This Much Is Clear: The Failure to Recognize Statutory Ambiguity in *National Cotton Council v. EPA*

*By Ellen Steen & Jessica A. Hall**

The Sixth Circuit recently struck down an EPA Clean Water Act (CWA) regulation that sought to define reasonable boundaries of the National Pollutant Discharge Elimination System (NPDES) permitting program in the context of pesticide use.[1] For CWA practitioners, the decision is significant for its sweeping expansion of the definition of regulated "point source" discharges and the resulting implications for a wide range of activities now subject to the threat of CWA enforcement. But it is also noteworthy for followers of administrative law generally, because of the court's invalidation of an EPA regulation and 35 years of consistent agency practice based on what may reasonably be characterized as conclusory assertions of the statute's "plain" meaning, rather than faithful adherence to the traditional *Chevron* analysis.

The *NCC* decision, in a single blow, negates more than three decades of agency practice and dramatically expands the NPDES permitting program to cover at least an estimated 5.6 million pesticide applications annually.[2] This article describes the decision and its implications for pesticide application and a wide range of other activities now potentially subject to CWA permitting requirements and liability under the panel's reasoning.[3] But our primary focus is how the decision offends fundamental principles of administrative law by improperly imposing the panel's own interpretation over the agency's patently reasonable construction of the statutory text through formal rulemaking.

Chevron Then and Now

The modern standard for judicial review of agency interpretations of statutes traces to the Supreme Court's decision in *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*[4] Although most administrative law practitioners can readily recite the *Chevron* rule of deference to reasonable agency interpretations, it is useful occasionally to be reminded of the statutory provisions and agency policies at issue in that case.

In 1977, Congress amended the Clean Air Act to deal with states that had failed to attain EPA's national air quality standards. The amendments required these "non-attainment" states to establish a strict permitting program to regulate "new or modified major stationary sources" of air pollution.[5] In August 1980, under the Carter Administration, EPA issued regulations defining the term "stationary source" in the statute to mean any individual piece of equipment in a plant that produced pollution.[6] Under the Reagan Administration, however, EPA began to reconsider its approach.[7] One reason for the reconsideration was EPA's belief that the 1980 definition could "act as a disincentive to new investment and modernization by discouraging modifications to existing facilities" and might "actually retard progress in air pollution control by discouraging replacement of older, dirtier processes or pieces of equipment with new, cleaner ones."[8] In October 1981, EPA therefore adopted a new definition of "stationary source" that allowed for a plant-wide definition.[9] This new definition made it possible for an existing plant to install new equipment without meeting stringent new source performance standards, as long as the total emissions from the plant (as if it were encased in a "bubble") did not increase. Some environmental groups, which viewed EPA's change in policy as an improper relaxation of environmental requirements, successfully challenged EPA's plant-wide definition in the D.C. Circuit.

The U.S. Supreme Court reversed. In an opinion by Justice John Paul Stevens, the Court upheld EPA's new interpretation of "stationary source" to mean an entire facility, not just a specific pollution-emitting device. In doing so, the Court articulated the now-familiar two-step standard for judicial review of an agency's construction of a statute that it administers:

> First [Step One], always, is the question whether Congress has *directly spoken to the precise question* at issue. If the intent of Congress is clear, that is the end of the matter; for the court as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, [in Step Two] the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, *if the statute is silent or ambiguous with respect to the specific issue*, the question for the court is whether the specific agency's answer is based on a *permissible construction* of the statute.[10]

The *Chevron* Court explained that judges should defer to reasonable agency interpretations both when Congress has explicitly created a gap for the agency to fill and when it has done so implicitly—such as through statutory ambiguity or silence.[11] This applies equally to statutory gaps left intentionally and inadvertently—such as when Congress simply did not consider the precise question at issue.[12] In finding that it was appropriate to defer to EPA's interpretation of "source" in the Clean Air Act, the *Chevron* Court was influenced by the fact that the regulatory scheme at issue was "technical and complex," and that the agency had "considered the matter in a detailed and reasoned fashion."[13] The Court observed, moreover, that judges do not share the same level of expertise or political accountability that executive agencies experience.[14] For this reason:

> When a challenge to an agency construction of a statutory provision, fairly conceptualized, really centers on the wisdom of the agency's policy, rather than whether it is a reasonable choice within a gap left open by Congress, the challenge must fail."[15]

Twenty-five years later, *Chevron* still provides the framework for judicial review of agency interpretations of the statutes they administer, particularly when those interpretations are embodied in regulations promulgated using notice and comment procedures.[16] Indeed, the Supreme Court has twice

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this year (both since the *NCC* ruling was issued) invoked *Chevron* in reversing appellate courts' erroneous "plain language" decisions in the CWA context and affirming EPA's contrary interpretations.[17] The analysis of the Court in *Entergy* (as well as the dissenting opinion in that case) in particular, presents an illuminating contrast to the Sixth Circuit panel's cursory treatment of the statutory text. Later in this article, we discuss *Entergy*, as well as a recent case in which the Eleventh Circuit swallowed hard and properly applied *Chevron* to uphold a CWA rule that deviated from the court's preferred interpretation of the statute. But first, we describe the background and fate of EPA's CWA pesticide rule.

