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[Submitted on behalf of all Plaintiffs]

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF TULARE

CITY OF LOS ANGELES, *et al.*,

Plaintiffs,

v.

COUNTY OF KERN; KERN COUNTY BOARD OF SUPERVISORS,

Defendants.

Case No. Civ. 242057

PLAINTIFFS' TRIAL MEMORANDUM

Date: April 26, 2016
Time: 8:30 a.m.
Dep't: 12
Judge: Hon. Lloyd L. Hicks

PLAINTIFFS' TRIAL MEMORANDUM OF FACT AND LAW

Direct land application is the most common form of managing biosolids in the United States, and has been closely regulated for decades. Plaintiffs City of Los Angeles, R&G Fanucchi Farms, Responsible Biosolids Management, Sierra Transport, California Association of Sanitation Agencies, Orange County Sanitation District, and the County Sanitation District No. 2 of Los Angeles County submit this trial memorandum to outline the evidence by which Plaintiffs will prove the unlawfulness of Kern County's "Measure E" ban on the land application of biosolids. The evidence also includes 164 Stipulated Facts for Trial the parties filed with this Court on April 12, 2016. Exhibit A.

A. Introduction

After twenty-two years of land application of biosolids in Kern County, eighteen years of direct regulatory oversight by Kern, and ten years of litigation regarding Measure E, the evidence is overwhelming that recycling biosolids to the soil benefits Kern County and its neighbors in many ways and poses no threat to human health or the environment. Indeed, Kern admits that there is no evidence of actual harm from land application in Kern County. Measure E – a 2006 county ballot initiative with no scientific basis that passed after a campaign that appealed to prejudice against Southern California outsiders – is preempted by state recycling mandates and places an unconstitutional burden on Kern's neighbors. The testimony at trial from the farmers, biosolids managers, municipal employees, and experts who have devoted their careers to sustainable biosolids recycling will provide an ample record supporting a permanent injunction against Measure E.

Kern's defense of Measure E boils down to two factual arguments. The first is obvious and irrelevant – that biosolids not land applied in Kern County can, and must, go somewhere else. Kern cannot legitimize its "just not here" sentiment by dictating that biosolids be diverted to "alternative" sites that Kern finds more palatable, regardless of distance, cost, technology, or other factors. The second is entirely speculative and hollow – that if Measure E were enjoined, as it has been during the last ten years without incident, then some as-yet unregulated chemical may or may not create a "potential" for risk. The actual facts regarding two decades of land application belie Kern's

speculation. Kern has stipulated that "there is no evidence of actual physical injuries to human or livestock that resulted from land application of biosolids at Green Acres Farm," and that the same goes for any human or livestock "illness." Ex. A, Fact Stip. at ¶ 160-161.

In a telling moment in discovery, the Director of Kern County Public Health, designated as a PMQ deponent, conceded that land application of biosolids does not pose concerns to Kern's leading regulatory agency:

> Q. So does Kern County Public Health have concerns about the land application of biosolids?
> ...
> A. We are aware of concerns in the literature. We're aware of the interest in the discussion. The Kern County Public Health, in itself, does not.
> ...
> Q. I understood you to say that currently your department does not have health or safety concerns regarding the application of biosolids at Green Acres Farm. Did I understand you correctly?
> A. Yes.

Exhibit B, Deposition of Matthew Constantine, at 17:12-19; 18:5-13. Likewise, Plaintiffs will show that each expert in this case who has analyzed the data has identified no harm to the Kern Water Bank, other groundwater, soils, or crops from biosolids land application after two decades of operations, and cannot opine on if or when harms would appear. In fact, Kern was so unconcerned about impacts that in 2011 it simply stopped enforcing even its preexisting biosolids ordinance, contrary to this Court's preliminary injunction order keeping those prior regulations in place. Notwithstanding, Kern's decision to stop enforcing its own ordinance, Plaintiffs continue to comply with that ordinance.

Neither of Kern's arguments, nor any other evidence, bears upon or saves Measure E from preemption under the IWMA, which this Court can decide as a matter of law. As discussed below, all five judges considering the merits of Measure E have ruled in favor of Plaintiffs. Land application of biosolids unquestionably is a "feasible" recycling option under the IWMA: The parties stipulate that "land application is a currently ongoing method of recycling used by the City of Los Angeles at Green Acres Farm," and that biosolids are predominantly land applied across California and the United States. Ex. A at ¶ 159, 163, 164. Kern acknowledged at oral argument on

summary judgment in 2015 that "feasible" under the IWMA does not relate to alleged risks and its new effort to shoehorn its risk arguments into the IWMA preemption claim fail as a matter of law.

With respect to Plaintiffs' other claims, Kern likely will attempt to show that a ban on land application is justified by threats to human health and the environment despite the heavy costs to its neighbors and commerce. The Court in 2011 held that banning biosolids from Kern County damaged Kern's neighbors – the Plaintiffs – and provided no benefits to the County. Nothing has changed regarding biosolids land application at Green Acres Farm since the Court's 2011 preliminary injunction. Beginning in mid-2015, Kern has engaged in intensive discovery efforts, including undertaking a large soil, water and biosolids sampling project at Green Acres in the fall of 2015. This was the first time in the 22 year history of Green Acres that Kern had ever elected to undertake sampling, and the data reaffirmed the safety of biosolids recycling, as underscored by Kern's experts' testimony and Kern's stipulations.

For example, Kern's expert, Dr. Christopher Higgins, conceded that he is "not aware of any actual harms to soil, to organisms, to humans, to any particular receptors as a result of the land application of biosolids at Green Acres Farm." Exhibit C, Deposition of Christopher Higgins, 205:24-206:2. Indeed, after detecting trace chemicals in the groundwater at the parts per trillion billion level, Kern has been forced to abandon the claim that biosolids pose a threat to groundwater, which for years has been the Defendants' leading argument for Measure E:

> Q. Has your department become aware of any risks to the Kern Water Bank as a result of the land applications of biosolids at Green Acres Farm?
> A. I have not.

