

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

<b>SANDRA L. WYATT,</b>	)	Case No. 3:06CV00835
<b>WILLIS E. WYATT, JR.,</b>	)	
<b>ROBERT L. WYATT,</b>	)	<b>PLAINTIFFS'</b>
<b>EVA S. GREGORY,</b>	)	<b>REBUTTAL BRIEF</b>
<b>LEVERETTE B. GREGORY, JR.,</b>	)	<b>IN SUPPORT OF</b>
<b>TERESA E. GREGORY,</b>	)	<b>MOTION TO REMAND</b>
	)	<b>TO STATE COURT</b>
Plaintiffs,	)	
	)	
v.	)	
	)	
	)	Hearing Date: _____
<b>Sussex Surry, LLC,</b>	)	Time: _____
<b>Synagro Central, Inc.,</b> individually and	)	Location: _____
formerly known as Synagro Mid-Atlantic Inc.	)	Judge: <u>Henry E. Hudson</u>
	)	
Defendants	)	
	)	

**REBUTTAL BRIEF IN SUPPORT OF MOTION TO REMAND**

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## I. INTRODUCTION

Plaintiffs allege state law claims for nuisance, negligence, and trespass against Defendants for *acts and omissions* related to the storage and spreading of sewage sludge on trees and soils on a 1300-acre forest in Surry County. Defendant Synagro's response to Plaintiffs' remand, by its very nature, reinforces the fact that there is no federal jurisdiction over this case and it is properly heard in state court.

Rather than addressing the key jurisdictional argument, Synagro instead provides a lengthy, one-sided, general factual defense of the agricultural use of sewage sludge. *See* Reply at 2-6. This amounts to little more than a six-page rehashing of Synagro's public relations spin aimed at the merits of Plaintiffs' claims. Defendant claims that its sludge disposal operations in Virginia have been "highly successful," failing to mention the level of public resistance to Defendant's disposal activities as is best evidenced by the growing number of complaints filed with the State. *See* <http://www.vdh.state.va.us/OEHS/wwe/complaintlist.asp>.

Synagro then provides a glossed-over page-and-a-half account of the spreading of sewage sludge in Surry County, claiming sewage sludge has been "spread beneath the tree canopy" and anecdotally comparing Defendants' sludge operations in Surry to those in King County, Washington. *See id.* at 7. This characterization is hardly representative of the spreading of sewage sludge around Plaintiffs' land where it is sprayed or slung into trees creating a coating of treated sewage, often inches thick, and as high as twenty to thirty feet. Defendant's overview also fails to report the "yuck factor," the term used by a public affairs representative with the Virginia Biosolids Council (a consortium of sludge applicators) describing the smell emanating from sludge disposal operations. *See* Cortney Langley, *Sludge Spread Elsewhere*, SUSSEX SURRY DISPATCH, Aug. 30, 2006, at 1, 14A. Defendant's fanciful depiction of the facts about

sewage sludge is neither accurate nor an appropriate basis for this Court to determine the question of jurisdiction.

Defendant's misrepresentation of the facts and allegations in Plaintiffs' complaint leads Defendant to rely on misplaced analogy to the torts of an independent contractor. To support its analysis, Defendant offers its own facts, including the assertion that Sussex receives no consideration from Defendant in exchange for use of its land as a disposal area. This supposed lack of consideration is contradicted in the very same paragraph of Defendant's reply when it says that Sussex "consented to the land application of biosolids to *improve its loblolly pine trees.*" Reply at 10 (emphasis added). This does not refute the potential for Sussex's liability, but raises more questions about the true nature of the sludge operations on Sussex's property, such as why Sussex gets valuable fertilizer and what would give Sussex the right to make claims for indemnification against Synagro. See Sussex Answer, at 17 (Attached as Exhibit 1). But again, the facts alleged by Defendant are not the proper basis for the determination of federal jurisdiction in this case. The Court's role is not to predict what facts lie behind the curtain but rather only to determine if there is any *possible* scenario within which Sussex *may be found liable*. If so, the case *must* return to state court.

After offering its own set of facts, Defendant misapplies case law, turning centuries of common-law tort liability on end. Plaintiffs' claims against Sussex are not based on the tortious conduct of Defendant Synagro through some form of third-party vicarious liability; rather, Plaintiffs' claims against Sussex arise out of Sussex's own tortious acts and omissions as the party with exclusive ownership and control of the disposal site. In this context, the cases cited by Defendant have no bearing on Plaintiffs' allegations against Sussex. Plaintiffs negligence claim against Sussex comes out of the first principles of tort liability, duty and breach of duty.

