

United States District Court for the Southern District of New York

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NO SPRAY COALITION, INC., NATIONAL COALITION :
AGAINST THE MISUSE OF PESTICIDES, INC., :
DISABLED IN ACTION, INC., SAVE ORGANIC :
STANDARDS NEW YORK by its President Howard :
Brandstein, VALERIE SHEPPARD, MITCHEL COHEN, :
ROBERT LEDERMAN, and EVA YAA ASANTEWAA : No. 00 Civ. 5395 (GBD)
: :
Plaintiffs, :
: :
: :
-against- :
: :
THE CITY OF NEW YORK, MICHAEL BLOOMBERG, as :
Mayor of the City of New York, THE DEPARTMENT :
OF HEALTH OF THE CITY OF NEW YORK, :
THOMAS FRIEDEN, Commissioner of the Department of :
Health of the City of New York, THE OFFICE OF :
EMERGENCY MANAGEMENT OF THE CITY :
OF NEW YORK, and JOHN THOMAS ODERMATT, :
Commissioner of the Office of Emergency :
Management for the City of New York, :
: :
Defendants. :
-----X

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT
ON REMAND FROM THE SECOND CIRCUIT COURT OF APPEALS**

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Dated: June 11, 2004
White Plains, NY

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PRELIMINARY STATEMENT

Plaintiffs submit this supplemental memorandum of law in support of their motion for partial summary judgment under Rule 56 of the Federal Rules of Civil Procedure, upon remand from the Second Circuit Court of Appeals. See No Spray Coalition, Inc. v. City of New York, 351 F.3d 602 (2d Cir. 2003). Plaintiffs originally brought this action in 2000 under the citizen suit provision of the Clean Water Act (“CWA” or “Act”), Section 505, 33 U.S.C. § 1365, to enjoin Defendants from spraying pesticides from helicopters and trucks into New York City (“NYC”) water bodies, and for civil penalties for past violations. Plaintiffs originally filed a motion for partial summary judgment on May 17, 2002, on the issue of Defendants’ liability for violating the CWA by their unpermitted and unlawful discharges of pollutants in the form of aerial and ground spraying of pesticides into waters in and around New York City. Defendants cross-moved for summary judgment on July 12, 2002. The District Court denied Plaintiffs’ motion, and granted Defendants’ motion on November 26, 2002. See No Spray Coalition, Inc. v. City of New York, 2002 WL 31682387 (S.D.N.Y. Nov. 26, 2002). On December 9, 2003 the Second Circuit Court of appeals vacated and remanded the District Court’s November 26, 2002 decision, and the motions for summary judgment are currently being resubmitted to this Court. The Second Circuit specifically rejected the District Court’s holding that the “CWA’s provision for citizen suit becomes inoperative where the alleged violation of CWA lies in the use of pesticides covered by [the Federal Insecticide, Fungicide and Rodenticide Act] FIFRA in a manner that is not a substantial violation of FIFRA,” but did not address the issue of whether pesticide spraying “in substantial compliance with FIFRA must be deemed also to comply with CWA.” No Spray Coalition, Inc. v. City of New York, 351 F.3d at 605-06.

Defendants discharge pollutants in the form of pesticides from helicopters and trucks into NYC water bodies without a permit, causing harm to the environment, and to aesthetic and recreational interests of Plaintiffs and their members. The members of the plaintiff organizations are residents of New York City, whose recreational use, and aesthetic enjoyment of NYC water bodies has been damaged by Defendants' discharges. The Clean Water Act, a strict liability statute, prohibits the addition of any pollutant from any point source into navigable waters by any person without a permit. See CWA § 301(a), 33 U.S.C. § 1311(a). Because the undisputed facts established by eyewitness testimony, statements made by NYC Police pilots, admissions by the Defendants, and spray maps show that Defendants have discharged pesticides into NYC water bodies without a permit, Plaintiffs renew their May 17, 2002 motion for partial summary judgment declaring that Defendants violated CWA § 301(a), 33 U.S.C. § 1311(a), every day that pesticides were discharged.

STATEMENT OF MATERIAL FACTS

In 1999, in response to several cases of West Nile virus in birds and humans, the City of New York and various City officials (hereinafter collectively "Defendants" or "the City") sprayed or authorized the spraying of pesticides from helicopters and trucks as a part of an aerial and ground spraying campaign throughout New York City to reduce the mosquito population. See, Public Health Alert NYCDOH, Urgent Update: Outbreak of St. Louis Encephalitis in NYC, (September 13, 1999) (Pl. SJ Ex. 6); Press Release, NYCDOH, First Round of Citywide Spraying for Mosquitoes Completed; Mosquito Control Efforts in NYC Continue, (September 15, 1999) (Pl. SJ Ex. 7); Press Release, NYCDOH, Mayor Guiliani Provides Update on St. Louis Encephalitis; Second Round of Citywide Spraying to Begin This Evening, (September 18, 1999)

(Pl. SJ Ex. 2); Press Release, NYCDOH, St. Louis Encephalitis (SLE) Update, (September 24, 1999) (Pl. SJ Ex. 8); Press Release, NYCDOH, West Nile Virus: Overview of West Nile Virus in New York City in 2000, (Pl. SJ Ex. 9); Press Release, NYCDOH, New York City Health Department Releases Summary of West Nile Virus Activity in New York City for 2001 (December 11, 2001) (Pl. SJ Ex. 10). The City implemented the pesticide spraying campaign having never been granted, a National Pollutant Discharge Elimination System (hereinafter NPDES”) or State Pollutant Discharge Elimination System (hereinafter “SPDES”) permit. See Affirmation of Joel Kupferman, dated May 14, 2002 (hereinafter “Kupferman Affirm.”) ¶¶ 2,4.

The City’s 1999 campaign involved two rounds of citywide aerial spraying with the organophosphate pesticide “Malathion,” as well as the ground spraying of pyrethroid pesticides. See Press Release, NYCDOH, Mayor Guiliani Provides Update on St. Louis Encephalitis; Second Round of Citywide Spraying to Begin This Evening (September 18, 1999) (Pl. SJ Ex 2). Although the City engaged in two rounds of citywide pesticide spraying, the West Nile virus episode was on the decline before the pesticide spraying had even commenced. See United States Center for Disease Control, Update: West Nile Virus Encephalitis - New York, 1999, Fig. 1, October 22, 1999 available at <http://www.cdc.gov/epo/mmwr/preview/mmwrhtml/mm4841a3.html> (last visited June 24, 2000) (Pl. SJ Ex. 3).

