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2 through counsel, Tiffany Yee, and the Real Parties in Interested, California Grape and Tree  
3 Fruit League (“CGTFL”), appeared through counsel, Jan L. Kahn. At the conclusion of the  
4 hearing, the Court expressed its intention to issue a writ and requested further briefing from the  
5 parties on the scope of relief. Having received the briefing, the Court now has entered a  
6 Judgment granting Petitioner’s request for declaratory relief and issues a writ of mandate  
7 consistent with the Judgment. The reasons for this relief are set forth below.

8 STATEMENT OF FACTS

9 On October 2, 2006, the CGTFL requests DPR to allow a 24-hour restricted reentry  
10 interval (“REI”)<sup>1</sup> through December 31, 2006 for sulfur applications on table grapes in the  
11 counties of Kern, Tulare, Kings, Fresno and Madera. (AR 01-02.)<sup>2</sup> The factual support for the  
12 request is set forth in the following paragraph:

13 For table grape producers the month of September places the industry square in  
14 the middle of harvest. The central San Joaquin Valley received its first fall rainfall  
15 during this past weekend; however forecasts predict rains between Tuesday and  
16 Thursday. Once again this provides an ideal environment for a wide variety of  
17 microorganisms to attack, degrade and rot fruit which is still on the vines. One of the  
18 best broad spectrum materials is COCS dust, which is a combination of copper and  
19 sulfur. Dusts can be applied quickly, easily and effectively, however rains can wash off  
20 protection and place production at risk for bunch rot. (AR 01.)

21 Based on this letter and only this letter, DPR declares the “existence of circumstances  
22 that could cause an agricultural emergency on agricultural establishments applying sulfur for the  
23 production of table grapes in the counties of Fresno, Kern, Kings, Madera, and Tulare.” (AR 03.)  
24 This declaration is made “pursuant to Title 3, California Code of Regulations (3 CCR) section  
25 6770, and Title 40, Code of Federal Regulations (CFR 40), Part 170.112(d).” (Id.) Specifically,

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<sup>1</sup> REI refers to the time that must elapse before farm workers may work in a field that has been sprayed with CCOS dust.

<sup>2</sup> The request by CGTFL on behalf of growers in a wide geographical area is consistent with the recommendation of the United States Environmental Protection Agency. 57 Fed. Reg. 38113 (August 21, 1992).

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2 DPR identifies the following circumstances that exist that “could cause an agriculture  
3 emergency”:

- 4 • High moisture levels in the fields due to **unexpected unseasonable rains** on or about  
5 October 1, 2006 in grape growing areas of the San Joaquin Valley.
- 6 • There is forecasted continuing rain for the next few days.
- 7 • These conditions are optimum for mildew and fungal growth.
- 8 • There are cultural practices, including harvesting, that use hand labor and are at a critical  
9 juncture during this time.
- 10 • The agricultural employer **could not have anticipated** and has no control over these  
11 circumstances. (Id., emphasis added.)

12 DPR further states that “the production of table grapes may require worker entry into sulfur-  
13 treated vineyards during a restricted-entry interval ... when **no alternative practices would**  
14 **prevent or mitigate a substantial economic loss this year** to an agricultural establishment in  
15 the counties specified.” (Id., emphasis added.)

16 The emergency declaration is to last until December 31, 2006 and provides that “a  
17 worker may enter a sulfur treated table grape vineyard ... to perform tasks ... to mitigate the  
18 effects of an agriculture emergency, provided the agricultural employer assures the following  
19 criteria are met:

- 20 1. The agricultural **employer determines** the specific agricultural establishment is subject  
21 to the circumstances declared above which result in an agriculture emergency on that  
22 establishment **and notifies the county commissioner** of the following:
  - 23 a. The caller’s name
  - 24 b. The name under which the agriculture establishment operates
  - 25 c. A statement of the intent to use the exemption
  - 26 d. An estimation of the acres of table grapes intended for the exemption.
- 27 2. Hand labor tasks are not conducted when the temperature exceeds 90 degrees Fahrenheit  
(F).
- 28 3. At least 24-hours have elapsed since the sulfur treatment.
- 29 4. The requirements of 3 CCR sections 6768 and 6771 and applicable provisions of 3 CCR  
30 section 6770 have been met. (AR 04, emphasis added.)

