

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

NO SPRAY COALITION, ET AL.,)
)
 Plaintiffs,) 00 Civ. 5395 (GBD)
)
 against)
)
 THE CITY OF NEW YORK, ET AL.,)
)
 Defendants.)
)
 _____)

**MEMORANDUM OF LAW OF AMICI CURIAE AMERICAN MOSQUITO CONTROL
ASSOCIATION AND AQUATIC COMMITTEE IN SUPPORT OF DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT AND IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

ANN E. SCHOFIELD (AS-6832)
McDermott Will & Emery LLP
50 Rockefeller Plaza, 11th Floor
New York, NY 10020-1605
(212) 547-5400

EDWARD M. RUCKERT
McDermott, Will & Emery LLP
600 13th Street, N.W.
Washington, DC 20005
(202) 756-8214
*Attorneys for Amicus American
Mosquito Control Association*

JOHN D. CONNER, JR.
McKenna Long & Aldridge LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 496-7500
*Attorney for Amicus RISE Aquatic
Committee*

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IDENTITY AND INTEREST OF THE AMICI CURIAE

The American Mosquito Control Association (AMCA) and the RISE (Responsible Industry For A Sound Environment) Aquatic Committee (RISE Aquatic Committee) submit this *amicus curiae* memorandum in support of the motion for summary judgment of defendants City of New York *et al.* Amici agree with defendants and with the United States Environmental Protection Agency (EPA) that the City of New York is not required by the Clean Water Act (CWA) to obtain a National Pollutant Discharge Elimination System (NPDES) permit in order to apply mosquito adulticide products in accordance with the relevant provisions of their EPA-approved labels.

The AMCA is a not-for-profit corporation supported primarily by dues paid by its members. Its members are private and public health organizations that apply mosquito larvicides and adulticides as part of their mosquito control programs, companies that produce those products, individuals employed by those organizations and companies, and academicians and students interested in mosquito control. AMCA has participated actively in activities of the EPA relating to mosquito control.

The RISE Aquatic Committee consists of manufacturers and formulators of aquatic pesticides. The RISE Aquatic Committee is a committee of the Responsible Industry for Sound Environment of CropLife America, a non-profit trade association whose members manufacture and formulate crop protection and other pest control products.

The AMCA, RISE Aquatic Committee, and their members have a significant interest in the issue of whether the use of mosquito larvicides or adulticides in accordance with their EPA-approved label use instructions constitutes the “discharge” into water of “pollutants” within the meaning of the CWA. A ruling that applicators of mosquito larvicides or adulticides must obtain CWA permits in order to carry out their activities would have a significant adverse effect on

AMCA and RISE Aquatic Committee members frustrate their ability to protect public health against disease transmitted by mosquitoes and control other aquatic pests such as, weeds that clog irrigation canals and interfere with the use and enjoyment of public waters.

ARGUMENT

A. Summary

Mosquito larvicides and adulticides are essential public health tools that are registered and regulated as pesticides by the EPA under the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S. C. § 136 *et seq.*, and under the pesticide laws of the state of New York.

The City of New York (the City) uses several mosquito adulticides, each of which has been approved for such use by registrations issued by EPA's Office of Pesticide Programs (OPP) under FIFRA. The City also uses mosquito larvicides, although use of those products has not been challenged by plaintiffs in this action.

The Clean Water Act (CWA), 33 USC §§ 1311 and 1342, makes it unlawful for any person to discharge a "pollutant" from a point source into waters of the United States except in compliance with the terms of a National Pollution Discharge Elimination System (NPDES) permit issued by EPA or by a state to which permitting authority has been delegated. Plaintiffs would have this Court declare that the City must obtain an NPDES permit before conducting its mosquito control program, and that the City is subject to penalties for its past conduct of the program without having obtained an NPDES permit.

EPA has never required applicants of mosquito control products to obtain an NPDES permit. In 2003, EPA issued a guidance statement expressly stating that NPDES permits are not required for such applications. EPA reasoned that pesticide products, including the mosquito control products of the sort used by the City, do not fall within the CWA definition of "pollutants" when used as directed and as approved by EPA, but rather are designed, approved

by federal and state governments, sold, purchased, and applied precisely because they will serve a useful and important beneficial purposes when used in accordance with their labeling. Accordingly, said EPA, persons who apply such products in accordance with their EPA-approved registrations should not be required to obtain an NPDES permit. The Court should find that this EPA guidance is a persuasive and appropriate interpretation of the CWA, and therefore that the City did not violate the CWA by conducting its mosquito adulticide program without having obtained an NPDES permit. The Court also should find that the atmospheric spraying conducted by the City does not constitute the discharge of pesticide into water, and for that an additional reason the City did not need an NPDES permit.

B. Under The Pesticide Laws, EPA Registers Pesticide Products To Provide Benefits Without Posing Unreasonable Risk To Man Or The Environment

The sale and use of pesticides are regulated by EPA under FIFRA and by the New York State Department of Environmental Quality under state pesticide laws. Under FIFRA and the implementing regulations set forth in 40 CFR Parts 152-172, EPA's Office of Pesticide Programs (OPP), working with other Agency offices and State agencies, comprehensively regulates the sale and use of pesticides. No person may sell or distribute a pesticide unless it is first registered with EPA. 7 U.S.C. § 136a (a). When EPA registers a pesticide, it reviews required safety and environmental studies (and for public health products such as those designed for mosquito control, efficacy studies) submitted by the applicant and determines whether the product's label has appropriate and necessary directions for use and warnings to insure that the pesticide will perform its intended function without causing "unreasonable adverse effects" to non-target organisms, including aquatic organisms. 7 U.S.C. § 136a(c)(5)(C), (D). "Unreasonable adverse effects" is defined to mean any unreasonable risks to man or the environment, "taking into account the economic, social, and environmental costs and benefits of the use of any pesticide."

