

IN THE SUPREME COURT OF PENNSYLVANIA

---

NO. 121 MAP 2014

---

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

---

**BRIEF FOR *AMICI CURIAE***  
**PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION,**  
**ALLEGHANY COUNTY SANITARY AUTHORITY, AND**  
**NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES**

---

*Appeal from the Order of the Superior Court of Pennsylvania  
dated April 15, 2014, at No. 119 MDA 2013; reversing the Order of the Common  
Pleas of York County, Civil Division dated December 28, 2012, at No. 2008-SU-  
003249-01)*

---

Steven A. Hann, Esquire  
Identification No. 55901  
Hamburg, Rubin, Mullin, Maxwell  
& Lupin P.C.  
Attorney for *Amicus Curiae*  
Pennsylvania Municipal Authorities  
Association & National Association  
of Clean Water Agencies  
375 Morris Road  
P.O. Box 1479  
Lansdale, Pennsylvania 19446  
Ph: (215) 661-0400  
Fax: (215) 661-0315

Nathan Gardner-Andrews, Esquire  
National Association of Clean Water  
Agencies  
Of Counsel  
1816 Jefferson Place, NW  
Washington, DC 20036-2505  
Ph: (202) 833-3692

Chester R. Babst III, Esquire  
Identification No. 17232  
Babst, Calland, Clements and Zomnir, P.C.  
Attorney for *Amicus Curiae*  
Allegheny County Sanitary Authority  
Two Gateway Center  
Pittsburgh, PA 15222  
Ph: (412) 394-5400  
Fax: (412) 394-6576

**TABLE OF CONTENTS**

**TABLE OF CITATIONS ..... i**

**STATEMENT OF *AMICI CURIAE* INTEREST ..... 1**

**I. PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION..... 1**

**II. ALLEGHENY COUNTY SANITARY AUTHORITY ..... 3**

**III. NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES..... 6**

**QUESTION PRESENTED FOR REVIEW ..... 8**

**STATEMENT OF THE CASE ..... 9**

**SUMMARY OF ARGUMENT ..... 10**

**ARGUMENT ..... 13**

**I. THE AGRICULTURAL USE OF BIOSOLIDS IS AN APPROVED AND HIGHLY  
REGULATED ACTIVITY WHICH IS BOTH ENVIRONMENTALLY BENEFICIAL  
AND PROTECTIVE OF HUMAN HEALTH. .... 13**

**A. The Processing of Sewage Sludge to Create Biosolids for Agricultural Use is  
Environmentally and Economically Sound. .... 13**

**B. Biosolids Recycling on Agricultural Land is Comprehensively Regulated by  
EPA and DEP to Ensure Protection of Public Health and the Environment..... 14**

**II. APPLICATION OF BIOSOLIDS TO FARMLAND IN CONFORMANCE WITH  
STATE AND FEDERAL REGULATORY REQUIREMENTS IS A NORMAL  
AGRICULTURAL OPERATION. .... 18**

**III. ALLOWING JURIES TO DECIDE WHETHER THE USE OF LAWFUL APPLICATION OF BIOSOLIDS TO FARMLAND IS A “NORMAL AGRICULTURAL OPERATION” ON A CASE-BY-CASE BASIS WILL MAKE THE UTILIZATION OF BIOSOLIDS IMPRACTICABLE ..... 21**

**IV. DECIDING WHETHER THE APPLICATION OF BIOSOLIDS TO FARMLAND IN CONFORMITY WITH STATE AND FEDERAL REGULATORY REQUIREMENTS SATISFIES THE DEFINITION OF A “NORMAL AGRICULTURAL OPERATION” IS A QUESTION OF LAW FOR THE COURT TO DECIDE ..... 24**

**CONCLUSION ..... 28**

## TABLE OF CITATIONS

### **Cases**

<i>Commonwealth v. McKetta</i> , 364 A.2d 1350 (Pa. 1976).....	26, 28, 29
<i>Gilbert v. Synagro Central, LLC</i> , 2012 Pa. Dist. & Cnty. Dec. LEXIS 323 (York C.C.P. Dec. 31, 2012) .....	2, 21, 22
<i>Gilbert v. Synagro Central, LLC</i> , 2014 Pa. Super. 77 .....	2
<i>Lindstrom v. City of Corry</i> , 763 A.2d 394 (Pa. 2000).....	25
<i>McConnaughey v. Building Components Inc.</i> 637 A.2d 1331 (Pa. 1994) .....	26, 27
<i>Snead v. SPCA</i> , 985 A.2d 909 (Pa. 2009) .....	26

### **Statutes**

3 P.S. § 951 .....	2
3 P.S. § 952 .....	21
42 Pa.C.S. § 5536 .....	27

### **Other Authorities**

25 Pa. Code § 271.914 .....	17
25 Pa. Code § 271.915 .....	18
25 Pa. Code § 271.917-920 .....	17
25 Pa. Code § 271.932 .....	17
25 Pa. Code § 271.933 .....	17
40 C.F.R. Part 503 .....	15

### **Regulations**

58 FED. REG 9251 (February 19, 1993).....	15
---	----

## STATEMENT OF *AMICI CURIAE* INTEREST

### **I. PENNSYLVANIA MUNICIPAL AUTHORITIES ASSOCIATION**

*Amicus Curiae* Pennsylvania Municipal Authorities Association (“PMAA”) is an association that represents approximately 720 sewer and water authorities in Pennsylvania, which collectively provide water and sewer infrastructure services to over 6 million Pennsylvania citizens. <http://www.municipalauthorities.org/> Founded in 1941, the mission of PMAA is to assist authorities in providing services that protect and enhance the environment, promote economic vitality, and further the general welfare of the Commonwealth and its citizens.

