

Defending Beneficial Use: Local Ordinances and Tort Lawsuits

NACWA Law Conference

November 12-14, 2008

**Christopher M. Westhoff, Assistant City Attorney,
Public Works General Counsel
City of Los Angeles**
Chris.Westhoff@lacity.org

**James B. Slaughter, Principal
Beveridge & Diamond, P.C.**
jslaughter@bdlaw.com



The written and oral information contained in this presentation is for discussion purposes only and is not legal advice.

Recent Legal Developments

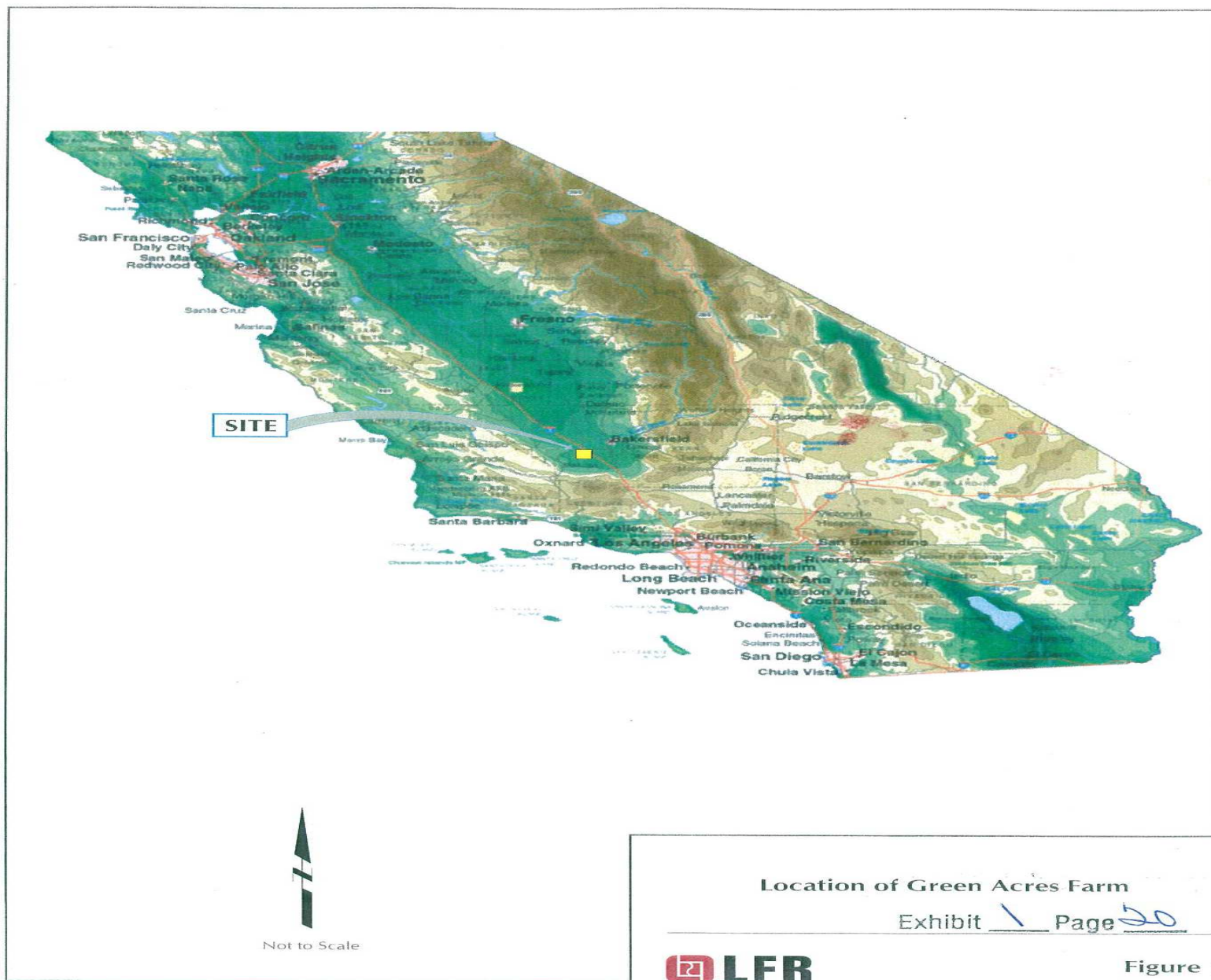
- Victory over Kern County, CA
 - Biosolids ban rejected by federal court and Kern must pay \$1.1 MM attorneys fees; Kern appealed
- *Wyatt* case in Virginia
 - Nuisance and toxic tort lawsuit ongoing
 - Plaintiffs have produced six expert reports claiming biosolids cause health impacts
- *Gilbert* case in Pennsylvania
- Augusta cow cases in Georgia
- Center for Food Safety lawsuit against EPA challenge Part 503 Rules

