CA No. 07-56564
DC No. 06-5094

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

CITY OF LOS ANGELES, ET AL.,
Plaintiffs and Appellees,

v.

COUNTY OF KERN, ET AL.,
Defendants and Appellants.

Appeal From A Judgment Of The United States District Court
For The Central District Of California
(The Hon. Gary A. Feess)

APPELLANTS' OPENING BRIEF

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JURISDICTIONAL STATEMENT

Appellees' constitutional claims invoked the District Court's jurisdiction under 28 U.S.C. §1331. Their state-law claims invoked the court's supplemental jurisdiction under 28 U.S.C. §1367. The judgment is appealable pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. This Court has appellate jurisdiction under 28 U.S.C. §1291. The judgment was entered on September 5, 2007. 1ER1. Appellants' Notice of Appeal was filed on September 24, 2007. 2ER58. The appeal is timely pursuant to Rule 4(a)(1)(A) of the Federal Rules of Appellate Procedure.

STATEMENT OF ISSUES

1. Does a non-discriminatory local ordinance that bans the land application of all biosolids, regardless of where those biosolids were generated, violate the Commerce Clause?

2. Is such an ordinance preempted by the California Integrated Waste Management Act?

STATEMENT OF REVIEWABILITY AND STANDARD OF REVIEW

The District Court granted Appellees summary judgment on their Commerce Clause and state-law preemption claims. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 870 (C.D. Cal. 2007). Appellants opposed summary judgment on these grounds. 2ER253, 195, 63.

This Court reviews the District Court's grant of summary judgment *de novo*. *Cornhusker Cas. Ins. Co. v. Kachman*, 514 F.3d 977, 981 (9th Cir. 2008). All factual inferences must be drawn against the moving parties. *Id.*

STATEMENT OF THE CASE

Plaintiffs challenge the validity of Measure E, an ordinance adopted by the County's voters in June 2006 ("the Ordinance"). 4ER883-84(¶¶1,4). Measure E bans the land application of biosolids within the County's unincorporated areas. 4ER732(§8.05040).[1] The governmental Plaintiffs are the City of Los Angeles, the Orange County Sanitation District and County Sanitation District No. 2 of Los Angeles County. 4ER886-89(¶¶12-14, 19). The remaining Plaintiffs are private businesses that assist the governmental Plaintiffs in recycling their sewage sludge. 4ER888(¶¶15-18). Defendants are the County of Kern and the County's Board of Supervisors. 4ER889(¶¶20-21).

Plaintiffs' Complaint asserted that Measure E (1) violates the dormant Commerce Clause, (2) violates the Equal Protection Clause, (3) is preempted by the federal Clean Water Act, (4) is preempted by the California Integrated Waste Management Act ("the Act"), (5) is preempted by the California Water Code and (6) constitutes an invalid exercise of the County's police

[1]Copies of Measure E and the provisions of the California Public Resources Code that are relevant to Appellees' preemption claim will be found in the Addendum to this brief.

power. 4ER904-10(¶¶70-114). The third and fifth claims were dismissed by the District Court on Defendants' motion. *City of Los Angeles v. County of Kern*, No. CV 06-5094 GAF (VBKx), 2006 WL 3073172, at *1-2 (C.D. Cal. Oct. 24, 2006) ("*Kern I*"). The court then preliminarily enjoined enforcement of Measure E, concluding that Plaintiffs had demonstrated both irreparable harm and a likelihood of success on their Commerce Clause claim, their police power claim and their claim that Measure E was preempted by the Act. *City of Los Angeles v. County of Kern*, 462 F. Supp. 2d 1105, 1108-09 (C.D. Cal. 2006) ("*Kern II*").

The parties next filed cross-motions for summary judgment. Defendants moved for summary judgment on all claims. 4ER651. Plaintiffs moved for summary judgment on their remaining state-law preemption claim. 4ER645. Plaintiffs' opposition to the County's motion also asked the District Court to enter summary judgment in their favor on their Commerce Clause and police power claims. 2ER253.

On August 10, 2007, the District Court granted summary judgment for Defendants on Plaintiffs' Equal Protection claim and found that disputed facts precluded summary judgment on Plaintiffs' police power claim. *City of Los Angeles v. County of Kern*, 509 F. Supp. 2d 865, 869-70 (C.D. Cal. 2007) ("*Kern III*"). However, the court granted summary judgment to Plaintiffs on their Commerce Clause and state-law preemption claims. *Id.* at 870.

The court then entered a final judgment under Rule 54(b). 1ER1. Defendants timely appealed. 2ER58.

STATEMENT OF FACTS

A. Overview Of Biosolids And Land Application.

Sewage sludge is the "solid, semi-solid, or liquid residue generated during treatment of domestic sewage." 40 C.F.R. §503.9(w). It presently must be disposed of by landfilling, incineration or land application. 2ER167(¶3). "Land application" means the spraying, spreading or other placement of biosolids onto the land surface, the injection of biosolids below the surface, or the incorporation of biosolids into the soil. 40 C.F.R. §503.11(h). Biosolids are sewage sludge treated for use in land application. 4ER750.

The EPA regulates sewage sludge disposal in regulations codified at 40 C.F.R. §503. The regulations divide biosolids into Class B, treated to reduce pathogen concentration, and Class A, treated to virtually eliminate pathogens. 2ER124(¶¶13-14). In addition, biosolids low in eight trace metals qualify as "Exceptional Quality" ("EQ") and may be used with fewer restrictions. 2ER125(¶15). Nevertheless, the National Research Council of the National Academy of Sciences ("NRC") has found that "[t]oxic chemicals, infectious organisms, and endotoxins or cellular material may all be present in biosolids." 4ER753.

Although the EPA promotes the land application of biosolids (4ER795), it "has consistently recognized at least the potential that biosolids could be dangerous." *Kern III*, 509 F. Supp. 2d at 871. The preamble to the EPA regulations, which were published in 1993, acknowledges that they "'may not regulate all pollutants in sewage sludge that may be present in concentrations that adversely affect public health and the environment.'" *Id.* at 871-72 (quoting 58 F.R. 9248-01). "The preamble also acknowledges uncertainties in several important aspects of the risk assessment on which the Part 503 regulations are based, including uncertainties concerning the impacts of land application . . . on human health, plant toxicity, wildlife, and ground water." *Id.* at 872 (citing 58 F.R. 9248-01).

In 1996, the NRC opined that, "when practiced in accordance with existing federal guidelines and regulations," land application "presents negligible risk to the consumer, to crop production, and to the environment" (3ER579), and that there were no reported outbreaks of infectious disease associated with exposure to "adequately treated" biosolids. 3ER444(¶14). However, in 2000 the EPA's Inspector General concluded that that agency "does not have an effective program for ensuring compliance" with the Part 503 regulations and thus "cannot assure the public that current land application practices are protective of human health and the environment." 4ER795.

In 2002, "the EPA asked the [NRC] to evaluate the Part 503 regulations by evaluating the technical methods and approaches used to establish chemical and pathogen standards for biosolids, focusing specifically on human health protection (and not ecological or agricultural issues)." *Kern III*, 509 F. Supp. 2d at 872. While the NRC found "no documented scientific evidence that the Part 503 rule has failed to protect public health," it acknowledged "'anecdotal reports attributing adverse health effects to biosolids exposures, ranging from relatively mild irritant and allergic reactions to severe and chronic health outcomes.'" *Id.* (citation omitted). The NRC also "found the technical basis of the 1993 [Part 503] chemical standards for biosolids to be outdated" as there "have been substantial advances in risk assessment since then, and there are new concerns about some adverse health outcomes and chemicals not originally considered." 4ER760. The NRC concluded that the EPA's chemical standards "cannot with confidence be stated to be adequately protective for all of the regulated pollutants." 4ER779.

These concerns were echoed in Measure E's findings, which state:

> There are numerous serious unresolved issues about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment even if properly handled. (4ER731 (§8.05.010))

In addition, the NRC has found that land application raises "'nuisance' risks to community quality of life and property values, such as odors, traffic, and the attraction of vermin to sludge application sites." 4ER820. Indeed, the EPA says that "even the best run operations may emit offensive odors" (4ER813), and that such odors not only cause "public concern" themselves, but also "trigger fears that 'foul-smelling' residues from municipalities and industry must be toxic and harmful." 4ER812. Measure E's findings thus concluded that land application "presents risks of unique odor, insect attraction, and other nuisances which are unacceptable to the people of Kern County." 4ER731. These findings reflect not only the problems posed by land application in general, but also the specific concerns raised by Plaintiffs' operations in Kern County. *See* pp.8-10, *infra*.

Land application also raises economic issues. The NRC has recognized that "[d]espite the existence of extensive [federal] regulations, public perceptions of significant risks associated with beneficial land application persist in some areas." 4ER821. As the NRC explained, "'[t]he major business risk for farmers and food processors . . . is stigmatization of the product and its source,'" which can "'lead[] to loss of customer confidence, choice of competing products, and loss of market share on regional and even national scales.'" *Kern III*, 509 F. Supp. 2d at 880 (citation omitted). Because "factors other than scientific realities frequently affect the public's beliefs about its food supply," such risks exist even if land application is restricted to crops

used for animal feed. *Id.* at 880-81. Measure E's findings therefore stated that land application "may cause loss of confidence in agricultural products from Kern County." 4ER731. This doubtless added to public concern, because the County is "one of the country's largest producers of agricultural products." 4ER896(¶41).

B. Land Application In Kern County.

1. Plaintiff City Of Los Angeles.

Plaintiff City of Los Angeles ("LA") treats wastewater for approximately four million residents. 2ER123-24(¶10). Since 1994, LA has land applied biosolids at Green Acres, a 4700-acre farm in the County's unincorporated area. 2ER122-23(¶7).

LA purchased Green Acres in 1999. 2ER127(¶20). LA sends approximately twenty-eight tractor trailer loads—700 wet tons—of biosolids to Green Acres per day. 2ER155(¶6). Crops grown at Green Acres are sold as animal feed to local dairies. 2ER162(¶5). All biosolids land applied at Green Acres are Class A EQ. 2ER125(¶¶14-15).

Plaintiffs' expert described Green Acres as "one of the best monitored and professionally operated land application sites." 3ER497-98(¶10). Nevertheless, the District Court found that Green Acres "emanates strong odors and attracts an unusual amount of flies." *Kern III*, 509 F. Supp. 2d at 873. Green Acres also lies next to the Kern Water Bank, which stores water in the underground aquifer for extraction during dry years (2ER244-46(¶¶2,

8)), and is twelve miles from the Arvin-Edison aquifer. 2ER235(¶12). When groundwater is pumped during dry years, groundwater levels can drop rapidly, potentially causing groundwater from under Green Acres to move into these aquifers. 2ER235(¶12), 245-46(¶8). Plaintiffs' experts asserted that land application at Green Acres "is not expected to adversely affect groundwater quality" (3ER403(¶1)) and "presents no threat to the environment that is discernable—at least based on current science." *Kern III*, 509 F. Supp. 2d at 873. However, the District Court found that "the groundwater from beneath Green Acres could flow into the water banks when water is extracted from them during dry seasons." *Id.* at 901. Accordingly, the court concluded that "[e]ven given the apparently low ***likelihood*** that land application [at] Green Acres would introduce contaminants into the groundwater, the ***tremendous amount*** of harm to the water banks that could result is sufficiently palpable that a trier of fact could conclude Green Acres is not an ideal location." *Id.* (emphases in original; citations to record omitted)).

2. Plaintiff Orange County Sanitation District.

Plaintiff Orange County Sanitation District ("OCSD") produces approximately 250,000 wet tons of biosolids per year. 2ER175(¶3), 177(¶6). Thirty percent of OCSD's biosolids are land applied in unincorporated Kern County; the remainder is composted in Riverside, or land applied or composted and landfilled in Arizona. 2ER177(¶6), 286(¶4).

