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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES; ORANGE COUNTY SANITATION DISTRICT; COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY; RESPONSIBLE BIOSOLIDS MANAGEMENT, INC.; R&G FANUCCHI, INC.; SHAEN MAGAN, both individually and d/b/a HONEY BUCKET FARMS and TULE RANCH/MAGAN FARMS; WESTERN EXPRESS, INC.; SIERRA TRANSPORT, INC.; CALIFORNIA ASSOCIATION OF SANITATION AGENCIES,

Plaintiffs,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants.

No. CV 06-5094 GAF (VBKx)

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION

Date: October 16, 2006
Time: 9:30 a.m.
Place: 255 East Temple St., Room 740
Los Angeles, CA 90012
Judge: Hon. Gary A. Feess

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I. INTRODUCTION

Defendant Kern County's illegal biosolids ban ("Ban") is forcing a sudden, expensive and imprudent overhaul of biosolids management in Southern California that requires this Court to issue a preliminary injunction. Plaintiffs City of Los Angeles and its partners in biosolids management (Plaintiffs RBM, Sierra Transport, and Fanucchi Farms) move this Court to enjoin the Ban during the pendency of the case and allow the City of Los Angeles to continue doing what it has done safely for 19 years – and for the last 12 years at its Green Acres Farm in Kern County – recycling treated sewage sludge through land application to provide plant nutrients for farming.

The City and its co-Plaintiffs easily meet the standards for a preliminary injunction. The Kern Ban requires Green Acres to stop land applying biosolids on January 22, 2007. Los Angeles is incurring large costs to prepare for the Ban and faces millions of dollars in additional costs to find alternative, lawful ways of managing 700 tons of biosolids per day. The City cannot recover those costs from Kern County, even when the Ban is declared illegal; its damages are irreparable as a matter of law. RBM, the City's biosolids contractor, Sierra Transport, which hauls the City's biosolids to Green Acres, and Fanucchi Farms face the loss of millions of dollars in contract revenues that imperils their businesses.

The Ban will also cause significant environmental harm, by forcing the City to attempt to find new sites for handling biosolids, most likely in Arizona, which means longer hauling distances and therefore increased fuel combustion and air pollution. Only a preliminary injunction can prevent these harms and preserve the status quo of almost two decades of safe, lawful land application of biosolids by the City of Los Angeles, most of that time at Green Acres.

Allowing land application at Green Acres to continue during the case causes no harm at all to Kern County. Preeminent biosolids scientists have visited Green Acres and scrutinized its operations and data, and unequivocally declare that it is

well-run and poses no environmental or health risk. The declarants and their expert opinions include:

Dr. Albert Page, Professor Emeritus of Soil Science at UC Riverside and Chair of the 1996 National Academy of Sciences review of land application: "Green Acres Farm has an unusually robust amount of data concerning its biosolids and operations, which helps support my opinions that the land application operations there are professionally conducted, are in compliance with regulatory requirements, and present negligible risk to public health and the environment."

Dr. Ian Pepper, Professor, University of Arizona Department of Soil, Water, and Environmental Science, and Director of the National Science Foundation Water Quality Center: "Based on the above data and observations, and my experience with hundreds of land application sites, including many similar to Green Acres, I conclude that if land application . . . at Green Acres Farm continues during the period of an injunction there is negligible risk to human health or the environment. In fact, the use of biosolids over the last 12 years at Green Acres has plainly improved the soil quality and the farm is producing good crops."

Dr. Chuck Gerba, Professor of Microbiology, University of Arizona, and author of over 500 articles on pathogens in the environment: "Green Acres Farm is one of the best monitored and professionally operated land application sites that I have studied. It is well suited for the application of Class B or A biosolids."

Tom Johnson, R.G. C.HG., Levine Fricke LFR, Walnut Creek, California, a leading hydrogeology and groundwater expert: "I conclude that land application of biosolids at Green Acres Farm has not affected groundwater quality in Kern County. . . . [and] continued land application of biosolids by the City of Los Angeles during this case is not expected to adversely affect groundwater quality."

By contrast, neither Kern County nor any federal or state regulatory agency has ever documented or asserted that the Farm causes any environmental problems. In fact, the Kern County Water Resources Committee concluded after an

investigation of groundwater issues that "land application can be permitted to occur with appropriate regulatory oversight." *See* Decl. of S. Stockton, Ex. 1 at 7 (Memorandum to Kern County Water Resources Committee from David Price, Committee Secretary (Sept. 8, 2003)). The balance of harms weighs decisively in favor of a preliminary injunction.

A preliminary injunction is also warranted because the Plaintiffs likely will succeed on their claims that the Kern Ban is illegal. The Ban unconstitutionally discriminates against Plaintiffs' biosolids and heavily burdens commerce in biosolids, without justification, in violation of the Commerce Clause. It is also preempted by the Clean Water Act and violates California law.

II. FACTUAL AND REGULATORY BACKGROUND

A. Biosolids And Their Use at Green Acres Farm

Summarized below are some of the key facts from the nine fact and expert declarations supporting this motion that discuss land application of biosolids, its practice at Green Acres, and the regulations and science that support its safety.

All sewage treatment plants process wastewater from homes and businesses, resulting in sewage sludge that must be recycled or disposed of. Most localities further treat sewage sludge to produce a useful product – biosolids. Whether used by farmers or home gardeners, biosolids provide an effective organic fertilizer rich in nitrogen, phosphorous, potassium and trace elements that are essential for plant growth. The other chemical and trace metal constituents of biosolids are miniscule and do not pose any risk. *See* Decl. of Professor Pepper, ¶¶ 8-12; Decl. of Professor Page, ¶¶ 12, 17-18; and Decl. of R. Fanucchi, ¶¶ 9-11.

