SUPERIOR COURT OF THE STATE OF CALIFORNIA

IN AND FOR THE COUNTY OF TULARE

COUNTY SANITATION DISTRICT NO. 2 OF LOS ANGELES COUNTY, et al., Petitioners and Plaintiffs v. COUNTY OF KERN, et al, Respondents and Defendants	Case No.: 242057 TENTATIVE DECISION
AND RELATED CROSS ACTION	

This matter came on for trial on April 26, 2016, in Department 12 of the above entitled court. All parties appeared by their counsel of record. The court having considered the testimony, exhibits, and arguments of the parties, finds as follows:

Prior Proceedings:

On June 6, 2006, the voters of Kern County approved Measure E, barring the land application of all biosolids (as below defined) in unincorporated Kern County.

Shortly thereafter most of the same Plaintiffs here filed suit in federal District Court, seeking to invalidate and enjoin enforcement of Measure E on essentially the same grounds asserted here. On November 20, 2006, the District Court granted a preliminary injunction, and later summarily adjudicated that "E" violated the Commerce Clause of the U.S. Constitution, and

was preempted by California general law. Judgment was entered for Plaintiffs. City of Los Angeles et al v. County of Kern (C.D. Cal. 2006) 462 F. Supp 2nd 1105.

The Ninth Circuit reversed (City of Los Angeles et al v. County of Kern (9th Cir. 2009) 581 F. 3rd 841), with a finding of lack of prudential standing in federal court. On remand, the District Court declined to exercise supplemental jurisdiction and, on 11-9-2010, dismissed the case.

On January 26, 2011, Plaintiffs filed this case in Kern County Superior Court. The matter was transferred to this court, where it was filed on April 18, 2011. This court granted a preliminary injunction on June 9, 2011, and rejected Defendant's contention that the suit was time barred under the federal savings statute. The Court of Appeal affirmed the granting of the preliminary injunction and ruling on the savings clause. The Supreme Court reversed (City of Los Angeles, et al v. County of Kern (2014 59 Cal 4th 618) solely on the grounds of the federal savings statute, finding that this action was not timely filed under that statute in state court after dismissal in federal court.

After remand, on cross motions for summary judgment, this court found that the action was timely under our state savings statute, and denied both motions on February 5, 2015.

The case proceeded to trial, from April 26, 2016, through May 6, 2016. The parties filed post trial briefs and the matter is before the court for decision.

It should be noted that this case is related to previous litigation among most of the parties relating to Defendant's 1999 ordinance G-6638, in essence barring land application of any but class AEQ biosolids effective January 1, 2003.

That litigation resulted in a decision by the Court of Appeal (CSD2, cited below) finding that the ordinance did not violate the federal commerce clause, but that both Kern County and the City of Los Angeles were required to perform environmental reviews per CEQA.

That case was filed well over a decade ago and is still not final. Los Angeles' EIR was just recently found deficient by this court, and the judgment is now on appeal. Kern County has yet to prepare its environmental review.

Material Facts:

The court adopts (and adapts) those portions of the decision in CSD2 (cited below) regarding historical background and regulatory context, as set forth below:

Sewage sludge is a product of wastewater treatment. The safe and efficient disposal of sludge is a modern and worldwide concern–a by–product of population growth and modernization. Recent decades have witnessed increasing governmental involvement in the effort to safely and efficiently treat sewage and dispose of sewage sludge. In the United States, efforts at regulation have involved the executive, legislative, and judicial branches of government at the federal, state and local levels. This historical background briefly describes the process that reduces sewage to sewage sludge and then discusses the disposal and use if that sludge.

"Sewage sludge" is defined by federal regulations 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) (2005).) More generally, sewage sludge refers to the mud-like deposit originating from sewage and created by the treatment processes used to decontaminate wastewater before it is released into local waterways. Sewage sludge typically consists of water and 2 to 28 percent solids. (68 Fed. Reg. 61084, 61086 (Oct. 24, 2003).) To illustrate, the Joint Water Pollution Control Plant located in Carson, California (Carson Plant) produces sewage sludge by detaining wastewater solids in an anaerobic digester for approximately 18 days. After digestion, the remaining solids are dewatered in a centrifuge that produces a residue that is approximately 25 percent solids. The Carson Plant refers to these residues as "biosolids"-a term that is not defined by federal regulations, and the meaning of which varies with the context in which it is used. Some use the term to mean sewage sludge that has been stabilized and disinfected for beneficial use. To others, the term helps emphasize the material is a recyclable resource with potential beneficial properties.

Because the percentage of solids in sewage sludge varies, there is no constant for converting the wet weight of sewage sludge to its dry weight. Dry weight is defined by federal regulation to mean the mass reached after drying to essentially 100 percent solids content. (40 C.F.R. § 503.9(h) (2005).)

Scope of Sewage Sludge Production

National Production

The United States Environmental Protection Agency (EPA) recently estimated the annual production of sewage sludge from the 16,000 wastewater treatment plants in the United States at both 7 million tons and 8 million dry metric tons. In 2003, the EPA estimated that approximately 60 percent of sewage sludge was treated and applied to farmland, 17 percent was buried in landfills, 20 percent was incinerated, and 3 percent was used as landfill or mine reclamation cover. The land application of sewage sludge occurred on approximately 0.1 percent of the agricultural land in the United States. Other application sites include forests, strip-mines, reclamation sites, and public spaces like parks, golf courses, and highway median strips.

The EPA has estimated the United States production of human sanitary waste, a precursor of sewage sludge, at approximately 150 million wet tons per year. This figure can be restated as about 0.518 wet tons per person per year or 2.8 pounds per person per day. By comparison, in 1997, the United States annual production of animal waste from cattle, hogs, chickens and turkeys (which includes more than manure) was estimated at 1,365,661,300 tons, or roughly 5 tons for every person in the United States.

California

CASA estimated that in 1998 California produced approximately 672,330 dry tons of biosolids and approximately 67.8 percent was applied to land, 10.6 percent was composted, 9.1 percent was buried in landfills, 5.6 percent was incinerated, and 6.9 percent was put in onsite and offsite storage.

The EPA estimated that in 2003 California produced 777,480 dry tons of treated sewage sludge. Approximately 50 percent of this sewage sludge was applied to land, 30 percent was put in landfills, 10 percent was transported out of state, 3 percent was incinerated, and the balance was put in long-term storage or treatment or put to other uses.

Conflict between urban and rural interests has caused controversy over the land application of sewage sludge in California. In 1998, approximately 73 percent of land-applied biosolids in California was applied within the geographical jurisdiction of the Regional Water Quality Control Board, Central Valley Region (Central Valley Water Board), a region that generated only 16.7 percent of California's total production. In contrast, the Los Angeles and San Francisco Regions generated 37.9 percent and 14.4 percent, respectively, and received less than 0.1 percent and 1.8 percent, respectively, of the total land-applied biosolids. The proportion of biosolids applied to land in the Central Valley Region has decreased as a result of restrictive ordinances adopted by counties.

In 1998, the Counties of Kings, Kern, Fresno, and Riverside did not have ordinances that prohibited the land application of Class B biosolids. By early 2004, these counties had adopted ordinances that prohibited the land application of Class B biosolids and were among the 17 of the 58 counties in California that had some type of ordinance related directly to the land application of biosolids.

Kern County

In 1998, approximately one-third of the biosolids applied to land in California was applied in Kern County. In 1999, County estimated that one million wet tons of sewage sludge was applied to approximately 23,594 acres of irrigated agricultural land in Kern County. The acreage, which was distributed among 14 noncontiguous sites, represented approximately 3 percent of the harvested cropland in Kern County. There is about 700,000 acres of harvested cropland in Kern County, and about 7,000,000 in California. Kern County is the largest recipient of biosolids of any county in Southern California.

As of September 1, 1999, the estimated volume of Class B biosolids brought into Kern County was 823,350 wet tons per year. The four largest sources were the City of Los Angeles (273,700), Los Angeles County (214,000), Orange County (130,300) and "Fresno" (85,000).

Statutory and Regulatory Framework

Federal

Congress enacted the Federal Water Pollution Control Act Amendments of 1972 to restore and maintain the quality of the nation's waters (33 U.S.C.A § 1251 (a)) by addressing various sources of pollution, including municipal sewage. In addition to providing extensive federal grants to finance the construction of local sewage treatment facilities, the 1972 amendments increased the role of the federal government by extending water quality standards to intrastate waters, setting technology-based effluent limitations, and implementing the water quality standards through a discharge permit system. The federal legislation became commonly known as the Clean Water Act (33 U.S.C.A. § 1251 et seq.) as a result of amendments adopted in 1977. (Pub. L. No. 95-217, § 2 (Dec. 27, 1977) 91 Stat. 1566.) The Clean Water Act reflected the judgment of Congress that the problem of water pollution caused by the discharge of municipal sewage outweighed problems associated with the building of sewage treatment facilities which, in turn, significantly increased the national production of sewage sludge.

According to Milton Russell and Michael Gruber, 'Risk Assessment in Environmental Policy-Making,' 236 *Science* 286, 289 (April 17, 1989), 'the removal of pollutants from waste water produces sludge that must be either disposed of on land, incinerated, or dumped at sea. None of these procedures are without risk to human health or the environment.' (Breyer, Breaking the Vicious Circle: Toward Effective Risk Regulation (1993) p. 97, fn. 111.)

The Clean Water Act addressed the problem of sewage sludge disposal in four ways. First, the use or disposal of sewage sludge was subjected to a permitting program (33 U.S.C.A § 1345(a)-(c)). The National Pollutant Discharge Elimination System (NPDES) permitting program set forth in the Clean Water Act regulates point sources of pollution that reach the waters of the United States. (33 U.S.C.A. § 1342.) Congress delegated the authority to issue permits to discharge pollutants under the NPDES to states with approved water quality programs. Second, the EPA was directed to develop comprehensive regulations establishing standards for sewage

sludge use and disposal (33 U.S.C.A. § 1345(d)). The Water Quality Act of 1987 (Pub. L. No. 100-4 (Feb. 4, 1987) 101 Stat. 7) amended the Clean Water Act to require the EPA to identify and set numeric limits for toxic pollutants in sewage sludge and establish management practices for the use and disposal of sewage sludge containing those pollutants. (33 U.S.C.A. § 1345(d)(2).) Third, states were allowed to establish more stringent standards (33 U.S.C.A. § 1345(e)). Fourth, grants were authorized for the conduct of scientific studies, demonstration projects, and public information and education programs concerning the safe and beneficial management of sewage sludge.

