

**IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

HOLIDAY SHORES SANITARY DISTRICT,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

SYNGENTA CROP PROTECTION, INC., and
GROWMARK, INC.,

Defendants.

Cause No. 04-L-710

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS'
COMBINED MOTIONS TO DISMISS PURSUANT TO 735 ILCS 5/2-619.1**

Defendants have moved to dismiss Plaintiff's First Amended Complaint ("Complaint"), alleging that dismissal is warranted pursuant to 735 ILCS 5/2-615 and pursuant to 735 ILCS 5/2-619(a)(9) (alleging that Plaintiff lacks standing to bring the claims). As set forth below, Plaintiff's Complaint has alleged all the essential elements of the claims for nuisance, trespass, negligence, strict liability, and violations of state environmental laws. Defendants' motions to dismiss Plaintiff's Complaint should be denied.

INTRODUCTION

Plaintiff Holiday Shores Sanitary District (HSSD) operates a plant that provides water to the Holiday Shores community in Madison County, Illinois. HSSD draws water from a lake that has been contaminated by atrazine, a chemical found in herbicides applied to the agricultural land surrounding the lake. It is undisputed that Defendants manufacture and sell atrazine and atrazine-containing products for use in Illinois. Seeking damages for remediation costs associated with

atrazine contamination of its water supplies, HSSD sued Defendants in Illinois state courts, stating claims for nuisance, trespass, negligence, strict liability, and violations of state environmental laws.

STANDARD OF REVIEW

Pursuant to 735 ILCS 5/2-615, a court should dismiss a cause of action on the pleadings only if it is clearly apparent that no set of facts can be proven which entitle a plaintiff to recover. *Burdinie v. Village of Glendale Heights*, 139 Ill.2d 501, 504 (1990). The only matters to be considered in ruling on such a motion are the allegations of the pleadings themselves. *Urbaitis v. Commonwealth Edison*, 143 Ill.2d 458, 475 (1991). Any section 2-615 motion “admits not only the facts alleged in a complaint, but also all reasonable inferences that can be drawn therefrom.” *Weinberger v. Bell Fed. Sav. & Loan*, 262 Ill.App.3d 1047, 1049-50 (1st Dist. 1994). The allegations of the complaint are to be “viewed in a light most favorable to the plaintiff.” *LaSalle National Bank v. City Suites, Inc.*, 325 Ill.App.3d 780, 790 (1st Dist. 2001).

“When ruling on a motion to dismiss, the trial court must interpret all pleadings and supporting documents in the light most favorable to the nonmoving party. The court should grant the motion only if the plaintiff can prove no set of facts that would support the cause of action.” *Carver v. Nall*, 186 Ill.2d 554, 557 (1999). “A trial court should not grant the section 2-619 motion to dismiss if material facts are controverted or if the court must weigh evidence.” *Kontos v. Boudros*, 241 Ill.App.3d 198, 200 (2^d Dist. 1993). “Similar to a motion brought under section 2-615, a motion to dismiss under section 2-619 admits all well-pleaded facts.” *Gragg v. Calandra*, 297 Ill.App.3d 639, 643 (2^d Dist. 1998).

A motion to dismiss pursuant to Section 5/2-619(a)(9) is allowed when the “the claim asserted against the defendant is barred by other affirmative matter avoiding the legal effect of or

defeating the claim.” 735 ILCS 5/2-619(a)(9). “An ‘affirmative matter’ is something in the nature of the defense which completely negates the cause of action or refutes crucial conclusions of law or conclusions of material fact unsupported by allegations of specific fact contained in or inferred from the complaint.” *Economy Mechanical Industries, Inc. v. T.J. Higgins Company*, 294 Ill.App.3d 150, 153 (1st Dist. 1997).

ARGUMENT

I. THIS COURT IS THE PROPER TRIBUNAL TO ADJUDICATE THIS STATE LAW CONTROVERSY.

Defendants wrongfully removed this case to federal court, only to have it remanded back to this tribunal. Now Defendants argue that the Complaint should be dismissed altogether. Having failed to convince the Honorable Michael J. Reagan that the USEPA’s role is significant enough to create federal question jurisdiction, Defendants contend that this Court should defer this case to the USEPA under the “primary jurisdiction” doctrine. While the “primary jurisdiction” jargon is new, the allegations Defendants make in support of it are the same ones Judge Reagan already has rejected. Further, even setting Judge Reagan’s opinion aside, the primary jurisdiction argument is doomed for independent reasons. Case law on point forecloses Defendants’ contention that the elements of agency superiority or need for uniformity exist here. Moreover, even were Defendants able to satisfy one of these elements, which is denied, as a matter of law the “primary jurisdiction” theory is irrelevant to a motion to dismiss.

A. Defendants’ Jurisdiction Analysis Repeatedly Ignores United States District Judge Reagan’s Decision in this Case.

In challenging this Court’s jurisdiction, Defendants adopt the motto that, “If at first you don’t succeed, try making in state court the same arguments you lost before United States District Judge

Reagan.” In rejecting Defendants’ attempt to place this state law tort action in federal court, Judge Reagan issued a remand order that in substantial part disposes of these Defendants’ jurisdiction allegations. *See* Memorandum and Order, *Holiday Shores Sanitary District v. United Agri Products, Inc.*, Civ. No. 04-689-MJR (S.D. Ill. March 28, 2005), attached hereto and incorporated herein by reference as Exhibit 1 (hereinafter “Mem. & Order”).¹

Defendants’ rambling over the Maximum Contaminant Level (“MCL”) of 3 ppb for atrazine overlooks Judge Reagan’s finding that, “In the instant case, where the SDWA creates a floor, a maximum contaminant level, **adequate room remains for state tort law to operate.**” Mem. & Order, p. 7 (emph. supp.). Defendants overlook that the SDWA contains a “savings clause” that preserves statutory and common law actions such as the case *sub judice*: “Nothing in this section shall restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any requirement prescribed by or under this subchapter or to seek any other relief.” 42 U.S.C. § 300j-8(e). Thus, Judge Reagan held that the SDWA does not preempt this case. “Congress does not require uniformity and consistency in drinking water standards; rather, Congress requires that the states adopt and enforce laws or regulations respecting drinking water that do not exceed the maximum contaminant levels established by the EPA.” *Id.* at 8.

Similarly, “FIFRA leaves ample room for state action[.]” *Id.* at 9 (citing *Wisconsin Public Intervener v. Mortier*, 501 U.S. 597, 614 (1991), and parenthetically quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (“... the statute leaves ample room for States and localities

¹ *See also* Exhibit 2, *Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc. and Growmark, Inc.*, Civ. No. 04-688-MJR (S.D. Ill. March 28, 2005) (applying order in *Holiday Shores Sanitary District v. United Agri Products, Inc.*, Civ. No. 04-689-MJR, to the instant case).

to supplement federal efforts even absent the express regulatory authorization....”)); see also *Bates v. Dow AgroSciences LLC*, 125 S. Ct. 1788 (2005).²

Judge Reagan also explained why the United State Circuit Court of Appeals for the District of Columbia is not the proper tribunal for this case.³ Defendants’ invocation of 42 U.S.C. § 300j-7 is misplaced, Judge Reagan explained:

Only actions pertaining to the establishment of primary regulations must be filed in the United States Court of Appeal for the District of Columbia. 42 U.S.C. § 300j(7)(a)(1). The instant action does not pertain to the establishment of primary regulations, nor does it challenge those regulations. HSSD seeks damages for various state-law tort claims and seeks to hold Defendants liable, whether or not Defendants violated federal regulations, for actions that affected the quality of HSSD’s water supply.

Mem. & Order, p. 8 (citing *Pioneer Southern, Inc. v. Dow Agrosciences, L.L.C.*, No. 03-CV-23-MJR, 2-3 (S.D. Ill. August 20, 2003)). Judge Reagan quoted the *Pioneer Southern* finding that, “Where plaintiff asserts its rights to ‘relief under state tort law,... EPA’s licensing and regulatory authority **has no bearing on those state law rights.**’” Mem. & Order, p. 9 (parenthetically quoting *Pioneer Southern*) (emph. supp.).

So intent are they on ignoring the federal court decision that already has been penned here, Defendants persist in citing *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992),⁴ impervious to Judge Reagan’s finding that, “the holding in *Mattoon* is much narrower than suggested,” that “*Mattoon* does not hold that state common law is preempted,” and that, the *Mattoon* Court “noted

² Cf. also *Diehl v. Polo Cooperative Assoc.*, 328 Ill.App.3d 576, 581 (2d Dist. 2002) (finding that FIFRA did not preempt claims that did not depend on the content of labels).

³ Contrast Mem. in Supp. of Combined Mots. to Dismiss Pursuant to 735 ILCS 5/2-619.1 (“Defendants’ Mem.”), p. 3 with Mem. & Order, p. 8.

⁴ See Defendants’ Mem., p. 3 (citing *Mattoon*).

that the primary responsibility for implementation and enforcement of the SDWA standards remained with the States, and that the States were allowed to set stricter standards than those of the federal government.” Mem. & Order, p. 8.

The dispute here distills to whether any statutory or administrative law forbids *safer* drinking water, and the answer is, “No.” As long as the answer is, “No,” there is no conflict whatsoever between this lawsuit and the regulatory provisions regarding which Defendants drone.

B. The Primary Jurisdiction Doctrine Does Not Apply.

Heedless of Judge Reagan’s explanation that agency regulation of atrazine has no bearing here, Defendants float the theory that the “primary jurisdiction” doctrine compels this Court to abandon this state tort action, allegedly because the USEPA is better suited to handle it. Defendants argue this is so because the USEPA has scientific expertise on the subject. Defendants’ primary jurisdiction analysis was resoundingly rejected in *Metropolitan Sanitary District of Greater Chicago v. United States Steel Corp.*, 30 Ill.App.3d 360 (1st Dist. 1975), *cert. denied*, 424 U.S. 976 (1976). The *Metropolitan Sanitary District* court found that the primary jurisdiction doctrine did not justify staying a water pollution abatement case until such time as the USEPA had adjudicated defendant’s permit application on the subject. The court analyzed the Clean Water Act, which, like the SDWA, has a savings clause. *Compare* 30 Ill.App.3d at 368 (discussing Clean Water Act) *with* 42 U.S.C. § 300j-8(e) (SDWA savings clause). The court found that Congress has a continuing intention to perpetuate the right of municipalities to adopt and enforce pollution requirements more stringent than “any which may be adopted under the federal system” *and* to make certain that this activity by states and municipalities “continues for the public benefit.” 30 Ill.App.3d at 368. HSSD brings this case for the public benefit of safe drinking water.

Metropolitan Sanitary District and its progeny are an insurmountable obstacle to the application of primary jurisdiction. Not only was the First District Court of Appeals' finding based on the Illinois Supreme Court's *Metropolitan Sanitary Dist. of Greater Chicago v. U.S. Steel Corp.*, 41 Ill.2d 440 (1968) decision, but its analysis of common law nuisance actions was favorably cited by the Illinois Supreme Court later in *People v. NL Industries*, 152 Ill.2d 82, 90 (1992) ("For a review of common law nuisance actions see *Metropolitan Sanitary District*"). In addition, *People ex rel. Scott v. U.S. Steel Corp.*, quotes *Metropolitan Sanitary District* at length and rejects defense arguments "seek[ing] to escape the implications of the *Metropolitan Sanitary District* decision[.]" 40 Ill.App.3d 607, 610 (1st Dist. 1976).

Citing *Metropolitan Sanitary* and *People ex rel. Scott*, the Fourth District Court of Appeals rejected the primary jurisdiction doctrine in the context of hazardous waste disposal, concluding that the fact that the defendant had a permit did not compel deferment to the administrative agency. *Village of Wilsonville v. SCA Services, Inc.*, 77 Ill.App.3d 618, 626 (4th Dist. 1979), *aff'd*, 86 Ill.2d 1 (1981). In *Village of Wilsonville*, the court reasons that *Metropolitan Sanitary* and *People ex rel. Scott* "recognize the importance placed by the Environmental Protection Act upon the availability of judicial remedies." 77 Ill.App.3d at 626. The court was persuaded that, "there is no policy of this state that requires trial courts to defer to administrative agencies in cases of this nature." *Id.* at 626-27. In affirming the appellate court's decision, the Illinois Supreme Court rejected the defendant's argument that the trial court should have deferred to the USEPA and IEPA, and further stated that, "jurisdiction exists in the circuit court 'to abate public nuisances which may endanger the general welfare.'" 86 Ill.2d at 28 (cit. om.). See also *City of Chicago v. Nielsen*, 38 Ill.App.3d 941, 946 (1st Dist. 1976) ("We held [in *Metropolitan Sanitation*] that, despite the existence of a

statute authorizing abatement of water pollution and additionally the existence of a statutory scheme of federal legislation for this purpose, courts of chancery have power by injunction and otherwise to abate the nuisance of pollution of a water supply. The cases there cited by us leave no doubt as to the existence of this inherent power of the court in the case before us.”). In short, *Metropolitan Sanitary District* is founded on and later bolstered by Illinois Supreme Court decisions, and has been additionally followed by intermediate appellate courts. *Metropolitan Sanitary District* and its progeny foreclose any application of the primary jurisdiction argument to the facts of this case. To rebut a line of cases denouncing the application of the primary jurisdiction doctrine as a reason to defer litigation to the USEPA, Defendants cite not a single primary jurisdiction case involving the USEPA.

As detailed below, Defendants cannot satisfy either of the essential elements of the doctrine. An action should not be stayed under the primary jurisdiction doctrine if the “agency’s technical expertise is not likely to be helpful or there is no need for uniform administrative standards[.]” *Fredericks v. Liberty Mutual Ins. Co.*, 255 Ill.App.3d 1029, 1034 (5th Dist. 1994) (cit. om.); *see also Administrative Office of the Illinois Courts v. State and Municipal Teamsters*, 167 Ill.2d 180, 187-88 (1995) (“Referral to the customary agency is not warranted, however, when regularity or consistency is not a concern and the matter does not require ‘the judgment of a technically expert body’ for its resolution.”). Indeed, Defendants concede that the doctrine requires either administrative agency superiority or a need for uniformity (*see* Defendants’ Mem., p. 5). Subsection B(1) *infra* discusses why the USEPA is not a better tribunal to decide a state water pollution abatement case; the *Metropolitan Sanitary District* cases have already decided as much. That there is no need for uniformity is addressed below at subsection B(2). Finally, subsection B(3) explains that the primary

jurisdiction argument is independently flawed in that primary jurisdiction does not by definition lend any support to a motion for dismissal.

1. *Contrary to Defendants' arguments, the USEPA is not superior to this Court.*

With regard to the pending permit application that it had before the USEPA, the *Metropolitan Sanitary District* defendant advanced the very argument Defendants float herein, that “there are ‘intricate, complex and voluminous scientific, technological, and economic facts relevant to the present action (which) must be determined in the first instance by the specialized agency through its expertise.’” 30 Ill.App.3d at 369. The *Metropolitan Sanitary District* defendants thus asked the court to step aside until the USEPA completed its fact finding process. *Id.* The court flatly rejected defendants’ arguments:

We cannot accept this argument. In our opinion, it is based entirely upon the faulty and erroneous premise that both this court and the federal administrative agency are dealing with the identical problem. From a completely general and superficial point of view, it may be stated with an apparent degree of validity that the ultimate objective of both jurisdictions is attainment of unpolluted water supply. But, the method and manner of reaching this desired objective is entirely different in the two jurisdictions.

30 Ill.App.3d at 369. The court explained that the proceedings before the USEPA were in “complete contrast” to the case filed in court. *Id.* at 370. The USEPA is concerned with a gradual and permissive elimination of the problem, but in complete contrast, an abatement action attempts “to terminate the pollution, subject only to such essential delays as may be absolutely necessary and unavoidable.” 30 Ill.App.3d at 370. Thus the court explained that the USEPA and the courts address “completely divergent” matters:

In short, the federal administrative hearings are concerned with permissive regulation and the proceedings before us involves total abatement. The proceedings before us are thus completely divergent from the matter pending before the administrative body. In a situation of this type, the doctrine of primary jurisdiction is not applicable. We do not have here an issue of priority of jurisdiction but we have two tribunals which are approaching a problem from entirely different points of view and which are attempting to exercise jurisdiction in two entirely different matters.

