

# Protecting Beneficial Use: Biosolids Law Update

BioFest 2017: Biosolids Beyond a Movement

**Jimmy Slaughter**  
**Beveridge & Diamond, P.C.**

October 15, 2017



**NORTHWEST  
BIOSOLIDS**

# Legal Highlights Around the Country

- *City of Los Angeles v. Kern Co.* – After two week trial, judge rejects biosolids ban, finds land application safe
- *Washington State v. Wahkiakum Co.* – Local class B ban overturned
- *Gilbert v. Synagro* – Pennsylvania Supreme Court rules biosolids are a normal ag practice
- *Abrahamsen v. Synagro*: New claim in Pennsylvania seeking damages regarding alleged odors from biosolids

# City of Los Angeles v. Kern County



# *LA v. Kern: The Road to Trial*

- Measure E voter initiative banning all biosolids in Kern County passed 2006
- Agencies, farmers and biosolids managers sued Kern County to overturn Measure E
- Measure E never went into effect; preliminary and permanent injunctions while case motions decided and appealed

# Plaintiffs Coalition



plus

Responsible Biosolids Management, Inc.

R&G Fanucchi Farms

Sierra Trucking

Shaen Magan

# Biosolids Ban On Trial 2016

- Two week trial May 2016 in Tulare County, California Superior Court
- Four claims against Measure E:
  - Preemption of biosolids ban by IWMA
  - Ban exceeds limits on county police powers
  - Ban interferes with federal commerce
  - Ban interferes with state commerce

# Proving Biosolids Safety at Trial

- Eight days of evidence on biosolids safety from eight experts and twelve fact witnesses
- Kern County defense focused on trace perfluorinated compounds (PFCs) in groundwater
- Plaintiffs focused on no impacts after 22 years of land application

