

VIRGINIA:
IN THE CIRCUIT COURT OF SURRY COUNTY

SANDRA L. WYATT, et. al.)
)
)
 Plaintiffs,) Case No. CL06000069-00
)
 v.) Hearing: June 7, 2007
)
)
 SUSSEX SURRY, LLC, et. al.)
)
)
 Defendants)

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**MEMORANDUM IN OPPOSITION TO DEFENDANT SYNAGRO'S DEMURRER AND
MOTION TO DISMISS**

Plaintiffs, by counsel, hereby submit their Memorandum in Opposition to Defendant Synagro's Demurrer and Motion to Dismiss as follows, adopting and incorporating the facts and arguments set forth in Plaintiffs' Memorandum in Opposition to Defendant Sussex Surry, LLC's Demurrer and Motion to Dismiss:

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I. INTRODUCTION

Sewage sludge, as it is technically and appropriately named,¹ is the solid by-product of municipal and industrial wastewater treatment. Dressing this odorous and offensive waste product up with carefully devised marketing terms is equivalent to putting lipstick on a pig; in the end, sludge is still sludge. This waste, along with untreated hog waste, was disposed of in a 1300-acre forest in Surry County, in the vicinity of Plaintiffs' homes, and remains present today.

Plaintiffs filed their Complaint 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. Plaintiffs do not seek a ban of the disposal of sludge. Plaintiffs do seek compensation for personal injuries and damages as well as the prevention of further injury through appropriately defined measures. The mere fact that Synagro was issued a permit relating to this disposal, does not absolve Defendants of their common law duties.²

Synagro's sole basis for dismissal is "preemption." In stating its case, Synagro claims that the Complaint is triply preempted by federal law, under the Clean Water Act (CWA), and by State law, under both the Virginia Biosolids Use Regulations ("VBUR") and the Virginia Right to Farm Act. Synagro's argument is based on arguments that have been repeatedly rejected by state and federal courts, most recently by Judge Henry Hudson in the Eastern District of Virginia

¹ The US EPA dictionary of "Terms of the Environment" defines sludge as "a semi-solid residue from any of a number of air or water treatment processes; can be a hazardous waste" and sewage sludge as sludge produced at a Publicly Owned Treatment Works, the disposal of which is regulated under the Clean Water Act. *See* <http://www.epa.gov/OCEPAterms/sterms.html>. In addition to the linguistics, the very "comprehensive" set of regulations established by the EPA and referenced repeatedly by the Defendants refer to the same waste material as sewage sludge, starting with the title of the rule, "PART 503—STANDARDS FOR THE USE OR DISPOSAL OF SEWAGE SLUDGE." *See* 40 C.F.R. Part 503.

² *See Bowers v. Westvaco*, 244 Va. 139, 144 (1992) ("When a business enterprise, even though lawful, becomes obnoxious to occupants of neighboring dwellings and renders enjoyment of those structures uncomfortable by virtue of, for example, smoke, cinders, dust, noise, offensive odors, or noxious gasses, the operation of such business is a nuisance.") (quoting *Nat'l Energy Corp. v. O'Quinn*, 233 Va. 83 (1982)).

in this very litigation. See Wyatt v. Sussex Surry, LLC, 2007 U.S. Dist. LEXIS 17929 (E.D. Va. Mar. 13, 2007). Synagro cannot point to a single precedent that indicates this case should be dismissed. Rather, Synagro tortures or simply ignores the relevant caselaw, repeating failed assertions previously made in federal court.

United States Supreme Court precedent is as clear as day; the federal Clean Water Act (“CWA”) simply *does not preempt state common law claims under the law of the source state. See Int’l Paper Co. v. Ouellette*, 479 U.S. 481 (1987) ; *see also* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L.REV. 967, 995 (2002). Furthermore, Defendant does not cite any Virginia case law where state *common law* is preempted or abrogated by the VBUR. Synagro also does not cite any case law supporting the standard it offers for *state statutes* preempting *state common law*. Defendant inappropriately relies on a line of cases where state laws preempt conflicting *local ordinances* when the real issue is whether state law abrogates the state’s *common law*. While it is true that in certain narrow circumstances the General Assembly abrogates the common law – for example in the workers’ compensation context – this argument is not supportable in this case, where there is clearly no expressed or necessarily implied intent to abrogate the common law. The Virginia Right to Farm Act does create a narrow restriction of common law claims, however, it only applies under tightly defined factual conditions not present here. For all of the reasons discussed below, Synagro’s demurrer fails as a matter of law.

II. BACKGROUND

A. Statement of the Case

The following facts are alleged in the Plaintiffs’ Complaint (“Complaint”), except where otherwise noted:

Plaintiffs are private individuals, residing in the Commonwealth of Virginia. *Complaint* at ¶¶ 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.* at ¶¶ 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.* at ¶ 42. Defendant Sussex-Surry, LLC owns the land where the sludge has been disposed. *Id.* at ¶ 44.

Sewage sludge is the semi-solid byproduct of the treatment of municipal and industrial waste. *Id.* at ¶ 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.* at ¶¶ 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.* at ¶ 31. The sludge also forms airborne particulate matter when it dries. *Id.* at ¶ 49. The presence of these particulates, chemicals, biologicals, aerosols, and odors in sludge makes it hazardous to human health, irritating to the skin, eyes, nose, throat, and lungs, and offensive to the senses. *Id.* at ¶¶ 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.* at ¶¶ 30, 32-33, 49. These particulates, odors, chemicals, aerosols, and other materials were released from the disposal site owned by Sussex both during and after the disposal operations, causing damage and injury to Plaintiffs. *Id.* at ¶¶ 53, 68, 76-78, 82, 94, .

In addition to disposing of permitted treated sewage sludge, Synagro also disposed of roughly one million gallons of noxious hog waste material from Smithfield's lagoons. *See* Complaint at ¶ 45. This material does not meet the definition of "biosolids" and was not approved for disposal.³ *See* Surry Permit, Ex. 1. This same permit prohibits the spread of odors from the disposal site. *See id.*

Starting in or around October of 2005, public outcry about Defendants' sludge-related activities at the Surry County site reached the local media and the state and local government. *See id.* at ¶¶ 60-66. Despite the attention regarding the public's concern, culminating in both actual and constructive notice to both Defendants, sludge maintenance and disposal continued with permission from Sussex Surry. *Id.* at ¶ 67. Sussex, at all times, had the right under the disposal agreement to stop Synagro's disposal operations. *See* Agreement, Ex. 2.

