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FILED BY FAX

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FILED / ENDORSED  
 MAY 24 2018  
 By S. SLORT, Deputy Clerk

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
 10 COUNTY OF SACRAMENTO

13 CITY OF ANTIOCH,  
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 Petitioner,  
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 v.  
 16  
 17 CALIFORNIA DEPARTMENT OF  
 PESTICIDE REGULATION,  
 18  
 Respondent.

Case No. 34-2017-80002687-CU-WM-GDS

~~Proposed~~ JUDGMENT DENYING  
 PETITION FOR WRIT OF  
 ADMINISTRATIVE MANDAMUS

Judge: Hon. James P. Arguelles  
 Trial Date: May 4, 2018  
 Action Filed: September 7, 2017

20 This matter came on regularly before the Court on May 4, 2018, in Department 17,  
 21 Honorable James P. Arguelles, presiding. Derek P. Cole of Cota, Cole & Huber LLP, appeared  
 22 for Petitioner City of Antioch. Deputy Attorney General Linda Gándara appeared for Respondent  
 23 California Department of Pesticide Regulation.

24 The Court having considered the administrative record, which was admitted into evidence,  
 25 the papers of the parties, and the arguments of counsel,

26 IT IS ORDERED, ADJUDGED, AND DECREED that:  
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1. As set forth in this Court's Petition for Writ of Administrative Mandamus – Final Ruling, attached hereto as Exhibit A and incorporated by reference, Petitioner City of Antioch's petition for writ of administrative mandamus is denied.

2. Petitioner City of Antioch shall take nothing by its action; and

3. Respondent California Department of Pesticide Regulation shall recover its costs in this proceeding in the amount of \$ \_\_\_\_\_, following the submission of a memorandum of costs and any motion to tax that may be filed.

Dated: 24 May 2017



[Signature]  
Hon. James P. Arguelles  
Judge of the Superior Court

APPROVED AS TO FORM  
COTA COLE & HUBER LLP

[Signature]  
Derek P. Cole  
Attorney for Petitioner  
CITY OF ANTIOCH

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# EXHIBIT A

**SUPERIOR COURT OF CALIFORNIA  
COUNTY OF SACRAMENTO**

<b>DATE/TIME</b>	<b>MAY 4, 2018, 9:00 A.M.</b>	<b>DEPT. NO.</b>	<b>17</b>
<b>JUDGE</b>	<b>JAMES P. ARGUELLES</b>	<b>CLERK</b>	<b>SLORT</b>
<b>CITY OF ANTIOCH,</b>  <b>Petitioner,</b>  <b>v.</b>  <b>CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION,</b>  <b>Respondent.</b>		<b>Case No.: 34-2017-80002687</b>	
<b>Nature of Proceedings:</b>		<b>Petition for Writ of Administrative Mandamus – Final Ruling</b>	

This case arises out of a penalty that the Contra Costa County Agricultural Commissioner imposed on the City of Antioch for exposing patrons at a City pool to chlorine levels in excess of the product's label requirements. The City appealed the penalty to the Department of Pesticide Regulation, which upheld the penalty. The City then filed this petition for writ of administrative mandamus seeking to set aside DPR's decision on the ground DPR has misapplied the law. The court shall deny the petition.

**Statement of the Case**

On June 18, 2015, an apparent equipment malfunction at the City's Prewitt Family Water Park caused the swimming pool to become massively over-chlorinated due to the release of excessive amounts of "Liquichlor" chlorine solution. The lifeguards at the pool were alerted to the excessive chlorine levels when they noticed children coughing and complaining that their eyes were stinging. The lifeguards called for emergency first aid personnel. Upon arrival, the first responders noted that about 34 people who were swimming in the pool at the time of the incident were experiencing respiratory irritation, shortness of breath, and skin rashes. A total of about 22 individuals experienced health effects and sought medical treatment. Seventeen people were transferred via ambulance for urgent care.

The Contra Costa Environmental Health Division was contacted and arrived to investigate the incident. The Environmental Health Division tested the water and found chlorine levels between 10.5 and 13.5 parts per million (ppm). The maximum concentration permitted by the approved label for Liquichlor is 4 ppm. "Re-entry into treated swimming pools is prohibited above levels of 4 ppm of chlorine due to risk of bodily harm." The label also states

that "[i]t is a violation of federal law to use this product in a manner inconsistent with its labeling." (AR 228-232.)

The State Department of Public Health is responsible for the supervision of sanitation, healthfulness, and safety of public swimming pools. The Department is directed to make and enforce such regulations pertaining to public swimming pools as it deems proper. In accordance with this authority, the Department has adopted regulations governing a wide range of pool safety issues, including the permissible range of "disinfectant" concentrations in public swimming pools. Under the Department's regulations, the maximum concentration of a disinfectant (such as chlorine) in public pool water is 10 ppm. (22 C.C.R. § 65529.) Thus, the chlorine levels in the City's pool on the date of the incident exceeded both the maximum level permitted by the label and the maximum level permitted by the Department's regulations.

