IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT, DIVISION \_\_\_\_

IMMEDIATE STAY REQUESTED

PESTICIDE FOGGING TO RECOMMENCE

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

CHERIEL JENSEN, HEALTHY ALTERNATIVES 2 PESTICIDES

Petitioners

vs.

SUPERIOR COURT OF SANTA CLARA COUNTY

Respondent Case No.

SANTA CLARA COUNTY VECTOR CONTROL DISTRICT,

Real Party in Interest

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Santa Clara County Superior Court Case No. 1-14-CV266780

The Honorable Joseph H. Huber, Judge

(408) 882-2330

**PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF**

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**INTRODUCTION**

After seven years responding to an “emergency” to control the West Nile Virus through mosquito abatement with pesticide fogging of residential neighborhoods, the “Silent Spring” decried by Rachel Carson has revisited the Santa Clara Valley. Petitioners seek to reverse that. The two questions presented in this Petition are questions of law.

1. Under the California Environmental Quality Act (CEQA), Public Resources Code §21000 et seq, does the adoption of a Categorical Exemption for the approval of a “vector control program”, including the use of pesticide fogging for mosquitoes in the event of an emergency disease outbreak, preclude all later “CEQA” challenges to decisions implementing that program?
2. Is a warrant required pursuant to The Fourth Amendment to the US Constitution and Article 1, Section 13 of the California Constitution as referenced in Health and Safety Code §2053(b) when a public employee on a public street deliberately directs a pesticide fog onto a private property?

In this case Petitioners seek to compel the Santa Clara County Vector Control District to obtain a warrant, based upon probable cause, prior to any further pesticide fogging of private residences for mosquitoes alleged to be carrying the West Nile Virus. In addition Petitioners seek to compel the Vector Control District to prepare an environmental impact report pursuant to the CEQA prior to any further pesticide fogging of residential communities in Santa Clara County.

An immediate stay of the Trial Court proceedings is requested. By ORDER RE: DEMURRER TO SECOND AMENDED PETITION FOR WRIT OF MANDATE filed March 26, 2015, EXHIBIT 1, EXHIBITS IN SUPPORT OF PETITION FOR WRIT OF MANDATE OR OTHER APPPRORIATE RELIEF, the Trial Court, the Honorable Joseph H. Huber, granted the demurrer without leave to amend. The Trial Court exceeded its jurisdiction in that its decision on the law was in error. This Court is asked to halt all further proceedings in the Superior Court pending the determination of this Writ Petition. Petitioners’ 4th Amendment Right to be safe and secure in their homes free from governmental intrusion without a warrant, or permission, is imperiled so long as this Trial Court ruling is not stayed. The ordinary process of appeal is too lengthy to adequately protect Petitioners’ and the public’s Constitutional rights without irreparable injury.

Further, an immediate stay of any further pesticide spraying of residential communities with etofenprox by Real Party in Interest is also requested. Real Party in Interest has adopted a practice in 2011 whereby upon receiving notice of a dead bird, infected with the West Nile Virus (WNV), traps are set out around the dead bird for mosquitoes. EXHIBIT 13, Santa Clara County Mosquito-Borne Virus Response & Operations Plan, p.3, Exhibit A to DECLARATION OF CHERIEL JENSEN IN SUPPORT OF PETITION FOR WRIT OF MANDATE AND INJUNCTIVE RELIEF Upon finding one mosquito in one of the traps infected with WNV, pesticide fogging is performed on all areas within a one-mile radius. Id As of March 26, 2015, Real Party in Interest had found three infected birds according to its website. Last year pesticide fogging commenced in May. This year, unless stayed by this Court, Real Party in Interest will commence spraying in this month, April, or May.

The pesticide spraying is acknowledged to harm most insects, good and bad alike, on each property sprayed. The label for the product currently being used by Real Party in Interest, ZenivexE4, specifies that it is harmful to bees. See EXHIBIT 3, SECOND REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF RESPONDENT’S REPLY TO PETITIONERS’ OPPOSITION TO DEMURRER, Exhibit D thereto, Zenivex Label, p.3 . Last year’s spraying resulted in a serious decline this year in the local Santa Clara Valley bee population. See Declaration of Frank Holt, EXHIBIT 17.

The label also states it can be harmful to humans as well. EXHIBIT 3, Exhibit D thereto, “Material Safety Data Sheet” p.1 of 4. As Dr. Moench sets out in his declaration submitted to the Trial Court, virtually any chemical a mother is exposed to will enter the bloodstream of her developing fetus. EXHIBIT 14, p.4 That is why pregnant women are advised to avoid any unnecessary exposure to chemicals, or even pharmaceuticals. Id Etofenprox falls into that category to be avoided by pregnant women. Id, pp.6-7 Spraying residential communities with etofenprox threatens to cause irreparable injury to humans, as well as the local insect populations and the animals whose food source is insects.

Upon the demurrer of the Santa Clara County Vector Control District, the Trial Court found no cause of action under CEQA could be stated challenging the District’s decisions being made in 2014 and 2015, to apply the pesticide etofenprox in residential areas. EXHIBIT 1, ORDER, p.5. The reasoning was that because of the 2007 decision to adopt a benefit/assessment for the vector control program, including mosquito control, and the accompanying Notice of Exemption for a “Categorical Exemption”, under CEQA the statute of limitations had run in 2007 on all activities identified in the vector control benefit/assessment. Id. The Trial Court found that changes in the chemical being applied did not affect the statute of limitations bar. Id

This is a clearly erroneous holding. It grants Respondent the same right to continue its “program” of pesticide fogging as if an EIR had been done. Despite new evidence of changed conditions, changes in the project such as the chemical being applied, no further environmental review for subsequent discretionary decisions would be necessary under the Trial Court’s ruling. Compare Public Resources Code §21166 which states the conditions on when further environmental review is required.[[1]](#footnote-1) . But here no EIR was ever done. Instead, the practice of pesticide fogging initiated to respond to a perceived “emergency”, has morphed into an annual event every year since 2007. Every year since 20007 Respondent has made discretionary decisions to apply various pesticides throughout the residential communities of Santa Clara County without ever analyzing the environmental impacts thereof in any document authorized under CEQA. An EIR, a document of environmental accountability, would demonstrate to an apprehensive citizenry that local government officials have indeed studied the environmental repercussions of their decisions prior to making the tough decision to have the government place a pesticide poison on and about people’s homes and businesses.

