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4 5 6 7 8 9 10 11 12 13	Lawrence E. Culleen (pending pro hac vice admillawrence.culleen@aporter.com 555 Twelfth Street, NW Washington, DC 20004-1206 Telephone: 202.942.5000 Facsimile: 202.942.5999  Thomas W. Stoever, Jr. (Cal. Bar No. 150056) thomas.stoever@aporter.com 370 Seventeenth Street, Suite 4400 Denver, CO 80202-1370 Telephone: 303.863.1000 Facsimile: 303.832.0428  ARNOLD & PORTER LLP Attorneys for Petitioner RECKITT BENCKISER	
14	SUPERIOR COURT OF THE STATE OF CALIFORNIA	
15	COUNTY OF SAN DIEGO	
16		
17	RECKITT BENCKISER LLC,	Case No.:
18 19	Petitioner and Plaintiff,	PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF
i	V.	
20   21	CALIFORNIA DEPARTMENT OF PESTICIDE REGULATION; BRIAN R. LEAHY, in his official capacity as Director of the California Department of Pesticide Regulation; and DOES 1 through 60,	[Pub. Res. Code §§ 21167.1, 21167.5; Code Civ. Proc. §§ 1085, 1060; Gov't Code § 11350; Food & Agric. Code §§ 12751 <i>et seq.</i> ]
22		[Subject to judicial assignment under CEQA, Pub. Res. Code § 21167.1]
23	Respondents and Defendants.	
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PETITION FOR WRIT OF MANDATE; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

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#### INTRODUCTION AND NATURE OF THE CASE. T.

- Petitioner and Plaintiff Reckitt Benckiser LLC ("Reckitt Benckiser," "Reckitt" or the "Company") brings this action against the California Department of Pesticide Control ("DPR" or the "Department") and its Director, seeking a writ of mandate, declaratory relief, and injunctive relief to set aside the adoption and enforcement of DPR Regulation No. 13-002, which was adopted as Cal. Code Regs. tit. 3, §§ 6471 et seq. ("Regulation No. 13-002" or the "Regulation").
- 2. Reckitt Benckiser is the producer of d-CON® rodent control products, which are sold to consumers at retail stores, and only in small packages intended for individual household use. Reckitt does not produce rodent control products intended for sale to professional applicators. Reckitt's bait products contain a rodenticide formulated with a second generation anticoagulant rodenticide ("SGAR") active ingredient. These products are widely used by California consumers, homeowners, and small business owners to control rodents and the health risks associated with them, in homes and businesses around the state. They are the most affordable and effective rodent control method available to consumers.
- The Regulation amends Sections 6000 and 6400 and adopts Section 6471 of Title 3, 3. California Code of Regulations ("CCR"). It designates four active ingredients used in rodenticide products (brodifacoum, bromadiolone, difenacoum, and difethialone) as California Restricted Materials, pursuant to Food & Agriculture Code Section 14004.5, thus classifying as restricted all affected products containing these four SGAR ingredients.
- As a practical matter, classifying all SGAR-containing products in this manner will 4. effectively halt the legal sale to individual consumers of the most cost-effective rodent control products available because Restricted Materials may only be sold by licensed pesticide dealers, and may only be purchased, possessed and used by or under the direct supervision of a certified private applicator or a certified commercial applicator (e.g., licensed professional exterminators). The Regulation applies to all products containing SGAR ingredients. Thus, it restricts products of any size, including not only those sold in bulk (e.g., pails and buckets) which are intended for professional and agricultural users, but also those currently marketed in small placement packs sold exclusively to consumers for individual household use. In doing so, the Regulation restricts

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consumer products that have been legally registered and sold in California for more than thirty years and effectively halts the sale of Reckitt's d-CON® branded rodenticide products, because they are packaged, labeled, and distributed through retailers only for sale to individual consumers and are not sold through licensed pesticide dealers.

- In adopting the Regulation, DPR violated its own statutory mandate and exceeded its 5. statutory authority. DPR has not followed the statutory procedures required before it may cancel an existing pesticide registration. Specifically, DPR has made no showing that any of the statutory prerequisites for cancellation are met and has not provided an administrative hearing on cancellation. See Food & Agric. Code § 12825. Instead, DPR has crafted a regulation that effectively cancels Reckitt's existing registrations, but which DPR claims to promulgate under distinct statutory provisions governing the classification of "Restricted Materials." Those provisions, however, apply to agricultural and commercial uses, not to consumer products. DPR has therefore acted beyond its statutory authority, both by failing to follow the statutory procedures for cancellation and by seeking to classify all products containing SGARs as restricted, without limiting the application of the Regulation to the agricultural or commercial uses to which the restricted use provisions apply.
- DPR also proceeded in violation of the California Administrative Procedure Act 6. ("APA") and the California Environmental Quality Act ("CEQA"). The APA establishes the procedures that state agencies must follow when adopting or amending regulations. It requires, for example, that the agency: give public notice of a proposed regulatory action; provide access to all materials upon which the agency relied and place those materials in the rulemaking file; give interested parties an opportunity to comment; and respond in writing to public comments.
- The APA also requires that new regulations be necessary, clear, and consistent with 7. state and federal law. Agencies must disclose the costs of new regulations to the State as well as the economic impacts on California businesses. The APA requires that agencies explain their reasons for rejecting alternative measures that would be as effective and less burdensome than those adopted. The agency must also demonstrate by substantial evidence that regulations adopted are reasonably necessary to carry out their stated purposes.

- 8. The rules of the APA are designed to foster meaningful public participation in the adoption of regulations and to ensure that the public's voice is heard and that DPR complies with the law. Here, however, DPR ignored important information in its possession which was critical to an adequate assessment, failed to provide sufficient information to the public to engage in these discussions, and failed to show substantial evidence demonstrating that the Regulation is necessary to address its stated goal.
- 9. Pest control is integral to public health in California. SGARs have provided safe and effective pest control to consumers for over three decades. The affordable and effective solution to rodent infestations that Reckitt provides is essential to preventing the spread of disease and related social and economic costs. Before DPR eliminates consumer access to the most affordable and effective rodent control available, it must establish that there is substantial evidence supporting the need for the regulation adopted, and it must consider all of the potential environmental, public health, and economic impacts.
- 10. DPR's failure to comply with the APA in adopting the new regulations has deprived the public of its right to full and meaningful participation in the rulemaking process and resulted in a regulation that is not well-reasoned or supported by substantial evidence. DPR's shortcuts in the process have failed to provide a complete understanding of the impact the Regulation will have, including the economic impact on California's small business and most-vulnerable communities.
- 11. DPR is required to study the environmental impacts and other intended and unintended effects of proposed regulation as a certified regulatory program under CEQA. DPR also must study reasonable alternatives that would reduce the significant environmental impacts of the Regulation. Despite these requirements, DPR concluded here, after cursory and legally insufficient analysis that there would be no environmental impact. It therefore failed to adequately consider any alternatives.
- DPR is required to study the environmental impacts and other intended and unintended effects of proposed regulation as a certified regulatory program under CEQA. DPR also must study reasonable alternatives that would reduce the significant environmental impacts of the Regulation. Despite these requirements, DPR concluded here, after cursory and legally insufficient

analysis that there would be no environmental impact. DPR has not established that indoor consumer use of SGARs contributes to nontarget wildlife exposures. DPR has not established that FGARs and other non-SGAR rodenticides are less dangerous to wildlife, due to increased FGAR resistance and its risks to nontarget wildlife, and substantially unknown risks of secondary exposure from bromethalin. DPR rejected other alternatives that would have been less impactful. These alternatives would achieve as much or more nontarget wildlife protection without the risks attendant to restricting consumer use of SGARs. Therefore DPR failed in its mission and has failed in its duty to adequately consider any alternatives.

- 13. DPR has forged ahead with a rulemaking that effectively cancels Reckitt's registration to sell its products to consumers in California without affording Reckitt the process that is due when DPR intends to revoke a registration. In so doing, DPR not only effectively voids Reckitt's registration to market its products to the customers it has served for decades, but DPR also leaves small business owners, homeowners, residential renters and other consumers without an effective and affordable solution to rodent control. Low-income Californians will be hit hardest, including those in poor neighborhoods, and in minority and inner-city communities.
- 14. For all these reasons, DPR's adoption, implementation, and enforcement of the Regulation should be set aside unless and until DPR complies with California law.

#### II. PARTIES.

#### A. Petitioner And Plaintiff.

15. Petitioner and Plaintiff Reckitt Benckiser manufactures and distributes a full line of affordable and effective rodent control products under the d-CON® brand name. Reckitt's d-CON® rodenticide products include snap and glue traps as well as bait products. Reckitt's d-CON® bait products are marketed in small packages around one pound or less for retail sale to consumers who primarily use d-CON® products to control house mice infestations in their homes and small businesses. The d-CON® rodenticide product line is, and long has been, the leading retail brand of consumer-use rodenticide products in the United States for over sixty years. Reckitt's d-CON® products are not sold or packaged for agricultural or professional users.

d-CON® rodenticide products are formulated with brodifacoum or difethialone, which are second generation anticoagulant rodenticides ("SGARs"). All of the rodenticide bait products currently offered by Reckitt are produced in a pellet form, which is the form that rodents consume most readily. Individual placements do not exceed three weight ounces. Such bait products are comprised primarily of feed materials that are attractive to and edible by rodents, as well as colorants and a bittering agent to discourage accidental ingestion by humans and pets, and serve as an indicator of unintended exposure. A small percentage of the formulation (<0.005%) is the SGAR active ingredient.

#### B. Respondents And Defendants.

- 17. Respondent and Defendant Department of Pesticide Regulation ("DPR") is a public agency of the State of California. DPR was created in 1991 as part of a reorganization of six California agencies (including the Air Resources Board and the State Water Resources Control Board, among others) into a single Cabinet-level agency, the California Environmental Protection Agency ("Cal EPA"). As part of the reorganization, California's pesticide regulation program was transferred from the California Department of Food & Agriculture to the newly formed DPR. DPR's regulatory activities are authorized pursuant to the Food & Agriculture Code.
- 18. Respondent and Defendant Brian R. Leahy is the Director of DPR. Director Leahy is authorized to act on behalf of DPR in executing its responsibilities, and he is responsible to act on behalf of DPR for the adoption, implementation, and enforcement of Regulation No. 13-002. Director Leahy is named as a Respondent and Defendant in his official capacity.
- 19. The true names and capacities of Does 1 through 60 are unknown to Reckitt
  Benckiser. Reckitt is informed and believes, and on that basis alleges, that each of the respondents
  and defendants is responsible in some manner for the acts or omissions of the other respondents and
  defendants, is a real party in interest, or has some interest in the subject matter of this litigation.
  Reckitt sues such respondents and defendants by fictitious names and reserves the right to amend
  this Petition and Complaint by inserting their true names when they are determined.
- 20. Unless otherwise stated herein, the allegations in this Petition and Complaint are made on information and belief.

#### III. JURISDICTION AND VENUE.

- 21. The Court has jurisdiction over this Petition pursuant to Code of Civil Procedure Sections 1085 and 1060, Public Resources Code Section 21168.5, and Government Code Section 11350.
- 22. Venue is proper in this Court pursuant to Code of Civil Procedure Sections 393(b) and 401, because the cause or part of the cause arose and will impact Reckitt in this County, and the Attorney General maintains an office in this County.

#### IV. GENERAL ALLEGATIONS.

#### A. The Problem Of Rodent Infestations.

- 23. Rodents invade millions of homes in California each year. In its own economic analysis, DPR cites to U.S. EPA documents acknowledging the scale of rodent infestations in the United States, including the U.S. EPA's 2006 Impact Assessment, Reckitt Benckiser Comments Concerning California DPR Regulation No. 13-002, dated October 4, 2013 ("RB Comments," attached hereto as Exhibit C at 2 & n.4, Exs. 4, 5).<sup>1</sup>
- 24. Rodent infestations pose significant social, health, economic, and environmental consequences to California households and communities. Those consequences are well known to DPR and amply documented in the record. For example, the U.S. EPA estimates that the annual cost of rodent control to homeowners nationally is at least \$90 million. (Ex. C, RB Comments at 2, 3 n.9). Rodents spread more than thirty-five identified diseases worldwide, including viral, bacterial, protozoan, and other pathogens. (*Id.* at 3 & nn.10-11). Hantavirus, a disease carried by semi-commensal rodents, such as deer mice, which infest cabins, trailers, and other buildings in less urban environments, has occurred in outbreaks causing fatalities in several areas of the country, including at least three confirmed fatalities at Yosemite National Park during 2012. (*Id.* at 3-4 & n.16, Ex.15). Rodents are also responsible for the spread of the plague, which has throughout history devastated communities. Another emerging disease spread by rodents is lymphocytic

Citations herein to "RB Comments" are to comments submitted to DPR by Reckitt during the public comment period, along with the supporting documents and exhibits attached as numbered exhibits to that submission, all of which are contained in the rulemaking file for Regulation 13-002.

choriomeningitis, which is spread to humans through contact with rodent feces, urine and other contamination, and has been identified in a large percentage of house mice in many urban areas. (*Id.* at 4 & n.23, Ex. 19).

