

Hot Topics in Clean Water Law

September 17, 2014



Promoting Environmental Justice as an Essential Best Management Practice for Utilities in Economically Distressed Communities

Andrew Kricun, P.E., BCEE
Executive Director / Chief Engineer
Camden County Municipal Utilities Authority
Camden, New Jersey

September 17, 2014

“It isn’t what the world holds out for you... but
what you bring to it!”

L.M. Montgomery






Wastewater Managers Have A
Tremendous Challenge...

And Opportunity, To Improve Things!



Wastewater Managers can Make a Positive Difference By:

- Optimizing Water Quality
- Minimizing Odors
- Achieving Cost Efficiencies to Reduce Rates
- Reducing Carbon Footprint, and Other Green Initiatives



These challenges, and opportunities, are especially prevalent for wastewater utilities operating in economically distressed communities...like Camden City, NJ



Camden City, NJ

- One of the poorest cities in the nation
- One of the highest rates of violent crime in the nation
- Poor urban planning (little separation between residential community and industry)
- Aging infrastructure (sewer system is over 100 years old)

Camden County Municipal Utilities Authority (CCMUA)

- Services 500,000 customers in Southern New Jersey
- Design Flow: 80 MGD
- Average Flow: 58 MGD
- Secondary, pure oxygen activated sludge treatment
- Discharges to Delaware River





Initial Conditions

- CCMUA obliged to raise rates by 22½%, from \$275 per household to \$337
- Numerous odor complaints from neighboring residents



Odor Prevention- ➡ Change Institutional Culture

- Closed odorous sludge composting facilities
- Odor inventory by independent consultant
- Installed new odor control systems at plant headworks
- Imposed zero tolerance policy with respect to odors from carelessness (doors left open; odor systems left off, etc)
- Increased supervision, especially on weekends
- Numerous outreach attempts to neighboring community to improve relationship



Happy Ending ... or a New Beginning

- Odor prevention established as a core priority
- No longer the “ceiling” goal, but the new “floor”
- CCMUA now looked for other opportunities to help the community



Environmental Justice Initiatives

- Reduced rates for Camden City residents
- Elimination of truck traffic
- Creation of a waterfront park
- Creation of a Community tree nursery



Environmental Justice Initiatives (Cont.)

- Combined sewer overflow system improvements
- Federal Grant Assistance to the City
- Provision of Technical Assistance to the Community



Camden SMART

- Collaborative among NJDEP, NJ Tree Foundation, Rutgers, CCMUA, Camden City and Cooper's Ferry Partnership to reduce flooding citywide
- 30 Rain Gardens and 1000 trees planted
- Water conservation ordinance adopted
- Combined sewers replaced and rehabilitated
- Increased oversight of operations and maintenance



Camden Collaborative Initiative

- Collaboration among USEPA NJDEP, CCMUA, Camden City and 25 other environmental and community agencies, to address environmental issues.
- Six working groups formed
 - Flooding
 - Contaminated Sites
 - Air Emissions
 - Recycling
 - Environmental Justice
 - Environmental Education



Flooding

- Water Conservation Ordinance Adopted
- Green Infrastructure
- Optimization of Operations & Maintenance
- Capital Improvements



Contaminated Sites

- Identification of best opportunities for redevelopment
- Identification of best opportunities for green space preservation



Air Emissions

- Identification of most significant discharges
- Development of BMP's for each industry to cost effectively minimize impacts from emissions
- Green ports initiative with USEPA
- Development of mobile sources strategy



Recycling

- Revised Camden City recycling specification
- Developing Camden City school recycling challenge



Environmental Justice

- Developed sustainability/environmental justice ordinance
- Creating four riverfront parks to provide riverfront access to residents



Environmental Education

- Developed environmental resource guide for Camden Schools
- Established Camden Green Ambassadors Internship Program



The “Cost” of Environmental Justice

- Did improved environmental performance result in cost increases or rate increases?

NO!