Ex. B, Constantine Dep. at 130:5-9. Current and former employees of the Kern County Water Agency acknowledge that there is no evidence that land application of biosolids poses a threat to groundwater or that the Kern Water Bank has been contaminated by biosolids:

> Q. As you sit here today, are you aware of any contamination of groundwater in the groundwater banking facilities [in Kern County] which were caused by sewage sludge?
> A. No, I'm not.
>
> Exhibit D, Deposition of James Beck, 21:4-7.

One of those former employees is Kern's expert Thomas Haslebacher, who has admitted that he has no evidence to support any threat to groundwater from biosolids, and has further testified that groundwater predominantly flows from the Kern Water Bank to Green Acres and not the other way around. Exhibit E, Deposition of Thomas Haslebacher, 24:7-14, 66:13-22, 67:1-6. Gary Hokkanen, Kern's second groundwater expert, can only testify to the presence of trace constituents in groundwater, and not any movement offsite. Exhibit F, Deposition of Gary Hokkanen, 28:12-29:11, 30:25-31:10, 40:1-41:7. With respect to land application of biosolids' risk to groundwater, Hokkanen stated: "I have not rendered an opinion on that, nor do I plan to." *Id.* 145:8-12. *See also* Ex. E, Haslebacher Dep. at 65:22-67:22 (admitting that he lacks evidence to support a threat to the Kern Water Bank from land application of biosolids at Green Acres Farm, and that he will not offer any such testimony).

Dr. Higgins speculates based on his laboratory experiments with biosolids in jars that trace chemicals in the soil pose a "significant potential unacceptable risk," namely to worms and creatures that may eat the worms. Ex. C, Higgins Dep. at 14:21-22. That theory is unsupported by field evidence, contested by other experts and is not endorsed by regulatory authorities. Dr. Higgins, who has never visited Green Acres Farm or studied its considerable history and records, does not suggest that twenty-two years of land application has caused any harm to date.

The final defense expert, Dr. Gwynn Johnson, who has little experience with biosolids, testified that she requested additional sampling at Green Acres because the existing data "did not [show] any harm or potential harm." Exhibit G, Exhibit of Gwynn Johnson, 50:21-51:3. This opinion did not change after reviewing the sampling results. *Id.* at 133:21-134:9, 147:23-148:2. Dr. Johnson, however, contends that Green Acres Farm will approach non-existent regulatory limits on trace metals in soils faster than the Plaintiffs believe those limits will be reached. But Dr. Johnson's theory that regulatory limits may soon curtail land application at Green Acres – with which Plaintiffs disagree – shows how the pre-Measure E regulatory system functions and undermines rather than supports Kern's argument for completely banning land application.

Kern by its conduct as a regulator and in discovery has conceded land application poses no threat to health or the environment. This Court's 2011 preliminary injunction expressly ordered Plaintiffs to continue complying with Kern's comprehensive biosolids regulations that predated Measure E, which the City of Los Angeles and RBM have adhered to through continued testing and data reporting to Kern County. Kern, however, "decided not to enforce the ordinance." Ex. B, Constantine Dep. at 22:9-11. After 2011, Kern abandoned inspections of Green Acres and reviews of the voluminous data submitted to Kern County altogether. Nor has Kern County or incorporated cities in Kern County like Bakersfield tested their own biosolids for the long list of constituents that Kern now contends pose a threat.

Regarding the burdens Measure E imposes on everyone outside Kern County, discovery and stipulations establish that Measure E has imposed substantial costs on Southern California wastewater agencies and forces other communities to accept Kern County's biosolids. Accordingly, Plaintiffs should prevail on the state and federal constitutional claims that require consideration of the regional welfare and weighing the burdens and benefits of Measure E. Kern agrees that "Measure E will increase the City of Los Angeles' costs to manage biosolids by $3 to $4 million per year." Ex. A at ¶ 86. This is an increase of approximately 50%. Exhibit H, Email Between T. Dafeta and T. Minamide. The parties also agree that the City invested nearly $13 million in purchasing and improving Green Acres Farm to support its biosolids land application program, and an additional $15 million upgrading its wastewater treatment plants to generate Class A-EQ biosolids. Ex. A at ¶ 139. The City undertook this costly conversion in ensuring long-term viability of its land application program at Green Acres Farm. The City would also have to find an alternate means to manage the up to 20 million gallons of irrigation effluent the City receives daily under a contractual agreement with the City of Bakersfield. Measure E undermines these significant investments, and there is nothing on the other side of the ledger to balance against these costs. Measure E precludes the recycling of organic material to the naturally poor soil in western Kern County, which Kern's experts acknowledges has improved the environment. Ex. G, Johnson Dep. at 162:1-3; Ex. C, Higgins Dep. at 200:14-16. Kern has admitted that it did not engage in any analysis

of the potential impact of Measure E before it was adopted for afterward. Ex. B, Constantine Dep. at 96:21-97:11.

Finally, the evidence remains undisputed that (as found by the federal court in 2007) Measure E targeted Southland communities and thus is a per se violation of the Commerce Clause. As its proponents repeatedly emphasized, Measure E was intended to, and would if enforced, discriminate against outsiders. The goal of Measure E proponents was to "Keep L.A. Sludge out of Kern County." By walling off Kern County from the enormous California biosolids market Measure E also offends the Commerce Clause of the California Constitution. As the Court wrote in 2011, "California does not consist of 58 separate fiefdoms, or of three or four separate regions, all insular from each other . . . [w]e all live here, and what any state actor does elsewhere may affect us all." *City of Los Angeles v. County of Kern*, (2011) Case No. 242057 (citing this Court's order granting preliminary injunction). The evidence at trial will underscore Kern's environmental pretext for the true purpose of Measure E, and support the issuance of a permanent injunction to allow the beneficial and critical recycling practice of biosolids land application to continue.

B. Regulation of Land Application of Biosolids by U.S. EPA, California and Kern County

Humans have recognized the value of sewage as a crop fertilizer since the dawn of civilization. In Kern County, sewage was used on farms as early since the early 1900s. In the 1970s, the United States Environmental Protection Agency promulgated federal regulations to require treatment of sewage sludge before land application and other land application best management practices. A major scientific review and risk assessment of land application in the late 1980s and early 1990s led to the promulgation of new federal regulations in 1993 that continue to guide land application to this day. U.S. E.P.A., Standards for the Use or Disposal of Sewage Sludge, 40 C.F.R. Pt. 503, 58 Fed. Reg. 9387 (Feb. 19, 1993) ("503 Rules"). Plaintiffs' expert, Greg Kester, P.E., will describe this regulatory history and Dr. Scofield, Plaintiffs' expert on risk assessment, will explain that the conclusions of EPA's risk assessment that land application is safe and beneficial remain true.