B. Land Application of Sludge in Virginia

Defendant spends a considerable portion of its brief "describing" the history and regulatory framework of the land application of sewage sludge in Virginia. *See* Synagro Brief at 1-8. This misinformation amounts to no more than a public relations campaign that does nothing to address the legal sufficiency of Plaintiffs' allegations in this case, which is the only issue before the Court. However, due to the inaccurate and incomplete nature of Defendant's fictitious account, Plaintiffs are compelled to provide key aspects of the relevant background.

Defendant presents a fanciful picture of the land application of biosolids as a highly regulated, widely accepted, proven safe, and completely understood practice encouraged by the

³ According to the VBUR, "biosolids" means a sewage sludge that has received an established treatment for required pathogen control and is treated or managed to reduce vector attraction to a satisfactory level and contains acceptable levels of pollutants, such that it is acceptable for use for land application, marketing or distribution in accordance with this chapter." In addition, "'Sewage sludge' or 'sludge' means any solid, semisolid, or liquid residues which contain materials removed from municipal or domestic wastewater during treatment including primary and secondary residues." 12 VAC 5-585-10.

US EPA, hinting that Plaintiffs claims are remarkable and unsubstantiated. *See* Synagro Brief, at 1-8. This could not be further from the truth.

Alarmed by public concern, the Virginia General Assembly commissioned an investigation of the land application program in Virginia and a draft report was published in 2005. *See* Review of Land Application of Biosolids in Virginia, (Oct. 11, 2005) (the “JLARC Study”), attached as Ex. 3. This report details the weak and ineffective nature of the oversight of sewage sludge disposal both by the federal and state regulatory agencies. The regulatory programs are given low priority, are understaffed, rely on inexperienced individuals, rarely lead to inspections, rarely result in regulatory sampling or analysis, carry little or no enforcement, and ultimately fail to ensure compliance with the regulations or with good management practices. *See generally*, JLARC Study. This is also reflected in federal audits:

EPA does not have an effective program for ensuring compliance with the land application requirements of Part 503. Accordingly, while EPA promotes land application,⁴ EPA cannot assure the public that current land application practices are protective of human health and the environment.

Water – Biosolids Management and Enforcement, Office of the Inspector General Audit Report, *Biosolids Management and Enforcement*, at p. ii, “Results in Brief” (2000).

The public, especially those dealing with the immediate impact of the disposal of this waste, have not welcomed land application. The controversy in Virginia is as deep as it is wide, but begins by simply noting the growing number of complaints relating to sludge filed with the State. *See* <http://www.vdh.state.va.us/OEHS/wwe/complaintlist.asp>. Due to the injury and disruption associated with the land application of sewage sludge, several counties across the country have passed laws restricting or completely banning the land application of sludge.

⁴ EPA withdrew its support after this report was published.

Several Virginia counties have banned, attempted to ban, or otherwise restricted the land disposal of sludge as well.

Despite Defendant's contentions, EPA regulation and its associated risk assessment provide no comfort to those concerned about sludge disposal. First and foremost, the EPA Sludge Rule *does not even address odor issues* associated with land application, perhaps the most fundamental issues in this case. This is true despite the fact that EPA recognized the potential for concern with the odors stating in 1999 that "[n]ot only do the odors themselves cause a public concern, but odors also trigger fears that 'foul smelling' residues from municipalities and industry must be toxic and harmful." Office of EPA Inspector General, *Land Application of Biosolids*, p. 24 (2002). In addition, the "peer reviewed risk-assessment" of land application, also referenced by Defendant, did not consider the risks the public from exposure to airborne aerosols, odors, particulates, and vapors from the disposal of sewage sludge; the dominant pathway at issue in this case. See National Research Council of the National Academy of Sciences, *Biosolids Applied to Land: Advancing Standards and Practices* (2002). Perhaps the most striking aspect of the "risk assessment" was that the risk assessors themselves concluded that it is not possible to conduct a science-based risk assessment of the land application of sewage sludge due to the complex mixture of chemicals and the chemical-biological interactions found in sewage sludge. See *id* at 248-256.

Land application of sludge has not been "proven safe" by any stretch, rather, this issue is the subject of great controversy. See JLARC at 11. Defendant relies on the current limit of scientific data to say that this practice is affirmatively proven to be safe. However, the inappropriateness of that logic was made clear in the NRC report referenced by Defendant and discussed by the JLARC authors:

The NRC report, in a sentence often quoted by biosolids supporters [and by Defendant], said, that ‘There is no documented scientific evidence that the [federal regulation] has failed to protect public health.’ On the other hand, the next sentence of the report said that ‘additional scientific work is needed to reduce persistent *uncertainty* about the potential for adverse human health effects from exposure to biosolids.’

This is clearly not a ringing endorsement of the so-called “proven safety” of land application. To the contrary, there is a growing amount of evidence showing that there are, in fact, health risks associated with land application.⁵ Again, these health reports arise out of conditions not even considered by the risk assessors. This literature stands counter to Defendant’s claim that this is proven safe and that there is no evidence indicating otherwise. *See e.g.*, Synagro Brief at 6.

Defendant states repeatedly that the federal government “encourages” or promotes the land application of sewage sludge. This is also flatly untrue. In 2002, with a status report from the Office of the Inspector General, the EPA withdrew its encouragement of land application and adopted a method-neutral position, denying favor to any sludge disposal method, despite the industry’s urging. *See* EPA Office of Inspector General, *Land Application of Biosolids*, (2002).

In sum, Defendant has painted an incomplete and actively deceptive picture of the land application of sewage sludge, the public acceptance surrounding it. This is a highly controversial practice with many unknown, unstudied, and unquantifiable risks. There is often little-or-no regulatory oversight and enforcement is lax at best. The regulatory program is insufficient to ensure that adequate reviews and oversight are in place to protect the rights, health, and wellbeing of Virginia’s citizenry.

⁵ *See e.g.* Harrison, Ellen Z., “Investigation of Alleged Health Incidents Associated With Land Application of Sewage Sludge,” *NEW SOLUTIONS*, Vol. 12(4) 387-408, (2002), attached as Ex. 4; *see also* Snyder, Caroline PhD, *INT. J. OCCUP. ENVIRON. HEALTH*, *The Dirty Work of Promoting “Recycling” of America’s Sewage Sludge*, 2005;11:415–427.

