Nos. 09-533 and 09-547

In the Supreme Court of the United States

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

ELENA KAGAN
Solicitor General
Counsel of Record
IGNACIA S. MORENO
Assistant Attorney General
THOMAS LORENZEN
ALAN GREENBERG
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

This case involves a challenge to a regulation promulgated by the Environmental Protection Agency (EPA). The EPA's responsibilities include the administration of both the Clean Water Act (CWA) and the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The challenged EPA rule interpreted the CWA not to require permits for the application of pesticides, in a manner consistent with the relevant requirements of the FIFRA, either directly to waters of the United States or over, including near, such waters to control pests. The question presented is as follows:

Whether the court of appeals erred in concluding that the text of the CWA unambiguously foreclosed EPA's rule.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 09-533

CROPLIFE AMERICA, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

No. 09-547

AMERICAN FARM BUREAU FEDERATION, ET AL., PETITIONERS

v.

BAYKEEPER, ET AL.

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

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-25a) is reported at 553 F.3d 927.[1]

[1] References to "Pet. App." are to the appendix to the petition for a writ of certiorari filed in No. 09-533.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 2009. A petition for rehearing was denied on August 3, 2009 (Pet. App. 64a-65a). The petitions for a writ of certiorari were filed on November 2, 2009 (a Monday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Since the enactment of the Clean Water Act (CWA or Act), 33 U.S.C. 1251 *et seq.*, in 1972, the Environmental Protection Agency (EPA) has not required persons applying pesticides directly to or over waters of the United States for the purpose of controlling pests to obtain a CWA permit. That longstanding practice was codified in the 2006 EPA final rule at issue in this case. Pet. App. 26a-63a.

a. CWA Section 301(a) states that "the discharge of any pollutant by any person shall be unlawful" unless the discharge is in compliance with certain other provisions of the Act. 33 U.S.C. 1311(a). The Act defines the term "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." 33 U.S.C. 1362(12). The Act defines the term "pollutant," in turn, as "dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water." 33 U.S.C. 1362(6). A "point source" is a "discernible, confined and discrete conveyance." 33 U.S.C. 1362(14).

The primary way that a person may discharge a pollutant without running afoul of the Act is to obtain a per-

mit pursuant to CWA Section 402, 33 U.S.C. 1342, which establishes the National Pollutant Discharge Elimination System (NPDES). Subject to certain conditions, EPA and approved States "may, after opportunity for public hearing issue a permit for the discharge of any pollutant, or combination of pollutants." 33 U.S.C. 1342(a)(1). In addition to individual NPDES permits, EPA issues general permits that can cover entire classes of discharges by similarly situated dischargers. Dischargers who comply with the terms of the general permit, including specified technology and water-quality-based effluent limitations, do not require individual permits for any discharges within the covered class. 40 C.F.R. 122.28.

Congress authorized EPA to promulgate regulations to administer the NPDES program. 33 U.S.C. 1361(a). EPA regulations include a list of discharges that do not require NPDES permits. 40 C.F.R. 122.3.

b. Three days after Congress enacted the CWA, it passed comprehensive amendments to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Pub. L. No. 92-516, 86 Stat. 973, which regulates the sale, distribution, and use of pesticides through a registration program. Before registering a pesticide, EPA must determine, *inter alia*, that the pesticide "will perform its intended function without unreasonable adverse effects on the environment," and that "when used in accordance with widespread and commonly recognized practice [the pesticide] will not generally cause unreasonable adverse effects on the environment." 7 U.S.C. 136a(c)(5). FIFRA defines the term "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," including water-quality and other ecological effects. 7 U.S.C. 136(bb). If there are risks of concern, EPA considers which mitigation measures (*e.g.*, establishing a buffer between the area sprayed and a water body, or lowering the proposed application rate to reduce toxicity to non-target species) are necessary to reduce those risks. In performing the FIFRA analysis, EPA examines, *inter alia*, the ingredients of a pesticide, the intended type of application site and directions for use, and supporting scientific studies. 7 U.S.C. 136a(c); see 40 C.F.R. Pts. 152, 156, 158.

