United States District Court,C.D. California.

CITY OF LOS ANGELES, et al., Plaintiff,
v.
COUNTY OF KERN, et al., Defendant.
No. CV 06 5094 GAF(VBKX).

Oct. 24, 2006.

Los Angeles City Attorney's Office, Rockard J. Delgadillo, City Attorney, Christopher M. Westhoff, Assistant City Attorney, Keith W. Pritsker, Deputy City Attorney, Los Angeles, CA, for Plaintiff City of Los Angeles.
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Woodruff Spradlin & Smart, Bradley R. Hogin, Orange, CA, for Plaintiff Orange County Sanitation District.
Law Offices of Michael J. Lampe, Michael J. Lampe, Visalia, CA, for Plaintiffs Shaen Magan, Honey Bucket Farms, Tule Ranch/Magan Farms and Western Express, Inc.
Somach Simmons & Dunn, Roberta L. Larson, Jonathan Schutz, Sacramento, CA, for Plaintiff California Association of Sanitation Agencies.
Kern County Counsel's Office, Bernard C. Barmann, Sr., County Counsel, Bakersfield, CA, Hogan Guiney Dick LLP, Michael M. Hogan, San Diego, CA, for Defendants County of Kern and Kern County Board of Supervisors.

ORDER RE: DEFENDANTS' MOTIONS TO DISMISS

FEESS, J.

I.

INTRODUCTION

This case arises from Defendants Kern County's and Kern County Board of Supervisors' (collectively "Kern") intended enforcement of "Measure E," a ballot initiative enacted after a campaign that included entreaties to keep "Los Angeles" sludge out of Kern County. The legislation prohibits the "land application" of sewage treatment residues called "biosolids" or "sludge" in the unincorporated areas of Kern County. The government Plaintiffs (City of Los Angeles, Orange County Sanitation District, and County Sanitation District No. 2 of Los Angeles) generate biosolids, some portion of which is transported to Kern County. The farm and contractor Plaintiffs (R & G Fanucchi Farms, Responsible Biosolids Management, Sierra Trucking and Shaen Magan) recycle the biosolids and allegedly use the material as fertilizer to improve the quality of their soil and grow crops.

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

Defendants now move to dismiss the Complaint: (1) under Rule 12(b)(1) for lack of subject matter jurisdiction under the *Rooker-Feldman* doctrine; (2) under Rule 12(b)(3) for improper venue; and (3) under Rule 12(b)(6) for failure to state a claim. For the reasons set forth below in more detail, the motions are GRANTED IN PART and DENIED IN

PART. Because the instant case is not a de facto appeal of a state court judgment, the *Rooker-Feldman* doctrine is inapplicable, and thus Kern's Rule 12(b)(1) motion is DENIED. Moreover, venue is proper in the Central District because Plaintiffs seek to redress alleged injuries to constitutional rights that occurred here-which means a substantial part of the events giving rise to the claim occurred here-and thus the Rule 12(b)(3) motion is DENIED.

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

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

II.

BACKGROUND

A. Overview of Biosolids

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

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

B. Kern's Regulation of Biosolids Prior to Measure E

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

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

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

C. Measure E

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

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

Measure E is at issue here.

III.

DISCUSSION

A. The Motion to Dismiss for Lack of Subject Matter Jurisdiction

1. Overview of the *Rooker-Feldman* Doctrine

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

2. The *Rooker-Feldman* Doctrine Does Not Apply Here

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

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

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

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

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

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

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

B. The Motion to Dismiss for Improper Venue

1. The Legal Standard

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

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

28 U.S.C. § 1391(b). Plaintiffs may lay venue under either the first or second option, but the third option is a "fallback" that is only available if the first two are not.[FN1]

FN1. Kern cites an out of circuit district court case for the proposition that the second option is also a "fallback" available only if the first is not. (Reply at 4-6 (citing *Cobra Partners L.P. v. Liegl*, 990 F.Supp.

332, 333-34 (S.D.N.Y.1998)). This position is in the distinct minority, however, and contradicts the express language of the statute. *See* 15 Charles Alan Wright, et al., *Federal Practice and Procedure* § 3802.1 (2d ed. 1986 & Supp.2006).