The following year, on July 17, 2000, NYCDOH announced that two dead crows found on Staten Island had tested positive for the West Nile virus. See Press Release, NYCDOH, West Nile Virus Confirmed in Two Dead Crows on Staten Island (July 17, 2000) (Pl. SJ Ex. 4). The City immediately resumed ground spraying of Staten Island with Anvil 10+10 (hereinafter “Anvil”), a pyrethroid pesticide. On July 23, 2000, the City announced that it had identified West Nile Virus in two dead birds in Woodhaven and Richmond Hill, Queens, and on the basis

of this finding the City would spray Anvil in the areas of Brooklyn and Queens. See Press Release, NYCDOH, West Nile Virus Confirmed in Two Dead Birds in Woodhaven and Richmond Hill, Queens (July 23, 2000) (Pl. SJ Ex. 5). The City recommenced pesticide spraying despite the fact that there had not yet been any human cases of West Nile Virus in 2000. Id.

Through the acts of their spray contractors, during 1999 and 2000, the City performed aerial and ground spraying of the pesticides Malathion, Anvil, and Scourge. See Press Release, NYCDOH, First Round of Citywide Spraying for Mosquitoes Completed: Mosquito Control Efforts In New York City Continue (Sept. 15, 1999) (Pl. SJ Ex. 7); Press Release, NYCDOH, Mayor Guiliani Provides Update on St. Louis Encephalitis; Second Round of Citywide Spraying to Begin This Evening (September 18, 1999) (Pl. SJ Ex. 2). Pesticide spray contractors were under the City's direct control when they discharged pesticides from helicopters and trucks throughout the City of New York. See Defendants' Responses and Objections to Plaintiffs' First Request for Admissions, Response No. 1 (Defendants' Adm. Response) (Pl. SJ Ex. 11).

During 1999 and 2000, the City sprayed pesticides directly over New York City water bodies without a permit in violation of the CWA. See Deposition of Mr. Gerald Rivalsi taken on August 23, 2001 at 9, line 13 (Pl. SJ Ex. 15) (hereinafter "Rivalsi Dep."); Deposition of Mr. Gerard Robert Miller taken on June 27, 2001 at 10-32 (Pl. SJ Ex. 16) (hereinafter "Miller Dep."); Deposition of Ms. Susan Statkowski-Rivalsi taken on August 23, 2001 at 14, lines 16-19 (Pl. SJ Ex. 17) (hereinafter "Statkowski-Rivalsi Dep."); Deposition of Mr. Kent B. Smith taken on January 17, 2002 at 39, 45 (Pl. SJ Ex. 18) (hereinafter "Smith Dep.").

In 1999, NYC Police pilots flew as observers on pesticide spray missions. See Defendants' Response to Plaintiffs' Third Set of Interrogatories, Resp. 1 (Pl. SJ Ex. 19); Deposition of Sergeant John O'Hara taken on July 24, 2001 (Pl. SJ Ex. 20) (hereinafter "O'Hara

Dep.”); NYC Police Pilot Interrogatory Responses¹ (hereinafter “Police Pilot Responses) (Pl. SJ Ex. 21-30). NYC Police pilots were able to observe when the sprayers were turned on and off. See Police Pilot Responses, Response No. 5 (Pl. SJ Ex. 21-30). NYC Police pilots identified geographic areas, on maps, that were sprayed. See O’Hara Dep. (Pl. SJ. Ex. 20); Police Pilot Responses, Response No. 3 (Pl. SJ Ex. 21-30). The responses of NYC Police pilots establish that helicopters made passes over the designated spray areas with pesticide sprayers turned on. See O’Hara Dep. at 24, line 18 (Pl. SJ Ex. 20); Police Pilot Responses, Response No. 6 (Pl. SJ Ex. 21-30). Helicopters sprayed pesticides in a sweeping motion, flying back and forth in a grid type pattern, while passing over the designated spray areas. See O’Hara Dep. at 23, lines 18-19 (Pl. SJ Ex. 20); Police Pilot Responses, Response No. 6 (Pl. SJ Ex. 21-30). The entire area within the perimeter of the spray zone was to be sprayed with pesticide. See O’Hara Dep. at 23, lines 18-19 (Pl. SJ Ex. 20). There was no area within the perimeter of the zone that was not to be sprayed. See O’Hara Dep. at 27, line 13 (Pl. SJ Ex. 20).

The City produced maps that were used to guide all spray applicators, and their drivers or pilots who participated in the 1999 and 2000 spraying campaigns. See Defendants’ Response to Plaintiffs’ First Request for Production of Documents (Defendants’ 1st Doc. Resp.) No. 2 (Maps from Sept. 3, 1999 to Sept. 23, 1999 produced by J. Sondgeroth, North Fork Helicopter:

¹ Defendants’ Objections and Responses to Plaintiffs’ Fifth Set of Interrogatories to Sgt. James P. Coan (Pl. SJ Ex. 21); Defendants’ Objections and Responses to Plaintiffs’ Sixth Set of Interrogatories to Sgt. John W. Galligan (Pl. SJ Ex. 22); Defendants’ Objections and Responses to Plaintiffs’ Seventh Set of Interrogatories to Sgt. Mathew K. Rowley (Pl. SJ Ex. 23); Defendants’ Objections and Responses to Plaintiffs’ Ninth Set of Interrogatories to Det. Gregory J. Semendinger (Pl. SJ Ex. 24); Defendants’ Objections and Responses to Plaintiffs’ Eleventh Set of Interrogatories to P.O. Timothy Hayes (Pl. SJ Ex. 25); Defendants’ Objections and Responses to Plaintiffs’ Twelfth Set of Interrogatories to Det. John G. Kehoe (Pl. SJ Ex. 26); Defendants’ Objections and Responses to Plaintiffs’ Thirteenth Set of Interrogatories to Det. Stephen P. Cirigliano (Pl. SJ Ex. 27); Defendants’ Objections and Responses to Plaintiffs’ Fourteenth Set of Interrogatories to P.O. Glenn A. Hoffman (Pl. SJ Ex. 28); Defendants’ Objections and Responses to Plaintiffs’ Nineteenth Set of Interrogatories to P.O. David Leader (Pl. SJ Ex. 29); Defendants’ Objections and Responses to Plaintiffs’ Twentieth Set of Interrogatories to P.O. Anthony J. Cassillo (Pl. SJ Ex. 30) (collectively “Police Pilot Responses”)(Pl. SJ Ex. 21-30).

NYCDOH 2000 Spray Maps) (Pl. SJ Ex. 32); Defendants' 1st Doc. Resp. No. 3 (Aerial ULV, August 17th through August 31st, 2000) (Pl. SJ Ex. 33); Agrotors' Response to Subpoena Issued on March 28, 2001 (Agrotors' Maps of Flight Locations) (Pl. SJ Ex. 34).