The success of the 503 Rules has encouraged biosolids recycling. More than half of the nation's wastewater treatment solids is used as fertilizer and soil amendment, including that generated by many American cities and towns, including Bakersfield. The 503 Rules encouraged the growth of biosolids recycling in California and, by the late 1990s numerous Kern County farms were fertilizing crops with biosolids. Land application at what is now Green Acres Farm started in 1994. Farmer/Plaintiff Rob Fanucchi and Jay Stockton of Plaintiff Responsible Biosolids Management will explain how biosolids are applied and the success growing feed crops. The farm was an ideal site for land application because the naturally poor soil quality in the western San Joaquin Valley benefits from an organic soil amendment like biosolids. In 1994 and 1995, the Regional Water Quality Control Board issued to Plaintiff RBM two permits ("Waste Discharge Requirements" or "WDRs") for land application of biosolids at the 4,700 acres adjacent to Interstate 5 encompassing Green Acres Farm. The permits mirror the 503 Rules and continue in force to this day. Exhibits. J, K, Waste Discharge Requirements Nos. 94-286, 95-140. In 2000 and 2004, the State Water Resources Control Board issued statewide general permits ("General Orders") to simplify the permitting for land application sites and encourage the wide use of land application. RBM has the option to seek to substitute the 2004 general permit for its existing Regional Board site-specific permits but to date has not elected not to do so after consulting with the Regional Board.[1] The Regional Board continues to regulate RBM pursuant to its site-specific WDRs, like several other land appliers in California.

In August 1998, Kern County adopted Ordinance G-6528, Regulations of Biosolids Land Application, which provided detailed regulations on the practice of biosolids land application in

[1] Though the WDR permitting authority is the Regional Board and not Kern County, Kern argues – in this litigation for the first time – that Green Acres is governed by the 2004 California General Order. But the parties stipulate that RBM never submitted a notice of intent to be covered by the General Order, which is a prerequisite to coverage. Ex. A at ¶ 135. Kern also will argue that declarations by several of Plaintiffs' witnesses in which that they recognized that Green Acres Farm was "subject to" the General Order and the two WDRs somehow supplants the legal authority of the site-specific WDRs, which is impossible. In any event, which state permits govern land application at Green Acres has no bearing on the lawfulness of Measure E.

Kern County. In October 1999 Kern adopted Ordinance G-6638, Land Application of Biosolids, phasing out land application of "Class B" biosolids (having low but detectable amounts of microorganisms, but made safe to land apply by restrictions on human access to farms and other measures). Kern's 1999 Ordinance endorsed and allowed land application of Class A-EQ ("Exceptional Quality") biosolids. Los Angeles invested approximately $15 million to upgrade its wastewater treatment facilities to produce pathogen-free Class A EQ biosolids. Also in 1999, the City purchased Green Acres for $9.63 million, and spent over $4 million on improvements to the farm to facilitate biosolids recycling. Kern County's phase out of Class B biosolids was complete by 2003 with its amended Ordinance No. G-6931. After that, only Class A EQ biosolids were permitted to be land applied in unincorporated areas of Kern County, and all municipal Plaintiffs (City of Los Angeles, Los Angeles County Sanitation Districts, and Orange County Sanitation District) came into compliance. The ordinance did not apply to the incorporated cities in the County, which continue to land apply Class B biosolids within their city limits. In its Ordinance G-6931, Kern recognized the safety and efficacy of land application of Class A EQ biosolids: "The County recognizes that Exceptional Quality Biosolids, as defined in this chapter, are considered by the U.S. Environmental Protection Agency to be a product, whether distributed in bulk form, bags or other containers, that can be applied as freely as any other fertilizer or soil amendment to any type of land." Exhibit L, County of Kern Ordinance No. G-6931.

Beginning in 1998, Kern County employees conducted regular inspections of all permitted land application sites, including Green Acres Farm. Kern's records of those inspections detail only a few minor violations and nothing suggesting a threat to human health or the environment. Guy Shaw, the Kern County Environmental Health Services Department employee tasked with inspecting Green Acres Farm in the early 2000s, testified that "most of [RBM's violations] were reporting violations as related to the County ordinance." Exhibit M, Deposition of Guy Shaw, 32:19-25, 36:21-23. When brought to RBM's attention, the violations were always promptly remedied, and Kern has agreed that all noticed violations at Green Acres Farm of any prior Kern County biosolids ordinance were resolved to Kern's satisfaction. *Id.* at 37:1-4 38:1-39:2. Kern acknowledges that

there have been only three odor complaints made to its Environmental Health Division regarding Green Acres Farm since 2002, when the City switched to Class A biosolids. Ex. A at ¶ 146. Ex. B, Constantine Dep. at 105:24-106:8.

C. The Adoption of Measure E and the Multiple Rulings Against It

On June 6, 2006, Kern County voters adopted Measure E, an initiative ordinance known as the "Keep Kern Clean Ordinance of 2006," which banned all land application of biosolids in unincorporated Kern County, including commercial application of compost material containing biosolids. At the time Measure E was adopted, the only generators of biosolids land applied in Kern County were the City of Los Angeles, Los Angeles County Sanitation District, and the Orange County Sanitation District. No Kern County-generated biosolids were land applied in Kern County. Statements of the sponsors of the initiative and the campaign materials propagated by the initiative's proponents show that Measure E was intended to target out-of-county biosolids generators. The campaign employed such slogans as "Measure E will stop L.A. from dumping on Kern," "Keep L.A. Sludge out of Kern County," and "We will proclaim our independence from polluting Southern California and Los Angeles." At the time County voters approved Measure E, approximately 61% of Kern County's registered voters resided within incorporated areas that are not governed by County ordinances, with approximately 44% of these in the City of Bakersfield, which has continuously land applied Class B biosolids within the city limits.