Similarly, Sussex is liable to Plaintiffs under additional common-law theories because of the condition that it authorized through its own acts and omissions, and that it *maintained* on its own private property, thereby creating a nuisance and permitting the trespass of odors and particulates onto Plaintiffs' property, above and beyond the conduct of Defendant Synagro. Defendant's attempt to confuse the issues by inapplicable theories of third-party liability, fails to address the true basis of liability for Sussex. Such legal sleight-of-hand cannot withstand scrutiny.

In addition, the Virginia Right to Farm Act does nothing to protect Sussex from common-law liability in this case. First and foremost, the Right to Farm Act, which only limits a farmer's liability for nuisance, *does not apply to the conduct at issue in this case*, the storage and spreading of sewage sludge:

For the purpose of this section, "production agriculture and silviculture" means the bona fide production or harvesting of agricultural or silvicultural products but shall *not include the processing of agricultural or silvicultural products or the above ground application or storage of sewage sludge*.

Va. Code § 3.1-22.28 (emphasis added). Second, a defense under the Right to Farm Act raises several determinative questions of fact, including whether the conduct of either Defendant amounts to the "bona fide production or harvesting of agricultural or silvacultural products." Finally, and of equal importance, the Right to Farm Act only applies limits on nuisance liability, but expressly does not limit liability in the case where negligence has been alleged, as in this case, or where conduct is not in accordance with the best management practices.

Just as Defendant twists Plaintiffs' allegations, Defendant tortures textbook Supreme Court holdings, most notably *International Paper Company v. Ouelette*, 479 U.S. 481 (1987). As was thoroughly discussed in Plaintiffs' Brief In Support of Motion to Remand ("Brief"), *International Paper* stands for the black-letter proposition that the Clean Water Act ("CWA") preserves Plaintiffs' common law claims. Therefore, Plaintiffs' claims of negligence, nuisance,

and trespass are not preempted, and thus there can be no federal jurisdiction based on the doctrine of complete preemption.

The support offered by Defendant is an attempt to argue its side of the merits of its case rather than focus on the legal question before the Court. The legal arguments posed do not withstand even the most generous scrutiny and provide no basis for the positions that Defendant relies on for federal jurisdiction.

## II. ARGUMENT

### A. Sussex is a Proper Defendant in Plaintiffs' Action

Defendant bears a significant burden in claiming that Sussex has been fraudulently joined, even greater than that posed by a 12(b)6 motion to dismiss. *See* Brief at III, IV(A). As Defendant points out, all that is needed is a “reasonable possibility” that a state court will find liability on even one of Plaintiffs’ claims to find that they are properly joined. *See* Reply at 9 (*quoting Beaudoin v. Sites*, 866 F. Supp. 1300, 1302 (E.D. Va. 1995) (Payne, J.)). This determination is made after resolving all issues of law and fact in the plaintiff’s favor. *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)). Defendant’s discussion of Sussex’s common-law liability<sup>1</sup> distills down to a mischaracterization of the legal and factual basis of Plaintiffs’ allegations against Sussex as one of vicarious liability, rather than as on Sussex’s own acts and omissions.

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<sup>1</sup> *See* Reply at B(1) and B(2). Defendant offers a third argument based on the preclusion of nuisance liability for Sussex under the Virginia Right to Farm Act. This argument is different than saying that Sussex has no liability under common-law. Furthermore, Defendant’s arguments seem to focus on nuisance liability and ignore liability as alleged for negligence and trespass.

As discussed in detail below, on the limited information available to Plaintiffs' without the benefit of discovery, Sussex's acts or omissions *begin* with its authorization of Synagro's disposal on the forests under Sussex's custody and control. This is enough to trigger liability. *See Campbell v. Louisville Coal Mining Co*, 89 P. 767, 768 (Colo. 1907). While *still maintaining control over its property*, Sussex continued to authorize Defendant's dumping, despite knowing the injury it inflicted on the public and, specifically, on Plaintiffs. Plaintiffs' injuries continued throughout periods of Synagro's inactivity caused by the sludge now owned and maintained by Sussex due to its acts and omissions, negligently failing to abate the nuisance and resulting in a trespass on Plaintiffs' property.

In addition to maintaining control of its property, Sussex has frequently been at public meetings and spoken out in the press defending the disposal operations on its property, demonstrating both conduct and rhetoric of one *actively* involved in the disposal on its land for its alleged benefit. Plaintiffs do not yet know the full extent of Sussex's role in the injuries they have and continue to suffer, but they have made good faith allegations justifying the finding, or possible finding, of liability. The merits will be supported by facts brought to light through discovery and determined by a jury, but the mere possibility of so finding requires remand to state court.

