

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA**

_____)	
RALPH GILBERT, <i>et al.</i> ,)	Case No. 1:08-CV-1460
)	
Plaintiffs,)	
)	
v.)	
)	Judge: Hon. Sylvia H. Rambo
SYNAGRO CENTRAL, LLC, <i>et al.</i> ,)	
)	September 22, 2008
Defendants.)	
_____)	

**DEFENDANTS’ MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS’ MOTION TO REMAND**

James B. Slaughter, Esq.
(admitted *pro hac vice*)
Fred R. Wagner, Esq.
Katherine E. Wesley, Esq.
Beveridge & Diamond, P.C.
1350 I Street, N.W., Suite 700
Washington, D.C. 20005
(202) 789-6000
Attorneys for Synagro Defendants

Alexandra Chiaruttini, Esq.
Neil A. Slenker, Esq.
Stock and Leader
221 West Philadelphia Street
York, PA 17401-2994
Attorney ID # 77974
(717) 846-9800
Attorneys for Synagro Defendants

David Lehmann, Esq.
Curtis N. Stambaugh, Esq.
Kandice Giuritano, Esq.
McNees Wallace & Nurick LLC
100 Pine Street, P.O. Box 1166
Harrisburg, PA 17108-1166
Attorney ID # 80565
Harrisburg, PA 17108-1166
(717) 237-5435
*Attorneys for Defendant George
Phillips and Hilltop Farms*

David R. Breschi, Esq.
Breschi & Associates, LLC
946 Lincoln Way East
Chambersburg, PA 17201
Attorney ID # 59001
(717) 263-9533
*Attorney for Defendant Steve
Troyer*

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I. INTRODUCTION

This lawsuit represents another chapter of a coordinated political and legal attack against municipalities that generate biosolids, their contractors that manage them, and farmers who legally and safely recycle biosolids to fertilize crops and improve soil. Plaintiffs' claims, though couched in terms of nuisance, negligence, and trespass, directly challenge the federal regulatory scheme devised by Congress and the United States Environmental Protection Agency ("EPA") to govern this successful wastewater management and agricultural practice. The federal regulatory questions at the heart of Plaintiffs' Complaints, as well as the complete conflict between Plaintiffs' claims and federal regulations encouraging land application, support this Court retaining jurisdiction over this case.

The Supreme Court has rejected similar nuisance claims regarding wastewater discharges as preempted under the Clean Water Act with rationales that apply fully to the Act's biosolids provisions. *See International Paper v. Ouellette*, 479 U.S. 481 (1987). Here, as in *International Paper*, Plaintiffs' direct challenge to the federal regulations and the complete preemption doctrine each create distinct bases for federal jurisdiction and make this Court the appropriate forum for these claims to be heard. Accordingly, this Court should deny Plaintiffs' Motion to Remand.

II. PROCEDURAL HISTORY

In July 2008, Plaintiffs filed two Complaints in the Court of Common Pleas of York County, Pennsylvania, alleging that Defendants were liable for nuisance, negligence, and trespass. Plaintiffs seek compensatory and punitive damages and an injunction. Defendants filed a timely Notice of Removal on August 5, 2008. This Court consolidated the two cases and ordered Defendants to answer or otherwise respond to the Complaints by September 3. Defendants filed and served a Motion to Dismiss on September 3, 2008. Plaintiffs filed a Motion to Remand to State Court on September 3, and served that motion on Defendants on September 5, 2008.¹ Plaintiffs filed a Motion to Stay on September 10, 2008. In an order dated September 12, 2008, the Court stayed proceedings on Defendants' Motion to Dismiss.

¹ Plaintiffs certified that the Motion to Remand was served on September 3. This was incorrect. Plaintiffs admitted in writing that they did not serve the Motion until September 5, but they refused Defendants' request that they amend the Certificate of Service to reflect the September 5 service, thus denying Defendants additional time to prepare and serve this Opposition.

