements will ensure that the aquatic ecosystem return to a state "functionally identical to the original."

It is unlikely, then, that Congress had biological pesticides in mind when deciding to use the term "materials" rather than "wastes." This is also demonstrated by the fact that at the time the Act was adopted in 1972, chemical pesticides were predominant. EPA Pesticide Rule, 71 Fed. Reg. at 68,486. Moreover, as EPA points out, it would be irrational for Congress to include biological pesticides in the NPDES permitting program, while excluding chemical pesticides, as both are equally regulated under FIFRA. R. at 12. Likewise, it would be irrational for Congress to include the natural, biological material pyrethrin within the CWA's ambit while excluding the synthetic chemical version, resmithrin, when both are equally toxic to fish.

As demonstrated, EPA's interpretation of the term "biological materials" was not arbitrary, capricious, or manifestly contrary to the CWA. Rather, it was a rational interpretation which precluded the district court from substituting its own judgment for that of EPA. Whereas Congress *may* have concluded that non-indigenous species posed a greater threat than the introduction of chemicals, R. at 12, that interpretation by the district court is not controlling under the well-established rule of *Chevron*. Although it may not agree with EPA's interpretation, under *Chevron*, the district court may not supplant the interpretation with its own.

For the foregoing reasons, Industry Plaintiffs respectfully request this Court to find that EPA's Pesticide Rule, which was based on a reasonable interpretation of the CWA, is wholly valid.

VI. Given The Extensive Regulation Of Pesticides Under FIFRA, EPA's Failure To Include Pesticide Residues, Pesticides Applied In Violation Of FIFRA Requirements, And Pesticides Applied Distant From Water But Which Drift Into Water Within The Exemptions Of The Pesticide Rule, Is Against The Clear Intent Of Congress, And Is Arbitrary And Capricious.

The APA governs judicial review of agency action. 5 U.S.C. § 701 *et seq.* (2000). When a court reviews an agency's construction of a statute which it administers, it is confronted with two

questions. *Chevron*, 467 U.S. at 842. First, the court must ask "whether Congress has directly spoken to the precise question at issue." *Id.* at 842 . If the intent of Congress is clear, the court, must give it legal effect. *Id.* at 842-843. Congress' intent may be determined by the "traditional tools of statutory construction," including the text, legislative history, and the overall purpose of the statute.

If Congress has not directly spoken to the issue at hand, the court must decide if the agency's action is based on a permissible construction of the statute. *Id.* at 843. In this second step, the court must give considerable weight to the agency's construction and it may not substitute its own construction if the agency's interpretation is reasonable. *Id.* at 843-44. Instead, under the APA and *Chevron*, a court may set aside agency action only by finding the action "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." *Id.*; 5 U.S.C. § 706(2)(A); *Ctr. for Biological Diversity v. Veneman,* 335 F.3d 849, 853 (9th Cir. 2003). An agency action is arbitrary and capricious where the agency has, "offered an explanation for its decision that runs counter to the evidence before the agency." *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.,* 463 U.S. 29, 43 (1983). In the present case, Congress intended FIFRA to extensively regulate pesticide use.

A. The overall purpose, text, requirements, and legislative history of FIFRA reveal Congress' intent to regulate pesticides extensively under FIFRA.

The overall purposes of FIFRA demonstrate Congress' intent to extensively regulate the use of pesticides under its provisions. FIFRA is a comprehensive regulatory statute which extensively governs the registration and use of pesticides. *See Ruckelshaus v. Monsanto Co.,* 467 U.S. 986, 991-95, (1984) (providing a detailed history of FIFRA). FIFRA's overall purpose is to ensure that pesticides perform their intended function without unreasonable adverse effects on the environment. *See* 7 U.S.C. § 136a(c)(5)(C)-(D) (2000). EPA accepts registration of a pesticide only upon a finding that the pesticide "will perform its intended function without unreasonable adverse effects on the environment; and when used . . . will not generally cause unreasonably adverse effects on the environment." *Id.*; *see also Worm v. Am. Cyanamid Co.*, 5 F.3d 744, 747 (4th Cir. 1993).