Id.

The *Metropolitan Sanitary District* Court rejected the defendants' invocation of the USEPA's purported "powers and skills to ascertain proper water quality standards," finding that there was no reason why the trial court could not obtain expert testimony. 30 Ill.App.3d at 372. Specifically, the court and not the USEPA should decide the issue of "the level of discharge of pollutants... 'which would have no deleterious effect' upon the use and enjoyment of the water supply" – in other words, the same issue the Defendants in this case are trying to transfer to the USEPA. 30 Ill.App.3d at 373. Very specifically rejecting the premise of Defendant's primary jurisdiction analysis, the *Metropolitan Sanitary District* decision explains why the safety level for pollutants should not be punted to the USEPA:

If it is true, as defendant suggests, that any tribunal which hears this matter will be confronted with complicated facts requiring expert assistance, we know of no reason why testimony of these same experts cannot be successfully applied by the trial court.... In our opinion, all necessary factual questions presented by this record can be determined by the trial court with at least the same, and perhaps greater, skill and expertise than any administrative body would manifest.... Certainly, the primary jurisdiction doctrine notwithstanding, highly technical matters per se are no strangers to the courts. In any case, the existence of such "practicalities," of itself, is surely not a ground for either dismissal of the action or for the invocation of the "primary jurisdiction" doctrine as we understand it to be.

30 Ill.App.3d at 373, 375 (cit. om.). The court concluded that the trial court was "completely correct" in denying the defendant's primary jurisdiction argument. *Id.* at 375; cf. *Village of*

Wilsonville, 86 Ill.2d at 35 (“[T]he USEPA [in an amicus brief] is asking this court to remand this cause to the circuit court on the basis of evidence which the trial court has previously considered and discounted in favor of the plaintiffs’ evidence. We see no point in doing so.”).

That the superiority element of the primary jurisdiction doctrine is inapplicable is also apparent from the face of Defendants’ arguments. Defendants fail to articulate a theory as to what more the USEPA could do to assist the Court in this case. According to the Defendants, the USEPA’s 3 ppb MCL is correct. Accordingly, there is nothing more for the USEPA to do or say.⁵ Because Defendants cannot demonstrate to any reasonable degree of certainty that the USEPA would act to resolve any issue in this case, the primary jurisdiction doctrine is inapplicable.⁶ This argument is merely a delay tactic that the jurisprudence does not countenance.⁷ Whatever the USEPA would be inclined to do it has done, and all other issues in this case are clearly inapposite to its regulatory functions.

⁵ See, e.g., *Crain v. Lucent Technologies, Inc.*, 317 Ill.App.3d 486, 494 (5th Dist. 2000), *appeal denied*, 194 Ill.2d 567 (2001) (“The FCC has already aided in the resolution of the question of preemption. FCC regulations and expertise are not implicated in the remaining issues.”).

⁶ See *Heller Equity Capital Corp. v. Clem Environmental Corp.*, 232 Ill.App.3d 173, 179-80 (1st Dist. 1992) (“We are unpersuaded by defendant’s arguments that a stay of the proceedings should have been granted. Defendant has failed to demonstrate with any reasonable degree of certainty to what stage, if any, the FRB’s [Federal Reserve Board] investigation has progressed. Indeed, defendant has failed to present any evidence that the FRB has any intention of pursuing this matter any further. As such, we cannot abide by defendant’s attempt to prolong the issuance of the preferred stock to HECC and continue to thwart the purpose of the agreement.”); *Valiquet v. First Federal Savings & Loan Assoc. of Chicago*, 87 Ill.App.3d 195, 198 (1st Dist. 1979) (“Board regulations existent at the time of the alleged usurpation did not include any procedures by which plaintiff could trigger, obtain, or participate in an adjudication of her complaint.... Absent such procedures, the doctrine of primary jurisdiction does not apply.” (footnote om.)) (citing *Nader v. Allegheny Airlines, Inc.*, 426 US. 290 (1976) (further cit. om.)).

⁷ See *Heller*, 232 Ill.App.3d at 179-80.

The USEPA would not and cannot instruct this Court on the substance or application of the Illinois law at issue here. “Where the legal and factual issues involved are standard fare for judges, the issues must be deemed to be within the conventional competence of the courts, and referral to an administrative body is not required.”⁸ Regardless of whether a regulatory body is involved in regulating an issue, tort actions should be left for the courts to decide.⁹

⁸ *Village of Itasca v. Village of Lisle*, 352 Ill.App.3d 847, 854 (2d Dist. 2004), *appeal denied*, 213 Ill.2d 560 (2005). *See also e.g., Administrative Office of the Illinois Courts*, 167 Ill. 2d at 187 (“we do not agree with the State Board that the doctrine of primary jurisdiction requires that this court defer to the administrative agency so that the agency may initially decide who employs the court reporters.”); *Employers Mutual Cos. v. Skilling*, 163 Ill.2d 284, 289 (1994) (the circuit court erred in declining resolution of an insurance dispute in deference to the Industrial Commission; circuit court is in the best position to address the scope of insurance coverage issue presented); *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 446 (1986), *cert. denied*, 479 U.S. 949 (1986) (the primary jurisdiction doctrine did not require a stay pending referral to the Federal Communications Commission because the plaintiff’s allegations that the defendant phone company’s advertisements violated the Consumer Fraud and Deceptive Business practices Act and the Uniform Deceptive Trade Practices Act did not require agency expertise for their resolution); *Fredericks*, 255 Ill.App.3d at 1035 (“The Industrial Commission’s expertise would not be helpful in resolving the breach of contract dispute.”); *Speakers of Sport, Inc. v. U.S. Telephone, Inc.*, 149 Ill.App.3d 898, 902 (1st Dist.1986), *appeal denied*, 114 Ill.2d 558, *cert. denied*, 484 U.S. 925 (1987) (following *Kellerman*); *Steward v. Allstate Ins. Co.*, 92 Ill.App.3d 637, 642 (1st Dist.1980) (plaintiffs’ allegations that their insurance policies were cancelled in violation of the Illinois Insurance Code did not require administrative expertise or discretion).

⁹ *See, e.g., Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 303-04 (1976). Thus in *Nader*, the plaintiff brought a fraudulent misrepresentation action against an airline after plaintiff was bumped from an over booked flight. The Civil Aeronautics Board’s regulations required each airline to establish priority rules for boarding passengers and to offer denied boarding compensation to bumped passengers. 426 U.S. at 294. Notwithstanding the existence of a Board rule on the issue of compensation to bumped passengers, the United State Supreme Court held that the action should not be stayed for referral to the Board. “The standards to be applied in an action for fraudulent misrepresentation are within the conventional competence of the courts, and the judgment of a technically expert body is not likely to be helpful in the application of these standards to the facts of this case.” 426 U.S. at 305-06.

The authorities invoked by Defendants cannot withstand the weight of authority condemning their invocation of the primary jurisdiction theory. Defendants ignore *Metropolitan Sanitary District* and its progeny, instead citing *Charles v. Seigfried*, 165 Ill.2d 482 (1995) for the proposition that administrative bodies “like the USEPA” allegedly have superior abilities. See Defendants’ Mem., p. 5. Unlike the *Metropolitan Sanitary District* line of cases, which addressed the abilities of the USEPA and found them to be no better than the courts of this State, *Charles* says **nothing whatsoever** about the USEPA. *Charles* was referring to the General Assembly in the context of whether Illinois jurisprudence should be changed by the judiciary to recognize a new cause of action against social hosts who serve alcoholic beverages. “[F]ew rules of law are as clear as that no liability for the sale or gift of alcoholic beverages exists in Illinois outside of the Dramshop Act,” the court explained. 165 Ill.2d at 490. HSSD is not asking this Court to defy clear jurisprudence. *Charles* lends no support to Defendants’ claim that this Court should bar HSSD from the courts of justice.

Similarly unavailing is Defendants’ strange invocation of *Ford Motor Co. v. National Labor Relations Board*, 441 U.S. 488 (1979) (Defendants’ Mem., p. 6). *Ford Motor* has nothing to do with the USEPA, drinking water, atrazine, MCLs, the primary jurisdiction doctrine, or anything else applicable or allegedly applicable here. That *Ford Motor nowhere mentions* the USEPA does not deter Defendants from citing the case as alleged support for the proposition that, “the USEPA is uniquely qualified to resolve the complexities of certain areas which are outside the conventional expertise of the court” (Defendants’ Mem., p. 6 (citing *Ford Motor*)). In truth, *Ford Motor* addressed the pricing of cafeteria and vending machine food at Ford Motor, deciding that such matters are terms and conditions of employment subject to mandatory collective bargaining.

Defendants have boldly miscited the case for a proposition it does not address, much less decide in their favor.

Defendants' reliance on *Monsanto Co. v. Pollution Control Bd.*, 67 Ill.2d 276 (1977) (cited at Defendants' Mem., p. 4) also is misplaced. The quoted excerpt from *Monsanto* refers to the court's resolution of the standard of review applicable to Monsanto's challenge of a Pollution Control Board decision that Monsanto could not have a permanent variance for mercury emission limits. State tort actions were not at issue, and the court did not purport to address them. Nor did the court suggest that any state or federal agency supplants the judiciary's role in adjudicating tort actions.

City of Chicago v. Beretta U.S.A. Corp., 213 Ill.2d 351 (2005) (cited at Defendants' Mem., p. 4), fails to salvage Defendants' primary jurisdiction analysis. *Beretta* is not a primary jurisdiction case, and its quotation of Restatement (Second) of Torts § 821B, Comment f (1979) does not advance Defendants' argument. First, Defendants neglect to mention that this discussion ultimately culminated in the rejection of the defendant's theory of the law on that issue.¹⁰ Second, the invoked Restatement Section, read in its entirety, undermines the defense theory. This Section reflects that

¹⁰ After quoting the Restatement comment cited by Defendants, the *Beretta* court "turn[ed] to the merits of defendants' argument that public nuisance liability may not be imposed because their compliance with existing statutory schemes renders their conduct, by definition, reasonable," and rejected it: "We conclude that it is possible to create a public nuisance by conducting a lawful enterprise in an unreasonable manner." 213 Ill.2d at 389. The court then referenced the rule of *Gilmore v. Stanmar*, 261 Ill.App.3d 651 (1st Dist.), *appeal denied*, 157 Ill.2d 499 (1994), which is discussed *infra*.

statutes and rules are circumstances for consideration as opposed to being grounds for dismissal, and the Section's commentary further explain that compliance with the law is not necessarily a defense.¹¹

Defendants similarly misplace reliance on a discussion of judicial restraint in *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004) (cited at Defendants' Mem., p. 5). Again, *Norton* is not a primary jurisdiction case. The *Norton* court addressed what was "contemplated by the APA," *id.* 2381, which is not at issue here. Unlike the HSSD, the *Norton* plaintiff sued under the auspices of the federal Administrative Procedure Act, 5 U.S.C. § 706(1), – *not* state tort law. The *Norton* plaintiffs tried to force the Bureau of Land Management to prohibit off roading at wilderness study areas. Thus, *Norton*'s discussion of judicial interference with agency action arose in the context of a plaintiff's attempt to dictate what the agency does. Here, in stark contrast, HSSD does not ask this Court to direct any order to any governmental agency.

2. *Defendants have not met the uniformity prong of the primary jurisdiction test.*

Defendants argue that the USEPA should handle this case in the interest of uniformity.¹² There is no such interest. As Judge Reagan already found here, "Congress does not require

¹¹ While Defendants here reference an excerpt from Comment f to Section 821B, the text of the section itself states that "whether the conduct is proscribed by a statute, ordinance or administrative regulation" is one of three circumstances that may sustain a holding that an interference with a public right is unreasonable. Restatement (Second) of Torts § 821B(2)(b) ("Circumstances that may sustain a holding that an interference with a public right is unreasonable include ... (b) whether the conduct is proscribed by a statute, ordinance or administrative regulation"). Thus statutory or administrative law is a circumstance, not a grounds for dismissal. Further, Comment f states that, "In the case of negligence as a matter of law, the standard defined by a legislative enactment is normally a minimum standard, applicable to the ordinary situations contemplated by the legislation. Thus traveling at less than the speed limit may still be negligence if traffic conditions indicate that a lesser speed is required." Restatement (Second) of Torts § 821B, comment f.

¹² See Defendants' Mem., p. 6 (invoking a purported "strong interest in maintaining uniform environmental regulations").

uniformity and consistency in drinking water standards[.]” Mem. & Order, p. 8. Further, “The instant action does not pertain to the establishment of primary regulations, nor does it challenge those regulations.” *Id.*

In rejecting the very same primary jurisdiction analysis Defendants advance herein, the *Metropolitan Sanitary District* Court distinguished the seminal primary jurisdiction decision, *Texas & Pac. Ry. v. Abilene Cotton Oil Co.*, 204 U.S. 426 (1907), because it addressed the need for uniformity of rates charged by a common carrier. *Metropolitan Sanitary District*, 30 Ill.App.3d at 370-71. “This is a totally different field depending upon facts and concepts completely immaterial in the case before us. While uniformity is essential concerning rates charged by a common carrier, no such factor exists in abatement of water pollution,” the court explained. 30 Ill.App.3d at 371. Significantly, the First District Court of Appeals found that, “Virtually the identical argument was raised by this defendant and expressly rejected by the Supreme Court of Illinois with reference to a case involving pollution of the waters of Lake Michigan by discharge of oil.” 30 Ill. App.3d at 371 (citing *Metropolitan Sanitary Dist. v. U.S. Steel*, 41 Ill.2d 440 (1968)).

In the face of appellate decisions finding no need for uniformity between water pollution abatement cases and agency action, Defendants cite no case law on point. Defendants cite *Pesticide Public Policy Foundation v. Village of Wauconda*, 117 Ill.2d 107 (1987) (Defendants’ Mem., p. 6), for the proposition that, “the Illinois Supreme Court has held that there is a strong interest in maintaining uniform environmental regulations.” Defendants’ Mem., p. 6. *Pesticide Public* is not a primary jurisdiction case. The *Pesticide Public* court discussed the need for uniformity in pesticide regulation in the context of “regulation by local government units.” 117 Ill.2d at 115-16. The case *sub judice* is not an attempt by a local government unit to regulate pesticides, as Judge Reagan

already has found. Mem. & Order, p. 8. HSSD is not trying to issue regulations that contradict any other regulations. Unlike the Village of Wauconda, the Plaintiff here filed a tort action seeking relief from the torts committed by the defendants.

3. *As a matter of law, the primary jurisdiction doctrine cannot be employed in a 5/2-615 motion.*

“Should primary jurisdiction be found to exist, the action should never be dismissed from the court but may only be stayed.” *People v. NL Industries*, 152 Ill.2d 82 (1992). Defendants essentially admit this, citing *NL Industries* (see Defendants’ Mem., p. 6). Irreconcilably, Defendants then argue that this Court should ignore this Illinois Supreme Court case in favor of a preceding Fourth Circuit Court of Appeals decision (see Defendants’ Mem., p. 6 (citing *Kerr-McGee Chemical Corp. v. Department of Nuclear Safety*, 204 Ill.App.3d 605 (4th Dist. 1990))). First, were *Kerr-McGee* support for the proposition that the primary jurisdiction doctrine is a basis for dismissal, then *Kerr-McGee* would not be good law once the Illinois Supreme Court penned *NL Industries* two years later. Second, *Kerr-McGee* is not support for this proposition. *Kerr-McGee* was dismissed because the case and controversy was not ripe. See 204 Ill. App.3d at 606, 611 (“We hold the question of whether the rules are valid is not yet ripe for decision.... It is possible that the rules at issue here will never become applicable to *Kerr-McGee*.”).¹³

¹³ To the extent *Kerr-McGee* discusses the primary jurisdiction doctrine, it was in the context of *Kerr-McGee*’s lawsuit *against* the Illinois Department of Nuclear Safety, in which *Kerr-McGee* requested a declaratory judgment that the Department could not promulgate rules in an effort to obtain jurisdiction over *Kerr-McGee*’s West Chicago facility and thereby thwart *Kerr-McGee*’s ongoing proceedings before the Nuclear Regulatory Commission. 204 Ill.App.3d at 606-07. The basis of the lawsuit surrounded *Kerr-McGee*’s complaint that the Department was disrupting *Kerr-McGee*’s licensing efforts before the NRC. The NRC had authority to reject the Department’s rules and had yet to make a decision. See *id.* at 611. As the NRC was the appropriate body to consider the rules and had not finished doing so, the *Kerr-McGee* court stated that decision should be deferred. The *Kerr-McGee* parties were a company and a state

In sum, there is no merit to Defendants' demand that the United States Environmental Protection Agency handle a state tort action that already has been bounced from federal court. The Honorable Michael J. Reagan already has concluded that this is a state court case upon which agency regulations have no bearing. Defendants' jurisdiction theories should be rejected.