3. Plaintiff County Sanitation District No. 2 Of Los Angeles County.

County Sanitation District No. 2 of Los Angeles County ("CSD2") treats wastewater for approximately 5.1 million residents. 3ER643(¶2). Between 2003 and 2005, CSD2 supplied 1,088,627 wet tons of biosolids to San Joaquin Composting ("SJC") in Kern County for composting and later land application in Kern and other counties (*see* 2ER170(¶14); 3ER644(¶5)), and land applied 268,375 wet tons at Honey Bucket Farms in unincorporated Kern County. *See* 3ER644(¶5). Honey Bucket Farms is located in a flood zone. 4ER806. Land application at Honey Bucket Farms could degrade groundwater, which might be only twenty feet below the surface. *Id.*

4. Defendant Kern County.

The County's wastewater is treated by the Kern Sanitation Authority ("KSA"), which produces approximately 300-400 dry tons of sewage sludge per year. 4ER738(¶¶2-3). KSA owns an 1100-acre farm adjacent to its treatment plant, which was used to land apply biosolids before the County adopted a previous biosolids ordinance. 4ER738(¶¶3, 5-6). Since 2004, KSA has been sending sludge to SJC, to be made into compost and sold. 4ER738-39(¶7). KSA's contract with SJC runs from year to year. *Id.*

The District Court stated that the County "ships its materials to [SJC] for sale to private firms out of its jurisdiction." *Kern III*, 509 F. Supp. 2d at 869. However, no record evidence shows where SJC sends the compost it

makes from the County's biosolids. The record does show that SJC land applied compost *from CSD2* in Kern County between 2003 and 2006. 3ER644(¶5). Given this evidence, and the procedural posture of this case, the Court must infer that SJC *did* land apply its compost in the County's unincorporated areas before Measure E was enacted.

5. Cities And Districts Within The County.

Until the County revoked its land application permit in June 2006, for unrelated reasons, USA Transport, Inc., was land applying biosolids in the County's unincorporated areas from the City of Wasco and the Buttonwillow Community Sanitation District. 4ER706(¶¶52, 53). Kern County cities, including Bakersfield, Taft, Wasco and Delano, currently land apply biosolids within city boundaries, where Measure E has no legal effect. 2ER147-48(¶20).

C. Measure E And Its Effects.

On June 6, 2006, the County's voters adopted Measure E, the "Keep Kern Clean Ordinance of 2006" (the "Ordinance"). 4ER688-89(¶1). During the campaign, supporters of Measure E utilized such rhetoric as "Measure E will stop L.A. from dumping on Kern," "we've got a bully next door, flinging garbage over his fence into our yard" and other messages critical of Southern California biosolids. 2ER147(¶19).

Measure E makes it "unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County." 4ER732 (§8.05.040(A)).[2] It therefore prohibits land application in the County's unincorporated areas regardless of whether the biosolids were generated inside or outside the County.

Each of the governmental Plaintiffs has investigated alternative disposal options. LA would likely utilize a site in Arizona. 2ER123(¶9), 131(¶34), 134(¶41). CSD2 will pursue land application in Arizona, although it is uncertain whether that alternative will remain available. 2ER171-72(¶17). OCSD has determined that landfilling in Arizona, if feasible, would be its least expensive alternative. 2ER177(¶8). However, switching to disposal sites in Arizona will increase transportation costs and vehicle emissions. 2ER171-72(¶17), 131(¶33), 136(¶46).

Although the County does not presently land apply biosolids within its borders, Measure E prohibits the County from resuming land application of biosolids at KSA's farm and prevents SJC from land applying its compost in the County's unincorporated areas. 4ER739(¶¶9-10). Accordingly, County staff expressed concern that Measure E might cause SJC to stop accepting

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[2]Measure E defines "Land Apply" as "the spraying, spreading or other placement of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil." 4ER732 (§8.05.030(E)). Its definition of "Biosolids" includes compost and palletized sludge derived from sewage sludge. 4ER732 (§8.05.030(B)).

the County's biosolids. 4ER739(¶10), 742. If that occurred, the County, like the governmental Plaintiffs, would have to find alternative means of disposal. 4ER739(¶10). If this did not occur, Measure E would reduce the number of SJC's markets and increase the distance to these markets (2ER170-71(¶14)), thus potentially increasing costs for both CSD2 and the County.

SUMMARY OF ARGUMENT

Land applying biosolids causes noxious odors and flies, as well as potential risk to public health, the environment and the local economy. The Commerce Clause does not prohibit the County from addressing these problems by adopting an even-handed ban. Indeed, this ban has *no* adverse impact on interstate commerce because no one seeks to land apply biosolids from outside California in the County's unincorporated areas. *See* Part I(A)(1)(a), *infra*.

Accordingly, the District Court had every reason to conclude that "the circumstances presented in this case are out of line with the usual pattern of discrimination in Commerce Clause jurisprudence." *Kern III*, 509 F. Supp. 2d at 886. Yet the court nevertheless found that Measure E was discriminatory, and therefore subject to strict scrutiny under the Commerce Clause, because it impacts only *out-of-county* biosolids. However, even if an adverse impact on out-of-county (but not out-of-state) businesses were sufficient to

trigger such scrutiny, the Supreme Court has held that a facially neutral state law is not discriminatory under the Commerce Clause if it only impacts businesses outside the enacting jurisdiction. *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). Moreover, Measure E does not prohibit land application in the County's unincorporated areas by Plaintiffs alone; it likewise prohibits such land application by the County and all the cities and special districts within the County. *See* Part I(A)(1)(b), *infra*.

The District Court also found that the Ordinance was discriminatory because it does not prohibit land application within the County's incorporated areas. However, the California Constitution gives the County no power to impose legislation on the County's cities. The County cannot be faulted for failing to exercise power that it does not possess. *See* Part I(A)(1)(c), *infra*.

In addition, the Ordinance is not discriminatory under the Commerce Clause because it does not advantage in-county businesses at the expense of their out-of-county competitors. *See* Part I(A)(1)(d), *infra*. Accordingly, Measure E is similar to the many other neutral laws, including waste management ordinances, that repeatedly have been upheld under the Commerce Clause. *See* Part I(A)(1)(e), *infra*.

Nor is the Ordinance subject to strict Commerce Clause scrutiny merely because the voters who enacted it wanted to rid the County of out-of-county sludge. Animus against biosolids from other parts *of California* triggers no

such scrutiny, because it is not animus against *interstate* commerce. Moreover, as the District Court found, the campaign in favor of Measure E focused on out-of-county governments because they were the only ones currently dumping their sludge in the County. *See* Part I(A)(2), *infra*. Even if it were discriminatory, Measure E would satisfy strict scrutiny because no less restrictive alternative would achieve the County's goals of preventing the odors and flies that accompany even the best-run biosolids operations and protecting the County's agricultural businesses against adverse public perception caused by land application. *See* Part I(A)(3), *infra*.

Once the Court reverses the District Court's holding that Measure E fails strict scrutiny, it should remand the case so that that court can determine whether the Ordinance satisfies the balancing test prescribed by *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). *See* Part I(B), *infra*. In the alternative, the Court should take this case *en banc* and hold that Plaintiffs have no prudential standing to litigate their Commerce Clause claims. While this contention is currently foreclosed under Circuit precedent because the County did not raise it in the District Court, the Court should follow the majority of circuits and hold that the County can raise this issue now even though it was not raised below. *See* Part I(C), *infra*.

The District Court also erred in finding that Measure E was preempted by the California Integrated Waste Management Act ("the Act"). Measure E is protected against preemption by Section 40059(a), which preserves the

authority of California's cities and counties to "determine . . . [a]spects of solid waste handling which are of local concern, including . . . [the] nature, location, and extent of providing solid waste handling services."[3] Measure E fits comfortably within Section 40059(a) because it controls the "nature, location, and extent" of one form of "solid waste handling service"—land application of biosolids. Hence it is not preempted. *See* Part II(A), *infra*.

Even if that were not true, conflict preemption under California law exists only when a local ordinance prohibits what a state statute commands or commands what a state statute prohibits, or when it is impossible to comply with both. *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1161 (2006). Measure E is not preempted under these tests. Moreover, nothing in the Act gives one local agency the right to recycle its solid waste in another jurisdiction—much less the right to recycle in violation of that jurisdiction's laws. Hence, Measure E does not frustrate the Act's purpose. Finally, there is no conflict between the Act and Measure E because the Act endorses land application only when the California Integrated Waste Management Board has found that the particular application will not harm public health or the environment, findings that do not exist here. *See* Part II(B), *infra*.

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[3]Unless otherwise indicated, all references to state statutes refer to the California Public Resources Code.

ARGUMENT

I.

MEASURE E DOES NOT VIOLATE THE COMMERCE CLAUSE.

A. Because Measure E Is Not Discriminatory, The District Court Erred In Subjecting It To Strict Scrutiny Under The Commerce Clause.

As the District Court acknowledged, even "'one of the best monitored and professionally operated land application sites'" "emanates strong odors and attracts an unusual amount of flies." *Kern III*, 509 F. Supp. 2d at 873 (citation omitted); *accord id.* at 901 (same site "attracts large amounts of flies and emits noxious odors"). The court also found that land application can contaminate groundwater (*see id.*) and presents "unknown future risks that would be avoided by banning the practice." *Id.* at 880. Nevertheless, the court found that the Commerce Clause requires the County and its residents to suffer the flies, odors and potential threats to health and safety caused by land applying biosolids.

This was error. While environmental measures are not immune from Commerce Clause scrutiny, "a State's power to regulate commerce is never greater than in matters traditionally of local concern." *Kassel v. Consol. Freightways Corp.*, 450 U.S. 662, 670 (1981). That rule governs this case. As the Supreme Court stated only last year, the courts "should be particularly reluctant to interfere," under the Commerce Clause, with local waste disposal regulations because "'[w]aste disposal is both typically and traditionally a

local government function.'" *United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth.*, —U.S.—, 127 S. Ct. 1786, 1796 (2007) (citation omitted). Indeed, "Congress itself has recognized local government's vital role in waste management, making clear that 'collection and disposal of solid wastes should continue to be primarily the function of State, regional, and local agencies.'" *Id.* (quoting 42 U.S.C. §6901(a)(4)).

"For Commerce Clause purposes," the courts "'have long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other.'" *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Natural Res.*, 504 U.S. 353, 365 n.6 (1992) (citation omitted). The District Court ignored this difference, and subjected Measure E—a classic health and safety regulation—to the strict scrutiny reserved under the Commerce Clause for discriminatory measures that constitute "simple economic protectionism." *United Haulers Ass'n*, 127 S. Ct. at 1796.

The District Court acknowledged that "Measure E does not discriminate on its face; by its terms, it bans all biosolids regardless of their origin." *Kern III*, 509 F. Supp. 2d at 884. Yet it held that, "despite Measure E's facial neutrality, it nonetheless transgresses the Commerce Clause because its underlying purpose and effect is to discriminate against biosolids from the City [of Los Angeles] and other Southern California communities." *Id.* This conclusion was wrong for multiple reasons.

1. The District Court Erred In Finding That Measure E Is Discriminatory In Effect.

In the Commerce Clause context, "'discrimination' simply means differential treatment of in-state and out-of-state economic interests that benefits the former and burdens the latter." *Oregon Waste Sys., Inc. v. Dep't of Envtl. Quality*, 511 U.S. 93, 99 (1994). Measure E is not discriminatory under this standard.

a. Measure E Could Not Discriminate Against Interstate Commerce Because Plaintiffs Have Failed To Show That Any Out-Of-State Business Seeks To Land Apply Biosolids In Kern County.

