Understanding and Managing Potential Liability for PFAS in Biosolids

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Biosolids background from a legal perspective

- Biosolids
  - Nutrient-rich solid byproduct of wastewater treatment, sometimes called sewage sludge
  - Millions of tons generated each year
  - Options – dispose or reuse. Commonly reused as a fertilizer or soil amendment. Disposal options include landfilling and incineration.
- Land application of biosolids is part of the critical role WRRFs play in achieving sustainability goals and moving toward a circular economy (keeping materials and products out of the landfill as long as possible)

Biosolids background from a legal perspective

- Problem of pass-through PFAS (and other traces of emerging contaminants)
  - Utilities are “passive receivers,” not generators, of PFAS
  - Treatment not designed with PFAS in mind
  - EPA draft risk assessment (Jan. 2025 – 25,000 comments, not finalized yet). EPA has authority to issue regulations, but a court ruled it cannot be compelled to do so (that finding is currently on appeal).
  - Landspreading creates various legal liability concerns for landowners, spreaders, WRRFs (remediation, torts)
    - Contaminants (presumably originating in the biosolids) have been detected in soil, groundwater, livestock, crops, surface water, and (allegedly) humans

Biosolids background from a legal perspective

- These concerns have led to a wide variety of state actions
  - Testing requirements
  - Interim rules/policies based on PFAS concentration (WI DNR's on next slide)
  - Temporary or permanent application ban
  - Liability exemptions

Biosolids background from a legal perspective

Interim Strategy for Land Application of Biosolids and Industrial Sludges Containing PFAS

Version3
Date: April 28, 2026
Proposed Effective Date: TBD

Tier 1: PFOA + PFOS <20 ug/kg (ppb)

- Track cumulative PFAS loading on each field.
  - PFOA
  - PFOS
  - PFOA + PFOS
- Notify the property owner/farmer of the results.
- Land apply the biosolids or industrial sludge without additional requirements.

Tier 2: PFOA + PFOS at or above 20 ug/kg (ppb) and <50 ug/kg (ppb)

- Track cumulative PFAS loading on each field.
  - PFOA
  - PFOS
  - PFOA + PFOS
- Notify the property owner/farmer of the results.
- Monitor WWTF effluent for PFAS within 30 days if not already required under the WPDES permit. Report the results to the department.
- Create and implement a (or continue an existing) PFAS source identification and reduction plan.
- If PFOA is greater than 20 ug/kg (ppb), notify the department and reduce application rate to 1.5 dry tons per acre or propose an alternative risk mitigation strategy for approval from the department to land apply.
- The department will modify the facility's WPDES permit to incorporate numeric limits or conditions to address PFAS in biosolids.

Tier 3: PFOA + PFOS at or above 50 ug/kg (ppb) and <100 ug/kg (ppb)

- Track cumulative PFAS loading on each field.
  - PFOA
  - PFOS
  - PFOA + PFOS
- Notify the property owner/farmer of the results.
- Monitor WWTF effluent for PFAS within 30 days if not already required under the WPDES permit. Report the results to the department.
- Create and implement a (or continue an existing) PFAS source identification and reduction plan.
- Land apply at a reduced application rate of 1.5 dry tons per acre or propose an alternative risk mitigation strategy for approval from the department to land apply.
- If PFOA is greater than 20 ug/kg (ppb) notify the department.
- The department will modify the facility's WPDES permit to incorporate numeric limits or conditions to address PFAS in biosolids.

er 4: PFOA + PFOS at or above 100 ug/kg (ppb)

- Land application is not allowed. Arrange for alternative management and/or disposal.
- Notify and provide results to the department
- Monitor WWTF effluent for PFAS within 30 days if not already required under the WPDES permit. Report the results to the department.
- Create and implement a (or continue an existing) PFAS source identification and reduction plan.
- Site specific requirements may be necessary.
- Requests for new land application site requests by the WPDES permitted facility are not approved.
- Requests to transfer sites to the WPDES permitted facility are not approved.
- The department will modify the facility's WPDES permit to incorporate numeric limits or conditions to address PFAS in biosolids.