EPA's CWA Pesticide Rulemaking

Statutory Background

The CWA prohibits the "discharge of any pollutant" to waters of the United States, except in compliance with certain statutory provisions.[18] One of those provisions, section 402, establishes the NPDES permitting program and authorizes EPA or an approved state agency to issue NPDES permits for the discharge of pollutants under specified terms and conditions.[19] NPDES permits must contain technology-based limits on the pollutant discharge, in addition to more stringent limits as necessary to meet applicable "water quality standards" for the receiving waters.[20]

A few key terms define the scope of the NPDES regulatory program. "Discharge of a pollutant" means the "addition of any *pollutant* to navigable waters *from any point source*."[21] "Pollutant" means "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."[22] "Point source" means a "discernible, confined and discrete conveyance."[23] "Navigable waters" means "waters of the United States," which has been interpreted to include both navigable-in-fact waters and other waters with a substantial nexus to such waters.[24] Any pollution-generating source that falls outside the scope of the regulated universe as defined by these terms is categorized as a "nonpoint source" and is not subject to federal regulation under the CWA.

In addition to the regulatory program for point source discharges, the CWA establishes a variety of non-regulatory programs in furtherance of the statutory goal of protecting and maintaining the quality of the nation's waters. For example, states (with EPA oversight and approval) must establish "water quality standards" for all navigable waters, review and adjust those standards periodically, and establish plans for the achievement of those standards.[25] States must identify specific waters not attaining water quality standards and establish "total maximum daily loads" sufficient to achieve standards.[26] TMDLs are incorporated into NPDES permits for permitted discharges and are implemented through regulatory or non-regulatory state programs for nonpoint sources.[27]

For context on the CWA pesticide rule, background on one additional statute is needed. The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) authorizes EPA to regulate the sale, distribution, and use of pesticides through a registration program. EPA may not issue a registration for a pesticide that causes "unreasonable adverse effects on the environment."[28] The statute defines "unreasonably adverse effects on the environment" to include "any unreasonable risk to man or the environment."[29] In approving any pesticide registration, EPA must approve label requirements that prescribe the purposes for which and the manner in which the pesticide may be applied.[30]

CWA Pesticide Rulemaking

In August 2003, EPA issued an interim interpretive statement and requested public comment as the initial step in what would become a three-year process of developing a regulation to address the applicability of the NPDES permitting program to pesticide application.[31] Although EPA had never—in three decades administering the CWA—required an NPDES permit for pesticide application, clarification was necessitated by several court rulings, including a Second Circuit decision observing that there was ambiguity under current law regarding whether "properly used pesticides can become pollutants that violate the Clean Water Act."[32]

EPA's interpretive statement declined to address pesticide application generally, but identified two discrete circumstances in which pesticides applied from a point source 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.[33] The first scenario involved the application of pesticides directly to waters of the U.S. to control pests, such as mosquito larvae or aquatic weeds.[34] The second scenario involved the application of pesticides to control pests that are present over waters of the U.S., such as adult mosquitoes, where the application results in a portion of the pesticide being deposited to waters of the U.S.[35] After considering public comment, EPA finalized its interpretive statement and proposed formal rulemaking to codify that interpretation in 2005.[36]

EPA published its final rule in November 2006.[37] Consistent with the agency's prior interpretive statement, the final rule codified two specific instances in which the application of pesticides in accordance with all relevant FIFRA requirements (i.e., those related to water quality) would not trigger NPDES permitting requirements because the pesticide being applied is not a "pollutant." The two circumstances were:

1. The application of pesticides *directly to waters* of the U.S. 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 U.S.

