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

ORDER

This cause, coming before the Court on Defendant Growmark's Motion to Dismiss Based on Prior Pending Action, the Court being fully advised in the premises, hereby orders as follows:

Defendant's Motion is ALLOWED in part; Plaintiff is granted leave to file an Amended Complaint specifying the manufacturer of the atrazine which Growmark is alleged to have distributed.

SO ORDERED.

Date: JUL 07 2008

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.	)	Cause No. 04-L-710
SYNGENTA CROP PROTECTION, INC., and GROWMARK, INC.,	)	
Defendants.	)	

ORDER REGARDING SYNGENTA'S AND GROWMARK'S MOTIONS TO DISMISS PURSUANT TO 735 ILCS 5/2-619.1

This cause comes before the Court on Syngenta's and Growmark's Motions to Dismiss Pursuant to 735 ILCS 5/2-619.1. The parties have argued this motion and the Court, being fully advised in the premises, hereby rules as follows:

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, Defendants' motion to dismiss Plaintiff's Complaint is allowed in part and denied in part.

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. The only matters to be considered in ruling on such a motion are the allegations of the pleadings themselves. Any section 2-615 motion admits not only the facts alleged in a complaint, but also all

reasonable inferences that can be drawn therefrom. The allegations of the complaint are to be Aviewed in a light most favorable to the plaintiff.

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).

Primary Jurisdiction

Defendants contend that this Court should defer this case to the USEPA under the primary jurisdiction doctrine. Under the doctrine of primary jurisdiction, "a matter should be referred to an administrative agency when it has a specialized or technical expertise that would help resolve the controversy, or when there is a need for uniform administrative standards." *Kellerman v. MCI Telecommunications Corp.*, 112 Ill.2d 428, 445, 493 N.E.2d 1045, 1052, 98 Ill.Dec. 24, 31 (1986). "Conversely, when an agency's technical expertise is not likely to be helpful, or there is no need for uniform administrative standards, courts should not relinquish their authority over a matter to the agency." *Id.* "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."*Village of Itasca v Village of Lisle*, 352 Ill. App. 3d 847, 854 (2nd Dist. 2004), appeal denied, 213 Ill. 2d 560 (2005).

This Court finds *Metropolitan Sanitary District of Greater Chicago* particularly instructive. *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. 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." *Id.* at 368.

Metropolitan Sanitary District noted the difference between the goals of an agency such as the USEPA and the courts in a matter such as this. "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 [the court and the USEPA] is attainment of an unpolluted water supply. But, the method and manner of reaching this desired objective is entirely different in the two jurisdictions." *Id.* at 369.

Plaintiff Holiday Shores Sanitary District ("HSSD" or "Holiday Shores") argues that Defendants advanced similar arguments before Hon. Michael J. Reagan after removing this case to Federal Court. While Judge Reagan's order remanding this case to this Court is not binding on this Court, his reasoning is persuasive. Judge Reagan quoted the decision in *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[1], (quoting *Pioneer Southern, Inc. v. Dow Agrosciences*, L.L.C., No. 03-CV-23-MJR, 2-3 (S.D. Ill. August 20, 2003)). Moreover, "[t]he 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, 8 (citing *Pioneer Southern*).

Defendants have not met the uniformity prong of the primary jurisdiction test outlined in *Kellerman*. As Judge Reagan noted, "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." Mem. & Order, 8. The court in *Metropolitan Sanitary District* agreed: "[w]hile uniformity is essential concerning rates charged by a common carrier, no such factor exists in abatement of water pollution." 30 Ill. App. 3d at 371.

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.

Defendants' motion to dismiss on the grounds of primary jurisdiction is denied.

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[1] *Holiday Shores Sanitary District v. United Agri Products, Inc.*, Civ. No. 04-689-MJR (S.D. Ill. March 28, 2005), which was applied to this case in *Holiday Shores Sanitary District v. Syngenta Crop Protection, Inc.*, Civ. No. 04-688-MJR (S.D.Ill. March 28, 2005).

