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Preemption of Local Environmental Regulations: Courts and the Legislature Reject Local Control of Biosolids

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Virginia's population growth has brought pressure on local governments to enact ordinances addressing a variety of environmental, quality of life and public health concerns. These efforts are often spearheaded by vocal activists relying on anecdotal and sensational arguments of public health threats, or by local residents who simply do not want certain agricultural or business activities in their communities (the NIMBY syndrome). Local governments, however, typically lack the technical and regulatory expertise to address complex scientific issues involving pollution and risk assessment. More importantly, the advent of comprehensive federal and state environmental laws since the 1970s has largely preempted localities from acting as environmental regulators and enacting a patchwork of local laws that conflict with state and federal programs. Environmental practitioners should be aware of the strength of preemption arguments when faced with attempts by localities to override state or federal environmental requirements.

The conflict in Virginia between county and state regulation of biosolids illustrates these principles. The article in the summer 2002 issue (Volume XIV, Number 2) of the *Environmental Law News*, "The Battle Over Biosolids," suggested that Virginia law may grant counties significant leeway to regulate this valuable fertilizer and soil amendment derived from treated sewage sludge. Recent court decisions, legislative activity and a close review of the federal and state regulatory program, however, demonstrate that the Com-

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Chair's Corner

Our Section will co-sponsor an interesting and informative program this year at the Virginia State Bar's Annual Meeting in June, 2003, focusing on administrative practice. The program is entitled ***Administrative Law Practicum: Nuts and Bolts of Appearing Before an ALJ***. The program will provide practice tips for preparing an administrative record, presentation of witnesses in administrative settings, dealing with extremes — the pro-se appellant v. the energetic litigator, mechanisms for settlement prior to hearing, and judicial review. A portion of the program will also spotlight administrative proceedings before the State Corporation Commission and will

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monwealth occupies the field of biosolids regulation.

Current Science on Biosolids Safety

Biosolids are sewage sludge from wastewater treatment plants that has been treated in conformance with detailed federal and state requirements to reduce the amount of pathogens (disease-causing microorganisms) and other contaminants.[1] State and federal governments have long encouraged municipalities to beneficially use biosolids by recycling it on land because of its proven value as a fertilizer and organic soil amendment.[2] In the United States in the last half-century, biosolids have been land applied to many thousands of farms and used to reclaim disturbed lands such as mine sites.[3] Beneficial use of biosolids is an important, large-scale recycling activity that is recognized as superior to landfilling or incinerating sewage sludge.[4]

Decades of research and experience confirms that the beneficial use of biosolids is safe for the public and good for the environment. In 1996, the National Academy of Sciences stated that land application poses a "negligible risk."[5] In 2002, the Academy revisited these issues and focused on allegations of public health threats from biosolids. While calling for more research, the NRC also found that "[t]here is no documented scientific evidence that the Part 503 rule [the federal biosolids regulation] has failed to protect public health...a causal association between biosolids exposures and adverse health outcomes has not been documented."[6]

Despite the safety and benefits of biosolids, allegations of health impacts from nearby land applications and odor complaints are issues facing localities. Upon investigation, allegations of health impacts have been found to be not based on toxicological or medical research, or thorough attempts at a differential diagnosis, but instead are often prompted by partisan activists committed to banning beneficial use or barring what they view as an undesirable agricultural practice from their communities. County governments, lacking resources to understand and fairly evaluate the scientific and environmental issues, sometimes face pressure to take the politically expedient course of banning land application, either through outright bans or onerous regulations that act as a ban. This is contrary to the recommendation of the National Academy of Sciences that "anecdotal information [should not be] used for the predication of past, current or future regulations."[7]

Local Regulation of Biosolids in Virginia is Preempted by the State Program

Authority over most environmental issues, including biosolids, is vested in federal and state governments because of their greater expertise, resources and the need for uniformity. Virginia, like many states, developed a comprehensive biosolids program that builds on the federal regulatory floor of the Part 503 regulations promulgated under the Clean Water Act. The Virginia Biosolids Use Regulations span 87 pages of the Virginia Administrative Code and prescribe detailed requirements for the generation, application and monitoring of biosolids. Of particular importance to a preemption analysis, the Virginia Department of Health issues site-specific permits allowing land application after a comprehensive application process that requires review of technical data, site inspections, soil samples, as well as public meetings and consultations with local governments.

The starting point for a preemption analysis in Virginia is VA. CODE § 1-13.17, which mandates that local law "must not be inconsistent" with state or federal law. Preemption can be found on the basis of express preemption (where a statute forbids subordinate government legislation), field preemption (where the comprehensive federal or state program occupies the field), or conflict preemption (where the requirements of federal/state law clash with local law).

The overwhelming weight of authority in Virginia holds that counties cannot enact substantive regulations of biosolids, particularly where local ordinances essentially block the use of a state permit authorizing land application. Substantive local regulations that are preempted include the types of ordinances discussed favorably in "The Battle Over Biosolids," such as mandates for subsurface injection of biosolids and buffer zones. All of these technical issues are governed by the state Biosolids Use Regulations and permit terms.