2. Analysis

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

In support of the motion to dismiss, Kern relies mainly on an unpublished opinion wherein Judge Anderson held that the Central District was not the proper venue for an action challenging a previous Kern County biosolids ordinance. *Cal. Ass'n of Sanitation Agencies v. County of Kern,* No. 03-8581, slip op. at 2-4 (C.D.Cal. Apr. 28, 2004)("*CASA"*).

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

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

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

C. The Motion to Dismiss for Failure to State a Claim

1. The Legal Standard

A court may not dismiss a complaint for failure to state a claim "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957). Thus, dismissal pursuant to Rule 12(b)(6) is proper only where there is either a "lack of a cognizable legal theory" or "the absence of sufficient facts alleged under a cognizable legal theory." *Balistreri v. Pacifica Police*

Dep't, 901 F.2d 696, 699 (9th Cir.1988). The Court accepts all factual allegations pleaded in the complaint as true in deciding a motion to dismiss for failure to state a claim; in addition, it construes those facts and draws all reasonable inferences from them in favor of the nonmoving party. *Cahill v. Liberty Mut. Ins. Co.*, 80 F.3d 336, 337-38 (9th Cir.1996).

2. Analysis

a. The First Cause of Action for Violation of the Commerce Clause

I. Overview of the Dormant Commerce Clause

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

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

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

II. Plaintiffs State a Claim for a Commerce Clause Violation

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

Kern contends that these allegations fail to state a claim for a Commerce Clause violation because the Clean Water Act and accompanying regulations mean that Congress expressly authorized a ban on biosolids, and thus that Measure E is not subject to the Dormant Commerce Clause analysis. (Opp. at 12-13). Alternatively, Kern contends that Measure E does not discriminate against interstate commerce because it is facially neutral and does not discriminate in its effect. (*Id.* at 13-15). Both arguments fail.

(a). Congress Has Not Expressly Authorized Discrimination Against Biosolids in Interestate Commerce

In support of its contention that Commerce Clause analysis does not apply because of express congressional approval, Kern cites to 33 U.S.C. § 1345(e), which provides as follows:
The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

33 U.S.C. § 1345(e). Kern also cites regulations promulgated by the Environmental Protection Agency ("EPA"), which state that:Nothing in this part precludes a State or political subdivision thereof or interstate agency from imposing requirements for the use or disposal of sewage sludge more stringent than the requirements in this part or from imposing additional requirements for the use or disposal of sewage sludge.

40 C.F.R. § 503.5(b).

As discussed in greater detail below, these so called "savings clauses" make clear that state and local government regulations are not preempted unless they interfere with an objective of the Clean Water Act. *United States v. Cooper,* 173 F.3d 1192, 1200-01 (9th Cir.1999); *Welch v. Bd. of Supervisors of Rappahannock County, Va .,* 888 F.Supp. 753, 759-60 (W.D.Va.1995); *County Sanitation,* Cal.App. 4th at 1610. However, approval for local regulation in general does not constitute express approval for discriminatory regulation. *See South-Central Timber Development, Inc. v. Wunnicke,* 467 U.S. 82, 91-92 (1984); *Sporhase v. Nebraska, ex rel. Douglas,* 458 U.S. 941, 960 (1982). Accordingly, the Dormant Commerce Clause analysis applies.

(b). Plaintiffs' Allegations are Adequate

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

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

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

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

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

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

Here, Plaintiffs allege that Measure E arbitrarily treats them differently than persons applying manures and other fertilizers on Kern County farms, as well as persons using bagged biosolids. (Compl.¶ ¶ 54, 55, 63).[FN2] They also allege that Measure E "offers no environmental benefits to Kern County and in fact will cause numerous environmental detriments to Kern County and Southern California, including decreased soil quality, substitution of chemical and manure fertilizers for biosolids, [and] increased demands for irrigation water, increased consumption of diesel fuel," among other things (*Id.* ¶ 56). Further, Plaintiffs allege that "[t]he drafters, sponsors and organizers of ... Measure E ... and the Defendants who implemented the Ban, intended that the Ban deny these specific Plaintiffs access to farm land in Kern County to recycle biosolids." (*Id.* ¶ 57).

> FN2. Though Plaintiffs also allege a classification differentiating between biosolid application in incorporated versus unincorporated areas, as noted above Kern has no power to regulate in incorporated areas. Thus, Measure E does not "classify" on this basis.