7 U.S.C. § 136(bb) (emphasis added). As explained below, the benefits of mosquito adulticides used in public health programs to control the spread of human and animal disease, such as West Nile virus and encephalitis, are significant.

Mosquitoes are vectors for parasitic protozoa (e.g., the plasmodium species that cause malaria) and viruses (e.g., West Nile virus, St. Louis encephalitis, La Crosse encephalitis, Eastern equine encephalitis). In addition to mosquitoes' ability to transmit diseases, their bites can cause extreme discomfort and can make outdoor activities or livestock husbandry impractical. The public health benefits of mosquito larvicide and adulticide uses are significant. As EPA Deputy Assistant Administrator Benjamin H. Grumbles recently testified before Congress,

In an integrated mosquito management program, ultra-low volume adulticide applications are used when source reduction and larvicides are inadequate or not feasible, or where surveillance data show it is necessary to reduce adult mosquito density for public health or severe nuisance reduction purposes. Adulticide is a supplement to other control practices and is used when needed.

Testimony of Benjamin Grumbles before the Subcommittee on Water Resources and Environment, House Committee on Transportation and Infrastructure, Hearing on West Nile Virus: the Clean Water Act and Mosquito Control, October 10, 2002 (*italics added*) (hereafter, "Grumbles Testimony"), Amici's Exhibit 1¹.

C. An NPDES Permit Is Required Only For The Discharge Of Defined "Pollutants"

The CWA prohibits the "point source" discharge of "pollutants" to "waters of the United States" unless, *inter alia*, the discharge meets the terms and conditions of an NPDES permit. 33 U.S.C. §§ 1311(a), 1342(a)(1), 1362(12)(A). The CWA defines "pollutant" as follows:

¹ All references to Amici's Exhibits are to exhibits submitted as part of the Affidavit of Edward M. Ruckert, dated June 8, 2004.

The term '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.

33 U.S.C. § 1362(6). This definition of "pollutant," added to the CWA in 1972, consists of a list of specific terms that is exclusive, not illustrative. *National Wildlife Federation v. Gorsuch*, 893 F. 2d 126 (D.C. Cir. 1986).

With regard to the adulticides used by the City, the definition's only potentially relevant term is "chemical wastes."² Congress intentionally used the term "chemical waste," not the much broader term "chemical." In order for a chemical being discharged into water to be a "pollutant" it must be a "waste." The placement of a chemical over or into water intentionally for its intended purpose, particularly a governmentally approved or governmentally directed beneficial purpose, certainly should not be characterized as the discharge of a waste.

D. EPA's Recently Issued Guidance, Stating That The Use Of A Mosquito Larvicide Or Adulticide In Accordance With Its FIFRA Registration Is Not The Discharge Of A Pollutant, And Thus That An NPDES Permit Is Not Required For Such Use, Is A Reasonable And Persuasive Reading Of The CWA That The Court Should Uphold

During the 32 years since 1972, when FIFRA was completely rewritten and the NPDES program was established by Congress, EPA never sought to require the users of registered pesticides for outdoor uses such as mosquito control to obtain NPDES permits for such uses, nor to penalize persons for failing to obtain NPDES permits for such uses. Nor did the state agencies to which much of the permitting authority has been delegated.³ (EPA has required pesticides used in industrial manufacturing processes, such as papermaking or leather production, to bear

² It should be noted that some pesticides, including some mosquito larvicides, might also arguably fall within the term "biological materials." Thus, the recent EPA guidance, discussed below, also considers whether application of a biological pesticide to water constitutes the discharge of a pollutant.

labeling reminding their users that an NPDES permit may be needed for the industrial facility's discharge of leftover residues of such pesticides in effluent from a point source, see, e.g., 49 FR 37960, 37965-66, 37983 (Sep. 26, 1984), but those permits regulate *waste discharges from* facilities, not the *use* of the pesticide *in* facilities.)

Plaintiffs in citizen suits have claimed that use of mosquito adulticides – of necessity applied in or adjacent to aquatic environments – requires the applicator to first obtain an NPDES permit. In addition to the present case, two other pending citizen suits are aimed directly at mosquito control programs conducted by municipal agencies: *Altman v. Town Of Amherst, New York*, 190 F. Supp. 2d 467 (WDNY 2001), reversed and remanded, *Altman v. Town of Amherst, N.Y.*, 47 Fed. Appx. 62, 2002 U.S. App. LEXIS 20498 (2d Cir. 2002), and *Saint Johns Organic Farm et al. v. Gem County Mosquito Abatement District, et al.*, Civ. 04-087-S-BLW (D. Idaho)(complaint filed in early 2004).