PMAA’s members provide drinking water, sewage treatment, including biosolids recycling, waste management and recreational and community projects valued at billions of dollars to Pennsylvania citizens. In addition to active institutional members, PMAA has 500 associate members, such as CPAs, engineers and solicitors, who provide services to municipal authorities.

PMAA, due to its nature, mission and membership, is in a unique position to offer this Court credible and unbiased analysis of the possible state-wide impact to municipal authorities from the Superior Court’s narrow interpretation of the Pennsylvania Right to Farm Act, 3 P.S. §§ 951-957 (“RTFA” or the “Act”). PMAA wishes to participate as an *Amicus Curiae* in this case because of important, state-wide issues of whether recycling biosolids to farmland in

compliance with all applicable state and federal regulations may subject persons to liability irrespective of the applicable provisions of the RTFA, 3 P.S. § 951 *et seq.* The Honorable Maria Musti Cook of the Court of Common Pleas of York County in the opinion reported in *Gilbert v. Synagro Central, LLC*, 2012 Pa. Dist. & Cnty. Dec. LEXIS 323 (York C.C.P. Dec. 31, 2012) analyzed these issues and found that land application of biosolids to farmland is a normal agricultural operation as a matter of law, particularly in light of the expansive definition of that term provided in the RTFA. The Superior Court disagreed and held that there is a genuine issue of material fact as to whether the land application of biosolids is a “normal agricultural operation.” *Gilbert v. Synagro Central, LLC*, 90 A.3d 37, 2014 Pa. Super. 77 at p. 28 (2014), *appeal granted*, 101 A.3d 1114 (Pa. 2014)

Affirmance of the Superior Court’s decision will adversely affect biosolids recycling practices by PMAA’s members. Furthermore, PMAA’s members have a strong financial interest in the outcome of this case due to their substantial capital investment and operating costs incurred in connection with biosolids recycling, which would be harmed by a decision in favor of Appellees. PMAA’s interest in this litigation is more than financial. First, land application of biosolids is critical for achieving recycling and sustainability goals for members. Second, the operation of a biosolids processing and recycling operation is complex. To allow expansive tort liability in addition to the existing state and federal regulation would serve to

disrupt operations, add to the burden of operators and administrators and make more complicated one of the most technically complex operations carried out by PMAA's members.

For these reasons, the outcome of this case is important to PMAA and its members' direct experience generating and recycling biosolids on Pennsylvania farms will be useful to the Court. As a result, PMAA submits this *Amicus Curiae* Brief in support of Appellants pursuant to Pa. R. App. P. 531.

## **II. ALLEGHENY COUNTY SANITARY AUTHORITY**

*Amicus Curiae* Allegheny County Sanitary Authority ("ALCOSAN") is a member of PMAA and is the largest publicly-owned treatment works in the western region of Pennsylvania. <http://www.alcosan.org/> Formed in 1946, ALCOSAN covers a service territory of approximately 300 square miles in Allegheny County and the surrounding counties, providing service to 83 customer municipalities (including Pittsburgh) with nearly 315,000 industrial, commercial and residential accounts (roughly 900,000 individuals). ALCOSAN owns and operates a treatment plant with a flow-treatment capacity of 250 million gallons per day ("MGD"), and handles an average daily flow of 180 to 210 MGD. Under a consent decree entered into with the U.S. Environmental Protection Agency ("EPA") in 2007, there is a potential that the plant capacity may be increased



substantially to 400 MGD. ALCOSAN has typically generated about 150,000 wet tons of sludge each year, and along with the anticipated plant expansion, it expects an increase in the production of biosolids. As a major producer of biosolids in the region, ALCOSAN is pleased to share with this Honorable Court its experience and success with recycling biosolids to farmland and its support for reversal of the Superior Court decision and reinstatement of the trial court judgment dismissing the tort claims against the defendant/appellant farmers and their contractor.