31 DPR does not restrict future pesticide applications during the period of the declared emergency.

32 DPR also requires CGTFL to submit information about any entry under the emergency  
33 declaration including the date, acres, number of workers, tasks performed and occurrence on any

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2 rashes and “information that would give a **better understanding of the decision making**  
3 **process** to use the exemption.” (Id., emphasis added.) DPR notes that the use of the exemption  
4 “is subject to **review and denial by the county agricultural commissioner** on a site-specific  
5 basis.” (Id., emphasis added.)

6 The record establishes that the rain in the first few days of October, 2006 did not exceed  
7 historical norms. (Gettleman Dec. ¶¶ 1- 4.) Moreover, the record is silent that DPR had before it,  
8 let alone considered, alternative practices to prevent or mitigate a substantial economic loss. In  
9 fact, DPR had no information as to an economic loss of any kind. What DPR had was simply the  
10 well known fact that it rains in the Central Valley of California every Fall and this leads to  
11 moisture in agriculture fields.

12 On October 10, 2006, Petitioners write to DPR to express serious concerns regarding the  
13 Declaration of an Agriculture Emergency. (AR 8-11.) DPR responds on October 26, 2006  
14 asserting that its declaration complies with applicable law. (Id. 14-17.) Yet one day later in the  
15 face of an impending request for a Temporary Restraining Order and alternative writ of mandate,  
16 DPR rescinds its declaration of emergency all the while contending that it has complied with  
17 applicable law. (Id. 19-20.)

18 The record also establishes that the above described practice of seeking and declaring an  
19 agriculture emergency has occurred annually since 2003.

20 DPR HAS FAILED TO DISCHARGE ITS ADMINISTRATIVE DUTY WHEN  
21 CONSIDERING A REQUEST FOR AN AGRICULTURE EMERGENCY

22 The issue to be addressed is the responsibility of DPR to follow federal law in the Worker  
23 Protection Standard (“WPS”), 40 CFR 170.112 (1992) relating to the issuance and administration  
24 of agriculture emergencies. DPR is the State agency charged with enforcing pesticide  
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2 regulations. “The director [or DPR] shall be responsible for overall statewide enforcement and  
3 shall issue instructions and make recommendations to the commissioner.” Food Ag. § 2281.  
4 This includes the duty to insure that no pesticide is used in conflict with the label or other  
5 applicable limitations. Id. §12973. The agency administers a pervasive pesticide regulatory  
6 scheme governing all aspects of registration, sales, possession and use of pesticides in California.  
7 Id. § 12811 et seq.; Californians for Alternatives to Toxics v. Department of Food  
8 Administration (2005) 136 Cal.App.4th 1, 13. The EPA regulations apply to California and DPR  
9 purportedly is adhering to the regulations in declaring the October 4, 2006 agriculture  
10 emergency.

11 DPR has adopted a regulation establishing restricted entry intervals (“REI”) of three days  
12 for the use of sulfur on table grapes in the Central Valley<sup>3</sup> during the warm months between May  
13 15 and harvest. (3 CCR 6772.) By declaring an agriculture emergency, the REI is reduced to 24  
14 hours. Petitioners contend that the October 4, 2006 declaration constitutes an abuse of discretion  
15 and seek both a writ of mandate and declaratory relief. DPR contends, first, that it has no  
16 mandatory duty under 40 CFR Part 170.112 when considering a request for an agriculture  
17 emergency. Second, it is the County Agriculture Commissioners who enforce laws at the local  
18 level.<sup>4</sup> Finally, both federal and state worker protection regulations place the burden on the  
19 employer, not DPR, to ensure worker safety. The last two points are, at best, peripheral to the  
20 issue of DPR’s duty.

#### 21 FEDERAL RULES DEFINE AN AGRICULTURE EMERGENCY

22 The United States Environmental Protection Agency (“EPA”) has adopted rules related to  
23 the safety of agriculture workers.

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25 <sup>3</sup> Kern, Tulare, Kings, Madera and Fresno Counties.

