

VIRGINIA:

IN THE CIRCUIT COURT OF SURRY COUNTY

SANDRA L. WYATT, et al.)	
)	
Plaintiffs,)	
)	Case No. CL06000069-00
v.)	
)	June 18, 2007
SUSSEX SURRY, LLC, et al.)	
)	
Defendants.)	

DEFENDANT SYNAGRO CENTRAL, INC.’S AND SUSSEX SURRY, LLC’S SUPPLEMENTAL BRIEF IN SUPPORT OF DEMURRER AND MOTION TO DISMISS

Defendant Synagro Central, Inc. (Synagro) and Sussex Surry, LLC (Sussex Surry) jointly submit this supplemental brief in support of their demurrers and motions to dismiss Plaintiffs’ Complaint.

I. VIRGINIA CODE SECTION 32.1-164.5(G) REQUIRING CONTRACTOR FINANCIAL RESPONSIBILITY DOES NOT SAVE PLAINTIFFS’ CLAIM

During oral argument on the demurrer and motion to dismiss, Plaintiffs for the first time raised the issue of the applicability of Section 32.1-164.5(G) of the Virginia Code. This provision states in full:

All persons holding or applying for a permit authorizing the land application of sewage sludge shall provide to the Department written evidence of financial responsibility, which shall be available to pay claims for cleanup costs, personal injury and property damages resulting from the transportation, storage or land application of sewage sludge. The Board of Health shall, by regulation, establish and prescribe mechanisms for meeting the financial responsibility requirements of this section.

Va. Code. Ann. § 32.1-164.5(G).

Plaintiffs now focus their defense of their right to sue in contravention of the Virginia biosolids program on this paragraph, one of the hundreds of code and regulatory provisions defining how land application occurs in Virginia. Plaintiffs suggest that this provision, which

merely requires contractors to provide evidence that they have the financial means to address certain claims related to accidents in the transportation and application of biosolids, sanctions their Complaint. Synagro acknowledges that there might be circumstances where biosolids applicators would be liable for costs and damages – for example, in suits involving truck spills, improper application or a breach of containment facilities. However, the General Assembly’s decision to require financial responsibility for injuries or damages caused by accidents or actual negligence does not support Plaintiffs’ argument that their lawsuit, which challenges legislative and executive decisions approving and regulating land application, can somehow be harmonized with the Virginia biosolids program.

The Virginia Department of Health (VDH) regulations implementing Section 32.1-164.5(G), which became effective in February 2007, provide guidance on the intent of this provision.¹ VDH’s summary of the implementing regulations, 12 V.A.C. 5-585-310, states that one of the purposes of the new regulations is to “hold permit holders responsible for the cleanup and removal of biosolids spilled during transport to the land application site or to and from a storage facility.” 23 Va. Reg. Regs. 17 (Feb. 9, 2007) (Ex. A). VDH’s interpretation of Section 32.1-164.5(G) has not been contradicted by the General Assembly, and does not contemplate that land appliers must provide financial assurance against or be subject to tort lawsuits alleging that biosolids cannot be safely land applied. Similarly, the narrow purpose of Section 32.1-164.5(G) – to insure that contractors can clean up spills and repair actual damages – is consistent with the surrounding code provisions of Section 164.5, which impose numerous state requirements for the

¹ During argument, counsel for Synagro stated that Section 32.1-164.5(G) became effective February, 2007. This statement was not completely accurate – the implementing regulations for Section 32.1-164.5(G) became effective February 2007.

conduct of land application (further elaborated on in the Biosolids Use Regulations (VBUR)) that occupy the field.

In re Prins v. Hovatter Farms Partnership, 1997 Va. Cir. LEXIS 658 (Loudoun 1997), while not controlling here, illustrates the type of claim likely envisioned by Section 32.1-164.5(G) that might not be precluded by VBUR or the other provisions of Section 32.1-164.5. The *Prins* plaintiffs brought suit for injunctive and compensatory relief based on allegations that “defendants’ application of sludge to the property ran over onto the complainants’ properties to the complainants’ detriment.” *In re Prins*, 1997 Va. Cir. LEXIS 658, 1. The allegations thus resulted “from the transportation, storage or land application of sewage sludge.” Va. Code Ann. § 32.1-164.5(G). Because the plaintiffs’ alleged injuries resulted directly from the transportation or application of biosolids, the claim in *Prins* would likely not be precluded by VBUR or Section 32.1-164.5.