Other citizen suits have targeted use of herbicides by irrigation districts to control the growth of aquatic weeds that restrict the flow of water in irrigation canals, *Headwaters, Inc. v. Talent Irrigation District*, 243 F. 3d 526 (9th Cir. 2001), and use of insecticides by the U.S. Forest Service for tussock moth control, *League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181 (9th Cir. 2002),), cert. denied, *Am. Forest & Paper Ass'n v. League of Wilderness Defenders*, 157 L.Ed. 2d 18, 124 S. Ct. 369 (2003). Although neither *Headwaters* nor *Wilderness Defenders* directly involved mosquito control, they are of concern because in both cases the Ninth Circuit found—incorrectly, in our view—that permits were required, whether the pesticide had been applied directly to water (*Headwaters*) or sprayed over forested areas

3 However, within the last year, some of the states in the Ninth Circuit have responded to citizen suit litigation there, discussed *infra*, by considering the establishment of permit programs for aquatic uses of pesticides.

containing water bodies (*Wilderness Defenders*), and because plaintiffs that challenge mosquito control programs are urging courts to extend those cases to mosquito control uses.

In response to several of these holdings, and to the specific request by the Second Circuit in its *Altman* decision, on June 11, 2003, the Agency issued an “Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA” (*Interim Guidance*), Amici’s Exhibit 2. In a *Federal Register* notice (68 FR 48385, August 13, 2003) (Amici’s Exhibit 3), the Agency requested public comments on the *Interim Guidance*. That notice stated that unless and until the *Interim Guidance* is modified, NPDES permits would not be required for, among other things, the use of mosquito larvicides and adulticides in accordance with their registered FIFRA labels.

The *Interim Guidance* points out that EPA had never issued or required an NPDES permit “solely for the direct application of a pesticide to target a pest that is present in or over a water of the United States.” It then noted that in view of the *Headwaters* and *Altman* cases, there is a need for a clear statement of the Agency’s position. After setting forth the CWA’s definition of “pollutant” in 42 USC 506(2), the *Interim Guidance* states (some footnotes omitted):

EPA has evaluated whether pesticides applied consistent with FIFRA fall within any of the terms in section 506(2), in particular whether they are “chemical wastes” or “biological materials.” EPA has concluded that they do not fall within either term. First, EPA does not believe that pesticides applied consistent with FIFRA are “chemical wastes.” The term “waste” ordinarily means that which is “eliminated or discarded as no longer useful or required after the completion of a process.” The New Oxford American Dictionary 1905 (Elizabeth J. Jewell & Frank Abate eds., 2001); see also The American Heritage Dictionary of the English Language 1942 (Joseph P. Pickett ed., 4th ed. 2000) (defining waste as “[a]n unusable or unwanted substance or material, such as a waste product”). Pesticides applied consistent with FIFRA are not such wastes; on the contrary, they are EPA-evaluated products designed, purchased and applied to perform

their intended purpose of controlling target organisms in the environment. (note 4)

⁴ Where, however, pesticides are a waste, for example when contained in stormwater regulated under section 402(p) of the CWA or other industrial or municipal discharges, they are pollutants and require a permit when discharged to a water of the U.S.

Therefore, EPA concludes that “chemical wastes” do not include pesticides applied consistent with FIFRA.

...
Under EPA’s interpretation, whether a pesticide is a pollutant under the CWA turns on the manner in which it used, i.e., whether its use complies with all relevant requirements of FIFRA. That coverage under the Act turns on the particular circumstances of its use is not remarkable. Indeed, when asked on the Senate floor whether a particular discharge would be regulated, the primary sponsor of the CWA, Senator Muskie (whose views regarding the interpretation of the CWA have been accorded substantial weight over the last four decades), stated:

I do not get into the business of defining or applying these definitions to particular kinds of pollutants. That is an administrative decision to be made by the Administrator. Sometimes a particular kind of matter is a pollutant in one circumstance, and not in another. Senate Debate on S. 2770, Nov. 2, 1971 (117 Cong. Rec. 38,838).

Here, to determine whether a pesticide is a pollutant under the CWA, EPA believes it is appropriate to consider the circumstances of how a pesticide is applied, specifically whether it is applied consistent with relevant requirements under FIFRA. Rather than interpret the statutes so as to impose overlapping and potentially confusing regulatory regimes on the use of pesticides, this interpretation seeks to harmonize the CWA and FIFRA. Under this interpretation, a pesticide applicator is assured that complying with environmental requirements under FIFRA will mean that the activity is not also subject to the distinct NPDES permitting requirements of the CWA. However, like an unpermitted discharge of a pollutant, application of a pesticide in violation of relevant FIFRA requirements would be subject to enforcement under any and all appropriate statutes including, but not limited to, FIFRA and the CWA.

On September 3, 2003, EPA issued another guidance document in which it found that the aerial application by the Forest Service of insecticides to fight codling moth infestations,⁴ or of fire retardant products to fight forest fires in accordance with Forest Service guidance, similarly does not constitute the discharge of chemical wastes, but rather is the release of an approved substance for beneficial purposes, and thus does not require an NPDES permit. See Amici's Exhibit 4. With regards to pesticides, it should be noted that EPA has not argued that FIFRA preempts the working of the CWA, but rather that under the CWA's own language, the legal application of certain kinds of registered pesticide products is not the discharge of a pollutant.

The *Interim Guidance* is an appropriate exercise of the interpretative discretion that Congress granted the EPA Administrator. Although the Guidance has not yet taken the form of a regulation, it certainly is an answer to a question left open to Agency decision-making by the statute and clearly states Agency policy with regard to the availability of and need for NPDES permits in particular situations. Amici are aware of at least one instance where the *Interim Guidance* has been used by EPA as the basis for denial of a request for an NPDES permit.⁵ Had the *Interim Guidance* been denominated a regulation by EPA it clearly would have qualified for the kind of strict judicial deference contemplated by *Chevron, USA, Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). In view of the format chosen by EPA, the Court may or may not find the *Guidance* to be entitled to *Chevron* deference. If not, it nonetheless is a rational and persuasive interpretation, consistent with over 30 years of Agency practice, and

⁴ An exception was made for matters in the Ninth Circuit to recognize the existence of the *League of Wilderness Defenders* decision, *supra*, although the document says the Agency believes that decision is incorrect.