<sup>4</sup> DPR acknowledges that it has the power to enforce to enforce state law when it chooses to do so. (Cal. Code Regs. tit. 3, § 6701; 7 USC §§ 136t, 136u, 136v.)

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2 An agriculture emergency means a sudden occurrence or set of circumstances  
3 which the agricultural employer could not have anticipated and over which the  
4 agricultural employer has no control and which requires entry into the treated area during  
5 a restricted-entry interval, when no alternative practices would prevent or mitigate  
6 substantial economic loss. A substantial economic loss means a loss in profitability  
7 greater than that which would be expected based on the experience and fluctuations of  
8 crop yields in previous years. Only losses caused by the agricultural emergency specific  
9 to the affected site and geographic area are considered. The contribution of  
10 mismanagement cannot be considered in determining loss. 40 CFR 170.112(d)(1).

11 The EPA notes that “[s]uch emergencies might consist of unexpected and severe adverse  
12 weather ... on a time-sensitive crop such as soft fruits. If an emergency is anticipated through a  
13 weather forecast, ... **it is not acceptable to proceed with pesticide application** ... and require  
14 workers to, due to the emergency, to enter the treated area before the [restricted entry period] has  
15 expired.” (57 FR 38114, emphasis added.)

16 The EPA regulations, on their face, provide concrete directions to be followed when an  
17 agency declares an agriculture emergency. Specifically,

- 18 • An agriculture emergency must exist, meaning “a sudden occurrence or set of  
19 circumstances which the agricultural employer could not have anticipated”.
- 20 • It must be a situation over which the “employer has no control”.
- 21 • Entry is required when “no alternative practices would prevent or mitigate a  
22 substantial economic loss”.
- 23 • “A substantial economic loss means a loss in profitability greater than that which  
24 would be expected based on the experience and fluctuations of crop yields in  
25 previous years”.
- “The contribution of mismanagement cannot be considered in determining loss.”
- Only losses to an “affected site and geographic” area may be considered.

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2 The record conclusively establishes that DPR had no evidence of “a sudden occurrence”  
3 or a “circumstance which the agricultural employer could not have anticipated”. All DPR knew  
4 is that the Central Valley experienced its first rainfall and more rain was predicted on the  
5 upcoming Tuesday and Thursday. Certainly, the growers have no control over the weather but  
6 also it is no surprise that rain falls in the Central Valley at this time of year and continues  
7 periodically thereafter until Spring of the following year. CGTFL’s request is silent on the  
8 amount of rainfall and the record is undisputed that, in fact, the actual rain was less than normal.  
9 CGTFL’s request refers to a five county area with no information as to rainfall, actual or  
10 anticipated, in the region as a whole or any part thereof. The fact that the soil is moist when it  
11 rains is not an unexpected circumstance nor is the fact that such an environment is ideal for a  
12 variety of microorganisms to rot fruit. The request for an emergency declaration is devoid of any  
13 economic information or any explanation as to why alternatives were not viable.

14 Based on this record, DPR declares an agriculture emergency over a five county area  
15 from October 4, 2006 to December 31, 2006. Moreover, DPR’s action effectively authorizes the  
16 continued use of COCS dust, a combination of sulphur and copper, throughout this period while  
17 authorizing a 24-hour REI; it is effectively a rolling suspension of the reentry protections for  
18 farm workers.<sup>5</sup>

19 DPR’s position is succinctly summarized in its interpretation of 40 CFR Part 170.112(d):  
20 “The statutory language of this regulation is unambiguous – the employer makes the  
21 determination of agriculture emergency, may obtain a Declaration, and must ensure worker  
22 safety.” (Opposition p. 12 lines 20-22.) DPR insists that it has no mandatory duty to gather

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24 <sup>5</sup> Both DPR and CGTFL assert this is of little consequence since a 24-hour REI remains in place and such an  
25 interval is all that is required by the United States Food & Drug Administration and/or is not required for other  
crops. This assertion ignores the fact that California adopted a 72-hour REI for the protection of farm laborers  
working on this crop in this area and that protection cannot be blithely ignored. If DPR and/or CGTFL believe only  
24-hour protection is warranted, there is a legislative process to achieve that result.