III. BACKGROUND

A. **Biosolids Recycling Is a Well-Established Practice and Has Long Been Regulated by the United States EPA**

Biosolids² recycling is a well-established, safe practice that benefits America's cities and farmland. The EPA estimates that over half of America's sewage sludge is recycled as biosolids through land application, with the remainder being incinerated or disposed of in landfills. EPA, *Biosolids Generation, Use and Disposal in the United States* (1999). Biosolids provide an effective organic fertilizer that "helps improve crop growth and yield . . . [and] reduce the farmer's production costs and replenish the organic matter that has been depleted over time." See Pennsylvania Department of Environmental Protection ("PaDEP") Biosolids Program Website, *available at* <http://www.depweb.state.pa.us/biosolids/cwp/view.asp?A=1291&Q=451139&pp=3>. In Pennsylvania, over 1,500 farms and mine reclamation sites have benefited from biosolids application since 1988. *Id.*

EPA began regulating the land application of biosolids in the late 1970s, building on the experience with biosolids recycling of major cities such as

² "Biosolids" is the correct term for sewage sludge that has been treated and qualifies for recycling, not the pejorative term sewage sludge. See National Research Council of the National Academy of Sciences, *Biosolids Applied to Land: Advancing Standards and Practices* 13-14 (2002) (explaining and endorsing use of the term biosolids).

Chicago. 40 C.F.R. Part 257 (1979). In 1987, Congress amended the Clean Water Act and directed EPA to develop comprehensive rules to govern methods of biosolids recycling and disposal, including land application. Congress directed EPA to develop a national strategy to manage biosolids, “adequate to protect the public health and the environment,” and encompassing “utilization of sludge for various purposes.” Water Quality Act of 1987, Pub. L. No. 100-4, § 406, 101 Stat. 7, 72 (1987) (codified at 33 U.S.C. § 1345(d)).

After years of research, a peer-reviewed risk assessment, and a formal notice and comment rulemaking, EPA in 1993 adopted the Part 503 Rules, governing the beneficial recycling of biosolids through land application for crops, silviculture, and mine reclamation.³ The Part 503 rules constitute a comprehensive nationwide permitting scheme that establishes specific, science-based standards for the generation and use of biosolids. *See* 40 C.F.R. § 503.3(b) (2006); *see also* EPA, *A Guide to the Biosolids Risk Assessments for the Part 503 Rule* (1995); EPA, *A Plain English Guide to the EPA Part 503 Biosolids Rule* (1994) (these and other publications *available at*

³ The Part 503 Rules adopted land application as the single largest management option, recognizing biosolids as “a valuable resource” and “useful as a fertilizer and a soil conditioner” when land applied. Standards for the Use or Disposal of Sewage Sludge, Part II, 58 Fed. Reg. 9,248, 9,249 (Feb. 19, 1993). EPA further stated its “preference . . . for local communities to reuse [biosolids] in beneficial ways” and that it would “actively promote” such practices. *Id.* at 9,258.

www.epa.gov/owm/mtb/biosolids). Many wastewater agencies began land application programs in the 1990s in reliance on the new, scientifically validated federal regulations. Pennsylvania and other states likewise began building biosolids regulatory programs to complement and enhance the federal regulations by, for example, requiring state approval for specific farms to receive biosolids.⁴

EPA's overarching Part 503 Rules provide a federal regulatory underpinning for land application. Among other controls, the Part 503 Rules: (i) limit the amounts of trace metals in biosolids and in the farm fields receiving biosolids; (ii) mandate standards for reduction (Class B biosolids) or elimination (Class A biosolids) of microorganisms; and (iii) establish minimum operational controls such as limits on the amount of biosolids that may be applied (the agronomic rate) and restrictions on access to fields receiving biosolids. *See* 40 C.F.R. Pt. 503. Both Class A and Class B biosolids are equally safe for land application. Microorganisms (including any potential disease causing pathogens) in Class B biosolids are reduced by 99 percent.

⁴ PaDEP plays a significant role in regulating biosolids recycling, including reviewing permit applications from wastewater treatment plants, holding public meetings on those applications, issuing registrations for farms to receive biosolids, and overseeing compliance with state regulations. *See* PaDEP website, *supra*.