- Most initiatives not only improved environmental performance but also reduced cost as well
- Other Environmental Justice initiatives were generally low cost/high impact



Doing the Right Thing is Also the Smart Thing

- Reduction of regulatory liability, fines, etc.
- Reduction of liability to litigation from residents
- Improvement in public perception

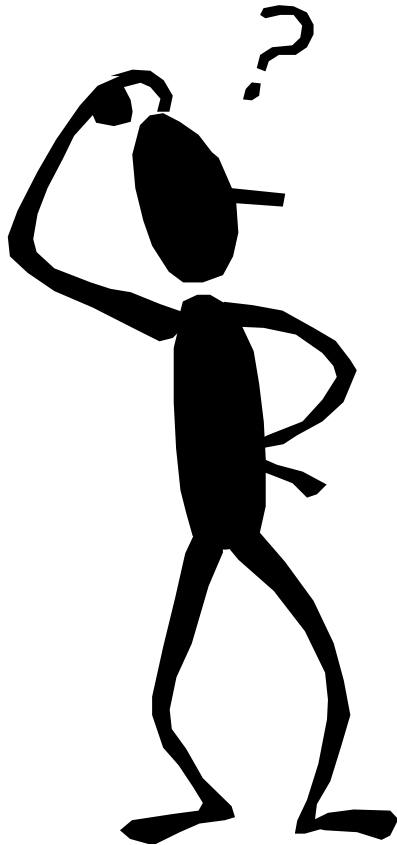


Thanks for Listening!

If you would like more information, please contact:

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Questions?

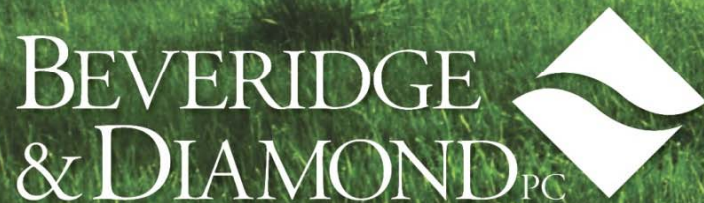


NACWA
A Clear Commitment to America's Waters

Land Application of Biosolids and Rural Environmental Justice - Litigation Update & Issues

NACWA Clean Water Law Web Seminar
September 17, 2014

Jimmy Slaughter, Beveridge & Diamond



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Today's Discussion

Primer on Environmental Justice

- Definitions and history
- Federal and state initiatives
- Trends and implications for land application of biosolids

Local Regulation of Biosolids

- *L.A. v. Kern County* – Biosolids ban still blocked despite Sup. Ct. reversal
- *Wash. Dept. of Ecology v. Wahkiakum County* – Awaiting appellate court decision
- Many states preempt local bans, new bans passed in New York

State Tort Suits Against Biosolids

- *Gilbert v. Synagro* – Appellate court requires jury to decide if land application is a normal farming practice; petition to Pennsylvania Sup. Ct. pending
- Other toxic tort suits have yielded little for plaintiffs



ENVIRONMENTAL JUSTICE – THE BASICS

EJ Definitions

- EPA: “Fair treatment and meaningful involvement of all people regardless of race, color, national origin, or income with respect to the development, implementation, and enforcement of environmental laws, regulations, and policies.”
- “Fair treatment”: *no group of people should bear a disproportionate share of the negative environmental consequences resulting from industrial, governmental and commercial operations or policies.*

EJ History

- 1980s: Growing concerns that poor and minority communities targeted for hazardous waste disposal and pollution
- 1993: EPA establishes NEJAC (National Environmental Justice Advisory Council)
<http://www.epa.gov/compliance/environmentaljustice/nejac/index.html>
- 1994: President Clinton signs Executive Order 12898 – federal agencies must address EJ issues

EJ Development/States

- 2011: EPA Issues *Plan EJ 2014* to reinvigorate federal enviro justice efforts
<http://www.epa.gov/environmentaljustice/plan-ej/index.html>
- EJ in the States: Most states have supported EJ initiatives, but not rigorous enforcement measures. *Environmental Justice for All: A Fifty State Survey* (2010)
<http://gov.uchastings.edu/public-law/env-policy/index.php>

