Case No. F063381
(Tulare County Superior Ct. No. VCU242057)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

City of Los Angeles, *et al.*,
Plaintiffs and Respondents
v.
County of Kern and Kern County Board of Supervisors
Defendants and Appellants

On Appeal from an Order Granting a Preliminary Injunction
Tulare County Superior Court
(Hon. Lloyd Hicks, Presiding)

APPLICATION TO FILE AND *AMICUS CURIAE* BRIEF OF NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES ON BEHALF OF RESPONDENTS

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

Pursuant to California Rule of Court 8.208, the undersigned certifies that no person or entity has an ownership interest in the National Association of Clean Water Agencies, which is an unincorporated association.

Dated: August 9, 2012

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APPLICATION FOR PERMISSION TO FILE AN *AMICUS CURIAE* BRIEF

TO THE HONORABLE PRESIDING JUSTICE:

Pursuant to California Rule of Court 8.200(c) the National Association of Clean Water Agencies ("NACWA") respectfully submits this *amicus curiae* brief in support of Plaintiffs/Respondents City of Los Angeles, County Sanitation District No. 2 of Los Angeles County, Orange County Sanitation District, Responsible Biosolids Management, Inc., R & G Fanucchi Farms, Inc., Sierra Transport, Inc., and California Association of Sanitation Agencies (collectively, "Plaintiffs").

NACWA is a trade association representing the interests of nearly 300 of the nation's publicly owned treatment works ("POTWs"). NACWA membership includes almost 30 California public wastewater utilities including Plaintiffs City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County. Collectively, NACWA member agencies serve the majority of the sewered population in the United States and treat and reclaim more than 18 billion gallons of wastewater each day. Managing biosolids that result from the treatment process, the majority of which are recycled to farmland as fertilizer and a soil conditioner, is an essential function of many NACWA members. If the preliminary injunction against Appellant Kern County's biosolids ban is reversed, land application of biosolids by wastewater agencies in California and across the country will likely face additional local bans and restrictions that are not based on sound science, conflict with

federal and state law and policy, and dramatically increase costs for NACWA's member utilities and their ratepayers.

Ensuring safe and beneficial management of biosolids is a key component of the environmental mandate of NACWA and its members. NACWA is also committed to preserving the ability of municipalities to select biosolids management options that are both environmentally and financially optimal, including recycling of this inevitable product of wastewater treatment via land application. A ruling dissolving the preliminary injunction and reinstating Measure E would encourage local interest groups opposed to biosolids recycling throughout California and beyond to pursue similar efforts that discriminate against urban wastewater treatment plants and thwart federal and state laws which encourage biosolids recycling. These repercussions, both within California and nationwide, could severely limit biosolids management options and substantially harm the public clean water agencies and wastewater professionals that constitute NACWA's membership.

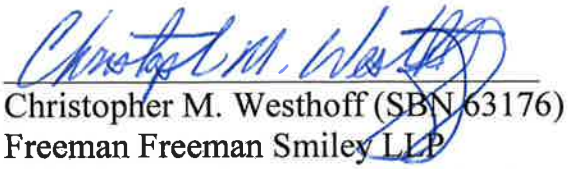
The existing federal and state regulatory framework, which both permits and encourages the beneficial reuse of biosolids through appropriate land application practices, recognizes the inevitable production of the material by every wastewater treatment plant in America and the world. Once produced, there is a concomitant need to efficiently and effectively manage this product and the valuable nutrients it contains in an environmentally and financially responsible manner. NACWA has an interest in this case to provide the Court with a national perspective on the importance of biosolids land application for America's wastewater infrastructure, and to correct

certain statements in Kern County's appeal of the preliminary injunction. NACWA is also interested in emphasizing the primacy of science-based federal and state regulation of biosolids, as opposed to misguided local efforts to ban the recycling of biosolids based on unfounded fear and prejudice, as occurred in this case via an initiative enacted by Defendant Kern County's voters that targeted the out-of-county Plaintiffs.

NACWA participated in this litigation as *amicus curiae* throughout the federal court proceedings, and brings a unique and important national perspective and expertise to this case. Counsel for NACWA have examined the briefs on file in this case and are familiar with the issues involved. NACWA's counsel authored its brief, and no party or counsel for any party has authored NACWA's proposed *amicus curiae* brief in whole or in part. No person or entity besides *amicus curiae* has made a monetary contribution intended to fund the preparation or submission of its proposed *amicus curiae* brief. For the reasons stated in this application, NACWA respectfully requests permission to file the *amicus curiae* brief that accompanies this application.

Dated: August 9, 2012

Respectfully Submitted:



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AMICUS CURIAE BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES

SUMMARY OF ARGUMENT

The trial court correctly entered a preliminary injunction to allow the continued recycling of Class A-Exceptional Quality ("Class A EQ") biosolids generated by millions of Southern California residents to farmland in the Central Valley. For nearly two decades, the City of Los Angeles has safely recycled the biosolids generated by its residents on land it actually owns and operates as a working farm to grow animal feed. The City further supports its sound environmental farming practices by watering its crops with recycled water from the City of Bakersfield within Kern County. The longtime, established operations of all the Plaintiffs in this case have fed countless dairy cows in the Central Valley and improved the soil in Kern County while causing no environmental harm, a fact confirmed in the trial court's uncontested findings here.

The trial court, consistent with earlier opinions issued by a federal district court in this matter, appropriately found that a Kern County voter initiative rooted in unfounded fears of biosolids and explicit anti-Southland bias likely violated California law on at least two grounds, and reserved judgment on potential violations of federal law. The court also found – on an extensive record including seven expert declarations – that biosolids benefit the farms where they are applied and pose minimal, if any, risks to human health and the environment. Kern County's appeal of the preliminary injunction does not challenge the trial court's factual findings, but to color its appeal Kern nevertheless suggests that land application of biosolids

poses significant risks. Kern's argument is at odds not only with the empirical evidence at Plaintiffs' farms, but also with a vast, decades-long record of science and regulatory experience across the United States that demonstrates the safety and value of recycling biosolids to farmland.

The trial court also correctly found that forcing the Plaintiffs to cease land application now would impose significant and unnecessary additional costs on public agencies to divert biosolids to less economic and environmentally responsible management options. Biosolids land application is crucial to many publicly owned clean water agencies, with the majority of biosolids produced in the United States being managed through land application. Eliminating this management method through bans such as Kern County's Measure E would have significant environmental, economic, and public health impacts on communities and wastewater utilities within California and nationwide. Existing federal and state regulations and local testing and oversight ensure that land application is performed in a manner that is protective of the environment and of human health.

To allow individual communities such as Kern County to countermand federal and state biosolids programs through local land application bans would cause significant problems in biosolids management at both the state and national level. This is particularly true in California, where the California Integrated Waste Management Act ("CIWMA"), Public Resources Code §40000 *et seq*., requires municipalities to divert solid waste away from landfills through recycling such as land application, and preempts local measures like Measure E which conflict with that core recycling mandate.

Moreover, as in this case, such parochial efforts typically target and discriminate against out-of-county or out-of-state biosolids, disrupting long-term planning for utilities and farmers, endangering capital investments, and imposing great expense to find alternative ways to manage biosolids consistent with environmental mandates and economic constraints. Local biosolids bans like Kern's ignore the severe out-of-jurisdiction impacts of stopping commerce in and recycling of biosolids, and the trial court correctly found as a factual matter that the Kern ban likely exceeded the county's police powers because of the failure to even consider the impacts on the biosolids generators and their contractors.

ARGUMENT

I. Biosolids Land Application Is Critical for Many Clean Water Utilities to Meet Environmental and Recycling Mandates.

Biosolids are a natural by-product of the wastewater treatment process undertaken in over 16,000 POTWs across the United States. As the federal district court that reviewed this case observed, the "collection and treatment of wastewater, and the resulting generation of biosolids that must be recycled or disposed of, is a 'constant, non-discretionary governmental function' . . . . In other words, government agencies cannot decide to stop producing biosolids and instead must find ways to manage those that are produced." *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865, 871 (C.D. Cal. 2007) (citation omitted). Although municipalities utilize a variety of different biosolids management methods, recycling through land application is the most widely used alternative nationally. Land application recycles the nitrogen, phosphorous, trace nutrients, and organic soil-building

value of biosolids to provide an agricultural benefit to thousands of farmers.

Approximately 7,000,000 dry tons of biosolids are produced in the United States during a typical year. *See* North East Biosolids and Residuals Association, *A National Biosolids Regulation, Quality, End Use & Disposal Survey Final Report* (2007) ("NEBRA Report"). Based on an estimated current national population of 313 million,[1] each person in the United States produced an average of over 40 pounds of biosolids per year. Simply put, there is a great deal of human organic waste produced on a daily basis that must be managed safely and effectively.

There are three primary methods of biosolids management in the United States: land application, landfilling, and incineration.[2] A 2007 national survey of biosolids use indicated that approximately 55% of all biosolids in the United States are recycled to the soil through land application to grow crops, timber, and restore disturbed soils such as those found at mine sites, while 45% are managed primarily through landfills or incineration. *See* NEBRA Report at 1. Many major American cities use land application as a significant component of their biosolids management programs, including San Francisco, Sacramento, Fresno, Bakersfield, Merced, Modesto, Phoenix, Portland, Seattle, Denver, Milwaukee, Chicago,

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[1] Census figures from U.S. Census Bureau website, http://www.census.gov (last visited Aug. 8, 2012).

[2] Prior to 1990, significant amounts of biosolids were disposed of in the ocean. However, this practice was outlawed by Congress in 1988 with the passage of the Ocean Disposal Ban Act. *See* 33 U.S.C. §§ 1401-1445.

Philadelphia, Washington, Charlotte, New York City, and of course the City of Los Angeles, Los Angeles County, and Orange County. Many of these jurisdictions send their biosolids across county and state lines to appropriate agricultural and forestry land application sites. Ironically, the voters of Bakersfield, California, approved Measure E while allowing their own land application activity to continue.

The vast majority of biosolids that are land applied are used for agricultural purposes, as in Kern County where the Plaintiffs' farms grow feed crops for nearby dairies. *See* Respondents' Appendix ("RA") 058 (¶9); RA 074 (¶7); RA 090 (¶5). Approximately 74% (2,907,460 tons) of the land applied biosolids are used in bulk for agriculture, while a small percentage 4% (157,160 tons) of land applied biosolids are used for land restoration/reclamation and in silviculture. *See* NEBRA Report at 14. The remaining 22% (864,380 tons) are treated to meet EPA's highest quality biosolids standards, Class A EQ, and are publicly distributed for a variety of uses including landscaping, horticulture and agriculture.[3] *See id.* at 1.

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[3] EPA has established a two-tiered system to evaluate the quality of biosolids produced in the United States based on the amount of potential pathogen content, Class B and Class A. 40 C.F.R. §§ 503.30, 503.32. Class B biosolids have been treated to substantially reduce the levels of indicator organisms that are surrogates for potential pathogens, but can still contain detectable levels prior to being subject to environmental conditions in the field that further reduce pathogens. Accordingly, Class B biosolids have site access restrictions on land application to allow further pathogen reduction and reduce the low potential for animal and human exposure. Class A biosolids are subject to an even higher level of treatment which destroys pathogens below detectable levels and can be land applied

The biosolids land applied by Plaintiffs in Kern County are all Class A EQ biosolids, in compliance with Ordinance G-6638 passed by the Kern County Board of Supervisors in 1999 prior to the passage in 2006 of the Measure E voter initiative that banned land application.[4] In fact, in response to the 1999 ordinance, Plaintiff City of Los Angeles invested nearly $25 million at its Hyperion and Terminal Island Wastewater Treatment Plants to meet Kern's Class A EQ mandate and to purchase its Green Acres Farm in Kern County only then to be confronted with Kern's Measure E ban. *See* RA 062 (¶¶22, 24). Kern's cities, whose residents voted in favor of the ban on Plaintiffs' Class A EQ land application, continue to land apply Class B biosolids within their city limits and in closer proximity to population centers and natural resources.

Proper, safe, and effective management of biosolids is a key part of clean water agencies' environmental mandate, and land application provides an important and proven option for recycling a product with beneficial properties that might otherwise end up in decreasing and increasingly expensive landfill space in California. The enormous scale of biosolids management illustrates the

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without any pathogen-related restrictions. National Research Council, *Biosolids Applied to Land: Advancing Standards and Practices* (2002) at 14.

In addition, Class A biosolids that have low levels of trace metals are called "Class A Exceptional Quality" and under federal law are sold or distributed as commercial fertilizer no more restricted than other fertilizers on the market. *See City of Los Angeles,* 509 F. Supp. 2d at 870-71.

[4] This Court upheld Kern's Class A EQ requirements in *Cnty. Sanitation Dist. No. 2 of Los Angeles v. Cnty. of Kern*. 127 Cal. App. 4th 1544, 1567 (Cal. Ct. App. 2005) ("*CSD2*").

magnitude of the problem utilities would face if land application of biosolids was no longer an option due to bans such as Measure E. This in part led the trial court in this case to find that the balance of the equities weighed against Kern, based on the clear costs to the Southland wastewater agencies of foregoing land application and the lack of any harm to Kern from the continued practice. *See* 3 Appellants' Appendix ("AA") 665-66. If Kern's ban is allowed to stand, it is likely that other communities across California, and other parts of the nation, will enact land application bans. This would create substantial environmental and financial challenges for municipal wastewater treatment agencies and the communities they serve, many of which rely on land application.