2. Since 2000, several cases in the Second and Ninth Circuits have raised the question whether the CWA requires NPDES permits for certain pesticide applications. Although the Ninth Circuit held in two cases that a pesticide applicator was required to obtain an NPDES permit, neither decision contained a square holding interpreting the term "pollutant" in a manner inconsistent with the EPA rule that is at issue in this case. See *Headwaters, Inc.* v. *Talent Irrigation Dist.*, 243 F.3d 526, 532-533 (2001) (determining chemical residue from herbicide application to be a pollutant, but without analyzing whether it constituted point-source pollution); *League of Wilderness Defenders/Blue Mountains Biodiversity Project* v. *Forsgren*, 309 F.3d 1181, 1184 n.2 (2002) (assuming that the parties did not dispute that insecticide applied above navigable waters qualified as a pollutant); see also Pet. App. 49a-51a. In 2005, the Ninth Circuit, relying in part on EPA's interim interpretation, held that chemical "pesticides that are applied to water for a beneficial purpose and in compliance with FIFRA, and that produce no residue or unintended effects, are not 'chemical wastes,' and thus are not 'pollut-

ants' regulated by the CWA." *Fairhurst* v. *Hagener*, 422 F.3d 1146, 1150-1151 (2005). Neither of the pertinent Second Circuit decisions reached the merits of the question presented in this case, let alone foreclosed EPA from interpreting the Act not to require permits for the type of pesticide applications at issue. Indeed, one of those decisions essentially called on EPA to resolve the issue. See *Altman* v. *Town of Amherst*, 47 Fed. Appx. 62, 67 (2002) ("Until the EPA articulates a clear interpretation of current law—among other things, whether properly used pesticides released into or over waters of the United States can trigger the requirement for NPDES permits * * * —the question of whether properly used pesticides can become pollutants that violate the CWA will remain open."); *No Spray Coalition, Inc.* v. *City of New York*, 351 F.3d 602, 605-606 (2003) (reserving the "complex question" whether a pesticide application to waters of the United States constitutes a CWA discharge of a pollutant).

Taken together, those decisions created uncertainty among the regulated community and other affected citizens about the applicability of the NPDES permit program to certain pesticide applications. Pet. App. 30a-32a. In 2003, EPA sought to resolve that uncertainty by addressing the issue administratively. See 68 Fed. Reg. 48,385 (2003). In an Interim Statement and Guidance, EPA identified two circumstances for which it had concluded that pesticides applied to waters of the United States consistent with all relevant requirements of FIFRA are not "pollutants" under the CWA and therefore do not require an NPDES permit. *Id.* at 48,387. The first circumstance was the application for pest-control purposes of pesticides directly to waters protected by the CWA. *Ibid.* The second circumstance was the

application of pesticides to control pests that are present over waters of the United States where the application results in a portion of the pesticides being deposited to covered waters. *Ibid*.

EPA solicited public comment on the Interim Statement and Guidance. 68 Fed. Reg. at 48,385. After considering the public comments, EPA issued a final Interpretive Statement confirming its interim position. 70 Fed. Reg. 5095-5096 (2005). At the same time, EPA published notice of a proposed rulemaking to incorporate the substance of the Interpretative Statement into EPA regulations, and it solicited public comment on the proposed rulemaking. *Id*. at 5093.

On November 27, 2006, EPA issued its final rule. 71 Fed. Reg. 68,483. The rule revised EPA's NPDES regulations to add a paragraph to the list of discharges in 40 C.F.R. 122.3 that do not require NPDES permits. 71 Fed. Reg. at 68,492. The rule covered the application of pesticides, "consistent with all relevant requirements under FIFRA (*i.e.*, those relevant to protecting water quality)," in the following two circumstances:

1. The application of pesticides directly to waters of the United States in order to control pests. Examples of such applications include applications to control mosquito larvae, aquatic weeds, or other pests that are present in waters of the United States.

2. The application of pesticides to control pests that are present over waters of the United States, including near such waters, where a portion of the pesticides will unavoidably be deposited to waters of the United States in order to target the pests effectively; for example, when insecticides are

> aerially applied to a forest canopy where waters of the United States may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.

Ibid. (40 C.F.R. 122.3(h)).

EPA further concluded that "if there are residual materials resulting from pesticides that remain in the water after the application and its intended purpose (elimination of targeted pests) have been completed, these residual materials are * * * pollutants under CWA section 502(6) because they are wastes of the pesticide application." 71 Fed. Reg. at 68,487. EPA explained, however, that such applications "do not require NPDES permits" because, "while the discharge of the pesticide is from a point source (generally a hose or an airplane), it is not a pollutant at the time of the discharge. * * * Instead, the residual should be treated as a nonpoint source pollutant." *Ibid.*

3. After various parties petitioned for review of EPA's rule in 11 different courts of appeals, the petitions were consolidated in the Sixth Circuit. Applying the principles set forth in *Chevron, U.S.A., Inc.* v. *NRDC*, 467 U.S. 837 (1984), the court of appeals vacated the rule. Pet. App. 1a-25a.