II. AS A MUNICIPAL CORPORATION, PLAINTIFF HAS THE INHERENT RIGHT TO SUE AND BE SUED AND THUS HAS STANDING TO BRING THESE CLAIMS.

Defendants are correct that the "powers" granted to non-home rule municipal corporations such as Plaintiff are governed by the Illinois Constitution. ILLINOIS CONST., ART. VII § 8 (2004). Although not expressed by Defendants, the cases cited by Defendants acknowledge that this constitutional provision incorporates "Dillon's Rule" regarding the scope of authority of non-home rule municipal corporations: "Dillon's Rule provides that non-home rule units possess only those powers expressly granted to them by the Illinois Constitution or by statute, powers incident to those expressly granted, and powers indispensable to the accomplishment of the declared objectives of the non-home rule unit." *Commonwealth Edison Co. v. City of Warrenville*, 288 Ill.App.3d 373, 380 (2^d Dist. 1997) (citing *Pesticide Public Policy Found. v. Village of Wauconda*, 117 Ill.2d 107, 112 (1987)).

Dillon's Rule is routinely applied – as it was in the cases cited by Defendants – to disputes over the power to regulate. *See, e.g., Village of Sugar Grove v. Rich*, 347 Ill App.3d 689 (2^d Dist. 2004) (noise control ordinance); *Hawthorne v. Village of Olympia Fields*, 328 Ill.App.3d 301 (1st Dist. 2002) (zoning regulations). However, none of the cases cited by Defendants apply Dillon's

organization fighting with each other over an NRC license, and the court unremarkably observed that the NRC should be given a chance to make a decision. Here, in stark contrast, HSSD brings a state court action that does not purport to supplant anything defendants may or may not be doing before any agency.

Rule to limit the standing of a municipal corporation.¹⁴ All of these cases address the enactment of ordinances or the levy of taxes. See *Pesticide Public Policy*, 117 Ill.2d at 114 (Under Dillon’s Rule, the non-home rule entity acted within its “valid power” in enacting local pesticide control ordinance.); *East Lake Fork Special Drainage Dist. v. Ivesdale*, 137 Ill.App.3d 473, 478 (4th Dist. 1985) (Illinois General Assembly had authority to limit right of drainage districts to levy special assessments); *Village of Glencoe v. Metropolitan Sanitary Dist.*, 23 Ill.App.3d 868, 872 (1st Dist. 1974) (Sanitary District did not exceed its authority in enacting pollution control ordinance). Indeed, no Illinois court (or any court in any jurisdiction) has ever applied Dillon’s Rule to limit the standing to sue of a municipal corporation. Defendants’ proposed novel application of Dillon’s Rule to standing in this case must be rejected because this rule was never intended to apply to standing.

In fact, according to the treatise that is the genesis of Dillon’s Rule, the ability to sue and be sued is an inherent attribute of municipal corporations. JOHN F. DILLON, MUNICIPAL CORPORATIONS § 64 (5th ed. 1911) (“Certain attributes or powers are absolutely essential to constitute a body corporate, such as perpetual succession, the right to contract, to sue and be sued as a corporation, &c.”). This very principle was recently recognized by the United States Supreme Court: “Municipal

¹⁴ The case that Defendants argue is “very similar” is particularly instructive (although it is not particularly similar). In *Pesticide Public Policy Foundation v. Wauconda*, 117 Ill.2d 107, 111 (1987), the Illinois Supreme Court addressed two separate questions: (1) whether under Dillon’s Rule, the non-home rule entity at issue had the authority to pass a local pesticide control ordinance, and (2) whether the local ordinance was preempted by the Illinois Pesticide Act and Illinois Structural Pest Control Act. The court held that, under Dillon’s Rule, the non-home rule entity acted within its “valid power” in enacting the ordinance. *Id.* at 114. However, the two State acts preempted local regulation in the field. *Id.* As the court noted, “the municipality’s **power to act is an issue entirely separate from the question of whether this power has been preempted** or superceded by the superior authority of another lawmaking body.” *Id.* at 111 (emphasis added). Inexplicably, Defendants ignore the relevant Dillon’s Rule holding (which supports Plaintiff’s position) and explain that the ordinance was preempted (which is not relevant to the question of standing).

corporations have, as an attribute ‘necessarily and inseparably incident to every corporation,’ the ability ‘[t]o sue or be sued, ... and do all other acts as natural persons may.’” *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 126-27 (2003) (alterations in original) (quoting W. GLOVER, A PRACTICAL TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 41 (1837)).

Illinois courts have long recognized that municipal corporations are endowed with the inherent right to sue. See *City of Oakbrook Terrace v. Hinsdale Sanitary Dist.*, 172 Ill.App.3d 653, 661 (2^d Dist. 1988) (“A municipal corporation has the power to sue and be sued[.]”); *City of West Chicago v. County of DuPage*, 67 Ill.App.3d 924, 926 (2^d Dist. 1979) (Municipal corporation “has the implied authority to contract obligations and to sue and be sued in order to effectuate the purposes for which it was created.”); *People ex rel. Ammann v. Dipper*, 392 Ill. 38, 43-44 (1945) (“A municipality’s power to sue or to be sued includes the right to exercise discretion as to compromising or settling litigation or releasing judgments.”); *Perkins, Fellows & Hamilton v. State*, 4 Ill. Ct. Cl. 197 (1921) (The Board of Commissioners of Lincoln Park, as a municipal corporation, has the “implied authority to contract obligations and to sue and be sued.”); *City of Spring Valley v. Franckey*, 150 Ill.App. 435 (2^d Dist. 1909) (A municipal corporation “may prosecute suits in favor of the corporation, and defend actions brought against it. It may sue and be sued, and the right to settle matters in litigation follows logically from the right to maintain or defend actions.”) (citation omitted).

In *Lilly v. County of Cook*, 60 Ill.App.3d 573, 579 (1st Dist. 1976), the court rejected the precise argument presented by Defendants in this case, i.e., that a municipal corporation was not capable of suing or being sued.

[T]he Commission was more closely akin to a quasi municipal corporation, similar to the status of the Board of Education of the City of Chicago between 1889 and 1917. (See *McGurn v. Board of Education* (1890), 133 Ill. 122, 24 N.E. 529; *Brennan v. People ex rel. Kraus* (1898), 176 Ill. 620, 52 N.E. 353.) As such, the Commission had the implicit power to sue or be sued that necessarily flows from the creation of an independent agency of government.

Id. at 579-80 (emphasis added). This Court should similarly reject Defendants' novel construction of Dillon's Rule to restrict the inherent right of municipal corporations to sue and be sued.

Moreover, it is clear that under the Sanitary District Act of 1936 ("SDA"), 70 ILCS 2805/0.1 *et seq.*, Plaintiff's right to sue falls under the second prong of Dillon's Rule, *i.e.*, it is a "power" incident to those expressly granted. The SDA grants to the board of trustees of all sanitary districts the "government, control and management of the affairs and business" of the entity. 70 ILCS 2805/3(a). This includes the right to "exercise all the powers and manage and control all the affairs and property of the district." 70 ILCS 2805/4 (emphasis added). The right to "manage and control all of the affairs and property" implicitly grants Plaintiff the right to file suit against Defendants. *City of West Chicago*, 67 Ill.App.3d at 926 (Municipal corporation "has the implied authority to contract obligations and to sue and be sued in order to effectuate the purposes for which it was created."). See also 70 ILCS 2805/7 ("The board of trustees of any sanitary district organized under this Act shall have power ... to save and preserve the water supplied to the inhabitants of such district from contamination."); 70 ILCS 2805/27(a) ("The board of trustees of any such sanitary district shall have power and authority to prevent the pollution of any waters from which a water supply may be obtained within said sanitary district[.]"). These broad grants of authority necessarily carry with them the right to bring suit against those who have contaminated the public's water supply and damaged the sanitary district's property.

Here, Defendants have failed to point to any section of the SDA which prohibits Plaintiff from seeking damages and declaratory relief. *See* DILLON, MUNICIPAL CORPORATIONS § 64 (If an act creating a municipal corporation omits the right to sue or be sued, such right is implied; if it is expressly excluded, then the created entity is not a municipal corporation.). The mere fact that the SDA does not expressly mention the right to sue for damages – a right that has always been considered inherent in municipal corporations in Illinois – cannot possibly eliminate Plaintiff’s standing in this case. *Cf. Northern Illinois Home Builders Ass’n v. City of St. Charles*, 297 Ill. App. 3d 730, 741 (2d Dist. 1998) (non-home rule municipality authorized to pay for improvements in a different fashion than specifically authorized in its enabling act because “[n]othing in the provision prohibits other methods of payment”); *Metropolitan Sanitary Dist. v. On-Cor Frozen Foods, Inc.*, 36 Ill.App.3d 239, 243 (1st Dist. 1976) (Under Dillon’s Rule, sanitary district’s “power to adopt an ordinance carries with it the implicit authority to adopt penalties for the violation of such ordinance.”); *Pesticide Public Policy*, 117 Ill.2d at 113-14 (authority to enact ordinance relating to public health implicitly grants authority to enact pesticide regulation ordinance).

The Illinois legislature obviously believes that municipal corporations like Plaintiff have standing to pursue the present action. *See* 415 ILCS 25/0.01 et seq. Under the Illinois Water Pollution Discharge Act (count VI of Plaintiff’s Complaint), Plaintiff “may, if necessary, bring an action in the circuit court for the recovery of the actual costs of removal, plus reasonable attorneys fee, court costs and other expenses of litigation” against “[t]he owner or operator of such facility from which oil or other pollutants are discharged in violation” of the Act. 415 ILCS 25/5. If Defendants were correct that the SDA prohibits sanitary districts from filing suit, then the sanitary district would not have standing to proceed under the express provisions of the Water Pollutant

Discharge Act. This would defeat the express purpose of that Act – namely “that there should be no discharges of oil or other pollutants into or upon any waters which are or may be used for the purposes of providing a water supply for any city, town or village[.]” 415 ILCS 25/1. It is axiomatic that “statutes which relate to one subject are governed by one spirit and a single policy, and that the legislature intended the enactments to be consistent and harmonious.” *Williams v. Illinois State Scholarship Comm’n*, 139 Ill.2d 24, 52 (1990). This Court should decline to interpret the SDA in a fashion that would be inconsistent with the Water Pollutant Discharge Act.

Finally, the Illinois Constitution *expressly* grants Plaintiff standing in this case. Section 12 of article 1 states: “Every person shall find a certain remedy in the laws for all injuries and wrongs which he receives to his person, privacy, property or reputation. He shall obtain justice by law, freely, completely, and promptly.” ILLINOIS CONST., ART. I § 12. Plaintiff’s provision of water service is clearly a property right. *See Fountain Water Dist. v. Illinois Commerce Comm’n*, 291 Ill.App.3d 696, 700 (5th Dist. 1997). Section 12 of article 1 demonstrates that Defendant’s attempt to create artificial barriers to standing is disfavored in Illinois. In addition, section 2 of article 11 of the Constitution provides: “Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.” ILLINOIS CONST., ART. XI § 2. *See also* ILLINOIS CONST., ART. XI § 1 (“The public policy of the State and the duty of each person is to provide and maintain a healthful environment for the benefit of this and future generations.”). Although article 11 of the Constitution also does not create a new cause of action, it does eliminate the special standing requirement in environmental cases. *City of Elgin v. County of Cook*, 169 Ill.2d 53, 85-86 (1996). As the Appellate Court recognized in the

course of holding that a non-home rule sanitary district (like Plaintiff) did not exceed its Dillon's

Rule authority:

We note that in Illinois, the public concern with pollution has been elevated to the level of constitutional dignity. Article XI, Section 1 of the Illinois Constitution of 1970 provides that, 'The public policy of the State ... is to provide and maintain a healthful environment for the benefit of this and future generations.' Viewing the statute as a whole, we believe it is clear that the legislature intended to carry through this posture by granting extremely broad powers to the District.

Village of Glencoe, 23 Ill.App.3d at 873 (cited by Defendant). In conflict with the express mandate of the Illinois Constitution, Defendant is attempting to limit its liability for environmental hazards through the creation of a novel standing requirement never before applied in Illinois.

III. PLAINTIFF'S COMPLAINT SHOULD NOT BE DISMISSED BECAUSE HSSD HAS PROPERLY PLEADED CAUSATION.

Defendants argue for dismissal of HSSD's complaint apparently because HSSD has not — at the pleading phase — presented sufficient evidence to support a finding of causation against each defendant. Their motions are based on the contention that HSSD "effectively admits that it does not know whose atrazine may be in its water or how it got there." Defendants' Mem., p. 10. But HSSD makes no such admission. Nor did HSSD "indiscriminately su[e] groups of manufacturers and sellers without identifying who made or who sold the product that caused the plaintiff's alleged damage." *Id.* Rather, HSSD alleges that all six manufacturers caused the contamination of its water supply and that each manufacturer is liable under each count of the Complaint. Illinois law requires no more of HSSD.

Of course, HSSD need not *prove*, at the pleading stage, precisely which of the defendants caused a particular portion of its injury. After discovery is complete, if HSSD cannot prove

causation, Defendants may renew their challenge in the form of a motion for summary judgment. Such a challenge is premature here, before discovery has even begun. The Court should not reach this issue on the pleadings, in advance of any discovery of the facts on which the issue necessarily turns.

Even so, the traditional causation requirements are relaxed where, as here, a plaintiff pleads concert-of-action or civil conspiracy. Although Defendants rely on *Lewis v. Lead Indus. Assoc'n Inc.*, 793 N.E.2d 869 (Ill. App. Ct. 2003), *Lewis* actually undermines their argument. In *Lewis*, the court found that the plaintiffs' inability to identify which manufacturer's lead paint caused the injury was not fatal as long as the plaintiffs could establish that the sale and distribution of lead paint was tortious, that the defendants were the sole suppliers and promoters of lead pigment, and that each defendant was a party to the conspiratorial agreement. *Id.* at 879. Once plaintiffs established those facts, "each defendant would be liable regardless of which one was the active tortfeasor." *Id.*

A federal district court recently denied a motion to dismiss based on the same arguments made here. In *In re Methyl Tertiary Butyl Ether (MTBE) Products Liability Litigation*, the manufacturers of gasoline containing MTBE moved to dismiss the claims stated under Illinois state law because the plaintiffs had alleged that they could not identify who manufactured any particular batch of MTBE-containing gasoline. The court disagreed, holding that the plaintiffs' complaints were sufficient under Illinois law although they did not identify which defendant's product caused the injury. 2005 WL 906322, *25 (S.D.N.Y. 2005) (slip copy). Judge Scheindlin explained that the plaintiffs could proceed in accordance with Illinois law because they alleged that the manufacturers acted together:

Here, the Illinois Plaintiffs have alleged that all the named defendants “engaged in a common plan and concerted action to commit, assist and/or encourage a tortious act among Defendants” and that “[o]ne or more of the defendants committed overt acts in furtherance of the conspiracy.” Among other things, defendants allegedly created joint task forces and committees to promote the use of MTBE while concealing its dangers. If plaintiffs prove these allegations, all defendants would be liable regardless of which one proximately caused plaintiffs’ injuries. Accordingly, ... plaintiffs may proceed on a theory of concert of action and civil conspiracy.

