IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT OF ILLINOIS
MADISON COUNTY

HOLIDAY SHORES SANITARY DISTRICT, individually and on behalf of all others similarly situated,	)	
Plaintiff,	)	NO. 2004-L-000710
vs.	)	
SYNGENTA CROP PROTECTION INC. and GROWMARK, INC.,	)	JURY TRIAL DEMANDED
Defendants.	)	

MEMORANDUM IN SUPPORT OF COMBINED
MOTIONS TO DISMISS PURSUANT TO 735 ILCS 5/2-619.1

INTRODUCTION

Plaintiff is a municipal water district near Edwardsville, Illinois, claiming the water it sells to the public is unsafe. Plaintiff claims this water contains small amounts of atrazine, an agricultural herbicide widely relied on by Illinois farmers to control broadleaf and grass weeds on corn fields. Atrazine is highly regulated by both the United States and Illinois Environmental Protection Agencies ("USEPA" and "IEPA," respectively), and plaintiff concedes that its water meets USEPA and IEPA safety levels for atrazine. Plaintiff nonetheless asks the court and jury to find those safety standards inadequate, even though such a finding violates the United States Constitution's commerce and due process clauses. Plaintiff's authorizing statute limits its powers to sue for only a narrow range of equitable remedies for alleged contamination of plaintiff's own water. Nonetheless, plaintiff purports to sue on behalf of a class of all Illinois water and sanitary districts, which allegedly are, like plaintiff, providing unsafe drinking water to the public.

The amended complaint names Syngenta Crop Protection Inc. ("Syngenta") and Growmark, Inc. ("Growmark") as defendants. Syngenta is a major manufacturer and supplier of agricultural products, including herbicides and insecticides. Syngenta manufactures various products that contain atrazine as an active ingredient. Growmark is a federated regional farm supply and grain marketing cooperative, organized as a Delaware corporation. Federated cooperatives such as Growmark have only other farmer cooperatives as members. Each member of Growmark is a separate cooperative with voting rights in the affairs of Growmark, and these member cooperatives are normally composed of individual farmers. Growmark is one of many companies that sells atrazine products.

Plaintiff's complaint should be dismissed pursuant to 735 ILCS 5/2-619.1[1] for several distinct reasons. First, the USEPA has primary jurisdiction of this dispute over the adequacy of approved atrazine safety levels, thus barring plaintiff's claims. Second, plaintiff lacks standing to sue even if primary jurisdiction did not apply. Third, plaintiff admits it cannot identify the product on which it purports to assert a claim, which is a fundamental requirement to sustain a claim under Illinois law. Fourth, plaintiff's limited statutory powers do not permit this suit (and certainly do not permit plaintiff to act in a class representative capacity). And plaintiff has also failed to allege any injury in fact: both the federal and Illinois state governments deem plaintiff's water to be safe. Fifth, the complaint's various trespass, nuisance, negligence, strict liability and environmental statutory claims fail to meet the requisite elements to state such claims.

ARGUMENT

I. PLAINTIFF'S CLAIMS SHOULD BE DISMISSED PURSUANT TO 735 ILCS 5/2-615 BECAUSE THE USEPA HAS PRIMARY JURISDICTION TO SET THE STANDARD FOR ATRAZINE IN DRINKING WATER.

Plaintiff's amended complaint is an attempt to ban atrazine from the agricultural market. Each count of plaintiff's amended complaint seeks damages for the presence atrazine in levels below the Maximum Contaminant Level ("MCL") set by the USEPA in 1991. Am. Compl., Prayer for Relief, pp. 12, 16, 18, 21, 24 and 27; *see* 56 Fed. Reg. 3526 (Jan. 30, 1991). Each count also seeks a declaration that the presence of any atrazine is harmful to human health. Am. Compl., Prayer for Equitable Relief, pp. 12, 15, 18, 21, 24 and 27. The MCL, which does permit the presence of a certain level of atrazine, is and remains the only nationwide standard.

[1] Plaintiff's allegations are legally deficient, therefore the amended complaint should be dismissed pursuant to 735 ILCS 5/2-615(a). Plaintiff also lacks standing to sue, as demonstrated in Section II.A below, therefore plaintiff's claims should be dismissed pursuant to 735 ILCS 5/2-619(a)(9). The 615(a) and 619(a)(9) motions are combined herein pursuant to 735 ILCS 5/2-619.1.

Plaintiff's challenge to it is barred by the doctrine of primary jurisdiction.[2]

Drinking water safety is strictly regulated by the federal Safe Drinking Water Act ("SDWA") and the associated National Primary Drinking Water Regulations ("NPDWR"). 42 U.S.C. § 300f, *et seq.*; 56 Fed. Reg. 3526-01 (Jan. 30, 1991). "[T]he regulatory scheme established under the SDWA evinces a clear congressional intention to entrust the regulation of public drinking water systems to an expert regulatory agency *rather than the courts*." *Mattoon v. City of Pittsfield*, 980 F.2d 1, 4-5 (1st Cir. 1992) (emphasis added). Congress granted the USEPA's scientific judgment such force that parties who really believe that judgment to be wrong are afforded the right to *federal* judicial review. *See* 42 U.S.C. §§ 300j-7, 300j-8(e) (judicial review exclusively in the District of Columbia Circuit).[3]

The SDWA requires that USEPA adopt "public maximum contaminant level goals and promulgate national primary drinking water standards." 42 U.S.C. § 300g-1(b)(1). MCLs for

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[2] The USEPA estimates that banning atrazine would decrease corn production in the United States by $1.5 billion annually nationwide. See Assessment of Potential Mitigation Measures for Atrazine, Biological and Economic Analysis Division, Office of Pesticide Programs, U.S. EPA, at 18-21. (http://www.epa.gov/oppsrrd1/reregistration/atrazine/atrazineadd.pdf). On an individual basis, it would slash net revenue by $29 per acre, which would profoundly disadvantage Illinois farmers faced with an actual or effective ban. See Assessment of Potential Mitigation Measures for Atrazine, Biological and Economic Analysis Division, Office of Pesticide Programs, U.S. EPA, at 18-21. (http://www.epa.gov/oppsrrd1/reregistration/atrazine/atrazineadd.pdf)