Standing

Holiday Shores has the inherent right to sue and be sued and thus has standing to bring these claims. The powers granted to non-home rule municipal corporations such as Plaintiff are governed by the Illinois Constitution, which states in pertinent part that "special districts and units, designated by law as units of local government, which exercise limited governmental powers or powers in respect to limited governmental subjects shall have only powers granted by law." Illinois Const., Art. VII Sec. 8 (2004).

The cases cited by Defendants acknowledge that this constitutional provision incorporates the doctrine commonly known as "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 (2d Dist.1997).

None of the cases cited by Defendants apply Dillon's Rule to limit the standing of a municipal corporation. The ability of a municipal corporation to sue or be sued has been recognized by United States Supreme Court and the courts of Illinois. *See Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 126-27 (2003) ("Municipal 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." (quoting W. GLOVER, A PRACTICAL TREATISE ON THE LAW OF MUNICIPAL CORPORATIONS 41 (1837)), *City of Oakbrook Terrace v. Hinsdale Sanitary Dist.*, 172 Ill. App. 3d 653, 661 (2d 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 (2d 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.")

Plaintiff was created under the Sanitary District Act of 1936 ("SDA"), 70 ILCS 2805/0.1 *et seq.* The SDA grants to the board of trustees of all sanitary districts the Agovernment, 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. The right to "manage and control all of the affairs and property" implicitly grants Plaintiff the right to file suit against Defendants. *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 allegedly contaminated the public's water supply and damaged the sanitary district's property, under the second prong of Dillon's Rule enumerated in *Commonwealth Edison Co.*, *i.e.*, it is a "power" incident to those expressly granted by this act. *See Commonwealth Edison,* 288 Ill. App. 3d 373, 380 (2d Dist.1997).

Particularly informative is *Metropolitan Sanitary Dist. of Greater Chicago v. U.S. Steel Corp.*, 30 Ill.App.3d 360, 369, 332 N.E.2d 426, 432-33 (1st Dist. 1975). Like in the instant case, the plaintiff was created under a statute that specifically authorized it to bring an action for injunctive or mandamus relief, but was silent on whether the plaintiff could bring suit for damages. There, the

First District noted that the statute "authorizes plaintiff to commence action in the circuit court in the county in which plaintiff is located 'for the purpose of having the pollution stopped and prevented either by mandamus or injunction.' This is in addition to the common law right vested in plaintiff or in any other municipal corporation to institute and prosecute all necessary court action to eliminate pollution of water supplies as a common law nuisance." *Metropolitan Sanitary Dist. of Greater Chicago v. U.S. Steel Corp.*, 30 Ill.App.3d 360, 369, 332 N.E.2d 426, 432-33 (1st Dist. 1975). Plaintiff, as a non-home rule entity, has standing to bring this lawsuit.

Plaintiff has alleged sufficient injury in fact to have standing in this case. The United States Supreme Court has explained that for purposes of standing, an environmental plaintiff claiming damages from water contamination need not show that water quality standards were exceeded. *Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 181 (2000). Rather, a plaintiff must merely allege generally that it has been injured in some way. *Id.* Here, Plaintiff's Complaint does just that: Holiday Shores alleges an invasion of its property rights, interference with the use and enjoyment of its property, and severe and permanent damage to its property and water system caused by the presence of atrazine and atrazine's degradant chemicals.