# Experts for Kern

Chris Higgins



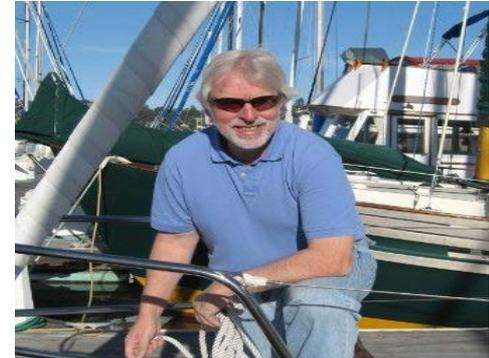
Gwynn Johnson



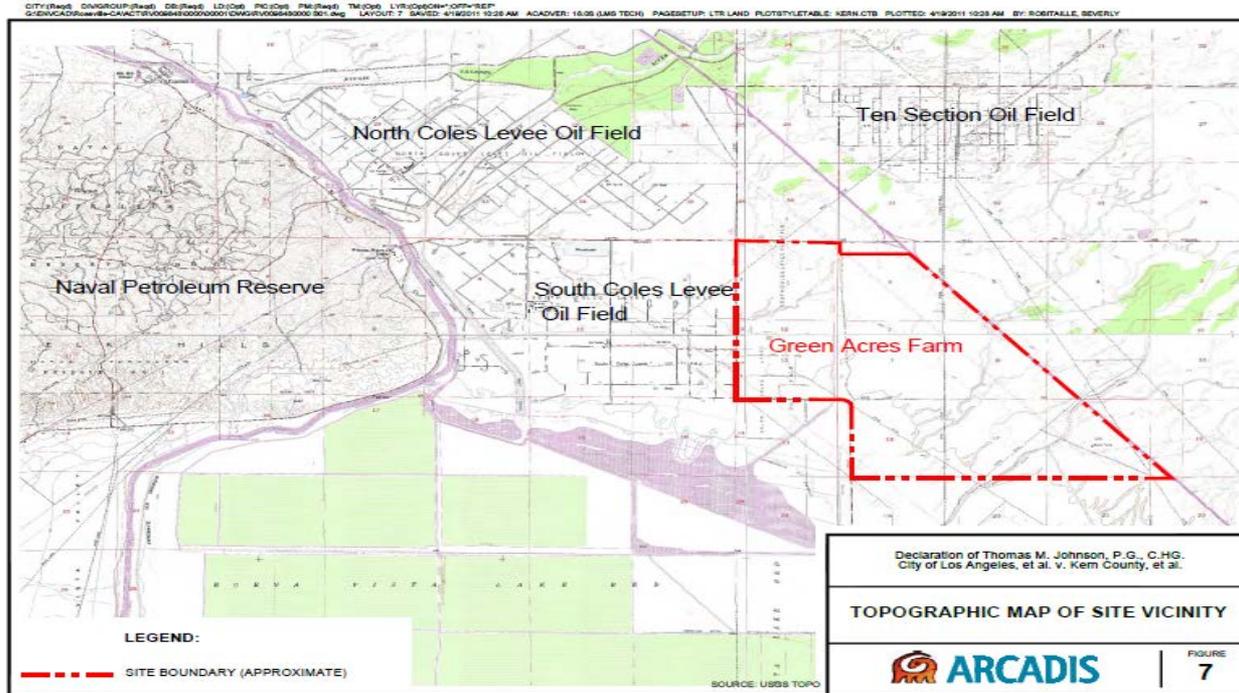
# Experts for Kern County

- Kern focused on trace organic compounds in soil and groundwater (PFCs) at ppb level, potential risks
- Chris Higgins (Colorado School of Mines)
- Gwynn Johnson (Portland State)
- Gary Hokkanen (hydrogeologist)