Eventually, in 1993, the EPA complied with the directive regarding regulations by promulgating Standards for the Use or Disposal of Sewage Sludge (40 C.F.R. § 503 (2005)) (Part 503), which specify that sewage-sludge may be (1) applied to land, (2) placed in a surface disposal site, such as a sewage-sludge-only landfill, (3) burned in a sewage sludge incinerator, or (4) disposed of in a municipal solid waste landfill that complies with the minimum criteria set forth in 40 Code of Federal Regulations part 258. (Part 503, subparts B [land application], C [surface disposal] and E [incineration]; 40 C.F.R § 506.4 (2005) [disposal in municipal solid waste landfill].)

A fifth option, ocean dumping of sewage sludge, was eliminated as a legal disposal option effective December 31, 1991 by the federal Ocean Dumping Ban Act of 1988. (33 U.S.C.A. §§ 1401-1445.)

The land application provisions of subpart B of Part 503 establish concentration ceilings as well as annual and cumulative loading rates for arsenic, cadmium, copper, lead, mercury, nickel, selenium and zinc (40 C.F.R § 503.13 (2005)); set the standards for the reduction of pathogens and vector attraction (40 C.F.R. § 503.15 (2005)); and include requirements for monitoring (40 C.F.R. § 503.16 (2005)), recordkeeping (40 C.F.R. § 503.17 (2005)), reporting (40 C.F.R. § 503.18 (2005)).

Pathogenic organisms cause disease and "include, but are not limited to, certain bacteria, protozoa, viruses, and viable eggs of parasitic worms" (40 C.F.R. § 503.31(f) (2005)), such as tapeworms, whipworms, roundworms, and hookworms.

Vectors are rodents, flies, mosquitoes, or other organisms capable of transporting infectious agents; vector attraction refers to the characteristic of sewage sludge that attracts these carriers. (See 40 C.F.R. § 503.31(k) (2005).)

Pathogen reduction standards contained in Part 503 are used to differentiate between Class A sewage sludge and Class B sewage sludge. (See 40 C.F.R. § 503.32 (2005).) While Class A sewage sludge is sufficiently treated to essentially eliminate pathogens, Class B sewage sludge is treated only to substantially reduce them. As a result, the requirements for land application of Class B sewage sludge are more stringent than the requirements imposed in Class A sewage sludge.

At the time of their adoption the EPA stated it was confident the regulations in Part 503 adequately protected the environment and public health from all reasonably anticipated adverse effects. Nevertheless, Part 503 has been described as "quite controversial." Citizens and environmental organizations have questioned the adequacy of the chemical and pathogen standards contained in Part 503. As a result of these concerns and the requirement in the Clean Water Act that the sewage sludge regulations be reviewed every two years, the EPA commissioned the National Research Council (NRC) of the National Academy of Sciences to independently review the scientific basis of the regulations governing the land application of sewage sludge.

In July 2002, the NRC published its report-Biosolids Applied to Land: Advancing Standards and Practices-and made the following overarching findings: "There is no documented scientific evidence that the Part 503 rule has failed to protect public health. However, additional scientific work is needed to reduce persistent uncertainty about the potential for adverse human health effects from exposure to biosolids. There have been anecdotal allegations of disease, and many

scientific advances have occurred since the Part 503 rule was promulgated. To assure the public and to protect public health, there is a critical need to update the scientific basis of the rule to (1) ensure that the chemical and pathogen standards are supported by current scientific data and risk-assessment methods, (2) demonstrate effective enforcement of the Part 503 rule, and (3) validate the effectiveness of biosolids-management practices.

In response to the NRC report, the EPA developed a final action plan that established objectives and identified research and regulatory projects designed to strengthen its sewage sludge use and disposal program. To date, 503 has not been amended to address "emerging contaminates" such as PFCs.

California

In response to Congress's delegation of authority to the states to issue NPDES permits, the California Legislature amended the Porter-Cologne Water Quality Control Act (Wat. Code, § 13000 et seq.) to require the State Water Board and its regional counterparts to issue discharge permits that ensure compliance with the Clean Water Act. (See Wat. Code, § 13370 et seq.) As a result, on May 14, 1973, California became the first state to be approved by the EPA to administer the NPDES permit program.

In August 1993, as part of administering the NPDES permit program, the Central Valley Water Board adopted a general order setting the waste discharge requirements (WDR) for the use of sewage sludge as a soil amendment and approved an initial study and negative declaration in connection with that general order. Under the general order, a person wanting to apply biosolids to agricultural land could file with the Central Valley Water Board a notice of intent to comply with the general order, a filing fee, and a pre-application report and, upon receiving an approval letter from the Central Valley Water Board, could begin to apply biosolids subject to the terms and conditions in the general order. Projects using sewage sludge that did not fit the conditions contained in the general order were required to apply for individual WDR's.

On May 26, 1995, the Central Valley Water Board modified its earlier general order by adopting Order No. 95-140 titled "Waste Discharge Requirements General Order For Reuse of Biosolids and Septage on Agricultural, Forest, and Reclamation Sites." The order set minimum standards for the use of biosolids, including Class B sewage sludge, as a soil amendment.

Also in 1995, the California Legislature specifically addressed the land application of sewage sludge by adopting Water Code section 13274 which required the State Water Board or the regional boards to prescribe general WDR's for the discharge of treated sewage sludge used as a soil amendment. (Wat. Code, § 13274, subds. (a) & (b).) Water Code section 13274 also states that it does not restrict the authority of local government agencies to regulate the application of sewage sludge to land within their jurisdiction.

Other California legislation affecting the disposal and use of sewage sludge is the California Integrated Waste Management Act of 1989 (Pub. Resources Code, § 40000 et seq., which requires the use of recycling and source reduction to reduce the amount of solid waste going into landfills. (§ 41780.) More specifically, counties were required to adopt integrated waste management plans that described how 25 percent of the solid waste stream would be recycled, reduced, or composted by 1995 and how 50 percent would be achieved by 2000. This legislation caused sewage sludge to be diverted from disposal in landfills in favor of recycling it as a fertilizer applied to agricultural land. For example, in 1995 the City of Oxnard purchased 1,280 acres in Kern County for $1,174,000 as part of a program to apply its sewage sludge to agricultural land and thus reduce its use of landfills.

The California Integrated Waste Management Act of 1989 defines "solid waste" to include "dewatered, treated, or chemically fixed sewage sludge [that] is not hazardous waste, manure, vegetable or animal solid ... ." (§ 40191, subd. (a).)

According to one set of estimates, the portion of California's annual sewage sludge production disposed of in landfills was 60.2 percent in 1988, 43.3 percent in 1991, 9.1 percent in 1998, and 30 percent in 2003.

By 2000, several of the nine regional boards had issued WDR's for the use of biosolids as a soil amendment. To provide a single regulatory framework for the land application of treated sewage sludge in California, in August 2000, the State Water Board issued Water Quality Order No. 2000-10-DWQ, entitled "General Waste Discharge Requirements for the Discharge of Biosolids to Land for Use as a Soil Amendment in Agricultural, Silvicultural, Horticultural, and Land Reclamation Activities" (General Order 2000-10). General Order 2000-10 also was intended to comply with the directive in Water Code section 13274 and streamline the permitting process. The State Water Board's final program EIR relating to General Order 2000-10 was approved on June 30, 2000. General Order 2000-10 allowed Class B biosolids to be applied to agricultural land subject to numerous conditions, including site, crop, and harvesting restrictions.

The State Water Board's approval of General Order 2000-10 and certification of the final program EIR was vacated as a result of a CEQA lawsuit brought by County. The Third Appellate District held the EIR was defective because it did not evaluate, as alternatives to General Order 2000-10, either a requirement that sewage sludge be treated to Class A standards before application as a soil amendment or a prohibition on the use of treated sewage sludge where fruits and vegetables are grown.

Our reference to the unpublished opinion as part of a factual narrative of the historical development of California's regulation of sewage sludge is not a citation or reliance upon that opinion as legal authority for purposes of California Rules of Court, rule 976.

To comply with that decision, the State Water Board's 2004 Final PEIR for Biosolids considered, but rejected, the two alternatives specified by the Third Appellate District. Based on that final EIR, the State Water Board adopted Water Quality Order No. 2004-0012 on July 22, 2004 (General Order 2004-0012). General Order 2004-0012 allows Class B biosolids to be applied to agricultural land subject to numerous conditions, including site and crop restrictions.

The Farm has been operating under two WDRs - - one from 1994 and one from 1995. The Regional Board has requested that the WDRs be updated or coverage under the 2004 General Order be applied for. RBM told Board in 2006 that it would upgrade a WDR, but has not yet done so, and has not applied for coverage under the 2004 General Order.

Kern County

County first attempted to regulate the application of sewage sludge to agricultural land within its jurisdiction in August 1998, when it adopted Ordinance No. G-6528, an interim urgency ordinance which became operative on September 1, 1998, and was repealed effective December 31, 1999. Ordinance No. G-6528 allowed the application of Class A and Class B sewage sludge in Kern County by any person who obtained a permit from the County Environmental Health Services Department, paid a $7,250 application fee, and observed specified management practices, site restrictions and other requirements.

On October 19, 1999, the Kern County Board of Supervisors adopted Ordinance No. G-6638 (Ordinance G-6638) to substitute a new chapter 8.05 into Kern County Ordinance Code. Ordinance G-6638 provided for two regulatory stages. The first stage, which lasted three years, allowed the application of Class B sewage sludge on sites that had already been approved, but precluded the approval of any new sites. The second stage was scheduled to become effective on January 1, 2003, and allowed only exceptional quality (EQ) sewage sludge to be applied to land in Kern County.

EQ sewage sludge must meet one of the Class A pathogen reduction alternatives set forth in 40 Code of Federal Regulations part 503.32 (a) (2005); the more stringent pollutant concentration standards set forth in 40 Code of Federal Regulations part 503-13(b)(3)(2005); and a level of vector attraction reduction required by 40 Code of Federal Regulations part 503.33 (2005).

In late 2002, County adopted Ordinance No. 6931, which amended chapter 8.05 of the county code to impose a permitting requirement on the application of EQ biosolids to land within the

unincorporated area of Kern County, and found that the project was exempt from CEQA pursuant to section 15308 of the Guidelines, which concerns actions by regulatory agencies to protect the environment.

In connection with its consideration and adoption of an ordinance regulating the land application of biosolids within its jurisdiction, County undertook a process that involved the public and produced an administrative record of over 25,000 pages.

In 1997, County established a Biosolids Ordinance Advisory Committee to assist in the preparation of a draft ordinance. The committee included representatives from farming organizations, sludge generators and applicators, environmental groups, County staff and other interested parties. In all, the committee held five public meetings between November 20, 1997, and April 29, 1999. Expert presentations on the scientific issues involving biosolids were received at two public hearings held by County.

