Case No. C086957

In the Court of Appeal
OF THE

State of California

THIRD APPELLATE DISTRICT

North Coast Rivers Alliance, et al.
Petitioners and Respondents, and

Environmental Working Group, et al.
Petitioners and Respondents,

v.

California Department of Food and Agriculture, et al.
Defendants and Appellants.

APPEAL FROM THE SACRAMENTO COUNTY SUPERIOR COURT
Case Nos. 34-2015-80002005, 34-2016-80002424, & 34-2017-80002594
THE HONORABLE TIMOTHY FRAWLEY, DEPARTMENT 60
PHONE NUMBER: (916) 874-8490

RESPONDENTS ENVIRONMENTAL WORKING GROUP, ET AL.'S OPPOSITION TO PETITION FOR WRIT OF SUPERSEDEAS AND REQUEST FOR STAY OF INJUNCTION

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP
*Arthur J. Friedman, Cal. Bar No. 160867
Alexander L. Merritt, Cal. Bar No. 277864
Four Embarcadero Center, 17th Floor
San Francisco, California 94111-4109
TEL: 415-434-9100

Attorneys for Petitioners and Respondents Environmental Working Group; City of Berkeley . Center for Food Safety; Pesticide Action Network North America; Beyond Pesticides; California Environmental Health Initiative; Environmental Action Committee of West Marin; Safe Alternatives for our Forest Environment

AQUA TERRA AERIS LAW GROUP
*Jason R. Flanders, Cal. Bar. No. 238007
828 San Pablo Ave., Ste. 115B
Albany, California 94706
TEL: 916-202-3018

Attorneys for Petitioners and Respondents Center for Biological Diversity; Center for Environmental Health; California Environmental Health Initiative Californians for Pesticide Reform; Moms Advocating Sustainability

TO BE FILED IN THE COURT OF APPEAL **APP-008**

COURT OF APPEAL THIRD **APPELLATE DISTRICT, DIVISION**	COURT OF APPEAL CASE NUMBER: C086957
ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NUMBER: NAME: Arthur J. Friedman (SBN 160867); Alexander L. Merritt (SBN 277864) FIRM NAME: SHEPPARD, MULLIN, RICHTER & HAMPTON LLP STREET ADDRESS: Four Embarcadero Center, 17th Floor CITY: San Francisco STATE: CA ZIP CODE: 94111-4109 TELEPHONE NO.: 415-434-9100 FAX NO.: 415-434-3947 E-MAIL ADDRESS: afriedman@sheppardmullin.com; amerritt@sheppardmullin.com ATTORNEY FOR (*name*): Respondents Environmental Working Group, et al.	SUPERIOR COURT CASE NUMBER: 34-2015-80002005
APPELLANT/ PETITIONER: California Department of Food and Agriculture, et al. RESPONDENT/ REAL PARTY IN INTEREST: Environmental Working Group, et al.	

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Date: May 10, 2018

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

The Environmental Working Group Petitioners (Petitioners) in this consolidated action, consisting of eleven national, state, and local environmental and public interest organizations along with the City of Berkeley, sought and obtained a writ of mandate directing Respondent, California Department of Food and Agriculture (CDFA) to set aside its Program Environmental Impact Report (PEIR) for its Statewide Pest Prevention and Management Program (Program).

The Program broadly includes numerous physical, biological and chemical techniques, including aerial spraying of toxic pesticides. CDFA prepared the PEIR to serve its stated goal of "rapid response by streamlining project-level implementation activities." However, in its haste to secure for itself broad and unfettered "streamlined" authority to implement any and all Program activities throughout the State, CDFA violated California's Environmental Quality Act (CEQA) in numerous respects, including implementation of site-specific applications of chemical pesticides without conducting site-specific analysis, and legally inadequate public notice of subsequent activities.

After extensive briefing and oral argument, the trial court in its well-reasoned 33-page opinion determined that: (1) The PEIR's "Tiering Strategy" is "unlawful because it authorizes implementation of site-specific activities without the required site-specific environmental review;" (2) CDFA violated CEQA's requirements to issue a Notice of Determination (NOD) for each subsequent activity under the Program; (3) the PEIR relied on an improper baseline that considered only 1/3 of the actual amount of pesticide

use in the State; (4) the PEIR failed to adequately analyze impacts on pollinators; (5) the PEIR failed to adequately analyze impacts on surface waters; (7) the PEIR's cumulative impacts analysis is inadequate in part because the description of other pesticide programs is "woefully deficient;" and (8) the PEIR improperly defers formulation of mitigation measures, including measures concerning impacts on special-status species.

