

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

<p>Juana Vasquez et al Plaintiff/Petitioner(s) VS. California Department of Pesticide Regulation Defendant/Respondent(s)</p>	<p>No. RG17847563 Date: 03/09/2023 Time: 8:06 AM Dept: 21 Judge: Evelio Grillo ORDER re: Ruling on Submitted Matter</p>
--	--

The Court, having taken the matter under submission on 02/28/2023, now rules as follows:

The motion of the plaintiffs to enforce the writ is GRANTED IN PART.

PROCEDURE

The claim in this case was that the Township Cap Program was an unlawful underground regulation. The judgment declared that the Township Cap Program was an unlawful underground regulation and that the DPR had failed to comply with the APA.

The judgment and resulting writ stated (1) the DPR was to “Submit to the Office of Administrative Law a notice of proposed regulatory action to address potential cancer risks to bystanders from the use of 1,3-D, consistent with the APA and Food and Agricultural Code sections 12980 and 12981, no later than one year following the date the writ is issued” and (2) that “until formal rulemaking is completed,” the township cap of 136,000 adjusted total pounds and the prohibition on December applications remain in place “as interim measures to address potential cancer risks to bystanders from the use of 1,3-D.”

The Court of Appeal affirmed. (Vasquez v. Department of Pesticide Regulation (2021) 68 Cal.App.5th 672.) The Court of Appeal states: “The applicability of sections 12980 and 12981 will depend on the contours of any final adopted regulation.” (68 Cal.App.5th at fn 3.)

DPR has submitted a proposed regulation to the OAL. (Katten Dec., Exh F.) The proposed regulation is focused on protecting non-occupational/residential bystanders. The DPR is separately considering a regulation to protect occupational bystanders. (Katten Dec., Exh E.)

On 11/19/22, the DPR filed an amended return to the writ stating that it has submitted the proposed regulation to the OAL.

Plaintiffs seek an order directing the DPR to comply with the writ by proposing a regulation that “address(es) potential cancer risks to (residential and occupational) bystanders .. consistent with Food and Agricultural Code sections 12980 and 12981.”

The court separately considers the issues of (1) whether the motion seeks to challenge the

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

proposed new regulations; (2) what the writ required; (3) whether the DPR has complied with the writ; and (4) what remedy is appropriate.

MOTION AS CHALLENGE TO THE NEW REGULATIONS

The motion is not a challenge the proposed new regulations. The court addressed this in the order of 3/1/22, stating:

If plaintiff or any other person asserts that any final regulation does not comply with the law, then they must file a new lawsuit challenging the new regulation. ... Serial claims arising from distinct but serial administrative decisions regarding the same issue should be resolved in different cases. *Ballona Wetlands Land Trust v. City of Los Angeles* (2011) 201 Cal.App.4th 455, 480, ... Similarly, *Planning & Conservation League v. Castaic Lake Water Agency* (2009) 180 Cal.App.4th 210, 228, ... Here, the court has entered judgment in this case and the Court of Appeal had affirmed the judgment. This case will be complete when the DPR completes its rulemaking process and the temporary extension of the Township Cap Program comes to an end. ... If in the future petitioner challenges the DPR's rules on 1,3-D products, then that will be part of a continuing narrative - but it would be a new and different challenge to a new, different, future DPR action decision based on a different administrative record.

[End of block quotation.]

WHAT THE WRIT REQUIRED

The writ required DPR to "Submit to the Office of Administrative Law a notice of proposed regulatory action to address potential cancer risks to bystanders from the use of 1,3-D, consistent with the APA and Food and Agricultural Code sections 12980 and 12981, no later than one year following the date the writ is issued."

At the hearing on 2/8/23, counsel brought to the court's attention the distinctions among (1) non-occupational bystanders (e.g. persons in residences adjacent to fields), occupational bystanders (e.g. persons employed adjacent to fields), and workers (persons working with the 1,3D in the fields). The trial court's order of 3/28/18 does not address the distinctions. The Court of Appeal decision does not address the distinctions. (*Vasquez v. Department of Pesticide Regulation* (2021) 68 Cal.App.5th 672.)

The court considers the underling facts, the complaint, the order, and the writ.

The Township Cap Program states that "An annual township (36 square-mile area) cap is necessary to minimize the levels of the amount of 1,3-D in the atmosphere and mitigate the potential for chronic exposure." (Hanger Dec., Exh D, page C-109.) The TCP was designed to address "the levels ... in the atmosphere," suggesting that it was designed to protect all persons in the township areas who breathed or who had exposed skin. Although this suggests that it was designed to protect workers in addition to non-

occupational bystanders and occupational bystanders by the plain terms of the May 14, 2018, judgment and the writ, Department was ordered only to undertake the rulemaking process to

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

address potential cancer risks to bystanders.

