

**Revised 2008 National Environmental Law Moot Court Competition Problem**

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

**Laconic Baykeeper, Inc., Ima Fisher,  
and Sam Schwimmer,**

**Appellants—Cross-Appellees,**

**v.**

**CA. No. 07-1001**

**STEPHEN JOHNSON,  
ADMINISTRATOR,  
U.S. Environmental Protection  
Agency,**

**Appellees—Cross-Appellants.**

**New Union Farmers Institute,  
Union of New Union Pesticide  
Applicators, Happy Valley Farm,  
Inc., and Wicillum Copters, Inc.,**

**Appellants,**

**v.**

**CA. No. 07-1002**

**STEPHEN JOHNSON,  
ADMINISTRATOR,  
U.S. Environmental Protection  
Agency,**

**Appellee.**

**ORDER**

In these consolidated cases, two groups of plaintiffs challenge the scope and validity of the so-called “Pesticides Rule” issued by Environmental Protection Agency (EPA) on November 27, 2006. 71 Fed. Reg. 68,483 (Nov. 27, 2006). The Pesticides Rule adopts an amendment to 40 C.F.R. § 122 that adds an exemption to permitting

requirements under Clean Water Act (CWA) § 402, 33 U.S.C. § 1342, in two circumstances: 1) where aquatic pesticides are discharged directly to 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. EPA adopted this regulation in order to resolve conflicting interpretations of the term “pollutant” under CWA § 502(6), 33 U.S.C. § 1362(6).

In No. 07-1001, Laconic Baykeeper, together with other environmental plaintiffs, challenged EPA’s authority to adopt any exemption from CWA permitting requirements for pesticides discharged into waters of the United States. In No. 07-1002, New Union Farmers Institute, together with other industry plaintiffs, challenged the limited scope of the exemption, seeking 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.

The District Court rejected EPA’s arguments that both actions were precluded by CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1), which provides for exclusive Court of Appeals jurisdiction of challenges to specified EPA regulatory actions. The District Court granted the Environmental Plaintiffs’ summary judgment in part, ruling that EPA acted contrary to the express intent of Congress when it purported to exempt biological (i.e., non-chemical) pesticides and non-aquatic pesticides applied over or near water, from CWA permitting requirements. The District Court did not reach the Industry Plaintiffs’ challenges, ruling instead that their challenges were not ripe under *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

Environmental Plaintiffs and Industry Plaintiffs both appealed. EPA cross-appealed in both cases, asserting that the District Court lacked jurisdiction to consider challenges to the Pesticide Rule.

The parties are directed to brief the following issues:

1. Whether the Environmental Plaintiffs have standing to challenge the Pesticide Rule. (Environmental Plaintiffs argue that they do; EPA and Industry Plaintiffs argue that they do not)
2. Whether the 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. (Environmental Plaintiffs and Industry Plaintiffs both argue that jurisdiction in the District Court was proper; EPA argues that it was not)
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 CWA § 509(b)(1). (Environmental Plaintiffs and Industry Plaintiffs argue it should; EPA argues it should not)

4. Whether Industry Petitioners' challenge is ripe under the doctrine of *Abbott Laboratories v. Gardner*. (Environmental Plaintiffs and Industry Plaintiffs argue it is; EPA argues it is not).
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. (Environmental Plaintiffs argue it was; Industry Plaintiffs and EPA argue it was not).
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. (Industry Plaintiffs argue it was; Environmental Plaintiffs and EPA argue it was not).

SO ORDERED

Entered September 6, 2007.

[NOTE: No cases decided after September 1, 2007 may be cited either in the briefs or in oral argument.]

**UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF NEW UNION**

**Laconic Baykeeper, Inc., Ima Fisher,  
and Sam Schwimmer,**

**Plaintiffs,**

**v.**

**07CV1015 (RNR)**

**STEPHEN JOHNSON,  
ADMINISTRATOR,  
U.S. Environmental Protection  
Agency,**

**Defendant.**

**New Union Farmers Institute,  
Union of New Union Pesticide  
Applicators, Happy Valley Farm,  
Inc., and Wicillum Copters, Inc.,**

**Plaintiffs,**

**v.**

**07CV1016 (RNR)**

**STEPHEN JOHNSON,  
ADMINISTRATOR,  
U.S. Environmental Protection  
Agency,**

**Defendant.**

**DECISION, ORDER AND JUDGMENT**

In these consolidated cases, plaintiffs challenge the validity of the so-called “Pesticide Rule” issued by United States Environmental Protection Agency (EPA) on November 27, 2006. In the “Pesticide Rule,” EPA amended the Code of Federal Regulations to exempt two categories of pesticide application from the permitting requirements of Clean Water Act § 301, 33 U.S.C. § 1361. The regulation 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. In 07CV1015, environmental plaintiffs assert that EPA had no authority under the Clean Water Act to adopt any such exemption. In No. 07CV1016, plaintiff farmers and pesticide applicators assert that the EPA exemption did not go far enough and should have exempted agricultural applications of pesticides from Clean Water Act permitting requirements as well. For the reasons explained below, this Court determines that it has jurisdiction over these rule challenges and that all plaintiffs have standing, grants partial summary judgment in favor of environmental plaintiffs on their challenge to the Pesticide Rule, and grants summary judgment against the industry plaintiffs in their challenge.

## **THE PARTIES**

Plaintiffs in No. 07CV1015 include Laconic Baykeeper, Inc.<sup>1</sup> (“LBK”), Ima Fisher, and Sam Schwimmer. LBK is a not-for-profit environmental organization whose members are various recreational and commercial users of Laconic Bay, a tidal estuarine body of water connected to the Laconic Ocean. LBK opposes the use of pesticides in or near Laconic Bay or its tributaries. Plaintiffs Ima Fisher and Sam Schwimmer are members of LBK. Fisher has submitted an affidavit describing her use of Laconic Bay as a third-generation commercial fisherperson and her concern that the possible use of mosquito control pesticides by the City of Progress in the salt marshes surrounding Laconic Bay will cause fish kills and reduce the reproductive success of finfish and crabs in the estuary, reducing the value of the commercial fishery that she depends on for her livelihood. Schwimmer is a recreational user of Laconic Bay. His affidavit describes his use of Laconic Bay and its adjacent marshlands for swimming and birdwatching. Schwimmer expresses the concern that use of pesticides to control mosquitoes in the marshes surrounding Laconic Bay will expose him to dangerous chemicals when he swims in the waters of Laconic Bay and will reduce his opportunities to view birds.

Plaintiffs in No. 07CV1016 include the New Union Farmers Institute (“NUFI”), the Union of New Union Aerial Pesticide Applicators (“UNUAPA”), Happy Valley Farm, and Wiccillum Copters. NUFI is a trade association representing the farming industry in New Union, whose members include dairy farms, corn and soybean growers, and cotton farms. UNUAPA is a trade association representing aerial pesticide applicators in New Union, whose businesses include crop dusting and mosquito control using fixed wing aircraft and helicopters. Happy Valley Farm is a corn grower. NUFI’s members, including Happy Valley, routinely spray pesticides on their fields to control insects, including the corn-borer and boll weevil, that would otherwise destroy their crops. NUFI’s members typically apply these pesticides using aircraft. Many of NUFI’s members are located near surface water bodies, including rivers and streams that flow into Laconic Bay. Although some drift from such aerial pesticide applications inevitably ends up in surface waters flowing into Laconic Bay, none of NUFI’s members have been required to get a permit under the federal Clean Water Act for such applications, and no enforcement action has ever been threatened against any of the farmers. UNUAPA’s members include Wiccillum Copters, an aerial pesticide applicator that serves farmers

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<sup>1</sup> We are informed that “Baykeeper” is a registered trademark of the Waterkeeper Alliance, of which Laconic Baykeeper is apparently a member.

surrounding Laconic Bay, as well as having a conditional contract with the City of Progress to conduct mosquito control operations.