- and on minority households and communities. For example, U.S. EPA documents on which DPR relies note that 11% of households below the poverty level in the U.S. face rodent infestations, and U.S. EPA has recognized that "the lower the household income level the greater the expectation of rodent problems." (Ex. C, RB Comments at 2 & n.4). More recent data in DPR's rulemaking file confirms this disproportionate impact, including Census data showing that households with incomes below the poverty level were 72% more likely to have seen signs of rats and 35% more likely to have seen mice in their housing or residences than other households. (*Id.* at 4 & n.19, Ex. 90). A literature survey submitted to DPR concluded that low-income households generally have the highest rate and degree of rodent infestations, which in turn present the greatest opportunities for exposure to various sources of infectious disease and allergens related to rodents. (*Id.* at 5 & n.26, Ex. 22).
- 26. Heightened risk of asthma, and exacerbation of existing asthma symptoms, is another health risk posed by rodents. Elevated levels of mouse allergens are associated with above-average rates of asthma attacks in children. (Ex. C, RB Comments at 3 & n.11). The Centers for Disease Control and Prevention has recognized that "[e]xposure to rats and mice can result in exacerbation of asthma symptoms." (*Id.* at 3 n.11 & Ex. 13). Again, this problem is especially acute for low-income and inner-city households. Literature presented to DPR concluded that "the concentrations [of mouse allergen] in inner-city homes are orders of magnitude higher than those found in suburban homes." (*Id.* at 4 & n.21, Ex. 17). Likewise, a study in Indiana found mouse allergens associated with childhood asthma on the kitchen floors of 36% of low-income households studied. *Id.* Another publication advised pediatricians in 2013 that, "children with asthma who are both sensitized and exposed to high mouse allergen concentrations at home are at greater risk for symptoms, exacerbations and reduced lung function . . . . [r]at allergen is found primarily in inner-

city homes and has also been linked to asthma morbidity among sensitized children." (*Id.* at 5 & n.27, Ex. 18).

27. Other social, economic, and health impacts of rodent infestations are well documented, and ample evidence of those impacts is found in the rulemaking file for the Regulation.

#### B. Rulemaking History.

- 28. DPR issued a Notice of Proposed Regulatory Action on July 19, 2013, and released an Initial Statement of Reasons ("ISOR," attached hereto as Exhibit D) at that time. The ISOR detailed a longer series of contemplated regulatory actions that were never formalized by DPR, dating back to approximately 1999. DPR reports that the impetus for the Regulation was a stated concern of the California Department of Fish & Wildlife's ("DFW") "that California's wildlife are exposed to and may be adversely affected by currently registered uses of brodifacoum, primarily from ingesting rodents with lethal concentrations of this SGAR."
- 29. The ISOR also relied on analysis in a DPR Memorandum dated June 27, 2013, entitled "Second Generation Anticoagulant Rodenticide Assessment" ("DPR White Paper" or "White Paper"). The White Paper constitutes DPR's "assessment, based on available data, of the potential and actual risk to nontarget wildlife from second generation rodenticides." (Ex. C, RB Comments at 7 & n.32).
- 30. Public comments on the Regulation were accepted until October 4, 2013. Interested parties, including Petitioner, submitted voluminous comments, totaling approximately 24,500 unique comments, according to DPR. No public hearing was scheduled or held.
- 31. On February 6, 2014, DPR issued the Final Statement of Reasons ("FSOR," attached hereto as Exhibit E) and submitted the proposed regulations and rulemaking file to the Office of Administrative Law ("OAL") for review. Despite the more than 24,000 comments submitted, DPR did make a single change to the proposed regulations. Rather, the FSOR "incorporate[d] by reference the Initial Statement of Reasons," pursuant to Government Code Section 11346.9(d), stating that "[n]o changes were made to the proposed regulations nor are any changes necessary to the Initial Statement of Reasons."

- 32. The Regulation restricts consumer access to products containing any of the covered four SGAR active ingredients: brodifacoum, bromadiolone, difenacoum, and difethialone. SGARs work by inhibiting a rodent's production of several key blood clotting factors. (*See* Ex. D, ISOR at 2). Since they were developed, SGARs have been a widely-adopted means of rodent control by consumers, particularly for indoor control of rodent populations. SGARs at issue in the Regulation have been registered for legal sale and use in California since 1982 (bromadiolone), 1983 (brodifacoum), 1997 (difethialone), and 2008 (difenacoum).
- 33. Specifically, the Regulation designates SGARs as Restricted Materials under 3 CCR Sections §§ 6000 and 6004, meaning that possession and use requires a pesticide/rodenticide applicator license. Under the Regulation, only professional exterminators and certain licensed agricultural users would be allowed to use SGARs. Residential consumers would be prohibited from purchasing or possessing any products containing SGARs. Additionally, the Regulation restricts above-ground placement of SGARs to no more than fifty feet from a man-made structure, unless further placement (up to 100 feet away from a man-made structure, as allowed by EPA regulation) is required to address a specific feature harboring or attracting rodents. Finally, the Regulation alters the definition of a "private applicator" of pesticides/rodenticides to allow producers of livestock, poultry, and fish to use SGARs with a proper license. The Regulation makes no distinction between urban, rural or agricultural uses, nor does the Regulation limit the quantity of SGAR products that can be applied at any one time.
- 34. DPR is a certified regulatory program pursuant to Public Resources Code Section 21080.5 and therefore did not prepare an Environmental Impact Report pursuant to CEQA for the Regulation. Nevertheless, DPR must adhere to the substantive tenets of CEQA as it engages in a functionally equivalent process under its own regulations.
- 35. Although DPR engaged in a public process leading to the adoption of the Regulation, DPR never conducted the analyses required by statute and critical to meaningful public participation in the agency's rulemaking. DPR conducted *no* environmental impact analysis of the regulations and therefore failed to consider reasonable alternatives that would have alleviated the impact.

- 36. The adoption of the Regulation will have significant direct and indirect effects on health and the environment. Among other things, the impact of voluntary and involuntary changes in managing pest infestations, such as delaying dealing with an infestation because of the expense or resorting to less effective products, causing an increase in pest infestations; the environmental impact from other chemicals and products used to control pests, including effects on children who might be accidentally exposed to alternative rodenticides; the direct effects of the alternative chemicals on nontarget wildlife and pets; the potential for additional environmental loading and consequent adverse impacts on the environment due to the use of less effective products; and impacts on the public health and property due to increased pest infestations due to use of less effective control solutions. These significant effects have not been analyzed by DPR as required under CEQA.
- 37. Despite these failures, DPR adopted the Regulation with no changes from the initial proposal, and no amendments or changes made in response to the extensive public comments.
- 38. The Regulation was approved by OAL and filed with the Secretary of State on March 18, 2014, and will go into effect July 1, 2014, unless this Court requires DPR to comply with the law.
- 39. Petitioner has complied with Public Resources Code Section 21167.5 by mailing written Notice of Intent to Commence Action to the Respondents. A copy of the written notice and proof of service thereof is attached hereto as Exhibit A.
- 40. Petitioner has complied with Public Resources Code Section 21167.7 and Code of Civil Procedure Section 388 by furnishing a copy of this Petition to the California Attorney General. A copy of the written notice and proof of service thereof is attached hereto as Exhibit B.
- 41. Petitioner has performed all conditions and prerequisites to the filing of this action and has exhausted all available administrative remedies with respect to the subject matter hereof.

  During public comment periods and public hearings, Petitioner timely submitted written comments and objections to DPR.
- 42. The Department's determinations are final, and no further administrative remedies are available.

#### V. DPR ACTED OUTSIDE THE SCOPE OF ITS STATUTORY AUTHORITY.

- A. The Department Lacked The Statutory Authority To Adopt A Regulation Designating Non-Agricultural Consumer Use Products As "Restricted Materials."
- 43. Food & Agriculture Code, Division 7, Chapter 2 ("Pesticides," §§ 12751 et seq.) sets forth the scheme for DPR's regulation of pesticides. It defines critical regulatory terms, such as "pest," "rodent," and "pesticide." See id. §§ 12751-12759. It sets out the procedures for DPR to register all pesticides before they may be sold in California. Id. §§ 12811-12837. It governs violations and penalties (§§ 12991-13000.1), and gives the Director of DPR authority to adopt and implement regulations carrying out the statutory mandates. Id. § 12531.
- 44. Pursuant to those provisions and DPR's implementing regulations, Reckitt's consumer-use SGAR products have been registered with DPR and legally sold in California for over 40 years, beginning in approximately 1983.<sup>2</sup> Each of Reckitt's registrations have been renewed by DPR each year, including most recently January 2014.
- 45. The Food & Agriculture Code also governs the classification and designation of "Restricted Materials" and DPR's regulations of those materials. *See* Food & Agric. Code §§ 14004.5, 14005.
- 46. The provisions governing Restricted Materials are codified in a separate chapter of the Food & Agriculture Code, Chapter 3 of Division 7 ("Restricted Materials"). In advancing the present Regulation, DPR purports to act pursuant to those portions of the Food & Agriculture Code, specifically Sections 14004.5 and 14005. Section 14004.5 enumerates six criteria for designating Restricted Materials. Section 14005 provides for regulations governing the possession and use of materials designated as "restricted."
- 47. The statutory criteria for designating materials as "restricted" pursuant to Section 14004.5 describe conditions or hazards that warrant classification of a product as "restricted." These enumerated criteria relate to agricultural uses and contexts, as is clear from the language of the statute. For example, Section 14004.5 allows DPR to designate materials as "restricted," if they

<sup>&</sup>lt;sup>2</sup> Reckitt's products are also registered with the U.S. EPA pursuant to the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA").

pose "[h]azards to applicators and farmworkers;" "[h]azards to domestic animals, including honeybees, or to crops from direct application or drift;" "[h]azards to the environment from drift;" "[h]azards related to persistent residues in the soil;" or "[h]azards to subsequent crops through persistent soil residues." Food & Agric. Code § 14004.5. Four of the six criteria enumerated by the legislature explicitly include such language, including references to "farmworkers" "drift" from pesticide application, and repeated reference to "crops." The other two enumerated criteria, "[d]anger of impairment of public health" and "[h]azards related to persistent residues in the soil," must be read in conjunction with the provisions surrounding them, which provide for designation of "Restricted Materials" in agricultural uses and contexts. Moreover, DPR has made no claim that the Regulation is promulgated on the basis of either of those two criteria.

- 48. DPR has stated that its basis for designating SGARs as "Restricted Materials" is because "SGARs are a hazard to the environment." (Ex. E, DPR Response to Comments<sup>3</sup> at 25 ¶ 90). The explicit statutory criteria for Restricted Material designation however, include "Hazard to the environment *from drift onto streams, lakes, and wildlife sanctuaries.*" Food & Agric. Code § 14004.5(c) (emphasis added). DPR has presented no evidence showing that SGAR products "drift," onto streams, lakes or wildlife sanctuaries, or otherwise, and indeed DPR has made no such claim. DPR has cited no other criteria for designating the SGARs at issue in the regulation as Restricted Materials.
- 49. Other language in the chapter of the Food & Agriculture Code governing "Restricted Materials" further demonstrates that these provisions apply to agricultural uses. For example, the exact provision on which DPR depends for this regulation (Food & Agric. Code § 14004.5), authorizes the agency to adopt regulations that "carry out the purposes" [of Division 7] of the Food & Agriculture Code, which is titled "Agricultural Chemicals, Livestock Remedies, and Commercial Feeds." Numerous other provisions use language targeted to agricultural uses and only make sense in an agricultural context. See, e.g., id. § 14006.5 ("no person shall use or possess any

References to the "DPR Response to Comments" are to Attachment A to DPR's Final Statement of Reasons (attached as Exhibit E hereto), setting forth in table format the Department's responses to comments received during the public comment period.

pesticide designated as a Restricted Material for any agricultural use except under a written permit"); *id.* § 14006.6(a) ("A permit shall not be required for the agricultural use of any pesticide not designated as a Restricted Material unless the commissioner determines that its use will present an undue hazard when used under local conditions").

- 50. The legislative history of the statutory provisions on which DPR relies further demonstrates that the Legislature, in enacting the statutes governing Restricted Materials, intended only to regulate agricultural uses. Section 14004.5 was initially enacted by the Legislature in 1971 in SB 1021, which also amended Section 14005. Numerous examples from the documents that make up the legislative history of that enactment confirm that the purpose and legislative intent of SB 1021 was limited to regulating agricultural pesticides. For example:
- a. In a letter from the Bill's author, Senator Nejedly, seeking the Governor's signature, Senator Nejedly explained that

This measure would change California's Agricultural Pest Control Laws to assure that pesticides may be issued only under permit if deemed to be injurious to environment, persons, animals, or crops . . . . [¶] Additionally, it would provide for the registration of agricultural pest control agents with county agricultural commissioner's. Registered agents would be allowed to make recommendations concerning the agricultural use of any method or device for the control of any agricultural pest or make any recommendation concerning the agricultural use or application of pesticides. (Attached as Exhibit F-1 hereto)

b. Likewise, the Department of Finance, in its Enrolled Bill Report, noted that:

The bill creates a requirement that users of pesticides must have a permit from the County Commissioner to use pesticides for agricultural purposes. (Attached as Exhibit F-2 hereto (emphasis added))

c. The Legislative counsel also, in its Report on Enrolled Bill to Governor Reagan, describes SB 1021 as follows:

[a measure that] Amends, amends and renumbers, adds, and repeals various secs., Ag.C., re agricultural chemicals. (Attached as Exhibit F-3 hereto (emphasis added))

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d. After SB 1021 was amended in the Senate, a Legislative Analysis was prepared which, *inter alia*, included a summary of the Bill specifically describing Section 14004.5 as relates to use of materials "in agriculture:"

Chapter 3, commencing with Section 14001 entitled "Injurious Materials," is substantially amended to change the existing classification of injurious materials to one of Restricted Materials based on specified criteria and retaining the present permit system for use in agriculture of these Restricted Materials and at the same time creates an entirely new classification of exempt materials for use in agriculture for which a permit is not required . (Attached as Exhibit F-4 hereto)

- DPR thus lacks statutory authority to classify and regulate as "Restricted Materials" all SGARs when such a designation would include consumer products formulated with SGAR active ingredients that are packaged in small containers and sold for individual consumer use (e.g., in households and on the premises of small business).
- DPR's previous regulatory actions have recognized and accommodated this limit on 52. the Department's regulatory authority over "Restricted Materials." Thus, in instances where other active ingredients were designated as "Restricted Materials" and the active ingredients have had uses in formulations sold specifically as consumer-use products as well as formulations prepared specifically for agricultural or professional uses, the final regulations have provided an exception for products labeled only for home use. Section 6400(e) of 3 CCR, lists the pesticides that are designated as "Restricted Materials." The Regulation amends that subsection to add Brodifacoum, Bromadiolone, Difenacoum and Difethialone to the list. Prior to this Regulation, DPR has listed as Restricted Materials other active ingredients used in pesticides applied agriculturally or by professional pest control applicators as well as in formulations packaged and sold for purchase and use by consumers or homeowners, but DPR has also included an exception to the restriction for those products in formulations and packages labeled for home use. For example, pesticides such as Carbaryl (Sevin), Disulfoton (Di-Syston), Endosulfan (Thiodan), Lindane, Strychnine, Zinc Phosphide, and certain products formulated as a dust are listed as restricted Materials but contain a "home use" exception. 3 CCR § 6400(e).