EPA imposes additional restrictions on land application of Class B biosolids (such as waiting periods before certain crops are grown or harvested) to ensure equal safety compared to Class A biosolids. *See* EPA, *Control of Pathogens and Vector Attraction in Sewage Sludge* (1999) (revised 2003). Part 503 also imposes vigorous monitoring, recordkeeping, and reporting requirements to ensure that land applicators comply with the federal regulations and do not pose a threat to public health or the environment. 40 C.F.R. §§ 503.16-18. The Part 503 Rules are not static. The Clean Water Act requires bi-annual review by EPA to determine whether additional pollutants need to be regulated under Part 503. *See* 33 U.S.C. § 1345(d)(2)(C).

America's wastewater treatment plants — such as the four Pennsylvania plants and one Maryland plant whose biosolids have been recycled at the Phillips farm — play the most significant role in this program. They certify that biosolids meet Class A or Class B standards and are eligible for land application. Indeed, most of the work to comply with land application regulations occurs at wastewater plants, where biosolids are tested and treated through various technologies in order to qualify for land application. *See* 40 C.F.R. § 503.12(f) (generator must provide notice and necessary information of compliance with Part 503 requirements). This work, in turn, rests on years of

research by EPA and others to establish the risk criteria and technical specifications for biosolids.

B. EPA's Regulation of Biosolids Is Thorough and Science-Based

Many objective scientific reviews have endorsed the environmental value and safety of land application. For example, two separate studies of the National Research Council of the National Academy of Sciences ("Academy") have examined and rejected allegations that land application of biosolids can impact the health of those living near land application sites. In 2002, building on a previous study published six years earlier, the Academy reviewed the scientific methodology supporting Part 503 and other issues regarding land application. Its report, *Biosolids Applied to Land: Advancing Standards and Practices*, concluded that "[t]here is no documented scientific evidence that the part 503 rule has failed to protect public health. . . . [A] causal association between biosolids exposures and adverse health outcomes has not been documented." *Id.* at 4-5, available at <http://www.epa.gov/waterscience/biosolids/nas/complete.pdf>.

Following the 2002 Academy report, EPA issued an action plan to implement key recommendations of the report to improve the science supporting the Part 503 Rules. *See* Final Agency Response to Biosolids Applied to Land, 68 Fed. Reg. 75,531 (Dec. 31, 2003). EPA also has

researched and rejected occasional allegations that land application is linked to any human health impacts. *See* Letter of G. Tracy Mehan, III, Ass't Admin., Office of Water, EPA, to the Center for Food Safety and the Community Environmental Legal Defense Fund, Inc. (Dec. 23, 2003) (denying petition to impose moratorium on land application of biosolids), *available at* http://www.nacwa.org/images/stories/public/2006belib-mehan_mend_ltr.pdf.

C. Recycling of Biosolids on the Phillips Farm

In August 2005 Synagro applied to PaDEP for permission to recycle biosolids on the Phillips Farm in York County, Pennsylvania. *See* Declaration of Mark D. Reider ¶ 4 (“Reider Decl.”), attached hereto as Exhibit A. The Phillips Farm is undeveloped farmland zoned for agricultural purposes. (Reider Decl. ¶ 5). At the Phillips farm, as is typically done, biosolids are spread over the surface of the land using a manure spreader pulled by a tractor driven by Defendant George Phillips or Defendant Steve Troyer. (Reider Decl. ¶ 7). The biosolids applied at the Phillips Farm in 2006-08 came from five wastewater treatment plants: Derry Township, Pennsylvania, New Freedom Borough, Pennsylvania, Penn Township, Pennsylvania, Little Patuxent, Maryland, and the Lancaster Area Sewer Authority’s Susquehanna Water Pollution Control Facility in Lancaster, Pennsylvania. (Reider Decl. ¶ 8). Representatives of PaDEP, the York County Conservation District, and the

York County Solid Waste Authority inspected the Phillips farm on many occasions to assess odors and compliance with federal and state regulations, including observance of setbacks from property lines. (Reider Decl. ¶¶ 6, 8). Additional testing was performed on waterways adjacent to the Phillips Farm.