Unlike the *Prins* plaintiffs, the Wyatt Plaintiffs have not alleged that biosolids were actually applied to their land, or that their injuries resulted directly from improper land application or transportation of biosolids. Rather, Plaintiffs’ Complaint is grounded in the premise that biosolids are inherently unsafe and that they are entitled to a jury award to countermand the decisions of the General Assembly and VDH to allow biosolids recycling. *See, e.g.*, Compl. ¶ 30 (any land application of biosolids “endangers life or health”).

To the extent the General Assembly contemplates any private lawsuits regarding land application, Plaintiffs’ lawsuit is not within the scope of that exception. If the General Assembly has recognized a limited right under Section 32.1-164.5(G) to sue contractors who improperly transport, store or land apply biosolids, such an exception in an area of comprehensive legislation represents an exclusion of all other claims not defined in that exception. *See Dep’t of Corr. v.*

Brown, 259 Va. 697, 704-05, 529 S.E.2d 96 (2000) (“[W]here a statute speaks in specific terms, an implication arises that omitted terms were not intended to be included within the scope of the statute.”). Moreover, any such “savings clause” preserving a limited right to sue does not displace the requirement that Plaintiffs’ Complaint be analyzed for whether it conflicts with the Commonwealth’s decision to allow and encourage the land application of biosolids performed pursuant to Virginia requirements. *See, e.g., Aetna Health, Inc. v. Davila*, 542 U.S. 200, 216-17 (2004) (the existence of a savings clause does not disrupt the normal conflict preemption analysis); *Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 871 (2000) (the presence of a savings clause did not preclude “the application of ordinary conflict preemption principles”).

II. PLAINTIFFS SEEK TO HAVE THE COURT USURP THE DECISIONS OF THE LEGISLATURE AND EXECUTIVE TO ALLOW LAND APPLICATION

Through comprehensive laws and regulations, Virginia’s legislative and executive branches have defined the standard of care for the land application of biosolids. Plaintiffs have not alleged any violations of those laws or the regulations implementing them; nonetheless they claim that Synagro and Sussex Surry have acted negligently, causing them injury.

To succeed in a negligence claim, a party must prove by a preponderance of the evidence that the defendant breached its duty to exercise that degree of care to be expected from a reasonably prudent person under the same or similar conditions to avoid causing injury to another. *Griffin v. Shively*, 227 Va. 317, 321, 315 S.E.2d 210, 212-13 (1984). Ordinarily, it is a question for the jury to determine whether or not defendant exercised the requisite degree of care. Plaintiffs have alleged no facts upon which a jury could reach that question; instead they are attempting to change the regulatory scheme established by law for the use of biosolids.

The legislature and the VDH have prescribed detailed requirements for handling and applying biosolids. The legislature has created the standard of care in this field. An operator

land-applying biosolids acts reasonably and prudently when it conforms its activities to the requirements of the law and regulations. Thus, to state a claim for negligence based on biosolids application, a plaintiff must either allege facts showing that the operator failed to comply with Virginia's comprehensive biosolids laws and regulations, or show that there were particular conditions, known to the operator, requiring a greater standard of care under the circumstances.

Plaintiffs in this case have not done that. Instead, they have alleged that biosolids are inherently unsafe and that Plaintiffs have been injured by their application. Compl. ¶ 106. Plaintiffs' theory would therefore make biosolids applicators subject to strict liability, regardless of their compliance with established rules and procedures.

Were the Court to adopt such a standard of liability, it would invade the province of the legislature and violates the separation of power requirements set forth in the Virginia Constitution. Va. Const. art. I § 5 (“[T]he legislative, executive, and judicial departments of the Commonwealth should be separate and distinct.”); Va. Const. art. III § 1 (“The legislative, executive, and judicial departments shall be separate and distinct, so that none exercise the powers properly belonging to the others”); *Va. Mun. Group Self-Insurance Ass’n v. Crawford*, 66 Va. Cir. 236, 249 (Fairfax 2004) (“The constitutional function of the judiciary is to enforce rights created by the legislature, not to create additional rights by way of judicial fiat.”). If strict liability were applied in the field of biosolids, applicators would have no means of determining a standard of care but would face potential strict liability whenever they engaged in their permitted activity. Indeed, it is hard to imagine anything that would be more detrimental to the functioning of a program that has been approved and created by the General Assembly.

For these reasons, Synagro submits that Plaintiffs here seek improperly to have the Court invade the province of the legislature by creating a standard of care not embodied in the Code of

Virginia. In order to state a claim for negligence, Plaintiffs must allege facts showing that Synagro has breached its duty to exercise the proper standard of care – i.e., the law and regulations governing land application. They have not done so.