Following the ruling on the merits, the trial court held a hearing and requested briefing from the parties regarding the appropriate remedy pursuant to CEQA's remedy statute, Public Resources Code section 21168.9. Consistent with CEQA's mandates under Section 21168.9, the trial court was careful to narrowly tailor the remedy, mindful, however, of the PEIR's numerous legal deficiencies and therefore of the heightened need to protect the environment and the citizens of California from the components of the Program posing the greatest risk to human health and the physical environment. Following a hearing regarding the scope of remedy, the trial court posed the question of whether the injunction should be limited to chemical treatment activities under the Program. CDFA's counsel in response agreed to this limitation on the scope of the Injunction and proposed the language largely adopted by the trial court, suspending only "further chemical activities undertaken by the Department to control or eradicate pests under the Program." CDFA's vast array of physical and biological pest management techniques fall outside the scope of the trial court's Injunction. So too are chemical activities to the extent authorized under CEQA independently from the PEIR.

This Court should reject CDFA's Petition for a Writ of Supersedeas and request for stay because the Injunction is prohibitory – "suspending further chemical activities

undertaken by the Department to control or eradicate pests under the Program…" CDFA's contention that the Injunction mandates affirmative action because the Department must "dismantle its current infrastructure for pest treatments" and "cancel or amend private contracts" is wholly unsupported by any evidence submitted in support of the Petition. For this and other reasons, the CDFA's reliance on the California Supreme Court's 1939 decision in *Feinberg v. One Doe* is misplaced. Moreover, subsequent case authority involving analogous facts to this case refutes CDFA's strained interpretation of the Injunction as explained below.

Additionally, the Court should decline CDFA's invitation to exercise its discretion to stay the Injunction. Because of the numerous and significant deficiencies in the PEIR, allowing CDFA to resume site-specific chemical treatments throughout the State without conducting site-specific environmental analysis poses imminent risk of serious and irreparable injury to humans, animals, and to the physical environment, including without limitation, as the trial court found, significant impacts on pollinators, surface waters, and special-status species. CDFA's Petition does not attempt to take issue with the trial court's findings nor does it offer any evidence to suggest that the PEIR in fact satisfied CEQA's mandates. CDFA does not even reference CEQA's mandatory remedy statute, Section 21168.9, or argue that the trial court improperly applied its requirements. Instead, CDFA requests that the Court stay enforcement of the Injunction solely based on alleged economic considerations. That request, however, violates CEQA's mandates under Section 21168.9. Moreover, scrutiny of CDFA's evidence submitted in support of the Petition reveals that CDFA has no evidence whatsoever that the trial court's narrow

Injunction suspending only chemical treatments under the Program absent independent CEQA authority would cause any injury, much less substantial and/or irreparable injury, or injury that in any way outweighs the clear threat posed to humans, animals, and the environment from resumed chemical activities.

CDFA's unfounded and wholly unsupported request of this Court to stay the trial court's narrowly framed and well-reasoned Injunction is emblematic of a pattern and practice of disregard for CEQA's requirements. CDFA's actions in this regard speak louder than any words. During the past 15 years, CDFA has certified three Environmental Impact Reports (EIRs) including the PEIR. The First District Court of Appeal, this Court, and the trial court below determined that all three EIRs violated CEQA in multiple respects. CDFA's Petition repeatedly emphasizes its "statutory mandate to protect and support the state's agricultural industry." (Petition, p. 7.) However, CDFA apparently has lost sight of CEQA's statutory mandates to which the Department is also subject. CEQA mandates that economic interests and environmental protection be balanced. The trial court's ruling and Injunction properly strike this balance. This Court therefore should deny the Petition and request for stay of the Injunction in order to prevent any further substantial environmental and human health injuries from CDFA's continued wide-scale use and application of highly toxic chemicals in communities throughout the state (including parks, schools, neighborhoods, and in proximity to wetlands and other surface waters).