State and local laws come "within the domain of the Commerce Clause if they burden interstate commerce or impede its free flow." *C&A Carbone, Inc. v. Town of Clarkson*, 511 U.S. 383, 389 (1994). Measure E does neither. While it bans land application of all biosolids, whether generated in-state or out-of-state, no evidence indicates that *anyone* has *ever* sought to land apply biosolids from outside California in the County. Accordingly, nothing in the record indicates that the Ordinance adversely affects *any* out-of-state business or public entity, or any existing or future interstate commerce. Thus, the Ordinance is the functional equivalent, for Commerce Clause purposes, of an ordinance that prevented *out-of-county* waste from being land applied in Kern County, but which did not apply to *out-of-state* waste. Such an ordinance would not be discriminatory under the Commerce Clause. *See Ben Oehrleins & Sons & Daughter, Inc. v. Hennepin County*, 115 F.3d 1372,

1386 (8th Cir. 1997) ("When local facilities are comparatively disadvantaged by a regulation that restricts their access to the market while out-of-state entities bear no such burden, there is little risk of inciting 'jealousies and retaliatory measures' from neighboring states").[4]

The District Court nevertheless held that Measure E came "within the ambit of the Commerce Clause" because "elimination of the sites in Kern County, California will likely lead to diversion of the material to Arizona." *Kern III*, 509 F. Supp. 2d at 882-83. But diverting Plaintiffs' California-generated biosolids to Arizona would *benefit* interstate commerce, not burden it. That is not enough to establish "discrimination" under the Commerce Clause. *See Nat'l Audubon Soc'y, Inc. v. Davis*, 307 F.3d 835, 857 (9th Cir. 2002) (initiative banning trade in fur of animals caught in leghold traps in California was not discriminatory under Commerce Clause; because it did not apply to in-state trade of furs from animals caught with similar traps

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[4]In contrast, every solid waste restriction that the Court has reviewed under the Commerce Clause has had an existing adverse impact on interstate commerce. *See United Haulers Ass'n*, 127 S. Ct. at 1792 (petitioner alleged that respondent's flow control ordinance prevented it from using cheaper, out-of-state landfills); *C&A Carbone*, 511 U.S. at 389 (challenged ordinance "drives up the cost for out-of-state interests to dispose of their solid wastes"); *Oregon Waste Sys.*, 511 U.S. 93 (surcharge on in-state disposal of waste from other states); *Fort Gratiot Sanitary Landfill,* 504 U.S. at 357 (petitioner could not accept out-of-state waste at its landfill due to challenged ordinance); *Chem. Waste Mgmt. v. Hunt*, 504 U.S. 334 (1992) (higher fee on interstate waste); *City of Philadelphia v. New Jersey*, 437 U.S. 617, 622-23 (1978) (ban on out-of-state waste).

outside California, it benefited "interstate commercial activities"), *amended on other grounds*, 312 F.3d 416 (9th Cir. 2002); *Ben Oehrleins*, 115 F.3d at 1385 (amended local ordinance that required waste destined for disposal within the state to use specified transfer stations or processing facilities, but did not impose similar requirement on waste destined for disposal out-of-state, was not subject to strict scrutiny because "market controls that inure to the benefit of out-of-state concerns simply do not constitute 'discrimination' under the Commerce Clause"); *Reynolds v. Buchholzer*, 87 F.3d 827, 830 (6th Cir. 1996) (nondiscriminatory ban on commercial walleye fishing in-state did not violate Commerce Clause where "'out-of-state fishermen . . . may market their walleye in Ohio without competition'") (citation omitted).

b. The District Court's Holding That Measure E Is Discriminatory Because It Burdens Only Out-Of-County Generators Of Biosolids Contravenes Supreme Court Precedent And Is Factually Erroneous.

Because there was no evidence in the record that the Ordinance impacts out-of-*state* interests, the District Court was forced to rely on its impact on out-of-*county* interests. Indeed, the court held that Measure E discriminates against interstate commerce because "out-of-county interests are the only ones directly applying biosolids to land in the unincorporated areas, and therefore they will be the only ones to incur the significant transaction costs associated with the termination and relocation of their Kern County operations." *Kern III*, 509 F. Supp. 2d at 886. Even if a Commerce Clause

violation could be found without any adverse out-of-state impact, there are multiple reasons why this finding is both legally and factually insufficient to support the District Court's conclusion that Measure E is discriminatory.

First, the court's analysis contradicts *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117 (1978). There, the Supreme Court upheld a Maryland statute prohibiting producers and refiners of petroleum products from operating retail service stations and requiring the producers and refiners to divest the stations they already owned. *Id.* at 125-29. The Court held that because Maryland had "no local producers or refiners" that were affected by the statute, "claims of disparate treatment between interstate and local commerce would be meritless." *Id.* at 125. Accordingly, "the fact that the burden of the divestiture requirements falls solely on interstate [*i.e.*, out-of-state] companies" did "not lead, either logically or as a practical matter, to a conclusion that the State is discriminating against interstate commerce." *Id.*; *accord Norfolk S. Corp. v. Oberly*, 822 F.2d 388, 402 (3d Cir. 1987) (citing *Exxon* for proposition that "showing that out-of-state firms happen to be the only ones currently interested in engaging in activity foreclosed by a facially evenhanded state regulation has not by itself been held to trigger heightened scrutiny"). Under *Exxon*, the District Court's assertion that "out-of-county interests are the only ones directly applying biosolids to land in the unincorporated areas" of the County (*Kern III*, 509 F. Supp. 2d at 886) disproves, rather than proves, discrimination.

Second, the District Court's narrow focus on out-of-county waste generators enabled it to ignore Measure E's significant adverse effect on the businesses within the County that derive income from land applying sludge for the governmental Plaintiffs. For example, Plaintiff Shaen Magan and Plaintiff R&G Fanucchi, both Kern County businesses, will lose revenues of $4M/year and $2M/year, respectively, if Measure E is enforced. 4ER876(¶10); 2ER161-62(¶¶3, 6). In addition, Shaen Magan would have to lay off more than sixty local residents (4ER874(¶4)) and Fanucchi eleven workers. 2ER162(¶¶4, 8). Similarly, Plaintiff Sierra Transport, Inc., a Kern County business that hauls biosolids for LA, would lose the return on more than $6M in capital investments. 2ER155-57(¶¶1, 4, 10-13).

Accordingly, the District Court erred in finding that "out-of-county interests . . . will be the only ones to incur the significant transaction costs associated with the termination and relocation of their Kern County operations." *Kern III*, 509 F. Supp. 2d at 886. To the contrary, Measure E "removes one way in which [the County's] businesses can attract out-of-[county] dollars. It thus accomplishes virtually the opposite of economic protectionism." *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005).

Third, the District Court also erred in looking only at Measure E's effect on *existing* land application. In addition, the court should have considered its

potential *future* impact.[5] Had it done so, the District Court could not have found that Measure E would impact only out-of-county waste generators. Instead, the court would have concluded that Measure E could also have an adverse impact on the County, the business that the County currently uses for composting its waste and other waste generators within the County.

Until a few years ago, the County's biosolids were land applied at a farm adjacent to the KSA treatment plant, and they are now sent to SJC for composting. *See* p.9, *supra*. Moreover, this Court must assume that SJC was disposing of at least some of this compost in the County's unincorporated areas and that this practice would resume but for Measure E. *Id.* Measure E could thus raise the cost to the County of composting its biosolids through SJC. *See* p.13, *supra*. Moreover, if SJC ever stops accepting the County's biosolids—and county staff thought this might happen due to Measure E (4ER741-42)—the County would have to find alternative means of disposal outside the unincorporated areas, because Measure E prevents the

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[5]*See, e.g.*, *Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 300 (1997) ("in the absence of actual *or prospective* competition between the supposedly favored and disfavored entities in a single market there can be no local preference . . . to which the dormant Commerce Clause may apply" (emphasis added)); *cf. Procter & Gamble Co. v. City of Chicago*, 509 F.2d 69, 80-81 (7th Cir. 1975) (ordinance banning sale of detergents with phosphates justified by need to protect against future growth of nuisance algae in Illinois Waterway, even if nuisance algae were not a present problem).

County from resuming land application at KSA's farm (or anywhere else in those areas). 4ER739(¶¶9-10).

SJC also processes most of the sewage sludge generated by Plaintiff CSD2 that goes to Kern County. 3ER644(¶5). Measure E requires that this compost, too, be sent out of the County's unincorporated areas. If this is "discrimination," the word has no meaning.

Finally, Measure E also affects other in-county waste generators. As late as June 2006, biosolids from the City of Wasco and the Buttonwillow Community Sanitation District were being land applied in the County's unincorporated areas by USA Transport, Inc. 4ER706(¶¶52, 53). While USA Transport's land application permit was revoked for unrelated reasons, Measure E prevents the resumption of land application in those areas by these entities.

Thus, the District Court erred in concluding that Measure E's only adverse effect is on out-of-county interests.

c. The District Court Also Erred In Finding That Measure E Is Discriminatory Because It Permits Land Application In The County's Incorporated Areas.

The District Court also found that Measure E discriminated "by banning land application in areas used by out-of-county entities, while tolerating it in areas used by in-county entities," such as the County's cities. *Kern III*, 509 F. Supp. 2d at 885. Like the court's finding that Measure E affects only out-

of-county waste generators, this finding is both legally and factually erroneous for multiple reasons.

Measure E does not, and constitutionally could not, "tolerate" land application in the County's incorporated areas. As the District Court acknowledged, "the incorporated areas of the County necessarily lie beyond Kern's jurisdiction." *Id.* at 876 (citing CAL. CONST. art. XI, §7). Consequently, the Ordinance cannot be faulted for failing to exercise a power that the County does not have.[6]

Nor can Measure E be invalidated because the County's incorporated cities have chosen—in the exercise of *their* police powers—"to allow land application of biosolids, in some cases of lesser quality than Plaintiffs['']." *Kern III*, 509 F. Supp. 2d at 886. While the court speculated that these cities "would not accept Plaintiffs' biosolids" (*id.* at 887), the cities could not constitutionally permit land application of their own biosolids while prohibiting land application of out-of-county biosolids. *See City of Philadelphia v. New Jersey*, 437 U.S. 617 (1978). Moreover, the conduct of the *cities* is irrelevant to the constitutionality of the *County's* ordinance, as the California Court of Appeal found in rejecting an identical challenge brought to the County's

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[6]The District Court had recognized as much in ruling on Plaintiffs' motion for preliminary injunction, stating "that the geographic limitation of Measure E to 'unincorporated' areas does not itself constitute discrimination." *Kern II*, 462 F. Supp. 2d 1105, 1114 (C.D. Cal. 2006). Its summary judgment ruling did not explain this change of position.

previous biosolids legislation. *See County Sanitation Dist. No. 2 v. County of Kern*, 127 Cal. App. 4th 1544, 1612-13 (2005).

The cases the District Court cited as authority for looking at Measure E's purported extra-territorial effects—albeit with a "*cf.*" (*see Kern III*, 509 F. Supp. 2d at 886)—authorize no such thing. These cases hold that Commerce Clause analysis must consider whether the practical effect of a challenged law "is to control conduct beyond the boundaries of the State." *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989). But the law invalidated in *Healy* tied a beer wholesaler's in-state prices to its prices outside the State. In contrast, Measure E does not control, either directly or indirectly, *any* activity outside the County's unincorporated area, let alone activity outside of California.

d. Measure E Cannot Have A Discriminatory Effect Because It Does Not Advantage Domestic Competitors At The Expense Of Their Interstate Competitors.

Because it based its finding of discriminatory effect on Measure E's impact on out-of-county interests and the Ordinance's failure to prohibit land application in the County's incorporated areas, the District Court did not ask whether the Ordinance benefited in-state (or in-county) interests. This, too, was error.

The dormant "Commerce Clause prohibits economic protectionism—that is, regulatory measures designed to benefit in-state economic interests by

burdening out-of-state competitors." *New Energy Co. v. Limbach*, 486 U.S. 269, 273 (1988). Accordingly, laws that disadvantage interstate businesses or goods *in favor of their local counterparts* violate the Commerce Clause. *See, e.g., Bacchus Imports, Ltd. v. Dias*, 468 U.S. 263, 271 (1984) ("as long as there is some competition between the locally produced products and non-exempt products from outside the State, there is a discriminatory effect"). Conversely, there is no Commerce Clause violation if a law simply burdens out-of-state businesses without bestowing a corresponding advantage on their local competitors. For example, in *Exxon* the Court held that the Maryland law prohibiting producers and refiners of gasoline from owning or operating in-state gas stations did not violate the Commerce Clause because it gave "in-state independent dealers . . . no competitive advantage over out-of-state dealers." 437 U.S. at 126; *accord, e.g., CTS Corp. v. Dynamics Corp. of Am.*, 481 U.S. 69, 88 (1987) ("Because nothing in the Indiana Act imposes a greater burden on out-of-state offerors than it does on similarly situated Indiana offerors, we reject the contention that the Act discriminates against interstate commerce"); *Town of Southold v. Town of E. Hampton*, 477 F.3d 38, 49 (2d Cir. 2007) (no discriminatory effect where statute banning all high-speed and vehicular ferries "does not give any advantage to local businesses at the expense of out-of-state competitors").

Measure E is not discriminatory under this test. It admittedly imposes a burden on the out-of-county biosolids generators that previously have

dumped their sludge in the County. But it applies equally to—and therefore confers no corresponding benefit on—biosolids generators within the County. It therefore differs from the other solid waste ordinances that the Court has found objectionable. *See, e.g., C&A Carbone*, 511 U.S. at 392 (flow control ordinance "hoards solid waste, and the demand to get rid of it, for the benefit of the preferred [local] processing facility"); *Fort Gratiot Sanitary Landfill*, 504 U.S. at 361 (Michigan out-of-county waste import ban "affords local waste producers complete protection from competition from out-of-state waste producers who seek to use local waste disposal areas").

e. The Courts Repeatedly Have Indicated That Neutral Waste Management Ordinances Like Measure E Are Constitutional.

