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Clerk of the Superior Court

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IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF SOLANO
DEPARTMENT ONE

NORTHERN CALIFORNIA
RECYCLING ASSOCIATION,

NO. FCS033687

Petitioner,

vs.

COUNTY OF SOLANO,

Respondent. /

SUSTAINABILITY PARKS, RECYCLING AND
WILDLIFE LEGAL DEFENSE FUND,

NO. FCS033700

Petitioner,

vs.

COUNTY OF SOLANO, etc., et al.,
Respondents.

WASTE CONNECTIONS, INC., et al.,
Real Parties in Interest. /

SIERRA CLUB,
Petitioner,

NO. FCS034073

vs.

COUNTY OF SOLANO, et al.,
Respondents

POTRERO HILLS LANDFILL, INC., et al.,
Real Parties in Interest. /

RULING AFTER WRITS OF MANDATE HEARING

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1 The above-entitled cases came on for hearing of the Writs of Mandate on
2 February 18, 2010 before the Honorable Paul L. Beeman. John D. Moore, Esq.,
3 appeared on behalf of Petitioner Northern California Recycling Association. Stephan
4 C. Volker, Esq., appeared on behalf of Petitioner Sustainability, Parks, Recycling and
5 Wildlife Legal Defense Fund. Robert S. Perlmutter, Esq., appeared on behalf of
6 Petitioner Sierra Club. James Slaughter, Esq., Scott W. Gordon, Esq., and Gary J.
7 Smith, Esq., appeared on behalf of Real Party in Interest Potrero Hills Landfill, Inc.
8 Nicole S. Gordon, Esq., appeared on behalf of the State of California. James W.
9 Laughlin, Esq., appeared on behalf of Respondent, County of Solano. The Court
10 heard the argument of counsel, and the matter was submitted for decision. Now,
11 therefore, based on the pleadings and records on file and good cause, the Court
12 enters the following ruling.

13 All three petitions seek a writ of mandate and/or declaratory relief that the
14 initiative known as Measure E, adopted by the voters of Solano County in 1984, is
15 constitutional and enforceable, and is to be enforced by the COUNTY OF SOLANO
16 ("COUNTY").

17 COUNTY and Real Party in Interest POTRERO HILLS LANDFILL, INC.
18 ("PHLI") argued that Measure E is unconstitutional, under the Commerce Clause, and
19 otherwise unenforceable, under the case of In re Lyons (1938) 27 Cal.App.2d 182.

20 The Commerce Clause of the federal constitution authorizes Congress "To
21 regulate Commerce with foreign Nations, and among the several States, and with the
22 Indian Tribes". (Art. I, Section 8, Clause 3).

23 The Commerce Clause has been interpreted to prohibit states "from advancing
24 their own commercial interests by curtailing the movement of articles of commerce,
25 either into or out of the state." Fort Gratiot Sanitary Landfill, Inc. v. Michigan
26 Department of Natural Resources (1992) 504 U.S. 353, 359 [112 S.Ct. 2019, 2023;
27 119 L.Ed.2d 139, 147].

1 Fort Gratiot involved a state statute which prohibited out of county waste to be
 2 accepted by any of the counties in that state if that county had not explicitly authorized
 3 it in their approved solid waste management plan. It essentially gave each county the
 4 right to refuse any waste generated outside of that county, including from out of state.
 5 The Supreme Court held that such a ban violated the Commerce Clause.

6 In its decision, the Court focused on the ban as it applied to out of state waste
 7 producers, and not on its restrictions against acceptance of waste generated within the
 8 state, in other counties.

9 In a case which came out later in the same year that Fort Gratiot was decided,
 10 the Court in dicta stated that an out of county waste ban was per se unconstitutional.
 11 BFI Medical Waste Systems v. Whatcom County (9th Cir. 1992) 983 F.2d 911.

