Reply Brief of Plaintiff-Appellant

Plaintiffs-Appellants, No Spray Coalition et al., (hereinafter "Plaintiffs" or "Appellants") submit this brief in reply to the brief of the Defendants-Appellees, New York City et al., (hereinafter "Defendants" or "Appellees"), dated February 2, 2001, and in further support of this appeal.

Preliminary Statement

The Plaintiffs seek to enjoin the haphazard, dangerous and illegal misuse of pesticides by the defendants in the City of New York. The original action was based on the violation of the Clean Water Act (CWA) § 301, 33 U.S.C. § 1311, the Resource Conservation and Recovery Act, (RCRA), § 3005, 42 U.S.C. § 6925 and § 7002 (a)(1)(B), 42 U.S.C. 6972 (a)(1)(B), the State Environmental Quality Review Act (SEQRA) and the City Environmental Quality Review law (CEQR).[1] The current appeal addresses only the Defendants' violations of RCRA since the CWA case has remained in the Southern District Court of New York and all parties are proceeding with discovery. Defendants' in their brief, fail to recognize (or even address) that the District Court's denial of a preliminary injunction was premised on its dismissal of Plaintiff's citizens suit under RCRA, and that this dismissal should be considered de novo by this Court on appeal. The District Court's denial of preliminary relief was based on its determination that the spraying was within the FIFRA approved class of uses and therefore not subject to RCRA, not on any analysis of the merits of the preliminary injunction nor the merits of the RCRA claims.

[1] The Plaintiffs brought suit under the citizen suit provisions of the CWA and RCRA. CWA § 505(a), 33 U.S.C. 1365(a) and RCRA § 7002 (a)(1)(A) and (B), 42 U.S.C. 6972, (a)(1)(A) and (B).

This appeal, therefore, turns on the critical questions of (1) whether abuse and misuse of pesticides, including deposition over people, food, buildings and streets constitutes a RCRA violation enforceable in a citizens suit notwithstanding the regulation of the pesticides by FIFRA and (2) and whether a law that contains no private action extinguishes the private rights of actions and remedies that exist in other laws and potentially apply to the same class of harmful activities.

Although Defendants devote substantial portions of their lengthy brief to a discussion of Plaintiffs' CWA claims, these issues are not before the Court. The CWA claims remain before the District Court, and Plaintiffs do not rely on these claims in support of their appeal of denial of a preliminary injunction and dismissal of the RCRA claims. Defendants also make reference to a chimerical "prohibition on citizen suits in FIFRA." (Brief of Defendants-Appellees at 54). In fact , plaintiffs have never relied on any claim of a citizen suit directly under FIFRA, and base their complaint and request for a preliminary injunction on RCRA, not on the violations of FIFRA. FIFRA also has no prohibition on citizens suits, it simply is not the law that provides one. FIFRA regulates the use of pesticides; but what is at issue in this case is the misuse, which is egregious and outside the scope of FIFRA-regulated uses.

Reply Statement of the Case

The Defendants-Appellees' Brief has misstated several factors that should be considered on Plaintiffs' application for a preliminary injunction, including the effectiveness, safety and legality of the pesticides Malathion and Anvil used in New York City's campaign against West Nile Virus. For example, although the City asserts that its

extensive spraying of the pesticide Malathion in 1999 limited the spread of West Nile Virus, the proclaimed decline in the cases of West Nile Virus in 1999 in fact came before the start of the spray campaign. The Center for Disease Control's (CDC) own report documents this and it is incorrect to attribute this conclusion on the effectiveness of spraying to the CDC. (A-50).

The City's claim that the pesticides were 90% effective in reducing mosquito populations was also not supported by any evidence, and was in fact contradicted by the Plaintiffs' witnesses. (A-1208-09). The reliance on the CDC's opinions and recommendations is also irrelevant, since the CDC cannot summarily exempt New York City from the requirements of RCRA.

