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

CITY OF GREENVILLE, ILLINOIS, *et al.*	)	
	)	
Individually and on behalf of all others similarly situated,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	Case No. 10-188-JPG-PMF
	)	
SYNGENTA CROP PROTECTION, INC., and SYNGENTA AG,	)	
	)	
Defendants.	)	

PLAINTIFFS' OPPOSITION TO SYNGENTA'S MOTION TO DISMISS[1] DECLARATORY RELIEF COUNT

In its motion to dismiss Plaintiffs' count for declaratory relief, Syngenta rehashes the same three arguments it made when it opposed Plaintiffs' motion for leave to add the count. *See* Doc. 219.

1) Syngenta argues that Plaintiffs lack standing to pursue their declaratory count because the count assumes future atrazine contamination that may never occur. But the Seventh Circuit does not require absolute certainty of future injury to establish standing—only a "nonnegligible, nontheoretical, probability" of it. The inherent chemical and environmental properties of atrazine, combined with the consistent track record of *actual* atrazine contamination of Plaintiffs' water supplies, make future contamination sufficiently certain to create standing.

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[1] Plaintiffs filed their Second Amended Complaint on September 14, 2011. Under Fed. R. Civ. P. 15(a)(3), Syngenta's response was due on October 3. Before the due date, Syngenta contacted Plaintiffs' counsel to see whether they would oppose an extension of Syngenta's response due date. Plaintiffs' counsel agreed not to oppose a motion to extend the response due date until October 11. But Syngenta never filed a motion seeking an extension of time from the Court. Instead, Syngenta simply filed its motion to dismiss on November 11, eight days after the official due date.

2) Syngenta argues that even if Plaintiffs have standing, the Court should dismiss the declaratory relief count because it is duplicative of Plaintiffs' four coercive counts. While there will be factual and legal overlap with the four coercive counts, the declaratory count seeks additional, distinct relief that will resolve future legal uncertainty among the parties. Where the declaratory relief sought is different from the coercive relief, courts routinely allow declaratory counts to proceed alongside coercive counts.

3) Syngenta argues that the declaratory relief count infringes on the EPA's primary jurisdiction in establishing atrazine Maximum Contaminant Levels (MCLs) in water dispensed to the public. But Plaintiffs are not seeking to judicially impose stricter water-safety standards on themselves or other water providers. Plaintiffs are merely asking for a declaration of their rights as property owners to completely remove the toxic chemical that Syngenta intentionally introduces into their raw water sources. The EPA has no jurisdiction to regulate the extent to which companies may pollute raw water sources and interfere with property rights.

In sum, Syngenta has failed to provide any legitimate reason to dismiss Plaintiffs' count for declaratory relief. The Court should deny Syngenta's motion.

I. Plaintiffs have standing to pursue their declaratory relief count because future atrazine contamination is almost certain to occur.

Syngenta first argues that the Court has no subject matter jurisdiction over Plaintiffs' declaratory relief count because it does not present an "actual controversy." Doc. 235, pp. 7-9. Claims under the Declaratory Judgment Act are justiciable if they present "an actual, substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *NUCOR Corp. v. Aceros Y Maquilas de Occidente, S.A. de C.V.*, 28 F.3d 572, 577-78 (7th Cir. 1994) (citations and internal quotations omitted). Declaratory relief claims are ripe unless "the parties point only to hypothetical, speculative, or illusory disputes as opposed to actual, concrete

conflicts." *Wisconsin Cent., Ltd. v. Shannon*, 539 F.3d 751, 759 (7th Cir. 2008) (citations and internal quotations omitted).

Plaintiffs' declaratory relief count relies on the same concrete injury-in-fact as their four other counts, which the Court has already held present an "actual controversy." Plaintiffs allege—and the Court must take as true—that atrazine's inherent chemical characteristics ensure that "[e]very time that farmers apply Syngenta's atrazine to their crops, atrazine inevitably runs off into the surface water that Plaintiffs appropriate, treat, and distribute for human consumption." Doc. 229, ¶ 82. As a consequence, "Syngenta's atrazine has contaminated Plaintiffs' sources of raw water for many consecutive years." *Id.* Given atrazine's immutable chemical characteristics and the consistent track record of *actual* atrazine contamination, "the contamination of Plaintiffs' water supplies is substantially certain to continue for as long as Syngenta continues to sell its atrazine-containing products." *Id.*