In the late 1980s, Congress amended the Clean Water Act to phase out ocean disposal of biosolids and directed EPA to develop comprehensive rules to govern various methods of biosolids recycling and disposal, including land application. 33 U.S.C. § 1345. After years of research, in 1993 EPA adopted regulations establishing a nationwide permit for land application. 40 C.F.R. Part 503. Los

Angeles and many other wastewater agencies began land application programs in the late 1980s and early 1990s in reliance on the development of new, scientifically validated federal rules. California and other states likewise began building regulatory programs to complement the federal rules by, for example, requiring state approval for specific sites to receive biosolids. *See, e.g.*, State Water Resources Control Board (SWRCB or State Water Board), Order 2001-10 DWQ.

Los Angeles and RBM began land application of biosolids at the Green Acres site in 1994. Kern County authorities in fact suggested the remote area southwest of Bakersfield as an ideal location for land application. Stockton Decl., ¶ 17. The crops at Green Acres (corn, wheat, sudan grass, alfalfa and milo) are sold as animal feed for local dairy farms and for export. In reliance on federal and state endorsement and approvals of land application, Los Angeles purchased Green Acres in 1999 at a cost of $9.63 million. Decl. of T. Minamide, ¶¶ 20, 23, 27.

Kern County passed its first ordinance to regulate land application of biosolids in 1998 (Ordinance G-6528), requiring reporting of site data to the County and inspections of land application sites. In 1999, Kern County adopted a new ordinance (Ordinance G-6638) phasing out by 2003 land application of "Class B" biosolids (which have detectable amounts of microorganisms, but are made safe to land apply by restrictions on human access and other measures). In response, Los Angeles invested over $15 million to upgrade its wastewater treatment facilities to produce pathogen-free Class A, Exceptional Quality (EQ) biosolids to meet Kern County's new requirements. In 2003, this achievement and others were recognized when Los Angeles became only the second entity in the country to receive the prestigious Environmental Management System certification from the National Biosolids Partnership. Minamide Decl., ¶¶ 22, 30.

With Kern's stricter requirements, the only remaining land application sites in unincorporated County areas are the two sites operated by Plaintiffs, totaling approximately 1% of County farmland under cultivation. Stockton Decl., ¶ 20.

In June 2006, activists persuaded Kern voters to adopt an initiative banning land application of biosolids in the County's unincorporated areas. *See* Stockton Decl., ¶ 19. The Ban exempts Bakersfield, Taft, Wasco, Delano and other Kern cities, which will continue to land apply thousands of tons of biosolids in the County within their city limits. *Id.*, ¶ 20. The initiative plainly targeted out-of-County biosolids and the statements and images propagated by Ban proponents attacked the Plaintiffs. For example, the website of "Keep Kern Clean," the political action committee that spearheaded the initiative campaign, stated: "By working together we can protect Kern County from becoming a dumping ground for other cities' and counties' waste problems." *See* www.keepkernclean.com. The Ban's proponents did not provide or rely upon data, analysis, public hearings or reasoned deliberation. Decl. of L. Bahr, ¶ 24.

B. Regulations Governing Land Application of Biosolids

EPA, California and preexisting Kern County regulations govern the generation of biosolids by Los Angeles and their land application at Green Acres. EPA's overarching Part 503 rule, among other controls, (i) limits the amounts of trace metals in biosolids and farm fields receiving biosolids; (ii) mandates standards for reduction (Class B biosolids) or the essential elimination (Class A biosolids) of microorganisms; and (iii) establishes minimum operational controls such as limits on the amount of biosolids that may be applied (the agronomic rate) and buffer zones for fields and waterways. Part 503 also imposes vigorous monitoring, recordkeeping and reporting requirements to ensure that land appliers comply with the federal regulations and do not pose a threat to public health or the environment. 40 C.F.R. §§ 503.16-18.

In a recent letter relating to the Kern Ban, EPA states that "[w]astewater agencies across the county have widely relied upon land application as a method for managing biosolids," and that land application is "clearly an important option for municipalities to have" and "should be available to all municipalities whenever

possible . . . ." Decl. of R. Larson, Ex. 1 at 2 (Letter from J. Hanlon, Director, Office of Wastewater Management, U.S. EPA (Sept. 15, 2006)). EPA further states that land application of biosolids to farmland "serves to help meet several important environmental goals, including improving soil and preserving increasingly scarce landfill capacity for wastes not appropriate for recycling." *Id.* EPA concludes: "Published research and major scientific reviews by EPA, the Water Environment Research Foundation, and others, in addition to the results of successful land application systems across the country, continue to demonstrate that the practice, when conducted in compliance with the Part 503 requirements, is protective of public health and the environment." *Id.*

California further regulates land application of biosolids. The State Water Board has adopted a General Order that encourages recycling of biosolids through land application and prescribes detailed preconditions and management practices to enhance environmental protection. The General Order is supported by a 600-page Environmental Impact Report (EIR), finalized in 2004, which concluded after an exhaustive analysis of scientific literature and data that land application of Class A and B biosolids is safe and beneficial. *See* Bahr Decl., ¶¶ 15-17 & Ex. A. The Regional Water Quality Control Boards (RWQCBs) rely on the General Order or issue local permits to regulate land application. Land application at Green Acres is permitted under both the State Water Board's General Order and site specific requirements issued by the Central Valley Regional Board. Minamide Decl., ¶ 26.

The General Order specifies protections for groundwater, including requiring monitoring when the depth to groundwater is less than 25 feet (the depth to groundwater at Green Acres far exceeds this). Decl. of T. Johnson, ¶¶ 22-25. Groundwater monitoring at Green Acres was instituted in 1988, six years before land application operations began, in conjunction with the use of effluent from the City of Bakersfield for crop irrigation. *See* RWQCB, Monitoring and Reporting Program No. 88-172 at 2.

