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**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

SANDRA L. WYATT,)
WILLIS E. WYATT, JR.,)
ROBERT L. WYATT,)
EVA S. GREGORY,)
LEVERETTE B. GREGORY, JR.,)
TERESA E. GREGORY,)
)
Plaintiffs,)
)
v.)
)
Sussex Surry, LLC,)
Synagro Central, Inc., individually and)
formerly known as Synagro Mid-Atlantic Inc.)
)
Defendants _____)

Case No. 3:06CV00835

**PLAINTIFFS' BRIEF
IN SUPPORT OF
MOTION TO REMAND
TO STATE COURT**

Hearing Date: _____
Time: _____
Location: _____
Judge: Henry E. Hudson

BRIEF IN SUPPORT OF MOTION TO REMAND

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I. INTRODUCTION

Plaintiffs' complaint alleges exclusively state common-law tort claims of nuisance, negligence, and trespass against Defendants engaged in the disposal of treated sewage sludge on a 1300-acre forest abutting Plaintiffs' property. Plaintiffs originally filed this action in the Circuit Court of Surry County, Virginia. Defendant then removed the case on December 19, 2006. Remand to state court is required because there is no basis for federal jurisdiction.

Sewage sludge, also known as "biosolids," is the solid by-product of municipal and industrial wastewater treatment. This odorous and offensive waste product was disposed of in a 1300-acre forest in Surry County, in the vicinity of Plaintiffs' homes, and remains present today. Plaintiffs' Complaint was filed against the two entities responsible for the disposal of the sewage sludge: Defendant Sussex-Surry, LLC ("Sussex-Surry), the owner of the sludge disposal site, and Defendant Synagro Central, LLC ("Synagro"), the sludge disposal company.

Defendant Synagro relies on two independent bases for federal jurisdiction in its Notice of Removal ("Notice"): (1) fraudulent joinder without which there is complete diversity and jurisdiction under 28 U.S.C. § 1332(a); and (2) "federal question jurisdiction" under 28 U.S.C. § 1331 because Plaintiffs' claims are allegedly preempted by federal regulation and/or the resolution of the claims raises a "substantial federal question" giving the Court "arising under" jurisdiction. *See* Notice at ¶¶ 6-12.

Defendant's first basis for removal hinges on the faulty assertion that there is no colorable basis for the landowner to be found liable under the facts as alleged in the complaint. As the owner with ultimate control over entry and use of the land, there are multiple scenarios in

which Sussex-Surry may be found liable under state common-law. *See* § IV(A), *infra*. There is therefore no diversity in this action because Sussex-Surry is a proper in-state defendant.

Synagro's invocation of federal question jurisdiction is equally misplaced. No federal question exists because each and every cause of action in the complaint arises completely and solely under state law. The "federal question" that Defendant explicitly raises is the anticipated defense of preemption under the Clean Water Act ("CWA"). It is black-letter law, however, that a federal defense, including that of preemption, does not confer federal question jurisdiction. *See* § IV(B)(3), *infra*.

The only remaining avenue for federal jurisdiction is "arising under" jurisdiction created by the "complete pre-emption" doctrine. *See Caterpillar Inc. v. Williams*, 482 U.S. 386, 393 (1987). This argument fails because the Clean Water Act expressly allows state and political subdivisions to promulgate regulations with respect to sewage regulation. *See* 40 C.F.R. § 503.5(b). Indeed, both the Supreme Court and the Fourth Circuit have found that the Clean Water Act specifically does not preempt common-law claims such as those in this case. *See* § IV(B)(3), *infra*. No legitimate argument can therefore be made that Congress, in passing the Clean Water Act and the laws thereunder, intended to provide the exclusive remedy. Thus, even under the federal regulatory scheme, Plaintiffs' claims survive under state law.

In short, Defendant's removal of this case is frivolous. Both the Supreme Court and the Fourth Circuit have squarely rejected the mistaken jurisdictional arguments advanced by Synagro in its notice of removal. The Clean Water Act does not preempt Plaintiffs' state law claims nor provide a basis for federal jurisdiction. The allegedly fraudulently joined in-state defendant is an indispensable party to the suit. For these reasons, and those set forth more fully

below, Plaintiffs respectfully request that the Court remand this case to state court and grant Plaintiffs their removal-related fees and costs.

II. BACKGROUND

A. Statement of the Case

The following facts are alleged in the Plaintiffs' Complaint ("Complaint"),¹ except where otherwise noted:

Plaintiffs are private individuals, residing in the Commonwealth of Virginia. *Complaint*, ¶¶ 5-10. Plaintiffs Sandra L. Wyatt, Willis E. Wyatt, Jr., Leverett B. Gregory, Jr., and Eva S. Gregory own property in Surry County Virginia. *Id.*, ¶¶ 5-6, 8-9. The land owned by these plaintiffs is adjacent to the 1300-acre forest used by Defendants for disposal of sewage sludge. *Id.*, ¶ 42. Defendant Sussex-Surry, LLC owns the land where the sludge has been disposed. *Id.*, ¶ 44.

Sewage sludge is the semi-solid byproduct of the treatment of municipal and industrial waste. *Id.*, ¶ 19-20. Sewage sludge is different from animal manures, and contains prescription drugs, drug metabolites, synthetic chemicals, industrial wastes, flame-retardants, carcinogenic chemicals and metals, and hazardous biological materials such as e-coli and other bacteria, viruses, endotoxin, and other pathogens. *Id.*, ¶¶ 21-25.

In addition to the harmful components of sewage sludge, sludge has an extremely offensive odor. It is even more offensive than other agricultural manures due to the presence of offensive and toxic gases including dimethyl sulfide, dimethyl disulfide, methyl mercaptan, trimethylamine, and ammonia. *Id.*, ¶ 31. The sludge also forms airborne particulates when it dries. *Id.*, ¶ 49. The presence of these particulates, chemicals, biologicals, and odors in sludge

¹ A copy of the Complaint is attached as Exhibit 1 to the Motion.

makes it hazardous to human health, irritating to the skin, eyes, nose, throat, and lungs, and offensive to the senses. *Id.*, ¶¶ 31-33, 46-50. These properties of sludge make it an obstruction to the reasonable and comfortable use and enjoyment of one's property. *Id.*, ¶ 30, 32-33, 49.

Starting in or around October of 2005, public outcry about Defendants' sludge-related activities reached the local media and the state and local government. *See id.*, ¶¶ 60-66. Despite the public attention regarding the public concern, including the complaints made by the Plaintiffs, sludge maintenance and disposal continues. *Id.*, ¶ 67.

B. Procedural History

Plaintiffs commenced this action in the Circuit Court of Surry County, Virginia. Motion, Ex. 1. Plaintiffs' complaint alleged exclusively state-law causes of action for: (1) negligence; (2) private nuisance; (3) trespass; and (4) punitive damages. On December 19, 2006 Defendant Synagro removed the action to this Court. Plaintiffs now timely move to remand this action to state court.

III. STANDARD OF REVIEW

Removal statutes are strictly construed in favor of state court jurisdiction. *Shamrock Oil & Gas Corp. v. Sheets*, 313 U.S. 100 (1941); *Mulcahey v. Columbia Organic Chems. Co.*, 29 F.3d 148, 151 (4th Cir. 1994) (*citations omitted*). A defendant seeking to remove a state court action has the burden of demonstrating that the federal court has subject matter jurisdiction. *Mulcahey*, 29 F.3d at 151 (*citing Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92 (1921)). This burden is particularly high where the basis for removal is fraudulent joinder. *See Hartley v. CSX Transportation, Inc.*, 187 F.3d 422, 424 (4th Cir. 1999) (*citing Marshall v. Manville Sales Corp.*, 6 F.3d 229, 232-33 (4th Cir. 1993)). Any uncertainty necessitates remand. *See Mulcahey*, 29

F.3d at 151 (*citing In Re Business Men's Assurance Co. of America*, 992 F.2d 181, 183 (8th Cir. 1993)). As demonstrated below, Defendant completely fails to meet its burden.

IV. ARGUMENT

A. No Diversity Jurisdiction Over This Case Exists

Defendant's first argument for original jurisdiction in this exclusively state-law action filed in state court is that Defendant, a Delaware corporation with its principle place of business in Baltimore, Maryland, is the only proper defendant in the action and thus complete diversity is present under 28 U.S.C. § 1332(a). Notice, ¶ 6. However, common-law liability clearly accrues to landowners, and therefore Sussex-Surry is a proper defendant in this action. There is no complete diversity and no jurisdiction under 28 U.S.C. § 1332(a).