ALCOSAN's treatment plant must have multiple options for sewage sludge management. To maintain cost-effective rates and reliable service for its ratepayers, ALCOSAN needs to be able to incinerate, landfill or land-apply all of its daily-produced sewage sludge as necessary, and land-application of biosolids to farmland covers a significant portion of that need. ALCOSAN has beneficially used its biosolids product since 1991 in response to growing encouragement from EPA to supplement the traditional practices of landfill disposal and incineration by reusing the valuable soil-amending nutrients in sewage sludge in a manner that protects the public. The diminishing availability of landfills also encouraged recycling, rather than disposing, of biosolids. Beneficial use of biosolids achieves several laudable objectives in a single stroke: it reduces the amount of waste disposal, thereby lessening the impacts on the environment, provides low-cost beneficial nutrients to farms and reclamation sites, improves soil quality with a

bulk organic material, sequesters carbon to the soil and avoids the greenhouse gas emissions attendant to incineration, and helps maintain affordable rates for ratepayers. By reducing the need for landfill disposal, land-application of biosolids also eases the upward pressure on costs for landfill disposal.

Unfortunately, although ALCOSAN in 1994 supplied 96,000 wet tons of biosolids (over 60% of its annual average production) for beneficial use on farms and former mine sites, lack of public understanding and threats of local bans have resulted in a decline of beneficial use to just over 12,000 wet tons in 2011, which represents under 10% of the annual average production. Despite this decline in opportunity, beneficial use of biosolids has become more cost-effective, with unit cost falling from \$58 per ton in 1991 to roughly \$35 per ton in 2014.

ALCOSAN's experience shows that unfavorable legal or regulatory developments regarding beneficial use of biosolids dampen the practice. Accordingly, it is critical that this Court affirm the balanced approach to liability reflected in the trial court's opinion and the RTFA, which provides a one-year window for tort claims against farm operations before the statute of repose bars litigation. Judges, not juries, should decide the legal question of whether a well-established farm practice like land application meets the definition of a normal agricultural operation under the Act. Land-application of biosolids benefits the environment, the public, and ratepayers. ALCOSAN respectfully requests that the

Honorable Court preserve the viability of this important option by reversing the Superior Court.

### **III. NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES**

*Amicus Curiae* the National Association of Clean Water Agencies (“NACWA”) is a trade association representing the interests of nearly 300 of the nation’s publicly owned treatment works (“POTWs”). *See* <http://www.nacwa.org/>. NACWA’s membership includes 6 Pennsylvania public wastewater utilities, including ALCOSAN. NACWA member agencies serve the majority of the sewered population in the United States and, together, treat and reclaim more than 18 billion gallons of wastewater each day.

Ensuring safe and environmentally appropriate management of biosolids is a key component of the environmental mandate of NACWA’s members. NACWA is committed to preserving the ability of municipalities to choose the method of biosolids management which works best for them, including the use of land application to manage biosolids and recycle nutrients to the land. Many NACWA members, including some of America’s largest cities, such as Philadelphia, Pittsburgh, Chicago, Los Angeles, San Francisco, Denver, Pittsburgh, Washington and Charlotte, use land application as the primary method of biosolids management. This case is the first time any state supreme court has examined

whether land application of biosolids is protected under right to farm laws, and the decision in this case could have significant impacts nationally on how other courts elsewhere in the country examine this issue. NACWA has an interest in this case to provide the Court with a national perspective on the importance of land application of biosolids to clean water utilities.

In NACWA's experience, tort lawsuits against farming with biosolids can discourage even the best-run biosolids programs. The trial court's interpretation of the RTFA strikes a fair balance, allowing tort claims for one year, then applying as a matter of law the sweeping definition of normal agricultural operations in the Act to protect the well-established practice of land application of biosolids.

## **QUESTION PRESENTED FOR REVIEW**

Did the Superior Court incorrectly interpret the Pennsylvania Right to Farm Act (“RTFA”) by requiring a jury trial to determine that the land application of biosolids falls within the Act’s definition of a “normal agricultural operation,” which was contrary to the Act and this Court’s precedent that statutes of repose and statutory interpretation present questions of law for resolution by courts, not juries?

## **STATEMENT OF THE CASE**

PMAA, ALCOSAN, and NACWA adopt and incorporate by reference the Statement of the Case as set forth by Appellants in their brief.

## SUMMARY OF ARGUMENT

The Superior Court incorrectly interpreted the RTFA to require juries to determine whether the application of biosolids to farmland constitutes a “normal agricultural operation” on a case-by-case basis. The Superior Court’s decision creates uncertainty in the law, undermines the purpose of the RTFA, and ultimately jeopardizes the continued use of biosolids as a viable farming practice. The three amici herein urge this Court to apply the plain meaning of the RTFA’s broad definition of “normal agricultural operations” and find as a matter of law that farming with biosolids is protected by the Act’s statute of repose.

Farming with biosolids is indisputably an agricultural pursuit that has been practiced in its modern form since the 1970s, when federal and state regulations were promulgated to govern biosolids quality, how it is applied, and limits on volumes. Fertilizing crops and conditioning soils with biosolids is a widely accepted practice in the farming community and has received support of agricultural scientists and environmental regulators in Pennsylvania and throughout the United States. The beneficial reuse of sewage sludge is not “waste disposal,” but is, instead, an important part of modern farming. Hundreds of Pennsylvania farms fertilize crops and improve soil quality through biosolids, which is a local product available at low or no cost to farmers. In fact, more farmers want biosolids than is available. The quality of the product, the means

through which it is recycled, the areas where recycling may occur and the time and rate of application of the product are extensively regulated by the Pennsylvania Department of Environmental Protection (“DEP”) and the EPA.