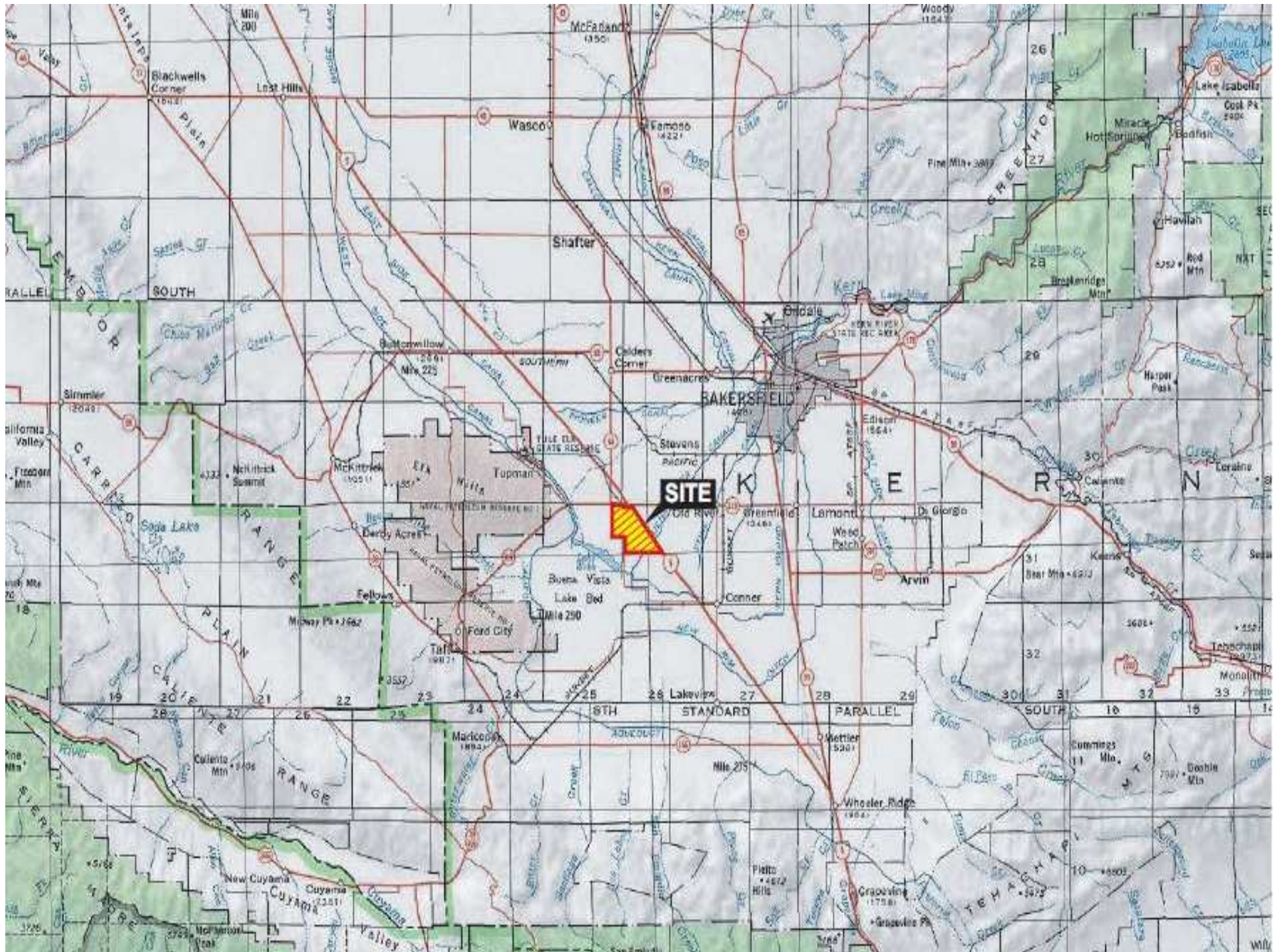
***City of Los Angeles et al.
v.
Kern County, CA***