EJ – Federal Enforcement

- EJ comes under Title VI of the Civil Rights Act, which forbids discrimination in federal programs
- But Sup. Ct. decided there is no right to bring private lawsuits to enforce EJ -- *Alexander v. Sandoval*, 532 U.S. 275 (2001)
- Federal authorities have enforcement power; aggrieved parties file administrative complaint with EPA against any state or local agency receiving federal funding
- EPA may include EJ mandates in settlements, consent decrees

EJ – Voluntary Measures

- EJ is a powerful force even without significant private litigation
- EJ is a mature movement with deep support that unites environmental and civil rights advocates
- Many municipalities, companies and their trade associations incorporate EJ principles into their values, goals and best practices

EJ in Land Application

- Do not appear to be any Title VI complaints filed with EPA regarding land application; limited federal role in land application in most states.
- Most state permitting schemes already allow some public involvement with site selection
- EJ concerns are well-known and land appliers must consider possible impacts on neighbors and demographics of neighbors
- Good relationship of farmer with neighbors prior to land application is important



LOCAL REGULATION OF LAND APPLICATION

City of Los Angeles et al. v. Kern County, California



Kern Ban: Federal Litigation

- 2006: Passage of Measure E, a ballot initiative to ban land application in Kern County, California
- 2006-07: Federal district court granted preliminary and then permanent injunction, ruling that the ban violated CA recycling mandates and the federal Commerce Clause
- 2009: Ninth Circuit dismissed the Commerce Clause claim for lack of standing
- 2010: Supreme Court denied certiorari

Kern Ban: State Litigation

- 2011: Challenge re-filed in state court; court granted preliminary injunction
 - Ban likely exceeded the County's police powers because of its impacts on out-of-county interests
 - Ban was likely preempted by state recycling mandates
 - Experts: Kester, Pepper, Gerba, Page, Johnson
- 2013: California Court of Appeal affirmed preliminary injunction

Kern Ban: State Supreme Court Reverses on Technicality

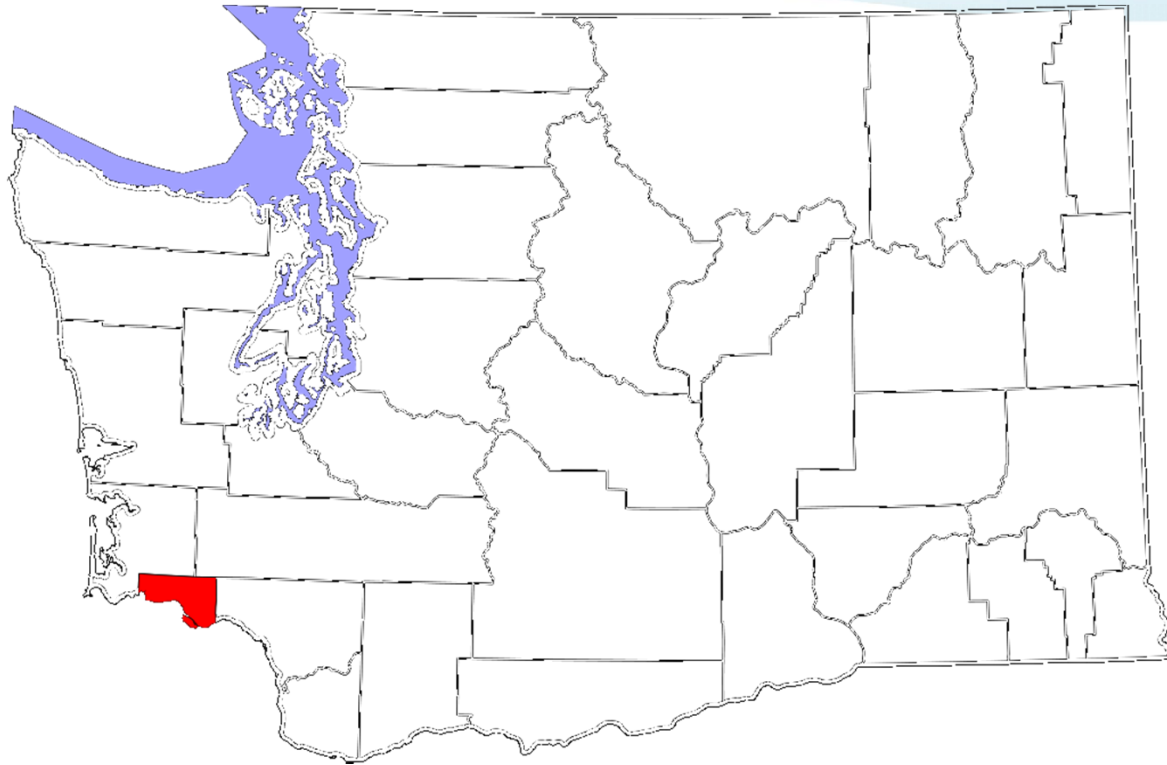
- 2014: California Sup. Ct. rules Plaintiffs waited too long to bring new lawsuit in state court
 - Case now returns to trial court in Central Valley to determine if lawsuit otherwise timely under state law
 - Court of Appeal ruling that ban likely illegal no longer published but remains law of the case
 - Injunction against Kern Ban still in place
- Fall 2014: Tulare County Superior court likely to rule again on case