The First Cause of Action in Petitioner’s Second Amended Complaint alleges Respondent has been making discretionary decisions to carry out pesticide fogging operations throughout various parts of Santa Clara County since 2007 including 2015, without making any references to compliance with CEQA. As set out in the Second Cause of Action an EIR is required because there is substantial evidence the pesticide fogging may have significant adverse environmental impacts.

The alternative basis for relief rests in the Constitutional Right guaranteed by the Fourth Amendment, and in the California Constitution at Article I, Section 13, for the people to be safe and secure in their homes free from governmental intrusion. This Constitutional Right has been incorporated into the organic legislation for the Respondent Vector Control District wherein Health and Safety Code §2053(b) states that vector control agents may enter private property without permission or notice, *subject to the United States and California Constitutions.* This means that a warrant is required unless exigent circumstances require governmental intrusion without a warrant. In the case of *Gleaves v. Waters* (198) 175 Cal.App.3d 413, the Court held that “a search within the meaning of the fourth Amendment occurs whenever one’s reasonable expectation of privacy is violated by unreasonable governmental intrusion.” Id., 175 Cal.App.3d at 419.

In this case the Trial Court found the pesticides are delivered to the private properties from the adjoining public streets thereby negating any “entry” onto private property requiring a warrant. EXHIBIT 1, ORDER, p.7

The release of pesticides in a manner intended to enter private properties is an unpermitted entry onto private property by the RPI. Certainly the release of a poison onto the land of another is a trespass, which is defined as an unpermitted entry onto the land of another. Since time immemorial depositing material onto the property of another without consent is an entry for purposes of trespass. It would seem the only way for the Respondent to obtain the right to enter onto private property with a pesticide poison consistent with the Constitution is for the Respondent to obtain a warrant based upon probable cause to believe a public nuisance exists on said private property warranting summary abatement, or for there to be exigent circumstances negating the ability to secure a warrant and still protect the public’s interest.

There cannot be a reasonable governmental intrusion unless it is a reasoned intrusion. A reasoned intrusion must be passed upon by a magistrate in the context of issuing a warrant showing probable cause to believe a condition on the private property requires governmental intrusion.

Herein Respondent has no probable cause to support its program of spraying all property within one mile radius around a single mosquito confirmed to be infected with WNV. A single infected mosquito of the species most often found with the WNV in Santa Clara County will generally fly no more than one-quarter of a mile in their lifetime, but finding one infected mosquito triggers pesticide fogging of over 3 square miles of residential communities under the protocols used by Real Party in Interest (RPI). RPI does take the time to notify communities where spraying is to be conducted, anywhere from three days to 13 days with 6-7 days being the mean average. There is no exigent circumstance precluding obtaining a warrant. Compare *Gleaves v. Waters,* supra, 175 Cal.App.3d at 419

There is no dispute on the facts in this case both because it was decided on a demurrer, requiring all facts pled to be assumed as true, and because the documents subject to the Request for Judicial Notice are also not contested as to their contents.

Last summer there were 19 instances of Respondent’s pesticide foggings for mosquitoes. Given a radius of one mile for each fogging, roughly 65 square miles of the Santa Clara Valley were sprayed in 2014. This year the Santa Clara Valley is experiencing a “Silent Spring” first noted by Rachel Carson, and for the same reason, community-wide dousing with a toxic pesticide. Beehives are smaller, fewer bees, butterflies are gone, tree frogs no longer sing in Vasona Creek, the numbers and varieties of birds in the area is diminished as the food supply of insects is decimated by the pesticide foggings.

Further, people with chemical sensitivity are driven from their homes, as are expectant mothers, and mothers with newborns, particularly lactating mothers. People’s health is being put in jeopardy and compromised by the pesticide spraying.

For either, and both, of these reasons a writ should issue staying further pesticide fogging of residential communities in Santa Clara County by Respondent unless and until it has caused to be prepared and considered an EIR; and unless and until Respondent has secured a warrant for the entry onto private properties with a pesticide poison.

PETITION FOR WRIT OF MANDATE OR OTHER APPROPRIATE RELIEF

For the reasons set forth below Cheriel Jensen and Healthy Alternatives 2 Pesticides respectfully petition this Court for a writ of mandate or other appropriate relief;

1. Staying the effect of the Trial Court’s granting of the demurrer without leave to amend thereby leaving Petitioners with no legal recourse other than appeal which would be lengthy during which time Petitioners will suffer irreparable injury; and
2. Staying the actions of Real Party in Interest (RPI) in the application of pesticides to combat adult mosquitoes potentially carrying the West Nile Virus onto private properties in residential communities of Santa Clara County without a warrant and without having caused to be prepared and considered an EIR on the environmental impacts of the “adulticiding”[[2]](#footnote-2) program.

THE PARTIES

1. Petitioners Cheriel Jensen and Healthy Alternatives 2 Pesticides were the Petitioners in the action before the Trial Court in Santa Clara County Superior Court Case No. 1-14-CV266780
2. Respondent Santa Clara County Superior Court is the Court from which Petitioners seek relief from demurrer without leave to amend.
3. Real Party In Interest Santa Clara County Vector Control District was the Respondent in the writ of mandate proceeding below.