Following the incident, the County's Environmental Health Division issued a report setting out corrective actions to be taken by the City. The Division declined to assess any fines against the City.

The Contra Costa County Agricultural Commissioner's office, which is authorized to enforce state pesticide laws, also was notified of the incident. (See Cal. Health & Saf. Code § 105200.) The Agricultural Commissioner investigated the incident for a possible violation of Food and Agricultural Code section 12973, which prohibits the use of pesticide in a manner that conflicts with its registered label. Following an investigation, the Agricultural Commissioner found that the City violated section 12973 by using Liquichlor in a manner inconsistent with its label. The Agricultural Commissioner notified the City that he intended to impose a \$5,000 fine for the violation.

The City requested a hearing to contest the penalty. After a hearing, the Hearing Officer issued a written ruling upholding the penalty. The City then appealed to the Department of Pesticide Regulation (DPR), which affirmed the decision and upheld the penalty. This petition followed. The City argues that penalty must be set aside because, under California law, the regulation of swimming pool sanitation is governed exclusively by the Health and Safety Code's "Swimming Pool Sanitation" laws, which take precedence over any conflicting "registration requirements" in the Food and Agricultural Code.

#### Standard of Review

The City does not challenge DPR's factual findings. The only issue before the court is whether the Agricultural Commissioner/DPR had authority to penalize the City for violating Food and Agricultural Code section 12973. This is a question of statutory interpretation.

The weight accorded to an agency's interpretation of the law is "fundamentally situational," and "turns on a legally informed, commonsense assessment of [its] contextual merit." (*Yamaha Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12, 14.) Where the meaning and legal effect of a statute is the issue, the agency's interpretation is one

among several tools available to the court. Depending on the context, it may be helpful, enlightening, even convincing. It may sometimes be of little worth. (*Id.* at p.8.) In determining how much weight to give an agency interpretation, courts must analyze two broad categories of factors: those indicating that the agency has a comparative interpretive advantage over the courts, and those indicating that the interpretation in question is probably correct. (*Id.* at p.12.)

But the ultimate interpretation of a statute or regulation is an exercise of the judicial power conferred upon the courts. Thus, while the court accords at least "weak deference" to an agency's interpretation, it is the duty of the court to state the true meaning of the law finally and conclusively, even if this requires the court to overturn an erroneous administrative construction. (*Id.* at p.7; see also *County of Sonoma v. Cohen* (2015) 235 Cal.App.4th 42, 47; *California Association of Professional Scientists v. Brown* (2013) 216 Cal.App.4th 421, 430.)

### Discussion

As DPR argues in its brief, this case involves the interplay of two state regulatory programs: the Health and Safety Code's "swimming pool sanitation" laws and the Food and Agricultural Code's "pesticide" laws.

Under the Health and Safety Code, the Department of Public Health regulates the sanitation and safety of public swimming pools. Consistent with its regulatory authority, the Department of Public Health has enacted regulations governing the permissible range of chlorine concentrations in public swimming pools. The Department's regulations allow concentrations of chlorine in public pools up to 10 ppm.

Under the Food and Agricultural Code, DPR regulates the use of pesticides, in part, by assuring that pesticides are properly labeled and used in accordance with their label requirements. The City admits that Liquichlor is a pesticide subject to the state's pesticide laws, and that, as a pesticide, Liquichlor must be used in accordance with its label. The City also admits that the label for Liquichlor prohibits entry into a swimming pool when the chemical concentration exceeds 4 ppm.

Because the "swimming pool sanitation" laws allow public pool operators to use chlorine in concentrations up to 10 ppm, and the "pesticide" laws prohibit concentrations over 4 ppm, the City argues there is a conflict in the law, and that the "specific" swimming pool sanitation laws must prevail over the more "general" pesticide laws. As a result, the City argues that the Agricultural Commissioner/DPR do not have jurisdiction to penalize the City for exceeding the 4 ppm labeling requirement.

DPR argues that, contrary to the City's contentions, there is no conflict. The laws can be harmonized because it is possible to comply with both the Department of Public Health's regulations and the Food and Agricultural Code's "pesticide" laws. Further, if there were a conflict, DPR argues that the Food and Agriculture's statutory requirements must prevail over the Department of Public Health's regulations. The court agrees.

There is no conflict between the Department of Public Health's "chlorine" regulation (22 C.C.R. § 65529) and Food and Agricultural Code section 12973. The regulation does not require public pools to use 10 ppm of chlorine. It merely requires public pools, when open or in use, to be "disinfected continuously" by use of a chemical that imparts a disinfectant (such as chlorine) at concentrations *between* 1 ppm and 10 ppm.