PFAS in biosolids: legal concerns

- Sampling requirements (and disclosure)
- Remediation claims
  - Federal
  - State
  - Third Party
- Toxic tort lawsuits
- Noncompliance with permit or regulations
  - National patchwork
- Alternate disposal costs

Sampling

- In Wisconsin (and probably in most states) utilities can likely be forced to disclose the results of any PFAS sampling they do, either by regulatory agencies pursuant to permits and regulations, by requesters pursuant to open records laws, or both
- This means sampling biosolids for PFAS for internal purposes only, and not disclosing the results upon request, is not a feasible option

Liability

- Utilities are rightly concerned about becoming litigation targets as a result of “pass-through” PFAS and other emerging contaminants in biosolids
  - Status as “passive receivers” isn’t completely protective, nor are governmental enforcement discretion policies

State actions

- Some states (and possibly USEPA) are moving toward banning or restricting the land application of biosolids containing specified levels of PFAS
  - A total ban would be very expensive and damaging to the circular economy
  - In other states, laws have been proposed or passed to immunize some parties who would otherwise be liable
  - If effective treatment is unavailable or too costly, utilities will likely have to pursue source control efforts via pretreatment programs or, as a last resort, enforcement and targeted litigation

Understanding and Minimizing Liability

- Liability for environmental remediation (and other costs) under CERCLA (federal)
  - Liability attaches to “potentially responsible parties” when there has been a release of a hazardous substance to the environment, if the release causes the incurrence of response costs
  - PRPs include facility owners, operators, and waste generators, among others
  - CERCLA liability is:
    - Strict (no element of intent or negligence)
    - Joint and several
    - Retroactive
  - The problem of third-party claims

Neenah-Menasha Sewerage Commission

110. The Neenah-Menasha Sewerage Commission ("NMSC") has owned and/or operated a regional sewer system and a POTW that is adjacent to the Little Lake Butte des Mort segment of the Lower Fox River, at the western end of Garfield Avenue, in Menasha. As alleged above, the NMSC's sewer system and POTW received PCB-containing wastewater from several facilities – including the WTM Facility, the John Strange Facility, and the Kimberly-Clark Neenah and Badger Globe Facilities – and the NMSC in turn discharged partially-treated, PCB-containing wastewater from those facilities to the Lower Fox River. The NMSC still owns and/or operates the NMSC POTW and its associated regional sewer system.

111. The NMSC therefore: (i) owns and operates a facility from which there have been releases of hazardous substances, and there were releases of hazardous substances from that facility to the Site; and (ii) owned and operated a facility at the time of disposal of hazardous substances at that facility, and there were releases of hazardous substances from that facility to the Site.

112. In light of the foregoing, the NMSC is liable to Plaintiffs in this action under: (i) CERCLA § 107(a)(1), 42 U.S.C. § 9607(a)(1); and (ii) CERCLA § 107(a)(2), 42 U.S.C. § 9607(a)(2).

- Example: liability under CERCLA (federal)
  - US DOJ has successfully taken the position that all of the CERCLA elements are satisfied in the context of contaminants passing through a wastewater treatment facility, even if the facility was completely unaware of it

Understanding and Minimizing Liability

- Parties are not liable under CERCLA for selling a new and useful product that was later improperly disposed
  - Highly fact specific
  - PFAS manufacturers are attempting to assert this defense
- "Useful product" defense for biosolids? See Ryan v. Newark Group, Inc., 814 F.Supp.3d 78 (2026) (under Massachusetts state law, biopellets are a useful product)
  - Biosolids producers then did not have knowledge of the persistence and toxicity of PFAS – still true?

Understanding and Minimizing Liability

- State equivalents – e.g., Wisconsin Spills Law (Wis. Stat. 292.11)
- "A person who possesses or controls a hazardous substance which his discharged or who causes the discharge of a hazardous substance shall take the actions necessary to restore the environment to the extent practicable and minimize the harmful effects from the discharge to the air, lands or waters of this state."
- Toxic tort suits
  - Nuisance, negligence, strict liability
  - Plaintiffs allege that they suffered devastating health consequences and that their land was contaminated because of high PFAS concentrations emanating from biosolids land-applied nearby

Understanding and Minimizing Liability

- The federal government and some state governments have formally stated that they will not pursue farmers and related entities for response actions or costs related to unintentional PFAS contamination resulting from permitted land spreading. However, this will not protect against third party actions.
- Insurance
- Federal and state legislation could exempt WWTF from liability for PFAS releases

Understanding and Minimizing Liability

- Federal level: Water Systems PFAS Liability Protection Act
  - Proposes to exempt certain entities, including WWTF, from liability under CERCLA with respect to releases of PFAS and related substances.
  - No action since February 2025 (referred to committee)

Wisconsin Acts 200 and 201

- Summary – Act 200 appropriates amounts from the PFAS "trust fund", and Act 201 contains the substantive compromise provisions
  - $79.5M for community grant program (defined to include sewerage systems)
  - $35M to well owners and operators
  - $5.25M to airports and industrial properties
  - $1.6M for DNR general program operations relating to PFAS contamination
  - $10.4M for other miscellaneous activities required by the bill

