Has the District considered provisions of the Clean Water Act in its decision to spray?

The District states it believes that it is in full compliance with the Clean Water Act. The District is being disingenuous. Contrary to the District's response, the use of adulticides over waterways violates the Clean Water Act.

While the District has a NPDES permit for its larvicide program and the application of larvicide to the waters of the United States, the District's NPDES does not cover the use of adulticides that are discharged into the waters of the United States. More specificsponally the active ingredients pyrethrins and piperonyl butoxide are not covered by the District's NPDES Permit. (See WDID 5a57NP00016; see also Statewide General NPDES Permit No. CAG990004.)

The Clean Water Act, 33 U.S.C. §§ 1251-1387, requires that government agencies obtain an NPDES permit before discharging pollutants from any "point source" into navigable waters of the United States. (33 U.S.C. § 1323(a).) This type of pollution is commonly referred to as "point source pollution." Absent the required permit, such discharge is unlawful. (*League of Wilderness Defenders v. Forsgren*, 309 F.3d 1181, 1183 (9th Cir. 2004).)

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).)

The District uses Evergreen 60-6 and Pyrenone 25-5, which contain pyrethrins and piperonyl butoxide. The label for EC 60-6 states:

> This pesticide is highly toxic to fish. For terrestrial uses, do not apply directly to water, or to areas where surface water is present or to intertidal areas below the high water mark. Drift from treated areas may be hazardous to organisms in adjacent aquatic sites.

Any discharge of pyrethrins and piperonyl butoxide by the District into the waters would be "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).)

"It 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. 1088,

1101 (S.D.N.Y.) *aff'd* 751 F. Supp. 1088 (S.D.N.Y. 1990), 940 F.2d 649 (2d Cir. 1991).) In that case, the City of New York violated the CWA by injecting chlorine and alum into a water tunnel that 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.

In *Headwaters, Inc. v. Talent Irrigation District* (9th Cir. 2001) 243 F.3d 526, 531, the court stated: "[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. 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.) Thus, 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).)

Section 502(14) of the CWA 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).) The Ninth Circuit has held that the aerial spraying of pesticides from an airplane is a point source and requires an NDPES permit if the pesticide is sprayed over the waters of the United States. (*League of Wilderness*

Defenders, 309 F.3d at 1190.)

In *League of Wilderness Defenders v. Forsgren,* the court found that an airplane fitted with tanks and mechanical spraying apparatus is a "point source." In that case, 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. (*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, airplanes spraying pesticides over and into water bodies of Sacramento County are point sources and thus regulated by the CWA. Thus, it is undisputed that within the Ninth Circuit, an airplane fitted with spraying devices is a point source under the CWA.

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*. (1985) 474 U.S. 121, 132. In *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Eng'rs* (2001) 531 U.S. 159 (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.)

It is without dispute that "navigable waters of the United States," within the meaning of CWA § 502(7), are located within the areas indicated by the District as the aerial spray zone (and possibly the ground area). Tributaries, marshlands, and wetlands are hydrologically connected to waters of the United States (in this case the American River and Sacramento River) are also located in areas that the District has identified as within the aerial spray zone. The breadth and size of the spray zones almost assures that the pesticide will be discharged into waterways that will be classified as waters of the United States.

Since the CWA is a strict liability statute, even if the District does not intend to spray pesticide directly over and into waters of the United States it is immaterial in determining liability under the Act. (See *U.S. v. Fort Pierre* (D.S.D. 1983) 580 F. Supp. 1036, 1041 *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).) As the District has hired a private company to conduct the aerial spraying, Vector Disease Control, Inc., the private company and/or employees applying the pesticide may also be held strictly liable for any and all violations of the CWA associated the District's planned aerial application.

These arguments are the subject of a case in New York City where the federal district court held that the City may be in violation of the Clean Water Act if the spraying is over the waterways. The District may attempt to argue that spray opponents tried these arguments in court and lost. This is simply not true, as the spray opponents were denied a temporary restraining order, which the federal judge noted that to grant a temporary restraining order would be extraordinary relief. The challenge to the District's violation of the Clean Water Act will continue.