[3] Such a challenge "may be filed only in the United States Circuit Court of Appeals for the District of Columbia circuit." 42 U.S.C. § 300j-7(a)(2). Many parties have availed themselves of this method of review. *See, e.g.*, *CIBA-Geigy Corp. v. USEPA*, 46 F.3d 1208 (D.C. Cir. 1995) (challenging atrazine standard); *NRDC v. USEPA*, 673 F.2d 392 (D.C. Cir. 1980) (challenge of consolidated permit regulations promulgated by USEPA under four separate statutes; court recognizing that D.C. Circuit possessed exclusive jurisdiction to review the regulations under three of the statutes, including the SDWA); *City of Waukesha v. USEPA*, 320 F.3d 228 (D.C. Cir. 2003); *Chlorine Chemistry Council v. USEPA*, 206 F.3d 1286 (D.C. Cir. 2000); *American Water Works Ass'n v. USEPA*, 40 F.3d 1266 (D.C. Cir. 1994) (lead standard).

This review provision is analogous to those found in several other environmental statutes that also confer exclusive jurisdiction to review EPA regulations in the D.C. Circuit. *See e.g.*, 33 U.S.C. § 1369(b)(1) (Clean Water Act); 42 U.S.C. § 7607(b)(1) (Clean Air Act); 42 U.S.C. § 9613(a) (CERCLA); 42 U.S.C. § 6976(a)(1) (RCRA). "By centralizing appeals in the District of Columbia Circuit Court within a limited time period, Congress hoped to avoid needless delays in the implementation of important national programs caused by incessant litigation and inconsistent decisions." *Lubrizol Corp. v. Train*, 547 F.2d 310, 315 (6th Cir. 1976); *see also*, *NRDC v. USEPA*, 512 F.2d 1351, 1354-56 (D.C. Cir. 1975) (Congress granted the D.C. Circuit exclusive jurisdiction to review regulations that are national in scope "to ensure uniformity in decisions concerning issues of more than purely local or regional impact.").

each chemical of concern, including atrazine, are codified following extensive study by the USEPA. *Mattoon*, 980 F.2d at 4. The USEPA's 3 ppb atrazine MCL was expressly set at a level that has "no known or anticipated adverse effects" on human health and which allows an adequate margin of safety. *Mattoon*, 980 F.2d at 4; *see* 42 U.S.C. § 300g-1(b)(4)(A). Notably, Illinois adopted the federal drinking water regulations, including USEPA's MCL of 3 ppb for atrazine, to secure certain enforcement authority under the SDWA. *See* 415 ILCS 5/7.2; 35 Ill. Admin. Code. §§ 611.100, 611.311.

Courts give substantial deference to the administrative agencies that have the power, granted by the legislature, to regulate the sale and use of atrazine. *See Monsanto Co. v. Pollution Control Bd.*, 67 Ill. 2d 276, 290 (1977) ("When a regulation is promulgated by an agency pursuant to a grant of legislative power, a reviewing court should not substitute its judgment as to the content of the regulation, because the legislature has placed the power to create such regulations in the agency and not in the court."). Courts are reluctant to exercise their powers over activities highly regulated by statute:

> The variety and complexity of a problem and of the interests involved and the feeling that the particular decision should be a part of an overall plan prepared with a knowledge of matters not presented to the court and of interests not represented before it, may also promote judicial restraint and a readiness to leave the question to an administrative agency if there is one capable of handling it appropriately.

City of Chicago v. Beretta U.S.A. Corp., 213 Ill. 2d 351, 386 (2004) *quoting* RESTATEMENT (SECOND) OF TORTS § 821B, Comment f, at 91-92 (1979).[4] The purpose of this judicial restraint "is to protect agencies from undue judicial interference with their lawful discretion, and to avoid judicial entanglement in abstract policy disagreements which courts lack both expertise and

[4] Unreported decisions and Restatement sections are filed in a separate appendix.

information to resolve." *Norton v. South Utah Wilderness Alliance*, 124 S. Ct. 2373, 2381 (2004). Administrative bodies, like the USEPA, have "a superior ability to gather and synthesize data pertinent to the issue, … solicit information and advice from those that may be impacted, … [and] to weigh and properly balance the many competing societal, economic, and policy considerations involved." *Charles v. Seigfried*, 165 Ill. 2d 482, 493 (1995).

The doctrine of primary jurisdiction thus provides that a court stay judicial proceedings pending referral of a controversy to an agency, like the USEPA, where that agency has special or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards." *Kellerman v. MCI Telecommunications Corp.*, 112 Ill. 2d 428, 444 (1986); *see also Employers Mutual Companies v. Skilling*, 163 Ill. 2d 284, 288-89 (1994); *Administrative Office of Illinois Courts v. State and Municipal Teamsters, Chauffeurs, and Helpers Union, Local 726*, 167 Ill. 2d 180, 187 (1995); *Fredericks v. Liberty Mutual Ins. Co.*, 255 Ill. App. 3d 1029, 1034 (5th Dist. 1994); *Crain v. Lucent Technologies, Inc.*, 317 Ill. App. 3d 486, 494 (5th Dist. 2000).[5] The doctrine is "concerned with promoting proper relationships between the courts and administrative agencies charged with particular regulatory duties." *Id.*

This is a case in which the technical expertise of the USEPA would be helpful to the court. The adjudication plaintiff seeks – that atrazine is unsafe in water in concentrations of less than three ppb – raises a scientific issue both squarely within the USEPA's expertise and already subject to extensive USEPA study and analysis. Applying the primary jurisdiction doctrine here

[5] According to the United States Supreme Court,

> [p]rimary jurisdiction . . . applies where a claim is originally cognizable in the courts, and comes into play whenever enforcement of the claim requires the resolution of issues which, under a regulatory scheme, have been placed within the special competence of an administrative body; in such a case the judicial process is suspended pending referral of such issues to the administrative body for its views.

