No. 05-1095

In the Supreme Court of the United States

INDIANA WATER QUALITY COALITION, PETITIONER

v.

ENVIRONMENTAL PROTECTION AGENCY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

ANDREW J. DOYLE
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Under Section 118(c)(2)(A) and (C) of the Federal Water Pollution Control Act Amendments of 1972, Pub. L. No. 92-500, 86 Stat. 816, as amended, the Environmental Protection Agency (EPA) was required to "provide guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System," and to review the Great Lakes States' proposed standards, policies, and implementation procedures for "consisten[cy] with such guidance." 33 U.S.C. 1268(c)(2)(A) and (C). In 1995, following notice to the public and an opportunity to comment, EPA issued the required guidance. In 2000, after reviewing the State of Indiana's proposed standards, policies, and implementation procedures for consistency with the guidance, EPA disapproved one of Indiana's implementation procedures. The question presented is as follows:

Whether EPA's decision to disapprove Indiana's implementation procedure was reasonable and consistent with the 1995 guidance.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 411 F.3d 726.

JURISDICTION

The judgment of the court of appeals was entered on June 16, 2005. A petition for rehearing was denied on November 22, 2005 (Pet. App. 17a-18a). The petition for a writ of certiorari was filed on February 21, 2006 (the Tuesday following a holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Water Pollution Control Act Amendments of 1972 (Clean Water Act or CWA), Pub. L. No. 92-500, 86 Stat. 816, as amended (33 U.S.C. 1251 *et seq.*),

prohibit the discharge of any pollutant into "navigable waters" except in accordance with the Act. 33 U.S.C. 1311(a), 1362(12)(A). "The Clean Water Act anticipates a partnership between the States and the Federal Government, animated by a shared objective: 'to restore and maintain the chemical, physical, and biological integrity of the Nation's waters.'" *Arkansas* v. *Oklahoma*, 503 U.S. 91, 101 (1992) (quoting 33 U.S.C. 1251(a) (1988)). Under the CWA, the Environmental Protection Agency (EPA) "provides States with substantial guidance in the drafting of water quality standards." *Ibid.* (citing 40 C.F.R. Pt. 131 (1991)). "If the EPA recommends changes to the standards and the State fails to comply with that recommendation, the Act authorizes the EPA to promulgate water quality standards for the State." *Ibid.* (citing 33 U.S.C. 1313(c) (1988)).

The National Pollutant Discharge Elimination System (NPDES) is established by Section 402 of the CWA, 33 U.S.C. 1342, and "requires dischargers to obtain permits that place limits on the type and quantity of pollutants that can be released into the Nation's waters." *South Fla. Water Mgmt. Dist.* v. *Miccosukee Tribe of Indians*, 541 U.S. 95, 102 (2004). NPDES permits impose limits based on available technologies, 33 U.S.C. 1311(b), and any more stringent limits necessary to meet water quality standards, 33 U.S.C. 1311(b)(1)(C). Longstanding NPDES regulations require water quality-based limits whenever a discharge would "cause, have the reasonable potential to cause, or contribute to an excursion above any State water quality standard." 40 C.F.R. 122.44(d)(1)(i); see *id.* § 122.44(d)(1)(iv). "Section 402(b) authorizes each State to establish 'its own permit program for discharges into navigable waters within its

jurisdiction.'" *Arkansas*, 503 U.S. at 102 (quoting 33 U.S.C. 1342(b)).

In 1990, Congress amended Section 118 of the CWA to address the problem of pollutant discharges into the Great Lakes System. 33 U.S.C. 1268 (2000 & Supp. III 2003); see *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979, 989 (D.C. Cir. 1997) ("Congress was attempting to create a uniform set of requirements for water pollution in the Great Lakes."). Section 118 directs EPA to "provide guidance to the Great Lakes States on minimum water quality standards, antidegradation policies, and implementation procedures for the Great Lakes System," 33 U.S.C. 1268(c)(2)(A); see 33 U.S.C. 1268(c)(2)(B), and it requires the Great Lakes States to "adopt water quality standards, antidegradation policies, and implementation procedures * * * which are consistent with such guidance," 33 U.S.C. 1268(c)(2)(C). If and to the extent that a Great Lakes State fails to adopt standards, policies, and procedures that are consistent with the guidance provided by EPA, EPA is directed to promulgate federal standards, policies, or procedures that will then apply to discharges in the relevant State. See 33 U.S.C. 1268(c)(2)(C); 40 C.F.R. 132.5(f)(2); Pet. App. 3a.