West Nile Virus was first identified in the United States during an outbreak in New York City in 1999. The disease is carried by birds and can be spread to humans who are bitten by mosquitoes that have also bitten an infected bird. While humans who are exposed to West Nile Virus often have no symptoms, the disease can be fatal. Although there have yet to be any human cases of West Nile Virus in the State of New Union, the City of Progress Health Department has developed a plan to eradicate mosquitoes (the Mosquito Control Plan) in the event that significant numbers of infected mosquitoes or birds are identified. This plan includes a plan to apply a non-chemical biological mosquito larvicide known as BTI to tidal salt marshes adjacent to Laconic Bay. These saltmarshes include small areas of open water. Larvicides kill mosquitoes in their larval stage, when they live in the water. BTI is a biological insecticide in the form of a bacteria that interferes with the larval mosquito digestive system. It is generally considered safer for aquatic life than chemical larvicides.

The Mosquito Control Plan also includes a plan to apply a chemical adulticide known as “Anvil 10 + 10” from helicopters flying directly over the Laconic Bay saltmarshes at altitudes of 50 to 100 feet. The application label, required by the Federal Insecticide Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. §§ 136-136y, for Anvil 10 + 10 states, “for terrestrial uses, do not apply directly to water, to areas where surface water is present or to intertidal areas below the mean high water mark.” The active ingredient of Anvil 10 + 10 is resmethrin, a synthetic chemical that mimics pyrethrin, a naturally occurring chemical insecticide that can be extracted from chrysanthemum flowers. Adulticides work by killing adult mosquitoes in flight or in vegetation; they do not affect larval mosquitoes in water, and adult mosquitoes are not found in water. Pyrethroids, including resmethrin, are highly toxic to fish.

The City of Progress has not yet applied either Anvil 10 + 10 or BTI to Laconic Bay’s saltmarshes. Nevertheless, the environmental plaintiffs have submitted affidavits detailing what they claim are adverse impacts of applications of these pesticides in other cities. According to one affidavit, application of Anvil 10 + 10 in 2002 led to the die-off of thousands of fish in freshwater lakes. According to another affidavit, use of Anvil 10 + 10 in salt marshes on the East Coast has resulted in declining crab populations and interference with crab reproduction – specifically, accelerated sexual maturity of female crabs.

EPA commenced the regulatory process that ultimately led to adoption of the Pesticide Rule in 2003. Responding to several judicial decisions addressing the question whether the discharge of FIFRA-registered pesticides to waters required a separate permit under the federal Clean Water Act, 33 U.S.C. §§ 1361, 1342,<sup>2</sup> the EPA issued an “interim guidance” document in 2003, which expressed the view adopted by the final rule, that 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. 68 Fed. Reg. 48,385 (Aug. 13, 2003). After soliciting comments on its interim guidance, EPA issued a “final guidance” document in

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<sup>2</sup> See *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002); *Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526 (9th Cir. 2001); *Altman v. Town of Amherst*, 47 F. App’x 62, 67 (2d Cir. 2002).

2005, and at the same time, issued the proposed rule that is the basis of this lawsuit. 70 Fed. Reg. 5093 (Feb. 1, 2005). EPA received many comments from interested individuals, businesses, and organizations in support of and in opposition to the proposed rule and issued the final Pesticide Rule on November 27, 2006. 71 Fed. Reg. 68,483 (Nov. 27, 2006).

Environmental Plaintiffs commenced their action for a declaratory judgment declaring the Pesticide Rule invalid on February 23, 2007. Industry Plaintiffs commenced their action seeking declaratory judgment requiring EPA to include terrestrial pesticide application within the scope of the exemption on February 24, 2007. Industry Plaintiffs also challenge EPA's determination in the Pesticide Rule that pesticide applications contrary to "pertinent FIFRA requirements," as well as residual chemicals from pesticide applications, are "pollutants" subject to Clean Water Act regulation and permitting requirements. Both actions are premised on federal question jurisdiction, 28 U.S.C. § 1331, and on the Administrative Procedure Act, 5 U.S.C. § 704. These two actions were consolidated, and Environmental Plaintiffs and Industry Plaintiffs were permitted to intervene as defendants by consent in Nos. 07CV1016 and 07CV1015, respectively. The matters are now before the Court on cross motions for summary judgment.