2. The application of pesticides to control pests that are present *over waters* of the U.S., *including near such waters*, where a portion of the pesticides will unavoidably be deposited to waters of the U.S. in order to target the pests effectively; for example, when insecticides are aerially applied to a forest canopy where waters of the U.S. may be present below the canopy or when pesticides are applied over or near water for control of adult mosquitoes or other pests.[38]

EPA's rule expressly left unaddressed the question of pesticide applications to "terrestrial agricultural crops,"[39]

which might involve "drift over and into waters of the United States."[40] Such terrestrial applications, for which EPA also has never required or issued an NPDES permit, are the subject of the Pesticide Program Dialogue Committee, a Federal Advisory Committee Act committee formed to advise EPA on issues related to pesticide "spray drift" from agricultural and other pesticide applications.

EPA's interpretation was based on its determination that pesticides in use in the specified circumstances are not "pollutants." Of the 16 items listed in the statutory "pollutant" definition, pesticides could potentially be classified as either "chemical wastes" or "biological materials." EPA reasoned that chemical pesticides being applied for their intended purpose of controlling pests and in accordance with all relevant FIFRA labeling requirements are not "eliminated or discarded" products, and thus are not "chemical wastes." Rather, they are products that EPA has evaluated and registered for the purpose of controlling target organisms, including controlling pests through application of the pesticide to water. EPA further reasoned that the term "biological material" is ambiguous as to whether it includes biological pesticides being applied in accordance with FIFRA requirements. EPA interpreted the term to exclude such pesticides, largely because the contrary conclusion would lead to the anomalous result that biological pesticides would be regulated as "pollutants" under the same circumstances in which chemical pesticides would not. Based on the predominance of chemical pesticides when the relevant statutory provisions were enacted, and the generally more environmentally benign nature of biological pesticides, EPA reasoned that Congress probably did not intend to regulate biological pesticides under the circumstances addressed in the rule.

EPA acknowledged throughout the rulemaking process that pesticides remaining in the environment *after* their intended purpose had been served—so-called "residual materials"—are waste and therefore properly viewed as "pollutants." Yet even if such materials will be generated as a result of pesticide application, EPA concluded that the application itself is not properly regulated under the CWA, because the pesticide is not a "pollutant" *at the time of its discharge* from a point source (the application equipment). In other words, the application of pesticides under the circumstances identified in the rule is not an "addition of any *pollutant*… *from* any point source" because the pesticide is not a "pollutant" when it comes "from" the application equipment.[41] In EPA's view, therefore, pesticide residual that may remain in the environment following application is appropriately viewed as "nonpoint" source pollution and addressed through other CWA and state programs.

Judicial Review of the CWA Pesticide Rule

Challenges to the Rule

Environmental and industry groups[42] filed petitions for review of EPA's CWA pesticide rule. Petitions filed in eleven circuits were ultimately consolidated in the Sixth Circuit. Farming and forestry groups intervened in defense of the rule.

The environmental groups argued that EPA exceeded its authority under the CWA by excluding *any* pesticide application—even under the carefully cabined circumstances spelled out in the rule—from the NPDES permitting requirement. The industry groups, on the other hand, argued that EPA's exemption was too narrow: even pesticide application *not* in compliance with FIFRA should be excluded from regulation as a CWA "pollutant" discharge.

The Panel's Decision

On January 7, 2009, the Sixth Circuit panel vacated the rule. The court first addressed EPA's interpretations of the term "pollutant." With regard to chemical pesticides, the panel agreed that only "waste" pesticide—i.e., excess or residual—is a "chemical waste" and therefore a CWA "pollutant."[43] On this basis, the panel identified "at least two" circumstances in which chemical pesticides are "pollutants."[44] The first is when pesticide is initially applied to land or dispersed into the air (including applications within the scope of the rule that target pests "over… including near" waters) and "[a]t some point following application, excess or residual pesticide finds its way into the navigable waters."[45] The second circumstance is when a chemical pesticide is applied "directly and purposefully to navigable waters to serve a beneficial purpose" and "residual aquatic pesticide 'remain[s] in the water after the application and [the pesticide's] intended purpose has been completed.'" In both scenarios, consistent with EPA's interpretation, any excess or residual pesticide in the waters as a result of the application is a "pollutant."[46]

With regard to biological pesticides, however, the panel found that the CWA phrase "biological materials" (included in the "pollutant" definition) unambiguously encompasses "matter of a biological nature, such as biological pesticides."[47] According to the panel, all biological pesticides under all circumstances are "pollutants," regardless of whether they result in any excess or residual material after their purpose has been served.[48] Therefore, any application of biological pesticide to navigable waters would be a discharge of a pollutant to those waters.