Plaintiffs sued to enjoin Measure E in the United States District Court for the Central District of California, and successfully obtained preliminary and permanent injunctions against Measure E. The court's preliminary injunction opinion succinctly summarized its conclusions:

> The Court concludes the outright ban is likely to impermissibly discriminate against interstate commerce because it was enacted in part for the purpose of protecting the reputation of Kern's agricultural products and specifically to exclude out-of-county biosolid commerce. Measure E is also likely to be preempted by state law because it thwarts recycling activities specifically promoted by the [CIWMA]. It is also likely to constitute an invalid exercise of police power because it cannot reasonably be said to accommodate the regional interest in

> safe, cost-effective management of biosolids. *City of Los Angeles v. County of Kern* (2006) 462 F.Supp.2d 1105.

Thereafter, the court granted Plaintiffs summary judgment on their Commerce Clause and IWMA preemption claims, finding with respect to the Commerce Clause that Measure E "was intended to and does have a discriminatory effect." With respect to the IWMA preemption claim, the court noted: "Given CIWMA's mandate to recycle solid waste, Measure E's ban on land application of biosolids amounts to a ban on activity that the state statute attempts to promote." On that basis, the court concluded "that Measure E is inimical to the goals of the CIWMA, contradicts it, and is therefore preempted."

The federal case was later dismissed on prudential standing and supplemental jurisdiction grounds in November 2010, leaving Plaintiffs to challenge Measure E in state court. Plaintiffs filed their complaint in this action in January 2011 and this Court issued its own preliminary injunction against enforcement of Measure E in June 2011 based on IWMA preemption and abuse of the police power. As to preemption, the Court concluded:

> [Measure E] takes away as to Kern County a method of disposing of biosolids that state law specifically requires be promoted by local governments. The court finds that it is reasonably probable that LA will prevail on the theory that [Measure E] is invalid as contrary to state law. *City of Los Angeles v. County of Kern*, Case No. 242057 (2011) (order granting preliminary injunction).

And with respect to the police power, the Court held:

> The record is devoid of any consideration of any competing interests, and of any attempt to accommodate competing interests. … A reasonable accommodation would seem to be the 1999 ordinance, restricting the land application to "A" grade biosolids. [Measure E] represents no accommodation. A complete ban precludes an 'accommodation.' The court thus finds that there is a very reasonable probability that LA will prevail on the theory that [Measure E] is invalid as beyond the scope of an allowed police power measure. *Id.*

The Court of Appeal unanimously affirmed the preliminary injunction ruling in 2013. Affirming the IWMA preemption ruling, the Court stated:

> We agree with plaintiffs that they are likely to prevail on their claim that the CIWMA preempts Measure E. Section 40051 requires local

> agencies like Kern County and the City of Los Angeles to "[p]romote" and "[m]aximize" recycling. An ordinance of one local government that prohibits, within its jurisdiction, the employment by another local government of a major, widely accepted, comprehensively regulated form of recycling is not consistent with this mandate. *City of Los Angeles v. County of Kern*, (2013) 154 Cal.Rptr.3d 122 at 138.

As for the police power claim, the Court stated:

> It is likely plaintiffs will succeed on the merits of this claim because the evidence presented so far shows—undisputedly for purposes of this appeal—considerable hardship to waste-generating municipalities around the region if Measure E is enforced and no offsetting hardship to Kern County if it is not enforced. ... [I]t is likely that plaintiffs will succeed in showing that Measure E does not strike a reasonable accommodation of the competing interests and that there is no fair argument that Measure E promotes the general welfare of the region. *Id.* at 144.

After the California Supreme Court reversed a statute of limitations ruling underlying the injunction, on remand in early 2015 this Court found the Plaintiffs' claims timely on other grounds and reaffirmed the preliminary injunction.

D. The Trial Evidence on the Safety and Value of Land Application Will be Overwhelming

Kern has had the opportunity for years as a regulator, and for years in this litigation, to produce any actual evidence of harm from land application of biosolids in Kern County. Repeatedly, Kern cannot. At the same time, Plaintiffs and their experts, many of whom have dedicated their entire careers to research on biosolids, have demonstrated the clear benefits of land application and the absence of risk. Because Measure E confers no benefit on Kern County to weigh against its targeted shutdown of Plaintiffs' operations, this Court should permanently enjoin Measure E's baseless ban of this valuable recycling activity.

Kern is in the position of looking for a problem to justify Measure E after-the-fact. The parties have now taken nearly 30 depositions and pored over the data generated over two decades at Green Acres Farm. Kern County undertook weeks of drilling and soil sampling at GAF this past fall

in pre-trial discovery. Separately, in discovery, Kern sampled the City's biosolids directly from its Hyperion Wastewater Treatment Plant, and effluent water from the City of Bakersfield on its way to irrigate Green Acres Farm. After this work, the parties stand in the same position as they were in 2011, and the Court's prior findings on safety remain valid. Indeed, Kern and its experts acknowledge that this large scientific record shows that land application is safe, and as discussed above the parties have stipulated to there being evidence of no actual harm. The parties also stipulate that "Green Acres Farm generates strong crop yields, including corn, alfalfa, milo, wheat, rye, and Sudan grass." Dr. Gwynn Johnson called the crops "beautiful." Ex. G, Johnson Dep. at 23:18-22.

The data, including from this fall, is objective and underpins the consensus of a lack of risk. As expected, sampling shows that the soil at Green Acres has trace levels (parts per billion or trillion) of various chemicals that are found in wastewater and biosolids worldwide (including that of Bakersfield and Los Angeles used at Green Acres Farm). No experts -- Plaintiffs or Kern's -- will contend that these minuscule levels of chemicals in the soil are damaging crops or the environment. Similarly, the levels of trace metals in the soil are low and within limits set by U.S. EPA, the two WDRs, and Kern County's 2003 ordinance. Professor Johnson's recalculation of biosolids loading rates to argue that Green Acres has reached limits for a molybdenum on a few fields – limits nowhere to be found in the WDRs, because EPA does not regulate molybdenum loading at this time – has nothing to do with sustaining Measure E and is an argument that should be directed to the Regional Water Board.