a. The court of appeals stated that the first question under *Chevron* is whether the CWA unambiguously includes pesticides within its definition of "pollutant." Pet. App. 14a. The court interpreted the term "chemical waste," part of the Act's definition of "pollutant," to include discarded, superfluous, or excess chemicals. *Id.* at 16a. Applying that interpretation, the court concluded that so long as a chemical pesticide is intentionally applied to waters to perform a useful purpose and leaves

no excess portions after performing its intended purpose, it is not a "pollutant" and therefore does not require an NPDES permit. *Ibid.* At the same time, the court concluded that excess chemical pesticide and pesticide residue—*i.e.*, any portions of the pesticide that remain in the water after the pest-control purpose has been served—"unambiguously fall within" the term "chemical waste" and therefore are "pollutant[s]" under the CWA. *Id.* at 16a-18a.

EPA had recognized that excess or residual portions of a discharged pesticide are "pollutant[s]" within the meaning of the CWA. The agency had concluded, however, that the application of a pesticide that leaves such a residue does not require a CWA permit because such portions are neither excess nor residual (and therefore are not "pollutant[s]") at the time of the discharge. EPA contended that such residues are properly viewed as non-point source pollutants. The court of appeals rejected that conclusion, finding it contrary to the CWA's plain language and purpose. The court held that, when pesticide discharges result in the entry of excess or residual portions into waters of the United States, those discharges require a permit because excess or residual pesticides are pollutants discharged from a point source, as they are introduced into the water by the applicator from a point source. Pet. App. 21a-24a.

b. The court of appeals also addressed the question whether the term "biological materials," another component of the CWA definition of "pollutant," includes biological pesticides applied to control pests. Pet. App. 18a-20a. Citing the dictionary definition of "material," the court concluded that the "plain, unambiguous nature" of the statutory text compelled the conclusion that biological pesticides qualify as biological materials. *Id.*

at 18a-19a. The court of appeals also relied on Congress's use of the term "biological *materials*," rather than "biological *wastes*," to justify the court's different treatment of biological and chemical pesticides. *Id.* at 19a-20a (emphasis added).

4. EPA moved to stay the mandate for two years in order to avoid significant disruption to (i) EPA and those States that administer NPDES permit programs, and (ii) the thousands of persons and businesses nationwide who apply pesticides to or over, including near, waters protected by the CWA. EPA explained that the stay would provide it and state permitting authorities time to develop and issue general CWA permits containing appropriate terms to govern the discharge of pesticides to covered waters in a more administratively workable manner. Pet. App. 105a-123a. The court of appeals granted EPA's motion and stayed issuance of the mandate until April 9, 2011.

ARGUMENT

Petitioners contend that the court of appeals disregarded settled principles governing the deference owed to agency interpretations, and that the court's construction of the CWA is in tension with decisions of this Court and other courts of appeals. 09-533 Pet. 14-22; 09-547 Pet. 13, 20, 25-28. Although the government agrees that the court of appeals misapplied *Chevron* to EPA's 2006 rule, the Sixth Circuit's ruling does not conflict with any decision of this Court or another court of appeals. And while the decision below potentially applies to thousands of applications of pesticides to or over, including near, waters protected by the CWA, the court of appeals' two-year stay of its mandate has provided time to EPA and authorized States to mitigate the administrative burdens

resulting from the decision. Indeed, EPA is currently in the process of developing general permits governing the types of pesticide applications covered by its rule. Further review is therefore unwarranted.

1. Although the court of appeals recited the correct standard of review under *Chevron* (Pet. App. 9a-10a), it misapplied that standard to EPA's rule. Contrary to the court of appeals' conclusion, the relevant CWA terms do not unambiguously foreclose EPA's interpretation. Congress defined the term "pollutant" to encompass 16 specific items. 33 U.S.C. 1362(6); see p. 2, *supra*. None of the 16 items clearly encompasses pesticides applied to waters, in a manner consistent with FIFRA requirements, in order to control pests. In particular, Congress's use of the terms "chemical wastes" and "biological materials" does not indicate a clear intent to cover the application of pesticides to covered waters under the circumstances specified in EPA's rule.

a. Although the court of appeals viewed the term "chemical waste" as unambiguous and therefore did not rely on EPA's interpretation as reflected in the 2006 regulation, the court's construction of that term with respect to chemical pesticides is consistent with EPA's rule. Both EPA and the court of appeals determined that pesticides intentionally applied to or over, including near, water to perform a particular useful purpose (*i.e.*, control pests) are not chemical wastes if they leave no residue after performing their intended purpose. See 71 Fed. Reg. at 68,487; Pet. App. 16a-17a. Both EPA and the court further concluded that any pesticide residue remaining in the water after the intended purpose has been served constitutes "chemical waste" and is therefore a "pollutant" within the meaning of the CWA. *Ibid.*

