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UNITED STATES DISTRICT COURT CENTRAL DISTRICT OF CALIFORNIA

CITY OF LOS ANGELES; ORANGE
COUNTY SANITATION DISTRICT;
COUNTY SANITATION DISTRICT
NO. 2 OF LOS ANGELES COUNTY;
RESPONSIBLE BIOSOLIDS
MANAGEMENT, INC.; R&G
FANUCCHI, INC.; SHAEN MAGAN,
both individually and d/b/a HONEY
BUCKET FARMS and TULE
RANCH/MAGAN FARMS; WESTERN
EXPRESS, INC.; SIERRA
TRANSPORT, INC.; CALIFORNIA
ASSOCIATION OF SANITATION
AGENCIES,

Plaintiffs,

v.

COUNTY OF KERN; KERN COUNTY
BOARD OF SUPERVISORS,

Defendants.

No.

COMPLAINT

Plaintiffs City of Los Angeles, Orange County Sanitation District, County Sanitation District No. 2 of Los Angeles County, Responsible Biosolids Management, Inc., R&G Fanucchi, Inc., Shaen Magan (individually and d/b/a Honeybucket Farms and Tule Ranch/Magan Farms), Western Express, Inc., Sierra Transport, Inc., and California Association of Sanitation Agencies allege as follows:

I. INTRODUCTION

1. This case concerns whether one of California's 58 counties can unilaterally disrupt a statewide regulatory scheme and impede safe commerce regarding a commodity that is central to modern wastewater treatment -- biosolids, the recyclable, organic product from treated wastewater. Plaintiffs are a city, two public sanitation districts, the state trade association representing California sanitation agencies, contractors, trucking companies and farmers who treat hundreds of millions of gallons of wastewater on a daily basis and through that process generate, manage, and reuse biosolids in Southern California and Kern County. They bring this suit because Defendant Kern County adopted an initiative to ban the land application of biosolids in the unincorporated areas of the county ("the Kern Ban"), in violation of the federal and state laws that govern the use of this organic fertilizer and in contravention of Plaintiffs' constitutional rights. The Kern Ban blocks sound biosolids management in California, is causing Plaintiffs to seek alternative ways to either recycle or dispose of their biosolids at a cost of millions of dollars and great environmental harm, and is depriving marginal Kern farmland of this nutrient rich product. The intent and effect of the Kern Ban are to discriminate against biosolids from urban communities in Southern California; by its own terms, the Ban allows continued land application by cities in Kern County just a few miles from the fields owned or used by Plaintiffs.

2. The government Plaintiffs (City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County) have rights and under federal and California law, as well as Kern County's prior biosolids ordinance, that allow them to generate biosolids and then transport these materials to Kern County for recycling through land application on farm fields. In the case of Plaintiff City of Los Angeles, it owns the farm that the Kern Ban intends to bar from receiving biosolids. The farm and contractor Plaintiffs (R&G Fanucchi Farms, Responsible Biosolids Management, Sierra Trucking and Shaen Magan) operate under permits and the same laws to manage and recycle the biosolids and use the material to improve the quality of the soil and grow crops.

3. Since the early 1990s, the Plaintiffs and other California communities, businesses and farms have successfully recycled biosolids in Kern County. Over the years, the Plaintiffs have complied with the biosolids ordinances adopted by Kern County that regulate health and safety standards for the land application of biosolids in the County. The Kern ordinances provided detailed requirements for monitoring the quality and controlling the use of biosolids and in large part complemented federal and state regulations. The Plaintiffs have invested millions of dollars on wastewater

treatment plant changes and management improvements to meet Kern's exacting standards for biosolids quality and monitoring.

4. However, on July 11, 2006, Kern County declared the results of a June 6, 2006 county ballot initiative that bans the land application of biosolids in the unincorporated areas of the county. The Kern Ban flatly prohibits Plaintiffs' recycling of biosolids and allows only six months for a phase-out of land application, with a provision for a few more months' grace period in the County's discretion upon a showing of "hardship."

5. The Kern Ban directly conflicts with comprehensive federal and state programs which regulate biosolids and encourage their recycling through land application. The Kern Ban has no rational basis, discriminates against a valuable fertilizer, and impermissibly bans an article in interstate commerce. The Kern Ban is illegal, renders worthless significant investments the Plaintiffs have made in their existing land application programs, and will impose millions of dollars in costs on Plaintiffs to find alternative locations for reuse or disposal of their biosolids.

6. For example, the Kern Ban eviscerates the purchase by Plaintiff City of Los Angeles, at a cost of almost \$10,000,000, of a farm in Kern County dedicated to the beneficial recycling of biosolids, as well as the investment of several additional million dollars the City made to construct improvements on the property to support its biosolids recycling program. The Kern Ban also renders superfluous the more than \$16 million the City spent on improvements to its wastewater treatment facilities to meet previous land application regulations imposed by Kern County.

7. Accordingly, Plaintiffs bring this case to have the Kern Ban enjoined and declared unlawful.

II. JURISDICTION AND VENUE

8. The Court has jurisdiction over this action pursuant to 28 U.S.C. § 1331 (federal question), 28 U.S.C. § 1337 (supplemental jurisdiction), 28 U.S.C. § 1343 (§ 1983 jurisdiction), and 28 U.S.C. § 2201 (declaratory judgment).

9. For purposes of the declaratory relief sought in this Complaint, an actual case or controversy within the meaning of 28 U.S.C. § 2201 (declaratory judgment) exists between Plaintiffs and Defendants as a result of Kern County's enactment of the Ban and its conflict with the Plaintiffs' rights to land apply biosolids under federal and state law and previous Kern County ordinances. Plaintiffs seek a declaratory judgment pursuant to 28 U.S.C. § 2201 and related preliminary and permanent injunctive relief pursuant to Fed. R. Civ. P. 65.