In January 1998, County pursued early consultation with public agencies and interested parties to obtain comments on the potential environmental effect of its proposed form of biosolids ordinance. After revisions to the proposed ordinance, County again sought early consultation in May 1999 in connection with determining whether compliance with CEQA would require preparation of an EIR for the proposed ordinance. After the second consultation period was complete, an initial study was prepared.

On August 10, 1999, an environmental checklist was completed which found the project-that is, enactment of the ordinance-would not have a significant effect on the environment, and which recommended the preparation of a negative declaration.

Measure "E"

The concern about out of county generators of biosolids applying them to land in Kern County appears to have begun with, and been maintained by, Kern County Water Authority ("KWA") and at least some of its board members.

KWA originally was concerned regarding whether there might be an effect on the groundwater under the Kern Water Bank ("KWB") resulting from the application of biosolids to soil at adjacent Farm. This was a perfectly reasonable concern.

However, rather than commissioning studies to ascertain facts relating to that concern, KWA (the proponents) began a campaign to completely ban the application of biosolids to any Kern County land, other than within its cities, by those cities.

After Kern repudiated the proponents' demand for a complete biosolid ban, with its findings that restricting such application to class AEQ biosolids was sufficient to protect the health and welfare of Kern's citizens and the environment, and adopted Ordinance 6-6638 [The subject of CSD2] proponents of a ban pressed on.

In 2002, proponents urged the board of supervisors to adopt an ordinance banning land application of biosolids on any property identified as having "usable" groundwater, which covered essentially the entire valley, including the Farm. Proponents referred to their proposal as restricting land application to areas with marginal groundwater. The County revised the subject ordinance to add additional requirements for land application, but did not ban it.

Another biosolids task force was convened to evaluate practice under the ordinance and groundwater issues, and reported back in September, 2003. That report concluded that "The predominate body of evidence has failed to establish a clear indication of risk to either humans or natural resources due to land application activities when those are conducted in accordance with existing regulations." It was recommended that research be conducted regarding the impact of land application on groundwater. KWA still did not do so.

KWA opposed a proposed statewide General Order (2004) regarding land application of biosolids (see discussion below - - "Unknown"). The State's response to these comments stated that there was no health risk to such application done per applicable state and federal regulations.

Proponents presented a complaint to the Grand Jury, which released a report in 2005 (see discussion below). Proponents then approached their State Senator, who proposed legislation prohibiting the import of sewage sludge into Kern County (SB926). The bill passed the Senate, but failed in the Assembly (per Defendants, Plaintiffs "killed it" there).

All these having failed, proponents put forward the "Keep Kern Clean Ordinance of 2006", to be known as "Measure E". It qualified for the ballot as an initiative measure. "Keep Kern Clean" was the official sponsor.

As of that time, KWA had still done no studies regarding the existence, nature, or extent, if any, of groundwater contamination below the Farm, nor any groundwater flow studies to determine whether groundwater beneath the Farm could ever reach the KWB.

The sponsor had a website, and circulated campaign material via that website, in newspapers, and door to door. The tone of it all was that Southern California, and specifically Los Angeles, was polluting Kern County by dumping its sewer products there. There was no mention in the material of any evidence of actual threats to health, welfare, or the environment. There was no mention of any competing interests nor of any possible accommodation of those interests.

At the time "E" was voted on, 61% of Kern County voters lived in incorporated cities within the county. 44% lived in the City of Bakersfield. On June 6, 2006, the initiative passed with 83% of the vote in its favor.

The Farm

Plaintiffs RBM, R & G Fannucchi, and Sierra Transport are private contractors involved with land application of biosolids at the Farm. RBM is the farm manager; R & G Fannucchi grows and sells the crops, and Sierra Transport hauls the biosolids from City of Los Angeles' treatment plant and deposits where directed by RBM or Fannucchi on the farm. The biosolids are then immediately disked into the soil.

"The Farm" consists of c. 4700 acres located in the southwest corner of Kern County. It originally consisted of soil with high salt/ph levels, known as "alkali" soil. It is not conducive to growing crops. Prior owners tried to make productive use of the Farm. Their degree of success is reflected in the name they gave it - - "Poverty Farm".

The general area is such that Kern County determined it to be the most appropriate area to locate dairies. It was designated a "Dairy Corridor". It is zoned exclusive agriculture.

City of Bakersfield effluent has been used for a significant portion of Farm's irrigation water since the late 1980's. There is currently a contract in effect which requires Farm's owners

to use this effluent to irrigate crops on Farm some time into the future. This contract is not contingent on continued land application of biosolids.

Orange County originally land applied biosolids on the Farm. Beginning in 1994, Los Angeles began doing so. In 2000, City of Los Angeles purchased the property and improved it, at a cost of c. $13,000,000. City contracted with RBM to accept up to 800 wet tons per day of biosolids for application on the Farm.

As the result of years of such application the Farm now consists of good organic soil. It produces "strong" (parties stipulation) fields of corn, alfalfa, milo, wheat, rye, and sudan grass. Most is sold to the dairies in the area as part of their cow feed. Some goes to feed animals in the Los Angeles Zoo, and some to feed Los Angeles Police Department horses.

Between 1996 and 2002, Kern County received 23 complaints about the Farm, most related to flies and odors. Kern received three complaints from 2003 to 2012, and none since 2012. All noticed violations by Farm of Kern's biosolids ordinance were resolved to County's satisfaction.

Testing Results

In 2015, and for the first time, Kern conducted soil and water tests in the Farm; took samples from Los Angeles' Hyperion treatment plant, and sampled the City of Bakersfield effluent delivered to the Farm.

Kern tested for certain metals and "trace organic compounds", specifically perfluorocarbons, PFOS and PFOA. Both are found in significant quantities in the human environment, particularly homes, where they occur in nonstick pans, fabrics, carpets, sofas, and more. Kern also tested for triclosan (TCS) and triclocarban (TCC), used in soaps and toothpaste, and polybrominated diphenyl ethers (PBDEs) used in flame retardants.

Kern selected four of the 54 "fields" on the Farm to test, three based on the highest rate of application of biosolids. One was an attempt at a central, but also had application. Four shallow "wells" (3 feet deep) and four deeper (50 to 70 feet) were drilled.

No TCS, TCC, nor PBDE was found below the first foot of soil. No PFCs were found below 30 feet in the soil. The water table under the Farm varied from about 50 feet in the northwest corner to over 100 feet on the southeastern side.

Some, but not all, of the samples showed the presence of these compounds in the parts per billion (ppb) or parts per trillion (ppt) range. None exceeded any regulatory standard or advisory screening level. The concentration of PFCs in the groundwater varied from 11 to 30 ppt. This was less than the advisory limit, which itself is not a risk based standard.

No expert would state that, to a reasonable degree of scientific certainty, what was found in the groundwater was caused by the land application of biosolids.

There was no evidence that metals migrated. To the contrary they, and the TCS, TCC, and PBDE bind to the soil.

The amount of PFCs in biosolids will be declining, as their use in consumer products is being phased out.

There was no evidence of what risk, if any, these compounds present, in these quantities, to human health, animal health, or the environment.

PFCs, TCS and TCCs occur in the human environment and consumer products in concentrations many times more than found at the Farm. In fact, they only exist in residential sewer waste because they were passed there from humans who absorbed them in their environment. Industrial waste, a small percentage (10-20%) of sewer product, is regulated to minimize the introduction of these compounds, and metals, into the waste stream.

Commerce

As stipulated by the parties (57-60), no out of state biosolids generators have land applied biosolids in unincorporated areas of Kern County; no out of state biosolids generators have applied for, or received, permits to land apply biosolids in Kern County; no out of state generated biosolids are land applied at the Farm, and no out of state generators have sought to do so, and Plaintiffs have not land applied or sought to land apply any biosolids generated outside of California.

Other facts are set forth in the analysis portion below.

Contentions of the Parties:

I

PREEMPTION

Plaintiffs allege that measure "E" is invalid because it is preempted by the mandates of the California Integrated Waste Management Act (CIWMA), Part 1 of Division 30 of the Public Resources Code ("PRC"), sections 40051 f.f.

Kern contends that under what they say is a recent change in California preemption law, and for other reasons, "E" is not preempted and is valid.

The Statutes

CIWMA states, in applicable part as follows:

§40051. Duties of Board and local agencies

In implementing this division... local agencies [which include counties] shall do both of the following: [Emphasis supplied]

(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.....

§40052. Purpose of division

The purpose of this division is to reduce, recycle, and reuse solid waste generated in the state to the maximum extent feasible in an efficient and cost effective manner....

§40053. Relation to municipal land use restrictions

This division, or any rules or regulations adopted pursuant thereto, is not a limitation on the power of a city, county, or district to impose and enforce reasonable land use conditions or restrictions on solid waste management facilities in order to prevent or mitigate potential nuisances, if the conditions or restrictions do not conflict with or impose lesser requirements than the policies, standards, and requirements of this division and all regulations adopted pursuant to this division. (Emphasis supplied)

§40191. "Solid waste"

(a) Except as provided in subdivision (b) [none applicable here], "solid waste" means... dewatered, treated, or chemically fixed sewage sludge...

The Legislature has also found that "The diversion of solid waste from disposal at solid waste landfills and the application of landfill cover materials are matters of statewide concern and provisions governing those activities must be applied in a uniform and consistent manner throughout the state"(Stats 1996, ch.978, §1.(a)).

Applicable Law

In a new Supreme Court case, People v. Rinehart (filed August 22, 2016: 2016 DJDAR 8680) the Court, in a case involving federal over state law preemption, discusses the possible

bases for preemption as being: 1) an express preemption provision; 2) occupying a relevant field that would foreclose state regulation; 3) imposing obligations which would make it impossible to comply with both federal and state law, and, citing Hines v. Davidowitz (1941) 312 U.S.52, 4) the principle that a state may not adopt laws impairing the accomplishment and execution of the full purposes and objectives of Congress. This principle is referred to as "obstacle preemption."

Hines is the bedrock case cited by numerous subsequent Supreme Court and California cases, and is thus worth looking at in detail as an expression of the principles behind the concept of preemption. There, Justice Black addressed the question of whether a state alien registration act was preempted by federal law.

Black observed that the federal government represents the collective interests of all the states, and for national purposes – "We are but one people, one nation, and one power." The interests of the people of the whole nation require that the federal power regarding national interest "...be left entirely free from local interference." He asked whether if a local rule caused a difficulty, would the locals alone suffer, or all the Union?

Citing the Supremacy Clause of the United States Constitution, Black concluded that "No state can add to or take from the force and effect of [a Federal treaty or statute]."