Contrary to Defendant's claims that Sussex-Surry was merely joined to destroy diversity, Sussex-Surry was joined in this suit because of tortious liability for its acts or omissions related to the disposal and maintenance of sewage sludge on its property and the subsequent injuries caused by its acts or omissions. To establish fraudulent joinder, the Defendant bears a heavy burden. The Defendant must show that Plaintiffs cannot establish any claim against Sussex-Surry even after resolving all issues of law and fact in the Plaintiffs' favor. *See Hartley*, 187 F.3d at 424 (4th Cir. 1999) (*citing Marshall*, 6 F.3d 229, 232-33 (4th Cir. 1993)). The question of proper joinder is not a question of the merits of the claims against the joined defendant. *See Hartley*, 187 F.3d at 425; *see also*, 14A Charles A. Wright et. al., *Federal Practice & Procedure* § 3723, at 353-54 (1985) (only a possibility of a right to relief need be asserted to defeat removal). The burden under this standard is even more favorable to the Plaintiffs than those under the standard for ruling on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). *See, e.g., Batoff v. State Farm Ins. Co.*, 977 F.2d 848, 852 (3d Cir. 1992).

Defendant makes the sweeping claim that Sussex-Surry cannot be held liable under the causes of action in Plaintiffs' Complaint. In support of this claim, Defendant makes a handful of factual allegations diminishing Sussex-Surry's role in the facts forming the basis of Plaintiffs' Complaint. Notice, ¶¶ 4,7. Defendant has failed to meet its burden of *affirmatively negating all possibility* of recovery against Sussex-Surry. *See Hartley*, 187 F.3d at 425. As Defendant concedes in its Notice, Sussex-Surry is the owner of the 1300-acres where Defendant is engaged in the disposal of sewage sludge. Notice at ¶ 4. Defendant falsely alleges that Sussex-Surry did not participate in or control the actions alleged in Plaintiffs' Complaint. In reality, as owner of the land, Sussex-Surry had *ultimate control over its own land* prior to the disposal of sewage sludge on it, during the disposal of sewage sludge on the land, and after the disposal of sewage sludge on the land. The acts *or omissions* of Sussex-Surry constitute participation and lead to its potential liability.² Plaintiffs can get no equitable relief without Sussex-Surry in the case.

It is clear that as landowner, Sussex-Surry did have some role in the acts that form the bases for Plaintiffs' claims, even if that role was simply that it willfully, recklessly, or negligently refrained from participation and control of the entry and use of its land by Defendant and its agents. *See Jordan v. Commonwealth*, 36 Va. App. 270, 275 (2001) ("The sovereign's effort to stop conduct that creates a public nuisance can only be effective if directed at the person with ultimate authority over the premises where the nuisance exists. The person who can assert the rights, privileges, powers and immunities of ownership to real property is the entity vested

² In this case, it is alleged that Sussex-Surry has actual, or at a minimum constructive notice of the hazardous condition present on its land and the resulting impact on Plaintiffs and other members of the surrounding public. *See* Complaint at ¶¶ 40-41, 66-67. This notice prohibits the landowner from claiming innocence or ignorance as to the impact of the use of its land and creating tortious liability for the acts or omissions in relation to its business of land ownership. *See generally Memco Stores, Inc. v. Yeatman*, 232 Va. 50 (1986).

with title in fee simple.”).³ While the disruptions outlined in the Complaint began with the initial sludge disposal operations, the presence and maintenance of the 1300-acre sludge disposal area causes continued discomfort and injury to Plaintiffs. *See e.g.*, Complaint at ¶¶ 48-49, 51-52. Furthermore, many of the facts underlying the relationship between Defendant and Sussex-Surry, although not fully known to Plaintiffs pending factual discovery, are expected to provide additional grounds for the alleged liability of Sussex-Surry. Any doubts about the propriety of removal should be resolved in favor of retained state court jurisdiction. *Marshall*, 6 F.3d 229, 232 (4th Cir. 1993).

There can be no doubts in this case, however, because there are multiple scenarios under the state common-law claims in which Sussex-Surry may be found liable. The Supreme Court of Virginia set forth grounds for landowner liability for private nuisance, which it defined as the “using, or *authorizing the use of*, one’s property, or of anything under one’s control, so as to injuriously affect an owner or occupier of property (1) by diminishing the value of that property; (2) by continuously interfering with his power of control or enjoyment of that property; (3) by causing material disturbance or annoyance to him in his use or occupation of that property.” *Virginian Railway Co. v. London*, 114 Va. 334, 76 S.E. 306 (1912) (emphasis added); *see also Wells v. Whitaker*, 207 Va. 616, 630 (1966) (citations omitted). Landowner liability for private nuisance is consistent with the State of Virginia’s inclusion of the landowner as liable in its definition of a public nuisance.⁴ *See Jordan*, 36 Va. App. at 275. A similar analysis can be made for the claims of negligence and trespass.⁵

³ Though this is in the context of public nuisance, it illustrates the importance of ultimate control over the property through ownership and the potential liability that is associated with such ownership and control.

⁴ *See* VA CODE § 48-3 Permitting continuation of a nuisance – presentment against premises (*emphasis added*):
If any such nuisance be upon premises the owner of which did not create or cause such nuisance, but permitted its continuation, such owner shall, for the purposes of this chapter, be deemed responsible for such nuisance, and if such owner be not a resident or citizen of this

Plaintiffs have joined Sussex-Surry in this case along with Defendant Synagro on the basis of state common-law, the alleged facts contained in Plaintiffs' Complaint, and additional facts that Plaintiffs believe will be determined through discovery and ultimately by the finder of fact. Viewing all allegations in a light most favorable to Plaintiffs, Defendant Sussex-Surry has a clear connection to the controversy and therefore is a proper defendant in this action and the doctrine of fraudulent joinder does not apply. *See Republic Iron & Steel*, 257 U.S. at 97. Defendant's removal to this Court on the basis of complete diversity is preposterous.

B. There Is No Basis For "Federal Question" Jurisdiction In This Case

1. The Authority Referenced By Defendant Does Not Support Federal Jurisdiction Over This Case

Synagro removed Plaintiffs' complaint alleging "federal question" jurisdiction in the face of well-established precedent from both the Fourth Circuit and the Supreme Court that directly rejects Defendant's jurisdictional arguments. Synagro cites three cases in support of its assertion that Plaintiffs' right to relief depends on the resolution of substantial questions of federal law, and therefore "arises under" federal law. *See* Notice, ¶¶ 10, 12.⁶ The first authority, *City of Chicago v. International College of Surgeons*, 522 U.S. 156 (1997), cited generally for the proposition that federal courts have "arising under" jurisdiction, does not apply to the instant case. Notice at ¶¶ 5, 10. Indeed, while the Supreme Court did find "federal question"

Commonwealth, or one whose residence is not known, such presentment shall be against the premises upon which such nuisance is.

⁵ The Supreme Court of Virginia in *Akers v. Mathieson Alkali Works* stated that "[t]he law requires that every person so use his own property as not to injure the property of another...When **defendant permitted the muck to escape from its land** and injure land of the plaintiff, without his fault, defendant was liable for the damages sustained by the plaintiff...The loss in such cases must be borne by plaintiff or defendant and it seems just that it fall upon the defendant **by whose conduct it was made possible.**" *Akers v. Mathieson Alkali Works*, 151 Va. 1, 11 (1928) (*emphasis added*).

⁶ Defendant cites *City of Chicago v. International College of Surgeons*, 522 U.S. 156, 163 (1997), *Franchise Tax Bd. of the State of Calif. v. Construction Laborers Vacation Trust for So. Calif.*, 463 U.S. 1, 13 (1983), and *Pinney v. Nokia, Inc.*, 402 F.3d 430, 442 (4th Cir. 2005) in their discussion of this Court's "arising under" jurisdiction. It is not clear which case or combination of cases serve as their basis for asserting that this Court has jurisdiction.

jurisdiction over the claims in the *City of Chicago* case, it was on the basis of the inclusion of federal constitutional challenges made in the well-pleaded complaint itself. *See* 522 U.S. at 159, 164. The federal court could then exercise pendent jurisdiction over the state law claims. *Id.* at 164-65. The Complaint in this case does not and need not make any references to federal sources of authority.