STATEMENT OF THE CASE

1. This action was commenced on June 19, 2014, by Cheriel Jensen, in pro per. While in pro per she applied for a preliminary injunction to halt the pesticide spraying by Respondent due to the failure to have prepared and considered an EIR. EXHIBIT 4 While the motion was pending, Petitioner Cheriel Jensen joined with Healthy Alternatives 2 Pesticides in an Amended Complaint, prepared and filed by counsel. The motion for a preliminary injunction was denied on September 4, 2014, based upon the pleadings and presentation of facts by Cheriel Jensen whilst in pro per. EXHIBIT 8 Since the spraying near her house had been completed, the Court ruled her need for immediate injunctive relief was moot, among other reasons.
2. A demurrer to the Amended Complaint was sustained with leave to amend on October 24, 2014. A Second Amended Complaint was filed November 14, 2014. EXHIBIT 9 A demurrer to the Second Amended Complaint was sustained without leave to amend by Order filed on March 26, 2015. EXHIBIT 1 The Order finds that the 2007 approval of a benefit/assessment for vector control by RPI with a categorical exemption from CEQA created a statute of limitations bar to any challenges to the mosquito abatement program. Specifically the Trial Court noted a change in the pesticide used would not be a new project for purposes of CEQA analysis. EXHIBIT 1, p.5 Thus, the statute of limitations applied due to the 2007 decision. As to the issue of whether a warrant was required prior to applying the pesticide fogging on private properties, the Order states that “The ‘entry’ of a pesticide spray or fog from a sidewalk or street or any other nearby public property (or private property entered with permission) is simply not an ‘entry’ under the code section, much less an entry by a District employee onto private property.” EXHIBIT 1, p.7
3. Because a Judgment has yet to be filed dismissing the case, no appeal has been taken yet. This Petition seeks to stay further proceedings in the Trial Court pending this Court’s review of the issues of law. If the Superior Court is allowed to proceed to issue a final judgment of dismissal, Petitioners will perfect an appeal. This Petition and any requisite appeal will be based upon the argument that the Trial Court erred in failing to find that RPI had a continuing duty to examine the environmental implications of its discretionary decisions to apply pesticides to residential communities in Santa Clara County. Every year, and particularly when a change was made in the pesticide used, Respondent had an obligation to examine the environmental impacts of its discretionary decisions which it failed to do.
4. This Petition and the appeal will also assert that the “entry” onto the land of another without permission or a warrant for use of a pesticide poison is considered a trespass. Thus, whether Respondent’s employee put his boots on private property to spray it, or stayed on the street while spraying the pesticide poison onto private property, should matter not. Either way, the rights of the residents of Santa Clara County to be safe and secure in their homes free from “unwarranted” governmental intrusion is guaranteed in the United States and California Constitutions, and is carried forth in Health and Safety Code §2053(b). The current spraying program violates those rights. The Trial Court erred as a matter of law in finding otherwise.