Before the Kern Ban, Kern County had in place a local ordinance that supplemented the federal and State regulatory programs. Kern Co. Ord. Code, ch. 8.05 (repealed 2006) ("Pre-Ban Ordinance"). This Ordinance imposed management, permitting, testing, reporting and inspection requirements more stringent than those under Part 503 and the General Order. Among many other requirements, the Pre-Ban Ordinance limited land applications to biosolids meeting EPA Class A standards for pathogen reduction and EPA EQ standards for trace metal concentrations. It also required field testing and analyses and provided for unannounced inspections of land application sites. The Pre-Ban Ordinance explicitly recognized that Class A EQ biosolids "are considered by [EPA] to be a product . . . that can be applied as freely as any other fertilizer or soil amendment to any type of land." Pre-Ban Ordinance § 8.05.010. The City of Los Angeles and RBM continue to comply with the Pre-Ban Ordinance. Minamide Decl., ¶ 26.

III. STANDARD FOR A PRELIMINARY INJUNCTION

"The purpose of a preliminary injunction is to preserve rights pending resolution of the merits of the case by the trial." *E&J Gallo Winery v. Andina Licores S.A.*, 446 F.3d 984, 990 (9th Cir. 2006). "A preliminary injunction is appropriate where plaintiffs demonstrate either: (1) a likelihood of success on the merits and the possibility of irreparable injury; or (2) that serious questions going to the merits were raised and the balance of hardships tips sharply in their favor." *Id.* (citation and quotation marks omitted); *accord*, *Warsoldier v. Woodford*, 418 F.3d 989, 993-94 (9th Cir. 2005).

"These two formulations represent two points on a sliding scale in which the required degree of irreparable harm increases as the probability of success decreases." *LGS Architects, Inc. v. Concordia Homes of Nev.*, 434 F.3d 1150, 1155 (9th Cir. 2006). "Thus, the greater the relative hardship to [plaintiff], the less probability of success must be shown." *Warsoldier*, 418 F.3d at 994 (citation and quotation marks omitted).

IV. PLAINTIFFS ARE LIKELY TO PREVAIL ON THE MERITS

A. The Ban Violates The Dormant Commerce Clause

The Kern Ban was specifically written to eliminate Plaintiffs' biosolids operations in isolated areas of Kern County, while the City of Bakersfield and other Kern County cities remain free to apply biosolids in more densely populated areas within their city limits. Green Acres poses no threat to public health or the environment and the Ban has no legitimate local purpose. Kern County cannot, by closing its borders to biosolids, arrogate to itself the determination of national and state commerce and policy regarding biosolids.

The Dormant Commerce Clause prohibits discriminatory or burdensome local or state regulations that interfere with Congress' authority over interstate commerce. *See, e.g., Fort Gratiot Sanitary Landfill, Inc. v. Mich. Dep't of Natural Res.*, 504 U.S. 353, 360 [112 S.Ct. 2019, 119 L.Ed.2d 139] (1992). The Commerce Clause embodies the "principle that our economic unit is the Nation . . . [and] one state in its dealings with another may not place itself in a position of economic isolation." *City of Philadelphia v. New Jersey*, 437 U.S. 617, 623 [98 S.Ct. 2531, 57 L.Ed.2d 475] (1978) (internal citations omitted) (invalidating ban on out-of-state waste). An ordinance is invalid under the *Pike* test if it either discriminates against interstate commerce or imposes a burden on interstate commerce that is "clearly excessive in relation to the putative local benefits." *C&A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 390 [114 S.Ct. 1677, 128 L.Ed.2d 399] (1994) (citing *Pike v. Bruce Church*, 397 U.S. 137, 142 [90 S.Ct. 844, 25 L.Ed.2d 174] (1970)); *Kleenwell Biohazard Waste & Gen. Ecology Consultants, Inc. v. Nelson*, 48 F.3d 391, 395 (9th Cir. 1995) (quotation marks omitted). The Ban fails both tests.

1. The Kern Ban Is Discriminatory

Under the first test of the Dormant Commerce Clause, discriminatory regulations are per se invalid unless the proponent can show that "a legitimate local

interest unrelated to economic protection is served by the regulation and no less discriminatory alternative exists." *Kleenwell*, 48 F.3d at 395. This rule of presumptive invalidity applies even to a facially neutral regulation that is discriminatory in purpose or effect. *See Chem. Waste Mgmt., Inc. v. Hunt*, 504 U.S. 334, 344 n.6 [112 S.Ct. 2009, 119 L.Ed.2d 121] (1992). The Kern Ban is just another effort by a state or locality to close its borders to what it perceives as undesirable wastes, a practice the U.S. Supreme Court has repeatedly struck down. *See, e.g., City of Philadelphia*, 437 U.S. at 628 (overturning "the attempt by one State to isolate itself from a problem common to many [disposal of solid waste]"); *see also Or. Waste Sys. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 [114 S.Ct. 1345, 128 L.Ed.2d 13] (1994).

The Ban's discriminatory intent and effect are obvious: Plaintiffs' biosolids operations are outlawed, while Bakersfield and other cities in the County may continue land application unaffected. The discriminatory animus that led to the Ban is evident in the publicity generated by the Ban's proponents. For example, Keep Kern Clean ran a video advertisement stating: "Let's all pitch in. A 'yes' vote on Measure E will get the sludge out. It's time we tell L.A. that we've had enough." *See* www.keepkernclean.com; *see also* Stockton Decl., ¶ 19. Keep Kern Clean also posted on its website and disseminated the following crude caricatures directed at the Plaintiffs:

Since the Kern Ban discriminates against interstate commerce, it can be upheld only if it is based on a legitimate non-economic interest, furthers that interest, and represents the least discriminatory alternative. *Kleenwell*, 48 F.3d at 395. The Kern Ban fails all three prongs. First, although the Ban nominally is intended to protect the environment, the absence of evidence that Plaintiffs' operations pose any environmental threat, and the prevalent anti-L.A. theme to the campaign of the Ban's proponents, show that "environmental protection" is nothing more than pretext.[1] Second, even if the stated interest were legitimate, "the incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 [101 S.Ct. 1309, 67 L.Ed.2d 580] (1981). Banning the Plaintiffs' biosolids operations cannot serve to protect the environment because the evidence demonstrates that applying biosolids at Green Acres does not cause environmental harm, and in any event, cities in Kern County will continue to land apply Class B biosolids in more heavily populated areas. Third, there are less discriminatory means to safeguard the environment, including the status quo. Current EPA and California regulations and Kern's Pre-Ban Ordinance simultaneously permit land application and protect the environment by requiring Class A EQ biosolids and limiting the areas and manner in which they are applied. *See, e.g., Wash. State Bldg. & Constr. Trades Council v. Spellman*, 518 F. Supp. 928, 934-35 (E.D. Wash. 1981) (invalidating state waste import ban since federal regulations were adequately safe); *City of Philadelphia*, 437 U.S. at 629.