# Key Witnesses for Plaintiffs



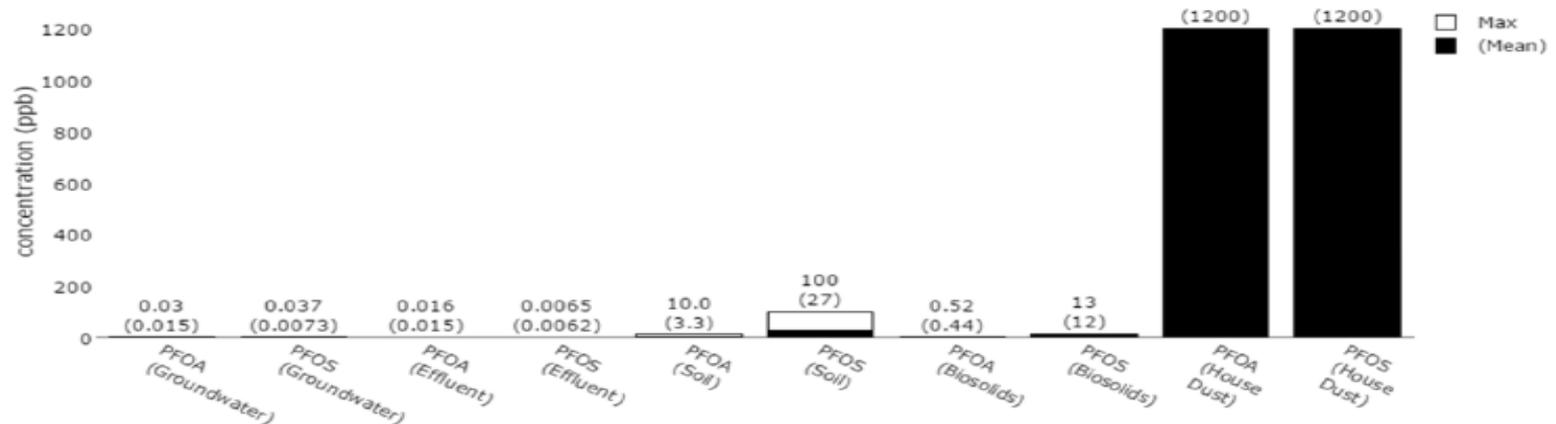
# Oil Fields Surround Farm





# Trace Contaminants in Soil and Groundwater

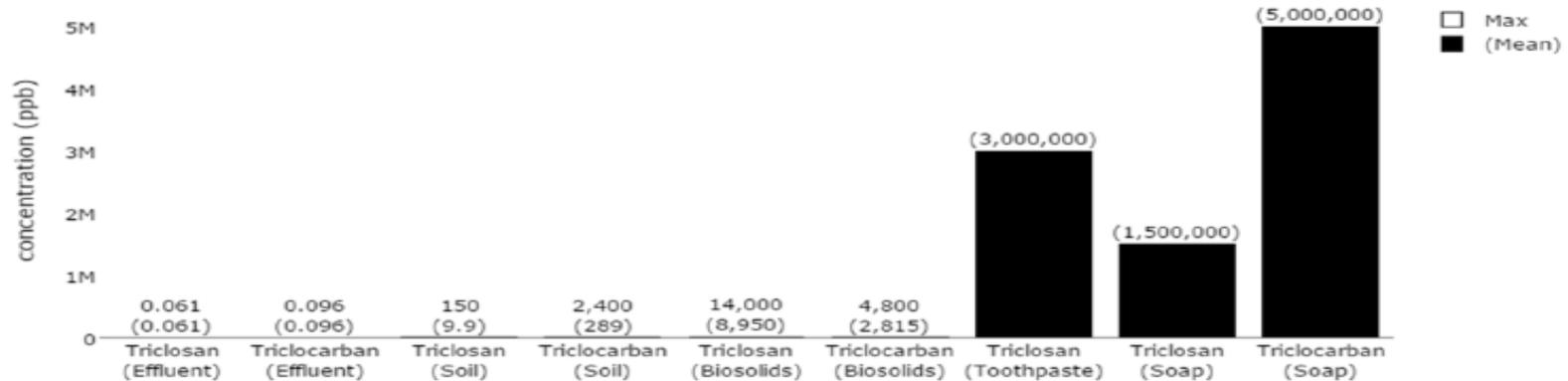
PFOA and PFOS in effluent, soil, and biosolids measured at Green Acres Farm, 2015, compared with PFOA and PFOS concentrations in household dust\*



\*Household dust measurements from Trudel et al. *Risk Analysis*, Vol. 28, No. 2, 2008

# LA v. Kern: Antimicrobial Data

Antimicrobials in effluent, soil, and biosolids measured at Green Acres Farm, 2015, compared with typical household products



Triclosan: toothpaste – Colgate 2016 (<http://www.colgatetotal.com/health-benefits/colgate-total-triclosan>);  
Triclosan: soap – FDA, 2015 (<http://www.fda.gov/ForConsumers/ConsumerUpdates/ucm205999.htm>)  
Triclocarban: soap – OEHA 2010 (<http://oehha.ca.gov/multimedia/biomon/pdf/052410Triclocarban.pdf>)

# Judge Strikes Down Measure E November 2016

- Measure E conflicts with Integrated Waste Management Act's mandate for recycling
- Measure E exceeds Kern County's police power because of impacts on neighbors, lack of benefits
- Court of Appeal reached same conclusions in 2013 when it upheld preliminary injunction

# Opinion Stresses Safety of Land Application

- “There is no basis in fact for any determination that land application of biosolids poses any risk to Kern County”
- “Los Angeles has met its burden of producing evidence that there is no basis in fact for Measure E’s public welfare claims”
- “There is no evidence of risk to human health”

# No Reasonable Basis for Biosolids Ban

- “No real and substantial relationship” between a ban and the public welfare
- Measure E does not accommodate regional interests in cost-efficient management of biosolids
- No countervailing environmental or public health interests served by the ban

# State Recycling Law Preempts Measure E

- State law requires local governments to “promote” and “maximize” recycling
- “Banning a commonly used and cost-efficient means of recycling and re-use is destructive of the state’s policies and requirements”
- Composting not an alternative to land application because compost must be land applied

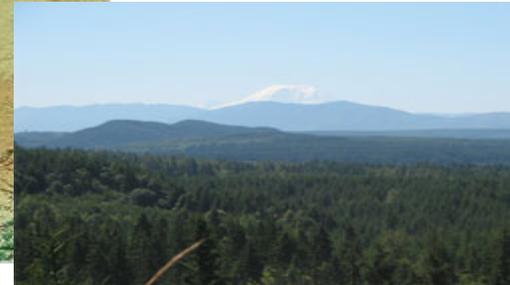
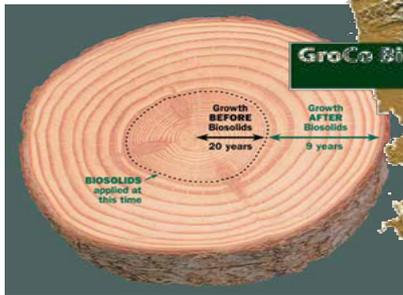
# Talking Points for LA v. Kern Trial

- First trial on the safety of land application resulted in a decisive finding for benefits and lack of risk
- Kern County spent millions of dollars on sampling, experts, and one of country's largest law firms
- Trial court and appellate opinions should convince localities that future bans or regulations close to bans will fail, at great expense to enacting jurisdiction

