

VIRGINIA:

IN THE CIRCUIT COURT OF SURRY COUNTY

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| SANDRA L. WYATT, et al. |) | |
| |) | |
| Plaintiffs, |) | |
| |) | Case No. CL06000069-00 |
| v. |) | |
| |) | July 10, 2007 |
| SUSSEX SURRY, LLC, et al. |) | |
| |) | |
| Defendants. |) | |

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

Defendant Synagro Central, Inc. (Synagro) and Sussex Surry, LLC (Sussex Surry) jointly submit this reply to Plaintiffs’ opposition to the Defendants’ supplemental brief in support of their demurrers and motions to dismiss Plaintiffs’ Complaint.¹

I. INTRODUCTION

Plaintiffs’ final submission represents a further retreat from their Complaint’s harsh attack on federal and state regulated biosolids recycling. While Plaintiffs succeeded in eliciting inflammatory media coverage in Surry County by filing this toxic tort Complaint, Plaintiffs must now face the legal consequences of twenty-six pages of allegations asserting that any biosolids, even those meeting federal and state standards for metals, chemical and pathogen content, are highly toxic, dangerous and cause sickness and injury, requiring eighteen million dollars in

¹ The cover letter to the Clerk of Court accompanying Plaintiffs’ Supplemental Memorandum in Opposition to Synagro’s and Sussex Surry’s Demurrer and Motion to Dismiss indicates that the brief was mailed to the Clerk’s office on June 28, 2007 making the Memorandum untimely under the briefing schedule set by the Court on June 7, 2007. Synagro informed Plaintiffs that Synagro will not object to a request by Plaintiffs for leave *nunc pro tunc* for an out-of-time filing for good cause shown.

compensation for injuries and an injunction barring land application. Plaintiffs now try to re-cast their lawsuit as a simple negligence claim regarding alleged permit violations for odors.

The question before the Court, however, is whether the Complaint, as filed, is “irreconcilably opposed” to either the federal or state biosolids programs. Plaintiffs’ allegations and relief sought cannot rationally be construed as complementing the federal and state regulations and adding an additional level of protection, and therefore the Complaint should be dismissed. The Court, however, might take other steps short of complete dismissal to address the clash between this Complaint and the state and federal programs, including:

- Dismissal of the claim for injunctive relief;
- Dismissal of the negligence claim; or
- Dismissing Plaintiffs’ claims for health impacts and limiting the claim to the alleged nuisance impacts from odors.

These measures could be applied alone or in combination to address the conflict between Plaintiffs’ Complaint and the statutory and regulatory scheme for biosolids application in Virginia, in addition to the relief sought by Sussex Surry and Synagro regarding the insufficiency of the nuisance count to overcome the Right to Farm Act, the lack of a cause of action for trespass, and Teresa Gregory’s lack of standing.

II. PLAINTIFFS INAPPROPRIATELY RELY ON MATERIALS AND BRIEFING OUTSIDE OF THE COMPLAINT AND HAVE MISSTATED THE STANDARD OF REVIEW

Plaintiffs continue to make two procedural errors throughout their briefing of this matter. First, Plaintiffs attempt to use their briefs and materials that were not attached to their Complaint, and of which this Court cannot take judicial notice, to add allegations to their Complaint. Second, Plaintiffs’ argument that their nuisance claim is not barred by the Right to Farm Act (RFA) relies on the wrong standard of review.

A. Plaintiffs Improperly Attempt to Add Allegations to Their Complaint

Defendants have demurred to and moved to dismiss Plaintiffs' Complaint. "A demurrer tests the legal sufficiency of the facts alleged in the plaintiff's complaint." *Ogunde v. Prison Health Servs.*, 2007 Va. LEXIS 73, 15 (June 8, 2007) (citing *Sanchez v. Medicorp Health Sys.*, 270 Va. 299, 303, 618 S.E.2d 331, 333 (2005)); accord *Faulknier v. Shafer*, 264 Va. 210, 213, 563 S.E.2d 755, 757 (2002) (on demurrer, "we look solely at [plaintiff's] allegations in her bill of complaint"). Accordingly, at issue here is whether Plaintiffs' Complaint, and any exhibits attached thereto, "states a cause of action on which relief can be granted." *Shelor Motor Co. v. Miller*, 261 Va. 473, 478, 544 S.E.2d 345, 348 (2001); see also *Perk v. Vector Resources Group, Ltd.*, 253 Va. 310, 312, 485 S.E.2d 140, 142 (1997); Va. Sup. Ct. R. 1:4(i).