Although EPA's interpretation had sought to avoid inconsistent regulatory treatment of chemical and biological pesticides, that concern proved to be academic in light of the next stage of the panel's analysis. Turning to whether chemical pesticide residues are discharged "from a point source" or, as EPA determined, are nonpoint source pollution, the panel rejected EPA's determination.[49] Although EPA concluded there is no point source pollutant discharge where the pesticide is not a "pollutant" *at the time of the discharge* from the application equipment, the panel found that "EPA's attempt at temporally tying the 'addition' (or 'discharge') of the pollutant to the 'point source' does not follow the plain language of the [CWA]."[50]

To flesh out its own interpretation of the circumstances in which excess or residual pesticide is discharged "from a point source," the panel turned to a separate EPA rulemaking and an Eleventh Circuit decision (which had been vacated on other grounds), both of which concerned whether the transfer of polluted waters from one waterbody to another is an "addition of any pollutant to navigable waters from any point source."[51] In the context of discussing such water

transfers, EPA had noted its "longstanding position… that an NPDES pollutant is 'added' when it is introduced into a water from the 'outside world' by a point source."[52] EPA made the statement in discussing its conclusion that "outside world" does not include a different navigable waterbody, so that transfers between navigable waterbodies are not an "addition… to navigable waters."[53] Also, in the context of water transfers, the Eleventh Circuit had rejected an argument that such transfers do not discharge pollutants "from" pumping stations because the pumping stations are not the "original source" of the pollutants.[54] According to the Eleventh Circuit, the "relevant inquiry is whether—but for the point source—the pollutants would have been added to the receiving body of water."[55] Thus, in the Eleventh Circuit's view (prior to EPA's promulgation of a regulation to the contrary), the pumping of polluted waters from one navigable waterbody into a receiving water where they would not naturally flow is a regulated discharge of pollutants "from" the pumping station because the pollutants would not be present in the receiving water "but for" the pumping station.

Finding the reasoning of these extraneous sources both relevant and persuasive, the *NCC* panel found it "clear" that "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.'"[56] Formulated in terms of the Eleventh Circuit's "but for" test, the panel found that pollutants are deemed to be "from" a point source if the pollutants would not be present in the waters "but for" the point source.[57] According to the panel: "It is clear that *but for* the application of the pesticide, the pesticide residue and excess pesticide would not be added to the water; therefore, the pesticide residue and excess pesticide are from a 'point source.'"[58]

Petition for Rehearing

Respondent-intervenors (but not EPA)[59] petitioned for rehearing or rehearing en banc. The petition contends that the CWA is at least ambiguous as to whether a substance must be a "pollutant" at the time it is emitted from a point source for there to be a discharge of a pollutant "from a point source." Focusing on the ordinary meaning of statutory terms, the petition argues:

> The panel's construction is contrary to the common understanding of the word "from." One cannot spray ice "from" a hose, or squeeze butter "from" a cow. Likewise, pesticide *waste* is not discharged "from" application equipment during pest control activities merely because some portion of the pesticide product may *in the future* become excess or residue. At the very least, there is sufficient ambiguity in the statute to require deference to EPA's reasonable interpretation.

The petition also highlights the dramatic—presumably unintended—change in the scope of CWA regulatory jurisdiction that would be wrought by the panel's "but for" test to identify regulated "point source" discharges. NPDES permitting historically has been limited to circumstances in which (1) a "pollutant" is emitted from a conveyance (e.g. pipe, ditch, or vessel) and (2) the conveyance has some proximate relationship to navigable waters, such that it conveys pollutants to those waters. Yet the panel's "but for" test would reach across time and space, imposing NPDES permitting requirements on virtually any activity that can be identified as a "but for" cause of future pollution to waters. Potentially regulated pollutant "discharges" include: applying lawn fertilizer; salting a road, parking lot, or sidewalk; washing a car; even applying sunscreen or mosquito repellant—all "but for" causes of pollutants that find their way to waters. The point, of course, is not that the Sixth Circuit or other courts will ultimately require NPDES permitting for the application of sunscreen—but that the panel's "plain language" interpretation is at odds with the traditional scope of the NPDES permitting program and embodies no limiting principle to define *which* pollution-causing activities are subject to those requirements. This alone casts serious doubt on the panel's conclusion that its interpretation is a reasonable—let alone the *only* reasonable—construction of the statute.

Critique of the Sixth Circuit's "Plain Language" Analysis

For many CWA practitioners, the *NCC* ruling illustrates the wrong turns law can take when judges apply their own construction of a statute in the face of contrary agency rulemaking—particularly in the context of a complex regulatory scheme. Judges and CWA practitioners distinguishing or disagreeing with the ruling in the CWA enforcement context will likely see the decision as a poster child for judicial deference to administrative interpretation—a perfect example of why judges should resist the urge to impose their independent assessment of the "best" interpretation of statutory text, even in furtherance of laudable goals such as protecting water quality.