Kern discounts the proliferation of local biosolids bans as a "speculative possibility," but this threat is very real.[5] Appellants' Reply Brief ("ARB") at 34. Besides NACWA's members that depend on land application to fulfill their biosolids management

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[5] Typically, threats by localities to ban land application lead to negotiated resolutions that allow land application to continue, or land appliers are forced to seek other jurisdictions. Nevertheless, numerous federal and state courts have struck down land application restrictions in whole or in part. *See, e.g.*, *Liverpool Twp. v. Stephens*, 900 A.2d 1030 (Pa. Commw. Ct. 2006); *Granville Farms, Inc. v. Cnty. of Granville*, 612 S.E.2d 156 (N.C. Ct. App. 2005); *Synagro-WWT, Inc. v. Rush Twp.*, 299 F. Supp. 2d 410 (M.D. Pa. 2003); *O'Brien v. Appomattox Cnty.*, 293 F. Supp. 2d 660 (W.D. Va. 2003); *Blanton v. Amelia Cnty.*, 540 S.E.2d 869 (Va. 2001); *Azurix N. Am. Residuals Mgmt., Inc. v. Desoto Cnty.*, No. 2-01-CV-428-FTM-29DNB (M.D. Fla. Sept. 7, 2001) (attached at Exhibit A); *Soaring Vista Props., Inc. v. Bd. of Cnty. Comm'rs*, 741 A.2d 1110 (Md. 1999); *Franklin Cnty. v. Fieldale Farms, Corp.* 507 S.E.2d 460 (Ga. 1998).

responsibilities, anti-biosolids special interests in California and other states are also closely following this case. If one of the nation's largest agricultural counties can outlaw land application of outside-generated biosolids, then others may follow suit. Courts have found relevant these aggregate impacts of similar measures elsewhere. *Healy v. Beer Inst.,* 491 U.S. 324, 336 (1989) (Commerce Clause analysis); *U & I Sanitation v. City of Columbus,* 205 F.3d 1063, 1072 (8th Cir. 2000) (burdens on commerce "far from trivial" when ordinance is aggregated with similar actions elsewhere).

Banning land application of biosolids would force municipalities that rely on it to manage biosolids in other ways, most likely through incineration or placement in municipal solid waste ("MSW") landfills.[6] Both incineration and landfilling, however, present complicated problems for communities which have relied on land application. Incineration, for example, can have a high start-up cost in order to install the necessary equipment and incinerators, if a permit can even be secured.[7] Additionally, the incineration process produces a residual ash which also requires disposal. Furthermore, in some urban areas of the nation such as Southern California,

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[6] Currently, incineration and disposal in landfills are the only other viable alternatives that could handle biosolids in the large amounts required if land application was unavailable. However, controversial new federal air emission standards for incineration could also limit its potential as an alternative management option.

[7] There are a number of wastewater utilities across the nation that effectively use incineration as the primary method of biosolids management because it is the most appropriate option based on the needs of their local communities. Many of these utilities have been incinerating for some time and have thus been able to absorb the capital costs of building and operating the incinerators.

management of biosolids through incineration would present regulatory and political challenges due to strict local air quality restrictions, the difficulty of even finding a site for such a facility in an urban area, and likely political opposition from clean air advocates. For these reasons it is unlikely that all wastewater utilities which have relied on land application would be able to switch to incineration in the event of a large-scale ban on land application. Imposing such burdens would be particularly inappropriate on an interim basis; even if Measure E is ultimately struck down at final judgment, damage to biosolids management programs would already have occurred.

The other available option for clean water utilities in response to land application bans is landfilling. While about a quarter of biosolids produced in the United States are currently managed in this manner, drastically increasing that amount to make up for the lack of land application would create significant environmental and financial problems for many communities around the nation. Based on the most recent numbers available from EPA, in 2010 approximately 135.5 million tons of municipal solid waste were sent to landfills around the United States. *See* EPA, *Municipal Solid Waste Generation, Recycling, and Disposal in the United States: Facts and Figures for 2010* (Dec. 2011).[8] Widespread transition by municipal wastewater utilities from land application to landfilling of biosolids could result in an increase of an additional three to four million tons per year being sent to landfills.

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[8] Available at http://www.epa.gov/epawaste/nonhaz/municipal/pubs/msw_2010_rev_factsheet.pdf.

This would present management challenges for the many communities already facing a shortage of landfill capacity, including those that have no landfills at all. Additionally, utilities will have to pay tipping fees to dispose of biosolids at landfills, causing a significant increase in the cost of managing biosolids which must ultimately be passed on to ratepayers. Many communities may also have to transport the biosolids increased distances to reach landfills with sufficient capacity to accept the biosolids, resulting in more transportation costs and environmental harm through increased truck emissions. Local bans like Kern's Measure E simply externalize these costs with no concern for the regional welfare.

II. The California Integrated Waste Management Act Mandates Biosolids Recycling and Protects This Critical Infrastructure Activity from Conflicting Local Bans.

State law often protects fertilizing farmland with biosolids, and California is no exception.[9] The CIWMA, Cal. Pub. Res. Code §§ 40000 *et seq.*, directs municipalities and counties to reduce, recycle, or reuse solid waste. The CIWMA requires local governments (including both Defendants and the government Plaintiffs) to engage in and promote the recycling of all solid wastes. *See id.* §§ 40000(e), 40051(a). Nowhere does the CIWMA permit localities to ignore this mandate and ban such recycling. As the federal district court and now the trial court have found, Measure E's land application ban runs afoul of the CIWMA. *See* 3 AA 662-67 (trial court preliminary injunction ruling); *City of Los Angeles v. Cnty. of Kern*, 509 F. Supp. 2d 865

[9] *See supra* note 4 (listing cases striking down biosolids bans under state and federal law).

(C.D. Cal. 2007) (summary judgment, vacated on other grounds); *City of Los Angeles v. Cnty. of Kern*, 462 F. Supp. 2d 1105 (C.D. Cal. 2006) (preliminary injunction).

NACWA strongly agrees with the state and federal court decisions that recycling biosolids through land application is a major part of fulfilling a California locality's recycling obligations under the CIWMA. Land application bans such as Measure E directly conflict with local and state efforts (and requirements) to reduce disposal of municipal solid waste. Try as it may, Kern cannot brush aside this state law recycling mandate under the CIWMA or its stark conflict with Measure E.

NACWA's California members have been operating under the CIWMA since its enactment in 1989 and understand that its overarching recycling mandate informs and controls the subsidiary provisions that Kern focuses on in an attempt to undercut the statute and excuse its recycling ban. As the Court explained in 2005, the CIWMA was the driving force in promoting land application of biosolids in California: "This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land." *CSD2*, 127 Cal. App. 4th at 1567. For example, in 1989, Plaintiff City of Los Angeles stopped landfilling biosolids, and began a program, still in effect, of recycling 100% of its biosolids through land application and some composting. *See* RA 061 (¶21). If Kern is correct that the CIWMA does not preempt an outright ban on the primary method of biosolids recycling in California, then the purposes and policies of the CIWMA to promote statewide solid waste management and recycling would be a nullity.

Kern incorrectly argues that the Court's 2005 decision in *CSD2* somehow defined and limited the reach of the CIWMA, relying on the decision's two sentence discussion of the CIWMA in a background section regarding the statutes that regulate biosolids. *See* ARB at 16 (quoting *CSD2,* 127 Cal. App. 4th at 1566-67). The Court in no way interprets the reach of the CIWMA's recycling mandate, much less narrows it, and as the passage from *CSD2* quoted above suggests, the Court recognized the broad goals of the CIWMA to promote land application of biosolids.[10] Moreover, Kern overlooks the fact that the CIWMA's recycling mandate is expressed twice in the statute itself and governs all solid waste activates in the state. *See* Cal. Pub. Res. Code §§ 40051 (localities "shall . . . [p]romote" recycling and shall "[m]aximize the use of all feasible" recycling options), 40052 (purpose of statute is "to reduce, recycle, and reuse solid waste

[10] *CSD2* upheld Kern's earlier biosolids ordinance, passed by the Board of Supervisors, that mandated that only Class A EQ biosolids could be land applied in Kern County. *See CSD2*, 127 Cal. App. 4th at 1568. By contrast, this case involves a total ban and presents the issue of whether the CIWMA preempts such a ban. As explained by the federal district court, *CSD2* did not address Measure E at all, but instead the significantly different 1999 Kern biosolids ordinance. *City of Los Angeles v. Cnty. of Kern*, 2006 U.S. Dist. LEXIS 81417, at *12 (C.D. Cal. Oct. 24, 2006) (denying Kern motion to dismiss) ("County Sanitation did not uphold Measure E, *but rather the less stringent requirements of Kern's 1999 ordinance*. Since the 1999 ordinance did not ban the land application of all biosolids, but merely phased out the use of Class B biosolids and eventually banned all biosolids except those of "exceptional quality," the Court of Appeal had no occasion to consider the validity of a complete ban.") (Emphasis in original.) (Attached at Exhibit A.)

generated in the state to the maximum extent feasible").[11] Kern's effort to read regional cooperation out of the CIWMA is also unavailing, *see* ARB at 23-24; it misreads the statute when it deems such regional cooperation to be "voluntary," particularly when, for instance, CIWMA Section 40002 specifically uses the term "require" and not "voluntary" or "encourage" as Kern incorrectly suggests.

Similarly, Kern ignores the central role of the CIWMA's preemption provision, Section 40053, which expressly uses the term "conflict," to protect against local efforts like Measure E that undercut the CIWMA. Even under Kern's invented and erroneous rule that preemption only protects "affirmative privileges or rights granted by state law," ARB at 25, Plaintiffs and NACWA's members have rights, conferred by the California Constitution, the CIWMA, and state and regional water board permits allowing land application, to recycle biosolids free of conflicting, arbitrary and discriminatory barriers like Kern's Measure E.

III. Wastewater Infrastructure Crosses County Lines and Needs the Protection of the Regional Welfare Doctrine from Extraterritorial Application of the Police Power.

The trial court's ruling that Measure E likely violates the regional welfare doctrine reflects that biosolids recycling is a national practice that ties together far-flung urban and rural communities as part of a unitary wastewater and agricultural infrastructure. Measure

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[11] Kern elsewhere attaches importance to "statutory neighbors," ARB at 22 n.13, but not to the consecutive provisions in Pub. Res. Code §§ 40051, 40052, and 40053, which in turn establish the hierarchy of recycling over disposal, explain that hierarchy's application statewide, and preempt conflicting local laws.

E threatens this infrastructure for one of America's most populous regions. The record is overwhelming that the burdens of Measure E fall on millions of Californians and others who had no voice in Kern's voter initiative. *See* 3 AA 665-66. The fact that Measure E's campaign specifically targeted Los Angeles cements the conclusion that it was passed not just in disregard of the regional welfare, but to harm outsiders to the perceived advantage of Kern County inhabitants. *See generally* RA 081 (¶¶24-26) (addressing Measure E campaign).

Kern repeatedly frames the trial court's preliminary injunction as somehow coercing Kern to accept Plaintiffs' biosolids in contravention of Kern's local authority over solid waste, when that was neither the issue before nor the holding of the trial court. The City of Los Angeles has land applied biosolids successfully in Kern County since 1994, obeying all local ordinances and state and federal regulations and permits. *See* RA 062-64 (¶¶23, 27-29); RA 075-79 (¶¶10-12, 18-19, 21). Kern's voters chose to enact a comprehensive ban targeting the Southland generators. In exercising its police power, particularly over an existing activity, Kern was constitutionally required to assess the impacts in the region. The trial court ruled that did not happen, and Kern does not contest that ruling.

The Court in *CSD2* recognized the authority of California counties to regulate land application of biosolids, but even in the regulatory context the Court acknowledged that the regional welfare doctrine (which the Court also recognized as a constitutionally-derived limitation) could come into play. *See CSD2*, 127 Cal. App. 4th at 1614-15 (declining to address regional welfare doctrine pending California Environmental Quality Act review of biosolids ordinance).

This same principle applies with even greater force for a total exclusionary ban like Measure E. Application of the constitutional regional welfare doctrine to examine insular voter initiatives – even if they at first blush seem to be a valid police power measure – is the correct function of courts, and is not, as Kern claims, "judicial activism." ARB at 32.

IV. A Science-Driven Regulatory Process Ensures that Biosolids Land Application Provides Agricultural and Environmental Benefits.

Kern County's opening brief in this appeal grossly mischaracterizes the state of the science regarding biosolids. Contrary to the few out-of-context quotes from the literature relied on by Kern, the scientific and regulatory consensus has long been that land application of biosolids is beneficial and, as found by the National Academy of Sciences in 1996, poses "negligible risk." Biosolids have a long and successful history of being applied to agricultural lands in order to help increase crop yields, improve soil quality, and recycle the many nutrients in human waste in a safe and cost-effective manner. The trial court's finding of a lack of any environmental risk from land application of biosolids in Kern County was based on a large factual and expert record, and is now the second independent court ruling to so find in five years in preliminarily enjoining Measure E.[12] Kern did not challenge that ruling and cannot be heard now to

[12] The trial court's findings could not have been clearer: "Kern presents no evidence of any actual harm to the environment: to the air, water, or soil, as a result of LA's continued application of biosolids,"; "Kern presents no evidence whatsoever of any health and safety or environmental actual harm,"; and "there is no evidence at all

suggest that the preliminary injunction should be reversed because of purported risks from land application.

Modern wastewater treatment has made biosolids generation and recycling a routine and scientific endeavor. Since that time, EPA and the states have developed comprehensive rules and permitting processes governing land application and other uses of biosolids, allowing recycling to occur on a very large scale with minimal public health and environmental risks, and significant benefits for wastewater agencies and farmers.