II. AUTHENTICITY OF EXHIBITS

Exhibits 1 through 3 accompanying this Opposition to the Petition are true and correct copies of the original documents contained in the Administrative Record on file with the trial court. The record for the appeals has not yet been filed in this Court. Therefore, pursuant to California Rules of Court, rule 8.112, subdivision (a)(4), Petitioners submit the additional documents necessary for proper consideration of CDFA's Petition in separately tabbed and indexed volumes entitled "Attachments to Opposition to Petition for Writ of Supersedeas and/or other Appropriate Relief." Exhibits 1 through 3 consist of portions of the PEIR. References to AR refer to the Administrative Record.

III. ADDITIONAL FACTS

1. The CDFA prepared the PEIR to "serve as an overarching CEQA framework for efficient and proactive implementation of Statewide Program activities." (Pet. Attachments, Exh. 1 at 16, citing AR 344.)

2. As part of the PEIR, CDFA implemented a CEQA Tiering Strategy, a checklist tool and guide for project-level CEQA compliance and integration of new pest programs and management techniques. (Pet. Attachments, Exh. 1 at 16, citing AR 344; Exh. 2 at 424-464, citing AR 2695-2735.)

3. The goals and objectives of the PEIR include "Support[ing] CDFA's goal of rapid response by streamlining project-level implementation activities, addressing new pests as they are detected, and integrating new pest management approaches as they are developed;" (Pet. Attachments, Exh. 1 at 17, citing AR 345.)

4. The Program includes a set of options to achieve CDFA's objectives, including physical, biological, and chemical management techniques. (Pet. Attachments, Exh. 1 at 19, citing AR 347; at 61-67, citing AR 389-395.)

5. Proposed Program activities may occur "anywhere that a plant pest is (or may be) found in agricultural or nursery settings (in cooperation with commercial growers), in residential communities, at border protection stations, and sometimes outside California…." "The location, area and extent of specific activities under the Proposed Program ultimately would be evaluated, based on the site-specific situation and dictated by the targeted pest, the regulatory requirements and the management approaches available." (Pet. Attachments, Exh. 1 at 46, citing AR 374.)

6. Under the Program, CDFA may use or oversee the use of a variety of pesticides, including conventional pesticides, microbial pesticides…biopesticides… and spray adjuvants (additives that improve pesticide performance)." (Pet. Attachments, Exh. 1 at 64, citing AR 392.)

7. Chemicals under the Program are applied using a variety of methods, generally categorized as inside traps, spot applications, soil applications, fumigation applications, and foliar spray applications. (Pet. Attachments, Exh. 1 at 66, citing AR 394; at 80-85, citing AR 408-413.)

8. Dating back to 1974, CDFA has certified seven EIRs, the last three of which, including the PEIR, have been set aside by California courts based on violations of CEQA. Pierce's Disease Control Program EIR (CDFA 2002, 2003) – (*Californians for Alternatives to Toxics et al. v. CDFA* (First District Court of Appeal, 2005, Case No.

A107088); Light Brown Apple Moth Eradication Program EIR (March 2010) (*North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal. App. 4th 647.) (Pet. Attachments, Exh. 1 at 157, 162, citing AR 485, and 490.)

9. Pesticide chemicals used under the Program include: (1) "Cholinesterase inhibitors that interfere with cholinesterase, an enzyme needed for proper functioning of the nervous systems of humans, other vertebrates and insects."; (2) Reproductive Toxicants – pesticide chemicals that are on the State's Proposition 65 list of chemicals which are known to cause reproductive toxicity."; (3) Cancer Causing pesticide chemicals that are on the State's Proposition 65 list of chemicals which are known to cause cancer; (4) Toxic Air Contaminants (TACs) – pesticide chemicals that are listed in Section 6860 of the California Code of Regulations…reflecting threshold levels causing adverse health effects. (Pet. Attachments, Exh. 1 at 188-189, citing AR 516-517.)

10. The PEIR lists several dozen chemicals used in the Program that it describes as toxic or hazardous to humans and/or animals under a variety of categories. (Pet. Attachments, Exh. 3 at 465-475, citing AR 3821-3831.)