The text of FIFRA demonstrates Congress' intent to allocate broad authority to EPA under the statute. FIFRA defines the phrase, "unreasonable adverse effects on the environment" to include, "any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of any pesticide." 7 U.S.C. § 136(bb) (2000). In addition, FIFRA defines the term "environment" to include, "water, air, land, and all plants and man and other animals living therein, and the interrelationships which exist among these." 7 U.S.C. § 136(j) (2000). Thus, the plain text of FIFRA shows that Congress intended FIFRA to regulate the impacts of pesticide use on the waters of the United States.

FIFRA's requirements mandate registration with EPA of all pesticides and herbicides sold in the United States, *see* 7 U.S.C. § 136(a) (2000), and require EPA to issue a "label" for each registered pesticide, indicating the manner in which it may be used. 7 U.S.C. §136(a)(2)(G) (2000). FIFRA makes it unlawful "to use any registered pesticide in a manner inconsistent with its labeling," 7 U.S.C. § 136(a)(2)(G), and provides that any use of a pesticide in a manner inconsistent with FIFRA labeling requirements is subject to both civil and criminal penalties. 7 U.S.C. § 136 (2000). Thus, Congress also demonstrated its intent to regulate pesticide use under FIFRA by providing ample means for EPA to prosecute offenders of FIFRA's pesticide use requirements.

The legislative history of FIFRA confirms this construction. The 1972 Senate Report on the proposed FIFRA amendments states, "[FIFRA] provides for more complete regulation of pesticides in order to provide for the protection of man and his environment . . . . Pesticides affect the food man eats, the water he drinks, [and] the air he breathes." S. REP. No. 92-838, at 3-9 (1972). Additionally, the report states, "[The Administer of EPA] must consider . . . cover to keep the rain where it falls, prevent floods, [and] provide clear water." *Id.* Thus, the legislative history of FIFRA supports a broad interpretation of FIFRA's scope.

Finally, it is worth noting that the modern versions of FIFRA and CWA are each the result of comprehensive amendments to the former versions of the statutes which were enacted within three days of each other in 1972. *See* PUB. L. NO. 92-516, 86 Stat. 975 (Oct. 21, 1972) (FIFRA); PUB. L. NO. 92-500, 86 Stat. 816 (Oct. 18, 1972) (Clean Water Act). Given this temporal proximity, it stands to reason that had Congress intended to require EPA to issue NPDES permits for the use of pesticides, it would have simply ad-

ded pesticides to its list of "pollutants" in the 1972 amendments to the CWA.

Moreover, the fact that these two regulatory schemes were before Congress at the same time supports the logical finding that Congress' failure to include pesticides within its list of "pollutants" indicates an intent to regulate pesticides under FIFRA. Further support for this inference lies in the fact that the CWA has a citizen suit provision, 33 U.S.C. § 1365, while FIFRA does not. 7 U.S.C § 136 *et seq*. This difference shows that Congress intended to preclude individuals from suing to enforce regulations on the use of pesticides, and instead intended to leave enforcement up to EPA and the Attorney General under FIFRA. *See* ADAIR V. TROY STATE UNIV. OF MONTGOMERY, 892 F.Supp. 1401, 1405 n. 3 (M.D. Ala. 1995) (recognizing FIFRA as, "the only major environmental statute without a citizen suit provision.").

In sum, Congress intended FIFRA to govern registration and use of pesticides. Therefore, EPA's failure to exempt pesticide applications from CWA permit requirements went directly against the intent of Congress and should be reversed.

B. Assuming *arguendo* that Congress' intent is unclear, EPA's promulgation of the Pesticide Rule was arbitrary and capricious because it failed to properly consider evidence of its own regulatory history under the CWA.

Recently, some courts have attempted to determine the question of whether CWA permit requirements can apply to pesticide applications. *See Headwaters*, 243 F.3d 526 (holding that aerial application of insecticides required an NPDES permit); *but see Fairhurst*, 422 F.3d at 1149 (limiting *Headwaters* to its particular facts); *Forsgren*, 309 F. 3d at 1185 (indicating that the parties to the suit agreed that chemical pesticides constituted pollutants); *No Spray Coal., Inc. v. City of New* York, 351 F.3d 602 (2d Cir. 2004) (failing to answer the question of whether spraying in compliance with FIFRA must be deemed also to comply with CWA).