United States v. Western Pacific R.R. Co., 352 U.S. 59, 63-64 (1956).

would be particularly appropriate, since the Illinois Supreme Court has held that there is a strong interest in maintaining uniform environmental regulations. *See Pesticide Public Policy Found. v. Wauconda*, 117 Ill. 2d 107, 116 (1987). While the doctrine typically does not result in dismissal, but rather a stay pending a ruling by the administrative agency, (s*ee People v. NL Ind.*, 152 Ill. 2d 82, 95 (1992)), in this case the agency has already ruled. All that remains is for the court to apply the USEPA's ruling to the facts alleged. In this regard, the case is analogous to *Kerr-McGee Chemical Corp. v. Department of Nuclear Safety*, 204 Ill. App. 3d 605 (4th Dist. 1990), in which the appellate court reversed a trial court's denial of a motion to dismiss on ripeness and primary jurisdiction grounds. Plaintiff filed a declaratory judgment challenging regulations promulgated but not approved by the federal nuclear regulatory body. There, as here, the plaintiffs sought a judgment that administrative agency regulations – on a topic unquestionably within the agency's purview – were wrong. In its ruling, the court reasoned that the plaintiff's proper recourse would be to follow the Department of Nuclear Safety's administrative procedures to contest the regulations. *Id.* at 611-12.

The SDWA, and the Illinois law following it, demonstrates a clear legislative intent to trust a specialized federal agency – the USEPA – with regulating the safety of public drinking water systems. As a specialized agency, the USEPA is uniquely qualified to resolve the complexities of certain areas which are outside the conventional expertise of the court. *Ford Motor Co. v. National Labor Relations Board*, 99 S. Ct. 1842, 1848 (1979). This is one of those areas. The USEPA's judgment is that atrazine in water at 3 ppb is safe. That judgment bars plaintiff's claims and the complaint therefore should be dismissed.

II. PLAINTIFF LACKS STANDING TO PURSUE THESE CLAIMS, EVEN IF THEY WERE NOT BARRED BY PRIMARY JURISDICTION.

Plaintiff lacks standing to pursue its claims for two distinct reasons. First, plaintiff is a

municipal corporation and has not been granted authority by the statute under which it was formed to bring this suit. Second, plaintiff is required to allege an injury in fact, which plaintiff has not and cannot do.

A. PLAINTIFF IS A NON-HOME-RULE MUNICIPAL CORPORATION WITHOUT STATUTORY AUTHORITY TO BRING THESE CLAIMS, THEREFORE ITS COMPLAINT SHOULD BE DISMISSED UNDER 735 ILCS 5/2-619(A)(9).

Plaintiff was organized in October 1972 under The Sanitary District Act of 1936 ("SDA"). 70 ILCS 2805/0.1, *et seq.*; *see* Order of October 4, 1972, attached as Exhibit A. Unlike the broad powers exercised by home rule units in Illinois, non-home rule units—including sanitary and water districts like plaintiff—have only those powers enumerated by their organizing statute: "[S]pecial districts and units, designated by law as units of local government, which exercise limited governmental powers or powers in respect to limited governmental subjects shall have only powers granted by law." ILLINOIS CONST., ART. VII § 8 (2004), *see also East Lake Fork Special Drainage Dist. v. Ivesdale*, 137 Ill. App. 3d 473, 478 (4th Dist. 1985). Such powers are construed strictly against the water or sanitary district claiming a right to them. *Pesticide Public Policy Found. v. Wauconda*, 117 Ill. 2d 107, 113 (1987); *see also Glencoe v. Metropolitan Sanitary Dist.*, 23 Ill. App. 3d 868, 870 (1st Dist. 1974).

Under the SDA, plaintiff is granted the power to seek "injunctive relief or mandamus, when . . . necessary to prevent the pollution of any waters from which a water supply may be obtained within the district." 70 ILCS 2805/27(d). Further, plaintiff is limited to filing suit in the circuit court in and for the county in which the district is located for the purpose of having the pollution stopped. 70 ILCS 2805/27(e). In addition, the Illinois legislature found that it has the responsibility to set up a "unified state-wide program for environmental protection." 415 ILCS 5/2(a)(ii). The legislature also found that "air, water, and other resource pollution, public water

supply, solid waste disposal, noise, and other environmental problems are closely interrelated and must be dealt with as a unified whole in order to safeguard the environment." 415 ILCS 5/2(a)(iii).

Plaintiff's right to bring litigation thus is restricted to seeking "mandamus or injunctive relief." *Id.* Nowhere does the SDA grant plaintiff the power to bring suit for any other relief. Plaintiff thus is not entitled to seek money damages or declaratory relief. *See, e.g.,* Am. Compl. Prayer for Relief pp. 21-22. Nowhere does the SDA grant plaintiff the power to bring suit "on behalf of a Class consisting of all Public Water Districts established pursuant to the [various statutes cited by plaintiff] who have suffered atrazine contamination of their water source(s) at any measurable level." Am. Compl. at ¶ 20. None of the nine remedies sought by plaintiff is styled as a request for an injunction or mandamus.[6]

In a very similar case, the Illinois Supreme Court held that a non-home-rule unit—like plaintiff—was preempted from enacting a pesticide control ordinance. *See Pesticide Public Policy Found. v. Wauconda*, 117 Ill. 2d 107, 113 (1987). In that case, the village of Wauconda, a non-home-rule unit, enacted a local pesticide control ordinance contrary to the standards enumerated by the Illinois Department of Agriculture and Environmental Protection Agency. *Id.* at 115. Despite the fact that the Pesticide Act does not expressly preempt such an ordinance, the Supreme Court held that preemption was warranted because of the Act's desire for uniformity of regulations and the ordinance's frustration of the state's licensing scheme by imposing an additional layer of regulation. *Id.* at 116-19. The court expressly differentiated between home

[6] Plaintiff's complaint requests the following: 1) a declaratory judgment; 2) an order certifying a class and appointing Holiday Shores as a class representative; 3) abatement costs; 4) an order directing the defendants to produce an abatement plan and declaring them liable for future abatement and maintenance costs; 5) monetary damages based on injury to property values; 6) punitive damages; 7) costs and attorney's fees; 8) prejudgment interest; and 9) an order compelling the defendants to cease and desist causing atrazine to enter Holiday Shores's property. Am. Compl. at Prayers for Relief pp. 21-22.

rule and non-home-rule units, noting that the preemption question was a closer call for home rule units. *Id.* at 117-18. The *Pesticide Public Policy Foundation* case is analogous to the present case. Both involve situations in which non-home-rule units attempt to impose additional environmental regulations. As the Supreme Court recently noted, "[l]itigation should not be used to achieve legislative goals." *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill. 2d 351, 388 (2004) (specifically noting that the nature of the injunctive relief sought indicated a desire for judicial legislation).