Id. at *26. Therefore, Judge Scheindlin ruled that the plaintiffs could continue to litigate claims for design defect, failure to warn, negligence, public nuisance, private nuisance, trespass, and civil conspiracy. *Id.* at *27. HSSD’s “concert of action” allegations compel the same result here.

And despite Defendants’ vehement arguments to the contrary, Illinois courts have recognized the applicability of the theory of alternative liability, at least when all potentially-responsible defendants are before the court. *Smith v. Eli Lilly & Co.*, 137 Ill.2d 222, 251 (1990); *Wysocki v. Reed*, 222 Ill.App.3d 268 (1st Dist. 1991); *Erickson v. Baxter Healthcare, Inc.*, 15 F.Supp.2d 952, 969 (N.D.Ill. 2001), citing *Gruca v. Alpha Therapeutic Corp.*, 51 F.3d 638, 640 (7th Cir. 1995) (applying alternative liability where plaintiff had identified manufacturer for every concentrate treatment received). Further, the Illinois courts have firmly embraced the *res ipsa loquitur* doctrine, which shifts the burden of proof on causation from plaintiff to defendants, and have adopted flexible standards in its application such that “[t]he essential question becomes one of whether the probable cause is one which the defendant was under a duty to the plaintiff to anticipate or guard against.” *Lynch v. Precision Machine Shop, Ltd.*, 93 Ill.2d 266, 273-74 (1982) (quoting RESTATEMENT OF TORTS, Explanatory notes sec. 328D, comment g. at 161). Illinois recognizes that defendants need not be in control of the instrumentality causing plaintiffs’ injury at the time of injury, so long as defendants were in control of it at the time of the alleged negligence — here, at the time defendants

developed atrazine and atrazine-containing products and introduced them into the chain of distribution. *See Darrough v. Glendale Heights Community Hosp.*, 234 Ill.App.3d 1055, 1060 (2^d Dist. 1992); *Metz v. Central Illinois Elec. & Gas Co.*, 32 Ill.2d 446, 450 (1965). This openness to shifting traditional rules of causation suffices at the pleading stage to suggest that Illinois courts would consider adopting some form of collective liability to provide a remedy for HSSD's injuries in this case. Again, however, any challenge to Plaintiff's evidence of causation is premature at the pleading phase, and Defendants' motion must be denied.

IV. PLAINTIFF'S INDIVIDUAL CLAIMS ARE SUFFICIENT TO STATE A CAUSE OF ACTION UNDER 735 ILCS 5/2-615.

A. Plaintiff Correctly Pleads a Intentional Trespass under Illinois Law.

Defendants claim that HSSD fails to allege sufficient facts to support its trespass claims. As discussed fully herein, HSSD clearly and correctly has stated a claim for intentional trespass under Illinois law. As such, Defendants' motion must be denied.

In Illinois, in order to prove intentional trespass, the "plaintiff must prove the defendant had knowledge, to a high degree of certainty, that ... (trespass) would follow from defendant's acts or omissions." *Porter v. Urbana-Champaign Sanitary Dist.*, 237 Ill.App.3d 296, 303 (4th Dist. 1992). "One can be liable in trespass for an intrusion by a thing or third person if he acts with knowledge that his conduct will, to a substantial degree of certainty, result in the intrusion." *Freese v. Buoy*, 217 Ill.App.3d 234, 244 (5th Dist. 1991). "Thus, a person who aids, abets, assists, or directs the commission of a trespass by another is liable for a trespass." *Freese*, 217 Ill.App.3d at 244. Contrary to Defendants' assertions, Plaintiff pleads precisely these facts.

In Count I, Plaintiff states several intentional acts or omissions committed by Defendants, including manufacturing, distributing, and/or selling atrazine products for agricultural use while knowing to a substantial certainty that these products would invade Plaintiff's property and contaminate its water. Plaintiff also alleged that Defendants aided and abetted the continuous contamination of Plaintiff's property by others. Complaint, ¶¶ 32 & 33. In fact, HSSD clearly states that Defendants knew to a substantial certainty that the intrusion of atrazine onto the property owned by HSSD would result from its acts. Complaint, ¶ 32. This is sufficient to state a cause of action for trespass in Illinois.

Defendants claim that Illinois law requires that, in order to plead a trespass, the defendant must be in control of the atrazine when it entered Plaintiff's property. This is a complete misstatement of the law in Illinois. Defendants cite only one case for this proposition – *Traube v. Freund*, 333 Ill.App.3d 198 (5th Dist. 2002). Not only does this case not speak in absolute terms, it does not even concern the cause of action of trespass. As noted above, Illinois law allows for a claim of trespass when a party aids and abets another in committing the trespass. *Freese*, 217 Ill.App.3d at 244. Further, case law makes clear that a defendant is liable when they set into motion events that they know to a high degree of certainty will result in a trespass, even if they are not in control of the object when the trespass occurs. See *Dial v. City of O'Fallon*, 81 Ill.2d 548, 555-56 (1980).

Plaintiff completely complies with Illinois pleading requirements in pleading its cause of action of trespass. Plaintiff goes into great detail in its allegations of the extensive knowledge that Defendants had concerning the physical and chemical properties of atrazine, the ordinary use of this product, and the harmful nature of this product. Complaint, ¶¶ 4-17 & 31. Plaintiff also specifically alleges Defendants' actions that caused the trespass, including its manufacturing, distributing, and/or

selling of atrazine for agricultural use, its selling of atrazine to others for resell purposes, and its aiding and abetting the cover-up of the true harmful nature of atrazine. Complaint, ¶¶ 2, 3, 14, 15, 16, 17, 32, & 34. Finally, Plaintiff alleges that this trespass has caused injury. Complaint, ¶¶ 33 & 35. This is sufficient to state a cause of action for trespass in Illinois.

Defendants' final argument apparently is that Plaintiff's trespass claim is based upon Defendants' negligence, rather than being an intentional tort.¹⁵ Defendants state that Plaintiff makes no allegations that Defendants had knowledge to a high degree of certainty that a trespass would result. However, Defendants accurately quote Plaintiff's Complaint, in which Plaintiff alleged that Defendants had knowledge to a substantial certainty that the trespass would result from Defendants' actions. Clearly, Plaintiff is alleging an intentional act on the part of the Defendants. *See Freese v. Buoy*, 217 Ill.App.3d 234, 244 (5th Dist. 1991) ("One can be liable in trespass for an intrusion by a thing or third person if he acts with knowledge that his conduct will, **to a substantial degree of certainty**, result in the intrusion."(emphasis added))¹⁶ As noted above, Plaintiff went into great detail concerning the high degree of knowledge that Defendants had when they committed the trespass. Complaint, ¶¶ 4-17 & 31. Plaintiff correctly alleged that Defendants had the heightened knowledge necessary to commit an intentional trespass.

¹⁵ A trespass claim can be based upon either negligent or intentional behavior. However, if the plaintiff pleads a separate negligence claim, the court deems the trespass claim to be based upon intentional acts to avoid duplication. *Porter v. Urbana-Champaign Sanitary Dist.*, 237 Ill.App.3d 296 (4th Dist. 1992).

¹⁶ Some Illinois cases use the phrase "high degree of certainty," while others state "substantial degree of certainty" or "substantial certainty." See e.g. *Porter v. Urbana-Champaign Sanitary Dist.*, 237 Ill.App.3d at 303 ("high degree of certainty") and *Dial*, 81 Ill.2d at 554, citing Restatement (Second) of Torts, § 158, comment i, at 278-279 (1965) ("to a substantial certainty"). Both "high degree" and "substantial" accurately state the heightened knowledge necessary for an intentional tort.

B. Plaintiff Correctly Pleads Both Public and Private Nuisance under Illinois Law.

Likewise, Defendants' Motion to Dismiss as to Count II is without merit. "A private nuisance is a substantial invasion to another's interest in the use and enjoyment of his or her land. The standard for determining if particular conduct constitutes a nuisance is the conduct's effect on a reasonable person." *In re Chicago Flood Litigation*, 176 Ill.2d 179, 204 (1997). "[A] 'public nuisance is the doing of or the failure to do something that injuriously affects the safety, health or morals of the public, or works some substantial annoyance, inconvenience or injury to the public.'" *Donaldson v. Central Illinois Public Service Co.*, 199 Ill.2d 63, 101 (2002), *quoting Village of Wilsonville v. SCA Services, Inc.*, 86 Ill.2d 1, 21-22 (1981). In the instant case, Plaintiff has correctly pled both private and public nuisance.

First, Defendants rely on *Traube* to establish that once a product leaves the control of a manufacturer, the manufacturer will generally not be liable for a nuisance or negligence claim. Defendants fail to note that the *Traube* court specifically stated, "[a]bsent from the complaint are any allegations that American Cyanamid engaged in any negligent or intentional conduct giving rise to any nuisance" and "[t]he failure to plead sufficient facts to state a cause of action supports the dismissal of plaintiff's claim." *Traube v. Freund*, 333 Ill.App.3d 198, 202 (5th Dist. 2002). In the instant case, Plaintiff has alleged specific negligent and intentional acts performed by Defendants.

"In order to sufficiently plead a cause of action for public nuisance the plaintiffs must allege 'facts from which the law gives [them] certain rights, a transgression of those rights by the defendant[s], and resulting damages.'" *Gilmore v. Stanmar, Inc.*, 261 Ill.App.3d 651, 661 (1st Dist. 1994), *quoting Wheat v. Freeman Coal Mining Corp.*, 23 Ill.App.3d 14, 17 (5th Dist. 1974). "The pleading requirements are not strenuous because the 'concept of common law public nuisance

elude[s] precise definition.” *Gilmore*, 261 Ill.App.3d at 661, *quoting City of Chicago v. Festival Theatre Corp.*, 91 Ill.2d 295, 306, 438 N.E.2d 159, 63 Ill.Dec. 421 (1982).

Plaintiff has successfully alleged that Defendants have infringed upon a public right, namely the right to potable drinking water that is supplied by Plaintiff. In Illinois, the right to a healthy environment is a right guaranteed by the State Constitution. “Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings subject to reasonable limitation and regulation as the General Assembly may provide by law.” ILLINOIS CONST., ART. XI, §2. Such basic concerns as safe water to drink and clean air to breathe are an integral part of a healthful environment.

Defendants rely heavily on the recent Illinois Supreme Court case concerning firearms litigation for their argument that Plaintiff has not alleged an infringement of a public right. In this case, the court chose not to expand the definition of public rights to include being free from the threat of firearms. However, Defendants neglected to mention that the court specifically noted that sources of environmental pollution had long been recognized in Illinois as a nuisance that effects the public generally. *City of Chicago v. Beretta U.S.A. Corp.*, 213 Ill.2d 351 (2004). *See also Donaldson v. Central Illinois Public Service Company*, 199 Ill.2d 63 (2002) (coal tar contamination as a public nuisance); *Gardner v. International Shoe Co.*, 319 Ill.App.416 (1943) (odors, noise and smoke as a public nuisance). It is not an expansion of the law of public nuisance in the instant case to recognize the actions by Defendants in this case to be a public nuisance.

Further, Plaintiff can prove a public nuisance even if the Defendants complied with the current law. “Moreover, the existence of an ordinance or other law purportedly making a nuisance legal does not automatically destroy a common law nuisance action where the defendant’s conduct

was not in compliance with the law, where the defendant was otherwise negligent, or where the law itself is invalid for allowing a nuisance.” *Gilmore v. Stanmar, Inc.*, 261 Ill.App.3d 651, 661 (1st Dist 1994). In order to successfully state a claim for a public nuisance for a highly regulated industry like the one in which Defendants engage, the Plaintiff must show that “(1) the defendant violated the applicable statutes or regulations, (2) the defendant was otherwise negligent in carrying out the enterprise, or (3) the law regulating the defendant’s enterprise is invalid.” *Beretta*, 213 Ill.2d at 389. In the instant case, Plaintiff has listed several examples of Defendants’ negligence in carrying out their enterprise. Complaint, ¶¶ 39, 40, & 42. Plaintiff has alleged that these negligent acts have infringed upon the public right to clean potable water. Complaint, ¶41. As such, Plaintiff has successfully stated a claim for public nuisance.

Plaintiff has also correctly stated a claim for private nuisance. In Illinois, “[a] private nuisance is a substantial invasion of another’s interest in the use and enjoyment of his or her land. The invasion must be: substantial, **either intentional or negligent**, and unreasonable.” *In re Chicago Flood Litigation*, 176 Ill.2d 179, 204 (1997) (emphasis added). Again Defendants completely misstate Illinois law by saying that the private nuisance claim must be intentional. The one case cited by Defendants for this proposition concerns the cause of action of trespass, not nuisance. Defendants do not cite any cases where a nuisance claim caused by negligent conduct merges with a traditional negligence claim.

The Supreme Court of Illinois “has repeatedly described a nuisance as ‘something that is offensive, physically, to the senses and by such offensiveness makes life uncomfortable.’” *In re Chicago Flood Litigation*, 176 Ill.2d at 205, citing *Rosehill Cemetary Co. v. City of Chicago*, 352 Ill. 11, 30 (1933). “A plaintiff in a private nuisance action may recover all consequential damages

flowing from the injury to the use and enjoyment of his or her person or property.” *In re Chicago Flood Litigation*, 176 Ill.2d at 206. These are different damages than in a typical negligence claim. It would not constitute double recovery if the nuisance alleged by Plaintiff were resulting from negligent acts of Defendants; however, Plaintiff has not merely alleged that negligent action by Defendants caused the nuisance.

Instead, HSSD has alleged that it is Defendants’ “intentional and/or negligent actions ” that caused the nuisance. Complaint, ¶ 41. Plaintiff has alleged numerous facts that show that the actions of Defendants were intentional, in that Defendants had substantial knowledge that their actions would create a private nuisance to Plaintiff. Complaint, ¶¶ 5-17, 39, 40 & 42. Plaintiff has alleged that the atrazine contamination of its property is a nuisance that is a “continuous, substantial and unreasonable invasion of the use and enjoyment of Plaintiff’s property, which is perceptible to the senses.” Complaint, ¶ 41. The facts alleged by HSSD are sufficient to state a claim for both private and public nuisance under Illinois law. Defendants’ motion must be denied.

C. Plaintiff Correctly States a Claim for Negligence

“In order to prevail on a negligence claim, a plaintiff must show a duty owed by the defendant to the plaintiff, a breach of that duty, and an injury proximately caused by the breach.” *Cozza v. Culinary Foods, Inc.*, 311 Ill.App.3d 615, 622 (1st Dist. 2000). Plaintiff has alleged sufficient facts to correctly allege a negligence claim.

“It is axiomatic that every person owes to all others a duty to exercise ordinary care to guard against injury which naturally flows as a reasonably probable and foreseeable consequence of his act, and that such duty does not depend upon contract, privity of interest or the proximity of relationship, but extends to remote and unknown persons. *Cozza v. Culinary Foods, Inc.*, 311 Ill.App.3d at 622.

Plaintiff has correctly alleged that Defendants owed a duty of care to Plaintiff and that Defendants breached this duty.

Defendants claim that they do not owe a duty to Plaintiff. Defendants rely solely on the recent gun nuisance case decided by the Illinois Supreme Court in their arguments. However, Defendants' reliance on this case is misplaced. In *Beretta*, the plaintiff alleged that the defendants had a duty to the public at large, not to the individual plaintiff. *Beretta*, 213 Ill.2d at 392. The court determined that there was "no duty owed to the public at large, at least with respect to the manufacturer and distributor defendants." *Id.* at 392-93 (emphasis added). This is markedly different from the instant case, where Plaintiff correctly alleged that Defendant breached a duty owed to Plaintiff itself.