Land Application In Kern County

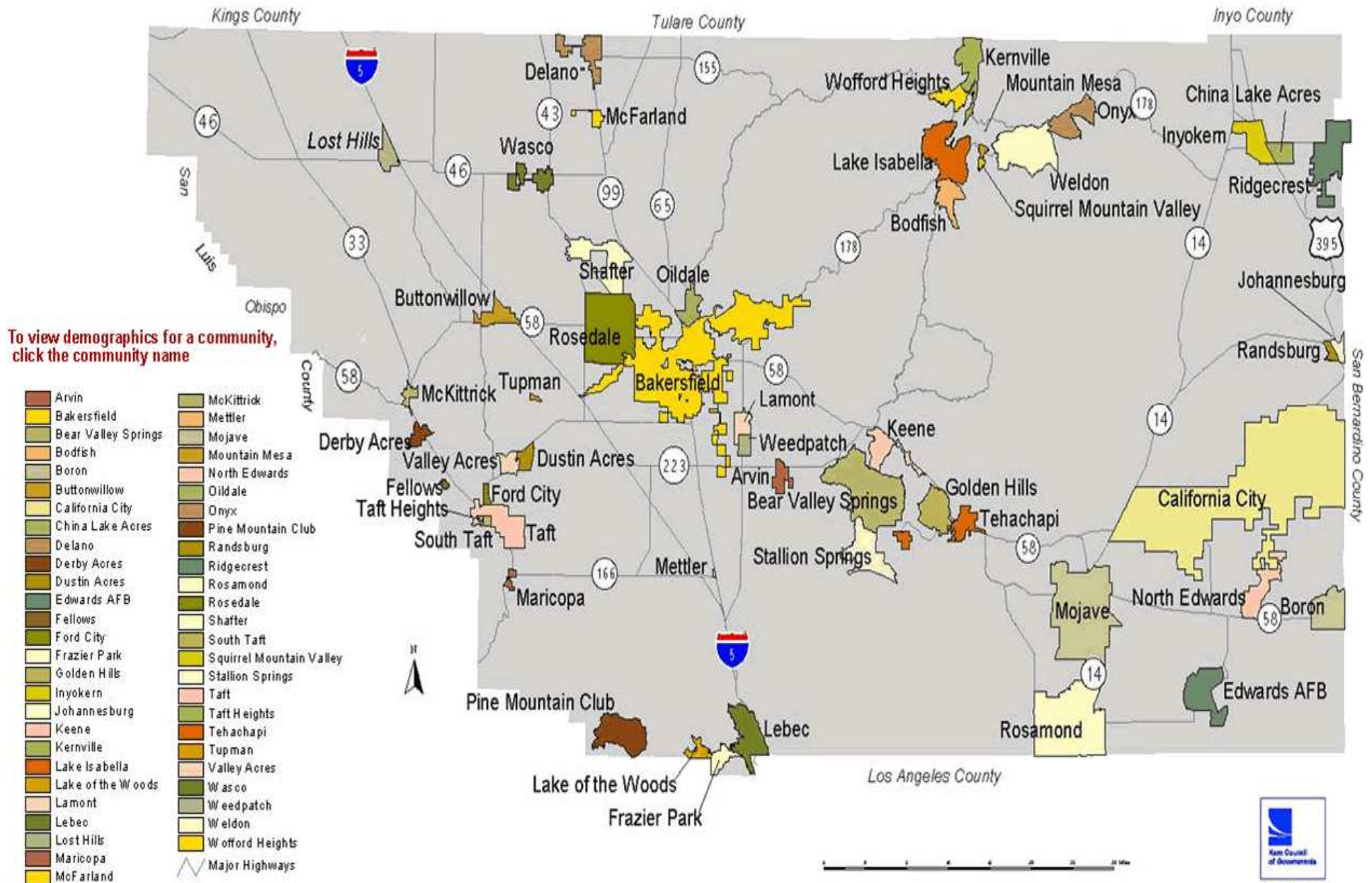
- Land application in unincorporated Kern County
 - Green Acres Farm
 - 4,700 acres owned by City of Los Angeles (“City”)
 - Accepts 100% of City’s thermophillically digested Class A biosolids
 - City of Bakersfield effluent applied under separate contract
 - Tule Ranch/Honeybucket Farms
 - 4,000 acres, near Kern/King County border
 - Accepts some of L.A. County and Orange County’s biosolids; lime stabilization on-site