In an attempt to stave off dismissal, however, Plaintiffs have sought to use their briefs in opposition to Defendants' motions to make additional allegations against Defendants. See *Morgan Distrib. Co., Inc. v. Unidynamic Corp.*, 868 F.2d 992, 995 (8th Cir. 1989) ("It is axiomatic that a complaint may not be amended by the briefs in opposition to a motion to dismiss."); accord *Katz v. Odin, Feldman & Pittleman, P.C.*, 332 F. Supp. 2d 909, 917 n.9 (E.D. Va. 2004). For example, Plaintiffs repeat an allegation that first appeared in their May 22 Opposition to Defendants' Demurrer and Motion to Dismiss, that Synagro and Sussex Surry failed to comply with "EPA's best management practices." Opp'n 25; Opp'n to Suppl. 12-13. Yet Plaintiffs' Complaint contains no mention of EPA's "best management practices," or allegations of any violations thereof. In their latest brief, Plaintiffs also state that "Defendants improperly disposed of unpermitted hog waste" at the Sussex Surry Site, and that Synagro violated the conditions of its permit issued by the Virginia Department of Health (VDH). Opp'n to Suppl. 13. However, Plaintiffs Complaint does not allege that Synagro lacked a permit to spread hog waste, nor does it allege any violation of the conditions of Synagro's validly-obtained

VDH permit to land apply biosolids. Compl. ¶ 45. Indeed, Plaintiffs do not even cite to their own Complaint in support of these arguments. Plaintiffs' belated allegations attempt to transform their Complaint from a strict liability claim against all biosolids per se into a suit keyed to state and federal standards that may survive preemption.

While both Plaintiffs and Synagro have provided the Court with publications from state and federal governmental agencies regarding biosolids, neither these materials nor several other exhibits provided by Plaintiffs can be bootstrapped into Plaintiffs' Complaint. As noted, a demurrer is decided on the allegations contained in the Complaint. *See, e.g., Ogunde*, 2007 Va. LEXIS at 15 (a demurrer is sustained "if it is clear that the plaintiff has not stated a valid cause of action" in the complaint). Courts may not, therefore, examine materials that were not part of the Complaint. *See Flippo v. F & L Land Co.*, 241 Va. 15, 17, 400 S.E.2d 156, 156 (1991) (noting that, on demurrer, a court may examine . . . any *accompanying exhibit mentioned in the pleading*") (emphasis added). Thus, this Court's ruling should be made on the pleadings submitted, not on the pleadings as supplemented by the exhibits Plaintiffs have attempted to use to bolster the allegations in their Complaint.

B. Plaintiffs Attempt to Change the Standard of Review to Save Their Complaint from Being Barred Under the Right to Farm Act

In arguing that their claims are not precluded by the RFA, Plaintiffs argue that "several factual determinations [beyond those in the Complaint] . . . need to be made" before this Court can determine whether Plaintiffs' have stated a cause of action that survives the RFA. Opp'n to Suppl. 14. Through this assertion, Plaintiffs seek to escape dismissal of their insufficiently pled Complaint by changing the standard of review to allow further discovery to save their claims. At issue here, however, is whether the facts as alleged in the Complaint are sufficient to state a cause of action not precluded by the RFA, not whether further discovery would so demonstrate.

As discussed below, Plaintiffs' Complaint cannot survive the RFA bar because Plaintiffs have failed to allege that Defendants violated the standards of care for agricultural operations, or provided specific averments as to how Synagro negligently performed the land application.

III. PLAINTIFFS MISSTATE THE APPLICABLE STANDARD FOR WHETHER VIRGINIA LAW PRECLUDES PLAINTIFFS' COMMON LAW CAUSES OF ACTION

Additionally, Plaintiffs have misstated the proper standard for determining whether common law actions are precluded by state law, and attempt to read the doctrine of conflict preemption out of Virginia's law. The common law must fall to a state statute either if the law "encompass[es] the entire subject covered by the common law," or the law is "*directly and irreconcilably opposed* to the [common law] rule." *Boyd v. Commonwealth*, 236 Va. 346, 349, 374 S.E.2d 301, 302 (1988) (emphasis added). Incompatibility between statutes and the common law can be "expressly stated or *necessarily implied*." *Id.* (emphasis added). Plaintiffs, however, argue that unless a statute expressly states that it conflicts with the common law, it cannot be read to impliedly or inherently conflict with the common law.

Plaintiffs' reading cannot be correct because it renders the *Boyd* phrase "irreconcilably opposed" a nullity, and thereby allows conflicts to exist between the statutory and the common law. *Cf. Schlegel v. Bank of Am., N.A.*, 271 Va. 542, 553, 628 S.E.2d 362, 368 (2006) (holding that plaintiffs could not pursue common law claims that would "create rights, duties, and liabilities inconsistent with those stated in" Virginia law). Moreover, Plaintiffs' reading would allow parties to use common law actions to have courts re-write statutes unless the General Assembly expressly states that the common law cannot be so used. In *Boyd*, however, the Virginia Supreme Court recognized that while the common law is presumed to be preserved in full, such a presumption survives only so long as the common law is not irreconcilably opposed to a statute.