⁵ Shortly after issuance of the *Interim Guidance*, EPA's Region X office relied on it to reject, albeit informally, an application for an NPDES permit that had been filed by a mosquito abatement district in response to a threatened citizen suit. See paragraph 28 (and Exhibit B) of First Amended Complaint (Apr. 19, 2004), *Gem County Mosquito Abatement District v. EPA et al.*, 1:02-CV-2179, U.S. Dist. Ct. D. D.C., Amici's Exhibit 5.

surely is entitled to considerable deference under the doctrine classically described in *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), and recently confirmed in *U.S. v. Mead Corp.*, 533 U.S. 218 (2001):

To agree with the Court of Appeals that Customs ruling letters do not fall within *Chevron* is not, however, to place them outside the pale of any deference whatever. *Chevron* did nothing to eliminate *Skidmore*'s holding that an agency's interpretation may merit some deference whatever its form, given the "specialized experience and broader investigations and information" available to the agency, 323 U.S., at 139, and given the value of uniformity in its administrative and judicial understandings of what a national law requires, *id.*, at 140. See generally *Metropolitan Stevedore Co. v. Rambo*, 521 U.S., 121, 136 (1997) (reasonable agency interpretations carry "at least some added persuasive force" where *Chevron* is inapplicable); *Reno v. Koray*, 515 U.S. 50, 61 (1995) (according "some deference" to an interpretive rule that "do[es] not require notice and comment"); *Martin v. Occupational Safety and Health Review Comm'n*, 499 U.S. 144, 157 (1991) ("some weight" is due to informal interpretations though not "the same deference as norms that derive from the exercise of ... delegated lawmaking powers").

EPA's *Interim Guidance* distinguishes between *application* or *use* of a pesticide in accordance with its government approval, which *does not* require an NPDES permit, and the point-source discharge of pesticide residues *after* the pesticide has been used, which *does* require a permit. That distinction also is useful in evaluating the holdings in some recent judicial decisions. Although the FIFRA-authorized addition of an aquatic pesticide directly to water is not subject to the requirement for an NPDES permit, this is not to say that deliberately added, beneficial-use materials cannot become pollutants at some point *after* their addition to water, and this is where there is potential for confusion. Just such a situation was presented by the facts in *Hudson River Fishermen's Association v. City of New York*, 751 F. Supp. 1088 (SDNY 1990), affirmed without opinion, 940 F. 2d 649 (2d Cir. 1991). There, the city pumped water from the relatively dirty Hudson River, and at the pumping station added chlorine and alum to the river

water to kill bacteria and remove turbidity. The treated water went to a navigable reservoir containing cleaner water, by way of the station's outflow pipe (a point source). The court held the outflow discharges of excess chlorine, excess alum, and alum floc constituted the discharge of "pollutants." It was not the addition of chlorine and alum to the water in the pumping station that was found to constitute the discharge of a pollutant. Rather, it was the city's allowing excess, *unreacted* chlorine and alum, and *unfiltered* alum floc, to be discharged from the treatment facility outflow pipe to the reservoir (where the chemicals no longer were serving any useful purpose) that was held to require a permit. The formerly useful water additives had become useless waste that lawfully could be discharged into the reservoir only as allowed by an NPDES permit.

Headwaters, supra, properly understood, presents another example of a court addressing the same kind of situation. There, the court expressly declined to hold the herbicide was a pollutant at the time it was applied to the irrigation canal. The only discharge of a substance found by the court to be a "pollutant" was the premature discharge into a river (via a leaking sluice gate) of previously treated canal water containing undispersed, undegraded, post-application residues of acreolin. Had there been no premature release of treated water, there would have been no discharge of a pollutant. Unfortunately, the lack of clarity of the Ninth Circuit opinion (finding that the aquatic herbicide application equipment hose was a point source and finding that the irrigation canal also was a water of the United States) has led to confusion and led some to conclude that the Ninth Circuit has found that the application of a pesticide requires an NPDES permit. Amici respectfully submit that *Headwaters* does not support this conclusion.

E. Application Of A Mosquito Adulticide Over Or Around Water Bodies Ordinarily Does Not Constitute Use In Violation Of The Product's Labeling

Plaintiffs assert or at least imply that the City's applicators violated the label language of each of the three mosquito adulticide products by making pesticide applications over or near bodies of water. The EPA-registration of each product, as of 1999 and 2000, specified that its label include the phrase "For terrestrial uses, do not apply directly to water..." EPA does not regard that label language as applicable to products when used as mosquito adulticides, and has not since at least 1993, because it regards use as a mosquito adulticide to be an aquatic use, not a terrestrial use.

The pesticide registration process under FIFRA involves the filing of an application for registration that contains, among other things, a copy of the proposed label of the product. OPP staff review the proposed label and either approve it as proposed or point out changes to be made before it can be approved. After registrations have been issued they often are amended, by the same basic process.