Further, the *Beretta* case concerned imposing "a heretofore unrecognized duty" on the gun industry – a duty to not sell guns to certain individuals. *Beretta*, 213 Ill.2d at 392. One of the duties owed to Plaintiff that the Defendants breached in the instant case has long been recognized by Illinois courts – the duty to not contaminate the environment. *See People v. Brockman*, 143 Ill.2d 351, 372 (1991); *Nutrasweet Company v. X-L Engineering Corporation*, 933 F.Supp. 1409, 1425 (N.D.Ill. 1996). Plaintiff has correctly alleged specific facts that show that Plaintiff's injury was caused by the reasonably probable and foreseeable consequence of Defendants' actions. Complaint, ¶¶ 5, 16, 17.

Further, Plaintiff has correctly alleged that Defendants' breach of duty caused Plaintiff's injury. Because of Defendants' actions, Plaintiff's property has become contaminated with atrazine at levels that are harmful to human health. *See* Complaint, ¶¶ 7, 8, 10-13, 19. Plaintiff has correctly alleged that Defendants owe a duty to Plaintiff that they then breached, causing injury to Plaintiff.

D. Plaintiff Correctly States a Claim for Strict Liability

“A manufacturer has a nondelegable duty to produce a product that is reasonably safe for all intended uses.” *Hansen v. Baxter Healthcare Corp.*, 198 Ill.2d 420, 433 (2002).

“A plaintiff may demonstrate that a product is defective in design, so as to subject a retailer and a manufacturer to strict liability for resulting injuries, in one of two ways: (1) by introducing evidence that the product failed to perform as safely as an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or (2) by introducing evidence that the product's design proximately caused his injury and the defendant fails to prove that on balance the benefits of the challenged design outweigh the risk of danger inherent in such designs.”

Id. at 433, quoting *Lamkin v. Towner*, 138 Ill.2d 510, 529 (1990). In the instant case, Plaintiff has alleged sufficient facts to show that Defendants' product atrazine was unreasonably dangerous for its intended and foreseeable uses.

Contrary to Defendants' arguments, Plaintiff did not admit that atrazine performed as an ordinary user would expect. Instead, Plaintiff alleges that the atrazine products were used in the manner in which they were intended and foreseeably certain to be used, but that the products were unreasonably dangerous when they were used as intended. Complaint, ¶¶ 51, 52. Plaintiff lists several ways in which the product did not perform as safely as an ordinary consumer would expect, including its propensity to contaminate reservoirs and lakes providing supplies for public water providers and that the ingestion of water containing even small amounts of atrazine is hazardous to human health. Complaint, ¶¶ 7, 8, 10-13, 19, 51.

Further, the fact that atrazine is an herbicide that kills broadleaf plants and weeds does not give the ordinary consumer applying atrazine to his fields any indication that this chemical could cause cancer or other health concerns to humans drinking water provided by Plaintiff and other community water providers. Defendants cite to *Camp Creek Duck Farm* in an apparent attempt to

draw correlations between this and the instant case. In *Camp Creek Duck Farm*, a farmer had rat poison applied to his land in areas where his ducks ran and fed. This caused the farmer's land to become contaminated in the areas where the poison was applied and harmed the ducks that were being raised by the farmer in these areas. The court determined that the plaintiff had not pled sufficient facts to show that the ordinary consumer would not contemplate that rat poison applied to land would contaminate the land and harm the ducks that were raised on that land. *Camp Creek Duck Farm, Inc. v. Shell Oil Co.*, 103 Ill.App.3d 81, 85 (4th Dist. 1981). This is vastly different from the case *sub judice*.

In the instant case, the ordinary consumer would not expect atrazine to perform in the manner that it does. The ordinary consumer does not contemplate that atrazine is so soluble in water and recalcitrant to biodegradation that it will mix readily with groundwater and travel great distances. Complaint, ¶¶ 51(a), 51(b). The ordinary consumer does not expect that the atrazine will then contaminate reservoirs and lakes providing supplies for public water providers, such as Plaintiff and the putative class members. Complaint, ¶¶ 20, 51(c). The ordinary consumer does not expect that exceedingly small amounts of atrazine are dangerous to humans. Complaint, ¶¶ 8, 10-13, 51(d). The average consumer does not contemplate that atrazine breaks down into degradant chemicals that are dangerous to humans at any level. Complaint, ¶ 7, 19. Plaintiff has pled sufficient facts to show that atrazine does not perform as safely as the ordinary consumer would expect. As such, Plaintiff has pled sufficient facts to state a claim for strict liability.

E. Plaintiff Has Stated a Valid Claim for Damages and Declaratory Relief under the IEPA.

Defendants attempt to defeat Plaintiff's claim under the Illinois Environmental Protection Act (IEPA) through two separate lines of attack. Both must fail. First, Plaintiff has stated a valid claim under the IEPA because the Act contains an implied private right of action for aggrieved parties. Moreover, even if there is no private right of action, it is clear from the plain language of the statute that as a local unit of government, Plaintiff can proceed under the express terms of the IEPA. Second, Plaintiff is not required to bring this action before the Pollution Control Board, because, as Defendants acknowledge, Plaintiff's action is for damages. The circuit court has concurrent jurisdiction over cases seeking non-injunctive relief.

1. Plaintiff Has Stated a Valid Claim under the IEPA.

Although Defendants note that the IEPA does not expressly provide for a private right of action, this is only the beginning of the relevant inquiry. While it is true that the IEPA does not expressly provide for private actions, the Act's stated purpose is "to establish a unified, state-wide program *supplemented by private remedies*, to restore, protect and enhance the quality of the environment, and to assure that adverse effects upon the environment are fully considered and borne by those who cause them." 415 ILCS 5/1(b) (emphasis added). By the terms of the IEPA, there is an implied private right of action available to Plaintiff in the present case. "Implication of a private right of action is appropriate if: (1) the plaintiff is a member of the class for whose benefit the statute was enacted; (2) the plaintiff's injury is one the statute was designed to prevent; (3) a private right of action is consistent with the underlying purpose of the statute; and (4) implying a private right of action is necessary to provide an adequate remedy for violations of the statute.'" *Metzger v. DaRosa*,

209 Ill.2d 30, 36 (2004) (citation omitted). Plaintiff, as a water provider, is a member of the class for whose benefit section 12 of the IEPA was enacted because the Act is aimed at prohibiting the discharge of contaminants causing water pollution.

The provisions of this Act authorizing implementation of the regulations pursuant to an NPDES program shall not be construed to limit, affect, impair, or diminish the authority, duties and responsibilities ... of any unit of local government ... to enforce provisions, set forth in this Act or other State law or regulation.

415 ILCS 5/11(c).¹⁷ Thus, the legislature specifically singled out Plaintiff sanitary district as a party authorized to enforce the Act. *See also Noyola v. Board of Educ.*, 284 Ill.App.3d 128, 132 (1st Dist. 1996).

Moreover, Plaintiff's injury (contamination of its property and pollution of its waters) is unquestionably the type of injury the statute was designed to prevent. The IEPA states:

It is the purpose of this Act, as more specifically described in later sections, to establish a unified, state-wide program supplemented by private remedies, to restore, protect and enhance the quality of the environment, and ***to assure that adverse effects upon the environment are fully considered and borne by those who cause them.***

415 ILCS 5/2(a),(b) (emphasis added). Thus, the IEPA was enacted to protect those parties, like Plaintiff here, that have suffered injury based on prohibited actions by others, and to assure that the damages are borne by the responsible parties. This private right of action for damages "assure[s] that adverse effects upon the environment are fully considered and borne by those who cause them." *See also King v. Senior Servs. Assocs., Inc.*, 341 Ill.App.3d 264, 270 (2^d Dist. 2003) (persons who provide services for elder abuse can proceed for retaliatory discharge under Elder Abuse and Neglect Act because "ct was not designed to protect elders from abuse, neglect, and exploitation; the central purpose of the Act is to put in place a system to provide services to such persons"); *Fiumetto v.*

¹⁷ "“Local government unit’ means ... sanitary district[.]” 415 ILCS 5/19.2.

Garrett Enters., Inc., 321 Ill.App.3d 946, 951-52 (2^d Dist. 2001) (plaintiff's injury from retaliatory discharge is type sought to be prevented by statute providing for unemployment benefits).

An implied private right of action is also consistent with the express underlying purpose of Title III of the IEPA, entitled "Water Pollution": "It is the purpose of this Title to restore, maintain and enhance the purity of the waters of this State in order to protect the health, welfare, property, and the quality of life, and to assure that no contaminants are discharged into the waters of the State[.]" 415 ILCS 5/11(b). The action here is precisely to restore the purity of the waters and protect Plaintiff's property and the public health and welfare.

Finally, this private right of action is necessary to provide an adequate remedy for violations of the statute. The Illinois Supreme Court has stressed that the mere fact that a statute provides for state enforcement does not mean that there is no implied private right of action. *See Rodgers v. St. Mary's Hosp. of Decatur*, 149 Ill.2d 302, 308-09 (1992) (implied private right of action exists under X-Ray Retention Act because "threat of liability much more efficient" way of enforcing the act than enforcement by Department of Public Health). Thus, the question is whether allowing a sanitary district to proceed under the IEPA is a *more efficient means* of assuring that Illinois waters are safe and pure than vesting sole responsibility for enforcing the provisions of the IEPA in the state.

In *Corgan v. Muehling*, 143 Ill.2d 296, 312 (1991), the Court explained that "the Psychologist Registration Act does not authorize private individuals who are harmed by violation of the statute to seek any form of civil relief. However, nothing in the statute suggests that the legislature intended to limit the available remedies to those administrative or criminal measures specifically enumerated within the Act." *Id.* at 314. Thus, the Court held: "A civil private right of action for compensatory damages is necessary to uphold and implement the public policy behind

section 26 of the Psychologist Registration Act, to protect the public from persons who are incompetent and unqualified to render psychological services.” *Id.* at 314-15. “A private right of action under the Psychologist Registration Act is the only way that an aggrieved plaintiff can be made whole, when a defendant fails to comply with the provisions of the Act.” *Id.* at 315.

The present case is indistinguishable from *Corgan*. The “only way” to make the injured Plaintiff here “whole” is to imply a private right of action under the statute. Moreover, nothing in the IEPA suggests that the legislature intended to limit the available remedies under the Act. In fact, the broad language of the Act indicates that the legislature recognized the need to comprehensively protect the environment. In both *Corgan* and the present case, the statute unambiguously provides for a State cause of action, but a private right of action is necessary to effectuate its purposes and provide an adequate remedy for those injured by violations. Here, Plaintiff has a responsibility to mitigate the damage done to its property and to the public water supply. The *only way* to make the responsible parties shoulder the burden is to provide for an implied private right of action under the IEPA. *See also Calloway v. Kinkelaar*, 168 Ill.2d 312 (1995) (implied right of action for willful and wanton conduct of police officers and municipalities under Domestic Violence Act); *Sawyer Realty Group, Inc. v. Jarvis Corp.*, 89 Ill. 2d 379 (1982) (implied private right of action under Real Estate Brokers and Salesmen License Act for deceptive and fraudulent practices); *Kelsay v. Motorola, Inc.*, 74 Ill.2d 172 (1978) (implied private right of action for retaliatory discharge under Workers’ Compensation Act).

Courts have routinely found that the IEPA contains an implied private right of action. *See Singer v. Bulk Petroleum Corp.*, 9 F.Supp.2d 916, 924-25 (N.D. Ill. 1998); *Midland Life Ins. Co. v. Regent Partners*, No. 96 C 3235, 1996 WL 604038, at *5 (N.D. Ill. Oct. 17, 1996); *Krempel v.*

Martin Oil Mktg., Ltd., No. 95 C 1348, 1995 WL 733439, at *2 (N.D. Ill. Dec. 8, 1995). In contrast, Defendants' case is inapposite. In *NPD Bank v. Krueger Ringier, Inc.*, 292 Ill.App.3d 691 (1st Dist. 1997), the court held that the economic loss doctrine prevented the plaintiff from recovering in tort and held: "[T]he recovery sought by plaintiffs consisted of purely economic losses based upon disappointed commercial expectations. Under these facts, we hold that a private right of action under the Illinois Environmental Protection Act does not exist[.]" *Id.* at 698. Here, Plaintiff is a municipal corporation that provides water to the public – there is no contract between the parties and no issue under the economic loss doctrine. Finally, Title III of the IEPA, entitled "Water Pollution" states:

The provisions of this Act authorizing implementation of the regulations pursuant to an NPDES program ***shall not be construed to limit, affect, impair, or diminish the authority***, duties and responsibilities of the Board, Agency, Department or any other governmental agency or officer, or ***of any unit of local government***, to regulate and control pollution of any kind, to restore, to protect or to enhance the quality of the environment, or to achieve all other purposes, or ***to enforce provisions, set forth in this Act*** or other State law or regulation.

415 ILCS 5/11(c) (emphasis added). Regardless of whether the IEPA contains a right of action for a wholly private entity, it is indisputable that the above paragraph provides for a right of action for Plaintiff sanitary district, as a unit of local government, to enforce the provisions of the Act.

2. *Plaintiff Is Not Required to Bring this Claim Before the IPCB.*

Even though Defendants admit that Plaintiff seeks damages under the IEPA,¹⁹ Defendants argue that Plaintiff must initiate its claim before the Pollution Control Board (Board). However, the plain language of the IEPA section cited by Defendants applies to injunctive relief only:

¹⁹ Defendants' Mem., p. 20 n.8 ("Count V seeks monetary damages; however the statute authorizes private litigants to seek injunctive relief only.").

Any person adversely affected in fact by a violation of this Act, any rule or regulation adopted under this Act, any permit or term or condition of a permit, or any Board order ***may sue for injunctive relief against such violation***. However, except as provided in subsections (d) and (e), no action shall be brought ***under this Section*** until 30 days after the plaintiff has been denied relief by the Board[.]

415 ILCS 4/45(b) (emphases added). This action was not brought under section 45 for injunctive relief – as Defendants acknowledge in their brief. Thus, section 45(b) is inapplicable. *Krempel*, 1995 WL 733439, at *3 (“Section 45(b) of the statute explicitly limits itself to injunctive relief.”). The cases cited by Defendants hold only that a party seeking an injunction must first exhaust administrative remedies. *City of Elgin v. Cook County*, 257 Ill.App.3d 186, 198 (1st Dist. 1993), *aff’d in part, rev’d in part on other grounds*, 169 Ill.2d 53 (1995) (“section 45 of the EPA requires any person adversely affected by a violation of the EPA to exhaust their administrative remedies before seeking ***injunctive relief*** in the circuit court”) (emphasis added); *Decatur Auto Auction, Inc. v. Macon County Farm Bureau, Inc.*, 255 Ill.App.3d 679, 682 (4th Dist. 1993) (plaintiff’s “motion for preliminary injunction” must be presented to the Board).

While Defendants argue that section 31 of the IEPA vests exclusive jurisdiction of this controversy in the Board, the Illinois Supreme Court has already rejected this exact argument. In *People v. NL Industries*, 152 Ill.2d 82, 97 (1992), the court analyzed section 22.2, which states, like section 31 here, that actions “may” be brought before the Board. *See* 415 ILCS 31(d) (“Any person may file with the Board a complaint....”). In holding that section 22.2 provides for the ***concurrent jurisdiction*** of the Board and the circuit court, the Court stated: “Based upon this section of the statute, it would appear that the legislature intended that cost-recovery actions ***could*** be filed before the Board. However, no language in this section explicitly excludes the circuit court from hearing such cases.” *NL Indus.*, 152 Ill.2d at 97 (emphasis added). Thus, [t]he failure to recognize that

concurrent jurisdiction exists in the circuit court would merely frustrate purposes of judicial economy and the ultimate goal of mitigating harm to the environment.” *Id.* at 99.

V. THIS CASE DOES NOT VIOLATE THE U.S. CONSTITUTION.

Defendants argue that the commerce clause and due process protection grant them *carte blanche* to poison the drinking water supply in this State. *See* Defendants’ Mem., pp. 21-24. To construct this brazenly self-serving interpretation of the Constitution, Defendants combined blatant mischaracterizations of the Complaint with cases that are in no way on point. These constitutional challenges should be denied.

