

**Court of Appeals Nos. 06-4630;
07-3180/3181/3182/3183/3184/3185/3186/3187/3191/3236**

**IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT**

THE NATIONAL COTTON COUNCIL OF AMERICA, ET AL.,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY,
Respondent,

AGRIBUSINESS ASSOCIATION OF IOWA, ET AL.,
Defendant-Intervenors.

Brief of Amici Curiae

**Agricultural Retailers Association, American Soybean Association, California Cotton Growers, Cranberry Institute, Florida Citrus Mutual, Golf Course Superintendents Association of America, Kansas Cotton Association, National Agricultural Aviation Association, National Association of Home Builders, National Association of Wheat Growers, National Corn Growers Association, National Council of Farmer Cooperatives, National Potato Council, National Sorghum Producers, National Water Resources Association, Oklahoma Cotton Council, Plains Cotton Growers, Inc., Southern Cotton Growers, Texas Cotton Producers, U.S. Rice Producers Association, USA Rice Federation, and Utility Water Act Group
In Support of Petitions for Rehearing**

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I. Statement of *Amici*'s Broad and Deep Interests in the Outcome

Amici are 22 trade groups representing a broad range of public and private agricultural, retail, water, energy, development, and recreation interests.¹ *Amici* use pesticides to prevent disease, infestation, and other harmful invasions that would otherwise threaten food, water, energy, and other resources on which *Amici* and the public depend. Their application of pesticides is strictly regulated under the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA). The panel's decision rejected an EPA rule that certain pesticide applications do not constitute a discharge of a pollutant requiring a Clean Water Act (CWA) permit. *Nat'l Cotton Council of Am. v. U. S. EPA*, 553 F.3d 927 (6th Cir. 2009).

The panel's decision will burden *Amici*'s operations by subjecting a wide range of activities to the economic and competitive disadvantage of broad and uncertain CWA liability. Imposition of CWA permit requirements unsuited to those activities will impede *Amici*'s ability to respond quickly and effectively to

¹ *Amici* are Agricultural Retailers Association, American Soybean Association, California Cotton Growers, Cranberry Institute, Florida Citrus Mutual, Golf Course Superintendents Association of America, Kansas Cotton Association, National Agricultural Aviation Association, National Association of Home Builders, National Association of Wheat Growers, National Corn Growers Association, National Council of Farmer Cooperatives, National Potato Council, National Sorghum Producers, National Water Resources Association, Oklahoma Cotton Council, Plains Cotton Growers, Inc., Southern Cotton Growers, Texas Cotton Producers, U.S. Rice Producers Association, USA Rice Federation, and Utility Water Act Group. *Amici*'s Motion for Leave to File Brief provides more detail about each group.

harmful pests, risking significant losses and crippling costs.² Moreover, the panel's reasoning is squarely contrary to provisions of the statute that explicitly exclude agricultural stormwater and return flows from the CWA's definition of "point source." More broadly, the decision obliterates Congress's careful point source/nonpoint source distinction, relied upon by *Amici* and many others who are not before the Court. *Amici*'s operations are essential to our Nation's supply of food, water, shelter, and energy, and they are vitally affected by this case. The Court should rehear this case and allow *Amici* to file this brief.

II. Argument

A. The CWA Regulates Discharges "From" Point Sources, Excludes Agricultural Stormwater from the Point Source Provisions, and Addresses Nonpoint Source Pollution Separately.

The CWA is founded on a purposeful distinction between specific "point sources" and broader "nonpoint sources" of pollution. This Court observed over 25 years ago that "Congress viewed the [permit] program as the most effective weapon against pollution, yet limited its application to situations involving the addition of pollutants from point sources. Water pollution arising from nonpoint

² Contrary to the panel's suggestion, general permits are no easy answer. 553 F.3d at 930-31. They are typically complex and frequently challenged.

sources is to be dealt with differently, specifically through the device of areawide waste treatment management by the states.”³

