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Indemnity Agreement Offers Protection to Bankers

by Jane Forste



Jane Forste is Vice President, Technical Services for Bio Gro Systems Inc., Annapolis, Md., specializing in biosolids recycling programs and land application projects.

The Bio Gro Division of Wheelabrator Clean Water Systems has released the language of an Indemnification Agreement recently agreed upon with a major northeastern agricultural financing institution regarding the application of biosolids (municipal sludge) on farmland. The language is likely to become a model for risk-sharing between biosolids applicators, landowners and lenders.

Farm lenders have long sought to protect themselves from environmental liability, and to be able to determine in advance whether an environmental problem exists, and what, if any detrimental impact it could have on the borrower's ability to repay the loan, or on the value of the property or collateral underpinning the loan. The Environmental Protection Agency responded to lenders' concerns by issuing a rule, "Lender Liability Under CERCLA,"¹ which offered lenders clarity and a measure of security from environmental liability in making loans.

Of particular interest to farm lenders over the past few years has been the issues of risks and liability associated with applying biosolids to farmland. Numerous studies had shown that biosolids are both a beneficial amendment to soil and a valuable soil reclamation tool for damaged land. It is most often supplied to farmers at no cost. Research also shows that biosolids pose minimal risk to humans through crops grown on biosolids-treated soil, runoff, groundwater contamination, or the spread of diseases.

Nevertheless, farm lenders and borrowers remained concerned over the long-term (20 years+) effects of municipal biosolids which could impact real estate collateral values. Meanwhile, the cities and municipalities producing the products failed to make any guarantees that were agreeable to lenders.

Bio Gro, founded in 1978, has recycled biosolids on agricultural land under contract to more than 100 biosolids generators throughout the country. The company took the lead in drafting indemnification language after participating in a symposium on the application of biosolids to agricultural land held Nov. 29-30, 1993,

where use and liability was vigorously debated.

The symposium was sponsored by the Springfield District Farm Credit Council, a trade organization for agricultural lending cooperatives in the Northeast and focused upon the following questions: Who is responsible if something goes wrong – the generator of the biosolids – the contractor who applied it – the farmer who used it – or the lender? Specifically, the organizers sought to advance discussion of risks associated with land application of biosolids, and biosolids-based products and to explore equitable ways to share liability arising from such applications.

After several months of discussions and exchanges of draft language, Bio Gro and the Springfield District Farm Credit Council agreed to indemnification language outlining terms of liability that many in both the biosolids and financial industries believe establishes a model set of guidelines that can be used across the country.

The agreement, the first of its kind, is good for bankers, good for farmers and good for the environment as well.

It reads, in part:

"Contractor (Wheelabrator/Bio Gro) agrees to indemnify, defend and hold harmless (landowner) from and against any and all claims, suits, actions, demands, losses, costs, liabilities, and expenses (including remediation costs and reasonable attorneys fees) to the extent such losses result from (1) Contractor's or Generator's violation of applicable laws or regulations in effect at the time of biosolids application to the and owner's property ..."

The language provided by Bio Gro also ensures that they (as a contractor) will address claims relating to the generator's responsibilities under the law, thus relieving the landowners of any need to pursue such actions:

"In the event this indemnification is enforced against Contractor for a violation of law by a Generator, Landowner agrees to assign and subrogate to Contractor its claim against Generator."

For the bankers, the agreement establishes a mechanism for handling business risk and reasserts the industry's confi-

dence in the product. Because the generators, too, must operate within closely regulated safeguards and strictures, this leaves little room for banks to be concerned about the improper use of biosolids.

Land application of biosolids has been a conservation and environmental practice for decades in Europe, where farmers called it "black gold." Biosolids application is on the increase in the United States with more than 25% of all municipal biosolids generated in this country being applied to farmland. Municipal and private industry officials agree the percentage of biosolids recycled onto farmland will continue to grow. Besides improving soil tilth, land-applied biosolids can save on commercial fertilizer costs, providing nutrients worth up to \$100 per acre.

The Clean Water Act and the ban on ocean dumping significantly increased the amount of nutrient-rich municipal biosolids available for beneficial uses such as application on farmland. The Act, passed 20 years ago, has resulted in improved and expanded wastewater treatment technology and facilities, guaranteeing both cleaner water and high quality biosolids. Consequently, the land application of biosolids has become an attractive and effective alternative to chemical fertilizer, and continues to gain favor in many sectors.

Biosolids are the accumulated, treated solids that are separated from water during the wastewater treatment processes used by public and private wastewater treatment plants (Generators). They are primarily organic materials and when added to soil, they improve water and nutrient retention, reduce erosion potential and improve soil structure. They provide nitrogen in a form that is taken up by plants as it is needed during growth cycles. Biosolids also add phosphorus to the soil. Sometimes lime is added during processing, so some biosolids have the added benefit of a liming agent.

The application process is closely monitored and regulated to ensure that it presents little risk to people, animals or the environment. The procedures ensure that the future use of the land is not restricted because of the application. Martha Prothro,

EPA Acting Assistant Administrator for Water has asserted that "farmers who use biosolids in accordance with Federal regulations are protected from CERCLA liability and any other enforcement action from EPA" in a letter to a California Congressman. Recycling biosolids for agricultural use also has received the green light from the U.S. Department of Agriculture, the U.S. Food and Drug Administration, the National Association of Soil Conservation Districts, and many land-grant colleges nationwide.

Business risks associated with the use of biosolids are minimal and can be managed. The responsible use of biosolids is a worthy goal for all involved; achieving it will require government, private industry, farmers and their neighbors, politicians and citizen groups to work cooperatively in voicing concerns, understanding and dealing with potential problems, and equitably sharing in the benefits of land apply-

ing biosolids.

The Bio Gro Division of Wheelabrator Clean Water Systems, as a leader in the biosolids recycling industry, is proud to announce this important agreement. We believe that it will help alleviate concerns about financial risks for lenders and farmers with respect to the long-term effects of biosolids applications which could impact on land values. When our indemnification agreement is coupled with responsible management in the field (including reports to farmers and regulatory agencies), such beneficial use practices will help complete the recycling loop needed to effectively deal with the by-products of a modern society. The result is a triple-win situation: for municipalities, farmers, and their lending institutions. ■

¹*Comprehensive Environmental Response Compensation and Liability Act*

Indemnification Agreement

Contractor agrees to indemnify, defend and hold harmless (Landowner) from and against any and all claims, suits, actions, demands, losses, costs, liabilities, and expenses (including remediation costs and reasonable attorneys fees) to the extent such losses result from: 1) Contractor's or Generator's violation of applicable laws or regulations in effect at the time of biosolids application; or 2) the negligence or wilful misconduct of Contractor in the delivery and application of biosolids to the undersigned Landowner's property. In the event this indemnification is enforced against Contractor for a violation of law by a Generator, Landowner agrees to assign and subrogate to Contractor its claim against Generator. This indemnification shall survive termination of this Agreement until the expiration of any applicable statutes of limitations. Landowner shall promptly notify Contractor in the event of a third party claim and Contractor shall have the right to provide and oversee the defense of such claim, and enter into any settlement of such claim at its discretion. Landowner agrees to fully cooperate with Contractor in the defense against any third party claim.

Landowner

Contractor

Date: _____

Date: _____