The fundamental error in the decision is the panel's refusal to recognize ambiguity in the statutory phrase "discharge of any pollutant"—defined as "addition of any *pollutant* to navigable waters *from a point source*." EPA—reasonably, we contend—interpreted the phrase to mean that a pollutant must be a pollutant *at the time* it is emitted "from" a point source. Thus, the discharge of a pesticide *product* under the circumstances described in the EPA rule is not a regulated "discharge of a pollutant" even if the product becomes a "pollutant" (excess or residual material) some time, perhaps a short time, *after* its release from a point source. EPA explained its interpretation this way:

> [P]esticide applications [within the scope of the rule] do not require NPDES permits, even if the application leaves residual materials which are "pollutants" under the Act in waters of the United States.… The [CWA] defines "discharge of a pollutant" to mean "any *addition* of any pollutant to navigable waters from *any point source.*" … In this case, 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.… Even though the pesticide may become a "pollutant" at a later time (*e.g.*, after the pesticide product has served its intended purpose), a permit is not required for its application because it did not meet both the statutory prerequisites (pollutant and point source) at the time of its discharge into the water. Instead, the residual should be treated as a nonpoint source pollutant, potentially subject to CWA programs other than the NPDES permit program.[60]

Although EPA's interpretation would appear to have firm grounding in the words of the statute, the panel vacated

the rule with only conclusory assertions that it contradicts the statute's "plain language"—mocking EPA for the purported lack of judicial precedent on the issue.[61] The entirety of panel's analysis of the provisions at issue follows:

> … according to the EPA, pesticides at the time of discharge do not require permits because they are not yet excess pesticides or residue pesticides. But there is no requirement that the discharged chemical, or other substance, immediately cause harm to be considered as coming from a "point source." Rather, the requirement is that the discharge come from a "discernible, confined, and discrete conveyance," 33 U.S.C. § 1362(14), which is the case for pesticide applications.
>
> The EPA offers no direct support for its assertion…. This omission of authority is understandable, as none exists. The [CWA] does not create such a requirement. Instead, it defines "discharge of a pollutant" as "any addition of any pollutant to navigable waters from any point source." … EPA's attempt at temporally tying the "addition" (or "discharge") of the pollutant to the "point source" does not follow the plain language of the Clean Water Act.[62]

Immediately following this eisegesis is a discussion of the broader statutory goals that purportedly illuminate the statute's plain meaning. According to the panel:

> [EPA's interpretation]… is also contrary to the purpose of the permitting program, which is "to prevent harmful discharges into the Nation's waters." *Defenders of Wildlife*, 127 S.Ct. at 2525. If the EPA's interpretation were allowed to stand, discharges that are innocuous at the time they are made but extremely harmful at a later point would not be subject to the permitting program. Further, the EPA's interpretation ignores the directive given to it by Congress in the [CWA], which is to protect water quality. As the EPA itself recognizes [in the water transfers rulemaking discussed above], "Congress generally intended that pollutants be controlled at the source whenever possible." 73 Fed. Reg. at 33,702 (citing S.Rep. No. 92–414, p. 77 (1972)).[63]

Finally, venturing entirely beyond the statute, the panel drew its own interpretation of "pollutant… from a point source" from prior EPA statements and an Eleventh Circuit opinion applying the phrase in the distinct context of water transfers.[64] Based on those sources, and in presumed furtherance of the broader goals of the statute, the panel reasoned that the statute can *only* be construed to regulate any point source emission of a substance that is a *but for* cause of pollutants that ultimately enter waters.[65]

We submit that a proper *Chevron* analysis gives more serious consideration to the potential for alternative reasonable interpretations of the text. In *Entergy*, for example, the Court upheld EPA's reasonable interpretation of the phrase "best technology available for minimizing adverse environmental impact" to allow consideration of cost-benefit analysis in determining which technology was "best."[66] Various environmental groups and states argued (and the Second Circuit agreed) that the phrase must be read to mean the economically feasible technology that achieves the *greatest possible reduction* in environmental harm.[67] While acknowledging that this was a plausible interpretation of the statute, the Court explained that it was not necessarily the *only* interpretation: "Best technology may also describe technology that *most efficiently* produces some good. In common parlance one could certainly use the phrase 'best technology' to refer to that which produces a good at the lowest per-unit cost."[68] Because the statutory text allowed room for EPA's construction, the Court found that the agency's view must be upheld.