**1. Sussex is Not Simply a "Passive" Landowner as Defendant Suggests**

Synagro's discussion of vicarious liability is based on the mistaken contention that Sussex is an act-less, or "passive," third party. Synagro is not a "passive" landowner. To the contrary, Synagro admits that Sussex *provided its consent*, allowing Synagro to dispose of sewage sludge on property within Sussex's exclusive custody and control. *See Reply at 10.* Sussex never leased the land to Synagro or otherwise gave up its control of its land. This act

authorizing the use of its land provides a basis for Sussex's liability under Plaintiffs' common law theories.

Interestingly, Sussex itself does not claim to have clean hands in this matter. In fact, Sussex answered Plaintiffs' Complaint rather than moving to dismiss the claims as baseless. *See* Sussex's Answer, attached as Exhibit 1. Furthermore, Sussex itself, through one of its stakeholders, described the public's backlash against its operations saying, "[e]very time we apply [biosolids], we get complaints and the [Department of Environmental Quality] has to come out." Cortney Langley, *Surry Sludge Site for Sale, Buyers Very Interested*, SUSSEX SURRY DISPATCH, Aug. 2, 2006, at 1 (bracketed material in original, emphasis added). This same stakeholder met, on at least one occasion, with both the press and the public advocating on behalf of Defendant Synagro's sludge disposal operations. *See* Cortney Langley, *Sludge Spread Elsewhere*, SUSSEX SURRY DISPATCH, Aug. 30, 2006, at 1. This is hardly the type of "passive" landowner that Defendant uses to characterize Sussex, and calls into question Sussex's true role in Synagro's operations in Surry.

Whether it is Sussex's omissions in maintaining, negligently or otherwise, a nuisance and permitting a trespass, negligently failing to abate a nuisance within its custody and control, or its "actively" granting permission to Synagro, or some greater involvement in the sludge disposal in Surry awaiting discovery, it is clear that *some possible basis* for tort liability exists. Taking Plaintiffs' allegations in the light most favorable to Plaintiffs, it is impossible to accept that there is *no possible basis* for Plaintiffs to recover, whether in whole or in part, from Sussex. As a proper defendant, Sussex defeats Defendant's basis for diversity jurisdiction.

## **2. Sussex is Liable for its *Own* Acts or Omissions and is a Proper Defendant**

In its effort to establish federal jurisdiction, Defendant misrepresents Plaintiffs' allegations and distorts case law. Defendant falsely states, "Plaintiffs have not alleged any independent negligent acts on the part of Sussex." Reply at 10. Then, referencing these allegations, Defendant leaves out the one fact that is undisputed regarding Sussex's role as alleged in paragraphs 103 and 104 of the Complaint -- that Sussex, *at the absolute minimum*, provided the land for Synagro's sludge disposal. The omission of this allegation in reference to Plaintiffs' Complaint, whether intentional or otherwise, materially alters the allegations made by Plaintiffs as a basis for Sussex's liability, setting Defendant and this Court, on a misguided path discussing vicarious liability rather than properly addressing the Plaintiffs' allegations.

Defendant is consistent with its mischaracterizations, twisting case law and selectively quoting dicta out of context in support of supposed broad legal principles. Defendant cites *Cooper v. Horn* for the idea that there is no liability for trespass without some affirmative act committed by a defendant. See Reply at 10 (*quoting Cooper v. Horn*, 248 Va. 417, 423 (1994)). However, this case, including the quote cited with emphasis by Defendant, when put back in the context of the facts of the court's opinion, provides the absolute opposite conclusion, supporting Plaintiffs' claims against Sussex. In *Cooper*, plaintiffs alleged damage to their property caused by a large volume of water which escaped after a dam on defendant's property burst during a torrential rainstorm. See *Cooper* at 419-21. The defendant had engaged several contractors to build the dam on its property. *Id.* at 419. The court allowed plaintiff to proceed in the alternative with claims of negligence and trespass, and rejected defendant's contention that trespass required showing negligence, holding instead that civil liability for trespass may be predicated upon *unintentional trespass*, or on "acts" done accidentally or by mistake. *Id.* at 423-24 (citations omitted). The court, finding defendant's "acts" that permitted the flood waters to escape and

injure the plaintiffs, summarized the law relevant to land under the custody and control of a landowner:

The 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.

*Cooper* at 424 (quoting *Akers v. Mathieson Alkali Works*, 151 Va. 1 (1928)). At a minimum, Sussex allegedly permitted, and continues to permit, the escape of odors, particulates, and other obnoxious matter from its property, now covered with sludge, causing injury to Plaintiffs. The court's rationale applies whether the injurious material escaping from defendant's property is water, supplied by an "act of God," or muck otherwise supplied by the act of a less divine third-party, such as Synagro. Defendant's use of the land for supposed agricultural purposes, including the beneficial "fertilizing," injures Plaintiffs and their property.