CENSUS PLACES AND CITIES

KERN COUNTY, CALIFORNIA
BAKERSFIELD MSA









Measure E: Ballot Initiative to Ban Land Application

- Asserted bases:
 - “[N]umerous serious unresolved issues about the safety, environmental effect, and propriety” of biosolids land application
 - Unsubstantiated allegations of risk to groundwater
 - Purported need to protect reputation of local agribusiness interests
- Does not apply to Kern cities/incorporated areas that land apply Class B biosolids within their borders (Bakersfield, Taft, Wasco, Delano)
- Exception for home use of bagged products

Preemption in Action – *L.A. v. Kern County Overview*

- June 6, 2006: Ban approved
 - Kern County approves Measure E by a 83% vote
- Aug. 15, 2006: Lawsuit filed
 - Plaintiffs, entities engaged in recycling of biosolids in Kern County, file suit in federal court alleging the Ban violated federal and state constitutions and biosolids law, and the CA Integrated Waste Management Act
- Sept. 18, 2006: Plaintiffs file for preliminary injunction against enforcement of Measure E

Preliminary Injunction Arguments

- Plaintiffs support preliminary injunction with declarations from:
 - Numerous respected scientists and consultants
 - Municipal employees from each Plaintiff sanitation district
 - Each private Plaintiff (truckers, farmers, etc.)
- Kern County offers no evidence of environmental harm or health risk from land application
 - Only submits declaration of Ellen Harrison alleging scientific uncertainty

Preliminary Injunction Granted

- Nov. 22, 2006: Judge Fees grants preliminary injunction
 - Plaintiffs “likely to succeed” on three legal claims
 - Court: Biosolids land application “indeed is the most environmentally sound method of managing material”
 - Injunction also in public interest, given environmental benefits of biosolids and “no evidence at all” of harm

Permanent Injunction Granted

- Aug. 10, 2007: Court ruled the Ban violated the California Integrated Waste Management Act and Commerce Clause
 - “Further research has occurred since [the 2002 NAS Report] but as yet has uncovered nothing that would change the EPA’s conclusion that land application compliance with the Part 503 regulations is safe.”
- March 2008: Kern County appealed to the U.S. Court of Appeals, Ninth Circuit
- Plaintiffs granted \$1.1 MM in attorney fees that Kern must pay; Kern has appealed

Kern County Appeal

- Water Environment Federation (WEF) files amicus brief in support of Plaintiffs: “Decades of successful land application experience and numerous studies demonstrate that biosolids recycling is a sound practice banning land application was not science-based.”
- National Association of Clean Water Agencies (NACWA) files amicus brief in support of Plaintiffs: “[A]llowing individual communities to pass bans on land application would undermine the current regime of biosolids management.”

Why Was This Case Important?

- The City needed to protect its **\$13 million dollar** investment in Green Acres, its **\$16 million dollar** investment in going to Class “A” biosolids at Hyperion and Terminal Island and to protect itself from increased yearly costs for handling its biosolids of at least **\$4 to \$5 million** if the City was forced to leave Kern County and land apply in Arizona.
 - Over 10 years the City was seeking to “protect” a financial investment and future costs if we lost, of close to **\$70 million**.
- The City needed to protect land application at Green Acres as the most environmentally friendly method of handling this material.
 - A move to Arizona or to a “combustion” solution would have increased the environmental impact of our program.

Why Was This Case Important?