11. Under Part A of the PEIR's "Tiering Strategy," CDFA determines whether a proposed site-specific subsequent physical, biological, or chemical management activity was previously "described in the PEIR." If the answer is "yes," no further environmental analysis under CEQA is performed. Instead, the CDFA proceeds to Part B of the Tiering Strategy, which requires consideration of relevant requirements for implementation of the activity. To assist CDFA in determining whether the proposed subsequent activity was "described in the PEIR," and thus requires no further

environmental analysis under CEQA, CDFA relies on Table 1 of the Tiering Strategy. Table 1 consists of a checklist of factors for CDFA to consider before implementing a proposed physical, biological, or chemical management activity under the Program. Importantly, with respect to physical and biological management activities, Table 1 provides for no evaluation of any site-specific conditions. Moreover, with respect to chemical management activities, Table 1 presents one optional inquiry, but poses the wrong question: "Are there site-specific factors relevant to the proposed activity which reduces the potential for impacts compared to the scenario evaluated in the PEIR…." The relevant inquiry, of course, should be whether there are site-specific factors that increase the potential for impacts compared to the scenario evaluated in the PEIR. (Pet. Attachments, Exh. 2, at 429-438, citing AR 2700-2709.)

12. In addition to not evaluating site-specific conditions prior to implementing subsequent physical, biological, and chemical management activities throughout the State under the Program, CDFA has consistently failed and refused to issue any NODs prior to implementing its subsequent activities under the Program, in violation of Public Resources Section 21108(a), which requires agencies to file NODs following any "determinations" to "carry out" projects. (*See also Comm. For Green Foothills v. Santa Clara County Bod. Of Supervisors* (2010) 48 Cal. 4th 32, 56.) (CDFA Attachments, Exh. 17.)

13. The PEIR states that "many" Program activities are ongoing and therefore included within the baseline. (Pet. Attachments, Exh. 1 at 231-232 citing AR 559-560).

However, the PEIR does not specify which Program activities are ongoing and therefore included within the baseline. (*Ibid.*)

14. The PEIR's baseline includes only reported commercial pesticide use and excludes unreported use, which encompasses most residential and industrial uses. (Pet. Attachments, Exh. 1 at 190, citing AR 518.) The PEIR estimates that unreported uses account for approximately 2/3 of pesticide use in the State. (*Ibid*.) The PEIR offers no explanation why it did not consider unreported pesticide use in its baseline in light of CDFA's demonstrated ability to reasonably estimate and forecast this usage. (CEQA Guidelines, § 15144 ["drafting an EIR…involves a degree of forecasting," and [therefore], an agency must use its best efforts to find out and disclose all that is reasonably can."].)

15. The PEIR failed to adequately analyze impacts on pollinators by assuming without evidence that impacts would be "minimal," and by relying on unenforceable mitigation measures. (Pet. Attachments, Exh. 1 at 310, 321-322, citing AR 638, 649-650.)

16. The PEIR failed to adequately analyze impacts on surface waters by assuming, without supporting evidence or analysis, that all impacts would be reduced through a combination of poorly defined and unenforceable management practices and permit regulatory requirements. (Pet. Attachments, Exh. 1 at 365, 370-378, 382-388 citing AR 707, 712-720, 724-730.)

17. The PEIR cumulative impacts analysis identifies a large number of other pesticide programs, run by many federal, state, and local agencies, which will substantially overlap and combine with the pesticide applications under the Program.

However, the PEIR provides no meaningful information about those other programs, not even basic data about the amount and types of pesticides used, the treatment areas, and how the environmental impacts of all these programs will combine. (Pet. Attachments, Exh. 1 at 220-223, citing AR 548-551 [Table 5-15 – "Past, Existing and Future Pesticide Use Activities"].)

18. The PEIR improperly defers mitigation measures. For example, mitigation measure BIO-CHEM 2 improperly defers mitigation of impacts on special-status species. It relies on the preparation of vague future "treatment plans," without specific performance criteria and on undefined "technical assistance" from state and federal wildlife agencies. (Pet. Attachments, Exh. 1 at 314, 318-319, citing AR 642, 646-647.)