Since the application of biosolids to crop fields is regulated and is limited to the nutrient needs of the crop being grown, the timing and amounts of biosolids application varies from field to field, season to season and year to year. This annual variation in biosolids application, much like fertilizer, is normal. Allowing juries to determine what is normal on a case-by-case basis, however, takes away the flexibility that is necessary for properly applying biosolids and necessarily creates confusion with respect to compliance.

Due to the extensive regulation of both the quality of biosolids and how and where biosolids may be applied to crop lands, municipal entities including PMAA’s and NACWA’s members and ALCOSAN, are already subject to specific affirmative legal duties. Allowing juries to determine whether the application of biosolids in compliance with state and federal requirements is normal on a case-by-case basis would necessarily be quite variable and the practice of beneficial reuse of biosolids would be made undeservedly risky. Moreover, such uncertainty would potentially expose clean water utilities to substantial liability. As a result, PMAA’s and NACWA’s members, along with ALCOSAN, would incur significantly increased costs in their operations. The RTFA expressly seeks to



reduce that uncertainty by barring litigation after one year of the farm work in question, and its plain meaning should be given effect.

The Superior Court's decision will discourage investment in an already regulated and highly beneficial farming practice. Instead of – as the trial court found – a clear and easily applied statute of repose, the court below decided that a jurisdictional and statutory decision should be delegated to a jury. This was plain error on a question of law that this Court should reverse.

## ARGUMENT

### **I. THE AGRICULTURAL USE OF BIOSOLIDS IS AN APPROVED AND HIGHLY REGULATED ACTIVITY WHICH IS BOTH ENVIRONMENTALLY BENEFICIAL AND PROTECTIVE OF HUMAN HEALTH.**

#### **A. The Processing of Sewage Sludge to Create Biosolids for Agricultural Use is Environmentally and Economically Sound.**

Publicly Owned Treatment Works (“POTWs”) in Pennsylvania, including those operated by ALCOSAN and members of PMAA and NACWA, generate sewage sludge as a normal part of the wastewater treatment process. “Sewage sludge” is the solid matter captured during various screening, settling, biological and mechanical processes and is not raw fecal material. Though sewage sludge may be disposed of in landfills, for example, sewage sludge may not be applied to land unless it is first treated by heat or chemicals, and then tested for satisfaction of federal and Pennsylvania standards for land application as biosolids. The recycling of biosolids by application to agricultural land is undertaken by nearly one-third of Pennsylvania POTWs. Nationally, over 50 percent of the sewage sludge generated annually is recycled through land application.

Biosolids are a valuable soil conditioner and a high quality fertilizer that provide both primary plant nutrients (nitrogen, phosphorus and potassium) as well as secondary nutrients found only in organic fertilizers. Moreover, the generation of biosolids from sewage sludge and the recycling of biosolids on agricultural land

is more environmentally sound and more economical than the sewage sludge disposal method of landfilling. As a result, many of PMAA and NACWA's members, including ALCOSAN, have invested in and implemented both federal and state regulations to generate high quality biosolids that qualify for farm use.

EPA has long acknowledged the environmental benefits of recycling biosolids on agricultural land. In 1977, Congress amended the Clean Water Act to require EPA to develop regulations for the use and disposal of sewage sludge. Thereafter, in 1984, EPA published a Beneficial Reuse Policy to encourage land application of biosolids. Moreover, in its 1993 Notice of Final Rulemaking for the Part 503 rules that currently govern land application nationwide, EPA recognized the environmental benefits of recycling biosolids:

[i]mproving the productivity of our land using the soil conditioning properties and nutrient content of sewage sludge has human health and environmental advantages [including] reduction in the adverse human health effects of incineration, a decreased dependence on chemical fertilizers, a reduction in the emissions . . . that may contribute to the 'greenhouse effect' and a reduction in fuel or energy costs.

EPA, *Standards for the Use or Disposal of Sewage Sludge*, 58 FED. REG 9,248, 9,251 (Feb. 19, 1993).

**B. Biosolids Recycling on Agricultural Land is Comprehensively Regulated by EPA and DEP to Ensure Protection of Public Health and the Environment.**

The practice of biosolids recycling on farms is longstanding in Pennsylvania and predates state and federal regulatory control of this activity. Sewage sludge application to farms was common as far back as the 1960s, but was not subject to state oversight until the 1970s, when guidelines were established by the Pennsylvania Department of Environmental Resources, the predecessor agency to DEP. In 1989, these early guidelines were replaced by a formal state regulatory program based upon permit issuance for each application site. These regulations were later amended to conform to national standards established by EPA in 1993 after formal notice and comment rulemaking, and codified at 40 C.F.R. Part 503 (“Part 503 Rules”) for the use and disposal of sewage sludge. Together the federal and state regulations set requirements for the necessary level of processing of sewage sludge consistent with environmental and public health protection.<sup>1</sup>

