

BIOSOLIDS LAW 2011: CHALLENGES TO BENEFICIAL USE

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2011 Legal Developments

- *Kern County*- California biosolids stakeholders refile case in state court and in June 2011 win new preliminary injunction against biosolids ban
- *Gilbert* – Ongoing “nuisance” suit against land application in Pennsylvania
- PFC lawsuits in Alabama
- Fraud claims against EPA/UGA researchers rejected

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



Green Acres Farm 18 miles from Bakersfield, CA



2006-10: Federal Court Enjoins Biosolids Ban

- **June 6, 2006:** Passage of Measure E, a ballot initiative to ban land application in Kern County, California
- **Aug. 10, 2007:** Permanent Injunction Granted
 - The Court granted a permanent injunction and ruled that the ban violated the CA Integrated Waste Management Act and the federal dormant Commerce Clause
- **The Court stressed:**
 - 1) Ban was motivated by anti-Los Angeles bias, as shown by the statements of the initiative's sponsors
 - 2) Ban purported to regulate even-handedly, but in practice the ban discriminated against out of county biosolids

Ninth Circuit Ruling

- **Appeal:** Kern County appealed the permanent injunction to the U.S. Court of Appeals for the Ninth Circuit
- **Ruling:** Ninth Circuit dismissed the dormant Commerce Clause claim because it found that California plaintiffs land applying California biosolids in California do not have standing to bring a federal claim in federal court
- **Remand:** Ninth Circuit directed the district court to decide whether to dismiss entire case and sent it to state court

Biosolids Stakeholders Seek Supreme Court Review

- **L.A. and Co-Plaintiffs File Petition for Certiorari in U.S. Supreme Court Spring 2010**
 - Biosolids associations and cities filed amici curiae briefs in support of the City
 - Associations include NACWA, NEBRA, WEF and Northwest Biosolids Management Association
 - Cities include Greater Chicago; Denver Metro; King County, WA; St. Louis; and Milwaukee
- **Implications:** Dormant Commerce Clause claims can still succeed in federal court but out-of-state plaintiffs or land application activities across state borders may be necessary for establishing standing

Victory for Biosolids in California State Court

- Case refiled in state court and assigned to rural county adjacent to Kern County
- Coalition seeks new preliminary injunction; Professors Pepper, Gerba, Page review new data on farms and prepare declarations on benefits of biosolids
- Court found that ban likely exceeded County's police powers because of its impacts on out-of-county interests, and ban likely preempted by state recycling mandates
- Court found no evidence of environmental harm from land application of biosolids

Outlook for Local Ordinances/Bans

- Kern viewed as a test case and ban has not been implemented for over 5 years
- Multiple federal and state legal grounds to oppose bans, possible recovery of attorney fees and damages
- Coalition with farmers and contractors key
- Few facts or science to support bans

Gilbert Nuisance Suit

- **July 2008:** Lawsuit filed in York County, Pennsylvania by 37 individual plaintiffs living near land application site; sued farmer, land owner, contractor
- **Complaint has three counts:** Nuisance, negligence and trespass and seeks over \$2.5 million in damages
- **Plaintiffs allege that a 3 day land application in July 2007 caused:**
 - Nuisance impacts from alleged bad odors, and
 - Alleged physical injuries ranging from coughs, rashes, sore throats to *staph aureus* infections

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 grounds because biosolids are regulated under state rules (motion denied)
- **April 2010:** Plaintiffs amend complaint in an attempt to remove “doctor diagnosed diseases”
- **October 2011:** Right to Farm Act defense rejected

Farm with Plaintiffs on Perimeter



Google earth

BEVERIDGE
& DIAMOND_{PC}

miles 1
km 1



Gilbert Case Defenses

- **Many health impact allegations remain including:**
sore throats, eye irritation, nausea, sinus infection, gland pain, migraines, nose bleeds, diarrhea, rashes, teeth pain, and various degrees of respiratory irritation and congestion
- **Defenses:**
 - Land application of biosolids has never been linked to physical injuries
 - Experts must prove link between biosolids and health impacts
 - PA and York County regulators aware of odors
 - Trial Set for July 2012

Elevated Levels of Perfluorochemicals in Biosolids Near Decatur, Alabama

- **Source:** Trace Chemicals in biosolids from discharges using them in manufacturing
- **EPA Response:** EPA and the industrial generators have entered a consent order for further testing and providing of drinking water to certain homes
- **Lawsuits:** Plaintiffs' lawyers have filed several lawsuits in state court in northwest Alabama claiming property damage from the trace perfluorinated compounds in the biosolids; little movement on cases

Toxic Tort Suits – To Date

- No case to date has linked biosolids to human health problems through a court-approved expert report, court finding, or jury verdict
- EPA addressed and rebutted the underlying allegations of health impacts in a comprehensive letter dated December 2003 denying a petition to ban land application; NAS also has not found links

Tort Claims Against Biosolids -- Prognosis

- Nuisance and personal injury claims are rare; facts and science do not support
- Lawsuits may be viewed by activists as a tool to fight land application
- Contractors and farmers are the targets
- Location, location, location

Augusta Cow Cases

- Toxic tort cases in Georgia alleging harm to cattle from grazing on biosolids fertilized fields



U.S. ex rel. Lewis v. Walker et al.

- **Plaintiffs in false claims suit challenged:**
 - Accuracy of Augusta's environmental reporting in City's federal grant applications
 - Accuracy of researchers' work related to a paper published regarding soil conditions after application of Augusta biosolids to pastureland
- **Key case activities:**
 - False Claims Act lawsuit against city/county government dismissed
 - Some false statement claims against researchers were dismissed; some claims subsequently reinstated
 - Defendants' motion for summary judgment granted and affirmed by the 11th Circuit