C. Procedural History of the Case

Plaintiffs commenced this action in the Circuit Court of Surry County, Virginia. 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. On April 3, 2007, Judge Henry Hudson issued his opinion in this case, remanding it to this Court. *Wyatt*, 2007 U.S. Dist. LEXIS 17929. Due to the nature of Defendants' arguments in Federal Court, including that Sussex was improperly joined, the Federal Court addressed many of the same issues regarding both federal and state preemption of Plaintiffs' claims.

III. STANDARD OF REVIEW

A "demurrer admits the truth of all material facts that are properly pleaded, facts which are impliedly alleged, and facts which may be fairly and justly inferred from alleged facts." *Cox Cable Hampton Roads, Inc. v. City of Norfolk*, 242 Va. 394, 397 (1991) (citing *Palumbo v. Bennett*, 242 Va. 248, 249 (1991)). In addition, the reviewing court may also consider exhibits filed with the pleadings. *Id.* (citing *Flippo v. F & L Land Co.*, 241 Va. 15, 17 (1991)). A plaintiff's claim is only to be dismissed if it completely fails to state a cognizable cause of action under Virginia law. *See Fun v. Virginia Military Inst.*, Record 91180, 422 S.E.2d 770 (1992). Defendant generally argues for dismissal on the ground that Plaintiffs' claims are preempted by state and federal law. *See Synagro Brief* at 9-28. As discussed below, based on well-established case law, this argument fails.

Because the allegations and facts support Plaintiffs' common law claims for negligence, nuisance, trespass, and for punitive damages which are properly pleaded under Virginia law and, Defendant's motion must be denied.

IV. ARGUMENT

A. State Sludge Regulation Does Not Abrogate Plaintiffs Common Law Claims

Defendant relies on a flawed analysis to support its argument that Plaintiffs' *state* common law claims are preempted by *state* regulation of land application of sludge. Defendant cites cases striking down *local ordinances* on the ground that they are preempted by state regulation. See Synagro Brief at 9-19. The analysis of state versus local law applies a uniquely protective standard due to Virginia's strong preference for state legislation over local rules.⁶ This analysis relies on Va. Code § 1-13.17, which prohibits the enactment of ordinances inconsistent with the laws of the Commonwealth, further increasing the limitations on local ordinances. However, the issue presented by this case is whether *common law rights and remedies* are stripped by state regulations passed pursuant to the federal CWA. Unlike local ordinances, the abrogation of common law is controlled by the principles set forth in *Boyd*:

The common law *will not be considered as altered or changed by statute unless the legislative intent is plainly manifested*. A statutory change in the common law is limited to that which is *expressly stated* or *necessarily implied* because the presumption is that no change was intended. When an enactment does *not encompass the entire subject covered by the common law*, it abrogates the common law rule only to the extent that its terms are directly and irreconcilably opposed to the rule.

Boyd v. Commonwealth, 236 Va. 346, 349 (1988) (citations omitted, emphasis added). This standard is well established in Virginia.⁷ It further follows that "statutes in derogation of the common law are to be *strictly construed and not to be enlarged in their operation beyond their express terms*." *Hyman v. Glover*, 232 Va. 140, 143 (Va. 1986) (citations omitted, emphasis added). Even when a statutory remedy exists, the common law remedy is not to be stripped,

⁶ See 2002 Op. Va. Att'y Gen., 01-085 ("Virginia adheres to the Dillon Rule of strict construction, which provides that local governing bodies 'have only those powers that are expressly granted, those necessarily or fairly implied from expressly granted powers, and those that are essential and indispensable.'") (citations omitted).

⁷ See *Herndon v. St. Mary's Hosp., Inc.*, 266 Va. 472, 476 (2003) (citations omitted); *Mitchem v. Counts*, 259 Va. 179, 186 (2000) (citations omitted); *Schwartz v. Brownlee*, 253 Va. 159, 166 (1997) (citations omitted).

except in the narrow circumstance where the *statutory remedy is meant to be exclusive*.⁸

Defendant's analysis under the "preemption" rubric, whether looking at federal-state or state-local preemption, does not control this case.

Defendant points to only two instances where common law rights were abrogated by state statutes. Both rely on express statutory language and neither applies broad "preemption" such as that offered by Defendant's field preemption argument.⁹ Defendant simply begs this Court to legislate from the bench by finding an express intent to abrogate common law even though the only expression from the General Assembly is plainly and directly to the contrary. *See Couplin v. Payne*, 613 S.E.2d 592, 595 (Va. 2005) (It is not within the province of the judiciary to amend or enlarge the statute).

Defendant cites no authority supporting the contention that the VBUR abrogates Plaintiffs' common law rights. Rather, Defendant repeatedly miscites perhaps the most relevant case that it discusses, *Vintner. The Country Vintner v. Louis Latour, Inc.*, 272 Va. 402 (2006). Defendant cites *Vintner* multiple times for the proposition that state law preempted common law claims for breach of contract. In fact, the *Vintner* court held that plaintiff's common law claims

⁸ *See Cavallo v. Star Enter.*, 100 F.3d 1150, 1156 (4th Cir. Va. 1996) ("Because the Consent Order did not provide for damages payments to homeowners, the court found, awarding damages to the Plaintiffs would not conflict with the Consent Order") (citing *Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1417-18 (4th Cir. 1992)); *see also Pearman v. Rayon Corp.*, 207 Va. 854 (1967) (finding state courts have common law jurisdiction over claims related to highly regulated labor relations, despite concurrent, but non-exclusive, federal jurisdiction) (citing *United Construction Workers v. Laburnum Construction Corp.*, 194 Va. 872, affirmed 347 U.S. 656 (1954)).