2. The Burdens On Commerce Outweigh Any Benefits

While the Ban's discriminatory intent and effect render it illegal, the Ban also must be struck down under the *Pike* test because it imposes burdens on

[1] The Ban's alternative justification, "loss of confidence" in Kern's farm products that might result from the Plaintiffs' continued biosolids application, is precisely the sort of economic protectionism the courts have consistently rejected.

interstate commerce that substantially outweigh any purported benefits to Kern County. The Ban will damage commerce in biosolids by eliminating 8,000 acres of farm land used for land application and forcing the Plaintiff agencies to find alternative means to manage more than 1,000 tons of biosolids daily. *See* Bahr Decl., ¶ 24. The private Plaintiffs will lose substantial contract revenues, significant investments, and possibly their businesses. *See* pp. 22-23, *infra*. The Ban's impacts are statewide and national, driving up prices for biosolids management options in California and Arizona and creating costly uncertainty in long-range planning for land application and other management options. Bahr Decl., ¶¶ 22-30. Moreover, the Ban "must be evaluated not only by considering the consequences of the [ordinance] itself, but also by considering how the challenged [ordinance] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst.*, 491 U.S. 324, 336 [109 S.Ct. 2491, 105 L.Ed.2d 275] (1989); *see also U & I Sanitation v. City of Columbus*, 205 F.3d 1063, 1072 (8th Cir. 2000) (ordinance's burdens on commerce were "far from trivial" after aggregating potential effects of several cities acting similarly).

Balanced against the disruption and increased expense of biosolids management for the Plaintiffs and other California agencies, the Ban's benefits, if any, are trivial and speculative. Four leading experts have studied Green Acres and opined that it poses no threat to the environment, human health, or groundwater. *See* Decls. of C. Gerba, I. Pepper, A. Page & T. Johnson. A regulation that imposes substantial burdens on interstate commerce, but provides only speculative or illusory benefits, fails the *Pike* test and is unconstitutional under the Dormant Commerce Clause. *Alaska Airlines, Inc. v. City of Long Beach*, 951 F.2d 977, 983 (9th Cir. 1991); *see U & I Sanitation*, 205 F.3d at 1070-71 (invalidating ordinance where only "sheer speculation" that it would achieve its stated purposes); *see also Raymond Motor Transp., Inc. v. Rice*, 434 U.S. 429, 450-

51 [98 S.Ct. 787, 54 L.Ed.2d 664] (1978) (invalidating regulation limiting size of trailers on highways that had only "illusory" safety benefits).

A recent Washington district court decision striking down a statewide initiative that would have banned further importation of nuclear waste into the state is a model for analyzing the Kern Ban. *United States v. Manning*, 434 F. Supp. 2d 988 (E.D. Wash. 2006). The court found the law discriminatory in purpose and effect because it "benefits [Washington] while burdening 'unrepresented' out-of-state interests." *Id.* at 1011-12. The court observed that a state cannot "isolate" itself from a problem common to all states, noting that Washington ships *its* unwanted products out of state. *Id.* at 1012.[2] The court also found that the initiative failed the *Pike* balancing test, refusing to accept at face value its claimed benefits, "where the state law is the product of the initiative process and not the more detailed and deliberate approach normally associated with the state legislature." *Id.* at 1014.[3]

As in *Manning*, the Kern Ban is the result of a plebiscite motivated by fear and bias against the Plaintiffs, with no foundation in deliberation or fact-finding. The Ban illegally insulates Kern from lawful commerce in biosolids and causes

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[2] Kern County ships substantial amounts of waste from its large petroleum and chemical industries to processing facilities in Los Angeles County and the City of Los Angeles. *See generally* http://www.dtsc.ca.gov/HazardousWaste/HW_ Summary/HW_ Summary_Downloadable.cfm (providing reports detailing the hazardous waste manifests California DTSC receives each year, including inter-jurisdictional shipments). Kern County also supports its economy through heavy use of the Port of Los Angeles and Los Angeles International Airport, two facilities with extensive environmental impacts on the City of Los Angeles.

[3] While no federal court has yet ruled on whether a local ban on land application violates the Commerce Clause, at least two courts have upheld such claims against motions to dismiss. *See O'Brien v. Appomattox County*, 2002 WL 31663227 (W.D. Va. 2002); *Synagro-WWT, Inc. v. Rush Twp.*, 204 F. Supp. 2d 827, 843 (M.D. Pa. 2002). Also, in an unpublished 2001 decision, the Middle District of Florida issued a preliminary injunction against a county biosolids ban, as the plaintiff's Commerce Clause claim was likely to prevail. *Azurix v. DeSoto County*, No. 2-01-CV-428 FTM-29 DNF (M.D. Fla. Sept. 7, 2001) (unpublished) (attached as Exhibit A).

substantial costs and impacts beyond its borders. The Ban does not advance a valid local interest beyond what is already being accomplished by current law. For all these reasons, Plaintiffs are likely to prevail on their Commerce Clause claim.