Plaintiffs' true complaint is that the VBUR are inadequate to protect health and safety. They allege numerous "facts" and theories about the safety of biosolids. However, any remedy they may have against VBUR lies in the Virginia Administrative Process Act. Va. Code Ann. §§ 2.2-4000 – 4033. These provisions create the sole mechanism for Plaintiffs' challenge to agency regulations like VBUR. *See Va. Bd. of Medicine v. Va. Physical Therapy Ass'n.*, 13 Va. App. 458, 466, 413 S.E.2d 59, 64 (Ct. App. 1991) (noting that "the Board has consented to and may be sued only for its promulgation of a rule") *aff'd.*, 245 Va. 125, 427 S.E.2d 183 (1993).

By seeking to have this Court adopt their standard of care, Plaintiffs would have the Court re-write laws and regulations duly adopted by the legislative and executive branches. Virginia courts consistently have rejected the role of legislators. *See Boynton v. Kilgore*, 271 Va. 220, 230, 623 S.E.2d 922, 927 (2006) ("[C]ourts are not permitted to rewrite statutes.") (citing *Anderson v. Commonwealth*, 182 Va. 560, 566, 29 S.E. 2d 838, 841 (1944)); *Jackson v. Fid. & Deposit Co.*, 269 Va. 303, 313, 608 S.E.2d 901, 906 (2005) (rejecting an argument that "would require the Court to add an exception to the statute which the General Assembly has not seen fit to adopt"). Plaintiffs' Complaint seeks to accomplish what biosolids opponents failed to achieve in the General Assembly, and it must be dismissed.

III. THE RIGHT TO FARM ACT BARS PLAINTIFFS' NUISANCE CLAIM

The Complaint is also flawed in significant part because of the protections afforded biosolids by the Right to Farm Act (RFA). Va. Code Ann. § 3.1-22.29. On close scrutiny, Plaintiffs have not pled a case that allows their nuisance count to go forward. The specific provision of the RFA that the Court must interpret states:

No agricultural operation or any of its appurtenances shall be or become a nuisance, private or public, if such operations are conducted in accordance with existing best management practices and comply with existing laws and regulations of the Commonwealth. The provisions of this section shall not apply whenever a nuisance results from the negligent or improper operation of any such agricultural operation or its appurtenances.

Va. Code Ann. § 3.1-22.29.A.²

Under the first clause, if agricultural operations are “conducted in accordance with existing best management practices and comply with existing laws and regulations,” they cannot be considered a nuisance. The second clause provides that the bar on nuisance claims does not extend to a nuisance resulting from “negligent or improper” agricultural operation. *Id.* As a matter of statutory interpretation, the terms “negligent” and “improper” must be read in conjunction with and modified by the previous clause, and accordingly a negligent or improper biosolids operation is one that is not in accord with law or best management practices – an allegation not made by Plaintiffs here. *See, e.g., United States v. Atl. Research Corp.*, 2007 U.S. LEXIS 7718, 12-13 (June 11, 2007) (consecutive provisions in a statute must be read in conjunction); *Patton v. City of Galax*, 269 Va. 219, 231-32, 609 S.E.2d 41, 47 (2005) (“When general words and specific words are grouped together, the general words are limited and qualified by the specific words”) (quoting *Commonwealth v. United Airlines, Inc.*, 219 Va. 374, 389, 248 S.E.2d 124, 132-33 (1978)); 2A Norman J. Singer, *Statutes and Statutory Construction*, § 46.05 (6th ed. 2000) (“[W]here there is in the same statute a specific provision and also a general one, the specific provision controls.”).

² An “agricultural operation” is defined as “Any operation devoted to a *bona fide* production of crops, or animals, or fowl . . . and the production and harvest of products from silviculture activity.” Va. Code Ann. § 3.1-22.29. Unlike the Code provision restricting the application of local zoning ordinances to production agriculture, Va. Code Ann. § 3.1-22.28, and contrary to Plaintiffs’ argument, the provisions of the RFA limiting nuisance suits do not exclude biosolids from their protection.

Of course, it may be argued that the statute requires a different analysis: that any agricultural operation conducted in compliance with existing laws and regulations is immune from nuisance claims as a matter of law, regardless of what impact it may have on surrounding properties, whereas a negligent agricultural operation that actually causes a nuisance loses the protection of the Act. Plaintiffs lose under this interpretation as well. While farming operations in general are subject to common law rules defining negligence, most are not subject to the exacting regulatory regime that applies to biosolids. For the reasons stated above, the standard of care for an activity conducted under a pervasive regulatory scheme such as VBUR is prescribed by the regulations.