The fact that the USEPA has set standards for atrazine in water does not mean that Plaintiff cannot recover on its state-law claims. In *Rucker v. Norfolk & Western Railway Co.*, the Illinois Supreme Court addressed the role of federal regulations that specified the safety features of railroad cars in determining the standard of care. 77 Ill. 2d 434 (1979). The Court disagreed with the defendants' argument that compliance with federal regulations gave immunity to manufacturers whose products are in compliance with those regulations, explaining that the presence of federal regulations does not preclude "the imposition of tort liability according to State tort law standards

more stringent than those contained in the Federal regulations." *Id.* at 440. Other courts agree that defendants may be liable under state law even if they did not violate federal regulations. It has been held in other courts that the fact that an MCL existed did not "preclude a suit" for negligence, public nuisance, product liability, deceptive business practices and related claims of alleged contamination of groundwater, but "could serve as a convenient guidepost in determining that a particular level of contamination likely caused injury." ***In re Methl Tertiary Butyl Ether ("MTBE") Products Litigation* 458 F.Supp.2d 149 (S.D.N.Y.,*2006)*** The existence of an MCL for atrazine does not extinguish Holiday Shores' claims under Illinois law against the manufacturers and suppliers of an alleged defective product that is alleged to have caused damage to Holiday Shores. Since all well plead facts in the complaint must be taken as true at this stage of the proceedings, defendants' motion to dismiss for standing is denied.

Causation

Defendants argue that Holiday Shores has not pled that Defendants are the cause of Holiday Shore's damages. Holiday Shores has five other similar causes of actions concerning atrazine pending in this Court against five other manufacturers of atrazine. These six cases are not consolidated. In deciding if Plaintiff has alleged that the Defendants in this case are the cause of Plaintiff's damages, this Court must look at the Complaint filed in this case, not the Complaints filed in the other five cases or all six causes of action in the aggregate.

In the instant case, Holiday Shores alleges that the Defendants named in the Complaint caused the contamination of Plaintiff's water supply and that the Defendants named in the Complaint are liable under each count of the Complaint. Illinois law requires no more of Holiday Shores.

A plaintiff must simply allege facts that, if proved, would entitle the plaintiff to relief. Plaintiff has alleged sufficient facts to state all of the elements of the claims against Defendants alleged in the Complaint. While all of these complaints might be subject to Motions for Summary Judgment in the future, at this stage, defendants' motion to dismiss for lack of causation is denied.

Trespass

Both Plaintiff and Defendants agree that Plaintiff's claim for trespass is an intentional tort. 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.

Plaintiff 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. Plaintiff also specifically alleges Defendants' actions that caused the trespass. Finally, Plaintiff alleges that this trespass has caused injury. This is sufficient to state a cause of action for trespass in Illinois.

Defendants ask the Court to dismiss the trespass claim because Defendants did not control the atrazine at the time that it entered Plaintiff's property. Defendant cites to *Traube v. Freund*, 333 Ill.App.3d 198, 202 (5th Dist. 2002) for this argument. *Traube* is not a trespass case. The plaintiff in *Traube* sought relief on the grounds of **public nuisance** and strict liability. 333 Ill.App.3d at 199. This Court finds *Traube* unpersuasive as to this issue.

After *Traube,* the Illinois Supreme Court issued its decision in *City of Chicago v. Beretta U.S. Corp.*, 213 Ill. 2d 351 (2004). As *Beretta* makes clear, "[c]ontrol is not a separate element of causation in nuisance cases that must be pleaded and proven in addition to cause in fact and legal cause. It is, rather, a relevant factor in both the proximate cause inquiry and in the ability of the court to fashion appropriate injunctive relief." *Beretta,* 213 Ill.2d at 403. "In the present case, the dealer defendants had ownership and control of the firearms at some point in the distribution chain. If a public nuisance later results from the illegal use of firearms by third parties, liability in public nuisance is not necessarily precluded simply because defendants no longer control the object." *Id.* "[W]hen the nuisance results from the use or misuse of an object apart from land, or from conduct unrelated to a *defendant's* use of land, lack of control of the instrumentality at the time of injury is not an absolute bar to liability." *Id.*

"The proper inquiry regarding legal cause involves an assessment of **foreseeability**, in which we ask whether the injury is of a type that a reasonable person would see as a likely result of his conduct." *Beretta,* 213 Ill. 2d at 395. Here, the Complaint is replete with allegations of the foreseeability of Plaintiff's injury from Defendants actions.