After these motions were fully briefed, this Court was informed through an affidavit submitted by plaintiffs that the City of Progress Health Department identified 12 birds infected with West Nile Virus during the last week of July, 2007, as well as 3 infected mosquito populations in tidal marshes on Laconic Bay, and will shortly commence larviciding and adulticiding operations according to the Mosquito Control Plan.

## **STATUTORY BACKGROUND**

The Federal Water Pollution Control Act was amended in 1972 to impose a comprehensive system of regulation and permitting for all point source discharges to the nation's waterways. Federal Water Pollution Control Act Amendments of 1972, Pub. L. 92-500, 86 Stat. 896. The Congressionally declared purpose of these amendments, now known as the Clean Water Act (CWA), was to "to restore and maintain the chemical, physical, and biological integrity of the Nation's waters." CWA § 101(a), 33 U.S.C. § 1251(a).<sup>3</sup> To achieve this purpose, the CWA prohibits the "discharge of any pollutant" except as authorized by a National Pollutant Discharge Elimination System ("NPDES") permit. CWA §§ 301(a), 402(a), 33 U.S.C. §§ 1311(a), 1342(a). An activity is subject to NPDES permit requirements when it 1) discharges, i.e. adds, 2) a pollutant 3) to navigable waters 4) from a point source. *Comm. to Save Mokelumne River v. E. Bay Mun. Util. Dist.*, 13 F.3d 305, 308 (9th Cir. 1993). A permit under the NPDES system is required to impose both technology-based and water-quality based effluent limitations. CWA §§ 301(b), 301(a), 402(a), 33 U.S.C. §§ 1311(b), 1312(a), 1342(a)(1). Although NPDES permits are required by the federal CWA, such permits may be issued and administered by the states, and New Union has a delegated NPDES permit program. CWA § 402(b), 33 U.S.C. § 1342(b).

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<sup>3</sup> Statutory references to the Clean Water Act will be given both to sections of the 1972 CWA and to its codification at 33 U.S.C.

The parties do not dispute that pesticide application mechanisms constitute “point sources” that are within the ambit of the Act. The main area of dispute seems to be the question whether EPA could legitimately interpret the term “pollutant” to exclude pesticides applied into or over water in accordance with FIFRA requirements. The CWA defines “pollutant” to include, inter alia, “chemical wastes” and “biological materials.” CWA § 502(6), 33 U.S.C. § 1362(6). In addition, the Industry Plaintiffs argue that pesticide spray drift is not the “discharge of a pollutant” within the meaning of the CWA even though some small amount of that pesticide may reach surface waters through the air or through surface runoff. They further maintain that EPA could not legitimately include pesticide residues and pesticides applied inconsistently with FIFRA labeling as “pollutants” subject to regulation under the CWA, given the extensive regulation of these pesticides under FIFRA.

The CWA provides for direct review in the Courts of Appeals for certain specified regulatory actions taken by EPA, including (in relevant part) “approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of” the CWA and “issuing or denying any permit under section [402]” of the CWA. CWA § 509(b)(1)(E), (F), 33 U.S.C. § 1369(b)(1)(E), (F). Such review must be commenced in the Court of Appeals within 120 days of the action in question. CWA § 509(b)(1), 33 U.S.C. § 1369(b)(1).

Pesticide use is also regulated by FIFRA, 7 U.S.C. § 136. FIFRA requires registration with EPA of all pesticides sold in the United States. 7 U.S.C. § 136a. In order to accept a pesticide registration, the EPA must determine that when used according to its label, “it will perform its intended function without unreasonable adverse effects on the environment.” Any person who violates the label instructions for use of a pesticide is guilty of a misdemeanor. 7 U.S.C. §§ 136j(a)(2)(G), 136l(b)(2).