The County enacted Measure E not to benefit in-county sludge generators, but to protect the County's environment, the health of County residents and the reputation of the County's agricultural products. *See* pp.6-8, *supra*. While these benefits are local, they do not affect competition between Plaintiffs and local biosolids generators. Thus, they provide no evidence of discrimination. *See Minnesota v. Clover Leaf Creamery Co.*, 449 U.S. 456, 463 n.7 (1981) ("We will not invalidate a state statute under the Equal Protection Clause merely because some legislators sought to obtain votes for the measure on the basis of its beneficial side effects on state industry"); *id.* at 471 n.15 (applying Equal Protection rationale to issue of discriminatory purpose under Commerce Clause); *Norfolk S. Corp.*, 822 F.2d at 402 ("A state's

choice between competing land uses or between alternative environmental protection policies does not implicate the Commerce Clause simply because the alternative chosen may be in the best economic interests of the state as long as the state's choice does not discriminate between in-state and out-of-state competitors").

Indeed, similar benefits are provided by *every* environmental measure that, like Measure E, applies equally to all waste generators. Nevertheless the Supreme "Court has indicated that an evenhanded, nondiscriminatory limitation on the amount of waste disposed of that does not discriminate on the basis of the waste's origin would pass constitutional muster." *Chambers Med. Techs. of S. Carolina, Inc. v. Bryant*, 52 F.3d 1252, 1258 (4th Cir. 1995). For example, in *Fort Gratiot Sanitary Landfill*, the Court invalidated a ban on landfills accepting out-of-county waste, while simultaneously noting that the State "could, for example, limit the amount of waste that landfill operators may accept each year." 504 U.S. at 367. In *Chemical Waste Management, Inc. v. Hunt*, 504 U.S. 334 (1992), the Court held that a state could alleviate its concern with limited landfill capacity, and still satisfy the dormant Commerce Clause, if it imposed "an evenhanded cap on the total tonnage landfilled" with hazardous waste, "which would curtail volume from all sources." *Id.* at 345. And in *City of Philadelphia*, 437 U.S. 617, the Court invalidated a ban on the importation of most out-of-state waste, while simultaneously noting that "it may be assumed" that the State could protect

its environment "by slowing the flow of *all* waste into the State's remaining landfills, even though interstate commerce may incidentally be affected." *Id.* at 626 (emphasis in original).[7]

This result is not surprising. Outside the waste management sphere, the courts have repeatedly upheld outright bans that apply equally to local and out-of-state interests. *See, e.g., Clover Leaf Creamery,* 449 U.S. at 471-72 (statute banning retail sale of milk in plastic nonreturnable, nonrefillable containers upheld because it applied "without regard to whether the milk, the containers, or the sellers are from outside the State" and was "therefore unlike statutes discriminating against interstate commerce"); *UFO Chuting of Hawaii, Inc. v. Smith*, 508 F.3d 1189, 1198 (9th Cir. 2007) (Hawaii statute banning parasailing off the coast of Maui during whale mating season was not discriminatory, because it "does not differentiate between residents and nonresidents, or residents and non-citizens"); *Pac. Nw. Venison Producers v.*

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[7]A contrary holding would turn the Commerce Clause from a shield against discriminatory legislation into a sword that gave governments and businesses an affirmative right to dump their refuse wherever they found a landowner willing to accept it. That is not its function. The Commerce Clause does not give "residents of one State a right of access at 'reasonable' prices to resources located in another State that is richly endowed with such resources, without regard to whether . . . residents of the resource-rich State have access to the resources." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 618 (1981). Accordingly, it does not require a county to allow waste disposal in its territory. *See E. Kentucky Res. v. Fiscal Court*, 127 F.3d 532, 544 (6th Cir. 1997) ("Inasmuch as [plaintiff] argues that the Commerce Clause required Magoffin County to build a landfill within the County, we emphatically reject that argument").

Smitch, 20 F.3d 1008, 1012 (9th Cir. 1994) ("An import ban that simply effectuates a complete ban on commerce in certain items is not discriminatory, as long as the ban on commerce does not make distinctions based on the origin of the items").

As the District Court noted, Measure E "bans all biosolids regardless of their origin." *Kern III*, 509 F. Supp. 2d at 884. It thus fits squarely within the decisions of the Supreme Court and this Court holding that such bans are not discriminatory.

2. Plaintiffs' Evidence Of Discriminatory Purpose Is Insufficient To Support A Commerce Clause Violation Because There Is No Evidence That Measure E Was Aimed At Interstate Commerce.

The District Court cited and purported to follow the Supreme Court's ruling in *Clover Leaf Creamery*, 449 U.S. at 463 n.7, that the "presence of a genuine environmental purpose precludes application of strict scrutiny on purpose grounds." *Kern III*, 509 F. Supp. 2d at 885. It nevertheless justified strict scrutiny by finding that the Ordinance "*was intended to* and does have a discriminatory effect." *Id.* (emphasis added). Because that holding is premised on a finding of discriminatory effect, it must fall for all the reasons stated in Part I(A)(1), *supra*. But even if that were not so, the District Court's finding that Measure E "was intended to . . . have a discriminatory effect" cannot withstand scrutiny.

The court found that "the initiative was not so subtly animated by a specific desire to exclude Plaintiffs' biosolids from the County." *Kern III*, 509 F. Supp. 2d at 885. But this finding merely demonstrates animus toward *California* entities and *California-generated* biosolids. Indeed, Plaintiffs conceded as much below. *See* 2ER81 ("the purpose and effect of the Ban is just what its supporters urged the voters to do: 'Keep L.A. Sludge Out of Kern County'"). The record contains *no* evidence that the County's voters were hostile toward *out-of-state* entities or intended to exclude *out-of-state* biosolids. That is not surprising, as no one has ever sought to land apply biosolids from outside California in Kern County. *See* Part I(A)(1)(a), *supra*.

Moreover, as the District Court elsewhere explained in its opinion, the focus in the Measure E campaign on the evils of "L.A. Sludge" did not demonstrate "a bare desire to harm Plaintiffs unrelated to the environmental harm they were perceived to be causing and which Kern could legitimately redress. Rather, the statements merely reflect an indisputable fact—that Southern California counties were the ones introducing the perceived pollutant to Kern's jurisdiction." *Kern III*, 509 F. Supp. 2d at 879 (emphasis omitted).

The Commerce Clause has "'long recognized a difference between economic protectionism, on the one hand, and health and safety regulation, on the other." *Fort Gratiot Sanitary Landfill*, 504 U.S. at 365 n.6 (citation omitted). All the out-of-county animus discussed by the District Court

related to the latter goals, not the former. *See Kern III*, 509 F. Supp. 2d at 870 ("Plaintiffs were rationally perceived as polluters, and so a campaign including rhetoric against them does not mean Measure E's stated environmental purposes were mere pretext for something more nefarious"). Indeed, the District Court conceded that no evidence suggested "that Measure E was enacted for the purpose of protecting local industry at the expense of outside businesses." *Id.* at 885. Accordingly, there was no evidence of unconstitutional purpose that could justify strict scrutiny. *See Town of Southold*, 477 F.3d at 48-49 (reference to curbing traffic from out-of-state casinos not proof of discriminatory purpose, but instead "simply reflect[ed] the reality of the Town's traffic situation [and] the observation that congestion would result from new casino ferry service").[8]

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[8]Nor is a discriminatory purpose shown by the fact that Measure E was enacted, in part, to prevent a "loss of confidence in agricultural products from Kern County." 4ER731 (§8.05.010). Indeed, the District Court acknowledged that the County's voters "could properly be concerned that the reputation of Kern's agricultural products would be adversely affected if the County became known as a dumping ground for the refuse of Southern California residents." *Kern III*, 509 F. Supp. 2d at 880. A desire to protect the local economy is not invidious as long as there is no discrimination (*see* pp.29-30, *supra*), and there was none here.

3. Even If Measure E Is Discriminatory, It Satisfies Strict Scrutiny Because No Alternative Short Of A Complete Ban On Land Application Would Accomplish The County's Goals.

Even if it were discriminatory, Measure E would not violate the Commerce Clause if it "serve[d] a legitimate local purpose [that] could not be served as well by available nondiscriminatory means." *Maine v. Taylor*, 477 U.S. 131, 138 (1986) (citation and internal quotation marks omitted). The District Court found that Measure E could not pass this test, concluding that "Kern could easily have guarded against the perceived environmental harm with a more tailored regulation regarding the location[,] quality, and volume of biosolids that could be applied to land." *Kern III*, 509 F. Supp. 2d at 870.

This is wrong on all counts. As far as quality is concerned, the County's previous biosolids regulation limited land application to Class A EQ biosolids, the highest quality level. *See id.* at 876. Yet the District Court found that one site at which these biosolids are deposited "attracts large amounts of flies and emits noxious odors." *Id.* at 901. Regulating "quality" is therefore not enough.

Nor would regulating "location" or "volume" accomplish the same purposes as Measure E. Although the EPA has concluded that land application in compliance with its regulations is safe, uncertainty remains over the safety of even the highest quality biosolids. *See* pp.4-7, *supra*. Given this uncertainty, Kern may prohibit land application completely because it "has a legitimate interest in guarding against imperfectly understood environmental

risks, despite the possibility that they may ultimately prove to be negligible." *Maine*, 477 U.S. at 148. The only way to eliminate that risk is to eliminate biosolids entirely, as Measure E does. Similarly, a complete ban on biosolids is the only way to protect the public perception of the County's agricultural produce from being tarnished by land application on County farmland. *See Kern III*, 509 F. Supp. 2d at 880-81 (ban on use of biosolids on human cropland would not suffice because "factors other than scientific realities frequently affect the public's beliefs about its food supply").

B. Once The District Court's Finding Of Discrimination Is Set Aside, If The Court Believes That Measure E Implicates The Commerce Clause It Must Remand Plaintiffs' Claim That Measure E Fails To Satisfy *Pike* Balancing.

Because it believed that Measure E did not satisfy strict scrutiny, the District Court did not subject Measure E to the balancing test set forth in *Pike v. Bruce Church, Inc.*, 397 U.S. 137 (1970). Accordingly, if the Court determines that the Ordinance is not discriminatory, it should remand the case for *Pike* balancing. *See, e.g.*, *Ben Oehrleins*, 115 F.3d at 1387 (remanding for *Pike* balancing after district court's finding of discrimination reversed).[9]

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[9]If the Court decides that Measure E satisfies strict scrutiny for the reasons set forth in Part I(A)(3), *supra*, a remand would be unnecessary because the Ordinance would satisfy the *Pike* test *a fortiori*.

C. As An Alternative To Considering The Commerce Clause Claims, The Court Should Overrule Its Prior Decisions Holding That Prudential Standing Issues Are Not Jurisdictional And Find That Plaintiffs Have No Standing To Assert Their Commerce Clause Claims.

To litigate their Commerce Clause claims, Plaintiffs must demonstrate that they are "asserting [their] own legal interests rather than those of third parties" (*Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 804 (1985)), and that their interests are arguably within the "'zone of interests'" protected by that Clause. *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State, Inc.*, 454 U.S. 464, 475 (1982) (quoting *Ass'n of Data Processing Serv. Orgs., Inc. v. Camp*, 397 U.S. 150, 153 (1970)). Because Plaintiffs' sludge disposal occurs entirely within California, they can neither assert their own rights under the Commerce Clause nor bring themselves within the "zone of interests" that the Clause protects.[10]

Unfortunately, the County's present ability to raise this standing issue is foreclosed by Ninth Circuit precedent, because it did not raise the issue below. *See, e.g., Pershing Park Villas Homeowners Ass'n v. United Pac. Ins. Co.*, 219 F.3d 895, 899-900 (9th Cir. 2000). However, this is a minority view: the Second, Sixth, Seventh and District of Columbia Circuits have all

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[10]This is a different issue than the issue raised in Part I(A)(1)(a), *supra*. There we contended that Measure E is not discriminatory because it does not adversely affect *anyone's* right to engage in interstate commerce. Here we contend that, even if the Ordinance does have an adverse impact on *some* interstate commerce, it does not affect Plaintiffs' commerce, and they cannot assert the Commerce Clause rights of unidentified third parties.

held that failure to raise prudential standing contentions in the District Court, in a cross-appeal or in a party's appellate briefs, does not waive those arguments. *Thompson v. County of Franklin*, 15 F.3d 245, 248-49 (2d Cir. 1994); *Cmty. First Bank v. Nat'l Credit Union Admin.*, 41 F.3d 1050, 1053 (6th Cir. 1994); *MainStreet Org. of Realtors v. Calumet City*, 505 F.3d 742, 747-49 (7th Cir. 2007) (Posner, J.); *Am. Immigration Lawyers Ass'n v. Reno*, 199 F.3d 1352, 1357-58 (D.C. Cir. 2000); *Animal Legal Def. Fund, Inc. v. Espy*, 23 F.3d 496, 499 (D.C. Cir. 1994). Accordingly, the County respectfully requests, in the alternative, that the Court take this case *en banc*, hold that "prudential standing" issues can be raised on appeal even if they were not raised in the District Court and hold that Plaintiffs have no standing to contend that Measure E violates the Commerce Clause.[11]

II.