Significantly, DEP’s biosolids regulations, codified at 25 Pa. Code Chapter 271 (“Chapter 271 Rules”) are more stringent than EPA’s Part 503 Rules. DEP’s regulations prescribe minimum allowable site requirements related to slope, minimum depth of groundwater and mandatory setbacks from property lines, streams, sinkholes and wells. These regulatory standards reflect DEP’s decision to regulate both biosolids quality and use of biosolids in the farm environment. Under DEP’s regulations there are also provisions pertaining to notification of neighbors

---

<sup>1</sup> The term “biosolids” is the accepted term to refer to sewage sludge that has been treated and tested to meet the standards for land application.

and local officials that go beyond EPA's Part 503 Rules. Each farm must be inspected and approved by DEP before land application can occur; citizens may challenge the farm approval action before the Commonwealth Court, an avenue which a number of plaintiffs here pursued.

The RTFA is harmonized with these regulations because a farm activity is only a normal agricultural operation if it is in compliance with state and federal requirements related to nuisance conditions. Appellees have never challenged the fact that Appellant George Phillips' farm was in compliance with the Part 503 Rules and the Chapter 271 Rules pertaining to quality. Instead, Appellees have attempted to apply their own personal standards primarily related to the application of biosolids to farm fields.

Under the Chapter 271 Rules, biosolids quality is regulated in three distinct ways. First, pursuant to 25 Pa. Code §§ 271.914(a)(1), (3), (4) and 25 Pa. Code § 271.932, the concentrations of eleven specific "pollutants" that can be found in trace quantities in the biosolids are limited. These pollutants include primarily heavy metals such as lead, cadmium, copper and arsenic. Second, pursuant to 25 Pa. Code § 271.914 (a)(2), the total amount of pollutants that may accumulate in the soils on any one site is limited. Third, pursuant to 25 Pa. Code § 271.933, biosolids must be treated (usually by heat or lime addition) to reduce bacteriological activity in the biosolids, and also assist in reducing odors and other

objectionable characteristics such as attracting flies and/or vermin (a process known as vector attraction reduction). Further, DEP requires that these standards be met and imposes mandatory testing, recordkeeping, reporting and inspection, which is also set forth in the Chapter 271 Rules. *See* 25 Pa. Code § 271.917-920. Though PMAA, NACWA and ALCOSAN acknowledge that odors cannot completely be eliminated, the biosolids preparation processes required by the Chapter 271 Rules help to reduce odors to levels comparable to odors associated with other organic fertilizers.

In addition to regulating biosolids preparation, DEP regulates land application siting and methods and must approve each farm or other site for biosolids after reviewing a detailed application and conducting a site visit. In particular, DEP prescribes standards for physical conditions of the land such as slope, minimum groundwater depth, and setbacks from neighbors' property lines. Moreover, the Chapter 271 Rules mandate buffer zones to keep biosolids within application areas where they will be retained in the soil to benefit the land and help reduce off-site odors. *See* 25 Pa. Code § 271.915. DEP enforces its regulations in this regard through inspections and through required recordkeeping performed by the applier of the biosolids.

Furthermore, DEP's regulations (1) control the total amount of biosolids that may be applied to a site, so that no unacceptable levels of pollutants are permitted

to accumulate in the soil or groundwater, and (2) limit the rate of biosolids application to avoid application of excess nutrients, which might be lost to surface or groundwater. *See* 25 Pa. Code § 271.915(f). DEP and local environmental regulators regularly visit land application sites, checking all aspects of compliance.

## **II. APPLICATION OF BIOSOLIDS TO FARMLAND IN CONFORMANCE WITH STATE AND FEDERAL REGULATORY REQUIREMENTS IS A NORMAL AGRICULTURAL OPERATION.**

The Superior Court failed to consider the broad definition of “normal agricultural operations,” which includes “activities, practices, equipment and procedures that farmers adopt, use or engage . . . in the production, harvesting and preparation for market or use of agricultural . . . crops . . . .” The plain meaning of this text compels finding as a matter of law that farming with biosolids is a farm practice that meets this definition.

Biosolids make a significant contribution to Pennsylvania agriculturally. Notably, DEP’s online database of regulatory actions provides information on over 700 farms in over 55 Pennsylvania counties that have obtained state approval to use biosolids. Over 200 Pennsylvania wastewater treatment plants, which include PMAA and NACWA members and ALCOSAN in particular, are certified with respect to conformance of their biosolids to the quality standards established under the Chapter 271 Rules and are, therefore, permitted to recycle biosolids on farmland. Approximately 125,000 tons of biosolids from POTWs in Pennsylvania

are used in soil fertilization and conditioning each year. Thus, it is clear that the use of biosolids on farmlands is widely accepted in Pennsylvania, consistent with the wide acceptance throughout the rest of the United States.

Biosolids recycling is not disposal and instead is a highly regulated process intended to provide essential nutrients for crop growth. Biosolids are a sound substitute for manure and chemical fertilizers, and the trial court's determination that the application of biosolids to crop land is a normal agricultural operation as a matter of law is correct.