Defendant likewise misrepresents *Virginian Railway Company v. London*, 114 Va. 334 (1912).<sup>2</sup> As quoted in Plaintiffs' Brief, *Virginia Railway* finds tort liability for use or *authorizing the use of one's property, or anything else under one's custody and control*. Brief at 7 (citations omitted). Defendant slips in the requirement that the action authorized must be one with an "inherently injurious affect [sic]"<sup>3</sup> though "inherently" is not required by the court:

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<sup>2</sup> In addition to misrepresenting its implications, Defendant reads between the lines of the *Virginian Railway* opinion, finding that the case "involved no independent contractor and the court properly assigned liability to the landowner who was the party directly conducting the harmful activity." See Reply at 15. However, these facts are not clear from the opinion and furthermore, the fact that liability was imposed on a landowner that is both the one authorizing, creating, and maintaining the nuisance maintenance, does nothing to indicate limits on the landowner that authorizes and maintains a nuisance but that does not itself independently create the condition leading to the nuisance.

<sup>3</sup> See Reply at 15.

A private nuisance is 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...by causing material disturbance or annoyance to him in his use or occupation of that property.

*Virginian Railway*, 114 Va. at 308. Defendant then concludes, apparently through reference to its own “fact finding,” that the application of sewage sludge in Surry County is not “an injurious action” under Virginia law, despite Plaintiffs’ claims of injury. Brief at 7. However, it is not Defendant’s fact finding and conclusions that are to be relied upon in determining whether there is injury or a possible basis for recovery from Sussex. *See Hartley*, 187 F.3d at 424 (4th Cir. 1999) (citing *Marshall*, 6 F.3d 229, 232-33 (4th Cir. 1993)); *see also*, Brief at IV(A). To the contrary, Defendant’s alleged compliance with the law is only a factor to be considered in determining liability, and even lawful activity can be injurious.<sup>4</sup> Even if Plaintiffs fail to establish that Defendants violated any applicable law or regulations, Defendants still face liability if the conduct injures Plaintiffs. *See id.*

US EPA recognizes the potential for injury to result from the mismanagement of sewage sludge applications resulting from the failure to use reasonable care and the best management practices, even some of the very same injuries faced by Plaintiffs. Sussex’s authorizing Defendant to use its private land resulting in a nuisance, whether through lawful or “improperly managed” activities, that Sussex has maintained, is sufficient for liability.

More to the point, the facts forming the basis for Plaintiffs’ claims do not end with Synagro’s disposal of sludge on Sussex’s property. As Defendant points out, Defendant’s own

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<sup>4</sup> *Int’l Paper*, 479 U.S. at 507 (Brennan, J., concurring in part and dissenting in part) (citations omitted); *see also Nat’l Energy Corp. v. O’Quinn*, 223 Va. 83, 85 (1982) (“When a business enterprise, even though lawful, becomes obnoxious to occupants of neighboring dwellings and renders enjoyment of the structures uncomfortable by virtue of, for example smoke, cinders, dust, noise, offensive odors, or noxious gases, the operation of such business is a nuisance.”) (citations omitted); *Barnes v. Quarries, Inc.*, 204 Va. 414, 417 (1963) (“It is beyond the power of a county or municipality to authorize the maintenance of a nuisance.”).

disposal actions on the site were not continuous. Reply at 8. However, the odors, nuisance, and trespass continued, and still continue, as Sussex, whether actively or passively, maintained the dumped sludge on the property under its exclusive custody and control. The act, and the failure to abate, creates Sussex's liability for private nuisance. The failure to exercise reasonable care to control odors, dusts, flies, and other injurious elements leads to Sussex's liability under common-law negligence and trespass. These acts or omissions go beyond those acts or omissions for which Synagro may be found liable.

While neither Plaintiffs nor Defendant has found a Virginia case determining common law liability in the narrow circumstances presented here, analysis of common law in other jurisdictions confirm Sussex's liability. *See State v. Monarch Chem., Inc.*, 90 A.D.2d 907 (N.Y. App. Div. 1982). In *Monarch*, the State brought an action against both the landlord and lessee to abate a nuisance brought about by contamination handled and stored by lessee Monarch. *Id.* at 868. The landlord moved to dismiss on the same grounds Defendant argues here, that the "absence of affirmative misconduct on its part relieved it of any potential liability." *Id.* The court rejected this, stating that the landlord can be held liable "for the wrongdoing of the tenant *when the landlord continues to exercise control over the premises.*" *Id.*; *see also Campbell*, 89 P. at 768 ("It has been held that whoever, for his own advantage, authorizes his property to be used by another in such manner as to unnecessarily endanger and injure the property of others is answerable for the consequences. Such liability has been based up on the law of nuisance, but it follows when predicated upon negligence the same as when grounded upon an intentional wrong." citations omitted). This is consistent with the definition of private nuisance embraced by the Supreme Court of Appeals of Virginia in *Virginia Railway*. These traditional common

law principles apply with even greater force here, where Sussex maintained complete control of the property and cannot claim to have surrendered control to a lessee.