## **JURISDICTION**

At the outset, this Court must determine three jurisdictional issues. First, we must determine whether the Environmental Plaintiffs have standing to challenge the Pesticide Rule, given that the City of Progress has not yet engaged in any larviciding or adulticiding activities.<sup>4</sup> Second, we must determine whether jurisdiction in this Court is proper or whether both Industry and Environmental Plaintiffs were required to commence their action in the Court of Appeals. Third, we must determine whether the Industry Plaintiffs’ challenge is ripe for review at this time under the standard announced in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967).

***Standing of Environmental Plaintiffs.*** In order to have standing to challenge regulatory action, a plaintiff must have 1) suffered injury in fact, 2) that is causally related to the action challenged, and 3) that injury must be subject to redress by the Court. *Friends of the Earth, Inc. v. Laidlaw Envntl. Servs., (TOC), Inc.*, 528 U.S. 167, 180-181 (2000). Even if there is an injury to the environment somewhere, Environmental Plaintiffs must show that they themselves are among the injured. *Lujan v. Defenders of*

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<sup>4</sup> As entities subject to regulation under the CWA, there is no question of the Industry Plaintiffs’ standing to challenge EPA’s rulemaking activities that potentially affect them. See *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561-562 (1992).

*Wildlife*, 504 U.S. 555, 563 (1991); *Sierra Club v. Morton*, 405 U.S. 727, 735 (1972). In order to support standing, environmental injury must be “actual or imminent.” *Lujan*, 504 U.S. at 560 (quoting *Whitmore v. Arkansas*, 495 U.S. 149, 155, (1990)). EPA and Industry Plaintiffs argue here that Environmental Plaintiffs’ injury is not “actual and imminent” because the City of Progress never has applied mosquito adulticides and larvicides, and at the time suit was filed, it was wholly speculative whether they would ever do so.

We conclude that the Environmental Plaintiffs have standing to challenge the EPA rule. Certainly, the kinds of harm alleged in Environmental Plaintiffs’ affidavits (and not refuted by either EPA or the Industry Plaintiffs) more than satisfy the threshold for injury in fact established by the Supreme Court. See *Friends of the Earth*, 528 U.S. 167 (holding that recreational users of a river subject to unnatural pollution suffered injury in fact, even though no actual injury to the river was proven). We believe also that Environmental Plaintiffs’ injury is sufficiently imminent to support standing. Although the City of Progress has not yet discharged pesticides into Laconic Bay, it has announced its intention to do so. Plaintiffs need not wait until the City has actually caused harm to Laconic Bay before challenging the regulatory scheme under which the City claims a right to act. See *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973). If this were the case, then environmental groups could never challenge a regulation until it was too late to prevent the very harms threatened by the regulation.

***Exclusive Review in the Court of Appeals.*** EPA argues that judicial review of the regulation at issue lies exclusively in the Court of Appeals under CWA § 509, and that both actions must accordingly be dismissed with prejudice. EPA argues that its regulation exempting certain activities from the ambit of the NPDES permitting program must be considered to be either an action with respect to an “effluent limitation or other limitation” under CWA § 509(b)(1)(E), 33 U.S.C. § 1369(b)(1)(E), or an action “issuing or denying a permit” under CWA § 509(b)(1)(F), 33 U.S.C. § 1369(b)(1)(F), review of which is exclusive to the Court of Appeals. According to EPA, an Administrative Procedure Act § 704 action in the District Court is available only where no other means of review is available, and here, review has been provided in the Court of Appeals.