STATEMENT OF PERTINENT FACTS

1. Commencing in 2005, Respondent proposed a new financial assessment of properties in Santa Clara County. EXHIBIT 2, REQUEST FOR JUDICIAL NOTICE IN SUPPORT OF RESPONDENT’S DEMURRER TO PETITIONERS’ SECOND AMENDED COMPLAINT AND PETITION FOR WRIT OF MANDATE, Exhibit D Santa Clara County Vector Control District Mosquito, Vector, and Disease Control Assessment, Engineer’s Report, p.1. The assessment was needed to maintain current levels of service and to enhance disease surveillance and vector control services to better respond to the growing threat of West Nile Virus and other public health issues. Id
2. The “Engineer’s Report” on the assessment describes all the programs the District will spend the money on from the assessment, for “mosquito control” to “upgrading the facilities and Equipment Utilized by the SCC VCD”. Id, at pp.1-2
3. While the Engineer’s Report discusses the Respondent’s efforts regarding mosquito surveillance and treatment in some detail, Id., pp.8-9, 13-15, there is no discussion of the then current practice of “adulticiding”. Indeed the entire discussion of killing adult mosquitoes is, “The District maintains the capability of applying aerosolized insecticide for area treatment of adult mosquitoes. However, this capability is unlikely to be used except in the event of an emergency, such as a significant disease outbreak.” Id, p.13
4. While the Engineer’s Report goes on to discuss the benefits of the assessment being proposed, Id, pp.23-29 it is clear it is the assessment that is being analyzed, not the mosquito abatement program. Id, pp. 23-24. This is crystalized when one notes the “CONSEQUENCES OF NEGATIVE ACTION” is no money. EXHIBIT 2, Exhibit B, County of Santa Clara Department of Agriculture and Environmental Management Department of Environmental Health Vector Control District Memorandum, p.4
5. The assessment was adopted by Respondent on May 1, 2007. EXHIBIT 2, Exhibit C. A Notice of Exemption from CEQA was also approved by Respondent that date. EXHIBIT 2, Exhibit A. The Exemption Notice states it is for the adoption of “Santa Clara County Vector Control District Comprehensive Description and Analysis of Programs and Services.” Id. “The programs consist of the District’s ongoing integrated mosquito management and control, the rodent program, the urban wildlife program, disease surveillance and education and outreach.” Id
6. Three months later, and without any findings of an emergency, in July, 2007, Respondent determined to “conduct ground fogging to suppress adult mosquitoes” for the first time that year. EXHIBIT 20, AR 57.[[3]](#footnote-3)[[4]](#footnote-4) In the area to be fogged 15 WNV infected birds and one “group of positive mosquitoes” had been found. Id. The product used was Pyrenome 25-5, which is a pyrethrin at an ultra-low flow from truck-mounted foggers discharging an estimated one ounce per acre. EXHIBIT 3, Exhibit B, 28, 30 The truck mounted foggers should be designed to throw the aerosol up to 150 feet on either side of the truck as a 300 foot swath is recommended in the label. EXHIBIT 3, Exhibit D, p.2
7. Spraying of residential areas was continued by Respondent in 2008, EXHIBIT 20 AR 62, 2009, AR 67, 2010, AR 69, and 2011, AR 89.
8. In 2011, Respondent’s Board adopted the “SANTA CLARA COUNTY MOSQUITO-BORNE VIRUS RESPONSE & OPERATIONS PLAN”. [PLAN] EXHIBIT 2, Exhibit I As stated in the Resolution adopting the plan, the Board approves policies to be carried out for the operations of the district. EXHIBIT 13, Exhibit B to DECLARATION OF CHERIEL JENSEN IN SUPPORT OF WRIT, Resolution 2011-1, p.1.[[5]](#footnote-5) The Resolution noted that WNV was “endemic in California.” Id. The PLAN describes the district’s current [in 2011] surveillance and response program for mosquito-borne viruses. EXHIBIT 2, Exhibit I The PLAN states, “A single positive pool of one or more mosquitoes…results in public outreach and limited truck-based ultra-low volume (ULV) adulticiding operations.”. Id p. 6. In fact the ground fogging is done within a mile radius of a trapped WNV-infected mosquito. EXHIBIT 2, Exhibit I, Appendix I, p.55.
9. Truck-mounted fogging continued through the summer of 2011, and resumed in 2012, 2013, and 2014. EXHIBIT 20, AR 89, 100, 116, 120, 136, 142, 147, 154, 235, 313 By 2013 Respondent had switched products in its pesticide fogging to Zenivex E20, EXHIBIT 3, Exhibit D, with the active ingredient being etofenprox, a lower toxicity non-ester pyrethroid. Id at AR241
10. The ZenivexE20 label states that it is toxic to aquatic organisms and bees. EXHIBIT 3, Exhibit D, p.11 Repeated exposure to skin can cause skin irritation, it can cause moderate eye irritation, and it is harmful if swallowed. Id Because the inert material contains petroleum product, EXHIBIT 3, Exhibit D, p.10, it may pose an aspirational pneumonia hazard. EXHIBIT 3, Exhibit D, p.11
11. Substantial evidence exists that the spraying with Zenivex E4 does have a significant adverse environmental impact. It kills bees, and other potentially beneficial insects such as dragonflies and other aquatic invertebrates. Id It makes people with chemical sensitivities sick, EXHIBIT 3, Exhibit A, p. 35, EXHIBIT 9, SECOND AMENDED PETITION FOR WRIT OF MANDATE AND INJUNCTIVE RELIEF,1-2 , EXHIBIT 13 , DECLARATION OF CHERIEL JENSEN IN SUPPORT OF WRIT Areas fogged for mosquitoes support fewer insects thereby reducing the available food supply for bats and birds thereby reducing the number of bats and birds in locations that are fogged. EXHIBITS 15, 16, DECLARATION OF KATHYN MATHEWSON, DECLARATION OF RICHARD FAGERLUND Children walking to school on mornings after fogging will inhale an unknown amount of this pesticide aerosol. EXHIBIT 16 DECLARATION OF RICHARD FAGERLUND, EXHIBIT 13, DECLARATION OF CHERIEL JENSEN IN SUPPORT OF WRIT. Localized losses of bees will cause diminished pollination for all growers. EXHIBIT 15 DECLARATION OF KATHRYN MATHEWSON, EXHIBIT 16, DECLARATION OF RICHARD FAGERLUND.
12. Pesticide fogging resumed with Zenivex E4 May 22, 2014, the earliest ever in response to finding WNV infected mosquitoes. EXHIBIT 20 AR 235 Record-breaking levels of WNV infections were observed in 2014. EXHIBIT 20 AR 313. The last fogging was done on September 18, 2014, after finding a WNV-infected mosquito on September 11, 2014. EXHIBIT 20 AR 344.
13. The time between detection and the fogging has varied from as little as four days, EXHIBIT 20 AR 136, 147, to as much as 10 days, EXHIBIT 20 AR 89, 331, and even 13 days. EXHIBIT 20, AR 67 It is most frequently about 6 or 7 days, EXHIBIT AR 120, 142, 295, 312, 334, 344. Time enough to provide notice to the residents whose properties are being sprayed, e.g. EXHIBIT 20, AR 89. However, the time from the date of the press release notice of the spraying, to the date of the proposed spraying, varied from as little as one day, EXHIBIT 20 AR 154, 295, 313, to as much as 7 days. EXHIBIT 20 AR 69 .
14. On or about March 27, 2015, RPI reported on its website of finding three dead birds infected with WNV in zip codes 95124, 95123, and 95014. Under RPI’s practices, the dead birds trigger mosquito trapping, which has previously always precipitated pesticide fogging. Unless restrained by this Court, Respondent will resume pesticide fogging of residential communities in Santa Clara County without ever having studied the environmental impacts thereof and without securing a warrant before entering private properties causing irreparable injuries to Petitioners. Petitioners will suffer irreparable injury to their right to be safe and secure in their homes if Respondent is allowed to proceed with pesticide fogging of private properties without first securing a warrant. Petitioners will suffer irreparable injury to their interests in maintaining a healthy environment with bees and butterflies and other beneficial insects that will be killed by the pesticide fogging and with a diversity of birds and bats that will be diminished along with the insect food supply. Petitioners will suffer irreparable injury from being assaulted with this pesticide chemical throughout their property while not knowing what the long-term risk of exposure to this chemical might be to their person, their children, their pets, or their gardens.
15. If a stay of further pesticide fogging is granted there will be negligible if any harm to the interests of Respondent in protecting people from the WNV. The results of Respondent’s 7 years of pesticide fogging have done nothing to reduce the incidence of WNV over time according to RPI’s report. See EXHIBIT 18. At least one study has been done of the incidence of WNV in communities that use pesticide fogging and in communities that do not. That study found the statistical difference of WNV incidence to be negligible with one suite of communities that used pesticide spraying having a WNV incidence of 1.37 people/100,000 while the others that did not spray had an incidence of 1.19 people/100,000. See EXHIBIT 19 In 2014 Santa Clara County had 11 human cases of WNV. See EXHIBIT 18.[[6]](#footnote-6) Given that the pesticide fogging is only a minor effort by Respondent in its fight against the WNV[[7]](#footnote-7), its suspension pending the determination by this court of this case, should pose no serious hardship on Respondent’s effort to combat WNV nor the public interest.
16. No stay of pesticide spraying has been sought in the Trial Court since Petitioner’s Cheriel Jensen’s effort in pro per last year. Given the Trial Court’s ruling on the demurrer indicating Petitioners’ claims had no likelihood of success, any request for a stay of pesticide fogging to the Superior Court would have been futile.