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2 evidence of facts necessary for a determination of an agriculture emergency. (Id. p. 13 lines 18-  
3 19.) In addressing CGTFL's request based on rainfall, DPR states:

4           Petitioners argue that there was no evidence showing that recent rainfall created  
5 an emergency condition, citing to historical records. These records, however, are  
6 irrelevant because the Department had no duty to consider several sources of weather  
7 data before issuing the Declaration. The Department properly based the Declaration on  
8 the CG&TFL's assertion that the rains that occurred in October could necessitate early  
9 reentry to harvest. Nothing in the federal regulation requires otherwise on the  
10 Department. (Id. lines 20-25.)

11           The EPA regulations "are intended to reduce the risk of pesticide poisonings and injuries  
12 among agricultural workers and pesticide handlers through implementation of appropriated  
13 exposure reduction measures. (57 Fed. Reg. 38102.) DPR correctly notes that the regulations  
14 address the employer's obligation to ensure safe working conditions consistent with the EPA  
15 regulations and when the employer desires to alter the REI due to an emergency, the regulations  
16 spell out what must occur. The first step is for the employer to obtain from a "State, Tribal or  
17 Federal Agency having jurisdiction" a declaration of the existence of circumstances that "could  
18 cause an agricultural emergency on that agricultural establishment." (40 CFR Part  
19 170.112(d)(2)(i).) This is done by "meeting the criteria of paragraph (d)(1)".  
20 (170.112(d)(2)(ii).) By the plain reading of the regulation, the entity charged with the  
21 responsibility for determining whether the employer has done so is the "State, Tribal or Federal  
22 Agency having jurisdiction".<sup>6</sup> Without question, DPR has a central role to play in ensuring that  
23 the employer has come forward with facts that warrant a declaration of an agriculture  
24 emergency. To accept DPR's interpretation is to render its role meaningless in the regulatory  
25 scheme. That is not an interpretation to which the regulation is susceptible.<sup>7</sup>

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24 <sup>6</sup> Can there be any doubt that the employer would be entitled to a writ of mandate if the employer provided facts  
addressing each of the criteria of (d)(1) and DPR declined to act?

25 <sup>7</sup> DPR argues that because it has discretion to prosecute violations of pesticide laws (Food & Agriculture Code  
§§11401 et seq., 11891-94 and 97, 12500 et seq., 12999.4 & .5), it has discretion to ignore its role in ensuring that,



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2 CGFTL emphasizes that workers are protected by the applicable statutory scheme. After  
3 the emergency declaration, an employer must notify the County Agricultural Commissioner of  
4 the grower's intent to utilize the exemption. (AR 16.) As a consequence, the grower is subject to  
5 a site-specific review and potential denial by the Commissioner. Moreover, there are a host of  
6 detailed regulations governing the working conditions in the fields. CGFTL may be correct that  
7 the requirement that DPR declare an agricultural emergency is of little consequence in ensuring  
8 worker protection. However, that is not the regulatory scheme that has been crafted and one can  
9 discern many valid reasons for the present structure of insisting upon State review of any request  
10 for a modification of rules designed to protect workers. Although CGFTL's observations are of  
11 interest<sup>8</sup>, they are not persuasive in interpreting the responsibilities of DPR.

12 A WRIT IS WARRANTED TO DIRECT DPR TO COMPLY WITH ITS  
13 OBLIGATIONS WHEN DECLARING AND ADMINISTERING AN AGRICULTURAL  
14 EMERGENCY

15 Petitioners seek a Judgment (1) declaring a violation of 40 C.F.R. §170.112(d) when  
16 DPR issued the Declaration of Agricultural Emergency on October 4, 2006; (2) declaring a  
17 violation of 40 C.F.R. § 170.112(d) and 57 Fed. Reg. 38114 by failing to restrict agricultural  
18 employers from continuing to apply pesticides during the emergency period and, thereafter,  
19 forcing workers to enter fields within 24 hours; and (3) ordering DPR to refrain from emergency  
20 declarations without facts to support the requirements of 40 C.F.R. § 170.112(d)(1) and (2), to  
21 refrain from allowing pesticide applications while allowing reentry within twenty-four hours, and  
22 (4) to "adopt and implement procedures" for the declaration of emergencies. Respondent

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24 in fact, an agricultural emergency exists. DPR's duty under 40 CFR 170.112 (d) has nothing to do with its  
discretionary prosecutorial responsibilities.