The Virginia Supreme Court, two federal courts and the Virginia Attorney General have rejected local efforts to regulate biosolids. Recent legislative activity by the General Assembly further confirms the very narrow scope of county authority over biosolids, allowing counties only to undertake "testing and monitoring" for compliance with state law.[8]

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First, in 2001 the Virginia Supreme Court voided Amelia County's ban on biosolids, because of the conflict with the state biosolids program.[9] The *Blanton* court wrote:

> As we have clearly and repeatedly stated, a local government may not "forbid what the legislature has expressly licensed, authorized, or required." The General Assembly, by its enactment of Code § 32.1-164.5, has expressly authorized the land application of biosolids conditioned upon the issuance of a permit.[10]

Blanton did not offer an opinion as to what residual authority a county may have to enact ordinances affecting biosolids, but emphasized that any "local ordinances and requirements must not be inconsistent with Code § 32.1-164.5 or the Biosolids Use Regulations."[11]

Second, in the wake of the *Blanton* ruling, the Virginia General Assembly amended the Commonwealth's biosolids statutes in 2001 to delineate specifically a limited local role in implementing the state program:

> Any county, city or town may adopt an ordinance that provides for the testing and monitoring of the land application of sewage sludge within its political boundaries to ensure compliance with applicable laws and regulations.[12]

Under accepted Virginia principles of statutory construction, this express provision granting this specific power excludes all other powers not mentioned.[13] This narrow grant of authority over biosolids to counties does not provide any basis, express or implied, for a dual regulatory program imposed by county ordinance.[14]

Third, the Virginia Attorney General published an opinion in the spring of 2002 unequivocally rejecting local authority over biosolids.[15] The Attorney General opined that VA. CODE § 62.1-44.19:3(C) "expressly limits" localities to adoption of ordinances "that pertain only to the testing and monitoring of land application of biosolids."[16] Consistent with *Blanton*, the opinion held that "the state occupies the field of sewage sludge disposal, treatment and management.... [A] local ordinance requiring an applicant to obtain a conditional use permit before applying or storing biosolids in the locality is preempted by the comprehensive state program."[17] The 2002 Opinion built upon and elaborated on a 1999 Attorney General Opinion which held that state authority over biosolids is "paramount" and "any local ordinance must not operate in a conflicting manner."[18,19]

The *O'Brien* Preliminary Injunction Against Appomattox County's Biosolids Ordinances

Against this backdrop, it was no surprise when the United States District Court for the Western District of Virginia in August 2002 issued a preliminary injunction barring enforcement of biosolids ordinances passed by Appomattox County, Virginia.[20] The County enacted detailed operational and zoning controls regulating biosolids in early 2002, shortly before eleven Appomattox farmers received permits for land application from the Virginia Department of Health. Those farmers brought a lawsuit and a motion for a preliminary injunction against the County. They argued that the County's biosolids ordinances were (a) preempted under Virginia law and the federal Clean Water Act; (b) violations of due process and equal protection under the Virginia Constitution; and (c) causing damages to the farmers, for which the County was liable under 42 U.S.C. § 1983. The *O'Brien* court granted a preliminary injunction and ruled that: (i) the farmers had critical agricultural, environmental and conservation needs for this organic fertilizer, exacerbated by a drought; (ii) the County's concerns regarding the safety of biosolids were speculative; (iii) the farmers' preemption claims were likely to succeed because the County ordinances conflicted with the farmers' state permits and state law; and (iv) the state and federal biosolids programs were best suited to protect public health and the environment. The County has appealed the ruling.

O'Brien followed a similar ruling in 2001 by another judge in the Western District enjoining Louisa County's biosolids ordinances.[21] Like *O'Brien*, the *Synagro* court found compelling "the existence of a state regulatory scheme addressing the same subject matter [as the challenged ordinances]" in finding sufficient cause to issue a preliminary injunction. The *O'Brien* decision, based on a full evidentiary hearing, analyzed in detail the likely preemption of the County ordinance by the state biosolids program.

The *O'Brien* case also illustrates the potential perils to local governments that seek to abrogate the rights of state permit holders. The *O'Brien* farmers are pursuing § 1983 claims for damages against the County for loss of the benefits of biosolids due to the County's ordinance. On November 15, 2002, the *O'Brien* court denied the County's motion to dismiss § 1983 damage claims based on the Commerce Clause of the United States Constitution and the Clean Water Act. The Court dismissed the farmers' § 1983 claims based on the Equal Protection and Due Process

guarantees of the United States Constitution.

Current Legislative Developments

The Virginia General Assembly addressed biosolids again in the 2003 session. Senator Bill Bolling (R-Hanover), who chaired hearings in 2002 on biosolids conducted by the Commission on the Future of Virginia's Environment, introduced Senate Bill 1088 in January 2003, which strengthens state biosolids regulations. The legislation also provides that localities that have adopted "testing and monitoring" ordinances may enforce state biosolids regulations. Senate Bill 1088 passed the Virginia Senate and the Virginia House of Delegates unanimously and was signed into law by the Governor on March 19, 2003. Again, this specific and narrow grant of local authority further confirms that Virginia counties may not exercise their police power or zoning powers to otherwise regulate biosolids.