This Court is unpersuaded by EPA’s argument for exclusive Court of Appeals review. The regulations entirely exempting certain kinds of pesticide application from the NPDES permit program cannot in any sense of the word be considered an “effluent limitation or other limitation.” Far from limiting anything, the regulations in question are permissive and remove specified pesticide activities from the limitations of CWA regulation. Similarly, the Pesticide Rule can hardly be considered an action “issuing or denying a permit” as the effect of the Pesticide Rule is to remove the specified activities from the permitting program entirely. Contrary to EPA’s argument, the Pesticide Rule is not the equivalent of issuing a permit. A permit would include conditions and limitations under the CWA designed to meet water quality standards. See CWA §§ 402(a), 301(b), 302(a), 33 U.S.C. §§ 1342(a), 1311(b), 1312(a).

EPA relies on cases that held that regulations establishing procedures for NPDES permitting can be considered “other limitations” subject to Court of Appeals review under CWA § 509(b)(1)(E), see *NRDC v. EPA*, 673 F.2d 400 (D.C. Cir. 1982); *NRDC v.*

EPA, 966 F.2d 1292, 1296-97 (9th Cir. 1992). EPA also relies on cases that have assumed, without discussion, that regulations expanding the scope of activities covered by the NPDES program are subject to direct review under CWA § 509. *See Env'tl. Def. Ctr. v. EPA*, 344 F.3d 832, 843 (9th Cir. 2003); *Am. Mining Cong. v. EPA*, 965 F.2d 759, 763 (9th Cir. 1992). Obviously, regulations that expand the scope of permitting activities and define the procedures for obtaining permits are very different from a regulation providing an exemption from permitting entirely, which can in no sense of the word be described as either a "limitation" on such activities or the "approval or denial of a permit" for such activities.

Far more persuasive is the decision of the District Court for the Northern District of California, which held in a case involving the identical exemptions section of the CWA regulations that review of exemptions is proper in the District Court. *Nw. Env'tl. Advocates v. EPA*, 2005 U.S. Dist. LEXIS 5373, 61 ERC (BNA) 1245 (N.D. Cal. 2005). There, the Court held that "these cases do not support defendant's assertion that the regulation in question, which eliminates an entire type of discharge from the NPDES permit requirements, is a provision governing the issuance of permits or regulates the underlying permit procedures." The Pesticide Rule likewise eliminates an entire category of discharge from regulation, and cannot be considered either a "limitation" or a regulation relating to permit issuance or denial. Although EPA argues that any ambiguity as to whether jurisdiction lies with a district court or with a court of appeals should be resolved in favor of review by a court of appeals, citing *Tennessee v. Herrington*, 806 F.2d 642, 650 (6th Cir. 1986) and *Suburban O'Hare Comm'n v. Dole*, 787 F.2d 186, 192 (7th Cir. 1986), this Court finds no ambiguity in the language of CWA § 509(b).

EPA also argues that judicial efficiency would be better served by having prompt review of nationally applicable CWA regulations in one court of appeals,<sup>5</sup> rather than a possible multiplicity of review in numerous district court proceedings. These arguments should be addressed to Congress, not to this Court, as the language of CWA § 509(b)(1) simply cannot be stretched to include a regulatory exclusion within the ambit of either a "limitation" or an "approval or denial of a permit."

***Ripeness of Industry Plaintiffs' Claims.*** EPA argues that the Industry Plaintiffs' challenge seeking a broader scope of the exemption in the Pesticide Rule should be dismissed as not sufficiently ripe for judicial review. We agree. The ripeness inquiry has two branches: "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967). Industry Plaintiffs fail both parts of this test.

Industry Plaintiffs' challenge is not fit for judicial review as the question whether particular terrestrial applications of pesticides involve discharges to water is highly fact bound. Clearly, not every terrestrial application of pesticides will result in a discharge to water that might subject it to Clean Water Act permitting. Moreover, EPA is currently studying the problem of pesticide drift from terrestrial applications and may engage in rulemaking in the future. *See* 71 Fed. Reg. 68,488 (Nov. 27, 2006). Under these circumstances, examination of the difficult CWA interpretational questions involved is

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<sup>5</sup> Pursuant to 28 U.S.C. § 2112(a), all petitions challenging an EPA rule would be consolidated into a single proceeding in a circuit Court of Appeals selected by lottery.

better deferred to a specific enforcement action, should one ever occur, or specific rulemaking. *Cf. Trans Union LLC v. FTC*, 295 F.3d 42 (D.C. Cir. 2002) (challenge to regulation not ripe for judicial review based on potential enforcement scenario, where no formal agency guidance or enforcement action had yet occurred). Similarly, any question of whether a particular application of pesticides leaves residues, or violates the FIFRA label in a way that converts the misuse of pesticides into the discarding of pesticides is also highly fact dependant.

