

BIOSOLIDS TECHNICAL BULLETIN

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Current Legal Issues on Land Application

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As beneficial use of biosolids has increased, some counties, townships, and other localities have attempted to impose bans and other restrictions on beneficial use, particularly land application of Class B material. The restrictions often go far beyond state and federal requirements under 40 CFR 503 rules and are effectively a ban on beneficial use.

Clean water agencies have many tools to protect beneficial use. This article surveys current legal issues affecting land application of biosolids for publicly owned treatment works, landappliers, and farmers. In the last decade, agencies undertaking beneficial use have encountered

- local efforts to restrict or ban land application of biosolids;
- onerous fees and regulations amounting to a ban;
- establishment of duplicate permit systems;
- requirements for the additional recording of information; and
- lawsuits alleging personal injuries from land application of biosolids,

These issues raise questions that are being addressed by courts and legislatures nationwide from land application of biosolids, including "toxic tort" suits in Tennessee, Pennsylvania, Florida, and New Hampshire.

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Use the Clean Water Act Carefully

The detailed coverage of biosolids uses and applications in the Clean Water Act (CWA) raises potential preemption arguments against stricter local regulations. **However, CWA Sec. 405(e), known as the "savings clause," expressly reserves the matter of disposal or use of sludge to local determination, stressing that U.S. Environmental Protection Agency (EPA) regulations do not preclude or deny a state or locality the ability to adopt more stringent standards or requirements. This language presents a significant challenge to preemption arguments**

For example, in 1993, a Virginia county banned the application of biosolids. Farmers argued that the local ordinance conflicted with a national policy established by CWA favoring land application of biosolids and therefore was pre-empted. (*Welch v. Board of Supervisors v. Rappahannock County*, 888 F. Supp. 753 [W.D. Va. 1995].) The court disagreed, focusing instead on the language of the savings clause and held that the county biosolids ordinance was not pre-empted by CWA. (See also *Thayer v. Town of Tilton*, 861 A.2d 800 N.H. 2004], also rejecting CWA preemption of a local biosolids ordinance.) local authority to be "more stringent" is not the authority for a ban.

[my comment: NH Supreme Court upheld the right of Tilton, NH to ban Class B sludge and regulate Class A }