- Every town, city and county produces and must recycle or dispose of biosolids every day
- 66% of all California biosolids are recycled through land application
- 55% of U.S. biosolids recycled to soil
- If Kern had been successful in banning land application through the initiative process it would have endangered biosolids recycling nationwide

Wyatt et al. v. Sussex Surry and Synagro

- Typical toxic tort claims asserted:
 - **Nuisance:** Claim that the land application caused an unreasonable interference with the use and enjoyment of the property and caused damages
 - **Trespass:** Claim that the biosolids, or gases or particles from the biosolids, invaded the property and caused damages
 - **Negligence:** Claim that land applying biosolids is bound to be risky and dangerous to nearby residents and causes injury

Wyatt Background

- Aug. 12, 2005: Land application begins
 - Synagro begins land application on 1,300 acres of loblolly pine forest in Surry County, VA owned by co-defendant Sussex Surry, LLC
 - Land application continues through Jan. 2, 2006 and resumes briefly from Oct. 31 - Nov. 11, 2006
- Nov. 17, 2006: Lawsuit filed
 - Plaintiffs, two families who live directly to the West of the Site, file a complaint seeking \$18 million in damages
 - Plaintiffs' Lawyer has stated commitment to ending land application of biosolids in Virginia

Media Eager to Publicize Allegations of Public Health / Environmental Threats



Motion to Dismiss

- June 7, 2007: Defendants argue:
 - Lawsuit is preempted by federal and state regulations
 - Nuisance claim is barred by Virginia's Right to Farm Act
 - Plaintiffs failed to state a claim for trespass
- Nov. 2, 2007: Judge Sharret's ruling
 - Plaintiffs' claims are not preempted as a matter of law
 - Right to Farm defense hinges on whether land application was negligent
 - Dismissed the trespass claim
- June 6, 2008: Court rules Plaintiffs must file expert reports

Wyatt et al. v. Sussex Surry and Synagro

Plaintiffs' Allegations:

- Claim severe nuisance impacts from odors and particles
- Allege that unspecified chemicals or pathogens caused 62 year old Sandra Wyatt to contract a pulmonary disease her doctors believe to be fatal (hypersensitivity pneumonitis, a form of pulmonary fibrosis), and that her husband contracted chronic obstructive pulmonary disease (COPD).
- All 6 plaintiffs claim that they suffered significant respiratory symptoms from exposure to biosolids, including coughs, severe nasal congestions and drips, and running and burning eyes and throats.
- Plaintiffs have recruited 6 well-credentialed PhD and MD experts who are hostile to land application.

Wyatt et al. v. Sussex Surry and Synagro

Plaintiffs' Experts:

- **Rob Hale**, Ph.D. Marine Science, Professor, Virginia Institute of Marine Science.
 - Attacks land application and the Part 503 rules, attacks the bioaerosol studies of recent years that have indicated that pathogens are not coming off of land application sites in any significant quantities.
- **Suresh Pallia**, Ph.D. Microbiology, Professor, Texas A&M.
 - Argues that prior studies finding a lack of bioaerosols coming from land application sites are not applicable to a silviculture site.
- **Kenneth Rudo**, Ph.D. Toxicology, State Environmental Toxicologist. NC Department of Health and Human Services.
 - Surveys some literature and concludes that persons living near land application sites suffer adverse effects from biosolids.
 - Claims that in his role as "North Carolina State Environmental Toxicologist" he has seen several unidentified sites where biosolids caused health impacts.

Wyatt et al. v. Sussex Surry and Synagro

Plaintiffs' Experts

- **Lake Morrison, M.D.**, Instructor and Director, Interstitial Lung Disease Clinic, Duke University Medical Center.
 - Has been Sandra Wyatt's treating pulmonologist since 2007.
 - Withdrew opinion that exposure to antigens caused pulmonary fibrosis; still believes biosolids exposure caused some pulmonary problems.
- **Sanford Marcuson, M.D.**, Chief, Hospital Medical Staff, Sentara Williamsburg Community Hospital, Williamsburg, VA.
 - Has been Sandra Wyatt's primary care physician since 2003, also treated husband Eddie Wyatt for a time.
 - Based on his review of unspecified biosolids literature and his observations of the Wyatts, concludes that their pulmonary problems have been caused by exposure to biosolids.
- **Paul Rosenfeld, Ph.D.**, Soil Chemistry, Environmental Chemist with consulting firm SWAPE ("Soil Water Air Protection Enterprise), Santa Monica, CA.
 - Prepared an air dispersion model to attempt to show exposure of the Wyatts to chemicals associated with odor.

