No. A114258

COURT OF APPEAL OF CALIFORNIA
FIRST APPELLATE DISTRICT, DIVISION 1

JORGE FERNANDEZ, et al.,
Plaintiffs and Respondents,

vs.

CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION,
Defendant and Appellant.

ALLIANCE OF THE METHYL BROMIDE INDUSTRY,
Appellant, Intervenor, and Respondent.

CALIFORNIA STRAWBERRY COMMISSION,
Appellant, Intervenor, and Respondent.

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APPELLANTS' AND INTERVENORS' OPENING BRIEF

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On Appeal from the Superior Court of San Francisco County
Superior Court Case No. CPF-04-504781
Honorable James L. Warren

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CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Cal. Rules of Court, rule 8.208)

There are no interested entities or persons to list in this Certificate per California Rules of Court, rule 8.208(d)(3).

DATED: March 28, 2007

LAW OFFICES OF TONY J. TANKE

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

FEDERAL STATUTES

STATUTES

INTRODUCTION

Methyl bromide is one of the most widely-used field pesticides. Its unique capability to eliminate a broad range of crop-destructive pests and diseases has made it essential to California's vitally-important agriculture industry.[1] Methyl bromide's use as a pesticide is comprehensively regulated in a multi-statutory scheme administered by the Department of Pesticide Regulation (DPR), a branch of Cal-EPA.[2] As part of the scheme, DPR is expressly empowered to assess health risks, determine methyl bromide exposure levels, and establish feasible control measures.[3]

The San Francisco County Superior Court struck down DPR's entire set of duly-enacted rules governing subchronic (seasonal) airborne methyl bromide exposure. The trial court did so because DPR adopted regulatory exposure standards that were established by a conservative scientific consensus and the professional judgment of DPR's expert toxicologists, but

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[1] Statement of Facts, Section A.

[2] Discussion, Section I(A)-(C).

[3] Food and Agricultural §§ 11454, 11454.1, 12980-12981, 14006, 14021-14024; see Discussion, Section II(B)-(C). All statutory references are to this code unless otherwise stated.

departed from the levels recommended by another Cal-EPA branch: the Office of Environmental Health Hazard Assessment (OEHHA).[4]

Toxicologists at DPR and OEHHA had a scientific disagreement about the optimal airborne methyl bromide exposure levels that amounted to a functional difference of eight parts per billion of air (ppb).[5] The variation arose from their respective reliance upon different animal studies. Neither DPR nor OEHHA nor any of the numerous scientific peer reviewers – *nor even the trial court itself* – found that the minuscule

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[4] Statement of Facts, Section C(2); 1 CT 237L:20-M:15. The record on appeal consists of two components: (1) a single-volume Reporter's Transcript (RT) of the hearing held on Petitioners' application for a writ of mandate on November 8, 2005; and (2) a 16-volume Clerk's Transcript (CT) which includes the Administrative Record (AR) of the rulemaking proceedings preceding the Subchronic Methyl Bromide Exposure Regulations at issue in this action, as well as pleadings, trial briefs, judicial notice requests, and other documents filed with the Superior Court. References to the multi-volume CT will be referred to by volume number preceding "CT" and the page number(s) following "CT." Because the AR, which comprises the bulk of the CT, has Bates numbers in the bottom right-hand corner, the Clerk of the Superior Court numbered the Clerk's Transcript in the *upper* right-hand corner. It is those numbers to which the CT citations refer.

[5] One ppb is equivalent to a single second of time in about 32 years. (15 CT 4384.) It also equates to a *half a teaspoon* in a regulation Olympic-size lap pool.

disparity between the chosen levels would have any real impact upon human health.[6]

Seizing the opportunity to exploit the difference of opinion between the two Cal-EPA agencies, Petitioners persuaded the trial court that DPR's methyl bromide exposure regulations had to conform to OEHHA's chosen exposure levels. The trial court so ordered.

Although inconsequential to health protection, the trial court's decree that DPR adopt OEHHA's lower levels will have an immense and negative impact upon those California crops that depend on methyl bromide field fumigation. Injury to agriculture in the hundreds of millions of dollars – with concomitant job losses, declines in availability of food crops, and increases in consumer prices – is inevitable.[7]

This appeal from the trial court's decision calls upon this court to decide whether OEHHA has the anomalous and virtually unprecedented authority to dictate the contents of rules made by another agency – DPR – which is the *sole and exclusive* decisionmaker under the statutory scheme. Astoundingly, OEHHA has never claimed this power for itself, and DPR

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[6] The court found *no evidence* that "pesticides applied under [DPR's] regulations [would] irreparably harm the public any more than pesticides applied under regulations issued according to [OEHHA's] subchronic exposure reference levels . . ." (1 CT 237R:24-26).

[7] Statement of Facts, Section A.

has always exercised it.[8] Only Petitioners assert that OEHHA has the power to dictate DPR's rules.

Intervenor-Appellants,[9] who represent agricultural and pesticide producers connected with the production and use of methyl bromide, respectfully submit that the trial court erred by failing to recognize the Legislature's grant to DPR of ultimate risk-assessment and risk-management powers over the use and application of pesticides. This oversight occurred in the following ways:

1. The court failed to harmonize worker safety statutes requiring DPR to base its rules on OEHHA's health-related "recommendations" with later and more comprehensive legislation clearly allocating to DPR the power to assess risk, set exposure levels, and manage methyl bromide's pesticidal use, while assigning to OEHHA the role of an important consultant.

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[8] Discussion, Section II(E).

[9] The Intervenor-Appellants are: (1) the California Strawberry Commission, a commission created by state law and the initiative of the industry which includes and represents all California strawberry growers and handlers in the state; and (2) the Alliance of the Methyl Bromide Industry, an unincorporated alliance comprised of California registrants of methyl bromide representing its member companies in California legislative, legal, and regulatory affairs. (1 CT 237HH.) Intervenor-Appellants will be referred to collectively as "Intervenors."

2. The court failed to recognize that DPR complied with this scheme by using OEHHA's exposure-level recommendations and opinions as: (a) a starting point for DPR's regulatory risk assessment; (b) a basis for broad consultation with numerous statutorily-mandated scientific experts; and (c) a sounding board for ongoing scientific dialogue. Short of forcing DPR to agree with OEHHA, nothing more could reasonably have been required.

3. The court ignored the adverse consequences that will inevitably result from its myopic reading of the statutory scheme, including:

- After duly receiving statutorily-prescribed peer reviews and data from multiple scientific and practical sources, DPR will be forced to toss them all out in favor of OEHHA's binding "recommendations." The Legislature's mandate to DPR to consider diverse views will be undermined. Public resources spent on producing and considering consultations and peer reviews will be squandered.
- DPR will be legally constrained to reject the consensus evaluations of independent expert toxicologists in obedience

to the insular opinions of a single agency: OEHHA.[10] This will soundly defeat the kind of broad-based, well-informed decisionmaking process set up by the Legislature.

- OEHHA would be able to enact legally binding standards without statutory guidance and without holding hearings, receiving testimony, or absorbing publically-supplied information or commentary. In this way, it would create administrative law without listening to or being accountable to anyone – in egregious violation of the California Administrative Procedure Act.

There is only one reasonable interpretation of the governing statutes that reconciles their provisions into a harmonious whole and avoids the adverse consequences just enumerated. It holds that DPR is the captain of the regulatory ship who is both authorized and required to consult a broad range of scientific and practical views before assessing health risks and

[10] OEHHA's independent expertise, integrity, and credibility as an essential scientific advisor are unquestionable. However, this case concerns who has the statutory authority to make final risk assessment and regulatory decisions. The law places OEHHA in a purely advisory role, insulated from other requirements that the statutory scheme attaches to DPR's decisionmaking authority over pesticides.

managing the pesticidal use of methyl bromide. While OEHHA is a vitally-important consultant and advisor to DPR, DPR makes all final decisions.

Just as a ship's advisors cannot legally force the captain from the bridge and seize command, so Petitioners cannot vest DPR's ultimate decisionmaking role in another agency. Yet the trial court's ruling here countenances just this kind of mutiny, and thereby scuttles a carefully-designed legal order for pesticide assessment, management, and control in California. It should not be permitted to stand.

JURISDICTIONAL STATEMENT

Intervenors' appeal is taken from a final appealable judgment granting a writ of mandate. (1 CT 237F-T; Code Civ. Proc., § 904(a)(1); *Public Defender's Organization v. County of Riverside* (2006) 106 Cal.App.4th 1403, 1409.) Notice of appeal was filed within 60 days of notice of entry of judgment as required by Rule 8.104(a). (1 CT 237A-B.)

ISSUES AND SUMMARY OF ARGUMENT

1. **Does the California Department of Pesticide Regulation (DPR) have the ultimate statutory authority to make decisions about subchronic airborne exposure standards and to issue health-protective regulations governing the pesticidal use of methyl bromide?**

Short Answer: Yes. Under the governing statutory scheme, DPR is *the* regulatory agency empowered to assess health risks and to manage those risks by controlling the use and application of methyl bromide as a pesticide. OEHHA, DPR's sister agency under Cal-EPA, acts as a vital consultant and advisor to DPR in the regulatory process, but its "recommendations" do not override DPR's expert assessments or regulatory decisions. (Discussion, Sections I-III.)

2. Did DPR's process of adopting subchronic exposure regulations with OEHHA's active involvement comply with a general statutory objective of joint and mutual development of regulations with OEHHA?

Short Answer: Yes. DPR engaged OEHHA in a pre-regulatory process and in the development of the rules themselves by: (a) starting DPR's subchronic risk analysis with levels consistent with OEHHA's recommendations; (b) soliciting and responding to OEHHA's comments and recommendations in numerous working group meetings and memoranda regarding the health effects of methyl bromide, particularly the reference exposure levels; and (c) soliciting and responding to OEHHA's input about the actual regulatory text and modifications. Short of blindly adopting OEHHA's substantive position, no more can be reasonably

expected of DPR in the developmental process, let alone feasibly mandated by judicial decree. (Discussion, Section IV.)

3. Did DPR's regulations violate the clarity standards of the California Administrative Procedure Act (APA)?

Short Answer: No. Intervenors will not address this issue, but will rely on and incorporate DPR's argument in defense of the clarity of its regulations.

STANDARD OF REVIEW

Questions of statutory interpretation are matters of law that are subject to de novo review on appeal. (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83; *Carpenter v. Superior Court* (2006) 141 Cal.App.4th 249, 259.)

STATEMENT OF FACTS

A. Use of Methyl Bromide in California

Methyl bromide is one of the most widely used pesticides in the world because it is uniquely effective against a broad range of crop-destructive pests. (2 CT 277.) Used as a fumigant before and after planting, it has been the primary means for eliminating insects, nematodes, root diseases and weeds for over fifty years. (11 CT 3016.)

California growers use methyl bromide to treat soil before planting various fruit, vegetable, and nut crops, as well as flower and forest nurseries.[11] They inject it into the ground in a gaseous form with specialized application equipment that simultaneously lays tarpaulins over the ground to minimize release into the atmosphere. Depending upon the crop, methyl bromide is applied to a field either once annually or every few years. (2 CT 277.)

As of 2000, methyl bromide application in California agriculture accounted for nearly half of its use nationwide. (11 CT 3018.) About 45% occurs during pre-planting for California's $1.2 billion strawberry industry. (1 CT 171:12-13; 3 CT 708.) Even the majority of organic operations rely upon transplants from methyl bromide-treated soil. (11 CT 3018.)

At present, there are no safe and effective alternatives to methyl bromide as a field fumigant. Experimental alternatives result in significantly lower crop yields and are highly toxic. (2 CT 277; 11 CT 3021-3022.) A California Department of Food and Agriculture (DFA) study estimated that, even in the short term, the unavailability of methyl bromide for soil fumigation would cause a loss of $248.3 million reflecting

[11] Although methyl bromide is also used in other contexts, its non-pesticidal use is not covered by the regulations at issue.