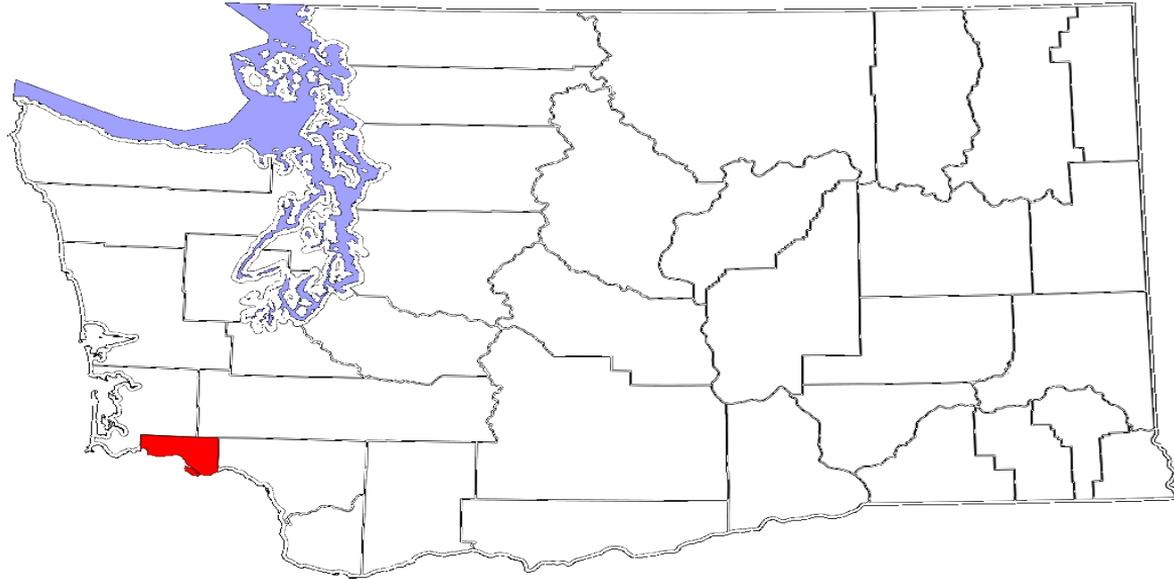
# Take-Aways from *LA v. Kern* Trial for Biosolids Communications

- Trace contaminants unregulated by Part 503 will continue to be an issue -- PFCs
- “Compost” deemed better than biosolids
- Explain risk in real world terms, not just measuring against ultra-protective guidance
- Biosolids win in court and we are prepared to litigate

# A Win in Washington for Land Application



# *Washington Department of Ecology v. Wahkiakum County*

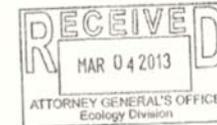


# *Washington Department of Ecology v. Wahkiakum County*

- Wahkiakum County enacted ordinance in April 2011 banning land application of Class B biosolids within the county
- Washington Dept. of Ecology challenged the ordinance as unconstitutional because it conflicted with state laws and program for Class B biosolids

# Washington Department of Ecology v. Wahkiakum County

- In February 2013, the trial court ruled that a ban only on Class B was not a sufficient conflict with state law to trigger preemption
- Ecology appealed to the WA Court of Appeals; Northwest Biosolids joins case with farm partners
- Natural Selection Farms, Boulder Park, WA Ass'n Sewer and Water Districts join lawsuit



FILED  
SUPERIOR COURT  
2013 FEB 22 P 3:21  
COWLITZ COUNTY  
BEVERLY R. LITTLE, CLERK  
BY W

IN THE SUPERIOR COURT FOR THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF COWLITZ

STATE OF WASHINGTON, DEPARTMENT OF ECOLOGY,	)	NO. 11-2-00554-3
	)	
Plaintiffs,	)	FINDINGS OF FACT AND
	)	CONCLUSIONS OF LAW
vs.	)	
WAHKLAKUM COUNTY, a political subdivision of the State of Washington,	)	
	)	
Defendant.	)	

On September 30, 2011, this matter came regularly before the court on the motion of Department of Ecology (the Department) for summary judgment and the cross-motion of defendant Wahkiakum County (the County) for summary judgment. At that time, the court heard arguments of counsel for each party and considered the agreed record, which consisted of the Declaration of Daniel Thompson dated August 4, 2011, with its attached Exhibits 1-2; and the Declaration of Lee Overton dated August 10, 2011, with its attached Exhibits 1-3.