12 BFI involved an ordinance adopted by a county in Washington state which
 13 banned the importation of infectious medical waste from outside of the county. Prior to
 14 the ban, waste had been shipped to that county from Oregon and from Canada, as
 15 well as from other counties within Washington state. The 9th Circuit cited Fort Gratiot
 16 for the proposition that "out-of-county waste bans are pro se [sic] unconstitutional". Id.
 17 at 913. With no showing by the county to establish that its discrimination was "justified
 18 by a valid factor unrelated to economic protectionism", such as evidence that the
 19 medical waste from outside the county was more dangerous than that generated
 20 within the county, the 9th Circuit found it violated the Commerce Clause.

21 BFI involved an outright ban, and clear evidence of impact across state lines,
 22 on out of state waste producers. It was decided in 1992, shortly after Fort Gratiot.

23 Other more recent cases from other Courts suggest that local ordinances which
 24 discriminate only against other cities or counties, and do not have direct effects across
 25 state lines, may not violate the Commerce Clause.

26 For example, in 2001, the 9th Circuit found a ban on exportation of waste out of
 27 city, and restricting deposit of waste to the city's public disposal area, was

1 enforceable. On the Green Apartments LLC v. City of Tacoma (9th Cir. 2001) 241 F.3d
2 1235. With no evidence that this would have any effect outside the state of
3 Washington, the Court found that the Commerce Clause was not implicated. Id. at
4 1241-1242.

5 At oral argument, PHLI's counsel cited a recent U.S. Supreme Court case as
6 suggesting a trend towards expansion of the Commerce Clause. Gonzales v. Raich
7 (2005) 545 U.S. 1 [125 S.Ct. 2195; 162 L.Ed.2d 1].
8

9 Upon closer examination, this case does not support an expansion of
10 Commerce Clause protection.

11 Gonzales was brought by two medical marijuana users in California, to
12 challenge the enforceability of the federal Controlled Substances Act (CSA). The
13 Court rejected an argument that the CSA exceeded Congress's authority under the
14 Commerce Clause. It instead held that Congress could regulate purely intrastate
15 activity, such as the growing by one user of six marijuana plants for her own personal
16 use, if Congress concluded that failure to regulate it would undercut the regulation of
17 the interstate market in that commodity.

18 Unlike drug enforcement, "waste disposal is both typically and traditionally a
19 local government function". United Haulers Association, Inc. v. Oneida-Herkimer Solid
20 Waste Management Authority (2007) 550 U.S. 330, 344. In fact, "Congress itself has
21 recognized local government's vital role in waste management, making clear that
22 collection and disposal of solid wastes should continue to be primarily the function of
23 State, regional, and local agencies". Id.

24 It must be said that to the extent Measure E as drafted would limit the
25 importation of waste from out of state, and not merely from other counties within
26 California, there would remain valid Commerce Clause concerns.
27

1 Courts do have some authority to rewrite statutes found to be unconstitutional.
 2 Kopp v. Fair Political Practices Comm'n (1995) 11 Cal. 4th 607, 660-661. Courts are
 3 cautious and use this authority sparingly, because it is a drastic action, but they can do
 4 so "when the result achieved by such a course is more consistent with legislative
 5 intent than result that would attend outright invalidation." Arp v. Workers' Comp.
 6 Appeals Bd. (1977) 19 Cal. 3d 395, 407-408.

7 Petitioners have produced evidence to show that Measure E was directed
 8 against waste produced around the Bay area, within California, and therefore not
 9 intended to apply to waste generated out of state. This, and the meager evidence of
 10 past out of state waste sent to Solano County, assure the Court that rewriting Measure
 11 E to apply only to intrastate waste, and not to any waste generated outside of
 12 California, would be an appropriate exercise of judicial power.

13 Measure E, if rewritten to apply only to waste generated within other counties in
 14 California, would not offend the Commerce Clause.

15 The concerns suggested by the Lyons case are more difficult to evaluate.

16 Lyons involved an Orange County pig farmer, found to have violated a county
 17 ordinance against the importation of garbage over the county line, which the farmer
 18 used to feed his pigs. The Court held that this ordinance was arbitrary and
 19 unenforceable, and released the farmer from custody.