⁹ The only two cases offered by Defendant finding state law abrogation of state common law are *Long* and *Schlegel*. *Long v. Commonwealth*, 23 Va. App. 537 (1996); *Schlegel v. Bank of America*, 271 Va. 542 (2006). Both applied express preemption principles. In *Long*, the court found that the common law defense of necessity was abrogated by the clear intent of the legislature to amend policy in criminal law. *Long* at 544. In *Schlegel*, there was no dispute that the relevant statute was expressly intended to be exclusive for those "situations covered by the particular provisions" of the regulation. *See Schlegel* at 553 (citing Va. Code Ann. § 8.4A-102 cmt.). Thus, because the common law tort of unauthorized payment involved a "situation covered by the particular provisions," the common law claim was preempted. However, the court held that Plaintiffs' second common law claim, involving a related but distinct transaction, was not preempted despite the clearly expressed intent of the legislature to exclusively regulate. *Schlegel* at 553-55. *Schlegel* reaffirmed the proposition that even where there is an express intent to exclusively occupy the relevant field, courts must still narrowly construe the exclusivity of the regulation when confronted with common law claims.

were not preempted by state law. In doing so, the court *rejected* the argument that the General Assembly intended the law to be exclusive such that common law remedies were extinguished. *See Vintner* at 411, 415. Yet Defendants now seek to invoke *Vintner* as an example where a court prevented common law claims in the face of comprehensive state regulation. This is not the case.

Defendant introduces *Vintner*, as well as *Hyman v. Glover* and *Long v. Commonwealth*, as cases that address state statute abrogation of state common law. But Defendant's superficial citation of this authority fails to apply the legal analysis set forth in those cases. *Vintner*, *Hyman*, and *Long* are consistent in holding that before a common law remedy may be abrogated, the court must establish that the statute expresses a plainly manifested intent to do so.¹⁰ Even when such an intent is manifest, the statute is narrowly construed to its express terms. *See id.* Thus, whether the statute provides the aggrieved with an appropriate remedy, and whether that remedy was intended as the *exclusive remedy*, guides the court in its determination of legislative intent. *See e.g. See Schlegel* at 551; *see also Feikema v. Texaco, Inc.*, 16 F.3d 1408, 1413 (4th Cir. 1994). This framework indicates the strong preference for preserving common law claims despite state regulation unless, *and only to the extent*, that the General Assembly has clearly spoken and has provided appropriate recourse. Defendant's arguments here fall strikingly short of this standard.

1. The VBUR Do Not Express Any Intention to Abrogate Longstanding Common law

The VBUR provide no express, *plainly manifest* indication that its regulations are intended to abrogate the common law. In fact, the regulations provide the plainly manifest and

¹⁰ *See Hyman v. Glover*, 232 Va. 140, 143 (Va. 1986); *See also, Chandler v. Nat'l R.R. Passenger Corp.*, 882 F. Supp. 533, 536 (EDVA 1995) ("This logic is especially compelling in Virginia where *a clear legislative intent is required* before a common law duty will be discarded.") (emphasis added).

express intent to do just the opposite. *See* 12 V.A.C. 5-585-30 (“Powers and procedures of regulations not exclusive”). With no express intention to strip the public of common law rights and the express provision that the regulations *are not meant to be exclusive*, there is no need for further analysis. *See e.g., Doss v. Jamco, Inc.*, 254 Va. 362, 371 (1997) (Court found plain manifestation of intent to abrogate under the VHRA language that causes of action “shall be exclusively limited...”). Thus, “[w]hen the legislature has spoken plainly, it is not the function of the courts to change or amend its enactments under the guise of construing them.” *Id.* at 370.

The rationale behind the requirement of express intent was provided in *Wicks v. City of Charlottesville*:

[The General Assembly] is presumed to have known and to have had the common law in mind in the enactment of a statute. The statute must therefore be *read along with the provisions of the common law...*

215 Va. 274, 276 (1974). The General Assembly included no express intention to remove the existing common law rights and remedies and went out of its way to indicate that the regulations are not exclusive, therefore the VBUR provide no basis for abrogation of the common law.

2. The VBUR Make No Necessary Implication Abrogating Longstanding Common law

Despite express indication to the contrary, Defendant insists that due to the “comprehensive” nature of the VBUR, Plaintiffs are stripped of their rights and remedies. As with any express intention, any implication abrogating common law is to be read strictly and narrowly. The Supreme Court of Virginia has routinely held that “unless the intention of a statute to change the common law appears from its express language or by *necessary implication*, the statute is to be read as if the common law remained unchanged.” *Environmental Defense Fund v. Lamphier*, 714 F.2d 331, at 337 (4th Cir. 1983) (citing *Hannabass v. Ryan*, 164 Va. 519 (1935)) (emphasis added).

Mere “comprehensive” regulation in the related field is insufficient to abrogate longstanding rights under the common law.¹¹ Defendant attempts throughout its brief to misapply the standards for preemption of regulation (federal-state, or state-local), arguing that the VBUR “occupy the field” and thus preempt common law claims. Synagro Brief at 10-17. However, as previously stated, the preemption of local ordinances does not apply to the question before the Court. *Boyd* requires that, for state regulations to abrogate the common law, the regulations must “encompass the entire subject area *covered by the common law.*” *Boyd*, 236 Va. at 349. First, the VBUR explicitly disavow any intent “occupy the field.” 12 V.A.C. 5-585-30. Second, the subject area to be entirely “occupied” in this context is not regulatory field of land application of sludge as is considered in the federal-state preemption, but rather the “field” of the common law. Therefore, only when the statute expressly encompasses the entire subject area, *including the rights and remedies under the common law*, will the common law claim be abrogated. *See e.g., Schlegel* at 551, 553 (despite statute's expressed intent to be exclusive, court did not find preemption of plaintiff's common law claim where the statute did not provide a remedy for the conduct at issue).¹² This is entirely consistent with Virginia courts' analysis of the abrogation of common law. *See e.g., McBride Metric Constructors, Inc.*, 239 Va. 138 (1980)

¹¹ *See e.g. Environmental Defense*, 714 F.2d 331; *Isbell v. Comm. Inv. Ass., Inc.*, 2007 WL 1166143 (Va. 2007) (Landlord Tenant Act does not abrogate common law claim for negligence); *Mitchem v. Counts*, 259 Va. 179 (2000). (Virginia Human Rights Act does not abrogate common law claim for wrongful termination); *see also, King v. Arlington County*, 195 Va. 1084 (Va. 1954). (“While it is true that the ‘Dog laws’ are comprehensive and provide for the exclusive licensing and taxing of dogs by the State...we do not agree that their purpose and effect were to withhold from the localities the entire field of regulation.”).