40-60% reductions in crop yields and the additional loss of thousands of full-time jobs. (2 CT 333; 11 CT 2995, 3022.) In 2001, a UC-Davis study estimated that compliance with DPR's emergency regulations relating primarily to buffer zones was already costing California strawberry growers alone over $25 million annually, or 25% of their net return above total cash production costs for the year. (2 CT 420.) The impact of restrictions upon smaller growers is particularly severe. (2 CT 423.)

For the reasons just stated, the regulatory exposure levels that determine methyl bromide usage limits are critically important. The trial court decreed that DPR was required to regulate "subchronic" or seasonal airborne exposure with OEHHA's recommended levels of 1 part per billion (ppb) for children (applied to the "non-occupational" public) and 2 ppb for adults (applied to workers) in average daily exposure.[12] (1 CT 237L:20-M:15.) The trial court tossed out the levels DPR had decided to adopt, 9 and 16 ppb. As a practical matter, the lower non-occupational regulatory standard (9 ppb) is the material number, because it actually dictates the

[12] The highest use periods for methyl bromide in California occur in August, September, and October of each year. (2 CT 315.) Thus, "subchronic" levels account for continuous exposure of workers and residents to small amounts over the course of a season. (2 CT 316.)

limits upon methyl bromide usage in the fields. (15 CT 4107 [9 ppb yields township use limit of 266,194 lbs/township-month].)

If OEHHA's levels become law, the decrease in allowable usage will cause treatable acreage to shrink and fumigation costs to rise so dramatically that planting will become financially prohibitive, forcing many growers and their employees out of business. (1 CT 172:19-173:5.) By contrast, California's current usage of methyl bromide is under the limits that achieve the non-occupational, regulatory standard of 9 ppb that DPR chose to adopt.[13] (2 CT 404; 15 CT 4224-4225, 4280.)

Regardless of how DPR regulates it, methyl bromide will ultimately be eliminated for reasons unrelated to its toxicity. The United States is a party to the United Nations Montreal Protocol, a treaty that scheduled the phase-out of methyl bromide beginning January 1, 2005 for ozone protection.[14] However, because methyl bromide remains essential to agriculture, the Protocol currently grants critical use exemptions for certain agricultural sectors, such as strawberries, that allow limited continued use

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[13] DPR defines a "township" as a thirty-six square mile block. Although 52 townships currently exceed usage of 1 ppb, only a few townships exceed 2.24 ppb. The highest was 4.14 ppb, and the numbers are decreasing. (15 CT 4108, 4115.)

[14] (See U.S. Environmental Protection Agency website, http://www.epa.gov/ozone/mbr/ [last visited March 23, 2007].)

until a future date.[15] Usage is already decreasing, and the phase-outs will eliminate methyl bromide use as feasible alternatives are developed. (2 CT 404, 409.)

B. Regulation of Methyl Bromide

The California Legislature has acted to create and empower administrative regulation of methyl bromide and other pesticides in a series of measures from 1967 to 1992. All of these measures grant DPR – and DPR alone – regulatory authority. Some of them explicitly reference OEHHA as a consultant or participant during the regulatory process.[16]

DPR has been plagued by lawsuits in its efforts to develop an effective regulatory scheme for methyl bromide. The major actions are reviewed below.

The Ventura lawsuit. DPR's first set of permanent rules dealing with acute (short-term) airborne exposure was overturned in 2002 in a suit by the Ventura County Agricultural Association because DPR had failed to consult with the California Department of Food and Agriculture (DFA) as required by section 11454.2 and a 1992 Memorandum of Understanding. (2 CT 277-278, 314.)

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[15] (See *id.*, http://www.epa.gov/ozone/mbr/2009_nomination.html [last visited March 23, 2007]; 1 CT 171:26-172:6.)

[16] Discussion, Sections I and II.

The Carillo lawsuit. DPR settled a suit brought by California Rural Legal Assistance – *Carillo v. Department of Pesticide Regulation* – by agreeing in part to regulate subchronic exposure to methyl bromide when it re-issued regulations to comply with the *Ventura County* judgment. (1 CT 162:14-20; 2 CT 277.) The agreement expressly required DPR to "promulgate the [new] regulations pursuant to [section] 14024" of the Food and Agricultural Code (the Tanner Act of 1983), which CRLA had argued governed subchronic methyl bromide exposure regulation.[17] (1 CT 162:19-20.)

The present lawsuit. In 2004, after complying with the *Carillo* and *Ventura County* judgments, DPR re-issued its methyl bromide regulations, now addressing subchronic exposure. (3 CT 668-669.) On November 3, 2004, the Office of Administrative Law approved the new rules. (2 CT 237QQ:17.) A month later, Petitioners brought this lawsuit against DPR to overturn the regulations. Individual Petitioners Fernandez and Ruiz are represented by California Rural Legal Assistance; the other Petitioner is the Environmental Defense Center. (1 CT 9-10.)

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[17] The settlement agreement transcript in the *Carillo* suit was adopted as a consent judgment with the express assent of all parties. (1 CT 164:1-17.)

In a Statement of Decision and Order Directing Writ of Mandate entered November 29, 2005, the San Francisco Superior Court, the Honorable James L. Warren presiding, overturned DPR's regulations, making two major rulings that Intervenors challenge in this appeal:

First, the court ruled that section 12981, a worker safety law, required DPR to enact OEHHA's "recommendations" into California administrative law. (1 CT 237L-M.) Specifically, the court ruled that OEHHA determines the final regulatory levels for subchronic airborne exposure, and ordered DPR to "follow" OEHHA's recommendations by adopting and integrating OEHHA's levels into DPR's regulations.[18] (1 CT 237L-M, S-T.)

Second, the court ruled that DPR did not "develop" the regulations "joint[ly] and mutual[ly]" with OEHHA. (1 CT 237M-N.) The court reasoned that, although OEHHA had "participated," its participation was

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[18] The regulations explicitly prescribe a subchronic exposure standard only for residents, establishing an "average daily non-occupational exposure [limit] of nine parts per billion." (Cal. Code Regs., tit. 3, section 6450, subd. (h).) This 9 ppb standard – derived from the reference level for children – does *not* regulate worker safety. DPR's 16 ppb adult reference level, which became the regulatory target for "worker" exposure, does not appear in the regulations. (1 CT 115-116.) Nonetheless, the court ruled that the worker safety laws required the revision of *all* regulations – worker and non-worker – according to OEHHA's chosen levels. (1 CT 237L-M, S.)

not at a high enough level at the early phases of DPR's reference level assessment. (1 CT 237M.) According to the court, DPR only gave OEHHA "equal treatment" to other consulting agencies and disregarded OEHHA's preeminent consulting role. (1 CT 237N.)[19]

C. The Subchronic Exposure Regulations and Exposure Levels

Despite their ultimate disagreement about subchronic exposure levels, scientists from DPR and OEHHA cooperated and exchanged views in a scientific dialogue that continued throughout a multi-year regulatory process. DPR assessed the risks of methyl bromide, OEHHA provided consultation and peer review, and DPR developed regulations with OEHHA's joint participation. Intervenors will summarize DPR's process and the peer review discussion that Petitioners have sought to elevate into a statutory power struggle.

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[19] Petitioners mounted two other challenges to DPR's regulations – a vagueness argument that persuaded the court to invalidate three particular rules, which will be briefed by DPR, and an underground rule-making argument that the court rejected. Petitioners also asked for an injunction, which the court denied. No cross-appeal has been filed and Intervenors will not address these failed contentions. (1 CT 237N-O, R.)

1. OEHHA's Recommendation as the Starting Point

DPR's and OEHHA's toxicologists started with the same reference exposure levels.[20] In 2002, DPR finalized the *Methyl Bromide Risk Characterization Document for Inhalation Exposure* (2002 RCD) following years of staff analyses and peer reviews of its draft RCD by OEHHA, a National Research Council (NRC) subcommittee (operating under the National Academy of Sciences), and the U.S. Environmental Protection Agency (US-EPA). (2 CT 311-312; 12 CT 3342-13 CT 3752.) In it, DPR posited initial human reference levels for subchronic exposure of 1 ppb for children and 2 ppb for adults. (3 CT 493; 12 CT 3454.) Conducting peer reviews of DPR's assessments, OEHHA's recommendations endorsed these levels.[21] (3 CT 493; 11 CT 3148.)

To develop human exposure reference levels, scientists first evaluate experimental animal studies in order to determine a No-Observable-Effects-Level (NOEL) – the level of exposure at which test animals exhibit no

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[20] DPR maintains a complete in-house staff of doctorally-trained toxicology experts who conduct risk assessments for pesticides. (First Request for Judicial Notice (RJN), Ex. L.)

[21] At all times since the draft 1999 RCD, OEHHA's chosen method of participating in the assessment process has been to send DPR written memoranda providing "comments" relating peer review of DPR's own staff assessments. (12 CT 3347; 13 CT 3732-3740; 16 CT 4471A.) OEHHA has not elected to administer an independent risk assessment process for methyl bromide.

effects. (13 CT 3688.) When a study does not establish an animal NOEL, scientists resort to using the Lowest-Observable-Effects-Level (LOEL) – the lowest level at which effects were observed – and then estimate a NOEL by dividing the LOEL by a conventional "uncertainty factor" of 10. (12 CT 3451.) From the estimated NOEL, additional standard uncertainty factors are applied to reach much lower reference levels reflecting a margin of safety for human protection.

When DPR finalized the 2002 RCD, no studies had established a NOEL for subchronic methyl bromide exposure. The best available data came from a 1994 study of six dogs known as the Newton study, from which toxicologists resorted to estimating a NOEL of 0.5 parts per million (ppm) from a questionable LOEL. (12 CT 3450-3451.) This led to the initial human levels of 1 and 2 ppb that OEHHA endorsed. (3 CT 493; 12 CT 3454.) However, peer reviewers, including the NRC subcommittee, criticized the Newton study, lamented the "equivocal" levels derived from it, and recommended a new study to conclusively establish a subchronic NOEL. (2 CT 278; 3 CT 485; 11 CT 3148-3149; 12 CT 3451.)

2. Development of the Levels

After issuing the 2002 RCD, DPR received the results of the 2002 Schaefer study, the new research recommended by the NRC that finally established a subchronic NOEL for methyl bromide. (11 CT 3149; 14 CT 3865.) Upon reviewing this study and additional information, DPR's toxicology staff drafted a memorandum amending its position on human exposure levels, the *Methyl Bromide RCD Inhalation Exposure Addendum to Volume I* (2003 Addendum). (14 CT 3861, 3865, 3882.)

Consistent with its own analyses and the consensus of independent peer reviews, DPR's staff found that the Schaefer study, considered in light of the other data, established a "conservative" NOEL of 5 ppm. (14 CT 3882, 3964.) Applying margins of safety, this translated to human reference levels of 9 ppb for children and 16 ppb for adults. (14 CT 3964.**)**

The 2003 Addendum summarizing DPR's toxicology findings was not a final decision about levels. (14 CT 3865.) To determine the final reference levels, DPR engaged OEHHA in exhaustive verbal and written discussions of their respective positions in which OEHHA presented its comments and DPR considered and responded to them.

DPR released the 2003 Addendum on February 3, 2003. (2 CT 278; 14 CT 3861; 16 CT 4471A.) Three days later, DPR began contacting

statutorily-prescribed consultants – including OEHHA – inviting them to a working-group meeting to solicit "comments on the appropriate regulatory target value [DPR] should use in the regulations to address subchronic exposures." (16 CT 4478 [notice of February 26 meeting].)