IV. PLAINTIFFS' CLAIMS RAISE SUBSTANTIVE FEDERAL QUESTIONS AND ARE PREEMPTED BY THE CLEAN WATER ACT

A. Standard of Review

A defendant seeking to remove a case has the burden of showing that the federal court has jurisdiction. *See Dukes v. U.S. Healthcare, Inc.*, 57 F.3d 350, 359 (3d Cir. 1995). Plaintiffs, however, overstate Defendants' burden.

Though Defendants have the burden of showing that this case arises under federal law, "the state suit need not invoke a federal law by name in order to 'arise under' it for removal purposes. It is sufficient that the merits of the litigation turn on a substantial federal issue that is 'an element, and an essential one, of the plaintiff's cause of action.'" *See U.S. Express Lines, Ltd. v. Higgins*, 281 F.3d 383, 389 (3d Cir. 2002) (citing *Gully v. First National Bank*, 299 U.S. 109, 112 (1936)). As noted in Defendants' Notice of Removal, Plaintiffs causes of action "will likely require judicial evaluation and decisions regarding the interpretation of EPA biosolids regulations and EPA fact finding regarding the safety of land application." (Defs.' Notice of Removal ¶ 4).

B. Plaintiffs' Complaints Expressly Raise Substantive Federal Questions

Plaintiffs argue that their nuisance, negligence, and trespass claims are exclusively state common law claims that do not, on their face, raise a federal question. *See* Plaintiffs' Brief in Support of Motion to Remand ("Pls. Br.") at 7. Plaintiffs ignore that their claims, by definition, challenge the sufficiency of the Clean Water Act and the standards for the generation and land application of biosolids promulgated under the Act by the EPA. This challenge to EPA's regulations raises a substantial federal question on the face of the complaints and therefore arises under federal law.

Plaintiffs' complaints do not hide their fundamental disagreement with the efficacy of federal EPA standards regulating biosolids treatment and land application. Plaintiffs allege, among other things, that (i) biosolids are a "hazardous and noxious material," (Compl. ¶ 45), (ii) that "current treatment methods" [prescribed by the EPA] do not adequately stabilize the bacteria in biosolids, (Compl. ¶ 58), (iii) that biosolids "contain [] neurotoxic pollutants such as mercury and lead," (Compl. ¶ 56), and (iv) that biosolids inherently contain bacteria and other biological materials that pose hazards and risks of infection and illness to humans. *See* (Compl. ¶ 87). Most directly, in their claim for negligence, Plaintiffs state that biosolids, generated in accordance with EPA regulations, still contain "chemical and biological pollutants."

(Compl. ¶ 400). Their assertion that “Plaintiffs’ claims are neither concerned with nor dependent upon any actions prior to the disposal of the sludge” is flatly contradicted by their Complaints. (Pls. Br. at 16).

Plaintiffs are not merely arguing that Defendants were negligent because biosolids were generated and applied *in violation of* EPA and other federal standards. Plaintiffs argue that biosolids were generated and applied *in accordance with* EPA standards and Defendants were still negligent. Plaintiffs allege that the EPA standards themselves do not make biosolids sufficiently safe and thereby directly challenge the adequacy of EPA regulations. The allegations raised in Plaintiffs’ Complaints necessarily require this court to resolve a substantive federal issue: whether the EPA Part 503 biosolids rules adequately protect human health.

Plaintiffs’ narrow reading of the Court’s opinion in *Franchise Tax Board of California v. Construction Laborers Vacation Trust* disregards the fact that the Supreme Court stated that federal law controls a plaintiff’s right to relief when “it appears that some . . . disputed question of federal law is a *necessary element* of one of the well-pleaded state claims.” 463 U.S. 1, 13 (1983) (emphasis added). While *Franchise Tax Board* also explains that removal cannot be based on a federal preemption defense, the well-pleaded complaint rule upon which Plaintiffs rely so heavily does not mean that a federal claim or