The Defendants also fail to note serious shortfalls in notice in their assertion that all spraying was preceded by 48 hours of public notice. The unopposed testimony of Deborah Schwartz was that spraying took place in her neighborhood despite same-day assurances from the City's own hotline that none was scheduled. (A-1225). Clare Feltham testified that spraying began in her neighborhood well before the publicly announced hour, causing her to be doused in the face with pesticides. (A-1219). Finally the Defendant Neal Cohen himself admitted that fields of young children at sports practice on Staten Island had been sprayed with pesticides by helicopter. (A-1259).

Defendants' claim that no fatalities from pyrethroid pesticides resulted in the most recent two years for which data was available, when in fact the Defendants' own Dr. Hoffman admitted, when confronted with the very study he claimed to rely on, that two deaths were associated with exposure to pyrethroids in that time period, as well as 15 major health cases. (A-1352, A-1150). In fact Dr. Hoffman conceded that ultra low

volume pesticide application delivers an internal dose to by-standers and is more toxic than non-vaporous application. (A-1349, A-1357.) Ultra low volume application is also a high potency application, using high concentrations of the pesticides being applied. See id. The so-called "mild symptoms" that resulted from pesticides use certainly does not include Clare Feltham's on-going loss of her voice. While Dr. Hoffman stated that pesticide poisonings were followed up on (A-1338), Dr. Neal Cohen conceded that they were not tracked (A-1261).[2]

Finally the legality of the spray operations is misstated for the Court of Appeals. Defendants state that spray maps used by drivers contained 100 foot buffers, critical to prevent the creation of an imminent and substantial endangerment to aquatic wild-life. In fact the maps provided by the City of New York show that no such buffers were marked. (A-920, 926, 991.) These spray routes, if followed, would put trucks and all-terrain vehicles within less than 100 feet of the Hudson and East Rivers, Jerome Park Reservoir, Eastchester Bay and Long Island Sound.

Argument

I. THE LABELS OF PESTICIDES ARE THE SOLE PERMITTED USES OF THOSE CHEMICALS .

It was a clear error of law for the District Court to fail to recognize that FIFRA labels set forth the only legal uses and are prohibitions on any other use. This error of law, critical in the denial of the preliminary injunction and decision on the RCRA claims, is subject to de novo review. See Malkentzos v. DeBuono, 102 F.3d 50, 54 (2nd Cir.

[2] The Defendants inaccurately characterized the testimony of Dr. Robert Simon as without any relevant support. In fact this Plaintiffs' witness has provided the court with extensive documentation of his research

1996). The District Court failed to recognize this important principle in the hearing. During the hearing, Plaintiffs' expert pesticide applicator, Steven Greenspan, stated that the label did not allow use over concrete in New York City's urban areas because this location wasn't stated on the label. (A-1228). The court responded "That is not precluded by the label, however?" Id. Defendants-Appellees repeat this error seeking to argue that there was no use in violation of the FIFRA labels for Anvil and Malathion, "since none of the labels for the sprays used specifically prohibited any manner of application other than that specified in its label." Brief of Defendants-Appellees at 56.

In fact, FIFRA itself defines "to use any registered pesticide in a manner inconsistent with its labeling" as "to use any registered pesticide in a manner not permitted by the labeling." 7 U.S.C. § 136 (ee). FIFRA labels specify permitted uses, not prohibited uses. See U.S. v. Saul, 955 F.Supp. 1076, 1077 (E.D. Ark. 1996). Any other use is therefore prohibited.

As the court in U.S. v. Saul noted, "Furadan 4F is a restricted use pesticide. See 7 U.S.C. § 136a (d). Its use is restricted to only those uses specifically permitted by its approved label and supplement." 955 F.Supp. at 1077. The defendants insistence that no violation took place since "none of the labels for the sprays used specifically prohibited any manner of application other than that specified in its label" fails to recognize that the label-specified uses *are* a prohibition on other uses and is in direct conflict with case-law and the EPA's own interpretation. In fact the letter from the EPA that the Defendants cite to defeats the very point they use it in support of,

> In enforcement terms, this interpretation means that an applicator may be presumed to be in violation of the label if…the application is not directed

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into the toxicity of pesticides. (A-622-633.) His unopposed testimony exposes the toxicity of Anvil, especially when coupled with its synergist, piperonyl butoxide. (A-1188.)

toward shrubbery or vegetation at the specific sites listed on the label.