However, despite these courts' best efforts to resolve this complex issue, it became clear that, "[u]ntil the EPA articulates a clear interpretation . . . the question of whether properly used pesticides can become pollutants that violate the CWA will remain open. EPA Pesticide Rule, 71 Fed. Reg. at 68,485 (citing *Altman v. Town of Amherst*, 47 Fed. App'x. 62, 67 (2d Cir. 2002)). In promulgating the Pesticide Rule, EPA attempted to provide the needed

"clear interpretation." *Id.* However, based on EPA's history of pesticide regulation, pesticides are properly regulated under FIFRA and not the CWA.

The purpose of the CWA is "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. § 1251(a) (2000). To accomplish its goals EPA requires NPDES permits for discharges of pollutants into navigable waters from point sources. *See* 33 U.S.C. § 1342(1) (2000). Section 1362(6) defines "pollutant" to mean (in relevant part) "chemical wastes," and "biological materials." Throughout EPA's history of enforcing both the CWA and FIFRA, EPA has never interpreted the CWA to require that pesticide users obtain NPDES permits nor has it ever said that an NPDES permit would be required for such applications. EPA Pesticide Rule, 71 Fed. Reg. at 68483. Thus, EPA has never found pesticides to be "point-source pollutants" under the CWA. *See id.*

Instead, EPA has consistently chosen to rely on the statutory requirements of FIFRA to regulate pesticides. *See* EPA Pesticide Rule 71 Fed. Reg. at 68487 ("EPA will continue to follow its long-standing practice of not requiring NPDES permits for agricultural pesticide applications that are conducted in compliance with relevant FIFRA requirements."). In discussing FIFRA's ability to address water quality impacts, EPA flatly stated, "registration and use of a pesticide in accordance with . . . FIFRA requirements indicates that a pesticide is intended to be used for a beneficial purpose that is authorized by EPA and is not a waste." EPA Pesticide Rule, 71 FR at 69488. Thus, the history of EPA regards FIFRA as the proper statute to regulate pesticide use.

Despite this history, some courts and commentators advocate CWA regulation of pesticides based on the notion that FIFRA regulations are purely national in scope and that NPDES permits under the CWA are necessary to protect local concerns. *See Headwaters*, 243 F.3d at 531 ("FIFRA's labels are the same nationwide, and so the statute does not and cannot consider local environmental conditions."); *see also* "Is FIFRA Enough Regulation?: Failure to Obtain a NPDES Permit for Pesticide Applications May Violate the Clean Water Act" 79 Chi.-Kent L. Rev. 317, 340 (arguing that CWA enforcement fills "statutory gap" between national FIFRA provisions and local CWA provisions).

However, EPA disclaimed this argument. *See* EPA Pesticide Rule 71 Fed. Reg. at 68489. EPA stated that it "disagrees with commenters' concerns that EPA's registration process does not

take into account local conditions." *Id.* EPA emphasized that "[t]he regulatory and non-regulatory tools under FIFRA provide means of addressing water quality problems arising from the use of pesticides." *Id.* at 68488. Therefore, the admittedly "cursory review of the statutes" undertaken in *Headwaters* decision is not worthy of credence. *Headwaters*, 243 F.3d at 531. Instead, FIFRA adequately and extensively responds to local concerns.

Accordingly, EPA's refusal to include within its exemption pesticide residues, pesticides applied in violation of FIFRA requirements, and pesticides applied distant from water but which drift into water was arbitrary and capricious because it runs counter to the evidence before EPA.

CONCLUSION

For the foregoing reasons, New Union Farmers Institute, Union of New Union Pesticide Applicators, Happy Valley Farm Inc., and Wiccillum Copters, Inc., respectfully request that this Court reverse the district court's grant of summary judgment dismissing the Industry Plaintiffs' complaint and the district court's grant of partial summary judgment in favor of Environmental Plaintiffs.