According to Syngenta, Plaintiffs' allegations of injury are too speculative to create an "actual controversy" because they rest on future events that may never occur. But Article III's "case" or "controversy" requirement does not mandate certainty of future injury. "A suit … is a 'case' or 'controversy' … as long as there is some nonnegligible, nontheoretical, probability of harm … ." *MainStreet Org. of Realtors v. Calumet City, Ill.*, 505 F.3d 742, 744 (7th Cir. 2007). "[E]ven a small probability of injury is sufficient to create a case or controversy [and] to take the

suit out of the category of the hypothetical … ." *Village of Elk Grove Village v. Evans,* 997 F.2d 328, 329 (7th Cir. 1993).

Just earlier this year, the Seventh Circuit reversed a district court after it accepted an argument similar to Syngenta's in a case with a much lower probability of future injury. *See Am. Bottom Conservancy v. U.S. Army Corps of Engineers*, 650 F.3d 652, 658-59 (7th Cir. 2011). In *Am. Bottom,* a local conservancy group sued the Corps of Engineers to revoke a permit that would have paved the way for a new landfill to replace roughly 18 acres of wetlands. *Id.* at 656-57. The group's alleged injury-in-fact was premised on the probability that the landfill would reduce the number of birds and butterflies the group's members would see. *Id.* The district court dismissed the suit for lack of standing, finding that the loss of wildlife was "merely speculative," particularly since only a portion of the wetlands would be impacted by the landfill, and the landfill's proponent committed to create new wetlands that would cover twice the acreage of the impacted wetlands. *Id.* at 659.

The Seventh Circuit reversed, finding that the probability of losing wildlife from the impacted wetlands was sufficient to establish injury-in-fact and create an "actual controversy." *Id.* at 659-661. The Seventh Circuit cautioned the district court not to confuse the merits of the requested relief with the issue of whether the conservancy group had alleged a "probable injury" for purposes of Article III standing. *Id.* at 659. "As we have noted repeatedly, the fact that a loss or other harm on which a suit is based is probabilistic rather than certain does not defeat standing." *Id.* at 658 (citations and internal quotations omitted).

The Plaintiffs have alleged not only a "nonnegligible, nontheoretical, probability" of future injury, but they have also alleged repeated, consistent, and ongoing injury. These allegations are not empty, and the Court should hear evidence before ruling on Plaintiffs' declaratory relief count. The persistent pattern of contamination alleged here makes future contamination far more probable than what the Seventh Circuit considers sufficient to create an "actual controversy." The same past, current, and future injury Plaintiffs allege (and are prepared to prove) in their coercive counts create standing to seek prospective declaratory relief as well.

The cases Syngenta cites to support its standing argument are not remotely similar to this case. In *Golden v. Zwickler,* for example, the Supreme Court found no standing for a citizen's proposed declaration that he could distribute anonymous literature criticizing a specific Congressman during a re-election campaign, because the Congressman had since accepted a 14-year term as a New York Supreme Court Justice, and it was "most unlikely" that he would run for Congress again. 394 U.S. 103, 106, 108-09 n.4 (1969). And in *Sencon Sys., Inc. v. W.R. Bonsal Co.,* a district court rejected an insurance company's proposed declaration of "no duty to indemnify" in *unfiled* lawsuits based on the well-settled principle that actions for indemnity accrue only after the indemnitee has either been found liable or has settled the underlying action. *See* 1998 WL 33842, *10 (N.D. Ill. Apr. 6, 1988). *See also Forty-Eight Insulations, Inc. v. Johns-Manville Prods. Corp.,* 472 F. Supp. 385 (N.D. Ill. 1979).

Golden would be relevant if Syngenta had already stopped selling atrazine. And *Sencon* would be relevant if Syngenta's atrazine did not have a long history of contaminating Plaintiffs' water supplies. But neither of these hypothetical scenarios is true. Every Plaintiff has had and continues to have Syngenta's atrazine in its raw water. Unless Syngenta stops selling atrazine (it has no intention to), atrazine's environmental fate and transport characteristics guarantee that Plaintiffs will have Syngenta's atrazine in their raw water again in the future. Because a history of persistent and recurring property contamination establishes a substantial likelihood of future harm, Plaintiffs have standing to pursue their declaratory relief count.

