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23 JUANA VASQUEZ, CALIFORNIANS
24 FOR PESTICIDE REFORM and PESTICIDE
25 ACTION NETWORK NORTH AMERICA

26 SUPERIOR COURT OF THE STATE OF CALIFORNIA
27 COUNTY OF ALAMEDA (UNLIMITED JURISDICTION)

28 JUANA VASQUEZ, an individual, and
CALIFORNIANS FOR PESTICIDE REFORM, a
non-profit organization and PESTICIDE ACTION
NETWORK NORTH AMERICA, a non-profit
organization;

Petitioners/Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF PESTICIDE
REGULATION, and DOES 1-20, inclusive;

Respondents/Defendants.

Case No.:

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

ENDORSED
FILED
ALAMEDA COUNTY

JAN 31 2017

CLERK OF THE SUPERIOR COURT

Anita Dhir

I

INTRODUCTION

1. This action challenges the failure of Respondent/Defendant CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION ("DPR") to regulate the fumigant pesticide 1,3-Dichlorpropene ("1,3-D") in a manner required by law. DPR has failed to (1) comply with the requirements of the California Administrative Procedure Act ("APA") and (2) develop and base its 1,3-D regulation on the recommendations of the Office of Environmental Health Hazard Assessment ("OEHHA") as mandated by Food & Agric. Code §§ 12980-12981.

2. On January 10, 2017, DPR publically released revised permit conditions for 1,3-D effective January 1, 2017, which had been announced in DPR's Risk Management Directive and Mitigation Guidance for Cancer Risk From 1,3-Dichlorpropene (1,3-D) ("Risk Management Directive") on October 6, 2016. PETITIONERS/PLAINTIFFS, JUANA VASQUEZ, CALIFORNIANS FOR PESTICIDE REFORM and PESTICIDE ACTION NETWORK NORTH AMERICA, by this verified Petition for Writ of Mandate, request that the Court declare that through its actions, DPR has implemented underground regulations in violation of the Administrative Procedures Act (Gov. Code § 11349.1).

3. Additionally, Petitioners/Plaintiffs request that the court issue a peremptory writ of mandate directing DPR to adopt 1,3-D regulations that comply with the Administrative Procedures Act and are based on the recommendations of OEHHA as required by Food & Agric. Code §§ 12980-12981.

II

PARTIES

4. PETITIONER/PLAINTIFF JUANA VASQUEZ supported herself and her family for many years by working as a strawberry harvester in Ventura County, California. She and her family continue to live near agricultural areas where 1,3-Dichlorpropene ("1,3-D") is used, and her children attend schools near high 1,3-D use areas. PETITIONER JUANA VASQUEZ and her family have a direct and beneficial interest in the implementation of strong 1,3-D regulations throughout the state of California that protect them, as well as other workers, residents, school children and school staff, from exposure to pesticides, including 1,3-D, in their workplaces, homes and schools. PETITIONER JUANA

1 VASQUEZ has been exposed to pesticides at her workplace. PETITIONER JUANA VASQUEZ has
2 paid, in the year preceding the filing of this action, and does pay sales tax in the State of California.

3 5. JUANA VASQUEZ has an interest in ensuring that DPR complies with all legal
4 requirements in promulgating regulations and that valuable resources are not wasted enforcing
5 regulations that are illegal and/or were illegally promulgated. As a result of DPR's failure to comply
6 with these requirements, JUANA VASQUEZ and the public at large will suffer injury and will continue
7 to be prejudiced by DPR's unlawful actions until and unless this Court provides the relief prayed for in
8 this Petition.

9 6. PETITIONER/PLAINTIFF CALIFORNIANS FOR PESTICIDE REFORM ("CPR") is a
10 non-profit, statewide coalition, headquartered in Oakland, California, whose mission is to protect public
11 health, improve environmental quality and support a sustainable and just agricultural system by building
12 a diverse movement across California to change statewide and local pesticide policies and practices.
13 Founded in 1996, CPR is made up of more than 190 member organizations across California, including
14 public health, children's health, educational and environmental advocates; clean air and water
15 organizations; health practitioners; environmental justice groups; labor organizations; farmers; and
16 sustainable agriculture advocates, all interested in shifting the way pesticides are used in California.
17 CPR engages thousands of community members around California through our organizational members.