Gilbert v. Synagro

- Pennsylvania Court of Common Pleas, York County (filed July 2007)
- 37 individual plaintiffs living near the land application site, have filed a lawsuit alleging that a land application over 3 days in July 2007 caused nuisance impacts and physical health impacts, ranging from alleged bad odors and coughs to alleged Staph aureus infections.
- Complaint has three counts: nuisance, negligence and trespass and seeks over \$2.5 MM in damages.
- Chris Nidel, the environmental activist/plaintiffs' lawyer leading the *Wyatt* suit, has teamed with a prominent personal injury law firm, the Peter Angelos firm.
- Defendants have moved to dismiss the lawsuit on preemption grounds because biosolids are regulated under EPA and state rules.

Toxic Tort Suits – Outlook

- To Date:
 - No case to date has linked biosolids to human health problems through a valid expert report, court finding, or jury verdict
 - No case to date has resulted in any expert being qualified to try to link biosolids to human health
 - EPA addressed and rebutted the underlying allegations in these cases in a comprehensive letter dated December 2003 denying a petition to ban land application.

Toxic Tort Suits – Outlook

- *Wyatt* and *Gilbert* cases represent the most serious threat to date to land application of biosolids.
- Synagro is on the front lines defending land application from these well-funded tort suits.
- Cities that land apply are likely to be sued directly in the next wave of lawsuits or will suffer the consequences if Synagro is unsuccessful in defending these lawsuits.
- Defense costs have potentially significant financial implications for the industry.

Augusta Cow Cases

- Toxic tort cases in Georgia alleging harm to cattle from grazing on biosolids fertilized fields



Boyce v. Augusta-Richmond Co **(2003)**

- Plaintiffs alleged the POTW breached its contract to the dairy farmers
- Trial in 2003: Jury awarded \$550,000 of the \$12.5 million in damages sought
- The jury made no finding of fact that the cattle were injured by the biosolids
- Augusta paid the jury verdict

McElmurray v. Augusta-Richmond Co.

- Another farmer alleged cattle deaths resulted from grazing on land applied field
- Case dismissed on the basis that Plaintiffs had insufficient evidence linking the cattle deaths to biosolids
- 2005: Georgia Court of Appeals reversed the decision
- 2007: Case settled with a payment to the Plaintiffs and no admission of liability

Aftermath: New Cases Against Augusta, EPA and Researchers

- Plaintiffs making allegations in new lawsuits regarding:
 - Accuracy of Augusta's environmental reporting in City's federal grant applications
 - Accuracy of researchers' work related to a paper published regarding soil conditions after application of Augusta biosolids to pastureland
- Recent court decisions:
 - False Claims Act lawsuit against city/county government dismissed
 - Some false statement claims against researchers dismissed; another motion to dismiss is pending

McElmurray v. U.S. Dep't of Agriculture

- Feb. 28, 2008: Georgia federal court grants McElmurray USDA prevented planting credits
 - “[E]xperts have yet to reach a consensus as regarding the safety of land application of sewage sludge generally.”
 - “Other evidence of record calls into question the fairness and objectivity of the EPA’s opinions with respect to the sludge land application program... Senior EPA officials took extraordinary steps to quash scientific dissent and any questioning of EPA’s biosolids program.”

McElmurray v. U.S. Dep't of Agriculture

- Biosolids community speaks out against the Court's ruling and misleading media coverage:
 - Mar. 11, 2008: NACWA letter to EPA Assistant Administrator Ben Grumbles urging an appeal
 - Mar. 20, 2008: Chris Peot, DCWASA, letter to Virginia Biosolids Expert Panel addressing flaws in Associated Press article regarding McElmurray case
 - USDA does not appeal

McElmurray v. U.S. Dep't of Agriculture

- Center for Food Safety claims to have provided EPA a sixty-day notice letter of a forthcoming citizen suit.
- CFS will seek to overturn Part 503 regulations
- EPA in December 2003 rejected a petition from CFS seeking to impose a moratorium on land application.

Defending Beneficial Use: Local Ordinances and Tort Lawsuits

NACWA Law Conference
November 12-14, 2008

**Christopher M. Westhoff, Assistant City Attorney,
Public Works General Counsel
City of Los Angeles**
Chris.Westhoff@lacity.org

**James B. Slaughter, Principal
Beveridge & Diamond, P.C.**
jslaughter@bdlaw.com



The written and oral information contained in this presentation is for discussion purposes only and is not legal advice.