20 The Lyons Court identified police powers as the source of a local entity's ability
 21 to regulate garbage. Article XI, section 11 (now section 7) of the California
 22 Constitution provides:

23 Any county or city [,town or township] may make and enforce within its
 24 limits all [such] local, police, sanitary (,) and other (ordinances and)
 25 regulations [as are] not in conflict with general laws. {[]= old section 11;
 ()= new section 7, as adopted 1970}.

26 //

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1 After finding that local government could exercise these powers to regulate
2 garbage, the Lyons Court then examined whether the ordinance "contravenes rights
3 secured to the citizen by the constitution, or laws made in pursuance thereof". Lyons,
4 supra, 27 Cal.App.2d at 186.

5 Lyons then examined the California Constitution. While finding no express
6 constitutional provision requiring a municipal ordinance to uniformly apply to all
7 persons, it did find that those ordinances which "unjustly discriminate" could be
8 invalidated.

9 There is no constitutional provision which expressly requires the uniform
10 operation of municipal ordinances. Nevertheless, where they unjustly
11 discriminate, they are sometimes declared unreasonable, and therefore
12 void.

13 The criterion to be used in deciding whether they are for that reason
14 unreasonable is, after all, essentially the same used in determining
15 whether general laws have or have not a uniform operation, which is
16 whether or not any classification that they attempt is based upon some
17 "constitutional, or natural, or intrinsic distinction". If it is so based then
18 the classification and therefore the ordinance is, so far as the distinction
19 made is concerned, reasonable; otherwise it is in that feature
20 unreasonable. Id. at 187.

21 The Lyons Court then cited a case which found the federal constitution Equal
22 Protection clause prohibited enforcement of a statute limiting the ability to obtain a
23 fishing license to those persons who continuously resided in the United States for at
24 least 1 year. Abe v. Fish & Game Com. (1935) 9 Cal.App.2d 300. That Court cited
25 other earlier California cases which held invalid a city or county's charging of higher
26 license fees to nonresidents than to residents.

27 The Lyons Court then found no reasonable justification for discriminating
against out of county garbage, and therefore no "constitutional, or natural, or intrinsic
distinction".

1 [W]e are not confronted with an ordinance undertaking to limit the
2 amount of garbage, as such, that may be used on hog ranches or
3 elsewhere within the county of Orange, or that may be transported on
4 the public highways of the county. Any amount may be so used and so
5 transported so far as this ordinance is concerned, provided it originates
6 within the county, even though it originates within incorporated areas
7 therein over which the police powers of the board of supervisors do not
8 extend. The sole inhibition attempted has to do with the place of origin of
9 the garbage. Garbage originating, for example, in the city of Whittier in
10 Los Angeles County may not be used in Orange County, even though
11 Whittier may, in distance, be closer to the Orange County ranch, where
12 the garbage is sought to be used, than say Fullerton, which, for
13 illustration we will suppose to be the Orange County city nearest to the
14 same ranch. Between the same quantity of garbage originating on the
15 one hand in Whittier or, on the other, in Fullerton, we are unable to find
16 any sort of "constitutional, or natural, or intrinsic distinction". The
17 existence of the county line in a particular position has no kind of relation
18 to the evil which the ordinance apparently seeks to remedy. In these
19 circumstances the ordinance provisions appear to us purely arbitrary,
20 and by that token unenforceable. Id. at 189.

21 The Lyons Court relied upon cases finding any differing treatment based upon
22 state or country of residence to violate the Equal Protection clause of the federal
23 constitution, and therefore not a reasonable ground of classification.

24 Changes in the evaluation of the Equal Protection clause since the late 1930's
25 may serve to require less scrutiny of the reasonableness of the grounds for
26 classification.

27 Under the Equal Protection clause, the degree of scrutiny given by the Court
depends upon whether a fundamental right or suspect classification is involved.