Justice Black, in the portion relied upon in subsequent cases, synthesized prior cases as follows:

> This Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula. Our primary function is to determine whether, under the circumstances of this particular case, [state] law stands as an obstacle to the accomplishments and execution of the full purposes and objectives of Congress.

Later Supreme Court cases, citing Hines, incorporated the last above phrase as part of the entire preemption formulation. They find two kinds of preemption - - express and implied, and sub and sub-sub classes of implied. There is "field" preemption when Congress by implication intended to occupy a field of law exclusively, and there is "conflict" preemption, which has sub-classes.

As stated in Sprietsma v. Mercury Marine, (2002) 537 U.S.51,("Sprietsma") "We have found implied conflict preemption where it is impossible for a private party to comply with both state and federal requirements... or where state law stands as an obstacle to the full purposes and objectives of Congress' [citing Hines and another case]."

Some cases refer to the first clause as "conflict" preemption, or "direct conflict" preemption, and the latter as "obstacle" preemption.

This language continues in Supreme Court cases. Oneok v. Learjet (2015) 135 S. ct,1591; Hughes v. Talen Energy Marketing, No.14-614, April 19, 2016, 2016 DJDAR 3693.

Defendant contends that California does not recognize obstacle preemption as a basis for finding local law preempted by state law. We therefore need to look into the cited cases.

California Supreme Court cases add "inimical" to Justice Black's list. Sherwin – Williams Co. v. City of Los Angeles (1993) 4 Cal. 4th 93 ("Sherwin-Williams") is one of our touchstone cases.

The Court there noted that California's "supremacy clause" is article XI, section 7 of our Constitution, stating that "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."

This same provision used to justify local "police power" regulation does, by implication, prohibit any local laws which "conflict" with general state law.

The issue in Sherwin-Williams was whether a Penal Code section prohibiting the sale of aerosol paint cans to minors and setting certain other requirements relating to aerosol paint preempted a city ordinance to display the cans out of the public's reach.

Addressing the issue in that context, the court there stated the following:

"The general principles governing preemption analysis are these." "If otherwise valid local legislation conflicts with state law it is preempted by such law and is valid."

"A conflict exists if the local legislation... duplicates, contradicts, or enters an area fully occupied by general law..."

"... local legislation is contradictory to general law when it is inimical thereto."

"We must next determine whether the ordinance contradicts the statute. It does not. The former is not inimical to the latter.... the ordinance does not prohibit what the statute commands or command what it prohibits."

Next up is Great Western Shows, Inc. v. County of Los Angeles (2007) 27 cal. 4th 853, ("Great Western"). The issue was whether county could ban gun shows on county property in light of state laws regulating gun sales. The Court there cites Sherwin-Williams for the rule; finds that there is no express preemption, nor field preemption; discusses what it calls "direct conflict", using the "inimical" definition, finds none, and then goes on to state that this "...does not end the matter" and takes up obstacle preemption and Blue Circle Cement, Inc. v. Board of County Commissioners (10th cir.1994) 27 F.3rd 1499("Blue Circle").

"Thus, Blue Circle Cement, Inc. and related cases cited by Great Western, stand broadly for the proposition that when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of the activity, local regulation cannot be used to comprehensively ban the activity or otherwise frustrate the statute's purpose."

It went on to distinguish obstacle preemption on the basis that state law did not promote or encourage gun shows, but merely recognized their existence and regulated them to promote public safety. The Court also noted that the ordinance did not completely ban gun shows in the county, but only on county owned property.

The Supreme Court here had an opportunity to address Great Western's obstacle preemption argument by holding that this was not the law in California, as now claimed by Kern. The Court not only did not do so, it at the very least implicitly recognized the grounds (previously stating that the lack of direct conflict and field preemption did not end the matter) and dealt with it on the merits by showing that it just was not applicable to the facts in that case.

We will look at Blue Circle itself, because it came up again in City of Riverside v. Inland Empire Patient's Health and Welfare Center Inc. (2013) 56 cal. 4th 729 ("Riverside").

There, a cement plant sought to use fuels which contained hazardous waste to heat its cement kilns. To prevent that, the county purported to use its zoning authority to regulate hazardous waste disposal, recycling, and treatment within its borders. Blue Circle contended that such regulation was preempted by the federal Resource Conservation and Recovery Act ("RCRA").

The court cited two types of implied preemption - - field and conflict, with its two sub-sets - - impossibility of compliance with both and, citing Hines, when state law stands as an obstacle to the accomplishment of the full purposes and objectives of Congress.

RCRA expressly allowed state and local governments to adopt waste management regulations more stringent than the federal's. Thus, if obstacle preemption were to apply, the court would have to find that the local regulation frustrated the purpose of the federal statute. Blue Circle held that the court must consider whether the local regulation is consistent with the structure and purpose of the federal statutory scheme as a whole.

The court found RCRA's purpose was to encourage recycling and the reuse of hazardous waste, and to replace land disposal with advanced treatment, recycling, and incineration (compare CIWMA).

The Court said that, consistent with "Hines and its progeny" local ordinances affecting hazardous waste treatment, disposal, and recycling "...cannot imperil the federal goals under RCRA." Local regulatory authority must be viewed within the parameters of RCRA's stated national objective to minimize land disposal of hazardous waste by encouraging recycling. Allowing more stringent regulation did not allow locals to ban outright important activities RCRA was designed to promote. "Ordinances that amount to an explicit or de facto ban on an activity that is otherwise encouraged by RCRA will ordinarily be preempted by RCRA."

Big Creek Lumber Co. v. County of Santa Cruz (2006) 38 Cal. 4th 113 9("Big Creek Lumber") is another case cited by the parties, but where the Court did not refer to or discuss obstacle preemption, which was not applicable to the facts of that case.

The Court there referenced as "preemption principles" field preemption and the direct conflict ("inimical") test of mandating what state law forbids or forbidding what state law requires. The Court's analysis was mainly based on field preemption ("preemption by implication of legislative intent").

The issue was whether local zoning fixing where timber could be harvested was preempted by state law regulating how timber could be harvested. The Court found no direct conflict and no clear legislative intent to preempt local zoning authority over the location of commercial activities.

Los Angeles cites Fiscal v. City and County of San Francisco (2008) 158 Cal. App. 4th 895 ("Fiscal") as a case using the "obstruction" test as California law. It does.

San Francisco passed, by initiative, a comprehensive gun control measure which, among other things, prohibited the private possession of handguns. The Court held that the measure was preempted by state general laws.

The Court started with the Sherwin-Williams tests and language and found the measure preempted under that language. It then went on to hold that the ordinance was also preempted under the obstruction test, stating:

"If the preemption doctrine means anything, it means that a local entity may not pass an ordinance, the effect of which is to frustrate a broad, evolutional statutory regime enacted by the Legislature. Section 3 of Proposition H stands as an obstruction to the accomplishment and execution of the full purposes and objectives of the legislative scheme regulating handgun possession in this state. For that further reason, it is preempted [citing Sherwin-Williams for the proposition that local legislation is preempted if it is inimical to accomplishments of the state law's policies]."

The Court also stated that "an ordinance that substantially burdens the purchasing and possession of handguns by banning their sale..." is "contrary" to and in "contradiction" with state law.

The Court, in a footnote, cited with approval a law review article stating that the principle behind the "duplicates", contradicts, and "inimical" language is that "... the invalidity of local law arises not from any specific intention of the state legislature that local governments be barred from regulating, but from the effect that the local action would have on the state's ability to exercise its sovereignty."

This brings us to Riverside.

The question there was whether California's medical marijuana laws preempted a local zoning ordinance banning businesses that distribute marijuana. The Court held that nothing in State law expressly or impliedly limited the inherent zoning power of local jurisdictions.

Under "Principles of Preemption" the Court cited Constitution article XI, section 7; Big Creek Lumber, and Sherwin-Williams to the effect that a local ordinance was void if it conflicted with general state law; it conflicted if it duplicated, contradicted, or entered an occupied field; and contradicted if it was inimical.

Then, in the portion relied upon by Kern, "The 'contradictory and inimical' forum of preemption does not apply unless the ordinance directly requires what the state statute forbids or prohibits what the state enactment demands" [citing Big Creek Lumber; Great Western Shows, and Sherwin-Williams](emphasis supplied). "Thus, no inimical conflict will be found where it is reasonably possible to comply with both the state and local laws."

The Court found no express preemption and no implied field preemption. The Court went to considerable length to emphasize that there was no state policy of promoting or encouraging the use of medical marijuana. It repeatedly noted that state laws were only limited, narrow exceptions to sanctions in state criminal and nuisance laws; that state laws had "modest objectives", and that there was "no comprehensive scheme for the protection or promotion of facilities that dispensed medical marijuana."

The Court noted the Court of Appeal's language that there was no "express conflict" - - another wording, apparently of the "directly" requires or prohibits formulation in the above cited "inimical" analysis. The Court found no "inimical" contradiction or conflict "in the sense that it is impossible simultaneously to comply with both."

The Court then addressed the arguments raised by Inland Empire based on the language of Blue Circle Cement and its discussion of that case in Great Western Shows. The focus was on language to the effect that even if state law allowed local regulation, localities could not ban an activity sanctioned and encouraged by state law, which brings in the "obstruction" sub prong of preemption analysis.

The Court, again, had the opportunity to reject the premise that the "obstruction" prong did not exist under California law, and again did not do so. As it did in Great Western, it distinguished on the basis that the predicate for its operation, namely a state policy promoting or encouraging an activity, did not exist in this case. The Court stated "The premise set forth in Great Western Shows is not applicable here", for the reason that there was no state scheme for the protection or promotion of facilities that dispense medical marijuana.

Fiscal was not mentioned, let alone overruled or disapproved.

In context, Riverside is based only on the direct conflict sub-prong of implied preemption, and its definition that sub prong does not either expressly nor impliedly rule out the existence of the "obstruction" sub prong.

In a concurring opinion, Justice Liu wrote "...to clarify the proper test for state preemption of local law." He directly addressed the issue Kern asserts here, which is, does California follow the entire federal preemption formula, or does it exclude the "obstacle" prong?

Liu states that the majority opinion "...should not be misunderstood to limit the scope of the preemption inquiry."

He notes that if local law prohibits an activity that state law authorizes or promotes it is obviously possible to comply with both by simply not engaging in the activities, "But that obviously does not resolve the preemption question."

He goes on to say "...in federal preemption law, we find a more complete statement of conflict preemption," and cites Sprietsma language to the effect that there is conflict preemption when it is impossible to comply with both or when state law is an obstacle to the accomplishments of the full purposes and objectives of Congress, and states "This more complete statement no doubt applies to California law" and "I do not understand today's opinion to hold otherwise".