10. Venue lies in the Central District of California, the District wherein Defendant Kern County has blocked lawful commerce in biosolids, where the impacts of the Kern Ban will be most felt, where a substantial part of the events giving rise to the claims occurred, and a substantial part of the property that is the subject of this action is situated.

III. PARTIES

A. Plaintiffs

11. All Plaintiffs are either (i) government agencies that operate publicly owned treatment works (POTWs) regulated under the Clean Water Act; (ii) an association that includes such agencies as its members; (iii) farmers who land apply biosolids in Kern County; or (iv) businesses under contract to supervise and implement the land application of biosolids or transport biosolids.

12. Plaintiff City of Los Angeles (“City”) operates a vast and complex wastewater treatment and collection system, which is considered to be one of the world’s largest “separate” sewage collection and treatment systems. Included in that system are two wastewater treatment plants that generate biosolids that are recycled in Kern County: Hyperion and Terminal Island, located adjacent to the Pacific Ocean. The City also owns Green Acres Farm in Kern County where the City recycles biosolids, pursuant to permits and authorizations from Kern County, the state of California, and EPA.

A. On February 19, 1987, the City entered into an Amended Consent Decree (“ACD”) in *United States v. City of Los Angeles*, Case No. 77-3047 HP. The ACD prohibited ocean dumping of biosolids by the City. As described in ¶ 33 below, the Integrated Waste Management Act (“IWMA”), enacted by the California legislature in 1989, required localities to use recycling and source reduction to reduce the amount of solid waste (including sewage sludge) going into landfills. The IWMA required counties to adopt waste management plans demonstrating specifically how the solid waste stream would be recycled or reduced by specific amounts. In response to those two developments, the City began working with farmers in Kern County to land apply biosolids on various properties in the early 1990s. In approximately 1992, the Kern County Water Agency, Kern County Agricultural Commissioner, UC Cooperative Extension, and US Soil Conservation Service located in Kern County identified for Plaintiff Responsible Biosolids Management, Inc. (RBM) an ideal location in the County for land application of the City’s biosolids. RBM has applied biosolids at this location since approximately 1994. In 1999, after several years of successful land application at this site, the City purchased the farm (hereinafter Green Acres Farm), at a cost of \$9,630,000. The City made this significant investment to guarantee an optimal site and controlled environment for its land application program, as well as to ensure full City oversight of the program. The City now employs a full-time staff of farm workers, contractors and employees to oversee its operations at Green Acres Farm.

B. The City contracts with Plaintiff RBM to administer its land application program at Green Acres Farm. To implement the City’s program at Green Acres, RBM has held permits for land application since 1995. RBM takes responsibility for on-site testing, and determines the quantity of biosolids to be applied to each field, and works with the City’s contract farmer, Plaintiff R&G Fanucchi, Inc. (“Fanucchi Farms”). RBM also subcontracts with Plaintiff Sierra Transport to transport biosolids from the City’s Hyperion and Terminal Island Treatment Plants to Green Acres. RBM holds a permit for land application of biosolids from the Kern County Environmental Health Services Department. It is also authorized to land apply biosolids at Green Acres Farm under permits issued by the Central Valley Regional Water Quality Control Board

(Regional Water Board), which is the regulatory agency charged with protecting the water quality of surface and ground waters in the Central Valley. The City also holds a permit issued by the Regional Water Board for use of treated wastewater from the City of Bakersfield for irrigation at Green Acres Farm.

C. Green Acres Farm is located in Kern County, approximately 15 miles southwest of Bakersfield. It is zoned as A-Exclusive Agriculture. In 2004-05, Plaintiff Fanucchi Farms planted 4,845 acres with alfalfa, corn, wheat, sudan and milo. Like the biosolids, these crops are items in interstate commerce, and are sold to local dairy farms and export markets as animal feed. Biosolids provide the primary source of nutrients in the otherwise alkaline, saline soil. Treated wastewater (effluent) from the Bakersfield sewage treatment plant is used for irrigation at Green Acres, furthering the recycling goals of the farm.

13. Plaintiff County Sanitation District No. 2 of Los Angeles County operates wastewater treatment plants in Los Angeles County that generate biosolids that are recycled in Kern County by Plaintiff Shaen Magan.

14. Plaintiff Orange County Sanitation District operates wastewater treatment plants in Orange County that generate biosolids that are recycled in Kern County by Plaintiff Shaen Magan.

15. Plaintiff Responsible Biosolids Management, Inc. is a small business in Lompoc, California that has a contract with the City of Los Angeles to manage its biosolids recycling program.

16. Plaintiff R&G Fanucchi, Inc. is a family farming business in Kern County that has a contract with the City of Los Angeles to use biosolids as a fertilizer and soil amendment at Green Acres Farm to grow and sell crops.

17. Plaintiff Shaen Magan is a farmer who has a contract with Orange County Sanitation District and the County Sanitation District No. 2 of Los Angeles County to land apply biosolids generated by these agencies at Honey Bucket Farms and Tule Ranch in Kern County, which Magan owns. Magan transports biosolids for this land application through Plaintiff Western Express, Inc.

18. Plaintiff Sierra Transport, Inc. is a small business in Kern County that hauls biosolids from Los Angeles to Green Acres Farm.

19. Plaintiff California Association of Sanitation Agencies (“CASA”) is a non-profit mutual benefit corporation organized under California law. CASA’s members include public agencies, cities, special districts and joint powers authorities engaged in the collection, treatment, disposal or reclamation of wastewater, including Plaintiffs City, County Sanitation District No. 2 of Los Angeles County, and Orange County Sanitation District. CASA’s mission is to provide proactive leadership, innovative solutions, and timely education and information to CASA members, legislators, and the public, and to promote partnerships on wastewater issues with other organizations, so that sound public health and environmental goals may be achieved. CASA’s biosolids program is intended to promote the environmentally sound recycling of biosolids, to develop and maintain a system of sharing up to date, accurate, science-based biosolids information, and to work to avoid biosolids recycling land application bans, such as the Kern Ban, on behalf of its members.