If a fundamental right (e.g., voting, interstate travel) or suspect
classification (e.g., race, national origin) is involved, the strict scrutiny
standard is used. If a quasi-suspect classification (e.g., gender,
illegitimacy) is involved, intermediate scrutiny is applied. And, if neither a
fundamental right is affected nor a suspect or quasi-suspect
classification is involved, then the rational basis standard applies.
Moreno v. Draper (1999) 70 Cal.App.4th 886, 893; see also Hernandez v.
City of Hanford (2007) 41 Cal.4th 279; Kasler v. Lockyer (2000) 23 Cal.4th
472 [less extensive discussion of strict scrutiny vs. rational basis/rational
relationship, tests].

1 The Moreno case cited a U.S. Supreme Court case which explained the
 2 rationale behind these distinctions:

3 The Equal Protection Clause of the Fourteenth Amendment commands
 4 that no State shall 'deny to any person within its jurisdiction the equal
 5 protection of the laws,' which is essentially a direction that all persons
 6 similarly situated should be treated alike. Section 5 of the Amendment
 7 empowers Congress to enforce this mandate, but absent controlling
 8 congressional direction, the Courts have themselves devised standards
 9 for determining the validity of state legislation or other official action that
 10 is challenged as denying equal protection. The general rule is that
 11 legislation is presumed to be valid and will be sustained if the
 12 classification drawn by the statute is rationally related to a legitimate
 13 state interest. When social or economic legislation is at issue, the Equal
 14 Protection Clause allows the States wide latitude, . . . and the
 15 Constitution presumes that even improvident decisions will eventually be
 16 rectified by the democratic processes.

17 "The general rule gives way, however, when a statute classifies by race,
 18 alienage, or national origin. These factors are so seldom relevant to the
 19 achievement of any legitimate state interest that laws grounded in such
 20 considerations are deemed to reflect prejudice and antipathy—a view that
 21 those in the burdened class are not as worthy or deserving as others.
 22 For these reasons and because such discrimination is unlikely to be
 23 soon rectified by legislative means, these laws are subjected to strict
 24 scrutiny and will be sustained only if they are suitably tailored to serve a
 25 compelling state interest. Similar oversight by the Courts is due when
 26 state laws impinge on personal rights protected by the Constitution." Id.
 27 at 892-893 [quoting Cleburne v. Cleburne Living Center, Inc. (1985) 473
 U.S. 432, 439-440 [105 S. Ct. at p. 3254].].

It would not appear that discrimination against out of county waste producers
 would qualify under Equal Protection analysis for strict scrutiny, or even intermediate
 scrutiny. Instead, as suggested by Petitioners, the "rational basis" test would apply.

Even if the Court was not sure that Equal Protection was the sole basis for the
 police powers limits imposed by Lyons, the lower level of scrutiny would likely be the
 same for other possible bases for such limits.

One recent case discussed the general concerns against "extraterritorial
 regulation" by government entities, but determined that interstate effects would result

1 in more scrutiny that merely intrastate effects. Burns Internat. Security Services Corp.
2 v. County of Los Angeles (2004) 123 Cal.App.4th 162.

3 Burns involved a local county ordinance prohibiting the county from contracting
4 with companies who did not pay employees for at least 5 days of jury duty. A
5 company filed an action, asking the Court to declare this ordinance to be
6 unconstitutional. The Court held that the ordinance was valid and enforceable.

7 In its decision, the Burns Court examined the police powers limitations of Article
8 XI, section 7, and compared them to the dormant Commerce Clause. It found some
9 similarities, including that "both are interpreted to preclude extraterritorial regulation by
10 government entities but permit incidental impact that results from an entity's legitimate
11 exercise of its contracting authority." Id. at 176.

12 Ultimately, though, the Burns Court found a significant difference in the level of
13 scrutiny a Court should give to the effects on interstate commerce under the dormant
14 Commerce Clause, than to the effects on intrastate commerce under the police
15 powers limitations.