¹² *Schlegel* is unique in that the Court was guided by the statute's official comment explaining why the regulations were to be exclusive and why the rights and remedies are limited to the regulatory provisions for those claims covered by its provisions. *See* Va. Code Ann. § 8.4A-102 cmt Because there was an explicit remedy for the particular injuries suffered by the plaintiff for unauthorized payment, plaintiff's common law remedy was preempted. Interestingly, Defendant ignores the Court's rejection of preemption of the plaintiff's second common law claim (for the freezing of funds), despite the Court's recognition of the exclusive intent of the regulations, because the statute did not completely occupy the field by providing a remedy for the particular injury. *See* Synagro Brief at 17; *Schlegel* at 553-54.

(Recognizing Virginia Workers' Compensation Act, which provides a statutory remedy, is exclusive).¹³

The extensive Virginia case law applying this standard is replete with examples of common law claims that survive despite comprehensive regulation of the related field. In *Environmental Defense* the defendant argued that Virginia's hazardous waste statute, Va. Code §§ 322.1177 et seq., preempts Virginia's common law of nuisance. *See Environmental Defense* at 337. The Fourth Circuit rejected this argument, relying not on preemption analysis, but on the same analysis of statutory abrogation of common law presented in *Boyd*, finding no express or implied amendment to the common law by the comprehensive set of regulations. *See id.* *Environmental Defense* brings into focus the specious claims of Synagro.

The Fourth Circuit considered whether a common law claim for damages conflicted with the RCRA federal regulatory scheme. *Cavallo v. Star Enter.*, 100 F.3d 1150 (4th Cir. Va. 1996). The court held that a damages claim stemming from remediation regulated by the EPA could proceed despite EPA's regulatory scheme. *Id.* at 1157. The court recognized that while Congress granted EPA broad regulatory authority, that authority was meant to complement other rights and remedies, such as the common law. *See id.* at 1156 (quoting *Feikema*, 16 F.3d at 1413).

There is a long line of Virginia cases that narrowly construe the abrogation of common law claims, including those brought in relation to highly regulated fields..¹⁴ The same narrow construction has been applied to the abrogation of federal common law by federal regulation.¹⁵

¹³ Defendant cites *McBride* as holding that the Virginia Longshoreman Act barred a common law claim for negligence. *See Syangro Brief* at 18. However, Defendant mis-cites this case, which in fact held that the Federal Longshoreman's and Harbor Workers' Compensation Act does not apply and that the claim is covered by the Virginia Workers' Compensation Act. *McBride* at 139. This is important to recognize, as the exclusivity of the limited remedy provided by workers' compensation is widely recognized and understood, but has little implication in this case.

The analysis of common law abrogation enlightened by analysis in federal preemption cases. This begins by quickly looking at the Supreme Court's ruling in *International Paper. Int'l Paper Co. v. Ouellette*, 479 U.S. 481 (1987). The CWA, which provides the basis for the VBUR, is clearly a comprehensive regulation governing many aspects of environmental protection and pollution prevention. However, the Supreme Court found that state common law claims, even those seeking large sums of damages, were preserved despite the regulatory scheme. *See id.*

3. The VBUR Are Not Directly and Irreconcilably Opposed to Common Law Claims and Thus Do Not Conflict For Purposes of Nullifying Longstanding Common law Rights

Defendant takes the unsupportable position that tort liability under the common law necessarily creates an impermissible conflict with the VBUR. *See* Synagro Brief at 17-20. Defendant provides no authority for extending the preemption analysis, normally applied to federal-state conflicts, to where there is a conflict between the state's own common law and a state regulation that lacks an express provision to abrogate other remedies.¹⁶ Defendant's logic

¹⁴ *Chandler*, 882 F. Supp. 533 (Common law duty to erect and maintain protective devices at railroad crossings despite comprehensive regulations and oversight by the Commonwealth Transportation Board.); *Virginia Imports, Inc. v. Kirwin Brewery of America, LLC*, 296 F. Supp. 2d 691 (2003) (Regulated relationship under the Beer Franchise Act does not "explicitly or necessarily" abrogate the common law claim of fraud); *Atkinson v. Davis*, 34 Va. Cir. 139 (1994) (Virginia Residential Property Disclosure Act does not abrogate common law action of fraud).

¹⁵ *See United States v. Texas*, 507 US 529, 534-38 (1993) (Debt Collection Act of 1982 regulating the federal government's debt collection does not prohibit the government from seeking prejudgment interest under the federal common law); *United States v Moffitt, Zwerling & Kemler, P.C.*, 83 F.3d 660, 668-70 (4th Cir. 1996) (Comprehensive Forfeiture Act does not abrogate common law remedies); *United States v. Mead*, 426 F.2d 118, 124-25 (9th Cir. 1970) (common law remedy of payment by mistake not abrogated by False Claims Act's statutory remedies); *Indus., Inc. v. Cheney*, 995 F.2d 1052, 1054-56 (Fed. Cir. 1993) (common law remedy of offsetting contract debts against contract payments not abrogated by Debt Collection Act's statutory remedies).

¹⁶ Defendant cites two Virginia cases dealing with common law claims. The first is *Vintner*, which Defendant again mis-cites, and, as was previously discussed, the Court's analysis and holding in *Vintner* support the preservation of common law claims. Defendant also cites *McBride*. While the implication in *McBride* is that under the Virginia act, an employer has immunity for tort claims, this is based on *the express provisions of the act*, and plays no part in the Court's holding that the state act controlled.

would extend preemption to any regulated activity, contrary to the cases discussed *supra*.¹⁷

Numerous contrary examples are presented throughout this discussion, ranging from the United States and Virginia Supreme Courts upholding common law claims in regulated fields to the *Bowers* court preserving common law claims against otherwise lawful activities.

Defendant argues that the common law is contrary to the policy of the VBUR. Synagro Brief at 17-20. First and foremost, Defendant provides no legal authority for the claim that the common law can be abrogated by policy. This is not a consideration appropriately weighed in the analysis under *Boyd*, except as that policy is plainly expressed in the regulation. However, the policy of the VDH is *not* to enshrine the right to dump sewage sludge across the State; rather, the policy of the VBUR is to protect health and the environment in Virginia. Va. Code Ann. § 32.1-2. In fact, it is broad policy in Virginia to safeguard “the public health, safety, and welfare of the citizens of Virginia.” Va. Code § 2.2-616. Plaintiffs’ claims seeking to protect their health, wellbeing, and environment do not conflict with the State’s policies.