B. The Kern Ban Is Preempted By The Clean Water Act

Plaintiffs' federal preemption claim is likely to succeed on the merits since the Kern Ban frustrates federal policy under the Clean Water Act ("CWA") and its Part 503 regulations to encourage land application of biosolids. State and local laws that frustrate the objectives of federal regulations are just as invalid as if Congress expressly provided for preemption by statute. *See Hillsborough County v. Automated Med. Labs.*, 471 U.S. 707, 712-713 [105 S.Ct. 2371, 85 L.Ed.2d 714] (1985).

The Kern Ban conflicts with both Part 503 and Congressional intent. In 1987, Congress instructed EPA to develop a comprehensive national strategy to manage biosolids, "adequate to protect public health and the environment," and encompassing "utilization of sludge for various purposes." 33 U.S.C. § 1345(d). EPA responded by adopting Part 503, a key part of which is beneficial reuse through land application.[4] *See* 40 C.F.R. § 503.3(b).

The CWA states that the "determination of the manner of disposal or use of sludge is a local determination," 33 U.S.C. § 1345(e), but this provision expressly concerns only the discretion of local wastewater agencies to choose among Part 503 management methods. It does not provide municipal veto power over a federal regulatory program such as land application. Similarly, like any other savings clause, the CWA and Part 503 savings clauses (33 U.S.C. § 1370 and 40

[4] Part 503 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. 58 Fed. Reg. 9248, 9249 (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 9258.

C.F.R. § 503.5(b)) define residual state and local authority to enact additional regulations, but do not displace the "ordinary working of conflict pre-emption principles" and cannot save a state or local law that countermands a key component of federal law. *See Geier v. Am. Honda Motor Co.*, 529 U.S. 861, 869-72 [120 S.Ct. 1913, 146 L.Ed.2d 914] (2000). The CWA permits stricter local regulations, but not those that eliminate an important component of the federal scheme for addressing water pollution, such as land application of biosolids.

Federal courts have narrowly interpreted savings clauses allowing more stringent local regulations but not sanctioning local bans, such as Kern's, that "upset the careful regulatory scheme established by federal law." *Geier*, 529 at 870 (citations omitted). Thus, a local law, even if motivated by the same goal as the CWA, "is pre-empted if it interferes with the methods by which the federal statute was designed to reach this goal." *Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 490, 492-94 [107 S.Ct. 805, 93 L.Ed.2d 883] (1987) (preempting state court nuisance suit under the CWA as exceeding the state's mere "advisory role" on out-of-state waste). *See Blue Circle Cement, Inc. v. Bd. of County Comm'rs*, 27 F.3d 1499, 1508 (10th Cir. 1994) (interpreting similar savings clause in RCRA and concluding that "[O]rdinances that amount to an explicit or de facto total ban of an activity that is otherwise encouraged by [federal law] will ordinarily be preempted").[5]

The Kern Ban conflicts with the CWA and Part 503, and Plaintiffs are likely to succeed on their federal law preemption claim.

[5] At least two federal courts have granted preliminary injunctions against local bans like Kern's, while looking favorably on claims that such bans are preempted by the CWA. *See Azurix v. DeSoto County*, *supra* (issuing a preliminary injunction against biosolids bans based on likelihood of prevailing on CWA preemption claim) (Ex. A); *O'Brien v. Appomattox Co., Va.*, 2002 WL 31663227 (W.D. Va. 2002) (granting preliminary injunction on state preemption and denying motion to dismiss CWA preemption claim). *Welch v. Rappahannock County*, 888 F. Supp. 2d 753 (W.D. Va. 1995) held that a biosolids ban was not preempted, but failed to undertake a complete and meaningful analysis of conflict preemption.

C. The Kern Ban Violates Equal Protection

The Plaintiffs also are likely to succeed on their claim that the Kern Ban violates Equal Protection. The Ban irrationally and arbitrarily prohibits biosolids application while leaving unregulated similarly situated persons who land apply manure and other fertilizers, and it is not rationally related to a legitimate government purpose. *See, e.g., City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 446-50 [105 S.Ct. 3249, 87 L.Ed.2d 313] (1985) (invalidating local ordinance as applied); *Romer v. Evans*, 517 U.S. 620, 631-36 [116 S.Ct. 1620, 134 L.Ed.2d 855] (1996) (invalidating constitutional provision created by referendum); *Silveira v. Lockyer*, 312 F.3d 1052, 1090-92 (9th Cir. 2002) (invalidating statute).

D. The Kern Ban Is An Invalid Exercise Of The County's Police Power

Plaintiffs also are likely to prevail on their claim that the Kern Ban is an invalid exercise of Kern County's police power, in violation of the California Constitution. *See* Compl. at ¶¶ 110-14.

When a local ordinance has significant effects beyond local borders, as the Kern Ban does here, the constitutionality of the ordinance is "measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." *Associated Home Builders, Inc. v. City of Livermore*, 18 Cal. 3d 582, 601 [135 Cal. Rptr. 41] (1976). As the California Supreme Court has explained, "municipalities are not isolated islands remote from the needs and problems of the area in which they are located." *Id.* at 607. Thus, "[w]hen we inquire whether an ordinance reasonably relates to the public welfare, inquiry should begin by asking *whose* welfare must the ordinance serve." *Id.* When a local ordinance affects an entire region, "judicial inquiry must consider the welfare of that region," and it must determine whether the ordinance, "in light of its probable impact, represents a reasonable accommodation of the competing interests." *Id.* at 607-09. *See also Arnel Dev. Co. v. City of Costa Mesa*, 126 Cal.

App. 3d 330, 340 [178 Cal. Rptr. 723] (1981) (local initiative with regional effects that did not effectuate a reasonable accommodation of competing regional interests was an invalid exercise of the police power). As explained in the context of a city enactment, these rules are designed to protect "the interests of nonresidents who are not represented in the city legislative body and cannot vote on a city initiative." *City of Livermore*, 18 Cal. 3d at 607.