The complaint in this case seeks relief to which plaintiff is not entitled and thus should be dismissed pursuant to 735 ILCS 5/2-619(a)(9); *Glisson v. City of Marion*, 188 Ill. 2d 211, 220 (1999).

B. PLAINTIFF HAS NOT ALLEGED AN INJURY IN FACT, THEREFORE ITS CLAIM SHOULD BE DISMISSED UNDER 735 ILCS 5/2-615.

In order to have standing to sue, a plaintiff must allege, among other things, that it has suffered an injury in fact. *Glisson v. City of Marion*, 188 Ill. 2d 211, 221 (1999). The USEPA has set the MCL for atrazine at 3 ppb. 40 C.F.R. § 141.50(b). The IEPA adopted the MCL. 35 Ill. Admin. Code §§ 611.100, 611.311. If the concentration of a chemical in water is less than the MCL, there is no redressable injury. *See Iberville Parish Waterworks Dist. No. 3 v. Novartis Crop Protection, Inc.*, 45 F. Supp. 2d 934, 941–43 (S.D. Ala. 1999) (finding that plaintiff water districts had suffered no injury when atrazine levels did not exceed the MCL), *aff'd*, 204 F.3d 1122 (11th Cir. 1999). Plaintiff admits that it is seeking relief for atrazine in its water that *does not exceed* the MCL. Am. Compl. at ¶ 19. Plaintiff thus has failed to allege that it suffered any injury in fact, and plaintiff's claims should be dismissed. *Greer v. Illinois Housing Development Authority*, 122 Ill. 2d 462, 492 (1988); *Glisson*, 188 Ill. 2d at 221.

III. PLAINTIFF ADMITS IT CANNOT IDENTIFY THE PRODUCT ON WHICH IT PURPORTS TO ASSERT A CLAIM, THEREFORE ITS COMPLAINT SHOULD BE DISMISSED UNDER 735 ILCS 5/2-615.

Plaintiff claims that Syngenta is one of six registered manufacturers of atrazine in the United States. Am. Compl. at ¶ 3. Plaintiff admits that Syngenta's atrazine is identical to the atrazine made by the other manufacturers, and that "[o]nce [atrazine] is applied to crops and enters the environment, there is no way to distinguish Syngenta's atrazine . . . from any other manufacturer's atrazine." Am. Compl. at ¶ 3. Plaintiff alleges that Growmark, an alleged atrazine distributor, participates in the ownership of local cooperatives, including a cooperative in Madison County, for the purpose of selling atrazine and other agricultural products. Am. Compl. at ¶ 4. Plaintiff does not indicate from whom Growmark allegedly purchased atrazine or to whom Growmark allegedly sold it. Plaintiff then makes a series of allegations referring generally to conduct by "defendants and other suppliers of atrazine." Am. Compl. at ¶¶ 31-32 and 39-40. Plaintiff does not allege that Syngenta manufactured or that Growmark distributed the atrazine that it claims is in its water. Plaintiff effectively admits that it does not know whose atrazine may be in its water or how it got there.

Illinois law forbids plaintiffs from indiscriminately suing groups of manufacturers and sellers without identifying who made or who sold the product that caused plaintiff's alleged damage. A manufacturer or seller cannot be held liable for an injury from a product unless the plaintiff can isolate the product that allegedly caused the harm: "A fundamental principle of tort law is that the plaintiff has the burden of proving by a preponderance of evidence that the defendant caused the complained-of harm or injury; mere conjecture or speculation is insufficient proof." *Smith v. Eli Lilly & Co.*, 137 Ill. 2d 222, 232 (1990). This fundamental

principle of Illinois law applies to all of plaintiff's claims: "In a negligence action this causation-in-fact requirement entails a reasonable connection between the act or omission of the defendant and the damages which the plaintiff has suffered." *Id*. "Likewise, to recover under strict liability the plaintiff must establish some causal relationship between the defendant and the injury-producing agent." *Id*. Merely manufacturing the same type of product that allegedly caused plaintiff's injury does not establish causation. Tort duties are "not so broad as to extend to anyone who uses the type of [product] manufactured by a defendant, and the fact that a duty is owed does not abrogate the requirement that the plaintiff maintains the responsibility of identifying the defendant who breached the duty." *Id*. at 266.

Plaintiff must allege (and ultimately prove) that a specific defendant's alleged tortious act caused the alleged injury, and courts dismiss complaints at the pleading stage for failure to make such allegations. *Lewis v. Lead Indus. Assoc'n Inc.*, 342 Ill. App. 3d 95, 103 (1st Dist. 2003); *City of Chicago v. American Cyanamid Co.,* 355 Ill. App. 3d 209, 220-221 (1st Dist. 2005), *petition for leave to appeal denied,* --N.E.2d-- (May 25, 2005). In *Lewis*, the plaintiff sued seven paint manufacturers and their industry association claiming that they manufactured, marketed and distributed lead paint. The trial court dismissed the complaint on the pleadings because plaintiff had not identified the manufacturer or supplier of the lead paint that had allegedly caused the injury. *Id.* at 103. The appellate court, relying on the Illinois Supreme Court's decision in *Smith,* affirmed, and repeated the bedrock principle that, in order to hold a defendant liable, a plaintiff must establish a causative link between the defendant's alleged tortious acts and the plaintiff's alleged injuries. *Id.* Likewise relying on *Smith*, the *City of Chicago* court also affirmed dismissal of Chicago's claims against a large group of lead paint manufacturers because the city could not allege which manufacturer's paint had caused the alleged public nuisance. The

First District concluded:

> Plaintiff is attempting to do what the *Smith* decision forbids: making each manufacturer the insurer for all harm attributable to the entire universe of all lead pigments produced over a century by many.