The origins of the current federal regulations governing the land application of biosolids date back to the 1972 enactment of the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.* The first federal regulations covering biosolids came in 1979, when EPA published regulations in the Code of Federal Regulations, Chapter 40, Part 257 (40 C.F.R. Part 257) to establish standards for the land application of biosolids, including acceptable pollutant levels. *See* National Research Council, *Biosolids Applied to Land: Advancing Standards and Practices* (2002), at 27 ("NRC Report"). These regulations protected the environment and human health by determining the acceptable level of pollutants in land applied biosolids. A number of states also began issuing biosolids regulations in the 1970s; as an example, Wisconsin

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that Kern will suffer any harm or injury by the grant of the injunction, and [] there is a substantial likelihood of significant, and some irreparable, harm to Plaintiffs if the injunction is denied." 3 AA 666-67. In likewise granting a preliminary injunction, the federal district court held that "the only evidence of environmental harm at Green Acres is no evidence at all." *City of Los Angeles*, 462 F. Supp. 2d at 1118.

issued some of the first state guidelines on the responsible recycling of biosolids through use on agricultural land in 1973. *See id.* at 28.

Congress revisited biosolids regulation in 1987 when it amended the Clean Water Act to add Section 405, which directed EPA to identify toxic pollutants that could be present in biosolids in amounts that could affect the environment and public health, and to develop regulations outlining acceptable management practices and numeric concentration limits for the pollutants in question. *See* NBP Factsheet, *The History of Biosolids*; *see also* National Association of Clean Water Agencies Handbook, *Biosolids Management Options, Opportunities & Challenges* (2006). EPA complied with this directive in 1993 by publishing updated regulations on biosolids at 40 C.F.R. Part 503. *See id.* These regulations are in effect today and apply to the three major methods of biosolids management, including land application. Also of note, EPA has specifically endorsed biosolids recycling by land application on several occasions. *See, e.g.,* EPA, et al., *Interagency Policy on Beneficial Use of Municipal Sewage Sludge on Federal Land*, 56 Fed. Reg. 33,186 (July 18, 1991); EPA, *Policy on Municipal Sludge Management*, 49 Fed. Reg. 24,358 (June 12, 1984). Subsequent research has consistently validated this position.

At the state level, California and many other states have enacted their own biosolids regulations to complement the federal standards.[13] California's land application program is supported by a robust

[13] *See, e.g.*, State Water Resources Control Board, Water Quality Order 2004-0012-DWQ (2004) (setting statewide standards that encourage and permit land application, and detailed operational and reporting requirements).

Environmental Impact Report ("EIR") that studied all environmental and public health issues regarding land application and concluded that recycling biosolids on farmland is beneficial and presents little risk. *See* California State Water Resources Control Board, *Statewide Program EIR Covering General Waste Discharge Requirements for Biosolids Land Application* (2004). This additional level of state regulation provides an even greater level of oversight on the land application process, ensuring the biosolids applied to agricultural land meet stringent controls to protect both the environment and public health.

One of the key elements of the federal regulatory program to maintain the safety of land application of biosolids is the industrial pretreatment regulations, which came into effect in 1978 at 40 C.F.R. Part 403. These regulations were implemented because clean water utilities typically have industrial customers who contribute wastewater to the collection system. The modern two-stage wastewater treatment process is not designed to treat and remove all these industrial pollutants. If untreated, some industrial pollutants could be present in biosolids. The pretreatment program addresses this concern by requiring industrial users to treat or remove the industrial waste before the wastewater enters the public sewer system. The purpose of the pretreatment program is to prevent the introduction of pollutants into the municipal system which will interfere with operation of the clean water utility, including interference with the use or disposal of biosolids, and to prevent the introduction of pollutants into the municipal system which could pass through the treatment works without proper treatment. *See* NRC Report at 28.

The current federal regulations in 40 C.F.R. Part 503 are the product of decades of scientific research, including thousands of public comments and independent review. *See* EPA, *Standards for the Use or Disposal of Sewage Sludge*, 58 Fed. Reg. 9,248 (Feb. 19, 1993); EPA, *A Guide to Biosolids Risk Assessments for the EPA Part 503 Rule* (1995); EPA, *A Plain English Guide to the EPA Part 503 Rule* (1994). EPA has twice asked the National Research Council ("NRC") of the National Academy of Sciences to review the practice of using biosolids for agricultural purposes and the EPA regulations governing land application, once in 1996 and again in 2002. The NRC produced detailed reports both times, noting in 1996 that the "use of [municipal wastewater and biosolids] in the production of crops for human consumption, when practiced in accordance with existing federal guidelines and regulations, presents negligible risk to the consumer, to crop production, and to the environment." NRC, *Use of Reclaimed Water and Sewage Sludge in Food Crop Production* (1996). In its 2002 report, the NRC stated that "there is no documented scientific evidence that the [40 C.F.R.] Part 503 rule has failed to protect public health." NRC, *Biosolids Applied to Land: Advancing Standards and Practices* (2002). These independent reviews by respected scientists reiterate the safety of biosolids when land applied under the requirements of existing federal regulations. Three of the experts for Plaintiffs in this case – Professor Ian Pepper, Professor Albert Page, and Greg Kester – served on either the first or second of these NRC committees.

The findings of these scientific investigations and evaluation of land application practices nationally are further validated by the

empirical evidence at Plaintiffs' land application sites. The City of Los Angeles, which owns its own land application farm, has been successfully applying biosolids for nearly 20 years at the site with the only impacts being the betterment of the soil conditions at its farm, increases in crop yields, and the increase of the overall economic value of the land. *See* RA 091 (¶¶10-12). Even with the close scrutiny of Kern County, no adverse environmental impacts have been recorded during the long tenure of biosolids land application.

V. Allowing Individual Communities to Ban Land Application Would Undermine the Effective State and Federal Regulations Currently In Place.

Kern County's arguments, if successful, will result in the balkanized regulation of California's wastewater infrastructure that Judge Hicks decried. *See* 3 AA 664 ("California does not consist of 58 separate fiefdoms . . . all insular from each other . . . . As noted by the Court of Appeal in [*CSD2*], in the context of effects to be considered in an EIR, localities cannot retreat into isolationism and ignore this fact."). In citing *CSD2,* the trial court's ruling was cognizant of and consistent with *CSD2*'s recognition of the relevance of impacts to the general welfare outside Kern County. A reversal of the preliminary injunction would also vindicate voter initiatives that flout sound science and regulatory programs, substituting laws driven by fear and animosity to outsiders. As outlined in Section IV, *supra*, over the past 30 years the federal government and the states have established a comprehensive framework ensuring that the land application of biosolids can provide communities across the nation

with environmental and economic benefits while providing the necessary protections for human health.

Allowing individual communities like Kern County to pass discriminatory bans on land application would undermine the current regime of biosolids management by frustrating the intent of federal and state regulations, including California's important environmental mandate in the CIWMA for recycling. Because most biosolids are produced in highly populated areas where land application is infeasible, management of biosolids often involves transporting the material across the boundaries of local jurisdictions. Allowing local communities to override these regulations through land application bans would upset federal and state biosolids management efforts, deny agricultural users the benefit of recycled biosolids, and prevent utilities from managing biosolids through land application. Indeed, allowing local land application bans like Kern's to stand could have a cascading effect on both in-state and out-of-state actors, causing significant negative impacts on commerce.

Federal and state governments are better positioned than counties and municipalities to fully appreciate the disruptive efforts that such insular local measures may have on national and state biosolids management efforts. The federal government and the states have demonstrated over the past three decades that they are the proper entities to regulate biosolids, and any changes to the existing regulations should be done by the federal or state entities which approved the regulations and not by individual communities.

Localities like Kern County that have chosen to undermine federal and state environmental law are few in number to date, but as

noted above, such bans could easily multiply if emboldened by a ruling for Kern on its appeal. Many clean water utilities throughout California and around the country have close relationships with hundreds of county governments and thousands of farmers who embrace the value of biosolids for farming, soil conservation, and preserving green space. Nevertheless, land application bans like those enacted by Defendants pose a significant threat to NACWA and its members that manage biosolids. Accordingly, NACWA urges the Court to affirm the preliminary injunction against Kern's ban and ensure it does not become a model for other, similar discriminatory bans in California or elsewhere in the nation.

CONCLUSION

For all of these reasons, NACWA joins in opposition to Defendant Kern County's appeal and respectfully requests that the Court affirm the trial court's preliminary injunction.

Dated: August 9, 2012

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CERTIFICATE OF WORD COURT

Pursuant to California Rule of Court 8.204(c), I certify that the *Amicus Curiae* Brief of National Association of Clean Water Agencies has been prepared using 14-point, proportionately spaced, Times New Roman typeface, and contains 5,831 words as counted by the Microsoft Word word-processing program used to generate the brief.

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EXHIBIT A

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
FORT MYERS DIVISION

AZURIX NORTH AMERICA RESIDUALS MANAGEMENT, INC., a Texas corporation authorized to do business in the state of Florida,

Plaintiff,

vs. Case No. 2-01-cv-428-FTM-29DNF

DESOTO COUNTY, a political subdivision of the State of Florida,

Defendant.

ORDER

This matter comes before the Court on plaintiff's Motion for Preliminary Injunction, filed on August 8, 2001. (Doc. #7). Plaintiff's Verified Complaint (Doc. #1) alleges that DeSoto County, Florida (DeSoto County) Ordinance 2001-05 (the Ordinance) is unlawful for a number of reasons, and seeks declaratory and injunctive relief prohibiting its enforcement. Defendant DeSoto County filed its Response in Opposition to Plaintiff's Motion for Preliminary Injunction (Doc. #19) on August 27, 2001, and the Court heard oral argument on August 28, 2001. De Soto County has agreed not to enforce the Ordinance until September 7, 2001.

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I. Background

Azurix North American Residuals Management, Inc. (Azurix) is a Texas corporation authorized to do business in Florida. One line of its business is the hauling, processing and land spreading of material variously referred to as "sewage sludge," "biosolids," and "residuals" (hereafter referred to as Sludge) produced by the processing of sewage by domestic wastewater treatment plants. Azurix has entered into contracts with the owners and operators of almost two hundred wastewater treatment plants in Florida, which service approximately two million persons, to dispose of their Sludge. Azurix transports the Sludge to DeSoto County, where most of it is spread onto thousands of acres of land pursuant to agreements between Azurix and certain large landowners. The contracts with the landowners require Azurix to spread the Sludge in accordance with Agricultural Use Plans prepared in accordance with Florida state law and approved by the Florida Department of Environmental Protection (FDER). Most of the contracts with the wastewater treatment plants specifically require disposal of the Sludge on the properties in DeSoto County, because this is required by permits issued to the wastewater treatment plants by the FDER. Many of the wastewater treatment plants serviced by Azurix produce only Class B Sludge (discussed below), as allowed by their state-issued permits.

Two federal statutes govern the use and disposition of Sludge. The Clean Water Act of 1972 (CWA) prohibits the discharge of any

pollutant into navigable waters of the United States from any source, except in compliance with the CWA. 33 U.S.C. §§ 1311(a), 1362(12). Amendments to the CWA have added sewage sludge and municipal waste discharged into water to the list of pollutants, 33 U.S.C. § 1362(6), and required the Environmental Protection Agency (EPA) to develop regulations for the use and disposal of Sludge. See Leather Indus. of Am., Inc. v. EPA, 40 F.3d 392, 394-98 (D.C. Cir. 1994) (explaining the historical development of the CWA and regulations regarding Sludge). "Navigable waters" is defined broadly enough to include discharge of pollutants into all waters that may eventually lead to waters affecting interstate commerce. United States v. Eidson, 108 F.3d 1336, 1341 (11th Cir. 1997) (holding that drainage ditch which flowed intermittently into system which ultimately reached Tampa Bay was "navigable waters"). The Supreme Court has noted that the CWA "applies to virtually all surface water in the country." International Paper Co. v. Ouellette, 479 U.S. 481, 486 (1987).

Additionally, the Resource Conservation and Recovery Act of 1976 (RCRA), see 42 U.S.C. §§ 6901-6992, established a national program for hazardous waste management administered by the EPA. The "RCRA is a comprehensive environmental statute that governs the treatment, storage and disposal of solid and hazardous waste." Meghrig v. KFC Western, Inc., 516 U.S. 479, 483 (1996). The RCRA provides a "cradle-to-grave" regulatory program which "sets minimum standards for the generation, treatment storage, and disposal of

hazardous wastes in the nation." National Solid Wastes Mgmt. Ass'n v. Alabama Dept. of Envtl. Mgmt., 910 F.2d 713, 722 (11th Cir. 1990), *as modified upon denial of reh'g*, 924 F.2d 1001 (11th Cir. 1991), *cert. denied*, 501 U.S. 1206 (1991). States are permitted to administer their own programs with the authorization of the EPA if the state program is equivalent to, and consistent with, the federal program and provides adequate enforcement of the federal requirements. 42 U.S.C. § 6926(b). Florida has been approved to operate its own hazardous waste program pursuant to its regulations. FLA. ADMIN. CODE ANN. § 62-640 (2001).

While other federal statutes address the cleanup of hazardous waste, the "RCRA attempts to address hazardous waste before it becomes a problem." Hazardous Waste Treatment Council v. State of South Carolina, 945 F.2d 781, 783 (4th Cir. 1991). The RCRA's primary purpose is to reduce or eliminate the generation of hazardous waste, and to ensure that "[w]aste that is nevertheless generated should be treated, stored, or disposed of so as to minimize the present and future threat to human health and the environment." 42 U.S.C. § 6902(b); Meghrig, 516 U.S. at 484.

"Sludge" is one type of waste covered by the RCRA and the CWA. Sludge refers to "any solid, semisolid or liquid waste generated from a municipal, commercial, or industrial wastewater treatment plant, water supply treatment plant, or air pollution control facility or any other such waste having similar characteristics and effects." 42 U.S.C. § 6903(26A). See also 40 C.F.R. § 503.9(w).

Regulations promulgated pursuant to the CWA regulate the final use or disposal of Sludge. 40 C.F.R. §§ 503.1-503.48.