Prior to 1992 many pesticide labels contained the language "Do not apply directly to water or wetlands." Questions arose regarding the applicability of that restriction to mosquito larvicides and adulticides. In a December 1992 letter responding to an inquiry from the New York State Bureau of Pesticide Management, the acting director of EPA OPP's Registration Division wrote that "EPA plans to change the "do not apply directly to water" statement to make clear that it applies only to terrestrial uses. When labels adopt this change, this statement will no longer apply to adult mosquitocide uses . . ." Exhibit 19 to Defendants' Motion for Summary Judgment. OPP carried out that plan by issuing Pesticide Regulation Notice 93-3 on March 9, 1993, Amici's Exhibit 6. The Notice was addressed to all registrants; its subject was "Labeling Statement Prohibiting Application to Water." It stated (emphasis added):

This notice explains EPA's policy concerning the labeling statement which prohibits application of a pesticide to water and specifies a revised statement. Until the new statement is adopted on pesticide product labels, the enforcement interpretation in this notice applies to the existing labeling statement. ...

A conflict occurs when the "Do not apply directly to water" statement is present on the labeling of products which are registered for both terrestrial and aquatic uses. While EPA does not intend for this statement to apply to the aquatic uses, the uses to which it applies are not clear. For example, a product which is registered as an insecticide against adult mosquitoes may have both aquatic and terrestrial sites in the use directions. Because the current "Do not apply directly to water" statement is unqualified, it applies to all of the registered sites. To correct this conflict, EPA is revising the water prohibition statement to clarify that it applies only to terrestrial uses.

II. POLICY

In the Environmental Hazards section of pesticide labeling, the statement "Do not apply directly to water or wetlands (swamps, bogs, marshes or potholes)..." should be replaced with:

For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark.

This statement will correct the two problems discussed above. First, inserting the phrase "For terrestrial uses" at the beginning of the water prohibition statement indicates that it applies to terrestrial, forestry (except aerial application) and domestic outdoor uses only ... The revised statement does not apply to other general use patterns—aquatic (e.g., mosquito larvicides or adulticides, aquatic herbicides, piscicides, slimicides, etc.), greenhouse, and indoor uses.

Second, the new statement more clearly describes where pesticides intended for terrestrial use may not be applied...

III. EFFECTIVE DATE AND REQUIRED ACTIONS

This policy is effective immediately.

...

Label changes should be made by registrants and distributors no later than April 21, 1994. Persons other than registrants or distributors should not distribute or sell products after April 21, 1996 unless the labeling complies with this notice...

In short, EPA made it clear that labels should indicate that the typical restrictions on application to water bodies did not apply to aquatic uses, including mosquito control uses, and said further that until new labeling reflecting this distinction appeared on products, the language on product labels were to be interpreted *as if* they complied with the policy statement in the Notice.

The record before the Court shows that the labeling of two of the products the City used, Anvil 10+ 10, EPA Registration Number 1021-1688-8329 (Plaintiffs' Exhibit 56) and Scourge, EPA Registration Number 432-667 (Plaintiffs' Exhibit 58) contain the statement "For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark." Each of those products is registered for use against pests other than mosquitoes. The non-mosquito uses may be regarded as terrestrial uses, which may explain why the language concerning terrestrial use appears on the label of those two products.

The Scourge product also includes in its "Directions for Use of Aircraft" the following language: "May be used as a mosquito adulticide in recreational and residential areas, and in municipalities, around the outside of apartment buildings, golf courses, athletic fields, parks, campsites, woodlands, swamps, tidal marshes, and overgrown waste areas. . . Avoid direct application over lakes, ponds and streams."

According to the record that was before the Court when it first ruled on the cross motions for summary judgment (Plaintiff's Exhibit 54), the label of the third product used by the City, Fyfanon ULV, contained the old-style language. That language would have been subject to the policy interpretation contained in PR Notice 93-3. Moreover, the EPA registration records indicate that in a January 9, 1997 letter to the registrant of that product (Amici's Exhibit 7), then bearing EPA registration number 4787-8, EPA indicated that the label language should be

changed to comport with PR Notice 93-3. A second letter from EPA to the registrant, dated December 9, 1998 (Amici's Exhibit 8), approved a request by the registrant to revise the label to incorporate the PR Notice 93-3 changes. The Environmental Hazards section of that label states:

This pesticide is toxic to fish, aquatic organisms, and aquatic life stages of amphibians. For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the mean high water mark. Drift and runoff may be hazardous to aquatic organisms in areas near the application site. Do not contaminate water when disposing of equipment washwaters.

For aquatic uses, do not apply directly to water except as specified on this label.

And as part of the directions for use of the product for mosquito control by airplane- or truck-mounted spraying apparatus, the revised label states:

NOTE FOR AQUATIC USES: Broadcast use only over intermittently flooded areas. Application may not be made around bodies of water where fish or shellfish are grown and/or harvested commercially.

Fyfanon ULV is registered for a large number of terrestrial agricultural crop uses in addition to its mosquito use. As allowed by EPA, Cheminova, Inc. markets two versions of the same product, one with only mosquito/public health use instructions, and another with only the remaining use instructions. There is only one approved version of the environmental hazard warning, however, which explains why the language appears on the mosquito label.