Comparison of the spray maps provided by the City with United States Geological Survey (hereinafter "USGS") maps establishes that during the 1999 and 2000 spraying campaign, the City sprayed pesticides directly over and into navigable waters of the United States. See USGS Maps² (Pl. SJ Ex. 35-48); Plaintiffs' Expert Report of Ralph E. Huddleston, Jr., dated September 14, 2001 (Pl. SJ Ex. 49) (hereinafter "Huddleston Report"); compare Police Pilot Responses, Response No. 6 (Pl. SJ Ex. 21-30), and Defendants' 1st Doc. Resp. No. 2 (Pl. SJ Ex. 32) and Defendants' 1st Doc. Resp. No.3 (Pl. SJ Ex. 33), and Agrotors' Response to Subpoena (Pl. SJ Ex. 34) with USGS Maps (Pl. SJ Ex. 35-48).

For example, areas sprayed with pesticide when Sgt. Mathew K. Rowley flew as an observer on September 11, 1999 included water bodies depicted on USGS maps, including Prawls Creek, Great Fresh Kills, Little Fresh Kills, Neck Creek, Sawmill Creek, Main Creek (and adjacent wetlands), and Richmond Creek (and adjacent wetlands), all of which connect to Arthur Kill, in Staten Island, New York. Compare Defendants' Response and Objections to Plaintiffs' Seventh Set of Interrogatories to Sgt. Mathew K. Rowley, Response No. 6 (Pl. SJ Ex. 23) with Arthur Kill, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1981 (Pl. SJ Ex. 36). Many more

² Far Rockaway, NY, U.S.G.S. 7.5 minute quadrangle, 1969 (Pl. SJ Ex. 35); Arthur Kill, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1981 (Pl. SJ Ex. 36); Elizabeth, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1995 (Pl. SJ Ex. 37); Jamaica, NY, U.S.G.S. 7.5 minute quadrangle, 1994 (Pl. SJ Ex. 38); Flushing, NY, U.S.G.S. 7.5 minute quadrangle, 1995 (Pl. SJ Ex. 39); Coney Island, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1995 (Pl. SJ Ex. 40); Brooklyn, NY, U.S.G.S. 7.5 minute quadrangle, 1995 (Pl. SJ Ex. 41); Jersey City, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1981 (Pl. SJ Ex. 42); Narrows, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1981 (Pl. SJ Ex. 43); Yonkers, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1998 (Pl. SJ Ex. 44); Central Park, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1995 (Pl. SJ Ex. 45); Lynbrook, NY, U.S.G.S. 7.5 minute quadrangle, 1969 (Pl. SJ Ex. 46); Sea Cliff, NY, U.S.G.S. 7.5 minute quadrangle, 1979 (Pl. SJ Ex. 47); Mount Vernon, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1995 (Pl. SJ Ex. 48) (collectively "U.S.G.S. Maps") (Pl. SJ Ex. 35-48).

specific comparisons of spray areas attested to by police officer observers with water bodies are detailed in Plaintiffs' Statement of Undisputed Material Facts, ¶¶ 50-64.

Aerial spray maps of Staten Island, New York, were made at or near the time of spray activities by a reliable recording device, and were generated and kept during the regular course of business. See Defendants' 1st Doc. Resp. No. 2 (Maps from Sept. 3, 1999 to Sept. 23, 1999 produced by J. Sondgeroth, North Fork Helicopter; NYCDOH 2000 Spray Maps) (Pl. SJ Ex. 32); Defendants' Second Amended Responses and Objections to Plaintiffs' First Request for Admissions, Responses 15-8 (Pl. SJ Ex. 13). The areas sprayed with pesticide on the Aerial ULV maps are indicated by bold rectangular boxes, and small square cross-hatchings. See Defendants' 1st Doc. Resp. No. 2 (Pl. SJ Ex. 32). Like the police testimony, the Aerial ULV maps demonstrate that areas sprayed with pesticide included water bodies depicted on USGS maps, including the wetlands surrounding Richmond Creek, Main Creek, Neck Creek, and Sawmill Creek. Compare Aerial ULV, Aug. 17 to Aug. 31st 2000 Maps (Pl. SJ Ex 32), with Arthur Kill, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1981 (Pl. SJ Ex. 36) and The Narrows, NY-NJ, U.S.G.S. 7.5 minute quadrangle, 1981 (Pl. SJ Ex. 43).

Eyewitnesses described Defendants' aerial spraying of pesticides directly over and into water bodies in 1999 and 2000. See Rivalsi Dep. at 9 (Pl. SJ Ex. 15); Miller Dep. at 32 (Pl. SJ Ex. 16); Statkowski-Rivalsi Dep. at 14, lines 16-9 (Pl. SJ Ex. 17). In 1999, witnesses observed the City discharge pesticides directly over and into the water at the Harlem Yacht Club, in City Island, New York. See Rivalsi Dep. at 9 (Pl. SJ Ex. 15); Statkowski-Rivalsi Aff. ¶¶ 7, 9 (Pl. SJ Ex. 17). In 2000, a DEC employee observed the City discharge pesticides directly over and into the ponds and the wetlands on the DEC property at Mount Loretto, Staten Island, New York. See Miller Dep. at 32 (Pl. SJ Ex. 16).

The City's discharge of pesticides into NYC water bodies had immediate adverse impacts. On September 24, 1999, numerous bluegill sunfish were found dead in Clove Lake, Staten Island, New York. See New York State Department of Environmental Conservation (hereinafter "NYSDEC") Memorandum from Peter Furdyne to Ward Stone (January 21, 2000) (hereinafter "NYSDEC Fish Kill Memo") (Pl. SJ Ex. 50). The NYSDEC directly attributed this fish kill to the presence of the toxic pesticide, Malathion. Id. Toxicological studies performed on the bluegill sunfish confirmed the presence of Malathion. See The Illinois Department of Agriculture Animal Disease Laboratory Toxicology Report (November 19, 1999) hereinafter "Fish Kill Toxicology Report") (Pl. SJ Ex. 51).

The pesticides discharged into NYC water bodies contain toxic chemical ingredients. See Fyfanon ULV Label (Pl. SJ Ex. 52); Fyfanon ULV Material Safety Data Sheet (Pl. SJ Ex. 53); Anvil 10+10 Label (Pl. SJ Ex. 54); Anvil 10+10 Material Safety Data Sheet (Pl. SJ Ex. 55); Scourge Label (Pl. SJ Ex. 56); Scourge Material Safety Data Sheet (Pl. SJ Ex. 57). This Court previously stated that a "pesticide is certainly a toxic substance." See No Spray Coalition, Inc. v. City of New York, 2000 WL 1401458, *3 n.2 (S.D.N.Y. 2000). The pesticides discharged by the City are "pollutants" and "toxic pollutants" within the meaning of CWA §§ 502(6), (13), 33 U.S.C. 1362 (6), (13). The City has not applied for nor received a NPDES/SPDES permit for the discharge of a pollutant into navigable waters. See Kupferman Affirm. ¶¶ 2,3.