Nevertheless, Kern maintains that we cannot perfectly predict the future, so we should ban biosolids now. Relatedly, Kern suggests there has not yet been a hard enough look for the elusive evidence of harm. This "what if" expert testimony is nothing more than speculative, remote or

conjectural, and has no evidentiary value. Kern's position is even more perplexing given its own passivity. Each of the sampling projects this fall constituted more testing than Kern had done or requested in the 18 years it regulated GAF, combined. Ex. B, Constantine Dep. at 167:17-21 ("Q. The Environmental Health Department during the period of time it was enforcing the 2002 ordinance, it never asked for any additional testing of the soil or the water at Green Acres Farm; is that correct? A. That's correct.") Kern also inexplicably shrugged off enforcement of its prior biosolids ordinance's protections. Constant monitoring and testing will continue to take place as always.

Moreover, there is no evidence to support Kern's identification of "someday" potential risks. Collectively, Kern's expert testimony amounts to the presence of parts per billion, or even parts per trillion, of chemicals such as the anti-bacterial triclosan with which people come into contact at massively higher concentrations in everyday life. But any scientist knows that presence does not equal harm. Kern's experts cannot testify to fate and transport, offsite migration, toxicity, causation, or most importantly risk. None of Kern's experts can articulate a risk to the Kern Water Bank, crops, dairy cattle that eat the crops, or any other media. Dr. Higgins has never visited the Farm and does not even know what is grown there. Mr. Hokkanen identified minute concentrations of metals and two organic chemicals, PFOS and PFOA, in deep soils and groundwater, but cannot attribute them to the surface or any source; the evidence will show that use of treated wastewater for irrigation and groundwater recharge throughout the Central Valley (including in the Kern Water Bank) likely contributes to trace chemicals in groundwater. Mr. Haslebacher was designated on groundwater flow and quality, but testified that he knows nothing on the latter topic, and concedes the prevailing direction of groundwater flow precludes groundwater from under Green Acres Farm – whatever is in it – from reaching the Kern Water Bank.

Plaintiffs' fact and expert witnesses that will rebut Kern's claims and present extensive affirmative evidence of the Farm's impressive track record of safety and benefits. Plaintiff Rob Fanucchi is a multi-generation family farmer in Kern County, and will testify to the well-run farming operations at Green Acres, farm site conditions, irrigation water, crop yields, crop sales to local dairies, and his direct experience with the superior benefits of utilizing biosolids versus chemical fertilizers and other amendments he uses at other farms in Kern County, such as slower nitrogen release, greater numbers of plant nutrients, and increased water retention. Jay Stockton will testify to the successful management of the City's biosolids at Green Acres for many years, including the logistics of land application, soil conditions, limiting application of biosolids to crop nutrient needs (agronomic rate), regular sampling and reporting, and interactions with Kern County, the Regional Board, and EPA. Both Mr. Fanucchi and Mr. Stockton will describe the flies and odors attendant to their farming work and that of the many neighboring dairies, and their efforts to address flies and odors.

Plaintiffs will present one or more City witnesses who will provide an overview of the City's biosolids program, including Green Acres Farm, nationally recognized for its excellence. The parties stipulate that the City has continuously maintained its National Biosolids Partnership Environmental Management System Certification from 2003 to present. Ex. A at ¶ 87. In fact, the City was only the second municipality in the country to receive this Certification, and now holds the highest platinum status under that program. The City witnesses will testify to the City's conversion to exclusively Class A-EQ biosolids and associated investments at Green Acres, oversight of Green Acres Farm, partnering with Bakersfield to use over 14 million gallons a day of its effluent, the lack of complaints and violations, the Measure E campaign targeting the City, Measure E's impacts, and

other topics. Witnesses from Sanitation District No. 2 of Los Angeles County and Orange County Sanitation District will explain Measure E's impacts on their programs.

Plaintiffs also will present three leading experts in the areas of biosolids, land application, soil science, geology, and hydrogeology. The Court is already familiar with three of these experts as each has previously filed declarations in 2011. Plaintiffs also will call a fourth expert, Dr. Robert Scofield, in the areas of toxicology and risk assessment. Each of these experts has studied the robust data and reporting at Green Acres Farm, and each has determined that continued land application presents no risk.

Thomas Johnson, a geologist and hydrogeologist, will testify to groundwater flow and conditions in the vicinity of Green Acres Farm, and why the fears of Kern Water Bank contamination by biosolids land application are unfounded. He will explain that land application of biosolids at Green Acres Farm has not affected any current or expected use of groundwater at the Farm or surrounding area. Mr. Johnson will illustrate the groundwater flow predominately to the south and east from Green Acres Farm, and away from the Kern Water Bank, as well as the extensive groundwater monitoring data at and around Green Acres Farm and the Kern Water Bank showing no adverse impact. He will explain that the results of Kern's groundwater and deep soil sampling are extremely low, well below any regulatory standard, and cannot be attributed to biosolids or any other specific source. He will also speak to the low permeability soil series present at Green Acres Farm, the influence of natural sediments and oil and gas operations on groundwater quality, and the use of Bakersfield effluent as irrigation. Mr. Johnson has also studied EPA's consideration of groundwater impacts in formulating its 503 Rules, and the agency's finding of no significant risk via that pathway.

Professor Ian Pepper of the University of Arizona has spent his over 35-year career studying biosolids, and is an expert in land application, soil science, and environmental microbiology. Dr. Pepper will testify to why land application of biosolids as a bulk organic fertilizer is a successful, safe and environmentally beneficial practice, and how the positive soil and crop outcomes from 20 years of land application at Green Acres Farm confirm these conclusions. He has studied and will interpret for the Court the extensive historical farm data, as well as newer fall 2015 sampling, which uniformly demonstrate no constituent levels of concern. Dr. Pepper will explain the fate and transport of metals and chemicals in biosolids-amended soils, and how those constituents are more tightly bound in the biosolids matrix. He will specify other relevant site conditions and factors, including layers of clay that retard downward movement of water and dissolved contaminants from the surface of the soil. Dr. Pepper will also testify on the strong regulations governing land application, Green Acres Farm's compliance with those regulations, and EPA's continuous work in this area. For example, he will discuss how trace organics have been the subject of study for years and no risk has been demonstrated from these compounds in biosolids, which are at very low levels in the soil.