The discharge of a pollutant from a “point source” – *e.g.*, waste streams from industrial facilities and sewage treatment plants discharged to waters through an outfall pipe – is prohibited, except in compliance with a permit issued under the Act. 33 U.S.C. § 1311(a). The Act defines “point source” as a “discernible, confined and discrete conveyance ... from which pollutants are or may be discharged.” *Id.* § 1362(14). Further, the definition states explicitly “the term does not include agricultural stormwater discharges and return flows from irrigated agriculture.” *Id.* A permit authorizing a discharge will generally impose “effluent limitations” on the point source, which control the “quantities, rates, and concentrations of ... constituents” in the effluent released from the point source. *Id.* §§ 1311(e) and 1362(11). This Court has noted that the “permit program was designed to control ‘point sources’ of pollution, and the legislative history behind the CWA indicates that Congress’s focus was on the discharge of traditional industrial and municipal wastes.”⁴

³ *United States ex rel. Tennessee Valley Authority v. Tennessee Water Quality Control Board*, 717 F.2d 992, 999 (6th Cir. 1983). Congress reinforced the nonregulatory aspects of the Act when it added section 319. 33 U.S.C. § 1329.

⁴ *Nat’l Wildlife Fed’n v. Consumers Power Co.*, 862 F.2d 580, 582 (6th Cir. 1988) (citing *Nat’l Wildlife Fed’n v. Gorsuch*, 693 F.2d 156, 175 (D.C. Cir. 1982)).

“Pollution” (including nonpoint source pollution) – *e.g.*, rainfall runoff collecting pollution as it moves across the landscape to waters – is broadly defined as “man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.” 33 U.S.C. § 1362(19). If it carries pollution, agricultural runoff is treated as a nonpoint source. *Id.* at 1362(14). Nonpoint sources are not subject to the permitting requirement, but rather are addressed through nonregulatory programs aimed at particular waterbodies – *e.g.*, the Great Lakes Initiative, *id.* §§ 1258, 1268 – or through watershed planning at the State and local levels. *See, e.g., id.* § 1329; § 1288 (state-led areawide waste treatment management); § 1256(a) (grants to states and interstate agencies for “programs for the prevention, reduction, and elimination of pollution”); § 1251(g) (directing federal government to “co-operate with State and local agencies to develop comprehensive solutions to prevent, reduce and eliminate pollution”).

B. The Panel Omitted and Misconstrued the Elements that Must Be Present to Trigger CWA Permit Requirements.

The panel misses the fundamental point established in this Court’s early CWA cases – *viz.*, “for NPDES [permit] requirements to apply . . . ‘five elements must be present: (1) a *pollutant* must be (2) *added* (3) to *navigable waters* (4) *from* (5) a *point source*.’”⁵ That is, a “pollutant” must be discharged to water “from” a

⁵ *Consumers Power*, 862 F.2d at 583 (quoting *Gorsuch*, 693 F.2d at 165).

point source.⁶ The Act makes plain that permits control pollutants at the point of “conveyance,” and thus the discharge prohibition applies only at the point at which a “pollutant” passes through a point source to a navigable water. Indeed, the effluent limitations established in a permit apply to the point source from which a pollutant is discharged. 33 U.S.C. §§ 1311(b)(2) and (e), 1362(14).

The panel ignored this fundamental framework, holding instead that if a substance ever came from a point source, its later overland flow to a water will be treated as a point source discharge. Thus, the panel held that a substance that is *not* a statutory pollutant at the time it is released from a point source will be treated as a pollutant if “[a]t some point following application [it] finds its way into the navigable waters . . .” *Nat’l Cotton Council*, 553 F.3d at 936-37. It compounded its error by further holding that once a substance “finds its way into the navigable waters,” its prior application, albeit not to water, is converted into a point source discharge to water because “*but for the [prior] application of the pesticide [from a point source], the pesticide residue . . . would not be added to the water . . .*” *Id.* at 940 (emphasis added). This is astonishingly broad.

By holding that activities may be regulated even if substances are not pollutants “at the *time of discharge*,” the panel would regulate products that are not

⁶ 33 U.S.C. § 1362(12) (discharge means addition of pollutant to navigable waters “from any point source”), (14) (point source means any conveyance “from which” pollutants are discharged).

pollutants at the time they are conveyed by a point source. *Id.* at 939 (emphasis added). But point sources are regulated only where they convey pollutants to navigable waters, not where they convey things that may at some later point result in water pollution. Many forms of water pollution could be traced back to some point source – *e.g.*, a truck salting a road – but the Act regulates only things that are statutory pollutants at their point of conveyance from a point source to a navigable water.⁷ As this Court noted, “[h]ad Congress wanted to use CWA § 402 to regulate all sources of pollution, ‘it would easily have chosen suitable language.’”⁸

Moreover, by holding that a permit is required if a pesticide “finds its way into the navigable waters,” the panel ignores the meaning of “point source.” The CWA regulates only the addition of a pollutant “from” a point source, and defines “point source” as that which “conveys” a pollutant to navigable waters. “Convey” means to “take or carry *from* one place to another.”⁹ Congress’s choice of

⁷ 33 U.S.C. §§ 1311(b)(2) and (e), 1362(14).