PRAYER

Wherefore Petitioners pray that this Court:

1. Issue its Writ of Mandate, or other appropriate stay to the Respondent’s decisions to dismiss this case and to deny any injunctive relief for the pesticide spraying by Real Party in Interest; and
2. To stay the pesticide spraying by Real Party in Interest pending the disposition of this writ proceeding; and
3. For costs of this appeal including reasonable attorneys’ fees pursuant to Code of Civil Procedure §1021.5; and
4. Grant such other relief as may be appropriate and proper.

Dated: April 4, 2015 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Alexander T. Henson, SB#53741

**VERIFICATION**

I, Cheriel Jensen, declare that I am one of the Petitioners herein. I have read the foregoing Petition for Writ of Mandate or Other Appropriate Relief and am familiar with the contents thereof which are true of my own knowledge.

Submitted herewith are the EXHIBITS IN SUPPORT OF THE PETITION FOR WRIT FOR WRIT OF MANDATE. Each of these documents was submitted to the Santa Clara County Superior Court in Case No. 1-14-CV266780 and would be part of the record on an appeal except Exhibits 17, 18 and 19.

EXHIBIT 17 is the DECLARATION OF FRANK HOLT who keeps bee hives on my property and has noted the adverse consequences of pesticide spraying;

EXHIBIT 18 is a table published on the Santa Clara County Vector Control District’s website setting forth the incidence of West Nile Virus in Santa Clara County over time.

EXHIBIT 19 is a study I found published on the web, examining the effectiveness of “adulticiding” mosquitoes to combat West Nile Virus in 10 selected communities, five of which used adulticiding and five which did not.

Pursuant to Rule 8.486(b)(3), California Appellate Rules, a Reporter’s Transcript of the Hearing on the Demurrer has not been ordered inasmuch as the Judge hearing the matter asked nothing of counsel and said nothing of substance regarding the issues being argued. The Transcript would show only counsel for each side making the points as set out in the legal briefs.

I declare under penalty of perjury the foregoing is true and correct. Executed this 6th day of April, 2015, at Saratoga, California.

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Cheriel Jensen

**MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPPORT OF PETITION FOR WRIT OF MANDATE OR OTHER RELIEF**

1. A WRIT OF MANDATE SHOULD BE GRANTED BECAUSE IT IS NECESSARY TO AVOID IRREPARABLE INJURY AND TO ADDRESS AN IMMEDIATE THREAT TOCONSTITUTIONAL RIGHTS FOR WHICH THE PROCESS OF APPEAL IS NOT TIMELY

This Court has the inherent power to stay any action which would compromise the jurisdiction of this Court to provide complete relief to an aggrieved party. *Deepwell Homeowners Protective Association v. City Council of the City of Palm* (1965) 239 Cal.App.2d 63, 65-67. Where Petitioner will suffer irreparable injury and a stay will not result in ‘disproportionate injury to respondent’ the equities tip in favor of issuing the writ where to deny a stay would deprive the appellant of the benefit of reversal of the judgment against him.” Id, 239 Cal.App.2d at 66.

In this case, Petitioners, and all other residents of the Santa Clara Valley, will suffer irreparable injury by being exposed against their will, and on their own property, to poisonous chemicals put there by the Real Party in Interest without any warrant nor environmental impact report ever having been prepared assessing the impacts of such dosing of an entire community with the pesticide etofenprox.

1. THE TRIAL COURT ERRED AS A MATTER OF LAW
2. CEQA REQUIRES ENVIRONMENTAL REVIEW EACH TIME RESPONDENT MAKES A DECISION TO SPRAY RESIDENTIAL NEIGHBORHOODS WITH A CHEMICAL AND THUS THERE IS NO STATUTE OF LIMITATIONS BAR TO PETITIONERS’ CEQA CLAIM

The California Environmental Quality Act (CEQA) Public Resources Code Section 21000 et seq, requires public officials who have to make discretionary decisions that may affect the environment to study beforehand the potential environmental effects of each such decision. This law applies to the decision to apply pesticides. In *Citizens for Non-toxic Pest Control v. California Dept. of Food and Agriculture* (1986) 187 Cal.App.3d 1575, the Court wrote about the Department’s apple moth eradication program,

“[C]ompliance with the EIR provisions of CEQA serves a more important function than providing the public with a detailed analysis of a project, its likely effect on the environment and alternatives which may be available. It also demonstrates to an apprehensive citizenry that the responsible public agency has considered the ecological implications of its action and correspondingly makes elected and appointed officials accountable for their environmental values. CDFA's attempt to embark on a seven-year, multimillion-dollar pest eradication and control project absent any compliance with CEQA other than its alleged use of a properly registered pesticide served none of these salutary purposes.” Id

Similarly, herein, Respondent has been spraying residential neighborhoods for 7 years with no evidence of a reduction in infected mosquitoes, birds or humans. EXHIBIT 18 Certainly the decision by a governmental agency to spray private property with a pesticide to control a pest is a discretionary project under CEQA. *Citizens For Non-Toxic Pest Control*. 187 Cal.App.3d at 1582-1583. While Respondent mistakenly asserts a statute of limitations based upon 2007 decisions, the decision-making process is renewed each year when the mosquito population recovers from its winter dormancy, and each year when the decision is made to spray pesticides, the RPI is required to assess the environmental implications of such decision in light of the evidence then existing. Public Resources Code §21151.

Consequently the assertion by the Trial Court that the change in chemicals being used made no difference as to whether the statute of limitations was applicable, EXHIBIT 1, ORDER, p.7, assumed that since the program called for adulticiding, it mattered not what chemical RPI used to do so. This ignores the reality of changing circumstances and the duty of public agencies that have continuing discretionary review to document the exercise of that discretion.