B. Defendants

20. Defendant Kern County is a local governmental entity located in California's Central Valley.

21. Defendant Kern County Board of Supervisors is the governing body of Kern County and is a Defendant in its official capacity.

IV. STATEMENT OF FACTS

A. Biosolids and Their Use in California and at Green Acres Farm

22. Biosolids are nutrient-rich organic materials that are solid residuals from the treatment of municipal wastewater. All sewage treatment plants, regardless of their location, process wastewater from homes and businesses, resulting in sewage sludge that in most instances is further treated pursuant to federal and state regulations to produce a useful, recyclable product -- biosolids. Biosolids are recycled and applied to fertilize and condition soil to stimulate vegetative growth on farms, forests, and reclaimed mine sites. They can be applied in bulk quantities to farmland as occurs in Kern and hundreds of other counties across the country, or they can be bagged and sold in retail stores to home gardeners and landscapers. Biosolids provide farmers with an effective, organic fertilizer that is rich in nitrogen, phosphorous, potassium, and trace elements (such as zinc) that are essential for plant growth.

23. Biosolids have many important environmental benefits. They add organic matter to farm fields that increases soil tilth, improving the soil's ability to retain moisture and encouraging plant root development. Their elements are bound in organic materials that release slowly during the growing season. Land application of biosolids reduces or eliminates the need for chemical fertilizers that can adversely affect the environment. Sewage sludge that is not recycled as biosolids must be disposed of in landfills or incinerated. Land application of biosolids reduces demand for landfill space and eliminates the production of air emissions associated with incineration.

24. Plaintiffs the City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles County generate biosolids pursuant to detailed federal, California, and Kern County requirements that eliminate pathogens (bacteria and viruses that can cause disease) from the materials, rendering them safe for use and qualifying them as biosolids. *See, e.g.*, 40 C.F.R. Pt. 503; Kern County Ordinance Code § 8.05, as set forth in Kern County Ordinance G-6931 (requiring that all biosolids land applied in the unincorporated sections of Kern County (thus excluding the biosolids generated by Bakersfield and several other cities in Kern County) meet high standards for pathogen elimination and trace metals based on EPA's Class A, Exceptional Quality ("EQ") standards). EPA's Class A standard mandates treatment that eliminates microorganisms, including those that could cause diseases. EPA's EQ standards require that trace metals in biosolids be below certain levels that have been determined to be protective of human health and the environment. Beneficial use of biosolids has undergone intensive scientific risk assessments by the United States Environmental Protection Agency ("EPA") and repeatedly has been

deemed safe for the public and the environment by objective scientific researchers since the 1970s. *See, e.g.*, National Research Council of the National Academy of Sciences, *Biosolids Applied to Land: Advancing Standards and Practices* (2002); *Use of Reclaimed Water and Sludge in Food Crop Production* (1996); Letter From Tracy Mehan, EPA Ass't Administrator for Water (December 22, 2003) (denying petition brought by activist groups to ban land application of biosolids nationwide). Multiple levels of federal and state standards apply to ensure that biosolids destined for agricultural use will be recycled without significant risk of harm to humans, animals, crops or the environment.

25. Biosolids recycling on farmland has thrived for decades in California, elsewhere in the United States and in Europe and is a practice approved and encouraged by the EPA, the United States Department of Agriculture, the California State Water Resources Control Board ("State Water Board"), the Regional Water Board, and other governmental agencies across the country. Kern County farms have used sewage sludge as fertilizer in some form since the early 1900s. No state has banned land application of biosolids. EPA estimates that over 50% of America's sewage sludge is recycled as biosolids that are applied to farm fields.

26. The government Plaintiffs all have successful, EPA-regulated pretreatment programs that ensure that biosolids applied to Kern County are low in metals and other contaminants. Pretreatment programs, overseen by the Plaintiffs, keep harmful pollutants out of biosolids by requiring industrial customers to treat their wastewater to remove many contaminants before it is discharged into municipal sewers. For example, through the 1980s and 1990s Plaintiff City of Los Angeles dramatically reduced the quantity of trace metals in its sewage sludge, and the few parts per million of trace metals in its biosolids are far below EPA thresholds for EQ biosolids. OCS and Los Angeles County Sanitation District likewise generate biosolids that are far below EPA's trace metals thresholds for EQ biosolids as required by the prior Kern ordinance. Samples are taken regularly at the wastewater plants and in Kern County to confirm that any biosolids land applied in Kern meet this standard.

27. The government Plaintiffs' biosolids are also treated to meet the highest standards for the elimination of pathogens (bacteria and viruses that can cause disease). While sewage sludge does not necessarily contain pathogens, EPA has approved several methods for eliminating microorganisms in biosolids that will also kill any pathogens present. Biosolids that are treated to the highest level of pathogen reduction are labeled Class A biosolids and are under few federal restrictions for their use as fertilizer.

28. Kern County since 2003 has required that biosolids that are land applied in the unincorporated sections of the County meet EPA Class A standards for pathogen reduction and EPA EQ standards for levels of trace metals, and additional requirements, in order to meet Kern County's definition of EQ biosolids. Kern County Code, Chapter 8.05.030.J (2002). Prior to 2003, Plaintiffs applied "Class B" biosolids to Kern County farmland. Class B biosolids are treated to significantly reduce, rather than eliminate microorganisms, and then additional steps are required at farm fields to

protect public health, such as setbacks from property lines and limited access to fields for thirty days.