The court of appeals departed from EPA's 2006 rule, however, when it concluded that the CWA unambiguously classifies excess or residual pesticide as a pollutant discharged from a point source. The court of appeals stated that "it is clear that under the meaning of the Clean Water Act, pesticide residue or excess pesticide * * * is a pollutant discharged from a point source because the pollutant is introduced into a water from the outside world by the pesticide applicator from a point source." Pet. App. 23a-24a (internal quotation marks omitted). The court rejected EPA's conclusion that, because such an excess or residue becomes a "chemical waste" (and therefore a "pollutant") only at some time after discharge, it should be treated as a nonpoint source pollutant. Compare *id.* at 21a-25a, with 71 Fed. Reg. at 68,487; see p. 7, *supra*.

Thus, the critical question is whether the portion of a chemical pesticide that ultimately becomes excess or residue is a "pollutant" at the time it is released from the point source, or whether it becomes a "pollutant" only after the pesticide has served its intended purpose and the excess takes on the character of "waste." The court of appeals identified no provision of the CWA that speaks directly to that question. The court's conclusion that the CWA unambiguously foreclosed EPA's interpretation—notwithstanding the Act's silence as to the temporal issue of when such pesticide loses its character as product and becomes a pollutant; EPA's past practice of not requiring permits for such discharges (p. 2, *supra*); and FIFRA's specific regulation of pesticide use (pp. 3-4, *supra*)—reflects an erroneous application of *Chevron*.

b. The court of appeals also erred in holding, contrary to EPA's rule, that the CWA term "biological ma-

terials" unambiguously encompasses biological pesticides. Pet. App. 18a-20a. As the Ninth Circuit previously concluded, the CWA is ambiguous on whether that term, read in conjunction with the other items specified in the definition of "pollutant," includes *all* biological material (waste or not) within its scope. See *Association to Protect Hammersly, Eld, & Totten Inlets* v. *Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (2002) (holding that natural byproducts of live mussels grown on harvesting rafts were not "biological materials"). The court below nevertheless found clear congressional intent to include biological pesticides within the term "biological materials," even though few biological pesticides existed at the time Congress adopted this definition. Compare Pet. App. 18a-19a, with 71 Fed. Reg. at 68,486. The court of appeals' decision also creates the peculiar result that, although a chemical pesticide (except for excess or residue) applied to waters for pest control is not a "pollutant," a biological pesticide applied to the same waters in the same manner for the same purpose is a "pollutant." That result is particularly anomalous in light of EPA's assessment that biological pesticides generally pose less serious adverse environmental consequences than chemical pesticides. *Ibid.*; see Valent Biosciences Amicus Br. 11-12.

c. Notwithstanding the court of appeals' errors, the decision below does not warrant this Court's review. The court of appeals recited the correct standard under *Chevron* and did not purport to articulate a new analytic framework for review of agency rules. Pet. App. 9a-10a. The result below does not conflict with a decision of this Court or any other court of appeals. The court below was the first to review the validity of EPA's 2006 final rule, and no court of appeals has held that pesticide ap-

plications to navigable waters resulting in chemical residue or involving biological pesticides do not require an NPDES permit. See pp. 4-5, *supra*. And, as explained below (pp. 15-16, *infra*), EPA is in the process of fashioning a regulatory response to mitigate the impact of the court of appeals' decision.

2. In addition to challenging the court of appeals' application of *Chevron* principles to EPA's rule, petitioners in No. 09-533 contend that the court's interpretation of the CWA term "chemical waste" conflicts with this Court's decision in *Burlington Northern & Santa Fe Railway* v. *United States*, 129 S. Ct. 1870 (2009), and with the Second Circuit's decision in *Cordiano* v. *Metacon Gun Club, Inc.*, 575 F.3d 199 (2009). Pet. 17-22. Petitioners' reliance on those decisions is misplaced.

In *Burlington Northern*, the Court interpreted the phrase "arrange for disposal" as used in the Comprehensive Environmental Response, Compensation, and Liability Act of 1980 (CERCLA). Specifically, the Court held that a manufacturer had not "arrange[d] for disposal" of pesticide that had spilled during its transfer from the delivery truck to the customer's storage tanks. 129 S. Ct. at 1875-1879. Relying on the intent element implicit in the CERCLA term "arrange for," the Court explained that the manufacturer had not entered into the transaction with "the intention that at least a portion of the product be disposed of during the transfer process." *Id.* at 1880.