### **3. Defendant's Emphasis on Vicarious Liability for the Torts of an Independent Contractor is Misplaced**

As discussed, Plaintiffs' claims against Sussex stem from Sussex's own acts and omissions. Therefore, all of the authority cited by Defendant, including the Restatement's definition of "independent contractor," is irrelevant to the instant case. *See* Reply at 10-15. The handful of Virginia cases Defendant cites hinge on the relationship between the tortfeasor and some removed third party sued only on the basis of the relationship between the two parties.<sup>5</sup> Plaintiffs' claims are not based on the relationship between Sussex and the Defendant, or the control or lack thereof between the parties. Rather, Plaintiffs' claims are quite simply based on Sussex's control of its property, the very land used by Synagro for the disposal of sludge, and the land from which the nuisance and trespass emanated and continues to emanate under Sussex's continued maintenance and control.

Defendant argues that just as a landlord is not vicariously liable for the torts of a tenant, Sussex has no liability in this case. *See* Reply at 14-15. This analogy lacks relevance to this case and is directly contrary to those facts alleged by Plaintiffs in their Complaint. Sussex is not an absentee property owner, it has not given up its control of its property, nor is Synagro a lawful tenant that has taken exclusive control. Defendant quotes *Wells v. Whitaker*, 207 Va. 616 (1966), in support of its argument, however the statement by the court that a "landlord who *retains no control over premises* is not liable to an adjoining landowner for damage resulting solely from

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<sup>5</sup> Defendant cites the following cases for the contention that Sussex has no possible liability: *Kesler v. Allen*, 233 Va. 130, 134 (1987) (Landlord hires contractor to install door, contractor leaves obstruction in doorway, and plaintiff is injured), *Southern Floors & Acoustics, Inc. v. Max-Yeboah*, 267 Va. 682, 689 (2004), *El-Meswari v. Washington Gas Light Co.*, 785 F.2d 483, 492 (4th Cir. Va. 1986)

the negligence of the tenant” does nothing to strip Sussex of liability. *See* Reply at 14 (*quoting Wells*, 207 Va. at 630) (emphasis added). Sussex both owns and controls the property. The quoted rationale from *Whitaker* has no bearing on Sussex’s liability as landowner, or as a tortfeasor negligently maintaining sludge on its property and allowing the trespass of odors, vapors, and particulates onto Plaintiffs’ property and permitting and maintaining a nuisance.

Even if we accept that Defendant Sussex did not exert any control over the “method and details of Synagro’s application of biosolids,” it *certainly has control over the use of its land*. *See* Reply at 11. And while it may be the case, and this is still open to discovery of the underlying facts, that Sussex has no contractual ability to supervise Synagro’s activities, Sussex *absolutely has the ability to supervise and control the use or misuse of its own private property*. This control distinguishes Sussex from the absentee landlords referred to by Defendants. Furthermore, Sussex is allegedly aware of, and allegedly *benefits from*, Synagro’s disposal activities on the site, contrary to the lack of awareness of the tortious condition at issue in *Kesler*, 233 Va. 130. Sussex is, and has for a time prior to Plaintiffs’ suit been, aware of the public outcry over the use of its land, including personal and public complaints made by Plaintiffs about the condition of Sussex’s property. *See* Compl. at ¶¶ 55-67, 97-101;

**4. Even if Viewed Under the Rubric of Vicarious Liability, Sussex’s Actions are Make Sussex a Proper Party in this Action**