II. Plaintiffs' declaratory relief count is not duplicative of their coercive counts because it seeks additional, more specific relief than the coercive counts.

Syngenta next argues that the Court should dismiss Plaintiffs' declaratory relief count because it is allegedly "duplicative" of Plaintiffs' existing coercive claims and is therefore "unnecessary." Doc. 235, pp. 4-6. But the declaratory relief count is not duplicative. In the four counts that survived Syngenta's original motion to dismiss, Plaintiffs seek damages for past and current atrazine contamination. As Syngenta repeatedly argued in its original motion, because atrazine contamination creates a temporary rather than a permanent nuisance, Plaintiffs cannot recover treatment costs for future atrazine contamination through their coercive claims, no matter how likely that contamination is to occur. Doc. 23, pp. 14-17. According to Syngenta's reading of the law, the Plaintiffs must wait, suffer additional

contamination, accrue additional treatment costs, and then periodically sue Syngenta to recover those costs. *Id.*

While the resolution of their existing coercive claims may reveal to Plaintiffs which of their past treatment costs might also be recoverable in the future, past and future treatment costs will not necessarily be the same. To date, Plaintiffs have not systematically *completely removed* atrazine from their water supplies. But as Plaintiffs explain in their complaint, recent scientific literature indicates that the presence of atrazine in drinking water *at any level* presents a real and unnecessary risk to the health of their customers. Doc. 229, ¶ 84. As a consequence, Plaintiffs want to know that they can exercise their legal rights as property owners to *completely remove* the atrazine that Syngenta intentionally introduces into their water supplies. *Id.* "Given the expense of complete removal and the fiscal constraints that Plaintiffs face, Plaintiffs cannot responsibly incur substantial additional treatment costs without knowing whether Syngenta will be required to compensate them for those costs." *Id.* at ¶ 85.

Plaintiffs added the declaratory relief count precisely in order to resolve the legal and fiscal uncertainty surrounding complete removal of future atrazine contamination. And according to the Seventh Circuit, resolving uncertainty about future damages is the "clear" purpose behind the Declaratory Judgment Act:

> Congress enacted [the Act] to avoid the accrual of avoidable damages to one not certain of his rights and to afford an individual an early adjudication, without waiting until … after damage ha[s] accrued.

Basic v. Fitzroy Eng'g, Ltd., 132 F.3d 36, *3 (7th Cir. 1997) (unpublished) (citing *NUCOR,* 28 F.3d at 577) (internal quotations omitted). *See also Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.*, 819 F.2d 746, 749 (7th Cir. 1987) (the purpose of declaratory relief is "to clarify and settle the legal relations at issue and to terminate and afford relief from the uncertainty, insecurity, and controversy giving rise to the proceeding"); *Sears, Roebuck & Co. v. Zurich Ins. Co.*, 422 F.2d 587, 588 (7th Cir. 1970) ("We do not believe that, considering the purposes of the Federal Declaratory Judgment Act, the plaintiff should be forced into a waiting period of legal uncertainty.").

In short, while Plaintiffs' declaratory relief count is premised on the same facts and the same violations of law as their four coercive counts, it asks for different relief. As this Court has recognized, the fact that a declaratory relief count "will address many of the same facts and legal issues" raised by contemporaneous coercive claims does not make the declaratory count "identical," "redundant," or "moot." *BPI Energy Holdings, Inc. v. IEC (Montgomery), LLC*, 2010 WL 145792, *3 (S.D. Ill. Jan. 12, 2010). "[T]he safer course for the court to follow is to deny a request to dismiss a [claim] for declaratory relief unless there is *no doubt* that it will be rendered moot by the adjudication of the main action." *Id.* (citations omitted) (emphasis added). *See also OgoSport LLC v. Maranda Enterprises, LLC*, 2011 WL 4404070 (E.D. Wis. Sept. 20, 2011) (refusing to dismiss a declaratory count that asked for distinctive relief, despite acknowledging many similarities to pending coercive counts).