Although the purpose of a pesticide discharge is relevant to whether the discharge involves a "chemical waste" within the meaning of the CWA, this Court's decision in *Burlington Northern* does not speak directly to the question presented here. As discussed above (pp. 10-11, *supra*), the Sixth Circuit *agreed* with EPA's con-

clusion, as reflected in the 2006 rule, that chemical pesticides do not constitute "chemical waste" within the meaning of the CWA unless some excess or residue remains after the pesticide has accomplished its intended purpose. And nothing in *Burlington Northern* sheds meaningful light on whether such excess or residue has been discharged into covered waters from a point source. Moreover, the ultimate question whether there has been a "discharge of any pollutant" under the CWA differs on its face from the question whether someone has "arrange[d] for disposal" of a pollutant under CERCLA. For example, the spilled pesticide at issue in *Burlington Northern*, like the excess or residual pesticide discussed in the EPA rulemaking and in the decision below, would constitute a "pollutant" within the meaning of the CWA if it had been spilled into waters of the United States.

In *Metacon Gun Club*, the Second Circuit addressed a part of the definition of "solid waste" in the Resource Conservation and Recovery Act of 1976 (RCRA)— specifically the term "discarded material," which RCRA regulations define as "abandoned" by being "[d]isposed of." 575 F.3d at 206-207 (citations omitted). The plaintiffs had brought claims under both RCRA and the CWA arising from alleged lead contamination attributable to the firing of bullets at a shooting range. *Id.* at 202. The Second Circuit first determined under RCRA that lead shot used at a shooting range is not a "discarded material" and therefore is not a solid waste. *Id*. at 207-209. Petitioners emphasize the Second Circuit's inquiry into the ordinary, intended use of a product. 09-533 Pet. 20-21. As noted above, however, the Sixth Circuit's construction of the term "chemical waste" in the CWA is consistent with that in the EPA rule. In any event, the

Second Circuit did not reject the plaintiffs' CWA claims on the ground that lead shot used for its intended purposes is not a "pollutant." Rather, the court found no CWA liability for independent reasons, explaining that the plaintiffs had not established that certain discharges were from a point source or that other discharges were into waters of the United States. *Metacon Gun Club*, 575 F.3d at 222-225.

3. In arguing that the decision below warrants further review, petitioners emphasize the potentially widespread impact of the court of appeals' ruling. 09-533 Pet. 28-33; 09-547 Pet. 14-20. The court of appeals' decision will make the NPDES permitting regime applicable to thousands of pesticide applications that were not previously subject to CWA requirements. Pet. App. 106a-107a, 126a-127a. But because the court of appeals has stayed its mandate for two years to enable EPA and authorized States to develop and issue general permits, the regulatory burdens of the court of appeals' decision will be reduced.

Immediate issuance of the mandate by the court of appeals likely would have caused significant disruption to both regulators and the regulated community. EPA and the States that administer the NPDES program lack the resources to issue individual permits in a short timeframe. Without NPDES permits and without a stay of the mandate, the many persons and businesses nationwide who apply pesticides to or over, including near, waters of the United States would have faced a choice between ceasing such applications or risking CWA violations.

For that reason, the government sought a stay of the mandate from the court of appeals. As the government explained at the time, EPA and authorized States plan

to create NPDES permits to cover a large number of similarly situated dischargers in lieu of issuing an individual permit to each discharger for the type of pesticide applications addressed in EPA's rule. Pet. App. 127a-128a. EPA estimated that the development and issuance of general permits would take two years, and it therefore requested a stay of the mandate until April 9, 2011. *Id.* at 128a-129a.

The court of appeals' grant of that motion mitigates the potentially adverse consequences of its decision. The two-year period should provide EPA and other authorized permitting agencies sufficient time to develop and issue general CWA permits to cover the activities at issue. In light of the Sixth Circuit's stay of the mandate, there is no pressing need for this Court's review.[2]

---

[2] Petitioners also suggest that the opinion below could be read to extend the CWA's coverage to discharges having a more attenuated connection to waters of the United States than the discharges addressed in EPA's 2006 rule. 09-533 Pet. 29-30; 09-547 Pet. 15-17. The possibility that future plaintiffs might invoke the Sixth Circuit's decision in substantially different (and currently hypothetical) factual circumstances does not independently warrant this Court's review. In any event, the opinion below is better read as limited to the issues actually before the court of appeals: pesticide applications to or over, including near, waters of the United States that are covered by EPA's rule.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

ELENA KAGAN
Solicitor General

IGNACIA S. MORENO
Assistant Attorney General

THOMAS LORENZEN
ALAN GREENBERG
Attorneys

JANUARY 2010