federal law must be stated explicitly in the complaint as one of the claims. The well pleaded-complaint rule merely means that the complaint itself must implicate a right or immunity created by the Constitution or laws of the United States and this right or immunity must be an essential element of the plaintiff's cause of action. *Id.* at 10-11. The federal question can be an element of the cause of action without being spelled out. *See United Jersey Banks v. Parell*, 783 F.2d 360, 366 (3d Cir. 1986). *Franchise Tax Board* stated plainly that there are “two situations where federal jurisdiction could be available even though a plaintiff based its claim in state court on state law: (1) when ‘it appears that some substantial, disputed question of federal law is a necessary element of one of the well-pleaded state claims’ or (2) when it appears that plaintiff’s claim ‘is ‘really one of federal law.’” *United Jersey Banks*, 783 F.2d at 366 (citing *Franchise Tax Board*, 462 U.S. at 13).

Here, Synagro and the farmers are not arguing for removal on the basis of an anticipated federal preemption *defense*, but rather on the basis of Plaintiffs’ challenge to federal biosolids standards. Defendants removed this case because tort claims can not be used to dictate federal biosolids standards. Removal is appropriate here because determination of whether Synagro complied with the Clean Water Act and its regulations is a “necessary element” to the resolution of Plaintiffs’ claims. *See United Jersey Banks*, 783 F.2d at

366. Plaintiffs' claims raise issues of federal law and can and should be heard in federal court.

C. The Clean Water Act Preempts Plaintiffs' Claims and Provides a Basis for Federal Jurisdiction

1. Complete Preemption is a Basis for Federal Jurisdiction

Plaintiffs admit that complete preemption provides a basis for federal jurisdiction. *See* (Pls. Br. at 18); *Franchise Tax Board*, 463 U.S. at 23-24 (citing *Avco Corp. v. Aero Lodge No. 735, Int'l Assn. of Machinists*, 376 F.2d 337 (6th Cir. 1967) ("If a federal cause of action completely pre-empts a state cause of action, any complaint that comes within the scope of the federal cause of action necessarily 'arises under federal law.'")). *See also Dukes*, 57 F.3d at 355. The Clean Water Act completely preempts the claims in this case and serves as a basis for federal jurisdiction in this matter. Defendants properly asserted this as a separate grounds for removal to federal court. *See* (Defs.' Notice of Removal ¶ 3).

2. Plaintiffs' Claims Are Completely Preempted by the Clean Water Act

The Court can assume jurisdiction of this case based on the Clean Water Act preemption of state court tort claims as applied in *International Paper v. Ouellette*. The plaintiffs in *International Paper* were Vermont residents who brought a nuisance suit in Vermont state court against International Paper, a

company across Lake Champlain in New York State that was discharging wastewater effluent into the lake pursuant to a permit under the Clean Water Act. International Paper held a National Pollutant Discharge Elimination System (“NPDES”) permit, administered by New York State under a formal delegation from EPA. The Supreme Court ruled that “the application of Vermont law against [International Paper] would allow [plaintiffs] to circumvent the NPDES permit system, thereby upsetting the balance of public and private interests so carefully addressed by the Act.” *Id.* at 494. Applying a preemption analysis, the Court voided all Vermont claims for compensatory, punitive, and injunctive relief. The Court emphasized the sweeping nature of the Clean Water Act:

Congress intended the 1972 Act [Clean Water Act] amendments to “establish an all-encompassing program of water pollution regulation.” . . . The Clean Water Act also provides its own remedies, including civil and criminal fines for permit violations, and “citizen suits” that allow individuals (including those from affected States) to sue for injunctions to enforce the statute. In light of this pervasive regulation and the fact that the control of interstate pollution is primarily a matter of federal law, it is clear that the only state suits that remain available are those specifically preserved by the Act.

International Paper, 479 U.S. at 492 (citations omitted).