Defendant next cites both *Franchise Tax Board* and *Pinney* to support an assertion of “arising under” jurisdiction based on the necessary resolution of substantial questions of federal law due to the regulation of Defendant’s conduct through the Clean Water Act. *Notice*, at ¶ 12. *Franchise Tax Board* does not support Defendant’s assertion of federal jurisdiction; rather, the Court’s opinion stands for the contrary conclusion. *See Franchise Tax Bd.*, 463 U.S. 1, at 13-14 (1983) (“since 1887 it has been settled law that a case may not be removed to federal court on the basis of a federal defense, including the defense of pre-emption...”). Likewise, Defendant’s reliance on *Pinney* adds nothing of substance to its claim of federal jurisdiction. The Fourth Circuit routinely references Supreme Court authority, including *Franchise Tax Board*, for the proposition that the plaintiff is generally the master of the claim and can avoid federal jurisdiction by exclusively relying on state law with the exception of a small class of cases. *See e.g., Pinney*, 402 F.3d at 442-43, 445-46, 449.

There are two ways for a removing party to show that the case “arises under” federal law. First, if federal law creates the cause of action, then the action “arises under” federal law. *Mulcahey*, 29 F.3d at 151. If federal law does not create the cause, the second option requires the defendant seeking removal to “establish two elements: (1) that the plaintiff’s right to relief necessarily depends on a question of federal law, and (2) that the question of federal law is substantial.” *Dixon v. Coburg Dairy, Inc.*, 369 F.3d 811, 816 (4th Cir. 2004). If defendant fails

to establish *either of these elements*, the claim does not arise under federal law and there is no proper basis for removal under the substantial federal question doctrine. *Id.*

Defendant Synagro - at its best - simply points out that there *could be federal issues lurking in the background* – but it is well established that lurking federal issues are not a sufficient basis for federal jurisdiction. *See Pinney*, 402 F.3d at 446 (*citing Gully v. First Nat’l Bank*, 299 U.S. 109, 117 (1936)); *see also Merrell Dow Pharms., Inc. v. Thompson*, 478 U.S. 804, 813 (1986) (“[T]he mere presence of a federal issue in a state cause of action does not confer federal question jurisdiction.”). Plaintiffs’ common law claims are in no way contingent or dependent on federal law.

2. No Federal Question Arises Under Plaintiffs’ Well-Pleaded Complaint

Federal courts do not have jurisdiction when federal issues do not appear in the well-pleaded complaint but are raised in defense of the claims in the suit. *See Franchise Tax Bd.*, 463 U.S. at 10 (*citations omitted*). “The presence or absence of federal question jurisdiction is governed by the ‘well-pleaded complaint rule,’ which provides that federal jurisdiction exists only when a federal question is presented on the face of the plaintiff’s properly pleaded complaint.” *Caterpillar*, 482 U.S. at 392; *Custer v. Sweeney*, 89 F. 3d 1156, 1165 (4th Cir. 1996). This doctrine significantly and importantly narrows the scope of federal “arising under” jurisdiction, requiring the basis for federal jurisdiction to appear on the face of the complaint and not by an anticipated defense, even a defense of federal preemption. *Franchise Tax Bd.*, 463 U.S. at 10-11 (*quoting Taylor v. Anderson*, 234 U.S. 74, 75-76 (1914)); *see also Beneficial Nat. Bank v. Anderson*, 539 U.S. 1, 6 (2003) (“Thus a defense that relies on the preclusive effect of a prior federal judgment or the pre-emptive effect of a federal statute will not provide a basis for removal.” *citations omitted*). The well-pleaded complaint rule is based on three jurisdictional

principles: “that the plaintiff is the master of the complaint, that a federal question must appear on the face of the complaint, and that the plaintiff may, by eschewing claims based on federal law, choose to have the cause heard in state court.” *Caterpillar*, 482 U.S. at 398-99; *see also Pinney*, 402 F.3d at 442 (*citing Caterpillar*, 482 U.S. at 392). Even where it may be *very likely* that in the course of the litigation “a question under the Constitution would arise, they do not show that the suit, that is, plaintiff’s original cause of action, arises under the Constitution.” *Louisville & Nashville R. R. Co. v. Mottley*, 211 U.S. 149, at 152 (1908).

In the only case cited by Defendant supporting federal jurisdiction where alleged jurisdiction is unrelated to Defendant’s claim of preemption, the Supreme Court relied on express federal constitutional allegations made by the plaintiff in the complaint. *City of Chicago*, 522 U.S. at 159, 164. The common-law claims of negligence, nuisance, and trespass brought in this action do not contain allegations based on federal law, such as those found in *City of Chicago*. *See e.g.*, Complaint, at ¶¶ 102-25. Plaintiffs’ complaint asserts only state-law claims and provides no basis for federal jurisdiction. *See Id.*

In order for federal courts to have “arising under” jurisdiction, “[a] right or immunity created by the Constitution or laws of the United States must be an element, and an essential one, of the plaintiff’s cause of action.” *Gully*, 299 U.S. at 112. If “a plaintiff can establish, without the resolution of federal law, all of the essential elements of his state law claim, then the claim does not necessarily depend on a question of federal law.” *Pinney*, 402 F.3d at 442 (*citing Franchise Tax Bd.*, 463 U.S. at 13; *Dixon*, 369 F.3d at 817.) This is true if “the plaintiff can support his claim with *even one theory* that does not call for an interpretation of federal law, his claim does not ‘arise under’ federal law for purposes of § 1331.” *Dixon*, 369 F.3d at 817 (*emphasis added*); *Mulcahey*, 29 F.3d at 153 (“[I]f a claim is supported not only by a theory

establishing federal subject matter jurisdiction but also by an alternative theory which would not establish such jurisdiction, then federal subject matter jurisdiction does not exist.”); *see also*, *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800 (1988). Even if the plaintiff ultimately relies on violations of the federal regulatory scheme in asserting common law claims, federal jurisdiction is not created. *See College Loan Corp. v. SLM Corp.*, 396 F.3d 588, 599 (4th Cir. 2005).

In this case Plaintiffs can satisfy all elements of the claims made in the complaint without reference, reliance or dependence on federal law. Under the well-pleaded complaint rule, Plaintiffs’ complaint does not state a claim that “arises under” federal law. *See Pinney*, 402 F.3d at 446.

3. Simple Preemption Does Not Provide a Basis for Federal Jurisdiction Over This Case

Defendant claims that Federal Courts have original jurisdiction in this matter because the Clean Water Act and its regulations preempt Plaintiffs’ complaint, thus requiring the resolution of a substantial federal question. *See* Notice ¶¶ 11-12. As discussed above, the existence of a defense of ordinary federal preemption does not give federal courts jurisdiction over plaintiff’s claims. *Beneficial*, 539 U.S. at 6; *see also*, *Caterpillar*, 482 U.S. at 392-93; *Metro. Life Ins. Co. v. Taylor*, 481 U.S. 58, 66 (1987); *Franchise Tax Bd.*, 463 U.S. at 14; *Lontz v. Tharp*, 413 F.3d 435, 440-41 (2005). Even if the preemption issue lies at the heart of the litigation, it does not create removal jurisdiction. *Caterpillar*, 482 U.S. at 393. The Supreme Court has clearly stated that the defense of ordinary preemption does not provide a basis for federal jurisdiction.

In this instance, the record is unambiguous that there is no preemption under the CWA. Given the presumption against federal preemption of areas of law traditionally reserved to the

state, the express intention of Congress as evidenced by the saving provision in the CWA,⁷ and the clear, direct, and authoritative law on federal preemption and the CWA, Defendant cannot establish that Plaintiffs' common-law claims are preempted.

There is a longstanding presumption against federal preemption of state common-law tort claims, most recently reaffirmed by the Supreme Court in *Bates v. Dow AgroSciences, LLC*, 125 S.Ct. 1788 (2005). This presumption serves a fundamental function in our federalist system, ensuring that federal authority does not invade the province of the States and their historical role under the powers reserved to them, unless Congress clearly and specifically intended such a result. Where the area of law has traditionally been left to the States, the law requires that Congress provide a "clear and manifest purpose" to supersede State powers. *Jones v. Rath Packing Co.*, 430 U.S. 519, at 525 (1972) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, at 230 (1947)); see also *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1413 (4th Cir. 1994) (citations omitted). Overcoming this presumption is even more difficult in areas of state law related to public health and safety. See *Hillsborough County v. Automated Medical Labs*, 471 U.S. 707, at 715 (1985); see also *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252 (1994).