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

Accordingly, Plaintiffs state a claim for an Equal Protection violation.

c. The Third Cause of Action for Clean Water Act Preemption

i. Overview of Federal Preemption Analysis

The Supremacy Clause of the United States Constitution provides: "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; ... any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const. art. VI, cl. 2. The Supreme Court has interpreted the Supremacy Clause to compel three ways that federal law may preempt state law:
First, in enacting the federal law, Congress may explicitly define the extent to which it intends to pre-empt state law. Second, even in the absence of express pre-emptive language, Congress may indicate an intent to occupy an entire field of regulation, in which case the States must leave all regulatory activity in that area to the Federal Government. Finally, if Congress has not displaced state regulation entirely, it may nonetheless pre-empt state law to the extent that the state law actually conflicts with federal law. Such a conflict arises when compliance with both state and federal law is impossible, or when the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.

Mich. Canners & Freezers Ass'n, Inc. v. Agric, Mktg. & Bargaining Bd., 467 U.S. 461, 469 (1984) (internal citations and quotation marks omitted).

ii. Plaintiffs Fall to State a Claim for Conflict Preemption

Plaintiffs allege that Measure E is subject to conflict preemption because it impedes a federal objective.[FN3] (Compl.¶ 90). Specifically, they contend that 40 C.F.R. § 503 constitutes a comprehensive nationwide scheme that encourages biosolid use and disposal in compliance with its terms, which Congress expressly enabled through 33 U.S.C. § 1345(d) as part of the Clean Water Act.

> FN3. Plaintiffs also allege field preemption, (Compl.¶ 88), but they abandon it in their opposition to the instant motion. In any event, field preemption would be impossible in light of the savings clauses discussed below, which expressly allow for local regulations not less stringent than federal law.

This argument faces an uphill battle because of the Clean Water Act's "savings clauses," which expressly allow local regulations that are more stringent than the federal government's. As noted above, 33 U.S.C. § 1345(e) reads:
(e) Manner of sludge disposal
The determination of the manner of disposal or use of sludge is a local determination, except that it shall be unlawful for any person to dispose of sludge from a publicly owned treatment works or any other treatment works treating domestic sewage for any use for which regulations have been established pursuant to subsection (d) of this section, except in accordance with such regulations.

33 U.S.C. § 1345(e) (emphasis added). Similarly, the Clean Water Act's provision on state authority in general reads:Except as expressly provided in this chapter, nothing in this chapter shall (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce ... (B) any requirement respecting control or abatement of pollution; except that if ... standard of performance is in effect under this chapter, such State or political subdivision or interstate agency may not adopt or enforce any ... standard of performance which is less stringent....

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

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

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

The court then considered the argument-which Plaintiffs here raise as well-that the CWA's preemptive effect should be analogous with the Resource Conservation and Recovery Act, 42 U.S.C. § 6900 *et seq.* ("RCRA"), another

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

Accordingly, *Welch* concluded that

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

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

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

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

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

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

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

i. Overview of State Preemption Principles

Californinia's state preemption doctrine is analogous to federal preemption jurisprudence. A county or city may make and enforce within its limits all local, police, sanitary, and other ordinances and regulations not in conflict with general laws. Cal. Const. art. XI, § 7. "Local legislation in conflict with general law is void. Conflicts exist if the ordinance duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication." *Morehart v. County of Santa Barbara,* 7 Cal.4th 725, 747 (1994) (citations and quotation marks omitted). "Local legislation is 'contradictory' to general law when it is inimical thereto." *Sherwin-Williams Co. v. City of Los Angeles,* 4 Cal.4th 893, 898 (1993).

The party claiming that general state law preempts a local ordinance has the burden of demonstrating preemption. *Big Creek Lumber Co. v. County of Santa Cruz,* 38 Cal.4th 1139, 1149 (2006).