Letter from EPA to DEC, A-538. Of course, this is exactly what Defendants here have done, and threaten to do again, as videotape evidence conclusively shows Defendants' spray trucks spraying crowds of people on urban streets with no vegetation or shrubbery in sight. Plaintiffs' Hearing Exhibit A.

Not only is it illegal to target a pest that is not specified, but the use of a pesticide in locations not specified is also a violation of FIFRA. In George's Pest Control Service v. United States Environmental Protection Agency the court found the defendant to have used pesticides outside of the labeled uses when he applied it to walls of a termite infested home instead of merely cracks in walls. The label had specified application only into "cracks and crevices." 572 F.2d 204, 205 (9th Cir. 1977). The Environmental Protection Agency has likewise recognized that the labels provide the sole FIFRA regulated and permitted uses of the product. See the decision of the Environmental Appeals Board in In Re: Richard Rogness and Presto-X Company, 7 E.A.D. 235, 1997 W.L. 406529. In that case, the pesticide label did not specify its use for electrical appliances or furniture and therefore the defendants' use on them was illegal. See id.

The spraying of the pesticide Anvil 10+10 in 2000 therefore was well outside the uses contemplated by its FIFRA label. The label of Anvil states that it is to be used in "outdoor residential and recreation areas where adult mosquitoes are present in annoying numbers in vegetation surrounding parks, woodlands, swamps, marshes overgrown areas and golf courses." (A-55.) As stated in George's Pest Control, the use areas listed are the only areas in which the pesticides can be used, not merely the suggested ones. While some discrete sections of New York City meet the criteria of the label, most of its urban

streets do not. As the startling video taped evidence shows, pesticides were used over people and food stands in urban neighborhoods where no vegetation was even present. See Plaintiffs' Hearing Exhibit A.

Defendants violations of the FIFRA labeling for these pesticides are not merely technical, but substantial violations of the category of uses. The defendants state "even if the spray was no longer airborne and settled in solid, cement, structures or objects, if it was still capable of killing mosquitoes there was no 'disposal' of the spray." See Defendants-Appellees' Brief at 50. This statement belies the Defendants' misunderstanding of FIFRA, if it anticipated covering such things with pesticides it should have chosen a pesticide that was approved for those locations and items.

II. DEFENDANTS' ILLEGAL DISCHARGE OF PESTICIDES CONSTITUTES THE DISPOSAL OF A SOLID AND HAZARDOUS WASTE SUBJECT TO RCRA REGULATION AND ABATEMENT.

As Defendants' discharge of pesticides into crowded, paved, unvegetated urban streets falls completely outside the use for which these pesticides are labeled under RCRA, they do not serve any legally useful purpose and must be considered "abandoned materials" subject to regulation as a solid waste under RCRA. See generally Connecticut Coastal Fishermen's Association v. Remington, 989 F.2d 1305 (2d Cir. 1993).

The Defendants seek to fit their pesticide spraying within the exception to RCRA that bars prosecution for disposal of waste based on the retention or recycling of solid wastes for re-use. In American Mining Congress v. U.S. EPA the court found that Congress did not intend to target with RCRA materials destined for immediate re-use or recycling. 824 F.2d 1177, 1189 (D.C. Cir. 1987). In Association of Battery Recyclers, Inc. v. U.S. EPA the court also found that stored wastes need not be used for their

intended purposes immediately to fit within this exception to RCRA's definition of disposal. 208 F.3d 1047, 1052 (D.C. Cir. 2000). Defendants' misapplication of pesticides is entirely unlike the storage of materials for re-use, however, as Defendants clearly have no intention of recovering these pesticides for any useful purpose. When pesticides are sprayed in unapproved locations, drift, and are deposited on people, food, cars and concrete they are no longer serving their intended purpose. Mosquitoes do not inhabit or breed on concrete surfaces and even if they did Anvil is to be used only over vegetated areas. Thus, the exceptions to RCRA are entirely inapplicable to pesticides that have landed in places where the only organisms they can harm, people for example, are not the FIFRA approved targets.[3]