We know that the decision drafting process used in the Supreme Court includes circulating drafts of not just the majority opinion but also concurrences or dissents. The majority thus has an opportunity to address in its opinion any points made in a concurrence or dissent. It is not at all unusual for them to do so.

It is thus a fair and reasonable inference here that the lack of any majority response to Justice Liu's explicit statement of California law indicates agreement with its conclusion.

Kern also cites Kirby v. County of Fresno (2015) 242 Cal. app. 4th 940 ("Kirby") to the same effect as Riverside. There, a County ordinance banned marijuana dispensaries and the cultivation of any marijuana in all zones. The ordinance made violation a misdemeanor, and a nuisance which the County could abate.

Plaintiffs sued to invalidate the ordinance on the ground that it was preempted by state law.

The Court held that the criminal component was preempted by state law but, per Riverside, the ban by zoning was not. The Court used the same analysis as the Court in Riverside.

Later in the opinion, the Court discussed federal preemption. In a part labeled "conflict preemption," the Court used the same "inimical" test of the ability to comply with both. In a subsequent part, labeled "obstacle preemption", the Court stated the test as being whether operation of federal law was frustrated by state law and found on the facts that it was not.

There was no discussion of obstacle preemption in the state v. local preemption analysis.

Under a discussion of "contradiction" in the state preemption analysis, in the context of direct conflict, the court observed that "The impossibility -of- simultaneous-compliance test used in Inland Empire [Riverside] appears to be more difficult to meet than the test used previously", citing Ex Parte Daniels (1920) 183 Cal 636, which used the term "direct conflict", and Sherwin Williams, which cited Daniels as there being preemption when a local law is "contradictory" to general law. In other words, the Court in Kirby just commented on Riverside's definition of direct conflict. This was not in the context of a reference to obstacle preemption.

The Court went on to find that the Riverside definition applied "...to determine whether a conflict of the contradictory type exists." (emphasis supplied). It then added "but see" Justice Liu's concurrence in Riverside.

Again, the holding in Kirby did not involve obstacle preemption, which we know the Court distinguished from conflict preemption per its later discussion as two separate issues in the federal preemption analysis.

The statement relied upon by Kern is in no way a holding that there has been a change in state law excluding obstacle preemption in California.

A look at post-Riverside cases does not enlighten. Quesada v. Herb Thyme Farms (2015) 62. Cal. 4th 298 was a federal preemption case. Riverside was not mentioned.

People v. Rinehart, above, was also a federal preemption case, decided on obstacle grounds, and found no obstacle. Again, Riverside was not cited. (It did cite City of Los Angeles v. County of Kern (2014) 59 Cal 4th 618 for the proposition that there is a presumption against preemption in areas where local agencies have a firmly established regulations role.)

In San Francisco Apartment Association v. San Francisco (9-19-16) 2016 DJDR 9687, the court addressed the issue of whether a San Francisco ordinance requiring a ten year wait after withdrawing a (rent controlled) apartment from the rental market before it could be merged into another unit conflicted with state law (Ellis Act).

Under "The Principles of Preemption" the First Appellate District cited the same previously discussed cases - - Big Creek Lumber; Riverside; Sherwin Williams - - and never explicitly referred to obstacle preemption. It did, however, use as its test whether the local law "penalized" an owner exercising rights under the Ellis Act rights, or "impermissibly conditioned" such rights.

It stated "The principle readily distilled from these cases is that a public entity may not impose an inevitable and undue burden... on a landlord's exercise of its right under the Ellis Act...." The Court cited another case holding that the Ellis Act preempts local regulations "...in so far as they interfere with and restrain the ability of landlords seeking to remove ...rental units from the rental market." The court concluded the local law was "fatally inconsistent" with state law and was void.

Synthesis and Conclusion

As expressed in Hines, the underlying principle of the doctrine of preemption is that purely local concerns are trumped by broader over-arching interests - - federal over state; state over county and city. The same principle is expressed in the regional welfare doctrine in evaluating local police powers (and both preemption and local police power authority derive from the same source - - article XI, section 7 of the California Constitution).

The concept that one jurisdiction's law is superior to and supersedes that of another is derived from the concept of "superior sovereign".

If the King says "A" is the rule, and the Duke says "B" is the rule, the King's rule prevails, not because it is a better rule on the merits, but just because the King is the King and the Duke is subservient to the King.

In the more egalitarian United States the principle has a similar, but functional basis. In our hierarchy of sovereignty - - United States over individual states, and states over municipalities (counties, cities, and local districts) it is recognized that the top tier concerns what is best for the entire nation and, for states, what is best for the entire state. These prevail over contrary purely local interests. It would effectively be anarchy were it otherwise.

Lesser jurisdictions are generally allowed to enact rules addressing, and only affecting, their particular locality in the same subject matter areas addressed by higher sovereigns but only

provided they do not differ in principle from the rules of the superior sovereign (expressed in our Constitution as "not in conflict with general laws")

These rules were adjudicated long ago, both at federal and state levels. They are relatively simple, though still a subject of lively controversy in their application (in this State, often gun laws and marijuana laws).

Kern argues that California's preemption law differs from federal law in that there is no preemption if a local ordinance obstructs, frustrates, interferes with, or "stands as an obstacle to the accomplishment and execution of the full purposes and objectives..." of state law, and conflict preemption can only occur if local law prohibits what state law requires or requires what state law prohibits, such that it is not possible to simultaneously comply with both.

Kern's position is contrary to the bedrock principles of preemption. The principles do not differ with the level of sovereignty. There is no analytical difference between federal v. state preemption and state v. local preemption principles.

Kern's position is also not sustained by case authority. Kern cites to language from only two cases to support its position – Riverside and Kirby. The use of case authority to support a position does not consist of finding sound bites or headnotes as labels to slap on an issue. Case authority is used to find principles of law so the party may argue why the principle applies to the case at bar.

In two Supreme Court cases (Great Western Shows and Riverside) the Court cited and discussed Blue Shield Cement and its formulation of obstruction preemption. In neither case did the Court hold that obstruction preemption was not the law in California. Both times the Court treated it as the law, analyzed it with reference to the facts of their case, and distinguished it.

Justice Liu, perhaps presciently aware that someone might take the majority language out of context and urge it as a change in the law, concurred to emphasize that it was not a change in the law, and that the entire formula, as expressed in federal cases, was the law in California. The majority did not disagree.

Kirby commented on the Riverside definition of direct conflict (inimical) but did not state that "obstruction preemption" was not the law in California.

Kern states that the holding of a case is limited to the facts of that case. That is not literally correct. We rarely if ever see different cases with identical facts.

What is correct is that you need to look at the facts of the cited case to find the circumstances to which the principle in question was applied, in order to properly analyze whether that principle applies to the facts and circumstances of the case at issue.

Thus, a court does not need to bring up and discuss in the abstract principles or rules which have no application to the facts of the case, such as stating the entire preemption rule when the "obstruction", prong is not applicable.

We started this section discussing Hines and will end it with Hines.

Black's main point was that preemption analysis is not the mechanical application of a bright line rule. It involves determination whether, by whatever test or label you attach to it, the lower sovereign's rule stands as an obstacle to the fulfillment of the full objectives of the higher sovereign's rule.

As stated by the District Court (City of Los Angeles v. County of Kern (2006) 462 F. Supp. 2nd 1105, "...Measure E appears to thwart the statute's [CIWMA] express purpose of promoting recycling of waste such as biosolids before other methods of disposal."

One jurisdiction's interference with another jurisdiction's efforts to comply with CIWMA's requirements, by banning a commonly used and cost efficient method of recycling and re-use is not consistent with and is destructive of the state's policies and requirements.

Every court which has addressed this issue has concluded that "E" is an obstacle to the fulfillment of the objectives of CIWMA. Not only does it prevent Kern from complying with CIWMA (see section here on direct conflict) it makes it, though not impossible, more difficult and expensive for Plaintiffs to comply.

"E" is therefore invalid.

Direct Conflict Preemption

No party contends that any State law expressly preempts "E" (but see PRC 40053), nor that "E" is preempted because the Legislature intended to "occupy the field."

That leaves conflict preemption. The "obstruction" prong has been discussed above. Declining to recognized the existence of that prong, Kern argues that the only applicable criteria is direct conflict preemption, as defined in Riverside, and that Plaintiffs must prove that "E" prohibits what state law requires, or requires what state law prohibits, such that it is impossible to simultaneously comply with both.

Kern points out that the evidence showed it was possible for Plaintiffs to comply with CIWMA without any land application of biosolids in Kern County. The evidence did indeed show this. Agencies other than the City of Los Angeles are already doing so, and there is at this time capacity in the system to absorb what Los Angeles is trucking to the Farm in Kern County.

The "possible/impossible" test means reasonably possible. Per above, it is reasonably possible now. It would cost considerably more in total dollar terms, but that is a negligible per person or household amount. It does restrict management choices, but not all choices are foreclosed. But what if the "snowball effect" is considered? What if Arizona, Nevada, and all counties in California with available land application sites enacted similar bans?

Plaintiffs could still theoretically blast all their biosolids into deep space at a cost of billions of dollars more, but no one would contend that this is a reasonably possible solution.

Kern looks at alternate technologies - - deep well injection (already being done by Los Angeles) and alternate fuel technologies - - already being explored by Los Angeles, but not yet practically available, though it may be in the not too distant future.

Kern looks to future possibilities other than land application, and those are indeed being explored and will probably eventually be the norm, but are not yet.

It is equally reasonable to look at the nearer future possibility that if "E" is allowed to be enforced other jurisdictions will do the same, in which case, until alternate technologies are commercially available, it will not be reasonably possible for Plaintiffs to comply with CIWMA.

Kern seems to believe that if it is possible for Plaintiffs to comply with CIWMA without land application in Kern County then that is the end of the matter. It is not. Kern neglects to consider the other side of the coin - - can not only Plaintiffs but also Kern simultaneously comply with "E" and CIWMA?

Plaintiffs can comply by simply not doing the activity banned by Kern. But is it possible for Kern to comply with CIWMA when it has completely banned the land application of biosolids in its jurisdiction?

What must Kern do to comply with CIWMA?

CIWMA (PRC 40051) mandates that all local agencies reduce the streams of solid waste (defined as including treated sewer sludge) going into landfills and incinerators.

CIWMA requires that local agencies promote recycling and composting and maximize the use of all feasible recycling options.

CIWMA does not say each agency shall do this just for their jurisdiction. The stated purpose of CIWMA is to reduce, recycle, and reuse waste generated in the state (40052).

Land application of treated biosolids is not only without questions "feasible" it is extensively used by generators in California and the entire United States.

Composting is not recycling or reuse per se. To complete the re-use process, the compost must be land applied. "E" bans its use in Kern County (except for small amounts bagged for residential use).

