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AND SHALE LAW

2024 Pennsylvania Agricultural Law Symposium

10:00–11:00am Legal Landscape of Land Application: Biosolids and Food Processing Waste

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CENTER MISSION AND BACKGROUND

The Center for Agricultural and Shale Law conducts research and educational programs to serve a wide variety of stakeholders including agricultural producers, landowners, mineral interest and royalty owners, business professionals, judges, attorneys, legislators, government officials, community groups, and the general public. Center programs are funded in part by the Commonwealth of Pennsylvania through the Pennsylvania Department of Agriculture. The Center for Agricultural and Shale Law is a partner of the National Agricultural Law Center (NALC) at the University of Arkansas System Division of Agriculture, which serves as the nation's leading source of agricultural and food law research and information.

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Pennsylvania Agricultural Mediation Program

- Who can request mediation?
 - USDA-related issues:
 - Agricultural Loans
 - Wetlands determinations
 - Compliance with farm programs, including conservation programs
 - National organic program established under the Organic Foods Production Act of 1990
 - Agricultural Credit
 - Rural water loan programs
 - Grazing on National Forest System land
 - Pesticides
 - Non-USDA issues:
 - Land and Equipment Lease issues.
 - Family farm transition.
 - Farmer-neighbor disputes.
 - As approved by PA Secretary of Agriculture



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***LEGAL LANDSCAPE OF LAND APPLICATION:
BIOSOLIDS & FOOD PROCESSING
WASTE (“FPR”)***



‘Dead fish, spoiled milk and human waste’: Food-waste fertilizers turn up noses

Updated: May. 21, 2024, 5:01 a.m. | Published: May. 21, 2024, 5:00 a.m.



FPR's (Food Processing Wastes) used as fertilizer are injected field in Penn Township, Cumberland County. May 17, 2024 Sean Simmers@pennlive.com Sean Simmers

NEWS

Food processing residual isn't regulated in Pennsylvania. Some people think it should be



Shawn Hardy
The Echo Pilot

Published 5:29 a.m. ET March 25, 2024 | Updated 5:29 a.m. ET March 25, 2024

What's that smell? Cumberland County leaders question food waste as farm fertilizer

Updated: Feb. 28, 2024, 6:08 p.m. | Published: Feb. 28, 2024, 5:00 p.m.



PA's FPR regulatory scheme:

[The Food Processing Residual Management Manual](#) (1994, rev. 2001)

The FPR Manual is the primary and best source. Otherwise, research turns into navigating the Solid Waste Management Act and its voluminous regulations, as well as DEP's programmatic structures, to extricate the comparatively infrequent references to food processing residual waste scattered in disparate places amongst the text of both.

DEPARTMENT OF ENVIRONMENTAL PROTECTION
Bureau of Land Recycling and Waste Management
Division of Municipal and Residual Waste

The
Food Processing Residual
Management Manual



DOCUMENT NUMBER:	254-5400-100
TITLE:	The Food Processing Residual Management Manual
EFFECTIVE DATE:	June 1994
AUTHORITY:	Solid Waste Management Act (35 P.S. §§ et seq.) and Regulations at 25 Pa. Code Chapter 287.
POLICY:	The Department's policy is to provide a person or municipality with the information necessary for the proper use or disposal of the food processing residual waste.
PURPOSE:	The purpose of this document is to provide instructions and operating procedures for FPR waste source reduction, recycling, and disposal.
APPLICABILITY:	This guidance applies to all persons, municipalities, and counties who operate a food processing facility and are exempt from acquiring a permit under 25 Pa Code Chapter 287.
DISCLAIMER:	<p>The policies and procedures outlined in this guidance document are intended to supplement existing requirements. Nothing in the policies or procedures will affect regulatory requirements.</p> <p>The policies and procedures herein are not an adjudication or a regulation. There is no intent on the part of the Department to give these rules that weight or deference. This document establishes the framework, within which DEP will exercise its administrative discretion in the future. DEP reserves the discretion to deviate from this policy statement if circumstances warrant.</p>
PAGE LENGTH:	268 (total)
LOCATION:	Volume 6, Tab 50



Definition of FPR

"Food processing waste." Residual materials in liquid or solid form generated in the slaughtering of poultry and livestock, or in processing and converting fish, seafood, milk, meat, and eggs to food products; it also means residual materials generated in the processing, converting, or manufacturing of fruits, vegetables, crops and other commodities into marketable food items.



- As waste, FPR is governed by the Solid Waste Management Act. (SWMA)
- FPR is classified as a form of **residual waste**, a variety produced in animal and plant food processing.
- FPR is commonly handled, and land applied, like manure.
- PA's residual waste regulations are at 25 Pa. Code, Chapter 287. Residual waste cannot be processed, disposed of, etc. without a permit from DEP.
- 25 Pa. Code § 287.101 contains a permitting exemption for FPR's use in a "**normal farming operation**," which is generally as a soil amendment, soil conditioner or nutrient source, but with conditions.