Federal law classifies sewage Sludge as either "Class A" or "Class B," depending essentially upon the quality of the Sludge. 40 C.F.R. §§ 503.30-503.33. The classifications are based on the level of disease-causing organisms (pathogens) and the reduction of the characteristics of sewage sludge which attracts rodents, flies, mosquitos, and other organisms capable of transporting infectious agents (vector reduction). Class A represents a "better" Sludge in terms of human health and the environment. Florida regulations further subdivides "Class A" into a "Class AA," which defines Sludge which has met higher standards for treatment for pathogen reduction and stringent pollutant limits. FLA. ADMIN. CODE ANN. § 62-640.850.

One of the allowed uses or disposal methods of Sludge is land application, also referred to as land spreading. 40 C.F.R. §§ 503.10-503.18. "Land application is the spraying or spreading of sewage sludge onto the land surface; the injection of sewage sludge below the land surface; or the incorporation of sewage sludge into the soil so that the sewage sludge can either condition the soil or fertilize crops or vegetation grown in the soil." 40 C.F.R. § 503.11(h). The federal regulations allow the land application of both Class A and Class B Sludge, according to specific requirements which apply to each. See 40 C.F.R. §§ 503.12-503.14, 503.16-18. Also, the respective pathogen and vector attraction reduction

requirements must be met for Class A and Class B Sludge applied to agricultural land. 40 C.F.R. § 503.15. Additionally, site restrictions apply for the land application of Class B sludge, including varying lengths of time after application before certain types of crops may be harvested, 40 C.F.R. § 503.32(b)(5)(i)-(iv); the prohibition of animal grazing on the land for thirty days after application, 40 C.F.R. § 503.32(b)(5)(v); limitations on the harvesting of turf to which application has been made, 40 C.F.R. § 503.32(b)(5)(vi); and restriction of public access to the land for varying periods after application. 40 C.F.R. § 503.32(b)(5)(vii, viii).

On July 21, 2001, the DeSoto County Board of County Commissioners adopted Ordinance 2001-5, referred to as the "Sludge Ordinance," which applied to "any person or enterprise seeking to engage in the land spreading of domestic wastewater residuals (sludge) or other related material in DeSoto County, Florida." (Doc. #1, Ex. A, p. 7). One of the expressed intents of the Ordinance is to prohibit the land application of certain wastewater residuals in the unincorporated areas of DeSoto County. (Doc. #1, Ex. A, p. 3). The Ordinance adopted the State and Federal rules as DeSoto County's regulatory standards and definitions governing the land application and disposals of Sludge, except to the extent modified in the Ordinance. (Doc. #1, Ex. A, pp. 4-6). Of relevance to this case, the Ordinance: (1) completely prohibits the land spreading of Class B Sludge; (2) effectively bans hauling of

Class B Sludge in DeSoto County; (3) allows land spreading only of Class A and Class AA domestic wastewater Sludge; (4) limits land spreading to Agricultural five and Agricultural ten zoning districts, and prohibits it in all other zoning districts and within the 100-year flood plain; (5) allows land spreading only from sunrise to sunset, Monday through Friday; (6) establishes specific setbacks for land spreading Class AA and Class A Sludge which are in excess of those required by federal or state law; (7) requires any person or enterprise who intends to land spread domestic wastewater Sludge to obtain a Land Spreading Permit; and (8) requires such person to obtain approval of a Special Exception and Development Plan from the DeSoto County Board of Commissioners. (Doc. #1, Ex. A, pp. 7-9).

II. General Preliminary Injunction Principles

The Court begins with the proposition that, in the Eleventh Circuit, issuance of "a preliminary injunction is an extraordinary and drastic remedy that should not be granted unless the movant clearly carries the burden of persuasion on each of [four] prerequisites." Suntrust Bank v. Houghton Mifflin Co., 252 F.3d 1165, 1166 (11th Cir. 2001). See also McDonald's Corp. v. Robertson, 147 F.3d 1301, 1306 (11th Cir. 1998). The four prerequisites for a preliminary injunction are: (1) a substantial likelihood of succeeding on the merits; (2) a substantial threat of irreparable injury if relief is denied; (3) an injury that outweighs the opponent's potential injury if relief is granted; and

(4) an injunction would not harm or do a disservice to the public interest. Suntrust Bank, 252 F.3d at 1166; American Red Cross v. Palm Beach Blood Bank, Inc., 143 F.3d 1407, 1410 (11th Cir. 1998); Gold Coast Pub'ns, Inc. v. Corrigan, 42 F.3d 1336, 1343 (11th Cir. 1994), cert. denied, 516 U.S. 931 (1995). The burden of persuasion for each of the four requirements is upon the movant. Siegel v. Lenore, 234 F.3d 1163, 1176 (11th Cir. 2000)(en banc).

III. Application of Principles

A. Substantial Likelihood of Success on Merits:

The first requirement is that Azurix establish a substantial likelihood of success on the merits.[1] Azurix argues that the Ordinance is unlawful because it (1) is preempted by federal law; (2) violates the Commerce Clause of Article I, § 8 of the United States Constitution; (3) violates the Impairment of Contracts Clause of Article I, § 10 of the United States Constitution; and (4) is preempted by Florida state law.[2]

(1) Federal Preemption:

The Supremacy Clause of the Constitution, Art. VI, Cl. 2, invalidates state laws which "interfere with, or are contrary to

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[1]Azurix asserts that a preliminary injunction should be granted "even if the Court determines that AZURIX has failed to demonstrate a substantial likelihood of success on the merits." (Doc. #8, p. 14). Azurix asserts that the Eleventh Circuit employs a sliding scale in which the lack of sufficient evidence as to one of the four prerequisites can be compensated by the presence of evidence as to another of the prerequisites. (Doc. #8, p. 5). The Court disagrees, and finds that a preliminary injunction will not be appropriate unless Azurix establishes a substantial likelihood of success on the merits. The en banc decision in Siegel v. Lenore, 234 F.3d at 1176-77 forecloses plaintiff's argument.

[2]While the Complaint asserts additional grounds (see Doc. #1), they are not asserted in connection with the Motion for Preliminary Injunction. (Doc. #7).

the laws of congress, made in pursuance of the constitution." Wisconsin Pub. Intervener v. Mortimer, 501 U.S. 597, 604 (1991)(quoting Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 211 (1824)). Whether federal law preeempts a state law or local ordinance[3] is a matter of Congressional purpose and intent. Gade v. National Solid Wastes Mgmt., 505 U.S. 88, 96 (1992). The Supreme Court has recognized three types of preemption: express preemption, field preemption, and conflict preemption. Gade, 505 U.S. at 98; Ouellette, 479 U.S. at 491; Boyes v. Shell Oil Products Company, 199 F.3d 1260, 1267 (11th Cir. 2000).

Azurix first asserts that express and field preemption apply. Azurix argues that the federal and state regulations "are so comprehensive as to effectively preclude county regulation of the disposal of biosolids." (Doc. #8, p. 6). The Court disagrees.

Federal law does not preempt the field of waste management either by express statutory language or implicit legislative design. City of Philadelphia v. New Jersey, 437 U.S. 617, 621 n.4 (1978)(finding that Congress has not shown that it intended to preempt the entire field of interstate waste management or transportation); Boyes, 199 F.3d at 1267 (holding that the RCRA does not expressly preempt Florida's program); PUD No. 1 of Jefferson County v. Washington Dept. of Ecology, 511 U.S. 700, 705 (1994)(holding that a state may develop more stringent standards

[3]The constitutionality of a local ordinance is analyzed in the same manner as a state statute for purposes of the Supremacy Clause. Hillsborough County v. Automated Med. Lab., Inc., 471 U.S. 707, 713 (1985).

than those in the CWA); Ouellette, 479 U.S. at 492 (stating that "although Congress intended to dominate the field of pollution regulation, the saving clause of the CWA negates the inference that Congress 'left no room' for state causes of action). Indeed, the "savings" clause of the RCRA states that:

> [N]o State . . . may impose any requirements less stringent than those authorized under this subchapter respecting the same manner as governed by such regulations. . . . Nothing in this chapter shall be construed to prohibit any State . . . from imposing any requirements . . . which are more stringent than those imposed by such [RCRA] regulations."

42 U.S.C. § 6929.[4] "This language prevents a conclusion that Congress preempted all state regulation of hazardous waste management." National Solid Wastes Mgmt. Ass'n, 910 F.2d at 723. Rather, the federal regulations governing the treatment of hazardous waste are generally recognized as the federally mandated "floor" below which a state or local government may not go, but States are free to impose more stringent requirements than the federal floor. United States v. Marine Shale Processors, 81 F.3d 1361, 1367 (5th Cir. 1996); Blue Circle Cement, Inc. v. Board of County Comm'rs of County of Rogers, 27 F.3d 1499, 1504-05 (10th Cir. 1994); Old Bridge Chemicals, Inc. v. New Jersey Dept. of Envtl. Prot., 965 F.2d 1287, 1292 (3rd Cir.), *cert. denied*, 506 U.S. 1000 (1992).

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[4]The CWA also allows States to impose more stringent water quality standards than imposed by the federal regulations. 33 U.S.C. § 1370; PUD No. 1 of Jefferson County, 511 U.S. at 705. The savings provision of the CWA mirrors that of the RCRA. Blue Circle Cement, Inc. v. Board of County Comm'rs of County of Rogers, 27 F.3d at 1506 n.6. The federal regulations for Sludge likewise allow for more stringent state standards. 40 C.F.R. § 503.5(b).

Additionally, there is no indication that Florida law allows only the State to enact the more stringent requirements allowed by federal law. The Florida Administrative Code provisions dealing with Sludge state that the FAC provisions establish minimum requirements and minimum standards, see FLA. ADMIN. CODE ANN. § 62-640.100(3), (4), (5), implying the ability of municipal or county government to enact more stringent requirements, and do not expressly prohibit county or municipal ordinances addressing Sludge. The Court, therefore, rejects Azurix's claim that federal and state regulations entirely preempt the field of Sludge regulation, either expressly or implicitly. A county may pass more stringent requirements in the area of Sludge use and disposal if the requirements are not in conflict with federal law and are otherwise lawful.

Azurix next argues that even if the Sludge field is not completely preempted, certain provisions of the Ordinance conflict with federal law and are, consequently, preempted to that extent. Azurix is certainly correct that conflicting provisions would be preempted. Boyes, 199 F.3d at 1267. The existence of the savings clauses discussed above will not preclude preemption of a *conflicting* state law. Ouellette, 479 U.S. at 493; National Solid Wastes Mgmt. Ass'n, 910 F.2d at 724.

Because the federal law sets only a regulatory floor, however, a mere inconsistency between the state and federal schemes does not constitute a conflict for preemption purposes. Old Bridge Chem.,

965 F.2d at 1296. "In making the determination of whether state law conflicts with federal law, the test to apply is whether it is impossible to comply with both state and federal law or whether the state law stands as an obstacle to the accomplishment of the full purposes and objectives of federal law." Boyes, 199 F.3d at 1269 (quotation and citations omitted). In the Sludge context, the Court's task is to distinguish between provisions which are preempted as conflicting with federal law and those which are permissible because they are simply more stringent than federal law.

Azurix claims that federal law preempts three aspects of the Ordinance: the prohibition against land spreading of Class B Sludge, the prohibition against the introduction and transportation of Class B Sludge within DeSoto County, and the *de facto* prohibition against the land spreading of Class A and Class AA Sludge without sufficient evidence to support the restrictions. The Court agrees with the first two arguments, but not the third.

The Court finds that Azurix has established that there is a substantial likelihood that it will succeed on the merits as to the federal preemption argument with respect to the ban on land application of Class B Sludge. It is clear that the savings provisions do not grant state and local authorities the power to ban activities that federal law allows. National Solid Wastes Mgmt. Ass'n, 910 F.2d at 722-24 (state regulations which did not adopt the variances allowed by the EPA from the effective date of

land disposal ban for certain wastes were preempted and may not be enforced); Blue Circle Cement, Inc., 27 F.3d at 1508, *on remand*, 917 F. Supp. 1514 (N.D. Ok 1995). The Ordinance is an explicit ban on activity which is otherwise expressly allowed by federal law. This ban on land spreading of Class B Sludge stands as an obstacle to the accomplishment of the full purposes and objectives of federal law and interferes with the methods by which the federal regulations were designed to reach their goals. The federal and state regulations allow such land spreading under specific restrictions, and the Court finds there is a substantial likelihood that the Ordinance is preempted as to its ban on this activity.

The Court also finds that Azurix has established that there is a substantial likelihood that it will succeed on the merits with respect to the ban on the introduction and transportation of Class B Sludge in DeSoto County. The Ordinance requires each truck to carry documentation that the Sludge it is carrying has been treated to the minimum standards necessary to meet the requirements of Class A or Class AA Sludge. (Doc. #7, Exhibit A, p. 10). This effectively bans the transportation of Class B Sludge in DeSoto County, which clearly conflicts with the federal authorization of land application of Class B Sludge. This ban on the transportation of Class B Sludge stands as an obstacle to the accomplishment of the full purposes and objectives of federal law and interferes with the methods by which the federal regulations were designed to achieve their goals. The Court finds this portion of the Ordinance

substantially likely to be preempted.

The Court, however, finds that Azurix has not established that there is a substantial likelihood that it will succeed on the merits with respect to the restrictions posed by the Ordinance on the land spreading of Class A or Class AA Sludge. While Azurix asserts the restrictions amount to a *de facto* ban on land spreading Class A and Class AA Sludge, the facts contained in the record at this point do not support that claim. The hours of operation, setbacks, geographical limitations, and permit requirements for land application of Class A Sludge may be more restrictive than the federal and state requirements, but Azurix has not adequately established that they constitute a *de facto* ban under the circumstances in DeSoto County.

(2) Commerce Clause, Article I, § 8:

Azurix argues that the Ordinance violates the Commerce Clause of the United States Constitution, Article I, Section 8, Clause 3, because the economic effects of the Ordinance impact interstate commerce and discriminates against it by allowing only the extremely limited land spreading of Sludge within DeSoto County. (Doc. #8, pp. 8-11).