The express purpose, in this context, of CIWMA is to recycle and reuse biosolids to the maximum extent feasible "... in an efficient and cost-effective manner ..." (PRC 40052).

Local conditions and restrictions are allowed only if they do not conflict with the policies and requirements of CIWMA (PRC 40053).

The Legislature has also decreed that the diversion of solid waste from landfills is a matter of statewide concern and that provisions governing such activities must be applied in a uniform and consistent manner throughout the state (statutes 1996, ch. 978).

The correct question under Kern's theory of the law is, is it possible for Kern to comply with CIWMA's requirement that it promote recycling and reuse of biosolids, including specifically by land application; and CIWMA's requirement that it maximize the use of all recycling options, by completely banning a widely accepted and comprehensively regulated form of recycling and reuse?

The answer is obvious. "E" prohibits what CIWMA requires. Even under the restricted test proposed by Kern, "E" is in direct conflict with, and inimical to, CIWMA, and is therefore, for that reason also, void.

II
IS MEASURE "E" A VALID EXERCISE OF KERN COUNTY'S POLICE POWER?

Under the California Constitution, a municipality has broad authority, under its general "police power", to enact laws which bear a reasonable relationship to the public welfare.

Courts recognize that such ordinances are presumed to be constitutional, and come before the court with every intendment in their favor.

A party challenging the validity of an ordinance thus bears the burden of proving that the law lacks a reasonable relationship to the public welfare.

If the ordinance represents a policy choice, and the necessity or propriety of the enactment is a question upon which reasonable minds may differ, the legislative judgment controls and courts will not interfere with the legislative policy judgment.

As stated in the still controlling case of Associated Home Builders of the Greater East Bay v. City of Livermore (1976) 18 Cal. 3d 582 (hereafter, "Livermore"), the first question is, whose welfare must the ordinance serve? "...municipalities are not isolated islands remote from the needs and problems of the area in which they are located; thus an ordinance superficially reasonable from the limited viewpoint of the municipality may be disclosed as unreasonable when viewed from a larger perspective."

Livermore prescribes a process to analyze this issue. The extent and bounds of the affected region are determined as a question of fact by the trial court. The court then forecasts the probable effect and duration of the ordinance; identifies the competing interests affected, and then determines whether the ordinance, in light of its probable impact, represents a reasonable accommodation of the competing interests.

The ordinance must have "...a real and substantial relation to the public welfare....There must be a reasonable basis in fact, not in fancy, to support the legislative determination." (Livermore)

The reconciliation and accommodation depends upon the needs and characteristics of the community and its surrounding region.

The initiative process is a constitutionally (article IV, section 25) reserved power of the people. Whatever authority a municipal legislature has to enact an ordinance may also be exercised by the people, by initiative. Conversely, the validity of such enactment is subject to the same criteria as one by the municipal legislature.

Before returning to the Livermore formula for weighing conflicting interests, we start with an analysis of whether "E" is valid even if no regional issues are involved. In other words, does it have a reasonable relation to the public welfare of the citizens of Kern County?

To paraphrase, is there a reasonable basis in fact, not fantasy, to support a legislative determination that the ordinance bears a real and substantial relation to the public welfare?

We start with the legislative determination.

The Livermore requirements of factual basis for a police power enactment is in the context of a discussion of the regional welfare doctrine. It is however a requirement for validity of any police power enactment itself. Without any factual basis and real relation to the public welfare, such an enactment would be "capricious" and invalid.

The "Keep Kern Clean Ordinance of 2006" (Measure E, or "E") repeals the previous chapter 8.05 (banning class B biosolids but allowing class AEQ) and prohibits the land application of any materials containing biosolids in unincorporated Kern County.

As defined, "biosolids" would include the effluent from the City of Bakersfield's waste water treatment facility.

The "Purpose and Intent" provisions (8.05.010) state as follows:

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

it is the intent of this chapter that the land application of Biosolids shall be prohibited in the unincorporated area of Kern County.

The use of the term "fantasy" is unfortunate and not helpful. In context of the rest of the Livermore court's analysis, it appears to refer to public concern without any factual basis. Not that such concern is not natural, normal, and must be addressed, but just that such unsupported concern is not a sufficient basis to support a legislative determination.

The terms "real and substantial" give us more to work with. "Real", in this context, means scientifically supported facts as opposed to speculation, conjecture, and theoretically possible but unknown.

"Substantial", in accord with Mr. Webster, means real, actual, true, not imaginary; considerable; genuine; strong and solid, as opposed to miniscule, negligible; trivial.

The basic public welfare at issue is protection of the people of Kern County from risks to their health, economy, and environment caused by the land application of biosolids.

"Relation to" public welfare, in this context, means connected to in a causal relationship. In other words, will "E" in fact protect the public from or mitigate such risk.

Is there proof that there is no reasonable basis in fact for Kern's position ("claim") that "E" bears a real and substantial relation to the public welfare of the citizens of Kern County?

Los Angeles' proof consisted of the testimony of experts and the facts and studies they relied on. Los Angeles presented experts Schofield, Pepper, Kester and Johnson. The essence of their opinions is that biosolids, as land applied to grow crops, are safe and pose no health risk.

There is not a single documented incident of an adverse health effect from the land application of biosolids. Studies state that it is safe to grow human food crops with class B biosolids, and that there are no adverse effects to humans consuming meat or milk from cattle or cows eating feed grown with biosolids applied to the fields on which the feed is grown.

There was also (undisputed) evidence that biosolids benefit poor soil (such as "Poverty Farm") and turn unproductive alkali land into productive ag land with good organic soil. Los Angeles presented evidence regarding internal dust control and how flies have been mitigated.

Los Angeles has thus met its burden of producing evidence to the effect that there is no basis in fact for "E"'s public welfare claims.

What evidence did Kern present in rebuttal?

It must be noted that all such evidence is a retrospective effort to justify "E". At the time of its adoption, there was no stated factual basis whatsoever. In fact, as a result of the initial efforts of the proponents (appearing to be KWA people) Kern adopted the "AEQ" ordinance (replaced by "E"), discussed in more detail below, and made findings that the ordinance was sufficient to protect the safety, health, and welfare of Kern and no complete biosolids ban was necessary.

Taking up E's claim in reverse order:

1. Flies and Odor.

Kern presented testimony from various nearby owners and users regarding odors and numerous flies.

The testimony of a horse ranch owner and from the owner of a gas station complex was not at all credible. Both moved into the area well after biosolids were being applied on the Farm.

There was credible testimony from a truck facility (he couldn't say where the flies came from - - he didn't ask) and personnel from Lake Buena Vista.

The gist was that there were a lot of flies - - particularly in the summer - - and that there was an odor (comparable to that from a dairy) while the biosolids were being dumped and disked in. However, per a Kern Health Department investigation, and given the existence of over 45,000 cows in dairies in the area, they could not verify where the flies came from. The evidence was that flies do not propagate in biosolids, but do in manure.

There was no evidence that there would be no fly problem if biosolids were banned. There was evidence that flies are attracted to any water and thus irrigated farm land. There was no evidence to support a reasonable inference that a county wide ban on biosolid application would eliminate or even mitigate a nuisance level of flies.

In light of Civil Code section 3482.5, and no evidence of any biosolid related fly or odor issue other than in the vicinity of the Farm (apparently Bakersfield's similarly sized farm, with class B applied biosolids, was not a problem), this is at worst a localized private nuisance and has no substantial relation to the public welfare of all of Kern County.

2. Risk of airborne particles:

There was no evidence of any such risk.

3. Causes loss of ag food land.

Not only was there no evidence of any such thing, the only evidence was to the contrary. Exhibit 333, the NSA 1996 study "Use of Reclaimed Water and Sludge for Food Crop Production" found that Class A requirements were adequate to protect public health, and that even Class B posed no significant risk to human food crops.

4. Allowing Biosolid application may cause Loss of Confidence in Kern Ag Products.

"May" is not a real and substantial nonspeculative basis for "E". Even at that, no factual basis was presented for this proposition. The only evidence was to the contrary. Los Angeles' Kern County crop reports exhibits show increasing ag sales in Kern over time, when there was significant publicity, including "E"'s negative campaign, about the fact biosolids were being land applied in Kern County.

There are statements in the NAS reviews regarding public perception of biosolids on a national level. These emphasize that public perception, even without a factual basis, does need to be addressed in order to assure the public that biosolids are safe. These were in the context of recommending that the EPA fund studies using new technology to detect chemicals previously not studied because they were non-detected or were considered safe. The NAS noted that there were "data gaps" which needed to be filled so that risk assessments could be performed.

The studies did note that in a number of places growers would not use biosolids on human food crops (including Mr. Fannuchi, managing The Farm) in order to avoid any possible public reaction.

There is no requirement that farmers apply biosolids. No attempt was made to prove that Kern County crops grown without biosolids would bear any stigma as a result of the other growers choosing to use them.

5. Biosolids Pose a Risk to Land, Air, Water, and Human and Animal Health.

As noted above, there is no such evidence. The parties stipulated (160-161) that there is no evidence of actual illness or physical injuries to human or livestock resulting from land application of biosolids at the Farm.

The undisputed evidence was that biosolids improve the soil, particularly very poor alkali soils such as existed at the Farm.

The evidence was that the compounds now questioned by Kern already exist in the air. There was no evidence that land application of biosolids contributed to what was already in the air.

There was no evidence of risk to human health.

The only evidence of risk to animal health was molybdenum, which was a known risk to cows, counteracted with copper supplements.

There was no evidence that the barely detectable levels of trace "emergents" found in groundwater under the Farm would ever get into any drinking water (and there was substantial evidence that they would not) even assuming (which was not proved) that they resulted from biosolid application. The net groundwater movement was away from the KWB.

These same compounds exist in effluent, and in the air. They have been found in the Arctic, oceans, and deserts, all without any biosolids source.

These compounds were found in trace amounts in the soil at the Farm (where, inferentially, they can be sourced from applied biosolids) but no traces were found at the depth where the groundwater begins. "Trace" amounts here means in parts per billion and parts per trillion. One witness put this in context by observing that one part per trillion is equivalent to one second in thirty two thousand years.

During, and long after "E"'s enactment, KWB reports indicate that their only items of concern in its water were metals and naturally occurring problems, including nitrates, salt, arsenic, radiation, and solids.

It is extremely telling that there is no evidence that the groundwater under KWB was ever tested for the compounds which now concern Kern. KWB is exposed to air with rain deposition to land; Kern River water, with its contaminants, aqueduct water, and oil and gas pollutants.

It would have been significant if there were evidence of such tests showing no trace of these compounds. Without such tests, it is difficult to even infer that the groundwater under the Farm is any different from that under KWB.