The case of *Meridian Ocean Systems Inc. v. California State Lands Commission* (1990) 222 Cal.App.3d 153illustrates the point that where there is continuing discretionary review of an activity, here it was permitting underwater geophysical testing, there is a continuing duty to review the environmental effects of the activity in light of conditions extant when the subsequent discretionary review occurs. In that case, after an initial review found a categorical exemption was appropriate, the State Lands Commission approved permits based upon the categorical exemption believing the project as proposed could not have any significant adverse environmental impact. Id, 222 Cal.App.3d at 160-161. However, when the permits for the activity came back before the Commission for further permits, the Commission determined an EIR was required. Id, 222 Cal.App.3d at 162-163. The applicants then sued the Commission claiming the Agency could not at a late date change its mind concerning the environmental assessment. Id 222 Cal.App.3d at 164 The Court of Appeal rejected this argument and held that because there existed a continuing discretionary review, there was a continuing duty to consider the environmental implications of the project in light of current information in an EIR. Id 222 Cal.App.3d at 165.

Given that this is an activity being done by a public agency, it clearly is a “project” under CEQA. 14 Calif. Code of Regs. §15378 Because the mosquito season is an annual event, the strategy to eradicate the mosquitoes is also an annual decision. It is a discretionary decision in that the Real Party in Interest has discretion as to how the mosquito abatement will be done and where. Certainly there exist restrictions from the Federal and State governments, but within the parameters set by those restrictions, RPI exercises considerable discretion. Certainly there are no set of rules whereby the decision to use “adulticiding” can be said to be ministerial. Compare also *Citizens For Non-Toxic Pest Control*., supra, 187 Cal.App.3d at 1582-1583 holding that the decision to use chemical spraying is a discretionary decision that should be informed by an EIR.

The 2007 environmental assessment was for the “vector control program” and not the specifics of spraying residential areas with pesticide. This is based upon the statement in the Engineer’s Report that spraying would only be done to quell an “emergency” disease outbreak. EXHIBIT 2, Exhibit D, p.13 But no emergency has been declared by any entity of government indicating WNV must be controlled on an “emergency” basis. Even more significantly, Real Party In Interest has failed to acknowledge in any way that the decisions to spray pesticides in residential areas subsequent to 2007 require CEQA compliance. There is no Notice of Exemption, no Initial Study, no reference to previous environmental analysis anywhere in Respondent’s possession other than the paperwork from 2007.

Because any and all discretionary decisions of RPI to approve pesticide spraying are subject to CEQA because they constitute approval of a “project”, Petitioners are entitled to a writ on the First Cause of Action to compel RPI to indicate how it is complying with CEQA for each of its decisions to carry out the discretionary project of spraying private property with pesticide to combat mosquitoes potentially carrying the WNV. Petitioners are also entitled to a writ prohibiting RPI from approving pesticide fogging projects or plans without first performing CEQA compliance. Were RPI to do so, it would find that there is substantial evidence that the project may have significant adverse environmental impacts thus requiring an EIR and the opportunity for public involvement.

Once Respondent has done an EIR as required, subsequent decisions will refer back to the EIR and simply evaluate whether changes in the project or the conditions under which the project proceeds have environmental consequences not previously examined. Public Resources Code §21166, *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 200.

1. THE DEPOSITION OF A CHEMICAL FOG ON PRIVATE PROPERTY TO CONTROL MOSQUITOES CONSTITUTES AN ENTRY ONTO PRIVATE PROPERTY BY AGENTS OF THE GOVERNMENT REQUIRING EITHER CONSENT OR A WARRANT UNDER THE CONSTITUTIONS OF THE US AND CALIFORNIA

Health and Safety Code (H&S) Section 2003(a) announces that it provides the authority for vector control districts such as Respondent. Respondent’s authority to enter private property for the purpose of vector control, including mosquitoes, is set out in H&S Section 2053 and Section 2060 et seq concerning abatement. In enacting the vector control district law, the Legislature did not authorize warrantless searches nor warrantless abatement of vectors such as complained of herein. H&S Section 2053(a) states the District may request a warrant pursuant to Code of Civil Procedure Section 1822.50 which may authorize district employees to enter private property for the purposes of inspecting to determine whether vectors are present, determining whether a prior notice to abate a public nuisance has been complied with, and to abate a public nuisance either directly with appropriate physical, chemical, or biological control measures, or indirectly by giving the property owner notice to abate the public nuisance. H&S Section 2053(a).[[8]](#footnote-8)

Similarly, where the vector control district has knowledge of the existence of a public nuisance upon private property, it must notify the owner to abate it, and hold a hearing thereon if contested. H&S Section 2061

Because Respondent has never sought nor obtained a warrant pursuant to Code of Civil Procedure Section 1822.50 for its mosquito abatement activities to combat the West Nile Virus, the authority for its current program can only come from H&S Section 2053(b) which authorizes district employees to enter any property without hindrance or notice, to inspect the property to determine the presence of vectors, or to determine whether the terms of a notice to abate have been complied with, or to abate a public nuisance or to control vectors with appropriate means, “Subject to the limitations of the United States Constitution and the California Constitution…” Health and Safety Code Section 2053(b).

Those limitations had been previously spelled out in the case of *Gleaves v. Waters* (1985) 175 Cal.App.3d 413, wherein the Court of Appeals wrote, “absent exigent circumstances, the need summarily to abate a public nuisance does not of itself justify state invasion of legitimate privacy interests without consent or a warrant.” Id, 175 Cal.App.3d at 416.