This court determined that a material issue of fact existed as to whether the ordinance complained of constitutes a "ban:" regulation sufficient to thwart the state's statutory scheme. Therefore it denied summary judgment and invited additions to the record. The parties then stipulated to clerk's numbers 19-28; the Department also filed additional argument on September 14, 2012; and the defendant County responded on October 12, 2012.

Additional argument from each party was heard on October 12, 2012.

# Court of Appeals Strikes Down Wahkiakum Ban November 2014

- “Land application of biosolids is a widely used, widely accepted, comprehensively regulated method by which municipalities fulfill their obligation to reduce the flow of waste to landfills.”
- “Farmers have come to rely on the well-established and uniform state regulation of land application of biosolids for planning and investment.”

FILED  
COURT OF APPEALS  
DIVISION II

2014 NOV -4 AM 10:02

STATE OF WASHINGTON

BY DEB

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

## DIVISION II

STATE OF WASHINGTON, DEPARTMENT  
OF ECOLOGY,

No. 44700-2-II

Appellant,

v.

WAHKIAKUM COUNTY, a political  
subdivision of Washington State,

PUBLISHED OPINION

Respondent.

LEE, J. — The Washington State Legislature has charged the Department of Ecology (Ecology) with executing the state’s biosolids program to facilitate and encourage recycling, rather than disposal, of sewage waste. In 2011, Wahkiakum County passed an ordinance banning the use of the most common class of biosolids within the County. Ecology filed an action for an injunction and declaratory judgment arguing that the County’s ordinance conflicts with state law, and, thus, is unconstitutional under article XI, § 11 of the Washington Constitution which prohibits local government from enacting ordinances that is “in conflict with general laws.” The superior court granted the County’s cross-motion for summary judgment declaring the ordinance constitutional. Ecology appeals.

We hold that the County’s ordinance is unconstitutional because it irreconcilably conflicts with state law. Accordingly, we reverse the superior court’s order granting summary judgment in favor of the County and remand for entry of summary judgment in favor of Ecology.

# Preemption of Local Biosolids Bans Is the Law in Many States

- Pennsylvania: *Liverpool Twp. v. Stephens*, 900 A.2d 1030 (Pa. Cmwlth. 2006)
- Virginia: *O'Brien v. Appomattox County*, 213 F. Supp. 2d 627 (W.D. Va. 2002)
- North Carolina: *Granville Farms*, 170 N.C. App. 109 (2005)
- Also California, Maryland, New York State

# *Gilbert v. Synagro*

**SYNAGRO**



# *Gilbert*: Right to Farm Act

- Fight over whether Right to Farm Act protects biosolids
  - Whether application of biosolids constitutes a “normal agricultural operation”?
  - One year to bring suit measured from date farm nuisance began or date the farm began?



# Farm with Plaintiffs on Perimeter



# Gilbert Key Rulings Unanimous Opinion Dec. 2015

- Biosolids are a normal agricultural operation:
  - Prevalence of use
  - Recognized in state law
  - State government supports

[J-32-2015]  
IN THE SUPREME COURT OF PENNSYLVANIA  
MIDDLE DISTRICT



SAYLOR, C.J., EAKIN, BAER, TODD, STEVENS, JJ.

RALPH GILBERT, GLORIA GILBERT, MICHELLE TORGERSON, EDWIN TORGERSON, MELDA BITTORF, BEVERLY COX, WILLIAM COX, KIMBERLY MILES, CLEA FOCKLER, JOHN FOCKLER, LINDA ECKERT, SCOTT ECKERT, WILLIAM STRINE, KENNY JASINSKI, DENNIS JASINSKI, KATHRYN JASINSKI, JOSEPH JASINSKI, PATRICIA UNVERZAGT, MEGAN JACOBS, BARBARA UNVERZAGT, DONNA PARR, JEFF FODEL, WENDY FODEL, JENNIFER JASINSKI, JOHN JASINSKI, JUDY QUEITZSCH, JEAN FRY, RICK MCSHERRY, JOHN FREESE, DONNA LYNN FREESE, JEFF VAN VOORHIS, SUSAN LEE FOX, TERRENCE FANCHER AND DONNA FANCHER,

Appellees

v.