Although it is also true that the complaint filed 1/31/17 at para 4 states that plaintiffs seek to protect themselves “as well as other workers, residents, school children and school staff, and at para 27 states that the TCP did not “protect nearby residents and workers from cancer risks,” the writ issued on 5/14/18 required the DPR to propose new regulations that addressed potential cancer risks to bystanders, notwithstanding the complaint’s second cause of action under Food And Ag Code 12980 which alleges a failure to protect “workers.”

Even considering that the Township Cap Program (the underground regulation) was designed “to minimize the levels of the amount of 1,3-D in the atmosphere,” and the complaint concerned “workers, residents, school children and school staff,” and the order concerned workers, the court reads the writ as ordering the DPR to prepare formal regulations to replace the underground regulations, and even if the intent of the parties was to include workers under the umbrella of the regulation(s) to be promulgated, the writ on its face cannot reasonably be read to require the DPR to prepare formal regulations that protect workers, in addition to non-occupational bystanders and, occupational bystanders. The reasonable construction of the writ is that the DPR was ordered to prepare formal regulations that protect only occupational and non-occupational bystanders.

THE DPR HAS NOT COMPLIED WITH THE WRIT

The DPR has not yet complied with the writ. The proposed regulations designed to protect only “non-occupational/residential bystanders” and are not designed to protect occupational bystanders.

On 9/16/22, the DPR sent a letter to the OEHHA that refers to “DPR's proposed regulations that are designed solely to mitigate acute and cancer risks for non-occupational/residential bystanders” and then states: “DPR's proposed regulations will address both acute and cancer risks to non-occupational bystanders from the use of 1,3-D. DPR is requesting that OEHHA state its agreement that, since DPR's proposed regulations address risks to non-occupational bystanders rather than workers, the proposed regulations are not subject to joint and mutual development process set forth in Food and Agricultural Code sections 12980 and 12981.” (Katten Dec Exh D.)

On 9/20/22, the OEHHA sent a letter to the DPR that states: “OEHHA understands that DPR is separately considering regulations to address risks to workers that DPR has identified from exposure to 1,3-D and that DPR plans to develop any such regulations jointly and mutually with OEHHA as set forth in FAC sections 12980 and 12981 and the August 2008 Memorandum of Understanding between DPR and OEHHA. ... OEHHA agrees that since the purpose of DPR's proposed regulations is to address risks to nonoccupational bystanders and not workers, the proposed regulations are not subject to

joint and mutual development process set forth in FAC sections 12980 and 12981.” (Katten Dec Exh E.)

The exchange of letters demonstrates that the current proposed regulations are designed only

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

protect “non-occupational/residential bystanders” and that the “DPR is separately considering regulations to address risks to workers.”

The DPR has not yet complied with the writ. The DPR has indicated that it is continuing to make efforts to comply with the writ regarding protecting occupational bystanders. The proposed regulations are designed to protect only “non-occupational/ residential bystanders” and are not designed to protect occupational bystanders.

At the hearing on 2/8/23, counsel for DPR suggested that there is an unresolved legal issue about whether FAC 12981 requires the DPR to consult with the OEHHA for regulations to protect both “workers” and “occupational bystanders.” The court does not decide this legal issue, but makes two observations. First, FAC section 12980 suggests that the court read 12981 consistent with the legislative goal of providing “safe working conditions for farmworkers, pest control applicators, and other persons handling, storing, or applying pesticides, or working in and about pesticide-treated areas.” Second, legislative history might suggest a different legislative purpose or a nuanced legislative distinction between “workers” and “occupational bystanders.”

WHAT REMEDY IS APPROPRIATE

The DPR apparently needs additional time to prepare a proposed regulation or regulations to protect occupational bystanders and to consult with the OEHHA regarding that proposed regulation(s).

Plaintiffs in the Opening at 13:1-12 state they seek an order directing DPR to (1) transmit to OEHHA within 10 working days of the Order a request for OEHHA to its recommendation on the current proposed regulation and (2) propose a regulation consistent with Food and Agricultural Code 12981 within 60 days following the receipt of 10 OEHHA's recommendation.

The DPR in opposition at 4:24-28 states: “The Department cannot newly develop and propose regulations to address occupation-specific exposure risks in 60 days, as Petitioners suggest. As detailed in the Department’s motion for an extension, there are far too many steps necessary, and consultations necessary, to do that; some of those individual steps take 60 days. ... A year, as the Court’s 2018 writ envisions, would be the minimum amount of time required.”