19. Following extensive briefing on the merits and oral argument before the Court that spanned the morning and afternoon court sessions, the trial court on January 8, 2018 issued its 33-page Consolidated Ruling on Submitted Matters. (CDFA Attachments, Exh. 84 at 2513-2547.) Applying the appropriate standard of review (*Id*. at 2521-2522), the trial court ruled that the PEIR's tiering strategy is unlawful because it authorizes implementation of site-specific activities without the required site-specific environmental review. (*Id*. at 2522-2527.) The trial court ruled that CDFA violated CEQA's requirement to file a NOD when the Department approves a subsequent activity under the Program. (*Id*. at 2528-2530.) The trial court ruled that the PEIR's baseline is legally inadequate in multiple respects. First, the baseline includes the Department's ongoing activities, without any identification of these other programs or how their inclusion affected the baseline. Second, the baseline relies solely on reported pesticide use, despite CDFA's

admitted ability to estimate unreported use – thereby understating actual baseline pesticide use in the state by approximately 66%. (*Id*. at 2531-2532.) The trial court ruled that the PEIR failed to adequately analyze the Program's impacts on pollinators (*Id*. at 2533) and on surface waters. (*Id*. at 2534-2535.) The trial court further ruled that the PEIR's cumulative impacts analysis was unlawful because its description of other pesticide programs is "woefully deficient." (*Id.* at 2535.) The trial court further ruled that the PEIR improperly defers formulation of certain mitigation measures, including mitigation measures regarding impacts on special-status species. (*Id*. at 236-2537.)

20. Following the trial court's ruling on the merits, the parties and trial court engaged in extensive efforts to formulate the appropriate remedy, including the proper scope of an injunction pertaining to the CDFA's Program activities. The parties appeared before the trial court for hearing regarding the proper scope of judgment and writ on January 30, 2018 (CDFA Attachments, Exh. 73.) During that hearing, CDFA's counsel requested that the trial court clarify that any injunction not limit the Department's ability to comply with CEQA pursuant to any appropriate method. (*Id*. at 2352.) Contrary to CDFA's current position that a stay is necessary in order for CDFA to comply with its mission, CDFA's counsel argued that CDFA has other means and mechanisms under CEQA or CEQA exemptions to proceed with its Program activities. (*Id.* at 2373.) Following this hearing, the trial court issued a Minute Order, directing all counsel to prepare and submit proposed forms of Judgment and Writ for the trial court's consideration. (CDFA Attachments, Exh. 74.)

21. On February 15, 2018, the trial court issued a Minute Order noting that many Program activities are unlikely to result in any material adverse change or alteration to the physical environment. The trial court therefore posed the question "whether it is possible to resolve this dispute by further narrowing the scope of the injunction, such as by limiting the Injunction to Program activities to control or eradicate invasive pests by physical, biological and chemical techniques (including spraying of pesticides), or perhaps only chemical techniques." (CDFA Attachments, Exh. 75.)

22. In response to the trial court's minute order and further meet and confer discussions with Petitioners' counsel, on February 21, 2018, CDFA's counsel submitted a letter to the trial court proposing language for the Injunction that would suspend further chemical activities but limit the injunction solely to chemical activities "directly undertaken" by the Department, thus excluding all chemical activities overseen by CDFA. CDFA's letter to the trial court stated: "**The Department proposes narrowing the injunction so that it applies only to chemical activities directly undertaken by the Department to control or eradicate pests.**" (CDFA Attachments, Exh. 77 [emphasis in **original**].)

23. On February 22, 2018, the trial court issued the Judgment granting the Petitions. The Injunction reads: "An Injunction is hereby GRANTED, suspending further chemical activities undertaken by the Department to control or eradicate pests under the Program, except as authorized under CEQA independently of the PEIR, unless and until Respondents correct the violations of the California Environmental Quality Act identified in the Consolidated Ruling." (CDFA Attachments, Exh. 84 at 2510.) Thus, with the

exception of the trial court's rejection of CDFA's request to limit the scope of the injunction to chemical activities "directly" undertaken by the Department, the trial court adopted CDFA's proposed language for the Injunction.

