

FILED - BARSTOW  
SAN BERNARDINO COUNTY  
SUPERIOR COURT

APR 11 2008

By *[Signature]*  
Deputy

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SUPERIOR COURT OF THE STATE OF CALIFORNIA  
COUNTY OF SAN BERNARDINO, BARSTOW DISTRICT

CENTER FOR BIOLOGICAL  
DIVERSITY, a California non-profit  
corporation, and HELPHINKLEY.ORG,  
an unincorporated association,

Petitioners,

vs.

COUNTY OF SAN BERNARDINO,

Respondent.

NURSERY PRODUCTS, LLC,  
Real Party in Interest.

Case No.: BCV09950

**STATEMENT OF DECISION AND  
ORDER THEREON**

On March 29, 2007, petitioners filed their Verified Petition for Writ of  
Mandate. Certification of the Administrative Record of Proceedings [AR] of the  
County of San Bernardino [County] was made on August 14, 2007. The  
Administrative Record was lodged with the court on August 17, 2007; consisting  
of 15,232 pages, a total of 27 volumes. A hearing on the first cause of action, a  
violation of the California Environmental Quality Act [CEQA] was heard on  
February 8, 2008. The second and third causes of action were previously  
dismissed without prejudice. The court denied the petitioners request for judicial

1 notice of documents related to a conditional use permit for a fully enclosed  
2 composting facility in Redlands, CA. The court denied real party in interest,  
3 Nursery Products, LLC [hereinafter Nursery Products] request for judicial notice  
4 of separate documents related to the same proposed facility. After argument by  
5 all parties, the court took the matter under submission. The decision of the court  
6 follows.

### 7 FEASIBLE ALTERNATIVES

8 It is undisputed that volatile organic compounds [VOC] will be emitted  
9 from the proposed composting facility [Project] and will contribute to a  
10 significant cumulative impact on air quality. (AR 02429.) "Each public agency  
11 shall mitigate or avoid the significant effects on the environment of projects that  
12 it carries out or approves whenever it is feasible to do so." (Public Resource  
13 Code § 21002.1(b).) The potential mitigation measure evaluated by the County  
14 was an enclosed composting operation. The gases would be captured and  
15 thermally destroyed. (*Ibid.*) The County found this mitigation measure to be not  
16 feasible on an economic and technical basis; the capital and operating costs  
17 would make it infeasible; and there is no electricity to the site. (AR 02429,  
18 02430.)

19 In analyzing the financial infeasibility of the Project, the County was  
20 provided with a sample of the cost of an enclosed composting facility in Rancho  
21 Cucamonga, CA. The presentation to the County is phrased as, "For example,  
22 the Inland Empire Regional Composting Facility, currently under construction in  
23 Rancho Cucamonga, has an estimated cost of \$62.5 million." (AR 02429.) If  
24 there are other examples, they were not considered. Apparently the only  
25 financial analysis of an indoor facility was a five-page memorandum from  
26 Geoffrey H. Swett to Jeff Memberg dated November 15, 2006 (the Final  
27 Environmental Impact Report for the Project was adopted November 30, 2006).  
28 (AR 07575-07579.) The analysis takes the projected capital cost of the Rancho

1 facility, compares that cost to the Project size, and extrapolates a capital cost of  
2 the Project of \$83.3 million. The analysis estimates an operating cost increase  
3 of 62.5% over an open air site. (AR 07577.)

4 The court finds that the County's finding of economic and technical  
5 infeasibility is not supported by the record. Feasible is defined as "capable of  
6 being accomplished in a successful manner within a reasonable period of time,  
7 taking into account economic, environmental, social, and technological factors."  
8 (Public Resource Code § 2106.1.) Only one indoor facility is evaluated  
9 regarding feasibility. In response to comments section of the Final  
10 Environmental Impact Report, the California Department of Health Services  
11 stated, "Enclosed facilities, such as those operating in Los Angeles and  
12 Riverside Counties and throughout the country, have been shown to be  
13 effective in controlling emissions (VOCS, pathogens, bioaerosols [sic], dust,  
14 odors)." (AR 00034.)