On February 21, 2003, DPR sent OEHHA representatives an email reiterating the invitation to the working-group meeting to "provide any suggestions on what should be the subchronic regulatory goal for methyl bromide and why." (16 CT 4477.) Shortly after DPR released its 2003 Addendum, OEHHA requested the Addendum and the Schaefer study for this purpose. DPR provided them. (16 CT 4471B.)

DPR convened the Methyl Bromide Interagency Working Group (the Working Group) on three occasions: February 26, March 12, and April 9, 2003. (16 CT 4472, 4411, 4417.) Before each meeting, DPR wrote OEHHA to encourage its attendance. (15 CT 4378; 16 CT 4469, 4477.) DPR requested OEHHA's input "to fully engage your agency not only to comply with the provisions of the law but to ensure we fully consider your staff's expertise." (15 CT 4380.) DPR even offered to extend the entire comment schedule to accommodate OEHHA, but OEHHA declined an extension and promptly submitted its comments. (16 CT 4469.)

At all three Working Group meetings, DPR specifically requested OEHHA's comments on the appropriate regulatory subchronic exposure levels. In each instance, OEHHA provided them. (15 CT 4380; 16 CT 4413-4414, 4418.) DPR then responded directly to OEHHA's comments both verbally and in writing. (15 CT 4380-4381.)

At the March 12, 2003 meeting, OEHHA's scientists actually acknowledged that they believed the Schaefer study was "equivalent in acceptability" to the Newton study, and expressed agreement with DPR's 2003 Addendum determining a 5 ppm NOEL. (16 CT 4413.) However, by the time the Working Group met again on April 9, 2003, OEHHA had abandoned its acceptance of the Schaefer study and reverted to its original position. (16 CT 4418.) Relying upon the 1994 Newton study and rejecting the Schaeffer study, OEHHA adhered to DPR's old numbers, a 0.5 ppm estimated NOEL yielding 1 and 2 ppb human reference levels. (3 CT 493, 507; 16 CT 4471A-J.)

In addition to the Working Group discussions, DPR obtained OEHHA's input through detailed position papers exchanged directly between the agencies' respective toxicologists. By DPR's invitation, OEHHA sent memoranda providing DPR its various comments and reiterating its position on the reference levels on March 11, 2003 (16 CT

4471-A-J**)**, June 30, 2003 (3 CT 504-510), and November 10, 2003 (3 CT 451-460). DPR responded directly to OEHHA in detail on March 17, 2003 (16 CT 4438-A), August 20, 2003 (2 CT 468-474), and February 3, 2004 (2 CT 443-450, 461-467). DPR also generated numerous internal memoranda considering OEHHA's comments. (3 CT 476-488; 14 CT 3960-3971.) DPR did not have such detailed, repeated, or extensive consultations on these issues with any other agency or person.

In its memoranda, OEHHA adhered to its original recommendation of a 0.5 ppm NOEL and 1 and 2 ppb reference levels. However, the consensus of other agencies and expert consultants conducting peer reviews of the database all concluded that the Schaefer study established an evidentiary NOEL *no lower than 5 ppm*, and many were far more expansive. (3 CT 582, 715.)

The scientists who conducted the Schaefer study concluded it established a NOEL of 20 ppm – *four times greater than the 5 ppm NOEL DPR chose*. (3 CT 582.) Professor Janet Chambers, member of the NRC committee whose recommendations catalyzed the Schaefer study, agreed that the studies established a NOEL of 20 ppm. (*Id*.) Dr. Ginger Moser of the U. S. EPA recommended a NOEL of 10 ppm. (3 CT 589.) Dr. Jerold Last of the University of California-Davis recommended a NOEL of 5 ppm

"to err on the side of caution." (3 CT 583.) Dr. Kent Pinkerton, another UC-Davis consultant, independently recommended a NOEL of "5 or 10 ppm rather than 20 ppm." (3 CT 585.)[22]

OEHHA acknowledged the scientific "consensus . . . that the 5 ppm exposure should be considered a NOEL," but dismissed the results of the Schaefer study as "not sufficiently compelling." (2 CT 456.) Essentially, OEHHA questioned the consensus' conclusions that Schaefer actually established a NOEL. In particular, OEHHA interpreted the behavior of a single dog at the 5 ppm level as treatment-related, while other peer reviewers found the behavior inconsequential or attributed it to causes unrelated to methyl bromide exposure. (2 CT 445; 14 CT 3961.) Although there was no evidence whatsoever that the 0.5 ppm NOEL achieved greater health protection than 5 ppm, OEHHA simply chose to "err" with the lower-than-consensus NOEL. (2 CT 457.)

In the end, DPR's staff findings of a 5 ppm NOEL resolved the antithetical positions and resonated with the most conservative values identified by nearly all of the scientific reviewers. This yielded human

[22] Intervenor the Alliance of Methyl Bromide Industry contended that the studies had established a NOEL of 20 ppm, which would lead to human reference levels of 18 and 32 ppb. (3 CT 715; 4 CT 869.)

reference levels of 9 ppb for children and 16 ppb for adults.[23] (2 CT 446-447.) These levels were "at the low end of the range of reference concentrations . . . based on the NOELs supported by a majority of the reviewers" and reflected DPR's conservative, "health-protective approach." (2 CT 465.)

For regulatory purposes, DPR thereafter applied the 9 ppb children's level to the "non-occupational" public and the 16 ppb adult level to workers. (3 CT 666, 669.) Because the lower number determines actual usage limits, the 9 ppb level effectively determines the maximum level of exposure for all humans – workers and non-workers. Only the non-occupational level appeared in the regulation. (Cal. Code Regs., tit. 3, § 6450, subd. (h).)

Although it did not endorse DPR's final levels, OEHHA confirmed that it had fully developed its comments, observing: "This subject has been *thoroughly discussed* in the Methyl Bromide Interagency Work Group meetings and in our prior memorand[a] sent to you on this subject, the last

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[23] OEHHA did not persuade DPR because "OEHHA did not provide any scientific rationale" for its 1 ppb and 2 ppb reference levels apart from OEHHA's reliance on the NRC's pre-Schaeffer analysis. (3 CT 485.) DPR found that OEHHA's comments disregarded the new data as well as the "extensive reviews and comments on the . . . study (2002) and the database by scientists with expertise on neurotoxicity." (3 CT 485.) OEHHA's comments added "no new data or information." (2 CT 443.)

of which summarized OEHHA's opinions and was sent to you on November 11, 200[3]." (2 CT 439.)[24] OEHHA also acknowledged that the ultimate decision about exposure levels belonged to DPR, stating: "While DPR appears to have finalized *its decision*, OEHHA would look forward to further discussion with DPR staff . . . " (2 CT 457.) OEHHA never asserted final authority over the issue.

3. Development of the Regulations

OEHHA also shared in the development of the regulatory text. On June 11, 2003, DPR sent OEHHA the "pre-decisional," unpublished first draft of the regulations, requesting OEHHA's input. (16 CT 4404B- C.) On June 30, 2003, OEHHA requested changes to the Statement of Reasons to reflect OEHHA's peer review and disagreement with DPR over the reference exposure levels. (3 CT 508.) DPR added the information. (2 CT 471; 3 CT 668-669.)

Following APA-mandated public notices and two waves of comments, DPR proposed changes to the first two drafts of the regulations. Before issuing public notice for each modification, DPR sought and considered OEHHA's pre-notice input on the text. (2 CT 441-442 [First

[24] All emphasis in bold or italic type that appears in any part of the text or in any quotation is added unless otherwise stated.

Modifications]; 2 CT 436-440 [OEHHA's comments]), 2 CT 434-435 [Second Modifications]; 2 CT 431-33 [OEHHA's comments].)

DISCUSSION

This case turns on the meaning and application of the statutory scheme governing the pesticidal use of methyl bromide. In interpreting statutory language, this District begins "with the fundamental rule that our primary task is to determine the lawmakers' intent." (*MacIsaac v. Waste Management Collection and Recycling, Inc.* (Cal.App. Dist. 1 2005) 134 Cal.App.4th 1076, 1082, citing *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 798.) This judicial task proceeds in a "three-step sequence as follows: 'we [1] first look to the plain meaning of the statutory language, [2] then to its legislative history and [3] finally to the reasonableness of a proposed construction.'" (*Id.*)

As Intervenors will show, each of these steps leads inexorably to a single conclusion: DPR is the final decisionmaker at all phases of the pesticide regulatory process, including the determination of regulatory standards for subchronic airborne exposure to methyl bromide. OEHHA is a vitally-important advisor, but has no decisionmaking authority.

I. EVEN STANDING ON THEIR OWN, THE WORKER SAFETY STATUTES EMPOWER DPR – NOT OEHHA – TO MAKE THE FINAL DECISIONS ABOUT METHYL BROMIDE EXPOSURE LEVELS.

The trial court interpreted sections 12980 and 12981 (the worker safety statutes) to mean that whatever OEHHA "recommend[s]" relating to health effects of methyl bromide – including exposure levels – DPR must "follow" by adopting OEHHA's views into regulations. (1 CT 237L:25-26.) In so construing the statutes, the trial court disregarded both their plain meaning and their history, which reveal that the Legislature intended to grant DPR the decisionmaking authority over its pesticide worker safety regulations. The court also disregarded the other governing statutes that are part of the Legislature's scheme for regulating methyl bromide – an oversight that will be discussed in Discussion Section II.

A. DPR is Not Required to Adopt OEHHA's "Recommendations" Into Law.

Plain meaning construction "give[s] effect and significance to every word and phrase" in a statutory scheme. (*Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, 1284.) In ascertaining plain meaning, "[t]he words of the statute should be given their ordinary and usual meaning and

should be construed in their statutory context . . . [to] preclude [a] judicial construction that renders part of the statute 'meaningless or inoperative.'" (*Thornburg v. El Centro Regional Medical Center* (2006) 143 Cal.App.4th 198, 204.) Furthermore, appellate courts do "not construe statutes in isolation, but rather read every statute '*with reference to the entire scheme of law of which it is part* so that the whole may be harmonized and retain effectiveness.'" (*Smith v. Superior Court* (2006) 39 Cal.4th 77, 83.)

Sections 12980 *et seq.* apply to the limited regulatory sphere of pesticide-worker safety. (§ 12980 [defining scope].) Consistent with the regulatory authority the Legislature grants DPR throughout the entire Code, section 12981 states unequivocally that: "The director [of DPR] shall adopt regulations to carry out the provisions of this article [10.5]." Indeed, every statute relating to the regulation of the use and application of pesticides in any context names DPR – and no other agency – the regulator.[25] The worker safety statutes are no different.

Section 12981 states, in pertinent part: "The Office of Environmental Health Hazard Assessment shall *participate in the development of any regulations* adopted pursuant to this article. *Those*

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[25] Intervenors discuss other statutes that govern these regulations and must be harmonized within the entire statutory scheme in Discussion Sections II and III.

regulations that relate to health effects shall be based upon the recommendations of the office." (§ 12981 [italics added]).

The trial court ruled that section 12981 required DPR to "follow" OEHHA's preferred levels for subchronic, airborne exposure to methyl bromide, which were 1 ppb (for children) and 2 ppb (for adults).[26] (1 CT 237L:20-M:15; 14 CT 3960.) The order required DPR to disregard its own staff assessment of the levels and use OEHHA's unmodified numbers as DPR's regulatory standards for both the "non-occupational" public (1 ppb) and workers (2 ppb). (1 CT 237M:11-15, S:15-T:12.)

While the word "shall" in section 12981 does signal a mandatory obligation, that simplistic observation begs the key question: What, exactly, is mandated? The use of "shall" must be examined in the context of surrounding language to determine precisely what is required of DPR. (*In re Dannenberg* (2005) 34 Cal.4th 1061, 1087.)