The Superior Court, on the other hand, erred by stating that “nowhere in the definition of ‘normal agricultural operation’ [under RTFA] did the legislature include any language *suggesting* that the application of biosolids meets this definition.” *Gilbert*, 2014 Pa. Super. at P. 20 (emphasis added). To support its opinion, the majority of the Superior Court explained that the legislature did not (but could have) specifically identified the application of biosolids as a covered practice or procedure in the definition. *Id.* at 21. However, the Superior Court ignored the fact that the definition of a “normal agricultural operation” does not mention any specific *practices* or *procedures*.

The only type of uses that are explicitly mentioned in the definition are types of machinery. The definition states, “[u]se of equipment shall include *machinery* designed and used for agricultural operations, including, but not limited to, crop



dryers, feed grinders, saw mills, hammer mills, refrigeration equipment . . .” 3 P.S. § 952 (emphasis added). Given that biosolids are not consistent with types of machinery like grinders, mills, and refrigerators, the absence of biosolids from that list should not lead to an adverse interpretation.

Moreover, the Superior Court overlooked well-established law on statutory construction, long embraced by this Court, that the term “include” means that the legislature expressly did not want to list all of the activities covered by a law. *See Dep’t of Env’tl. Prot. v. Cumberland Coal Res., LP*, 2014 Pa. LEXIS 2512, at \*29 (Pa. Sept. 24, 2014) (internal citation omitted) ([I]t is widely accepted that general expressions such as ‘including’ . . . that precede a specific list of included items are to be considered as words of enlargement and not limitation.”). Accordingly, “normal agricultural operations” “includes . . . practices, and procedures that farmers adopt . . . ” which would include a recognized practice like land application. 3 P.S. § 951.

In contrast with the Superior Court, the trial court properly addressed the broad nature of the term, “normal agricultural operation” by recognizing that “the term includes *new* activities, practices, equipment and procedures *consistent with technological development* within the agricultural industry.” *Gilbert*, 2012 Pa. Dist. & Cnty. Dec. LEXIS at P. 12. Yet the majority of the Superior Court simply did

not address the intent and significance of the legislature's inclusion of such comprehensive language in the RTFA.

The trial court was also persuaded by the fact that the application of biosolids to soil has been regulated by the EPA and DEP for over 20 years and is commonly used on hundreds of farms throughout Pennsylvania. With this in mind, the trial court correctly held that the "application of biosolids does constitute an activity or practice that has been adopted or used by farmers, and is consistent with technological development, and . . . meets the RTFA's definition of 'normal agricultural operation.'" *Id.* at 13.

Given the expansive term "normal agricultural operation," highly regulated nature of biosolids, and widespread usage on farm land in Pennsylvania and across the country, this Court should hold as a matter of law that the lawful application of biosolids to farmland is a practice that constitutes a "normal agricultural operation" under the RTFA.

### **III. ALLOWING JURIES TO DECIDE WHETHER THE USE OF LAWFUL APPLICATION OF BIOSOLIDS TO FARMLAND IS A "NORMAL AGRICULTURAL OPERATION" ON A CASE-BY-CASE BASIS WILL MAKE THE LAND APPLICATION OF BIOSOLIDS IMPRACTICABLE.**

The application of biosolids to farmland balances the biosolids production schedule at POTWs with the needs of the crops planted by the farmer involving, among other things, biosolids generation, storage and transportation logistics, the

nutrient needs of the farmer's crops, and weather. The technical and regulatory complexity of farming with biosolids is reason alone that juries should not decide on a case-by-case basis whether this activity meets a statutory definition.

Due to the interplay of these and other factors, the amount and time of year of biosolids application—and even the length of time that biosolids will remain on the surface—varies on a monthly, seasonal and annual basis. As such, the variation of the application rate of biosolids to George Phillips' farm was a normal part of the farm's agricultural operations and would naturally vary the amount and intensity of the odors that the neighbors experienced.<sup>2</sup>

Notwithstanding such complexities, the Superior Court held that juries should be able to decide on a case-by-case basis what constitutes a "normal agricultural operation," even when biosolids are applied to farmland in conformity with the methods approved by DEP and EPA. In essence, the Superior Court's ruling opens the door for individuals—not regulators—to dictate exactly how, when and where biosolids recycling operations are to be conducted. In doing so, juries could potentially ignore DEP's regulations and, instead, come to varying opinions with regard to what is and what is not a normal farming practice on any

---

<sup>2</sup> George Phillips' farm, like many farms in the mid-Atlantic region, was required under its conservation plan to use no-till agriculture, which provides many environmental benefits, including improved soil quality and erosion control. This requirement prevented the plowing under of biosolids and, thus, a major odor control strategy was unavailable to Appellants.

given day. This outcome is patently contrary to the text and intent of the RTFA to cover and protect farm work after the passage of the one year statute of repose.

POTWs operated by the members of PMAA and NACWA, including ALCOSAN, rely upon the settled structure of the Pennsylvania biosolids program to provide fertilizer for farmers. The municipal generators also rely upon the knowledge of the farmer to undertake the necessary steps in a biosolids fertilization program. Allowing juries to determine what uses of biosolids are “normal agricultural uses” eviscerates the protections granted by the RTFA and destroys the certainty needed by PMAA and NACWA’s members and farmers using biosolids.