The City's discharges of pesticides harm the recreational and aesthetic interests of the members of No Spray Coalition, et. al., including individual NYC residents that recreate on or near NYC water bodies. See Affidavit of Mitchel Cohen, sworn to on May 15, 2002, ¶¶ 14-22 (hereinafter "Cohen Aff."); Affidavit of Jay Feldman, sworn to on May 10, 2002, ¶¶ 6,7, (hereinafter "Feldman Aff."); Affidavit of Bryna Eill, sworn to on May 10, 2002 ¶¶ 14, 17, 18

(hereinafter “Eill Aff.”); Affidavit of Howard Brandstein, sworn to on May 10, 2002, ¶¶ 10, 11 (hereinafter “Brandstein Aff.”); Affidavit of Valerie Sheppard, sworn to on May 14, 2002, ¶¶ 1-7 (hereinafter “Sheppard Aff.”); Affidavit of Robert Lederman, sworn to on May 10, 2002, ¶ 9 (hereinafter “Lederman Aff.”); Affidavit of Eva Yaa Asantewaa, sworn to on May 10, 2002, ¶¶ 4, 11-13 (hereinafter “Yaa Asantewaa Aff.”).

The City’s discharge of pesticides into NYC water bodies discourages the members of No Spray Coalition, et. al. from recreating on or near NYC water bodies. See Feldman Aff., ¶¶ 6, 7, 12; Eill Aff., ¶¶ 14, 17, 18; Sheppard Aff., ¶¶ 1-7; Lederman Aff., ¶ 9; Yaa Asantewaa Aff., ¶¶ 4, 11-3.³ The City’s discharge of toxic pollutants has made NYC water bodies aesthetically offensive to the members of No Spray Coalition, et. al.. See Sheppard Aff., ¶ 12. For these reasons, organizational Plaintiff-Appellants’ members, and individual Plaintiff-Appellants, enjoyment of the NYC water bodies for recreational or aesthetic purposes has been significantly reduced. See Eill Aff., ¶¶ 14, 19; Sheppard Aff., ¶¶ 9, 10; Lederman Aff., ¶¶ 9-13; Yaa Asantewaa Aff., ¶¶ 7, 11. As long as the City continues to implement its current pesticide application plans and consequently discharge pesticides directly over and into NYC water bodies in a manner consistent with the 1999 and 2000 campaigns, the City will continue to cause the degradation of NYC water bodies, and harm the interests of No Spray Coalition, et. al.’s organizational members, as well as those of the individual Plaintiffs.

The undisputed facts of this case establish that Defendants have discharged, and will likely continue to discharge, pesticides from helicopters and trucks into NYC water bodies without a NPDES or SPDES permit. Plaintiffs now move for partial summary judgment

³ These affidavits more than adequately demonstrate both individual Plaintiff-Appellants’ standing to sue under the standards articulated in Friends of the Earth v. Laidlaw Env’tl. Services (TOC), 528 U.S. 167 (2000) and organizational Plaintiff-Appellants’ standing to sue under the standards of Hunt v. Washington State Apple Advertising Comm’n, 432 U.S. 333 (1977).

declaring that Defendants are in violation of CWA § 301(a), 33 U.S.C. § 1311(a), on every day that Defendants sprayed pesticides directly over and into waters of the U.S. without a permit.

ARGUMENT

I. THIS CITIZEN SUIT IS PROPER BECAUSE PLAINTIFFS ARE CITIZENS, DEFENDANTS ARE ALLEGED TO BE IN VIOLATION OF AN EFFLUENT STANDARD OR LIMITATION, AND PROPER NOTICE WAS GIVEN.

Section 505(a) of the CWA, 33 U.S.C. § 1365(a), provides, in relevant part, that “any citizen may commence a civil action ... against any person ... who is alleged to be in violation of ... an effluent standard or limitation under this chapter.” “Citizen,” for the purposes of CWA § 505(a), 33 U.S.C. § 1365(a), means “a person or persons having an interest which is or may be adversely affected.” CWA § 505(g), 33 U.S.C. § 1365(g). The term “effluent standard or limitation” includes the limitations mandated under CWA § 301(a), 33 U.S.C. § 1311(a), one of which prohibits the discharge of any pollutant by any person unless pursuant to and in compliance with an NPDES or SPDES permit. See CWA § 505(f), 33 U.S.C. § 1365(f); CWA § 301(a), 33 U.S.C. § 1311(a). Plaintiffs here are “citizens” within the meaning of the Clean Water Act and gave proper notice (see Plaintiffs’ Complaint (“Cplt.”) ¶ 8 (Pl. SJ Ex. 58)), as admitted by Defendants’ Answer (“Ans.”) ¶¶ 8, 9 (Pl. SJ. Ex. 59).

Section 505(a) of the CWA, 33 U.S.C. § 1365(a), also requires that a citizen suit plaintiff “make a good-faith allegation of continuous or intermittent violation[s]....” Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc., 484 U.S. 49, 64 (1987). Such a good-faith allegation of continuous or intermittent violations may be satisfied by proving actual violations that occurred on or after the date that the plaintiffs’ complaint was filed. See Chesapeake Bay Found., Inc. v. Gwaltney of Smithfield, Ltd., 844 F.2d 170, 171-72 (4th Cir. 1988); N.R.D.C. v Texaco Ref. & Mktg., 2 F.3d 493, 501 (3rd Cir. 1993).

In their Complaint, Plaintiffs alleged that Defendants' violations are continuing. See Cplt. ¶ 73 (Pl. SJ. Ex 58). Since this action was commenced on July 20, 2000, Defendants have continued to violate CWA § 301(a), 33 U.S.C. § 1311(a), by discharging pesticides into NYC water bodies from helicopters and trucks without a permit. As demonstrated by the affidavits of Mr. Rivalsi, Ms. Statkowski-Rivalsi, and Mr. Miller, individuals have witnessed Defendants' discharges of pesticides from helicopters into NYC water bodies on numerous occasions. See Rivalsi Dep., p. 9 (Pl. SJ Ex. 15); Miller Dep., p. 32. (Pl. SJ Ex. 14); Statkowski-Rivalsi Dep. p. 14 lines 16-19 (Pl. SJ Ex. 17).