There was also a lack of evidence of any tests under Bakersfield's farm - - the effects of their application of Class B biosolids not appearing to concern Kern's residents at all.

6. <u>The Unknown</u>

Kern's position is in effect that even though there is no evidence of adverse effects from biosolids, they may ban them because there is not conclusive evidence that they have no effect. "E" is valid as a prophylactic measure, they argue. In Kern's view, in effect, any level of uncertainty regarding safety justifies a ban.

Kern's focus shifted from an original concern about EPA regulated compounds to unregulated compounds - - so called "emerging contaminants," more specifically PFOS, PFOA, triclosan and triclocarbon.

Kern's experts derived their opinions mainly from references in the above referenced NAS (NRC) studies to "uncertainties".

A good synopsis of the issue is found in EX1120, Kern Food Growers Against Sewage Sludge comments to the California State Water Resources Control Board's Draft PIER covering waste discharge requirements for biosolids land application (EX 1118), regarding a then proposed (2004) General Order. The comment refers to "uncertainties," in a 2002 EPA OIG report, and then a July 2002 NRC report (EX334).

The Response states, accurately, that the commenter has taken their points out of context. It pointed out that the OIG uncertainties quote was a reference to the 503 preamble, not a finding, and is an expected feature of risk assessment.

The OIG and NRC reports both relate to the fact that, due to budget constraints, the EPA has given a low priority to studying nonregulated compounds, and should now address them.

The "uncertainty" comments in the NRC studies are in the context of a failure to study nonregulated compounds, not any question of their safety. The low priority was a result of EPA's original determination that they were safe. The studies simply pointed out that in order to assure the public of such safety, they need to be studied, which would require significant time, effort, and money, which should all be provided.

The reports noted that scientific advances now enable detection of previously non – detectable compounds, and the new methods should be applied.

The "questionable methods" of risk assessment in fact related to the prior use of an unrealistic and overly conservative protocol, which overstates risk. The new method uses a still very conservative but more realistic exposure protocol.

Nothing in the sources cited by Kern's experts finds these compounds in biosolids are not in fact safe as applied. To the contrary, the cited 1996 NRC report re: food production finds that class A biosolids are safe for human food crops, and that even class B pose no significant risk.

Keeping in mind the scope of "E", it does not ban the use of the contaminants found in biosolids which are also found in other products in Kern County, where there is a relatively massive actual exposure to these compounds compared to the alleged (but not shown) minute possible exposure from land application of biosolids.

There is no evidence whatsoever of any imminent harm from biosolids. There is no mention by anyone, nor anywhere, of whether banning biosolids would, or even could, result in protection of Kern County residents from any risk posed by these compounds. There is no reference to the effect of the miniscule incremental possible risk.

The overwhelming weight of the evidence is that there is no basis in fact for any determination that land application of biosolids poses any risk to Kern County residents, let alone a real and substantial risk which would be alleviated by banning such application.

The "real and substantial" requirement precludes a justification based on Kern's theory.

"E" thus fails the initial criteria for the validity of a police power measure.

To put this all in the context of the Livermore formula, we will now go back and address these elements.

As previously noted, the Livermore formula requires the court to first determine whether the ordinance affects residents outside the enacting jurisdiction. If it does, then the court must determine the extent and bounds of the affected region; the probable effect and duration; identify the competing interests involved, and decide whether, in light of the probable impact, the ordinance represents a reasonable accommodation of the competing interests.

Affected Area

The first is patently obvious. "E" affects persons outside Kern County.

The ordinance directly affects the petitioners in this action, and, geographically, Los Angeles County (including the city of Los Angeles) and Orange County.

The ordinance indirectly affects the entire state. It is in the interest of every citizen that the ubiquitous product in question here be disposed of in the safest and least expensive manner, and with the fewest effects on air, water, the general environment, and on people.

To roughly generalize in this context there are two types of areas in the state - - those with land suitable for the application of biosolids, and those without such land. Densely populated and commercially intense areas (Los Angeles, for example) do not have such capacity. Kern, Kings, Tulare and Fresno Counties, among others, do.

The undisputed evidence is that land application of biosolids is the most efficient method of disposal, in terms of beneficial re-use, cost, and least environmental damage, and has the benefit of converting non-arable land to productive ag land. (Noting that composting itself is not a disposal - - it will be land applied somewhere).

The goal of managers is to find the nearest viable site. If Kern is ruled out, they must find another county (or state), which county is then affected by the ordinance.

In this context, the "snowball effect" is properly considered. If one county is allowed to ban the product, then all others may too, thus potentially precluding any intra state land application of biosolids.

Probable Effect and Duration

This is not a short term, nor conditional measure. "E" is a permanent total ban of the land application of treated effluent within unincorporated Kern County.

Competing Interests

On the one hand we have Kern's concern that, despite evidence that AEQ biosolids are safe when land applied, there may possibly be unknown effects.

The only identified vector was drinking water. The only evidence, all regarding a single location (the Farm) was that its groundwater would not migrate to existing drinking water sources. Unless drinking water wells were drilled on the Farm, there was no path for human exposure.

While listed as "usable" groundwater, the Farm would, as a practical matter, be the next to last place anyone would drill for drinking water (with the surrounding oil and gas sites and dairies being the last place).

On the other hand, we have the interests of the City and County of Los Angeles, and the generators in Orange County. Some have already been discussed.

All have a policy, consistent with the mandate of state law (see Section I) to beneficially reuse their sewer products.

Because of the public safety need to continuously deal with a never ending stream of sewer sludge, treatment plant managers need a flexible, diverse management plan with the most possible options.

Land application of biosolids is the most common disposal method in the United States (and California). In 2014 in California 34% was direct land applied and another 30% composted and then land applied.

Managers need multiple land application sites for flexibility. They want the closest possible sites to minimize expense (nominal per resident, but millions in the aggregate) and the adverse environmental effects (air pollution and energy use, among others) resulting from longer truck hauls.

Biosolids are also beneficial as a soil amendment, turning (as here) nonproductive alkali soil into productive good organic soil.

Also in the mix is the fact that property owners anywhere in the state have the right to use their land in any legal manner. No state law bans the application of biosolids, but rather contemplates that they will be land applied in conformity to applicable federal and state laws and regulations.

Reasonable Accommodation of Competing Interests

The bottom line is that there was no accommodation whatsoever, reasonable or otherwise. A complete ban in all areas under the jurisdiction of Kern is simply not an "accommodation".

There is no evidence nor even a mention of the existence of competing interests in the process of adopting "E", let alone any attempt to reconcile them. The evidence is that there was only parochial anti Los Angeles material promulgated, devoid of any reference to competing interests or their reconciliation. Even the Grand Jury reported (EX 596) that "The source of the biosolids is also of concern to residents."

Contrast the "E" campaign and adoption with the previous Board of Supervisors adoption of the "AEQ" ordinance. See Exhibits 263, 265, and 284, among others.

The same pressures were brought to bear on the Supervisors to ban biosolids. The County, via Mr. Price and his department, studied the issues in detail. They discussed the pros and cons of land application. They reviewed the applicable regulations and then current studies.

They appointed a task force to investigate and report on the issues. They held public hearings, with presenters by proponents and opponents of a ban.

The board then reasonably accommodated the interests - - they did not ban biosolids, but required that they be additionally treated to eliminate pathogens and reduce other contaminants - - to meet "AEQ" standards.

Los Angeles then spent many millions of dollars to provide plants to meet the AEQ standards, and all application since has been that standard.

Even after adoption, after pressure from the later "E" proponents, the county re-visited the issue, and concluded that there was no clear public health threat from the land application of AEQ treated biosolids, and that it could safely continue with appropriate regulatory oversight, but suggesting additional monitoring of ground water and research into ground water impacts.

"E" did none of the above. It was a non fact based reaction to the Supervisors declining to ban all biosolids. It was based primarily on antipathy to the source. The city of Bakersfield's application of Class B locally generated biosolids into a similar sized farm was of no apparent concern to E's proponents or the voters of Kern County. It was never mentioned.

III

COMMERCE CLAUSE

The United States Constitution, article 1, §8, clause 3, delegates to Congress the power to regulate commerce "...among the several States..." This has long been held, in a doctrine referred to as the "dormant" commerce clause, to be an implied limit on the power of state and local governments to adopt laws which burden or interfere with interstate commerce.

The dormant commerce clause prohibits states and localities from advancing their own interests by curtailing the movement of articles of commerce into or out of the state or jurisdiction, Fort Gratiot Sanitary Landfill v. Michigan (1992) 504 U.S.5353 (Fort Gratiot). The doctrine is designed to protect a free national market by prohibiting local "protectionism" - - favoring local markets by placing additional burdens only on out of jurisdiction markets.

The threshold question is whether this case's issues are subject to analysis under the dormant commerce clause. They are if an article of commerce is involved and Congress did not specifically authorize the adoption of such an ordinance.

It has been held that the land application of sewage sludge (biosolids) is an article of commerce for purposes of the commerce clause. County Sanitation District No. 2 of Los Angeles County, et.al, v. County of Kern (2005) 127 Cal. App. 4th 1544 (CSD2).

While Congress has allowed local regulation of the manner of disposal and use of biosolids, it did not explicitly authorize local agencies to discriminate against biosolids arriving in state via interstate commerce. CSD2. Thus, "E" is subject to analysis under the dormant commerce clause.

It does not have to be a state act to violate the commerce clause. Any local government action which discriminates against or unduly burdens interstate commerce is equally invalid (Fort Gratiot).

To determine if an act violates the commerce clause, the first look is at whether it discriminates on its face. "Discrimination" here "...means different treatment of in-state and out-of –state economic interests that benefits the former and burdens the latter". United Haulers Assoc. v. Oneida-Herkimer Solid Waste Management Authority (2007) 550 U.S.330 (United Haulers). That Court further stated that "Discriminatory laws motivated by 'simple economic protectionism' are subject to a 'virtually per se rule of invalidity' [citation] which can only be overcome by a showing that the state has no other means to advance a legitimate local purpose [citation]."

A local law is also per se invalid if it has the practical effect of discriminating against interstate commerce.

There are in essence three per se invalid local laws - - facially discriminatory against interstate commerce; facially neutral but discriminatory purpose, and facially neutral but discriminatory in practical effect. Courts should, in evaluating practical effect, consider what the effect would be if many, or every, state adopted similar legislation. Healy et.al v. The Beer Institute, et.al (1989) 491 U.S.324 (Healy).

In addition to per se invalidity, if a local law "...regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits." Pike v. Bruce Church, Inc. (1970) 397 U.S. 137 (Pike).

The various formulations of the per se violations all require the same thing - - a protectionist component; a discrimination against out of jurisdiction markets by favoring an "in" market, and/or burdening an "out" market.