Expert Findings in Kern Case

“LA presents declarations from qualified individuals with first hand knowledge of the sites and, particularly as to [Green Acres], who have studied the test reports relating to the subject biosolids. These experts opine that continued biosolid applications will not [affect] the groundwater; will not [affect] the water banks nearby; that metals will not leach down anywhere near the water level. They opine that the net effect of the application is a benefit to Kern, in that it improves the soil and allows marginal land to grow crops. . . .

“Kern presents no evidence of any actual harm to the environment: to the air, water, or soil, as a result of LA’s continued application of biosolids.”

Washington Department of Ecology v. Wahkiakum County



Washington Department of Ecology v. Wahkiakum County

- Wahkiakum County enacted ordinance in April 2011 banning land application of Class B biosolids within the county
- Washington Dept. of Ecology challenged the ordinance as unconstitutional because it conflicted with state laws and program for Class B biosolids

Washington Department of Ecology v. Wahkiakum County

- In February 2013, the trial court ruled that a ban only on Class B was not a sufficient conflict with state law to trigger preemption
- Ecology has appealed to the WA Court of Appeals; Northwest Biosolids Ass'n, NACWA, farmers filed briefs and argued as friends of court on July 1, 2014

Arguments on Appeal

- Ordinance does conflict with State law and is a ban in practical effect
- Ordinance clashes with State program goals
- Decision in fall '14

NO. 44700-2

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,
Appellant,
v.
WAHKIAKUM COUNTY, a political subdivision of Washington State,
Respondent.

APPELLANT'S OPENING BRIEF

ROBERT W. FERGUSON
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Preemption of Local Biosolids Bans Is the Law in Many States

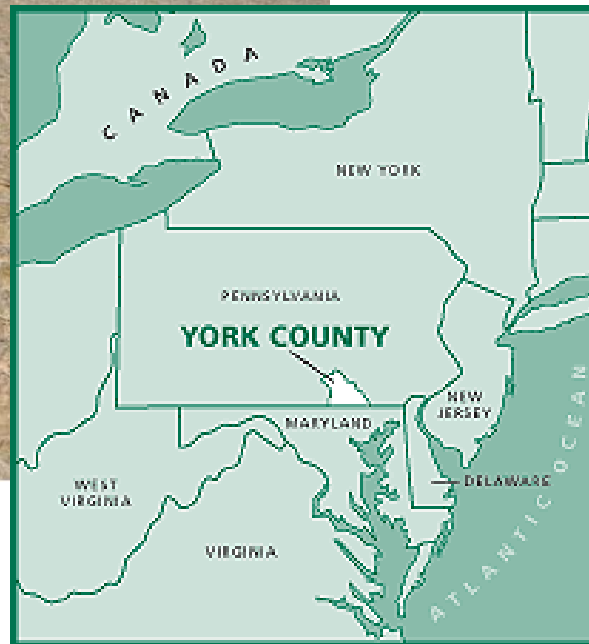
- Pennsylvania: *Liverpool Twp. v. Stephens*, 900 A.2d 1030 (Pa. Cmwlth. 2006)
- Virginia: *O'Brien v. Appomattox County*, 213 F. Supp. 2d 627 (W.D. Va. 2002)
- North Carolina: *Granville Farms*, 170 N.C. App. 109 (2005)
- New York: New bans in western localities