II. DEFENDANTS' OWN DOCUMENTS AND ADMISSIONS ESTABLISH THAT THEY HAVE VIOLATED THE CLEAN WATER ACT BY DISCHARGING PESTICIDES FROM HELICOPTERS AND TRUCKS INTO NEW YORK CITY WATER BODIES.

“The [CWA] is a comprehensive water quality statute designed to ‘restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.’” PUD No. 1 of Jefferson County v. Washington Dep’t of Ecology, 511 U.S. 700, 704 (1994) (citing 33 U.S.C. § 1251(a)). The CWA mandates that “[e]xcept as in compliance with [specific provisions] of this Act, the discharge of any pollutant by any person shall be unlawful.” CWA § 301(a), 33 U.S.C. § 1311(a). The EPA and state agencies with EPA-approved permit programs may issue a NPDES or SPDES permit under § 402 of the CWA, allowing the discharge of pollutants into waters of the United States, notwithstanding the general prohibition of Section 301(a). Id. at § 1342.

The CWA defines the term “discharge of a pollutant” as “any *addition* of any *pollutant* to *navigable waters* from any *point source*.” CWA § 502(12), 33 U.S.C. § 1362(12) (emphasis added). A source of pollution meeting these criteria is required to obtain a NPDES or SPDES permit. See CWA § 402(a), 33 U.S.C. § 1342(a). Thus, the plain language of the Clean Water

Act prohibits (A) the addition of any pollutant (B) into navigable waters (C) from any point source (D) by any person (E) without a permit. See CWA § 301(a), 33 U.S.C. § 1311(a); CWA § 502(12), 33 U.S.C. § 1362(12); Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 273 F.3d 481 (2d Cir. 2001). Violators of this prohibition are strictly liable. See Connecticut Fund for the Env't v. Upjohn Co., 660 F. Supp. 1397, 1409 (D. Conn. 1987).

A. Defendants' Discharge of Pesticides from Helicopters and Trucks Directly Over and Into New York City Water Bodies Constitutes an "Addition"

Defendants admit having discharged Fyfanon ULV, Scourge, and Anvil 10+10 from helicopters and trucks during 1999, 2000, and 2001. See Pl. SJ Ex. 6; Pl. SJ Ex. 9. Navigational spray maps provided by Defendants, NYC Police pilot interrogatory responses, and eyewitness testimony establish that during 1999 and 2000, Defendants discharged pesticides directly over and into water bodies in the New York City area, which are waters of the United States under the Clean Water Act. See Plaintiffs' Expert Report of Ralph E. Huddleston, Jr., In the Matter of No Spray Coalition, et. al. v. The City of New York, et. al., dated September 14, 2001 ("Huddleston Report") (Pl. SJ Ex. 49); Compare NYC Police Pilot Interrogatory Responses, Response No. 6 (Pl. SJ Ex. 21-30) and Defendants' 1st Doc. Resp. No. 2 (Pl. SJ Ex. 32) and Defendants' 1st Doc. Resp. No. 3 (Pl. SJ Ex. 33) with United States Geological Survey Maps ("USGS Maps") (Pl. SJ Ex. 35-48). See also Rivalsi Dep., p. 9 (Pl. SJ Ex. 15); Miller Dep., p. 32. (Pl. SJ Ex. 16); Statkowski-Rivalsi Dep., p. 14 lines 16-19 (Pl. SJ Ex. 17).

The fact that pesticides are discharged as liquid droplets into the air directly over New York City water bodies does not negate the fact that there is an "addition." The droplets were observed by eyewitnesses to fall from the helicopters directly into the water. See Rivalsi Dep. (Pl. SJ Ex. 15); Miller Dep. (Pl. SJ Ex. 16). Further, according to the United States Department of Justice: "the use of mist blowers and hydraulic sprayers to spray pesticides in, on, or over

waters of the United States ... constitutes an addition of pesticides to waters of the United States.” See Brief of United States as Amicus Curiae in Altman v. Town of Amherst (U.S. Altman Amicus Br.), 2d Cir. No. 01-7468, Reply Aff. of Karl S. Coplan Sworn to on August 16, 2002 (Coplan Reply Aff.) Ex. B. In that case, plaintiffs alleged that the Town of Amherst sprayed pesticides for mosquito control in wetland areas without an NPDES permit as required by the CWA. Altman v. Town of Amherst, 190 F. Supp 2d 467 (N.D.N.Y. 2001) vacated and remanded, 47 Fed. Appx. 62, 2002 U.S. App. LEXIS 20498 (2d Cir. 2002).

In the instant case, the City of New York routinely sprayed pesticides over and into waters of the United States using trucks and helicopters equipped with sprayers. See Huddleston Report, at 3, ¶ 1 (Pl. SJ Ex. 49); Miller Dep. at 19 (Pl. SJ Ex. 16); Rivalsi Dep. at 10 (Pl. SJ Ex. 15); Statkowski-Rivalsi Dep. at 14 (Pl. SJ Ex. 17); Smith Dep. at 31, 38 (Pl. SJ Ex. 18). Since the spray equipment used by the Town of Amherst, specifically mist blowers and hydraulic sprayers, is of a similar type as that used in the instant case, and the spraying of pesticides was over and into waters of the United States, such spraying is an addition for purposes of the CWA.

B. The Discharge of Pesticides Over and Into New York City Water Bodies Constitutes the Discharge of “Pollutants.”

The CWA, section 502(6), defines “pollutant” to mean:

[D]redged 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).

Legislative history shows “pollutant” should be interpreted broadly. S. Rep. No. 92-414, at 76 (1972), reprinted in 1972 U.S.C.C.A.N. 3668, 3736, 3742 (referring to the Refuse Act’s

basic formula requiring that a permit be acquired “before *any* material can be added to the navigable waters” (emphasis added)).

1. The Pesticides Discharged by Defendants are “Pollutants” Under the Clean Water Act Because they Are “Chemical Wastes”

Section 502(6) of the CWA lists several types of pollutants, including “chemical wastes” and “solid wastes.” 33 U.S.C. § 1362(6).