- 53. On information and belief, the Regulation is the first instance in which DPR has classified a registered pesticide as a Restricted Material without also applying this established exception for those products that are packaged, labeled and marketed only for excepted uses, including home use.
- Because the Regulation is beyond the scope of authority conferred by the statute that it purports to implement, the Regulation is unlawful and cannot be enforced. *See, e.g.*, Gov't Code § 11342.1 ("Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by the provisions of law."); *id.* § 11342.2 ("no regulation adopted is valid or effective unless consistent and not in conflict with the statute"); *Nortel Networks Inc. v. State Bd. of Equalization*, 191 Cal. App. 4th 1259, 1276-77 (2008) ("An administrative agency may not promulgate a regulation that is inconsistent with the governing statute, or that alters, amends, enlarges, or impairs the scope of the statute.") (citation and internal quotation marks omitted).
  - B. DPR Has Exceeded Its Statutory Authority By Effecting The *De Facto*Cancellation Of Reckitt's Registrations Without Following The Statutory
    Requirements For Such Cancellation.
- 55. The Code also establishes conditions and standards under which the DPR may cancel the registration of any pesticide. See Food & Agric. Code § 12825.
- DPR may cancel existing registrations if it establishes that at least one of nine enumerated statutory criteria has been met. Food & Agric. Code § 12825(a)-(i). These criteria are distinct from the criteria for classification of Restricted Materials (see supra, ¶¶ 43-54), and unlike the Restricted Materials criteria, they are not limited by their terms to agricultural products or uses. DPR may cancel, for example, pesticides "[t]hat [have] demonstrated serious uncontrollable adverse effects" (Food & Agric. Code § 12825(a)) or pesticides for which DPR shows that "[t]he use of [the pesticide] is of less public value or greater detriment to the environment than the benefit received by its use" (id. § 12825(b)), or pesticides for which "the director determines the registrant has failed to report an adverse effect" (id. §12825(g)) or pesticides which "when properly used, [are] detrimental to vegetation . . . domestic animals, or to the public health and safety" (id. §12825(d)). The

Department may recommend cancellation after finding that at least one of the enumerated statutory criteria exists.

- bearing. Food & Agric. Code § 12825. As summarized by the courts, "Food and Agricultural Code sections 12825 and 12827 provide for a hearing and a decision by the director that a pesticide should not be registered or that a registration should be canceled, based on specified grounds." Syngenta Crop Prot., Inc. v. Helliker, 138 Cal. App. 4th 1135, 1160 (2006) (emphasis added). This hearing is conducted in accordance with the Government Code Sections 11500 et seq. and held before a neutral administrative law judge. Food & Agric. Code § 12825; Gov't Code § 11502. DPR must file a statement of issues outlining the basis for the cancellation and the registrant has the opportunity to respond and sometimes obtain discovery. Gov't Code §§ 11504, 11506, 11507.5. Then, at the hearing, both parties have the right to call and examine witnesses, present exhibits, and make arguments before the administrative law judge. Gov't Code § 11513.
- 58. In this case, DPR's action is in effect a cancellation of Reckitt's registrations, which are similar to a license, because it will entirely remove Reckitt's d-CON® SGAR products from the California market. Reckitt's d-CON® SGAR products, all of which have existing, valid registrations with both DPR and the U.S. EPA, are packaged, marketed, and sold only for consumer uses. Reckitt's d-CON® products are not marketed to agricultural users, distributed through agricultural sales channels, nor distributed and sold in quantities that are either intended or appropriate for agricultural users or commercial applicators. DPR's regulatory action therefore acts as a cancellation of Reckitt's existing registrations. DPR's designation of SGARs as "Restricted Materials," pursuant to Section 14004.5 is a thinly veiled effort to avoid the requirements of the Food & Agriculture Code that govern cancellations.
- 59. The statutory prerequisites for cancellation were not met. No notice of intended cancellation was issued to Reckitt, no hearing was held, and DPR at no point made or substantiated a determination that any of the enumerated statutory criteria for cancellation exist. See Food & Agric. Code § 12825(a)-(i). Without establishing that any of the statutorily required criteria is met, and absent a hearing at which Reckitt might contest such a determination (if one had been made),

DPR never adduced evidence or was required to defend its decision in an adjudicative setting. *See* Food & Agric. Code § 12827; Gov't Code §§ 11500 *et seq.* Reckitt was thus not given the process and protections that the statutes require before DPR may cancel existing registrations and effectively terminate the sale of a lawfully registered product in California.

60. Because DPR circumvented the statutory requirements and protections for cancellation, its action is unauthorized by statute and invalid. See, e.g., Gov't Code § 11342.1 ("Each regulation adopted, to be effective, shall be within the scope of authority conferred and in accordance with standards prescribed by other provisions of law."); id. § 11342.2 ("no regulation adopted is valid or effective unless consistent and not in conflict with the statute"); Nortel Networks Inc., 191 Cal. App. 4th at 1276-77 ("An administrative agency may not promulgate a regulation that is inconsistent with the governing statute, or that alters, amends, enlarges, or impairs the scope of the statute.") (citation and internal quotation marks omitted).

#### VI. DPR FAILED TO ACT AS REQUIRED BY THE APA.

- A. DPR Failed To Provide Substantial Evidence That The Regulation Is Necessary To Carry Out Its Stated Purposes.
- 61. Government Code Section 11346.2(3)(b)(1) requires an agency to state "the specific purpose of each adoption, amendment, or repeal . . . and the rationale for the determination by the agency that each . . . is reasonably necessary to carry out the purpose for which it is proposed." A regulation is invalid if "[t]he agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute . . . or other provision of law that is being implemented, interpreted, or made specific . . . is not supported by substantial evidence." *Id.* § 11350(b)(1). Here, DPR has not identified or provided a record of substantial evidence to support the conclusion that the Regulation is reasonably necessary to effect the stated purpose or serve the Agency's statutory mandates.
- 62. DPR claims the Regulation is needed to protect wildlife from alleged risks related to SGARs but has not shown substantial evidence that SGARs cause the alleged impacts to wildlife, or that the indoor consumer use of SGARs specifically contributes to such alleged risks. Absent such

a showing, DPR has not established the necessity of the Regulation, which terminates *all* non-licensed use and sale of SGARs in California, including consumer use of SGARs, because DPR has not established that such a restriction on consumer uses will mitigate the alleged risks to wildlife that DPR seeks to address.

- address the effect of the Regulation on public health or show that its actions protect public health. In fact, DPR's action poses a substantial threat to public health and safety, eliminating the most effective and affordable means for California consumers to reduce and avoid the substantial health risks of rodent infestation, and replacing products that contain a familiar ingredient with products containing ingredients for which there is no antidote in the event they are ingested by humans and domestic animals. The Regulation is therefore invalid because it violates DPR's statutory mandate to protect public health and safety and because DPR, in its rulemaking process, has failed to address these concerns.
  - 1. DPR Has Not Presented Substantial Evidence That The Regulation Is Necessary For The Stated Goal Of Mitigating Alleged Harms To Wildlife.
- 64. The stated justification for the Regulation, which classifies *all* SGARs as Restricted Materials, is DPR's allegation that SGARs pose a risk to nontarget wildlife. (Ex. D, ISOR; *see also* Ex. E, FSOR DPR Response to Comments at 25 ¶ 90 ("The purpose of the proposed regulation is to protect nontarget wildlife.")).
- 65. The Department purports to assess the risks to nontarget wildlife in its White Paper. The DPR White Paper does *not* provide substantial evidence showing that consumer use of SGARs in small quantities labeled for indoor-only use poses a risk to nontarget wildlife or that eliminating such consumer use would reduce any such risks.
  - a. DPR Lacks Substantial Evidence Documenting A Risk To Nontarget Wildlife From SGARS And Thus Overstated The Risk, Particularly From Indoor Consumer Uses.
- 66. DPR has not identified substantial evidence to support the conclusion that SGARs from consumer products are significantly harming wildlife populations in California.

- 67. The DPR White Paper did not consider the likelihood of nontarget wildlife being exposed to SGARs by any particular pathway or means. Indeed, it explicitly states that it reached no conclusions regarding the significance of consumer use as a pathway causing exposures to wildlife. (Ex. C, RB Comments, Ex. 2 at 1) ("While the data show exposure, they do not link specific uses, or location of use of a second generation anticoagulant rodenticide (i.e., indoors or outdoors, homeowners or professionals) to exposure."). In short, the principal analysis relied on by DPR did not answer the most important question: Is wildlife affected by SGARs in products used by consumers? Until that question is answered, DPR cannot establish an actual risk posed by consumer uses of SGARs, or that the Regulation will mitigate that risk.
- 68. Likewise, the DPR White Paper does not characterize the risks to nontarget wildlife from use of SGARs. The data presented in the DPR White Paper amount to a hazard assessment rather than a risk assessment. In other words, it described the toxicity of rodenticides to certain wildlife, but it did not establish, much less quantify, the risk that such wildlife may be exposed to SGARs at levels sufficient to have toxic effects.
- harm to wildlife—demonstrates that only a very small number of wildlife fatalities were likely or definitely attributable to SGAR exposure. Only 211—fewer than half—of the 492 animals reportedly exposed to SGARs were necropsied. Based on its review of the necropsy reports, the Department concluded that SGARs were the cause of death or a likely cause of death in only twenty-nine cases. As DPR conceded, even the finding of SGAR liver residues in other incidents means, at most, that "some of [the] animals could have died" from SGAR exposure. (Ex. C, RB Comments, Ex. 2 at 16 (emphasis added)). The actual causes of mortality cannot be determined. Thus DPR can document at most 29 instances, statewide from 1995 to 2011, in which death or likely death of wildlife was associated with SGAR exposure. As DPR's own peer-review process identified, "the number of mortalities directly attributable to SGARs are usually relatively small compared to the number of exposed animals." (Id. at 9 & n.50, Ex. 28). And, even if SGAR exposure was the cause of death, the source of exposure was unknown.

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- Even with such low numbers, other flaws in DPR's data call the basis for the 70. rulemaking further into doubt. The necropsy reports on which DPR relied can be inconclusive or erroneous; in fact, an independent review of all of the publicly available necropsy reports and analytical chemistry data on which DPR relied found that only thirteen were verifiable cases of deaths related to SGARs. (Ex. C, RB Comments at 9 & n.54). DPR also improperly conflated the level of SGAR residues found in animal livers with cause of death, when in fact the relationship between liver residues and acute oral lethal doses of SGARs is not documented. (Id. at 10-11 & n.61). Further, DPR over-represented the number of rodenticide exposures by including 71. 142 cases reported by the Department of Fish and Wildlife ("DFW"). The DFW submitted only those cases where the animal already tested positive for rodenticide residues. (Ex. C, RB Comments at 10 & nn.55-56). DFW did not provide any context for that number, i.e., what is the total number of mortalities the DFW sees in a year. Thus, DPR could not assess the significance of the figures reported by DFW. 72.
  - 72. Indeed, the DPR White Paper does not provide information on the total number of reported wildlife deaths attributable to all causes. Publicly available information suggests that the number of wildlife deaths that DPR attributes to SGARs (even if correct) is only a small fraction of all wildlife deaths in California. For example, studies in the record estimate that wind energy projects kill 573,000 birds and 888,000 bats nationally each year, and that domestic cats are responsible for hundreds of millions of bird deaths annually. (Ex. C, RB Comments at 10 & nn.58-59). This compared to fewer than thirty potential SGAR reported deaths.
  - 73. Given the problems with DPR's data, and the failure to analyze the numbers of SGAR-related wildlife incidents in comparison to all wildlife mortality, DPR cannot show based on the record that there is substantial evidence that the Regulation is reasonably necessary to curtail wildlife mortality.
    - b. DPR Failed To Provide Substantial Evidence That Restricting Indoor, Consumer Use Of SGARs Is Necessary To Protect Wildlife.