Federal laws only preempt State regulation where Congress expresses a clear intention to displace state control. See *Feikema*, 16 F.3d at 1413. The requirement of an unambiguous statement of Congressional intent to strip states of their reserved powers is one of the important "procedural safeguards inherent in the structure of the federal system" and must be maintained. See *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, at 552 (1985). To allow mere ambiguity to strip the State of its traditional power would "evade the very procedure for

⁷ The savings clause reads, "[e]xcept as expressly provided in this [Act], nothing in this [Act] shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) any standard or limitation respecting discharges of pollutants, or (B) any requirement respecting control or abatement of pollution; or (2) be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States." 33 U.S.C.A. § 1370

lawmaking on which *Garcia* relied to protect states' interest." L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, p. 480 (2d ed. 1988); *see also Florida Lime & Avacado Growers, Inc. v. Paul*, 373 U.S. 132, 146-47 (1963) ("In other words, we are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect."). These principles impose a substantial burden on the party arguing that traditional state law has been usurped by federal regulation.

Congress made its intention clear in drafting the CWA, explicitly and unquestionably indicating the intent *not to preempt* State common-law claims. This intention to preserve state law claims is found in the savings clause of the CWA and sits in stark contrast to Defendant's contention that Congress meant to supplant the traditional powers of the State. *See* 33 U.S.C.A. § 1370. This provision of the CWA expressly provides for state protections that are more stringent than those federally imposed. *See id.* This express non-preemption preserves Plaintiffs' rights in this case. To find ordinary preemption, Courts look to Congress's intention to preempt, but here Congress expressly provided there *is no preemption*.

The United States Supreme Court interpreted the impact the CWA has on state common-law claims in *International Paper Company v. Ouellete*, clarifying any remaining ambiguities. *See Int'l Paper Co. v. Ouellete*, 479 U.S. 481 (1987). According to the Court, federal regulation in an area may preempt *federal* common-law, but state common-law remedies remain even where they may ultimately impose requirements more stringent than the federal requirements. *See id.* at 497; *see also* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L.REV. 967, 995 (2002). The *Ouellete* decision is consistent with earlier Fourth Circuit rulings on the impact of the CWA on state common-law claims. *See Stoddard v. Western Carolina Reg. Sewer Auth.*, 784 F.2d 1200, 1207 (4th Cir. 1986); *Committee for Jones Falls*

Sewage System v. Train, 539 F.2d 1006, 1009, and n. 9 (CA4 1976) (CWA preserves common-law suits filed in source state).

4. The Doctrine of “Complete Preemption” Does Not Apply In This Case And Therefore Does Not Provide Federal Courts With Jurisdiction Over Plaintiffs’ Complaint

Under the strictures of the well-pleaded complaint rule and legal authority discussed above, without diversity as a basis for federal jurisdiction, generally “a case will not be removable if the complaint does not affirmatively allege a federal claim.” *Beneficial Nat. Bank*, 539 U.S. at 6. The doctrine of “complete preemption,” provides an exception to the well-pleaded complaint rule providing that if a “federal cause of action completely pre-empts a state cause of action any complaint that comes within the scope of the federal cause of action necessarily ‘arises under federal law.’” *Franchise Tax Bd.*, 463 U.S. at 23-24 (citing *Avco Corp. v. Aero Lodge No. 735, Int’l Assn. of Machinists*, 376 F.2d 337 (CA6 1967), *aff’d*, 390 U.S. 557 (1968)). A presumption lies against a finding of complete preemption. *Custer*, 89 F.3d at 1167. Synagro does not clearly or directly raise complete preemption as a basis for federal jurisdiction.

This failure is not surprising. The Supreme Court and Fourth Circuit have determined Congress did not intend to provide an exclusive remedy, displace state law claims, nor completely preempt claims made within the field of clean water protection with the passage of the CWA. Congress included further evidence of its lack of intention to completely preempt when it included a savings provision in the biosolids regulations promulgated under the CWA:

Nothing in this part precludes a State or political subdivision thereof or interstate agency from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge.

40 C.F.R. § 503.5(b). The express intent of Congress preserves more stringent regulation despite EPA's regulation of sludge. *See Welch v. Bd. of Supervisors of Rappahannock County, Virginia*, 888 F.Supp. 753, 758 (W.D.V.A. 1995).

Plaintiffs' complaint simply does not "arise under" federal laws. The regulatory scheme promulgated by Congress in the Clean Water Act and its provisions relating to biosolids disposal was not intended to preempt state law claims. This Court has no "arising under" jurisdiction because there is no need for any resolution of any substantial federal questions.

C. Plaintiffs Are Entitled To Their Removal-Related Attorney's Fees and Costs

Pursuant to 28 U.S.C. § 1447(c), an order remanding a case to state court "may require payment of just costs and any actual expenses, including attorney fees, incurred as a result of the removal." An award of fees and costs to Plaintiffs in this case, where Defendant removed this exclusively state-law action and asserted jurisdictional grounds that are precluded by Supreme Court and Fourth Circuit authority directly on point, is clearly warranted. In conjunction with its reply brief in support of this Motion, Plaintiffs will submit evidence (in the form of affidavits of counsel) sufficient to prove an award of fees and costs.

V. CONCLUSION

Due to the comprehensive nature of both Supreme Court and Fourth Circuit authority on these issues, Defendants have not raised any colorable justification for removal. There is no federal jurisdiction over the claims in this case. Accordingly, the Court should grant this Motion and issue an order remanding this case in its entirety to the Circuit Court of Surry County, Virginia and award Plaintiffs reasonable fees and costs.

Respectfully submitted,

DATED: January 16, 2007

H. BISHOP DANSBY

By:

H. BISHOP DANSBY

CHRISTOPHER T. NIDEL

Attorneys for Plaintiffs

Exhibit 1

VIRGINIA:
IN THE CIRCUIT COURT OF SURRY COUNTY

SANDRA L. WYATT,)	
WILLIS E. WYATT, JR.,)	
ROBERT L. WYATT,)	
EVA S. GREGORY,)	
LEVERETTE B. GREGORY, JR.,)	
TERESA E. GREGORY,)	
)	
Plaintiffs,)	
)	
v.)	
)	
)	Case No.
Sussex Surry, LLC,)	
Synagro Central, Inc., individually and)	
formerly known as Synagro Mid-Atlantic Inc.)	
)	
Defendants)	

COMPLAINT

Plaintiffs, Sandra L. Wyatt, Willis E. Wyatt, Jr., Robert L. Wyatt, Eva S. Gregory, Leverette B. Gregory, Jr., and Teresa E. Gregory (“Plaintiffs”), by counsel, file this complaint against Sussex Surry, LLC and Synagro Central, Inc., f/k/a Synagro Mid-Atlantic, Inc. (“Defendants”), jointly and severally and, in support thereof, allege the following:

NATURE OF THE CASE

1. This case involves a fundamental right in the Commonwealth of Virginia – the right to the use and enjoyment of one’s home.

2. Sludge is the solid by-product of sewage treatment and contains the contents of sewage that are not water-soluble.

3. Defendants have spread, are spreading, and appear to be continuing to spread their sludge on fields in Surry County, Virginia including on land adjacent to the Plaintiffs' property. and Defendants have sprayed, are spraying, and appear to be continuing to spray the hazardous and noxious material onto trees in Surry County, Virginia including on land adjacent to the Plaintiffs' property.
4. Defendants' application of the hazardous and noxious material has and is taking place on thousands of acres in the County.