IV. ARGUMENT

A. The Injunction Is Prohibitory and Therefore Not Automatically Stayed

"The designation given an injunction by the trial court does not determine whether the decree is prohibitive or mandatory. Instead, the appellate court must examine the terms and effect of the injunction in order to discover its character." (*People v. Mobile Magic Sales, Inc*. (1979) 96 Cal. App. 3d 1, 13.) "The purpose of mandatory relief is to compel the performance of a substantive act or a change in the relative position of the parties." (*Ibid*. [citing cases].) "By contrast, the prohibitive order seeks to restrain a party from a course of conduct or to halt a particular condition." (*Ibid*.) Moreover, "the character of prohibitory injunctive relief, however, is not changed to mandatory in nature merely because it incidentally requires performance of an affirmative act." (*Ibid*, citing *United Railroads v. Superior Court* (1916) 172 Cal. 80, 88-89.)

Here, the trial court's Injunction is prohibitory because it seeks to restrain a party from a course of conduct or to halt a particular condition; namely, "suspending further chemical activities undertaken by the Department to control or eradicate pests under the Program…" CDFA's contention that the Injunction will compel the Department to take several affirmative steps, including "reassessing" its treatments, "dismantle[ing]" its "current infrastructure for pest treatments," and canceling or amending private contracts is completely unsubstantiated by CDFA's citations. (Memorandum, pp. 39-41.) CDFA

cites to paragraph no. 48, 49, 52, and 60-64 of its Petition to support the foregoing claims. (Ibid.) Paragraph 48 of the Petition is unsupported by any evidence. (Petition, p. 27). Paragraph 49 of the Petition references Exhibit 77, which is ***a letter from CDFA's counsel***, Carolyn Rowan to the trial court regarding addressing the proper scope of remedy. Counsel's letter does not constitute evidence, much less provide any evidentiary support for CDFA's claims set forth in Paragraph 49. For example, Paragraph 49 contends that the Injunction will compel the CDFA to cancel contracts. This paragraph, however, merely cites to Ms. Rowan's letter to the court, which references (without supporting evidence) the hypothetical possibility that some form of injunction may require CDFA to amend or modify contracts. (Petition, p. 27, citing Ex. 77 at 2385 [Carolyn Rowan letter].) Paragraph 52 of the Petition consists of legal argument completely unsubstantiated by evidence. (Petition, p. 28.) The same is true with respect to paragraphs 60-62, and 64. (Petition, pp. 31-33.) Paragraph 63 purports to provide an example of harm one pest can cause and thus provides no support whatsoever to CDFA's claim that the Injunction would compel any affirmative actions. Fatally, CDFA fails to identify the specific terms of any contract, much less submit any actual contract for the Court's consideration to support CDFA's unsubstantiated assertion that the trial court's Injunction will compel CDFA to cancel or amend contracts. Nor has CDFA identified, much less provided any evidence to support, its vague assertions that the Injunction will affirmatively compel it to "reassess" its management techniques and/or "dismantle" unspecified "infrastructure."

This case thus stands in stark contrast to the fact in *Gherman v. One Doe Co*. (1939) 14 Cal. 2d 24 relied on by CDFA. (Memorandum, p. 39.) In that case, the court enjoined and restrained the defendant "from employing, and continuing to employ, or hereafter employing Amelia Greenwood while she is not a member in good standing of said International Ladies' Garment Workers' Union." (*Id*. at 27.) The Court held that because Ms. Greenwood was employed by the defendant, it was "quite obvious" that the injunction in essence was mandatory, compelling the defendants to discharge Ms. Greenwood from employment with defendants. (*Ibid*.) The injunction at issue in that case thus clearly required the defendant to terminate a specific, existing contract. Here, however, the Injunction clearly is not intended, nor does it effectively compel CDFA to cancel or amend any contracts or take any other affirmative actions. In fact, as noted, CDFA has failed to submit a single contract in support of its Petition. CDFA therefore has not remotely satisfied its burden of demonstrating that the Injunction compels CDFA to cancel or modify any specific contract.