TORT LAWSUITS REGARDING BIOSOLIDS

Gilbert et al. v. Synagro et al.

SYNAGRO®



Gilbert State Court Complaint

- Lawsuit filed in 2008 in York County, PA by 34 individual plaintiffs living near farm
- Alleged nuisance, negligence and trespass and sought over \$2.5 million in damages for odors over four years
 - Alleged inconvenience plus physical injuries, e.g. sore throats, eye irritation, nausea, sinus infection, migraines, nose bleeds, diarrhea, rashes, and various degrees of respiratory irritation and congestion
- Plaintiffs' strategy to target farmers and service providers, not generators

Farm with Plaintiffs on Perimeter



Google earth

BEVERIDGE
& DIAMOND_{PC}

miles 1
km 1



Gilbert Case Timeline

- **August 2008:** Defendants remove case to federal court based on Clean Water Act preemption; unsuccessful
- **October 2008:** Defendants move to dismiss the lawsuit on preemption and primary jurisdiction grounds because biosolids are regulated under state rules; motion denied

Gilbert Case Timeline

- **2011-12:** Extensive discovery:
 - Thousands of pages of documents exchanged
 - All 34 Plaintiffs deposed, plus two Township Supervisors
 - 5 Synagro employees/officers and 1 former employee deposed by Plaintiffs; 2 co-defendant farmers also deposed
 - No expert depositions (Pennsylvania law)
 - Private investigator interviews neighbors, visitors

Gilbert Experts

- Professor **Herschel A. Elliott**, Ph.D., P.E.
 - agronomy, land application
- Professor **John Novak**, Ph.D.
 - biosolids odors, duration
- **Michael Wardell**, M.S.
 - land application
- **Pamela Dalton**, Ph.D., MPH
 - odor perception
- **Lawrence Hentz**, P.E.
 - wastewater treatment plant processes, biosolids
- **Paul Knight**, M.S., Penn State Climatologist
 - meteorological and climate conditions and transport of odors
- **Marisa Kreider**, Ph.D.
 - Toxicology of biosolids

PENNSYLVANIA STATE UNIVERSITY



Gilbert Summary Judgment Motion: Right to Farm Act

“No nuisance action shall be brought against an agricultural operation which has lawfully been in operation for one year or more prior to the date of bringing such action, where the conditions or circumstances complained of as constituting the basis for the nuisance action have existed substantially unchanged since the established date of operation and are normal agricultural operations...”

“Normal agricultural operations” very broadly defined in statute

Gilbert Summary Judgment Motion: Right to Farm Act

- Fight over whether RTFA protects biosolids:
 - Whether application of biosolids constitutes a “normal agricultural operation”?
 - One year to bring suit measured from date farm nuisance began or date the farm began?
 - Whether the RTFA bars negligence and trespass claims in addition to nuisance?

Gilbert Summary Judgment Motion Granted

- Key rulings:
 - Land application of biosolids is a “normal agricultural operation” protected by the PA Right to Farm Act from nuisance claims, as well as negligence claims based on the same facts as nuisance claims
 - Under negligence, no legally recognized duty or standard of conduct to prevent off-site odors
 - No trespass for odors from a farm

RALPH GILBERT, ET AL., Plaintiffs v. SYNAGRO CENTRAL, LLC, SYNAGRO
MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS, and STEVE TROY-
ER, Defendants

No. 2008-SU-3249-01

COMMON PLEAS COURT OF YORK COUNTY, PENNSYLVANIA, FAMILY
DIVISION

2012 Pa. Dist. & Cnty. Dec. LEXIS 323

December 28, 2012, Decided

SUBSEQUENT HISTORY: As Corrected March 7,
2013.