The case South Florida Water Management District v. Montalvo is similarly inapplicable and Defendants' reliance on it is misplaced. 84 F.3d 402 (11th Cir. 1996). Montalvo deals entirely with contamination at a spraying company's spraying staging area. Chemicals were mixed, stored and spilled near the hangers. The Defendants were landowners who contracted for the spraying services on farmland. See id. at 404. The court rejected the landowners' responsibility for contamination at the sprayer company's site since the contracts only called for application of pesticides to the defendants' farms. See id. at 407. New York City is not facing RCRA liability for contamination at Clark

[3]The EPA letters the Defendants cite to stand only for the proposition that pesticides deposited on surfaces as a result of their intended and legal uses are not solid wastes. See Defendants-Appellees' Brief at 52. In fact one states "Soil, which is contaminated with unused [pesticide] would contain a hazardous waste." United States Environmental Protection Agency, "Soil Contaminated with Pesticide," Apr. 8, 1987, available in Lexis, Environmental Library, Guidance Document File, ELI Number AD-1572, A-547. The letters stand only for the unchallenged idea that pesticides deposited where their label allows them to be are not within RCRA's purview. To the extent that the letters suggest that pesticides deposited incident to use but after their target organism have been reached are not solid or hazardous wastes the letters would conflict with Connecticut Fishermen's Association, Inc. v. Remington Arms Co. Inc., 989 F.2d 1305 (2d Cir. 1993). That case clearly rejects any permissible disposal of chemicals once their intended use has been served.

Mosquito Control's staging and parking areas. It is facing liability for disposal exactly where it asked Clark to spray, the urban streets of the City. To state that "contracting for aerial spraying of insecticide did not constitute arranging for the disposal of pesticide" misstates the law of that case and RCRA. Defendants-Appellees' Brief at 50.

Defendants argument also contradicts the holding in United States v. Tropical Fruit, S.E. 96 F. Supp. 2d 71 (D.P.R. 2000). That case held that the FIFRA-governed spraying of pesticides could constitute a "release" under the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA) where the spray drifted outside the area for which the product was labeled. The CERCLA exemption of pesticide application only meant that "Congress intended that no person be permitted to recover response costs or damages attributable to the actual use of a registered pesticide at its place of use." It did not exempt parties from CERCLA liability for the application of pesticides "in a manner which allowed for drift in contravention of the FIFRA labeling requirements." Id. at 88, 90. In other words, the exception only applies to the proper and labeled uses of pesticides. The misuse of pesticides, or contracting for spraying that results in the misuse, can be violation of another statute; in this case disposal under RCRA § 7002 (a)(1)(A)-(B).

Since there are no loopholes for the pesticide spraying to escape a RCRA analysis the Court should have analyzed the lack of a hazardous waste disposal permit required by RCRA Section 3005, 42 U.S.C. § 6925, and the merits of the imminent and substantial endangerment claim. In fact, the District Court admitted that use beyond the FIFRA regulated ones would subject the spraying to RCRA, "It is no doubt that the use of a pesticide for a purpose or in a manner well beyond that for which it was approved could

result in a violation of either the Clean Water Act or RCRA." A-1385. Since the above case-law clearly demonstrate that this spraying was well beyond the FIFRA approved uses, this analysis should have taken place and a preliminary injunction should have been granted. The court's failure to understand the legal import of the labels was critical in its refusal to conduct such an analysis.

The Plaintiffs presented sound evidence which established that an imminent and substantial endangerment to human health and the environment was created by the disposal of a solid waste. § 7002 (a)(1)(B). Video evidence depicted spraying in Harlem with hundreds of people on the street, food stands uncovered, and little or no warning taking place. See Video, Plainitiffs' Hearing Exhibit A. In 1999, malathion, toxic to fish as stated on its label, was found in and responsible for fish kills in Clove Lakes on Staten Island. See A-59. Testimony and statements of dozens of impacted persons attested to the toxicity of these pesticides as did the testimony of Dr. Robert Simon at the September 18, 2000 hearing. See A-135, 156, 1193.