This case challenged the eradication program for Japanese beetle by spraying pesticides in residential areas. Id There was no question but that the existence of the Japanese beetle was a public nuisance. Id The Court considered and rejected the Defendant’s position that summary abatement of a public nuisance was not a search within the constitutional sense writing,

 “Entries onto private property by administrative functionaries of the government, like searches pursuant to a criminal investigation, are governed by the warrant requirement of the Fourth Amendment. (Camara v. Municipal Court (1967) 387 U.S. 523 [18 L.Ed.2d 930, 87 S.Ct. 1727];Michigan v. Tyler (1978) 436 U.S. 499, 504-508 [56 L.Ed.2d 486, 494-498, 98 S.Ct. 1942];Michigan v. Clifford (1984) 464 U.S. 287, 292 [78 L.Ed.2d 477, 483, 104 S.Ct. 641].) Thus, where there is a legitimate privacy interest in the property entered, a warrantless and nonconsensual entry is permissible only where exigent circumstances justify the intrusion. (Michigan v. Clifford, supra, 464 U.S. at p. 292 [78 L.Ed.2d at p. 483].) Depending on the circumstances, a reasonable expectation of privacy may be recognized in certain of the areas surrounding one's home which are, perforce, protected from non-exigent warrantless intrusions by governmental officers. (See generally, Witkin, Cal. Criminal Procedure (1985 supp., pt. 2, ch. IX) Exclusion of Illegally Obtained Evidence, § 921, pp. 120-121.) Id.

The Court went on to write,

“Whether the governmental purpose for the invasion here is to abate a public nuisance by the application of chemicals or to perform a routine inspection, the privacy interests of homeowners are no less affected. The governing principle is explained in Michigan v. Tyler, supra: "The decisions of this Court firmly establish that the Fourth Amendment extends beyond the paradigmatic entry into a private dwelling by a law enforcement officer in search of the fruits or instrumentalities of crime. As this Court stated in Camara v. Municipal Court, 387 U.S. 523, 528 [18 L.Ed.2d 930, 87 S.Ct. 1727], the 'basic purpose of this Amendment ... is to safeguard the privacy and security of individuals against arbitrary invasions by governmental officials.' The officials may be health, fire, or building inspectors. Their purpose may be to locate and abate a suspected public nuisance, or simply to perform a routine periodic inspection.” Id, 175 Cal.App.3d at 419

This constitutional prohibition against “arbitrary invasions by governmental officials” has been applied to mosquito abatement by the Legislature in Section 2053 and is carried forward in Code of Civil Procedure Section 1822.51 requiring there be an affidavit to support the warrant, which affidavit must present good cause for the entry and inspection of private property. As stated in *Vidaurri v. Superior Court* (1970) 13 Cal.App.3d 550, “Without a warrant requirement, the statute authorizing inspection would be unconstitutional.” Id, 13 Cal.App.3d at 553.

In that case, an agricultural inspector, looking for the wooly white fly, entered private property without a warrant or consent. Id. This case emphasized the expectation of privacy that was invaded, and thus violated. The principal was clearly established requiring pest control inspectors to obtain warrants before entering private property, unless the circumstances excuse the warrant, Id, citing *Camara v. Superior Court* (1967) 387 US 523, 528-529. The search for the wooly white fly was not such a circumstance. Id, 13 Cal.App.3d at 554.

In *Department of Toxic Substances Control v. Superior Court* (1996) 44 Cal.App.4th 1418, the Court noted that an administrative inspection search conducted without a warrant violates the US Constitution Fourth Amendment. Id. A warrant requires “probable cause” which requires a weighing of the governmental interest that allegedly justifies official intrusion upon the constitutionally protected interests of the private citizen. There can be no ready test for determining reasonableness other than by balancing the need to search against the invasion which the search entails. Id 44 Cal.App.4th at 1422-1423.

CCP Section 1822.52 sets out the Legislature’s standard that good cause existed for the issuance of a warrant “if either reasonable legislative or administrative standards for conducting a routine or area inspection are satisfied with respect to the particular place …or there is reason to believe that a condition of non-conformity exists with respect to the particular place…” Id.

The Supreme Court has defined the scope of the Fourth Amendment to include a person’s ‘reasonable expectation of privacy’ and thus a search of private houses is presumptively unreasonable if conducted without a warrant. *Michigan v. Clifford* (1984) 464 U.S. 287, 104 S.Ct. 641, 648. Administrative agency searches generally require a warrant. Id, 104 S.Ct. at 646. “If the government intrudes on a person’s property, the privacy interest suffers whether the governmental motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards.” *Marshall v. Barlow’s Inc.* (1978) 436 U.S. 307, 312-13

Consequently it is clear the Legislature has required a warrant for inspections and for abatement of mosquitoes, and a warrant will issue only upon there being reason to believe “a condition of non-conformity exists…” Code of Civil Procedure Section 1822.52

However, the Fourth Amendment, and the California Constitution recognize

“the requirement of a warrant may be excused where circumstances do not tolerate delay, like that incident to obtaining a warrant, of an officer making an arrest. But the basic principle, the constitutional safeguard that, with room for exceptions, assures citizens the privacy and security of their homes *unless a judicial officer determines that it must be overridden* is applicable…” *People v. Ramey* (1976) 16 Cal.3d 263, 273 (Emphasis added) (holding that entering a dwelling to arrest the occupant always requires an arrest warrant.)

Abatement of a public nuisance, including mosquitoes, can certainly be done by the vector control district, but it must follow the rules of the statutes governing its actions. In *Skinner v. Coy* (1939) 13 Cal.2d 407, the Court noted the Agricultural Commissioner could act to abate a nuisance involving infected plants but only by following the prescribed statutory scheme which involved giving prior notice to the property owner of the alleged nuisance condition. Id, 13 Cal.2d at 422.

“It cannot, of course, be doubted that in the exercise of such powers public officers are bound to follow such statutory provisions as may exist regulating the manner in which they shall be exercised and that a failure to do so will render the action taken unlawful.” Id

In this case Respondents needed to get a warrant before proceeding unless there were exigent circumstances negating the warrant requirement.[[9]](#footnote-9)

1. Respondent Has No Evidence of Exigent Circumstances Sufficient To Dispense With A Warrant

While the Legislature has clearly mandated that a warrant is required to inspect real property for mosquitoes or to abate mosquitoes, H&S Section 2053(a), it has also provided that these activities may be done, in a manner consistent with constitutional requirements, without a warrant. H&S Code Section 2053(b). The only exception to the warrant requirement applicable to these activities would be where “exigent circumstances” preclude getting a warrant before government action is taken. *Gleaves v. Waters, supra,* 175 Cal.App.3d at 420. “[E]xigency turns on "whether the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search." *People v. Gemmill* (2008) 162 Cal.App.4th 958, 968[[10]](#footnote-10). Therein the Court noted, “Among those exceptions [to the warrant requirement] is the emergency doctrine…in the absence of a showing of true necessity-that is an imminent and substantial threat to life, health, or property-the constitutionally guaranteed right of privacy must prevail.” Id.