18 7. PETITIONER/PLAINTIFF PESTICIDE ACTION NETWORK NORTH AMERICA
19 ("PANNA"), is an Oakland-based non-profit organization that serves as an independent regional center
20 for Pesticide Action Network International, a coalition of over 600 public interest organizations in more
21 than 90 countries. For more than 30 years, PANNA has worked to replace hazardous and unnecessary
22 pesticide uses with socially-just and ecologically sound pest management across North America.
23 PANNA provides scientific expertise, public education, access to pesticide data and analysis, policy
24 development, and other support to partner organizations. PANNA's California membership includes a
25 number of groups who directly represent or advocate on behalf of small-scale farmers, farmworkers,
26 children and rural residents.

27 8. RESPONDENT/DEFENDANT CALIFORNIA DEPARTMENT OF PESTICIDE
28 REGULATION ("DPR") is a department of the California Environmental Protection Agency ("Cal

1 EPA"). DPR was established in 1991 by then Governor Pete Wilson when he reorganized the Cal EPA.
2 See Gov. Reorg. Plan No. 1 of 1991, § 27, effective July 17, 1991; Cal. Food & Agric. Code §§ 11452-
3 11477. As a result, DPR is a state government agency organized under the laws of the State of
4 California. DPR is empowered, among other duties, to undertake the promulgation of regulations as part
5 of the Pesticide Regulatory Program in California, subject to the obligations and limitations of all
6 applicable state, federal, and other laws, including the Food and Agricultural Code (Food & Agric. Code
7 §§ 12980, 12981) and the APA (Gov't Code §§ 11340 *et seq.*).

8 9. DOES 1 through 20, inclusive, are persons, agencies, or subdivisions of a state agency or
9 any other person or entity that claims any interest in the Regulations or is responsible in some manner
10 for the actions described herein. Petitioner will amend the Petition to specifically identify each such
11 respondent as required and as the capacity and identity of each such respondent becomes known.

12 III

13 JURISDICTION AND VENUE

14 10. The alleged violations of the Food and Agricultural Code and California Administrative
15 Procedures Act ("APA") have occurred in the state of California. Pursuant to California Code of Civil
16 Procedure § 401, when an action or proceeding is commenced against a state agency, it may be
17 commenced and tried in any city and county in which the Attorney General has an office. The Attorney
18 General has an office in Oakland, Alameda County. Thus, venue is proper in this Court under Code of
19 Civil Procedure Sections 395 and 401.

20 IV

21 STATEMENT OF FACTS AND STATUTORY BACKGROUND

22 11. 1,3-Dichloropropene ("1,3-D") is an extremely toxic liquid with a penetrating odor used
23 for soil fumigation and pest control. The United State Environmental Protection Agency ("U.S. EPA")
24 classifies 1,3-D as "likely to be carcinogenic to humans" because it causes lung cancer in test animals
25 and as toxic to the liver, stomach, pancreas, kidneys, bladder, lungs, and nasal passage. It is listed in
26 California pursuant to the Safe Drinking Water and Toxic Enforcement Act of 1986, Health & Safety
27 Code Sections 25249.5 *et seq.*, (commonly referred to as "Proposition 65") as known to the State to
28 cause cancer to humans. A number of short-term case reports published in medical journals and texts

1 have documented the health effects following acute and subacute exposures to 1,3-D. Several studies
2 published in peer-reviewed scientific journals have found an elevated risk of cancer mortality among
3 residents of counties where 1,3-D use is high.

4 12. 1,3-D is a pre-plant fumigant applied into the soil to control and/or kill most, if not all,
5 organisms, including nematodes, insects, and disease organisms. 1,3-D can quickly dissipate from the
6 soil into the air as vapor, where most exposure to humans occurs. 1,3-D is routinely applied to soil
7 before strawberry and raspberry planting and is also used prior to planting a variety of fruit, nut,
8 vegetable, and ornamental crops including sometimes the installation and planting of vineyards. The
9 strawberry industry is a huge economic force in California and that industry's widespread use of 1,3-D
10 amounts to a significant risk to public health.

11 13. In California, 1,3-D is subject to regulation under the Pesticide Regulatory Program. DPR
12 has not initiated rulemaking procedures on the conditions for reducing cancer risk due to 1,3-D exposure
13 by limiting the application of 1,3-D or setting an air concentration target nor has it otherwise complied
14 with the APA in establishing standards addressing those issues.