The additional, more specific relief sought by Plaintiffs' declaratory count with respect to future atrazine contamination distinguishes this case from the only remotely relevant case Syngenta cites in support of its "duplicative and unnecessary" argument. *See Dixie Gas & Food, Inc. v. Shell Oil Co.,* 2005 WL 1273273 (N.D. Ill. May 25, 2005). In *Dixie Gas,* plaintiffs filed an eight-count complaint against defendants, and added a ninth count that sought "declarations that [defendants] violated the statutes and common law rights under which plaintiffs … claim damages and other relief in counts 1-8." *Id.* at *7. The district court dismissed plaintiffs' declaratory count as "redundant" because counts 1-8 already encompassed all of the issues in the declaratory count, and the declaratory count did not seek any unique relief beyond a declaration of liability under counts 1-8. *Id.* In other words, the declaratory count in *Dixie Gas* was "unnecessary" because it could not possibly provide the plaintiff with any additional relief.

The other cases Syngenta cites to support its argument are irrelevant to this case because they involved a *separate lawsuit* for declaratory relief, not just a separate count within the same lawsuit. In Syngenta's cases, courts chose to dismiss the separate declaratory lawsuits in favor of broader coercive lawsuits, citing reasons such as forum shopping, risk of inconsistent judgments, and waste of judicial resources. *See, e.g. Tempco Elec. Heater Corp. v. Omega Eng'g, Inc.,* 819 F.2d 746 (7th Cir. 1987); *Amari v. Radio Spirits, Inc.*, 219 F. Supp. 2d 942 (N.D. Ill. 2002); *Wireless Mktg. Corp. v. Cherokee Inc.*, 1998 WL 719944 (N.D. Ill. Oct. 6, 1998); *Res. Asset Mgmt., Inc. v. Cont'l Stock Transfer & Trust Co.*, 896 F. Supp. 782

(N.D. Ill. 1995). Simply put, none of those considerations is relevant to Plaintiffs' declaratory relief count.

In a last ditch effort to find support for its argument, Syngenta invokes the *Holiday Shores* court's dismissal of supposedly similar declaratory relief claims. Doc. 235, p. 6. Putting aside the different content of those requests for declaratory relief—which the court actually characterized as seeking mandatory injunctive relief—the *Holiday Shores* dismissal is irrelevant because the Illinois and federal declaratory relief standards conflict. The Illinois Declaratory Judgment Act provides that "a court *shall refuse* to enter a declaratory judgment or order, if it appears that the judgment or order, would not terminate the controversy or some part thereof, giving rise to the proceeding." 735 ILCS § 5/2-701(a) (emphasis added). Indeed, the Holiday Shores court dismissed the requests for declaratory relief because it found that plaintiffs had "an adequate remedy at law" for future damages. Doc. 219-4, p. 25.

The federal declaratory relief statute, by contrast, allows courts to "declare the rights … of any interested party … , *whether or not further relief is or could be sought*." 28 U.S.C. § 2201 (emphasis added). Fed. R. Civ. P. 57 also makes clear that "[t]he existence of another adequate remedy does not preclude a declaratory judgment." Given the direct conflict between the Illinois and federal declaratory relief standards, the *Holiday Shores* dismissal provides no support to Syngenta's "duplicative and unnecessary" argument.

III. Plaintiffs' declaratory relief count based on common law property rights does not fall within the EPA's primary jurisdiction.

Syngenta's final argument for dismissal is that Plaintiffs' requested declaratory relief falls within the EPA's primary jurisdiction under the Safe Drinking Water Act (SDWA). Interestingly, Syngenta does not explain the primary jurisdiction doctrine or cite to a single case that even mentions the doctrine. Instead, Syngenta cites one case where claims *against a water provider* were held to be preempted by the SDWA, *Mattoon v. City of Pittsfield*, 980 F.2d 1 (1st Cir. 1992), and one case where the Supreme Court refused to compel regulatory agency action on behalf of a private litigant. *Norton v. S. Utah Wilderness Alliance*, 542 U.S. 55, 124 S. Ct. 2373, 159 L. Ed. 2d 137 (2004). Neither case is relevant here.

The doctrine of primary jurisdiction applies where a claim requires a court to resolve issues that "under a regulatory scheme, have been placed within the special competence of an administrative body." *Ryan v. Chemlawn Corp.*, 935 F.2d 129, 131 (7th Cir. 1991) (citations and internal quotations omitted). The application of the doctrine "depends upon a case by case determination of whether, in view of the purposes of the statute involved and the relevance of administrative expertise to the issue at hand, *the court ought to defer initially to the administrative agency*." *Id.* (citations and internal quotations omitted) (emphasis added).