City of Chicago v. American Cyanamid Co., 355 Ill. App. 3d at 216-17.

Plaintiff seeks to hold Syngenta and Growmark liable for alleged atrazine contamination while at the same time admitting its inability to plead, much less prove, that atrazine manufactured by Syngenta and sold by Growmark is in its water. Illinois law does not permit such a claim, and plaintiff's complaint should be dismissed.

IV. INDIVIDUAL COUNTS OF PLAINTIFF'S COMPLAINT FAIL FOR ADDITIONAL REASONS AND SHOULD BE DISMISSED PURSUANT TO 735 ILCS 5/2-615.

A. PLAINTIFF FAILS TO ALLEGE FACTS THAT WOULD SUPPORT A TRESPASS CLAIM.

In Count I, plaintiff alleges that "Defendants and other suppliers of atrazine in the U.S. manufactured, distributed, and sold [their] atrazine products for agricultural use, knowing to a substantial certainty that [their] products . . . would invade Plaintiff's property and contaminate its waters." Am. Compl. at ¶ 32. This effort to plead a trespass claim fails for three reasons. First, the complaint fails to allege that either Syngenta or Growmark were in control of any atrazine in plaintiff's waters at the time that atrazine may have entered plaintiff's property. Control is a necessary prerequisite for claim of trespass on land. *Traube v. Freund*, 333 Ill. App. 3d 198, 202 (5th Dist. 2002). Plaintiff merely alleges that when defendants manufactured, distributed or sold atrazine, they knew the atrazine would invade plaintiff's property. Am. Compl. ¶ 32. That allegation is insufficient to support plaintiff's trespass claim.

Second, the trespass allegations are so vague and overly broad that they fail to meet Illinois pleading standards under 735 ILCS 5/2-615. Plaintiff fails to allege facts against any

specific defendant that would support a trespass claim. Plaintiff alleges neither a specific trespass (*e.g.*, an unlawful interference with plaintiff's property), nor identifies a particular defendant (if any) that caused the alleged invasion. *Dial*, 81 Ill. 2d at 553-54. Instead, plaintiff alleges that *"Defendants and other suppliers"* sold atrazine knowing that their products "would invade Plaintiff's property and contaminate its water." Am. Compl. ¶ 32 (emphasis added). That allegation is plainly insufficient, particularly in view of plaintiff's concession that it cannot identify the source of any atrazine in its water. Am. Compl. ¶ 3.

Third, because plaintiff asserts independent causes of action for negligence (Count III) and trespass (Count I), and both claims arise from the same alleged conduct (*compare* Am. Compl. at ¶ 32 with ¶ 47), Illinois law directs the court to construe Count I as a claim for intentional trespass to avoid multiple recoveries for a single injury. *See Porter v. Urbana-Champaign Sanitary Dist.*, 237 Ill. App. 3d 296, 303 (4th Dist. 1992). This intent requirement is demanding. Under Illinois law, there must be "a high degree of certainty that an intrusion of another's property will result from the act of the defendant." *Dial v. City of O'Fallon*, 81 Ill. 2d 548, 555 (7th Cir. 1989). "In other words, a person must know with a high degree of certainty that the intrusion will naturally follow from his act before liability for trespass attaches." *Dietz v. Illinois Bell Tel. Co.*, 154 Ill. App. 3d 554, 559 (1st Dist. 1987). No such allegations are made in the complaint. Plaintiff's trespass allegations fail to state a claim as a matter of law, and accordingly, Count I should be dismissed.

B. PLAINTIFF'S NUISANCE CLAIMS FAIL TO ALLEGE A PUBLIC RIGHT.

Count II purports to state a claim for nuisance. Under Illinois law, to state a claim for public nuisance, a party must allege: (1) an unreasonable interference; (2) with a common right to the general public; and (3) resulting damages. RESTATEMENT (SECOND) TORTS § 821 B(1)

(1979); *Donaldson v. Central Ill. Public Serv. Co.*, 199 Ill. 2d 63, 101 (2002). Additionally, under Illinois law, to state a claim for private nuisance, plaintiff must allege (1) an invasion of its own interest, separate and apart from a public right, in the use and enjoyment of its land; (2) a causal relationship between the defendant's conduct and the interference; and (3) resulting damages. *In re Chicago Flood Litig.*, 176 Ill. 2d 179, 203 (1997). Count II fails to allege these various elements for several reasons.

Because plaintiff admits that its water falls within the requirements of the USEPA and IEPA MCL for atrazine, plaintiff cannot meet the initial hurdle of stating the infringement of a public or private right. Am. Compl. ¶ 19. Plaintiff also admits that it cannot establish a link between the defendants in this case and the atrazine in its water. Am. Compl. at ¶ 3. In addition to these failures, plaintiff fails to state a claim for public nuisance because it does not allege an actionable public right.

The Illinois Supreme Court recently explained the limits to Illinois nuisance law in the context of challenges to heavily-regulated products. *City of Chicago v. Beretta U.S.A., Inc.*, 213 Ill. 2d 351 (2004); *Young v. Bryco Arms*, 213 Ill. 2d 433 (2004). In those cases and the present one, a municipal entity claims that those who manufacture and distribute products that comply with complex regulatory schemes nonetheless are liable in nuisance for use of products beyond defendants' control. The Court has ruled that no such theory of nuisance exists. *Beretta*, 213 Ill. 2d at 389. Indeed, the Court concluded "that there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiffs." *Id.* at 375.