Accordingly, the Fyfanon ULV product labels approved by EPA at the time of the City's spray program did not prohibit use of the products merely because the areas to be sprayed included some areas that were waters of the United States, wetlands, or other bodies of water. EPA regards mosquito adulticide products as intended for aquatic use, knowing that mosquitoes are associated with marshes and wetlands. The Scourge label told pilots to avoid "direct application" over lakes, ponds and streams, and the Fyfanon ULV label warns against use over

commercial fishing or shellfishing areas. Beyond that, the labels do not restrict the city's conduct of its spray program in, over, or around areas where surface water is present. In only a very few incidents are the City's applicators alleged to have sprayed over open water, and in those cases clearly the spraying over water was incidental to efforts to treat nearby lands. Under these circumstances, the City's use of the pesticides still would not constitute the "application of a pesticide in violation of relevant FIFRA requirements" that would require NPDES compliance under the EPA *Interim Guidance*.

F. Use Of ULV Equipment To Release Aerosol Particles Of Mosquito Adulticide Does Not Constitute Discharge Of The Pesticide "To Navigable Waters"

In addition to supporting strongly the EPA analysis based on whether a product as applied is a waste or is being used for a beneficial and government-approved purpose, amici urge the Court to hold that a mosquito adulticide ULV application into the air by use of ultra-low-volume (ULV) equipment does not constitute a discharge by the user *into waters* of the United States. Instead, to insure its public health efficacy such a ULV product is applied to the atmosphere in a government-mandated manner that is calculated to assure that the droplets of adulticide remain in the atmosphere and reach waters of the United States only in relatively small amounts, if at all, and only incidentally, not deliberately.

Use of ULV ground or aerial spray equipment introduces extremely small particles of mosquito adulticides into the atmosphere. Only a very few ounces of active ingredient are used per acre. The objective of ULV adulticide application is to produce a cloud of these tiny particles that will move laterally through the atmosphere and kill the adult mosquitoes that the particles contact. The intended target of pesticide adulticide applications is the downwind airspace in which adult mosquitoes may be flying or the vegetation in that airspace on which

adult mosquitoes may have alighted. As EPA official Benjamin H. Grumbles has stated

(Amici's Exhibit 1):

Adulticides are applied by truck-mounted or aircraft-mounted sprayers which dispense very fine (called "ultra-low volume") aerosol droplets that *stay airborne* and kill mosquitoes on contact.

Particles of this size released into the atmosphere do not follow a straight line downward. If they did, the product would not be effective as an adulticide. *After* the pesticide has been conveyed to the air, various factors, including ones not related to the method of application, combine to determine whether the pesticide will reach the earth's surface at all and if so, when, where, and in what quantity. The particle's fate is dictated largely by the relationship between the droplet's mass and its volume and by climatic features. It may drift or float vertically and horizontally through the atmosphere, or evaporate completely, depending on wind, temperature, humidity, and other atmospheric conditions. One recent article (in a peer-reviewed journal published by the Centers for Disease Prevention and Control) stated:

With insecticide application by air using high-pressure pumps of 2,500 lbs psi, special nozzles, proper aerial application altitude and wind drift, mosquito control is achievable for several miles downwind with minimal spray deposit below the aircraft, as a result of improved atomization of the insecticide.

R.I. Rose, "Pesticides and Public Health: Integrated Methods of Mosquito Management,"

Emerging Infectious Diseases, Vol. 7, No. 1, pages 17-23 (Jan-Feb 2001), Amici's Exhibit 9.

ULV mist blowers and hydraulic sprayers thus do not directly convey an adulticide particle to waters as a point source but disperse the particle by design into the atmosphere.

Emissions from a factory smoke stack are not treated as point source emissions for CWA purposes, even though it may be demonstrably true that particles in smoke from a particular factory stack eventually are deposited in a water body, even though "incinerator residues" is one of the terms listed in the definition of "pollutant," and even though the stack may be a point

source for Clean Air Act purposes. The particles simply are not being “discharged” into water. See *Chemical Weapons Working Group, Inc. v. U.S. Department of the Army*, 111 F. 3d 1485 (10th Cir. 1987). The same is true of the aerial or ground application of ULV mosquito adulticides, and in addition the ULV particles are specifically engineered to remain in the atmosphere to provide a beneficial function.

Similarly, to the extent that plaintiffs argue that after the adulticide droplets drift through the atmosphere some of them settle on surface waters, and assuming *arguendo* that once a droplet of adulticide lands on water it thereafter cannot impinge upon a mosquito, has no further beneficial purpose, and is thereby transformed from public health pesticide to pollutant, it nonetheless was not a pollutant when it was being “discharged by a point source” (applied) by the City, and conversely, at the time it arguably became a pollutant, it was no longer being discharged from a point source by the City. The time that the substance becomes an ostensible pollutant is separated from the time of application by a period during which the product was performing its intended, useful function. The asserted transformation from beneficial product to pollutant is too disconnected temporally and spatially from its discharge to be regarded as the discharge of a pollutant from a point source into waters” within the meaning of the CWA. For an NPDES permit to be required, a substance must be a pollutant *when it is discharged from the point source*, not some later time after it has served its intended, beneficial purpose. In short, the point source must convey a pollutant, not a pesticide being properly used, and the point source must convey the pollutant to waters of the United States, not to the atmosphere.

This issue was considered explicitly by this Court in its first decision in this case, *No Spray Coalition, Inc., et al. v. City of New York, et al.*, 2000 U.S. Dist. LEXIS 13919 (S.D.N.Y. 2000). In denying plaintiffs’ request for a preliminary injunction, the court there said:

Plaintiffs' argument that drift caused by the spraying of a pesticide from a truck or helicopter would constitute a discharge of a pollutant into navigable waters in violation of the Clean Water Act would not square with the Act's definition of discharge of a pollutant:

The term 'discharge of a pollutant' and the term 'discharge of pollutants' each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source... 33 U.S.C. §1362(12).