In Hudson River Fisherman’s Ass’n v. City of N.Y., 751 F. Supp. 1088 (S.D.N.Y. 1990), aff’d 751 F. Supp. 1088 (S.D.N.Y. 1990), 940 F.2d 649 (2d Cir. 1991), this Court held that “[i]t is indisputable that a pollutant is a pollutant no matter how useful it may earlier have been.” Hudson River Fisherman’s Ass’n v. City of N.Y., 751 F. Supp. at 1101. In that case, the City of New York violated the CWA by injecting chlorine and alum into a water tunnel which discharged into a reservoir. Id. The Court held that chlorine is indeed a pollutant, by reasoning that: (1) “chlorine inhibits much of the life in the aquatic food chain and can even kill fish eggs or small fish at certain times of the year and at certain concentrations,” and (2) that even “the EPA, the agency charged with the administration of the [CWA], in its published regulations and guidelines cites chlorine as an example of a ‘pollutant.’” Id. at 1101-02 (citing 49 Fed. Reg. 37998, 38028 (1984)). Consequently, the chlorine residual was found to be a “pollutant” even though its intended use was beneficial.

The Department of Justice in its Amicus Curiae Brief in Altman recommended that four objective considerations be taken into account in conjunction with one another when determining whether a pesticide is a “chemical waste” and therefore a “pollutant.” See U.S. Altman Amicus Br., Coplan Reply Aff. Ex. B. The questions are: (1) whether the pesticide is a chemical pesticide; (2) whether the pesticide is an aquatic pesticide; (3) whether the pesticide is applied for the intended purpose of providing public benefits; and (4) whether the pesticide is applied in

compliance with all applicable federal, state, and local legal requirements, including those that arise under FIFRA. Id. Under this approach, the City’s application of Malathion, Anvil 10 + 10, and Scourge into waters constitute chemical wastes, and thus, pollutants for purposes of the CWA.

First, Malathion, Anvil 10+10, and Scourge are undeniably chemical pesticides. See Fyfanon ULV Label (Pl. SJ Ex. 52); Fyfanon ULV Material Safety Data Sheet (Pl. SJ Ex. 53); Anvil 10+10 Label (Pl. SJ Ex. 54); Anvil 10+10 Material Safety Data Sheet (Pl. SJ Ex. 55); Scourge Label (Pl. SJ Ex. 56); Scourge Material Safety Data Sheet (Pl. SJ Ex. 57).

Second, neither Malathion, Anvil 10+10, nor Scourge are aquatic pesticides. In fact, the specimen label for Malathion states: “[t]his product is toxic to fish.” See Fyfanon ULV Label (Pl. SJ Ex. 52). The label for Anvil 10+10 states: “for terrestrial uses, do not apply directly to water.” See Anvil 10+10 Label (Pl. SJ Ex. 54). The label for Scourge states: “[t]his product is toxic to fish and birds... [f]or terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas.” See Scourge Label (Pl. SJ Ex. 56).

Third, the pesticides were not applied for the intended purpose of providing public benefits. In order to meet this requirement, the pesticide application must be for the predominant purpose of providing a public health benefit, such as the protection of the public water supply. In its Amicus Brief, the DOJ specifically explains that inadvertent application does not meet this requirement. See U.S. Altman Amicus Br., Coplan Reply Aff. Ex. B. Applying vegetative pesticides to water bodies surrounding NYC is not for the predominant purpose of protecting health because the aquatic application is inadvertent. This Court has indicated for purposes of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §§ 6901-6992k, that a pesticide is not a solid waste “until after it has served its intended purpose.” See No Spray

Coalition, Inc. v. City of New York, 252 F.3d 148, 150 (2d Cir. 2001). A similar rationale should be followed here. The DOJ adopted this argument stating, “[a]lthough the CWA and RCRA are distinct statutory schemes, the Second Circuit’s rationale (i.e. that a pesticide is not a waste until after it has served its intended purpose) is certainly apposite in this instance.” See U.S. Altman Amicus Br., Coplan Reply Aff. Ex. B. All of the pesticides involved in this case are meant to act in the air; once they hit the water they no longer serve their intended use.

Finally, the pesticide application was not in compliance with all applicable federal, state, and local legal requirements, including those that arise under the Federal Insecticide, Fungicide, and Rodenticide Act. The aquatic application of Malathion, Anvil 10+10, and Scourge is directly contrary to the permitted use on the labels. FIFRA is a federal program regulating pesticides. FIFRA requires EPA, as the registering authority, to analyze the potential environmental impacts of a pesticide in order to ensure that the pesticide satisfies the requirements of FIFRA. 7 U.S.C. § 136a(c)(5). Pesticides will only be registered for an approved use if EPA determines that (A) its composition is such as to warrant the proposed claims for it, (B) that its labeling complies with FIFRA requirements, (C) that it will perform its intended function without unreasonable adverse effects on the environment, and (D) when used in accordance with widespread practice, that it will not generally cause unreasonable adverse effects on the environment. Id.

Here, the application of pesticides is a discharge of a pollutant into waters of the United States without a permit, and thus constitutes a violation of the CWA. The application is also a violation of FIFRA, due to misuse in violation of the approved uses according to the pesticide labels. Because compliance with applicable legal requirements ensures that the pesticide at issue serves an intended, lawful purpose, the pesticide spraying at issue does not comply with all legal requirements. Each of the pesticide labels in question specifically precludes application directly

over water bodies. The spraying of Malathion, Anvil 10 + 10, and Scourge directly over and into NYC waterbodies constitutes the “discharge” of a “chemical waste” and thus the “addition” of a “pollutant” for purposes of the CWA.

2. *The EPA does not have the authority to exempt categories of pollutants from the permit requirements of the CWA*

EPA has issued a guidance memo purporting to address jurisdictional issues under the CWA pertaining to pesticides regulated under FIFRA. 68 Fed. Reg. 48,385 at 48,387 (Aug. 13, 2003).

This memorandum addresses two sets of circumstances for which EPA believes that the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA does not constitute the discharge of a pollutant that requires an NPDES permit under the Clean Water Act: (1) [t]he 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 or aquatic weeds that are present in the waters of the United States; and (2) [t]he application of pesticides to control pests that are present over waters of the United States that results in a portion of the pesticides being deposited to waters of the United States; 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 insecticides are applied over water for control of adult mosquitoes.

Id.

However, EPA’s position, that the application of pesticides in compliance with relevant FIFRA requirements is not subject to CWA permitting requirements, is contrary to the language and history of the CWA, case law, and is contradictory to the agency’s own previous interpretations.

The Clean Water Act provides for an EPA permitting program, not an EPA exemption program. Section 402(a) of the CWA, 33 U.S.C. § 1342, provides in relevant part:

the Administrator may, after opportunity for public hearing, issue a permit for the discharge of any pollutant . . . notwithstanding section 1311(a) of this title, upon condition that such discharge will meet either (A) all applicable requirements under sections 1311, 1312, 1316, 1317, 1318, and 1343 of this title, or (B) prior to the taking of necessary implementing actions relating to all such requirements,

such conditions as the Administrator determines are necessary to carry out the provisions of this chapter.