PARTIES

Plaintiffs

5. Plaintiff Sandra L. Wyatt is a natural person who owns property in Surry County, Virginia. She resides at 1534 Spring Grove Rd., Claremont, Virginia.
6. Plaintiff Willis E. Wyatt, Jr., is a natural person who owns property in Surry County, Virginia. He resides at 1534 Spring Grove Rd., Claremont, Virginia.
7. Plaintiff Robert L. Wyatt is a natural person who resides in Surry County, Virginia at 1534 Spring Grove Rd., Claremont, Virginia with his parents Sandra L. Wyatt and Willis E. Wyatt, Jr.
8. Plaintiff Eva S. Gregory is a natural person who owns property in Surry County, Virginia. She resides at 368 Spring Grove Road, Spring Grove, Virginia.
9. Plaintiff Leverette B. Gregory, Jr., is a natural person who owns property in Surry County, Virginia. He resides at 368 Spring Grove Road, Spring Grove, Virginia.
10. Plaintiff Teresa Gregory is a natural person, daughter of Leverette B. Gregory, Jr. and Eva S. Gregory who own property in Surry County, Virginia. She currently resides at 199 Mancha Avenue, Claremont, VA 23899.

11. Plaintiffs have been injured, aggravated, driven from their homes, irritated, inconvenienced, and/or otherwise negatively impacted by the spread of hazardous and noxious sewage sludge in Surry County by Defendants.

Defendants

12. Sussex-Surry LLC (“Sussex Surry”) is a Virginia corporation with its principal place of business at 140 Danielstown Road, PO Box 158, Dundas, Virginia 23938-0000, doing business in the Commonwealth of Virginia. Sussex-Surry LLC may be served with process through its registered agent, Sidney J. Brandon, Jr., 140 Danielstown Road, PO Box 158, Dundas, Virginia 23938-0000.
13. Synagro Central, Inc., (“Synagro”) individually and formerly doing business as Synagro Mid-Atlantic, Inc., is a Delaware corporation with its principal place of business at 7014 East Baltimore St., Baltimore, Maryland, 21224-0000, doing business in the Commonwealth of Virginia. Synagro Central, Inc. may be served with process through its registered agent, CT Corporation System, 4701 Cox Road, Suite 301, Glen Allen, Virginia 23060-6802.
14. Defendants engage in business in Virginia as real estate owners, sludge haulers, sludge processors, sludge spreaders, or a combination of these activities.
15. At all times relevant to this litigation, Defendants engaged in one or more phases of the sludge business, from the generation of sludge and other wastes mixed and spread along with sludge, the ownership of the property where the sludge and other waste is sprayed, the hauling of waste from the generator to the land where it is to be applied, and the marketing and sale of sludge and related waste services in Virginia.

16. When reference is made to any act or omission of the Defendants, it shall be deemed to mean that the officers, directors, agents, employees, or representatives of the Defendants committed or authorized such act or omission, or failed to adequately supervise or properly control or direct their employees while engaged in the management, direction, operation or control of the affairs of Defendants, and did so while acting within the scope of their employment or agency.

JURISDICTION AND VENUE

17. This Court has jurisdiction over Defendants because they are either Virginia corporations authorized to do business in Virginia, are registered with the Virginia Secretary of State, do sufficient business with sufficient minimum contacts in Virginia, or otherwise intentionally avail themselves of the Virginia market through the sale, manufacturing, distribution, spreading, spraying, and/or processing of sludge and related products in Virginia to render the exercise of jurisdiction over Defendants by the Virginia courts consistent with traditional notions of fair play and substantial justice.
18. Venue is proper in this Court because the cause of action – the injury, offense, and disturbance created by Defendants’ acts – arose in this County; and/or at least one defendant regularly conducts affairs or business activity in this County, or in the case of withdrawal from this Commonwealth by such Defendant did conduct such business at the time of such withdrawal; and/or Plaintiffs reside in this County and all Defendants are nonresidents.

Sludge in Surry County - Facts

19. According to Harper Collins Dictionary of Environmental Science, sludge is defined as, "[a] viscous, semi-solid mixture of bacteria, virus-laden organic matter, toxic metals, synthetic organic chemicals, and settled solids removed from domestic and industrial waste water at sewage treatment plants."¹ Sludge is not comprised solely of natural, untainted human waste, rather sludge contains numerous hazardous components that are not naturally occurring.
20. Sewage treatment facilities generating sludge receive waste not only from homes, but also street runoff, industry, and other sources including hospitals and medical facilities. This is due in part to the fact that every business in America is allowed to dispose of up to 33 pounds of hazardous wastes in sewers every month without reporting or further regulation.
21. For several reasons, including but not limited to the fact that sewage sludge contains prescription drug products and their biologically active metabolites, synthetic chemicals, and other industrial chemicals, waste, and toxic runoff, sludge is different from untreated hog waste or any other animal manure product used for fertilizing purposes. Manure contains few toxic ingredients and does not contain the vast array of human pathogens found in sludge.
22. In order to temporarily reduce the bacterial load in the sludge, it is often treated with lime, and raised to a severely caustic pH level, above pH of 12. Material at this high

¹ THE HARPER COLLINS DICTIONARY OF ENVIRONMENTAL SCIENCE, Gareth Jones, et. al., HarperCollins Publishers, Ltd., New York, (1992).

- of a pH is irritating to the skin, nose, throat, and lungs, and can cause rashes and burns.
23. In addition to bacteria (including e-coli), gram-negative bacteria, protozoa, viruses, pathogens, caustic, and endotoxins (including *Chlamydia pneumoniae*), sludge contains thousands of chemicals ranging from hormone disrupting polybrominated diphenyl ethers (PBDEs), which are used as flame-retardants, to carcinogenic pesticides and heavy metals such as arsenic, lead and cadmium.
 24. Sludge also contains neurotoxic pollutants such as mercury and lead.
 25. Because many synthetic chemicals, including pharmaceutical compounds such as the synthetic estrogens used in birth control pass through the body into wastewater and are not destroyed or removed in the sewage treatment process, they accumulate in the sludge and present a hazard. Other pharmaceutical compounds are expected to be found concentrated in sewage sludge, including hormone and mood altering drugs.
 26. Current treatment methods do not result in the long-term stabilization of the biological material contained in sludge and biological contaminants such as bacteria and fungi can regenerate during transportation and storage.
 27. Samples of sludge from sewage treatment plants have been found to exceed EPA Soil Screening Levels (SSLs), under the federal environmental laws these exceedences would require a risk assessment to determine the associated hazards and possible cleanup.
 28. To date, there has not been a scientifically adequate risk assessment of exposure to sludge and all of the pollutants contained therein.

29. Defendants have failed to exercise reasonable care by adequately, fully, and completely characterizing, testing, assessing, measuring, or otherwise estimating the potential impact to human health for the sludge disposed of in Surry County.
30. Spreading these chemicals, alone and/or in combination with the other components of sludge, endangers life or health, offends the senses, violates the laws of decency and obstructs the reasonable and comfortable use of property.
31. In addition to the chemical and biological hazards associated with sludge, sludge has an extremely offensive odor due to the presence of toxic and/or irritating gases including dimethyl sulfide, dimethyl disulfide, methyl mercaptan, trimethylamine, and ammonia. This odor is even more offensive than other agricultural manures.
32. The spreading of sludge gives offense to the senses, violates the laws of decency and obstructs the reasonable and comfortable use of property.
33. Along with the offensive odor, the smell, often accompanied by a strong ammonia or chemical smell, can burn and irritate the lungs, eyes, throat, nose, and skin. This smell, which emanates from sludge application sites, gives offense to the senses, endangers life and health, violates the laws of decency and obstructs the reasonable and comfortable use of property.
34. Before spreading the sludge, Defendants test it for a very limited number of pollutants. In fact, testing is limited to determining the levels of some of the more innocuous elements likely to be found in the sludge.
35. Defendants test the sludge for only 8 metals present in sludge: arsenic, cadmium, copper, lead, mercury, nickel, selenium, and zinc.

36. Often, there is no test data for the specific batch of sludge spread or sprayed on a particular plot of land.
37. Defendants do not test for pesticides, even persistent, hazardous organic pesticides that are commonly identified in sewage sludge.
38. Defendants do not test for pharmaceutical products.
39. Defendants test for the weaker indicative pathogens, but do not test for the full range of more persistent virulent pathogens that are commonly identified in sewage sludge.
40. Defendants have actual or constructive knowledge of the various impacts on the surrounding public, including the impacts on Plaintiffs caused by the spraying of sludge in Surry County.
41. Defendants nevertheless intentionally, willfully, maliciously, recklessly, and/or negligently transport, haul, spray, spread, otherwise use, or provide assistance or land for the transportation, hauling, spraying, spreading, or other uses or disposal methods of sludge.

