UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF ILLINOIS

CITY OF GREENVILLE, ILLINOIS, *et al*.,	)	
	)	
Plaintiffs,	)	Case No. 10-cv-188-JPG-PMF
v.	)	
	)	
SYNGENTA CROP PROTECTION, INC., and SYNGENTA AG,	)	
	)	
Defendants.	)	
	)	

ENVIRONMENTAL LAW AND POLICY CENTER'S AND PRAIRIE RIVERS NETWORK'S REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR LEAVE TO INTERVENE

This reply brief is filed in light of the exceptional circumstances present here. First, this Court issued an Order to Show Cause (Dkt. No. 170) after the Environmental Law & Policy Center ("ELPC") and Prairie Rivers Network ("Prairie Rivers") filed their motion to intervene. This reply brief addresses the Defendants' response and the Motion to Intervene in light of the Order to Show Cause, which instructs Defendants to show cause "why the Court should not unseal every document in this case that has been filed under seal." Dkt. No. 170 at 4. Second, Defendant Syngenta's responsive brief engages in repeated accusations against ELPC and Prairie Rivers which, while meritless, call for a short reply and clarification.

I. ELPC AND PRAIRIE RIVERS MEET THE STANDARDS FOR PERMISSIVE INTERVENTION UNDER F.R.C.P. 24(b) IN THIS CASE.

Under F.R.C.P. 24(b)(1)(B), the Court has discretion to permit permissive intervention on timely motion from anyone who "has a claim or defense that shares with the main action a common question of law or fact." "[T]his language is broad enough to encompass a third-party challenge to a protective order." *Bond v. Utreras*, 585 F.3d 1061, 1070 (7th Cir. 2009); *see also In Re Ethylene Propylene Diene Monomer (EPDM) Antitrust Litig.*, 255 F.R.D. 308, 315 (D. Conn. 2009) ("Courts have interpreted these requirements with even greater flexibility when the

third-party seeks to intervene only for the purpose of gaining access to discovery materials.") ELPC and Prairie Rivers satisfy the requirements of F.R.C.P. 24(b)(1)(B) here.

Syngenta cites several cases in its opposition to intervention. None of those cases apply in the circumstances of this case. For example, Syngenta cites *Mausolf v. Babbitt*, 85 F.3d 1295, 1301 (8th Cir. 1996), in arguing that that not everyone with an opinion is invited to intervene in a federal case. The Eighth Circuit made this statement in the context of holding that prospective intervenors must have Article III standing. *Id.* at 1300-01. *Mausolf* does not apply here. The Seventh Circuit has explicitly held that the presumptive right of public access to judicial records "give[s] members of the public standing to attack a protective order that seals [judicial documents] from public inspection." *Bond*, 585 F.3d at 1074. Thus, ELPC and Prairie Rivers clearly have standing to intervene here.

"[T]he court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." F.R.C.P. 24(b)(3). Allowing ELPC and Prairie Rivers to intervene for the limited purpose of asserting the public's right of access to judicial documents in this case will not cause undue delay or prejudice adjudication for either party.

II. ELPC'S AND PRAIRIE RIVERS' INTERVENTION IS ADDITIVE, NOT SUPERFLUOUS.

ELPC and Prairie Rivers are positioned differently here than both the Plaintiffs and Defendants, who are primarily focused on the merits of the underlying case. By contrast, ELPC and Prairie Rivers seek intervention for the limited and sole purpose of advancing the right of public access to judicial documents, as recognized in the Court's Order to Show Cause. Dkt. No. 170 at 2-3. F.R.C.P. 24(b) is the proper procedure for third parties like ELPC and Prairie Rivers to intervene, *Bond*, 585 F.3d at 1068, and permissive intervention is proper where an intervenor's interests are not fully and adequately represented by the other parties, *cf. Riverstone Group, Inc.*

v. Big Island River Conservancy Dist., No. 05-4020, 2005 U.S. Dist. Lexis 30578 at *14-15 (C.D. Ill. Aug. 11, 2005). ELPC and Prairie Rivers should thus be allowed to advance the public's right of access to judicial documents while the parties respond to the Court's Order to Show Cause.[1]