4. There Is No Basis for Abrogation of Common law Even Under Defendant’s Inapplicable Standards of “Conflict Preemption.”

Although the principles of conflict preemption do not apply to the issue before the Court, application of those principles does not dictate any different outcome. The principles of preemption and of impermissible conflicts in the context of the CWA has been fully discussed and dismissed by the Supreme Court in *International Paper* and by the Fourth Circuit in both *Stoddard* and *Committee for Jones Falls Sewage*. See discussion below; *Int’l Paper*, 479 U.S. at 498-500. The law is well-settled that common law requirements may be more stringent than

¹⁷ The case law is full of common law claims brought against some of the most highly regulated industries in this nation. Many of those are discussed throughout this brief and those presented are by no means an exhaustive list. See also, *Bates v. Down Agrosciences, LLC*, 125 S.Ct. 1788 (2005) (common law tort claims not preempted by comprehensive regulations of pesticide labeling under FIFRA); *Pinney v. Nokia, Inc.*, 402 F.3d 430, 446 (4th Cir. 2005) (common law claims against cell phone manufacturers for radiation levels survive as Federal Communications Act does not provide the exclusive remedy).

those imposed by the governing regulations and thus subjecting polluters to the common law, including juries, does not create an impermissible conflict or frustrate the purpose. *Int'l Paper*, 479 U.S. at 489-90.

The fact that regulation does not prohibit state tort claims is not unique to the CWA regulations, but rather is a generally applied proposition. As stated by the Fourth Circuit in *College Loan Corporation v. SLM Corporation*, “the courts have generally authorized state tort claims to be pursued in areas where the federal government has regulated, even when such claims are in some manner premised on violations of federal regulations.”¹⁸

Defendant cites *Geier v. American Honda Motor Company*, in further support of barring common law claims based on an alleged conflict with a statute. *See* Synagro Brief at 18-19. However, *Geier* is inapposite because the statute at issue included an express preemption provision directly on point with the contested claims and the decision clearly did not rely on mere conflict. 529 U.S. 861, 867 (2000). While Defendant places this case in a discussion of conflict preemption, it is clearly another example of express legislative intent.

Defendant apparently believes that the imposition of *any* common law liability more stringent than the federal or state sludge regulations “frustrates the purpose” and impermissibly conflicts with the regulatory scheme. However, both the CWA and the Sludge Rule have savings provisions, which allow for more stringent regulation. *See* Synagro Brief at 22-23. Defendant sidesteps this fact by arguing that any more stringent regulation is an impermissible conflict; all the while failing to see the hypocrisy of its very position. The VBUR themselves impose more stringent regulations than the CWA. *See* Synagro Brief at 22. The imposition of these regulations, according to Defendant’s own logic, should run afoul of the federal

¹⁸ 396 F.3d 588 (4th Cir. 2005) (citing *English v. Gen. Elec. Co.*, 496 U.S. 72, 85 (1990) (authorizing nuclear facility employee to assert common law claims against employer based on perceived violations of federal nuclear safety standards, despite existence of statutory remedies)).

regulations, creating an impermissible conflict with the federal regulations by banning, limiting, or deterring conduct that is *federally permitted*. See Synagro Brief at 22-24.

The reality is that even under conflict preemption principles, there is no impermissible conflict when there is simply a more stringent set of requirements that must be met. See *Feikema* at 1416 (“We have previously held that the test for determining whether state law conflicts with federal law is whether ‘it is impossible to comply with both state and federal law’ or whether ‘the state law stands as an obstacle to the accomplishment of the full purposes and objectives’ of federal law”) (citations omitted). The “purpose and objectives” of both the state and federal laws at issue is to protect the public health and environment. See Va. Code Ann. § 32.1-2 33 USC §1251(a) (“The objective of this chapter is to restore and maintain the chemical, physical, and biological integrity of the Nation’s waters.”). The state may therefore require greater setback buffers for land application than under federal law, a requirement that necessarily means that activity permitted under the federal regulations is made impermissible under state regulations, and still not create an impermissible conflict because the state regulation is still in furtherance of the underlying purpose and objectives. In the same way, state common law liability, whether there is a claim for damages or equitable relief, does not create an impermissible conflict where it seeks to protect the public health and environment.¹⁹ See *Feikema* at 1418 (Murnaghan, J. Concurring).

One last potential area of conflict is Plaintiffs’ claim for equitable relief through an

¹⁹ The Fourth Circuit in *Feikema* provides several additional examples of damages claims that survive regulation: “The Supreme Court has held repeatedly that state [common] law damages claims are not necessarily preempted by federal statutes that regulate the same field. For instance, in *Cipollone*, the Supreme Court held that a federal warning label requirement on cigarette packages does not preempt state common law damages actions. In *Silkwood*, the Supreme Court also held that federal statute regulating nuclear safety did not preempt state law tort suits seeking damage. Similarly, we held in *Worm v. American Cyanamid Co.* that the Federal Insecticide, Fungicide and Rodenticide Act did not preempt state tort actions seeking damages for breach of federally imposed standards.” *Feikema* at 1417 (citations omitted). While these are federal statutes, the analysis of conflict preemption is the same.

injunction. In *Feikema*, the Fourth Circuit did find that the requested injunction, which outlined specific remediation requirements that were irreconcilable with the EPA Consent Order, was preempted by the regulatory requirements in the consent order. *Feikema* at 1416. The distinction made by the Fourth Circuit, was not what it appeared:

Judge Murnaghan wrote separately in *Feikema* to emphasize that the court was not applying a different standard to damages than to equitable relief. He stressed that, whatever the relief sought, a ‘claim is preempted only to the extent that it may *actually conflict* with the EPA’s Consent Order and *only while that Order remains in effect.*’

Cavallo at 1156 (quoting *Feikema* at 1418 (Murnaghan, J. Concurring) (citations omitted, emphasis added)). Plaintiffs’ equitable claims do not create the necessary conflict with the state regulation that warrants dismissal of the claim. Rather, contrary to Defendant’s argument that the request for equitable relief amounts to a ban on permitted activity, Plaintiffs did not specify the extent and nature of the requested injunction and clearly did not request a ban. *See* Synagro Brief at 18; Complaint at ¶ 130. The equitable relief requested could come in several forms: enjoining additional hog waste to be disposed of at the Site, enjoining the further spread of odors to neighboring residences, enjoining the disposal of malodorous batches of sludge, increasing buffers from local properties, or other measures. These measures are merely existing permit requirements or consistent with EPA good management practices for land application of sludge. Therefore, little argument can be made that these equitable remedies conflict with either the state or federal goals of protecting the health and environment of Virginia and our Nation.