While the trucks and helicopters used to spray insecticides may be point sources, see 33 U.S.C. §1362(14), they discharge the insecticides into the atmosphere and not into navigable waters. It would be stretching the language of the statute well beyond the intent of Congress to hold that the de minimis incidental drift over navigable waters of a pesticide is a discharge from a point source into those waters. The fact that a pollutant might ultimately end up in navigable waters as it courses through the environment does not make its use a violation of the Clean Water Act. See *Chemical Weapons*, 111 F. 3d at 1490. To so hold would bring within the purview of the Clean Water Act every emission of smoke, exhaust fumes, or pesticides in New York City. Plaintiffs have cited no case that supports such a strained reading of the Clean Water Act.

Finally, *League of Wilderness Defenders* is not instructive on this issue. The Ninth Circuit there held that spraying pesticides from aircraft over national forest lands to control the Douglas fir tussock moth is not exempt under an EPA regulation exempting non-point source silvicultural activities. Amici respectfully submit that the Ninth Circuit's statement that "the insecticides at issue meet the definition of 'pollutant' under the Clean Water Act," 309 F.3d at 1185, is dictum. The court based its remark on its own assertion that "[t]he parties do not dispute that the insecticides at issue meet the definition of 'pollutant' under 33 U.S.C. § 1362(6)." *Id.* at 1184, n.2. The United States, however, in its Petition for Rehearing and Suggestion for Rehearing en Banc, Amici's Exhibit 10, advised the court that the panel had been "mistaken; the Forest Service specifically reserved the issues of whether the pesticides associated with the DFTM project are 'pollutants' and whether they are being discharged into 'navigable waters.'" "

U.S. Petition for Rehearing at 17.) The case had been decided below, and briefed on appeal, entirely on the “point source” issue. Because the United States disputed that the parties agreed that the insecticides were pollutants, amici respectfully submit that the Court should not rely upon *League of Wilderness Defenders*.

G. The NPDES Permit Program, Focused Largely On Industrial And Municipal Wastes, Is Not A Suitable Program For Use In Regulating Pesticide Applications

Considerable difficulties would result from trying to regulate pesticide application in the same way as the discharge of factory effluent and sewage. The NPDES program overwhelmingly focuses on regulating industrial and municipal wastes, and the regulations and forms that EPA has issued to implement it reflect this focus. See generally 40 CFR Parts 122 through 135. The procedures for obtaining an NPDES permit are complicated, and the criteria are extensive and even bewildering for newcomers to the program.

If it were found that NPDES permits were required for mosquito control programs or other aquatic pest control programs, there would be no simple, easy way to issue meaningful permits. Entirely new programs would have to be established by EPA and the various state agencies, because the current guidance (designed with typical stationary industrial or municipal discharge sites in mind) would not fit programs where the “point source” is an aerial sprayer on a helicopter or truck, the area where “discharge” (application) occurs varies over time and may be as large as several counties, and the substance being “discharged” is a valuable product specifically designed to be applied to or near water, not as a waste but to perform a useful purpose. The goal of the NPDES system is, as its title indicates, the *elimination of discharges* of pollutants to water, while the goal of mosquito treatment is to add approved substances to water (larvicides) or to the atmosphere (adulticides) when needed to serve a public good.

The existing NPDES structure is not designed to deal with the types of situations presented by mosquito control programs, noxious weed control programs, and other outdoor pest control programs. Requiring the many applicators to obtain NPDES permits would tax limited federal/state CWA permitting resources. Since it is indisputable that historically there has been very little environmental concern about the “pollution” caused by mosquito control, there is little reason to think that developing mosquito treatment permits would take priority over permits for more important polluters. The result could be very long delays in the issuance of permits. This has happened before with regard to low-priority tasks. See *USPIRG v. Stolt Sea Farm, Inc.*, 2002 U.S. Dist. LEXIS 2757, magistrate’s recommended decision of Feb. 19, 2002, affirmed by affirmed by the district court, 2002 U.S. Dist. LEXIS 12590 (D. Maine 2002) (EPA explained it had not issued NPDES permits requested many years earlier “due to resource constraints” because fish farms were considered “low-priority”).

It has been argued by some that NPDES permitting can be done expeditiously and inexpensively by use of “general permits” under 40 CFR 122.28. A general permit would cover all similar activities in a geographic area that could be as large as a state; it therefore would eliminate the need for each mosquito control organization to apply separately for an individual permit. However, general permits can be issued only in compliance with all the elaborate, time-consuming, and costly procedures and criteria set forth in 40 CFR Parts 122 through 135 for the issuance of individual permits. 40 CFR 122.28(b)(1). Moreover, the professed virtue of requiring any type of NPDES permit for pesticide use programs is that the FIFRA registration process does not take the nuances of individual sites into consideration. An NPDES permit cannot be both (A) inexpensive, simple, quick to obtain, and applicable state-wide and also (B) comprehensive and individually tailored to the particular environmental circumstances at each

application site. To the extent that simple, statewide or national general permits are proposed, they likely will be challenged by pesticide opponents as inadequate, using the procedures in 40 CFR Part 124 that require issuance of a draft permit, a period for public comment, a public hearing, a final decision, and appeal rights. To the extent that the permitting authorities attempt to individualize the permits to the particular circumstances of application sites or otherwise make them resemble permits for industrial point sources, the requirements would present significant costs, operational difficulties, and delays to mosquito control districts and other users of aquatic pesticides.