III. INTERVENTION WOULD NOT UNDULY PREJUDICE OTHER PARTIES.

ELPC's and Prairie Rivers' intervention would not "unduly prejudice" Syngenta. Dkt. No. 172 at 4-5. Syngenta's fanciful story of how ELPC and Prairie Rivers somehow joined with the Plaintiffs to attempt to somehow circumvent one of Magistrate Judge Frazier's Orders is absurd. First, it is a matter of public record that ELPC and Prairie Rivers have for years sought to bring public attention to atrazine pollution and other forms of pesticide pollution. *See, e.g.*, "50 years of Atrazine," *Prairie River Notes*, Winter 2009 (attached hereto as Exhibit A) and the Comments of the Sierra Club and the Environmental Law and Policy Center of the Midwest, dated July 19, 2010 (attached hereto as Exhibit B). While the motives of ELPC and Prairie Rivers in seeking the documents is irrelevant, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d

[1] Syngenta's reliance on *Carlock v. Williamson*, Case No. 08-3075, 2011 U.S. Dist. Lexis 7596 (C.D. Ill. Jan. 26, 2011) is misplaced. In *Carlock*, the plaintiff filed a motion for sanctions arising out of an alleged discovery violation and attached several exhibits that the defendants had produced during discovery. Defendants immediately requested that the court strike or seal the exhibits, alleging that they were protected by privilege, should have been reviewed *in camara*, and never should have been filed. *Id.* at *6. A newspaper then moved to intervene to oppose the sealing of the exhibits. *Id*. at *4. The court denied the motion to intervene, explaining that the exhibits should have been reviewed *in camara* and should never have been filed, for which reason allowing intervention would unduly prejudice the defendants. *Id.* at *15. The court also explained that the public's right of access was not harmed because the original parties were motivated to thoroughly litigate whether the exhibits should be sealed. *Id.* Here, in contrast, the original parties have not argued that the documents filed under seal are privileged and should have been reviewed *in camara*, rather than filed in the docket, nor have they voluntarily raised the issue of whether the exhibits should be sealed. Because the circumstances of this case are distinguishable from those in *Carlock*, *Carlock* does not support Defendants' argument that intervention is unnecessary and prejudicial in this case.

110, 123 (2d Cir. 2006), the interests noted above reflect their environmental organizations' missions.

Second, ELPC and Prairie Rivers did of course have reason to believe that discovery documents produced by Syngenta pertained to atrazine because the amended complaint (Dkt. No. 8) and the jurisdictional discovery order issued by Magistrate Judge Frazier (Dkt. No. 65) make clear this case concerns atrazine.

Syngenta's remaining accusations make no sense. For example, ELPC and Prairie Rivers could not have known that Magistrate Judge Frazier would deny the Plaintiffs' Motion to Re-Designate Documents Under the Protective Order on the same day they moved to intervene because the Court's Order (Dkt. No. 163) was entered into the docket after ELPC's and Prairie Rivers' Motion to Intervene (Dkt. No. 159).

Moreover, contrary to Syngenta's suggestion that ELPC's and Prairie Rivers' designation of particular documents indicates that they somehow improperly learned of the content of the documents (Dkt. No. 172 at 5), ELPC and Prairie Rivers actually requested that all documents in the record be unsealed. Dkt. No. 160 at 5. To the extent that ELPC and Prairie Rivers focused on certain sealed documents in the record in their motion, they did so only because those documents were the only exhibits that were entered into the record under seal. Lest there be any confusion, ELPC and Prairie Rivers request that all sealed documents in the record be unsealed unless Defendants compellingly establish good cause under law to maintain them under seal.

Finally, ELPC and Prairie Rivers have not seen the documents under seal. If granted leave to intervene, ELPC and Prairie Rivers will continue to seek to secure proper application of the law regarding public access to judicial proceedings.

CONCLUSION

The Court's Order to Show Cause may result in ELPC and Prairie Rivers doing little more in this case than reviewing the documents that become unsealed and continuing to review the proceedings to obtain information regarding the uses and effects of atrazine on the environment. However, ELPC's and Prairie Rivers' Motion to Intervene should be granted under F.R.C.P 24(b) for the purpose of achieving and realizing public access to judicial records before this Court. Syngenta has advanced no good reason for the Court to deny intervention for this limited and focused purpose.

Dated: April 28, 2011

Respectfully submitted,

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Attorneys for Environmental Law and Policy Center and Prairie Rivers Network

CERTIFICATE OF SERVICE

I hereby certify that on April 28, 2011, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will automatically send a notice of electronic filing to all persons registered for ECF as of that date.

/s/ Howard A. Learner

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Exhibit A

Prairie River Notes

A publication of Prairie Rivers Network

Volume 11, Issue 4 The Illinois Affiliate of the National Wildlife Federation Winter 2009

US EPA Pledges Improved Enforcement of Clean Water Laws

Sees Central Role for Groups Like Prairie Rivers Network

by Kim Knowles, Water Resources Specialist

The times they are a-changin'. At least in word, we've come a long way from the days when W's EPA refused to recognize carbon dioxide as a pollutant and issued rules that made it easier to mine coal by blasting off mountain tops and filling streams and valleys with the refuse. In a breath of fresh air, US EPA Administrator Lisa Jackson publicly admitted last summer that the EPA is not doing enough to deliver clean and safe water to our communities. Administrator Jackson directed her staff to boost enforcement actions against serious violators and to provide more information on the EPA web site in a form that is easily understood and useable.