The Kern Ban has significant effects beyond Kern County's boundaries, and the Ban does not even attempt to accommodate competing interests on a regional basis. As a result, the Ban is invalid.

As described below, the Ban will have significant adverse effects on Los Angeles, including substantially increasing the costs of the City's biosolids management program by millions of dollars every year, and threatening the continued viability of the City's longstanding program to recycle and beneficially reuse 100% of its biosolids, a program in which the City has invested tens of millions of dollars. *See* pp. 21-22, *infra*; Minamide Decl., ¶¶ 31-40.

The Kern Ban will have even broader effects on public wastewater agencies throughout California, by restricting already limited biosolids management options and increasing biosolids costs for public wastewater agencies and their ratepayers. *See* Bahr Decl., ¶¶ 3, 22-30.

The Kern Ban will have significant environmental effects beyond Kern's borders. By forcing the City to truck its biosolids to new distant locations, including sites in Arizona requiring a 700-mile round-trip from the City, the Ban will cause increased emissions of harmful air pollutants. Minamide Decl., ¶¶ 9, 46, Ex. 2 (*Assessment of Air Emissions of Transporting Biosolids for Beneficial Reuse to Alternative Locations in Response to Kern County Land Application Ban*).

Kern County is keenly aware of the Ban's potential to cause significant environmental impacts. In a case challenging its Pre-Ban Ordinance, which banned land application of Class B biosolids, the California Court of Appeal

ordered the County to prepare an Environmental Impact Report (EIR) to assess the Ordinance's environmental effects, "including effects occurring outside Kern County." *County Sanitation Dist. No. 2 of Los Angeles County v. County of Kern*, 127 Cal. App. 4th 1544, 1615 [27 Cal. Rptr. 3d 28] (2005). These adverse effects included increased fuel consumption and vehicle emissions resulting from greater hauling distances, and loss of landfill capacity from increased use of California's limited landfill space to dispose of bisolids. *See id.* at 1591. The Court expected that the County's EIR would address "the general welfare outside Kern County." *Id.* at 1615. But the County never prepared the EIR and thus never even examined, let alone considered, the "general welfare" or the negative environmental and other effects beyond Kern's boundaries.

Because the Kern Ban does not account for its effects on the surrounding region and does not accommodate competing regional interests, it is an invalid exercise of the County's police power.

E. The Kern Ban Is Preempted By California Law

Finally, the Kern Ban is preempted by the California Integrated Waste Management Act and the California Water Code. *See* Compl. at ¶¶ 96-109.

Under California law, "[i]f otherwise valid local legislation conflicts with state law, it is preempted by such law and is void." *Sherwin-Williams Co. v. City of Los Angeles*, 4 Cal. 4th 893, 897 [16 Cal. Rptr. 2d 215] (1993) (citations and quotation marks omitted). "[L]ocal legislation is contradictory to general law when it is inimical thereto," *id.* (citation and quotation marks omitted), would "frustrate the declared policies and purposes" of state law, *People ex rel. Seal Beach Police Officers Ass'n v. City of Seal Beach*, 36 Cal. 3d 591, 597 [205 Cal. Rptr. 794] (1984), or discourages what state law encourages, *Int'l Bd. of Elec. Workers v. City of Gridley*, 34 Cal. 3d 191, 201-02 [193 Cal. Rptr. 518] (1983).

Here, California has crafted a comprehensive scheme governing disposal of solid wastes, including biosolids, through enactment of the Integrated Waste

Management Act, Cal. Pub. Res. Code §§ 40000 *et seq*. ("IWMA"), California Water Code section 13274, and related regulations. This scheme's paramount goal is the "reduction, recycling and reuse of solid waste generated in the state." Cal. Pub. Res. Code § 40000(e). The law declares that "market development is the key" to achieving this goal. *Id.* § 40001(c). The Kern Ban is irreconcilable with, and preempted by, this comprehensive scheme.

1. California's Regulatory Scheme

a. The Integrated Waste Management Act

In 1989 California enacted the IWMA, which reflected the Legislature's recognition that "[b]y 1988, landfills throughout the state were nearly filled." *Valley Vista Servs., Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 886 [13 Cal. Rptr. 3d 433] (2004); Cal. Pub. Res. Code § 40000 *et seq*. To achieve the statutory goals of reduction, recycling and reuse of solid wastes, localities were required to adopt waste management plans that would divert 25% of the solid waste produced in their jurisdictions from landfills by 1995, and 50% by 2000. Cal. Pub. Res. Code § 41780; *see generally Valley Vista*, 118 Cal. App. 4th at 886.

In implementing the IWMA, the Integrated Waste Management Board and local agencies such as Kern "shall . . . [p]romote the following waste management practices in order of priority: (1) Source reduction; (2) Recycling and composting; [and] (3) Environmentally safe transformation and environmentally safe land disposal." Cal. Pub. Res. Code § 40051(a). The Legislature declared that "market development" for recycled products "is the key" to the IWMA's success. *Id.* § 40001(c). The IWMA defines "solid waste" to include biosolids. *Id.* § 40191.

The IWMA was a significant factor in promoting land application of biosolids in California. *See County Sanitation Dist. No. 2*, 127 Cal. App. 4th at 1567 ("This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land.").

Starting in 1989, the City of Los Angeles stopped landfilling biosolids, and began a program, still in effect, of beneficially reusing 100% of its biosolids through land application (and some composting). Minamide Decl., ¶ 19. Statewide, approximately 69% of biosolids are beneficially reused through land application and composting. Bahr Decl., ¶¶ 19-20.

b. Water Code Section 13274

California Water Code section 13274 complements the IWMA. This 1995 statute directs the State Water Board (or the Regional Boards) to prescribe "waste discharge requirements" for treated sewage sludge that "set minimum standards" for its use "as a soil amendment or fertilizer in agriculture, forestry, and surface mining reclamation," including "provisions to mitigate significant environmental impacts, potential soil erosion, odors . . . and any potential hazard to the public health or safety." Cal. Water Code §§ 13274(a)(1), (2). In implementing section 13274, the State Water Board determined that land application of biosolids is "environmentally sound and preferable to non-beneficial disposal." Bahr Decl., ¶ 17, Ex. A, ¶ 11.