MEASURE E IS NOT PREEMPTED BY THE CALIFORNIA INTEGRATED WASTE MANAGEMENT ACT.

In addition to holding that Measure E violates the dormant Commerce Clause, the District Court held that it conflicts with, and is thus preempted by, the California Integrated Waste Management Act ("the Act"). This is purely a question of California law. Because California law "presume[s] the

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[11]Normally calls for *en banc* review occur after a panel decision. However, the County raises the prudential standing issue at this juncture to avoid any further claim of waiver.

validity of local ordinances" (*Water Quality Ass'n v. County of Santa Barbara*, 44 Cal. App. 4th 732, 740 (1996)), the "party claiming that general state law preempts a local ordinance has the burden of demonstrating pre-emption." *Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1139, 1149 (2006).

That burden is particularly heavy in this case. "[W]hen local government regulates in an area over which it traditionally has exercised control, such as the location of particular land uses, California courts will presume, absent a clear indication of preemptive intent from the Legislature, that such regulation is *not* preempted by state statute." *Id.* (emphasis in original). The reason for this presumption is simple: "'it is not to be presumed that the legislature in the enactment of statutes intends to overthrow long-established principles of law unless such intention is made clearly to appear either by express declaration or by necessary implication.'" *Id.* at 1149-50 (citation omitted).

The state-law presumption against preemption applies here with full force, for three separate reasons. Not only does Measure E control "the location of particular land uses," it also concerns two other areas traditionally subject to local control in California: public health and safety in general, and waste handling in particular.

"Traditionally, the cities and counties have adopted regulations for the protection and preservation of public health." *People ex rel. Deukmejian v.*

County of Mendocino, 36 Cal. 3d 476, 484 (1984). Indeed, "[t]he Legislature has not only recognized the rights of counties to regulate to preserve and protect public health but has imposed a duty to regulate." *Id.*; *see* CAL. HEALTH & SAFETY CODE §101025 ("The board of supervisors of each county shall take measures as may be necessary to preserve and protect the public health in the unincorporated territory of the county, including, if indicated, the adoption of ordinances, regulations and orders not in conflict with general laws . . ."). "[I]n view of the long tradition of local regulation and the legislatively imposed duty to preserve and protect the public health, preemption may not be lightly found." *People ex rel. Deukmejian*, 36 Cal. 3d at 484.

The handling of solid waste is no exception to this rule. California's "local agencies through their traditional police power have played the dominant role in local sanitation matters." *Valley Vista Servs., Inc. v. City of Monterey Park*, 118 Cal. App. 4th 881, 888 (2004). "Prior to [the Act's] passage, courts accepted that, state legislation notwithstanding, the dominant role in refuse handling belonged to localities." *Waste Res. Techs., Inc. v. Dep't of Pub. Health*, 23 Cal. App. 4th 299, 307 (1994). As a result, "[t]he antecedent statutes were viewed as acknowledging that allowance had to be made for 'the unique circumstances of individual communities' and that the Legislature had therefore 'empowered local governments to adopt refuse regulations which would best serve the local public interest.'" *Id.* (quoting

City of Camarillo v. Spadys Disposal Serv., 144 Cal. App. 3d 1027, 1031 (1983)).

In passing the Act, the Legislature recognized "that the way in which Los Angeles deals with refuse may be entirely different from the approach of a small rural town." *Waste Res. Techs.*, 23 Cal. App. 4th at 307. Accordingly, the Act did not represent "a fundamental change in the Legislature's traditional outlook towards the subject of waste handling." *Id.* at 309. The California courts that have interpreted the Act have therefore found "no legislative intent to displace deeply entrenched local authority." *Id.* That is not surprising, for the Act "was in large measure a consolidation and recodification of existing law." *Id.* at 307. In fact, the Act "looks to a partnership between the state and local governments, with the latter retaining a substantial measure of regulatory independence and authority." *Id.* at 306.

The District Court's preemption ruling ignored most of these principles. While the court acknowledged that Appellees bear the burden of proving preemption (*Kern III*, 509 F. Supp. 2d at 891), it did not discuss California's history of local control over land use, public health and solid waste or the cases holding that the Act left these local powers undisturbed.

Instead, the court relied solely on one provision of the Act and its asserted incompatibility with Measure E. The court first held that Sections 40051(a) and (b) impose a mandatory duty on California's local governments to promote and maximize the recycling of solid waste in order to minimize

the amount of solid waste put in landfills. *See Kern III*, 509 F. Supp. 2d at 891. Second, the court held that "land application of biosolids . . . constitutes recycling." *Id.* Third, the court found that "[g]iven [the Act's] mandate to recycle solid waste, Measure E's ban on land application of biosolids amounts to a ban on activity that the state statute attempts to promote." *Id.*

This argument fails for multiple reasons, which we now discuss.

A. Measure E Is Protected Against Preemption By Section 40059(a).

Section 40059(a) provides, in relevant part, that, "[n]otwithstanding any other provision of law, each county . . . may determine . . . [a]spects of solid waste handling which are of local concern, including . . . [the] nature, location, and extent of providing solid waste handling services." Because its introductory clause provides that Section 40059(a) prevails over "any other provision of law," the California courts have recognized that the statute "overrides or supersedes any other provisions of the . . . Act which might indicate to the contrary." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1451 (1999) (citation and internal quotation marks omitted). Thus, even if the District Court had correctly identified a conflict between Section 40051 and Measure E (an issue discussed below), the latter is not preempted because it falls within Section 40059(a).

That statute preserves local authority over the "*nature, location, and extent* of providing solid waste handling services" (emphasis added). The

Act defines "solid waste handling" as "the collection, transportation, storage, transfer or processing of solid waste." §40195. "Processing" in turn means "the reduction, separation, recovery, conversion, or recycling of solid waste." §40172. Thus, "solid waste handling includes recycling—of solid waste." *Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Ctr., Inc.*, 7 Cal. 4th 478, 488 (1994) (emphasis omitted). Moreover, Appellees conceded below that "solid waste" includes biosolids. 2ER101. Thus, as the District Court found, "it is undisputed that land application of biosolids . . . constitutes recycling of solid waste within the meaning of the statute." *Kern III*, 509 F. Supp. 2d at 891.

The District Court nevertheless stated that land application was not covered by the statute because "no case . . . has construed [Section 40059(a)] to allow a city or county to completely ban a particular *method* of recycling." *Id.* at 895 (emphasis in original). This proves nothing. While several California courts have held that Section 40059(a) applies to trash haulers and garbage collectors,[12] no case holds, or even implies, that the statute's scope *is limited* to such entities. Hence, none of these cases support the District Court's suggestion that "methods of recycling" are outside the statute's scope.

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[12]*See, e.g., Rodeo Sanitary Dist.*, 71 Cal. App. 4th at 1453; *Waste Res. Techs., Inc.*, 23 Cal. App. 4th at 307.

Indeed, that suggestion contradicts the statute's plain language. As noted above, Section 40059(a) preserves local authority to determine the "nature, location, and extent" of recycling. Prohibiting a particular method (land application) of recycling a particular kind of solid waste (biosolids) is a way of controlling the "nature" of recycling. *See City of Alhambra v. P.J.B. Disposal Co.*, 61 Cal. App. 4th 136, 141 (1998) ("Section 40059 confirms the City's right to determine the frequency *and means* of solid waste handling services") (emphasis added). Similarly, prohibiting land application within the county's unincorporated areas controls the "extent" and "location" of recycling. Hence, the local autonomy preserved by Section 40059(a) necessarily includes the right to enact Measure E.

The District Court's crabbed interpretation of Section 40059(a) also contradicts other provisions of the Act. In addition to suggesting that banning "methods of recycling" was outside the statute's scope, the court attempted to draw a distinction between the "practice" of recycling and the "services" that "support" recycling. *See Kern III*, 509 F. Supp. 2d at 895 (Section 40059(a) "does not save Measure E . . . because Measure E is not a regulation of the *services* that support land application, but rather the practice itself") (emphasis in original). But Section 40057 unambiguously states that recycling *is* a "solid waste handling service[]," the precise term used in Sec-

tion 40059(a).[13] The inclusion of recycling as a "solid waste handling service" in Section 40057 compels the identical interpretation of the same phrase in Section 40059(a).[14]

The District Court also held that Measure E was not within Section 40059(a)'s exclusion for *other* "'aspects of solid waste handling which are of local concern.'" *See Kern III*, 509 F. Supp. 2d at 895 (citation omitted). However, if this Court finds that Measure E regulates the "nature," "location" or "extent" of "providing solid waste handling services," it will not need to reach this issue. Moreover, the District Court erred in finding that Measure E did not address a matter of "local concern" because it "purports to address health and safety priorities that will not vary across communities." *Id.* Nothing in Section 40059(a) requires that a county's regulation of "aspects of solid waste handling which are of local concern" be motivated only by interests particular to that locality.

Even if that were not so, and the District Court's understanding of the proper standard for identifying "aspects of solid waste handling which are of local concern" were correct, Measure E would come within this prong of the

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[13]Section 40057 reads as follows: "Each county, city, district, or other local governmental agency which provides *solid waste handling services* shall provide for those services, *including*, but not limited to, source reduction, *recycling* . . ." (emphases added).

[14]Statutes addressing the same subject should be construed *in pari materia*, particularly when they were enacted at the same time as part of the same bill. *See IBM v. State Bd. of Equalz'n*, 26 Cal. 3d 923, 932 (1980).

Section 40059(a) exemption. To begin with, the court expressly found that the County's voters "could properly be concerned that the reputation of Kern's agricultural products would be adversely affected if the County became known as a dumping ground for the refuse of Southern California residents." *Id.* at 880. Moreover, the court identified numerous *site-specific* concerns raised by Plaintiffs' land application. The court found evidence in the record that the Green Acres site "attracts large amounts of flies and emits noxious odors, which disrupt a nearby recreation area" and "lies adjacent to one water banking facility and a short distance from another, and that the groundwater from beneath Green Acres could flow into the water banks when water is extracted from them during dry seasons." *Id.* at 901. Record evidence also suggests that land application at Honey Bucket Farms raises potential groundwater problems. 4ER806. Because these are quintessentially "local concerns," the County's attempt to address them through Measure E is protected by Section 40059(a).[15]

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[15]The District Court also asserted that the County's construction of the "local concern" language in Section 40059(a) "would deprive the words of all meaning, and thereby allow communities to opt out of the mandatory hierarchy in . . . [Section] 40051 . . . ." *Kern III*, 509 F. Supp. 2d at 895-96. But if a conflict exists between Section 40051 and Section 40059(a), the latter prevails. *See* p.42, *supra*.

Finally, the court invoked *ejusdem generis*. *See Kern III*, 509 F. Supp. 2d at 896 n.18. But the "fundamental rule" that a court's objective "in construing a statute is to ascertain and effectuate the underlying legislative intent . . . overrides the *ejusdem generis* doctrine . . . if application of the (continued . . .)

B. Even If Measure E Were Not Protected By Section 40059(a), It Would Not Be Preempted By Section 40051.

Section 40051(a) requires each local agency, in "implementing this division," to

> [p]romote the following waste management practices in order of priority: (1) Source reduction. (2) Recycling and composting. (3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.

Section 40051(b) similarly requires local agencies, in "implementing this division," to "[m]aximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal." §40051(b).

The District Court held that Section 40051 preempts Measure E because the ordinance "amounts to a ban on activity that the state statute attempts to promote." *Kern III*, 509 F. Supp. 2d at 891. But the court's approach to the statute ignored both its language and the Act as a whole. As a result, the District Court's interpretation of Section 40051 violated the rule—which the court itself acknowledged—that "'every statute should be construed with reference to the whole system of law of which it is a part so that all may be harmonized and have effect.'" *Id.* at 896 n.18 (citation omitted).

(. . . continued)
doctrine . . . would frustrate the intent underlying the statute." *Moore v. California State Bd. of Accountancy*, 2 Cal. 4th 999, 1012 (1992). That "fundamental rule" controls here, for the District Court conceded that the Legislature did not intend to compel one county to accept solid waste generated by other counties. *See* p.52, *infra*.