Equally imposing burdens on both in and out markets is not a per se violation - - favoring local commerce is required.

That component is missing here. The commercial market in question is the re-use of biosolids by generators of those biosolids.

Defendant Kern is not itself a generator. Various cities in Kern County are - - particularly the large city of Bakersfield, with its own large farm, on which it applies (Class B) biosolids. As of enactment of "E", it appears that no Kern County city land applied in unincorporated Kern County (Bakersfield used to, but then annexed that property). If they had, "E" would be equally applicable to them.

These cities are not obtaining any commercial market advantage over Plaintiffs by virtue of "E". These cities are not in a for-profit business seeking to increase either profits or market share by impairing Plaintiffs' ability to compete in the marketplace with them. The cities are doing no more than performing their health and safety obligations to their citizens by disposing of the sewage created by their citizens.

There is no convincing evidence of an economic motive behind "E". Plaintiffs note that one of the stated purposes of "E" was to protect Kern County's reputation as an agricultural producer, and argue that this constitutes protectionism.

This court has, above, found no evidentiary basis for any finding that land application by Plaintiffs could or would adversely affect Kern's reputation regarding ag products. This language appears to be simply an effort to state a facially plausible police power basis for "E".

This is not sufficient to create an economic discrimination against out of state agriculture. It in no way burdens the interstate ag market.

There certainly is evidence in the "E" campaign of animus against Southern California (but they are nearly all Dodger fans!), but that does not show an intent to favor a local commercial market over a Southern California commercial market - - necessary for there to be an intent to discriminate, as above defined.

Even if there were evidence of discrimination against out of state generators wishing to land apply in Kern County, Plaintiffs have no standing to raise that issue.

To have standing, Plaintiffs must allege an actual or threatened injury to themselves, caused by a barrier imposed on interstate commerce. They have not done so.

The Court thus finds that "E" does not discriminate against interstate commerce.

The last question is whether, even though it does not discriminate against interstate commerce, does "E" unduly burden such commerce? If it does, it is not excused because it equally burdens local commerce as well, nor if there is no similar local commerce to benefit, nor if the amount of such commerce itself is minor - - it is the fact and the burden, not the amount of commerce involved that counts.

In this context, we do consider the "what ifs" (Healy). What if every county in California enacted a similar ban? Wouldn't that be the same as California itself banning any imports of biosolids into the state? Would the validity of such a measure depend on its purpose - - restricting commerce, or a legitimate local health and safety concern, such as ensuring that California generated biosolids would continue to have room for land application in this state?

In any event, the Pike analysis still requires a burden on interstate commerce. It is Plaintiffs' burden to prove that such a burden has in fact been imposed by "E". None has been shown. The theoretical possibility of future action is not substantial evidence to support a finding of a burden on interstate commerce.

What we have here are governmental entities - - Plaintiffs and the Kern County cities - - performing governmental waste disposal functions. They are not in an enterprise mode, competing against each other, nor anyone else anywhere, for profits and/or market share. They may have chosen to sub-contract part of this function to private business (hauling; land application; farming), but neither has any private Plaintiff made any evidentiary showing of discrimination nor undue burden on interstate commerce.

The court thus finds that Plaintiffs have failed to prove that "E" imposes a burden on interstate commerce such that a Pike analysis is required.

IV

CALIFORNIA IMPLIED COMMERCE CLAUSE

Plaintiffs assert that California protects commerce within the state to the same extent that the United States Constitution protects commerce between the states. Plaintiffs cite City of Los Angeles v. Shell Oil Co. (1971) 4 Cal. 3d 108 (Shell) and General Motors v. City of Los Angeles (1995) 35 Cal. App 4th 1736 (General Motors). Kern distinguishes, arguing that these cases are limited to a prohibition against the imposition of extra-territorial taxes.

Both Shell and General Motors explicitly state that there is no "commerce clause" in California's Constitution. Both, and other cases, find that other provisions of our Constitution accomplish the same thing.

For example, municipal taxes that operate to place businesses outside a city at a competitive disadvantage were invalid on equal protection grounds, and on the basis that local jurisdictions cannot pass laws with extra-territorial effect. In essence, it is a Pike analysis that is also functionally equivalent to a Livermore analysis under the regional welfare doctrine.

The principle is the same - - a jurisdiction cannot discriminate against out of jurisdiction businesses by placing burdens on them not borne by business within the jurisdiction.

Here, "E" applies equally to all. The City of Bakersfield and other Kern County cities which land apply biosolids would be prohibited from land applying in Kern County. So would Kern County itself, if it generated biosolids. It is a disadvantage for all. There is no advantage for anyone, let alone someone within the jurisdiction of unincorporated Kern County.

The argument that "E" "allows" cities within Kern County to land apply is not accurate. Kern County has no say in the matter, as it cannot exercise its police powers within the jurisdiction of incorporated cities.

The fact that a majority of voters for "E" came from voters within city limits, not affected by "E", but imposing limits on business outside the territory of the cities, is an interesting argument.

These voters were eligible to vote as residents of the county, even though the measure did not impede land application within the cities in which they live.

This might have some traction if the result were to impose an additional cost of doing business on private enterprises or government agencies outside the city (classically, auto dealerships – see General Motors) resulting in a competitive advantage for businesses or agencies within the city. This would require a finding that even though nominally a county

ordinance, it was in effect the same as combined city ordinances, which individually would be invalid under Shell and General Motors. That is not the case here.

Here, there is no "competitive advantage." City waste management is an essential public service and health and safety obligation. We do not find private entrepreneurs, nor other agencies, lined up to provide such services to the cities in Kern County. In the context of stifling free enterprise, this is not the kind of economic interest that requires protection.

Plaintiffs' interests here are best addressed, as we have, by other protections in our State Constitution. Plaintiffs' claims under an alleged state commerce clause are not well founded and must fail.

CONCLUSION

For the reasons set forth above, Plaintiffs are entitled to a declaration that measure "E" is invalid and of no effect for the reasons that it is preempted by State law, and that it is not a valid exercise of the police power of Kern County.

Defendant argues that Plaintiffs OCSD and CSD2 are not entitled to judgment because a ruling could not provide them with any relief and would have no practical impact, and thus their claims are moot. Defendants also argue that injunctive relief for Plaintiff City of Los Angeles is unique to its operations at the Farm, and OCSD and CSD2 failed to prove entitlement to an injunction.

Both OCSD and CSD2 previously land applied biosolids in Kern County. Both ceased application after "E" was effective. They could treat to AEQ standards to comply with Kern's 1999 ordinance. There was evidence to the effect that these Plaintiffs require diverse biosolid management alternatives which are cost efficient and the least environmentally impacted. Application in Kern County meets these criteria.

"E" is invalid and void for all purposes, for the dual reasons that it exceeds Kern's police power authority and is preempted by State law. All Plaintiffs have an economic and public health and safety interest in being able to land apply biosolids in Kern County. This case is not moot as to any Plaintiff.

Plaintiffs have failed to prove that by enacting "E" Defendant violated the Commerce Clause of the United States Constitution. There is no commerce clause in California's Constitution. No Plaintiff is entitled to damages from Defendant.

Plaintiffs are entitled to a permanent injunction prohibiting Defendant from enforcing, or attempting to enforce, Measure E. All Plaintiffs are entitled to recover their costs.

This tentative decision is the Court's proposed statement of decision, subject to timely objections as provided by law.

Plaintiffs shall prepare a judgment consistent with the statement of decision.

Dated: 11-28-16

Lloyd L. Hicks, Judge

SUPERIOR COURT OF CALIFORNIA
COUNTY OF TULARE
Visalia Division
221 S Mooney Blvd
Room 201
Visalia, CA 93291
(559) 730-5000

City of Los Angeles
Plaintiff/Petitioner,

vs.

County of Kern
Defendant/Respondent.

Case No. **VCU242057**

CLERK'S CERTIFICATE OF SERVICE BY MAIL

I certify that I am not a party to this cause.

I certify that I placed the Tentative Decision dated November 28, 2016 for collection and mailing on the date shown, so as to cause it to be mailed in a sealed envelope with postage fully prepaid on that date following standard court practices to the persons and addresses shown. The mailing and this certification occurred at Visalia, California on November 30, 2016.

LARAYNE CLEEK,
CLERK OF THE SUPERIOR COURT
COUNTY OF TULARE

By _____
Martha Gomez, Deputy Clerk

Names and Mailing Address of Person(s) Served:

MICHAEL FEUER
CITY ATTORNEY
JAMES P CLARK
CHIEF DEPUTY CITY ATTORNEY
VALERIE FLORES
MANAGING SENIOR ASSISTANT CITY ATTORNEY
EDWARD M JORDAN
ASSISTANT CITY ATTORNEY
ADENA M HOPENSTAND
DEPUTY CITY ATTORNEY
CITY OF LOS ANGELES
200 N MAIN STREET, CITY HALL EAST, 7TH FLOOR
LOS ANGELES, CA 90012-4110

LAW OFFICES OF MICHAEL J LAMPE
108 W CENTER AVE
VISALIA, CA 93291

GARY J SMITH
JAMES B SLAUGHTER
JAMES M AUSLANDER
BEVERIDGE & DIAMOND PC
456 MONTGOMERY STREET, SUITE 1800
SAN FRANCISCO, CA 94104-1251

THERESA A GOLDNER, COUNTY COUNSEL
MARK L NATIONS, CHIEF DEPUTY COUNTY COUNSEL
COUNTY OF KERN
1115 TRUXTUN AVENUE, FOURTH FLOOR
BAKERSFIELD, CA 93301

STEVEN L MAYER
EMILY H WOOD
JONATHAN HUGHES
ARNOLD & PORTER LLP
THREE EMBARCADERO CENTER, 10TH FLOOR
SAN FRANCISCO, CA 94111-4024

BRIAN K CONDON
STEVEN L MAYER
ARNOLD & PORTER LLP
777 SOUTH FIGUEROA STREET, 44TH FLOOR
LOS ANGELES, CA 90017-5844

MICHAEL M HOGAN
HOGAN LAW APC
225 BROUDWAY SUITE 1900
SAN DIEGO, CA 92101

PAUL J BECK
LEWIS BRISBOIS BISGAARD & SMITH LLP
633 WEST 5TH STREET, SUITE 4000
LOS ANGELES, CA 90071

BRADLEY R HOGIN
RICIA HAGER
WOODRUFF SPRADLIN & SMART
555 ANTON BOULEVARD, SUITE 1200
COSTA MESA, CA 92626

THERESA A DUNHAM
SOMACH SIMMONS & DUNN
500 CAPITAL MALL, SUITE 1000
SACRAMENTO, CA 95814