Defendants’ commerce clause argument should be rejected for at least four independent reasons. First, Defendants’ novel constitutional theory fails at the onset as it is founded on a false reading of the Complaint. For purposes of a motion to dismiss, the complaint is read *in favor of* the nonmoving party;²⁰ it is not distorted to meet otherwise inapposite case law. Defendants’ interstate commerce clause analysis is founded on the allegation that HSSD is effectively banning the sale of atrazine, thus rendering the Complaint a de facto regulation. *See* Defendants’ Mem., p. 22. As Judge Reagan has explained, however, this lawsuit does not represent an attempt by HSSD to regulate.²¹

As another example of Defendants’ distortion of the Complaint, the Memorandum invokes *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572 n.17 (1996) (cited at Defendants’ Mem., pp. 22-23),

²⁰ *Hanna v. City of Chicago*, 331 Ill.App.3d 295, 303 (1st Dist.), *appeal denied*, 201 Ill.2d 566 (2002) (“It is proper for the court when ruling on a motion to dismiss under either section 2-615 or section 2-619 to accept all well-pleaded facts in the complaint as true and to draw all reasonable inferences from those facts in favor of the nonmoving party.”) (cit. om.).

²¹ Mem. & Order, p. 8 (“The instant action does not pertain to the establishment of primary regulations, nor does it challenge those regulations. HSSD seeks damages for various state-law tort claims and seeks to hold Defendants liable, whether or not Defendants violated federal regulations, for actions that affected the quality of HSSD’s water supply.”).

for the proposition that a State may not impose sanctions ““with the intent of changing the tortfeasors’ lawful conduct in other States[.]”” Defendants’ Mem., p. 22. Such intent is invented by Defendants without supporting reference to the Complaint. In truth, HSSD’s intent here is to protect its District, and represent a class protecting certain other Districts within Illinois, from drinking water that causes cancer, infertility, poor fertilization, fetal death, and congenital anomalies, regardless of whether other States choose to do so.

Second, Defendants’ commerce clause cases address the effect that *statutes and regulations* have on interstate commerce. By taking this line of cases grossly out of context, Defendants would create a remarkable and heretofore unheard of immunity. The instant case is not about a commercial regulation, but rather is a lawsuit to address a defined injury. If every lawsuit that might potentially affect commerce in another state is somehow banned by the interstate commerce clause, as Defendants incredibly argue, then the courts of justice would be significantly emptier. With the exception of an inapposite, unpublished and uncitable decision from a federal court outside Illinois,²² the only commerce clause cases cited by Defendants address whether a statute or regulation – not

²² See *Shearson Lehman Bros. Inc. v. Greenberg*, 60 F.3d 834, 1995 WL 392028 (9th Cir. July 3, 1995) (table) (cited at Defendants’ Mem., p. 23). In *Shearson*, a pro se plaintiff tried to use a state statute as a basis for a nationwide permanent injunction. Unremarkably, this attempt failed. As the Complaint does not request a nationwide injunction, *Shearson* is irrelevant. Further, the Ninth Circuit specified *Shearson* as not citable authority pursuant to U.S.Cir.Ct. Rules (9th Cir.), rule 36-3.

a Complaint – violate the commerce clause.²³ The case law Defendants cite does nothing to advance the argument that a *lawsuit* is unconstitutional merely because it affects commerce.

Third, even ignoring the blatant mischaracterizations of the Complaint and the fact that HSSD has not purported to promulgate any statute or regulation to which a commerce clause challenge would possibly apply, Defendants omit any cogent commerce clause analysis from their argument. “Generally speaking, the Commerce Clause protects against inconsistent legislation arising from the projection of one state regulatory regime into the jurisdiction of another State.”

²³ Defendants cite *Shearson* and eight other cases. Of those, five are commerce clause cases analyzing state laws, not state lawsuits. See *Healy v. Beer Institute, Inc.*, 491 U.S. 324 (1989) (striking down discriminatory Connecticut statute affecting out-of-state beer pricing); *Allegro Services, Ltd. v. Metropolitan Pier and Exposition Authority*, 172 Ill.2d 243 (1996) (challenge to airport departure tax); *Lakehead Pipeline Co. v. Illinois Commerce Com’n*, 296 Ill.App.3d 942, 946 (3d Dist.), *appeal denied*, 179 Ill.2d 586 (1998) (contrary to the “holding” articulated in Defendants Mem., p. 23, the court held that the Pipeline Law did not violate the commerce clause); *Brown’s Furniture, Inc. v. Wagner*, 171 Ill.2d 410, *cert. denied*, 519 U.S. 866 (1996) (dormant commerce clause analysis of taxing authority and use tax); *Knoll Pharmaceutical Co. v. Sherman*, 57 F. Supp. 2d 615 (N.D. Ill. 1999) (analyzing statute banning advertising).

The three remaining cases cited by Defendants do not support their commerce clause analysis. Contrary to Defendants’ claim, *Cipollone v. Liggett Group, Inc.*, 505 U.S. 504 (1992), did not say that a commerce clause analysis applies equally to a lawsuit as to a statute. See Defendants Mem., p. 21. At the cited page of *Cipollone*, the Court discussed the Public Health Cigarette Smoking Act of 1969, which in no way compares to the language of the commerce clause. Contrast 505 U.S. at 520-21 (discussing statutory language that *bars* “requirement[s] or prohibition[s] ... imposed under State law”) with Const. art. I, § 8 clause 3 (granting Congress the power “To regulate Commerce ... among the several States” and not expressly articulating a prohibition against State regulation).

The remaining cases are punitive damages cases. See *Gore, supra.*; *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408 (2003). While *Gore* at one point mentions the commerce clause, the issue there was whether the plaintiff could justify his punitive damages award with the argument that he was deterring BMW’s conduct in other states, where the conduct was lawful. The Court did not say that *Gore*’s case violated the commerce clause merely because it harmed BMW sales, nationally or otherwise. Here, HSSD is not trying to justify punitive damages, or any other damages, as arising from a need to prevent Defendants from polluting the drinking water supplies of other states. Unlike the *Gore* plaintiff, HSSD seeks to redress a harm to Illinois.

Healy v. Beer Institute, Inc., 491 U.S. 324, 336-37 (1989) (cit. om.). As explained in the very case law Defendants themselves invoke, there is a two-tiered approach to analyzing state economic regulation under the commerce clause. *See Healy*, 491 U.S. at 337 n.14.²⁴ The first tier queries whether “a state statute directly regulates or discriminates against interstate commerce” and whether “its effect is to favor in-state economic interests over out-of-state interests.” 491 U.S. at 337 n.14 (cit. om.). “Where the purpose of a state regulation affecting interstate commerce amounts to ‘simple economic protectionism,’ a virtual *per se* rule of invalidity has been applied by the Court.” *People v. Kesler*, 186 Ill.2d 413, 416 (1999) (cit. om.). Here, the Complaint has nothing to do with economic protectionism on behalf of the State of Illinois.

The second tier in the commerce clause framework addresses the more complex situation of legislation that is not so clearly aimed at affording economic advantages to local business. *See id.* If “a statute has only indirect effects on interstate commerce and regulates evenhandedly, we have examined whether the State’s interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits.” *Healy*, 491 U.S. at 337 n.14 (cit. om.). Thus, because the Complaint has nothing to do with economic protectionism, Defendants would have to prove that there is a burden on interstate commerce that clearly exceeds the local benefits. They cannot do so. Even assuming for the sake of argument that HSSD had promulgated a statute or regulation, which

²⁴ *Healy*, which is cited at Defendants’ Mem., p. 21, does not advance the Defendants’ argument. *Healy* struck down a discriminatory Connecticut statute requiring out-of-state shippers of beer to contemporaneously affirm pricing, which had the effect of controlling Massachusetts beer prices. 491 U.S. at 338 (“has the practical effect of controlling Massachusetts prices”), 341 (discussing discriminatory treatment). The Court explained that this statute created “just the kind of competing and interlocking local economic regulation that the Commerce Clause was meant to preclude.” 491 U.S. at 337. HSSD is not trying to regulate anything, and even if it were, the “regulation” would not be directed out-of-state, nor would it compete or interlock with any other state’s regulation.

is denied, laws ensuring the safety of the citizenry do not violate the commerce clause, regardless of whether a defendant can foment a theory as to how its commerce is adversely impacted.²⁵ This is the third reason why Defendants' commerce clause analysis lacks any semblance of merit.

The fourth independent reason why Defendants' commerce clause theory fails is because they have failed to carry the necessary burden of proving an excessive burden on commerce. Defendants cannot strike down laws and regulations, even were any at issue here, based on an *ipse dixit* proclamation that commerce is harmed.²⁶ Reading the Complaint in the light most favorable to

²⁵ See, e.g., *Kesler*, 186 Ill.2d at 417 (noting the Supreme Court's reluctance to invalidate regulations that pertain to safety and reasoning that, "If safety justifications are not illusory, the Court will not second-guess the state legislature's judgment of their importance in comparison to the burdens they impose on interstate commerce. Those who seek to challenge *bona fide* safety regulations must overcome a strong presumption as to their validity."); *People v. Conrail Corp.*, 245 Ill.App.3d 167, 184-85 (5th Dist.), *appeal denied*, 152 Ill.2d 566 (1993) ("If the effect on interstate commerce is merely incidental and the State's action regulates evenhandedly, then the regulations should be upheld unless it is established that the burden imposed upon interstate commerce is clearly excessive in relation to the putative local benefit.... [W]e find that the injunction entered by the trial court [enforcing the Illinois Environmental Protection Act] has no aspect of local protectionism, and that it can and should be viewed as a regulation directed to the legitimate local concern of environmental damage and the health and safety of the people living in close proximity to the Fairmont City railyard."); *Edward R. Bacon Grain Co. v. City of Chicago*, 325 Ill.App. 245, 255-56 (1st Dist. 1945) (finding that a local police regulation intended to protect the city, its people and property from fire and explosion arising out of the maintenance and operation of warehouses did not conflict with the commerce clause).

²⁶ See *Kesler*, 186 Ill.2d at 417-18 ("There is no indication that the State's safety justifications are illusory. Moreover, there is no indication that the regulation imposes any significant burdens on interstate commerce. The record is devoid of evidence on the subject.... In view of the limited record before us, the judgment of the circuit court can be sustained only if one can say, as a matter of law, that the federal commerce clause imposes a blanket prohibition against any efforts by the State to regulate the configuration of vehicles which operate on its highways. There is no authority for such a sweeping proposition and no basis in the law for creating such authority now."); *Village of Caseyville v. Cunningham*, 137 Ill.App.3d 186, 190-91 (5th Dist. 1985) ("Defendants have failed to show a substantial burden on interstate commerce.... There was no effort at trial by defendants to show how the ordinance substantially burdened interstate commerce. Defendants have failed to meet their burden of proving the invalidity of the ordinance."); see also *Lakehead*, 296 Ill.App.3d at 952 ("Indeed, the statute does not appear to place any burden on interstate commerce since it is not restricting any federal scheme or interstate traffic."); contrast *Knoll Pharmaceutical*, 57 F. Supp. 2d at 623 (citing "overwhelming

HSSD, as it is read for purposes of a motion to dismiss, any alleged effect on commerce is overwhelmingly outweighed by the local interest in preventing the citizenry from drinking water that causes cancer and turns frogs into hermaphrodites, among other health dangers. There is not a shred of proof of any burden on commerce, much less an excessive one, and much less one that outweighs the weighty local interest in protecting our drinking water.

Defendants' "due process" argument is equally lacking in any semblance of legal authority. In support of the strikingly convenient theory that being sued abridges their due process rights, Defendants present a quote from *BMW of N. Am., Inc. v. Gore* which, according to Defendants, is the "holding" of the case. Defendants Mem., pp. 22-23. Defendants argue that, "This holding eviscerates plaintiff's effort to regulate lawful conduct of the defendants beyond the municipality's borders...." *Id.* Aside from the fact that there is no such effort on the part of HSSD, this quote does not represent the holding of *Gore*.²⁷ Most pernicious about this patchwork quote is that Defendants ellipsed out the text preceding footnote 19, which states that, "Alabama *may* insist that BMW adhere to a particular disclosure policy in that State. Alabama does not have the power, however, to punish BMW for conduct that was lawful where it occurred and that had *no impact* on Alabama or its residents." *Gore*, 517 U.S. at 572-73 (emph. supp.). Therefore, the true text of *Gore*, to the extent it is applicable at all, reveals that the Complaint is doing what it may do, namely insisting that

evidence" of effect of advertising ban at issue).

²⁷ Defendants attribute this text to footnote 17, which is inaccurate, as the quote is pieced together from different places in the opinion and assembled in a particularly creative and misleading whole. The "[since]" Defendants inserted is deceptive. The text Defendants quote after they inserted the word since is a parenthetical from footnote 19, and appears after a citation to a federal habeas corpus case addressing the irrelevant proposition that the State may not retaliate against an accused for lawfully attacking his conviction. *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) (cited at *Gore*, 517 U.S. at 573 n.19). Footnote 19 then discusses criminal habitual offender statutes, which obviously bear no relation to the litigation *sub judice*.

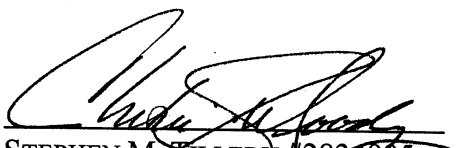
Defendants adhere to an Illinois policy that water be safe to drink. Nowhere does the Complaint ask this Court for relief that would have “no impact on” Illinois or its residents. Therefore, the Complaint is allowed under the *Gore* analysis. The same is true for *Campbell*, upon which Defendants similarly misplace reliance.²⁸

CONCLUSION

For the foregoing reasons, Plaintiff respectfully requests that the Court deny Defendants’ Motion to Dismiss. In the event that this Court were to find any defect in the pleadings, Plaintiff requests leave to amend its Complaint.

Respectfully submitted,

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²⁸ See *Campbell*, 538 U.S. at 422 (“Lawful out-of-state conduct may be probative when it demonstrates the deliberateness and culpability of the defendant’s action in the State where it is tortious, but that conduct must have a nexus to the specific harm suffered by the plaintiff.”) (*Campbell* cited at Defendants’ Mem., p. 23).

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**HOLIDAY SHORES SANITARY)
DISTRICT, individually and on behalf of all)
others similarly situated,)**

Plaintiff,)

vs.)

CIVIL NO. 04-689-MJR

**UNITED AGRI PRODUCTS, INC., D/B/A)
UAP LOVELAND PRODUCTS, INC.; and)
GROWMARK, INC.,)**

Defendants.)

MEMORANDUM AND ORDER

REAGAN, District Judge:

Before the Court is Plaintiff's Motion to Remand (Doc. 15), filed October 25, 2004.

Plaintiff moves the Court to enter an Order remanding this case and other cases filed by Holiday Shores Sanitary District ("HSSD") which have the same or a similar fact pattern, in which HSSD has filed motions to remand, and which are pending before the undersigned judge: *Holiday Shores Sanitary District v. Makhteshim-Agan of North America, Inc.*, 04-687-MJR; *Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc.*, 04-688-MJR; *Holiday Shores Sanitary District v. Sipcam Agro USA, Inc.* 04-690-MJR; *Holiday Shores Sanitary District v. Dow AgroSciences, LLC*, 04-691-MJR; and *Holiday Shores Sanitary District v. Drexel Chemical Co.*, 04-692-MJR. A hearing was held on this matter on December 13, 2004.

Plaintiff asserts that these cases should be remanded for the following reasons: (1) the Court does not have original jurisdiction pursuant to 28 U.S.C. § 1331 because the case is neither



controlled by federal law nor raises a federal question; (2) the Court lacks subject matter jurisdiction pursuant to 28 U.S.C. § 1442(a)(1) because Defendants are not “federal officers”; and (3) the Court does not have original jurisdiction over this case pursuant to 28 U.S.C. § 1332 because Growmark, an Illinois corporation, was not fraudulently joined to defeat diversity.