In 1995, following a notice-and-comment procedure, EPA issued the required guidance. *Final Water Quality Guidance for the Great Lakes System*, 60 Fed. Reg. 15,366 (Guidance); see Pet. App. 3a. The Guidance has three basic parts. First, it outlines criteria and methodologies for protecting aquatic life, human health, and wildlife from toxic pollutants. See 40 C.F.R. Pt. 132, Tbls. 1-4, Apps. A-D. Second, it prescribes antidegradation procedures to protect existing high-quality waters within the Great Lakes System. See 40 C.F.R.

Pt. 132, App. E. Third, the Guidance establishes requirements to ensure more consistent implementation of water-quality criteria in regulating individual discharges of toxic pollutants into the System. See 40 C.F.R. Pt. 132, App. F.

The third part of the Guidance establishes an implementation procedure under which an NPDES permitting authority determines whether a facility's permit requires a discharge limitation to control whole effluent toxicity (WET) to a level that will assure attainment of water quality standards. See Pet. App. 2a. The term "WET" is defined under pre-existing NPDES regulations as the combined toxic effect of individual chemicals in a discharge measured directly using test organisms in a laboratory. See 40 C.F.R. 122.2; *Edison Elec. Inst.* v. *EPA*, 391 F.3d 1267, 1268-1269 (D.C. Cir. 2004) (describing test procedures). In general terms, the Guidance's implementation procedure for determining the need for a WET limit (a) starts with the maximum observed toxicity value derived from laboratory testing of a facility's effluent; (b) applies a statistical multiplier to that maximum value to account for the likelihood that the facility did not collect samples at the precise moment when the combined toxic effect of the facility's wastestream was at its highest; (c) adjusts downward to reflect any available dilution in the receiving water; and (d) compares the resulting value to the amount of toxicity that a healthy water body can sustain (*i.e.*, the applicable WET criteria in the water quality standard). See 40 C.F.R. Pt. 132, App. F, Procedure 6, Sec. D; Pet. App. 3a-4a. If the permitting authority projects that the discharge is likely to have a greater toxic effect on the receiving water of the Great Lakes System than the acceptable level of toxicity identified in the standard, then it may autho-

rize the discharge only with an NPDES permit that includes an effluent limitation for WET.

The Guidance further provides that, "[f]or any pollutant other than those in Table 5 of this part for which the State * * * demonstrates that a methodology or procedure in this part is not scientifically defensible," a Great Lakes State shall "[a]pply an alternative implementation procedure that is consistent with all applicable Federal, State, and Tribal laws." 40 C.F.R. 132.4(h)(2). WET is not one of the pollutants listed in Table 5 of Part 132. At the same time that it promulgated the Guidance, EPA also issued a Supplementary Information Document (SID). C.A. App. 302. The SID explains that "[t]he reason for this [scientific-indefensibility] exclusion is that there may be pollutants identified in the future for which some of the methodologies or procedures in the final Guidance may not be technically appropriate." *Id.* at 308. The SID also expresses EPA's intent "that the exclusion be limited to each specific element of the Guidance that [is] demonstrated to be inappropriate if applied to a specific situation." *Id.* at 309. The Guidance itself notes that

> [t]he scientific, policy and legal basis for EPA's development of each section of the final Guidance * * * is set forth in the preamble, [SID], Technical Support Documents, and other supporting documents in the public docket. EPA will follow the guidance set out in these documents in reviewing State * * * water quality programs in the Great Lakes for consistency with this part.

40 C.F.R. 132.1(b).

2. In 2000, after reviewing the standards, policies, and implementation procedures proposed by the State

of Indiana and other Great Lakes States, including public notice and opportunity for comment, EPA approved a large majority of the state proposals. See Pet. App. 19a-26a, 34a-40a; 63 Fed. Reg. 10,221 (1998); 64 Fed. Reg. 49,803 (1999); C.A. App. 494-507, 628-633, 650, 657-659, 679-686, 690-696, 704. EPA disapproved Indiana's proposed WET implementation procedure, however, concluding that it was inconsistent with the Guidance. See Pet. App. 38a-40a. EPA explained that Indiana's proposed procedure, whose application turns on the *average* toxicity of different samples rather than on the maximum observed toxic value, "both lessens the impact of observed toxicity on the calculation and fails to account for the reasonable possibility that effluent toxicity may exceed the level observed in the tests because sampling did not coincide with periods of maximum toxicity." *Id.* at 39a. EPA further observed that the proposed Indiana procedures "often do not require a limit on WET where one would be required under the procedures in the Guidance," and that, "in some cases, Indiana's procedure would not require imposition of a [permit limit for WET] even where testing has showed actual, observed toxicity." *Ibid.*; see C.A. App. 658 (Indiana's WET implementation procedure "require[s] multiple failures" of a toxicity test before the facility's NPDES permit must contain a WET limit).