Wisconsin Acts 200 and 201

- Eligible activities under the community grant program
  - “Sampling for PFAS in wastewater, biosolids, liquid waste, sludge, influent, industrial waste, or treatment plant effluent that is intended for landspreading or to implement source reduction strategies.”
  - Other sampling (private water supplies, agricultural properties, landfills, schools and child care facilities)
  - Improvements at public water systems (installing treatment, new wells, connecting new customers)
  - Investigating PFAS contamination and determining remedy selection
  - Remedial action

Wisconsin Acts 200 and 201

- Permitting of “sewage sludge spreading”
  - Under DNR’s interim strategy, sampling required prior to spreading.
  - The Act requires DNR to impose permit limits or conditions for PFAS in landspreading permit provisions (Wis. Stat. 283.82).
    - If average of two samples show a combined PFOA/PFOS concentration greater than 20 ug/kg (ppb), DNR must include a limit in the permit
    - Can include groundwater monitoring requirement
    - General permit forthcoming

Wisconsin Acts 200 and 201

- Exemptions from the “Spills Law” coverage related to certain PFAS-contaminated waste (generally applies to those who cause the discharge of a hazardous substance, or who possess or control the land on which the spill occurred)
  - WPDES permitholders, with respect to PFAS discharged in compliance with limits or conditions in the permit
  - Landowners of agricultural, commercial, or residential property upon which spreading occurred, and owners of property upon which PFAS contamination did not originate
  - Industrial landowners, under more limited circumstances
  - Contracted landspreaders
  - Fire departments
  - Landfills, collection services, transfer facilities (municipal solid waste)

Wisconsin Acts 200 and 201

- Other provisions
  - Public utilities and metropolitan sewerage districts can use funds derived from its services for up to one-half the cost of pretreatment or PFAS source reduction measures

Ongoing litigation – Farmer v. EPA

- Issue: Must USEPA issue new regulations imposing limits for PFAS (and potentially other toxic chemicals) in biosolids? Plaintiffs argue that it must, pursuant to the Clean Water Act (CWA).
- Section 405(d)(1) of the CWA says EPA must "develop and publish . . . regulations providing guidelines for the disposal of sludge and the utilization of sludge for various purposes."
- Further, section 405(d)(2)(A)(i) requires EPA to "propose regulations specifying acceptable management practices for sewage sludge containing [toxic pollutants] and establishing numerical limitations for each such pollutant for each use. . . ."
- Finally, section 405(d)(2)(C) requires EPA to review the regulations "for the purpose of identifying additional toxic pollutants and promulgating regulations for such pollutants. . . ."

Ongoing litigation – Farmer v. EPA

- Plaintiffs argue that the statute should be interpreted to mean EPA must identify the pollutants *and* issue regulations imposing limits if EPA identifies toxic pollutants in biosolids that are not yet regulated.
  - EPA has not regulated new toxic substances in biosolids since 1993
  - It has simply gathered information
- EPA interpretation – statute means EPA must review its biosolids regulations, but is not required to issue new regulations

Ongoing litigation – Farmer v. EPA

- U.S. District Court for the District of Columbia granted a motion to dismiss the suit (Sept. 2025)
- Rationale: while the statute imposes a duty on EPA to *review* its regulations every two years, it does not mandate that EPA also *regulate* newly-identified pollutants in biosolids in the same time frame

Ongoing litigation – Farmer v. EPA

- Case is currently on appeal to the D.C. Circuit – final briefs currently scheduled to be due this month, but court won't likely issue a decision for quite some time
- Same basic textual issue
- The role of state regulations
- MBA signed on to an amicus brief

Ongoing litigation – Alessi v. Synagro

- Tort litigation (civil wrongs, here negligence, nuisance, strict liability product defect) rooted in state law
- Suit filed in Maryland state court; via legal machinations, ended up in Texas federal court, where it is still pending
- Allegation – PFAS in biosolids caused health problems and property damage
- Class action certification sought

Strategies

- Treatment
- Source Control
  - Wisconsin regulations allow sewerage districts to prohibit and regulate certain discharges into their systems, including those that would “interfere with the marketing of treated sewage sludge”
  - The regulations also allow districts to require preliminary treatment of certain harmful discharges into the system
  - “Fingerprinting”?
- Litigation? Last resort, as always, due to cost and uncertain outcome

What to watch

- EPA response to comments/revisions to draft risk assessment
- Additional state legislation and regulation
- Outcome of court cases
  - Farmer v. EPA
  - Alessi v. Synagro

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