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[26] The court assumed OEHHA's recommended reference exposure levels were "recommendations" covered by the worker safety statutes, even though the reference levels were unrelated to workers. Both DPR and OEHHA assessed exposure levels for *children* (1 ppb [OEHHA], 9 ppb [DPR]) and *adults* (2 ppb [OEHHA], 16 ppb [DPR]), accounting for different breathing rates. (14 CT 3960, 3965, 3991; 16 CT 4438A-B, 4471A.) The adult level was later applied to workers, but did not appear in the regulations. The 9 ppb level was applied to the "non-occupational" public in the regulations. (Cal. Code Regs., tit. 3, § 6450, subd. (h).)

The *New Oxford American Dictionary* defines the phrase "be based (on or upon)" as "[to] have as the foundation for (something); Use as a point from which (something) can develop."[27] The nominative form of "base" is "*something used as a foundation or starting point for further work*; *a basis: uses existing data as a base for further study*."[28]

Under the plain meaning of the statute, DPR could not simply dismiss or refuse to consider OEHHA's recommendations, or exclude OEHHA from participating by way of input and advice. However, this does not translate – either literally or implicitly – into a mandate that DPR adopt and incorporate into law whatever OEHHA might recommend about any matter related to the health effects of a pesticide. While DPR was called upon to use OEHHA's health effect recommendations as starting points for further study, DPR did not have to transpose everything OEHHA might espouse into the text of DPR's regulations.

In this case, DPR began its subchronic risk characterization with the exposure levels OEHHA had endorsed. (3 CT 493.) After additional data

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[27] THE NEW OXFORD AMERICAN DICTIONARY (2nd Ed. 2005); see also COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH (3rd Ed. 2005) [defining verb "base" as "to use something as the foundation for."].

[28] *Id.* [defining "base" as "a foundation, support, or starting point."]. The trial court itself cited a definition of "based upon" as simply "the foundation of." (1 CT 237K:11-13.)

became available establishing a NOEL no lower than 5 ppm, DPR staff toxicologists revisited their position, sought additional peer review from OEHHA and others, and decided that 9 and 16 ppb were the most accurate and appropriate levels. (14 CT 3882, 3964.) This fully complies with the plain language of section 12981.

Nothing in the worker safety statutes states or implies that DPR's regulations must be based *exclusively* upon OEHHA's recommendations and nothing else. Indeed, they require just the opposite. Section 12980 provides that, in promulgating the worker safety regulations: "*[T]he University of California, the Department of Industrial Relations, and any other similar institution or agency should be consulted*."

If, as the trial court held, DPR had no discretion to deviate from OEHHA's recommendations, there would be neither reason nor opportunity for DPR to consult with any other agency. OEHHA alone would be canvassed – and whatever it chose to say would become California law. The statutory language referring to the consultation would be surplusage, in derogation of the canon that every word and phrase be accorded meaning and significance. (*Doe v. Saenz* (Cal.App. Dist. 1 2006) 140 Cal.App.4th 960, 984.) Consultations with other agencies and

institutions mandated in the worker safety statutes would be a superfluous waste of time and resources.[29]

As the Supreme Court recognized in *Copley Press, Inc. v. Superior Court* (2006) 39 Cal.4th 1272, courts must not adopt a narrow or restricted meaning of statutory language that evades the evident purpose of the statute when a permissible but broader meaning would prevent the evasion and carry out the purpose. (*Id*. at p. 1291.) Here, there is a permissible broader meaning of the words in section 12981. The Dictionary defines "recommend" as "to put forward with approval as being suitable for a purpose" or "advise as to course of action."[30] Furthermore, "participate" means simply "to take part."[31] Both words indicate legislative intent that OEHHA weigh in as a *mandatory consultant*, not the final decisionmaker about the substance of DPR's rules.

Had the Legislature actually intended to transform OEHHA's recommendations into inviolable standards and rules, it would have made OEHHA and not DPR the regulator. At a minimum, it could have used

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[29] Such absurd consequences are discussed further in Discussion Section III, *infra*.

[30] COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH (3rd Ed. 2005).

[31] *Id*.

language candidly specifying that OEHHA's conclusions about standards or other specific matters had to be incorporated verbatim into the regulations, and would certainly have done so if that were intended.[32]

In fact, when the Legislature does intend to invest OEHHA with explicit decisionmaking authority, or even require OEHHA's assent to a DPR decision, it does say so explicitly. For example, in a provision of the Birth Defect Prevention Act of 1984 not directly applicable here, the Legislature authorized DPR to waive mandatory health-effects studies of a pesticidal ingredient, but only when OEHHA approved DPR's decision. (§ 13131.2 [DPR must have "*concurrence of OEHHA*" on such decisions].) In the event that OEHHA disagreed, the Legislature took care to specify a procedure by which a committee would make the final decision. (§ 13131.3.)

Similarly, the plain meaning of section 12980 – the other worker safety statute addressed by the trial court – grants no regulatory or decisionmaking authority to OEHHA. The statute merely outlines a broad

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[32] The Legislature has done so in other contexts. (See *e.g.* Labor Code, § 5307.27 [". . . [T]he administrative director, in consultation with the Commission on Health and Safety and Workers' Compensation, shall adopt, after public hearings, a medical treatment utilization schedule, *that shall incorporate the evidence-based, peer-reviewed, nationally recognized standards of care recommended by the commission pursuant to Section 77.5* . . ."].)

legislative objective "that the development of regulations relating to pesticides and worker safety should be the joint and mutual responsibility of [DPR] and [OEHHA]." (§ 12980.)

As used in section 12980, "joint" means "shared, held or made by two or more people . . . sharing in an . . . activity."[33] "Mutual" means "experienced or done by each of two or more parties towards the other or others."[34] Like section 12981, section 12980 contemplates that OEHHA will at most "share" in the process of developing regulations in some real and substantial way – not that OEHHA will dictate the substance of those regulations by fiat as the *de facto* rulemaking agency.

In addition, there is no indication that the Legislature intended the worker safety statutes to extend beyond the sphere of adopting practical, nuts-and-bolts methods of protecting workers, as the plain language of section 12981, subsections (a) through (f), demonstrates. The Legislature provided a list of the safety measures it contemplated: restricting worker re-entry, handling, hand washing, time limits, safe storage, protective gear, and posted warnings. While non-exhaustive, the list indicates that the scope of the worker safety statutes is confined to measures *specific to*

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[33] COMPACT OXFORD ENGLISH DICTIONARY OF CURRENT ENGLISH (3rd Ed. 2005).

[34] *Id.*

worker protection. Within this sphere, OEHHA can make non-binding health-related "recommendations."

The plain language of section 12981 does not give OEHHA authority to determine DPR's regulatory standards for human health nor even address the assessment of pesticide risk. The Legislature has made these subjects DPR's special province under the Tanner Act of 1983 and other post-section 12981 legislation. (See Discussion, Section II(A)-(D) below.) Yet the trial court somehow stretched section 12981's language to grant OEHHA the authority to dictate *all* airborne exposure standards for humans generally.

B. Legislative History Confirms DPR's Decisionmaking Authority and OEHHA's Advisory Role.

Although their plain meaning points to DPR's ultimate decisionmaking authority, sections 12980 and 12981 are not models of linguistic lucidity. They do not expressly address decisions about risk assessment and exposure standards. The two statutes are thus arguably ambiguous in addressing the essential practical question: Where does the buck stop in regulating methyl bromide? As Intervenors will show, that question receives a definitive answer in the Tanner Act and later statutes.

(See Discussion, Section II below.) But the Legislature's intent is also evident in the legislative history of the worker safety statutes.

As our Supreme Court has recognized, when statutory language can support "multiple readings," courts will "consult extrinsic sources, including but not limited to the legislative history and administrative interpretations of the language." (*Microsoft Corp. v. Franchise Tax Bd.* (2006) 39 Cal.4th 750, 758.) Here, the relevant history reveals that the Legislature removed proposed decisionmaking power from the Department of Public Health (DPH), OEHHA's predecessor, to preserve all final authority in the Department of Agriculture (DA), DPR's predecessor.[35]

Sections 12980 and 12981 were created by Assembly Bill (AB) 246, enacted in 1972 as part of a compromise of competing viewpoints about whether the DA or the DPH should be empowered to make decisions ensuring the safety of agricultural workers working with pesticides.[36] A

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[35] This was evident in two ways – the defeat of a competing bill giving DPH ultimate decisionmaking power and the deletion of language granting joint decisionmaking power. DA later became the Department of Food and Agriculture (DFA). DPR succeeded to the pesticide risk assessment and risk management authority of DFA when DPR was created as a Cal-EPA agency in 1991. (§ 11454.) DPH subsequently became the Department of Health Services (DHS). When OEHHA was created, it acquired certain responsibilities from DHS. (Health & Saf. Code, § 59004.)

[36] First RJN, Ex. B, at 9-10 [Bill Analysis, Assembly Committee On Environmental Quality].

competing bill in the same session, Senate Bill (SB) 21, would have made DPH and its officers the ultimate regulatory decisionmakers – to the exclusion of DA.[37] SB 21 failed; AB 246 became law.

Importantly, the version of AB 246 first introduced in the Legislature explicitly provided that DPH and DA would share not only the responsibility of developing regulations, but also *final decision-making authority* on all health-related matters. The earliest version of the statute's introduction stated that "*final decisions on matters of public health . . . be made jointly by Director of Public Health and Director of Agriculture*."[38] Consistent with this, section 12981 stated: "*The final decision on matters of public health* covered under this article, *shall be determined jointly* by the Director of Public Health and the director."[39]

DPH's "joint" authority with DA to make final decisions on health matters survived barely two months in the legislative process. The April 10, 1972 amendments struck the joint decisionmaking language and

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[37] *Id.*, Ex. E, at 18 [SB 21, January 4, 1972 version].

[38] *Id.*, Ex. A at 2 [AB 246, January 27, 1972 version].

[39] *Id.*, Ex. A at 4 [AB 246, January 27, 1972 version].

replaced it with the finally-enacted provision that "regulations that relate to health effects shall be based upon the *recommendations* of" DPH.[40]

As this District has ruled: "The Legislature's rejection of specific language constitutes persuasive evidence a statute should not be interpreted to include the omitted language." (*Doe v. Saenz* (Cal.App. Dist. 1 2006) 140 Cal.App.4th 960, 985.) The Legislature's summary removal from DPH of any authority to make regulatory *decisions* regarding health-related matters is inconsistent with the trial court's ruling that section 12981 granted superseding authority to OEHHA (as DPH's successor) to dictate rules on health effects.

A Senate Committee Staff Analysis confirms the Legislature's intent to transfer decisionmaking authority from both DPH and DA to DA alone. The Analysis emphasized that the DPH/OEHHA right to participate in "joint development" did not compromise DA's final authority over the regulations:

"*While the principal responsibility for adopting the required regulations would be vested with the Department of Agriculture, the bill*

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[40] *Id.*, Ex. A at 7 [AB 246, April 10, 1972 version].

provides that the Department of Public Health 'shall participate in the development of any regulations adopted pursuant to this article.'"[41]

The contemporaneous constructions of the affected agencies confirm this interpretation of the worker safety laws.[42] In its bill analysis, DPH described the effect of the new law as simply codifying a preexisting informal and voluntary consultation procedure. As DPH explained:

> "*This bill* [AB 246] *would require State Department of Public Health input into pesticide regulations relating to worker health. While currently the Department of Agriculture requests our assistance in these matters, they are not required by law to do so*. Since worker health is a legitimate interest of the State Department of Public Health, it is most appropriate to have a firm legal basis for Department of Agriculture – Department of Public Health cooperation in this area."[43]

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[41] *Id.*, Ex. C at 12.

[42] The Supreme Court rules that "when a statute is susceptible of more than one interpretation, we will consider an administrative interpretation of the statute that is reasonably contemporaneous with its adoption." (*Sara M. v. Superior Court* (2005) 36 Cal.4th 998, 1011-1012.)