Perhaps the *NCC* panel so easily settled on the wrong conclusions in part because it failed to ask the difficult questions posed in *Chevron*, *Entergy*, and countless decisions in between. In particular, the panel's opinion never poses the fundamental questions:

- Has Congress *directly spoken* to the *precise question* whether the application of a pesticide to or over waters constitutes a "discharge of a pollutant"?[69]
- Is EPA's interpretation a *reasonable* construction of the statute—even if not the only possible interpretation or the interpretation deemed *most* reasonable by the court?[70]

Because the text of the relevant provisions reveals no clear direction on the precise question and (at the very least) *allows for* the agency's construction, we further submit that the general CWA goals to "prevent harmful discharges" or "protect water quality" cannot justify invalidation of the rule.[71] The Eleventh Circuit's recent analysis in *Friends of the Everglades v. South Florida Water Management Dist.*[72] is instructive. Finding that the regulation at issue (EPA's water transfer regulation discussed above) embodied a permissible construction of the statutory provisions at issue, the court upheld the rule notwithstanding the court's acknowledged preference for a different interpretation and, indeed, despite the court's recognition that the rule arguably would *not* further the CWA's broad goal of protecting water quality.

Friends of the Everglades argued that EPA's water transfer rule would lead to absurd results, in that it would exclude from NPDES permitting requirements even the pumping of "the most loathsome navigable water in the country into the most pristine one," contrary to the CWA's water protection goals.[73] In the court's view, however, inconsistency with the CWA's "broad and ambitious" goals cannot resolve the ambiguity of the text itself to preclude EPA's otherwise reasonable construction of an ambiguous provision.[74] The court observed that "there are other provisions of the [CWA] that do not comport with its broad purpose… ," chief among them the limitation of the permitting program to "point source" discharges notwithstanding the recognized water quality effects of nonpoint source pollution.[75] Since not *every* provision of the CWA can be said to further its broad purposes, those purposes cannot resolve ambiguity in favor of an interpretation that would further those goals and against another interpretation that arguably would not. As the court explained:

> … even when the preamble to legislation speaks single-mindedly and espouses lofty goals, the legislative process serves as a melting pot of competing interests and a face-off of battling factions. What emerges from the conflict to become the enactment is often less pure than the preamble promises. The provisions of legislation reflect compromises cobbled together by competing political forces and compromise is the enemy of single-mindedness. *It is not difficult to believe that the legislative process resulted in a*

Clean Water Act that leaves more than one gap in the permitting requirements it enacts.[76]

The Eleventh Circuit's treatment of the CWA's water quality protection goals contrasts sharply with the Sixth Circuit panel's decision to vacate the CWA pesticide rule as "contrary to the purpose of the permitting program, which is 'to prevent harmful discharges into the Nation's waters.'"[77] We contend that the Eleventh Circuit's approach is more true to *Chevron*'s goal of ensuring that authorized agencies, not judges, "make such policy choices—resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities."[78] Indeed, if the CWA's ambitious water protection goals (including the elimination of *all* pollutant discharges by 1985) provide the clarity requisite to end a *Chevron* analysis at Step One, then Congress must be presumed to have left few gaps in the CWA for the agency to fill—whenever one interpretation is more protective of water quality, that interpretation must govern.[79]

CONCLUSION

The subjectivity inherent in the search for "clear" congressional intent weakens *Chevron*'s utility as a guide to judicial decision-making.[80] Under the *NCC* panel's ruling, EPA's CWA pesticide regulation is an unfortunate casualty of that subjectivity. Perhaps such casualties would be minimized, and judicial decision-making improved, by strict adherence to the Step One analysis as framed by the *Chevron* Court: "First, always, is the question whether Congress has *directly spoken* to the *precise question* at issue."[81]

Posing and answering this question logically requires that judges both: (1) articulate the *precise* question at issue,[82] and (2) identify evidence of specific congressional intent on that question.[83] The rigor of this analysis alone—in black and white, for all to see—may sharpen judicial thinking and bring into better focus Congress's actual intent (if any).[84] Undoubtedly, the failure to undertake this level of inquiry and to present the Step One analysis in roughly these terms leaves more room within which judges may comfortably impose their own statutory interpretation without due regard for the reasonable alternative interpretation of the agency charged to administer the statute.