The pesticides, as used, are within the definition of solid waste. They simply need to be a "liquid" and to have been "discarded." RCRA § 1004 (27), 42 U.S.C. § 6903 (27). Pesticides in droplet form are liquid and when used improperly are discarded. In fact not only is this Court's holding in Connecticut Coastal Fisherman's Association directly controlling in this matter, but the disposal taking place in the present matter, is of a more serious nature. In that case the legal and rational use of lead shot was to shoot clay pigeons. The disposal of lead shot and targets was incident to the use. 989 F.2d 1305, 1309 (2nd Cir. 1993.) In the present matter, the use that is taking place is largely illegal. Disposal results immediately upon spraying in inappropriate locations.

The spraying is clearly within the statutory definition of disposal, which includes "discharge, deposit…or placing any solid waste or hazardous into or an any land or water so that such solid waste or hazardous waste or any constituent thereof may enter the environment or be emitted into the air or discharged into any waters, including ground waters." RCRA § 1004 (3), 42 U.S.C. § 6903 (3). The definition of solid waste also contains several exempted activities, including those subject to a CWA permit. See § 1004(27). If Congress intended for there to be a FIFRA exception as well they easily could have inserted this.

The misuse resulted in the disposal of pesticides that requires a RCRA permit. RCRA requires a permit for "each person owning or operating an existing facility or planning to construct a new facility for treatment, storage, or disposal of hazardous wastes…" RCRA § 3005(a), 42 U.S.C. 6925 (a). Failing to seek such a permit is actionable under the citizen suit provision which provides that a civil action may be commenced against any person "who is alleged to be in violation of any permit, standard, regulation, condition, requirement, prohibition, or order which has become effective pursuant to this chapter." RCRA § 7002 (a)(1)(A), 42 U.S.C. 6972 (a)(1)(A). As discussed above, disposal is taking place. Not only are pesticides solid waste, but when misused they are hazardous waste. The labels of the pesticides themselves speak to this nature, "Hazards to Humans & Domestic Animals: Harmful by swallowing, inhalation or skin contact. Avoid breathing spray mist. Avoid contact with skin. Do not contaminate food products." Fyfanon Label, A-52. The Anvil label states similarly, "Harmful if absorbed through the skin…Avoid Contact with skin, eyes or clothing…Avoid contamination of food and feedstuffs." A-55. In fact the manner in which the City has

chosen to conduct its spraying, as depicted in the video evidence, engenders just the hazards the labels warn of.

III. FIFRA'S LACK OF A CITIZEN SUIT PROVISION DOES NOT INDICATE CONGRESS' INTENT TO ELIMINATE ALL PRIVATE RIGHTS OF ACTION THAT ALSO CONCERN FIFRA'S SUBJECT MATTER AS RCRA'S CITIZEN SUIT PROVISION WAS ENACTED AS A BROAD AND FAR-REACHING STATUTORY COMMON LAW NUISANCE ACTION TWELVE YEARS AFTER FIFRA.

RCRA's citizen suit provision was enacted to give citizens enforcement power co-extensive with the government's enforcement authority embodied in RCRA § 7003. See H.R. Rep. No. 2867, 98th Cong., 2d Sess. 2 (1984), reprinted in 1984 U.S.C.C.A.N. 3221, Legislative History at 5612, See also Plaintiffs-Appellants Brief at 17. Although Congress specifically included limitations on the citizens abatement action for an imminent and substantial endangerment, such as for ongoing CERCLA clean-ups, no such limitation exists for activities also subject to FIFRA regulation. See RCRA § 7002(b)(2)(B), 42 U.S.C. § 6972 (b)(2)(B). As the Defendants correctly note the CERCLA also specifically exempts application of pesticides registered under FIFRA.[4] Clearly Congress could have exempted pesticide application and disposal from RCRA's citizen suit provision if it had intended to.