SYNAGRO CENTRAL, LLC, SYNAGRO MID-ATLANTIC, GEORGE PHILLIPS, HILLTOP FARMS AND STEVE TROYER,

Appellants

OPINION

MR. JUSTICE EAKIN

DECIDED: December 21, 2015

# Right to Farm Law in Oregon

- ORS § 30.936 – “No farming or forest practice on lands zoned for farm or forest use shall give rise to any private right of action or claim for relief based on nuisance or trespass.”
- ORS § 30.937 – “No farming or forest practice allowed as a preexisting nonconforming use shall give rise to any private right of action or claim for relief based on nuisance or trespass.”

# Right to Farm Law in Washington

- RCW § 7.48.305 – “Agricultural activities conducted on farmland and forest practices, if consistent with good agricultural and forest practices and established prior to surrounding nonagricultural and non-forestry activities, are presumed to be reasonable and shall not be found to constitute a nuisance unless the activity or practice has a substantial adverse effect on public health and safety.”

# *More Gilbert Rulings*

- Judge, not a jury, determines applicability of Right to Farm Act
- Right to farm protection is dynamic as farm changes
- Lower appellate court ruling that odors don't constitute negligence stands
- Should influence other states/deter nuisance suits

# Abrahamsen v. Synagro

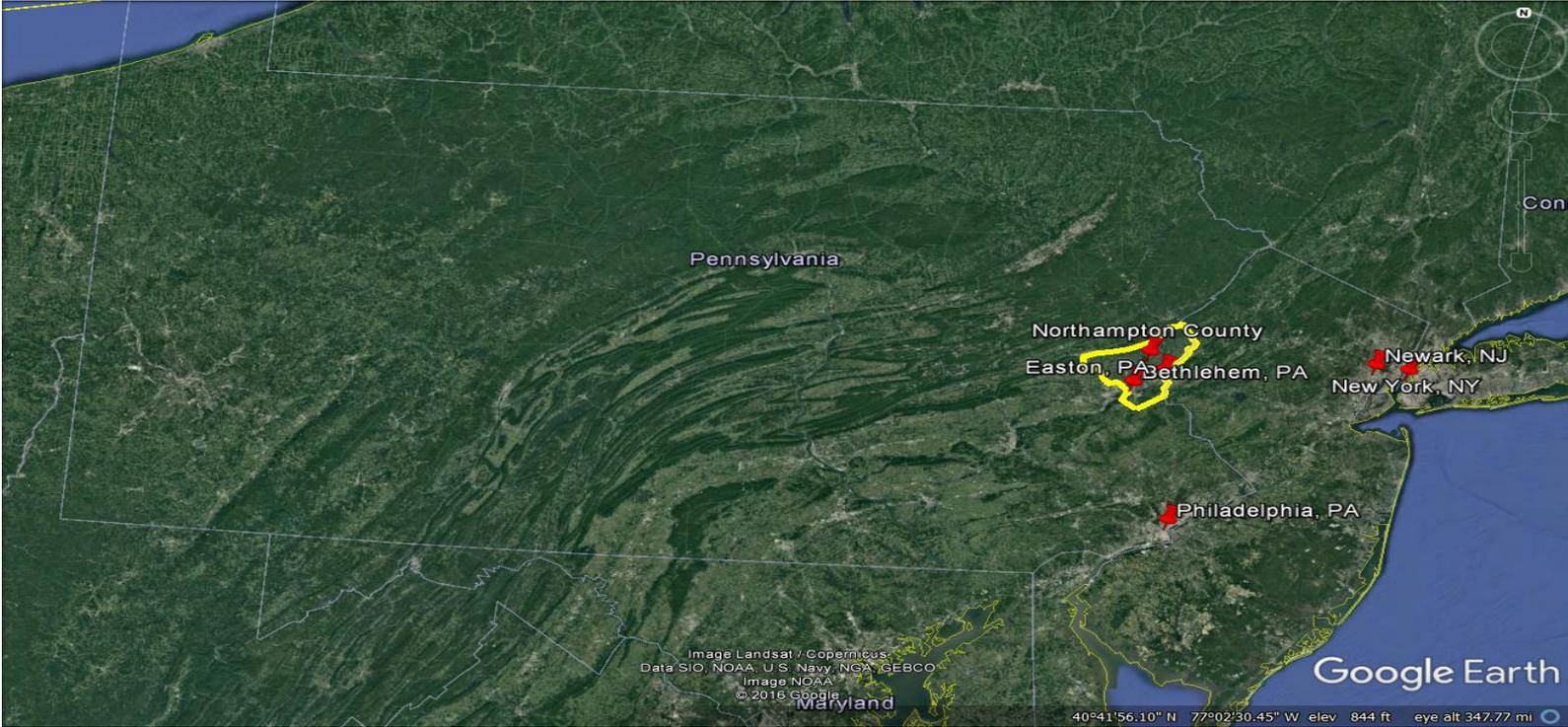
SYNAGRO



# New Tort Case: *Abrahamsen v. Synagro*

- 97 Plaintiffs surrounding three farms in northeast Pennsylvania
- Allegations of nuisance, products liability, exposure to Class A biosolids made them sick
- Organized by lawyers who lost *Gilbert* case

# Northampton County, PA



# Class A Philadelphia Pellets Near Homes



# Aggressive Tort Litigation Targets All Land Application

- All biosolids attacked as dangerous, toxic waste
- Neighbors of land application sites with no farm experience inflamed with outrageous allegations
- Farmers and contractors targeted, not generators
- Synagro vigorously defending lawsuit

I HEREBY CERTIFY THAT THE WITHIN IS A TRUE AND CORRECT COPY OF THE ORIGINAL FILED IN THIS ACTION. BY: *[Signature]*

LAW OFFICES OF JOHN E. KOTSATOS, PLLC  
 By: John E. Kotsatos, Esquire  
 PA ID No.: 92807  
 717 Washington St.  
 Easton, PA 18042  
 Telephone: (484)-403-6214  
 Email: jk@lawjek.com

COUNSEL FOR PLAINTIFFS

**IN THE COURT OF COMMON PLEAS OF NORTHAMPTON COUNTY, PA  
 CIVIL DIVISION – LAW**

Allen Abrahamson  
 23 Red Fox Lane  
 Mount Bethel, PA 18343