The permit exemption is for:

“The use of food processing waste or food processing sludge in the course of ***normal farming operations*** if the waste is ***not hazardous***. A person managing food processing waste shall ***implement best management practices***. The Department will prepare a ***manual*** for the management of food processing waste ***which identifies best management practices*** and ***may approve additional best management practices on a case-by-case basis***. ***If a person fails to implement best management practices for food processing waste, the Department may require compliance with the land application, composting, and storage, operating requirements*** of Chapters 291, 295 and 299.
[respectively]



“Normal farming operation” definition:

The customary and generally accepted activities, practices and procedures that farms adopt, use, or engage in year after year in the production and preparation for market of poultry, livestock, and their products; and in the production, harvesting and preparation for market of agricultural, agronomic, horticultural, silvicultural and aquacultural crops and commodities; ***provided that such operations are conducted in compliance with applicable laws, and provided that the use or disposal of these materials will not pollute the air, water, or other natural resources of the Commonwealth. It includes the storage and utilization of*** agricultural and ***food process wastes***, screenings and sludges for animal feed, and includes the agricultural utilization of septic tank cleanings and sewage sludges ***which are generated off-site. It includes the management, collection, storage, transportation, use or disposal of*** manure, other agricultural waste and ***food processing waste***, screenings and sludges on land ***where such materials will improve the condition of the soil, the growth of crops, or in the restoration of the land for the same purposes.***”



“Hazardous” definition:

- May cause or significantly contribute to an increase in mortality or an increase in morbidity in either an individual or the total population; or
- May pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

It is a very high standard.



FPR Workgroup – DEP/PDA created in 2023

- Made up of DEP, PDA, SCC, PA General Assembly, industry stakeholders and selected others.
- Conducted six meetings from late 2023 –May 2024.
- [FPR Workgroup Report](#) issued in July 2024.
- Workgroup analyzed incidents which produced complaints in the recent past; reviewed law and regulations, proposed solutions to better regulate transportation, storage and application.



Contributing factors to present problems

- Transportation and brokering of FPR not regulated in the same manner as manure. (no equivalent of the Manure Hauler/Broker Certification Act)
- Manual treats land application as a last resort. Now it is the predominant method of disposal. Landfills not accepting FPR.
- Land Application System (LAS) Plan guidance not adequate.
- Newer and variable business models not accounted for in the Manual. Practices have changed over time. Volume is greatly increased.
- FPR crossing state lines into PA frustrates regulatory scheme in multiple ways and introduces new forms of FPR.
- Inadequate documentation requirements of contents.
- Commingling with manure.



FPR Workgroup's proposed solutions

- Clarify liability and secure documentation;
- Enhance training for FPR haulers;
- Create a clearer definition of FPR;
- Require more stringent odor management for high-odor-risk FPR;
- Require notification of intent to store or apply FPR;
- Codify required minimums in land application system (LAS) plans;
- Reorganize internal management of FPR rules; and
- Enhance education around FPR rules and management.



Proposed Legislation – HB 2393

- [HB 2393](#) – introduced 6/7/24
- [Sponsorship Memorandum](#) – states that it will:
 - Differentiate between various sources of FPR and create a classification based upon their potential risk to farms and community, these distinct categories of FPR will be used to guide safe storage, handling, and application requirements of that FPR material.
 - Require FPR that is sourced from animal products or animal product waste to be processed by a digester or another means before allowing to stored on farms or be used as FPR;
 - Require documentation of the makeup of FPR and nutrients provided prior to being applied to farmland;
 - Require the nutrient levels of FPR to be included with any application plan before being applied to farmland;
 - Require the application plan to be reviewed by a local conservation district before FPR is applied to farmland; and
 - Require brokers and haulers of FPR to be licensed by the Commonwealth.



Right to Farm and ACRE protections

- Right to Farm Act and the ACRE statute's protections to a “normal agricultural operation” have been granted by caselaw to both land application of biosolids and FPR.
 - Biosolids: [Gilbert v. Synagro](#), 131 A.3d 1 (Pa. 2015).
 - FPR: [Branton v. Nicholas Meat](#), 159 A.3d 540 (Pa. Super. 2017).



Preemption re: biosolids

- In a final disposition of an ACRE claim, the [Office of the Attorney General](#) (OAG) concluded that the SWMA preempts local regulation of the land application of biosolids. [ACRE Complaint – East Penn Township 5/21/19](#). The township amended its ordinance as a result.

While the SWMA does not have express preemption language, numerous cases conclusively demonstrate that local control over biosolids/sewage sludge use is subject to conflict and field preemption. As noted above in *Concerned Citizens of the Yough, supra*, 639 A.2d at 1275, the Court could not have been more explicit – the SWMA and the accompanying regulations “indicate the General Assembly’s clear intent to regulate in plenary fashion every aspect of the disposal of solid waste....” This is textbook field preemption and East Penn’s position that there is room for municipalities to maneuver within the biosolids area is mistaken.

- Any precedential value of this OAG conclusion beyond the OAG’s handling of future claims is undetermined.

QUESTIONS?