Nor is there any hardship to the Industry Plaintiffs of deferring review. Industry Plaintiffs have been engaged in the aerial application of pesticides for decades without the benefit of a specific CWA exemption, and they make no suggestion that they will have to change their practices now simply because their activities were not included in the scope of the EPA exemption. None of the Industry Plaintiffs have been subjected to enforcement for their activities, and no such enforcement has been threatened.

***Merits of the Pesticide Rule.*** Our review of an agency's interpretation of a statute it administers is circumscribed. *See Chevron v. NRDC*, 467 U.S. 837 (1987). First, we must determine whether Congress has specifically addressed the issue in question. In making this inquiry we use the usual tools of statutory construction, *Id.* at 843 n.9, including the text of the statute, its legislative history, and the overall purpose of the statute. If Congress has specifically spoken to an issue, we must apply the congressional intent and strike down an inconsistent agency interpretation. If Congress has not specifically addressed the issue, however, we must simply review the agency's interpretation to determine whether that interpretation is a reasonable one; that is, whether it is a permissible interpretation of the statute. If the agency's interpretation is permissible, we must affirm the agency interpretation even though we might disagree with that interpretation; indeed, we must affirm that interpretation even if it conflicts with prior judicial interpretations. *See Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005).

Neither side has cited any legislative history of the CWA that indicates that Congress specifically considered the question whether pesticide application into and over water bodies would be subject to permitting requirements.<sup>6</sup> The validity of the Pesticide Rule thus turns on the question whether the definition of "pollutant" under CWA § 502(6) unambiguously includes the pesticides in question when used according to their FIFRA labels. CWA § 502 defines "pollutant" to include both "chemical wastes" and

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<sup>6</sup> The Court notes that, although not dispositive under *Teleprompter v. Brand-X*, there has been no definitive judicial resolution of the question whether pesticides applied to water constitute pollutants. Although the Ninth Circuit held in *Headwaters Inc., v. Talent Irrigation Dist.*, 243 F.3d 526, 532 (9th Cir. 2001) that the application of an aquatic herbicide directly to water required a CWA permit, the Ninth Circuit subsequently limited the *Headwaters* case to its facts, where pesticide residues constituting chemical wastes were released from an irrigation canal to a creek. *Fairhurst v. Hagener*, 422 F.3d 1146 (9th Cir. 2005). Another Ninth Circuit decision recited that the parties agreed that chemical pesticides constitute pollutants in holding that a NPDES permit was required, *League of Wilderness Defenders v. Forsgren*, 309 F.3d 118 (9th Cir. 2002), a position that EPA now vigorously denies ever having taken. The Second Circuit has twice declined to address the specific question whether application of a pesticide over water constitutes the discharge of a pollutant requiring an NPDES permit, while remanding citizens enforcement cases raising the issue to the District Courts for further factual development. *No Spray Coal., Inc. v. City of New York*, 351 F.3d 602 (2d Cir. 2004); *Altman v. Town of Amherst*, 47 F. App'x 62 (2d Cir. 2002).

“biological materials.” Congress presumably had a reason to classify “chemicals” as pollutants only if they were wastes, while classifying all “biological materials” as pollutants. The CWA does not define the term “waste.” The dictionary definition of waste, however, is that which is “eliminated or discarded as no longer useful or required after the completion of a process.” THE NEW OXFORD AMERICAN DICTIONARY 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001).