In the course of its decision, EPA considered and rejected Indiana's contention that EPA's own WET implementation procedure is scientifically indefensible, and that the State's procedure therefore was not required to be consistent with the applicable Guidance provisions. Pet. App. 52a-61a. EPA explained that the scientific-indefensibility exclusion set forth in 40 C.F.R. 132.4(h) is intended "to address pollutants identified in

the future for which some of the methodologies or procedures may not be technically appropriate," Pet. App. 53a, and "is not a vehicle for parties to challenge anew the Guidance itself," *id.* at 54a. EPA observed in that regard that "[t]he public had a full opportunity to provide its views on [EPA's WET procedure] during the rulemaking establishing the Guidance, and the time period for challenging the Guidance has passed." *Ibid.*; see 33 U.S.C. 1369(b)(1) (petition for review of EPA action must be filed in the appropriate court of appeals within 120 days after the challenged action).

EPA further observed that, even if the scientific-indefensibility exclusion could be applied to WET, neither Indiana nor any other Great Lakes State had "actually proposed an alternative approach of projecting effluent toxicity that attempts to meet even the basic parameters of the Guidance." Pet. App. 55a. EPA explained:

> [T]he procedures submitted by Ohio, Michigan and Indiana do not address in any manner the underlying premise of [EPA's WET procedure]—that effluent quality is variable and, therefore, a method for assessing WET data must account for the likelihood that the maximum value in a particular data set is less than the true maximum that is likely to be experienced by the environment as a result of the discharge. In evaluating the potential for a discharge to cause or contribute to an exceedance of water quality standards, EPA believes it prudent to employ a procedure that minimizes the likelihood of misclassifying a discharge as not needing an effluent limitation, given the potential in such circumstances for unacceptable adverse impacts on the aquatic resource.

Id. at 54a-55a. That approach, EPA explained, will "allow the permitting authority to make a decision that will protect water quality with a high degree of confidence in the face of uncertainty and with a relatively small data set." *Id.* at 55a.

By contrast, EPA observed, the WET procedures that Indiana proposed would have "move[d] in the opposite direction by averaging the observed effluent data." Pet. App. 55a. In EPA's view, the State's proposed WET procedures ignored "the fact that a small number of data sets may not capture the worst case effluent quality," and those procedures would have allowed discharges to occur even in situations "where available data ha[ve] indicated unacceptable toxicity." *Id.* at 55a-56a. Therefore, in addition to being inconsistent with the Guidance, EPA concluded that Indiana's proposal would not be "in accordance with applicable national regulations." *Id.* at 56a (citing 40 C.F.R. 122.44(d)(1)). The effect of EPA's decision was that, given the absence of an approved state alternative, the WET implementation procedures previously set forth in the Guidance apply within Indiana and other Great Lakes States. See *id.* at 61a.

3. The State of Indiana did not seek judicial review of EPA's decision disapproving the State's proposed WET implementation procedure. However, petitioner Indiana Water Quality Coalition—a coalition of industrial entities whose effluent discharges are potentially subject to regulation under the CWA—filed a petition for review in the Seventh Circuit. See Pet. App. 5a. That petition was subsequently transferred to the Sixth Circuit and consolidated with a previously filed petition for review raising similar issues with respect to implementation procedures proposed by the State of Ohio.

See *ibid.* The court of appeals denied the petitions for review. *Id.* at 1a-16a.

a. The court of appeals held that the petitions for review were timely, notwithstanding the fact that any petition for review of the Guidance itself was required to be filed within 120 days of the Guidance's promulgation in 1995. Pet. App. 7a. The court found that petitioner challenged only "the reasonableness of the EPA's finding that the Indiana * * * implementation procedures are inconsistent with the Guidance," and that petitioner did not "contest the legitimacy of the Guidance" itself. *Ibid.*

b. On the merits, the court of appeals rejected petitioner's contention that "EPA acted in an arbitrary or capricious manner in evaluating the Indiana regulatory scheme," Pet. App. 11a, and it accordingly denied the petition for review. The court explained:

> EPA acted rationally and on the basis of considerable evidence when it rejected Indiana's regulatory scheme. Given that Indiana's averaging of toxicity will call for fewer WET limits than a system using maximum values, the EPA's conclusion that the state's scheme would be less protective of the environment was far from being arbitrary or capricious.

Ibid.

