COUNTIES, CITIES AND TOWNS: GENERAL POWERS AND PROCEDURES OF COUNTIES.

HEALTH: ENVIRONMENTAL HEALTH SERVICES – SEWAGE DISPOSAL.

Governance of biosolids activities within Commonwealth resides with Department of Health. Local ordinance requiring applicant to obtain conditional use permit before applying or storing biosolids in locality is preempted by comprehensive state program regulating biosolids use.

Mr. Henry A. Thompson, Sr.
County Attorney for Sussex County
March 29, 2002

Issue Presented

You ask whether a county may enact an ordinance requiring that a person apply for a conditional use permit prior to applying or storing biosolids in the county. You attach a draft of a proposed ordinance amending the Sussex County Code adding a provision on land application of biosolids. You note that the Virginia Waste Management Act requires the governing body of a locality to certify to the Department of Environmental Quality that the location and operation of solid waste facilities are consistent with applicable local ordinances. You conclude that a county, in the exercise of its police powers, may require a person to submit an application for a conditional use permit.

Response

In light of the applicable authorities and the comprehensive state program regulating the use of biosolids in the Commonwealth, it is my opinion that a local ordinance requiring an applicant to obtain a conditional use permit before applying or storing biosolids in the locality is preempted by the comprehensive state program.

Applicable Law

Article 1, Chapter 6 of Title 32.1, §§ 32.1-163 through 32.1-166, authorizes the State Board of Health to implement a comprehensive plan for the handling, treatment, disposal and storage of sewage sludge. Specifically, § 32.1-164.5(A) provides
that no person shall "land apply" sewage without a proper state
permit. Section 32.1-164.5(B) further provides:

The Board of Health … shall promulgate regulations
to ensure that (i) sewage sludge permitted for land
application, marketing or distribution is properly
treated or stabilized, (ii) land application, marketing
and distribution of sewage sludge is performed in a
manner that will protect public health and the
environment, and (iii) the escape, flow or discharge of
sewage sludge into state waters, in a manner that
would cause pollution of state waters … will be
prevented.

The overriding goal of statutory interpretation is to discern and give
effect to legislative intent. Virginia adheres to the Dillon Rule of
strict construction, which provides that local governing bodies "have
only those powers that are expressly granted, those necessarily or
fairly implied from expressly granted powers, and those that are
essential and indispensable." Local ordinances adopted under the
broad police power authority of § 15.2-1200 of the Code of Virginia
must not be inconsistent with state law. An ordinance is
inconsistent with state law if state law preempts local regulation in
the area, either by expressly prohibiting local regulation or by
enacting state regulations so comprehensive that the state may be
considered to occupy the entire field.

Discussion

In accordance with § 32.1-164.5(B), the Department of Health has
adopted comprehensive regulations prescribing standards for
treating and stabilizing sewage sludge, also referred to as
"biosolids," prior to land application. These Biosolids Use
Regulations also create a sampling and testing program, define
restrictions for land application sites, prescribe minimum levels of
biosolids treatment, and set forth the procedures for treating,
utilizing, transporting, storing, and marketing biosolids.

The Virginia Waste Management Act authorizes the Virginia Waste
Management Board to regulate sanitary landfills, prohibit open
dumps, and generally to regulate and control solids waste activities
within the state. The Waste Management Act does not authorize
localities to adopt ordinances; it merely requires them to have "solid
waste management plans." It is my opinion that this Act is not
intended to govern biosolids activities within the Commonwealth;
rather, such responsibility resides with the Department of Health pursuant to § 32.1-164.5.

Section 32.1-164.5(A) requires a person to obtain the appropriate permit for the storage and land application of sewage sludge. Section 32.1-164.5(C)(7) provides for notification of local governing bodies when a land application permit is processed. Where the state and the county share jurisdiction in the area, however, the powers of the respective state boards are paramount, and any local ordinance must not operate in a conflicting manner. Accordingly, a prior opinion of the Attorney General concludes that, even though the Department of Health must consider land use concerns expressed by a county board of supervisors with regard to a sludge storage facility seeking reissuance of its state permit, a local ordinance may not subject a facility falling within state purview to restrictions more stringent than those proposed by the state.

Additionally, when the General Assembly expressly bestows certain powers in a statute, it intends to exclude those powers which have been omitted. For example, § 62.1-44.19:3(C) expressly limits the authority of localities to regulate biosolids activities:

Any county, city or town may adopt an ordinance that provides for the testing and monitoring of the land application of sewage sludge within its political boundaries to ensure compliance with applicable laws and regulations.

Thus, a locality may adopt ordinances that pertain only to the testing and monitoring of land application of biosolids within its political boundaries. It is my opinion, therefore, that § 62.1-44.19:3(C) indicates a legislative intent to restrict the locality’s authority to enact ordinances related only to the functions expressed in the statute.

To summarize, § 32.1-164.5 and the Biosolids Use Regulations contain the Commonwealth’s comprehensive program for regulating biosolids use, including sewage sludge, in the Commonwealth. The General Assembly has delegated the principal responsibility for regulating and managing the storage and land application of sewage sludge to specific state boards. The pertinent regulations vest the State Health Commissioner with the authority to "impose standards and requirements more stringent than those contained in [the Biosolids Use Regulations] when required to protect public health or prevent nuisance conditions from developing." The Virginia Waste Management Act does not
govern biosolids activities within the Commonwealth, nor does § 62.1-44.19:3(C) grant to localities the authority to restrict or prohibit the land application of biosolids beyond adopting ordinances pertaining to testing and monitoring.

Conclusion

In light of these statutes and the comprehensive state program regulating the use of biosolids in the Commonwealth, it is apparent that the state occupies the field of sewage sludge disposal, treatment and management. Accordingly, it is my opinion that a local ordinance requiring an applicant to obtain a conditional use permit before applying or storing biosolids in the locality is preempted by the comprehensive state program.¹


² You also ask for a review of a proposed ordinance assuming a conditional use permit may be required. Because my answer to your first inquiry is in the negative, it is unnecessary to address your second inquiry.


⁵ Any request by a county attorney for an opinion of the Attorney General "shall itself be in the form of an opinion embodying a precise statement of all facts together with such attorney’s legal conclusions." Va. Code Ann. § 2.2-505(B) (LexisNexis Repl. Vol. 2001).


10 See 12 VAC 5-585-10 (West Supp. 2001) (defining "biosolids" as "sewage sludge that has received an established treatment for required pathogen control and is treated or managed to reduce vector attraction to a satisfactory level and contains acceptable levels of pollutants, such that it is acceptable for use for land application, marketing or distribution in accordance with [the Biosolids Use Regulations]).


19 This opinion supersedes a previous opinion issued by this Office concluding that the state has not occupied the field of regulation of the disposal of sewage sludge, and that localities possess the authority to restrict land application of sewage sludge. 1983-1984 Op. Va. Att’y Gen. 86, 88. The 1984 opinion was issued prior to the enactment of § 32.1-164.5. To the extent the 1984 opinion conflicts with this opinion, it is expressly overruled.