16 There are similarities between article 1, section 7 and the dormant
17 commerce clause: both are interpreted to preclude extraterritorial
18 regulation by governmental entities but permit incidental impact that
19 results from an entity's legitimate exercise of its contracting authority.
20 This does not mean, however, that the two provisions must be
21 interpreted identically in all circumstances. The district Court in Air
22 Transport drew a distinction between the dormant commerce clause and
23 article 11, section 7, finding that the ordinance precluding the City and
24 County of San Francisco from contracting with companies that did not
25 provide benefits to domestic partners was invalid under the former, but
26 not the latter.

23 The Air Transport Court's conclusion that local ordinances should be
24 subject to a more rigorous review for extraterritorial impact under the
25 dormant commerce clause than under article 11, section 7 is not
26 unreasonable. State governments are independent governmental units,
27 not subject to control by other states, and Congress's power over the
states is limited. Local governmental entities, on the other hand, are
subject to the authority of the state. If a local government's contracting
actions place undue burdens on intrastate commerce, the Legislature

1 can more easily take corrective measures. Consequently, there is no
2 need for article 11, section 7 to be applied as stringently by California
3 Courts to protect cities or counties from overreaching by their neighbors.
Id. at 176-177.

4 In other words, because the state legislature can step in and protect other local
5 entities from discriminatory regulations, there is less reason for the Courts to invalidate
6 a city or county ordinance which has intrastate effects. Conversely, because
7 Congress faces more limitations on what it can do to control states, there is more
8 reason for the Courts to invalidate statutes which have interstate effects.

9 The next step is to determine whether Measure E satisfies the "rational
10 basis/rational relationship" test.

11 If it is at least debatable that the distinction drawn by the ordinance bears some
12 rational relationship to a legitimate public purpose, Courts will find no Equal Protection
13 violation.

14 Equal protection is not denied simply because an ordinance treats one
15 class of persons differently from another. Where there is no suspect
16 classification, and purely economic interests are involved, a municipality
17 may impose any distinction which bears some 'rational relationship' to a
18 legitimate public purpose. Courts consistently defer to legislative
19 determinations as to the desirability of such distinctions. The ordinance
20 will be upheld so long as the issue is "at least debatable." Suter v. City
of Lafayette (1997) 57 Cal.App.4th 1109, 1133.

21 It does not matter if there are other more efficient ways to achieve the legitimate
22 public purpose, as long as the ordinance can be reasonably justified.

23 [W]hen viewing the constitutionality of a public entity's action, the Courts
24 focus on whether the justification for the action is reasonable and not on
25 the wisdom or efficacy of the particular policy to achieve the stated
26 objectives. San Diego County Veterinary Medical Assn. v. County of
San Diego (2004) 116 Cal.App.4th 1129, 1136.

27 Petitioners have identified the following legitimate public purposes behind
Measure E:

- 1 1. To preserve landfill space;
- 2 2. To encourage recycling;
- 3 3. To avoid the need for landfill expansion;
- 4 4. To reduce the volume of waste transported on county roads; and
- 5 5. To limit the effects on global warming, including reducing transportation on
- 6 the roads, emissions, and fuel consumption.
- 7

8 There are alternative, nondiscriminatory ways of achieving the goals of
9 Measure E, including the use of waste caps, adding more landfills, and through
10 conditions placed on permit approvals. Also, recycling is only encouraged as to out of
11 county residents (through higher prices of disposing of waste once the annual cap of
12 Measure E is met), not of Solano County residents. For that reason, encouraging
13 recycling might not alone serve as a "rational basis" for Measure E. However, the
14 other identified purposes do serve as rational bases for Measure E, even if Measure E
15 is not the only or even the most effective way of promoting those purposes.

16 The petitions are therefore granted, to the extent they seek declaration and
17 mandate that COUNTY enforce Measure E against waste produced within California
18 but outside of Solano County.

19 The petitions are denied to the extent they seek any additional relief.

20 In particular, some of the petitions sought administrative mandamus, to vacate
21 prior approval by COUNTY of the landfill expansion permit recently certified by
22 COUNTY.