The court of appeals also rejected petitioner's contention that the proposed Indiana procedures should be treated as an appropriate alternative because the WET testing procedures described in the Guidance were scientifically indefensible. Pet. App. 14a-16a. The court explained that EPA's stated purpose for adopting the scientific-indefensibility exclusion was to allow flexibility in addressing discharges of "pollutants identified *in the*

future." *Id.* at 15a (quoting 58 Fed. Reg. 20,843 (1993)) (emphasis added by court of appeals). The court also observed that the exclusion "was intended to be 'applied to a specific situation,' * * * not to a sweeping alternative regulatory scheme." *Id.* at 16a (quoting SID, C.A. App. 309).

ARGUMENT

The judgment of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. The court of appeals' decision also raises no legal issue of recurring importance. Further review is not warranted.

1. Petitioner contends (Pet. 12-18) that the court of appeals erred in holding that 40 C.F.R. 132.4(h) is inapplicable to state WET testing procedures. That claim lacks merit.

a. Section 132.4(h) states that, "[f]or any pollutant other than those in Table 5 of this part for which the State * * * demonstrates that a methodology or procedure in this part is not scientifically defensible, the Great Lakes States * * * shall" apply an alternative procedure that is consistent with all applicable federal laws. On its face, the regulation simply states what options are available *if* a State validly demonstrates that a methodology or procedure set forth in the Guidance is scientifically indefensible. Section 132.4(h) does not discuss how, when, or under what circumstances a showing of scientific indefensibility may be made. And while petitioner is correct that Section 132.4(h) "contain[s] no language that limits a State's use of the scientific indefensibility provision only to pollutants identified in the future" (Pet. 15), Section 132.4(h) also contains no explicit statement that the exclusion *does* apply to pol-

lutants that were identified before the Guidance was issued. There is consequently no basis for petitioner's contention (Pet. 15) that the understanding of Section 132.4(h) reflected in the SID is "contrary to the plain language of the regulation."

b. Additional factors reinforce the reasonableness of EPA's determination that the scientific-indefensibility exclusion is inapplicable here. The Guidance itself explains that "[t]he scientific, policy and legal basis for EPA's development of each section of the final Guidance * * * is set forth in" supporting documents that include the SID. 40 C.F.R. 132.1(b). Section 132.1(b) further states that "EPA will follow the guidance set out in these documents in reviewing the State * * * water quality programs in the Great Lakes." *Ibid.*

The text of the pertinent regulations thus expressly identifies the SID as an aid to the understanding and implementation of the Guidance. In addition, the SID was issued contemporaneously with the Guidance itself, and EPA's understanding that the scientific-indefensibility exclusion would be applicable only to subsequently-identified pollutants was clearly reflected in the proposed Guidance previously issued for public comment in 1993.[1] Contrary to petitioner's contention (Pet. 17), treating EPA's adherence to that understand-

[1] Petitioner suggests (see Pet. 6, 12, 16) that the public did not receive notice of, and an opportunity to comment on, EPA's current interpretation of the scientific-indefensibility exclusion. That is incorrect. In issuing the proposed Guidance for public comment in 1993, EPA made clear that the exclusion was designed to address situations in which methodologies or procedures set forth in the Guidance proved to be inappropriate for newly discovered pollutants. See Pet. App. 15a-16a (quoting explanation of the exclusion given in the proposed Guidance, 58 Fed. Reg. 20,843 (1993)).

ing as permissible in no way suggests that an agency may circumvent notice-and-comment requirements by effectively amending its published regulations under the guise of re-interpretation.

Accepting petitioner's interpretation of the scientific-indefensibility exclusion would also be in tension with the statutory mandate that judicial challenges to EPA actions implementing the CWA—including the Guidance promulgated pursuant to Section 118—must be asserted promptly. See 33 U.S.C. 1369(b)(1); p. 9, *supra*. In holding that the petition for review in the instant case was timely filed, the court of appeals accepted petitioner's contention that the petition challenged only EPA's *application* of the Guidance to Indiana's proposed regulatory scheme. See Pet. App. 7a. An argument that the Guidance methodology is scientifically indefensible as applied to a newly-identified pollutant might plausibly be characterized in that manner. But petitioner's contention that the Guidance methodology is scientifically indefensible as applied to a pollutant that was known and specifically addressed at the time the Guidance was issued is much more naturally characterized as a challenge to the Guidance itself. That is particularly so in light of the fact that petitioner challenges the Guidance's WET implementation procedures "on their face," rather than as applied to a particular factual setting. See *id.* at 16a (noting that EPA intended the scientific-indefensibility exclusion to apply to a "specific situation," rather than to the sort of "sweeping alternative regulatory scheme" that petitioner advocates).[2]

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[2] The Guidance itself was previously challenged in court and was upheld in most respects. See *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997).