Here, the Commonwealth has enacted both laws and regulations to govern the land application of biosolids. *See* Va. Code Ann. § 164.5; 12 V.A.C. 5-585-10 –750. These enactments comprehensively address who may land apply biosolids, when they may do so, how they may do so, and how private parties may challenge permits or permitted activities. The two state provisions Plaintiffs cite as protecting their conflicting common law claims, 12 V.A.C. 5-585-30 and Va. Code Ann. § 62.1-44.22, do not countenance a massive toxic tort suit that challenges the safety of biosolids, but deal with whether the state and federally mandated standard of care was followed. First, as Defendants’ have previously illustrated, 12 V.A.C. 5-585-30 provides that VDH, not private parties, may seek to enforce Virginia’s biosolids regulations through any legal means. Syn. Reply Opp’n to Dem. and Mot. Dismiss 11. Moreover, as with 12 V.A.C. 5-585-30, Plaintiffs have failed to take the context of Virginia Code Section 62.1-44.22 into account. While the provision states that a “certificate issued under this chapter shall not constitute a defense in any civil action involving private rights,” the certificate referred to is not a VDH permit to land apply biosolids, but rather is a certificate issued to waste treatment plants to dispose of effluent in the Commonwealth’s waterways. Va. Code Ann. § 62.1-44.5. Thus, although Section 62.1-44.22 may preserve rights of action against waste treatment facilities, there simply is no “savings clause” in the Commonwealth’s laws and regulations preserving claims against land appliers of biosolids that conflict with Virginia’s laws, regulations and policy.

Finally, the regulations that expressly preserve a cause of action against contractors for improper land application, Va. Code Ann. § 32.1-164.5, do not encompass a lawsuit such as Plaintiffs’ that alleges that biosolids are inherently dangerous regardless of compliance with

federal and state regulations. This regulation does not immunize Plaintiffs' Complaint from a conflict preemption analysis.

Synagro and Sussex Surry emphasize that the necessary analysis is the degree of conflict between the Complaint and the state and federal programs. Just as under federal preemption doctrine, where a common law complaint is "directly and irrevocably opposed" to Virginia law, the common law complaint cannot stand. *Boyd*, 236 Va. at 349, 374 S.E. 2d at 302; *see also Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 870 (2000) (holding that a common law action that was "a potential threat to the objectives of federal safety standards" was barred under conflict preemption rules); *The Country Vintner, Inc. v. Louis Latour*, 272 Va. 402, 414, 634 S.E.2d 745, 752 (2006) (noting that an "irreconcilable inconsistency and repugnancy between [Virginia law] and a civil action" would prohibit a common law action). Through an injunction and through oppressive compensatory damages, Plaintiffs seek to prohibit Synagro and Sussex Surry from undertaking activities for which they obtained a valid, unchallenged permit from VDH, and that are specifically approved of by the Virginia General Assembly. Plaintiffs' action will likely have a chilling effect on other land appliers of biosolids in Virginia, thus curtailing a beneficial state program. *See O'Brien v. Appomattox County*, 293 F. Supp. 2d 660, 666 (W.D. Va. 2003) (striking down ordinances that made it "prohibitively expensive to land apply biosolids"). These goals could not be more irreconcilable, inconsistent and in conflict with Virginia law.

IV. PLAINTIFFS' CLAIMS ARE BARRED BY THE RIGHT TO FARM ACT

Again, the Court's decision on whether the Complaint as written overcomes Virginia's Right to Farm Act requires comparing the pleading to the statute, not Plaintiffs' new allegations set out in their opposition brief.

To state a claim for nuisance against an agricultural operation that survives the RFA, a plaintiff must allege a violation of best management practices. Va. Code Ann. § 3.1-22.29(A). Nowhere in their Complaint do Plaintiffs set out any applicable management practices, much less the best management practices, for the land application of biosolids, or claim that Defendants violated these standards. *See, e.g.*, Compl. ¶ 106(j). Realizing their error, Plaintiffs now have attempted to rehabilitate their pleadings through their Opposition by making allegations that do not appear in their Complaint. *See, e.g.*, Opp'n to Suppl. 13 (arguing that Plaintiffs alleged that Defendants acted out of compliance with EPA's best management practices). As noted above, Plaintiffs' attempt to restate their Complaint in their Opposition is improper and only highlights their failure to make allegations sufficient to state a cause of action under the RFA.