Lisa Jackson

With kudos to environmental groups like Prairie Rivers Network, she declared, "We have seen that when information is made public, it can be a powerful tool to help improve the environment directly. An informed public is our best ally in pressing for better compliance."

Is this a new world, or just lofty language? Has US EPA delivered? Well, so far so good. At Prairie Rivers we've already noticed an improvement in the information made available by US EPA on facilities that pollute our waterways and on the compliance records of those facilities. It is now easier to find the physical location where pollution enters our streams and lakes as well as information on the health of our waterways and, in some cases, on-line copies of the permits that govern pollutant discharges. We've been asking the Illinois EPA for better access to such information for years.

It seems US EPA aims to deliver on its enforcement promise as well. According to our partners in Tennessee, EPA recently brought enforcement actions against two Clean Water Act violators demanding penalties of $68,000 and $335,000 respectively!

This naturally begs the question, what about Illinois? Although Illinois' enforcement program received a favorable review from US EPA in 2007 compared to other states, according to Ms. Jackson, US EPA "needs to raise the bar for clean water enforcement programs" because "we have a long way to go" to clean and safe water. With 56% of the miles of streams studied in Illinois still not meeting public health and environmental goals set nearly four decades ago, we think there's room for improvement in the enforcement program.

Illinois facilities are doing well in self-reporting (89% submitted the required monitoring reports in 2008) and the IEPA is resolving some of the problems informally, but the state appears loath to impose penalties. In 2008, Illinois levied $0.00 against CWA violators though 82% were in some form of non-compliance. In contrast, Louisiana imposed penalties of $401,000.

Prairie Rivers Network has been steadily increasing the pressure on IEPA to hold violators accountable and requesting that penalties be imposed to send a clear message that the law must be observed! We are expanding our own enforcement work and will pursue legal action against repeat offenders.

While admittedly there's still "a long way to go" to clean and safe water, let's take a moment or two to recognize and celebrate the progress at US EPA. Salud, Lisa Jackson.

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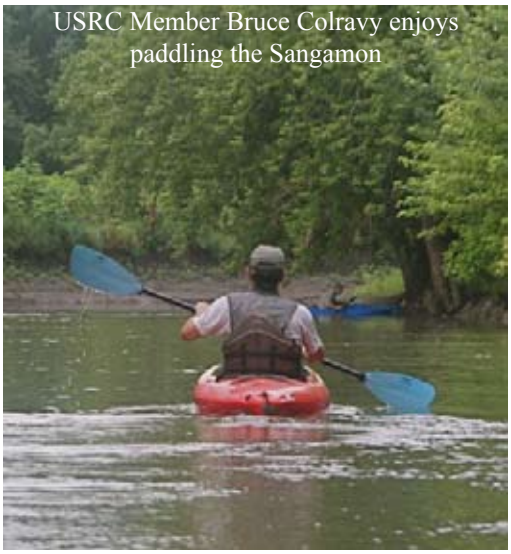
Welcome Upper Sangamon River Conservancy

by Scott Hays, President of USRC

A new group has formed to preserve, maintain, monitor, and promote appropriate public use and awareness of the Sangamon River in Champaign County. The volunteers of the Upper Sangamon River Conservancy (USRC) care deeply about the Sangamon River. The organization engages in activities such as river clean-ups and monitoring and provides a local resource for anyone interested in finding out more about the Sangamon River.

The USRC's mission includes education, recreation, and stewardship. The educational mission involves informing the public that the upper Sangamon River is a true resource; a healthy, mostly pristine river that deserves attention and protection. With much of the land along the riparian corridor in thick deciduous vegetation, the river in this area flows under a rich and diverse canopy of Sycamore, White Oak, Silver Maple, Honey Locust, and several other species. As part of Illinois Riverwatch, first year invertebrate monitoring by USRC members indicated that the water in the river is in "very good" health. In addition, this area of the river has been identified as an area of "ecological significance" by the Illinois Department of Natural Resources. Anyone who spends an afternoon on this part of the Sangamon will easily see why.