15 14. 1,3-D has been registered as a pesticide in the United State since 1954, but all use was
16 suspended in California in 1990 when high levels of 1,3-D, which posed a significant risk to public
17 health, were detected in the air. In 1995, however, DPR reintroduced 1,3-D with mitigation measures
18 aimed at reducing exposure, that were proposed by the 1,3-D manufacturer (DowElanco at the time, now
19 known as Dow AgroSciences or "Dow"). This reintroduction was intended to assist in the phaseout of
20 methyl bromide pursuant to the Montreal Protocol. From 1999 to 2014 there was a 22.5-fold increase in
21 the application of 1,3-D .

22 15. In subsequent years, the mitigation measures were periodically modified through
23 negotiations between DPR and Dow and without any public notice and comment, culminating in the
24 2002 "California Management Plan: 1,3-Dichloropropene" ("the Plan"). In the Plan, DPR agreed to
25 allow Dow to restructure its program for managing the use of 1,3-D. The new system for limiting 1,3-D
26 exposure capped use of 1,3-D in each "township" (6 x 6 mile area) at 90,250 adjusted total pounds
27 ("ATP") per year. This cap was set to control annual average air levels at DPR's regulatory target for air
28 concentrations of 1,3-D of 0.14 parts per billion ("ppb"). However, under this system if less than 90,250

1 ATP had been used in a township since 1995, the unused amount could roll over into the subsequent
2 years, allowing annual application of up to 180,500 ATP.

3 16. The Office of Environmental Health Hazard Assessment ("OEHHA") is an Office of Cal
4 EPA. OEHHA's overall mission is to protect and enhance public health and the environment through
5 scientific evaluation of risks posed by hazardous substances. The office is staffed by over 100 highly
6 trained professional individuals, many who are toxicologists, hold doctoral degrees and/or hold masters
7 degrees in public health or science. OEHHA is the "Lead Agency" designated by the Governor to
8 implement Proposition 65, California's "right to know" law that protects individuals from unwarned
9 exposures to known carcinogens like 1,3-D. OEHHA is also responsible for developing and providing
10 the Boards and Departments within Cal EPA with evaluations of toxicological and medical information
11 relevant to decisions involving public health.

12 17. DPR is required to jointly and mutually develop regulations for pesticides and worker
13 safety with OEHHA. Food & Agric. Code § 12980. Furthermore, those regulations related to health
14 effects shall be based upon the recommendations of OEHHA. Food & Agric. Code § 12981. The
15 collaborative process requires DPR to do more than inform OEHHA of regulations it has developed and
16 unilaterally determine whether or not to adopt recommendations made by OEHHA.

17 18. On August 31, 2015, DPR provided OEHHA with a draft 1,3-D Risk Characterization
18 Document ("RCD") for review. OEHHA issued review comments in November of 2015.

19 19. In its review comments OEHHA recommended changes to the way worker exposure
20 estimates and cancer potency calculations were made and expressed concern that the calculations
21 underestimated the cancer risk from exposure. OEHHA also stated that DPR should consider the
22 potential for the increased sensitivity of children to carcinogenic effects and combined exposure to the
23 fumigant chloropicrin.

24 20. On December 31, 2015, DPR completed a RCD for 1,3-D in which it evaluated exposure
25 to 1,3-D and included two alternative modes of action for cancer potency of 1,3-D, a "portal of entry"
26 and a "systemic" mode of action. Without consulting or involving OEHHA in the regulatory process,
27 DPR began drafting underground regulations in the form of a Risk Management Directive, drawn in part
28 from the RCD, to establish new standards for assessing and managing cancer risks of 1,3-D exposure.

1 21. On August 30, 2016, DPR provided OEHHA with a draft "Risk Management Directive,"
2 or RMD, which set a new township application cap of 136,000 ATP and a new target air concentration
3 of 0.56 ppb, four times its previous target of 0.14 ppb. OEHHA submitted a responsive memorandum to
4 DPR on September 20, 2016.

