

## INDUSTRY FEARS BIOSOLIDS SUITS AFTER COURTS REJECT EPA RULE DEFENSE



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The biosolids industry is scrambling to assess the financial risk from a growing number of tort suits challenging land applications of biosolids that plaintiffs are filing in state courts as federal courts are rejecting industry defenses that EPA regulations allowing the controversial practice preempt the tort suits.

The new tort challenges -- some of which are being brought by high-profile trial lawyers -- are the "most serious threat to date" to the common practice of reusing treated sewage sludge as fertilizer, James Slaughter, an industry attorney told a conference sponsored by the National Association of Clean Water Agencies Nov. 13.

The group, which represents publicly owned wastewater treatment facilities, strongly backs the disposal practice as a safe and inexpensive way to dispose of millions of tons of solid waste. But food safety and other public health groups say the disposal practice contaminates food and runoff from the land contaminates nearby waters.

Slaughter said the biosolids industry is exploring the financial implications of the increased risk from tort suits, which are creating pressure to accurately reflect the risk of the suits in financial arrangements.

Slaughter warned that while the suits have so far targeted companies like Synagro that collect and apply biosolids, he warned that municipalities that land apply "are likely to be sued directly in the next wave of lawsuits or will suffer the consequences if Synagro is unsuccessful in defending these lawsuits." He added that defense costs in the common law suits have "potentially significant financial implications for the industry."

Slaughter painted a picture of trial lawyers employing witnesses allegedly injured by the practice to profit off the inherent "yuck factor" in applying human waste to fields and forests. "These lawyers are not rational because they are in it for the money."

The biosolids suits are part of a growing tactic by environmentalists and others to rely on common law suits to stop what they see are gaps left by EPA regulations and other environmental safeguards. "What do you do when" EPA has regulated an industry but you still want to stop it from moving forward? "You make 'em bleed," says one source following the issue closely.

The source describes industry running an "experiment" on "country bumpkins" who are falling victim to ill health and even death from the sewage sludge.

Environmentalists and others have long been concerned about EPA regulations, issued under section 503 of the Clean Water Act, that allow land application of biosolids. The rules have become especially controversial since a recent federal district court ruling in Georgia found that EPA "fudged" its data on the risks posed by land application. "The administrative record contains evidence that senior EPA officials took extraordinary steps to quash scientific dissent, and any questioning of the EPA's biosolids program," says the ruling.

Since the ruling, the Center for Food Safety vowed to sue EPA to overturn its rules but the group has not yet acted on its threats.

EPA has also launched an effort to develop a new assessment of the risks posed by land application of biosolids, but the agency recently issued a preliminary notice saying it does not have enough data to develop the assessment.

Now plaintiffs groups are bringing in some high-powered legal help. Two of the biosolids suits in Pennsylvania have the backing of the high-powered law firm of Peter Angelos, the primary owner of the Baltimore Orioles who has led a lucrative career presiding over similar litigation challenging health hazards such as asbestos and tobacco.

"Gases, vapors, particulates, flies, and odors caused by Defendants' conduct have damaged and continue to damage Plaintiffs' property," charges the complaint in *Gilbert v. Synagro*, one of the Pennsylvania cases brought by the Angelos' firm, which seeks damages for nuisance, negligence and trespass. Relevant documents are available on [InsideEPA.com](http://InsideEPA.com).

Synagro, which is one of the largest biosolids recyclers in the country, is seeking to dismiss the suits on grounds that they are preempted by EPA and state rules, according to Slaughter's presentation.

However, a federal district court in Pennsylvania last month rejected arguments from Synagro that the case is preempted by EPA's rule, which allows the practice.

Judge Sylvia Rambo ruled Oct. 21 in *Gilbert, et al., v. Synagro Central, LLC, et al.*, to soundly reject industry arguments that compliance with EPA's rule preempts the state common law suit. Rambo ruled that the defendants had misinterpreted the unanimous Supreme Court ruling, *International Paper Company v. Ouellette*, which held that the water law's savings clause preserved plaintiffs right to pursue the suits.

"In fact, in *International Paper*, all nine justices, in three separate opinions, explicitly found that the Clean Water Act does not completely preempt a plaintiff's state common-law tort claims," the court said. The industry argument "does not pass the smell test," Rambo ruled.

Rambo also rejected industry arguments that the case involves a "federal question" in part because Synagro would rely on its compliance with EPA regulations as a defense.

"Defendants' suggestion that Plaintiffs' right to relief 'necessarily depends on resolution of a substantial question of federal law' is unreasonable and borders on being frivolous," the court ruled. "A potential federal defense is not a necessary element of a common-law tort claim. Calling something by a different name does not mean that it no longer stinks," the court said.

The decision also cited several times a similar case in Virginia, Wyatt et al. v. Sussex Surry and Synagro, where a federal court ruled in 2007 to reject an industry effort to remove a tort suit to federal court.

Slaughter said he believes plaintiffs in the Gilbert have a stronger case than the Virginia case because all of the property owners adjacent to the biosolids application site -- a total of 35 plaintiffs -- have joined the suit. -- Jonathan Strong

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