5. The VBUR Provide Plaintiffs No Alternative Remedy, Providing Additional Indication that Preemption Is Not Intended or Appropriate

One final consideration that enlightens the analysis of whether common law claims are abrogated by statute is whether the regulating statute provides a remedy. *See e.g. Feikema* at 1417 (“state law damages claims would not conflict with the Consent Order, which makes no

provision for the payment of damages to homeowners.”) . While the presence of a remedy does not mean that common law claims are preempted,²⁰ the lack of a statutory remedy at a minimum indicates that the common law remedy was not meant to be abrogated and that there is no conflict. *See id.*

Defendant suggests that Plaintiffs do have a remedy – they could have contested the original permit application and made a formal complaint, as they have done, to the VDH. *See id.* Defendant also boldly suggests that Plaintiffs should be petitioning the legislature to protect their right to comfort, safety, and the use and enjoyment of their homes and property – all things protected under the common law. *Id.* at n.4. It does not take multiple pages of analysis to realize that these are not the type of remedies considered by the case law and would not, or could not, provide the relief requested by Plaintiffs; relief that has long been available under the common law. Given the lack of enforcement and oversight in the current regulatory system, it is impossible to even take these recommendations seriously. *See Background supra.* The fact remains that the relief Plaintiffs request is not available to Plaintiffs through any of these suggested avenues. Furthermore, there is no express statement or necessary implication that these common law rights and remedies have been abrogated, and therefore the existence of a concurrent venue for Plaintiffs to seek partial relief does not mean that their common law claims are removed or diminished.

The lack of a relief or remedy places the final nail in the coffin of Defendant’s arguments regarding preemption. The General Assembly did not expressly abrogate the state common law. To the contrary, through a savings provision, they expressly created a system where the VBUR works in concert with the common law to protect the health and environment for all of Virginia.

²⁰ *See e.g., Pearman* at 858-859 (finding state courts have common law jurisdiction over claims related to highly regulated labor relations, despite concurrent federal jurisdiction).

Decisions considering several state and federal statutes, including the federal CWA, indicate that state law, including both regulatory statutes *and state common law*, survive regulation under so-called “comprehensive” regulatory schemes and that claims made under that common law for damages and equitable relief do not create an impermissible conflict.

B. Federal Law Does Not Preempt Plaintiffs Common law Claims

Defendant argues that Plaintiffs’ state common law claims are preempted by the federal CWA. *See* Synagro Brief at 24-28. This argument flatly contradicts the black-letter principles outlined in *International Paper* and was expressly rejected by Judge Hudson in this very case. 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.²¹ Defendant cited *International Paper* but only in an effort to obscure the holding of the Court. Yet Defendant cannot hide from the plain truth that a multitude of legal texts echo *International Paper*’s central holding that the CWA does not preempt state law claims brought under the laws of the source state. *Id.* Judge Hudson likewise found no preemption under the CWA.

Defendant tries to avoid Judge Hudson’s prior analysis in this case by stating that he did not consider conflict preemption in his ruling on federal jurisdiction, despite the fact that Defendant specifically raised conflict preemption in its reply brief to the EDVA. Synagro Brief at 25; Synagro Reply Brief, at 24. Judge Hudson clearly and deliberately stated, “[c]ontrary to Defendants’ contention, both the Supreme Court and the Fourth Circuit have expressly found that the Clean Water Act does *not preempt* state common law claims.” *Wyatt*, 2007 U.S. Dist. LEXIS 17929 (emphasis in original, citations omitted). Judge Hudson then uses the fact that

²¹ *See* Mary J. Davis, *Unmasking the Presumption in Favor of Preemption*, 53 S.C.L.REV. 967, 995 (2002).

there is no preemption to reach the conclusion that there is no basis for federal jurisdiction. *See Wyatt*, 2007 U.S. Dist. LEXIS 17929.

The analysis of CWA preemption should end here, but a full discussion is needed to address Defendant's dangerous misconstruction of black letter precedent. *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 critical part of the holding despite the fact that it controls the analysis of Plaintiffs' state law claims.

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 Synagro Brief* at 24-28; *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).

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. *Int'l Paper*. at 489-90 .

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 polluter is still subject to the strictures of the common law of the state that also shares the power to regulate the discharge through regulatory permits.*

Defendant attempts to circumvent the Court's holding by manipulating the legal definition of "source state" used for purposes of CWA permitting and state regulation and the colloquial definition of "source." This mischaracterization 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" of the benzene -- crude oil harvested somewhere off this Nation's shores.

Unfortunately for Defendant, “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*.²² As Defendant points out, the disposal operations at issue are permitted by the State of 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.

Defendant again raises the concern that allowing common law suits would create conflicting standards and frustrate the purpose of the regulatory system. *See e.g.*, Synagro Brief at 17. The Supreme Court’s analysis in *International Paper* flatly rejecting this as a legitimate concern provides the appropriate analytical framework for both CWA preemption and state law preemption under the VBUR. The Supreme Court clearly stated, “[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

²² *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 variety of 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.

Repeating the same argument twice does nothing to legitimize it, and the argument that federal preemption applies must once-again be rejected.

C. Plaintiffs Claims Are Not Abrogated By the Virginia Right to Farm Act

Synagro asserts preemption under the Virginia Right to Farm Act. Defendant Sussex Surry raised this same defense in arguing for federal jurisdiction based on fraudulent joinder. Based on the facts and allegations made in the Complaint, Judge Hudson rejected this argument. *See Wyatt*, 2007 U.S. Dist. LEXIS 17929.

The Virginia Right to Farm Act does nothing to protect Defendant from the common law claims made in this case. Abrogation of common law is limited to plainly manifest intent or necessary implication and the statute must be strictly construed in favor of the preservation of common law. *Hyman* at 143. First and foremost, the Right to Farm Act, *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 silvicultural products.” The Act does not apply “whenever a nuisance results from the negligent or improper operation of any...agricultural operation or its appurtenances,” as Plaintiffs have adequately alleged in this

case. Va. Code Ann. § 3.1-22.29(A). This section expressly requires that for the Act to apply, the agricultural activity must be conducted “in accordance with existing best management practices” and in compliance with all Virginia laws and regulations. *Id.* One cannot conclusively determine that the disposal operations in this case met these narrow requirements to be considered protected by the act. *See Wyatt*, 2007 U.S. Dist. LEXIS 17929. Rather, the allegations and exhibits offered in Plaintiffs’ Complaint and in this pleading *dictate* the opposite conclusion, thus, the Act provides no protection to Defendants.