The facts in this case are analogous to those in *Mobile Magic Sales*, *supra*. In that case, the State brought suit against mobile home dealers and others to obtain civil penalties and injunctive relief for alleged unfair competition and restraint of trade. The Court of Appeal affirmed the trial court's issuance of a preliminary injunction requiring the defendants to remove certain model mobile homes based on a Vehicle Code provision that made it unlawful to display mobile model homes within a mobile home park after that park has reached 70% occupancy. The Court held that while the removal of mobile homes is an affirmative act, "it is incidental to the injunction's prohibitive objective to

restrain further violation of a valid statutory provision. Thus, the…preliminary injunction is prohibitive in character and properly issued to halt continuing violation of the Vehicle Code." (*Mobile Magic Sales*, *supra*, 96 Cal. App. 3d at 13.) Here, like the facts in *Mobile Magic Sales*, to the extent the Injunction compels the CDFA to perform any affirmative acts (and none are substantiated by the Petition), such acts are incidental to the Injunction's prohibitive objective to restrain the CDFA from further violations of CEQA. The trial court's Injunction therefore is prohibitive in character, and "properly issued to halt continuing violations of [CEQA]." (*Ibid*.)

B. The Court Should Reject CDFA's Request To Stay The Narrow Injunction

As an initial matter, CDFA's request in equity for relief from the stay is undermined by the fact that the trial court largely adopted CDFA's proposed language for the Injunction. (Paragraph 22, *supra*; *see e.g.*, *Gherman v. Colburn* (1977) 72 Cal. App. 3d 544, 567 ["A party may not complain of the giving of instructions which he has requested."].) Beyond this threshold defect, CDFA has not, and cannot demonstrate that the equities favor staying the Injunction.

The trial court determined that the PEIR is deficient in numerous and significant respects, including a legally deficient Tiering Strategy that results in CDFA's failure to consider site-specific conditions prior to implementing site-specific Program activities. (Paragraph 19, supra). The PEIR's baseline is premised on only 1/3 of actual pesticide use in the State (the amount of reported pesticide use). (*Ibid*.). This deeply flawed and understated baseline infects and invalidates each and every subject of the PEIR's analysis. The PEIR additionally failed to adequately analyze the Program's impacts on

pollinators and surface waters. (*Ibid*.). Additionally, the PEIR's cumulative impacts analysis is "woefully deficient." (*Ibid*.) CDFA's Petition does not even attempt to take issue with the trial court's findings, much less provide evidence demonstrating that the PEIR in fact fully complied with CEQA.

Despite the PEIR's numerous legal deficiencies, the trial court narrowly tailored the remedy and injunction, solely suspending the most threatening component of the Program: chemical treatments. The Court should maintain the trial court's narrow and well-reasoned Injunction to prevent the threat of imminent and irreparable injury to people, animals, and the environment, including pollinators and all surface water, resulting from site-specific chemical treatments throughout the State without site-specific environmental review. The full magnitude of environmental injury that would result from CDFA resuming chemical treatments throughout the State cannot be known because of the PEIR's inaccurate baseline and complete failure to analyze the Program's cumulative impacts in light of existing federal, state and local pest management programs. (Paragraph 19, *supra*).

CDFA's Petition does address the mandatory requirements of CEQA's remedy statue, Section 21168.9. Nor does CDFA argue that the trial court improperly applied CEQA's remedy provisions. Instead, it encourages the Court to stay the Injunction based solely on alleged economic considerations. (Memorandum, pp. 43-46.) Section 21168.9, however, imposes mandatory requirements on trial courts to impose all necessary remedies to protect the environment and ensure compliance with CEQA. Additionally, scrutiny of CDFA's alleged evidence of harm reveals that none supports the claim that

the trial court's narrow Injunction would cause any injury, much less significant and/or irreparable injury. CDFA's Memorandum cites to Paragraph nos. 52-66 of its Petition. (Memorandum, pp. 43-44.) However, Paragraph nos. 52-56, and 58-59, and 61, and 63-64 of the Petition cite to no supporting evidence. (Petition, pp. 28-34.)