Defendant, United Agri Products, d/b/a UAP Loveland Products, Inc. (“UAP”), responds that federal jurisdiction is proper for the following reasons: (1) HSSD’s Complaint raises a substantial, disputed federal question regarding the validity, appropriateness and proper judicial review of EPA regulations promulgated pursuant to the Safe Drinking Water Act (“SDWA”); (2) because the SDWA requires such challenges to be brought in federal court, removal is proper; (3) federal agent removal pursuant to 28 U.S.C. § 1442(a) provides an independently sufficient basis for removal; and (4) this Court has diversity jurisdiction over this case pursuant to 28 U.S.C. § 1332 because HSSD fraudulently joined Defendant Growmark.

Background

On July 2, 2004, this action was commenced in the Circuit Court, Third Judicial Circuit of Illinois, Madison County. Defendant UAP was not served with the July 2, 2004, Complaint. On August 5, 2004, HSSD filed First Amended Class Action Complaint, which was served on UAP on August 27, 2004. On September 24, 2004, Defendant UAP timely filed Notice of Removal in the U. S. District Court for the Southern District of Illinois. Defendant Growmark consented to removal.

In its Complaint, Plaintiff HSSD states that it operates a plant that provides water to the Holiday Shores community in Madison County, Illinois. HSSD asserts that it draws water from a lake that has been contaminated by atrazine, a chemical found in herbicides applied to the

agricultural land surrounding the lake. HSSD states that it is undisputed that the Defendants manufacture and/or sell atrazine and atrazine-containing products for use in Illinois. HSSD states claims for nuisance, trespass, negligence, strict liability and violations of state environmental laws. HSSD seeks damages for remediation costs associated with atrazine contamination of its water supplies.

Standard of Review on Remand Motions

As the party seeking to remove a state court action has the burden of demonstrating the propriety of removal, UAP bears the burden of demonstrating that this Court has subject matter jurisdiction over this matter. *Collins v. Ralston Purina Co.*, 147 F.3d 592, 602 n.1 (7th Cir. 1998) (“The party seeking removal has the burden of establishing the jurisdiction of the district court.”); *In re Brand Name Prescription Drugs Antitrust Litigation*, 123 F.3d 599, 607 (7th Cir. 1997), *cert. denied*, 522 U.S. 1153 (1998); *County Collector v. O’Brien*, 96 F.3d 890, 895 (7th Cir. 1996); *Wellness Community-National v. Wellness House*, 70 F.3d 46, 49 (7th Cir. 1995). If the Court has any doubt regarding removal, jurisdiction should be resolved in favor of the state court. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). This is the standard by which the Court will be guided in reviewing the parties’ submissions and in determining whether the Court has jurisdiction over this cause of action.

Analysis

I. Whether the Court has original jurisdiction pursuant to 28 U.S.C. § 1331.

It is fundamental that “[f]ederal courts are not courts of general jurisdiction; they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto.” *Bender v. Williamsport Area School Dist.*, 475 U.S. 534, 541 (1986).

For this reason, district courts must “interpret the removal statute narrowly,” and any doubt regarding jurisdiction should be resolved in favor of remand to state court. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 911 (7th Cir. 1993). As the party seeking to invoke the Court’s jurisdiction, UAP bears the burden of proving the existence of federal subject matter jurisdiction by “competent proof,” *NLFC, Inc. v. Devcom Mid-America, Inc.*, 45 F.3d 231, 237 (7th Cir. 1995), which means “proof to a reasonable probability that jurisdiction exists.” *Target Market Publishing, Inc. v. ADVO, Inc.*, 136 F.3d 1139, 1142 (7th Cir. 1998).

The Supreme Court has admonished that “federal question jurisdiction arises only when the complaint standing alone ‘establishes either that federal law creates the cause of action or that the plaintiff’s right to relief necessarily depends on resolution of a substantial question of federal law.’” *Minor v. Prudential Securities, Inc.*, 94 F.3d 1103, 1105 (7th Cir. 1996) (quoting *Franchise Tax Bd. of State of Cal. v. Construction Laborers Vacation Trust for Southern California*, 463 U.S. 1, 27-28 (1983)). This concept, known as the “well-pleaded complaint rule,” is the basic principle marking the boundaries of federal question jurisdiction. *Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 63 (1987) (citing *Franchise Tax*, 463 U.S. at 9-12). It traces back to early decisions of the United States Supreme Court holding that a cause of action arises under federal law only when the plaintiff’s complaint itself raises issues of federal law. *Louisville & Nashville R.R. Co. v. Mottley*, 211 U.S. 149 (1908); *Gully v. First Nat’l Bank in Meridian*, 299 U.S. 109 (1936).

There is, however, an important exception to the well-pleaded complaint rule: the doctrine of “complete preemption.” The complete preemption doctrine provides that “to the extent that Congress has displaced a plaintiff’s state law claim, that intent informs the well-pleaded

complaint rule, and a plaintiff's attempt to utilize the displaced state law is properly 'recharacterized' as a complaint arising under federal law." *Rice v. Panchal*, 65 F.3d 637, 640 n.2 (7th Cir. 1995). Of course, a statute may have preemptive force even in the absence of complete preemption - but in that case there is only ordinary or "conflict" preemption, and the statute provides a defense to the merits of a claim and not a basis for federal question jurisdiction. *See Adkins v. Illinois Central R.R. Co.*, 326 F.3d 828, 834-35 (7th Cir. 2003).

The Seventh Circuit has only found complete preemption (sometimes referred to in the Seventh Circuit as "field preemption") to exist where "Congress has so completely preempted a particular area that no room remains for any state regulation and the complaint would be 'necessarily federal in character.'" *Bastien v. AT&T Wireless Services, Inc.*, 205 F.3d 983, 986 (7th Cir. 2000) (quoting *Metropolitan Life*, 481 U.S. at 63-64). In other words, the Seventh Circuit finds complete preemption "where there is a 'congressional intent in the enactment of a federal statute not just to provide a federal defense to a state created cause of action but to grant a defendant the ability to remove the adjudication of the cause of action to a federal court by transforming the state cause of action into a federal cause of action.'" *Rogers v. Tyson Foods, Inc.*, 308 F.3d 785, 788 (7th Cir. 2002) (quoting 14B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3722.1 (3d ed. 1998 & Supp. 2002)) (emphasis added).

In the Seventh Circuit, "complete preemption would not be appropriate if a federal remedy did not exist in the alternative." *Rogers*, 308 F.3d at 788. Thus, "'unless the federal law has created a federal remedy - no matter how limited - the federal law, of necessity, will only arise as a defense to a state law action' and will thus not give rise to the federal question jurisdiction

underlying complete preemption.” *Id.* (quoting *Rice*, 65 F.3d at 641).

In 1974, Congress enacted the SDWA, 42 U.S.C. § 300f, *et seq.*, to assure the safety of water supplies for human consumption. The SDWA prohibits states from enacting drinking water laws less stringent than those established by the EPA. 42 U.S.C. § 300g. “[A]lthough the primary responsibility for enforcement remains with the States, the Administrator is empowered to enforce State compliance.” 42 U.S.C. §§ 300g-2, 300g-3. The SDWA requires the EPA to promulgate standards to protect public health, by setting either (1) maximum contaminant levels for pollutants in a public water supply, or (2) a treatment technique to reduce the pollutants to an acceptable level if the maximum contaminant level is not economically or technologically attainable. Maximum contaminant levels are to be established at a level having no known or adverse human health effect, with an adequate margin for safety. 42 U.S.C. § 300g-1(b)(1)(B).

The SDWA does not create a federal private right of action for HSSD’s claims. *See Middlesex County Sewerage Authority v. National Sea Clammers Ass’n.*, 453 U.S. 1, 17-18, 101 S.Ct. 2615, 2625 (1981). On this basis alone, the Seventh Circuit would find that the SDWA does not completely preempt the claims. *Rogers*, 308 F.3d at 788; *see also Batton v. Georgia Gulf*, 261 F.Supp.2d 575 (M.D.La. 2003) (remanding, holding that the SDWA, which sets the acceptable arsenic level for drinking water, did not preempt plaintiffs’ state law claims based not on the Act, but on breach of duties allegedly imposed by Louisiana state law, where the Act did not provide a private right of action, nor prevent plaintiffs from pursuing state law remedies).

The Court has carefully considered *Geier v. American Honda Motor Co., Inc.*, 529 U.S. 861 (2000), cited by UAP for the proposition that the SDWA savings clause does not suggest “...an intent to save state-law tort actions that conflict with federal regulations.” *Geier*, 520 U.S.

at 869. While the clauses from *Geier* quoted by UAP appear to support UAP's position, when read in context, they lend little credence to UAP's assertions. A fair reading of *Geier* provides a sound basis for HSSD's position that the saving clause in the SDWA "...assumes that there are some significant number of common-law liability cases to save." *Id.* at 868.

The National Traffic and Motor Vehicle Safety Act at issue in *Geier* contained an *express* preemption provision¹. *Id.* at 867 (emphasis added). The Court opined that, "...a reading of the express pre-emption provision that excludes common-law tort actions gives actual meaning to the saving clause's literal language, while leaving adequate room for state tort law to operate - for example, where federal law creates only a floor, *i.e.*, a minimum safety standard. *Id.* at 868. As the Court explained, "...the saving provision still makes clear that the express pre-emption provision does not of its own force pre-empt common-law tort actions. And it thereby preserves those actions that seek to establish greater safety than the minimum safety achieved by a federal regulation intended to provide a floor." *Id.* at 870. "We have found no convincing indication that Congress wanted to pre-empt, not only state statutes and regulations, but also common-law tort actions, in such circumstances." *Id.* at 868.

Congress did not expressly preempt state law in enacting the SDWA; yet, based on *Geier*, even an express provision coupled with a saving clause allows room for state tort law to operate. In the instant case, where the SDWA creates a floor, a maximum contaminant level, adequate room remains for state tort law to operate.

¹ "Whenever a Federal motor vehicle safety standard established under this subchapter is in effect, no State or political subdivision of a State shall have any authority either to establish, or to continue in effect, with respect to any motor vehicle or item of motor vehicle equipment[,] any safety standard applicable to the same aspect of performance of such vehicle or item of equipment which is not identical to the Federal standard." 15 U.S.C. § 1392(d) (1988 ed.).

The Court also considered *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), which UAP cites for its assertion “...that Congress occupied the field of public drinking water regulation with its enactment of the SDWA.” *Mattoon*, F.2d at 4. While *Mattoon* has no precedential value for this Court, the Court looked to its reasoning to determine if it was persuasive.

The Court finds that the holding in *Mattoon* is much narrower than is suggested by UAP. The Court, in *Mattoon*, found that the federal SDWA preempts federal common law nuisance actions and bars relief under 42 U.S.C. § 1983. *Id.* at 6. *Mattoon* does not hold that state common law is preempted. *See also U. S. v. Hooker Chemical & Plastics Corp.*, 607 F.Supp. 1052, 1055, fn. 3 (W.D.N.Y. 1985). The Court noted that the primary responsibility for implementation and enforcement of the SDWA standards remained with the States, and the States were allowed to set stricter standards than those of the federal government. *Id.* Moreover, Congress does not require uniformity and consistency in drinking water standards; rather, Congress requires that the states adopt and enforce laws or regulations respecting drinking water that do not exceed the maximum contaminant levels established by the EPA.

UAP’s reliance on 42 U.S.C. 300j-7, for the proposition that the only appropriate forum for this action is the United States Court of Appeals for the District of Columbia circuit is also misplaced. Only actions pertaining to the establishment of primary regulations must be filed in the United States Court of Appeal for the District of Columbia. 42 U.S.C. §300j-7(a)(1). The instant action does not pertain to the establishment of primary regulations, nor does it challenge those regulations. HSSD seeks damages for various state-law tort claims and seeks to hold Defendants liable, whether or not Defendants violated federal regulations, for actions that affected the quality of HSSD’s water supply. *See Pioneer Southern, Inc. v. Dow Agrosiences, L.L.C.*, No.

03-cv-23-MJR, 2-3 (S.D. Ill. August 20, 2003) (Where plaintiff asserts its rights to “relief under state tort law,...EPA’s licensing and regulatory authority has no bearing on those state law rights.”).

UAP asserts that *Pioneer Southern* is distinguishable from the instant matter because the *Pioneer* plaintiff was not challenging an MCL. To the contrary, the Court’s reasoning in *Pioneer* is on point. In *Pioneer*, plaintiffs sought legal and equitable relief under state law asserting that the EPA’s licensing and regulatory authority had no bearing on their state law claims. Here, HSSD has alleged only state law causes of action. In *Pioneer*, this Court agreed that FIFRA does not grant the Court subject matter jurisdiction over complaints that include only state law causes of action. *Pioneer Southern, Inc.*, at 3 (citations omitted).

While FIFRA is a comprehensive regulatory statute, “...the resulting scheme was not ‘so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it.’” *Wisconsin Public Intervenor v. Mortier*, 501 U.S. 597, 111 S.Ct. 2476 (1991) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 67 S.Ct. 1146, 1152 (1947)) (“...the statute leaves ample room for States and localities to supplement federal efforts even absent the express regulatory authorization....”). As FIFRA leaves ample room for state action, the Court concludes that this basis for remand must be rejected.

Accordingly, for the aforesaid reasons, the Court concludes that it does not have original jurisdiction over this matter pursuant to 28 U.S.C. § 1331.

II. Whether the Court has subject matter jurisdiction pursuant to 28 U.S.C. § 1442(a)(1).

Section 1442(a) of 28 U.S.C. provides as follows:

A civil action ... commenced in State court against any of the following may be removed ... to the district court of the United States for the district and division embracing the place wherein it is pending:

(1) The United States or any agency thereof or any officer (or any person acting under that officer) ... sued in an official or individual capacity for any act under color of such office or on account of any right, title or authority claimed under any Act of Congress for the apprehension or punishment of criminals or the collection of the revenue.

While the primary beneficiaries of **Section 1442(a)(1)** are federal officers and agencies, a private party defendant may also invoke **Section 1442(a)(1)** but to do so must: (1) assert a colorable defense based on federal law in the notice of removal; (2) establish that it was acting under the direction of a federal officer when it engaged in the actions on which the plaintiff's claims are based; and (3) demonstrate that a causal nexus exists between its actions and the federal officer's use of his governmental office. *See Jefferson County, Ala. v. Acker*, 527 U.S. 423, 431 (1991). Additionally, a defendant seeking removal must also be a "person" within the meaning of **Section 1442(a)(1)**. Therefore, for UAP to invoke **Section 1442(a)(1)**, it must be a "person" under the section and demonstrate all three elements; if the Court finds that UAP has not proven any one of the elements nor is a person within the meaning of the statute, then removal is improper

HSSD does not dispute that UAP, a corporation, is a "person" within the meaning of **Section 1442(a)(1)**. *See U.S. v. Amedy*, 11 Wheat 392, 412 (1826) ("That corporations are, in law, for civil purposes, deemed persons, is unquestionable."). HSSD argues that removal is improper because (1) UAP did not act at the direction of the federal government in formulating, manufacturing and marketing atrazine-containing products; (2) UAP cannot demonstrate a causal nexus between HSSD's claims and the acts allegedly performed under federal direction; and (3)

UAP cannot raise a colorable federal defense to all of HSSD's claims.

Whether or not a party can remove a claim under the federal officer removal statute often turns on the second and third requirements of **Section 1442(a)(1)**. The Court notes that the "person acting under" element and the causal nexus element usually converge into one issue: whether the actions that form the basis of the state complaint were performed pursuant to comprehensive and detailed federal regulation. *See Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 945-46 (E.D.N.Y.,1992). Hence, UAP must prove the existence of a "federal nexus" between the actions for which they are being sued and the directives of federal officers. *Id.* This provision protects federal officers, federal agencies, and those acting under their direction "against interference in the course of their duties by hostile state court." *Willingham v. Morgan*, 395 U.S. 402, 405 (1969). The provision carries out its purpose "...by allowing those whose federal activity may be inhibited by state court actions to remove to the presumably less biased forum of federal court." *Ryan*, 781 F. Supp. at 939.