29. In response to Kern County's requirement that biosolids applied in unincorporated sections of the county meet Class A EQ standards, Plaintiffs invested heavily in new equipment and technology to meet the higher standards. The City of Los Angeles alone spent more than \$16 million to upgrade its Hyperion Treatment Plant and Terminal Island Plant to allow additional holding time for heat treatment of biosolids in large "digesters" that kill microorganisms. The City monitors levels of microorganisms both at the treatment plant and at its Green Acres Farm to ensure that the biosolids adhere to Class A standards. In any event, farm fields are not a hospitable environment for bacteria and viruses, which survive best inside a living host, and the soil, sun, wind, and drying insure destruction of any remaining pathogens in biosolids on farm fields.

30. Land application of biosolids has been a success for all of the governmental Plaintiffs and for the Plaintiff farms that have used biosolids as a soil amendment. Repeated sampling and scientific analysis demonstrate that the soil and crops continue to be of high quality. Data collected by third party regulators from numerous on and off site monitoring wells on the Farm demonstrate that there are no impacts on the ground water below Green Acres. In fact, the groundwater at Green Acres, which Kern County and the Kern County Water Agency themselves suggested as a site for land application of biosolids, flows away from the nearest water bank. A majority of Plaintiff Shaen Magan's permitted land is not located over a water bank as identified by the Kern County Water Agency.

B. Federal and California Law Governing Land Application of Biosolids

31. The primary legal framework for the generation and land application of biosolids is the Part 503 Rule ("Part 503") adopted by the EPA under the Clean Water Act, 33 U.S.C. § 1251. Both Part 503 and EPA encourage biosolids recycling and set forth detailed requirements for generation and land application of biosolids. States may enact stricter and more detailed regulations, as California has done, but states and localities may not ban the practice. For example, in California, as in many states, a notice of intent must be filed for a land application site to be covered under a general permit, and Kern, like many counties, requires that each site be specifically permitted for land application.

32. On February 19, 1987, the City entered into an Amended Consent Decree ("ACD") in *United States v. City of Los Angeles*, Case No. 77-3047 HP. The ACD prohibited ocean dumping of biosolids by the City. In 1988, the U.S. Congress passed the Ocean Dumping Ban Act, which prohibited disposal of solid waste (including sewage sludge) in the ocean. Pub. L. No. 100-688, 102 Stat. 4139 (Nov. 18, 1988). The City of Los Angeles and other coastal communities had used ocean discharge as an economical means of managing sewage sludge.

33. In 1989, California passed the Integrated Waste Management Act (IWMA) (codified at Cal. Pub. Res. Code § 40000 et seq.), which requires localities to

use recycling and source reduction to reduce the amount of solid waste (including sewage sludge) going into landfills. The IWMA required counties to adopt waste management plans demonstrating specifically how the solid waste stream would be recycled or reduced by specific amounts.

34. The IWMA and Ocean Dumping Ban, in conjunction with EPA's promulgation in 1993 of Part 503, encouraged California communities to recycle biosolids through land application on farmland.

35. After promulgation of EPA's Part 503, California and other states built comprehensive regulatory programs governing biosolids and land application based on Part 503. The Regional Water Board in 1993 issued the first General Order governing land application, setting forth additional mandates beyond Part 503 and requiring that a land applier file a notice of intent to comply, a filing fee, and a preapplication report. In 1995, the California Legislature adopted Water Code section 13274 (Stats. 1995, ch. 613, § 1), which directed the State Water Board or the regional water boards to prescribe general orders to govern land application.

36. Section 13274(i) of the Water Code states that “[n]othing in this section restricts the authority of a local government agency to regulate the application of sewage sludge and other biological solids to land within the jurisdiction of the agency, including but not limited to, the planning authority of the Delta Planning Commission, the resource management plan of which is required to be implemented by local government plans.” This provision allows stricter regulation of land application by localities but not bans that conflict with state law and Part 503. *See* California Const. Art. XI, § 7 (“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.”)

37. To provide a single regulatory framework for land application of biosolids in California, in 2000 the State Water Board issued General Order 2000-10, which endorsed the use of Class B, Class A, and EQ biosolids and supplemented EPA's Part 503 with regulations regarding appropriate sites and crops for land application and protections for groundwater. To support issuance of the General Order, the State Water Board prepared a detailed Environmental Impact Report (“EIR”) analyzing the environmental impacts of land application of biosolids, pursuant to the requirements of the California Environmental Quality Act (“CEQA”). Kern County filed a lawsuit challenging the General Order under CEQA, and the California Court of Appeal ordered the State Water Board to revise the EIR to assess the potential environmental impacts of limiting land application to Class A and EQ biosolids and prohibiting use of biosolids on fruit and vegetable crops.

38. The State Water Board issued a revised EIR and General Order in 2004. Based on the comprehensive environmental review in the revised EIR, which sets forth more than 600 pages of scientific analysis of the environmental impacts of land application of biosolids, the State Water Board concluded in its 2004 General Order that land application of biosolids is “environmentally sound and preferable to non-beneficial disposal.” The 2004 General Order allows land application of both Class

A and B biosolids and note that “EQ biosolids [which are now the only kind applied in the unincorporated areas of Kern County] may not necessitate regulation in the future.”

39. The Regional Water Board similarly has in place a General Order authorizing application of biosolids within its jurisdiction. The Order expressed the Board’s desire to encourage the diversion of biosolids away from landfills toward beneficial uses.

40. The land application activities of all Plaintiffs are duly authorized under orders issued by the State Water Board and/or the Regional Water Board.

C. Kern County’s Regulation of Biosolids

41. Kern County is one of America’s largest counties, covering more land than the states of Connecticut, Delaware and Rhode Island combined. It is also one of the country’s largest producers of agricultural products and crude oil. More than 700,000 acres of land are under cultivation in Kern County, and currently biosolids are land applied on fewer than 9,000 of those acres.