USRC Member Bruce Colravy enjoys paddling the Sangamon

Part of the recreational mission is to promote the Sangamon River to local residents seeking a unique natural experience. Conveniently, a number of public lands along the river in Champaign County provide public access. These include the Sangamon River Forest Preserve near Fisher, Lake of the Woods Forest Preserve, Barber Park (a municipal park in Mahomet), the "Open Space Lands" just south of Mahomet at the SR47 bridge, and Riverbend Forest Preserve. While these access points make it relatively easy to put together shorter or longer Sangamon River trips, nearly all are in need of various types of improvements to make the river more easily and more safely accessible. The USRC will work with public officials to facilitate such improvements.

The stewardship mission involves preserving and maintaining the health of this vital resource and includes keeping the river free of garbage and trash. While USRC members strive to leave the river cleaner than we found it with every outing, we also schedule specific trips with garbage pick-up as the goal. River monitoring and improving river access points are also major components of the stewardship mission. Finally, as part of the stewardship mission, the USRC has developed ten Sangamon River "Best Practices" for people who visit the Sangamon River.

The USRC, still relatively new, has plenty of volunteer opportunities for new members. These opportunities include helping with clean-ups, river monitoring, staffing information booths, helping with the web site, and many more. Members can even act as volunteer photographers and submit river photography to the website. Mostly, however, the USRC simply hopes to make more local residents aware of the local treasure that is the Sangamon River in Champaign County.

For more information, or if you want to get involved, visit www.sangamonriver.org.

prairierivers network

... strives to protect the rivers and streams of Illinois and to promote the lasting health and beauty of watershed communities.

By providing information, sound science, and hands-on assistance, PRN helps individuals and community groups become effective river conservation leaders.

50 Years of Atrazine

by Sarah Scott, Support Staff

Atrazine, one of the family of triazine herbicides, has been widely used to control broadleaf and grassy weeds in agriculture and lawns. First approved for use in 1959, it is widely used in corn growing; over 75% of corn crops nationwide are treated with atrazine every year. Swiss-based Syngenta, one of the manufacturers of atrazine, touts that it is an economical form of weed control that prevents crop damage, and that it also has positive environmental effects because farmers can spray atrazine instead of tilling the soil to reduce weeds, thus preventing soil erosion and reducing carbon dioxide gas from tractors.

However, the use of atrazine is not without controversy. In 2005, atrazine was banned in the European Union; this was part of a larger ban on chemicals that have a high tendency to leach into water. Atrazine does not degrade quickly in the environment - it persists for months in soil and can last for a year or more in water. As it degrades, it forms other toxic chemicals.

There are concerns that atrazine contamination of drinking water may be linked to low birth weights, menstrual problems and cancers in people. High doses of herbicides including atrazine are linked to frog deformities and intersex frogs, specifically male frogs that develop female organs. Atrazine is a restricted-use pesticide in the U.S. (only certified people can apply it), and it is not labeled for use within fifty feet of a well or sinkhole, and within sixty-six feet of any point where any field surface water runs off into streams or rivers. Interestingly, there are no restrictions on other points along streams, and drainage ditches are sometimes excluded from these regulations.

The Environmental Protection Agency (EPA) has set a limit of 3 ppb (parts per billion) for atrazine in drinking water, but does not require timely notification of residents when this limit is exceeded. The EPA has limited monitoring resources; of thirty monitoring sites around the state, most are sampled only once every five years, consisting of one sample taken before atrazine application and two afterwards. The problem is that this monitoring may not occur when atrazine levels are likely to be highest, such as after a heavy rain that increases levels in streams through run-off.

Since drinking water systems may only test for atrazine levels yearly, the EPA requires that the manufacturers of atrazine test more frequently. However, a recent study shows that utilities are not getting the information they need from these companies. Recently it was revealed that atrazine levels in Piqua, OH were measured by Syngenta at 59 ppb in April 2005, yet local authorities were not notified. The EPA commented that this level of exposure was safe and that Syngenta was not required to release this information.

There are also concerns about long-term, low level exposure to the chemical, especially for pregnant women. Atrazine levels may be mostly "safe" but at certain developmentally-important times during pregnancy, fetuses may be at higher risk for birth defects. In a recent study by Purdue University, levels at 0.1 ppb were linked to low birth weights.