While the regulation permits use of chlorine in concentrations exceeding 4 ppm, it does not require it.<sup>1</sup> There is no evidence before the court that concentrations exceeding 4 ppm were necessary to "disinfect" the pool. The minimum required concentration of chlorine is only 1 ppm (or 2 ppm with cyanuric acid). Thus, by the terms of the regulation, the City could have complied with both the regulation and the label requirements by keeping the chlorine levels between 1 and 4 ppm when persons were in the pool.<sup>2</sup>

The City argues that harmonizing the laws in this manner essentially nullifies the "higher concentrations" allowed in the Department of Public Health's regulation. However, it is entirely unclear whether this is true. The court has not been presented with the label requirements for other chlorine-based chemicals or other disinfectants. Thus, the court has no means of ascertaining whether there is a product that can be used in excess of 4 ppm to disinfect pools.

Moreover, even if there is a conflict between section 12973 and the Department of Public Health's regulation, the law is clear that the Food and Agriculture statute must prevail.

Administrative regulations that violate acts of the Legislature are void. (*Morris v. Williams* (1967) 67 Cal.2d 733, 748.) An administrative agency may not usurp the legislative function, no matter how altruistic its motives. (*City of San Joaquin v. State Bd. of Equalization* (1970) 9 Cal.App.3d 365, 374.) While this doctrine is most frequently invoked to strike down administrative regulations in conflict with enabling legislation, the principle is equally applicable to a regulation which contravenes the provisions of a different statute. (See *Agric. Labor Relations Bd. v. Superior Court* (1976) 16 Cal.3d 392, 419-420; see also *Engine Manufacturers Assn. v. State Air Resources Bd.* (2014) 231 Cal.App.4th 1022, 1025.) The "consistency" requirement of the Administrative Procedures Act requires that proposed regulations be "in harmony with, and not in conflict with or contradictory to, existing statutes, court decisions, or other provisions of law." (Cal. Gov. Code § 11349.)

A regulation conflicting with a statute is not invalid if the conflict is specially authorized by the Legislature. (See *Agric. Labor Relations Bd.*, *supra*, 16 Cal.3d at p.420.) However, there is nothing in this case to suggest that the Legislature, merely by granting the Department of Public Health general authority to promulgate regulations, intended to vest the Department with authority to override state statutes (and federal laws) requiring that registered pesticides

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<sup>1</sup> Nor is there any language in the regulation purporting to override the Food and Agricultural Code's requirements.

<sup>2</sup> In addition, it is worth noting that the concentration of chlorine in the City's pool exceeded the limits of both the label requirements and the Department's regulation.

be used in accordance with their labels.<sup>3</sup> Thus, even if there is a conflict, the Department's regulation must yield.

Disposition

The petition is DENIED. Counsel for Respondent DPR is directed to prepare a formal judgment, incorporating this ruling; submit it to opposing counsel for approval as to form; and thereafter submit it to the court for signature and entry of judgment in accordance with Rule of Court 3.1312.

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<sup>3</sup> The repeal of former Health & Saf. Code § 116064.1 suggests the Legislature does not intend the sanitation laws to occupy the field of health and safety standards for public swimming pools, and that Legislature does not intend the Department of Public Health to have plenary authority over the use of pesticides in public swimming pools. (See Stats 2012 ch 23 § 30 [AB 1467].)

**DECLARATION OF SERVICE BY E-MAIL and OVERNIGHT COURIER**

Case Name: **City of Antioch v. Department of Pesticide Regulation**  
No.: **34-2017-80002687-CU-WM-GDS**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am 18 years of age or older and not a party to this matter; my business address is: 1300 I Street, Suite 125, P.O. Box 944255, Sacramento, CA 94244-2550. I am familiar with the business practice at the Office of the Attorney General for collection and processing of correspondence for overnight mail with Golden State Overnight Courier (GSO). In accordance with that practice, correspondence placed in the internal mail collection system at the Office of the Attorney General is deposited with the overnight courier that same day in the ordinary course of business.

On May 21, 2018, I served the attached **[PROPOSED] JUDGMENT DENYING PETITION FOR WRIT OF ADMINISTRATIVE MANDAMUS** by transmitting a true copy via electronic mail. In addition, I placed a true copy thereof enclosed in a sealed envelope, in the internal mail system of the Office of the Attorney General, for overnight delivery, addressed as follows:

Derek P. Cole  
Elizabeth M. Perez  
COTA COLE & HUBER LLP  
2261 Lava Ridge Court  
Roseville, CA 95661  
Email: dcole@cotalawfirm.com;  
eperez@cotalawfirm.com

I declare under penalty of perjury under the laws of the State of California the foregoing is true and correct and that this declaration was executed on May 21, 2018, at Sacramento, California.

\_\_\_\_\_  
Leticia Aguirre  
Declarant

  
\_\_\_\_\_  
Signature