CONCLUSION

The Court should grant Defendants' motion for summary judgment.

Dated: New York, New York
June 11, 2004

Respectfully submitted,

ANN E. SCHOFIELD (AS-6832)
McDermott Will & Emery LLP
50 Rockefeller Plaza, 11th Floor
New York, NY 10020-1605
(212)547-5400

EDWARD M. RUCKERT
McDermott Will & Emery LLP
600 13th Street, N.W.
Washington, DC 20005-3096
(202) 756-8214

*Attorneys for Amicus American Mosquito
Control Association*

JOHN D. CONNER, JR.
MCKENNA LONG & ALDRIDGE LLP
1900 K Street, N.W.
Washington D.C. 20006
(202) 496-7500

*Attorney for Amicus RISE Aquatic
Committee*

CERTIFICATE OF SERVICE

I, Robert Candella, declare, pursuant to 28 USC § 1746, under the penalty of perjury that on June 14, 2004, I served a copy of the foregoing **MEMORANDUM OF LAW OF AMICI CURIAE** by first class mail properly addressed to each of the following counsel:

KARL S. COPLAN
Pace Environmental Law Clinic, Inc.
78 North Broadway
White Plains, NY 10603

JOEL R. KUPFERMAN
New York Environmental Law and Justice Project
351 Broadway, 4th Floor
New York, NY 10013

MARK McINTYRE
Office of Corporation Counsel, City of New York
100 Church Street
New York, NY 10007

Robert Candella

WDC99 934282-1.060906.0012

4. Submitted herewith as Exhibit 2 is a true copy of a USEPA document dated July 11, 2003, entitled “Interim Statement and Guidance on Application of Pesticides to Waters of the United States in Compliance with FIFRA.”
5. Submitted herewith as Exhibit 3 is a true copy of a *Federal Register* notice issued by USEPA and published at 68 FR 48385 (August 13, 2003).
6. Submitted herewith as Exhibit 4 is a true copy of a USEPA document dated September 3, 2003, entitled “Interpretative Statement and Guidance Addressing Effect of Ninth Circuit Decision in *League of Wilderness Defenders v. Forsgren* on Application of Pesticides and Fire Retardants.”
7. Submitted herewith as Exhibit 5 is a true copy of the First Amended Complaint and of Exhibit B thereto, filed April 19, 2004, in the case of *Gem County Mosquito Abatement District v. EPA et al.*, U.S. Dist. Ct, D. DC, case 1:02-CV-2179.
8. Submitted herewith as Exhibit 6 is a true copy of a document issued by the USEPA Office of Pesticide Programs, entitled Pesticide Regulation Notice 93-3, dated March 9, 1993, subject, “Labeling Statement Prohibiting Application to Water,” obtained from the Purdue University internet site, <http://www.ceris.purdue.edu/info/prnotice/pr93-3.txt>.
9. Submitted herewith as Exhibit 7 is a true copy of a letter from USEPA to Cheminova Agro A/S, dated January 9, 1997, subject, “Deletion of Unsupported Malathion Uses, Fyfanon ULV,” with its attachment, an EPA-accepted amended label for Fyfanon ULV, obtained from the USEPA internet site, <http://oaspub.epa.gov/pestlabl/ppls.home>.
10. Submitted herewith as Exhibit 8 is a true copy of a letter from USEPA to Cheminova, Inc., dated December 9, 1998, subject, “Fyfanon® ULV Concentrate Insecticide, EPA Reg. No. 67760-34 (previously 4787-8), Label Amendment submitted June 12, 1998,”

with its attachment, an EPA-accepted amended label for Fyfanon ULV, obtained from the USEPA internet site, <http://oaspub.epa.gov/pestlabl/ppls.home..>

11. Submitted herewith as Exhibit 9 is a true copy of an article by Dr. Robert I. Rose, entitled "Pesticides and Public Health: Integrated Methods of Mosquito Management," published in the journal *Emerging Infectious Diseases*, Vol. 7, No. 1, pages 17-23 (Jan-Feb 2001).
12. Submitted herewith as Exhibit 10 is a true copy of the United States' Petition for Rehearing and Suggestion for Hearing en Banc, submitted to the Ninth Circuit Court of Appeals after that Court's ruling in *League of Wilderness Defenders, et al., v. Forsgren*.

Edward M. Ruckert

Sworn to before me this

June __, 2004

Notary Public

CERTIFICATE OF SERVICE

I, Ann E. Schofield, declare, pursuant to 28 USC § 1746, under the penalty of perjury that on June _____, 2004, I served a copy of the foregoing **AFFIDAVIT OF AMICI CURIAE, AMERICAN MOSQUITO CONTROL ASSOCIATION AND AQUATIC COMMITTEE, IN SUPPORT OF THEIR MEMORANDUM OF LAW and accompanying exhibits** by first class United States mail properly addressed to each of the following counsel:

KARL S. COPLAN
Pace Environmental Law Clinic, Inc.
78 North Broadway
White Plains, NY 10603

JOEL R. KUPFERMAN
New York Environmental Law and Justice Project
351 Broadway, 4th Floor
New York, NY 10013

MARK McINTYRE
Office of Corporation Counsel, City of New York
100 Church Street
New York, NY 10007

ANN E. SCHOFIELD
Attorney for Amicus American Mosquito Control Association

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