Unlike the cases cited by Defendant in support of its motion, Plaintiff has not alleged that its injuries were caused, even in part, by the intervening negligent, intentional, and/or criminal actions

of others. As Plaintiff has alleged that its injuries were the foreseeable result of Defendants' actions, remoteness is not an issue.

In this case Plaintiff has alleged that its injury resulted from the use of an object apart from land (namely atrazine) and is unrelated to Defendants' use of land. This Court finds that the Defendants' lack of control of the atrazine when it entered Plaintiff's land is not a bar to liability. Further, this Court finds that Plaintiff has alleged that the conduct of Defendants foreseeably caused the injury to Plaintiff.

Because Plaintiff adequately states a cause of action for trespass, Defendants' motion to dismiss Count I of the Complaint is denied.

Nuisance

"[A] 'public nuisance is the doing of or the failure to 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). In the instant case, Plaintiff has correctly pleaded both private and public nuisance.

"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 91 Ill. 2d 295, 306 (1982)).

Plaintiff 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, Sec.2. Such basic concerns as safe water to drink are an integral part of a healthful environment. Further, sources of environmental pollution have long been recognized in Illinois as nuisances that affect the public generally. *See Beretta,* 213 Ill. 2d 372. *See also Donaldson v. Central Illinois Public Service Company*, 199 Ill. 2d 63 (2002). Unlike in *Beretta,* 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. There are no "intervening criminal acts" for which the burden of correction would be novel and extreme.

Plaintiff does not have to allege that Defendants failed to comply with the laws and regulations concerning its industry. "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*, 261 Ill. App.3d at 661. In order to successfully state a claim for a pubic nuisance for a highly regulated industry, 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 alleged Defendants' negligence in carrying out their enterprise and the use of the disjunctive "or" indicates that only one of the three must be shown. Plaintiff has alleged that these

negligent acts have infringed upon the public right to clean potable water. Plaintiff has adequately stated a claim for public nuisance.

"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). "The invasion must be: substantial, either intentional or negligent, and unreasonable." *Id.* The one case cited by Defendants for the proposition that a private nuisance must be predicated on intentional acts 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.

Holiday Shores has alleged facts that, if proven, would show that Defendants' intentional and/or negligent actions caused a continuous, substantial and unreasonable invasion of the use and enjoyment of its property - an infringement of Plaintiff's private right. This is sufficient to state a cause of action for a private nuisance.

Whether or not the plaintiff will be able to prove them, the facts alleged by Holiday Shores are sufficient to state a claim for both private and public nuisance under Illinois law. Defendants' motion to dismiss Count II of the Complaint is denied.

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. Under Illinois law, 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.

Defendants allege that Plaintiff failed to allege a duty owed by Defendants. The only legal authority cited by Defendants in support of this proposition is *City of Chicago v. Beretta U.S. Corp.*, 213 Ill. 2d 351 (2004). *Beretta* is markedly different from this case. *Beretta* was concerned with the negative ramifications of holding the *Beretta* defendants liable for "criminal misuse of their products." The public policy decision in *Beretta* was that the gun manufacturers and distributors owe no duty "to prevent their firearms from 'ending up in the hands of persons who use and possess them *illegally*.'"213 Ill. 2d at 393. In contrast, Holiday Shores alleges that Defendants' atrazine products were used in a manner in which they were intended and foreseeably certain to be used. They are sold to farmers for the intended purpose of spreading them on the fields. All of the allegations in plaintiff's complaint state that those products were used in their intended way and there are no allegations that they were used improperly or by any intervening criminal for a criminal pupose.