42. Farmers in Kern County have used sewage sludge on their fields for its soil-building and nutrient benefits since the early 1900s. Land application of biosolids in Kern County by the Plaintiffs began in the early 1990s, governed by EPA regulations and State and Regional Water Board requirements. In 1998, the Kern County Board of Supervisors passed its first biosolids ordinance, specifying additional management practices and requiring that the land applicator obtain a permit from the County Environmental Health Services Department and pay an annual \$8,000 fee.

43. In 1999, the Kern Board of Supervisors passed a new biosolids ordinance which directed the phase-out of land application of Class B biosolids in the unincorporated areas of the County by January 1, 2003. It mandated that all biosolids land applied in the unincorporated areas of the County must meet Kern County EQ standards by January 1, 2003. Further amendments in 2002 required that land application of biosolids be by permit only and imposed additional regulations beyond Part 503 and Water Board controls. Kern County biosolids regulations include detailed requirements for land applications, including stringent testing, extensive data gathering and reporting to the County, and unannounced inspections by Kern authorities of land application sites.

44. Kern County’s ordinance phasing out land application of Class B biosolids did not apply in the unincorporated areas of the county, including the City of Bakersfield, among other municipalities. Bakersfield continues to produce Class B biosolids, does not consider Class B biosolids to be an environmental hazard, and land applies its own Class B biosolids to a farm within the city limits. *See* Office of Municipal Website, City of Bakersfield, California, at <http://www.bakersfieldcity.us/cityservices/pubwrks/wastewater/plant2/index> (City of Bakersfield stating that its “dried sludge is categorized as Grade B quality and is safe and relatively odor free,” and “The City owns 5,000 acres located just south of the Plant 2 treatment plant. The farm land is leased to Progressive Associate Group which uses Plant 2 effluent to irrigate restricted crops (non-human consumption) such as cotton and

alfalfa. Biosolids generated from both Plant 2 and Plant 3 are spread on this farmland.”).

45. Kern County did not prepare an EIR for its ordinance phasing out land application of Class B biosolids in the unincorporated areas of the County. Some of the Plaintiffs in this action and others challenged the ordinance on CEQA and other grounds in State court. In 2005, the California Court of Appeal ruled that Kern was required to prepare an EIR to evaluate the environmental impacts inside and outside of Kern County of limiting land application to Class A EQ biosolids. *County Sanitation Dist. No. 2 of Los Angeles County et al. v. County of Kern*, 127 Cal. App. 4th 1544 (2005).

46. The Court of Appeal found there was substantial evidence that the Kern County ordinance could result in significant regional environmental impacts, for example, by causing an increase in the disposal of biosolids in landfills and by forcing land appliers in Kern County to haul their biosolids to more distant locations, thereby increasing fuel consumption and vehicle emissions. The Kern Ban that is the subject of this action has similar but far greater adverse environmental impacts because it bans all land application of biosolids and its impacts are felt outside the boundaries of Kern County.

47. In 2002, the Kern County Board of Supervisors directed the Kern County Resource Management Agency to form a task force to investigate possible groundwater impacts in Kern County of land application of biosolids. After extensive research and public hearings, the Kern County Water Resources Committee concluded that “land application can be permitted to occur with appropriate regulatory oversight.” The Committee recommended that the Board of Supervisors allow land application to continue, require ground water monitoring of certain sites, and restrict permitting of new sites to sites that pose a minimal risk to ground water. Memorandum of David Price, Water Resources Committee Secretary, to Kern County Water Resources Committee (Sept. 8, 2003). On May 10, 2005, Mr. Barmann, Kern County Counsel, stated in a letter to the Kern County Board of Supervisors that “the vast bulk of the scientific evidence supports the [biosolids] generators’ position that there is very low likelihood for [groundwater] contamination.”

48. In addition to the government Plaintiffs, other communities both in and out of Kern County land apply biosolids in Kern. For example, the cities of Bakersfield, Delano, Taft, Shafter and Wasco have recently applied Class B biosolids on farmland within their jurisdictions. As noted above, the Kern Ban does not prohibit the land application of biosolids by these communities within Kern County, however, because by its terms it applies only to the unincorporated areas of the county.

49. The land application activities of Plaintiffs are in full compliance with the prior Kern County biosolids ordinance allowing land application of biosolids within Kern County. Plaintiffs have rights under federal and state law and the prior Kern County biosolids ordinance to continue land application of biosolids, and they have committed significant resources in reliance on the right to recycle biosolids in Kern County.

D. Kern County's Biosolids Ban

50. The Kern Ban was passed by an initiative vote in Kern County on June 6, 2006. The ban did not undergo any public hearings, staff analysis, or other procedures and safeguards that are typically undertaken for such a draconian measure. Defendant Kern County Board of Supervisors without debate declared the results of the June 6 countywide vote on July 11, 2006. The Kern Ban on its terms purports to repeal in its entirety the existing biosolids ordinance and program of Kern County. *See* Exhibit A, "Keep Kern Clean Ordinance of 2006."

51. The substance of the Kern Ban is contained in two sentences, which read as follows: "It shall be unlawful for any person to Land Apply Biosolids to property within the unincorporated area of the County. Any Site for which a Permit was issued prior to the effective date of this Chapter shall have six (6) months from the effective date of this Chapter to discontinue land application of Biosolids." Kern County Code Chapter 8.05.040A (as revised by Measure E). The Kern Ban provides that every day of land application in violation of the ban constitutes a criminal misdemeanor, punishable by imprisonment of up to six months and a \$500 fine. Kern County Code Chapter 8.05.060 (as revised by Measure E).

52. The Kern Ban allows the County in its discretion to grant a few additional months for cessation of land application upon a finding of "hardship" by the Kern County Environmental Health Services Department. If the Department denies the request for an extension, the land applier may appeal to the Kern Board of Supervisors, which "may grant up to six months of additional time." Kern County Code Chapter 8.05.050 (as revised by Measure E). Plaintiffs have applied for the maximum extension allowable.