⁸ *Consumers Power*, 862 F.2d at 586 (quoting *Gorsuch*, 693 F.2d at 176). The panel states that “temporally tying” discharges to point sources would be “contrary to the purpose of the permitting program . . .” 553 F.3d at 939. But “no legislation pursues its purposes at all costs. Deciding what competing values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice. . . .” *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987) (emphasis in original).

⁹ Webster’s II New College Dictionary, 247 (1995) (emphasis added).

language demonstrates its intent to require a permit not for overland (nonpoint) dispersion that eventually “finds its way into the navigable waters,” but *only* where the point source is, as the Second Circuit has held, “the proximate source from which the pollutant is directly introduced to the destination water body[, such as a] pipe from a factory draining effluent into a navigable water.”¹⁰

Finally, the panel defines “pollutant” to reach the illogical and wrong conclusion that biological pesticides are pollutants *per se*. The panel acknowledges that chemical pesticides are not CWA pollutants until they become “wastes,” but anomalously holds that all biological pesticides are “pollutants” because the definition of pollutant includes “‘biological materials’ rather than a more limited term such as ‘biological wastes.’” 553 F.3d at 938. The panel ignores the Ninth Circuit’s holding that the specific items called out in the statutory definition of “pollutant” (“...garbage, sewage sludge, munitions, chemical wastes, biological materials...”) “support an understanding of the more general statutory

¹⁰ *Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York*, 273 F.3d 481, 493 (2nd Cir. 2001); *see Waterkeeper Alliance, Inc. v. U. S. EPA*, 399 F.3d. 486, 510 n.25 (2nd Cir. 2005) (CWA expressly defines point source to include “concentrated animal feeding operation” (CAFO), but CAFO runoff “primarily caused by rain ... is not subject to regulation because the rain -- not the CAFO -- is the proximate source of the discharge”). No court has previously held that the CWA regulates dispersed pollution because somewhere back in time the pollution came from a pipe, hose, or lawnmower.

term, ‘biological materials,’ as waste material of a human or industrial process.”¹¹

Otherwise, the Act would both protect and prohibit fish, shellfish, and wildlife.¹²

This cannot be right.

C. The Opinion Is Bounded by No Limiting Principle.

The panel would regulate pesticides that reach navigable waters by runoff, wind, or other *nonpoint* sources as point source discharges, resulting in overlap and confusion of the Act’s provisions contrary to congressional intent and this Court’s prior holdings.¹³ Nor does the panel provide a limiting principle for its conclusions, the implications of which are endless.¹⁴

¹¹ *Ass’n to Protect Hammersley, Eld, and Totten Inlets v. Taylor Resources, Inc.*, 299 F.3d 1007, 1016 (9th Cir. 2002); 33 U.S.C. § 1362(6). Even pesticide residue should not be presumed to be a “waste,” as many if not most pesticides are applied for long-lasting effect and their dispersion by wind or rain is properly viewed as a loss of useful commercial product rather than a disposal of waste.

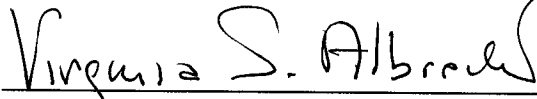
¹² *See id.* Under the panel’s reading of “biological materials,” an NPDES permit would presumably be required for, *e.g.*, catch-and-release fishing, release of rescued seals, and diving.

¹³ “Although an essential element of a national effort to control water pollution, the NPDES permit program stands alongside of the system controlling “nonpoint sources of pollution, *i.e.*, all water pollution not subject to § 402.” *Consumers Power*, 862 F.2d at 587.

¹⁴ The panel does not address highway salting, roadside mowing or garden watering (nor any other example of the vast implications of its holding), but its logic by necessary implication requires a permit for every truck, mower and hose that can be traced to salt, grass or chlorine which eventually reaches navigable waters. Indeed, requiring a permit with effluent limits for nonpoint source pollution not only exceeds the reach of the statute, it is impractical and futile.

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