Endnotes

1 Nat'l Cotton Council of Am. v. Envt'l Prot. Agency, 553 F.3d 927 (6th Cir. 2009) ("*NCC*").

2 EPA's motion to stay the *NCC* mandate estimated that the ruling would require NPDES permitting for *at least* the following categories of application "to, over, or near waters of the United States," which the agency estimated would amount to 5.6 million applications annually: mosquito larvicides; mosquito adulticides; herbicides used to control weeds in lakes and ponds, irrigation systems, and other waterways; herbicides used to control weeds along ditch banks; insecticides used in wide-area insect suppression programs; herbicides used in wide-area control programs directed at aquatic invasive plan species; and pesticides used in forestry programs when applied over waters of the United States.

3 We refer to the decision as the "panel's" ruling because, at the date of this writing, respondent-intervenors' petition for rehearing *en banc* remains pending.

4 467 U.S. 837 (1984).

5 *Chevron*, 467 U.S. at 840.

6 *Id*. at 857.

7 *Id*. at 857-58.

8 *Id*. at 858.

9 *Id*.

10 *Chevron*, 467 U.S. at 842-43 (emphasis added).

11 *Id*. at 843.

12 *Id*. at 865-66.

13 *Id*. at 865.

14 *Id*. at 865.

15 *Id*. at 866.

16 U.S. v. Mead Corp., 533 U.S. 218, 234-38 (2001) ("administrative implementation of a particular statutory provision qualifies for *Chevron* deference when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority.).

17 *See* Entergy Corp. v. Riverkeeper, 129 S.Ct. 1498 (2009), and Coeur Alaska, Inc. v. Southeast Alaska Conservation Council, No. 07-984 (June 22, 2009).

18 33 U.S.C. § 1311(a).

19 *See id.* § 1342. EPA may administer the NPDES program and issue discharge permits directly, or it may authorize states to administer the program and to issue NPDES discharge permits within their jurisdictions. *Id.* § 1342(b). EPA has approved 45 states and the Virgin Islands to administer NPDES programs under state or territorial law. A separate permitting program under CWA § 404 regulates the discharge of pollutants that constitute "dredged or fill material." *See id.* § 1344.

20 *Id.* § 1311(b)(1)(C).

21 *Id*. § 1362(12) (emphasis added).

22 *Id*. § 1362(6).

23 *Id.* § 1362(14).

24 *See* Rapanos v. U.S., 547 U.S. 715, 778-83 (2006).

25 *Id.* § 1313(c) and (e).

26 *Id.* § 1313(d).

27 *See id*. § 1329 (nonpoint source management program); 40 C.F.R. Part 130 (EPA regulations concerning water quality planning and management).

28 *See* 7 U.S.C. §§ 136a(c)(5) & (7).

29 *Id.* § 136(bb).

30 7 U.S.C. § 136a(c)(1)(C), (c)(5)(B), (c)(6).

31 *See* 68 Fed. Reg. 48,385 (Aug. 13, 2003).

32 Altman v. Town of Amherst, 46 Fed. App'x 62, 67 (2d Cir. 2002). *See also* Headwaters, Inc. v. Talent Irrigation Dist., 243 F.3d 526 (9th Cir. 2001); League of Wilderness Defenders/Blue Mountain Biodiversity Project v. Forsgren, 309 F.3d 1181 (9th Cir. 2002).

33 68 Fed. Reg. at 48,387.

34 *Id.*

35 *Id.*

36 *See* 70 Fed. Reg. 5093 (Feb. 1, 2005).

37 71 Fed. Reg. 68,483 (Nov. 27, 2006).

38 *Id*. at 68,492 (codified at 40 C.F.R. § 122.3(h) (2007)) (emphasis added).

39 *Id.* at 68,486.

40 *Id.* at 68,487.

41 In contrast, the discharge of pesticide *residues* from a point source – such as industrial or municipal discharges, or certain regulated stormwater discharges – would involve a "pollutant" discharge "from a point source." *See* 71 Fed. Reg. at 68,487.

42 "Industry" petitioners included several pesticide manufacturers and their trade association CropLife America, as well as several agricultural groups, including the National Cotton Council.

43 *NCC*, 553 F.3d at 936-37.

44 *Id.* at 936.

45 *Id.*

46 The court decided each issue presented – the meaning of "pollutant" as applied to both chemical and biological pesticides, and whether pollutant residues resulting from application are discharged "from a point source" – based on the plain language of the CWA and without deference to EPA. With respect to whether and under what circumstances chemical pesticides are "pollutants," the court agreed with EPA. With regard to the remaining two issues, the court arrived at a different interpretation.

47 *Id.* at 937.

48 *Id.* at 938.

49 *Id.* at 938-40.

50 *Id.* at 939.

51 *Id.* at 940.