- 74. The DPR White Paper does not address the degree to which any pathway for exposure, particularly indoor consumer use of SGARs, contributes to wildlife mortality. DPR therefore lacks substantial evidence linking exposures to consumer use of SGARs and has not demonstrated that restricting consumer products labeled for indoor-use only is reasonably necessary to protect nontarget wildlife or will be effective in doing so.
- SGARs. (Ex. D, ISOR at 5-6). DPR's analysis does not distinguish between mortality caused by SGARs placed by licensed pesticide applicators (who can continue to use SGARs under the Regulation), versus the use of consumer products containing SGARs. DPR tries to establish a connection between consumer uses of SGARs and wildlife exposures by relying on information about statewide volumes of pesticide sales drawn from the Mill Assessments database and information from the Pesticide Use Report database. (Ex. C, RB Comments at 16 & n. 94). However, this data is based on self-assessment, cannot be verified or peer reviewed for accuracy, and does not provide substantial evidence justifying the regulation. Indeed, DPR is aware of the inaccuracies in this data, including failures of self-reporting, underreporting of rodenticides sold for commercial use, and other distortions, such as internet sales whereby illegal marijuana growers can buy SGARs for deliberate misuse, without obtaining a restricted materials license. (*Id.* at 16 & n.97, Exs. 39.1, 39.2.)
- None of the analysis on which DPR relies (including the DPR White Paper) followed the specific guidance for ecological risk assessments published by the California EPA. (Ex. C, RB Comments at 8 & nn.41-44). Published state and federal guidelines provide the only available guidance for DPR's ecological risk assessment. DPR did not follow California EPA's own written guidance, omitting the critical step of analyzing how and where there is "co-occurrence" that could expose nontarget wildlife to SGARs at toxic levels. DPR's failure to follow California EPA's guidelines produced a regulation that is arbitrary and capricious and lacking in substantial evidence to support the action taken.
  - c. Commercial Or Professional SGAR Applications, Which DPR's Regulation Leaves Unrestricted, Pose At Least As Great A Threat.

- 77. Evidence in the record supports the conclusion that SGAR use by licensed applicators (which will continue under the Regulation) is more likely to cause wildlife exposures than use by homeowners or consumers.
- SGAR baits outdoors, with relatively higher risks of wildlife exposure. The vast majority of consumer rodenticide use, including SGARs, is for indoor pest control. Survey data in the rulemaking file shows that over 90% of consumer placements were inside a home or an enclosed structure. (Ex. C, RB Comments at 17 & n.103, Exs. 39.1, 39.2). By contrast, a 2013 survey showed that PCOs applied SGARs outdoors 48% to 54% of the time at commercial sites, and 66% to 77% of the time at residential sites. (*Id.* Ex. 39.2 at 11-14 (analyzing data)). The evidence in the record therefore shows that commercial applicators apply SGARs outdoors much more frequently than do non-licensed consumers. Given the nature of outdoor placements by PCOs, the length of placements, and the proximity of the bait and rodents to nontarget wildlife, SGAR use by licensed applicators, which the Regulation allows to continue, is the more likely pathway for nontarget wildlife exposures. (*Id.* at 17-18 & n.107, Exs. 46, 47). DPR did not address or rebut this data showing that commercial applications create a greater risk of wildlife exposures than the consumer applications that DPR seeks to eliminate.
- 79. Rodents targeted by consumers are also unlikely to cause secondary exposures. House mice are the target of at least 90% of indoor consumer SGAR use, but they have small ranges that are not likely to extend outside inhabited structures (where they are more vulnerable to predators). (Ex. C, RB Comments at 19, Ex. 26). Moreover, mouse behavior is not changed by use of pest control measures, and house mice therefore do not generally present prey or carrion opportunities resulting in secondary SGAR exposure to nontarget animals. Furthermore, most of the wildlife DPR is concerned about are unlikely to prey on house mice. (*Id.* at 19 & nn.111-115, Ex. 26). Indeed, the U.S. EPA recognized it is unnecessary to consider wildlife data for a rodenticide product labeled only for indoor use, because wildlife exposures are not an anticipated risk from indoor placements. (*Id.* at 19 n.116, Ex. 45).

- 80. By contrast, licensed pesticide applicators and persons applying rodenticides in agricultural settings target rats more frequently than do consumers. Rats forage outdoors and are more likely to be eaten by predators of concern than house mice. Licensed applicators such as PCOs and agricultural users are also far more likely to leave baits available for rodent contact permanently and have economic incentives to leave bait in outdoor placements continuously. (Ex. C, RB Comments at 20 & nn.117-18, Ex. 26 at 27, Ex. 46). These uses and duration of placements of SGARs are not restricted by the Regulation, but are, for all these reasons, far more likely to impact nontarget wildlife than are the indoor consumer uses that the Regulation would curtail.
- 81. The record before the Department therefore fails to establish that the Regulation promulgated by DPR is reasonably necessary to address the stated goal, or even addresses the concern that the Department seeks to address. The Regulation does not restrict commercial applications of SGARs, even though the evidence shows they are more likely to cause wildlife exposures, but it eliminates consumer uses even though they are much less likely to cause the purported harms.
  - d. DPR Has Not Demonstrated That The Regulation Reduces Wildlife Risks Because The Record Does Not Address The Risks Posed By Alternatives To SGARs.
- 82. DPR's analysis assumes the Regulation will eliminate the risk of exposure and mortality to nontarget wildlife. DPR did not consider the risks posed by the alternative rodenticides that will replace SGARs in the marketplace and therefore lacks substantial evidence that the Regulation will in fact mitigate risks to wildlife and indeed there is substantial evidence that the Regulation could cause unintended consequences of increased risk to wildlife as well as humans and domestic animals.
- 83. Nothing in the record assesses the risks to wildlife posed by the increased use of non-SGAR rodenticide products that will flood the market once SGARs are no longer available to consumers. Such risks are substantial. One of the potential alternative products to SGARs are the First Generation Anticoagulant Rodenticides ("FGARs"), which the Regulation does not restrict and which could be used by consumers in the absence of access to SGARs. (Ex. C, RB Comments at 12 & n.72, Ex. 28). But, for example, the DPR White Paper did not address the high susceptibility

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of raptors to FGARs. (*Id.* at 12 & n.72, Ex. 28). Furthermore, because FGARs are less effective than SGARs, it is likely that usage and dosing of FGAR products will increase once SGARs are removed from the market. This increased usage—placement of more bait and for longer durations—could lead to greater opportunities for nontarget wildlife exposures to rodenticides. The Department's analysis does not address the risks to wildlife posed by such predictable compensation. DPR also did not consider risks posed by increased use of non-anticoagulant rodenticides, including bromethalin, cholecalciferol and zinc phosphide. In particular, use of the potent neurotoxin bromethalin will increase once SGARs are unavailable to consumers, but DPR has not evaluated what risks that increase will pose to wildlife.

- While DPR failed to balance the risks of SGARs against the corresponding risks of 84. alternative rodenticide products, those risks were nevertheless raised in the record, including in a scientific report submitted by Dr. Anne Fairbrother. Dr. Fairbrother shows that the U.S. EPA data relied upon by CDPR understates the risks posed by FGARs to wildlife because the conclusions are based on short-term studies, while FGARs become more toxic when dosing occurs over multiple days. (Ex. C, RB Comments, Ex. 26 at 12). Other analysis in the record identifies the same concern, including DPR's own peer review process and comments of the U.S. EPA Scientific Advisory Panel ("SAP"), which found that "the conclusion that FGARs present a lesser risk to nontarget wildlife . . . may be flawed." (Id. at 12, Ex. 36 at 13). Moreover, the record demonstrates that the reduced effectiveness of FGARs may lead to excess applications and environmental loading of anticoagulants, risking still greater wildlife exposure, and "increased use of FGARs could result in development of resistance . . . which might be countered by greater application rates, which in turn could pose a greater hazard to nontarget wildlife." (Id. at 13, Ex. 28 at 22). DPR failed to respond meaningfully to these identified flaws in its assumption that non-SGAR rodenticides pose lesser risks to wildlife, DPR therefore lacks substantial evidence that eliminating consumer uses of SGARs will mitigate the alleged risks to wildlife that the Regulation is meant to address.
- 85. DPR also failed to provide or analyze evidence addressing the risks of increased use of the neurotoxin bromethalin, which has the second largest market share in the consumer market after SGARs, due to its ability to match the efficacy of the SGAR products by working within one

feeding. Bromethalin poisoning is likely underreported because it is hard to diagnose: it photodegrades, bioaccumulates in adipose tissue rather than in the liver, and is not among the suite of analytes for which wildlife carcasses are typically tested. (Ex. C, RB Comments at 13 & Ex. 26) The physical-chemical nature of bromethalin is not well understood, but it has a high inherent capacity for biomagnification in terrestrial food chains, and thus for increased secondary exposure to nontarget wildlife. *Id.* These concerns are shared by the U.S. EPA Scientific Advisory Panel, which has warned that "there is not enough evidence to support [bromethalin] as a lower-risk alternative to SGARs." (*Id.* at 13, Ex. 36 at 13).

86. Because DPR has not provided substantial evidence regarding the risks to wildlife anticipated from increased use of non-SGAR rodenticides, DPR has not established that the Regulation will actually reduce risks to wildlife and is therefore reasonably necessary to fulfill that sole stated purpose.

### 2. DPR's Regulation Threatens Significant Negative Public Health Consequences.

- 87. DPR focused its analysis on reducing risks to nontarget wildlife, but ignored risks to public health and safety created by the Regulation. Food & Agriculture Code Sections 403 and 11454 require DPR to prevent the introduction and spread of injurious animal pests and Section 11501(a) identifies "protection of the public health and safety" as a key purpose of pesticide regulation. In short, it is DPR's statutory mandate to implement its regulatory program in a manner that protects public health and safety and does not allow the undue spread of recognized and controllable pests such as rodents.
- products for indoor consumer use, as well as the corresponding public health risks from eliminating the consumer use of those products. Neither DPR's White Paper nor the ISOR addresses the impacts to public health that rodents present to society. In response to public health concerns raised during the comment period, DPR merely responded that "[t]he purpose of the proposed regulation is to protect nontarget wildlife," and that "alternatives to SGARs are available to consumers." DPR's response fails to grasp the significant public health impacts posed by restricting all SGARs from

consumer use, and DPR therefore fails to acknowledge its duty to protect public health and safety and to establish substantial evidence that the scope of the Regulation is "reasonably necessary" as a means of fulfilling DPR's statutory mandates.

### a. Rodent Infestations Pose Persistent Threats To The Public Health In California.

- 89. Rodents invade millions of homes in the United States each year and pose significant threats of disease. See supra, ¶¶ 23-27. The impacts of these rodent infestations include bites, increased risk and exacerbation of asthma (particularly for children), spread of viral and bacteriological diseases, and the resulting social and economic costs. There are over twenty-one different commensal rodent borne diseases each of which is a serious concern for the public health.
- 90. Homeowners, small business owners, and individual Californians are left to address the problem of rodent infestations by themselves. SGAR products serve a vital public health purpose because they are the most popular and effective bait product for rodent control available for consumer use.

### b. DPR's Regulation Will Especially Affect Minority And Low-Income Communities In California.

91. Low-income and particularly minority households are more likely than average to have rodent infestations. (Ex. C, RB Comments at 4 & n.18, Exs. 90 and 6). Members of those households, in turn, are more likely to suffer from rodent-related health impacts. Research shows that low-income populations suffer a disproportionate number of rodent-associated injuries and disease. *See supra*, ¶25. Analysis from the U.S. EPA and other studies also confirm the extent to which public health problems associated with rodents occur in U.S. cities and show that low-income households have the highest rate of rodent infestations, consequently leading to the greatest opportunities for exposure to rodent-related infectious diseases and allergens. (Ex. C, RB Comments at 5, nn.25-27). Unfortunately, therefore, the greatest exposure to rodent-related health risks often occurs in households with the least ability to afford the additional costs of rodent control. DPR's Regulation exacerbates this problem by eliminating the most effective and affordable rodent

control products for consumers from the California market, leaving consumers only with alternatives that are more expensive and/or less effective.

### c. DPR Lacks Substantial Evidence That Non-SGAR Consumer Products Are Effective.

- 92. DPR's primary response to the threat of rodent-related health risks is the claim that effective alternatives to consumer-marketed SGAR products are available to California households and consumers. Although DPR recognizes that alternative non-SGAR rodenticide products intended for consumer use are only sold for use in block/solid formulations or in bait stations (Ex. D, ISOR at 10), DPR fails to take into account that such formulations limit the efficacy of rodenticide baits. This was made clear to DPR during the comment period and is recognized in the U.S. EPA's SAP report, which recognized that the "practical field efficacy of the available rodenticides will likely be reduced" by use of bait stations. (Ex. C, RB Comments at 36 n.219, Ex. 36 at 16). Consequently, DPR's assumption that effective alternative consumer use rodenticides are available is not supported by substantial evidence.
- DPR's position is that "[a]lternative, efficacious, and affordable rodenticide products are still available on the consumer market." (Ex. E, FSOR DPR Response to Comments at 6 ¶ 19). This ignores the wide recognition that SGARs are more effective than FGARs. (Ex. C, RB Comments at 34 & n.203). Indeed, as DPR acknowledges, second generation rodenticides were developed in response to the limitations of first generation products, particularly in response to increasing resistance to FGARs. (*Id.* at 34; Ex. D, ISOR at 2). Numerous studies over twenty years show that FGARs are significantly less effective than SGARs. (Ex. C, RB Comments at 34 & n.203, Exs. 71, 72, 73). In part this is because resistant strains of house mice have developed that are essentially immune to FGAR products. (*Id.* at 34 & n.204, Ex. 71 at 13-14, Ex. 74, Ex. 42 at 18). In fact the U.S. Fish and Wildlife Service, a proposed treatment plan for mice on the Farallon Islands has recently rejected using FGAR products for island eradication programs because these products are less effective and have a history of rodent resistance. (*Id.* at 34 & n.205).
- 94. DPR's conclusion that effective alternatives are available to consumers ignores the facts that resistant house mice developed and that these mice have been reported throughout the

United States. (Ex. C, RB Comments at 34 & n.208). Even in areas where resistance has not yet been identified, a significant increase in the use of FGARs is likely to increase resistant populations once SGARS are removed from the consumer market.