In considering the ordinary usage of these terms to the aquatic pesticide applications exempted by Part One of the Pesticide Rule, this Court perceives a clear difference between biological pesticides, which require a permit under the plain language of the Clean Water Act, and chemical pesticides, which require a permit only if they constitute chemical “wastes.” We find that part one of the Pesticide Rule is a permissible interpretation of the Clean Water Act to the extent that it exempts chemical pesticides from the NPDES program. It is certainly a “permissible” interpretation to conclude that an aquatic pesticide that is designed, registered, and intended to be applied to water to kill pests living in the water is not a “waste” when it is so applied. On the other hand, extension of this exemption to bacteriological pesticides runs afoul of the unambiguously expressed Congressional intent to require permits for all “biological materials” discharged into water, whether or not they constitute “wastes.” *Accord U.S. PIRG v. Atlantic 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), *National 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). *Cf. contra Ass’n to Protect Hammersley, Eld, and Totten Inlets (APHETI) v. Taylor Res., Inc.*, 299 F.3d 1007, 1017 (9th Cir. 2002) (interpreting “biological materials” to be limited to biological materials that are wastes and declining to apply the term to mussel feces and shells from a mussel farm).<sup>7</sup>

EPA argues that it would be irrational to include biological pesticides in the NPDES permitting program while excluding chemical pesticides, as both pesticides are equally regulated under FIFRA. However, Congress might well have concluded that introduction of non-indigenous species, including bacteria, posed a greater threat to the “integrity” of the nation’s waters than the introduction of chemicals that were not “chemical wastes.”<sup>8</sup> Moreover, as EPA has itself argued in a previous case, FIFRA registration does not provide the equivalent protection to waterways as does individual permitting, as FIFRA registration only looks at generic environmental impacts for “reasonableness,” while the NPDES permitting process examines individual localized aquatic impacts to ensure compliance with water quality standards. *See Headwaters, Inc. v. Talent Irrigation Dist.*, 243 F.3d 526, 531 (9th Cir. 2001).

Part Two of the Pesticide Rule, dealing with pesticide application over and near water bodies to control pests that are not actually present in the water, poses a more difficult question. Applying the dictionary definition of “waste,” however, it would appear 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.” Neither EPA nor the Industry Plaintiffs argue that these non-aquatic pesticides serve any useful purpose once they hit the water. Accordingly, they

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<sup>7</sup> This Court declines to follow the *Hammersley* cases, as it is contrary to the plain language of the statute.

<sup>8</sup> The Court notes that pure water is itself a “chemical.”

fall within the common understanding of the term “chemical wastes” and under the unambiguous statutory language must be subject to the NPDES permitting requirements. This understanding accords with other courts’ application of the term “pollutant” in the Clean Water Act. See *Long Island Soundkeeper Fund, Inc. v. N.Y. Athletic Club*, 1996 WL 131863, at 13 (S.D.N.Y. Mar. 22, 1996) (holding that trap shooting targets and lead shot that fall into water after use constitute “solid waste,” which is included in the CWA definition of “pollutant.”); *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) (holding that chemical disinfectants and settling agents added to a water supply transfer tunnel constitute “pollutants” once discharged into a reservoir). As Judge Breiant put it in *Hudson River Fisherman’s Association*, “a pollutant is a pollutant no matter how useful it once may have been.” *Id.* at 1101.

The Court is not unmindful of the public health risks posed by West Nile Virus and the need for public health authorities to conduct mosquito control activities to protect public health. However, our ruling today does nothing to limit the use of chemical larvicides in water. Nor does coverage by the NPDES permitting program preclude the mosquito control activities in question; it just means that these activities will require a permit to ensure localized impacts are considered and water quality is protected.

Accordingly, we grant partial summary judgment in favor of Environmental Plaintiffs in No. 07CV1015 declaring the Pesticide Rule to be null and void to the extent that it purports to exempt biological pesticides and non-aquatic pesticides from the NPDES permitting requirements of the Clean Water Act, and we grant summary judgment dismissing the complaint in the Industry Plaintiffs action, No. 07CV1016.