1. The Act Does Not Expressly Preempt Measure E.

The District Court treated Section 40051 as if it commanded California's local agencies to promote or maximize recycling in *all* of their activities—*i.e.*, when they process *their own* sludge *and* when they adopt legislation governing the recycling of sludge generated by themselves and *other* local agencies. In fact, however, the Act contains no such sweeping mandate. Instead, the requirements contained in Sections 40051(a) and (b) are all limited by the prefatory language "[i]n implementing this division."

Although "this division" includes the entire Act, *no* provision of the Act *required* the County to adopt laws governing the recycling of solid waste. Indeed, Measure E was enacted pursuant to the police power granted by Article XI, Section 7 of the California Constitution. *See* 4ER731 (§8.05.020).[16] Hence, the County's voters were *not* "implementing this division" when they adopted Measure E. Section 40051 therefore does not expressly preempt the Ordinance.

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[16]Article XI, Section 7 provides: "A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws."

2. The Act Does Not Conflict With Measure E, Because The Ordinance Does Not Prohibit Conduct That The Act Commands, And Plaintiffs Have Failed To Show That It Is Impossible To Comply With Both.

As the California Supreme Court recently explained, under California law

> a local ordinance is not impliedly preempted by conflict with state law unless it mandates what state law expressly forbids, or forbids what state law expressly mandates. That is because, when a local ordinance does not prohibit what the statute commands or command what it prohibits, the ordinance is not "inimical to" the statute. (*Big Creek Lumber Co. v. County of Santa Cruz*, 38 Cal. 4th 1138, 1161 (2006) (citations, brackets and internal quotation marks omitted))

Measure E does not conflict with the Act under this standard. It does not prohibit conduct that the Act commands (or, of course, command what the Act prohibits).

Big Creek Lumber also suggested that a local ordinance would not be preempted by state law if it is "reasonably possible" to comply with both. *See* 38 Cal. 4th at 1161 (state forestry law did not preempt county land use ordinances where "it is reasonably possible for a timber operator to comply with both"). Here, too, Plaintiffs have failed to meet their burden of proof. Although the governmental Plaintiffs contended below that it would be expensive for them to comply with Measure E (2ER130-36(¶¶31-37), 171-72(¶17), 177-78(¶¶8-13)), they never attempted to bring themselves within this prong of *Big Creek Lumber* by claiming that it was not "reasonably possible" for them to comply with both the Act and Measure E.

3. The District Court Applied An Erroneous Test For Preemption.

Impliedly recognizing that Appellees could not meet either of the tests for preemption set forth in *Big Creek Lumber*, the District Court held that Measure E was preempted by the Act merely because it "amounts to a ban on activity that the state statute attempts to promote." *Kern III*, 509 F. Supp. 2d at 891. Even if this accurately characterized both the Act and the Ordinance, it would not demonstrate preemption. Merely prohibiting what state law *promotes*, rather than *commands*, is not enough under *Big Creek Lumber*. *See* Part II(B)(2), *supra*.

In holding otherwise, the District Court quoted language in a California Supreme Court opinion, drawn from *Blue Circle Cement, Inc. v. Board of County Commissioners*, 27 F.3d 1499 (8th Cir. 1994), that "when a statute . . . 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." *Kern III*, 509 F. Supp. 2d at 892 (quoting *Great W. Shows, Inc. v. City of Los Angeles*, 27 Cal. 4th 853, 868 (2002)). But this preemption issue is a question of California—not federal—law, and the Eighth Circuit's federal law test has never been adopted by the California Supreme Court as a standard for state-law preemption. As the District Court acknowledged in its opinion denying Defendants' motion to dismiss, the language it eventually

found dispositive "is merely the [California Supreme C]ourt's distillation of the rule from Blue Circle Cement, which it then distinguished." 4ER867 n.4.

4. The District Court's Conclusion That Measure E Frustrates The Act's Purpose Is Contradicted By Its Holding That The Act Does Not Give Plaintiffs The Right To Land Apply Their Biosolids In The County.

Even if the *Blue Circle Cement* test were part of California preemption law, it has not been met in this case. Measure E is not a complete ban on recycling. Nor does it frustrate the Act's purpose. Hence, it would not be preempted under *Blue Circle Cement*.

The District Court acknowledged that Measure E "is not a complete ban on the recycling of solid waste." *Kern III*, 509 F. Supp. 2d at 898. That is unquestionably correct. Measure E applies only to one kind of solid waste—sewage sludge. It does not affect, much less ban, recycling anything else. Even as to sludge, Measure E does not ban composting or pelletization, as long as the resulting compost or pellets are not land applied within the County. 4ER732 (§§8.05.030(B), 8.05.040(A)).

The District Court nevertheless found that "the absence of a complete ban is not dispositive" because "Measure E's total ban on a major method of recycling . . . clearly frustrates the [Act's] purpose." *Kern III*, 509 F. Supp. 2d at 898. Thus, the court held that because Section 40051 articulates a legislative policy in favor of recycling solid waste, it preempts any local legislation that bans "a major method of recycling."

As we have seen, however, Section 40051(a) does not establish a stand-alone policy favoring recycling. Instead, it commands local agencies to "promote" and "maximize" recycling "[i]n implementing this division"—*i.e.*, the remaining provisions of the Act. *See* p.48, *supra*. Thus, the Act requires public agencies to address recycling only within a complex statutory framework that does *not* give one local entity the right to recycle sludge in violation of another entity's laws.

The District Court recognized as much when it found that the Act "'does not require a city or county to allow other local agencies to conduct their recycling activities in its jurisdiction.'" *Kern III*, 509 F. Supp. 2d at 897 (citation omitted). This holding was unquestionably correct. The Legislature knew that "[l]ocal conditions transcending city or county boundaries might require collection and disposal to be handled on a regional basis" (*Waste Res. Techs.*, 23 Cal. App. 4th at 307), and therefore "made provision in the Act for the creation and operation of regional agencies, garbage disposal districts, and garbage and refuse disposal districts." *Id.* at 307-08 (citations omitted). However, the Legislature made participation in these regional agencies and districts *voluntary*. §§40971, 49010, 49110. These provisions would make no sense if the Act compelled counties to accept sewage sludge from cities and counties outside their borders *in the absence of regional cooperation*.

However, the District Court failed to give this critical holding the importance it deserved. If, as the District Court held, the Legislature did not intend to give public agencies like the governmental Plaintiffs a statutory right to deposit their sewage sludge in Kern County, how can Measure E frustrate the statutory purpose?

The District Court answered this question by asserting that Measure E is preempted because it "does not merely prohibit land application of out-of-county biosolids," but is instead "a broad ban of an entire method of recycling." 509 F. Supp. 2d at 897. Thus, according to the District Court, Measure E is preempted because it prohibits land application of both biosolids generated outside the County *and* biosolids generated within it.

This proposition contradicts the District Court's Commerce Clause analysis. There the court invalidated Measure E because its only real impact was on "out-of-county interests." *See* Part I(A)(1)(b), *supra*. Yet, when it came to preemption, the District Court invalidated the Ordinance because it reached *beyond* out-of-county biosolids. The court did not explain why the in-county impact it found constitutionally irrelevant for purposes of Commerce Clause analysis assumed critical importance for state-law preemption.

Moreover, Plaintiffs do not land apply biosolids generated within the County. Accordingly, they have no standing to assert that Measure E is pre-empted because it bans such activity. *See* p.37, *supra*.[17]

Finally, the District Court erred in asserting that Measure E frustrates the Act's purpose because it bans local land application of biosolids generated within the County. The Act gives *each* jurisdiction primary responsibility to dispose of *its own* biosolids, in whatever way it sees fit, as long as it complies with the Act's mandates for managing its waste. As long as this criterion is met, a county's decision to recycle its sludge outside its borders does not conflict with the Act.

The Act's basic device for fulfilling the recycling mandates contained in Section 40051 is the "source reduction and recycling element" ("SRRE"). For counties, the Act defines the SRRE as "a program for management of solid waste generated with the unincorporated area of the county, consistent with the waste management hierarchy provided in Section 40051." §§41300(a), 41301. Each city must also prepare a similar program "for management of solid waste generated within the city." §§41000(a), 41001.

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[17]In contrast to Plaintiffs' Commerce Clause claim, Defendants did contend below that Plaintiffs had no prudential standing to litigate this preemption claim, albeit on other grounds. 2ER260-64. That is sufficient to preserve the issue for appeal. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992).

Each SRRE must include a plan for "the disposition of sewage sludge *generated in the jurisdiction of the* [*city or county*]." §§41250, 41450 (emphasis added).[18] Accordingly, the Act gives each city and county the initial responsibility to determine how the statute's recycling goals should be met.

The SRREs must be submitted to the California Integrated Waste Management Board ("CIWMB"). The CIWMB can approve the SRRE only if it finds that the document is "in compliance with" the portion of the Act that includes Section 40051. §41800(a). The Act gives the CIWMB power to enforce the requirements contained in the SRREs by issuing compliance orders and imposing administrative penalties of up to $10,000/day if the agency does not make "all reasonable and feasible efforts" to comply with those orders. §§41825(b), (c); 41850.

By giving each public agency the initial responsibility to determine how to handle its own waste, the Act lets each such agency determine the means by which it will meet the Act's goals. However, this responsibility does not include any requirement to conform local law so as to maximize recycling within a county's borders. To the contrary, 14 C.C.R. §18735.3(b) merely requires each jurisdiction "to *consider* changing its own building and zoning code practices to encourage recycling" (emphasis added). If, as the District

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[18]Each SRRE prepared by a county or city must contain a "special waste" component. §§41003, 41303. That component must address the disposition of sewage sludge generated in the jurisdiction. §§41250, 41450.

Court found, the Act *required* each local entity to enact laws that maximize recycling and preempted laws that did not do so, this regulation would be anomalous. Moreover, the CIWMB's staff has concluded that "[l]and application projects must comply with local laws, ordinances, and regulations." California Integrated Waste Management Board, Board Meeting April 13-14, 2004, Agenda Item 4, *available at* http://www.ciwmb.ca.gov/agendas/mtgdocs/2004/04/00015951.doc, at 4-6.

Nor do the approval provisions of the Act preempt local ordinances. To the contrary, Section 41851 provides that nothing in the chapter of the Act that requires the CIWMB to approve SRREs "shall infringe on the existing authority of counties and cities to control land use or make land use decisions." In short, nothing in the Act preempts local governments from deciding—just like Plaintiffs have—to send their biosolids elsewhere for disposal.

If and when a county passes legislation that makes it impossible for it to meet the Act's requirements, the Act gives the CIWMB several powerful remedies—such as compliance orders and draconian monetary sanctions—to enforce those mandates. But the fact that Measure E might someday make it more difficult for the County—or, indeed, Plaintiffs—to meet the Act's goals does not mean that such legislation is preempted *now*. *See DeVita v. County of Napa*, 9 Cal. 4th 763, 793 (1995) (rejecting contention that general plans could not be amended by initiative because of "the mere possibility" that

giving electorate that right would frustrate the statutory purposes for requiring local governments to adopt general plans).

The Act might well have been a more efficient statute had it given the CIWMB (or, for that matter, the courts) power to suspend local ordinances upon a showing that such ordinances made the Act's mandates more difficult to achieve. But the California courts have recognized that "some of the seeming lack of clarity or apparent logical gaps in the statute may be the result of deliberate choices by the Legislature rather than inadvertence." *Rodeo Sanitary Dist. v. Bd. of Supervisors*, 71 Cal. App. 4th 1443, 1453 (1999). This is particularly true in this context, where the Act was passed in light of, and did not disturb, the traditional primacy of local governments in handling solid waste. *See* pp.40-41, *supra*. As a result, a court must interpret "the act as it is written, not . . . a different, perhaps broader, version that could have been, or still may be, enacted." *Waste Mgmt. of the Desert, Inc. v. Palm Springs Recycling Ctr., Inc.*, 7 Cal. 4th 478, 490 (1994). The Act "as it is written" does not preempt Measure E.

Leaving such policy questions to the Legislature is particularly important because compelling one jurisdiction to accept biosolids generated by others could lead to absurd or undesirable results. If cities and counties could compel other jurisdictions to accept their biosolids, the recipient jurisdictions could retaliate by compelling the first jurisdiction to accept *their*

sludge. Such scenarios raise policy issues that the Legislature is far better able than the courts to evaluate.

5. Measure E's Ban On Land Application Does Not Conflict With The Act.

The District Court apparently believed that Measure E conflicts with Section 40051 because the statute's endorsement of recycling simultaneously endorses land application. Instead, the Act's endorsement of recycling sewage sludge in general, and of land application in particular, is far more qualified.