The Court was "reluctant to recognize a public right so broad and undefined that the presence of any potentially dangerous instrumentality in the community could be deemed to

threaten it." *Id.* at 374. The Court was also reluctant to hold that there is a right to be free from the threat that some individuals "may use an otherwise legal product (be it a gun, liquor, a car, a cell phone, or some other instrumentality) in a manner that may create a risk of harm to another." *Beretta at* 375. The Court explained that many legal products may be misused—for example, consumption of alcohol is legal by adults, but driving under the influence is a crime. *Id.* Drivers may also misuse other legal products—cell phones, DVD players, and so on. The court resolved as follows:

> A public right to be free from the threat that other drivers may defy these laws would permit nuisance liability to be imposed on an endless list of manufacturers, distributors, and retailers of manufactured products that are intended to be, or are likely to be, used by drivers, distracting them and causing injury to others.
>
> **. . . there is no authority for the unprecedented expansion of the concept of public rights to encompass the right asserted by plaintiff.**

Beretta, 213 Ill. 2d at 375 (2004) (emphasis added).

Thus, to allege that conducting a lawful enterprise – like the manufacture and sale of atrazine – nonetheless creates an unreasonable interference with a public right, plaintiff must plead one of the following:

(a) that defendants violated applicable statutes or regulations;

(b) that the law regulating defendants' enterprise is invalid; or

(c) that the defendants were otherwise negligent in carrying out the enterprise.

Id. at 389, *citing Gilmore v. Stanmar*, 261 Ill. App. 3d 651 (1st Dist. 1994).

Plaintiff has made no such allegations. First, far from claiming that defendant violated any law, plaintiff admits that defendants complied with it – the atrazine in plaintiff's water is at or below the MCL. *See Beretta*, 213 Ill. 2d at 375 (courts must be "slow to declare an activity to be a public nuisance if it complies with the regulations") (internal citations omitted). Second,

while plaintiff improperly seeks to hold defendants liable for *complying* with the MCL, plaintiff goes to great lengths not to actually ask that the MCL be deemed invalid. Were it to seek this, plaintiff would have to do so in the United States Circuit Court of Appeals for the District of Columbia. 42 U.S.C. § 300j-7(a)(2). Third and finally, as more fully discussed in Section IV.C. below, plaintiff has also failed to allege any negligence on defendants' parts. The complaint fails under the *Beretta* analysis.

Plaintiff also fails to sufficiently plead a private nuisance. To state a claim for intentional nuisance – as required here (*Porter*, 237 Ill. App. 3d at 303) – a plaintiff must allege facts to support the inference that defendant knew "that the invasion of another's interest [in property] is resulting or is substantially certain to result." *Malone v. Ware Oil Co.*, 179 Ill. App. 3d 730, 734 (4th Dist. 1989) (internal quotations omitted); *see also Porter*, 237 Ill. App. 3d at 303. To clear that bar, Plaintiff here must allege facts to support a reasonable inference that Syngenta and Growmark knew that selling atrazine-containing products either would *definitely*, or be *substantially certain* to, contaminate Holiday Shores Lake. The amended complaint fails to make any such allegations.

Rather, the amended complaint asserts in only general terms that Syngenta and Growmark sold atrazine-containing products in Illinois and Madison County (Am. Compl. ¶¶ 2-3) with knowledge that atrazine has "great potential" to run off land to water that might reach and contaminate water supplies (Am. Compl. ¶¶ 31, 39). These allegations fall well short of the mark, because as the Restatement (Second) of Torts makes clear, "[i]t is not enough to make an invasion intentional that the actor realizes or should realize that his conduct involves a serious risk or likelihood of causing the invasion." Rest. 2d Torts § 825, cmt. c; see also, *Beretta U.S.A. Corp.*, 213 Ill. 2d at 365 (the Restatement is consistent with Illinois law); *Malone*, 179 Ill. App.

3d at 735 (plaintiff failed to show intentional nuisance, in part, because it did not show anything defendant could have done to prevent the migration of gasoline to plaintiff's property other than stop all operations and remove the storage tanks); *Patterson v. Peabody Coal Co.*, 3 Ill. App. 2d 311, 317 (4th Dist. 1954) (alleged invasion of property rights from fumes, gases and odors from gob piles at neighboring coal washer and drier could not be deemed intentional because it was not certain to occur and defendant did all in its power to prevent it).

For all these reasons, plaintiff cannot state a claim for public or private nuisance, and Count II therefore should be dismissed.

C. PLAINTIFF FAILS TO ALLEGE A DUTY OWED, THEREFORE ITS NEGLIGENCE CLAIM FAILS.

Count III purports to state a claim for negligence. To state such a claim, whether in support of a nuisance claim or otherwise, plaintiff must allege that defendants owe a duty to plaintiff. *Beretta*, 213 Ill. 2d at 392-93. Illinois courts consider four factors to determine whether such a duty exists: 1) the reasonable foreseeability of the injury, 2) the likelihood of the injury, 3) the magnitude of the burden of guarding against the injury; and 4) the consequences of placing that burden on the defendant. *Bajwa v. Metropolitan Life Ins. Co.*, 208 Ill. 2d 414 (2004).

The complaint fails to allege any facts supporting the existence of a duty owed by Syngenta or Growmark to plaintiff. Again, the USEPA has extensively studied the health effects of atrazine, and has concluded that water containing less than 3 ppb of atrazine *is safe*. Plaintiff admits that its water meets the USEPA standard and has less than 3 ppb of atrazine. Thus, based on plaintiff's own allegations, there is no reasonable foreseeability of injury, and no likelihood of injury even under plaintiff's own allegations. Plaintiff has not, and cannot, allege a duty or the

breach of that duty.[7] Such was exactly what the Illinois Supreme Court held in *Beretta*. In that case, firearms manufacturers and distributors owed the general public no duty to protect it from harm that might be caused from a purchaser's use of their highly regulated products:

> Plaintiffs have failed to state a cause of action for public nuisance predicated on negligence, because these defendants owe no duty to the city of Chicago or its residents to prevent their firearms from ending up in the hands of persons who use and possess them illegally.

Beretta, 213 Ill. 2d at 362 (internal citations omitted). Count III should be dismissed.