Plaintiffs have not alleged any violation of applicable regulations, nor have they pled any facts to support a finding that a different standard of negligence should apply in this case. Their bald allegation that biosolids “should not be handled near private residential property and should be disposed of in a different manner” is a legislative and policy argument, already addressed by the law and the VBUR. It does not state a *prima facie* case of negligence. Compl. ¶ 106(j). As in their negligence claim, Plaintiffs default to a circular argument asking the Court to assume that biosolids application is *per se* harmful, thereby stating a case in nuisance. That is precisely the sort of claim that the Act is designed to preclude. Again, Plaintiffs would have the Court second-guess the legislature and disregard the protections embodied in the RFA.

IV. PLAINTIFFS FAIL TO ALLEGE AN INTERFERENCE WITH A POSSESSORY INTEREST AND THEIR TRESPASS CLAIM SHOULD BE DISMISSED

Plaintiffs’ trespass claim fails because their allegations of odors, gases and particulates do not interfere with Plaintiffs’ possessory interest in their properties. Defendants offer additional authority demonstrating that Plaintiffs’ factual allegations do not support a trespass claim in Virginia. *See Springfield-Washington Golf Ctr. v. Gilbert Small Arms Range.*, 1993 Va. Cir.

LEXIS 854, 2-3 (Fairfax 1993). In *Springfield-Washington*, the plaintiff's trespass claim based on lead fumes and gunpowder residue emitted from the defendants' shooting range was dismissed because they did not allege "that the defendants interfered with [the plaintiffs'] exclusive possession of the property, only that the defendants interfered with their use of the premises." *Id.* at 2. By contrast, in *Xspedius Management Co. of Virginia, L.L.C. v. Stephan*, 269 Va. 421, 423 611 S.E.2d 385, 386 (2005), the plaintiffs were able to maintain their trespass claim because they showed that the defendants had actually placed cables on plaintiffs' land, thus preventing the use of that portion of property.

Other states, like Virginia, that have maintained the traditional common law elements for trespass, also uniformly reject claims similar to Plaintiffs', which are based solely upon atmospheric migrations of odors and particulates. *See, e.g., Adams v. Cleveland-Cliffs Iron Co.*, 237 Mich. App. 51, 54, 602 N.W.2d 215, 216 (Mich. Ct. App. 1999) (holding that a complaint alleging damages from "airborne particulate, noise, or vibrations," sounds in nuisance, not trespass); *Pestey v. Cushman*, 1994 Conn. Sup. LEXIS 3275, 9 (Conn. Super. Ct. Dec. 15, 1994) (rejecting a trespass claim based on farm odor). Here, Plaintiffs' allegations do not demonstrate interference with Plaintiffs' exclusive possessory rights, and, therefore, Plaintiffs have failed to state a claim for trespass.

V. PLAINTIFF TERESA GREGORY MUST BE DISMISSED AS A PARTY TO THE TRESPASS AND NUISANCE CLAIMS

Virginia courts have not recognized a visitor's standing to raise nuisance and trespass claims. At oral argument, Plaintiffs have erroneously claimed that an adult child has a sufficient interest in his or her parents' property to maintain such claims

Courts in Virginia and other states recognizing a family member's right to pursue such claims have done so in instances where the family member was a minor who resided at the

property, and who asserted legal rights through their parents. *See Bowers v. Westvaco Corp.*, 244 Va. 139, 148, 419 S.E.2d, 667 (1992) (minor children occupying land could maintain claim for nuisance); *Hosmer v. Republic Iron & Steel Co.*, 179 Ala. 415, 419, 60 So. 801, 802 (Ala. 1913) (minor child, as “a lawful occupant of his father’s home,” had a right against nuisances invading parents’ property); *Gesswin v. Beckwith*, 35 Conn. Sup. 89, 397 A.2d 121 (Conn. Super. Ct. 1978) (minor could maintain action as occupant of parents’ house). Here, Teresa Gregory is an adult. Plaintiffs do not claim she owns her parents’ property or resides there. Accordingly, Teresa Gregory lacks a sufficient possessory interest here to maintain nuisance and trespass claims. *See Mims St. LL.C. v. G.D.C., Inc.*, 38 Va. Cir. 254, 257 (Fairfax 1995) (non-signatory to lease agreement is not a tenant and thus has no possessory rights to property).