5 22. In its responsive memorandum, OEHHA objected to DPR's selection of a "portal-of-
6 entry effect" as the preferred mode of action for 1,3-D. Instead, OEHHA concluded that available
7 information supported a mode of action based on systemic effects, because test animals receiving an oral
8 dose of 1,3-D developed lung tumors, as well as animals dosed by inhalation. If the systemic effect
9 mode of action were used, the target air concentration would be 3.5-fold lower, 0.16 ppb rather than 0.56
10 ppb. OEHHA also expressed concern that the proposed township application cap cannot assure adequate
11 health protection of all township residents because 1,3-D is not applied uniformly across the township
12 and so the measured level at a single air monitor may not be reflect actual exposure. OEHHA also
13 expressed concern about DPR's failure to address the simultaneous exposure to chloropicrin of nearby
14 residents and workers due to the fact that many formulations of 1,3-D also contain significant amounts
15 of chloropicrin. Studies have documented lung tumors in test animals exposed to chloropicrin. OEHHA
16 also stated that additional consideration should be given to the potential for the increased sensitivity of
17 children to carcinogenic effects.

18 23. On October 6, 2016, DPR distributed final underground regulations entitled "Risk
19 Management Directive and Mitigation Guidance for Cancer Risk from 1,3-Dichloropropene (1,3-D)."
20 While DPR provided a response to the comments submitted by OEHHA along with a final version of
21 DPR's underground regulations, the final regulations were not modified in any way to incorporate or
22 accommodate even OEHHA's most significant concerns about the lack of health protectiveness of the
23 target air concentration as more fully described in this Petition.

24 24. Also on October 6, 2016, DPR provided a news release to the public entitled "New Rules
25 Governing Use of Fumigant Pesticide 1,3-D," which described updates as to how the pesticide would be
26 managed and used in California henceforth that would be taking effect on January 1, 2017.

27 25. On January 10, 2017, DPR sent a letter to County Agricultural Commissioners entitled
28 "Update to Volume 3, Restricted Materials and Permitting, Pesticide Use Enforcement Program

Standards Compendium, 1,3-D Recommended Permit Conditions” announcing underground regulations in the form of revised permit conditions for 1,3-D effective on January 1, 2017. The changes made effective are virtually identical to the conditions outlined in the RMD. DPR posted the letter on the department website.

26. DPR held no stakeholder meetings prior to distributing the final underground regulations to the public and solicited no comments besides those provided by OEHHA, the Monterey Bay Air Resources District and the State Air Resources Board.

27. As stated above, the current underground regulations were not revised before they were distributed and the regulations were based on scientific interpretations inconsistent with the determinations made by OEHHA. DPR chose to ignore the concerns that OEHHA had regarding the adequacy of the new permit conditions, including revised application limits and air concentration standards to protect nearby residents and workers from cancer risks.

28. There are no administrative remedies to exhaust and Petitioners have no other adequate remedy at law.

FIRST CAUSE OF ACTION

VIOLATIONS OF THE ADMINISTRATIVE PROCEDURE ACT

[Government Code §§ 11340 *et seq.*]

29. PETITIONERS/PLAINTIFFS reallege and herein incorporate by reference each preceding paragraph of the complaint herein.

30. Like all State agencies engaged in the adoption, amendment or repeal of administrative regulations, DPR was at all times under a clear and present duty to comply with all the requirements of the APA, specifically the Government Code’s requirement that the adoption of any regulations be preceded by public notice, an opportunity for public comment, a response in writing to comments, and the forwarding of all materials on which the agency relied to the OAL. Gov. Code §§ 11346(a), 11346.4, 11346.5, 11346.8, 11346.9, and 11347.3(b). A regulation adopted inconsistently with the APA may be declared invalid as an underground regulation. Gov. Code § 11350; Cal. Code Regs. Title 1, § 250.

1 in the application of 1,3-D, workers performing fieldwork near recently treated fields, and people
2 residing and working near treated fields from exposures to 1,3-D.

3 37. A writ of mandate should be issued to compel DPR to comply with Food and Agriculture
4 Code Sections 12980 and 12981.

5 38. PETITIONERS/PLAINTIFFS have no plain, speedy or adequate remedy in the ordinary
6 course of law and will be irreparably harmed, unless the Court grants the requested writ of mandate and
7 injunctive and declaratory relief requiring DPR to base the regulations on the recommendations of
8 OEHHA so as to satisfy their statutory joint and mutual responsibility.

9 **THIRD CAUSE OF ACTION**

10 [Against All Defendants]

11 [Injunctive Relief – C.C.P. § 526]

12 39. PETITIONERS/PLAINTIFFS reallege and herein incorporate by reference each
13 preceding paragraph of the complaint herein.