And

Craig A. Anderson  
 1224 Sunrise Blvd.  
 Mount Bethel, PA 18343

And

Lauri L. Anderson  
 1224 Sunrise Blvd.  
 Mount Bethel, PA 18343

And

Samuel Anderson  
 1224 Sunrise Blvd.  
 Mount Bethel, PA 18343

And

Kathryn Anderson  
 1408 Price Lane  
 Mount Bethel, PA 18343

And

Denise L. Ballentine  
 66 Summerfield Dr.  
 Mount Bethel, PA 18343

COMPLAINT

DOCKET No.: *CL8CV00108-0025*

JURY TRIAL DEMANDED

**FILED**  
 2018 OCT -3 P 1:58  
 COURT OF COMMON PLEAS  
 CIVIL DIVISION  
 NORTHAMPTON COUNTY, PA

# Current Odor Science

- Odor typically will not cause sickness
- Individuals will mistakenly link odor to sickness
- Individuals will overestimate duration and intensity of odors
- Need more data on odors at land application sites – duration and intensity

# Toxic Tort Suits – To Date

- Other toxic tort suits In New Hampshire, Virginia and Tennessee have yielded little for plaintiffs
- No case to date has linked biosolids to human health problems through a court-approved expert report, court finding, or jury verdict
- EPA: Denied petition to ban land application in detailed December 2003 decision
- Two National Academy of Sciences reports supporting land application (1996 and 2004)
- California 2004 Environmental Impact Review

# Tort Suits: Lessons Learned



- Odors are the focus, spur illness claims
- Data on odor levels are invaluable
- The more regulator visits, the better

# Virginia Biosolids Rules Upheld

- *Kelbe (Potomac Riverkeeper) v. Virginia State Water Control Board*, 2016 WL 7491575 (Dec. 2016, Richmond, Va. Cir. Ct.)
- Rejected allegations that rules were not protective against run-off from land application sites and that land application could endanger groundwater in areas with karst topography
- Court quoted Expert Panel that “concluded that land application is a viable reuse of biosolids that has been shown to be protective of the environment”

# JLARC Biosolids Report

Commonwealth of Virginia  
October 10, 2017

- October 10, 2017
- Favorable review of land application of biosolids and residuals in Virginia
- Attributes “low risk” for individuals down wind from land application
- Calls for further research

Report to the Governor and the General Assembly of Virginia

## Land Application of Biosolids and Industrial Residuals

2017



**COMMISSION DRAFT**

**JLARC**  
JOINT LEGISLATIVE AUDIT  
AND REVIEW COMMISSION

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