Even under Defendant’s vicarious liability theory, Sussex can still be found liable. Because it has been alleged that Sussex has knowledge of the nuisance and continued disruption caused by the odors and emissions from its property, as is detailed in Plaintiffs’ Complaint, Synagro’s analogy to innocent third parties collapses. This knowledge provides the very

exception required to find Sussex vicariously liable. *See* Reply at 12-15.<sup>6</sup> Defendant characterizes this exception as finding vicarious liability when a landowner “authorizes the ‘likely’ commission of a nuisance.” *See* Reply at 13 (citing *Desaire v. Solomon Valley Co-Op*, 1996 U.S. Dist. LEXIS 4194, 8 (D. Kan. 1996)). Plaintiffs allege in their Complaint, and it is supported by the voluminous public record, that at some point prior to filing this case, Sussex did, in fact, *know* that Synagro’s activities on Sussex’s land injured members of the surrounding public. These facts, unlike the unpredictable, discreet acts discussed in case law referenced by Defendant,<sup>7</sup> afforded Sussex the unique opportunity of *knowing* that their property was, and continued to be, a nuisance. *O’Quinn*, 223 Va. at 85. The instant case meets and exceeds the standard set out by Defendant in its reply. The nuisance created by Sussex’s property was a known fact, not merely ‘likely’ as the test requires. Even with this knowledge, Sussex continued to authorize Defendant’s use of its property as well as continues to negligently maintain its property, and the sludge thereupon, in a condition causing injury and disruption to Plaintiffs.

**B. No Other Basis for Federal Jurisdiction Exists in This Case**

In its discussion of Supreme Court and other authority on federal jurisdiction, Defendant’s reply once again isolates out-of-context statements to further confuse the issues and misrepresent well-established principles of federal jurisdiction. These misrepresentations do nothing to counter the authority presented in Plaintiffs’ Brief clearly showing that, while there

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<sup>6</sup> *See* Reply at 13 (“The *Restatement (Second) of Torts* likewise teaches that the hiring party may be held liable for the trespass or nuisance of an independent contractor when the hiring party ‘knows or has reason to know [the work is] likely to involve a trespass upon the land of another or the creation of a public or private nuisance.’” quoting *Restatement (Second) of Torts* § 427B).

<sup>7</sup> Cases cited by Defendant involve situations where one party hires a third to do a specified job, and outside of any integral task associated with that job, the third party commits an unforeseen discreet tortuous act, such as dropping a roll of roofing materials that strikes and kills a passing child or negligently leaving a board in plaintiff’s way after leaving the jobsite. Sussex is not remote, did not give up control of its property as would a landlord to a tenant, and is, and has been, aware of the problems created by the use and maintenance of its property.

may be federal issues lurking in the background, they do not provide substantial federal questions creating federal jurisdiction over Plaintiffs' claims.<sup>8</sup> Synagro places its reliance squarely on "a decision by Congress (and on-point Supreme Court precedent in *International Paper*)." Reply at 19. That decision of Congress, to preserve state-law claims as evidenced by its inclusion of a savings provision in the Clean Water Act, was interpreted and applied by the Supreme Court in *International Paper* and stands completely contrary to Defendant's position in this case. See generally, *Int'l Paper*, 479 U.S. 481.

Despite Defendant insisting that it is not arguing for removal based on a defense of preemption, it spends five pages trying to convince this Court that Plaintiffs' claims are completely preempted by the CWA under *International Paper*. See Reply at 20-24. There is nothing slight about this attempt to pervert black-letter principles outlined in *International Paper*. The Supreme Court's ruling in *International Paper* has long been referenced for the fact that state common law claims are *not preempted* by the CWA, consistent with Congressional intent.<sup>9</sup> Defendant's trickery here lies in its conflating the dual holding of the Court. This move, though subtle, does not change the holding referenced a multitude of legal texts; the Clean Water Act does not preempt state law claims brought under the laws of the source state. *Id.*

**1. Plaintiffs State Law Claims Do Not Rely on a Necessary Federal Element Nor Do They Raise a Substantial Federal Question**

Plaintiffs' claims are entirely state law claims of negligence, nuisance, and trespass.

While Plaintiffs may use violations of federal regulatory requirement or the state-issued permit

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<sup>8</sup> See *Pinney v. Nokia, Inc.*, 402 F.3d 430, 446 (4th Cir. 2005) (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.").

<sup>9</sup> See Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L.REV. 967, 995 (2002).

to bolster their claims, such a violation is not a necessary element of any of Plaintiffs' claims. These claims can be proven completely independent of the federal regulatory scheme. Therefore, federal "arising under" jurisdiction does not exist. *See* Brief at 11 (*citations omitted*).