14 40. PETITIONERS/PLAINTIFFS are entitled to the relief demanded, which consists of
15 restraining DPR from committing or continuing the acts complained of herein.

16 41. PETITIONERS/PLAINTIFFS and members of the public generally will suffer great or
17 irreparable harm if: (1) the underground regulations are allowed to go into effect and be implemented in
18 the absence of compliance with the APA standards, and (2) the underground regulations are
19 implemented in the absence of their being based on the recommendations of OEHHA as the product of
20 the joint and mutual responsibility of both DPR and OEHHA.

21 **FOURTH CAUSE OF ACTION**

22 [Against All Defendants]

23 [Declaratory Relief – C.C.P. § 1060]

24 42. PETITIONERS/PLAINTIFFS reallege and herein incorporate by reference each
25 preceding paragraph of the complaint herein.

26 43. There is an actual controversy between PETITIONERS/PLAINTIFFS, on the one hand,
27 and DPR on the other, in that PETITIONERS/PLAINTIFFS assert that:
28

a. The "Risk Management Directive and Mitigation Guidance for Cancer Risk from 1,3-Dichloropropene (1,3-D)" and the "Update to Volume 3, Restricted Materials and Permitting, Pesticide Use Enforcement Program Standards Compendium, 1,3-D Recommended Permit Conditions" issued by DPR are rules or standards of general application adopted by DPR to implement, interpret, or make specific the law enforced or administered by it, and are "regulations" as defined by Government Code § 11342.600, and DPR asserts to the contrary;

b. DPR failed to adopt regulations that met the requirements of the APA as set forth above, and DPR asserts to the contrary;

c. DPR failed to base the underground regulations on the recommendations of OEHHA as set forth above, and DPR asserts to the contrary.

44. A judicial declaration is necessary and appropriate at this time to clarify whether DPR's development and adoption of the underground regulations fully and completely satisfies the legal requirements of the California Code of Regulations, the Food and Agricultural Code, the Health and Safety Code, and the Government Code, so that the parties and the public can be informed as to the lawful promulgation of the Regulations.

V

PRA YER

WHEREFORE, PETITIONERS/PLAINTIFFS pray:

1. For declaratory judgment, stating that:

a. The underground regulations adopted by DPR are invalid for violating Government Code § 11340.5(a) that prohibits underground regulations, and

b. The underground regulations adopted by DPR are invalid since DPR failed to base the underground regulations that relate to health effects from 1,3-D upon the recommendations of OEHHA and failed therefore to develop the Regulations in concert with and through a joint and mutual responsibility with OEHHA;

2. That the Court issue a peremptory writ of mandate commanding DPR to:

a. Promulgate regulations to comply with the Government Code § 11340.5(a) prohibition on underground rulemaking, and

1 b. Develop the regulations that relate to the health effects from 1,3-D based upon
2 the recommendations of OEHHHA and in concert with OEHHHA so as to satisfy their joint and mutual
3 responsibility;

4 3. That Petitioners/Plaintiffs be awarded attorneys' fees pursuant to Code of Civil Procedure
5 Section 1021.5 or the substantial benefit theory and costs of this proceeding; and

6 4. That Petitioners/Plaintiffs be awarded such other and further relief as the Court deems just
7 and proper.
8

9 Dated: January 25, 2017

CALIFORNIA RURAL LEGAL ASSISTANCE, INC.

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12 _____
Natalia Ospina
13 Attorney for PETITIONER/PLAINTIFF
JUANA VASQUEZ

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16 Dated: January 25, 2017

MICHAEL FREUND & ASSOCIATES

17 

18 _____
Michael Freund
19 Attorney for PETITIONERS/PLAINTIFFS
JUANA VASQUEZ, CALIFORNIANS FOR
20 PESTICIDE REFORM and PESTICIDE ACTION
NETWORK NORTH AMERICA
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I am the Co-Director of Petitioner/Plaintiff Californians for Pesticide Reform. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief ("Petition") and know the contents thereof. The facts alleged in the Petition are true of my own personal knowledge and belief.

Executed on January 25, 2017 at Salinas, California.

Mark Weller
Mark Weller
Co-Director, for Petitioner and Plaintiff
Californians for Pesticide Reform