Plaintiffs in the Reply at 9-10 state: “Plaintiffs are amenable to providing DPR the time it needs to fully comply with the Court's orders. ... Plaintiffs propose an Order that 1) requires DPR to promptly (within 10 working days of the Order) request OEHHA to provide DPR with its recommendation ... and 2) instructs the parties to meet and confer

to attempt to reach an agreement about the timeline for completing revisions to the regulation.”

There appears to be a disconnect between the parties. Plaintiffs seem to presume that the DPR would have a single set of regulations that would apply to non-occupational bystanders and occupational bystanders. The DPR seems to suggest that it anticipates one set of regulations (the proposed regulations) that apply to non-occupational/ residential bystanders and a second set of regulations that apply to occupational bystanders. That noted, the disconnect might not be relevant to the remedy because the DPR has the discretion to decide whether to have one set of

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA

Rene C. Davidson Courthouse

broad regulations or various sets of narrower regulations. For example, the DPR might structure its regulations so that Food and Agricultural Code 12981 applies to one set but not to another set of regulations.

At the February 1, 2023, hearing, counsel for the petitioner requested the court to include in the order enforcing the writ a specific reference to FAC sections 12980 and 12981, and to order the Department to comply with those sections. In view of the specific direction given in the judgment and writ to the Department deliver a “a notice of proposed regulatory action to address potential cancer risks to bystanders from the use of 1,3-D, consistent with the APA and Food and Agricultural Code sections 12980 and 12981 no later than one year following the date the writ issued” the court perceives no need to do so. The Department remains under an obligation to cause regulations to be promulgated that are consistent with sections 12980 and 12981, pursuant to the terms of the writ and judgment, and California law.

ORDER

Consistent with the nature of the claim and the purpose of the judgment and writ, the court orders:

The court ORDERS that the writ issued 5/14/18 is not discharged. The DPR’s amended return to the writ filed 11/19/22 stating that it has submitted the proposed regulation to the OAL is not compliance with the writ.

The court ORDERS that no later than 9/15/23 the DPR must submit to the Office of Administrative Law a notice of proposed regulatory action to address potential cancer risks to non-occupational bystanders and occupational bystanders from the use of 1,3-D. This gives the DPR seven months to prepare and propose the required regulations. The exchange of letters between the DPR and the OEHHA indicates that the DPR has already started work on the regulations. (Katten Dec Exh D and E.)

The DPR may, in its discretion, may have (1) one comprehensive regulation that protects non-occupational bystanders and occupational bystanders from the use of 1,3-D or (2) two separate sets of regulations - one set of regulations to protect non-occupational bystanders and a second set to protect occupational bystanders.

The court ORDERS that the DPR must temporarily maintain, as interim measures to address potential cancer risks to non-occupational bystanders and occupational bystanders from the use of 1,3-D, the annual township cap of a maximum of 136,000 adjusted total pounds and the prohibition on December applications until formal rulemaking is completed.

The court ORDERS that a compliance date to be placed on calendar for September 15, 2023, to allow the Department to complete the rulemaking process and for the court to review compliance with this order. The court ORDERS the writ filed 5/14/18 remains in effect except as modified by this order.

Case Management Conference Re: Motion to Enforce Writ of Mandate Order is scheduled for 09/15/2023 at 10:00 AM in Department 21 at Rene C. Davidson Courthouse.

SUPERIOR COURT OF CALIFORNIA, COUNTY OF ALAMEDA
Rene C. Davidson Courthouse

Clerk is directed to serve copies of this order, with proof of service, to counsel and to self-represented parties of record.

Dated: 03/09/2023

A handwritten signature in black ink, appearing to read 'Evelio Grillo', written in a cursive style.

Evelio Grillo / Judge

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 03/09/2023
PLAINTIFF/PETITIONER: Juana Vasquez et al	Chad Finke, Executive Officer / Clerk of the Court By: <u><i>Nicole Hall</i></u> Deputy N. Hall
DEFENDANT/RESPONDENT: California Department of Pesticide Regulation	
CERTIFICATE OF MAILING	CASE NUMBER: RG17847563

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Michael Freund
Michael Freund & Associates
1919 Addison Street
Suite 105
Berkeley, CA 94704-

Stanley W. Landfair
ARNOLD & PORTER KAYE SCHOLER
LLP
Three Embarcadero Center
10th Floor
San Francisco, CA 94111-

Stanley W. Landfair
DENTONS US LLP
One Market Plaza,
Spear Tower, 24th Floor
San Francisco, CA 94105-

Tamara Theresa Zakim
Ace Attorney Services Inc.
1515 Clay Street
20th Floor
OAKLAND, CA 94612

Chad Finke, Executive Officer / Clerk of the Court

Dated: 03/09/2023

By:

Nicole Hall

N. Hall, Deputy Clerk

CERTIFICATE OF MAILING