Finally, and of equal importance, the Right to Farm Act, in its already limited application, only applies to claims for nuisance liability. The Act expressly *does not apply* in the case where negligence or trespass have been claimed, as in this case, or where conduct is not in accordance with the best management practices. *See Wyatt*, 2007 U.S. Dist. LEXIS 17929.

In contrast to the VBUR, the Right to Farm Act does express a limited intent to abrogate common law claims. However, this abrogation is only for nuisance and requires *certain limited factual conditions before it even applies*. This narrow and specific abrogation of common law must be strictly construed and limited in its application under *Boyd* and *Hyman*. Due to the inapplicability of the Right to Farm Act and the deep-rooted factual determinations required to be made before it even applies, this argument has no absolutely no traction.

D. Plaintiffs Claim of Trespass is a Properly Pled, Cognizable Claim Under Virginia’s Common law

Defendant claims that Plaintiffs have not properly pled a claim for trespass under Virginia’s common law. Synagro Brief at 29. Defendant points to a “long held distinction” based upon “traditional concepts” that require the invasion of a “tangible matter.” *Id.* (citing *Cooper v. Horn*, 248 Va. 417, 448 S.E. 2d 403 (1994); *Spicer v. City of Norfolk*, 46 Va. Cir. 535 (1996)). This distinction was made in *Spicer* for a limited purpose; to highlight the requirement

of an interference with possession. *See Spicer* at 543 (“A third requirement has been an entry that constitutes an interference with possession, that is, an invasion of tangible matter.”). This statement is made quoting Prosser and Keeton:

While it is generally assumed and held that a personal entry is unnecessary for a trespass, the defendant’s act must result in an invasion of tangible matter.
Otherwise, there would be no use or interference with possession...

Id. (citations omitted). This discussion is clearly aimed at reinforcing the need for an interference with the right of possession, a requirement consistent with the Virginia Supreme Court’s opinion in *Cooper*, and in no way dictates the size, shape, weight, or other physical properties of the required invasion.

To allege trespass under Virginia common law, plaintiff must allege an invasion that interfered with the right of exclusive possession of the property. *Cooper* at 423. The Supreme Court of Virginia clarified the term “invasion” stating, “[a]ny physical entry upon the surface of the land constitutes such an invasion, whether the entry is ‘a walking upon it, flooding it with water, casting objects upon it, or otherwise.’” *Id.* This definition broadly construes the application of common law trespass. The general distinction between trespass and nuisance is simply that trespass requires a physical invasion. *See* Matthew Bender, *Personal Injury Law in Virginia*, Ch. 17 “Nuisance.”

Neither Virginia law nor the requirement of a “tangible thing” discussed in *Spicer* require anything more than what has been alleged in Plaintiffs’ Complaint. *See generally*, Complaint. Wafting odors are “physically perceptible.” *See Cavallo* at 1154 (“Smell, like sight, certainly constitutes physical perception”). Based on this recognition, odors are sufficient for the maintenance of a claim of trespass under Virginia law. *See generally*, *Cavallo* at 1154 (Court refused to grant dismissal of Count III – “Common Law Trespass” where claim was based upon

“wafting vapors”). Odors do not happen without a physical component. Rather, odors indicate the physical presence of aerosols and organic chemicals that have been intentionally, negligently, or accidentally cast onto Plaintiffs’ property.

Furthermore, Plaintiffs’ allegations relating to trespass do not rely solely on aerosols and invisible particulates, but rather Plaintiffs’ allegations include tangible dusts that were released from the disposal site and entered Plaintiffs’ property, interfering with their exclusive possession. *See e.g.* Complaint at ¶¶ 47, 49, 76-78, 85, 94-95, 121. These dusts and solid particles formed physical grit on Plaintiffs’ skin at times.

To the extent that the Norfolk Circuit Court’s discussion in *Spicer* narrows this definition, Plaintiffs point to the fact that this decision has not been cited, and as an outlier, provides minimal guidance for this Court. The key element of a trespass claim is an invasion that interferes with plaintiff’s exclusive right of possession. *See Cooper* at 423. Plaintiffs’ pleadings clearly indicate that the physically perceptible invasion of their property that occurred as a result of Defendant’s conduct created a significant interference with Plaintiffs’ rights of possession, ultimately forcing some to leave the comfort and possession of their home. *See e.g.* Complaint at ¶ 49.

Plaintiffs have alleged that physically perceivable odors, aerosols, and tangible dusts invaded their property causing significant interference with their possession. These allegations, taken as true, properly plead the common law claim of trespass in Virginia. *Cooper* at 423. Because this entry is alleged to constitute an interference with possession, appropriately addressing the concerns of Prosser and Keeton discussed in *Spicer*. *See Spicer* at 543.

V. CONCLUSION


The VBUR does not abrogate Plaintiffs' longstanding common law claims of negligence, nuisance, and trespass. The Virginia Right to Farm Act provides a limited protection from the common law claim of nuisance, but only applies under limited factual circumstances and does not apply when negligence has been pled or when the best management practices have not been used, as has been pled here. Finally, the CWA does not preempt common law claims. For these reasons, Defendants demurrer and motion have no merit and must be denied. Any additional concerns are appropriately address by amending Plaintiffs' Complaint.

Respectfully submitted,

DATED: May 22, 2007

H. BISHOP DANSBY

By:



H. BISHOP DANSBY

CHRISTOPHER T. NIDEL

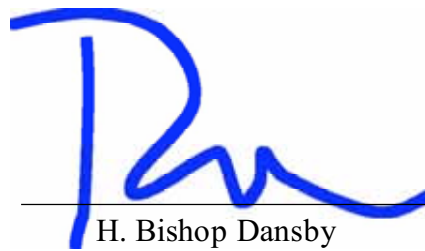
Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that a copy of this petition was sent by email this 22nd day of May, 2007 to the following:

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H. Bishop Dansby