Beretta is laced with statements distinguishing historically accepted pollution-based nuisance cases from the unprecedented and novel firearm theory created by the *Beretta* plaintiff. In questioning whether there is a public right to be free from the threat of illegal conduct by others, *Beretta* found the case law unhelpful in the context of firearms but noted that historically recognized public nuisances include "sources of pollution." 213 Ill. 2d at 371-72. Later, the *Beretta* Court explained that to accept the firearm nuisance theory, the court would have to act without any established and recognized standard, and that the Restatement warns against this. 213 Ill. 2d at 384 (citing Restatement (Second) of Torts Sec. 821B, Comment e, at 90 (1979)). There are established

factors, the court explained, but they do not apply to firearms; rather, "these factors are intended to apply to intentional conduct affecting the use and enjoyment of land." 213 Ill. 2d at 384. In short, every indication in *Beretta* is that the court in no way intended to immunize defendants from public nuisance liability in the arena of toxic pollution. If anything, *Beretta* approves of imposing such liability.

Moreover, this is not an instance where the Plaintiff is seeking to impose a heretofore unrecognized duty as in *Beretta.* 213 Ill.2d at 392, citing *Bajwa v. Metropolitan Line Insurance Co.*, 208 Ill.2d 414 (2004). One of the duties owed to Plaintiff that the Defendants are alleged to have 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 alleged specific facts that show that Plaintiff's injury was caused by the reasonably probable and foreseeable consequence of Defendants' actions.

Further, 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. This is markedly different from the instant case, where Holiday Shores has alleged that Defendants owed a duty to Plaintiff itself.

Plaintiff has adequately stated a cause of action for negligence. Defendants' motion to dismiss Count III is denied.

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: (l) 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' atrazine products were unreasonably dangerous for its intended and foreseeable uses.

Plaintiff alleged 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 by Defendants. 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.

Plaintiff has adequately stated a cause of action for products liability. Defendants' motion to dismiss Count IV is denied.

IEPA

Although Defendants note that the Illinois Environmental Protection Act (IEPA) does not expressly provide for a private right of action, this is only the beginning of the relevant inquiry. "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).

The IEPA'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).

By the terms of the IEPA, Plaintiff, as a water provider, is a member of the class for whose benefit Section 12 of the IEPA was enacted, as the IEPA 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 Y of any unit of local government Y to enforce provisions, set forth in this Act or other State law or regulation.

415 ILCS 5/11(c).[2] Thus, the legislature specifically singled out Plaintiff sanitary district as a party authorized to enforce the Act.

Moreover, Plaintiff's alleged injury (contamination of its property and pollution of its waters) is 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.

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[2] "Local government unit means a ... sanitary district[.]@ 415 ILCS 5/19.2.

15 ILCS 5/2(a),(b). 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. *See also King v. Senior Servs. Assocs., Inc.*, 341 Ill. App. 3d 264, 270 (2d Dist. 2003); *Fiumetto v. Garrett Enters., Inc.*, 321 Ill. App. 3d 946, 951-52 (2d Dist. 2001).

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). 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: "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 similar to *Corgan*. It would appear that the only way to make the injured Plaintiff here whole is to imply a private right of action under the statute as the IEPA is apparently not convinced

that the allegations of plaintiff's complaint are valid or that the levels complained of require any action on its part. 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 alleged responsible parties shoulder the burden is to provide for an implied private right of action under the IEPA.

The only state case in which the courts addressed a private right of action under the IEPA is markedly different from this case. 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 that "the 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. *NPD Bank* does not hold that a private right of action under the IEPA does not exist in the case *this case.*

Although not binding upon this Court, some federal 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).

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).

Under the facts alleged in this case, this Court finds that an implied private right of action under the IEPA exists.

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:

> 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). This action was not brought under Section 45 for injunctive relief. Plaintiff seeks damages based upon Defendants' violation of the IEPA. Thus, Section 45(b) is inapplicable. *See Krempel*, 1995 WL 733439, at *3 ("Section 45(b) of the statute explicitly limits itself to injunctive relief.").

Further, this Court finds that the IEPA does not vest exclusive jurisdiction of this controversy in the Board. 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. 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.