History of Plaintiffs' Problems with Sludge

42. In or around mid July 2005, Defendant Synagro began stockpiling and ultimately spraying sewage sludge on the roughly 1300 acres adjacent to the Wyatt's 38-acre lot located at 1534 Spring Grove Rd. Claremont, Virginia.
43. The sludge disposal began with Defendants', or their agents', trucks hauling loads of sludge both during the day and in the middle of the night throughout the remainder of the summer and for several months following the initial dumping, slowing in or around February of 2006. This hauling, dumping, and spraying operation continued during nights, through the winter, and often through rain and other adverse weather

- conditions. Defendants, or their agents, have returned to the site to spread, spray, distribute, or otherwise dispose of sludge, at various times throughout the months preceding this complaint.
44. The land where the sludge is and has been dumped, stored, sprayed, and spread is, or was at times relevant to this litigation, owned by one or more of Defendants.
 45. The waste sprayed into the trees contained both treated sewage sludge and untreated hog manure generated at local hog farms.
 46. Almost immediately, the nearby residents, including Plaintiffs, began to notice the offensive odors, and suffered from running nose, burning eyes, burning throat, irritated skin, and sores in the nasal passages. These problems got progressively worse.
 47. Eventually these symptoms progresses and Plaintiffs suffered from difficulty breathing, persistent cough, and other respiratory impairments due to the offensive odors and dust in the air.
 48. The offensive odors continued since the very first sludge application, getting more potent with certain wind and weather conditions. These odors have persisted and continue to offend the senses and obstruct the reasonable and comfortable use of the Plaintiffs' property.
 49. In addition to the odors, particulate matter and dust associated with the spread and settling of the sludge permeated and continues to permeate the Plaintiffs' air, endangering health and obstructing the reasonable and comfortable use and enjoyment of residents' homes.

50. Exposure to particulate matter causes increased mortality, especially in the elderly and in individuals with existing cardiopulmonary diseases, such as chronic obstructive pulmonary disease (COPD), interstitial lung diseases, pneumonia, and chronic heart disease.
51. Plaintiffs have also been disrupted by the increased presence of flies at various times throughout the Defendants' sludge operations.
52. Due to the presence of bacteria and other biological materials in sludge, the spread of airborne particulate matter presents an even greater hazard, posing the risk of infection and illnesses such as pneumonia.

Plaintiff Sandra L. Wyatt

53. In or around the middle of August 2005, within weeks of the start of Defendants' waste disposal operations on the property, Ms. Wyatt began suffering from severe cough and breathing troubles associated with the smell of sludge odors. These problems increased in severity over time.
54. On or around August 31, 2005, Ms. Wyatt made a telephone call to Reginald Harrison, a member of the Spring Grove Board of Supervisors, to ask him what it was that was being spread in the property surrounding the Wyatt property.
55. On or about the same day, Ms. Wyatt called Amy Pemberton at the Surry Health Department, and Ms. Pemberton came out to investigate the spread of sludge on the property surrounding the Wyatt property. Ms. Pemberton made a telephone call to the Virginia Department of Health and left a message for Cal Sawyer. Ms. Wyatt and Ms. Pemberton also made a call to contact Mark Alling at the Virginia Department of

- Environmental Quality. Mr. Alling informed them that Synagro would be notified about the complaint.
56. Sandra Wyatt was diagnosed with pneumonia on or around September 9, 2005.
 57. On September 16th, 2005, Sandra Wyatt was told by one of her physicians that something was infiltrating her lungs making them unhealthy.
 58. Ms. Wyatt was referred to a lung specialist by her primary care doctor, and started seeing him on or around September 22, 2005. He ordered an in-depth CT scan, and Ms. Wyatt was seen for the CT scan on September 26, 2005.
 59. Ms. Wyatt's pulmonologist informed her that her lungs were suffering as a result of an irritant inhaled into her lungs that caused inflammation and scarring.
 60. On or about October 11, 2005, Ms. Wyatt contacted a local television station, Channel 10, to express her concerns with the spreading of sludge and the impact on her wellbeing, her property, and her state of mind.
 61. On or around November 3, 2005, Ms. Wyatt underwent an open lung biopsy.
 62. On November 27th, 2005, Ms. Wyatt wrote a letter to Virginia Governor Mark Warner raising her concerns about the spraying of human and animal sewage sludge on the neighboring property and the impact that it had had on the environment, her health, her well-being, and her and her husband's property.
 63. On or around December 1st, The Smithfield Times ran an article about the spraying of sewage sludge in Surry County and discussed Ms. Wyatt's concerns.
 64. On or around December 15th, 2005, Mark Alling from the Virginia Department of Environmental Quality informed Ms. Wyatt that he had discussed Ms. Wyatt's

complaints with Synagro, and informed her that she needs to contact Virginia Department of Health with any further complaints.

65. On February 2nd, 2006, Sandra Wyatt sent a letter to Dr. Stroube at the Virginia Department of Health begging that something be done to stop the spread of sludge on the nearby land. She indicated that the odor was so bad that both her and her husband's eyes and nose were irritated and that she was having trouble breathing. She also indicated that the conditions were so bad, that she was forced from her home and had to seek refuge 45 minutes away.
66. In addition, starting soon after the disposal of sludge on the approximate 1300 acre property adjacent to the Wyatt property, there have been several articles and opinion pieces in the local papers, including the Daily Press and the Sussex-Surry Dispatch, discussing local residents' concerns, including specifically those voiced by Ms. Wyatt, about sludge, the problems that it has caused her, its offensive odor and the risk of health effects associated with sludge.
67. Despite the public concern and outcry from residents including Ms. Wyatt, Defendants continue to transport, haul, spray, spread, otherwise use, or provide assistance or land for the transportation, hauling, spraying, spreading, or other uses or disposal methods of sludge on land adjacent to or near Plaintiffs' property.

Plaintiff Willis E. Wyatt

68. Following the first sludge application, Mr. Wyatt has experienced the offensive odors associated with the spraying of the sewage sludge on the neighboring property, a smell that has, and continues to, offend his senses.

69. He has suffered, and continues to suffer from, the diminished use and enjoyment of his property.
70. He has developed a persistent cough since the initial spraying of sludge in 2005.
71. He has been woken from sleep and been otherwise disturbed on numerous occasions by the loud banging of sludge trucks running in and out of the adjacent property disposing of sludge and other waste materials, stockpiling sludge and other waste materials, and cutting down trees to prepare for the stockpiling and spraying of sludge and related materials.
72. He has also suffered from increased anxiety, emotional distress, and related health problems caused by the offensive odors, loud and disturbing noises, sleepless nights, and constant uncertainties associated with the spraying of waste on the surrounding property.
73. He also suffers from increased anxiety and emotional distress associated with the impacts suffered by his wife, Ms. Wyatt.

Plaintiff Robert L. Wyatt

74. Robert L. Wyatt is the son of Mr. and Mrs. Wyatt.
75. Robert Wyatt first experienced the offensive odors and disruption associated with the sludge spraying when coming to visit his parents shortly after the sludge application began.
76. Because of the presence of strong odors and dusts, Robert Wyatt could no longer bring his children to the Wyatt Property to spend time with their grandmother and grandfather, Mr. and Mrs. Wyatt. As the sludge remains on the surrounding property

and the spraying continues, Robert Wyatt's has had his ability to spend time with his children and their grandparents as a family severely limited.

77. On or around the week of September 25, 2006, Robert Wyatt moved back in to live with his parents at the family residence. With the presence of the sludge and the continued spraying in the surrounding property, Robert Wyatt experiences the sludge odors, dust, and other offenses on a daily basis.
78. The ongoing presence and spraying of the sludge has and continues to offend Robert Wyatt's senses with the offensive odors, dusts, and daily disruptions.
79. The odors have decreased and continue to decrease Robert Wyatt's lawful use and enjoyment of the family property.

Plaintiff Eva S. Gregory

80. Following the first sludge application, Ms. Gregory has experienced the offensive odors associated with the spraying of the sewage sludge on the neighboring property, a smell that has, and continues to, offend her senses.
81. Ms. Gregory has suffered, and continues to suffer from, the diminished use and enjoyment of her property.
82. Ms. Gregory has suffered, and will continue to suffer, property damage as a result of Defendants' sludge activities on the neighboring property in Surry County and the odors and dusts the and the associated irritation, offense, and disturbance.