2. In the administrative decision at issue in this case, EPA also explained that, *even if* the scientific-indefensibility exclusion were potentially applicable to WET testing procedures, Indiana's proposal would be rejected because the State's approach was insufficiently protective of aquatic resources and was not "in accordance with applicable national regulations." Pet. App. 56a (citing 40 C.F.R. 122.44(d)(1)); see *id.* at 54a-56a. Because a Great Lakes State that seeks to invoke the scientific-indefensibility exclusion must offer "an alternative implementation procedure that is consistent with all applicable Federal, State, and Tribal laws," 40 C.F.R. 132.4(h)(2), EPA's assessment of the shortcomings of Indiana's proposal provides an independent basis for the administrative action that is currently under review. And while the court of appeals' discussion of the scientific-indefensibility exclusion (see Pet. App. 14a-16a) did not refer to that aspect of EPA's rationale, the court had previously expressed general approval of EPA's scientific analysis. See Pet. App. 9a-11a.[3] There is consequently no reason to believe that the court of appeals' *judgment* denying the petition for review would have been affected if the court had rejected EPA's interpretation of 40 C.F.R. 132.4(h).

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[3] The court of appeals concluded that

> the EPA acted rationally and on the basis of considerable evidence when it rejected Indiana's regulatory scheme. Given that Indiana's averaging of toxicity will call for fewer WET limits than a system using maximum values, the EPA's conclusion that the state's scheme would be less protective of the environment was far from being arbitrary or capricious.

Pet. App. 11a.

3. For other reasons as well, petitioner's challenge to EPA's interpretation of its own regulation does not warrant this Court's review.

a. In its discussion of the scientific-indefensibility exclusion (Pet. App. 14a-16a), the court of appeals did not announce any general rule defining the circumstances under which documents like the SID may be consulted, or the weight that they should be given, when a court interprets published agency regulations. There is consequently no basis for petitioner's concern (see Pet. 17) that the Sixth Circuit's decision may be cited in future cases as authority for the proposition that informal agency guidance can supersede unambiguous regulatory text. Nor is there any basis for petitioner's claim (Pet. 12, 15-16) that the decision below conflicts with decisions in which other courts of appeals have interpreted other agency regulations in accordance with their plain language. The court of appeals did not hold or suggest that EPA's interpretation is inconsistent with any unambiguous regulatory text, and thus petitioner's claim of a conflict rests on a mistaken premise.

b. The statutory and regulatory provisions that govern the disposition of this case are unusual, and the practical significance of the court of appeals' decision is accordingly limited. Section 118 of the CWA, 33 U.S.C. 1268 (2000 & Supp. III 2003), applies only to States surrounding the Great Lakes. The EPA action at issue here applies by its terms only to activities conducted in Indiana that result in discharges of pollutants to Lake Michigan and its tributaries. See 33 U.S.C. 1268(a)(3)(C); 40 C.F.R. 132.6(c). The instant case, moreover, is the only one in which a court has reviewed an application of EPA's "final water quality guidance" to a Great Lakes State, see 33 U.S.C. 1268(c)(2)(B), and it

is unlikely that another such case will arise in the future, since the deadline for Great Lakes States to submit their water quality programs for review by EPA expired long ago, see 33 U.S.C. 1268(c)(2)(C), and EPA completed its review of those programs in 2000. See Pet. App. 19a-65a.

In addition, Section 118's directive that EPA provide "guidance" to state regulators is itself an unusual statutory mandate. As the court explained in *American Iron & Steel Inst.* v. *EPA*, 115 F.3d 979 (D.C. Cir. 1997), the Guidance issued by EPA in 1995 "certainly restricts state flexibility, but it does not immediately impose any requirements. It merely announces the standards by which state submissions will be judged and informs the states of the default rule that the agency will apply if a state submits a nonconforming plan." *Id.* at 988. Because the CWA requirement that EPA provide "guidance" to Great Lakes States and Tribes is essentially *sui generis*, this case would not present a suitable vehicle for addressing more general questions concerning federal agencies' efforts to clarify published regulations by incorporating contemporaneously issued, but less formal, explanatory documents.

c. In the decision at issue here, EPA disapproved limited aspects of the Great Lakes program adopted by the State of Indiana. The State did not petition for review of the EPA decision, nor did it intervene in the Sixth Circuit proceeding. Rather, in both the court of appeals and in this Court, EPA's action with regard to the Indiana proposal has been challenged solely by a coalition of regulated private entities. The State's acquiescence in EPA's decision provides a further reason for concluding that the question presented here does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

SUE ELLEN WOOLDRIDGE
Assistant Attorney General

ANDREW J. DOYLE
Attorney

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