For the foregoing reasons, this Court finds that there is an implied right of action under the IEPA in this case. Further, this Court finds that Plaintiff did not have to first bring this case before the Illinois Pollution Control Board in order to exhaust its administrative remedies. Finally, this Court finds that Plaintiff has pled sufficient facts to state a cause of action under the IEPA. Defendants' motion to dismiss Count V of the Complaint is denied.

Illinois Water Pollution Discharge Act

Growmark's motion to dismiss Count VI of the Complaint is allowed.

Punitive Damages

Plaintiff's Prayers for Relief asking for punitive damages are premature. 735 ILCS 5/2-604.1. The Court hereby strikes, without prejudice, the portions of Plaintiff=s Complaint seeking punitive damages. Upon the completion of discovery, the Plaintiff may petition the Court to amend the Complaint to include a prayer for relief seeking punitive damages.

United States Constitution

Defendants argue that Plaintiff's claims violate the Commerce and Due Process Clauses of the United States Constitution. Defendants' interstate commerce clause analysis is founded on the

allegation that Holiday Shores is effectively banning the sale of atrazine, thus rendering the Complaint a *de facto* regulation.

However, nowhere in the Complaint are any representations that Holiday Shores is attempting to regulate atrazine. Instead, this Complaint represents a tort action seeking redress for injury.

Nor is there supporting evidence in the Complaint for Defendants' assertion that Holiday Shores is attempting to impose sanctions with the intent of changing the tortfeasors' lawful conduct in other States in violation of the pronouncements from the United States Supreme Court. *See BMW of North America, Inc. v. Gore,* 517 U.S. 559, 572 n.17 (1996). In a fair reading of the Complaint, HSSD's intent here is to protect its District, and represent a class protecting certain other Districts within Illinois, from drinking water that it alleges causes a multitude of health problems, regardless of whether other States choose to do so.

Second, there is a two-tiered approach to analyzing state economic regulation under the commerce clause. *See Healy v. Beer Institute, Inc.,* 491 U.S. 324, 337 n.14.(1989) 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 does not seek economic protectionism favoring Illinois economic interests over out-of-state interests.

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. This is especially difficult in cases like this one, in which the citizenry's safety is at issue. "Those who seek to challenge *bona fide* safety regulations must overcome a strong presumption as to their validity." *Kesler,* 186 Ill. 2d at 417. Defendants have not satisfied either tier of this analysis. Defendants have failed to carry the necessary burden of proving an excessive burden on commerce at this stage of the proceedings. Defendants' motion to dismiss based upon violations of the Commerce Clause of the U.S. Constitution is denied. Defendants' due process argument is equally lacking. In support of its argument that being sued abridges its due process rights, Defendants present a quote from *BMW of North America, Inc. v. Gore.*[3] Unfortunately, when reading the text of this case as a whole, it is clear that the holding of *Gore* does not preclude the Plaintiff's cause of action. The *Gore* Court 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. 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

[3] 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 misleading whole. The "[since]" Defendants inserted is deceptive. The text Defendants quote after it 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 *this case.*

insisting that 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 also rely. Defendants motion to dismiss based upon violations of the Due Process Clause of the U.S. Constitution is denied.

PRAYERS FOR RELIEF:

Many of the plaintiff's prayers for relief seek either Declaratory Judgment or an order of this court requiring the defendants to maintain the "charcoal filtration system in the future". Without inferring that this court is finding that the plaintiff is entitled to any relief, those prayers cannot be allowed under any of the circumstances alleged in the complaint. This court finds that the imposition of a Declaratory Judgment would not conclude nor substantially assist in the ultimate conclusion of the litigation. The request to order the defendants to act affirmatively in the future sounds in mandatory injunctive relief. Not only would injunctive relief be required to go before the IEPA Board prior to being filed in the Circuit Court, but the plaintiff has alleged several counts and prayers for relief that indicate an adequate remedy at law. Even future maintenance of the filtration system, if warranted by the proofs at trial, could be effectively provided for by the calculation of present value of future damages.

SO ORDERED:

JUL 07 2008

DATED:_____

Judge