- 95. Data concerning FGAR resistance was before DPR but was ignored. For example, U.S. EPA's Scientific Advisory Panel stated that the U.S. EPA had underestimated the potential for resistance to FGARs to reduce the effectiveness of replacement products; one of DPR's peer reviewers noted that "increased use of FGARs could result in development of resistance;" and comments and reports submitted to DPR detailed the research demonstrating over the last twenty years that FGARs are simply less effective. (Ex. C, RB Comments at 34-35, Ex. 28 at 22). DPR did not address these concerns.
- 96. Like FGARs, non-chemical rodent control measures are less effective than SGARs, as was recognized by the U.S. EPA's Scientific Advisory Panel (especially for households or communities with the worst rodent problems). (Ex. C, RB Comments at 36 n. 225, Ex. 73 at 16-17 & 46) ("The Panel is concerned that . . . [U.S.] EPA has failed to recognize the difficulties associated with non-chemical control, especially in those communities where rodent populations are at high levels."). The U.S. EPA has also conceded that "few residential users of rodenticides will switch to non-chemical control" absent access to SGARs. (*Id.* at 36, Ex. 73 at 18).
- present substantial evidence that it has met that obligation) is thus exacerbated by the agency's lack of evidence establishing the availability of any affordable and effective alternatives for consumer use of SGARs. A regulation that replaces SGARs with more expensive and less effective alternatives for consumers will impose additional costs on local governments, health providers, and individual home and business consumers and will increase the risk of rodent-related health consequences. (Ex. C, RB Comments at 38-42 & nn.233-253).
- 98. The risks and costs of DPR's Regulation will be borne most heavily by low-income, inner-city, and minority populations, in violation of Cal. EPA's statutory obligation to "[c]onduct its programs, policies, and activities . . . in a manner that ensures the fair treatment of people of all races . . . and income levels." Pub Res. Code § 71110(a).

# d. DPR Has Failed To Assess The Risks Posed To Children, Pets, And Other At-Risk Populations By Non-SGAR Rodenticides.

- 99. DPR did not evaluate the alternative rodenticide products that will proliferate in the market as a result of the Regulation or consider the negative impacts those alternative products will have, particularly on children and pets.
- 100. DPR's consideration of these risks is limited to the remark that other consumer use rodenticides are sold in "block/solid formulations contained in a bait station or . . . sold with a bait station" and these "offer an increased level of protection for children, pets, and nontarget wildlife." (Ex. D, ISOR at 10; see Ex. E, FSOR DPR Response to Comments at 8). This conclusion and the absence of analysis in the rulemaking file indicate that DPR failed to acknowledge or consider that SGARs and non-anticoagulant rodenticides act in different ways and pose fundamentally different risks to children, at-risk adolescents and adults, and pets.
- SGARs products pose little risk to children and pets. SGARs are slow-acting anticoagulants that have familiar symptoms, are easy to diagnose, and have a readily available, effective antidote in the unlikely event of a toxic exposure. Experts have found that practically all unintentional exposures to SGARs for children under six are not harmful and can be safely observed at home without treatment or laboratory monitoring. (Ex. C, RB Comments, Ex. 65, Ex. 66 at 5-7). The U.S. EPA's Scientific Advisory Panel ("SAP") agreed that SGAR "exposure generally results in no clinical harm to children," and "[i]f the toxic threshold is exceeded, there is a widely available laboratory test and an antidote (vitamin K1) with which clinicians are familiar." (*Id.* at 31, Ex. 36 at 6).
- 102. In contrast, bromethalin and the other non-anticoagulant rodenticides (including cholecalciferol and zinc phosphide) are less familiar to the poison control and medical/veterinary communities, are not easy to diagnose or treat, and lack effective antidotes. (Ex. C, RB Comments at 31, Exs. 66, 67, 68, 69, 70). Bromethalin, for example, is a fast-acting neurotoxin with only a short window for treatment and *no* antidote. The only option for suspected exposures in both humans and pets is to try to remove the substance from the body and provide supportive care in hopes of avoiding severe complications.

- 103. The U.S. EPA's Scientific Advisory Panel likewise noted that "severe bromethalin poisonings are very concerning for clinicians because of less human experience with them and, unlike the anticoagulant rodenticides, there is no specific diagnostic test or antidote. Given that bromethalin targets the central nervous system ("CNS"), there is concern that the developing brain of young children may be particularly susceptible to the effects of bromethalin." (Ex. C, RB Comments at 32, Ex. 36 at 6).
- 104. A 10-year review of SGAR and bromethalin incidents reported to the national poison control centers revealed a higher incidence of fatalities, serious outcomes, and symptomatic exposures to bromethalin compared to SGARs. (Ex. C, RB Comments at 32, Ex. 66). When the comparative market shares of such products are taken into consideration, these comparisons are even more dramatic; a situation which will be made worse as SGAR products are replaced in the consumer market by non-anticoagulants such as bromethalin. This is particularly problematic for cases of intentional exposure by people with suicidal intentions or developmental disabilities, and for victims of malicious poisoning events. (*Id.* at 33, Ex. 66 at 9).
- 105. Bromethalin is also a major concern for pets because it is more toxic to dogs and cats than certain SGARs. Bromethalin is nearly fifty times more toxic than brodifacoum to cats and 6.5 times more toxic than differhialone to dogs. (Ex. C, RB Comments at 32, Ex. 67 at 20).
- 106. Furthermore, DPR's assertion that the use of bait stations would increase protection for children and pets applies, if at all, only when consumers use these products correctly. (Ex. C, RB Comments at 32; Ex. D, ISOR at 10 (the alternative products are not harmful to human health or the environment when used according to label directions)). However, there is evidence that consumers are misusing the products by placing blocks of bait around the home, outside of the bait stations. (Ex. C, RB Comments, Ex. 66 at 8-9, Ex. 67 at 33, Appendix G at 57). This behavior increases risks to children and pets because of the more toxic, less treatable ingredient to which they are being exposed. (*Id.* at 32-33, Ex. 66, Ex. 67 at 8, Ex. 70 at 3). In addition, the refill bags containing large quantities of bait blocks are not child or pet resistant. Pets have chewed through both refill bags and bait stations, which in turn has resulted in toxic exposures to bromethalin. (Ex. C, RB Comments, Ex. 67 at 34).

107. DPR failed to consider the heightened risks that the proliferation of non-anticoagulant rodenticides in the consumer market would pose once the Regulation removes the well-known SGAR products. Absent such analysis and a meaningful consideration of the risks documented in the record, DPR has failed to fulfill its obligations to consider and protect public health, and its conclusions about the safety of alternatives are not supported by substantial evidence.

# B. DPR's Regulation Is Arbitrary And Capricious Because It Does Not Achieve The Desired Effect And DPR Did Not Conduct A Meaningful Analysis.

- 108. A regulation is invalid if it is arbitrary and capricious. See Am. Coatings Ass'n, Inc. v. S. Coast Air Quality Dist., 54 Cal. 4th 446, 460 (2012). For reasons stated herein, DPR's action is arbitrary and capricious because it will not achieve the desired purpose. DPR did not conduct a meaningful analysis of the underlying basis for the Regulation. Instead DPR relied on the analysis of others, including the U.S. EPA, while ignoring the EPA's own critique of that analysis. DPR then sought peer and non-peer review, as well as input from other California agencies, but failed to respond to the solicited feedback in any meaningful way. (Ex. C, RB Comments, Exs. 28, 29). DPR ignored substantive comments regarding the data upon which it relied to justify the Regulation and its form. Without this analysis DPR's Regulation lacks any sort of coherent reasoning, unfairly targets Reckitt's d-CON® product, and will not achieve the desired ends.
- 109. Restricting SGARs is unlikely to have the desired effect of protecting nontarget wildlife. *See supra*, ¶¶ 64-81. First, DPR has not established that indoor consumer use of SGARs contributes to nontarget wildlife exposures. Second, DPR has not established that FGARs and other non-SGAR rodenticides are less dangerous to wildlife, due to increased FGAR resistance and its risks to nontarget wildlife, and substantially unknown risks of secondary exposure from bromethalin. Third, DPR rejected other alternatives that would have been less impactful. These alternatives would achieve as much or more nontarget wildlife protection without the risks attendant to restricting consumer use of SGARs.
- 110. DPR did not conduct a meaningful analysis of the data and comments it received during the public comment period. DPR relied upon the U.S. EPA but did not account for comments from the U.S. EPA's own Scientific Advisory Panel ("SAP") critiques of the data. And

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DPR merely disagreed with criticisms raised by other agencies, including the Department of Food & Agriculture, rather than making any substantive changes to its Regulation or supporting analysis. DPR was provided with comprehensive comments critiquing the underlying evidence upon which it relied, yet DPR failed to amend its actions or respond materially to the numerous problems raised before and during the public comment period. (Ex. C, RB Comments, Exs. 26, 27, 28).

- of substantial evidence that SGARs caused significant numbers of wildlife fatalities. Peer reviewers questioned both the breadth of the problem and also the methodology DPR used to calculate the problem. (Ex. C, RB Comments, Ex. 28 at 12 and 23, Ex. 26 at 8 and Ex. 33 at 8-9). Having received well-reasoned criticisms and suggestions from esteemed members of the scientific community, DPR did nothing to alter its risk assessment or improve the data underlying its regulatory action. It dismissed or disagreed with the concerns raised, rather than using them to inform any change in the Regulation or to seek additional supporting data or analysis.
- DPR ignored peer and non-peer review comments regarding the risks posed to 112. wildlife by SGAR alternatives. For example, DPR's peer reviewers pointed out that it underestimated the toxicity of FGARs based on data from single day laboratory studies. (Ex. C, RB Comments, Ex. 28 at 22). Data relied upon by the U.S. EPA, and subsequently DPR, to address FGAR risks is likewise flawed because it is based on short, often single-dose studies, masking the fact that FGAR toxicity is higher when—as in real-world conditions—the single exposure dose is divided into smaller doses and administered over a period of days. (Id., Ex. 26). In other words, rodents must feed on FGARs for at least three consecutive days, but SGARs only once. Commenters also pointed out that "it is also possible that increased use of FGARs could result in development of resistance in target organisms, which might be countered by greater application rates, which in turn could pose a greater hazard to nontarget wildlife." (Ex. C, RB Comments at 13, Ex. 28 at 22). DPR provided no substantive response to Dr. Rattner's and others' comments. DPR simply stated to Dr. Rattner, "Thank you for the comments. While it was not the goal of this document to develop mitigation measures, the comments are noted and appreciated." (Id. at 13 n. 77, Ex. 28 at 22.) Not only did DPR ignore commenters, it ignored the U.S. EPA SAP's warning

that the conclusion that alternative rodenticides present less risk than SGARs was flawed because "there is not enough evidence to support [bromethalin] use as a lower-risk alternative to SGARs... due to limited information on tissue persistence of bromethalin." (*Id.* at 13-14, Ex. 36 at 13).

- 113. DPR also dismissed peer reviewers who suggested that there was no evidence that consumer uses contribute to nontarget wildlife exposure. DPR Peer-Review Comment Responses, (Ex. C, RB Comments, Ex. 28 at 5). Not only that, as commenters pointed out, the White Paper did not contain any analysis regarding the extent to which consumer use contributes to wildlife exposure. Rather than addressing these issues, DPR responded that "DPR's SGAR assessment document is not intended to address specific mitigation measures." (*Id.*, Ex. 28 at 15 and 21. This inapt response is one of many instances of the flawed analysis that DPR used to advance the Regulation, rather than using the administrative process to strengthen the support for the Regulation and focus it effectively on the stated and statutorily-required regulatory goals.
- 114. Not only is this arbitrary and capricious, the summary dismissal of these comments is a violation of the APA and prevented meaningful public participation and understanding of the proposed regulatory action. The APA requires that an agency put forth its reasoning for public scrutiny. This has not occurred here.

#### C. DPR Failed To Consider Alternatives To The Regulation.

- accessible an Initial Statement of Reasons that contains, among other things, a detailed description of the reasonable alternatives to the regulation and the reasons for rejecting these alternatives.

  Gov't Code § 11346.2(b)(4)(A). The Code provides that "[r]easonable alternatives to be considered include, but are not limited to, alternatives that are . . . less burdensome and equally effective in achieving the purposes of the regulation."
- 116. DPR ignored alternative methods for mitigating risks to nontarget wildlife from SGAR exposures. One important and less burdensome alternative was that SGAR products be clearly labeled and limited in size and specifically limited for application only indoors. Reckitt presented this option to DPR at meetings and in formal comments with evidence that this alternative approach would both further minimize direct exposures to nontarget wildlife from consumer use

and further minimize the opportunity for secondary poisonings because there is little, if any, evidence that house mice regularly move from indoors to outdoors, or that mice that consume SGARs indoors go outside to die. This alternative would have been easily accomplished by providing an exemption from a final Restricted Materials classification for indoor uses of small quantities of SGARs by consumers, an alternative proposed by Reckitt in meetings with DPR. This exemption could have further reduced potential nontarget wildlife exposure from consumer uses of SGARs without the negative economic and public health consequences of the final Regulation. However DPR did not consider the relative merits of this alternative approach in comparison to the Regulation; rather the Department simply concluded without analysis that, despite considerable evidence to the contrary, "[a]lternative, efficacious and affordable rodenticide products are still available on the consumer market." (Ex. E, FSOR - DPR Response to Comment 19).