83. Ms. Gregory and her husband Leverette B. Gregory, Jr. own property containing a pond that is and will be threatened with contamination due to Defendants' sludge activities on the neighboring property.

Plaintiff Leverette B. Gregory, Jr.

84. Following the first sludge application, Mr. Gregory has experienced the offensive odors associated with the spraying of the sewage sludge on the neighboring property, a smell that has, and continues to, offend his senses.

85. He has suffered, and continues to suffer from, the diminished use and enjoyment of his property including, but not limited to, diminished use of his land for both professional work and hobbies as a result of the odors and dusts and the associated irritation, offense, and disturbance.

86. Mr. Gregory has suffered, and will continue to suffer, property damage as a result of Defendants' sludge activities on the neighboring property in Surry County.

87. Mr. Gregory and his wife Eva S. Gregory own property containing a pond that is and will be threatened with contamination due to Defendants' sludge activities on the neighboring property.

Plaintiff Teresa E. Gregory

88. Teresa E. Gregory is the daughter of Mr. Leverette B. Gregory, Jr. and Mrs. Eva S. Gregory.

89. Teresa Gregory first experienced the offensive odors and disruptions associated with the sludge spraying when coming to visit her parents shortly after the sludge application.

90. Teresa Gregory experiences the offensive odors and disruption of the legal use and enjoyment of the Gregory family property located at 368 Spring Grove Road, Spring Grove, VA 23881.
91. Teresa Gregory feeds and tends her horses at the Gregory family property twice every day.
92. Teresa Gregory also rides frequently on the wooded trails at the family property and the surrounding areas neighboring the 1300-acre sludge disposal area.
93. When the sludge is spread, the odors in our woods and pasture make riding there extremely disagreeable, limiting her use and enjoyment of the property and trails.
94. Because of the presence of offensive odors and dusts, Teresa Gregory also has serious concerns about the health and wellbeing of her horses that are constantly subjected to any dusts and odors emanating from the 1300-acre sludge disposal area neighboring the Gregory family property.
95. The ongoing presence and spraying of the sludge has and continues to offend Teresa Gregory's senses with the offensive odors and dust.
96. The odors and dust, and the associated irritation, offense, and disturbance, have decreased and continue to decrease Teresa Gregory's lawful use and enjoyment of Gregory family property.

Defendants have known or should have known the adverse impact that their intentional, willful, reckless and otherwise negligent activities were having, and continue to have on Plaintiffs.

97. Beginning as early as the end of August 2005 when Ms. Wyatt and Ms. Pemberton contacted the Virginia Department of Health and the Virginia Department of Environmental Quality, Defendants were aware, or should have been aware, of the

aggravation, concern, disruption, irritation, discomfort, and additional maladies caused by their conduct.

98. This knowledge, either actual or constructive, was repeatedly reinforced over time following the initial sludge disposal by letters to State and local officials and to the Defendants themselves, in-person communications with State and local officials and with Defendants and Defendants' agents, and by the numerous newspaper articles and opinion pieces regarding sludge and the public concerns associated with its disposal in Surry County. Much of this communication contained, in whole or in part, concerns related to Plaintiffs specifically.
99. At all times relevant to this litigation, Defendants, despite any actual or constructive knowledge of the general public concern and the concerns raised by the specific Plaintiffs joined in this case, continued to this day to intentionally, willfully, recklessly, and negligently transport, stockpile, spray, or otherwise assist in the transportation, stockpiling, or spraying of sludge.
100. At all times relevant to this litigation, Defendants, despite any actual or constructive knowledge of the impact of their activities on the general public and the impact that their activities was having on Plaintiffs, continued to intentionally, willfully, recklessly, and negligently transport, stockpile, spray, or otherwise assist in the transportation, stockpiling, or spraying of sludge, further impacting Plaintiffs.
101. Defendants are also jointly and severally liable because they conspired to conceal the true nature of sludge, to profit from the disposal of sludge at Plaintiffs' expense, to disrupt the comfortable use and enjoyment of Plaintiffs' property, to offend the senses of those exposed to their activities, to violate the laws of decency, to contaminate

Plaintiffs' property including its clean air, and to avoid liability for such contamination.

FIRST CAUSE OF ACTION

Negligence

102. Plaintiffs re-allege and reaffirm each and every allegation set forth in paragraphs 1 through 101 as if fully restated herein.
103. Defendants during the relevant time period transported, hauled, sprayed, spread, marketed, otherwise used, or provided assistance or land for the transportation, hauling, spraying, spreading, or other uses or disposal methods of sludge.
104. As transporters, haulers, sprayers, spreaders, marketers, users, or those otherwise providing assistance or land for the transportation, hauling, spraying, spreading, or other uses or disposal methods of sludge, Defendants owed and continue to owe a duty to Plaintiffs as well as all persons whom Defendants' sludge products might foreseeably harm, and to exercise due care in handling, control, transport, disposal, spread, spraying, storage, and hauling of sludge and other human, animal, or industrial wastes.
105. Defendants had and continue to have a duty and the financial and technical means to dispose of sludge and other industrial or animal wastes in a way that does not pose offense, harm, or hazard to Plaintiffs
106. At all times relevant to this litigation, Defendants knew or should have known that:
 - a. Exposures to odors, dusts, and other pollutants contained in sludge are commonplace and likely to occur;
 - b. Exposures to odors, dusts, and other pollutants contained in sludge actually did occur in the areas surrounding the 1300-acre area adjacent to the Wyatt Property;

- c. When sludge is sprayed 10 to 30 feet in the air that the chemical and biological pollutants in sludge will form particles and aerosols and can travel great distances in the air;
- d. When sludge is stored, sprayed, or spread in the environment, several of the chemical and biological pollutants found in sludge, including PCBs, dioxins, pesticides and heavy metals are released into the environment, where they will persist years following the disposal;
- e. Sludge and the chemical and biological pollutants found in sludge may expose people to unknown health risks;
- g. Sludge and the chemical and biological pollutants found in sludge may, and in fact did, irritate the skin, eyes, nose, throat, and lungs of those exposed;
- h. Sludge and the chemical and biological pollutants found in sludge may create offensive odors, offending the senses of those living near where it is hauled, stored, or sprayed into the trees;
- i. Sludge and the chemical and biological pollutants found in sludge may disrupt the comfortable use and enjoyment of one's property living near where sludge is sprayed, spread, or otherwise disposed of;
- j. Because of the offensive odors and the other hazards created by the hauling, storing, and spraying in the trees of sludge, sludge should not be handled near private residential property and should be disposed of in a different manner;

107. Defendants have negligently breached their duties of due care to Plaintiffs by:

- a. transporting and hauling sludge adjacent to or near private residential property, including that of Plaintiffs, at all hours of the day and night, creating offensive odors, dusts, and loud and disturbing noises that disrupt the sleep, peace and wellbeing of the surrounding residents;
- b. storing and stockpiling large amounts of sludge on land adjacent to private residential property including that of Plaintiffs;
- c. spraying several thousand pounds of sludge 10 to 30 feet in the air into and onto trees on land adjacent to or near private residential property including that of Plaintiffs;

- d. failing to test the sludge they hauled, stored, or sprayed for additional pollutants that could make the waste more hazardous to human health or the environment;
- e. voluntarily incorporating and spreading other forms of animal or industrial wastes, including but not limited to untreated hog waste, in addition to the sewage sludge, on property adjacent to or near the private residential property of people such as Plaintiffs;
- f. failing to use safer and less offensive means of disposing of sludge wastes such as landfilling;
- g. failing to respond to complaints regarding the physical injuries, the aggravation of physical injuries, mental anguish, emotional trauma, and loss of the comfortable use and enjoyment of personal property of public citizens, including Plaintiffs;
- h. continuing to haul, store, and spray sludge on property adjacent to or near private residential properties, including that of Plaintiffs, despite complaints that Defendants were, or should have been aware of.