Section 41780 required each city and county to adopt SRREs that diverted 25% of its solid waste from landfill disposal or "transformation" (incineration) by recycling, source reduction or composting by January 1, 1995, and 50% by January 1, 2000. However, not every attempt to recycle sewage sludge counts toward these goals. Section 41781.1 provides that "the diversion of sludge may be counted toward the diversion requirements established under section 41780" only if the CIWMB has made a "finding at a public hearing, based upon substantial evidence, that the sludge has been adequately analyzed and will not pose a threat to public health or the environment for the reuse which is proposed." Thus, far from uncritically

promoting the recycling of sewage sludge, the Act recognizes it *only* if it has been duly certified as safe for public health and the environment.[19]

Precisely the same message is found in Section 50002(b). Sections 50000 and 50000.5 impose detailed requirements—including local approval and judicial review—on every attempt to construct a new "solid waste facility" or expand an existing one before a countywide integrated waste management plan for the relevant jurisdiction is approved. However, Section 50002(b) creates a limited exemption from these approval requirements for "[t]he application to land of agricultural products derived from municipal sewage sludge for use as a fertilizer material, based on a finding by the [CIWMB] that the nature of the solid waste poses no significant threat to the public health, the public safety, or the environment . . . ." Thus, Section 50002(b) exempts land application from administrative and judicial scrutiny *only* if the CIWMB makes specified findings that it is consistent with public health and the environment.

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[19]That statutory requirement is particularly important in this case, for *none* of the governmental Plaintiffs have sought diversion credit for their land application of biosolids in Kern County. *See* 2ER187-88(¶¶33-35). Given the procedural posture of this case, the Court can infer that Plaintiffs chose not to seek such credit either because their land application could not satisfy the requirements imposed by Section 41781.1 or because they did not want to expose their land application to the public scrutiny that the Act requires. *See* CAL. CODE REGS., tit. 14, §§18764-18766 (SRREs subject to public review and hearing process).

The Act thus contains two different statutes which, in different contexts, indicate that its endorsement of sludge diversion in general, and land application in particular, is qualified. Consequently, the District Court erred in assuming that Section 40051's *general* endorsement of recycling constitutes a *specific* endorsement of land applying sewage sludge. Accordingly, the District Court should not have concluded that Measure E is preempted merely because it bans land application of biosolids.

CONCLUSION

The judgment should be reversed and the case remanded to the District Court with instructions to render judgment in Appellants' favor on Plaintiffs' Commerce Clause and state-law preemption claims.

DATE: March 17, 2008.

Respectfully,

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STATEMENT OF RELATED CASES

There are no known related cases.

DATE: March 17, 2008.

By _____
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CERTIFICATE OF COMPLIANCE WITH RULE 32(a).

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DATE: March 17, 2008.

By _____
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ADDENDUM

COUNTY OF KERN
MEASURE E

BALLOT TITLE AND SUMMARY PREPARED BY COUNTY COUNSEL

BIOSOLIDS LAND APPLICATION BAN: INITIATIVE ORDINANCE. Prohibits the land application of biosolids in the unincorporated area of Kern County. "Biosolids" are treated solid, semi-solid or liquid residue generated during the treatment of sewage in a wastewater treatment facility. Land application of any materials containing biosolids is prohibited immediately. In addition, the ban prohibits the discharge of biosolids to surface waters and surface water drainage courses and prohibits leaching or other introduction of biosolids to groundwater aquifers. Biosolids, packaged for routine retail sales through regular retail outlets, which are primarily used for residential purposes in limited amounts are permissible and are excluded from the ban.

Existing permit holders have six months to discontinue the land application of biosolids. An appeal procedure is established to request an extension of time to discontinue such application if special circumstances exist which create a hardship for those who have installed or constructed permanent improvements relating to the land application of biosolids. The final step of the appeal process is a hearing before the Kern County Board of Supervisors, which may grant an extension not to exceed six months.

Violation of the ordinance is a misdemeanor punishable by a fine of not more than $500 or not more than six months in prison, or both, for each day of violation. An offender may also be required to pay for cleanup and disposal costs.

INITIATIVE ORDINANCE

KEEP KERN CLEAN ORDINANCE OF 2006

THE PEOPLE OF THE COUNTY OF KERN, STATE OF CALIFORNIA, DO HEREBY ORDAIN AS FOLLOWS:

Section 1. This ordinance shall be know as the "Keep Kern Clean Ordinance of 2006". It shall take effect and be in full force immediately upon passage by the People of Kern County, and shall be published and processed in the manner required by the law of the State of California and Kern County.

Section 2. Chapter 8.05 of the Ordinance Code of Kern County is hereby repealed and a new Chapter 8.05 is hereby enacted to read as follows:

CHAPTER 8.05
LAND APPLICATION OF BIOSOLIDS

8.05.010 PURPOSE AND INTENT
There are numerous serious unresolved issues about the safety, environmental effect, and propriety of land applying Biosolids or sewage sludge, even when applied in accordance with federal and state regulations. Biosolids may contain heavy metals, pathogenic organisms, chemical pollutants, and synthetic organic compounds, which may pose a risk to public health and the environment even if properly handled. Sampling and other monitoring mechanisms are not feasibly capable of reducing the risks associated with Biosolids to a level acceptable to the people of Kern County. Land spreading of Biosolids poses a risk to land, air, and water, and to human and animal health. It may cause loss of confidence in agricultural products from Kern County. It causes the loss of productive agricultural lands capacity for human food production for significant periods of time. It presents a risk of airborne Biosolid particulate matter in circumstances unique to Kern County. It presents risks of unique odor, insect attraction, and other nuisances, which are unacceptable to the people of Kern County and cannot be feasibly controlled to a risk level acceptable to the people of Kern County.

For each of the foregoing reasons, individually and collectively, and in order to promote the general health, safety and welfare of Kern County and its inhabitants, it is the intent of this Chapter that the land application of Biosolids shall be prohibited in the unincorporated area of Kern County.

8.05.020 AUTHORITY
This Chapter is adopted pursuant to the initiative power of the People of Kern County and the police power of Kern County as set forth in Article XI, Section 7, of the California Constitution. In addition, the Clean Water Act, 33 U.S.C. Section 1345, U.S. EPA regulations, 40 C.F.R. Part 503, and California Water Code Section 13274 recognize the authority of local government to impose more stringent requirements on the use or disposal of sewage sludge in order to protect public health and the environment from any adverse effect from sewage sludge.

8.05.030 DEFINITIONS

A. "Agency" means an authorized representative of the Environmental Health Services Department of the County of Kern.

B. "Biosolids" are treated solid, semi-solid or liquid residues generated during the treatment of sewage in a wastewater treatment works and includes a material derived from or containing sewage sludge such as compost and palletized sewage sludge, irrespective of where generated, produced or treated. These residues include, but are not limited to, scum or solids removed in primary, secondary or advanced wastewater treatment processes and material derived from sewage sludge. Biosolids, as used in this chapter, excludes biosolid products that are in a bag or container packaged for routine retail sales through regular retail outlets, which are primarily used for residential purposed in limited quantities.

C. "County" means the County of Kern, State of California.

D. "Hardship" means a substantial economic burden imposed on a person after due consideration of potential alternative methods of disposal.

E. "Land Apply" means the spraying, spreading or other placement of Biosolids onto the land surface, the injection of Biosolids below the surface, or the incorporation of Biosolids into the soil.

F. "Permit" means a land application permit issued by the County under the provisions of former Chapter 8.05.

G. "Person" means any individual, firm, partnership, joint venture, association, corporation, estate, trust, receiver, syndicate, entity, city, county or other political subdivision or public agency, or any other group or combination acting as a unit.

H. "Site" means the area of land covered by a permit issued under former Chapter 8.05.

8.05.040 BIOSOLIDS PROHIBITED

A. It shall be unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County. Any Site for which a Permit was issued prior to the effective date of this Chapter shall have six (6) months from the effective date of this Chapter to discontinue land application of Biosolids.

B. The discharge of biosolids to surface waters or surface water drainage courses, including wetlands and water ways, or the leaching or other introduction of Biosolids or any constituent of Biosolids to groundwater aquifers is prohibited.

8.05.050 APPEAL PROCESS

A. Any person who has installed or constructed permanent improvements related to the Land Spreading of Biosolids who contends there are special circumstances which render the discontinuance of land application of Biosolids a Hardship, may request in writing filed with the Agency within thirty (30) days of the effective date of this Chapter, and the Agency may grant up to an additional three (3) months of time for the discontinuance of the land spreading of Biosolids commensurate with the circumstances creating the Hardship. If the Agency has not acted within sixty (60) days of the filing of the request, the request shall be deemed denied and the time for filing an appeal pursuant to subdivision B of this section shall begin to run.

B. Any denial of such a request may be appealed to the Board of Supervisors. Any appeal shall be made by filing a written request for a hearing before the Board of Supervisors with the Clerk of the Board not more than ten (10) calendar days after notice of the denial has been delivered. Upon receipt of a written request for a hearing, the Clerk of the Board shall set the matter for public hearing on a date not more than sixty (60) calendar days following receipt of such written request, and shall give the applicant, any person who has requested in writing from the Clerk notice under this section, and the Board of Supervisors at least thirty (30) calendar days written notice of the time, date, and place of the hearing. After the hearing, the Board of Supervisors shall issue its written decision and findings on the appeal within thirty (30) calendar days after the close of the hearing. If making a finding of Hardship, the Board of Supervisors may grant up to the six months of additional time. Such decision shall be final.

8.05.060 PENALTY FOR VIOLATION

Any person violating any provision of this chapter is guilty of a misdemeanor and upon conviction thereof is punishable by a fine of not more than $500 or by imprisonment of not more than six months or both for each offense. Every violation of this chapter shall be construed as a separate offense for each day during which such violation continues and shall be punishable as provided in this section. The Court or the County may also demand and require the violator to clean up at the violator's expense any illegally applied or deposited Biosolids and dispose of it in an approved, environmentally safe and clean manner.

Section 3. If any clause, provision, sentence, or paragraph of this ordinance, or the application thereof, is deemed to be invalid as to any person, entity, establishment, or circumstance, such invalidity shall not affect the other provisions of this ordinance which shall still remain in effect, and to that end, it is hereby declared that the provisions of this ordinance are severable.

Proponents:

s/Kevin McCarthy
s/Roy Ashburn
s/Dean Florez
s/Mary K. Shell
s/Gene A. Lundquist

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 30. Waste Management (Refs & Annos)
Part 1. Integrated Waste Management (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)
Article 2. General Provisions (Refs & Annos)
§ 40051. Implementation; duties of board and local agencies

In implementing this division, the board and local agencies shall do both of the following:

(a) Promote the following waste management practices in order of priority:

(1) Source reduction.

(2) Recycling and composting.

(3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.

(b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of solid waste that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices.

CREDIT(S)

(Added by Stats.1989, c. 1095, § 22.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 30. Waste Management (Refs & Annos)
Part 1. Integrated Waste Management (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)
Article 2. General Provisions (Refs & Annos)
→§ 40057. Local governmental agencies providing solid waste handling services; required services

Each county, city, district, or other local governmental agency which provides solid waste handling services shall provide for those services, including, but not limited to, source reduction, recycling, composting activities, and the collection, transfer, and disposal of solid waste within or without the territory subject to its solid waste handling jurisdiction.

CREDIT(S)

(Added by Stats.1989, c. 1095, § 22.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 30. Waste Management (Refs & Annos)
Part 1. Integrated Waste Management (Refs & Annos)
Chapter 1. General Provisions (Refs & Annos)
Article 2. General Provisions (Refs & Annos)
→§ 40059. Local determinations; extent of services; means for providing services; abrogation of existing franchises, contracts, or licenses

(a) Notwithstanding any other provision of law, each county, city, district, or other local governmental agency may determine all of the following:

(1) Aspects of solid waste handling which are of local concern, including, but not limited to, frequency of collection, means of collection and transportation, level of services, charges and fees, and nature, location, and extent of providing solid waste handling services.

(2) Whether the services are to be provided by means of nonexclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding, or if, in the opinion of its governing body, the public health, safety, and well-being so require, by partially exclusive or wholly exclusive franchise, contract, license, permit, or otherwise, either with or without competitive bidding. The authority to provide solid waste handling services may be granted under terms and conditions prescribed by the governing body of the local governmental agency by resolution or ordinance.

(b) Nothing in this division modifies or abrogates in any manner either of the following:

(1) Any franchise previously granted or extended by any county or other local governmental agency.

(2) Any contract, license, or any permit to collect solid waste previously granted or extended by a city, county, or a city and county.