Copies of this Order and Opinion shall be provided
to the Prothonotary to counsel of record.

Therefore, we find that the land application of biosolids
does constitute an activity or practice that has been
adopted or used by farmers, and is consistent with tech-
nological development, and accordingly, meets the
RTFA's definition of a "normal agricultural operation."

THE COURT,

Maria Musti Cook

MARIA MUSTI COOK, JUDGE

Summary Judgment

Matter is before the Court on the Joint Motion
for Summary Judgment of Defendants Synagro Central

For Defendants Hilltop Farms and Pl
Stambaugh, Esquire.

For Defendant Troyer: David R. Breschi

JUDGES: MARIA MUSTI COOK, JUDGE

OPINION BY: MARIA MUSTI COOK

OPINION

Motion for Summary Judgment

ORDER GRANTING DEFENDANT
TION FOR SUMMARY JUDGMENT

AND NOW, this 28th day of De
accordance with the foregoing Opinion,
for Summary Judgment of the Defend
ED.

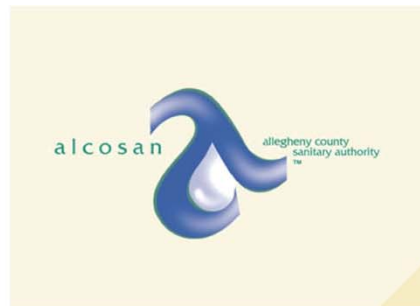
Furthermore, we believe that finding a trespass for
odors from a farm would undoubtedly expose any agri-
cultural operation, especially those located near more
suburban areas, to much vexation. The Court in *Guarina*,
supra, stated "[t]he person who lives in the middle of a
city cannot, of course, ask to be immunized from the
effects of the turbulence, traffic and noises which are
inevitably part of urban life." 407 Pa. at 313, 180 A.2d at
561. Correspondingly, a person who lives in an area that
is more rural or zoned agricultural cannot ask to be im-
munized from the effects of odors and insects which are
inevitably [*45] part of agricultural life.

near the Farm during 2007, including farm operations,
and hauling, spreading and applying "sewer sludge."²

Gilbert Summary Judgment Reversed on Appeal

- Key rulings in April 2014 split opinion:
 - Whether land application of biosolids is a “normal agricultural operation” protected by the PA Right to Farm Act is a factual dispute for a jury to decide
 - Agreed with trial court that Right to Farm Act protects new farm activities, not just farm as it existed at beginning
 - Agreed with trial court that there is no duty under negligence law to prevent off-site odors
 - Petition for appeal to PA Supreme Court

Amici Curiae on Appeal



City of Philadelphia
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Toxic Tort Suits – To Date

- Toxic tort suits In New Hampshire, Virginia and Tennessee have yielded little for plaintiffs
- No case to date has linked biosolids to human health problems through a court-approved expert report, court finding, or jury verdict
- EPA: Denied petition to ban land application in detailed December 2003 decision
- Two National Academy of Sciences reports supporting land application (2002 and 2004)
- California 2004 Environmental Impact Review

Tort Suits: Lessons Learned

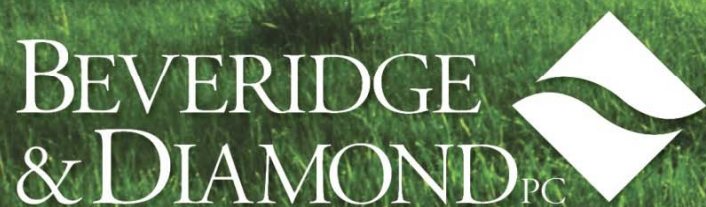


- Odors are the focus, spur illness claims
- Data on odor levels are invaluable
- The more regulator visits, the better

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