The costs of meeting the Part 503 Rules and Chapter 271 Rules is high. The risk of uncertainty and costs of estimating and complying with *ad hoc* jury determinations as to what is a normal operation would be exponentially high. With such uncertainty in mind, the only viable alternative for most Pennsylvania POTWs would be landfilling, which forfeits the benefits of recycling nutrients to the soil. As such, the result of accepting the Superior Court’s holding that juries should determine what is “normal” on a case-by-case basis would serve to substantially reduce the beneficial reuse of biosolids resulting in a significant increase of dumping biosolids into landfills. The effect on landfills, moreover, would be to accelerate the pace at which available capacity for disposal of actual solid waste is depleted.

It has been long recognized in Pennsylvania that courts must set a standard of care for a complex activity with clear social value based upon factors including the utility of the activity, the nature of the risks involved, the foreseeability of the harm, the consequences of imposing a duty and the public interest. *See, e.g., Lindstrom v. City of Corry*, 763 A.2d 394, 397 (Pa. 2000). With this in mind, PMAA, NACWA, and ALCOSAN urge this Honorable Court to consider the social, political and economic consequences of the interpretation of the RTFA sought by Appellees. Public policy and the plain meaning of the RTFA clearly dictate that the law should remain as it has been and the appropriate governmental agencies, namely DEP and EPA as well as the Pennsylvania Department of Agriculture, should be able to control the agricultural utilization of biosolids in an environmentally protective and economically beneficial way.

**IV. DECIDING WHETHER THE APPLICATION OF BIOSOLIDS TO FARMLAND IN CONFORMITY WITH STATE AND FEDERAL REGULATORY REQUIREMENTS SATISFIES THE DEFINITION OF A “NORMAL AGRICULTURAL OPERATION” IS A QUESTION OF LAW FOR THE COURT TO DECIDE.**

It is well settled that statutory interpretation is a function of courts, not juries. *Snead v. SPCA*, 985 A.2d 909, 915 (Pa. 2009); *Commonwealth v. McKetta*, 364 A.2d 1350, 1352 (Pa. 1976) Courts interpret and apply to the facts presented what are often broad terms of legislation. Juries do not play a role in statutory interpretation and certainly not in determining whether a well-recognized class of

farm activity falls within a statutory definition. As discussed below, the jury's fact finding role in a statute of repose is limited to statutes that require fact finding.

The Superior Court erred by relying on *McConnaughey v. Building Components*, 637 A.2d 1331 (1994) to hold that a jury should determine whether the application of biosolids in conformance with state and federal regulatory requirements is a "normal agricultural operation." In doing so, the Superior Court improperly delegated its role of statutory interpretation to the jury.

In *McConnaughey*, the parties argued over whether the defendant—a manufacturer of a roof trusses—fit within a class that was protected by a statute of repose. *McConnaughey*, 637 A.2d at 1333. The protected class encompassed "any person lawfully performing or furnishing the design, planning, supervision or observation of construction, or construction of an improvement to real property . . . ." *Id.* (quoting 42 Pa.C.S. § 5536).

The Court interpreted the class to include "economic actors who perform acts of 'individual expertise' akin to those commonly thought to be performed by builders." *Id.* at 1334. Further, the Court explained that there is a difference between merely furnishing supplies for construction and furnishing the actual construction. *Id.* The former would not fall within the protected class. *Id.* at 1334-35. Nonetheless, the parties did "not agree as to what involvement, *if any*, [plaintiff] had in the installation of the finished roof trusses, or the supervision

thereof.” *Id.* at 1335 (emphasis added). Accordingly, the disputed involvement of the defendant in the construction process presented a genuine issue of material fact for the jury to decide. *Id.*

Here, the parties do not dispute whether biosolids have been applied to farmland. The parties merely disagree over whether the application of biosolids in conformance with state and federal regulatory requirements constitutes a “normal agricultural practice” under the RTFA. Thus, there is not a genuine issue of material fact as was the case in *McConnaughey*, but rather a legal dispute over whether an activity falls under a statutory term.

The facts from the *McKetta* case are more analogous to this case and illustrate the division between judge and jury in statutory interpretation. In *McKetta*, this Court was presented with the question of whether a jury should determine if Ritalin constitutes a “dangerous drug” under the Drug, Device and Cosmetic Act. *McKetta*, 364 A.2d at 1351. As a preliminary matter, the Court distinguished between situations where the identity of the substance is disputed versus disagreements over whether a particular substance is covered by the statute. *Id.* at 1352. The identity of the substance—a material fact—was not being disputed. *Id.* The question of whether the substance came under the statutory definition by contrast was solely an issue of law for the court.

