

## Dirty Fight, Clean Win—How Enviro Experts at Beveridge and Diamond Beat Arnold and Porter in Fight Over LA’s ‘Biosolids’

By Jenna Greene

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When my kids were little, they enjoyed a book called “Everyone Poops.”

What the book didn’t cover, though, was what to do with it after it’s flushed down the toilet.

For the City of Los Angeles, which has a population of 4 million, the answer was to buy a big farm in neighboring Kern County and spread it (in treated form) on the fields there. The 880,000 residents of Kern County—go figure—were not delighted with this arrangement.

And thus gave rise to a decade-long legal fight pitting lawyers from Beveridge & Diamond on behalf of Los Angeles against a team from Arnold & Porter Kaye Scholer for Kern County.

It came to an end last week, with official city approval of a settlement agreement that allows L.A. to keep dumping its “biosolids” in Kern County—a win for the Beveridge team led by partners James Slaughter, James Auslander and Gary Smith plus co-counsel Mike Lampe of the Law Offices of Mike Lampe.

“It was a critical test case,” said Slaughter. “Biosolids face a lot of challenges in the court of public opinion because of the ‘ick’ factor, but the beauty of the American justice system is that an unpopular product like biosolids can get a fair shake in court.”

He added, “Recycling biosolids to farmland is good for cities, good for farmers and good for the environment.”

As for Kern County, at least it didn’t get stuck paying L.A.’s legal bill, though it did pony up a token \$54,000 for its neighbor’s court costs. “We fought this as best we could for as long as we could,” Kern County Supervisor

Mick Gleason told Bakersfield.com. “We are at the end.”

According to the Los Angeles Times, Kern County spent \$7.6 million litigating the case.

It began in 2006, when a whopping 83 percent of Kern County voters backed Measure E, which banned the application on open farmland of treated human and industrial sewage waste.

The initiative was seemingly targeted to shut down “Green Acres,” the 4,700 acre farm that L.A. bought in 2000. (The name—brilliant—I assume is a nod to the old-time sitcom about the New York attorney and his wife, played by Eva Gabor in diamonds and feather boas, who bought a farm.)

The biosolids—sewage sludge that’s “de-watered” and heat-treated—are plowed into the soil as fertilizer, used to grow feed crops like corn, alfalfa and wheat.

Is it stinky? Well ... “The degree of stinkiness can be an issue,” Slaughter said. “But odor is a part of farming.”

Still, he added that the smell of treated biosolids is minimal, and that he’s been to the farm and held the fertilizer in his hands.

Kern County received three complaints about Green Acres (related to odors and flies) from 2003 to 2012, and none since then.



James Slaughter

But apparently that wasn't really the point of Measure E. Consider its campaign slogans: "We got the bully next door flinging garbage over his fence into our yard" and "Measure E will stop L.A. from dumping on Kern."

Arnold & Porter senior counsel Steven Mayer, who represented Kern County, noted that California's voter initiative process by design is "a blunt weapon." It meant the Kern County government was committed to defending a law that, while wildly popular, was a less-nuanced than what the legislative process might have produced. "We fought hard to vindicate the will of the voters," he said.

L.A. challenged Measure E in federal court, joined by the Orange County Sanitation District and County Sanitation District No. 2 of Los Angeles County, which also shipped biosolids to farms in Kern County. In 2009, the U.S. Court of Appeals for the Ninth Circuit ruled that the out-of-county waste generators lacked standing to raise the issue under the Commerce Clause.

So they started again in state court, ultimately litigating the case in Tulare County Superior Court, which is due north of Kern County in California's Central Valley. After a trip to the California Supreme Court on a technicality involving filing deadlines under the federal savings statute, Tulare County Judge Lloyd Hicks held a two-week bench trial in April 2016.

Kern argued that the biosolids ban was intended to guard against potential health risks to its residents.

"The case raised important issues about the ability of local governments to control the quantity and quality of refuse dumped within their borders," Mayer of Arnold & Porter said.

But in a 48-page opinion issued in December 2016, Hicks sided with LA.

"There is not a single documented incident of an adverse health effect from the land application of biosolids," he wrote. "There was also (undisputed)



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evidence that biosolids benefit poor soil."

Hicks found that Measure E was preempted by a California state law requiring municipalities to beneficially reuse their sewer products. And the fact is, Los Angeles—densely populated and commercially intense—doesn't have suitable farmland for biosolids application. Kern County does.

He also considered the "snowball effect"—what would happen if every locality was allowed to enact a ban on biosolids. "Plaintiffs could theoretically blast all their biosolids into deep space at a cost of billions of dollars more, but no one would contend that this is a reasonably possible solution."

After Hicks' decision, Kern County weighed an appeal before finally throwing in the towel. The Los Angeles City Council voted to approve the settlement last week, even though it meant foregoing the possibility of legal fees.

Slaughter of Beveridge & Diamond said he was "proud to represent America's second-largest city," and offered high praise to Arnold & Porter. "They're a great law firm," he said. "They gave us everything we could handle."

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