[43] First RJN, Ex. D at 14.

DPR's predecessor agency agreed, noting that AB 246's purpose was to "state clearly" the fact that "regulations concerning the application and use of pesticides as they affect farm worker safety is the responsibility of the Department of Agriculture . . ."[44] Moreover, DA noted that unlike SB 21, AB 246 did not grant DPR any actual regulatory authority: "The bill has been extremely controversial and opposed all along by the California Rural Legal Assistance League which contends that the approach in SB 21 is the proper approach which would give pesticide regulatory authority to the Department of Public Health . . ."[45]

In summary, the legislative history of the worker safety statutes, as well as the contemporaneous statements of the affected agencies, make clear the Legislature's intent that DPR, not OEHHA, be the decisionmaker in the regulation of worker exposure to the pesticide methyl bromide.

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[44] *Id.*, Ex. D at 15. The United Farmworkers Organizing Committee and AFL-CIO also opposed AB 246 and supported SB 21. (*Id.*, Ex. C at 13.)

[45] *Id.*

II. THE TANNER ACT AND THE OTHER GOVERNING STATUTES MAKE DPR THE FINAL DECISIONMAKER AS TO ALL ASPECTS OF AIRBORNE PESTICIDE REGULATION.

The Tanner Act of 1983 provides the comprehensive blueprint for regulating airborne pesticides, including methyl bromide, to protect human health. The Act accords to DPR exclusive decisionmaking authority over airborne exposure reference levels and regulatory standards.[46] Although the trial court chose to disregard it, the Tanner Act subsumes the more limited and amorphous sphere of the worker safety statutes and thus resolves the fundamental dispute in this case. Other statutes further cement the Legislature's intent that DPR has the ultimate authority to assess the health effects of methyl bromide.

Under the established canons of statutory construction, the Tanner Act and the other statutes in the scheme must be harmonized, if possible. If this is not feasible, the later-in-time and more specific Tanner Act controls.

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[46] The trial court's ruling muddled the recognized distinction between the reference levels that DPR developed during risk assessment and the regulatory standards that are actually incorporated into regulations during risk management. As this section demonstrates, the Tanner Act and other statutes establish the distinction and grant DPR the authority *both* to assess the reference levels, with OEHHA providing consultation, and then to decide the regulatory standards. (§§ 11454.1, 14022, 14023, 14024.)

(Discussion, Section II(D).) Either way, DPR has the exclusive authority to decide regulatory exposure levels.

A. Under the Tanner Act, DPR is Expressly Empowered to Set Methyl Bromide Exposure Levels.

The Tanner Act's provisions are specific, clear, and unequivocal. It grants DPR – not OEHHA – the exclusive responsibility and authority over *all phases* of the methyl bromide regulation process, from initial identification to risk assessment, target-level setting, and risk management and control.[47]

Health & Safety Code section 39655 assigns DPR the sole power to regulate airborne methyl bromide: "A toxic air contaminant which is a pesticide shall be regulated in its pesticidal use by the Department of Pesticide Regulation . . . pursuant to Article 1.5 (commencing with Section 14021) . . . of the Food and Agricultural Code." Methyl bromide is an expressly-identified toxic air contaminant covered by the Tanner Act, and DPR was also required to promulgate these regulations under the Act by virtue of the *Carillo* settlement agreement.[48]

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[47] The relevant provisions of the Act include sections 14021 *et seq.* of the Food and Agricultural Code and sections 39650 *et seq.* of the Health & Safety Code.

[48] Methyl bromide is so listed by the United States Environmental Protection Agency (U.S. EPA) under a federal statute incorporated in the

Section 14022 directs DPR – not OEHHA – to "evaluate the health effects of pesticides . . ." (§ 14022(a).) And, although that section further directs DPR to conduct its evaluation "*in consultation with*" OEHHA (§ 14022(a)),[49] it also demands that DPR look *beyond* OEHHA for input as to health effects. DPR must assemble and consider "all available" scientific data and information, solicited not only from OEHHA, but also from "the Occupational Safety and Health Division of the Department of Industrial Relations, international and federal health agencies, private industry, academic researchers, and public health and environmental organizations." (§ 14022(c).)

The Tanner Act expressly dedicates to DPR both the authority and the responsibility to determine airborne exposure levels. DPR "assess[es] the availability and quality of data on health effects . . ." (§ 14023(a).) DPR – not OEHHA – makes "*an estimate of the levels of exposure which may cause or contribute to adverse health effects and, in the case where there is no threshold of significant adverse health effects, the range of risk to humans, resulting from current or anticipated exposure*." (§ 14023(a).)

Tanner Act. (§ 14021, incorporating 42 U.S.C. § 7412.)

[49] DPR's primacy as the decisionmaker is underscored by the fact that at DPR's apparent option, OEHHA must provide "an assessment of related health effects" or other "technical assistance." (§ 14022(c).)

Section 14024, which the *Carillo* settlement specified as the specific statute governing DPR's control measures for subchronic methyl bromide exposure, indicates that any "demonstrable safe level or threshold of significant adverse health effects" is "established" by DPR, and DPR develops the control measures.

As recent appellate decisions confirm, when it comes to determining methyl bromide exposure levels, the statutory buck clearly stops with DPR, not OEHHA. This District has recognized that the Tanner Act clearly grants DPR broad powers to decide health effects standards and to issue regulations governing airborne pesticides:

> "DPR has broad authority to regulate the registration and classification of pesticides and *promulgate regulations and standards for monitoring the effects of pesticide use*. The agency administers a pervasive pesticide regulatory scheme governing *all aspects* of registration, sales, possession and use of pesticides in California." (*Californians for Alternatives to Toxics v. Department of Food and Agriculture* (Cal.App. Dist. 1 2005) 136 Cal.App.4th 1, 13; see also *Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control District*

(1996) 43 Cal.App.4th 854, 861-863 [Tanner Act grants DPR "exclusive" authority over pesticidal use of methyl bromide].)

DPR and OEHHA both consistently acknowledged that the Tanner Act governs not just the regulations at issue, but their own roles in determining the subchronic exposure levels for methyl bromide. As the enforcing agency, DPR's views are "entitled to great weight and will be accepted unless . . . clearly unauthorized or erroneous." (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1027; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13, quoting *Culligan Water Conditioning v. State Bd. Of Equalization* (1976) 17 Cal.3d 86, 93.)

DPR repeatedly referenced both the Tanner Act and the *Carillo* consent judgment requiring DPR to comply with the Act. (1 CT 162:18-20 [DPR agrees to regulate "subchronic exposure" to methyl bromide "pursuant to [section] 14024"]; 2 CT 441, 468; 3 CT 519, 531-536, 547-557, 561-565, 577-579, 627; 15 CT 4380-4382.) OEHHA also expressly agreed that the Act governed DPR's consultation duties, as well as *DPR's*

consideration of OEHHA's own recommendations. (2 CT 431, 436, 452 & fn. 1; 3 CT 721 & fn. 1.)[50]

Regrettably, the trial court misconstrued the Tanner Act as somehow applying only outside the context of worker safety protection when the Act encompasses all regulation of airborne methyl bromide exposure. (1 CT 237L:6-8 [discussing the Tanner Act "[i]n contrast" to the worker safety statutes].) This was fundamental error.

B. The Tanner Act's Legislative History Confirms DPR's Role as Final Decisionmaker as to Pesticide Health Risk Assessment and Management.

During its evolution in the Legislature, AB 1807, which became the Tanner Act, was radically amended to establish and protect the comprehensive and exclusive authority of the Department of Food and Agriculture over pesticides. DPR inherited this authority over all phases of pesticide regulation.

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[50] Petitioners themselves conceded in their trial brief that the Tanner Act applied, asserting only that the *Carillo* agreement did not necessarily exclude the worker safety statutes. (1 CT 120:6-16.) CRLA, which brought *Carillo,* argued and stipulated in the agreement that section 14024 governed the regulation of methyl bromide. (1 CT 162:14-20.) Yet, in this case, both Petitioners and the trial court disregarded the Tanner Act and refused to construe it together with the worker safety and other statutes.

The bill originally included new provisions only in the Health and Safety Code providing that the Air Resources Board (ARB), not DFA or DHS, was to evaluate the health effects of all toxic air contaminants, including exposure levels, and to develop control measures in consultation with DHS.[51] Early amendments made DHS the evaluator of the health effects of toxic air contaminants, relegating DFA to the role of a consultant and participant with regard to those contaminants that were pesticides.[52]

DHS's status as lead agency regarding the health effects of pesticides did not survive. AB 1807 was amended to add Food and Agricultural Code sections 14021 to 14026, which granted DFA exclusive authority over all human health risks from airborne pesticides in their pesticidal use, including their assessment, evaluation, and control.[53] (§§ 14021-14024.)

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[51] First RJN, Ex. F at 30, 31 [April 11, 1983 versions of §§ 39660(a), 39662(b)].

[52] *Id.*, Ex. F at 40, 42 [August 15, 1983 version of §§ 39660(a), 39661(a), (b)].

[53] *Id.*, Ex. F at 50, 52-56 [August 23, 1983 versions of §§ 14021 *et seq.*, Health & Saf. Code § 39655]. DHS remained "lead agency" for evaluating health effects of air contaminants regulated by ARB. (*Id.*, Ex. I at 96.) The mid-stream amendment codifying DFA's exclusive authority over both risk assessment and risk management of pesticides followed Governor Deukmejian's Executive Order D-15-83 of June 7, 1983, which clarified the primacy of the DFA with regard to all aspects of pesticide regulation. Among other things, D-15-83 "reconfirm[ed] [that] the California Department of Food and Agriculture as the lead agency for pesticide regulation . . ." (*Id.*, Ex. J at 99.)

As the Senate Republican Caucus observed, these amendments directed DFA, not DHS, "to evaluate the health effects of all pesticides which 'may be or are emitted into the ambient air of California' and which poses a 'potential hazard to human health.' This about covers them all."[54] A Statement by the bill's author, Assembly Member Tanner, to the Senate Committee on Government Organization highlighted the fact that DFA's authority "*to determine the need for, and to adopt and implement, emission controls on the application of pesticides*" was both "sole" and "exclusive."[55]

C. Other Statutes Confirm DPR's Authority.

Other laws within the statutory scheme confirm that DPR is the final decisionmaker at all phases of human health risk assessment and management for pesticides, including methyl bromide.

As implemented by statute, Governor Pete Wilson's Reorganization Plan of 1991 (GRP-1) expressly transferred to DPR, a newly-created branch of Cal-EPA, "all the duties, powers, purposes, responsibilities, and

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[54] First RJN, Ex. H at 90-91; underlined emphasis in original.

[55] *Id.*, Ex. G at 88; underlined emphasis in original. Quoting this very committee statement, *Harbor Fumigation, Inc. v. County of San Diego Air Pollution Control District* (1996) 43 Cal.App.4th 854 officially recognized DPR's "exclusive" authority over regulating methyl bromide "in its pesticidal use" and application. (*Id.* at pp. 861, 863.)

jurisdiction of the Department of Food and Agriculture relating to the regulation of pesticides." (§ 11454.) Like the Tanner Act, the GRP-1 legislation clearly identified the agency empowered to assess health risks from pesticides. It provided that DPR "shall conduct *pesticide risk assessments*" in carrying out its responsibilities under section 11454. (§ 11454.1.) In contrast, OEHHA was only to provide "*scientific peer review*" of DPR's assessments.[56] (*Id.*) The trial court never addressed this pivotal statute.