It is not disputed that Sludge and the service of processing and disposing of Sludge can be an article of commerce to which the Commerce Clause applies. C & A Carbone, Inc. v. Town of Clarkstown, New York, 511 U.S. 383, 389 (1994). If the Commerce Clause applies to the DeSoto County situation, the Court must

determine whether the Ordinance discriminates against interstate commerce or whether the Ordinance imposes a burden on interstate commerce that is clearly excessive in relation to the putative local benefits. Id.

The Court finds that Azurix has not established that there is a substantial likelihood that it will succeed on the merits with respect to its Commerce Clause claim. First, under the facts asserted in this case, it is not clear that an article of commerce is involved. The only factual matters asserted by Azurix relate to Sludge from sewage treatment plants in Florida to be placed on land in DeSoto County, Florida. (Doc. #7, ¶¶ 10-14). Additionally, there are simply not enough facts asserted to conclude either that the Ordinance discriminates against interstate commerce or imposes a clearly excessive burden on interstate commerce. Plaintiff's efforts to bring this case within Carbone may ultimately prove successful, but they are not based on facts contained or proffered in this record.

(3) Impairment of Contracts Clause, Article I, § 10:

Article I, § 10 of the United States Constitution provides: "No State shall . . . pass any . . . Law impairing the Obligation of Contracts." This prohibition is not literal, and must accommodate the inherent police power of a state to safeguard the vital interests of its people. Energey Reserves Group, Inc. v. Kansas Power & Light Co., 459 U.S. 401, 410 (1983). The Court first determines whether the change in law has operated as a

substantial impairment of a contractual relationship. Energey Reserves, 459 U.S. at 411. This inquiry has three components: whether there is a contractual relationship, whether a change in law impairs that contractual relationship, and whether the impairment is substantial. General Motors Corp. v. Romein, 503 U.S. 181, 186 (1992). If the Ordinance constitutes a substantial impairment, the County must identify a significant and public purpose behind the Ordinance. Id. Finally, the Court must determine whether the adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying the adoption of the Ordinance. Id. at 412.

The Court finds that Azurix has established that there is a substantial likelihood that it will succeed on the merits with respect to its Contract Clause claim. First, Azurix has adequately established the existence of contractual relationships with both the Sludge producers and the land owners on whose property the Sludge will be applied. Azurix has also adequately established that the Ordinance substantially impairs these contractual relationships as they relate to Class B Sludge. The total ban on transportation and land application of Class B Sludge substantially impairs the obligations under the contracts for Azurix to haul and dispose of the material. E.g., United States Trust Co. v. New Jersey, 431 U.S. 1, 19 (1976). Second, the County has identified a significant and legitimate public purpose behind the Ordinance,

i.e., protecting county residents and the environment from the use and disposal of potentially hazardous Sludge. The final inquiry is whether the "adjustment of the rights and responsibilities of contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose justifying [the Ordinance's] adoption." Energy Reserves, 459 U.S. 411-13. As it relates to Class B Sludge, the Court concludes that the total ban is most likely to be found not to be a reasonable condition. The Court therefore concludes that there is a substantial likelihood that the provisions in the Ordinance banning the disposal of Class B Sludge violates the Contracts Clause of the federal Constitution.

(4) State Preemption:

Finally, Azurix asserts that the Ordinance is preempted by State law. (Doc. #8, pp. 12-13). Specifically, Azurix contends that the state legislature has comprehensively regulated biosolids in general and the land spreading of solids in particular through Chapter 403 of the Florida Statutes. Furthermore, plaintiff argues that Section 823.14 of Florida Statutes prohibits any political subdivision from adopting any ordinance that would prohibit, restrict, regulate, regulate, or otherwise limit an activity of a bona fide farm operation classified as agricultural.

The Court concludes that the state preemption argument only has merit as to the Class B sludge, and then only to the extent the Ordinance conflicts with state law. The analysis applicable to federal preemption discussed above is analogous to state preemption

in this situation. Otherwise, the Court concludes that Azurix has failed to demonstrate a substantial likelihood of success on its state preemption claims.

B. Threat of Irreparable Injury:

Even for those claims on which Azurix shows a substantial likelihood of success on the merits, it must also establish a substantial threat of irreparable injury. Siegel, 234 F.3d at 1176. A movant's "success in establishing a likelihood it will prevail on the merits does not obviate the necessity to show irreparable harm." United States v. Lambert, 695 F.2d 536, 540 (11th Cir. 1983); accord Jefferson County, 720 F.2d at 1519 n. 21. "'[T]he basis of injunctive relief in the federal courts has always been irreparable harm and inadequacy of legal remedies.'" Sampson v. Murray, 415 U.S. 61, 88 (1974)(citing Beacon Theatres, Inc. v. Westover, 359 U.S. 500, 506-07 (1959). "A showing of irreparable injury is "the sine qua non of injunctive relief." Siegel, 234 F.3d at 1176 (citations omitted).

Here, Azurix has established a substantial threat of irreparable harm. It is undisputed that Azurix has contracts with numerous wastewater treatment plants, that most of the Sludge it hauls and spreads is Class B, that its only currently available sites for disposal are in DeSoto County, that many of the FDER permits require disposal in DeSoto County, and that money damages against DeSoto are capped under state law. Enforcement of the Ordinance would operate as a ban on disposing of Class B Sludge as

agreed in those existing contracts. Therefore, the Court finds that Azurix has met its burden of showing a substantial threat of irreparable injury. See Suntrust Bank, 252 F.3d at 1166.

C. Balancing of Injuries:

Azurix must also establish that the threatened injury to it outweighs the harm a preliminary injunction may cause to the County. Siegel, 234 F.3d at 1176. DeSoto County certainly has a legitimate interest in the health of its residents and environment. However, the threatened harm from continuing to allow the land application of Class B Sludge is substantially less than the harm caused by allowing enforcement of the Ordinance as to Class B Sludge. The land application of Class B Sludge has been approved by the federal and state regulations, and the FDER has specifically approved land application on many of the sites at issue in DeSoto County. Land application is required under many of the FDER permits, and other disposition would violate those permits even if available. The Ordinance would adversely impact not only Azurix, but the waste producers who have made arrangements for the lawful disposal of their Sludge, the land owners who have contractual benefits and obligations regarding the Sludge, and the customers of the waste treatment centers who are the ultimate source of the material which results in the Sludge. As such, the Court concludes that DeSoto County's interest is outweighed by the threatened harm to Azurix and its customers.

D. Public Interest:

Finally, Azurix must establish that an injunction would not harm or do a disservice to the public interest. Siegel, 234 F.3d at 1176. Granting the preliminary injunction as to Class B Sludge will simply continue the existing practice, approved by both the federal and state regulations, of land application of Class B Sludge. DeSoto County expressed concerns in the Ordinance about health and environment concerns, but it is clear that no substantial evidence was presented which substantiated those concerns. There is a strong public interest in the lawful disposal of Class B Sludge, which both the state and federal governments have said include land application. The Court concludes that the public interest is best served by the continued allowance of disposal of Class B Sludge in accordance with the state and federal regulations.

Accordingly, it is now

ORDERED:

Plaintiff's Motion for Preliminary Injunction (Doc. #7), filed on August 8, 2001, is **GRANTED IN PART AND DENIED IN PART**. The Motion is **GRANTED** as to those portions of the Ordinance prohibiting land application of Class B Sludge in DeSoto County and prohibiting the transportation of Class B Sludge in DeSoto County, and is otherwise denied. A separate Preliminary Injunction will be

entered.

DONE AND ORDERED at Fort Myers, Florida, this 7th day of September, 2001.

JOHN E. STEELE
UNITED STATES DISTRICT JUDGE

Copies:
Counsel of record

CITY OF LOS ANGELES, et al., Plaintiff, v. COUNTY OF KERN, et al., Defendant.

Case No. CV # 06-5094 GAF (VBKx)

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

2006 U.S. Dist. LEXIS 81417; 36 ELR 20221

October 24, 2006, Decided
October 24, 2006, Filed

SUBSEQUENT HISTORY: Injunction granted at *City of Los Angeles v. County of Kern, 462 F. Supp. 2d 1105, 2006 U.S. Dist. LEXIS 88026 (C.D. Cal., Nov. 20, 2006)*

COUNSEL: [*1] For City of Los Angeles, Responsible Biosolids Management Inc, R and G Fanucchi Inc, Sierra Transport Inc, Plaintiffs: Barbara J Schussman, James J Dragna, Marc R Bruner, Thomas S Hixson, Bingham McCutchen, Los Angeles, CA, US.; Christopher M Westhoff, Keith W Pritsker, Los Angeles City Attorney's Office, Los Angeles, CA.; Gary Smith, James B Slaughter, Beveridge and Diamond, Washington, DC, US.

For Orange County Sanitation District, Plaintiff: Bradley R Hogin, Edward L Bertrand, Woodruff, Spradlin and Smart, APC, Orange, CA.; Michael M Hogan, Hogan Guiney and Dick, San Diego, CA.

For County Sanitation District No 2 of Los Angeles County, Plaintiff: Daniel V Hyde, Paul John Beck, Lewis Brisbois Bisgaard & Smith, Los Angeles, CA.

For Shaen Magan, individually doing business as Honey Bucket Farms doing business as Tule Ranch/Magan Farms, Western Express Inc, Plaintiffs: Michael J Lampe, Michael J Lampe Law Offices, Visalia, CA, US.

For California Association of Sanitation Agencies, Plaintiff: Jonathan Schutz, Roberta Larson, Somach Simmons & Dunn, Sacramento, CA, US.

For County of Kern, Kern County Board of Supervisors, Defendants: Charles F Collins, Kern County [*2] Counsel, Bakersfield, CA.; Michael M Hogan, Hogan Guiney and Dick, San Diego, CA.

JUDGES: Judge Gary Allen Feess, United States District Court.

OPINION BY: Gary Allen Feess

OPINION

ORDER RE: DEFENDANTS' MOTIONS TO DISMISS

I.

INTRODUCTION

This case arises from Defendants Kern County's and Kern County Board of Supervisors' (collectively "Kern") intended enforcement of "Measure E," a ballot initiative enacted after a campaign that included entreaties to keep "Los Angeles" sludge out of Kern County. The legislation prohibits the "land application" of sewage

treatment residues called "biosolids" or "sludge" in the unincorporated areas of Kern County. The government Plaintiffs (City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles) generate biosolids, some portion of which is transported to Kern County. The farm and contractor Plaintiffs (R&G Fanucchi Farms, Responsible Biosolids Management, Sierra Trucking and Shaen Magan) recycle the biosolids and allegedly use the material as fertilizer to improve the quality of their soil and grow crops.

Plaintiffs claim that Measure E: (1) violates the Dormant *Commerce Clause* (2) violates [*3] the *Equal Protection Clause*; (3) is preempted by the Clean Water Act, *33 U.S.C. §§ 1251, et seq.*; (4) is preempted by the California Integrated Waste Management Act ("CIWMA"); (5) is preempted by the California Water Code; and (6) constitutes an invalid exercise of police power. Plaintiffs seek declaratory relief, damages and attorneys fees pursuant to *42 U.S.C. § 1983*, and a permanent injunction against enforcement of the biosolids ban.

Defendants now move to dismiss the Complaint: (1) under *Rule 12(b)(1)* for lack of subject matter jurisdiction under the Rooker-Feldman doctrine; (2) under *Rule 12(b)(3)* for improper venue; and (3) under *Rule 12(b)(6)* for failure to state a claim. For the reasons set forth below in more detail, the motions are **GRANTED IN PART** and **DENIED IN PART.** Because the instant case is not a de facto appeal of a state court judgment, the Rooker-Feldman doctrine is inapplicable, and thus Kern's *Rule 12(b)(1)* motion is **DENIED.** Moreover, venue is proper in the Central District because Plaintiffs seek to redress alleged injuries to constitutional rights that occurred here--which means a substantial [*4] part of the events giving rise to the claim occurred here--and thus the *Rule 12(b)(3)* motion is **DENIED.**

As to the *Rule 12(b)(6)* motion, Plaintiffs state a claim for a *Commerce Clause* violation because they allege Measure E impermissibly discriminates against interstate commerce. They state a claim for an Equal Protection violation because they allege that Measure E actually harms the environment rather than helps it, and was enacted for the improper purpose of legislating "anti-Los Angeles" sentiment. They also state a claim for preemption by the CIWMA because that statute expresses a mandatory policy of recycling biosolids before other methods of disposal. Finally, Plaintiffs state a claim for invalid exercise of police power because they properly allege that Measure E's adverse impact on the region as a whole outweighs its putative local benefits. However, Plaintiffs fail to state a claim for preemption under the Clean Water Act or the California Water Code, because neither statute mandates that land application of biosolids be used before other methods of disposal.

As a result, the *Rule 12(b)(6)* motion is **DENIED** as to the first, second, fourth, and sixth causes of [*5] action, and it is **GRANTED** as to the third and fifth causes, of action.

II.

BACKGROUND

A. OVERVIEW OF BIOSOLIDS

EPA regulations define "sewage sludge," also referred to as "biosolids," as the "solid, semi-solid, or liquid residue generated during the treatment of domestic sewage in a treatment works." *40 C.F.R. § 503.9(w)*. Municipalities typically dispose of sewage sludge in one of three ways, one of which is the "land application" of the sludge. "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. (Id. § 8.05.030(D)). In 2003, the EPA estimated that approximately 60 percent of sewage sludge was treated and applied to farmland; of the remaining 40 percent, 17 percent was buried in landfills, 20 percent was incinerated, and 3 percent was used as landfill or mine reclamation cover. *68 Fed. Reg. 68817 (Dec. 10, 2003)*.