Under the SDWA, the EPA has authority over the minimum national standards for quality and purity of drinking water that public water providers distribute. In other words, the EPA regulates the relationship between water providers and their customers. By contrast, the EPA has no authority over the

relationship between polluters and water providers. The SDWA does not speak to common law property rights, and the EPA has no special expertise in such matters. By promulgating the MCL, the EPA has not defined the Plaintiffs' property rights or granted Syngenta a license to freely contaminate Plaintiffs' water supplies with up to 3 ppb of atrazine. The EPA has also not preempted lawsuits by water providers against polluters for contamination either above or below the MCL.

Contrary to Syngenta's characterization, Plaintiffs' requested declarations do not challenge the EPA's regulatory decisions or seek to impose a stricter MCL on water providers. Plaintiffs are merely seeking a declaration that as property owners, they have the right (not the obligation) to completely remove atrazine from the water they serve to their customers and to get reimbursed for the associated expense. Plaintiffs are also not seeking a declaration that atrazine is unsafe at any level. Instead, they are seeking a declaration that the health risks associated with atrazine make complete removal of atrazine from their raw water *reasonable* (hence compensable), not mandatory.

In addition to mischaracterizing Plaintiffs' declaratory relief count, Syngenta also ignores Seventh Circuit precedent that tort claims based on common law rights are outside the EPA's primary jurisdiction. *See Ryan*, 935 F.2d 129. In *Ryan*, a plaintiff sued a lawn care service for personal injuries caused by exposure to a pesticide that was regulated by the EPA. *Id.* at 130. The district court dismissed the lawsuit based on the primary jurisdiction doctrine, reasoning that "[plaintiff's] complaint essentially asks this court to substitute its judgment for that of the EPA

and to decide whether the active and inert chemical ingredients in [defendant's] products are safe for commercial use." *Id.* at 131. The district court found that the "[r]esolution of these issues involves a command of arcane technical data, uniquely within the EPA's competence … [so plaintiff's] claims fall squarely within the EPA's primary jurisdiction." *Id.*

But the Seventh Circuit reversed, holding that the primary jurisdiction doctrine did not apply to the plaintiff's common law claims. *Id.* at 132. These "state common law causes of action … are not dependent on any EPA provisions," and "there is no reason for the EPA to be brought in." *Id.* "We fail to see how this claim is any different from the thousands of other personal injury suits filed annually alleging a design defect or an inherently unsafe product that are regularly decided in the courts." *Id.* The courts, not the EPA, are responsible for adjudicating disputes concerning common law rights. As a result, there is no reason for this Court court to "defer" to the EPA the resolution of Plaintiffs' declaratory relief count based on their common law right to be free from property damage caused by the intentional acts of others.

In the *Mattoon* case cited by Syngenta, by contrast, plaintiffs sued a *water provider* in an effort to impose a duty to remove a particular contaminant which was not regulated by the EPA under the SDWA. *See* 980 F.2d at 3-4. Unlike the Plaintiffs here, the *Mattoon* plaintiffs directly challenged the EPA's authority over the relationship between water providers and their customers. *Id.* The court found their claim field-preempted by the SDWA: "Provided the EPA has the statutory

authority to regulate contaminants in the public drinking water supply, it is within the province of the agency, and not the courts, to determine which contaminants will be regulated." *Id.* at 5. Since Plaintiffs are challenging Syngenta's conduct under the common law, over which the EPA claims absolutely no authority, the *Mattoon* case does not support Syngenta's primary jurisdiction argument.

CONCLUSION

None of the three arguments put forward by Syngenta warrants the dismissal of Plaintiffs' declaratory relief count. Plaintiffs have standing to pursue the count because future atrazine contamination is almost certain to occur. The count is not duplicative of Plaintiffs' coercive counts because it seeks additional, more specific relief than the coercive counts. And the count is based on common law property rights and so does not fall within the EPA's primary jurisdiction. The Court should deny Syngenta's motion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 14, 2011, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will electronically deliver notice of the filing to all counsel of record.

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