GRP-1's legislative history demonstrates that the Legislature intentionally reserved pesticide risk assessment for DPR alone. A staff analysis of GRP-1 from the Senate Committee on Governmental Organization dated June 5, 1991, states: "*Risk assessment associated with pesticide regulation and use would be within [DPR's] jurisdiction.*"[57] While OEHHA did inherit risk assessment functions from DHS relating to "risks from *pesticide and chemical residues in food and water*, management

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[56] Under the GRP, the Legislature transferred to OEHHA all of DHS' functions "*relating to assessment of human health risks of chemicals and to toxicologic and scientific consultation* to programs in the State Department of Health Services and in other state agencies." (Health & Saf. Code, § 59004.) Unlike DPR, the Plan did not specify OEHHA authority over pesticide health assessments. (*Id.*, see also Health & Saf. Code, § 59017.)

[57] First RJN, Ex. K at 101.

of Prop 65 programs, and risk assessment of hazardous waste sites and other potentially dangerous situations,"[58] the GRP made clear that "*risk assessment associated with pesticide application and use, would reside within the proposed DPR*."[59]

The Food and Agricultural Code, including section 14006, also governs the regulation of methyl bromide as a designated "restricted material." (§§ 14004.5 & 14006; Cal. Code Regs., tit. 3, subd. (h).) Section 14006 has provided since 1991 that DPR must regulate methyl bromide to limit its usage "to those situations in which it is reasonably certain that no injury will result, or no nonrestricted material or procedure is equally effective and practical." (§ 14006; 2 CT 353.) The section also expressly grants DPR authority to determine quantity, concentration, or other limitations upon methyl bromide, which would certainly cover exposure standards. (*Id.*) OEHHA is nowhere mentioned.[60]

Shortly after the Tanner Act, the Legislature passed the Birth Defect Prevention Act of 1984, which required DFA to conduct comprehensive

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[58] *Id.*, Ex. K at 102.

[59] *Id.*, Ex. K at 105.

[60] Nor is OEHHA referred to in sections 14081 and 14082, enacted in 1988, which specifically order DFA to regulate methyl bromide by a deadline of April 1, 1989.

assessments of the top 200 pesticidal ingredients "suspected [by DFA] to be hazardous to people," and charged DFA with a timeline for filling in "data gaps" through studies, evaluations, and reports. (§ 13127.) Although it does not govern the regulations at issue here, the Birth Defects Act confirms that the Legislature has comprehensively entrusted risk assessment decisions about the use and application of pesticides to DPR, not OEHHA.[61]

D. The Statutes Governing the Pesticidal Use of Methyl Bromide Must be Harmonized. If They Cannot Be, the Tanner Act and Later Statutes Control.

The canons of statutory construction command that the words in a particular measure be interpreted "in context with the entire statute and the statutory scheme." (*In re Jennings* (2004) 34 Cal.4th 254, 263; see also *People v. Gonzalez* (Cal.App. Dist. 1 2004) 116 Cal.App.4th 1405, 1414.) "Where the issue involves two potentially overlapping statutory schemes, courts must read the two statutes together and construe them so as to give effect, when possible, to all the provisions thereof." (*Santa Clara Valley Transp. Authority v. Public Utilities Com. State of California* (2004) 124

[61] Significantly, none of the remaining statutes in the scheme referencing DPR's authority to regulate pesticides ever mentions OEHHA. (See e.g., §§ 11456, 11502, 12111, 12781, 12976, 14005.)

Cal.App.4th 346, 360; see also *Ailanto Properties, Inc. v. City of Half Moon Bay* (Cal.App. Dist. 1 2006) 142 Cal.App.4th 572, 584-585.)

Neither Petitioners nor the trial court even considered, let alone harmonized, all of the statutes governing the regulations at issue, not to mention the whole scheme covering pesticides generally. Instead of construing the worker safety statutes as part of the scheme to avoid anomalies as required by the canons (*In re Marriage of Harris* (2004) 34 Cal.4th 210, 222), they interpreted the worker safety statutes to create an anomaly in an otherwise fluid structure.[62] The multiple and complex statutory enactments are reconcilable as follows:

- DPR is the final arbiter of methyl bromide's pesticidal use and application, having final authority to: (1) evaluate and determine human health risks, including exposure levels; (2) determine the regulatory standards and control measures to safeguard against these risks; (3) issue regulations; and (4) provide enforcement oversight. (§§ 11454, 11454.1, 12980-

[62] The trial court did knowingly interpret the worker statutes "[i]n contrast" with the Tanner Act, as if they somehow covered different subjects. They do not. Both cover risk assessment and control of airborne exposure of methyl bromide as a pesticide. (1 CT 237L:6-8).

12982, 14022-14026; Health & Saf. Code, §§ 39655(a), 39660(a).)

- OEHHA is a primary consultant to DPR, serving as a supporting evaluator of health effects and a participant in the development of the regulations by engaging in a health-related dialogue with DPR's scientific staff and providing ongoing comments, recommendations, and peer reviews. (§§ 11454.1, 12980, 12981, 14022, 14023.) While OEHHA is a required participant in pesticide regulation, it is not a final decisionmaker.

The reconciliation just described is the *only* way to harmonize the worker safety statutes, the Tanner Act, the 1991 Governor's Reorganization Plan legislation, section 14006, and the other statutes in the scheme. It also comports with the actions and self-descriptions of both agencies. (Discussion, Sections I(B) & II(E).) It should, therefore, be adopted. (*Ordlock v. Franchise Tax Bd.* (2006) 38 Cal.4th 897, 909 [Courts "are *required* to harmonize statutes . . ." Statutes "relating to the same subject *must be harmonized* to the extent possible."].)

When statutes purporting to allocate authority cannot be reconciled, the canons of construction supply a tie-breaker: "Where statutes are

otherwise irreconcilable, later and more specific enactments prevail, pro tanto, over earlier and more general ones." (*Wells v. One2One Learning Foundation* (2006) 39 Cal.4th 1164, 1208.)[63] The 1983 Tanner Act was enacted over a decade later than the 1972 worker safety statutes. The Act is not only the more recent, but the "more specific enactment on the subjects it addresses." (*Id.*)

The Tanner Act provides a clear blueprint for regulating methyl bromide as an identified substance, and specifically empowers DPR to deal with every aspect of human health risk assessment and management, including exposure levels.[64] It is precise, unambiguous, and explicit. In comparison, the worker safety statutes are vague at best regarding OEHHA's powers, if any, and make no mention whatsoever of exposure-level authority.

Unlike the worker safety statutes, the Tanner Act completely and comprehensively envelops all human airborne exposure to methyl bromide.

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[63] Caselaw consistently confirms that "where two statutes or provisions conflict and are irreconcilable, the statute enacted last controls." (*Garber v. Levit* (2006) 141 Cal.App.4th Supp. 1, 46 Cal.Rptr.3d 348, 352; see also *People v. Weatherill* (1989) 215 Cal.App.3d 1569, 1578; *Carlton Santee Corp. v. Padre Dam Municipal Water Dist.* (1981) 120 Cal.App.3d 14, 29.)

[64] The latest statutes, sections 14006 and 11454.1 are also specific regarding DPR's specific authority to conduct risk assessments and make decisions regarding pesticidal usage.

It effectively subsumes section 12981's limited sphere of worker safety. Consistent with this authority, DPR assessed health risk with reference to two human exposure levels that were *not* confined to workers: one for children (9 ppb) and another for adults (16 ppb). (2 CT 446-447; 14 CT 3865-3866, 3960, 3965-3966, 3979-3980, 3991-3992; 16 CT 4404B, 4414.) The adult level ultimately determined the regulatory standard for workers only because, as OEHHA noted, human reference levels "drive regulations that are developed to protect residents and workers."[65] (14 CT 3980.) Both as a matter of law and of sound policy, the statutes that should govern DPR's authority to decide exposure levels in this case are those of sections 11454.1, 14021 *et seq*., and 14006, not sections 12980 and 12981.

E. DPR's and OEHHA's Words and Actions Confirm DPR's Authority to Assess and Manage Health Risks from Methyl Bromide.

Under well-established canons of statutory construction, the interpretation of a statute by an agency charged with its administration is

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[65] The final regulatory text only mentioned one subchronic exposure level – the one establishing a "*non-occupational*" standard of 9 ppb in section 6450(h) of the regulations. Petitioners themselves suggested only two regulations that might implicitly be informed by the "adult" reference level of 16 ppb. (1 CT 115:22-116:2.)

entitled to great weight and, unless clearly contrary to statute, is to be followed. (*American Federation of Labor v. Unemployment Ins. Appeals Bd.* (1996) 13 Cal.4th 1017, 1027; *Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 13, quoting *Culligan Water Conditioning v. State Bd. Of Equalization* (1976) 17 Cal.3d 86, 93.) Both DPR and OEHHA endorsed and complied with the pesticide statutory scheme granting DPR final authority over all aspects of methyl bromide regulation, with OEHHA acting in an advisory capacity.

Despite its scientific disagreement with DPR about reference levels, nothing in the record suggests that OEHHA ever regarded itself as the decisionmaker or its recommendations as superseding DPR's risk assessments. To the contrary, OEHHA referred to "ongoing *consultations* that our office is providing to your department on the development of methyl bromide regulations based on a sub-chronic reference exposure level (REL)." (16 CT 4438A.) As OEHHA acknowledged, it simply "*submitted comments on*" and "*reviewed*" DPR's own risk assessments. (3 CT 504; 14 CT 3979.)

OEHHA never insisted that DPR bow to OEHHA's conclusions, but merely "recommend[ed] that DPR reexamine its proposed target concentrations for the methyl bromide field fumigation regulations." (16

CT 4409A; see also 3 CT 507.) Indeed, OEHHA acknowledged that DPR was the decisionmaker: "While DPR appears to have finalized *its decision*, OEHHA would look forward to further discussion with DPR staff of the appropriate NOAEL . . ." (2 CT 457.)

DPR's own viewpoint on exposure level setting synchronizes with OEHHA's. DPR wrote to OEHHA that: "We take a broad view of the term 'need for and appropriate degree of control measures'" in section 14023 of the Tanner Act "to include your opinion on the appropriate regulatory exposure value." (15 CT 4381.) However, DPR clearly viewed OEHHA's recommendations as advisory: "We view [OEHHA's] external peer reviews as additional information for our staff analysis and recommendations. *We do not view [OEHHA's] peer reviews as superceding our staff recommendations.*" (*Id.*)

Unlike Petitioners and the trial court, DPR read the worker safety statutes and the Tanner Act in harmony as making OEHHA a consultant and reviewer and DPR the final decisionmaker. As DPR stated: "[W]e fully expect that the involvement of OEHHA under 12981(f) and 14023 will be *equivalent*." (15 CT 4381.) OEHHA nowhere disapproved of this harmonious interpretation. As the consensus of the only involved agencies,

the consistent, long-standing views of DPR and OEHHA are entitled to great weight and ought to be authoritative and controlling here.

F. The Supreme Court's *Western Oil & Gas* Decision Supports DPR's Authority to Set Regulatory Standards.

The Supreme Court's decision in *Western Oil & Gas Association v. Air Resources Board* (1984) 37 Cal.3d 502, which the trial court seemed to find dispositive against DPR, is based on an entirely different set of statutes that do not govern pesticide regulation. *Western Oil* addressed DHS' authority to establish the ambient air quality standards that Health and Safety Code section 39606 required ARB to adopt.

Despite a superficial similarity, the general air quality statute at issue in *Western Oil* differed markedly from the language of section 12981. Furthermore, unlike with DPR, nothing in the *Western Oil* statutory scheme granted ARB risk assessment authority, required consultations with other agencies beyond DHS in setting standards, or established ARB's health assessment expertise.