Plaintiffs discussed the burden faced by Defendant in claiming "arising under" Plaintiffs' claims in its opening Brief. *See* Brief at IV(B). As discussed in that Brief, Plaintiffs' claims are in no way dependent or contingent on a federal question. Once again, the plaintiff is the master of the claim and can avoid federal jurisdiction by relying on state law in drafting the complaint. *Pinney*, 403 F.3d at 442 (*citing Caterpillar Inc. v. Williams*, 482 U.S. 386, 392 (1987)). As in this case, defendants in *Pinney* claimed that substantial federal questions needed answering because of the comprehensive regulation under the Federal Communications Act of 1934. *Pinney*, 403 F.3d 430. The Fourth Circuit rejected this argument and remanded the case to state court. *Id.* at 459. The court recognized, that even in an area that is covered by comprehensive regulation, there is no federal jurisdiction when "state law establishes a set of elements, without reference to federal law, that the plaintiffs must establish in order to make out a 'valid claim[s] for relief.'" *Pinney*, 403 F.3d at 446 (*citing Franchise Tax Bd. of Calif. v. Construction Laborers Vacation Trust*, 463 U.S. 1, 13 (1983)). As with the state law claims in *Pinney*, the elements of the claims in this case can be satisfied without reference to federal law. For the same reasons as were discussed in *Pinney*, Plaintiffs' claims do not arise under federal law, thus there is no federal jurisdiction, and removal was improper. *See Pinney*, 403 F.3d at 450-51.

Defendant insists that Plaintiffs' state law claims cannot be resolved without deciding substantial issues of federal law. *See* Reply at 24. Defendant attempts to create federal questions raised by "attacks" that Plaintiffs' allegations make on the federal regulations regarding sewage sludge disposal. *See id.* at 25. This approach ignores the Fourth Circuit discussion in *Pinney*,

the very precedent that Defendant cites. *See Pinney*, 403 F.3d at 446-49. In *Pinney*, plaintiffs' state law claims questioned the safety of cellular phones, which are subject to extensive federal standards and regulation. *See Pinney* 403 F.3d at 445. The *Pinney* defendants argued that in order to resolve plaintiffs' state law claims, the court would have to make determinations as to the adequacy and protections offered by the federal regulatory provisions. *Id.* at 446. This argument was accepted by the district court in *Pinney*, however it was *rejected* by the Fourth Circuit in its reversal and remand of the district court. *Id.* at 445-59. This is precisely that same argument that Defendant makes in this instance and it likewise fails. *See Reply* at 25.

## **2. The Clean Water Act Does Not Completely Preempt Plaintiffs' State Claims**

While Defendant should be applauded for its persistence in trying to make *International Paper* stand for something it does not, this persistence does little to change the implication and opinions in that case. *International Paper* is on point, however, not for the reasons or conclusions that Defendant argues. The situation before the Court in *International Paper* involved pollutants discharged from the source state New York and, through *interstate waters*, allegedly injured the affected state, Vermont. *See generally, Int'l Paper*, 479 U.S. 481. While the Court did find that nuisance claims for damages caused by interstate discharges based on the law of the injured state were preempted, *nuisance claims for the same damages based on the law of the source state are not preempted*, and survive despite the comprehensive regulatory scheme found in the CWA referenced repeatedly by Defendant. *See Int'l Paper*, 479 U.S. 481. Defendant fails to discuss this part of the holding despite its clear relevance to Plaintiffs' state law claims. Plaintiffs are suing Sussex and Defendant for the discharge, spreading and maintenance of sludge in Virginia. Plaintiffs' claims are neither concerned with nor dependent upon any actions prior to the disposal of the sludge on the parcel adjoining Plaintiffs' residences.

In addition to misconstruing *International Paper*, Defendant completely fails to mention or address the two Fourth Circuit cases cited in Plaintiffs' Brief, one of which was cited by the Supreme Court in *International Paper*, that similarly held that the CWA does not preempt state law cases filed under the laws of the source state. See Brief at 14-15; *Committee for Jones Fall Sewage System v. Train*, 539 F.2d 1006,1009, and n. 9 (CA4 1976) (CWA preserves common-law suits filed in source state). This is not entirely surprising, as this allows Defendant to confuse the two holdings found in the Supreme Court's opinion and cloud the Court's implications for this case.

To untangle Defendant's argument one needs only to start with the fundamental principles guiding the Court's decision. In addition to the comprehensive regulatory scheme administered by the federal government, the source state has a strong voice in regulating its own pollution and may require limitations more stringent than those imposed by the federal government. See *Int'l Paper*, 479 U.S. at 490 (citing 40 CFR § 122.1(f) (1986)). This includes the right of the discharge state to set permit requirements that are more stringent than the federal requirements. *Id.* at 489-90. The affected state, however, has no power to formally regulate the out of state sources through more restrictive requirement, whether through permits or common law. Under this system, the source, or discharge, state issues permits to point sources within its boundaries and can have standards more protective than the federal regulations.