2. The Kern Ban Is Preempted

The Kern Ban is preempted by the IWMA and Water Code section 13274. Under California law, "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, *local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose*." *Great Western Gun Shows v. County of Los Angeles*, 27 Cal. 4th 853, 868 [118 Cal. Rptr. 2d 746] (2002) (emphasis added). But that is precisely what the Kern Ban seeks to do.

There is a comprehensive, carefully crafted regulatory scheme designed to encourage the safe and beneficial reuse of solid wastes, but the Kern Ban unlawfully frustrates this scheme. It thwarts the purpose of the IWMA, which provides that municipalities in California "shall . . . [p]romote [r]ecycling and

composting" of solid waste. Cal. Pub. Res. Code § 40051(a)(2).[6]

The Kern Ban, which broadly prohibits the placement of biosolids (which is also defined to include compost containing biosolids) onto the land surface, eviscerates the City's successful and longstanding recycling program at Green Acres and makes it impossible to "recycle[e] and compost[]" biosolids, as the IWMA contemplates. *See* Minamide Decl. ¶ 40. The Ban is therefore preempted. *See Candid Enters. v. Grossmont Union High Sch. Dist.*, 39 Cal. 3d 878, 885 [218 Cal. Rptr. 303] (1985).

Significantly, *non*-beneficial alternatives to landfilling (such as land disposal and transformation, *see* Cal. Res. Code §§ 40201, 40120.1) are lower in priority and may be permitted "at the discretion of the city of county." *Id.* § 40051(a)(3). But cities and counties lack that discretion as to recycling and composting, which are assigned a higher priority. *Id.* § 40051(a)(2).

The Kern Ban bars what the IWMA says Kern "shall . . . [p]romote." *Id.* § 40051(a)(2). It effectively outlaws "market development" for use of biosolids, which the law declares "is the key" to the IWMA's success. *Id.* § 40001(c).

3. The Kern Ban Falls Outside Any Savings Clause

The Kern Ban is not saved by California Water Code section 13274(i). That section provides that "[n]othing in this section restricts the authority of a local government agency to *regulate* the application of sewage sludge and other biological solids to land within the jurisdiction of that agency." (Emphasis added); *cf. County Sanitation Dist. No. 2*, 127 Cal. App. 4th at 1606 n. 69 (noting, but not deciding, whether a complete ban is preempted). Regulate does not mean ban. *See Great Western*, 27 Cal. 4th at 868 (distinguishing between "explicit or de facto

[6] The municipal Plaintiffs recycle sewage sludge by sorting, collecting, cleansing, and treating it, and then reconstituting and reusing it as a fertilizer and soil amendment meeting marketplace quality standards. *See* Minamide Decl., ¶ 40; Cal. Pub. Res. Code § 40180 (defining "recycle" and "recycling").

ban" and "an ordinance that falls short of imposing a total ban").

Similarly, the IWMA's savings clause – allowing localities to impose "reasonable land use conditions" or other "restrictions . . . to prevent or mitigate potential nuisances, *if the conditions or restrictions do not conflict with . . . the policies*" of the IWMA, Cal. Pub. Res. Code § 40053 (emphasis added) – does not contemplate complete local bans that, as here, *do* conflict with the policies of the IWMA. *Cf. Geier*, 529 U.S. at 869-74 (general savings clause in federal statute does not protect from preemption a state law that conflicts with or frustrates the purpose of the federal statute).[7]

In sum, the Kern Ban is preempted by state law and cannot be saved by characterizing it as a "regulation."

V. THE BALANCE OF THE HARDSHIPS TIPS SHARPLY IN FAVOR OF GRANTING A PRELIMINARY INJUNCTION

A. Irreparable Harms to the Plaintiffs

1. City of Los Angeles

The Kern Ban, if allowed to take effect, will shut down Los Angeles' longstanding land application program at Green Acres, at significant and unrecoverable cost to the City. The City will lose much of its investment of more than $25 million in public funds to purchase the Farm, improve it to support its land application program, and upgrade its wastewater treatment facilities to comply with Kern's Pre-Ban Ordinance. The City will also incur, at a minimum, more than $4 million annually in additional costs to relocate its biosolids program. *See* Minamide Decl., ¶¶ 7, 8, 23, 31-37.

The financial harm to the City is unrecoverable, since municipalities cannot

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[7] California courts have allowed local regulations only if they "harmonize[] with the [IWMA]." *See, e.g., Waste Resource Techs. v. Dep't of Public Health*, 23 Cal. App. 4th 299, 309 [28 Cal. Rptr. 2d 422] (1994) (upholding a local ordinance granting an exclusive waste collection contract to a private waste hauler).

sue under 42 U.S.C. § 1983 for monetary damages. *See Rockford Bd. of Educ. v. Illinois State Bd. of Educ.*, 150 F.3d 686, 688 (7th Cir. 1998) ("a city or other municipality cannot bring suit under" section 1983). The lack of an adequate remedy at law renders the harm irreparable. *See Zepeda v. INS*, 753 F.2d 719, 727 (9th Cir. 1984) (affirming preliminary injunction where plaintiffs "demonstrated a possibility of irreparable injury by showing violations of their constitutional rights which, if proven at trial, could not be compensated adequately by money damages"); *Rum Creek Coal Sales v. Caperton*, 926 F.2d 353, 362 (4th Cir. 1991) (irreparable harm shown where no monetary remedy is available).[8]