The trial court's reasoning about *Western Oil* was further flawed in several ways:

First, Health & Safety Code section 39606 contained language superficially similar to, but significantly different from, section 12981, i.e.:

"The state board shall: (b) Adopt standards of ambient air quality for each basin in consideration of the public health . . . *Standards* relating to health effects shall be based upon the recommendations of the State Department of Health." (*Id.* at p. 507.) Section 12981 does not mention standards. It states that "*regulations* that relate to health effects shall be based upon the recommendations of" OEHHA. The trial court ignored the important distinction, ruling that *Western Oil* required an interpretation of section 12981 that "[i]n adopting the Regulations, DPR had a mandatory duty to follow OEHHA's recommendations regarding *standards* related to health effects." (1 CT 237L:25-26.)

Second, the statutory scheme governing DPR and pesticide regulation differs profoundly from the one governing ARB and other air contaminants in the one particular respect found to be critical by the Supreme Court: ARB did not enjoy DPR's expertise, authority, and capacity for assessing health risks. The Supreme Court ruled that ARB had to "follow" DHS' recommendations for health effect standards precisely because ARB "lacked medical expertise in its membership" that would qualify ARB to make the health evaluations necessary to determine the standards. (*Id*. at pp. 507, 511-512.) Thus, ARB could not "substitute its judgment" about health for that of DHS. (*Western Oil, supra,* at p. 512.)

As discussed above, sections 12980 and 12981 are part of an integrated and overlapping series of statutes that all invest DPR with comprehensive authority over scientific risk assessment of pesticides, *as well as* risk management and control. Because ARB did not possess such authority or expertise, the Legislature has consistently made DHS (now OEHHA) ARB's health risk assessor. (Health & Saf. Code, §§ 39606, 39660.)

In contrast, the Legislature made DPR the assessor of pesticide health effects and OEHHA a consultant. (§§ 11454.1, 14006, 14023, 14024.) DPR employs a top-flight staff (of toxicologists and other premier scientific experts) that comprehensively assesses pesticide health risks and develop the exposure standards in compliance with its statutory risk assessment authority. (First RJN, Ex. L [sample resumes of DPR toxicology staff].) DPR is also required to consult other experts to enhance its in-house judgments in an elaborate process of peer review (§§ 12980; 14021-14022) – something ARB was not mandated to do.

Hence, *Western Oil*'s primary rationale – ARB's total lack of risk assessment authority and a corresponding absence of expertise – is inapplicable to DPR, which is both the statutory designee for risk

assessment of pesticides and the most qualified toxicological expert. (First RJN, Ex. L.)

Third, the trial court failed to recognize and apply *Western Oil*'s complete reasoning and decision. After stating that ARB had to follow DHS' recommended standards, the Supreme Court ruled: "while the Board was required to *consider* the department's recommendations as to health effects, *it was not required to adopt the department's recommended air pollution levels as California's ambient air quality standards.*" (37 Cal.3d at p. 507; see also *id.* at p. 512 [the standards of ambient air quality ARB adopted did *not* have to be "*identical to those recommended by [DHS]*."].)

The Supreme Court recognized that, even though DHS made ARB's risk assessment decision as to the final *reference exposure levels*, ARB was still the regulator charged with considering various factors in adopting *regulatory exposure standards.* Thus, ARB had authority to deviate from DHS' numbers when promulgating the regulations if other factors gave it a sufficient basis. (*Id.* at p. 512.)

Here the consensus of independent and highly expert scientific peer reviewers supported DPR's exposure levels. (Statement of Facts, Section C(2).) Moreover, DPR was permitted to choose regulatory standards that differed from OEHHA's levels to the extent DPR was required to factor in

considerations other than health. (See e.g., §§ 11454.2 [agricultural factors to be considered from DFA consultation]; 14006 [DPR has authority to limit usage to level where "no injury will result, *or* no nonrestricted material or procedure is equally effective and practical"]; § 14024(a) [DPR to regulate "the levels of exposure which may cause or contribute to *significant* adverse health effects" or within "practicable" measures].)

DPR inherited from DFA the responsibility, as phrased by Governor Deukmejian in a 1983 Executive Order, "of ensuring the orderly regulation of pesticides to preserve their beneficial uses while protecting the quality of the total environment." (First RJN, Exhibit J at 99; see also *id.* at 98 ["responsible for maintaining a balance between agricultural productivity, public and worker protection, and environmental quality by regulating all aspects of pesticide registration, sales and use."].)

Therefore, under *Western Oil*'s reasoning, DPR had even greater statutory discretion than ARB to choose a different regulatory standard of 9 ppb, which was within current methyl bromide usage limits *and* well below any level causing adverse effects. (*Pulaski v. California Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1334-1335 [health regulator not required to adopt lowest possible standards where statutory language implied feasibility and cost considerations.].)

III. ALLOWING OEHHA TO DICTATE METHYL BROMIDE EXPOSURE LEVELS AND HEALTH EFFECT REGULATIONS PRODUCES ABSURDITIES AND UNREASONABLE CONSEQUENCES.

When interpreting an ambiguous statute, "consideration must be given to the consequences that will flow from a particular interpretation." (*Santa Clara County Local Transp. Authority v. Guardino* (1995) 11 Cal.4th 220, 235.) Sound construction requires "a reasonable and commonsense interpretation" that is "practical rather than technical in nature, which upon application will result in wise policy rather than mischief or absurdity." (*In re Reeves* (2005) 35 Cal.4th 765, 771, fn. 9; see also *Maricela C. v. Superior Court* (1998) 66 Cal.App.4th 1138, 1146 [construction should be "workable and reasonable"].)

The trial court's decision granting OEHHA final authority to decide the contents of every methyl bromide regulation related in any way to "health effects" – a potentially unlimited category – is unworkable and unreasonable. Its adverse consequences include each of the following:

A. Giving OEHHA Ultimate Authority Forces DPR to Violate its Statutory Duties to Solicit and Consider the Views of Others.

In regulating methyl bromide, DPR is bound by statute and agreement to consult with numerous government agencies and to solicit, consider, and integrate input from independent experts and interested industries, as well as the public. (16 CT 4442C-D [summarizing requirements].) The health experts and advisors DPR is statutorily mandated to consult include: the University of California, the Department of Industrial Relations, "and any other similar institution" (§ 12980); the Air Resources Board, "the Occupational Safety and Health Division of the Department of Industrial Relations, international and federal health agencies, private industry, academic researchers, and public health and environmental organizations" (§ 14022); affected air pollution control districts, agricultural commissioners, and air quality management districts (§ 14023(e), 14024); and the California Department of Food and Agriculture. (§ 11454.2 and a February 6, 1992 Memorandum of Understanding, 2 CT 414.)

Regardless of the fruits of these consultations and the collective wisdom DPR might draw from them, the trial court's ruling requires DPR to

adopt into law only OEHHA's recommendations – not just about exposure levels, but about the potentially unlimited category of regulations "relat[ing] to health effects." (1 CT 237L:25-M:15.) By force of the court's logic, DPR must solicit under the statutory scheme the input of all statutorily-mandated consultants – scientists and non-scientists alike – and, under the APA, the views of the public as well, only to disregard all of the resulting data and perspectives whenever OEHHA has spoken on the same subject.[66] (*Id*.)

As this District has observed in an analogous context, the Legislature would not countenance the "absurd result" of placing a government agency into the "Catch-22 quandary" of following a statutory procedure – such as mandatory broad-based scientific and practical consultation – while being "forced to disregard the effect" of that very procedure by the provisions of another law. (*Gomes v. County of Mendocino* (Cal.App. Dist. 1 1995) 37 Cal.App.4th 977, 987; see also *Ung v. Koehler* (Cal.App. Dist. 1 2005) 135 Cal.App.4th 186, 204 ["Statutes should be construed to avoid 'the absurdity of creating [a] Catch-22.'"].)

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[66] DPR must comply with the APA requirements of public notice and comment, a procedure designed "to provide a procedure whereby people to be affected may be heard on the merits of proposed rules." (*Armistead v. State Personnel Board* (1978) 22 Cal.3d 198, 204.)

This very case illustrates the potential for the Catch-22 described by this District. To comply with its statutory obligations, DPR requested and received information from the sources listed above, such as those included in the Working Group, the University of California-Davis (3 CT 580-583), the U.S. EPA (1 CT 586-589), and private industry, as well as individual scientists. (2 CT 446.) All of the advisory and peer-reviewing scientists and agencies – except OEHHA – supported exposure levels equal to or higher than those DPR proposed. (Statement of Facts, Section C(2).) Yet, according to the trial court, OEHHA's viewpoint trumps all others.

The Legislature would not rationally impose on DPR a mandate to consult all viewpoints (and thereby develop a scientific consensus) only to bow to the insular and divergent opinions of a single peer reviewer. Nor would it require DPR to enshrine into law a "recommendation" bringing no greater health benefits, but causing a devastating impact on California agriculture. (Statement of Facts, Sections A and C.)

The Catch-22 created by the court's decision not only thwarts broad-based risk assessment and management decisions about methyl bromide, but it also produces an unconscionable waste of public and private resources. Both the time and money necessary to conduct multiple peer reviews and the high-level expertise of DPR's own staff will be squandered. Each and

every year, the Legislature adopts a budget that appropriates public funds to pay for DPR's staff to conduct its own assessments, consultations, and outside reviews regarding the human health effects of pesticides. Under the trial court's decision, all of this money and effort dissipates the moment OEHHA steps in with a recommendation about health effects.

The Legislature surely did not intend an interpretation resulting in a massive waste of public money and a spate of useless activity by in-house and outside experts whose views cannot have an impact on any final decision. (See *People v. Budwiser* (2006) 140 Cal.App.4th 105, 109 [Legislature abhors "an absurd waste of judicial resources"]; *City of Los Angeles v. Superior Court* (2003) 111 Cal.App.4th 883, 895 ["wasted private and public funds and time, and judicial resources"]; *Moore v. City Council of City of Maywood* (1966) 244 Cal.App.2d 892, 902 ["absurd and unjust result" amounting to "waste [of] public time, effort, and funds"].)

B. Giving OEHHA Ultimate Authority Undermines the Well-Informed and Multi-Faceted Regulatory Process Designed by the Legislature.

The Legislature has carefully and intentionally enacted a separate scheme for the regulation of airborne *pesticides* in the Food and Agricultural Code, distinct from that governing other toxic air

contaminants. (*Compare* §§ 14021 *et seq.* with Health & Saf. Code, §§ 39660 *et seq.*) The scheme requires DPR to consider numerous factors in addition to health when developing regulations. These reflect DPR's responsibility "for maintaining a balance between agricultural productivity, public and worker protection, and environmental quality by regulating all aspects of pesticide registration, sales and use." (First RJN, Ex. J at 98.)

Accordingly, DPR must consider input from the Department of Food and Agriculture under section 11454.2(b) on subjects including, but not limited to: "(1) impacts on agriculture resulting from the proposed action, (2) benefits derived from the use of the pesticide, and (3) any recommended alternative action." The obvious purpose of these consultations is to inform DPR's necessary considerations of practicability, as well as specific economic impact of its regulations.[67]

The Tanner Act further commands DPR, as health risk manager, to develop control measures "designed to reduce emissions sufficiently" to prevent "the levels of exposure which may cause or contribute to *significant* adverse health effects." (§ 14024(a).) Alternatively, "[w]here no

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[67] Consistent with these requirements, DFA (2 CT 395-430), the University of California-Davis for DFA (2 CT 420; 15 CT 4131), and Cal-EPA's Agency-Wide Economic Analysis Unit (15 CT 4219) provided DPR with agricultural and economic impact assessments.

demonstrable safe level or threshold of *significant* adverse health effects *has been established by the director*, the control measures [must] be designed to adequately prevent *an endangerment of public health* through the application of *best practicable control techniques*." (*Id.*)

Thus, DPR must also consult affected local agricultural commissioners, air pollution control districts, and air quality management districts. (§ 14024.) Finally, section 14006 requires DPR to limit pesticide usage "to those situations in which it is reasonably certain that no injury will result, *or* no nonrestricted material or procedure is equally effective and practical."