D. COUNT IV FAILS TO STATE A CLAIM FOR STRICT LIABILITY.

Count IV purports to state a claim for strict liability based on a design defect. A strict liability claim requires that plaintiff allege that (1) a product failed to perform as safely as an ordinary user would expect when used in an intended or reasonably foreseeable manner or (2) that the alleged design proximately caused plaintiff's injury. *Hansen v. Baxter Healthcare Corp.*, 198 Ill. 2d 420, 433 (2000); *see also Hunt v. Blasius*, 74 Ill. 2d 203 (1979). Plaintiff must also allege a causal relationship between the defendant and the injury-causing product. *Smith v. Eli Lilly*, 137 Ill. 2d 222, 232 (1990). Failure to sufficiently plead any of these essential elements requires dismissal as a matter of law. *Wieseman v. Kienstra, Inc.*, 237 Ill. App. 3d 721, 722 (5th Dist. 1992). Here, plaintiff has insufficiently pled a claim for strict liability and Count IV should be dismissed.

Plaintiff admits that atrazine performs as an ordinary user would expect when used in the intended manner: "Defendants atrazine products were used in a manner in which they were intended and foreseeably certain to be used." Am. Compl. at ¶ 52. Plaintiff also admits that "Atrazine is advantageous to farmers because it does not readily bind to soil, has limited

[7] For instance, in *Patton v. Country Place Condominium Assoc'n*, 2000 WL 33728374 (4th Dist. 2000), the court dismissed negligent testing claims like plaintiff's, holding that "[t]he failure to test is not a negligent act in itself."

solubility in water, and is not easily broken down by biological or photo-decomposition." Am. Compl. ¶ 5. Plaintiff asserts that atrazine is defective because it is "highly soluble in water and recalcitrant to biodegradation," and "has a tendency to mix with groundwater." Am. Compl. ¶¶ 51, 52. For a product to be unreasonably dangerous because of a design defect, plaintiff must allege that the product in question "is dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with ordinary knowledge common to the community as to its characteristics." *Hunt v. Blasius,* 74 Ill. 2d 203 *quoting* RESTATEMENT OF TORTS § 402A, comment i. The fact that atrazine kills grasses and broadleaf weeds does not make it defective because atrazine is manufactured and sold as a legitimate, USEPA-approved herbicide for that purpose. *See Camp Creek Duck Farms, Inc. v. Shell Oil Co.,* 103 Ill. App. 3d 81, 84-85 (4th Dist. 1981). Plaintiff fails to allege facts necessary to state a claim for strict liability. Therefore Count IV should be dismissed.

E. PLAINTIFF'S IEPA ACT CLAIM FAILS BECAUSE PLAINTIFF FAILED TO EXHAUST ITS ADMINISTRATIVE REMEDIES.

In Count V, plaintiff brings a claim directly under the IEPA Act, 415 ILCS 5/12, *et seq.* This claims fails for two reasons.

First, plaintiff failed to exhaust its state administrative remedies before the Illinois Pollution Control Board ("Board") prior to seeking relief in the courts. 415 ILCS 5/31(d). The Illinois legislature conferred exclusive jurisdiction upon the Board over actual or threatened violations of USEPA, IEPA permits, or Board rules and regulations under the IEPA Act. 415 ILCS 5/31. *City of Elgin v. Cook County,* 257 Ill. App. 3d 186, 195 (1st Dist. 1993), *aff'd in part, rev'd in part on other grounds,* 169 Ill. 2d 53 (1995); *Decatur Auto Auction, Inc. v. Macon County Farm Bureau, Inc.*, 255 Ill. App. 3d 679, 683-85 (4th Dist. 1993); *People v. State Oil Co.*, 1999 WL 676187, 8 (Ill. Poll. Control Bd. 1999). A private litigant can sue in court only

after he has sought and been denied relief by the Board. 415 ILCS 5/45(b) ("…no action shall be brought under this Section until 30 days after the plaintiff has been denied relief by the Board in a proceeding brought under subdivision (d)(1) of Section 31 of this Act."); *League of Women Voters v. North Shore Sanitary Dist.*, 1970 WL 3665, *1 (Ill. Pol. Control Bd. 1970); *City of Elgin*, 257 Ill. App. 3d at 198; *Decatur Auto Auction, Inc.*, 255 Ill. App. 3d at 683-85. Here, plaintiff has not sued before the Board to remedy the alleged violations of the IEPA.[8] Therefore, its complaint should be dismissed.

Second, plaintiff also fails to state a claim because the IEPA Act does not allow recovery of the damages sought. Plaintiff seeks monetary damages and declaratory relief. However, the IEPA Act allows litigants to seek injunctive relief only. 415 ILCS 5/45(b). Courts have declined to recognize an implied right of action for damages under the IEPA. *See NBD Bank v. Krueger Ringier, Inc.*, 686 N.E.2d 704, 709 (1st Dist. 1997). Generally, a right of action may be implied under a statute "only in cases where the statute would be ineffective, as a practical matter, unless such an action were implied." *Fisher v. Lexington Health Care, Inc.*, 188 Ill. 2d 455, 464 (1999). For these reasons, plaintiff fails to state a claim under the IEPA Act.

F. THE ILLINOIS WATER POLLUTION DISCHARGE ACT CLAIM IN COUNT VI SHOULD BE DISMISSED.

Count VI also fails to state a claim against Growmark under the Illinois Water Pollutant Discharge Act, 415 ILCS 25/1, *et seq*. This act allows suits for discharge of oil or other pollutants onto a plaintiff's property against the owner or operator of the *facility responsible for the discharge. Id.* at 25/5. The act strictly limits suits to those against such owners or operators

[8] Count V seeks monetary damages; however, the statute authorizes private litigants to seek injunctive relief only. *See* 415 ILCS 5/45(b) ("Any person adversely affected in fact by a violation of this Act . . . may sue for injunctive relief against such violation."). The only Illinois appellate court to consider the issue expressly held that "a private right of action under the [IEPA] does not exist…" *NBD Bank v. Krueger Ringier, Inc.*, 292 Ill. App. 3d 691 (1st Dist. 1997).

of facilities from which a discharge occurred. *Id.* Count VI fails to allege any facts, as opposed to the barest of conclusions,[9] that a nonmanufacturing agricultural cooperative like Growmark, is such an "owner or operator" of a discharging "facility." *See* Am. Compl. at ¶ 69. Nor does Count VI allege that any particular "discharge" occurred, when it allegedly occurred, and from which facility it emanated. *See* Am. Compl. at ¶¶ 70-71.