As stated by the court in Natural Resources Defense Council (NRDC) v. Costle, 568 F.2d 1369, 1375 (D.C. Cir. 1977), “[t]he use of the word ‘may’ in § 402 means only that the Administrator has discretion either to issue a permit or to leave the discharger subject to the total proscription of § 301.” In NRDC v. Costle, the Court found that “the EPA Administrator does not have the authority to exempt categories of point sources from the permit requirements of § 402.” Id. at 1377. Similar reasoning applies in this instance. Since EPA does not have the authority to exempt categories of point sources, it logically follows that EPA should not have the authority to exempt categories of pollutants from the permit requirements of CWA § 402.

Recent case law shows that pesticides can constitute either a “chemical waste” or “biological materials” and thus, a “pollutant” under the Clean Water Act. In Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526 (9th Cir. 2001), the Court held that the residue from acrolein, the active ingredient in the pesticide Magnacide H, is a chemical waste and, hence, a pollutant for purposes of the CWA. Id. at 532. Inescapably, pesticides are pollutants within the meaning and jurisdiction of the CWA.

EPA’s attempt to amend the CWA through its “interpretation” creates, rather than clarifies, confusion surrounding enforcement of the CWA and FIFRA. The statutory definition of “pollutant” clearly encompasses pesticides. As stated by the court in League of Wilderness Defenders/Blue Mountains Biodiversity Project v. Forsgren, 309 F.3d 1181, 1185-6 (9th Cir. 2002), an agency “cannot contravene the will of the Congress through its reading of administrative regulations. ‘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.’” (citing Chevron, U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-

43 (1984)). As Congress clearly intended for toxic chemicals to be considered pollutants, a guidance document suggesting otherwise obfuscates the objective of the CWA “to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.” 33 U.S.C. § 1251(a).

Hence, EPA has no authority to exempt certain categories of pollutants from prohibitions and regulatory provisions of the Act. The agency’s determination that “the application of a pesticide to waters of the United States consistent with all relevant requirements of FIFRA does not constitute the discharge of a pollutant that requires a NPDES permit under the CWA,” is arbitrary and capricious, and in excess of the authority granted to the agency by Congress.

3. The Discharge of Pesticides Over and Into Water Without a Permit Constitutes a Violation of the CWA Regardless of Whether the Application is in Conformity With Labeling Requirements Under FIFRA

As a matter of law, the discharge of pesticides over or into waters of the United States without a NPDES or SPDES permit violates CWA § 301, 33 U.S.C. § 1311, regardless of whether the application is in conformity with the labeling requirements under FIFRA, 7 U.S.C. §§ 136-136y. The Ninth Circuit Court of Appeals recently reinforced this position.

As stated by the court in Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526, 531 (9th Cir. 2001), “[t]o resolve whether a FIFRA label controls whether a permit is required under the CWA, [the court] must interpret the two statutes ‘to give effect to each ... while preserving their sense and purpose.’” The court further explains, “[w]hen two statutes are capable of co-existence, it is the duty of the courts ... to regard each as effective.” Id. quoting Resource Invs., Inc. v. U.S. Army Corps of Eng’rs, 151 F.3d 1162, 1165 (9th Cir. 1988).

The CWA and FIFRA are different statutes; however, the purposes of the CWA and FIFRA are complementary to one another. Id. at 531. The protective purpose of the CWA is

“[to restore and maintain] the chemical, physical and biological integrity of the Nation’s waters,” 33 U.S.C. § 1251(a). In achieving its purpose, the CWA requires that a NPDES permit be obtained before any pollutant can be discharged into navigable waters from a point source. See 33 U.S.C. § 1342(a)(1). FIFRA’s purpose is different in that it seeks only to protect human health and the environment from “unreasonable” harm caused by pesticides. In doing so, FIFRA establishes a national pesticide labeling system that requires all pesticides sold in the United States to be registered and all users to comply with the national label. See 7 U.S.C. § 136a, 136j(a)(2)(G). Thus, satisfaction of one statute does not automatically satisfy the other.

As noted above, the Headwaters case involved the application of Magnacide H to irrigation canals in order to control the growth of weeds. In an Amicus Brief filed by the United States in that case, the EPA stated, “[i]n approving the registration of Magnacide H, EPA did not warrant that a user’s compliance with the pesticide label instructions would satisfy all other federal environmental laws.” Headwaters, 243 F.3d at 531.

Registration and labeling of a pesticide under FIFRA does not preclude the need for a permit under the CWA. Id. at 532. In fact, approval of the registered pesticide does not mean “a user’s compliance with the pesticide label instructions would satisfy all other federal environmental laws.” Id. at 531. As this Court has held, a chemical can be deemed a “pollutant” even when its intended use is beneficial. See Hudson River Fisherman’s Assoc’n v. City of New York, 751 F. Supp. 1088, aff’d 940 F. 2d 649 (2d Cir. 1991).

C. Defendants Discharged Pesticides Directly Over and Into “Waters of the United States” Within the Jurisdiction of the Clean Water Act.”

The CWA defines “navigable waters” as “waters of the United States.” 33 U.S.C. § 1362(7). The EPA has clarified the definition to include, in relevant part: “(a) all waters which

are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide ... (e) tributaries of waters identified in paragraph (a) ... ” 33 C.F.R. § 328.3(a). The Supreme Court has recognized that “Congress chose to define the waters covered by the Act broadly,” and that it “intended to abandon traditional notions of ‘waters’ and include in that term ‘wetlands’ as well.” United States v. Riverside Bayview Homes, Inc., 474 U.S. 121, 132 (1985). In Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng’rs, 531 U.S. 159 (2001) (hereinafter “SWANCC”), the Court limited its holding in Bayview Homes, insofar as it applies to wetlands that are not adjacent to or tributary to navigable waters. The SWANCC Court simply held that isolated, freestanding water bodies without a connection to navigable waters are not within the jurisdiction of the CWA because they are not waters of the United States. Id. at 166. See Huddleston Report at 3, ¶¶ 1, (Pl. SJ Ex. 49). The Huddleston report compares the sworn interrogatory responses of NYC police pilots with USGS maps of the NYC area and identifies water bodies sprayed as well as the waters hydrologically connected to those waters that Defendants’ discharged pesticides over and into. See Id. The report also establishes that “navigable waters of the United States,” within the meaning of CWA § 502(7), are located within the areas indicated by the City as aerial spray zones. See Huddleston Report (Pl. SJ Ex. 49). Additionally, the report shows that tributaries, marshlands, and wetlands that are hydrologically connected to waters of the United States are also located in areas that were identified by the City as areas within aerial spray zones. See Huddleston Report (Pl. SJ Ex. 49).