The Legislature in adopting the provisions of Section 2053(b) must have intended to except from the warrant requirement true emergencies such as a bear running through the neighborhood. Authorizing public officials to take direct action to abate a public nuisance is not new. *Leppo v. City of Petaluma* (1971) 20 Cal.App.3d 711, 718. However, any governmental entity taking such action must be prepared to show by a preponderance of evidence that an emergency actually existed. Id. 20 CA 3d at 719. In *Gleaves v. Waters, supra,* the Court found there was no showing the pesticide spraying could not await securing a warrant. 175 Cal.App.3d at 421.

The District cannot be seeking to cover its mosquito spraying for 2014 or 2015 by claiming an “emergency” to excuse itself from seeking a warrant, because the District has not adopted any findings to justify the current spraying as an ‘emergency”. Also the findings of an emergency due to the West Nile Virus in 2007 which were used then to justify the spraying, see above, are no longer an “occurrence” but have become “endemic to California” EXHIBIT 13, Resolution 2011-1, p.1, Exhibit B to DECLARATION OF CHERIEL JENSEN IN SUPPORT OF WRIT , just like earthquakes. Taking measures to prevent an occurrence is not responding to an “emergency”. *Western Municipal Water District v. Superior Court* (1986) 187 Cal.App.3d 1104, 1112-1113[[11]](#footnote-11).

Consequently, because the District has not declared the 2014 nor the 2015 mosquito spraying, “adulticiding”, to be absolutely necessary without a warrant to combat an “emergency”, the Petitioners are entitled to the writ and injunctive relief requested to compel RPI to secure warrants before entering private property for the purpose of mosquito abatement.

1. Placing Any Substance on the Lands of Another Constitutes “Entry”

The Trial Court found that because no government employee entered private property to do the spraying, therefore there was no “entry” for purposes of constitutional protections. EXHIBIT 1, ORDER, p.7 This exalts form over substance and is contrary to the whole history of the common law of trespass. Any entity can be liable for trespass by the “entry” or invasion onto private property of almost anything, including vibrations, *McNeill v. Redington* (1944) 67 Cal.App.2d 315, 319. Given that the placement of almost any substance on the land of another without permission constitutes a trespass, compare *Herond v. Bonsall* (1943) 60 Cal.App.2d 152, 160 (involving heavy equipment), the unconsented placement on anyone’s private property of harmful chemicals is a trespass.[[12]](#footnote-12) J*acobs Farms/Del Cabo Inc. v. Western Farm Services* (2010) 190 Cal.App.4th 1502, 1515. It is a given that if there is no entry onto private property by the government, then there is no constitutional protection needed. But if there is an entry onto private property of a poisonous substance deliberately caused by a government employee, there has been an entry onto private property by a public employee.

It is submitted that as a matter of law and common sense the difference between a government employee coming onto one’s property to douse it with pesticides and having that same employee douse one’s property from the street is only a difference in degree of governmental intrusion, not a difference warranting different constitutional protection.

CONCLUSION

For each of the foregoing reasons, Petitioners are entitled to the relief requested.

Dated this 6th day of April, 2015.

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|  |
| Alexander Henson |

CERTIFICATE OF WORD COUNT

I, Alexander Henson, certify that according to the Word Program word count, this Petition is 8,957 words.

Dated: April 6, 2015 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Alexander Henson

1. The code section becomes superfluous under the Trial Court’s reasoning. Section 21166 states that no further environmental review in an EIR is required unless specified conditions are met. Yet the Trial Court finds that no further environmental review under any circumstances is required whenever a program is approved, and not challenged within the specified statute of limitations, and the current activity was mentioned in that program. [↑](#footnote-ref-1)
2. “Adulticiding” is the industry term for applying chemical pesticides to the adult stage of mosquito development which is the only stage that can fly. [↑](#footnote-ref-2)
3. This statement does not square with the “Engineer’s Report” about the use of ground fogging in 2007 which states it was “unlikely” to be used unless there was an emergency. EXHIBIT 2, Exhibit D, p.13. [↑](#footnote-ref-3)
4. While this case was proceeding as a Code of Civil Procedure §1085 proceeding, the parties agreed upon an Administrative Record of the activities of RPI that was submitted to the Superior Court. Relevant documents from that Administrative Record have been collected in Exhibit 20 hereto. [↑](#footnote-ref-4)
5. The Resolution does not reference any environmental review of the policies in the Plan. Id. [↑](#footnote-ref-5)
6. Respondent could have, but has not, compared the location of the victims’ homes, with its spraying regimen to show whether it has demonstrated its effectiveness in reducing the incidence of WNV. [↑](#footnote-ref-6)
7. The major components are larvaciding and public education. [↑](#footnote-ref-7)
8. Where a Constitutional mandate is involved, the word “may” is not really permissive but rather mandatory in delineating how a public official may perform his or her duty. [↑](#footnote-ref-8)
9. The Respondent could also proceed with an abatement proceeding. Health and Safety Code Section 2061 . [↑](#footnote-ref-9)
10. [↑](#footnote-ref-10)
11. In *Farmers Ins. Exchange v. State of California* (1985) 175 Cal.App.3d 494, 500, the Governor actually declared an emergency and authorized the malathion spraying of residential neighborhoods to combat the Mediterranean Fruit Fly. Id. [↑](#footnote-ref-11)
12. A Cause of Action for Trespass was dismissed by Petitioners inasmuch as the good faith belief by a government official as to the appropriateness of the trespass can excuse the trespass. *People v. Neth* (1970) 5 Cal.App.3d 883, 888 [↑](#footnote-ref-12)