VI. *INTERNATIONAL PAPER DOES NOT ALLOW THIS TORT LAWSUIT TO COUNTERMAND THE CLEAN WATER ACT AND EPA’S BIOSOLIDS PROGRAM*

The parties agree that Justice Powell’s 1987 opinion in *International Paper Co. v. Ouellette* on the scope of Clean Water Act preemption of state tort lawsuits controls the outcome of Synagro’s motion to dismiss based on federal preemption. The gravamen of Synagro’s argument is that *International Paper*’s rationale for dismissing a Vermont tort suit against a New York discharger is fully applicable to a Virginia lawsuit targeting biosolids from numerous jurisdictions, where both the biosolids quality and application methods are governed by federal standards. 40 C.F.R. Part 503. Synagro supplements its argument to note that *International Paper* remains good law and that the Supreme Court has reiterated its core teachings.

For example, in *Arkansas v. Oklahoma*, 503 U.S. 91, 101 (1992), the Supreme Court ruled that federal permitting decisions under the Clean Water Act (CWA) regarding Arkansas wastewater plant discharges that flowed into Oklahoma waters trumped Oklahoma laws on water quality. Among other factors, the Court pointed to “[CWA’s] purpose of authorizing the EPA to

create and manage a uniform system of interstate water pollution regulation.” *Id.* at 110.

Similarly, in the 1992 preemption case of *Gade v. National Solid Wastes Management Association*, 505 U.S. 88, 103, the Supreme Court reiterated that in deciding conflict preemption “it is not enough to say that the ultimate goal of both federal and state law’ is the same. ‘A state law also is pre-empted if it interferes with the methods by which the federal statute was designed to reach that goal.’” (O’Conner, concurring) (quoting *Int’l Paper Co. v. Ouellette*, 479 U.S. 481, 494 (1987)). Similarly, the Fourth Circuit has reiterated *International Paper*’s observation that “[i]n fact, the states are sometimes entitled to impose more stringent common law and statutory requirements in areas regulated by federal law, so long as such requirements are not incompatible with those established under federal law.” *College Loan Corp. v. SLM Corp.* 396 F.3d 588, 599 (4th Cir. 2004) (citing *Int’l Paper*, 479 U.S. at 498). Thus, *International Paper* remains vital and continues to prohibit tort lawsuits such as Plaintiffs that seek to impose standards on wastewater and biosolids management across lines of jurisdiction and regulatory authority. Plaintiffs have not offered any cases extending *International Paper* beyond its narrow carve-out for tort suits wherein state law provides the sole authority defining acceptable levels of pollutants, allowing the discharger to look exclusively to that state’s courts and legislatures for the applicable standards.

VII. CONCLUSION

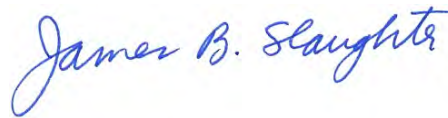
The United States Environmental Protection Agency has determined safe levels of trace elements and biological organisms in biosolids, how to reach those levels, and the amount of biosolids to apply to farmland and forests to balance fertilizer needs and environmental protection. The Virginia Department of Health has decided what sites are best suited for biosolids, how far land application should occur from neighboring residents, and which sites should receive permits under what conditions. These and myriad other regulatory actions of

these agencies and federal and state legislatures govern biosolids recycling in the Commonwealth. Plaintiffs' eighteen million dollar tort lawsuit plainly clashes with and cannot co-exist with this program. Defendants Synagro and Sussex Surry request that this Court grant their demurrers and motions to dismiss.

Dated: June 18, 2007

Respectfully submitted,

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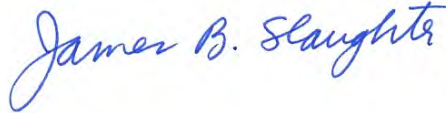
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CERTIFICATE OF SERVICE

I hereby certify on June 18, 2007, prior to filing, true and correct copies of the foregoing *Defendant Synagro Central, Inc.'s and Sussex Surry, LLC's Supplemental Brief In Support Of Demurrer and Motion To Dismiss* were served by electronic mail on Counsel for Plaintiffs, H. Bishop Dansby, 4060 Walnut Hill Dr., Keezletown, VA 22832, and Christopher Nidel, 1111 14th St., Suite 777 Washington, DC 20005, and on Counsel for Defendant Sussex Surry LLC, Stewart Leeth, McGuire Woods, One James Center, Richmond Virginia 23219.



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