SELECTED CASES ON BIOSOLIDS APPLICATION TO LAND

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The following is a summary of just some of the relevant case law involving the land application of biosolids in North America. The purpose of this summary is to point out areas of potential legal liability which the CRD may wish to investigate before deciding whether or not to repeal its ban on the application of biosolids to lands within the CRD.

PROVINCIAL OVERSIGHT

In British Columbia, in one case so far, the Environmental Appeal Board found that a permit issued by the province of BC allowing the use of biosolids as fertilizer did not ensure protection of the environment as per the necessary requirements under BC's *Waste Management Act* (WMA) (*Organic Producers Assn. of Cawston & Keremeos v. British Columbia (Assistant Regional Waste Manager*[1]). In that case, the permit was rescinded.

This case illustrates the potential for omissions by the province in its regulation of biosolids. It also illustrates how various administrative bodies might come to different conclusions about the environmental safety of biosolids application to land.

LOCAL GOVERNMENT JURISDICTION

In the United States, the battle over whether biosolids should be applied to land is being litigated in the context of jurisdiction. On the one hand, there are cases such as *Welch v. Board of Supervisors of Rappannock County*[2], where a local ordinance banning the land application of sewage sludge was upheld despite provisions of the federal *Clean Water Act* that encouraged the land application of biosolids. On the other hand, there are cases such as *Blanton v. Amelia County*[3], where a local ordinance banning biosolids application was overruled by state permits allowing such application.

US case law suggests that courts in that country will attempt to harmonize two levels of regulation over the same subject area, and only if the regulations cannot be harmonized will the state law trump the local law (*O'Brien v. Appomattox County Virginia*[4], *Queen Anne's Country v. Soaring Vistas*[5]). However, this principle can be applied with inconsistent results.

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[1] *Organic Producers Assn. of Cawston & Keremeos v British Columbia (Assistant Regional Waste Manager)* (11 April 2002), 2000WAS-024, online: BCEAP <http://www.eab.gov.bc.ca/waste/2002WASList.htm>

[2] *Welch v Board of Supervisors of Rappannock County,* 888 F Supp 753, 759 (WD Va 1995).

[3] *Blanton v Amelia County,* 540 SE 2d 869 871 (2001).

[4] *O'Brien v Appomattox County,* 293 F Supp 2d 660 (WD Va 2003) affirmed *O'Brien v Appomattox County,* 71 Fed. Appx. 176 (4t ct App 2003.

[5] *Queen Anne's Country v. Soaring Vistas* 121 Md. App. 140 (1997).

As another example, in *Thayer v. Town of Tilton*,[6] the Supreme Court of New Hampshire upheld a local ban on the use of more hazardous "Class B" biosolids, stating that federal and state law left space for the town to protect the health and wellbeing of its residents through the ban. Conversely, in the case of *Franklin County v. Fieldale Farms*[7], the Supreme Court of Georgia found that allowing such local ordinances would breach the principle of uniformity.

The US battle continues on in places such as Kern County, California, where residents seek to ban the application of biosolids to land despite state legislation that promotes the use of biosolids. That case, *Los Angeles v. Kern County*,[8] is currently being appealed to the Supreme Court of California.

A similar battle took place in Quebec, in the context of a prohibition on applying biosolids to farm land in Elgin County. Quoting the municipality's plenary powers to enact by-laws for the general welfare of its people, and the Supreme Court of Canada's direction to use the precautionary principle to deal with cases of conflicting scientific evidence, the prohibition was upheld at trial. However, on appeal the prohibition was held to be *ultra vires* the municipality and was overturned due to the specific wording of the various laws (*Ferme L'Évasion inc. c. Elgin (Municipalité du canton d')* 2011 QCCA 967).

These cases demonstrate different approaches that may be taken by courts in trying to deal with divergent rationales for regulation and conflicting scientific evidence about health and environmental concerns.

EMERGING ISSUES

In addition to local governments, it may be that Indian Tribes in the United States also have the ability to regulate the depositing of biosolids on their land. In a September 2013 decision, *St. Isidore Farms v. Coeur D'alene Tribe of Indians*,[9] the federal District court for Idaho ruled that the tribal court had jurisdiction to deal with concerns of the Tribe. The Tribe is concerned about the health risks for members who consume wildlife which grazes on a property located on the reserve that had sludge injected into it pursuant to state approval. In order to make that finding, the court found that the affidavits and expert evidence presented by the Tribe was sufficient to show that the health and safety of the Tribe may be threatened. To our knowledge, the case is now before the Tribal Court which will weigh the evidence.

While the authority of First Nations in Canada to regulate biosolids has not been addressed in courts to our knowledge, the *Coeur D'alene Tribe of Indians* case illustrates logic that Canadian courts could potentially adopt in considering whether applying biosolids to lands that provide habitat to wildlife may interfere with not just human health, but also aboriginal rights. If there was, for example, a First Nation that had valid health concerns about eating wildlife that had come into contact with biosolids, it is possible that a court could find that the application of biosolids effectively eliminated the aboriginal right to hunt for food or other purposes. It therefore may be

[6] 151 N.H. 483; 861 A.2d 800; 2004 N.H. LEXIS 186
[7] 270 Ga. 272; 507 S.E.2d 460; 1998 Ga. LEXIS 1157; 47 ERC
[8] 214 cal app 4th 394.
[9] 2013 U.S. Dist. LEXIS 127705

that the constitutional duty to consult and accommodate aboriginal rights is triggered in relation to governments' decisions to allow the application of biosolids in areas that provide habitat to wildlife that may be eaten.[10]

COULD APPROVING THE LAND APPLICATION OF BIOSOLIDS GIVE RISE TO LIABILITY?

Approving the land application of biosolids may open up various parties to legal liability if it results in public health or environmental problems.

HAS LIABILITY BEEN ATTRIBUTED TO THE GOVERNMENT?

The United States Department of Agriculture (USDA) was ordered by a federal judge to compensate a farmer whose cows died due to the land application of biosolids in the case of *R. A. McElmurray v. United States Department of Agriculture*[11]. In that case, the judge concluded that the USDA had failed to professionally monitor, test and record the toxicity levels of the biosolids it applied to the farmer's land.

CAN FARMERS BE HELD PERSONALLY LIABLE?

It remains the fact that farmers in the US can be held liable for damages caused by the land application of biosolids despite the protections offered by Right to Farm acts. This is because the application of biosolids may be considered to be outside the scope of normal farm practices, and because Right to Farm acts do not protect against negligence, trespass or the escape of a dangerous substance under the rule in *Rylands v Fletcher*. This is also the case despite the US federal *Comprehensive Environmental Response, Compensation, and Liability Act* (CERCLA) if the sludge that is applied to lands ends up containing particularly hazardous materials, and even if the farmer was unaware that the sludge was toxic (*Fallowfield Development Corp. v. Strunk*[12]).

In Quebec, neighbours of a farm storing municipal sludge were awarded a total of $2000 plus interest and costs due to the presence of odors. The farmer was held liable in that case primarily due to the fact that he had been issued two violations of the provincial environmental quality act (*Maisonneuve c. Fermes Lebec inc.*, 2013 QCCQ 5923 (CanLII)).

Although none of these cases are from BC, they demonstrate the potential for litigation on this topic, and therefore suggest that care be taken in regulating the application of biosolids to lands.

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[10] See, for example, *Haida Nation v*. *British Columbia* (Minister of Forests), [2004] 3 SCR 511, 2004 SCC 73.

[11] *R.A.McElmurray v United States Department of Agriculture,* 535 F Supp 2d 1318 (SD Ga 2008).

[12] 1994 WL 498316 (ED Pa).