By contrast, the trial court's ruling forces DPR's regulations to reflect OEHHA's insular numbers of 1 and 2 ppb, which OEHHA did not develop according to the Legislature's intended statutory factors, consultations, and considerations. This torpedoes the holistic process the Legislature envisioned to ensure prudent and practical pesticide regulation. It is manifestly unreasonable and should not be given credence.

C. The Trial Court's Grant of Authority to OEHHA Threatens Vital Constitutional Rights and Protections.

Under the trial court's ruling, OEHHA alone decides what a health-effect-related recommendation is, whether it will make one, and what policy

it will serve. The scope of OEHHA's new authority is limited only by the undefined phrase "relate to health effects." Nothing in the statutes addresses the procedure by which OEHHA makes its recommendations, what those proposals must address or achieve, or how they are to be justified. As a result, DPR must simply adopt into law whatever OEHHA produces. If it is OEHHA's preference to ban a pesticide altogether, then DPR, the agricultural industry, and the public must simply comply – and suffer the consequences, however irrational and arbitrary.

Delegation of such vast and unbridled legislative power to OEHHA is an unconstitutional violation of due process and the separation of powers, which "occurs whenever the Legislature confers upon an administrative agency unrestricted authority to make fundamental policy decisions." (*Samples v. Brown* (2007) 146 Cal.App.4th 787, 804; U.S. Const.; amend. XIV,§ 1 [Due Process Clause]; Cal. Const., art. I, §§ 1, 7(a) [property and due process protections]; art. III, § 3 [separation of powers].) Standing alone as interpreted by the trial court, section 12981 does not provide OEHHA an "effective mechanism to assure the proper implementation of" policy decisions. (*Id.*)

When a provision is this "vague, indefinite, and uncertain, standing alone," it is unconstitutional to delegate to an administrative agency the

legislature's power to define it. (See, e.g., *Ex Parte Peppers* (1922) 189 Cal. 682, 688-689.) In contrast, considered as a whole, the statutory scheme gives DPR abundant guidance and circumscribes its discretion in numerous ways that render its exercise of authority unquestionably constitutional.

D. Creating Separate Spheres of Regulation for the Same Pesticides – One for Workers and Another for Non-Workers – Is Unworkable.

If OEHHA holds the power to dictate the substance of all regulations relating to "health effects" of workers, DPR at least retains authority under the Tanner Act to assess and manage the health risks of airborne pesticides as to non-workers. However, because DPR has to promulgate *all* pesticide regulations, DPR will be forced to arbitrarily divide its regulations between those that protect workers and those that protect non-workers, even though both regulations will address the same pesticide emissions.

For example, a worker in a field and a resident living near the field will, under the trial court's decision, be protected according to each agency's divergent scientific assumptions about how much pesticide exposure an adult human can withstand. There would be no scientific justification for the divergence, so each set of regulations would inevitably

face substantive legal challenges vis-à-vis the other. The result would be legal chaos, thwarting the effectiveness of the entire regulatory scheme.

Moreover, because the different pesticide standards would apply to the same pesticide emission *sources* – e.g., field applications – the lowest standard would necessarily dictate actual usage limits and displace the other standard. Thus, the trial court has effectively given OEHHA the power to regulate pesticide health effects for *all people*, not just workers, by setting the lowest standard limiting a pesticide's usage. Under this model, this Tanner Act will be *de facto* repealed.

E. Allowing OEHHA to Dictate the Substance of Regulations is an Egregious Violation of the California Administrative Procedure Act.

The trial court's ruling converts OEHHA's "recommendations" as to exposure levels and health effects into *de facto* regulations subject to APA requirements. Yet OEHHA did not observe a single APA procedure in this record when producing its recommendations. Instead, if the trial court is correct, DPR must engage in sham APA compliance on OEHHA's behalf by soliciting public comments that cannot modify anything recommended by OEHHA. This is surely not what the Legislature had in mind.

The APA "is intended to advance '*meaningful* public participation in the adoption of administrative regulations.'" (*Pulaski v. California Occupational Safety and Health Standards Board* (1999) 75 Cal.App.4th 1315, 1327.) It was designed in part to prevent the use by administrative agencies of "underground" regulations that effectively give rise to binding administrative law without APA-mandated input and protection. (*California Advocates for Nursing Home Reform v. Bonta* (Cal.App. Dist. 1 2003) 106 Cal.App.4th 498, 506; Gov. Code, § 11340.)

The APA broadly defines "regulation" as "every rule, regulation, order, or *standard of general application* . . . or *standard* adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure . . ." (Gov. Code, § 11342.600.) An APA-governed regulation thus has two principal identifying characteristics: (1) it applies generally to declare how a class of cases is to be treated, rather than to resolve a single case; and (2) it implements, interprets, or specifies the law enforced or administered by the agency. (*California Advocates for Nursing Home Reform v. Bonta, supra,* 106 Cal.App.4th at pp. 506-507, citing in part Gov. Code, § 11342(g) [other citations omitted].)

To the extent the trial court's view is correct, OEHHA's so-called "recommendations" are APA-governed "regulations" under the two-part test just described.

First, both DPR and OEHHA intend the subchronic exposure "*standards*" (in APA terminology) to apply across the board to classes of humans; those standards apply class-wide to applications of methyl bromide. (*Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 334.)

Second, OEHHA's exposure standards serve to implement, interpret, and make specific the law administered by the agency. According to the trial court's ruling, even though DPR still formally adopts the regulations, OEHHA is actually administering the law because OEHHA's recommendations are the binding, in-the-field interpretation and implementation of the pesticide statutes. (Gov. Code, § 11342(g); *Morning Star Co., supra*, 38 Cal.4th at p. 334.)

The "basic minimum procedural requirements" the APA requires to invite meaningful public input into regulations include: (1) giving notice of proposed regulatory action (*id.*, §§ 11346.4, 11346.5); (2) publishing the text of the proposed regulation with a statement of the reasons (*id.*, § 11346.2, subds. (a), (b)); (3) giving interested parties an opportunity to

comment (*id*., § 11346.8); (4) responding in writing to public comments (*id*., §§ 11346.8(a); 11346.9); and (5) forwarding a file of all materials to the Office of Administrative Law for review (*id*., §§ 11349.1, 11349.3).

OEHHA did none of the above. Its closeted pre-determination of health effect standards disembowels the APA's guarantees of notice, an opportunity for influential public input, and "security against bureaucratic tyranny." (*California Advocates for Nursing Home Reform v. Bonta, supra,* 106 Cal.App.4th at pp. 507-508.) OEHHA's recommended exposure standards are therefore *invalid regulations.*

IV. DPR COMPLIED WITH ANY DUTIES CREATED BY THE JOINT AND MUTUAL RESPONSIBILITY STATEMENT IN SECTION 12980.

Section 12980 sets forth "Legislative findings and [a] declaration" about the regulation of pesticides in the limited sphere of worker safety, one of which is the following:

> "The Legislature further finds and declares that *the development of regulations* relating to pesticides and worker safety should be *the joint and mutual responsibility* of the Department of Pesticide Regulation and the Office of Environmental Health Hazard Assessment." (*Id*.)

The trial court ruled that this provision created a mandatory duty for DPR to work in a "unified and shared process" with OEHHA, and held that DPR did not "fulfill its statutorily mandated ministerial duty jointly and mutually to develop the Regulations."[68] (1 CT 237M:19-20.) Petitioners offered a standard no less cryptic and unenforceable, lamenting that there was not an "equal exchange of information, ideas and respect from DPR to OEHHA."[69] (1 CT 203:9-10.)

Under the plain meaning of section 12980, "joint and mutual" applies to "responsibility" and not "authority." As described in Discussion Section I(A) above, the statute requires that OEHHA "share" or "experience" the work involved in regulatory development, which it most certainly did. (Statement of Facts, Section C.)

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[68] As an initial matter, Intervenors do not concede that section 12980 actually creates a mandatory duty for DPR or OEHHA. By its terms, section 12980 sets forth a statement of legislative intent. The Courts of Appeal have repeatedly held that "a statement of legislative intent may not give rise to a mandatory duty." (*Shamsian v. Department of Conservation* (2006) 136 Cal.App.4th 621, 633.) The statement here is aspirational and, at bottom, impossible to enforce because it articulates no legal standard.

[69] Petitioners read the statute to imply that "DPR is not free to develop the Regulations without OEHHA as an equal partner," contrasting with a "consultant." (1 CT 202:3-4.)

OEHHA's "joint and mutual participation" in the development of DPR's subchronic methyl bromide exposure regulations was manifested in three concrete ways:

- DPR used OEHHA's recommendation as the starting point for its review of exposure levels and invited OEHHA's peer reviews. (Statement of Facts, Section C(1).)
- DPR placed OEHHA at the table in the inter-agency Working Group DPR assembled to fulfill its multi-agency consulting duties under the Tanner Act. There OEHHA had the fullest opportunities to participate in candid scientific and practical discussions of exposure levels and offer its own position. (Statement of Facts, Section C(2).)
- DPR solicited, received, and responded directly to OEHHA's scientific memoranda, thoroughly discussing exposure levels on multiple occasions from March 11, 2003 to February 3, 2004. DPR did not have such a detailed, repeated, or extensive consultation with any other agency. (Statement of Facts, Section C.)

To use Petitioners' words, OEHHA thus did enjoy a "special status" as DPR's primary consultant on subchronic, airborne exposure reference

levels, and DPR's detailed responses certainly demonstrate "respect" for OEHHA's viewpoints. OEHHA's own words confirmed that OEHHA had every opportunity to jointly participate in all phases of the development of the regulations, and viewed its own participation as that of a fully involved consultant. (2 CT 439-440; 3 CT 504-505; Discussion, Section II(E).)

Whether from a legal or practical perspective, no more could have been required of DPR – short of forcing it to bow to OEHHA's bottom-line exposure levels. However, as an agency with the statutory responsibility to consult broadly multiple views and integrate them into standards and rules, DPR could not discharge its duties fairly by displaying undue bias toward OEHHA's opinions.

Court-ordered intervention into the expert working process of an administrative agency by creating a "most favored consultant" status and forcing the agency to adhere to it is nothing less than judicial micro-management of an executive branch agency that is nowhere sanctioned by statute and lacks any fundamental legal basis. (*Lavin v. California Horse Racing Board* (1997) 57 Cal.App.4th 263, 268 [administrative agency has "discretion in selecting the methodology by which it will implement" regulatory authority].) The trial court's contrary view should therefore be rejected.

CONCLUSION

The allocation of regulatory power among government agencies abhors ties and stalemates. If the pesticidal use of methyl bromide is to be regulated in an administrative process that is open, well-informed, efficient, and effective to protect exposed humans, as well as crops in the field, the exposure-level-setting "buck" must stop with the single agency where the Legislature has so firmly and earnestly placed it: *DPR*.

Strikingly, OEHHA itself has never contended otherwise. Indeed, both agencies have endorsed DPR's standard-setting authority. Only the Petitioners here – without OEHHA's imprimatur – have asked California's courts to contradict the clear statutory scheme by granting OEHHA anomalous rulemaking powers. Their request should not be honored, and the judgment in their favor should now be reversed.

DATED: March 28, 2007

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CERTIFICATE OF WORD COUNT

(Cal. Rules of Court, rule 8.204(c)(1))

The text of this brief consists of 15,798 words as counted by the Corel WordPerfect version 10 word-processing program used to generate the brief. The entire brief is double spaced. The font is 13 point Times New Roman.

DATED: March 28, 2007

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PROOF OF SERVICE
STATE OF CALIFORNIA - COUNTY OF YOLO

I am employed in the City of Davis, County of Yolo, State of California. I am over the age of 18 and not a party to this action; my business address is: 2050 Lyndell Terrace, Suite 240, Davis, California 95616.

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