- The Department based its decision to restrict SGARs on U.S. EPA's 2007 Risk 117. Mitigation Measures Document. DPR reads that document to say that "[r]odents exposed to rodenticides indoors may not necessarily remain indoors if there is access in and out of the structure. In its 2007 Proposed Risk Mitigation for Nine Rodenticides, U.S. EPA indicated that although an indoor use-only limitation would reduce primary exposures to nontarget animals, it would not decrease secondary exposures." (Ex. C, RB Comments at 7; Ex. D at 7). The EPA does not take this position in its 2007 proposal, and there is no support for it in DPR's record. Moreover, EPA more recently has acknowledged that indoor use only rodenticides do not present a threat to wildlife. See supra, ¶¶ 78.
- DPR also cited to the United Kingdom's experience regarding non-professional use 118. of SGARs. DPR misunderstood the import of that experience and the recommendations that arise from it. Indeed, the United Kingdom experiences with SGARs counsels in favor of a robust "indoor-only label" resolution. (See Ex. C, RB Comments at 26).
- EPA and DPR both failed to present the issue of whether an indoor-only labeling 119. would be effective to the public for comment or to DPR's peer and non-peer reviewers. But without prompting, the U.S. EPA's SAP did address this issue, concluding that indoor use labeling would be an effective means of addressing wildlife exposures from consumer use rodenticides.

Specifically, the SAP stated that, "adjusting the homeowner label to limit use of the available second generation rodenticides to indoors only would help the casual user understand these products are not appropriate for use outdoors and would allow the continued use of a broader range of formulations while potentially helping address wildlife exposure issues." (Ex. C, RB Comments at 49).

- aimed at ensuring indoor use. A preliminary report, from Applied Safety and Ergonomics, presented in a U.S. EPA proceeding, concluded that Reckitt's proposed new indoor use only label for d-CON® products provides clear information that enables consumers to understand the proper placement of rodenticide baits more quickly. It also concluded that the new label "could reduce misuse both by encouraging users to read the labeling . . . and by conveying key information more clearly to those who read it." (Ex. C, RB Comments at 30, Ex. 64). This alternative would support a reasonable alternative of "indoor only use" for small quantities of SGAR products. Such an alternative would materially mitigate nontarget wildlife exposures while providing continued consumer access to affordable and effective rodent control, but DPR failed to adequately address this alternative.
- 121. Despite the many effective alternatives presented by commenters and outside entities, DPR failed to undertake a meaningful analysis of almost any of the proposed alternatives. Instead, DPR simply proceeded down its chosen path, making no accommodation of concerns raised or amendments to the proposed Regulation to respond to the voluminous and substantive input during the comment process. This failure to consider alternatives violates DPR's obligations under the APA.

# D. DPR Failed To Conduct A Proper Economic Analysis of the Regulation Under the APA.

122. Under the APA, the adopting agency "shall consider the proposal's impact on business, with consideration of industries affected including the ability of California businesses to compete with businesses in other states." Gov't Code § 11346.3(a)(2). Failure to provide

meaningful economic analysis supported by substantial evidence is grounds for setting aside the Regulation. *Id.* §§ 11346.5(a)(8), 11350(b)(2).

- assessment include "all cost impacts, known to the agency at the time the notice of proposed action is submitted to the [OAL], that a representative private . . .business would necessarily incur in reasonable compliance with the proposed action." The assessment must be based on "adequate information concerning the . . . consequences of . . . proposed governmental action." *Id.* § 11346.3(a)(1). This may not be a mere pronouncement of economic impact, but must include "facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination." *Id.* § 11346.5(a)(8).
- by commensal rodents and the additional public health costs and other costs that will result from more costly and less effective rodent control as a result of DPR's proposed action. DPR's economic analysis also does not consider numerous additional direct and indirect costs associated with the Regulation. In fact, the costs of achieving effective rodent control for consumers, for small businesses, and for localities all will increase as a result of the Regulation. (Ex. C, RB Comments at 38-42).

# 1. DPR Did Not Conduct A Sufficient Economic Analysis.

paragraphs in the ISOR, to which nothing was added in the Department's two-page FSOR. Of the sixteen documents identified in the ISOR as "documents relied upon," DPR identifies *only one document*—barely three and half pages long—as the underlying economic analysis. (Ex. D, ISOR at 14, item no. 16). That short memo was prepared by Cal. EPA's Agency-Wide Economic Analysis Unit ("AEAU"). The AEAU memo states that the AEAU "corresponded with DPR staff" and reviewed "material provided by DPR," but none of that correspondence or material appears in DPR's rulemaking file. The AEAU memo also purports to rely on a U.S. EPA document dated September 20, 2006, entitled "Impact Assessment for Proposed Rodenticide Mitigation." Reckitt obtained from DPR, via a California Public Records Act request, one additional nine-page

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document dated June 18, 2013, and entitled "Economic Analysis for Rulemaking Restricting Second Generation Anticoagulant Rodenticides," but the author of that document is not identified, and it is not listed in the ISOR as a document upon which DPR relied in its rulemaking or included in the Rulemaking File. (Ex. C, RB Comments, Ex. 4). That anonymous nine-page Economic Analysis for Rulemaking also relies heavily on U.S. EPA's 2006 Impact Assessment, as well as a January 29, 2013 U.S. EPA document entitled "Statement of Reasons and Factual Basis for Notice [of] Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products." 5 (Id., Ex. 81, Ex. 4 at 5-6).

The Department's reliance on U.S. EPA's 2006 Impact Assessment (which is the beginning of the thread that connects many of the other documents DPR appears to have relied on) is particularly inappropriate given the unique characteristics of California's economy, including its high proportion of minority and disadvantaged residents, its large population, its mix of extreme urban and extreme rural communities, and its status as the number one producer of agricultural commodities in the U.S. (Ex. C, RB Comments, Ex. 78). The data in the 2006 document is not reflective of the actual economics of the alternative products that now comply with The Regulation. Moreover, the document is not only clearly outdated, but its relevance is even more dubious given the economic downturn which commenced in 2007, after the U.S. EPA document was generated.

DPR also failed to conduct a meaningful economic analysis of its own. Again, there are only two documents of any substance that pertain to economic impacts of the proposed

Reckitt submitted extensive comments critiquing the failures of DPR's economic analysis during the public comment period. Those submissions also included some of the supporting and missing materials, and Reckitt's comments have been made part of the rulemaking file along with other comments received by DPR. DPR still fails to list or include key supporting materials and record documents related to its abbreviated economic analysis among the documents relied upon in the Rulemaking File as prepared by DPR. Mere citation in Reckitt's critique, where DPR has not responded or affirmatively included the required materials in its own preparation of the Rulemaking file should still be viewed as a substantial failure to comply with the requirements of the APA. For example, other commenters did not have access to the same information.

The anonymous nine-page memo, which appears to have been written by DPR, suggests the existence of numerous other documents, including correspondence with "livestock, poultry, dairy, and other stakeholders," as well as records relating to non-public meetings DPR held with numerous industry groups including the California Poultry Federation, the California Cattlemen's Association, the California League of Food Processors, and others. (See Ex. C, RB Comments, Ex. 4 at 5-6.)

regulation: the three and half page AEAU memorandum and the anonymous nine-page Economic Analysis for Rulemaking. Neither is listed or included by DPR as among the documents relied upon in its Rulemaking File. AEAU's short memorandum is conclusory at best, citing no data, literature, or other authority for most of its assertions. The Economic Analysis for Rulemaking, although slightly longer, also contains little analysis or documentation.

128. Ultimately, both of DPR's economic "analyses" are too superficial to comply with its statutory obligation to "provide in the record facts, evidence, documents, testimony, or other evidence upon which the agency relies to support its initial determination." Gov't Code § 11346.5(a)(8). The only putative "data" to which DPR cites consist of un-validated assertions reportedly made by various agricultural industry representatives in non-public meetings with DPR staff, or in emails that are not among the Department's documentation. (Ex. C, RB Comments, Ex. 4 at 5-6) (acknowledging that DPR contacted various agricultural industry groups and held one or more meetings with them in March 2013). The rest of DPR's economic analyses do not consist of "facts, evidence, documents, testimony, or other evidence upon which the agency relies" as the law requires. Instead, the analyses are based upon generalizations and assumptions. In fact, DPR incorporates no fewer than twelve assumptions in its anonymous nine-page Economic Analysis for Rulemaking. Although the Economic Analysis for Rulemaking includes some cost calculations, the underlying figures consist mostly of "estimates," for which no sources are cited. (See Ex. C, RB Comments, Ex. 4).

- 2. DPR's Economic Analysis Documents Cited For Rulemaking Understate Economic Impacts To Consumers, Businesses, State And Local Governments, And Registrants.
- 129. DPR's economic analysis reaches the erroneous conclusion that economic impacts of the proposed restrictions would be insignificant. A more thorough evaluation of the market demonstrates that, at a minimum, impacts on consumers, local and state government, businesses using SGARs, and registrants will be far more substantial than DPR acknowledges. Several more thorough economic analyses exist, and Reckitt submitted them to DPR together with Reckitt's formal comments on the proposed rulemaking. (Ex. C, RB Comments, Exs. 80, 89, 91).

# a. Economic Impacts To Consumers.

- 130. DPR adopts, apparently without evaluating, U.S. EPA's assertion that the incremental costs of using alternative rodenticide products for mouse control "will be small." (Ex. C, RB Comments, Ex. 4). U.S. EPA's analysis, however, actually indicates that the incremental costs of the proposed cancellation to consumers could be substantial. The 2006 EPA report relied upon by the Department masked this conclusion by presenting its results on a perhousehold basis. Even assuming that EPA's incremental cost estimates and methodology are appropriate, the actual incremental cost to California consumers of alternative products would be, in the aggregate, in the range of \$10.2 to \$44.2 million. (Ex. C, RB Comments at 38).
- 131. This is a conservative estimate. It includes the incremental cost for bait users only (*i.e.*, those who switch from SGARs to alternative bait products) and does not address the incremental costs for households that will switch to the services of a PCO in response to the cancellation of the consumer-use SGAR products. (Ex. C, RB Comments, Ex. 81 at 127) (stating that in the event of a cancellation of SGARs, "Some households will hire professional applicators who can utilize additional products, including SGARs."). Additionally, it excludes incremental costs for rat control, which EPA acknowledges are substantial. In fact, the incremental cost for rat control could be upwards of \$100 per infestation.
- 132. DPR's conclusion that changes in average rodent control expenditures per consumer are likely to be small is also based on its determination that "similar products with lower unit-prices" are available, which, in turn, is based on prices gleaned from internet searches. (Ex. C, RB Comments, Ex. 4). This methodology is unsound. First, it appears to select prices favorable to DPR's conclusion, listing package costs that are "possible to find" online rather than taking an average or median price. (*Id.*). More importantly, these isolated data points do not reflect consumer purchasing behaviors, *i.e.*, the limited selection of products and prices at local brick-and-mortar stores. Moreover, some consumers who may be in the greatest position to need access to low-cost effective rodent control products may lack the means to make purchases online, *i.e.*, a convenient Internet connection and a credit or debit card. (*Id.*, Ex. 82) ("Seventy-six percent of

white American households use the Internet, compared with 57 percent of African-American households.").)

impact of this incremental cost is substantial. For example, DPR must account for the need to purchase additional product because available products are less effective. Even if the economic impact of the proposed regulations were "small," as DPR asserts, such a cursory evaluation does not meet DPR's legal obligations under the APA. Although it may be "difficult to project overall changes in consumer expenditures that could take place as a result of product substitution," such a projection is part of DPR's responsibility as a regulator whose actions will affect millions of California residents. (Ex. C, RB Comments, Ex. 4 at 4).

associated with the proposed regulation. As explained in the discussions of alternative rodenticides and public health above, the products that would remain unrestricted are relatively ineffective in controlling rodent infestations. Use of these alternative products will result in an increased incidence of rodent-associated diseases and injuries, including childhood asthma, leptospirosis, and rodent bites. Costs associated with treating children and pets exposed to bromethalin—a neurotoxin with no antidote—are significantly higher than those for treatment of SGAR exposure, which is cheaply and easily treated with vitamin K1. DPR's economic analysis fails to consider the specific impact of the cost increases of switching to PCOs on low income populations, including tenants in public housing, who are the communities that are both hardest hit by rodent infestations and least able to absorb economic impacts of increased rodenticide prices or costly health care for rodent-related illness. (Ex. C, RB Comments, Ex.16 at Table 2-7). This is not only a significant gap in DPR's analysis; it also is inconsistent with the Department's obligation to consider environmental justice concerns to ensure "the fair treatment of people of all races, cultures, and income levels, including minority populations and low-income populations of the state" when developing and

<sup>&</sup>lt;sup>6</sup> See Gov't Code §§ 11346.3(a)(1)-(2), 11346.5(a)(8)-(9).

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implementing requirements and policies that affect human health or the environment. Pub. Res. Code § 71110(a); see id. §§ 71110–71116.