Defendants claim that they acted "at the direction of a federal officer" because they complied with federal regulations applicable to the registration, sale and use of atrazine. However, mere participation in a regulated industry is not action at the direction of a federal officer. *See, e. g., Tremblay v. Phillip Morris, Inc.*, 231 F.Supp.2d 411, 418 (D.N.H. 2002) (stating that although defendant participates in a regulated industry, "this is not enough to demonstrate that it acted under the direction of a federal officer when it designed its light cigarettes and elected to market them as low in tar and nicotine."); *Ryan v. Dow Chemical Co.*, 781 F.Supp. 934, 946 (E.D.N.Y.1992) ("If the corporation establishes 'only that the relevant acts occurred under the general auspices of' a federal officer, such as being a participant in a regulated industry, they

are not entitled to § 1442(a)(1) removal.”); *Jamison v. Purdue Pharma Co.*, 251 F.Supp.2d 1315 (S.D.Miss. 2003) (denying remand, holding that physician and pharmaceutical company defendants, while participants in highly regulated industry, were not federal officers or government contractors and were not acting under direction of the government, but rather on their own initiative).

“A majority of courts have held that the federal official must have “direct and detailed control” over the defendant.” *See Ryan*, 781 F. Supp. at 947; *Good v. Armstrong World Industries, Inc.*, 914 F. Supp. 1125, 1128 (E.D. Pa. 1996); *Winters v. Diamond Shamrock Chemical Co.*, 901 F.Supp. 1195, 1200 (E.D. Tex. 1995); *Guillory v. Ree’s Contract Service, Inc.*, 872 F. Supp. 344, 347 (S.D. Miss. 1994); *Pack v. AC and S, Inc.*, 838 F. Supp. 1099, 1103 (D. Md. 1993); *Fung v. Abex Corp.*, 816 F. Supp. 569, 572-73 (N.D. Cal. 1992); *Bahrs v. Hughes Aircraft Co.*, 795 F. Supp. 965, 969 (D.Ariz. 1992). “Direct and detailed control” is not satisfied by “establishing only that the relevant acts occurred under the general auspices of a federal office or officer.” *Ryan*, 781 F. Supp. at 947. Therefore, simple participation in an industry which is regulated by the federal government does not entitle a defendant to remove under 28 U.S.C. § 1442(a)(1). *Id.*; *Bakalis v. Crossland Sav. Bank*, 781 F. Supp. 140, 145 (E.D.N.Y. 1991).

While the manufacture and sale of atrazine and atrazine-containing products is a regulated industry, UAP cannot establish “express direction” in this case. The federal government did not mandate the use of atrazine in herbicides; that choice was made by UAP.

UAP relies on *In re Methyl Tertiary Butyl Ether Products Liability Litigation*, 342 F.Supp.2d 147 (S.D.N.Y. 2004) in support of its argument that federal agent removal should apply to this litigation. Based on *MTBE*, UAP asserts that “...the rule that appears to emerge from case

law is one of 'regulation plus.'" *MTBE* at 154 (quoting *Bakalis*, 781 F.Supp. at 145). UAP states that the EPA negotiated in a Memorandum of Agreement specific regulations governing the labeling, sale, registration, use, prohibition and water monitoring under the SDWA of atrazine.

In *MTBE*, the court held that § 1442(a) removal was proper where defendants had a colorable federal preemption defense to plaintiffs' state tort claims. 342 F.Supp.2d at 158. The court's holding was narrow: it premised removal pursuant to § 1442(a)(1) "...not on defendants' participation in a regulated industry, but rather the fact that defendants took actions at the express direction of the federal government, and those actions are the basis for the complaints." *Id.* Thus, consistent with other case law, mere participation in a regulated industry was found to be an insufficient basis for federal agent removal.

The Court finds its reasoning in *Pioneer Southern* to be dispositive of this issue. In *Pioneer Southern*, where Defendant Dow Agrosciences, L.L.C., argued that it was entitled to federal jurisdiction because it was subject to extensive regulation under FIFRA, this Court found, "The grant of an EPA registration does not constitute direction from the federal government to formulate the product in a certain way or to continue to sell the product for certain uses. Dow's actions with regard to its EPA registrations were determined by Dow." *Pioneer Southern*, 03-23-MJR at 2-3. That the labeling, sale, registration, use, prohibition and water monitoring under the SDWA of atrazine are governed by federal regulations is not beyond the scope of what might be expected when a company participates in an industry which is extensively regulated by the federal government. The government did not expressly direct the formulation, mandate the use of atrazine nor control how atrazine-containing products were to be marketed. Consistent with its opinion in *Pioneer Southern*, the Court finds that UAP is not entitled to subject matter jurisdiction pursuant

to 28 U.S.C. § 1442(a)(1).

III. Whether the Court has original jurisdiction over this case pursuant to 28 U.S.C. § 1332 because Growmark, an Illinois corporation, was fraudulently joined to defeat diversity.

If UAP can show that the joinder of Defendant Growmark was fraudulent, then removal is appropriate. *Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992) (citing *Wilson v. Republic Iron & Steel Co.*, 257 U.S. 92, 97, 42 S.Ct. 35, 37 (1921)). “Fraudulent joinder occurs either when there is no possibility that a plaintiff can state a cause of action against nondiverse defendants in state court, or where there has been outright fraud in plaintiff’s pleading of jurisdictional facts.” *Gottlieb v. Westin Hotel Co.*, 990 F.2d 323, 327 (7th Cir. 1993).

In this case, UAP contends that HSSD can state no cause of action against Growmark, a corporation with its principal place of business in Bloomington, Illinois, which participates in the ownership and operation of cooperatives in the State of Illinois for the purpose of selling agricultural products, including those products containing atrazine for use in Illinois. Defendants bear a heavy burden to establish fraudulent joinder and must show, after resolving all issues of fact and law in favor of HSSD, that HSSD cannot establish a cause of action against Growmark. *See Poulos v. Naas Foods, Inc.*, 959 F.2d 69, 73 (7th Cir. 1992); *see also Crowe v. Coleman*, 113 F.3d 1536, 1538 (11th Cir. 1997) (“When considering a motion for remand [of a case removed on the basis of fraudulent joinder], federal courts are not to weigh the merits of a plaintiff’s claim beyond determining whether it is an arguable one under state law.”).

After resolving all issues of fact and law in HSSD’s favor, the Court finds that there is a reasonable possibility that a state court would rule against Growmark. *See Poulos*, 959 F.2d at 73; *see also Crowe*, 113 F.3d at 1538 (“If there is even a possibility that a state court would

find that the complaint states a cause of action against any one of the resident defendants, the federal court must find that joinder was proper and remand the case to state court.”) (citation omitted). In other words, UAP has failed to satisfy its heavy burden to establish fraudulent joinder and, ultimately, subject matter jurisdiction because Plaintiff HSSD and Defendant Growmark are citizens of the same State, and Defendant Growmark is a citizen of the State in which this action was brought. *See* 28 U.S.C. § 1441.

More specifically, there is a reasonable possibility that a state court would find that HSSD’s complaint states a cause of action, in that it is undisputed that Defendant Growmark marketed, sold and supplied atrazine at the time that HSSD was allegedly injured. Whether HSSD can prevail on its claims is irrelevant to the issue of fraudulent joinder.

As to the issue of standing, UAP’s allegation that HSSD has standing to seek only “injunctive relief or mandamus” misses the mark because HSSD prays for injunctive relief against Growmark. Moreover, pursuant to 28 U.S.C. § 1447(c), “If at any time before final judgment it appears that the district court lacks subject matter jurisdiction, the case shall be remanded.” Therefore, if the Court were to determine that HSSD lacks standing, the Court must remand the case.

HSSD adequately alleges a claim of both private and public nuisance in its Complaint. As to HSSD’s claim of private nuisance, in Illinois, “[i]t has long been established that, in order to be actionable as a private nuisance, an invasion of another’s interest in the use and enjoyment of his land must exist. It must be substantial and it must be either negligent or intentional and unreasonable.” *Woods v. Khan*, 95 Ill.App.3d 1087, 1089, 420 N.E.2d 1028, 1030 (Ill.App. 5th Dist.1981). As to HSSD’s claim of public nuisance, “[w]hen the plaintiff’s theory of liability is public nuisance, the pleading requirements are not exacting because the ‘concept of common law

public nuisance ... elude[s] precise definition.” *Young v. Bryco Arms*, 213 Ill.2d 433, 441, 821 N.E.2d 1078, 1083 (Ill. 2004) (quoting *City of Chicago v. Festival Theatre Corp.*, 91 Ill.2d 295, 306, 438 N.E.2d 159 (1982)). “A sufficient pleading in a cause of action for public nuisance will allege a right common to the general public, the transgression of that right by the defendants, and resulting injury.” *Id.* (citation omitted).

Here, HSSD alleges that Growmark was substantially certain that atrazine would migrate into public drinking water. Complaint, ¶¶ 15-19, 31-35. HSSD alleges that Growmark knew that atrazine did not readily bind to soil, had limited solubility in water and was not easily broken down. Complaint, ¶ 31. Thus, according to HSSD, Growmark knew that these characteristics gave atrazine great potential for run-off into surface water, including community water sources. *Id.* Further, HSSD alleges that, as a result of Growmark’s intentional and/or negligent actions, its atrazine products have invaded the use and enjoyment of HSSD’s property by HSSD as well as by the public because HSSD supplies water to residents of the Holiday Shores community. Complaint, ¶ 41. Thus, HSSD’s Complaint adequately states a cause of action, in that it alleges Growmark’s participation in creating a nuisance consisting of a substantial and unreasonable invasion of HSSD’s interest in the use and enjoyment of its property.

HSSD also adequately alleges claims of trespass and negligence. HSSD alleges specific negligent and intentional acts performed by Growmark. It alleges that Growmark owed a duty to HSSD to prevent invasion of atrazine onto HSSD’s property and to prevent the continuous contamination of HSSD’s property and water supply. Complaint, ¶ 46. According to HSSD, Growmark breached its duty when it failed to conduct meaningful research into the potential health effects of atrazine and failed to abate or clean up contamination by atrazine despite its knowledge

that atrazine would run off and infiltrate surface waters, including public water supplies. *Id.* ¶ 47. HSSD alleges that despite Growmark's knowledge that atrazine products were used by farmers near surface water, including community water sources, and that the resultant run-off would contaminate these water sources, it distributed and sold its atrazine products for agricultural use. *Id.* ¶¶ 31, 32. The resultant invasion and trespass of atrazine caused HSSD to sustain severe and permanent damage to its property and the contamination of its surface waters. *Id.* ¶¶ 32-35.

As the Illinois Supreme Court stated in *Dial v. City of O'Fallon*, 81 Ill.2d 548, 556-57, 411 N.E.2d 217, 222 (Ill. 1980), "...one can be liable under present-day trespass for causing a thing or a third person to enter the land of another either through a negligent act or an intentional act." The court relied on the **Restatement (Second) of Torts, § 158(a)** definition of a trespasser as one who intentionally enters land in the possession of another, or causes a thing or a third person to do so. 81 Ill.2d at 553-54, 411 N.E.2d 217. Based on the above-cited allegations by HSSD and Illinois case law, the Court finds that HSSD has adequately pled a claim for trespass.

Given HSSD's allegations and the Court's determinations, as set forth above, the Court finds that UAP's arguments that HSSD has failed adequately to state a claim under the Illinois Environmental Protection Act and under the Illinois Water Pollutant Discharge Act are meritless as to the issue of fraudulent joinder. The Court cannot state on these facts that HSSD has no possibility of stating a valid cause of action under the IEPA or the IWDPA.

UAP's argument that Section 2-619(a)(3) of the Illinois Practice Act provides an independent basis for dismissing the instant case because there is another suit pending between the parties for the same cause is equally meritless. As the Seventh Circuit Court of Appeals stated in *AXA Corporate Solutions v. Underwriters Reinsurance Corp.*, 347 F.3d 272, (7th Cir. 2003), "In our view, the

problem addressed by § 2-619(a)(3) is closely akin to topics such as *forum non conveniens*, *lis pendens*, and venue statutes. Each of those areas addresses an organizational matter that is governed by the law of the sovereign that established the forum. In the case of a federal court, that sovereign is obviously the United States.” 347 F.3d at 278. In *Basic v. Fitzroy Engineering, Ltd.*, 949 F.Supp. 1333 (N.D.Ill. 1996) (*aff’d by unpublished opinion*, 132 F.3d 36 (7th Cir. 1997)), the Court stated, “Indeed, the Illinois Supreme Court considers it to be procedural in nature: the section exists “to foster orderly procedure by preventing a multiplicity of actions.... [T]he court finds Section 2-619(a)(3) to be a state procedural rule inapplicable to a federal court proceeding,...” 949 F.Supp. at 1336. Given the procedural nature of the problem, the Court must apply federal procedural law, *Erie Railroad Co. v. Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), and must find that the state statute plays no role in the decision whether to remand this matter.

Conclusion

For these reasons, the motion to remand (Doc. 15) is **GRANTED**, and this action is **REMANDED** to the Circuit Court for the Third Judicial Circuit, Madison County, Illinois, pursuant to 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

DATED this 28th day of March, 2005.

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS**

**HOLIDAY SHORES SANITARY
DISTRICT, individually and on behalf of
all others similarly situated,**

Plaintiff,

vs.

**SYNGENTA CROP PROTECTION, INC.;
and GROWMARK, INC.,**

Defendants.

CIVIL NO. 04-688-MJR

MEMORANDUM AND ORDER

REAGAN, District Judge:

Before the Court is Plaintiff's Motion to Remand (Doc. 14), filed October 25, 2004. Plaintiff moves the Court to enter an Order remanding this case and other cases filed by Holiday Shores Sanitary District ("HSSD"), which have the same or a similar fact pattern, in which HSSD has filed motions to remand, and which are pending before the undersigned judge.

The Court has considered this matter in a lengthy and detailed Memorandum and Order entered this day in *Holiday Shores Sanitary District v. United Agri Products, Inc.*, 04-689-MJR. Having reviewed HSSD's Complaint and the parties' submissions in the instant matter, the Court finds that its Memorandum and Order in 04-689-MJR is dispositive of all issues raised herein.

Accordingly, for the reasons fully set forth in its Memorandum and Order in *Holiday Shores Sanitary District v. United Agri Products, Inc.*, 04-689-MJR, entered this day, the motion to remand (Doc. 14 is **GRANTED**, and this action is **REMANDED** to the Circuit

PLAINTIFF'S
EXHIBIT

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Court for the Third Judicial Circuit, Madison County, Illinois, pursuant to 28 U.S.C. § 1447(c).

IT IS SO ORDERED.

DATED this 28th day of March, 2005.

s/Michael J. Reagan
MICHAEL J. REAGAN
United States District Judge

**IN THE CIRCUIT COURT
THIRD JUDICIAL CIRCUIT
MADISON COUNTY, ILLINOIS**

HOLIDAY SHORES SANITARY DISTRICT,
individually and on behalf of all others
similarly situated,

Plaintiff,

v.

SYNGENTA CROP PROTECTION, INC., and
GROWMARK, INC.,

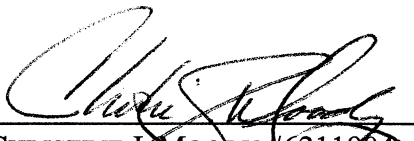
Defendants.

Cause No. 04-L-710

CERTIFICATE OF SERVICE

The undersigned certifies that a true copy of Plaintiff's Memorandum in Opposition to Defendants' Combined Motions to Dismiss Pursuant to 735 ILCS 5/2-619.1 was served upon the attorneys of record for the defendants in this cause by enclosing said copy in an envelope addressed to said attorney at his address as disclosed by the pleadings on file in this cause and by depositing said envelope in a U.S. Post Office mailbox at 5:00 p.m. on this 04 day of July, 2005.

KOREIN TILLERY



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