Along with the expert report of No Spray Coalition, eye witness testimony, police pilot interrogatories, and the City’s own spray maps show that pesticides were discharged over waters of the United States within the jurisdiction of the Clean Water Act. See Rivalsi Dep. at 9 (Pl. SJ

Ex. 15); Miller Dep. at 32 (Pl. SJ Ex. 16); Statkowski-Rivalsi Dep. at 14, lines 16-9 (Pl. SJ Ex. 17); NYC Police Pilot Interrogatory Responses (Pl. SJ Ex. 21-31); USGS Maps (Pl. SJ Ex. 35-48); Huddleston Report (Pl. SJ Ex. 49). Since the CWA is a strict liability statute, the fact that the Defendants did not intend to spray pesticide directly over and into waters of the United States is immaterial in determining liability under the Act. See U.S. v. Fort Pierre, 580 F. Supp. 1036, 1041 (D.S.D. 1983) rev'd on other grounds 747 F.2d 464 (8th Cir. 1984) (“Because the City's actions violated the strict liability Clean Water Act, the motive of the City is, in law, immaterial.”); see Piney Run Preservation Association v. County Commissioners, 268 F.3d 255, 265 (4th Cir. 2001) (“The CWA also established a default regime of strict liability.”). Under the CWA, “compliance is a matter of strict liability and a defendant's intention to comply or good faith attempt to do so does not excuse a violation.” See Connecticut Fund for the Env't v. Upjohn Co., 660 F. Supp 1397, 1409 (D. Conn 1987) (citing United States v. Earth Sciences, Inc., 599 F.2d 368, 374 (10th Cir. 1979)).

D. The Trucks and Helicopters Equipped With Spray Equipment Are “Point Sources” under the CWA

Section 502(14) defines the term “point source” as “any discernible, confined and discrete conveyance, *including but not limited to* any pipe ... or vessel or *other floating craft from which pollutants are or may be discharged.*” 33 U.S.C. § 1362(14) (emphasis added). A conveyance is “the action or process of transporting someone or something from one place to another.” The New Oxford American Dictionary 376 (Elizabeth J. Jewell & Frank Abate eds., 2001). A discernable conveyance is one that can be perceived or recognized. See id. at 485 (definition of “discern”).

The Supreme Court has adopted a broad interpretation of the term “point source.” In Weinberger v. Romero-Barcelo, 456 U.S. 305 (1982), plaintiffs brought a citizen suit to stop the discharge of ordnance into waters surrounding Puerto Rico. The Court upheld a ruling that aircraft are “point sources” because “the release of ordnance from aircraft or from ships into navigable waters is a discharge of pollutants.” Id. at 309.

The Southern District has stated that “[t]he concept of a point source was designed to further the scheme [of the CWA] by embracing the broadest possible definition of any identifiable conveyance from which pollutants might enter waters of the United States.” Long Island Soundkeeper Fund, Inc. v. New York Athletic Club, Inc., 1996 WL 131863 at 14 (S.D.N.Y. 1996) (citing Dague v. City of Burlington, 935 F.2d 1343, 1354-55 (2d Cir. 1991)).

Courts and the EPA have interpreted “point source” to include spraying devices. In Concerned Area Residents for the Env’t v. Southview Farm, this Court held that “vehicles themselves were point sources.” 34 F.3d 114, 118 (2d Cir. 1994). Also relevant is the determination by the DOJ that mist blowers and hydraulic sprayers are point sources as they “are the means for conveying pesticides into and over the water and, therefore, are point sources.” See DOJ Altman Amicus Br. at 10 (A-1086).

In Concerned Area Residents for the Env’t v. Bosma Dairy, 65 F. Supp 2d 1129 (E.D. Wash. 1999), the court held that spray guns are point sources within the meaning of the CWA. The court in League of Wilderness Defenders v. Forsgren, 309 F.3d 1181, 1184-85 (9th Cir. 2002), found that an airplane fitted with tanks and mechanical spraying apparatus is a “point source.” In that case, Forsgren and the U.S. Forest Service underwent an annual program of aerial pesticide spraying in order to combat a predicted outbreak of the Douglas Fir Tussock Moth, which kills Douglas Fir trees. Id. at 1182. The court reasoned that because the equipped

airplane could be considered both a “discrete conveyance” and a “floating craft from which pollutants are or may be discharged,” the airplane is a point source for purposes of the CWA.⁴ Id. at 1185. In Headwaters, Inc. v. Talent Irrigation District, 243 F.3d 526, 532 (9th Cir. 2001), the court held that a hose connected to a truck can be considered a point source.

In the case at hand, trucks and helicopters sprayed pesticides over and into water bodies of NYC. Trucks and helicopters equipped with spraying equipment are no different than many of the machines previously determined by this and several other courts as being “point sources.” Trucks and helicopters are machines that transport pesticides from one place (i.e. a storage tank) to another (i.e. the waters of the United States) and as such are “discernible conveyances.” Therefore, the trucks and helicopters equipped with spraying equipment at issue are point sources within the meaning of the CWA.

CONCLUSION

As defendants have indisputably discharged pesticides which are pollutants from point sources to waters of the United States, without a permit under the CWA, this Court should enter partial summary judgment in favor of Plaintiffs declaring Defendants are in violation of CWA § 301(a), 33 U.S.C. § 1311(a) every day pesticides were discharged over and into navigable waters without a permit.

⁴ The recent action taken by the EPA in issuing an Interpretive Statement and Guidance addressing the effect of the Ninth Circuit’s decision in League of Wilderness Defenders v. Forsgren, 309 F.3d 1181 (9th Cir. 2002) and choosing not to acquiesce to the Court’s decision, even if authorized, does not effect the Defendants’ liability in this case. The Interpretive Statement merely states EPA’s position that silvicultural pest control activities, carried out by means of airplanes fitted with sprayers are excluded from the definition of point source by virtue of 40 C.F.R. § 122.27. In Forsgren, the challenged pesticide spraying to combat the effects of a predicted outbreak of a moth which kills Douglas Fir Trees was carried out over 628,000 acres of national forest and was therefore in a silvicultural context. See League of Wilderness Defenders v. Forsgren, 309 F.3d at 1182. In the instant case, the purpose of Defendants’ spraying activities is to combat mosquito population; there is no silvicultural purpose.

Dated: White Plains, New York
June 11, 2004

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of June, 2004, I caused true and complete copies of the PLAINTIFF'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT ON REMAND FROM THE SECOND CIRCUIT COURT OF APPEALS to be mailed to all counsel of record at the following addresses by First Class U.S Mail:

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