53. The Kern Ban defines biosolids that are banned to include Class A, Class B, and Class A EQ biosolids, and compost that contains biosolids. It ignores the distinctions in biosolids content and land application practices that have long been recognized in federal and California law, as well as Kern County's prior biosolids ordinance. The Ban prohibits the land application of biosolids without reference to any health or safety standards. The ban requires that the large quantities of compost generated in Kern County at facilities that import sewage sludge from outside of Kern County to make compost must now export the compost for land application in other counties.

54. The Kern Ban has one exclusion, stating that it "excludes biosolids products that are in a bag or container packaged for routine retail sales through regular retail outlets which are primarily used for residential purposes in limited quantities." Kern County Code Chapter 8.05.030B (as revised by Measure E). None of these terms are defined. Under EPA's Part 503, biosolids meeting Class A EQ standards may be bagged and sold with few restrictions.

55. The Kern Ban effectively prevents all use of biosolids in the unincorporated portions of Kern County. But the ban does not apply to the incorporated areas of the County. The Ban is intended to and does discriminate against biosolids generated outside of Kern County, which are land applied in the unincorporated areas of Kern County, whereas significant amounts of biosolids generated in Kern County

(almost all of which are Class B biosolids that have less treatment) are overwhelmingly land applied in the incorporated areas of the County.

56. The Kern Ban offers no environmental benefits to Kern County and in fact will cause numerous environmental detriments to Kern County and Southern California, including decreased soil quality, substitution of chemical and manure fertilizers for biosolids, increased demands for irrigation water, increased consumption of diesel fuel, and increased truck traffic and air pollution as biosolids are diverted from Kern County.

57. The drafters, sponsors, and organizers of ballot initiative Measure E that became the Kern Ban, and the Defendants who implemented the Ban, intended that the Ban deny these specific Plaintiffs access to farm land in Kern County to recycle biosolids.

E. Additional Illegal and Unconstitutional Aspects of the Kern Ban

58. The Kern Ban, on its face and as applied, is ultra vires, is preempted under federal and California law, and violates the constitutional rights of Plaintiffs.

59. The Kern Ban is arbitrary and irrational because it has no reasonable basis in the facts available at the time of passage and enactment. Kern County acted arbitrarily based on vague and emotional speculation regarding biosolids, not on any reasoned legislative determination. Kern County conducted no rational review or fact finding regarding the established science and practice regarding biosolids prior to enacting the Ban. Moreover, Kern County had no basis to overturn the determinations made by EPA, California and Kern officials that the Plaintiffs were safely recycling biosolids in Kern.

60. Biosolids are an article in interstate commerce that the Kern Ban illegally bars from Kern County. While the Kern Ban purports to regulate land application of biosolids in Kern County, its effects are both intrastate and interstate in reach. The Kern Ban interferes with the market in biosolids that allows biosolids generators, managers, transporters and farmers, including all of the Plaintiffs, to trade millions of dollars worth of goods and services to achieve efficient and lawful compliance with the Clean Water Act. The Kern Ban greatly increases the costs of biosolids management for Plaintiffs, forcing them to turn to alternative land application or disposal sites in California and other states. By depriving Kern farmers of the ability to make their land available for application in exchange for the benefits provided by biosolids, the Kern Ban increases the farmers' costs because they force the farmers to purchase alternative products to replace the unavailable biosolids, or makes farming prohibitively costly on marginal land sites.

61. The Kern Ban imposes unreasonable and unjustified barriers to free trade. Out-of-county or out-of-state producers of biosolids are unable to avail themselves of the market for land application of biosolids in Kern County. Therefore, the Kern Ban imposes barriers to free trade among the states.

62. EPA and California biosolids regulations, and the prior Kern County biosolids ordinance, demonstrate that there are valid, nondiscriminatory alternatives to

the Kern Ban that adequately protect the environment. Environmental concerns such as protecting groundwater are of state-wide interest (Plaintiff City of Los Angeles, for example, has rights to groundwater in Kern County), and have been addressed in EPA's Part 503 Rule, the State Water Board's General Order, and the prior Kern County biosolids ordinance. Therefore, the Kern Ban imposes a burden on commerce clearly excessive in relation to its illusory local benefits.

63. The Kern Ban is facially discriminatory, discriminatory in its practical effect, and discriminatory by its purpose. It singles out for arbitrary and unreasonable treatment governmental entities, businesses and farmers that want to engage in trade in biosolids. The Kern Ban discriminates against biosolids and those engaged in commerce with it in comparison to other similar organic materials used for fertilizer, including animal manure, as well as chemical fertilizers. Farmers who use biosolids are also arbitrarily discriminated against by the Kern Ban in comparison to their use of other materials applied to farmland in Kern County, including herbicides and pesticides.

64. The Kern Ban will cause irreparable harm to the Plaintiffs for which there is no adequate remedy at law.

F. The Kern Ban Causes Plaintiff Farmers and the Environment Substantial Harm and Damages

65. Plaintiffs Fanucchi Farms and Shaen Magan (Farm Plaintiffs) are both farmers experienced in Kern County agriculture and the benefits of land application of biosolids. Fanucchi Farms is a small family-owned business that is responsible for the farming activities at Green Acres. Shaen Magan owns and runs Honey Bucket Farms in Kern County which recycles biosolids for Plaintiffs Orange County Sanitation District and Los Angeles County Sanitation District.

66. The Kern Ban will cause direct and serious financial damages to the Farm Plaintiffs. These damages include lost contract revenues from the government Plaintiffs if biosolids can no longer be used, increased costs for chemical fertilizers to substitute for biosolids, and increased irrigation costs to substitute for the nutrient and moisture retention value of biosolids. The Kern Ban also causes uncertainty in farm planning, cash flow and financial planning, further injuring the Farm Plaintiffs.