The Vermont plaintiffs argued that the Clean Water Act’s savings clauses did preserve their right to sue. They focused on a provision of the citizen suit section of the Act providing that “[n]othing in this section shall

restrict any right which any person (or class of persons) may have under any statute or common law to seek enforcement of any effluent standard or limitation or to seek any other relief.” 33 U.S.C. § 1365(e).⁵ They also invoked 33 U.S.C. § 1370, providing that “nothing in this Act shall . . . be construed as impairing or in any manner affecting any right or jurisdiction of the States with respect to the waters (including boundary waters) of such States.” The Supreme Court, however, interpreted both savings clauses narrowly, ruling that 1365(e) only acted to limit the reach of the citizen suit provision and did not generally authorize tort suits. Likewise, section 1370 was limited to authorizing state authority over intra-state discharges.

International Paper, 479 U.S. at 493.

The Court then applied traditional preemption analysis “guided by the goals and policies of the [Clean Water] Act in determining whether it in fact pre-empts an action based on the law of an affected State.” *Id.* The Court emphasized the complexities of the Clean Water Act, the balancing that goes into choices regarding wastewater, and how this system would be upended by allowing different states to dictate pollution control for other states. *Id.* at 494-

⁵ “Effluent standard or limitation” includes the requirements for biosolids quality and land application practices contained in the Part 503 Rules. *See* 33 U.S.C. § 1365(f) (incorporating in the term “effluent standards” the rules promulgated under 33 U.S.C. § 1345(d) for sewage use and disposal).

95. Allowing state court juries in particular to dictate pollution control measures was contrary to the federal program:

If the Vermont court ruled that respondents were entitled to the full amount of damages and injunctive relief sought in the complaint, at a minimum [International Paper] would have to change its methods of doing business and controlling pollution to avoid the threat of ongoing liability. In suits such as this, an affected-state court also could require the source to cease operations by ordering immediate abatement. Critically, these liabilities would attach even though the source had complied fully with its state and federal permit obligations. The inevitable result of such suits would be that Vermont and other States could do indirectly what they could not do directly -- regulate the conduct of out-of-state sources.

Id. at 495. The Court noted in particular how nuisance suits could bring disorder to the Clean Water Act, quoting *Prosser and Keeton on Law of Torts* that “[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’” *International Paper*, 479 U.S. at 497 (quoting *Prosser* 616 (5th ed. 1984)). Accordingly, the Supreme Court in *International Paper* found that the Vermont nuisance claims against an entity holding a New York discharge permit whose effluent reached Vermont waters were preempted.

International Paper controls here for removal to federal court and dismissal under the complete preemption doctrine. Through a tort suit identical in form to that of the Vermont residents in *International Paper*, the Plaintiffs here seek to dictate through a Pennsylvania lawsuit the safety and land

application practices of biosolids generated out of state, as well as an injunction blocking the recycling of biosolids pursuant to the Part 503 Rules. Under the Part 503 Rules, the out-of-state generators of the biosolids land applied at the Phillips Farm are responsible for generating biosolids eligible for land application, including meeting precise requirements for reduction of bacteria and viruses and ensuring that metals are below certain thresholds. *See, e.g.*, 40 C.F.R. § 503.7 (“Any person who prepares sewage sludge shall ensure that the applicable requirements in this part are met when that sewage sludge is applied to the land . . .”); (Reider Decl. ¶ 8). Plaintiffs directly target these standards and the out-of-state generators responsible for them in both their allegations in their Complaints and their causes of action.

The case for preemption is more compelling here than in *International Paper* because neither Pennsylvania nor Maryland have the same flexibility under the Clean Water Act that New York State did in *International Paper*. In *International Paper*, the Court noted that New York State had received delegation of NPDES permit writing authority, allowing the Court to rule that a right to sue under New York law was consistent with unitary authority over the discharger. That is not the case here, for while Maryland and Pennsylvania (the main sources for biosolids applied at the Phillips Farm) have delegation power under the Clean Water Act for the issuance of NPDES discharge

permits, neither state has delegated powers for administration and enforcement of EPA's Part 503 Rules. Moreover, even if the two states were delegated to enforce EPA's biosolids program, neither they (nor a jury sitting in those states) would be allowed to vary directly — or by the compulsion of a jury award — the Part 503 standards for biosolids quality and land application, which were set through notice and comment rule making. Part 503 sets agronomic rate, site access controls, and other important baselines for biosolids generators in all 50 states. The federal metal limits and pathogen reduction measures these states employ also are set by federal standards in 40 C.F.R. Part 503. The quality standards for biosolids generators are unequivocally national standards governed by EPA and based upon EPA studies.