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

Plaintiffs contend that Measure E is inimical to the goal of encouraging land application of biosolids expressed in the California Integrated Waste Management Act and the California Water Code, and thus is subject to conflict preemption. (Compl.¶ ¶ 96-109). Like the federal Clean Water Act, the CIWMA and the California Water Code contain savings clauses that allow counties and cities to enact more stringent regulations. Cal. Pub. Res.Code § 40053; Cal. Water Code § 13274(i). However, the California Supreme Court has indicated that "when a statute or statutory scheme seeks to promote a certain activity and, at the same time, permits more stringent local regulation of that activity, local regulation cannot be used to completely ban the activity or otherwise frustrate the statute's purpose." *Great W. Shows, Inc. v. County of L.A.*, 27 Cal.4th 853, 868 (2002) (citing *Blue Circle Cement, Inc.*, 27 F.3d at 1506-07).[FN4]

> FN4. The Court recognizes that there is some question whether the California Supreme Court has yet wholeheartedly endorsed *Blue Circle Cement.* The quoted language is merely the court's distillation of the rule from *Blue Circle Cement,* which it then distinguished. Nonetheless, the *Blue Circle Cement* rationale is powerful-if a superior body of law advances certain priorities, those priorities should not be undercut by inferior law, even when the inferior law is expressly allowed room to operate in non-offensive ways. *See Geier,* 529 U.S. at 869 (holding that a "saving clause ... does not bar the ordinary working of conflict pre-emption principles"); *Int'l Bhd. of Elec. Workers v. City of Gridley,* 34 Cal.3d 191, 193 (1983) ("Although the Legislature did not intend to preempt all aspects of labor relations in the public sector, we cannot attribute to it an intention to permit local entities to adopt regulations which would frustrate [its] declared policies and purposes...."). Accordingly, the Court concludes that the California Supreme Court would endorse *Blue Circle Cement* if squarely presented with the question.

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

(a). CIWMA Preemption

In support of their contention that it does, Plaintiffs note that the CIWMA, when enacted in 1989, required local governments to adopt waste management plans to divert 25% of the solid waste produced in their jurisdictions from landfills by 1995 and 50% by 2000. Cal. Pub. Res.Code § 41780. Additionally, the CIWMA provides:
In implementing this division, the board and local agencies *shall* do both of the following:
(a) Promote the following waste management practices *in order of priority:*
(1) Source reduction.
(2) *Recycling* and composting.
(3) Environmentally safe transformation and environmentally safe land disposal, at the discretion of the city or county.

(b) Maximize the use of all feasible source reduction, recycling, and composting options in order to reduce the amount of *solid waste* that must be disposed of by transformation and land disposal. For wastes that cannot feasibly be reduced at their source, recycled, or composted, the local agency may use environmentally safe transformation or environmentally safe land disposal, or both of those practices.

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

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

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

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

(b). Water Code Preemption

Less persuasive, however, are Plaintiffs' preemption theories relating to the California Water Code. Plaintiffs cite only to section 13274 of the Code, which does not articulate any particular policy in favor of land application. It provides in relevant part:
(a)(1) The state [Water Resources Control] [B]oard or a regional board, upon receipt of applications for waste discharge requirements for discharges of dewatered, treated, or chemically fixed *sewage sludge and other biological solids,* shall prescribe general waste discharge requirements for that sludge and those other solids.
...
(2) The general waste discharge requirements shall set minimum standards for agronomic applications of sewage sludge and other biological solids and the use of that sludge and those other solids *as a soil amendment or fertilizer* in agriculture, forestry, and surface mining reclamation, and may permit the transportation of that sludge and those other solids and the use of that sludge and those other solids at more than one site.

Cal. Water Code § 13724(a). Merely requiring the state or regional boards to establish minimum standards for land application of biosolids simply is not tantamount to reflecting a priority that such land application occur to the exclusion of other methods of disposal. In fact, this statutory language would seem to empower the state or regional boards to establish such stringent requirements that land application in practice could not occur. As a result, the Court cannot interpret this language as establishing a statewide policy of land application.

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

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

i. Overview of Limitations on Police Power

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

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

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

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

IV.

CONCLUSION

For the reasons discussed above, Kern's motions are GRANTED IN PART and DENIED IN PART as follows:
• Kern's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) is DENIED.
• Kern's motion to dismiss for improper venue pursuant to Rule 12(b)(3) should is DENIED.
• Kern's motion to dismiss for failure to state a claim pursuant to Rule 12(b)(6) is DENIED as to the first cause of action for violation of the Commerce Clause, the second cause of action for violation of Equal Protection of the laws, the fourth cause of action for preemption by the CIWMA, and the sixth cause of action for invalid exercise of the police power. The motion is GRANTED as to the third cause of action for preemption by the Clean Water Act and the fifth cause of action for preemption by the California Water Code.

IT IS SO ORDERED.