67. The Farm Plaintiffs likely will suffer reduced crop yields because the soil conditioning values of biosolids cannot be replaced with chemical fertilizers. These lost yields and attendant financial damages are a direct result of the Kern Ban.

68. Soil, health and environmental benefits will be irretrievably lost, including water retention, erosion and runoff reductions, reduction of bulk density, dust control, and improvements to soil structure and cation exchange capacity (which assists the soil's ability to retain nutrients).

V. CLAIMS FOR RELIEF

FIRST CLAIM FOR RELIEF (DORMANT COMMERCE CLAUSE)

69. Paragraphs Nos. 1 through 67 are incorporated here by reference.

70. Biosolids are an article in commerce subject to the sole power of Congress to regulate commerce among the several states under the Commerce Clause of the United States Constitution.

71. The Commerce Clause provides that only “[t]he Congress shall have the Power .. [t]o regulate Commerce ... among the several States” Art. I, § 8, cl. 3. Likewise, the Commerce Clause bars state or local governments from unjustifiably discriminating against or burdening the interstate flow of articles of commerce.

72. The Kern Ban, on its face and as applied, prohibits land application of biosolids in the unincorporated areas of Kern County and many activities related to the commerce and flow of biosolids.

73. The Kern Ban constitutes an undue burden on interstate commerce, outweighing the illusory, asserted benefits of the Kern Ban, and violates the Commerce Clause.

74. Kern County enacted the Ban with a discriminatory purpose making the Ban per se invalid.

75. Kern County’s enactment of the Ban violated all Plaintiffs’ rights under the Commerce Clause of the United States Constitution, and Plaintiffs are entitled to a declaratory judgment thereof and injunctive relief prohibiting Kern County from enforcing the Kern Ban.

76. At all times, Kern County acted under color of state law.

77. Kern County’s enactment of the Kern Ban deprived the farm Plaintiffs and contractor Plaintiffs of their rights under the Commerce Clause of the United States Constitution, in violation of 42 U.S.C. § 1983, and these Plaintiffs are entitled additionally to damages and attorneys’ fees.

78. As a direct and proximate result of Kern County’s actions, the Farm Plaintiffs and contractor Plaintiffs have suffered and continue to suffer substantial damages in an amount to be proven at trial.

SECOND CLAIM FOR RELIEF (EQUAL PROTECTION)

79. Paragraphs Nos. 1 through 77 are incorporated here by reference.

80. The Kern Ban on land application of biosolids treats the Plaintiffs differently from similarly situated persons that generate, manage or use manure, fertilizers, and other materials used in Kern County, and discriminates against persons that generate, manage, or use biosolids.

81. The Kern Ban is not rationally related to a legitimate government purpose.

82. Kern County’s enactment of the Kern Ban violated all Plaintiffs’ rights to equal protection of the laws as guaranteed by the United States and California Constitutions, and the Plaintiffs are entitled to a declaratory judgment thereof and injunctive relief prohibiting Kern County from enforcing its Ban.

83. At all times, Kern County acted under color of state law.

84. Kern County's enactment of the Kern Ban deprived the Farm Plaintiffs and contractor Plaintiffs of their rights to equal protection of the laws as guaranteed by the United States and California Constitutions, in violation of 42 U.S.C. § 1983, and these Plaintiffs are entitled additionally to damages and attorneys' fees.

85. As a direct and proximate result of Kern County's actions, the Farm Plaintiffs and contractor Plaintiffs have suffered and continue to suffer substantial damages in an amount to be proven at trial.

**THIRD CLAIM FOR RELIEF
(CLEAN WATER ACT PREEMPTION)**

86. Paragraphs Nos. 1 through 84 are incorporated here by reference.

87. The Supremacy Clause of the Constitution, Art. VI, cl. 2, invalidates local laws which "interfere with or are contrary to the laws of Congress, made in pursuance of the Constitution."

88. Federal regulations on biosolids promulgated pursuant to the Clean Water Act, 33 U.S.C. § 1251, allow the land application of biosolids and provide a detailed statutory scheme that occupies the field for regulation of biosolids. 40 C.F.R. Pt. 503.

89. The Kern Ban prohibits activity which is expressly allowed by federal law.

90. The Kern Ban stands as an obstacle to the accomplishment of the full purposes and objectives of federal law and interferes with the methods by which the federal biosolids regulations were designed to reach their goals.

91. Plaintiffs are entitled to a declaratory judgment that the Clean Water Act preempts the Kern Ban and to an injunction against Kern County prohibiting it from enforcing its Ban.

92. The Farm Plaintiffs and contractor Plaintiffs have a right to engage in commerce in and the land application of biosolids pursuant to federal law and regulations.

93. At all times, Kern County acted under color of state law.

94. Kern County's enactment of the Kern Ban deprived the Farm Plaintiffs and the contractor Plaintiffs of their rights protected by the Supremacy Clause of the United States Constitution, in violation of 42 U.S.C. § 1983, and these Plaintiffs are entitled additionally to damages and attorneys' fees.

95. As a direct and proximate result of Kern County's actions, the Farm Plaintiffs and contractor Plaintiffs have suffered and continue to suffer substantial damages in an amount to be proven at trial.

**FOURTH CLAIM FOR RELIEF
(PREEMPTION BY THE CALIFORNIA INTEGRATED WASTE
MANAGEMENT ACT)**

96. Paragraphs Nos. 1 through 94 are incorporated here by reference.

97. By 1988, landfills throughout California were nearly filled to capacity, requiring the development of alternative methods of addressing solid waste. Cal. Pub. Res. Code § 40000. To meet this crisis, the California Legislature passed the Integrated Waste Management Act of 1989 (the “IWMA”), codified as amended at California Public Resources Code § 40000 et seq. The IWMA’s stated purposes are to “reduce, recycle and reuse solid waste . . . to the maximum extent feasible.” Cal. Pub. Res. Code § 40052. Local agencies such as cities and counties which are responsible for waste disposal within their boundaries were obligated to enact comprehensive waste management plans that would eventually divert half of their refuse from landfills.