15 The analysis regarding economic feasibility of an enclosed facility should  
16 have looked at the capital and operating costs of other facilities. The conclusion  
17 that "Private financing for such a risky proposition would not be available," (AR  
18 07578) was not sufficient. Were any lenders contacted, would government  
19 funded low interest financing be available, or was any federal grant money  
20 available? Additionally, there is no analysis of the total cost of doing business  
21 and the prices a competitor can charge. What impact do the savings on the  
22 transportation costs have on the economic viability of the Project? There is  
23 insufficient documentation in the Administrative Record to justify the conclusion  
24 that an enclosed facility at the Hawes site is not economically feasible.

25 The County found that the Project is "not currently served by any  
26 electricity provider, and there are no electrical lines within a mile of the site."  
27 (AR 02439.) Nothing in the record supports a conclusion that providing  
28 electricity to the Hawes site is technologically infeasible. The only

1 technologically feasible aspect would be how long it would take to provide  
 2 electrical power to the site. There is no analysis. Providing electricity to the site  
 3 should undergo an economic feasibility analysis. The real question is not  
 4 whether electricity can be provided to the Hawes site, but how much it will cost.

5 The County failed to properly evaluate a technological feasible mitigation  
 6 measure. Its finding that an enclosed composting facility was not economically  
 7 feasible was not supported by substantial evidence or the Administrative  
 8 Record. As to this ground, the court will grant the petitioners pray for relief: a  
 9 peremptory writ to issue setting aside the certification of the Environmental  
 10 Impact Report [EIR], setting aside and vacating any and all approvals given to  
 11 the Project, including the issuance of a Conditional Use Permit, directing the  
 12 County to comply with CEQA regarding this Project and specifically directing the  
 13 County to conduct an appropriate economic feasibility analysis of an enclosed  
 14 facility at the Hawes site for the Project as proposed. No part of the Project is  
 15 severable.

16 **WATER**

17 The court finds that the Project is a "project" within the meaning of  
 18 California Water Code § 10912(a)(5). The Project will occupy more than forty  
 19 acres and will process biosolids and green waste into compost. The parties  
 20 agree that CEQA requires the identification of a facility's water source if it meets  
 21 the definition of a project under the Water Code. The County failed to identify a  
 22 water source. It is insufficient for the County to find that the Project "will either  
 23 use an on-site well or a commercial water provider." (AR 02408.) Which one is  
 24 it? The court does not believe the language of the Water or Public Resource  
 25 Code permits the identification of alternative sources; the actual source must be  
 26 identified. It was not. Under either alternative a water assessment is required.

27 The County adopted the EIR which failed to identify a water source for  
 28 the Project. This violates CEQA. On this ground, the court will grant the

1 petitioners pray for relief: a peremptory writ to issue setting aside the  
2 certification of the EIR, setting aside and vacating any and all approvals given to  
3 the Project, including the issuance of a Conditional Use Permit, directing the  
4 County to comply with CEQA regarding this Project and specifically to identify  
5 the water source for this Project and conduct a water assessment. No part of  
6 the Project is severable.

#### 7 AIR

8 The court finds that the EIR adequately assesses dust and other  
9 emissions from the Project, thereby justifying the County's findings on these  
10 issues. On this ground, the petitioners' prayer for relief is denied.

11 As to the emission of greenhouse gases, the court finds that an analysis  
12 of the Project's impact on global warming is not required under CEQA.  
13 California Public Resource Code § 21000(a) states, "The maintenance of a  
14 quality environment for the people of this state now and in the future is a matter  
15 of statewide concern." Subsection c refers to the general welfare of the citizens  
16 of the state. Subsection d refers to the health and safety of the citizens of the  
17 state. Subsection d says government agencies should give a major  
18 consideration to preventing environmental damage, "while providing a decent  
19 home and satisfying living environment for every Californian." There is nothing  
20 in CEQA that requires a California government agency to consider the  
21 worldwide environmental impact of a project. The California Global Warming  
22 Solutions Act of 2006, codified in Health and Safety Code § 38501 does not  
23 apply to the Project approved by the County; its effective date and other  
24 operational dates are all after approval of this Project. In addition Public  
25 Resource Code § 21097 states, "The failure to analyze adequately the effects  
26 of greenhouse gas emissions otherwise required to be reduced pursuant to  
27 regulations adopted by the State Air Resources Board... in an environmental  
28 impact report... does not create a course of action for a violation of this

1 division."