The Court in *International Paper* artfully navigates the tension between the Congressional intent found in the CWA and its savings provisions, the interest and ability of the source state to regulate its own pollution as preserved by the federalist system, and the complexities that would face a polluter releasing interstate pollution affecting those in other states. Thus, a state that is only affected by an out of state point source, which cannot impose its

own permit requirements on the source, cannot impose its own state's common law requirements. However, the state with the power to regulate the discharge through permits also has the power to impose the strictures of its own common law.

Defendant attempts to circumvent the Court's holding by confusing the legal definition of "source state" used for purposes of CWA permitting and state regulation and the colloquial definition of "source." This mischaracterizing of the discharged sludge at issue in this case takes Defendants almost all the way to the "source" bathrooms piping waste to sewage treatment plants from Maryland, New Jersey, Virginia, and the District of Columbia. However, this definition of source is not the one embraced by the Court throughout *International Paper*, nor is it one that leads to workable regulation of point source discharges of pollution. Under Defendant's logic, the "source state" of benzene manufactured by a chemical company in Delaware and discharged from a chemical company point source in Richmond, Virginia would not be Virginia, but rather Delaware. Virginia would have no ability to restrict that discharge through permits or state law. This logic has no end, and could go back to the true "source," crude oil harvested somewhere off this Nation's shores. As Defendant's discussion points out indirectly, this definition of source state leads to an unworkable regulatory scheme.

Fortunately for our purposes, "source state" is not so poorly defined. The source state is the state where the pollutant is "discharged into the navigable waters," and not the state where the pollutant, or its components, are manufactured, processed, or otherwise generated. *See* 33 U.S.C. § 1342(b). This is not merely the only definition that makes workable sense, but it is the definition embraced by the Supreme Court in *International Paper*.<sup>10</sup> As Defendant points out,

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<sup>10</sup> *See Int'l Paper*, 479 U.S. at 495 ("Given the nature of these complex decisions, it is not surprising that the [Clean Water] Act limits the right to administer the permit system to the EPA and the source States.").

the disposal operations at issue are permitted by Virginia, logically making Virginia the source state. *See* Reply at 7. Just as the application of Vermont common law to a New York point source, already subject to New York common law, would frustrate the regulatory scheme under the CWA, so would allowing New York, New Jersey, and the District of Columbia to impose additional regulatory or common law requirements on pollutants discharged in Virginia, no matter where the discharged material *technically* originated. Rather, consistent with the CWA and the Supreme Court's opinion in *International Paper*, Virginia state common law is appropriately applied to sources of pollution otherwise regulated by Virginia.

Furthermore, under the analysis offered by Defendant, no unified common law would apply to the disposal of sewage sludge under the CWA, or perhaps any other discharge comprised of multiple components or components manufactured or generated out of state. This is clearly not the intention of Congress in drafting the CWA, nor is it consistent with the Supreme Court and the Fourth Circuit's interpretation and application of that Act.

Defendant also raises the concern that allowing common law suits would create conflicting standards and frustrate the purpose of the regulatory system. *See e.g.*, Reply at 25 ("Plaintiffs' challenge, if allowed to proceed, could force numerous federally regulated entities to choose between continued adherence to federal standards and a jury's findings."). The Supreme Court flatly rejected this concern in *International Paper* stating, "[a]n action brought against IPC under New York nuisance law *would not frustrate the goals of the CWA*....Although New York nuisance law may impose separate standards and thus create some tension with the permit system, a source only is required to look to a single additional authority, whose rules should be relatively predictable." *Int'l Paper*, 479 U.S. at 498-99. While the Court did recognize limits to the various laws that a polluter may be held accountable to, the Court clearly preserved the right

of affected citizens to sue to enforce the protections provided by the common laws of their state, even in a suit like that brought in *International Paper*, seeking more than one-hundred million dollars in damages.

The additional cases Defendant cites to support its preemption analysis do not involve the CWA and Defendant does nothing to indicate why these cases should be given greater weight than the Supreme Court and the Fourth Circuit's decisions addressing preemption under the CWA. Without any such attempt, this last-ditch effort is not persuasive.

### **III. CONCLUSION**

Sussex has not been fraudulently joined. As discussed here and in Plaintiffs' Brief, they are proper defendants based on their own acts or omissions causing substantial injury to Plaintiffs. The CWA does not preempt, nor completely preempt, Plaintiffs' state law claims brought in this case and Plaintiffs may establish their case without raising "substantial federal questions" or upsetting the regulatory balance between state and federal controls as indicated by both *International Paper* and *Pinney*. Defendant's meritless removal of this state law case and in the needless burden it has imposed warrants the Court's exercise of authority in awarding the fees and costs of remand to Plaintiffs.

Respectfully submitted,

DATED: February 6, 2007

H. BISHOP DANSBY

By:



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