52 *Id.* (quoting 73 Fed. Reg. 33,697, 33,701 (June 13, 2008)).

53 *See* 73 Fed. Reg. at 33,701.

54 South Fla. Water Management District v. Miccosukee Tribe of Indians, 280 F.3d 1364, 1368, n.6 (11th Cir. 2002).

55 *Id.* at 1368.

56 553 F.3d at 940.

57 *Id.*

58 *Id.* (emphasis added).

59 Under new political leadership since the case was briefed, EPA did not petition for rehearing. EPA instead moved to stay the court's mandate for two years, to allow EPA and the States time to develop and issue NPDES permits to authorize at least some of the pesticide applications affected by the ruling. In response to that motion, issuance of the mandate has been stayed until April 9, 2011.

60 71 Fed. Reg. at 68,487 (emphasis in original).

61 As argued in the Petition for Rehearing En Banc, the lack of judicial precedent *explicitly* addressing the issue (*i.e.*, substances that become pollutants *after* being emitted from a point source) simply shows that this is a novel question, not that EPA's interpretation is far-fetched. Indeed, examination of numerous CWA decisions finding a "discharge" has revealed *none* where the substance involved was not a "pollutant" at the time it was emitted from the "point source."

62 553 F.3d at 939.

63 *Id*.

64 *See supra* at __.

65 *Id.* at 939-40.

66 129 S.Ct. at 1508, 1510.

67 *Id.* at 1506.

68 *Id*.

69 *See Chevron*, 467 U.S. at 842.

70 *See Entergy*, 129 S.Ct. at 1505. While the second question is the second step of the *Chevron* analysis as originally formulated, the majority in *Entergy* observed that it can just as properly be posed at the outset, because its answer will necessarily resolve Step One as well. *Id.* n.4 ("But surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable.") One advantage of proceeding in this fashion (which essentially collapses the two-step inquiry into a single question) is that it would tend to minimize the bias that may naturally result when judges first independently arrive at their own interpretation of a statute before confronting whether the agency's contrary interpretation is also permissible. *See* M. Stephenson and A. Vermeule, *Chevron* Has Only One Step, 95 Va. L. Rev. 597, 605 (2009).

71 *See* 553 F.3d at 939.

72 2009 WL 1545551 (11th Cir. June 4, 2009).

73 *Everglades*, 2009 WL 1545551 *14.

74 *Id.* at *14-15. Thus, the "broader context of the statute as a whole" did not resolve the ambiguity. *Id.* (citing Robinson v. Shell Oil Co., 519 U.S. 337, 341 (1997), and Koons Buick Pontiac GMC, Inc. v. Nigh, 543 U.S. 50, 60 (2004)).

75 *Id.* at *15.

76 *Id.* (emphasis added).

77 553 F.3d at 939.

78 *Chevron*, 467 U.S. at 865-66.

79 The recent *Entergy* and *Coeur Alaska* decisions both establish that the CWA's general water quality goals do not make otherwise ambiguous provisions "clear" for purposes of *Chevron* Step One. Both decisions involved a finding of ambiguity and deference to EPA's interpretation despite the fact that an alternative reasonable interpretation would be more protective of water quality. *See* Entergy, 129 S.Ct. at 1504; Coeur Alaska, Slip Op., dissenting opinion by J. Ginsburg, at 1 (EPA's interpretation, which would exclude discharges of fill material from CWA § 402 permit requirements and stringent new source performance standards, would allow a discharge that would "kill all of the lake's fish and nearly all of its other aquatic life.")

80 *See* A. Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 Duke L. J. 511, 520 ("How clear is clear?").

81 467 U.S. at 842 (emphasis added).

82 In *Chevron*, for example, the question was whether Congress had any "specific intention on the applicability of the bubble concept in these cases." 467 U.S. at 845.

83 Of course, where there is evidence of specific congressional intent favoring one interpretation, but there is *also* evidence that Congress intended an alternative interpretation, the result is that the statute is ambiguous as to the question presented. *See Coeur Alaska*, Slip Op. at 17-18. Moreover, the lack of evidence of specific intent on the question at issue should not be overcome by general expressions of statutory goals, for the reasons discussed in connection with *Everglades, supra*, and at note 78.

84 Just as important, the search for evidence of *specific* congressional intent aids in identifying situations in which Congress simply did not consider the matter and thereby left a "gap" for the agency to fill. *See Chevron*, 467 U.S. at 865. In those situations, one may proceed to consideration of what Congress *would have intended*, had it considered the matter, but only in the context of the Step Two inquiry into whether the agency's interpretation is reasonable.