This leaves only Petition paragraph nos. 57, 60, and 62 to support CDFA's claim of injury resulting from the Injunction. Paragraphs 57, 60 and 62 each rely solely on a Declaration submitted to the trial court on January 23, 2018, prior to the trial court's formulation of the Injunction, by Stephen Brown, CDFA's Director of Plant Health and Pest Prevention Services. (Petition, ¶¶ 57, 60 and 62 and pp. 30-32, citing CDFA Attachments, Ex. 69 at pp. 2260-2261.) Mr. Brown's Declaration, however, provides no support for CDFA's claim that the trial court's narrow Injunction limited to chemical treatments would cause any injury because his Declaration speaks exclusively to the risks associated with an injunction of all Program activities. All of Mr. Brown's concerns are premised on the consequences of an injunction that "results in the termination of all activities described in the PEIR, regardless of whether they are approved pursuant to other CEQA compliance…." (CDFA Attachments, Exh. 69 at 2257, ¶ 8.) Mr. Brown's Declaration thus explains: "The consequences of terminating the above activities would be severe and widespread, including effects on the agricultural industry, the economy, the environment, and public health." (*Id.*, ¶ 9.) His Declaration states further: "The immediate impact of terminating all activities described in the PEIR, regardless of whether they are approved pursuant to other CEQA compliance would likely include…."

(*Id.*, ¶ 10.) He further explains: "Depending on how the Court fashions an injunction….the Department may need to take affirmative actions…." (*Id.* at ¶ 15.)

Because Mr. Brown's Declaration assumes a broad injunction terminating all PEIR activities regardless of independent compliance with CEQA, it provides no foundation and no evidence in support of CDFA's claim that the trial court's actual, narrowly framed Injunction (as proposed by CDFA's counsel) would cause any injury, much less substantial and/or irreparable injury. As Mr. Brown conceded in his Declaration, the effects of an Injunction depend entirely on its actual scope. Notwithstanding this undeniable fact, CDFA failed to submit any evidence in support of its Petition demonstrating that the trial court's actual Injunction would cause any injury, much less evidence demonstrating that such injury would outweigh the clear threat to people, animals and the environment posed by CDFA resuming site-specific chemical treatments with no site-specific environmental analysis, and with no way of measuring the direct and cumulative impacts of such resumed treatments in light of the PEIR's deeply flawed environmental baseline and woefully deficient cumulative impacts analysis.

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V. CONCLUSION

For the foregoing reasons, the EWG Petitioners request that this Court deny CDFA's Writ of Supersedeas and application to stay enforcement of the trial court's Injunction.

Dated: May 10, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By *_/s/ Arthur J. Friedman_*
ARTHUR J. FRIEDMAN

Attorneys for
ENVIRONMENTAL WORKING GROUP; CITY OF BERKELEY; CENTER FOR FOOD SAFETY; PESTICIDE ACTION NETWORK NORTH AMERICA; BEYOND PESTICIDES; CALIFORNIA ENVIRONMENTAL HEALTH INITIATIVE; ENVIRONMENTAL ACTION COMMITTEE OF WEST MARIN; SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT

Dated: May 10, 2018

AQUA TERRA AERIS LAW GROUP

By *_/s/ Jason R. Flanders_*
JASON R. FLANDERS

Attorneys for
CALIFORNIA ENVIRONMENTAL HEALTH INITIATIVE; CENTER FOR BIOLOGICAL DIVERSITY; CENTER FOR ENVIRONMENTAL HEALTH; CALIFORNIANS FOR PESTICIDE REFORM; MOMS ADVOCATING SUSTAINABILITY

CERTIFICATE OF COMPLIANCE

I certify that the attached Opposition to Petition for Writ of Supersedeas and/or other appropriate relief uses a 13 point Times New Roman font and contains 4869 words.

Dated: May 10, 2018

SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

By */s/ Arthur J. Friedman*
ARTHUR J. FRIEDMAN

Attorneys for
ENVIRONMENTAL WORKING GROUP; CITY OF BERKELEY; CENTER FOR FOOD SAFETY; PESTICIDE ACTION NETWORK NORTH AMERICA; BEYOND PESTICIDES; CALIFORNIA ENVIRONMENTAL HEALTH INITIATIVE; ENVIRONMENTAL ACTION COMMITTEE OF WEST MARIN; SAFE ALTERNATIVES FOR OUR FOREST ENVIRONMENT

Dated: May 10, 2018

AQUA TERRA AERIS LAW GROUP

By */s/ Jason R. Flanders*
JASON R. FLANDERS

Attorneys for
CALIFORNIA ENVIRONMENTAL HEALTH INITIATIVE; CENTER FOR BIOLOGICAL DIVERSITY; CENTER FOR ENVIRONMENTAL HEALTH; CALIFORNIANS FOR PESTICIDE REFORM; MOMS ADVOCATING SUSTAINABILITY