# b. Economic Impacts To Businesses.

- operations, landlords, and small business people, among others. DPR assumes, without establishing, that all agricultural users other than aqua farming and poultry farming already have a licensed pesticide applicator on staff or currently hire a pest control company to manage rodents. This assumption ignores the thousands of family farms and other small agricultural operations that—as DPR acknowledges in the context of poultry and swine facilities—would need to hire a PCO or obtain their own certification. (Ex. C, RB Comments, Ex. 4 at 5). As a result, the Department understates the economic impacts to entities that, if restrictions on SGARs were implemented, would either have to seek certification or hire a PCO.
- 136. Moreover, DPR's economic analysis does not address economic impacts to small business people, many of whom use consumer products to deal with rodent infestations on their premises. This group includes, for example, landlords, restaurant owners, grocers, hotel/motel owners, and other privately owned and operated commercial establishments where food products are stored, sold, or consumed. DPR cites U.S. EPA's assumption (which relies on undisclosed, proprietary data that should be in the record but is not) that more than 90% of food-handling establishments already have a licensed PCO handling pest control functions. (Ex. C, RB Comments, Ex. 4 at 7). DPR assumes this figure to be accurate for California (there is nothing in the record to suggest that DPR had access to the proprietary data for the purposes of this rulemaking). Then, without any specific basis in the record, the Department further assumes that only half of the businesses not already using a PCO rely on rodenticides for their rodent control. Moreover, DPR also assumes that only about 20% of the persons who engage in do-it-yourself pest control will hire PCOs or obtain licensing for purposes of their rodent control going forward. DPR uses these multi-tiered assumptions to conclude that the additional expenses to small businesses attributable to the Regulation will be only in the range of \$1 million in the aggregate for the entire

state. If these unsupported DPR assumptions are low, the actual costs to business could be several times higher. (*Id.*, Ex. 80).

# c. Economic Impacts To State And Local Governments.

DPR evaluates potential economic impacts to local governments only in terms of potential costs to issue permits and administer applicator licensing examinations, or to acquire necessary certifications for public health officials charged with rodent control. The Department concludes that any additional work associated with increased licensing and permitting could be absorbed into the existing workload, and that public health officials already have the necessary certifications to apply Restricted Materials. This analysis fails to consider other economic impacts to local and state governments: namely, the increased costs associated with less effective rodent control. For example, if consumers are denied access to cost-effective rodenticides, the resulting increased rodent population may need to be addressed with pest control treatments by municipal health departments. Similarly, local and state public health programs will bear at least some of the cost of increased incidents of asthma, rodent bites, and disease transmission, as well as the costs of increased damage to property, including public property. Furthermore, the additional costs of oversight and enforcement of consumer uses of Restricted Materials rodenticides has not been estimated by DPR. Finally, DPR has failed to assess the foreseeable costs to the State of California from injuries or death to children and other consumers from exposure to neurotoxins, which will expand in market share if consumers no longer have access to SGARs.

### d. Economic Impacts To The Registrants.

138. DPR erroneously states that the Regulation will not have "a significant adverse economic impact" on companies selling consumer-use rodenticides because losses in SGAR sales will "be offset by additional sales of other rodenticide products." (Ex. D, ISOR at 11). DPR provides no basis for this conclusion. Although the Department acknowledges that only one company—Reckitt Benckiser—has consumer use SGAR products registered for sale in California, it has not meaningfully evaluated the economic impacts to Reckitt, as a business operating in

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California,<sup>7</sup> or to the retail businesses that sell Reckitt's products, and the California small businesses who rely on Reckitt's products. DPR did not reach out to Reckitt for further information about the extent of the business impact to inform its analysis. (Ex. C, RB Comments, Ex. 84).

139. For instance, the Department assumes that residential consumers who prefer the d-CON® brand of product but are unable to purchase Restricted Materials would shift to first-generation anticoagulant rodenticide products registered in California by Reckitt. This assumption ignores a range of commercial realities, including the fact that these first-generation products, though registered, are not widely produced or marketed, and none of the d-CON® first-generation products are currently commercialized in California. (Ex. C, RB Comments, Ex. 84 ¶¶ 5–6). To move these products into widespread production and distribution or to commercialize a d-CON® first-generation rodenticide product for sale only in California would require a costly transition. (*Id.* ¶¶ 5–6). DPR also incorrectly assumes that registrants can sell rodenticide products with bait stations and blocks within the same cost structure as products that are not in bait stations. (*Id.* ¶ 5c). Moreover, the transition to bait stations will mean the outsourcing of jobs to Mexico to produce bait stations, an economic impact not evaluated by DPR. (*Id.* ¶ 5c).

140. Some d-CON® products contain a label statement that the product "kills in one feeding"—a feature that is important to consumers. U.S. EPA permits such a claim for SGARs, but FGARs cannot carry the claim because such products require multiple feedings to be effective. The absence of this statement on product labels going forward will have a significant impact on d-CON®'s sales, a factor not considered by DPR in its economic analysis. (Ex. C, RB Comments, Ex. 84 ¶ 5c). The presence of this claim on bromethalin labels that have not been classified as Restricted Materials will contribute to consumer demand for such products if the proposed rule is promulgated. (*Id.* ¶ 5c).

DPR asserts that the APA's economic assessment requirements are "meant to assess the impact to California businesses operating in the state (job creation and elimination, and expansion), not registrants in general who may sell their product into the state." (Ex. E, FSOR - DPR Response to Comments 33, ¶ 117). DPR cites no authority for this construction of the limited purpose of the statute or for the purported distinction between "registrants in general" and the statute's requirement to address the impact on all businesses operating in California.

- 141. DPR's expectation that "any net change in [Reckitt's] revenues would be limited" is likewise ill-informed. (Ex. C, RB Comments, Ex. 4 at 2). In reality, the Restricted Materials restrictions will profoundly impact sales of d-CON® brand SGAR products nationwide. In the absence of a uniform regulatory regime, Reckitt will be forced—at enormous expense—to develop a fundamentally different product for sale in California, and to tailor its distribution chain to accommodate restrictions unique to California. (*Id.*, Ex. 84 ¶ 6). Moreover, national retailers may refuse to market d-CON® products tailored to satisfy the Regulation, lest they too be forced to shoulder the cost of customizing distribution from one state to the next; indeed, some retailers who are significant d-CON® customers have already indicated that they will not accept this unique distribution system of having products in their California stores different from those in other states. (*Id.* ¶ 6d).
- The Economic Analysis for Rulemaking notes that, consistent with the proposed regulations, Reckitt's four registered SGAR products could still be offered for sale by licensed pesticide dealers. This statement misses the essential point, which is that only certified applicators could purchase these products. Reckitt's rodenticide products are marketed solely for retail sales to consumers in small quantities in easy-to-use placements. DPR itself acknowledges that it does not anticipate that ordinary homeowners will pursue licensing certification in order to maintain access to SGARs. (Ex. C, RB Comments, Ex. 4). And DPR has stated that the goal of this regulation is to change the rules so that Reckitt "cannot sell these [products] in the general stores like Home Depot and Target." Charlotte Fadipe, Department of Pesticide Regulation, Statewide Ban on Rat Poison Approved to Protect Wildlife, available at http://www.nbclosangeles.com/news/local/Rat-poisonban-buy-store-home-deport-pesticide-rodenticide-harmful-california-d-CON-animals-wildlifemountain-lions-251494521.html. It is therefore highly unlikely that commercial applicators such as PCOs and agricultural users would purchase the current d-CON® SGAR-containing products, or that retailers oriented to certified applicators would offer them for sale. Moreover, by designating all SGAR products as Restricted Materials, the Regulation effectively terminates their sale by typical retail establishments that sell everyday consumer goods (e.g., supermarkets, hardware stores, or home supply retailers), since only licensed pesticide dealers may sell Restricted Materials. Thus,

in practical terms, DPR's proposed regulations would eliminate the market for d-CON® SGAR products, with substantial financial consequences for Reckitt Benckiser.

# E. DPR Failed To Include All Necessary Supporting Documentation In The Rulemaking File.

- 143. The absence of the any required documents from DPR's rulemaking file is a violation of the APA. See, e.g., Gov't Code § 11347.3(b)(6) ("The rulemaking file shall include . . . [a]ll data and other factual information, any studies or reports, and written comments submitted to the agency in connection with the adoption, amendment, or repeal of the regulation."); see also POET, LLC v. Cal. Air Res. Bd., 217 Cal. App. 4th 681, 750–54 (2013) (holding that the omission of four emails containing factual information that was submitted to the agency in connection with the adoption of a regulation was a violation of the APA requiring remand).
- 144. Here, the rulemaking file as submitted by DPR fails to include documents, data, factual information, studies and reports on which DPR relied in its rulemaking process and analysis, and in its responses to comments and criticisms submitted before and during the public comment period. These omissions represent a substantial failure to comply with the APA. The necessary documents, data, factual information, studies and reports omitted from the rulemaking file include but are not necessarily limited to:
- a. Documents, data, or facts related to the registration (by U.S. EPA and/or by DPR) of non-SGAR rodenticide products. DPR relies on this information for the claim that non-SGAR alternative rodenticides are effective but has failed to provide any of the supporting data or reports.
- b. Documentation supporting DPR's economic analysis for the Regulation, including any and all correspondence with Cal./EPA's Agency-Wide Economic Analysis Unit; correspondence with livestock, poultry, dairy and other stakeholders; or documentation of any meetings held with stakeholders not reflected in correspondence.
- c. Complete documentation of economic analysis pursued or completed by DPR or on DPR's behalf.

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- Data or factual information, if any exists, supporting DPR's assumptions d. about the percentage of food-handling institutions that rely on a PCO for rodent control.
- Data or factual information, if any exists, supporting DPR's assumptions about the percentage of agricultural operators that rely on a PCO for rodent control or have a licensed applicator on staff.

#### DPR FAILED TO FOLLOW CEQA REQUIREMENTS. VII.

- As a certified regulatory program, DPR need not prepare an Environmental Impact Report, but it still must comply with all other CEQA obligations when it promulgates new regulations. Mountain Lion Found. v. Fish & Game Comm'n, 16 Cal. 4th 105, 114 (1997) ("[a]n agency operating pursuant to a certified regulatory program must comply with all of CEQA's other requirements"). Its regulatory documents and process must meet threshold requirements for functional equivalency under CEQA. Pub. Res. Code § 21080.5(c); 14 CCR § 15250.
- DPR's certified regulatory program requires that its public report include (1) any significant adverse environmental effect that can reasonably be expected to occur, directly or indirectly, from implementing the proposal, and a statement of any reasonable mitigation measures that are available to minimize significant adverse environmental impact, and (2) a statement and discussion of reasonable alternatives which would reduce any significant environmental impact. 3 CCR § 6110. These requirements were not met in the eight page ISOR and two page FSOR.
- DPR did not meaningfully assess the environmental impacts, direct and indirect, of 147. the Regulation. DPR did not sufficiently study whether the Regulation would have the desired impact of protecting nontarget wildlife.
- DPR's reclassification of SGARs will cause consumers to rely on other, less 148. effective and potentially harmful products that carry their own environmental impact. See supra, ¶¶ 91-97. DPR ignored the environmental impacts arising from less effective rodent control, including from increased commensal rodent populations and infestations of longer duration. Variations in rodent populations can easily overwhelm and alter a local ecosystem. The U.S. Fish and Wildlife Service recently addressed this issue when it studied the alternatives for rodent eradication in the Farallon Islands, off the coast of California. This project was necessary because the high population

of rodents on the island artificially increased the food supply for burrowing owls that in turn threatened migrating seabirds when the rodent population died off for the winter. The Fish and Wildlife Service determined that SGARs would be the most appropriate way to restore the balance. CEQA requires that DPR study these types of impacts.

149. DPR did not analyze the environmental impacts of consumer reliance on products containing FGARs or non-anticoagulant rodenticides, including the environmental impacts from increased resistance to non-SGAR rodenticides. Although DPR acknowledges that SGARs were developed due to rodent resistance to FGARs, it does not acknowledge that this resistance has continued to exist even while SGARs were the predominant bait for consumer rodent control. The resistance will only increase once consumers are forced to rely on FGARs. DPR acknowledges that the alternative products intended for consumer use are sold for use in bait stations (or in solid/block formulations), while failing to take account of the reduced efficacy of those uses of rodenticide baits, even though this concern was made clear to DPR and expressed in the U.S. EPA's SAP report.

environmental impact, DPR did not adequately consider alternatives to the Regulation. Pub. Res. Code § 21080.5(d)(2)(A) & (d)(3)(A); City of Arcadia v. State Water Res. Control Bd., 135 Cal. App. 4th 1392, 1422 (2006) ("[T]he document generated pursuant to the agency's [functionally equivalent] regulatory program must include alternatives . . . and be made available for review by other public agencies and the public."). It did not, for example, properly consider an exemption from the Restricted Materials classification for small sized consumer use SGAR products bearing "indoor use only" labeling. Such an alternative could mitigate the unintended public health consequences of the Regulation by instead ensuring small-sized, affordable SGAR products remain available, cost effectively protecting residences in vulnerable communities while simultaneously decreasing the opportunities for misuse and outdoor uses of SGARs by consumers. See supra, ¶¶ 76-80. Nor did it consider recommendations to change the application rate and methods for outdoor use by PCO's, a solution which has been found to highly effective in the UK. (See Ex. C, RB Comments, at 26-28).