23 A prerequisite to administrative mandamus is the exhaustion of administrative
24 remedies, including the raising of the specific issue during the public review period for
25 the action in question. Public Resources Code section 21177; California Aviation
26 Council v. County of Amador (1988) 200 Cal.App.3d 337, 340-341.
27

1 This requirement is jurisdictional; the Court cannot rule on the merits unless the
2 petitioner has exhausted administrative remedies, or shown the existence of an
3 exception. Id.

4 In other areas of the law, it is well recognized that it would be inefficient and
5 unfair to allow a party able to raise all challenges in an initial proceeding to wait to
6 raise some of those issues until later proceedings. For example, a defendant on
7 demurrer may not "save" some grounds for challenging a pleading to a subsequent
8 demurrer, if an initial demurrer should be overruled. Likewise, a party may not wait
9 until appeal to raise issues that could have been raised earlier, at the trial Court level.
10

11 The Measure E issue was eventually raised by some parties in the underlying
12 CEQA challenge, Protect The Marsh V. County of Solano, et al. Case No.
13 FCS026839, but not during the initial CEQA challenge. However, the Measure E
14 issue existed during the public review period of the initial CEQA action challenged,
15 and was not a new issue triggered by the subsequent limited revisions to the EIR
16 ordered by the Court in that case.

17 Measure E was enacted in 1984. After the Fort Gratiot decision in 1992,
18 COUNTY announced its intent not to enforce Measure E. COUNTY's Board of
19 Supervisors first certified the EIR for the landfill expansion project in September 2005.
20 The initial CEQA challenge was filed in October 2005. The Court issued a writ in May
21 2007 directing expanded evaluation of project alternatives. COUNTY then certified the
22 revised EIR in June 2008, to add the expanded evaluation, and later filed a motion for
23 the Court to accept final return of that writ. The Court denied that motion in October
24 2008, identifying a need for further evaluation of a "no project" alternative, and
25 particularly the use of a different landfill operated by a different owner for expanded
26 capacity. COUNTY then certified a new revised EIR in June 2009.

1 Measure E was raised as an issue in the CEQA proceedings in July 2008, when
 2 the Court was asked to take judicial notice of it. This request for judicial notice was
 3 concurrently filed with opposition papers, filed by some of the current Petitioners. It
 4 was again raised in the opposition to the later motion by COUNTY in 2009 to certify
 5 the new revised EIR. However, it was not raised at the outset of the CEQA
 6 proceedings, in the initial challenges to the approval of the landfill expansion permit,
 7 as it could have been.

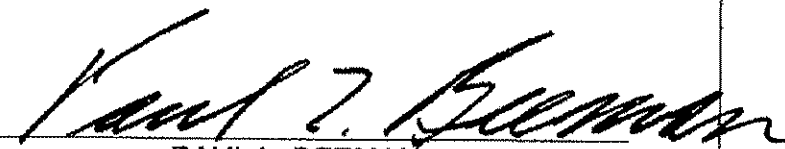
8 Furthermore, the environmental review appropriate for the landfill expansion
 9 permit must be viewed at the time of the approval of that permit.

10 A public agency can reject a project alternative on the basis of the legal
 11 uncertainty of pursuing that alternative. Marin Mun. Water Dist. v. Kg Land Cal. Corp.
 12 (1991) 235 Cal. App. 3d 1652, 1666 [water district adopted moratorium on providing
 13 new service; held it was not required to further evaluate the possibility of rescinding a
 14 commitment it had entered into with a local air force base for expanded service, since
 15 there was uncertainty as to whether the district could legally rescind that commitment].

16 Until this current ruling in these new actions, no Court had yet determined
 17 whether Measure E was enforceable. Legal uncertainty regarding its enforceability
 18 therefore existed at the time of COUNTY's review and certification of the initial EIR
 19 (and all subsequent versions, including the new revised EIR ultimately accepted by the
 20 Court on return).

21 The ruling on the present petitions is therefore limited to ordering COUNTY to
 22 enforce Measure E.

23
 24 DATED: May 12, 2010


 PAUL L. BEEMAN
 Judge of the Superior Court