Plaintiffs argue that complete preemption is inapplicable because the Clean Water Act expressly allows states and municipalities to promulgate regulations with regard to sewage byproducts. (Pls. Br. at 16-17). Express federal allowance of some state regulatory authority over biosolids, however, is not the same as the regulation of biosolids through a tort action sought by Plaintiffs and barred by *International Paper*. Again, *International Paper* rejected this argument and narrowly read similar savings clauses in the Clean Water Act.

Plaintiffs also mistakenly assert that “there is no federal cause of action that provides Plaintiffs redress for those injuries addressed by their state law claims.” (Pls. Br. at 8). In this case, as in *International Paper*, the Clean Water Act’s citizen suit provision offers Plaintiffs a venue for redress, and in addition Plaintiffs have administrative remedies before PaDEP.

Finally, Plaintiffs rely on *Wyatt v. Sussex Surry, LLC*, 482 F. Supp. 2d 740 (E.D. Va. 2007). Plaintiffs there, represented by the same counsel, successfully remanded to state court a tort case involving allegations related to biosolids recycling on forestland. The court’s opinion, however, barely touched on the important preemption concepts raised in *International Paper*. *Wyatt*, 482 F. Supp. 2d at 745-46. Instead, the *Wyatt* court focused primarily on arguments that plaintiffs had fraudulently joined a defendant as a means to avoid federal diversity jurisdiction. The court’s ruling hardly addressed the congressional intent behind the Clean Water Act and related Section 503 program which demonstrate, as discussed above, why the doctrine of complete preemption should have been applied.

3. Preemption of Plaintiffs’ Claims is Consistent With General Preemption Principles

While federal and state courts have rarely reviewed tort claims against biosolids recycling, they have repeatedly struck down local ordinances that seek to ban or impede biosolids recycling. *See Synagro-WWT, Inc. v. Rush*

Township, 299 F. Supp. 2d 410 (M.D. Pa. 2003) (finding that portions of a local ordinance regulating the application of sewage sludge were preempted by Pennsylvania law); *Liverpool Township v. Stephens*, 900 A.2d 10301 (Pa. Commw. Ct. 2006) (Pennsylvania Solid Waste Management Act preempted local biosolids ordinance); *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865 (C.D. Cal. 2007); *O'Brien v. Appomattox County*, 293 F. Supp. 2d 660 (W.D. Va. 2003). These decisions reflect that biosolids recycling is a vital part of the nation's wastewater infrastructure that can not be regulated by local governments or juries.

In other areas of law, the Supreme Court has not hesitated to preempt individual lawsuits that threaten through jury findings and verdicts to pose obstacles to federal programs in fields as varied as health care, product safety, and transportation. *See Geier v. Am. Honda Motor Co., Inc.*, 529 U.S. 861, 899 (2000). This past term, the Supreme Court ruled that negligence and strict liability tort claims were preempted by Food and Drug Administration regulations. *See Riegel v. Medtronic, Inc.*, 128 S. Ct. 999 (2008). The Supreme Court also granted certiorari and will review this term the Vermont Supreme Court's decision not to preempt tort claims that were impliedly preempted by the Food, Drug, and Cosmetics Act in *Wyeth v. Levine*, 944 A.2d 179 (Vt. 2006), *cert. granted*, 128 S. Ct. 1118 (Jan. 18, 2008).

Even the local government where Plaintiffs reside recognizes the dominance of the federal government in the field of biosolids regulation. In the “Findings and Purpose” section of a recently-enacted ordinance that purports to ban land application of biosolids by any incorporated entity, Shrewsbury Township recognized that the Township “has been rendered powerless by the state and federal government to prohibit land application of sewage sludge by persons that comply with all applicable laws and regulations.” Shrewsbury Township Ordinance No. 2008-05 § 3, attached hereto as Exhibit B.