2 A facility in California that emitted greenhouse gases to such extent that it  
3 increased California temperatures, causing environmental damage, could  
4 require a CEQA analysis. The question is how does an agency do that? If China  
5 increases its coal fired power plants, does a California agency have to require a  
6 California facility to decrease its emission comparatively to the increase? The  
7 court agrees with the County and Nursery Products on this issue, without  
8 guidelines from California government agencies, analyzing greenhouse gases  
9 and their environmental impact on California is speculative and conjectural.  
10 Petitioners' submission of documents on this issue to the County during the  
11 environmental review process does not mean it is undisputed that "greenhouse  
12 gas emissions are a significant environmental threat to California's future."  
13 (Petitioners Opening Brief, p. 18.) The fact that a document is in the  
14 administrative record does not prove the truth of its contents. Petitioners  
15 brought this issue to the attention of the County; therefore, it became part of the  
16 administrative record.

17 In any event, the EIR addressed the carbon emissions and determined  
18 that it would "have no effect on overall carbon emissions to the atmosphere and  
19 would not contribute to global warming." (AR 00158) As to this ground, the  
20 petitioner's prayer for relief is denied.

### 21 ANIMALS

22 The court finds that the EIR was sufficient in addressing the impacts on  
23 tortoises.

24 The court finds that the EIR was sufficient in addressing the impacts on  
25 Mohave ground squirrels. The EIR states, "Mohave ground squirrels were not  
26 detected during a total of 4.5 spring season survey days, although white-tailed  
27 antelope squirrel, a similar species, were commonly detected. Because the  
28 Mohave ground squirrel is a diurnal [active by day] species and because an

1 ecologically similar species was observed utilizing the site, it is assumed that  
2 the Mohave ground squirrel is not present onsite." (AR 01247.) The Conditions  
3 of Approval of the County issued Conditional Use Permit for the Project require  
4 "Prior to commencing ground disturbing activities, Mohave ground squirrel  
5 trapping surveys shall be conducted prior to construction of the project to  
6 determine this species presence within the project area." (AR 01443.) This  
7 condition does not mean the County had no idea whether Mohave ground  
8 squirrels were at the site, and instructed a trapping survey before the bulldozers  
9 are to be sent in. There was a survey conducted, Mohave ground squirrels were  
10 not detected, and the conclusion was that there was no reason to believe they  
11 were there. Unless construction began immediately after the survey, Mohave  
12 ground squirrels could potentially move to the Hawes site. Requiring trapping  
13 before ground disturbing activities does not nullify the original survey.

14 Requiring Nursery Products to comply with government fish and game  
15 agency's regulations is not an unlawful delegation of the County's  
16 responsibilities under CEQA. The EIR is snapshot in time. Actual construction  
17 takes place later. Once the Project has complied with CEQA, construction can  
18 begin. The County requiring the Project to take certain action in case of  
19 environmental changes, such as the Mohave ground squirrels moving into the  
20 site after approval, is appropriate.

21 On these grounds, the petitioners' prayer for relief is denied.

#### 22 FACILITY

23 The County's approval of a 400,000 ton operation over an 80-acre plot is  
24 not a sleight of hand violating CEQA. The options analyzed, 400,000 tons over  
25 160 acres and 320,000 tons over 80 acres, is not such a substantial change  
26 that a Supplemental EIR is required. On this ground, the petitioners' prayer for  
27 relief is denied.

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**ORDER**

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2 The petitioners are to prepare a judgment and peremptory writ in

3 conformity to this statement of decision. The petitioners are to submit the

4 proposed judgment and peremptory writ to the County and Nursery Products for

5 approval as to form and content. Any objections lodged by the County and

6 Nursery Products will be ruled on by the court without hearing. The court may

7 modify or reject the proposed judgment and peremptory writ if it finds they are

8 not in conformity with this statement of decision.

9 Dated: April 11, 2008

10 By JOHN P. VANDER FEER

11 John P. Vander Feer

12 Judge of the Superior Court

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