25 <sup>8</sup> It is interesting to note that the EPA encourages requests for the determination of an agricultural emergency by  
organizations such as CGFTL with the focus on a broad geographic area. See Fed.Reg. 38113. This, of course, is  
consistent with the definition of an agricultural emergency as contrasted with an isolated problem.

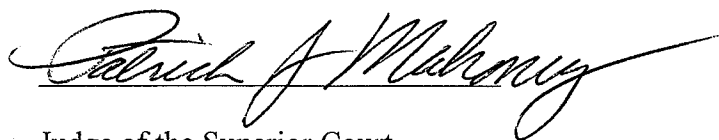
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2 proposes a simple declaration that DPR “refrain from declaring future declarations of  
3 ‘agricultural emergencies’” absent the existence of such an emergency as defined in 40 C.F.R.  
4 170.112(d)(1).

5 As explained, DPR declared an agriculture emergency “entirely lacking in evidentiary  
6 support”. As a consequence, this decision is “arbitrary and capricious” and the issuance of a writ  
7 of mandate is warranted. Gordon v. Horsley (2001) 86 Cal.App.4<sup>th</sup> 336, 351. Furthermore,  
8 Petitioners are entitled to a declaratory judgment for nothing remains to be litigated in this case.  
9 The issue is the scope of the Judgment and the Writ of Mandate.

10 The first issue centers on the force and effect of the statement of the EPA in 57 Fed. Reg.  
11 38114 that “[i]f an emergency is anticipated through a weather forecast, ... it is not acceptable to  
12 proceed with a pesticide application after becoming aware of an impending emergency and then  
13 require workers, due to the emergency, to enter the treated area before the REI has expired.”  
14 Respondent correctly notes that this language is not a regulation and the parties have not cited  
15 and the Court has not found any authority that this language is to be treated as legally binding,  
16 i.e. that it has the same force and effect as a federal regulation. See, Federal Register Act, 44  
17 U.S.C. § 1501 et seq.; 2 Am. Jur. 2d Admin Law § 173 (2007). At the same time, the statement  
18 by the EPA is far more significant than Respondent’s assertion that it is “merely public  
19 comment”. The statement plainly reflects the EPA’s intent as to how the regulation of entry  
20 during an agricultural emergency is to be construed so as to ensure protection of farm workers.  
21 For that reason, it seems patently unreasonable for DPR to imply that statement deserves no  
22 consideration when DPR considers how to respond to “circumstances that could cause an  
23 agricultural emergency” under 40 C.F.R. 170.112(d)(2). For that reason, the Judgment will  
24 reflect that consideration be given to the views of the EPA.  
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2 The last issue is whether to direct DPR to adopt and implement procedures for a  
3 declaration of an agriculture emergency as urged by Petitioners. Certainly, there is wisdom in  
4 the relief sought for it would enable the Real Party in Interest, CGTFL, and advocates for the  
5 farm workers to have a clear understanding of how to address what is a real and recurring issue –  
6 the need to effectively harvest crops while insuring the protection of farm workers from the  
7 effects of pesticides. Respondents note that “[t]raditional mandamus will not lie to control the  
8 discretion of a public official or agency; that is, to force the exercise of discretion in a particular  
9 manner.” Gordon v. Horsley, supra 86 Cal.App.4<sup>th</sup> at 350-351. Petitioners agree but point to  
10 authority that authorizes directing DPR simply to adopt and implement procedures, without  
11 specifying what the procedures should be, citing Conlan v. Bonta (2002) 102 Cal.App.4<sup>th</sup> 745,  
12 763-764. Petitioners are correct that such authority exists. The question is whether to proceed  
13 down that path. Conlan involved a far more complex system dealing with medical  
14 reimbursements. Here, both the regulations specifying what must be shown to declare an  
15 agriculture emergency and EPA’s views on spraying during such an emergency are quite clear.  
16 For that reason, the Court declines to grant this specific relief.

17  
18 May 10, 2007

  
19 Judge of the Superior Court