Rather, plaintiff's claim is plainly that atrazine found its way into plaintiff's water supply through the use of herbicides for agricultural purposes at a myriad sites upstream from plaintiff's facility. *See* Am. Compl. ¶ 71. Such a claim does not sound under the Illinois Water Pollutant Discharge Act, and Count VI therefore should be dismissed.

G. THE RELIEF SOUGHT BY PLAINTIFF VIOLATES THE COMMERCE AND DUE PROCESS CLAUSES OF THE UNITED STATES CONSTITUTION

This court should dismiss plaintiff's action because the relief sought violates the Commerce and Due Process clauses of the United States Constitution. U.S. CONST., art. I, § 8, cl. 3; amends. V, XIV. Because it burdens interstate commerce, no state—let alone a municipal unit like the Holiday Shores Sanitary District—may regulate commercial conduct occurring wholly outside its borders. *See, e.g., Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989) (the "Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside the State's borders, whether or not the commerce has effects within the State"); *see also Allegro Services, Ltd. v. Metropolitan Pier & Expo. Authority*, 172 Ill. 2d 243, 260 (1996) (holding that the Commerce Clause may serve "as a basis for invalidating state laws that interfere with interstate commerce"). The same test is used regardless of whether the state law in question emerges indirectly from common-law tort litigation or directly from a statute or regulation. *See, e.g., Cipollone v. Liggett Group, Inc.*, 505 U.S. 504, 521 (1992) ("[State]

[9] Plaintiff alleges that Growmark is an "owner or operator" under the statute (¶69); however, this allegation should

regulation can be as effectively exerted through an award of damages as through some form of preventive relief.").

Here, plaintiff is effectively seeking to curb or even ban the sale of atrazine in Illinois, thus halting a portion of interstate commerce: the sale of this particular pesticide ingredient. Illinois courts prohibit the violation of the Commerce Clause, and prevent local and state governments from regulating where the regulation impinges on the United States Constitution. *See Lakehead Pipeline Co. v. Illinois Commerce Comm'n*, 296 Ill. App. 3d 942, 951 (3d Dist. 1988) (holding that the Commerce Clause prohibits the State or municipalities from exercising local police powers where such an exercise conflicts with "free trade among the states") (citations omitted). This prohibition exists whether the free trade encumbered by local governmental acts is trade moving through Illinois to other states, or trade coming into Illinois from outside the State, and ending in a retail sale here. *See Brown's Furniture, Inc. v. Wagner*, 171 Ill. 2d 410, 413 (1996) (addressing the constitutionality of imposing an Illinois use tax on businesses located in other states but delivering goods to Illinois residents).

The lawful sale of a lawful product from outside Illinois to distributors within Illinois is by definition an action in interstate commerce. Plaintiff's attempt to terminate sales to distributors is a clear impediment to interstate commerce. Well-established case law interpreting the Commerce Clause expressly prohibits such regulation.

In any event, plaintiff further violates the U.S. Constitution by seeking to impose punishment on the manufacturers of atrazine for their actions: lawfully selling a legal product to a distributor. As the U.S. Supreme Court has explained:

> [A] State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States . . . nor may [it] impose sanctions on [a defendant] in

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be disregarded because it is conclusory. *See Knox College v. Celotex Corp.*, 88 Ill. 2d 407, 426, (1981).

> order to deter conduct that is lawful in other jurisdictions . . . [since] to punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort.

BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 572 n.17 (1996). This holding eviscerates plaintiff's effort to regulate lawful conduct of the defendants beyond the municipality's borders—and indeed beyond Illinois state lines—in other jurisdictions where that conduct is entirely lawful. *See also State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (applying *Gore*). Illinois case law is in complete accord. *See, e.g. Knoll Pharm. Co. v. Sherman*, 57 F. Supp 2d 615, 622-23 (N.D. Ill. 1999) ("The Commerce Clause invalidates a state law that in practical effect regulates markets outside the state's borders, even if the extraterritorial reach was unintended by the state legislature . . . Illinois may not impose its policy choices on other states.").

Manufacturers which, pursuant to Illinois and federal law, lawfully manufacture and sell legal products such as atrazine elsewhere in the country cannot be punished in Illinois by the imposition of damages or injunctive relief for putting that product into the lawful and regulated stream of commerce. The relief that plaintiff seeks would clearly require defendants to alter their legal business practices on a national scale: practices which take place wholly outside of plaintiff's borders. *See Shearson Lehman Bros. v. Greenberg*, 1995 U.S. App. LEXIS 17313 (9th Cir. 1995) (unpublished) (holding plaintiff's lawsuit unconstitutional under the Commerce Clause because his complaint sought to directly regulate interstate commerce by seeking to impose a permanent injunction against Shearson's nationwide business activities "until it changes its business practices"). Because defendants' sales of atrazine are national in scope, the alterations of their distribution practices necessary to comport with plaintiff's desired remedies would burden defendants' lawful, commercial conduct on a nationwide basis. Through this

lawsuit, plaintiff is effectively seeking unconstitutional changes in the national conduct of the defendants.

For the foregoing reasons, regulating the sale of a lawful product beyond the boundaries of Illinois punishes lawful conduct and violates due process. Punishing the manufacturers and a distributor for lawful activity—manufacturing a lawful, non-defective product and legally selling or distributing that product with the imprimatur of the USEPA—violates the U.S. Constitution.

CONCLUSION

Based on the foregoing reasons and authorities, Syngenta's and Growmark's combined Section 2-619.1 motions to dismiss should be granted.

DATED: June 20, 2005

Respectfully submitted,

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