- 151. DPR did not adequately consider the environmental impacts that would be borne by low-income and minority populations. DPR's assertion that it need not address this impact because the Regulation applies throughout the state (*see* Ex. E, FSOR DPR Response to Comments at 34 ¶ 121), is no answer to serious concerns that the Regulations disparately affect already vulnerable populations that will be unable to afford to pay a licensed applicator to provide SGAR products and provide the same level of rodent control d-CON® products currently provide. d-CON® brand SGAR products provide effective and low-cost pest control solutions. Without access to them certain communities will suffer significant environmental impacts from increased rodent infestation. Not only are these impacts significant under CEQA, DPR is mandated to consider them and to fulfill its regulatory responsibilities in a nondiscriminatory manner. *See* Pub. Res. Code §§ 71110-71116.
- DPR has also not adequately consulted with other California agencies, including public health agencies and the California Department of Food & Agriculture regarding the Regulation as is required by law. Pub. Res. Code § 21080.5(d)(2)(c); 3 CCR § 6110; 3 CCR § 6252. DPR lists correspondence with the Department of Finance and the Department of Food & Agriculture among the documents in the rulemaking file. However, no substantive or meaningful input from the Department of Finance was obtained. DPR's responses to the comments solicited from the Department of Food & Agriculture rejected that agency's advice and criticisms, rather than materially altering the Regulation or adding to the supporting analysis in a manner consistent with the Department's obligation to consult with other agencies. Moreover, while it appears that DPR consulted with DFW, the California Department of Public Health, and the Structural Pest Control Board, complete documentation of those consultations is not within the rulemaking file. To the extent Reckitt has obtained such materials outside the rulemaking file, the minutes of these meetings reflect a lack of meaningful discussion of the regulations with these agencies. The rulemaking record does not reflect consultation by DPR with other relevant entities, such as municipal governments, public housing authorities, or social services agencies most familiar with the impacts of commensal rodent infestation on California consumers and small businesses. DPR

has therefore failed to adequately fulfill its statutory obligation to consult with other relevant California agencies.

# VIII. DPR'S REGULATION IS PREEMPTED BY FIFRA.

- Insecticide, Fungicide, and Rodenticide Act ("FIFRA"). Reckitt holds valid federal registrations for all the SGAR products sold in California. Section 136v of FIFRA provides that although the states (including California) "may regulate the sale or use of any federally registered pesticide," the states "shall not impose or continue in effect any requirements for labeling or packaging in addition to or different from those required under [FIFRA]." 7 U.S.C. § 136v(a), (b).
- and trays and packaged and labeled for consumer uses. The U.S. EPA has specific labeling and package size limitations which differ for consumer use rodenticides and professional use rodenticides. U.S. EPA's 2008 Risk Mitigation Decision for Rodenticides (RMD) file:///C:/Users/lec4370/Downloads/EPA-HQ-OPP-2006-0955-0764%20(3).pdf. found at http://www.regulations.gov/#!documentDetail;D=EPA-HQ-OPP-2006-0955-0764;oldLink=false. By restricting use of SGARs in California to only licensed professional applicators, the Regulation will necessarily require Reckitt to seek permission from the U.S. EPA (and thereafter CDPR) to amend its current d-CON® SGAR registrations to add directions for use and to modify its packaging sizes and construction (in addition to its commercial distribution scheme) because the current d-Con® SGAR bait product labels do not contain the instructions U.S. EPA requires for professional users and Reckitt's d-CON® packages do not meet the minimum size restrictions imposed by the U.S. EPA on registrants of profession use products. Moreover, if Reckitt applies the professional use labeling and size requirements it will be unable to sell its product to consumers, without maintaining separate packaging and labeling lines of distribution.
- by U.S. EPA for professional use products are not currently employed on the Reckitt d-CON® SGAR products: (1) products distributed for use by professional applicators be packaged only in containers holding 16 pounds of bait or greater; 2) professional use rodenticides must be labeled for

use only in tamper resistant bait stations when placed above ground in outdoor locations; and (3) labels for professional use products must include terms that prohibit placements beyond specified distances from buildings.

- 156. Because these statements are different from and in addition to the statements required under FIFRA for consumer sized rodenticide products, pursuant to which d-Con® baits may still be sold for use, the Restricted Materials Regulation is preempted by FIFRA.
- 157. No provision of the Regulation is severable. To the extent that either 3 CCR Section 6400 or Section 6471, or any part thereof, is barred from adoption or enforcement by federal law, all parts of the Regulation, as adopted, must be considered invalid and unenforceable.

\* \* \* \*

#### FIRST CAUSE OF ACTION

(Writ of Mandate To Enjoin Improper Application Of Food & Agriculture Code § 14004.5)

- 158. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- 159. Respondents have a clear and present duty to administer the Food & Agriculture Code and its implementing regulations in accordance with state law and to uphold the purpose and intent of the statutes passed by the legislature.
- Reckitt is entitled to a writ of mandate under Code of Civil Procedure Section 1085 enjoining
  Respondent's implementation of Regulation No. 13-002 as an action not authorized by the statutes
  from which Respondents claim authority, specifically including, without limitation, Food &
  Agriculture Code Sections 14004.5 and 14005, governing designation and regulation of "Restricted Materials."
- 161. At all times relevant to this action, Respondents have had the ability to fulfill their duties under the law.
- 162. Reckitt made a written demand upon Respondents to perform their duties. In direct contravention of the law and Reckitt's written demand, Respondents have failed and refused to perform their duties expressly mandated by law, despite their ability to carry out those duties.

163. Reckitt has no plain, speedy, and adequate remedy in the ordinary course of law.

Unless this Court grants the relief requested, Respondents will continue to fail and refuse to perform their legal duties. No money damages or other legal remedy could adequately compensate Reckitt and others for the hardship cause by Respondent's failure to perform their legal duty.

### SECOND CAUSE OF ACTION

# (Writ Of Mandate To Enforce Food & Agriculture Code § 12825)

- 164. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- 165. Respondents have a clear and present duty to administer the Food & Agriculture Code and its implementing regulations in accordance with state law.
- Reckitt is entitled to a writ of mandate under Code of Civil Procedure Section 1085 (1) enjoining Respondent's implementation of Regulation No. 13-002 and (2) requiring that if Respondents seek to cancel Reckitt's pesticide registrations pursuant Food & Agriculture Code, Division 7, Chapter 2, or otherwise effect the termination of Reckitt's right to sell its products in California pursuant to those existing registrations, Respondents must follow the requirements for a cancellation proceeding as provided in Food & Agriculture Code Section 12825, including a prerequisite determination that one or more of criteria for cancellation enumerated in Section 12825 has been met and provision for a hearing at which Reckitt may contest that determination.
- 167. At all times relevant to this action, Respondents have had the ability to fulfill their duties under the law.
- 168. Reckitt made a written demand upon Respondents to perform their duties. In direct contravention of the law and Reckitt's written demand, Respondents have failed and refused to perform their duties expressly mandated by law, despite their ability to carry out those duties.
- 169. Reckitt has no plain, speedy, and adequate remedy in the ordinary course of law.

  Unless this Court grants the relief requested, Respondents will continue to fail and refuse to perform their legal duties. No money damages or other legal remedy could adequately compensate Reckitt and others for the hardship cause by Respondent's failure to perform their legal duty.

### THIRD CAUSE OF ACTION

(Violation Of Administrative Procedure Act, Gov't Code §§ 11340 et seq., And Claim For Declaratory Relief Pursuant To Gov't Code § 11350)

- 170. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- 171. Pursuant to Government Code Section 11350(a), a regulation may be declared invalid for substantial failure to comply with the California Administrative Procedure Act.
- 172. As detailed herein, Respondents have failed to substantially comply with the California Administrative Procedure Act in the adoption and intended enforcement of Regulation 13-002. These failures include, without limitation, failure to include proper consideration of alternatives, failure to include all required and relevant materials in the rulemaking file prepared under Government Code Section 11347, failure to provide meaningful public participation by allowing and responding to public input and comments, failure by Respondents to comply with relevant policy and written guidance, and otherwise acting in a manner that was arbitrary and capricious and contrary to law.
- 173. Pursuant to Government Code Section 11350(b)(1), a regulation may be declared invalid if the agency's determination that the regulation is reasonably necessary to effectuate the purpose of the statute or other provision of law that is being implemented, interpreted, or made specific by the regulation is not supported by substantial evidence.
- 174. As detailed herein, Respondents have failed to provide substantial evidence supporting a determination that the Regulation is reasonably necessary to effectuate the purposes being implemented, interpreted, or made specific.
- 175. Pursuant to Government Code Section 11350(b)(2), a regulation may be declared invalid if the agency declaration, pursuant to Government Code Section 11346.5(a)(8), is in conflict with substantial evidence in the record.
- 176. As detailed herein, Respondents' declaration pursuant to Government Code Section 11346.5(a)(8) (relating to the economic impact to business of the Regulation) is in conflict with substantial evidence in the record.

177. Reckitt has no plain, speedy, and adequate remedy in the ordinary course of law.

Unless this Court grants the relief requested, Respondents will continue to fail and refuse to perform their legal duties. No money damages or other legal remedy could adequately compensate Reckitt and others for the hardship cause by Respondent's failure to perform their legal duty.

### FOURTH CAUSE OF ACTION

# (Violation Of CEQA, Pub. Res. Code §§ 21080 et seq.)

- 178. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- of discretion in that: DPR has not proceeded in the manner required by law under its certified regulatory program and CEQA; DPR failed to conduct environmental review in compliance with CEQA; DPR failed to support its analysis with substantial evidence, and failed to consider substantial evidence undermining its conclusion; DPR failed to provide any reasoned basis for its conclusion that the Regulation posed no potentially significant effects on the environment; and DPR also failed to properly consult with appropriate agencies regarding the Regulation.
- 180. DPR must comply with CEQA obligations outside Chapters 3 and 4, and its regulatory documents and process must meet threshold requirements for functional equivalency under CEQA. Pub. Res. Code § 21080.5(c); 14 CCR, § 15250; *Mountain Lion Found. v. Fish & Game Comm'n*, 16 Cal. 4th 105, 114 (Cal. 1997) ("[a]n agency operating pursuant to a certified regulatory program must comply with all of CEQA's other requirements").
- 181. Under DPR's certified regulatory program it must create a public report that includes (1) any significant adverse environmental effect that can reasonably be expected to occur, directly or indirectly, from implementing the proposal, and a statement of any reasonable mitigation measures that are available to minimize significant adverse environmental impact, and (2) a statement and discussion of reasonable alternatives which would reduce any significant environmental impact. 3 CCR § 6110. DPR did neither of these things.
- 182. DPR did not consider the direct and indirect impacts of the Regulation. Instead DPR determined that there was no impact. But DPR's analysis was too thin. It ignored the consequences

of restricting use of a consumer product—that consumers will turn to other products or forego pest control. The impact of each reasonably likely consequence must be studied before adopting regulations. Because of this finding, DPR did not consider reasonable alternatives, even though some had been presented through the comment period. Finally, DPR did not adequately consult with other agencies regarding the Regulations.

- 183. By reason of the foregoing, DPR has failed to comply with the requirements of CEQA and committed prejudicial abuse of its discretion. Petitioner is entitled to a writ of mandate directing the DPR to set aside the adoption of the Regulations unless and until the agency complies with CEQA.
- 184. Reckitt has no plain, speedy, and adequate remedy in the ordinary course of law.

  Unless this Court grants the relief requested, Respondents will enforce or seek to enforce a

  Regulation adopted contrary to law. No money damages or other legal remedy could adequately compensate Reckitt and others for the hardship caused by Respondent's enforcement of that improperly adopted regulation.

### FIFTH CAUSE OF ACTION

### (Federal Preemption)

- 185. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- 186. As promulgated, the Regulation is contrary and preempted by federal law, specifically including, but not limited to 7 U.S.C. § 136v, because the Regulation imposes or places in effect requirements for labeling or packaging of products registered and regulated by the U.S. Environmental Protection Agency pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), 7 U.S.C. §§ 136 et seq., and the requirements imposed by the Regulation are in addition to or different from those required under FIFRA.
- 187. Under federal law including the supremacy clause of the U.S. Constitution, the Department is denied authority to promulgate and/or enforce the Regulation because it is contrary to federal law. Reckitt is therefore entitled to a judicial declaration according to Code of Civil

Procedure Section 1060 that Respondents have acted contrary to or inconsistent with federal law and that the Regulation, including all its parts, is contrary to law and shall not be enforced.

### SIXTH CAUSE OF ACTION

# (Injunctive Relief)

- 188. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- 189. Reckitt has no plain, speedy, and adequate remedy in the ordinary course of law.

  Monetary damages cannot adequately compensate for the irreparable injuries caused by

  Respondents' actions in violation of CEQA, the APA, and the Food & Agriculture Code.
- 190. Unless enjoined by this Court, Respondents will continue to violate CEQA, the APA, and the Food & Agriculture Code through the adoption and enforcement of Regulation 13-002, designating certain of Reckitt's California registered pesticides as Restricted Materials pursuant to Food & Agriculture Code Section 14004.5, and resulting enforcement of regulations prohibiting the sale, possession, or use in California of those products other than sale by licensed pesticide dealers and purchase, use, or possession by licensed applicators and certain other individuals licensed pursuant to provisions of the Food & Agriculture Code.
- 191. Reckitt is entitled to preliminary and permanent injunctive relief. Absent intervention by the Court, Reckitt (and others similarly situated) have suffered and will suffer irreparable harm in that they will be forced to cease sale of Reckitt's registered second generation anticoagulant products in California; Reckitt may also be compelled to incur costs associated with the return or recall of such products previously purchased or distributed and in the possession of California consumers and/or retailers.

#### SEVENTH CAUSE OF ACTION

# (Declaratory Relief)

- 192. Reckitt re-alleges and incorporates by reference each and every allegation contained in the above paragraphs as though set forth in full here.
- 193. An actual controversy exists between Reckitt and Respondents because Reckitt contends that Respondents' promulgation and expected enforcement of Regulation 13-002 violates

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# **VERIFICATION**

66641200v1

I, Hal Ambuter, am authorized to make this verification on behalf of Petitioner Reckitt
Benckiser LLC. I have reviewed the foregoing Petition for Writ of Mandate; Complaint for
Declaratory and Injunctive Relief and know its contents. I am informed and believe and on that
basis state that the matters contained in the Petition for Writ of Mandate; Complaint for Declaratory
and Injunctive Relief are true and correct.

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 27, 2014 at Parsippany, New Jersey.

Hal Ambuter

WALL

**VERIFICATION**