In resolving the Motion to Remand, this Court should focus on what Plaintiffs allege in their Complaints. If Plaintiffs are alleging that Defendants failed to comply with the Clean Water Act and EPA regulations in applying biosolids to the Phillips Farm site, then Plaintiffs’ claims are most appropriately brought in the form of a Clean Water Act citizen suit in a federal court. If Plaintiffs are alleging that the EPA standards themselves are inadequate to protect human health and property, then Plaintiffs challenge federal law directly. In either case, Plaintiffs’ claims raise federal questions in their Complaints and belong in this federal court.

D. Plaintiffs Are Not Entitled to Fees and Costs

Plaintiffs request an award of attorneys’ fees and costs. Such an award is not warranted. In *Martin v. Franklin Capital Corp.*, the Supreme Court held

that “absent unusual circumstances, attorney’s fees should not be awarded when the removing party has an objectively reasonable basis for removal.” 546 U.S. 132, 136 (2005).⁶ Accordingly, even if the Court decides to remand this matter to state court, an award of fees and costs is unwarranted and the Court should deny Plaintiffs’ request.⁷

V. CONCLUSION

Federal jurisdiction lies here because of the core federal question regarding the safety of biosolids generated under EPA’s Part 503 program or federal preemption of tort lawsuits that challenge the program itself. For the foregoing reasons, this Court should deny Plaintiffs’ Motion to Remand. Defendants request oral argument on their Opposition.

⁶ As a basis for this request, Plaintiffs note that Defendants made similar arguments before Judge Hudson in *Wyatt v. Sussex Surry*, 482 F. Supp. 2d 740, 745 (E.D. Va. 2007). However, Judge Hudson denied Plaintiffs’ request for fees and costs in *Wyatt*, stating Defendants had a “good faith” basis for removal. *See Wyatt Remand Hr’g Tr.* at 23:13-18, attached hereto as Exhibit C.

⁷ Plaintiffs’ request for fees and costs is also unsupported by evidence. Additional briefing and submission of facts is required before any such award can be considered.

Dated: September 22, 2008

Respectfully submitted,

/s/

James B. Slaughter, Esq. (admitted
pro hac vice)

Fred R. Wagner, Esq.

Katherine E. Wesley, Esq.

Beveridge & Diamond, P.C.

1350 I Street, N.W., Suite 700

Washington, D.C. 20005

(202) 789-6000

e-mail: jslaughter@bdlaw.com

e-mail: fwagner@bdlaw.com

e-mail: kwesley@bdlaw.com

Attorneys for Synagro Defendants

/s/

Alexandra Chiarunttini, Esq.

Neil A. Slenker, Esq.

Stock and Leader

221 West Philadelphia Street

York, PA 17401-2994

Attorney ID # 77974

(717) 846-9800

e-mail:

achiarunttini@stockandleader.com

e-mail: nslenker@stockandleader.com

Attorneys for Synagro Defendants

/s/

David Lehman, Esq.
Curtis N. Stambaugh, Esq.
Kandice Giurintano, Esq.
McNees Wallace & Nurick LLC
100 Pine Street, PO Box 1166
Harrisburg, PA 17108-1166
Attorney ID # 80565
(717) 237-5435
e-mail: cstambaugh@mwn.com
e-mail: kgiurintano@mwn.com
*Attorneys for Defendant George Phillips
and Hilltop Farms*

/s/

David R. Breschi, Esq.
Breschi & Associates, LLC
946 Lincoln Way East
Chambersburg, Pennsylvania 17201
Attorney ID # 59001
(717) 263-9533
e-mail: david@breschilaw.com
Attorney for Defendant Steve Troyer

CERTIFICATE OF COMPLIANCE

I hereby certify pursuant to Local Rule 7.8 of the U.S. District Court for the Middle District of Pennsylvania that the total number of words in this Memorandum of Law, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of authorities, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 4914. In determining this word count, I relied upon the word count feature of the word-processing system used to prepare the brief.

Dated: September 22, 2008

/s/
James B. Slaughter