Greg Kester, P.E., is employed by Plaintiff California Association of Sanitation Agencies (CASA) and oversees biosolids issues for CASA. Mr. Kester, like Professor Pepper, served on the 2002 National Academy of Sciences Committee that reviewed the safety of land application, and multiple EPA committees as well. At trial, Mr. Kester will speak to regulation of biosolids at the federal and state level, and the scientific basis for those regulations. Mr. Kester will describe the broader—regional, state-wide, and national – burdens on commerce and biosolids management if a total land application ban in California's second largest agricultural county (after Tulare) were upheld. Mr. Kester can forecast how other counties will react to similarly limit or foreclose land

application. He will also explain that the importance of land application will increase due to California mandates to further reduce landfill disposal. Mr. Kester has also studied the data at Green Acres Farm, and will offer his analysis of those low detections from and place those values in broader perspective. He will discuss trends in biosolids management, including why composting biosolids is not an alternative to land application because composted biosolids must be land applied as well.

Dr. Robert Scofield for the last 34 years has performed over 500 human health assessments for various chemicals in the environment. Dr. Scofield will explain EPA's highly conservative risk assessment underlying the 503 Rules. He additionally will discuss how those same 14 potential exposure pathways, coupled with the very low detection levels of metals and trace chemicals at Green Acres Farm, translate into a lack of risk that fails to support Measure E. Specifically, he will show the lack of risk from plant uptake, dairy cattle consumption of those crops, and human consumption of products from those cattle. He also will explain his qualitative risk assessment of purported risks to earthworms or birds at Green Acres Farm, which also found no risk.

E. The Elements of Plaintiffs' Claims are Simple and Will Be Readily Proven at Trial

Plaintiffs' four claims break down into three categories: (i) legal preemption under the IWMA, Pub. Resources Code, §§ 40051, 40052, 40053; (ii) discrimination against entities outside of Kern County in violation of the federal and state constitutions; and (iii) unreasonable burdens imposed on Plaintiffs under the regional welfare doctrine and the *Pike* balancing test of the federal Commerce Clause.

The IWMA claim can be decided without further factual development at trial. Similarly, Kern will not be able to negate or explain away the evidence showing the discriminatory purpose of Measure E to exclude outsiders from Kern County (while allowing the City of Bakersfield to continue to apply Class B biosolids).This Court should find, as did the federal court in 2007, that

Measure E is a *per se* violation of the Commerce Clause. The same evidence regarding Measure E's discriminatory intent and effect establishes a violation of the state Commerce Clause and shows that Measure E exceeds the limits on Kern's police power. Post-trial briefing will show that Kern's arguments that the federal Commerce Clause only protects biosolids that move across state lines is unsupportable.[2]

The Commerce Clause and regional welfare doctrine also bar local ordinances that either unreasonably burden out-of-jurisdiction actors or, under the regional welfare doctrine, simply fail to accommodate the regional welfare. The trial evidence will show that the scales tip decisively against Measure E under these claims because decades of land application in Kern County simply show there is no tangible harm from the practice and that it, in fact, has rejuvenated poor farmland in an area of the county with chronically undernourished soils.

1. The IWMA Preempts Measure E.

The IWMA claim has been exhaustively litigated since 2006. Plaintiffs appreciate the Court's decision in 2014 declining summary adjudication and deferring a ruling until trial given the existence of triable issues of fact on the other three Counts. Now at trial, there is no undisputed material fact in play on Count One for preemption under the IWMA. Accordingly, Plaintiffs ask that the Court once again find Measure E preempted as a matter of law.

All five state and federal judges who have considered the claim on the merits, including this Court and the Fifth District Court of Appeal, have found that the IWMA's recycling mandates

[2] Kern has made much of the fact that Plaintiffs' biosolids are generated in California, but commerce is entitled to Constitutional protections whether or not it crosses state borders. The Commerce Clause unequivocally applies to restrictions imposed at the county line: "a State (or one of its political subdivisions) may not avoid the strictures of the Commerce Clause by curtailing the movement of articles of commerce through subdivisions of the State rather than through the State itself." *Fort Gratiot Sanitary Landfill, Inc. v. Michigan Dep't of Nat. Res.* (1992) 504 U.S. 353, 361. "Discriminat[ion] against out-of-county interests . . . by definition . . . include[s] discrimination against out-of-state interests." *Cty. Sanitation Dist. No. 2 v. Cty. Of Kern* (2005) 127 Cal.App.4th at 1613 n.74.

preclude a total ban on a legally recognized and approved recycling method like land application. In 2007, Judge Feess made the following merits ruling with respect to the preemption issue:

> Given CIWMA's mandate to recycle solid waste, Measure E's ban on land application of biosolids amounts to a ban on activity that the state statute attempts to promote.
>
> Measure E is inimical to the goals of the CIWMA, contradicts it, and is therefore preempted.

City of Los Angeles v. County of Kern, 509 F.Supp.2d 865, 891. Four years later, in 2011, this Court in issuing its preliminary injunction ruling held:

> The declared policy of the [IWMA] Act is to promote source reduction, recycling, and re-use of solids to reduce the amount going into landfills...The Act allows local regulation not in conflict with the policies of the Act, but a complete ban is not a permitted regulation. 'E' takes away as to Kern County a method of disposing of biosolids that state law specifically requires be promoted by local governments. The court finds that it is reasonably probable that LA will prevail on the theory that 'E' is invalid as contrary to state law.

City of Los Angeles v. County of Kern, (2011) Case No. 242057 (tentative order granting preliminary injunction). Two years later, in 2013, a unanimous Fifth District Court of Appeal upheld this court's preliminary injunction opinion, finding that "[w]e agree with plaintiffs that they are likely to prevail on their claim that the CIWMA preempts Measure E." Simply put, the IWMA preempts Measure E because the IWMA mandates that Kern "promote" and "maximize" a recycling practice that Measure E prohibits.[3]

Unsurprisingly, Kern has sought to expand the Court's identified statutory term "feasible" in § 40051 to encompass every consideration on the other Counts which, unlike IWMA preemption, require a weighing of Measure E's benefits and burdens. Land application unquestionably is a

[3] Kern may also argue at trial that Plaintiffs should engage in "source reduction" as the IWMA's first preferred option for managing waste. That is largely not an option for biosolids. Indeed, this Court's preliminary injunction opinion aptly pointed out that "LA cannot engage in 'source reduction.' Its population is increasing. It has to do something with its biosolids, and whatever it does, and wherever it does it, someone will be affected."

feasible recycling option that Kern may not lawfully ban. Whatever evidence Kern presents at trial will not make any difference.