Specifically, the Court noted that if the jury could decide the types of substances that constitute “dangerous drugs,” then the law would become “uncertain and dependent upon the vicissitudes of each jury . . . .” *Id.* at 1354. “Such a result would needlessly ignore the . . . value of certainty in our law.” *Id.*

As in *McKetta*, this case does not involve a dispute over the identity of the farming practice that is being used. Rather, this dispute concerns a question of law which is whether the application of biosolids to farmland in compliance with federal and state regulations is covered by the term “normal agricultural operation.” Allowing juries to interpret and define the term “normal agricultural operation” makes the RTFA—an act that is intended to encourage investment in farming technologies—uncertain, ambiguous, and dependent on the vicissitudes of each jury.

As discussed above, farmers, members of PMAA and NACWA, and ALCOSAN depend on the established structure of DEP and EPA regulations for the continued use of biosolids as a beneficial farming practice. Allowing juries to determine what is “normal” on a case-by-case basis eliminates that vital certainty and discourages investment in biosolids. As a result, this Court should hold that the interpretation of the term “normal agricultural operation” is the role of courts and that the application of biosolids to farmland in conformity with state and federal requirements is a “normal agricultural operation.”



**CONCLUSION**

For the foregoing reasons, *Amici Curiae* Pennsylvania Municipal Authorities Association, Allegheny County Sanitary Authority and National Association of Clean Water Agencies respectfully request that this Honorable Court hold that courts, not juries should determine whether the land application of biosolids is a “normal agricultural operation” and to affirm the trial courts holding that the lawful application of biosolids to farmland constitutes a “normal agricultural operation.”

Respectfully submitted,

HAMBURG, RUBIN, MULLIN  
MAXWELL & LUPIN

By: \_\_\_\_\_

  
STEVEN A. HANN

Attorney for *Amicus Curiae*  
Pennsylvania Municipal Authorities  
Association & National Association of  
Clean Water Agencies  
375 Morris Road, P.O. Box 1479  
Lansdale, PA 19446-0773

NATHAN GARDNER-ANDREWS  
National Association of Clean Water  
Agencies  
Of Counsel  
1816 Jefferson Place, NW  
Washington, DC 20036-2505

BABST, CALLAND, CLEMENTS AND  
ZOMNIR, P.C.

By: Chester R. Babst JR

CHESTER R. BABST

Attorney for *Amicus Curiae*

Allegheny County Sanitary Authority

Two Gateway Center

Pittsburgh, PA 15222

**CERTIFICATE OF WORD-LIMIT COMPLIANCE**

I certify that the foregoing principal brief complies with the word limitation of Pa. R.A.P. 2135(a)(1), in that the word count of the brief, excluding the cover, table of contents, table of citations, proof of service, appendices, and this certificate, is 5,743 words based on the word count of the word processing system used to prepare the brief.

HAMBURG, RUBIN, MULLIN  
MAXWELL & LUPIN

By: \_\_\_\_\_

  
STEVEN A. HANN

Attorney for *Amicus Curiae*  
Pennsylvania Municipal Authorities  
Association & National Association of  
Clean Water Agencies  
375 Morris Road, P.O. Box 1479  
Lansdale, PA 19446-0773

## CERTIFICATE OF SERVICE

I hereby certify that I am this day serving two copies of the following document upon the persons and in the manner indicated below, which service satisfies the requirements of Pa. R.A.P. 121 and 531:

Service by email and first class mail addressed as follows:

John E. Kotsatos, Esquire  
Law Offices of Peter G. Angelos, P.C.  
60 West Broad Street, Suite 200  
Bethlehem, PA 18018  
Phone: (610) 866-3333  
Email: [jkotsatos@lawpga.com](mailto:jkotsatos@lawpga.com)  
Attorney for Appellees

Christopher T. Nidel, Esquire  
Nidel Law, P.L.L.C.  
1615 New Hampshire Avenue, N.W.  
Washington, DC 20009  
Phone (202) 558-2030  
Email: [chris@nidellaw.com](mailto:chris@nidellaw.com)  
Attorney for Appellees

James M. Hecker, Esquire  
Public Justice, P.C.  
1825 K Street NW, Suite 200  
Washington, DC 20006  
Phone (202) 797-8600  
Email: [JHecker@publicjustice.net](mailto:JHecker@publicjustice.net)

Arthur H. Bryant, Esquire  
Public Justice, P.C.  
555 12<sup>th</sup> Street, Suite 1230  
Oakland, CA 94607  
Phone: (510) 622-8150  
Email: [ABryant@publicjustice.net](mailto:ABryant@publicjustice.net)

Debra P. Furlas, Esquire  
McNees Wallace & Nurick, LLC  
100 Pine Street  
Harrisburg, PA 17108  
Phone: (717) 237-5201  
Email: [dfurlas@mwn.com](mailto:dfurlas@mwn.com)  
Attorney for Appellants George Phillips  
and Hilltop Farms

HAMBURG, RUBIN, MULLIN  
MAXWELL & LUPIN

By: \_\_\_\_\_

  
STEVEN A. HANN

Attorney for *Amicus Curiae*

Pennsylvania Municipal Authorities  
Association & National Association of  
Clean Water Agencies

375 Morris Road, P.O. Box 1479  
Lansdale, PA 19446-0773