2. RBM, Sierra Transport, and Fanucchi Farms

The private Plaintiffs who work at Green Acres, and their employees, will also suffer irreparable harm. Because Plaintiff Responsible Biosolids Management's (RBM's) contract with the City comprises the entirety of its business, if the Kern Ban goes into effect as planned, RBM could be forced out of business entirely, costing it more than $6 million in lost revenues per year. Stockton Decl., ¶¶ 23-24. *See Warren v. City of Athens*, 411 F.3d 697, 711 (6th Cir. 2005) ("financial ruin qualifies as irreparable harm"); *see also Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 [95 S.Ct. 2561, 45 L.Ed.2d 648] (1975) (same). RBM would also suffer diminishment of its $700,000 investment in specialized land application equipment. Stockton Decl., ¶¶ 22, 24. Even if RBM survives the Kern Ban, relocating its operations to alternative locations, such as distant new sites in Arizona, would require substantial investments in new facilities and would dramatically increase the costs of doing business. *Id.*, ¶¶ 25-31. The Ban would also harm RBM's employees, who may lose their jobs if biosolids can no longer be used at Green Acres. *Id.*, ¶ 35.

[8] Plaintiff California Association of Sanitation Agencies and its members would also be irreparably harmed by the Kern Ban and its regional and interstate effects. *See generally* Bahr Decl. Accordingly, CASA joins in this motion.

Plaintiff Sierra Transport, a family trucking business that hauls the City's biosolids to Green Acres, may also be forced out of business, as this hauling work comprises more than 80% of its business. Decl. of M. Lutrel, ¶ 9. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1382 (6th Cir. 1995) ("impending loss" of plaintiff's business "constitutes irreparable injury"). Sierra Transport stands to lose $4 million per year in contract revenues, and will suffer diminishments of its more than $5 million in investments in land, improvements, and equipment to support its hauling business. Lutrel Decl., ¶¶ 9-13. Sierra Transport's employees would also likely lose their jobs. *Id.*, ¶ 16.

Plaintiff R&G Fanucchi, Inc. ("Fanucchi Farms"), a 50 year-old family farming business that contracts with the City, could also lose its contract revenues, which are approximately $2 million per year. Fanucchi Decl., ¶¶ 2, 3, 6. *See Semmes Motors, Inc. v. Ford Motor Co.*, 429 F.2d 1197, 1205 (2d Cir. 1970) (threat to economic viability of family business is irreparable harm). The Ban would also force Fanucchi Farms to sell at a considerable loss the $600,000 worth of equipment it purchased to farm Green Acres. Fanucchi Decl., ¶ 7. As with RBM and Sierra Transport, the Ban could also hurt Fanucchi's employees. *Id.*, ¶ 8. Further, the Ban would eliminate the significant soil improvements that have resulted from using biosolids over the years; if farming operations are able to continue at Green Acres, purchasing chemical fertilizers would be required to supply nutrients now supplied by biosolids, a significant expense. *Id.*, ¶¶ 9-11.

In all, as a result of the Kern Ban, the Green Acres Plaintiffs stand to go out of business and lose tens of millions of dollars each year.

B. Irreparable Harm to the Environment

The Kern Ban will also cause significant harm to the environment. The City of Los Angeles has prepared, as part of its project evaluation, an air emissions report assessing the impact of relocating its biosolids land application program. For Los Angeles alone, transporting biosolids to other locations, such as in

Arizona, will produce up to a three-fold increase in emissions of particulate matter and oxides of nitrogen, both of which have been identified as toxic air contaminants and known to cause adverse health effects. Minamide Decl., ¶¶ 9, 46, Ex. 2 at i, ii, 1-2, 16-20, 30. *See also County Sanitation Dist. No. 2*, 127 Cal. App. 4th at 1591 (summarizing reasonably foreseeable negative environmental impacts flowing from Kern's Pre-Ban Ordinance and requiring Kern to prepare an Environmental Impact Report to evaluate those effects).

This is precisely the kind of "[e]nvironmental injury [which], by its nature, can seldom be adequately remedied by money damages and is often permanent or at least of long duration, *i.e.*, irreparable." *Sierra Club v. United States Forest Serv.*, 843 F.2d 1190, 1195 (9th Cir. 1988) (quoting *Amoco Prod. Co. v. Gambell*, 480 U.S. 531, 545 [107 S.Ct. 1396, 94 L.Ed.2d 542] (1987)). This demonstrated, irreparable increase in hazardous air emissions cries out for a preliminary injunction.

C. No Harm to Defendants

Allowing Green Acres to continue recycling biosolids would not cause any harm at all to Kern County. The expert declarations in support of this motion demonstrate that Green Acres is well-run, is in an optimal location, and poses no risk to soil, water or public health. *See* Page, Pepper, Gerba and Johnsons Decls. These expert opinions rest on years of data generated at the City's treatment plants and Green Acres, interviews of farm personnel, and recent inspections of the Green Acres site. The four scientist declarants have spent collectively many decades researching biosolids and land application, authored many hundreds of scholarly works in the field, and garnered the highest honors in the field.

Avoiding the severe harms that would be caused by the Ban also serves the public interest because the wastewater agency Plaintiffs are not-for-profit entities that serve approximately ten million customers and rate payers in Southern California. They have statutory and fiduciary obligations to meet their biosolids

management responsibilities under the Clean Water Act as economically as possible. Minamide Decl., ¶¶ 7-11; Bahr Decl., ¶¶ 11-12. Forcing Los Angeles to uproot its land application operation in a few short months, at great expense to the City and with significant damage to the environment, does not serve the public interest.

D. Preservation of the Status Quo

Finally, maintaining the status quo through a preliminary injunction is appropriate in this case. *See E&J Gallo Winery*, 446 F.3d at 990. The City has land applied biosolids since 1987 and at Green Acres since 1994, and applies only Class A EQ biosolids there. Minamide Decl., ¶¶ 7, 14-15, 18, 20. Given this long history of successful land application, coupled with Ban's injurious effects described above, maintaining the status quo during the pendency of this litigation is warranted.

VI. CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for a preliminary injunction.

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