It is undisputed that Measure E prohibits the most prevalent biosolids recycling method nationally and in California. Nationally, at least 50% of biosolids are recycled to land. In 2014 in California, the management of 64% of sewage sludge involved land application of treated and composted biosolids. Ex. A at ¶ 163, 164. (Although Kern argues that sending biosolids to composting facilities is an alternative to land application, until the compost is applied to land there is no recycling, and Measure E bars land application of composted biosolids.) The IWMA, federal and state regulations, and Kern itself in its 1999 and 2003 biosolids ordinances have all blessed land application, particularly of Class A-EQ biosolids like Plaintiffs'. The IWMA defines the term "solid waste" to include "chemically fixed sewage sludge which is not a hazardous waste," (Pub. Res. Code § 40191), and "recycling" to mean "the process of collecting, sorting, cleansing, treating, and reconstituting materials that would otherwise become solid waste, and returning them to the economic mainstream in the form of raw material for new, reused, or reconstituted products which meet the quality standards necessary to be used in the marketplace." *Id.* at § 40180. The 503 Rules establish detailed management criteria for land application and demonstrate EPA's approval of land application that complies with these criteria. Furthermore, the Central Valley Regional Water Quality Control Board has issued two orders that furnish site-specific state approval for the land application program at Green Acres Farm. Exs. J, K, WDR Order Nos. 94-286 and 95-140 ("The Board wishes to encourage the diversion of biosolids and septage away from landfills to beneficial uses, while assuring adequate protection of water quality and public health"). Calling Green Acres infeasible now would also necessarily suggest that Kern oversaw and sanctioned an infeasible operation for the last 18 years.

Kern has argued that Measure E does not conflict with the IWMA because Plaintiffs can both comply with Measure E and meet their own solid waste diversion requirements under the IWMA. This argument is a red herring, and the courts have rejected it time and again. The conflict causing preemption is Kern's inability to comply with Measure E without violating its mandatory duty under

the IWMA to "promote" and "maximize" all feasible recycling options. Measure E conflicts with the "policies, standards, and requirements" of the IWMA, and is thus preempted.

2. Measure E Discriminates Against Out-of-County Biosolids

Plaintiffs will offer evidence at trial demonstrating that Measure E is an arbitrary and discriminatory ordinance intended to stem the flow of out-of-county biosolids into Kern County, while the same voters tolerated land application of Class B biosolids within the cities in which they live. This evidence will establish that Measure E was intended to, and in fact does, discriminate against out-of-county entities, and that the Court should issue judgment in Plaintiffs' favor on their claims under the federal and state Commerce Clause, as well as Plaintiffs' claim that Measure E exceeds limits on Kern's police power.

Both the federal and the California Constitution hold arbitrary and discriminatory local ordinances invalid. The federal Commerce Clause prohibits discriminatory or burdensome local or state regulations that would interfere with Congress' authority over interstate commerce, even "[w]hen legislating in areas of legitimate local concern, such as environmental protection and resources conservation." *Minn. v. Clover Leaf Creamery Co.* (1981) 449 U.S. 456, 471. The California Constitution affords the same protections as the federal Constitution for commerce occurring within the state. *See, e.g., City of Los Angeles v. Shell Oil Co.* (1975) 4 Cal.3d 108; *General Motors Corp. v. City of Los Angeles* (1975) 5 Cal.3d 229, 238. Furthermore, arbitrary and discriminatory out-of-county waste bans like Measure E exceed a county's police powers. *See Merritt v. City of Pleasanton* (2001) 89 Cal.App.4th 1032, 1036; *In re Lyons* (1938) 27 Cal.App.2d 182.

Measure E unambiguously discriminates against interstate and intercounty commerce. One of Measure E's stated purposes is to preserve "confidence in agricultural products from Kern County." Such agricultural protectionism alone is per se unconstitutional.

At trial, Plaintiffs will show that the campaign materials propagated by Measure E's official sponsors and proponents without exception targeted out-of-county biosolids generators, using crude

statements such as "Measure E will stop LA from dumping on Kern," and "we've got a bully next door, flinging garbage over his fence into our yard." These materials prove that the campaign theme was denigration of Southern California and that the initiative was animated by a desire to exclude Plaintiffs' biosolids from Kern County. Campaign materials highlighting threats posed to human health or the environment by land application of biosolids in Kern County are conspicuously absent. Also conspicuously absent is any attempt by Measure E's sponsors or proponents to prohibit land application of biosolids within the cities where the majority of Kerns voters reside, where Class B biosolids are land applied in close proximity to Kern's population centers.

The only conclusion one can draw from this undisputed evidence is that Measure E's drafters and proponents were not concerned about biosolids but about *the source* of the biosolids. In the wake of this campaign, the overwhelming vote in favor of Measure E, dominated by voters living in cities that land applied their own biosolids within the city limits or were free to do so, demonstrates a discriminatory animus behind Measure E. That Measure E exclusively affected Southern California entities further establishes its discriminatory nature. The trial will thus establish that Measure E is invalid under the federal and state Commerce Clause, is an arbitrary and discriminatory ordinance passed in excess of Kern's police powers, and that this Court should issue a permanent injunction against Measure E.

3. Measure E's Impacts on Outsiders Far Outweigh the Purely Speculative Benefits to Kern County.

Lastly, under the *Pike* test of the federal Commerce Clause and the regional welfare doctrine under the California Constitution, this Court should invalidate Measure E if the harm to out-of-county entities greatly outweighs the local benefits. Measure E must be struck down under the federal Commerce Clause if it imposes burdens on interstate commerce that substantially outweigh any purported benefits to Kern County. *Pac. Merchant Shipping Assn. v. Voss* (1995) 12 Cal.4th 430, 517; *see Pike v. Bruce Church, Inc.* (1970) 397 U.S. 137, 142. Under this test, Measure E "must be evaluated not only by considering the consequences of the [ordinance] itself, but also by

considering how the challenged [ordinance] may interact with the legitimate regulatory regimes of other States and what effect would arise if not one, but many or every, State adopted similar legislation." *Healy v. Beer Inst.* (1989) 491 U.S. 324, 336; *see also U & I Sanitation v. City of Columbus* (2000) 205 F.3d 1063, 1072 (concluding ordinance's burdens on commerce were "far from trivial" after aggregating potential effects of similar actions by several cities).