Part 503 of the relevant EPA regulations differentiates between Class A and Class B sewage sludge depending on the concentration of pathogens, disease [*6] causing micro-organisms, remaining after treatment. See *40 C.F.R. § 503.32*. While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. See id. For these reasons, the requirements for, and restrictions placed on, land application of Class B sewage sludge are more stringent than those imposed on Class A sewage sludge.

B. KERN'S REGULATION OF BIOSOLIDS PRIOR TO MEASURE E

Kern began regulating land application of biosolids in 1998, when it required that the biosolids meet the standards set forth in the Code of Federal Regulations for "Class A" and "Class B" biosolids. *County Sanitation Dist. No. 2 of L.A. County v. County of Kern, 127 Cal. App. 4th 1544, 1568, 27 Cal. Rptr. 3d 28 (Ct. App. 2005)* ("County Sanitation").

In 1999, Kern adopted an ordinance that phased out the land application of Class B biosolids over a three-year period. And after the three-year phase-out, the 1999 ordinance allowed only "exceptional quality" (EQ) biosolids, which meet the pathogen reduction requirements of Class A biosolids and contain very low levels of other [*7] pollutants, like heavy metals. *Id. at 1568 n.34*; *40 C.F.R. 503.13(b)(3)*.

In earlier state court litigation, the government Plaintiffs, who have brought this lawsuit, challenged the 1999 ordinance on the grounds that it violated the *Commerce Clause* and was preempted by the federal Clean Water Act and the California Porter-Cologne Act. Although the Court of Appeal held that Kern should have prepared an environmental impact report before enacting the ordinance, it upheld the 1999 ordinance and rejected the government Plaintiffs' other claims. *County Sanitation, 127 Cal. App. 4th at 1605-14*.

C. MEASURE E

On July 11, 2006, Kern declared that voters in the June 6, 2006 election had adopted the ballot initiative known as Measure E. (Compl., Ex. A [Measure E] at 33). Measure E uses Kern's police power to prohibit the land application of all biosolids in the unincorporated areas of Kern County due to what it describes as "numerous serious unresolved issues about the safety, environmental effect, and propriety" of the practice, even when the biosolids are applied in conformance with federal and state regulation. ([*8] Id. §§ 8.05.10; 8.05.020; 8.050.40(A)).

Violations of the ordinance constitute misdemeanors punishable by fines and imprisonment. (Id. § 8.05.060). Although Measure E became effective immediately upon passage on July 21, 2006, it gave preexisting permit holders six months to discontinue land application of biosolids. (Id. § 8.05.040(A)). Accordingly, existing permit holders may continue to land apply biosolids until at least January 21, 2007.

Measure E is at issue here.

III.

DISCUSSION

A. THE MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

1. OVERVIEW OF THE ROOKER-FELDMAN DOCTRINE

Under the Rooker-Feldman doctrine, "a party losing in state court is barred from seeking what in substance would be appellate review of the state judgment in a United States district court, based on the losing party's claim that the state judgment itself violates the loser's federal rights." *Johnson v. De Grandy, 512 U.S. 997, 1005-06, 114 S. Ct. 2647, 129 L. Ed. 2d 775* (citing *D.C. Court of Appeals v. Feldman, 460 U.S. 462, 482, 103 S. Ct. 1303, 75 L. Ed. 2d 206 (1983)*; *Rooker v. Fid. Trust Co., 263 U.S. 413, 416, 44 S. Ct. 149, 68 L. Ed. 362 (1923))*. Moreover, "[i]f claims raised [*9] in the federal court action are 'inextricably intertwined' with the state court's decision such that the adjudication of the federal claims would undercut the state ruling... then the federal complaint must be dismissed for lack of subject matter jurisdiction." *Bianchi v. Rylaarsdam, 334 F.3d 895 (9th Cir. 2003)*. The Rooker-Feldman doctrine plainly acknowledges that the scope of congressional grants of original jurisdiction to the district courts provide no authorization to exercise appellate jurisdiction over state-court judgments, a power that Congress has reserved to the Supreme Court pursuant to *28 U.S.C. § 1257. Exxon Mobil Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280, 291-92, 125 S. Ct. 1517, 161 L. Ed. 2d 454 (2005)*; *Verizon Md., Inc. v. Pub. Serv., 535 U.S. 635, 644 n.3, 122 S. Ct. 1753, 152 L. Ed. 2d 871 (2002)*.

2. THE ROOKER-FELDMAN DOCTRINE DOES NOT APPLY HERE

Kern contends that claims in this action are "inextricably intertwined" with the 2005 County Sanitation case, in which the California Court of Appeal upheld the 1999 Kern ordinance's phase-out of Class B biosolids and eventual ban of all but exceptional quality biosolids, and thus that [*10] Rooker-Feldman precludes this Court's jurisdiction. (Opp. at 7-9). This argument erroneously suggests that any subsequent lawsuit that implicates the constitutional issues litigated

in County Sanitation is necessarily "intertwined" with that decision and therefore beyond the original jurisdiction of a federal district court. No decision at any level has ever attributed such sweeping scope to the Rooker-Feldman doctrine.

Under the Rooker-Feldman analysis, cases are not "inextricably intertwined" simply because they involve the same legal issues. Rather, "'inextricably intertwined' has a narrow and specialized meaning in the Rooker-Feldman doctrine." *Kougasian v. TMSL, Inc., 359 F.3d 1136, 1142 (9th Cir. 2004)* (citing *Noel v. Hall, 341 F.3d 1148, 1166 (9th Cir. 2003))*. As the Kougasian court stated:

> If a federal plaintiff has brought a de facto appeal from a state court decision--alleging legal error by the state court and seeking relief from the state court's judgment--he or she is barred by Rooker-Feldman. The federal plaintiff is also barred from litigating, ***in a suit that contains a forbidden de facto appeal,*** [*11] any issues that are "inextricably intertwined" with issues in that de facto appeal. The inextricably intertwined test thus allows courts to dismiss claims closely related to claims that are themselves barred under Rooker-Feldman.

Id. (citing *Noel, 341 F.3d at 1166*) (emphasis added).

Accordingly, if the federal case does not constitute a de facto appeal of the state case, it is immaterial that the two cases involve issues that are "inextricably intertwined" in the ordinary sense of the words. Said another way, the "inextricably intertwined" analysis is only triggered when the federal suit constitutes an impermissible de facto appeal; that is, when the plaintiff asserts that the state court decision itself constitutes a legal wrong or seeks relief from the state court judgment. See *Noel, 341 F.3d at 1166*. This conclusion is entirely consistent with recent United States Supreme Court decisions that have emphasized the very limited scope of the Rooker-Feldman limit on the subject matter jurisdiction of federal district courts. *Exxon Mobil Corp., 544 U.S., at 291-92*; *Verizon Md., Inc., 535 U.S., at 644 n.3*. [*12]

In this case, Rooker-Feldman has no application. The instant case does not constitute a de facto appeal. Plaintiffs plainly do not seek to redress an injury caused by the California Court of Appeal; that is, they do not contend that the decision in County Sanitation violated their rights in some way. Nor do they seek to set aside its judgment: County Sanitation did not uphold Measure E, ***but rather the less stringent requirements of Kern's 1999 ordinance.*** Since the 1999 ordinance did not ban the land application of all biosolids, but merely phased out the use of Class B biosolids and eventually banned all biosolids except those of "exceptional quality," the Court of Appeal had no occasion to consider the validity of a complete ban. In short, the relief sought in County Sanitation was from the 1999 ordinance, which materially differed from Measure E, which defeats any contention that the instant case somehow constitutes a de facto appeal of the County Sanitation decision. Because is clear that Plaintiffs' claims raise federal questions, the Court concludes it has subject matter jurisdiction.

B. THE MOTION TO DISMISS FOR IMPROPER VENUE

[*13] **1. THE LEGAL STANDARD**

In federal question cases such as this, the federal venue statute provides that the lawsuit may proceed in:

> (1) a judicial district where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

28 U.S.C. § 1391(b). Plaintiffs may lay venue under either the first or second option, but the third option is a "fallback" that is only available if the first two are not. [1]

1

> Kern cites an out of circuit district court case for the proposition that the second option is also a "fallback" available only if the first is not. (Reply at 4-6 (citing *Cobra Partners L.P. v. Liegl, 990 F. Supp. 332, 333-34 (S.D.N.Y. 1998))*. This position

is in the distinct minority, however, and contradicts the express language of the statute. See 15 Charles Alan Wright, et al., Federal Practice and Procedure § 3802.1 (2d ed. 1986 & Supp. 2006).

[*14] **2. ANALYSIS**

Plaintiffs advance three related reasons why a "substantial part of the events" at issue occurred in the Central District such that venue is proper here. First, they contend that the suit seeks to redress Kern's "intentional acts directed towards [the Central District]." (Opp. at 22 (citing *Sebastian Intl Inc. v. Russolillo, No. 00-03476, 2000 U.S. Dist. LEXIS 21510, at *19 (C.D. Cal. Aug. 25, 2000)*)). Second, they argue that "venue is proper where a challenged regulation's effects are felt, regardless [of] where it was enacted." (Id. at 24). Third, they contend that the entire sequence of events leading up to their claims includes damages felt in the Central District, specifically in the form of lost investments in upgrading local biosolid treatment plants. (Id. at 24).

In support of the motion to dismiss, Kern relies mainly on an unpublished opinion wherein Judge Anderson held that the Central District was not the proper venue for an action challenging a previous Kern County biosolids ordinance. Cal. Ass'n of Sanitation Agencies v. County of Kern, No. 03-8581, 2004 U.S. Dist. LEXIS 30168, *7 (C.D. Cal. Apr. 28, 2004) ("CASA").

The Court [*15] finds reason to distinguish CASA. As Judge Anderson indicated, because CASA did not involve a claim for damages suffered in the Central District, he had no basis for concluding that events giving rise to the lawsuit had occurred in the Central District. In contrast, the instant Complaint seeks damages to compensate Plaintiffs for being prohibited from engaging in commerce in and land application of biosolids. (Compl. at 29, P 3). Since damages as a result of alleged constitutional violations will be suffered in the Central District, including by a private Plaintiff that has properly asserted a *section 1983* claim, this case is analogous to tort-type actions where venue has been held to be proper where the injuries occurred. See, e.g., *Myers v. Bennett Law Offices, 238 F.3d 1068, 1075 (9th Cir. 2001)* (in suit against Utah defendant for violating the Fair Credit Reporting Act by obtaining credit reports of Nevada plaintiffs, venue was proper in Nevada because that is where the invasion of their privacy occurred); *Bates v. C & S Adjusters, Inc., 980 F.2d 865, 868 (2d Cir. 1992)* (venue proper in New York in suit for unfair collection practices where [*16] Pennsylvania collection agency mailed demand letter to debtor in New York); see also *Wilson v. Garcia, 471 U.S. 261, 278, 105 S. Ct. 1938, 85 L. Ed. 2d 254 (1985)* (analogizing personal injury torts and *section 1983* claims); *Imbler v. Pachtman, 424 U.S. 409, 417, 96 S. Ct. 984, 47 L. Ed. 2d 128 (1976)* (stating that *section 1983* creates a species of tort liability for violations of constitutional rights). And as Plaintiffs argue, the analogy is especially appropriate where, as here, wrongful conduct was allegedly directed at the forum district in the form of a ban enacted with the intent of harming the government Plaintiffs. See *Sebastian Intl. Inc. v. Russolillo, 2000 U.S. Dist. LEXIS 21510 at *19.*

Moreover, the only cases that would appear to support Kem's theory--that is, that venue is proper only where a law was enacted--have long been superceded by the 1990 amendments to the venue statute. See David D. Siegel, Commentary on 1988 and 1990 Revision, following *28 U.S.C.A. 1391 (1990)* (noting that *Leroy v. Great Western United Corp., 443 U.S. 173, 99 S. Ct. 2710, 61 L. Ed. 2d 464 (1979)*, was a case "made largely academic").

Accordingly, the Court concludes that Plaintiffs' alleged injuries [*17] in the Central District constitute substantial events giving rise to the cause of action, and thus venue is proper here.

C. THE MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM

1. THE LEGAL STANDARD

A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson, 355 U.S. 41, 45-46, 78 S. Ct. 99, 2 L. Ed. 2d 80 (1957)*. Thus, dismissal pursuant to *Rule 12(b)(6)* is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police Dep't, 901 F.2d 696, 699 (9th Cir. 1988)*. The Court accepts all factual allegations pleaded in the complaint as true in deciding a motion to dismiss for failure to state a claim; in addition, it construes those facts and draws all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co., 80 F.3d 336, 337-38 (9th Cir. 1996).*

2. ANALYSIS

a. The First Cause of Action for Violation of the *Commerce Clause* [*18] **i. Overview of the Dormant *Commerce Clause***

In addition to affirmatively granting power to Congress, the *Commerce Clause, U.S. Const. art. I, § 8, cl. 3*, limits the power of states and local government to adopt ordinances that interfere with interstate commerce. "[L]aws that discriminate against interstate commerce face 'a virtually per se rule of invalidity." *Granholm v. Heald, 544 U.S. 460, 476, 125 S. Ct. 1885, 161 L. Ed. 2d 796 (2005)* (quoting *Philadelphia v. New Jersey, 437 U.S. 617, 624, 98 S. Ct. 2531, 57 L. Ed. 2d 475 (1978))*. Such a law survives only if the government can demonstrate both that the law serves a legitimate local purpose and that this purpose could not be served as well by available nondiscriminatory means. *Maine v. Taylor, 477 U.S. 131, 138, 106 S. Ct. 2440, 91 L. Ed. 2d 110 (1986)*.