When a law governs a type of activity and does not contain a citizen suit provision, other remedies remain available unless specifically or implicitly precluded. See Volunteers of America of Western New York v. Heinrich, 90 F. Supp. 2d 252 (W.D. N.Y. 2000) (hereinafter "Volunteers of America"). In

[4] See CERCLA § 107 (i), 42 U.S.C. § 9607 (i), Application of a Registered Pesticide Product. This clause states "[n]o person…may recover under the authority of this section for any response costs or damages resulting from the application of a pesticide product registered under the Federal, Insecticide, Fungicide and Rodenticide Act."

analyzing CERCLA's impact on other remedies the court stated "CERCLA does not prevent a plaintiff from recovery damages under state law that are not duplicative of the damages it recovers under CERCLA." Id. at 257, 258. The Second Circuit Court of Appeals reached the same conclusion in Bedford Affiliates v. Sills; that CERCLA pre-empted state law claims only as they could be addressed under CERCLA. 156 F.3d 416, 426 (2nd Cir. 1998). For example, to the extent that common law remedies do not overlap with Congress' regulatory scheme they remain viable. See Volunteers of America, 90 F.Supp.2d at 257.

When the statute that governs a class of activities contains no private cause of action, the result should be no different. For example in Volunteers for America the court sustained a common law cause of action for indemnification even though New York's Superfund Law, Article 27, title 13 of the New York State Environmental Conservation Law (ECL), had no private cause of action. The court stated

> to the extent that plaintiffs seek common law contribution or indemnification for damages which are available under CERCLA, the common law claim is preempted. However, to the extent plaintiff seeks common law indemnification or contribution for damages not recoverable under CERCLA (such as response costs for contamination which may be characterized as "hazardous waste" by New York State under ECL § 27-0900 which is not classified by the EPA as a "hazardous waste" under CERCLA), the claim for indemnification is not preempted. Id. at 259-60.

Defendants rely heavily on the lack of a citizen suit provision in FIFRA to argue against the availability of relief under the RCRA citizens suit, as did the District Court. What this argument ignores is that fact that courts routinely look to violations of statutory standards, including statutes without a private right to

the relief sought, in considering the availability of relief for abatement of a nuisance. This Court has similarly recognized that injunctive relief to remediate environmental hazards can be established under a common law nuisance theory by showing violations of other statutory standards, despite the absence of available injunctive relief under CERCLA. State of New York v. Shore Realty Corp., 759 F.2d 1032 (2d Cir. 1985); see also Doralee Estates v. Cities Service Oil Co., 569 F.2d 716 (2d Cir. 1977) (upholding private punitive damages sounding in nuisance for violations of state environmental standards not themselves subject to private right of action).

Plaintiffs here are similarly entitled to relief under RCRA for Defendants' discharge of pesticides in violation of the environmental standards of FIFRA. The analogy to private nuisance actions for violation of statutory environmental standards is particularly apt, as the "imminent and substantial endangerment" abatement action embodied in RCRA section 7002(a)(1)(B) was explicitly intended to codify common law nuisance remedies. See Middlesex County Board of Chosen Freeholders v. State of New Jersey, 645 F.Supp. 715, 720 (D.N.J. 1986); S. Rep. No. 96-175 at p. 5 (1980), reprinted in 1980 U.S.C.C.A.N. at p. 5023 (stating that identical language of RCRA § 7003 was meant to incorporate common law nuisance remedies).

Affording Plaintiffs a remedy under RCRA section 7002 is not, as the District Court would have it, an "end run" around the lack of a FIFRA citizens suit remedy.[5] Obviously, the showing required to establish an actionable

[5] Even if the two statutory provisions were considered to be inconsistent, however, the RCRA imminent and substantial endangerment remedy should prevail, as it was adopted well after the enactment of FIFRA.

imminent and substantial endangerment goes well beyond simply showing a violation of a FIFRA label, but requires the affirmative showing, which Plaintiffs have made here, that the challenged practice causes an endangerment to health or the environment. This showing Plaintiffs have undisputedly made with eyewitness and videotape evidence of pesticides sprayed directly onto people, and the consequent health impacts.

The District Court's refusal to consider this evidence based on its determination that FIFRA precluded any remedy under the RCRA citizens suit is in error, and should be reversed.

Conclusion

The District Court's denial of a preliminary injunction and dismissal of Plaintiffs' RCRA claims was clear error and should be reversed. The Court of Appeals should find that the misuse of pesticides is not immune to RCRA's broad and far-reaching citizen suit provision which targets just this type of dangerous and haphazard disposal of pesticides.

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Respectfully Submitted,

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