The regional welfare doctrine has a lower bar for proof than the Commerce Clause. The California Constitution imposes on the police power of local governments a limitation requiring local enactments not to conflict with the general welfare or the public welfare. *Associated Home Builders Etc., Inc. v. City of Livermore* (1976) 18 Cal.3d 582, 604. Special considerations apply where, as here, the ordinance affects state residents outside the enacting jurisdiction. In that case, a court reviewing an ordinance must "determine whether a challenged restriction reasonably relates to the regional welfare." *Id.* at 608. This determination involves three steps. First, the court must "forecast the probable effect and duration of the restriction." *Ibid.* Second, the court is to "identify the competing interests affected by the restriction." *Ibid.* Finally, the court is required to "determine whether the ordinance, in light of its probable impact, represents a reasonable [accommodation] of the competing interests." *Id.* at 609 (fn. omitted).

The evidence at trial will show that nothing material has changed since this Court issued its preliminary injunction in July 2011. Kern engaged in a robust sampling effort at Green Acres Farm, but its experts will acknowledge that they have uncovered no evidence of harm to the environment. For example, Dr. Higgins stated that he does "not have any direct knowledge of actual harm as a result of biosolids land application at Green Acres Farm." Ex. C, Higgins Dep. at 202:5-7. Consequently, the competing interests involved at trial remain as they were in June 2011: "Kern's need to protect its citizens from the *unknown potential harm* from biosolids, and their alleged effect on the reputation of Kern's agricultural products, versus LA's need to dispose of biosolids in an environmentally appropriate and least costly manner." *City of Los Angeles v. County of Kern*, (2011) Case No. 242057 (order granting preliminary injunction) (emphasis added). Even though Kern reviewed tens of thousands of pages of documents and conducted numerous depositions, the

trial record will still be "devoid of any consideration of any competing interests, and of any attempt to accommodate any competing interests." *Id.* at 6. The initiative campaign materials that Plaintiffs will present at trial demonstrate that Measure E's "proponents were seeking to prevent big LA from taking advantage of little Kern." *Id.* It is still the case that "[a] reasonable accommodation would seem to be [Kern's 2002 ordinance], restricting the land application to [Class A EQ] biosolids." *Id.* Measure E, however, "represents no accommodation . . . a complete ban precludes an 'accommodation.'" *Id.* Finally, Measure E's claimed economic harms due to continued land application of biosolids have never materialized; to the contrary Kern has more than doubled its agricultural income since Measure E was first adopted and enjoined in 2006, and land application has occurred alongside that growth.

a. Measure E has Undeniable Extraterritorial Impacts, but Only Illusory and Speculative Benefits to Kern County.

Measure E's impacts on outsiders dwarf the purported benefits to Kern County. Measure E compels significant changes to Southern California's wastewater management practices by blocking access to Kern's vast farmland for biosolids recycling. Kern will rely on evidence that it claims demonstrates that the City can simply discontinue its operations at Green Acres Farm and move to alternative biosolids management options.[4] But Kern does not dispute that Measure E will increase the City's biosolids management costs by 50% and Plaintiffs will demonstrate at trial that Kern's purported alternatives to land application in Kern County (composting, biosolids-to-fuel, deep well injection, and land application elsewhere) present technical and logistical challenges that may render them infeasible. City of Los Angeles personnel will testify regarding the substantial administrative

[4] Kern's arguments regarding these "alternative" to land application at Green Acres Farm ignore the substantial procedural and substantive requirements that govern the City's contracting and dictate that any policy change regarding biosolids management will be complicated, time-consuming, and costly. *See, e.g.*, City of Los Angeles Charter § 370-33 and Los Angeles Administrative Code §§ 10.2, 10.5, 10.15, and 10.17. (http://library.amlegal.com/nxt/gateway.dll/California/laac/administrativecode?f=templates$fn=default.htm$3.0$vid=amlegal:losangeles_ca_mc).

and logistical hurdles involved in any effort by the City to redirect the 700 tons per day of biosolids generated at its wastewater treatment plants.

Furthermore, Measure E threatens the viability of the City's longstanding commitment to beneficially reuse 100% of its biosolids. As noted earlier, the City also made multi-million dollar investments solely to support its land application program at Green Acres and to ensure compliance with the new, more stringent regulations adopted by Kern County. Enforcement of Measure E, however, would devalue these investments. Additionally, because its contract with the City of Bakersfield requires Green Acres Farm to beneficially reuse wastewater effluent to grow vegetation, if the Farm were required to discontinue biosolids land application it would likely have to substitute chemical fertilizers to produce viable commercial crops.

Greg Kester will testify based on his decades of experience in the biosolids management field that Measure E reduces options for biosolids management in Southern California and the Central Valley, increasing costs and market instability. He will also testify that Measure E will encourage other jurisdictions to adopt bans of their own. These costs borne by outsiders can hardly be considered a reasonable accommodation that is justified by the illusory benefits that Measure E purports to confer upon Kern County. To the contrary, Plaintiffs will produce evidence that Measure E will actually harm the Kern environment. Land application actually confers benefits upon the soil. Additionally, Measure E will have negative environmental consequences, including increased air emissions resulting from longer shipping distances for biosolids.

Conclusion

The City has operated Green Acres Farm for years without any discernable impact upon the residents of Kern County. Measure E has always been, at its core, a political issue, reflecting (as both trial courts noted) animosity of many Kern voters toward Los Angeles. That is why it is unsurprising that there is no evidence of the harms to the environment, health, safety, or agriculture, the pretexts offered for Measure E. After ten years of litigation and extraordinary scrutiny of Green Acres Farm, the evidence is still overwhelming in favor of continued land application in Kern

County. The Court's preliminary injunction was correct and a permanent injunction should now issue.

DATED: April 21, 2016

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By: _____
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Authorized to Sign on Behalf of All Plaintiffs