"By contrast, nondiscriminatory regulations that have only incidental effects on interstate commerce are valid unless 'the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." *Oregon Waste Sys., Inc. v. Oregon Dep't of Envtl. Quality, 511 U.S. 93, 99, 114 S. Ct. 1345, 128 L. Ed. 2d 13 (1994)* (quoting *Pike v. Bruce Church, Inc., 397 U.S. 137, 142, 90 S. Ct. 844, 25 L. Ed. 2d 174 (1970))*.

However, [w]here state [*19] or local government action is specifically authorized by Congress, it is not subject to the *Commerce Clause* even if it interferes with interstate commerce." *White v. Mass. Council of Constr. Employers. Inc., 460 U.S. 204, 213, 103 S. Ct. 1042, 75 L. Ed. 2d 1 (1983)* (quoting *Southern Pacific Co. v. Arizona, 325 U.S. 761, 769, 65 S. Ct. 1515, 89 L. Ed. 1915 (1945))*. Courts should not assume Congress has authorized a discriminatory local regulation, however, unless it clearly expresses an intent to do so. *Hillside Dairy Inc. v. Lyons, 539 U.S. 59, 66, 123 S. Ct. 2142, 156 L. Ed. 2d 54 (2003)*.

ii. *Plaintiffs State a Claim for a Commerce Clause Violation*

Plaintiffs allege that the intent and effect of Measure E "are to discriminate against biosolids from urban communities in Southern California," (Compl. P 1) and that Measure E "constitutes an undue burden on interstate commerce, outweighing the illusory, asserted benefits to Kern," (id. P 73).

Kern contends that these allegations fail to state a claim for a *Commerce Clause* violation because the Clean Water Act and accompanying regulations mean that Congress expressly authorized a ban on biosolids, and thus that Measure E is not subject to the Dormant *Commerce Clause* [*20] analysis. (Opp. at 12-13).

Alternatively, Kern contends that Measure E does not discriminate against interstate commerce because it is facially neutral and does not discriminate in its effect. (Id. at 13-15). Both arguments fail. (a). Congress Has Not Expressly Authorized Discrimination Against Biosolids in Interestate Commerce

In support of its contention that *Commerce Clause* analysis does not apply because of express congressional approval, Kern cites to *33 U.S.C. § 1345(e)*, which provides as follows:

> The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

33 U.S.C. § 1345(e). Kern also cites regulations promulgated by the Environmental Protection Agency ("EPA"), which state that:

> Nothing in this part precludes a State or political subdivision thereof or interstate [*21] agency from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge.

40 C.F.R. § 503.5(b).

As discussed in greater detail below, these so called "savings clauses" make clear that state and local government regulations are not preempted unless they interfere with an objective of the Clean Water Act.

United States v. Cooper, 173 F.3d 1192, 1200-01 (9th Cir. 1999); *Welch v. Bd. of Supervisors of Rappahannock County, Va., 888 F. Supp. 753, 759-60 (W.D. Va.1995)*; *County Sanitation, 127 Cal. App. 4th at 1610*. However, approval for local regulation in general does not constitute express: approval for discriminatory regulation. See *South-Central Timber Development, Inc. v. Wunnicke, 467 U.S. 82, 91, 92, 104 S. Ct. 2237, 81 L. Ed. 2d 71 (1984)*; *Sporhase v. Nebraska, ex rel. Douglas, 458 U.S. 941, 960, 102 S. Ct. 3456, 73 L. Ed. 2d 1254 (1982)*. Accordingly, the Dormant *Commerce Clause* analysis applies. (b). Plaintiffs' Allegations are Adequate

The parties agree that Measure E does not discriminate facially against interstate [*22] commerce. That is, to know when the ban on land application of biosolids applies, enforcing authorities need not determine the geographic origin of the biosolids. Rather, Measure E prohibits land application regardless of the origin. (Compl., Ex. A [Measure E] §§ 8.04.040(A), 8.05.050(a), 8.05.060).

However, as noted above, Plaintiffs allege that the intent and effect of Measure E "are to discriminate against biosolids from urban communities in Southern California," (id. P 1) and that Measure E "constitutes an undue burden on interstate commerce, outweighing the illusory, asserted benefits to Kern," (Id. P 73). If proven, these allegations would mean Measure E transgressed the Dormant *Commerce Clause*. The *Commerce Clause* "forbids discrimination, whether forthright or ingenious. In each case, [courts must] determine whether the statute under attack... will ***in its practical operation*** work discrimination against interstate commerce." *West Lynn Creamery, Inc. v. Healy, 512 U.S. 186, 201, 114 S. Ct. 2205, 129 L. Ed. 2d 157 (1994)* (quoting *Best & Co. v. Maxwell, 311 U.S. 454, 455-56, 61 S. Ct. 334, 85 L. Ed. 275 (1940))* (emphasis added).

Kern correctly notes that the geographic limitation of Measure [*23] E to "unincorporated" areas cannot be the basis for a discriminatory effect, since the incorporated areas of Kern County--within the Bakersfield city limits, for example--are necessarily outside the jurisdiction of Kern. *County Sanitation, 127 Cal. App. 4th at 1612* (citing *Cal. Const. art. XI, § 7*; *City of Dublin v. County of Alameda, 14 Cal. App. 4th 264, 274-75, 17 Cal. Rptr. 2d 845 (Ct. App. 1993))*. In other words, Measure E's tolerance for biosolids in incorporated areas of the county does not "discriminate" because those incorporated areas are beyond the county's power to regulate. However, this does not mean that Plaintiffs have no other way of demonstrating a discriminatory effect For example, they could demonstrate that no in-county producer of sewage sludger needed access to land within the unincorporated areas for disposal purposes (though the plaintiffs were unable to do so in County Sanitation, see *127 Cal. App. 4th at 1613*). This, coupled with evidence of an intent to discriminate specifically against Plaintiffs, would constitute a violation of the *Commerce Clause*, unless Kern can demonstrate both that the law serves a legitimate local purpose [*24] and that this purpose could not be served as well by available nondiscriminatory means. *West Lynn Creamery, 512 U.S. at 201*; *Maine v. Taylor, 477 U.S. at 138*. In essence, whether the "practical operation" of Measure E works discrimination against interstate commerce is a question of fact that cannot be foreclosed by a Rule 12(b)(6) motion. See *Synagro-WWT, Inc., v. Rush Twp., 204 F. Supp. 2d 827, 843 (M.D. Pa. 2002)* ("Synagro") (declining to grant a 12(b)(6) motion against a Dormant *Commerce Clause* claim because at that stage it was "not in the position to judge either the Ordinance's effect on interstate commerce or the extent of the local benefits of the Ordinance"); *Camden County Bd. of Chosen Freeholders v. Beretta U.S.A. Corp., 123 F. Supp. 2d 245, 255 (D. N.J. 2000)* (same).

Accordingly, Plaintiffs state a claim for violation of the *Commerce Clause*.

b. The Second Cause of Action for Violation of the *Equal Protection Clause*

Where a statute does not use a suspect classification, a plaintiff asserting an equal protection challenge must demonstrate that the statute (1) treats similarly situated persons [*25] differently and (2) is not rationally related to a legitimate purpose. Although in general the statute need be related only to a conceivable legitimate purpose, the plaintiff may nonetheless prevail by demonstrating that the asserted basis is mere pretext. *Squaw Valley Dev. Co. v. Goldberg, 375 F.3d 936 (9th Cir. 2004)*. That is, if the justification for the classification is nothing more than pretextual, then the classification is arbitrary and thus violates the *Equal Protection Clause*. *Fajardo v. County of Los Angeles, 179 F.3d 698, 700 n.2 (9th Cir. 1999)*.

Here, Plaintiffs allege that Measure E arbitrarily treats them differently than persons applying manures and other fertilizers on Kern County farms, as well as

persons using bagged biosolids. (Compl. PP 54, 55, 63). [2] They also allege that Measure E "offers no environmental benefits to Kern County and in fact will cause numerous environmental detriments to Kern County and Southern California, including decreased soil quality, substitution of chemical and manure fertilizers for biosolids, [and] increased demands for irrigation water, increased consumption of diesel fuel," among other things ([*26] Id. P 56). Further, Plaintiffs allege that "[t]he drafters, sponsors and organizers of... Measure E... and the Defendants who implemented the Ban, intended that the Ban deny these specific Plaintiffs access to farm land in Kern County to recycle biosolids." (Id. P 57).

> 2 Though Plaintiff also allege a classification differentiating between biosolid application in incorporated versus unincorporated areas, as noted above Kern has no power to regulate in incorporated areas. Thus, Measure E does not "classify on this basis."

These allegations would demonstrate irrationality if proven. If, in fact, there are no environmental benefits to a biosolid ban, and Measure E actually harms the environment, Measure E would not be rationally related to the asserted government interests of public safety and health. And if the ban were merely motivated by a desire to target Plaintiffs, it would be arbitrary and thus fail even the lenient rational basis review.

Accordingly, Plaintiffs state a claim for an Equal Protection [*27] violation. **c. The Third Cause of Action for Clean Water Act Preemption**

i. Overview of Federal Preemption Analysis

The *Supremacy Clause of the United States Constitution* provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof... shall be the supreme Law of the Land... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." *U.S. Const. art. VI, cl. 2*. The Supreme Court has interpreted the *Supremacy Clause* to compel three ways that federal law may preempt state law:

> First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state [*28] law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Mich. Canners & Freezers Ass'n, Inc. v. Agric. Mktg. & Bargaining Bd., 467 U.S. 461, 469, 104 S. Ct. 2518, 81 L. Ed. 2d 399 (1984) (internal citations and quotation marks omitted).

ii. Plaintiffs Fail to State a Claim for Conflict Preemption

Plaintiffs allege that Measure E is subject to conflict preemption because it impedes a federal objective. [3] (Compl. P 90). Specifically, they contend that 40 C.F.R. § 503 constitutes a comprehensive nationwide scheme that encourages biosolid and disposal in compliance with its terms, which Congress expressly enabled through *33 U.S.C. § 1345(d)* as part of the Clean Water Act.

> 3 Plaintiffs also allege field preemption, (Compl. P 88), but they abandon it in their opposition to the instant motion. in any event, field preemption would be impossible in light of the savings clauses discussed below, which expressly allow for local regulations not less stringent than federal law.

[*29] This argument faces an uphill battle because of the Clean Water Act's "savings clauses," which expressly allow local regulations that are more stringent than the federal government's. As noted above, *33 U.S.C. § 1345(e)* reads:

> (e) Manner of sludge disposal **The determination of the manner of disposal or use of sludge is a local determination,** except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any

> other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

33 U.S.C. § 1345(e) (emphasis added). Similarly, the Clean Water Act's provision on state authority in general reads:

> Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce... (B) any requirement respecting control or abatement of pollution; except that if... standard of performance is in effect under this chapter, such State or political [*30] subdivision or interstate agency may not adopt or enforce any... standard of performance which is less stringent....

Id. *§ 1370*. Moreover, the regulations that the EPA implemented pursuant to the grant in *section 1345(d)* state: "Nothing in this part precludes a State or political subdivision thereof... from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge." *40 C.F.R. § 503.5(b)*.

However, as Plaintiffs note, the savings clauses do not end the inquiry. Even where a federal statute allows more stringent state and local regulations, state and local regulations are ordinarily still preempted if they constitute a ban on an activity that Congress has encouraged, because in such cases the local ban impedes a federal objective. See. e.g., *Blue Circle Cement, Inc., v. Bd. of County Commissioners, 27 F.3d 1499, 1508 (10th Cir. 1994)*. Thus, the question is whether the Clean Water Act encourages the land application of biosolids to such an extent that a ban on such application is preempted, notwithstanding [*31] the savings clauses.

According to the most persuasive case law, it does not. In *Welch,* the United States District Court for the Western District of Virginia considered whether a local ban on land application of biosolids was preempted by the CWA. *888 F. Supp. at 756-58*. The court began the analysis by noting that the Clean Water Act's sewage sludge provisions seek to help "restore and maintain the chemical, physical and biological integrity of the Nation's waters" by "provid[ing] for the reduction of risks and the maximization of benefits associated with the disposal and use of sewage sludge." *Id. at 756* (citing *33 U.S.C. § 1251*). Moreover, the court noted that EPA regulations conclude that land application of biosolids is preferred to burying or burning the sludge because the latter two methods may contribute to global warming and pose more of a carcinogenic risk. Id. (citing *58 Fed. Reg. 9249, 9258)*. Nonetheless, the court noted, "the regulations also make clear that land application of sewage sludge still carries with it some risks; it is, after all, a pollutant." Id. Accordingly, the EPA's final rules [*32] themselves include a savings clause, which expressly permit local governments to enact regulations that are more stringent than the EPA's. *Id. at 757* (citing *40 C.F.R. § 503.5(b)*).

The court then considered the argument--which Plaintiffs here raise as well--that the CWA's preemptive effect should be analogous with the Resource Conservation and Recovery Act, *42 U.S.C. § 6901 et seq.* ("RCRA"), another federal environmental statute that contains a savings clause. Despite the savings clause in the RCRA, courts have found a conflict between RCRA's objective of encouraging the safe disposal and treatment of hazardous waste and county ordinances banning the treatment of certain hazardous waste within their boundaries. E.g., *Blue Circle Cement, Inc., 27 F.3d at 1508*; *ENSCO, Inc. v. Dumas, 807 F.2d 743, 745 (8th Cir. 1986)*. But the Welch court distinguished the RCRA preemption result in two ways. First, instead of constituting a ban on the treatment and disposal of a substance that federal law affirmatively instructed it to treat and dispose of safely, the county's ban on land application of biosolids [*33] did not constitute a complete ban on sewage sludge within its boundaries; it simply banned one of three possible methods of use or disposal (the other two being the less favored burning or burying). *Welch, 888 F. Supp. at 757*. Second, while RCRA explicitly states that one of its objectives is "encouraging process substitution, materials recovery, properly conducted recycling and reuse, and treatment," *42 U.S.C. 609(a)(6)*, the Clean Water Act itself "contains no preference for land application of sewage sludge over other methods of use or disposal; one must consult the EPA's regulations to find such a preference." *Welch, 888 F. Supp. at 758 n.3*.