Conclusion

The keen interest of activists and the media in allegations of environmental threats will continue to generate pressure on localities to legislate on these issues. The environmental bar must carefully scrutinize such efforts for their conflict with federal and state authority, sound science and existing regulatory schemes. As demonstrated by recent biosolids litigation, the preemption doctrine provides affected parties a ready tool to counter and limit the otherwise broad police and zoning authority of Virginia localities.

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[1] See 40 C.F.R. Pt. 503; 12 Va. Admin. Code 5-585-10 *et seq.* (Virginia Biosolid Use Regulations).

[2] See USEPA, *Interagency Policy on Beneficial Use of Municipal Sewage Sludge* (1981); USEPA, *Standards for the Use or Disposal of Sewage Sludge: Final Rules*, 58 FED. REG. 9248 (Feb. 19, 1993)

[3] See USEPA, *Biosolids Generation, Use and Disposal in the United States* (1999); Cecil Lue-Hing et al., eds., 4 MUNICIPAL SEWAGE SLUDGE MANAGEMENT (1992).

[4] See, *e.g.*, United States Environmental Protection Agency, *Biosolids Recycling: Beneficial Technology for a Better Environment* (1994).

[5] See National Research Council of National Academy of Sciences, *Use of Reclaimed Water and Sludge in Food Crop Production* 13 (1996).

[6] NRC, *Biosolids Applied to Land: Advancing Standards and Practices* 3, 4 (July 2002).

[7] NRC, *Biosolids Applied to Land* 12.

[8] VA. CODE § 62.1-44.19:3(C).

[9] *Blanton v. Amelia County*, 540 S.E.2d 869 (Va. 2001).

[10] *Blanton*, 540 S.E.2d at 874.

[11] *Id.*

[12] VA. CODE § 62.1-44.19:3(C).

[13] *See, e.g.*, *Wise County Bd. of Supervisors v. Wilson*, 463 S.E.2d 650, 652 (Va. 1995) (where a statute enumerated the specific responsibilities of revenue commissioners, the omission of an additional duty implies that the General Assembly did not intend to confer such additional authority); *Turner v. Wexler*, 418 S.E.2d 886, 887 (Va. 1992) ("mention of a specific item in a statute implies that omitted items were not intended to be included within the scope of the statute").

[14] *See, e.g.*, *Bd. of Supervisors of Fairfax County v. Horne*, 215 S.E.2d 453, 455 (Va. 1975) ("the powers of boards of supervisors are fixed by statute and are limited to those conferred expressly or by necessary implication."); *City of Richmond v. Confrere Club of Richmond*, 387 S.E.2d 471, 473 (Va. 1990) ("If there is any reasonable doubt whether [local] legislative power exists, that doubt must be resolved against the local governing body."); *see also Franklin County v. Fieldale Farms Corp.*, 507 S.E.2d 460, 464 (Ga. 1998) (holding that "[b]y explicitly granting this narrow power to local governments [to monitor biosolids land application sites and assets reasonable monitoring fees], the statute by implication precludes counties from exercising broader powers," including concurrent jurisdiction to regulate through a permit system).

[15] Op. Va. Att'y Gen. 01-085, 2002 WL 1046581 (Mar. 29, 2002).

[16] *Id.*

[17] *Id.*

[18] Op. Va. Att'y Gen. 99-116, 1999 WL 631116, at *2 (June 2, 1999).

[19] Virginia's preemption of local biosolids regulation is consistent with case law from other jurisdictions. *See, e.g.*, *Soaring Vista Props., Inc. v. Bd. of County Comm'rs.*, 741 A.2d 1112-13 (Md. 1999) (state preempted the field of sewage sludge utilization); *Franklin County*, 507 S.E. at 464 (Georgia statute regulating the application of sludge to land preempted a county land disposal ordinance establishing a duplicate permit system); *Talbot County v. Skipper*, 620 A.2d 880, 885-86 (Md. 1993) (comprehensive state scheme preempted county ordinance requiring land owner to record information in county land records); *accord Craig v. County of Chatham*, 565 S.E.2d 172 (N.C. 2002) (state created a complete and integrated system for swine farm regulation, thereby preempting county regulation of swine farms, including zoning ordinance); *Azurix N. Am. Residuals Mgmt., Inc. v. Desoto County*, No. 2-01-cv-428-FTM-29DNB, at 12 (M.D. Fla. Sept. 7, 2001) (granting preliminary injunction against county biosolids ordinance based on likely preemption under state law) (unreported decision).

[20] *O'Brien v. Appomattox County*, 213 F.Supp.2d 627 (W.D.Va. 2002) (Moon, J.).

[21] *Synagro-WWT, Inc. v. Louisa County*, 2001 WL 868638 (W.D. Va. July 17, 2001) (Michael, J.).