98. Local waste management plans under the IWMA are required to promote specified waste management practices, including source reduction, recycling and composting, and environmentally safe transformation and environmentally safe land application of solid waste. Cal. Pub. Res. Code § 40051. The Legislature further declared that “market development is the key” to meeting the stated goal of diverting trash from landfills. Cal. Pub. Res. Code § 40001(c).

99. “Solid waste,” as defined in the IWMA, includes biosolids. Cal. Pub. Res. Code § 40191(a). The IWMA specifically contemplates that local agency waste management plans will include provision for diverting biosolids from landfill, just like other forms of solid waste, provided that doing so does not pose a threat to public health or the environment. Cal. Pub. Res. Code § 41781.1.

100. In part as a result of the IWMA, biosolids in California have in fact been diverted from disposal in landfills in favor of recycling as a fertilizer applied to agricultural land. Today, the majority of biosolids that are produced in California are land applied.

101. As a practical matter, the only way for a California municipality to manage any significant amount of biosolids is through landfilling or land application, or by sending it to a different locale to be landfilled or land applied there. Ocean dumping of biosolids is illegal, and incineration is effectively so, given federal, state and regional air quality regulations. Accordingly, a ban on the land application of biosolids eliminates the only practical alternative to landfilling and, thus, obstructs the goal of the IWMA to reduce the use of landfilling as a method of disposal of solid waste.

102. Kern County is a local agency subject to the IWMA. Cal. Pub. Res. Code § 41300. The Kern Ban is a complete ban on the land application of biosolids, including land application of compost that contains any biosolids, in the unincorporated areas of the county. The Ban renders Plaintiffs’ land application programs in Kern illegal.

103. The Kern Ban is preempted because it conflicts with the purposes and policies of the IWMA. It does so by banning the only practical alternative to landfilling that is available for biosolids, namely land application. A complete ban on the land application of biosolids eliminates all practical market options for the recycling or reuse of this form of solid waste. Moreover, there is no health or environmental basis for the Kern Ban because Plaintiffs’ biosolids and land application practices are safe.

104. Accordingly, Plaintiffs seek a declaration that the Kern Ban is preempted by the IWMA and an injunction against the enforcement of the Ban.

**FIFTH CLAIM FOR RELIEF
(PREEMPTION BY THE CALIFORNIA WATER CODE)**

105. Paragraphs Nos. 1 through 103 are incorporated here by reference.

106. Section 13274 of the California Water Code gives the State Water Board and regional boards authority to prescribe waste discharge requirements governing the land application, and certain other types of disposal, of biosolids. Pursuant to the Water Code, the SWRCB State Water Board prescribed such regulations in General Order No. 2004-12.

107. Section 13274 preserves the authority of a local agency to “regulate” the land application of biosolids. As used in that section, the word “regulate” means the setting of minimum health, safety and environmental standards. It does not include the power to completely ban the land application of biosolids, regardless of health standards. If every locality in California had the power to ban the land application of biosolids, then the delegation of authority to the State Water Board and the regional boards to prescribe waste discharge requirements could be rendered a nullity, contrary to the intent of the statute.

108. The Kern Ban is preempted by section 13274 of the California Water Code because it completely bans the land application of biosolids. It does not “regulate” health or safety standards within the meaning of section 13274.

109. Accordingly, Plaintiffs seek a declaration that the Kern Ban is preempted by the Water Code and an injunction against its enforcement.

**SIXTH CLAIM FOR RELIEF
(INVALID EXERCISE OF POLICE POWER)**

110. Paragraphs Nos. 1 through 108 are incorporated here by reference.

111. Under California law, if a local regulation or restriction significantly affects residents of surrounding communities, the constitutionality of the regulation or restriction must be measured by its impact not only upon the welfare of the enacting community, but upon the welfare of the surrounding region as well. This fundamental legal principle applies equally to a county ordinance adopted by initiative as it does to an ordinance adopted by a county board of supervisors.

112. The Kern Ban significantly affects residents outside Kern County. For example, the Ban degrades the environment outside the County, by causing increased usage of California’s limited landfill space to dispose of biosolids and by causing longer haul routes for disposal or reuse of biosolids, thereby leading to traffic and air quality impacts that extend well beyond the County’s borders. The Kern Ban also increases the costs for management of biosolids throughout central and southern California and Arizona by increasing competition for alternative management resources, including composting and land application in other counties. It will cause rate increases for sewage services provided by the government Plaintiffs.

113. In enacting the ban on biosolids, the County made no attempt to accommodate competing interests on a regional basis. The Ban is therefore in excess of the County's police power under the California Constitution.

114. Accordingly, Plaintiffs seek a declaration that the Kern Ban is an invalid exercise of the County's police power and an injunction against the enforcement of the ban.

VI. PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court:

1. Pursuant to 28 U.S.C. § 2201, enter a declaratory judgment in Plaintiffs' favor declaring the Kern Ban to be unlawful and preempted by federal and California laws, ultra vires, arbitrary, unreasonable and violative of the Plaintiffs' rights under the United States and California Constitutions;

2. Preliminarily and permanently enjoin Defendants, and anyone acting under the authority of or on behalf of Defendants, from enforcing or implementing the Kern Ban;

3. Award the Farm Plaintiffs and Contractor Plaintiffs damages from being prohibited from engaging in commerce in and land application of biosolids, the exact amount to be proved at trial, and their costs and fees under 42 U.S.C. § 1983, including attorneys' fees under 42 U.S.C. § 1988 reasonably expended in this cause; and

4. Grant such other and further relief as the Court may deem just and proper.

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