108. As a direct and proximate result of one or more of the foregoing negligent acts or omissions on the part of Defendants, sludge and/or the pollutants contained in sludge, whether in gaseous, solid, particulate, or other form, have:

- a. prevented and continues to prevent Plaintiffs' comfortable use and enjoyment of their private, residential property, severely restricting its use and enjoyment;
- b. posed and continue to pose a threat to the comfortable use and enjoyment of Plaintiffs' private residential property;
- c. negatively impacted and otherwise injured the mental health and general well-being of Plaintiffs;
- d. posed and continues to pose a threat to the mental health and general well-being of Plaintiffs;
- e. aggravated existing medical conditions experienced by Plaintiffs, causing increased pain and suffering and requiring additional medical care, attention, and treatment;
- f. diminished the property value of Plaintiffs' property adjacent to or near the land where sludge and hog wastes have been stored and sprayed.

109. Plaintiffs request an award of compensatory and punitive damages against Defendants, jointly and severally.

SECOND CAUSE OF ACTION

Private Nuisance

110. Plaintiffs re-allege and reaffirm each and every allegation set forth preceding paragraphs 1 through 101 as if fully restated herein.
111. Plaintiffs' private residential property, including but not limited to the once-clean air, has been and continues to be contaminated by sludge and the biological and chemical pollutants contained in sludge, whether they be in gaseous, solid, or particulate state, as a direct and proximate result of the intentional, unreasonable, negligent and reckless conduct of Defendants, all as alleged herein.
112. Gases, vapors, particulates, flies, and odors caused by Defendants' conduct have damaged and continue to damage Plaintiffs' property and business done on the property.
113. Gases, vapors, particulates, flies, and odors caused by Defendants' conduct have offended and continue to offend the senses of those living, working, and recreating in private residential property adjacent to or near the hauling, storage, spraying, and spreading of sludge and hog wastes, such as Plaintiffs.
114. Gases, vapors, particulates, flies, and odors caused by Defendants' conduct have created and continue to create a health hazard to those living, working, and recreating in private residential property adjacent to or near the hauling, storage, spraying, and spreading of sludge and hog wastes, such as Plaintiffs.

115. Gases, vapors, particulates, flies, and odors caused by Defendants' conduct violate and continue to violate the laws of decency with respect to those living, working, and recreating in private residential property adjacent to or near the hauling, storage, spraying, and spreading of sludge and hog wastes, such as Plaintiffs.
116. Gases, vapors, particulates, flies, and odors caused by Defendants' conduct obstructed and continue to obstruct the reasonable and comfortable use of one's property for those living, working, and recreating in private residential property adjacent to or near the hauling, storage, spraying, and spreading of sludge and hog wastes, such as Plaintiffs.
117. As a direct and proximate result of Defendants' acts and omissions creating the above-described nuisance, Plaintiffs have suffered injuries including diminished property value, physical and emotional injuries, the aggravation of existing medical conditions, diminished use and enjoyment of their property, reduced income from the loss of business, increased health care and associated costs due to the creation of or aggravation of health conditions, and irritation of the eyes, nose, throat, and skin.
118. Plaintiffs request an injunction and an award of compensatory and punitive damage against Defendants, jointly and severally.

THIRD CAUSE OF ACTION

Trespass

119. Plaintiffs re-allege and reaffirm each and every allegation set forth preceding paragraphs 1 through 101 as if fully restated herein.
120. Plaintiffs are the owners, lessees, and/or actual possessors of property adjacent to or near the roughly 1300 acres where Defendants, their agents, and/or employees have

stored, sprayed, and/or spread sludge and other industrial or animal wastes, and knew or in the exercise of reasonable care should have known, that sludge and other industrial or animal wastes or the pollutants contained therein, whether in solid, liquid, or gaseous phase, are hazardous to human health, offensive to the senses, diminish the comfort, use and enjoyment of one's property, diminish the value of nearby property, and diminish other property rights.

121. Defendants intentionally stored, spread, and sprayed sewage sludge and other industrial and animal wastes, releasing it into the environment and directly and proximately caused and continue to cause sewage sludge or the pollutants that comprise sludge, whether in solid, particulate, or gaseous state, to enter into and contaminate Plaintiffs' property.
122. As a direct and proximate result of the trespass, Plaintiffs have been damaged and are entitled to injunctive relief to abate the trespass and other damages alleged herein, including but not limited to, pain and suffering due to aggravated medical conditions, diminution in property value, loss of use and enjoyment of property, loss of business revenue due to loss of productivity, cost of bringing the property to its original condition, investigation, remediation, and treatment, and/or to such other appropriate relief Plaintiffs may elect at trial.
123. Plaintiffs requests an award of compensatory and punitive damages against Defendants.

FOURTH CAUSE OF ACTION

Punitive Damages

124. Plaintiffs re-allege and reaffirms each and every allegation set forth preceding paragraphs 1 through 101 as if fully restated herein.
125. Due to the Defendants' reckless disregard demonstrated by Defendants' actions, as illustrated in the alleged facts, Plaintiffs request an award of punitive damages to prevent further similar conduct on the part of Defendants.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs pray for a judgment against these Defendants jointly and severally, as follows:

Sandra L. Wyatt, Willis E. Wyatt, Jr.:

126. Compensatory damages according to proof including for (i) loss of use and enjoyment of private property; (ii) loss of property value; (iii) loss of revenue; (iv) pain and suffering associated with irritation of the eyes, nose, skin, throat, and lungs and other injuries associated with Defendants' conduct; (v) pain and suffering associated with aggravation of existing medical conditions including respiratory conditions; (vi) mental and emotional anguish; (vii) and medical costs associated with irritations, injuries, psychological and emotional injuries in the amount of:
- a. Three Million Dollars (\$3,000,000) on the First Cause of Action;
 - b. Three Million Dollars (\$3,000,000) on the Second Cause of Action;
 - c. One Million Dollars (\$1,000,000) on the Third Cause of Action;

Eva S. Gregory, and Leverette B. Gregory:

127. Compensatory damages according to proof including for (i) loss of use and enjoyment of private property; (ii) loss of property value; (iii) pain and suffering associated with irritation of the eyes, nose, skin, throat, and lungs and other injuries associated with Defendants' conduct; (iv) and mental and emotional anguish in the amount of:

- a. Two Million Dollars (\$2,000,000) on the First Cause of Action;
- b. Two Million Dollars (\$2,000,000) on the Second Cause of Action;
- c. One Million Dollars (\$1,000,000) on the Third Cause of Action;

Robert L. Wyatt:

128. Compensatory damages according to proof including for (i) loss of use and enjoyment of private property; (ii) pain and suffering associated with irritation of the eyes, nose, skin, throat, and lungs and other injuries associated with Defendants' conduct; (iii) and mental and emotional anguish in the amount of:

- a. One Million Dollars (\$1,000,000) on the First Cause of Action;
- b. One Million Dollars (\$1,000,000) on the Second Cause of Action;
- c. Five-hundred Thousand Dollars (\$500,000) on the Third Cause of Action;

Teresa E. Gregory:

129. Compensatory damages according to proof including for (i) loss of use and enjoyment of private property; (ii) pain and suffering associated with irritation of the eyes, nose, skin, throat, and lungs and other injuries associated with Defendants' conduct; (iii) and mental and emotional anguish in the amount of:

- a. One Million Dollars (\$1,000,000) on the First Cause of Action;

- b. One Million Dollars (\$1,000,000) on the Second Cause of Action;
 - c. Five-hundred Thousand Dollars (\$500,000) on the Third Cause of Action;
130. In addition, each Plaintiff prays for a judgment against these Defendants jointly and severally, for:
- a. An appropriate injunction to remedy the public nuisance created by these Defendants;
 - b. Exemplary and punitive damages sufficient to punish Defendants and deter Defendants from ever committing the same or similar acts, in the amount of:
 - Three Hundred Fifty Thousand Dollars (\$350,000) on the First Cause of Action;
 - Three Hundred Fifty Thousand Dollars (\$350,000) on the Second Cause of Action;
 - Three Hundred Fifty Thousand Dollars (\$350,000) on the Third Cause of Action;
 - c. Costs incurred in prosecuting this action;
 - d. Interest on all damages from the date the cause of action accrued until paid; and
 - e. Any other and further relief as the Court deems just, proper and equitable.

JURY TRIAL DEMANDED

Plaintiffs demand a trial by jury.

Respectfully submitted,
Plaintiffs

By:  _____

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(subject to admission *pro hac vice*)

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January 2007 a true and accurate copy of this pleading was sent by Overnight U.S. Mail to the following:

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