V. PLAINTIFFS' SUIT WOULD IMPOSE VIRGINIA'S COMMON LAW RULES ON EPA'S BIOSOLIDS PROGRAM CONTRARY TO THE SUPREME COURT'S HOLDING IN *INTERNATIONAL PAPER*

Plaintiffs do not dispute that conflict preemption principles prohibit common law claims that are contrary to federal laws and regulations. Such principals apply both to common law claims that frustrate federal purposes, as well as those that frustrate state law. *Geier*, 529 U.S. at 872; *see also The Country Vintner*, 272 Va. at 414, 634 S.E.2d at 752. Moreover, one state cannot impose its common law onto another state. *International Paper Co. v. Ouellette*, 479 U.S. 481, 496 (1987). Plaintiffs' Complaint, through which they seek to regulate the treatment and application of biosolids in Virginia and, necessarily, in Maryland and the District of Columbia as well, violates these principles and must be dismissed.

First and foremost, Virginia is not, contrary to Plaintiffs' continued assertions, the "source state" for biosolids under *International Paper*. As the Court in *International Paper* made clear, a "source state" is the state in which a discharge originates and is regulated. *Id.* at 489-90. As Plaintiffs recognize, biosolids that Synagro land applied in Virginia *originated* in

other states, most notably Maryland and the District of Columbia, and were treated in those states to achieve federal and state standards (which Plaintiffs seek to countermand through a Virginia tort suit) for the reduction of pathogens and metals. Virginia is, therefore, an “affected state,” much like Vermont in *International Paper*. *Id.* at 490. And, like the plaintiffs in *International Paper*, Plaintiffs here cannot use Virginia’s common law to create duties in source states, like Maryland and the District of Columbia, that otherwise do not exist. *Id.* at 496 (“Application of an affected State’s law to an out-of-state source also would undermine the important goals of efficiency and predictability in the permit system.”); *see also Credit Suisse Securities (USA) LLC v. Billing*, 551 U.S. ___, 127 S. Ct. 2383 2007 U.S. LEXIS 7724, at 31 (2007) (finding that security regulatory laws precluded private parties from bringing antitrust actions against regulated groups in part because of the “unusually high risk that different courts will evaluate similar factual circumstances differently” and create conflicting regulatory standards).

Plaintiffs incorrectly assert that their lawsuit concerns only Virginia’s standards for land application. However, by alleging that biosolids contain toxic materials – the very materials that are the object of federal and source state regulations under the Clean Water Act and the Part 503 regulations – that caused their injuries, Plaintiffs’ Complaint plainly targets both federal and source state standards for the generation of biosolids. Plaintiffs’ Complaint is therefore an attempt to establish guidelines for biosolids treatment that conflict with federal law and must be dismissed. *Geier*, 529 U.S. at 872.

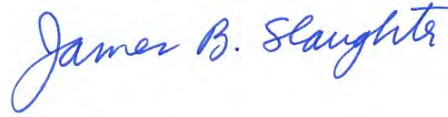
VI. CONCLUSION

For the reasons stated above, as well as for those stated in Defendants’ original demurrers, motions, replies, and supplemental memorandum, Defendants respectfully request this Court grant its demurrers and motions to dismiss.

Dated: July 10, 2007

Respectfully submitted,

SYNAGRO CENTRAL, INC.



James B. Slaughter, VSB 28116
Sarah S. Doverspike, VSB 72902
Joseph N. Bartels, Illinois State Bar No. 205366
Beveridge & Diamond, P.C
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000 (phone)
(202) 789-6190 (fax)

Clinton B. Faison, VSB 17728
Law Office of Clinton Faison
354 Bank Street
Surry, VA 23883-2725
(757) 294-3000 (phone)
(757) 294-0159 (fax)

Counsel for Defendant
Synagro Central, Inc.

SUSSEX SURRY, LLC

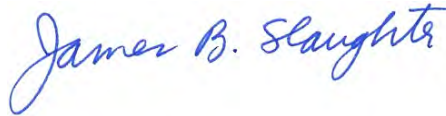
_____/s/ by authorization_____

Stewart T. Leeth, VSB 31122
McGuireWoods LLP
901 E. Cary Street
Richmond, Virginia 23219-4030
(804) 775-1000

Counsel for Defendant
Sussex Surry LLC

CERTIFICATE OF SERVICE

I hereby certify on July 10, 2007, prior to filing, true and correct copies of the foregoing *Defendant Synagro Central, Inc.'s and Sussex Surry, LLC's Reply to Plaintiffs' Opposition to Defendants' 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.



James B. Slaughter
Counsel for Defendant Synagro Central, Inc