CREDIT(S)

(Added by Stats.1989, c. 1095, § 22. Amended by Stats.1990, c. 1355 (A.B.3992), § 1, eff. Sept. 27, 1990.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective: September 17, 2002

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 30. Waste Management (Refs & Annos)
Part 2. Integrated Waste Management Plans (Refs & Annos)
Chapter 6. Planning Requirements (Refs & Annos)
Article 1. Waste Diversion (Refs & Annos)
→ **§ 41780. Implementation schedule**

(a) Each city or county source reduction and recycling element shall include an implementation schedule that shows both of the following:

(1) For the initial element, the city or county shall divert 25 percent of all solid waste from landfill disposal or transformation by January 1, 1995, through source reduction, recycling, and composting activities.

(2) Except as provided in Sections 41783, 41784, and 41785, for the first and each subsequent revision of the element, the city or county shall divert 50 percent of all solid waste on and after January 1, 2000, through source reduction, recycling, and composting activities.

(b) Nothing in this part prohibits a city or county from implementing source reduction, recycling, and composting activities designed to exceed these requirements.

CREDIT(S)

(Added by Stats.1989, c. 1095, § 22. Amended by Stats.1990, c. 145 (A.B.1820), § 43, eff. June 19, 1990; Stats.1996, c. 978 (A.B.1647), § 3; Stats.2000, c. 740 (S.B.2202), § 5; Stats.2002, c. 625 (S.B.649), § 5, eff. Sept. 17, 2002.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 30. Waste Management (Refs & Annos)
Part 2. Integrated Waste Management Plans (Refs & Annos)
Chapter 6. Planning Requirements (Refs & Annos)
Article 1. Waste Diversion (Refs & Annos)
§ 41781.1. Sludge diversion; finding; monitoring requirements

(a) Prior to determining that the diversion of sludge may be counted toward the diversion requirements established under Section 41780, but within 180 days of receiving such a request, the board shall do both of the following:

(1) Make a finding at a public hearing, based upon substantial evidence, that the sludge has been adequately analyzed and will not pose a threat to public health or the environment for the reuse which is proposed.

(A) Except as provided in subparagraph (B), prior to making the finding required to be made pursuant to this paragraph, the board shall consult with each of the following agencies, and obtain their concurrence in the finding, to the extent of each agency's jurisdiction over the sludge or its intended reuse:

(i) The state water board and the regional water boards.

(ii) The State Department of Health Services.

(iii) The State Air Resources Board and air pollution control districts and air quality management districts.

(iv) The Department of Toxic Substances Control.

(B) If, prior to the board making the finding required to be made pursuant to this paragraph, an agency specified in subparagraph (A) issues a permit, waste discharge requirements, or imposes other conditions for the reuse of sludge, the agency shall have been deemed to have concurred in that finding.

(2) Establish, or ensure that one or more of the agencies specified in subparagraph (A) of paragraph (1) establishes, ongoing monitoring requirements which ensure that the proposed sludge reuse does not pose a threat to health and safety or the environment.

(b) It is not the intent of this section to require the board, or the agencies listed in subparagraph (A) of paragraph (1) of subdivision (a), to impose additional requirements or approval procedures for sludge or sludge reuse applications, apart from the requirements and approval procedures already imposed by state and federal law. It is the intent of this section to require that the board determine that each sludge diversion, for which diversion credit is sought, meets all applicable requirements of state and federal law, and thereby provides for maximum protection of the public health and safety and the environment.

CREDIT(S)

(Added by Stats.1991, c. 718 (A.B.1520), § 3, eff. Oct. 9, 1991. Amended by Stats.1992, c. 1292 (A.B.2494), § 34; Stats.1992, c. 1293 (A.B.3322), § 1.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective: January 1, 2005

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 31. Waste Management Facilities (Refs & Annos)

→§ 50000. Establishment of new sites; certification by enforcement agency; city or county approval of site identification and description; judicial or task force review; resolutions

(a) Until an integrated waste management plan has been approved by the California Integrated Waste Management Board pursuant to Division 30 (commencing with Section 40000), no person shall establish a new solid waste facility or transformation facility or expand an existing solid waste facility or transformation facility that will result in a significant increase in the amount of solid waste handled at the facility without a certification by the enforcement agency that one of the following has occurred:

(1) The facility is identified and described in, or found to conform with, a county solid waste management plan that was in compliance with statutes and regulations in existence on December 31, 1989, adopted pursuant to former Title 7.3 (commencing with Section 66700) of the Government Code as that former statute read on December 31, 1989. The conformance finding with that plan shall be in accordance with the procedure for a finding of conformance that was set forth in the plan prior to January 1, 1990.

(2) The facility is identified and described in the most recent county solid waste management plan that has been approved by the county and by a majority of the cities within the county that contain a majority of the population of the incorporated area of the county, except in those counties that have only two cities, in which case, the plan has been approved by the county and by the city that contains a majority of the population of the incorporated area of the county.

(3) Pursuant to the procedures in subdivision (b), the facility has been approved by the county and by a majority of the cities within the county that contain a majority of the population of the incorporated area of the county, except in those counties that have only two cities, in which case, the facility has been approved by the county and by the city that contains a majority of the population of the incorporated area of the county.

(4) The facility is a material recovery facility and the site identification and description of the facility have been submitted to the task force created pursuant to Section 40950 for review and comment, pursuant to the procedures set forth in subdivision (c). For purposes of this paragraph, "material recovery facility" means a transfer station that is designed to, and, as a condition of its permit, shall, recover for reuse or recycling at least 15 percent of the total volume of material received by the facility.

(5) The facility is identified and described in the countywide siting element that has been approved pursuant to Section 41721.

(b)(1) The review and approval of a solid waste facility or transformation facility that has not been identified or described in a county solid waste management plan shall be initiated by submittal by the person or agency proposing the facility of a site identification and description to the county board of supervisors.

(2) The county shall submit the site identification and description to each city within the county within 20 days from

the date that the site identification and description is submitted to the county board of supervisors. The county and each city shall approve or disapprove by resolution the site identification and description within 90 days from the date that the site identification and description are initially submitted to the county or city. Each city shall notify the county board of supervisors of its decision within that 90-day period. If the county or a city fails to approve or disapprove the site identification and description within 90 days, the city or county shall be deemed to have approved the site identification and description as submitted.

(3) If a city or county disapproves the site identification and description, the city or county shall mail notice of its decision by first-class mail to the person or agency requesting the approval within 10 days of the disapproval by the city or county, stating its reasons for the disapproval.

(4) No county or city shall disapprove a proposed site identification and description for a new solid waste facility or transformation facility or an expanded solid waste facility or transformation facility that will result in a significant increase in the amount of solid waste handled at the facility unless it determines, based upon substantial evidence in the record, that there will be one or more significant adverse impacts within its boundaries from the proposed project.

(5) Within 45 days from the date of a decision by a city or county to disapprove a site identification and description, or a decision by the board not to concur in the issuance of a permit pursuant to Section 44009, any person may file with the superior court a writ of mandate for review of the decision. The evidence before the court shall consist of the record before the city or county that disapproved the site identification and description or the record before the board in its determination not to concur in issuance of the permit. Section 1094.5 of the Code of Civil Procedure shall govern the proceedings conducted pursuant to this subdivision.

(c) To initiate the review and comment by the task force required by paragraph (4) of subdivision (a) and subdivision (d), the person or agency proposing the facility shall submit the site identification and description of the facility to the task force. Within 90 days after the site identification and description are submitted to the task force, the task force shall meet and comment on the facility in writing. Those comments shall include, but are not limited to, the relationship between the proposed new or expanded material recovery facility and the requirements of Section 41780. The task force shall transmit those comments to the applicant, to the county, and to all of the cities in the county.

(d) On or before February 1, 1991, each county, by vote of the board of supervisors and the majority of the cities in the county containing a majority of the population of the incorporated area of the county, except in those counties that have only two cities, in which case the vote is subject to approval of the city that contains a majority of the population of the incorporated area of the county, shall adopt two resolutions after holding a public hearing. One resolution shall address solid waste transfer facilities that are designed to, and, as a condition of their permits, shall, recover for reuse or recycling less than 15 percent of the total volume of material received by the facility and that serve more than one jurisdiction. The second resolution shall address solid waste transfer facilities that are designed to, and, as a condition of their permits, shall, recover for reuse or recycling less than 15 percent of the total volume of material received by the facility and that serve only one jurisdiction. These resolutions shall specify whether the facilities shall be subject to the review and approval process described in subdivision (b) or the review and comment process described in subdivision (c). If the resolutions required by this subdivision are not adopted on or before February 1, 1991, those facilities shall be subject to the review process described in subdivision (c).

For purposes of this subdivision, a facility serves only one jurisdiction if it serves only one city, only the unincorporated area of one county, or only one city and county.

CREDIT(S)

(Added by Stats.1990, c. 1617 (A.B.2296), § 4, eff. Sept. 30, 1990. Amended by Stats.1996, c. 1038 (A.B.626), § 40, eff. Sept. 29, 1996; Stats.2004, c. 183 (A.B.3082), § 307.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 31. Waste Management Facilities (Refs & Annos)
➡ § 50000.5. Establishment or expansion of facility; finding of consistency with general plan

(a) Until a countywide integrated waste management plan has been approved by the California Integrated Waste Management Board pursuant to Division 30 (commencing with Section 40000), no person shall establish or expand a solid waste facility or transformation facility unless the city or county in which the site is located makes a finding that the establishment or expansion of the facility is consistent with the applicable general plan of the city or county. This finding shall not be made unless the city or county has adopted a general plan which complies with the provisions of Article 5 (commencing with Section 65300) of Chapter 3 of Division 1 of Title 7 of the Government Code.

(b) In addition to the requirements in subdivision (a), any new or expanded solid waste disposal facility or transformation facility shall be deemed to be consistent with the general plan only if both of the following requirements are met:

(1) The facility is located in a land use area designated or authorized for solid waste facilities in the applicable city or county general plan.

(2) The land uses which are authorized adjacent to, or near, the facility are compatible with the establishment, or expansion of, the solid waste disposal facility or transformation facility.

CREDIT(S)

(Added by Stats.1990, c. 1617 (A.B.2296), § 5, eff. Sept. 30, 1990.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

Effective:[See Text Amendments]

West's Annotated California Codes Currentness
Public Resources Code (Refs & Annos)
Division 31. Waste Management Facilities (Refs & Annos)

→§ 50002. Exemptions; solid waste facilities; application of municipal sewage sludge derived fertilizer

(a) The California Integrated Waste Management Board may, by regulation, specify classifications of solid waste facilities that are exempt from the requirements of Sections 50000, 50000.5, and 50001. The regulation may be adopted only if the board makes all of the following findings:

(1) The exemption is not contrary to the public interest.

(2) The quantity of solid wastes to be disposed of at each site is insignificant.

(3) The nature of the solid wastes poses no significant threat to the public health, the public safety, or the environment.

(b) The application to land of agricultural products derived from municipal sewage sludge for use as a fertilizer material, based on a finding by the board that the nature of the solid waste poses no significant threat to the public health, the public safety, or the environment, is exempt from the requirements of Sections 50000 and 50000.5.

CREDIT(S)

(Added by Stats.1989, c. 1247, § 3. Amended by Stats.1990, c. 1617 (A.B.2296), § 6, eff. Sept. 30, 1990.)

Current through Ch. 1 of 2008 Reg.Sess. and Ch. 6 of 2007-2008 Third Ex.Sess. urgency legislation.

END OF DOCUMENT

PROOF OF SERVICE BY MAIL

I am employed in the City and County of San Francisco, State of California. I am over the age of eighteen (18) years and not a party to the within action; my business address is Three Embarcadero Center, Seventh Floor, San Francisco, California 94111-4024.

I am readily familiar with the practice for collection and processing of documents for mailing with the United States Postal Service of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, and that practice is that the documents are deposited with the United States Postal Service with postage fully prepaid the same day as the day of collection in the ordinary course of business.

On March 17, 2008, I served the following document(s) described as:

APPELLANTS' OPENING BRIEF;

APPELLANTS' EXCERPTS OF RECORD (Vols. 1 through 4)

on the persons listed below by placing the document(s) for deposit in the United States Postal Service through the regular mail collection process at the law offices of Howard Rice Nemerovski Canady Falk & Rabkin, A Professional Corporation, located at Three Embarcadero Center, Seventh Floor, San Francisco, California, to be served by mail addressed as follows:

SEE ATTACHED LIST

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed at San Francisco, California on March 17, 2008.

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(Brief Only)