> Accordingly, Welch concluded that a mere preference is vastly different from legislation forcing states and localities to permit land application. This is especially true when no such preference for land application appears in the statute itself. Although agency regulations may preempt local laws, *Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 713, 105 S. Ct. 2371, 85 L. Ed. 2d 714 (1985)*, in such a case the challenged law is not presumptively preempted. *Id. at 715.* [*34] Regulations generally do not preempt state and local laws absent an express statement by the agency that it intends to do so. *Id. at 718.* Such an express intention cannot be found in the EPA's regulations.

Welch, 888 F. Supp. at 758. As a result, the Welch court held that the EPA's "preference for land application of sewage sludge" did not preempt the local ban on such land application. Id.

The Ninth Circuit has favorably cited Welch's holding, albeit in a case involving not a ban on land application, but the actual enforcement of laws prohibiting the land application of biosolids without the permit required by local authorities. *Cooper, 173 F.3d at 1200.* In dismissing the defendant's argument that the Clean Water Act preempted the local permitting requirements, the court stated that "[t]he regulations encourage direct land application of sewage sludge, but they do not require that states or local governments allow it." *Id. at 1200-01.* Though Plaintiffs attack the Cooper court's statement as dicta, the implication is unmistakable that Cooper approved of Welch's persuasive reasoning [*35] and result.

Plaintiffs do not challenge Welch's reasoning; rather, they cite to case law that found other local regulations preempted despite savings clauses in other federal statutes. (Opp. at 12-14 (citing *Geier v. Am. Honda Motor Co., 529 U.S. 861, 869-72, 120 S. Ct. 1913, 146 L. Ed. 2d 914 (2000)* (state product liability tort for lack of airbag preempted notwithstanding savings clause of National Traffic and Motor Vehicle Safety Act *§ 1397(k)*); *Int'l Paper Co. v. Ouellette, 479 U.S. 481, 492-93, 107 S. Ct. 805, 93 L. Ed. 2d 883 (1987)* (state nuisance tort preempted notwithstanding Clean Water Act's savings clause regarding citizen suits, *33 U.S.C. § 1365(e)*); *Blue Circle Cement, Inc., 27 F.3d at 1508* (RCRA preempted ban on hazardous waste). These citations, however, are not persuasive here because as Plaintiffs themselves note, the presence or absence of a savings clause matters less than the underlying federal objectives. The mere fact that other federal laws with savings clauses preempted more stringent local laws does not mean that the result is the same under the Clean Water Act.

Equally unpersuasive are Plaintiffs' citations to the unpublished cases in *O'Brien v. Appomattox County, 2002 U.S. Dist. LEXIS 22549, No. Civ.A.6:02 CV 00043, 2002 WL 31663227 (W.D. Va. Nov. 15, 2002)* [*36] and Azurix v. DeSoto County, No. 2-01-CV-428, slip op. (M.D. Fla. Sept. 7, 2001) (attached as Opp. Ex. B). Neither case attempts to rebut the Welch rationale.

In sum, Plaintiffs cite no authority sustaining a claim that a ban on land application of biosolids is preempted by the Clean Water Act, while the Ninth Circuit has endorsed the Welch court's persuasive reasoning that such a claim cannot succeed. Accordingly, the Court concludes that Plaintiffs fail to state a claim for conflict preemption under the Clean Water Act.

d. The Fourth and Fifth Causes of Action for State Law Preemption

I. Overview of State Preemption Principles

Californinia's state preemption doctrine is analogous to federal preemption jurisprudence. 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. *Cal. Const. art. XI, § 7.* "Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general [*37] law, either expressly or by legislative implication." *Morehart v. County of Santa Barbara, 7 Cal. 4th 725, 747, 29 Cal. Rptr. 2d 804, 872 P.2d 143 (1994)* (citations and quotation marks omitted). "Local legislation is 'contradictory' to general law when it is inimical thereto." *Sherwin-Williams Co. v. City of Los Angeles, 4 Cal. 4th 893, 898, 16 Cal. Rptr. 2d 215, 844 P.2d 534 (1993).*

The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. *Big Creek Lumber Co. v. County of Santa*

Cruz, 38 Cal. 4th 1139, 1149, 45 Cal. Rptr. 3d 21, 136 P.3d 821 (2006).

ii. Plaintiffs State a Claim for CIWMA Preemption, But Not for Water Code Preemption

Plaintiffs contend that Measure E is inimical to the goal of encouraging land application of biosolids expressed in the California Integrated Waste Management Act and the California Water Code, and thus is subject to conflict preemption. (Compl. PP 96-109). Like the federal Clean Water Act, the CIWMA and the California Water Code contain savings clauses that allow counties and cities to enact more stringent regulations. *Cal. Pub. Res. Code § 40053*; *Cal. Water Code § 13274(i)*. However, the [*38] California Supreme Court has indicated that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." *Great W. Shows, Inc. v. County of L.A., 27 Cal. 4th 853, 868, 118 Cal. Rptr. 2d 746, 44 P.3d 120 (2002)* (citing *Blue Circle Cement, Inc., 27 F.3d at 1506-1507).* [4]

[4] The Court recognizes that there is some question whether the California Supreme Court has yet wholeheartedly endorsed Blue Circle Cement. The quoted language is merely the court's distillation of the rule from Blue Circle Cement, which it then distinguished. Nonetheless, the *Blue Circle Cement* rationale is powerful--if a superior body of law advances certain priorities, those priorities should not be undercut by inferior law, even when the inferior law is expressly allowed room to operate in non-offensive ways. See *Geier, 529 U.S. at 869* (holding that a "saving clause... does not bar the ordinary working of conflict pre-emption principles"); *Int'l Bhd. of Elec. Workers v. City of Gridley, 34 Cal. 3d 191, 193, 193 Cal. Rptr. 518, 666 P.2d 960 (1983)* ("Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate [its] declared policies and purposes...."). Accordingly, the Court concludes that the California Supreme Court would endorse Blue Circle Cement if squarely presented with the question.

[*39] Thus, the question is whether California has a statutory scheme that seeks to promote land application of biosolids.

(a). CIWMA Preemption

In support of their contention that it does, Plaintiffs note that the CIWMA, when enacted in 1989, required local governments to adopt waste management plans to divert 25% of the solid waste produced in their jurisdictions from landfills by 1995 and 50% by 2000. *Cal. Pub. Res. Code § 41780*. Additionally, the CIWMA provides:

> 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, [*40] the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices.

Cal. Pub. Res. Code § 40051 (emphases added). The CIWMA defines "solid waste" to include sewage sludge. Id. *§ 40191*.

As Plaintiffs suggest, the CIWMA uses mandatory language to require recycling of biosolids that cannot be eliminated through source reduction. And it appears to have done so specifically to further the goal of avoiding placing biosolids in landfills. In contrast to the federal Clean Water Act, the CIWMA goes far beyond "expressing a mere preference;" rather, it mandates that recycling be used before other methods. Assuming Plaintiffs can establish that land application amounts to recycling within the meaning of the CIWMA, Measure E's prohibition on the practice would undercut an express state objective, and thus be subject to conflict preemption.

Kern's argument to the contrary is unavailing. Kern claims that the Water Code, not the CIWMA, is the exclusive source for the regulation of the land application of biosolids, and thus that the express statutory objectives laid out in the CIWMA have no application [*41] to the question now before this Court. (Reply at 20). This argument fails, however, because such a division of legislative authority simply does not exist: Water Code *section 13274* merely outlines the various spheres of authority for state regulatory ***agencies;*** it does not supercede previously enacted ***legislation*** impacting biosolids. See Cal. Wat. Code *§ 13274(d)* ("except as specified... general waste discharge requirements ***prescribed by a regional board*** pursuant to this section ***supersede regulations adopted by any other state agency*** to regulate sewage sludge and other biological solids" (emphasis added)). Thus, while it is true that *section 13274* allows the State Water Resources Control Board to issue regulations that would supercede those promulgated by the Integrated Waste Management Board ("IWMB"), this allocation of regulatory authority in no way replaces, undermines or supersedes the legislature's stated objective of promoting the recycling of biosolids over other methods of disposal, such as burning or placing them in landfills. *Cal. Pub. Res. Code § 40051.* Thus, since the Court is not faced with a conflict [*42] between competing state agencies--but rather between the legislative policy of the state and a local ordinance--the "division of authority" in *section 13274* is irrelevant.

As a result, it is simply inaccurate to say that the CIWMA does not address land application of biosolids. By mandating that the IWMB ensure "recycling" occurs before other disposal methods, the CIWMA's scope is broad enough to include land application. Accordingly, Plaintiffs have stated a claim for preemption by the CIWMA.

(b). Water Code Preemption

Less persuasive, however, are Plaintiffs' preemption theories relating to the California Water Code. Plaintiffs cite only to *section 13274* of the Code, which does not articulate any particular policy in favor of land application. it provides in relevant part:

> (a)(1) The state [Water Resources Control] [B]oard or a regional board, upon receipt of applications for waste discharge requirements for discharges of dewatered, treated, or chemically fixed ***sewage sludge and other biological solids,*** shall prescribe general waste discharge requirements for that sludge and those other solids.
>
> ...
>
> (2) The general waste discharge requirements [*43] shall set minimum standards for agronomic applications of sewage sludge and other biological solids and the use of that sludge and those other solids ***as a soil amendment or fertilizer*** in agriculture, forestry, and surface mining reclamation, and may permit the transportation of that sludge and those other solids and the use of that sludge and those other solids at more than one site.

Cal. Water Code § 13274(a). Merely requiring the state or regional boards to establish minimum standards for land application of biosolids simply is not tantamount to reflecting a priority that such land application occur to the exclusion of other methods of disposal. In fact, this statutory language would seem to empower the state or regional boards to establish such stringent requirements that land application in practice could not occur. As a result, the Court cannot interpret this language as establishing a statewide policy of land application.

Accordingly, Plaintiff's fifth cause of action must fail.

e. Sixth Cause of Action for Invalid Exercise of Police Power

i. Overview of Limitations on Police Power

An exercise of the police power is valid if "the restriction [*44] in fact bears a reasonable relation to the general welfare." *Associated Home Builders of the Greater E. Bay, Inc. v. City of Livermore, 18 Cal. 3d 582, 601, 135 Cal. Rptr. 41, 557 P.2d 473 (1976)* ("Associated Home Builders"). "The 'general welfare' that must be considered may extend beyond the geographical limits of the local governmental entity adopting the ordinance." *County Sanitation, 127 Cal. App. 4th at 1615.* "[I]f a restriction significantly affects residents of surrounding communities, the constitutionality of the restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region." *Associated Home Builders, 18 Cal. 3d at 601.* In evaluating ordinances with effects on surrounding communities, the court must identify and weigh the competing interests affected by the ordinance and ask "whether the ordinance, in light of its probable impact, represents a reasonable accommodation" of those competing interests." *Id. at 609.*

ii. Plaintiffs State a Claim for Invalid Exercise of Police Power

Plaintiffs allege that Measure E significantly affects residents outside [*45] Kern County. (Compl. P 28). They contend it "degrades the environment outside the County, by causing increased usage of California's limited landfill space to dispose of biosolids and by causing longer haul routes for disposal or reuse of biosolids." (Id.). Measure E also allegedly increases costs for managing biosolids by increasing competition for alternative management resources, and will "increase rates for sewage services provided by the government Plaintiffs." (Id.). Plaintiffs thus contend that Measure E does not constitute a reasonable accommodation of the competing interests on a regional basis. (Id. P 113).

As a result, Plaintiffs state a claim for invalid exercise of police power.

IV.

CONCLUSION

For the reasons discussed above, Kern's motions are **GRANTED IN PART** and **DENIED IN PART** as follows:

. Kern's motion to dismiss for lack of subject matter jurisdiction pursuant to *Rule 12(b)(1)* is **DENIED.**

. Kern's motion to dismiss for improper venue pursuant to *Rule 12(b)(3)* should is **DENIED.**

. Kern's motion to dismiss for failure to state a claim pursuant to *Rule 12(b)(6)* is **DENIED** as to the first cause of [*46] action for violation of the *Commerce Clause*, the second cause of action for violation of Equal Protection of the laws, the fourth cause of action for preemption by the CIWMA, and the sixth cause of action for invalid exercise of the police power. The motion is **GRANTED** as to the third cause of action for preemption by the Clean Water Act and the fifth cause of action for preemption by the California Water Code.

IT IS SO ORDERED.

DATED: October 24, 2006

Judge Gary Allen Feess

United States District Court

PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. I am employed at Freeman Freeman Smiley LLP at 1888 Century Park East, Suite 1900, Los Angeles, CA 90067.

On August 9, 2012, I caused the:

APPLICATION TO FILE AMICUS BRIEF AND AMICUS CURIAE BRIEF OF NATIONAL ASSOCAITION OF CLEAN WATER AGENCIES ON BEHALF OF RESPONDENTS

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The documents were served by the following means:

☒**BY OVERNIGHT DELIVERY.** I enclosed the documents in sealed envelope(s) or package(s) addressed to the persons on the above service list, for collection and delivery by FEDEX, with the delivery fees fully prepaid and placed the envelope for collection and delivery, following our ordinary business practices. I am readily familiar with this business' practice for collecting and processing correspondence for overnight delivery. On the same day that envelope(s) or package(s) are placed for collection and delivery, said envelope(s) or package(s) will be deposited for receipt by FEDEX on said date in the ordinary course of business.

I also served an electronic copy of the documents to the Supreme Court of the State of California before 5:00 p.m. today.

Dated: August 9, 2012

Mary B. Montgomery