Recently, Holiday Shores Sanitary District in Madison County, IL and forty-two other water districts, sued atrazine-makers Syngenta and Growmark to cover the costs of removing atrazine from drinking water. Water utilities commonly face the problem of atrazine removal—most water utilities do not have adequate filtering systems. EPA recommends a charcoal filter; most utilities are using sand filters as charcoal upgrades are cost-prohibitive. The lawsuit contains six counts: 1) trespass onto the property of the water district; 2) nuisance to the property of the water district; 3) negligence; 4) strict liability; 5) violation of the Illinois Environmental Protection Act; and 6) violation of the Illinois Water Pollutant Discharge Act. The lawsuit will not affect whether atrazine continues to be manufactured and used—that decree would have to come from Congress. Prairie Rivers Network is watching this lawsuit with interest; given the burden atrazine causes for water treatment systems, we expect future regulations will further restrict the use of this harmful pesticide.

To learn more about atrazine, you can read a recent New York Times article:

www.nytimes.com/2009/08/23/us/23water.html?pagewanted=1

To see the specific details of the lawsuit, go here:

http://documents.nytimes.com/atrazine-lawsuit#p=1

Exhibit B

July 19, 2010

Water Docket, U.S.
Environmental Protection Agency
Mail Code: 2822T, 1200 Pennsylvania Avenue, NW.
Washington, DC 20460

Re.: Docket ID No. EPA-HQ-OW-2010-0257

Dear Sir or Madam:

This letter constitutes the comments of the Sierra Club and the Environmental Law and Policy Center of the Midwest ("ELPC") regarding the need for strong Clean Water Act permits to regulate aquatic pesticides, aerial spraying and other discharges of pesticides to the nation's waters.

The commenting organizations and their members are affected by pesticide pollution of the nation's waters. The ability of the organizations and their members to use the nation's waters for drinking water, commercial fishing, recreation-based business, swimming and other forms of recreation are adversely affected by pollution which harms water quality or aquatic life that is essential to the ecological balance and biodiversity of our rivers, lakes and streams. We are particularly concerned about the presence of hormone disrupting chemicals in pesticides, both the registered components of the pesticide and as proprietary "inert" additives such as surfactants.

Sierra Club and ELPC strongly support prohibiting use of the general permit where the discharges may affect Outstanding National Resources Waters (see 40 CFR 131.12(a)(3)) or may affect waters that are already impaired by pesticide or pesticide breakdown products. (see 40 CFR 122.44(d)). Further, in considering general permits that may be created by states under delegated NPDES programs, EPA should require that the states limit use of general permits to use in watersheds that have been monitored for impairment by pesticides.

EPA's Draft National Pollutant Discharge Elimination System (NPDES) Pesticide General Permit for Point Source Discharges from the Application of Pesticides should be improved as follows:

1. The permit or future permit actions should cover incidental pesticide applications to row crops or forests that might involve direct application of chemicals to any of the nation's waters including any perennial or ephemeral stream. It is clear under the language of *The National Cotton Council v. U.S. EPA,* 553 F.3d 927 (6th 2009) that pesticides reaching the water from sources other than agricultural run-off or irrigation return should be considered point sources.

Assuming EPA does not want to require individual NPDES permits for incidental discharges of pesticides, EPA should establish a general permit that covers such discharges with limits that would minimize pollution and assure compliance with water quality standards. Also, EPA should consider banning discharges of atrazine.

2. EPA should require the use of the least toxic alternative (or require that non-toxic methods of pest control be tried first), and set objective standards for when pesticide use is allowed. This is legally necessary under 40 CFR 131.12(a)(2) which prohibits new or increased discharges to the nation's waters that are not necessary to accommodate important social or economic development.

3. The permit should impose notice of intent (NOI) requirements on all significant discharges of pesticides to waters. Certainly, it is arbitrary to limit the NOI requirement to applications that cover more than 20 acres for aquatic pesticides or more than 640 acres (one square mile) for mosquito spraying. [p. 3, 37-38]. Further, limiting the NOI requirement in this fashion will allow many applications to occur without EPA knowing about them and probably without the applicator paying serious attention to the permit conditions.

4. The draft permit should better protect drinking water sources and water bodies that serve as habitat for endangered or threatened species. Any significant discharge to such waters should require an individual permit.

5. The final permit should require meaningful water quality monitoring after pesticide applications. The draft permit does not require in-stream monitoring after pesticide applications; instead, the applicator need only conduct a visual "spot check," and need only do that if the opportunity arises. [p. 14, 31]

Finally, the public should have access – on EPA's website and in state environmental agency offices – to all notices of intent to discharge pesticides, pesticide treatment planning documents, and monitoring data generated as part of the general permit process. The draft permit allows applicators to keep much of this information to themselves, or requires it to be disclosed only in the form of unhelpful summaries. [p. 19-25]

Thank you for your consideration of these comments.

Sincerely,

Albert Ettinger
Senior Attorney
Environmental Law and Policy Center

Ed Hopkins
Director, Environmental Quality Program
Sierra Club