

PACIFIC LEGAL FOUNDATION  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(916) 419-7111 FAX (916) 419-7747

1 DEBORAH J. LA FETRA, No. 148875  
E-mail: djl@pacificlegal.org  
2 TIMOTHY SANDEFUR, No. 224436  
E-mail: tms@pacificlegal.org  
3 BRANDON M. MIDDLETON, No. 255699  
E-mail: bmm@pacificlegal.org  
4 Pacific Legal Foundation  
3900 Lennane Drive, Suite 200  
5 Sacramento, California 95834  
Telephone: (916) 419-7111  
6 Facsimile: (916) 419-7747

7 Attorneys for Petitioners and Plaintiffs

8 SUPERIOR COURT OF CALIFORNIA

9 COUNTY OF SACRAMENTO

10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

GEORGE HAHN, an individual, CALIFORNIA )  
VERMICULTURE, LLC, and a California )  
corporation, individually and as successor in interest )  
to GEORGE HAHN dba CALIFORNIA )  
VERMICULTURE/TREE & PLANT RESCUE, )  
Petitioners and Plaintiffs, )  
v. )  
CALIFORNIA DEPARTMENT OF PESTICIDE )  
REGULATION, )  
Respondent and Defendant. )

No. 34-2009-80000361

**PETITIONERS AND PLAINTIFFS'  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR JUDGMENT ON  
PETITION FOR WRIT OF  
ADMINISTRATIVE MANDATE  
AND COMPLAINT FOR  
DECLARATORY AND  
INJUNCTIVE RELIEF**

Date: July 30, 2010  
Time: 9:00 a.m.  
Place: Department 29  
Judge: The Hon. Timothy M. Frawley

TABLE OF CONTENTS

	Page
1	
2	
3	TABLE OF AUTHORITIES ..... ii
4	INTRODUCTION ..... 1
5	STATEMENT OF FACTS ..... 1
6	A. “Worm Gold” Brand Fertilizers ..... 1
7	B. How Worm Gold Brand Fertilizers Make Plants Resistant to Pests ..... 3
8	C. Worm Gold Sales and Advertising ..... 5
9	D. DPR’s Investigations and Citations of Hahn ..... 7
10	QUESTION PRESENTED AND STANDARD OF REVIEW ..... 8
11	ARGUMENT ..... 9
12	I. THE DPR LACKS JURISDICTION IN THIS MATTER BECAUSE WORM GOLD BRAND FERTILIZERS ARE NOT “PESTICIDES” ..... 9
13	
14	II. THE DPR’S EXPANSIVE INTERPRETATION OF “PESTICIDE” MUST BE REJECTED ..... 13
15	III. HAHN DID NOT MAKE “PESTICIDAL CLAIMS” FOR WORM GOLD BRAND FERTILIZERS ..... 19
16	
17	CONCLUSION ..... 21
18	DECLARATION OF SERVICE BY MAIL ..... 22
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	

**TABLE OF AUTHORITIES**

	<b>Page</b>
<b>Cases</b>	
<i>Abuelhawa v. United States</i> , 129 S. Ct. 2102 (2009) .....	8
<i>Burke v. Cal. Coastal Comm’n</i> , 168 Cal. App. 4th 1098 (2008) .....	8
<i>Byrum v. Landreth</i> , 566 F.3d 442 (5th Cir. 2009) .....	18-19
<i>Canon v. Justice Court</i> , 61 Cal. 2d 446 (1964) .....	18
<i>Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.</i> , 20 Cal. 4th 163 (1999) .....	11
<i>Coal. of Concerned Communities, Inc. v. City of Los Angeles</i> , 34 Cal. 4th 733 (2004) .....	9
<i>Gulf Oil Corp. v. EPA</i> , 548 F.2d 1228 (5th Cir. 1977) .....	18
<i>Leslie’s Pool Mart, Inc. v. Dep’t of Food &amp; Agric.</i> , 223 Cal. App. 3d 1524 (1990) .....	10, 16-18
<i>People v. Worst</i> , 57 Cal. App. 2d Supp. 1028 (1943) .....	10-12, 14-17
<i>Pitney-Bowes, Inc. v. State</i> , 108 Cal. App. 3d 307 (1980) .....	8, 14-15
<i>Roberts v. Farrell</i> , 630 F. Supp. 2d 242 (D. Conn. 2009) .....	19
<i>Santa Ana Unified Sch. Dist. v. Orange County Dev. Agency</i> , 90 Cal. App. 4th 404 (2001) .....	8
<i>Schneider v. Cal. Coastal Comm’n</i> , 140 Cal. App. 4th 1339 (2006) .....	8, 14
<i>Turner v. State</i> , 850 S.W. 2d 210 (Tex. App. 1993) .....	17
<i>Welton v. City of Los Angeles</i> , 18 Cal. 3d 497 (1976) .....	18
<b>United States Constitution</b>	
U.S. Const. amend. I .....	18-19
<b>California Statutes</b>	
Bus. & Prof. Code § 12210(a) .....	15
Evid. Code § 452(g) .....	13, 16
§ 452(h) .....	13, 16
Food & Agric. Code § 3 .....	17
§ 12753 .....	1, 6, 9-12, 15-16

	<b>Page</b>
1	
2 § 12753(b) .....	10
3 § 12993 .....	9
4 § 12996 .....	9
5 § 14533 .....	12
6 § 14548 .....	12
7	
<b>California Regulations</b>	
8 Code Regs. tit. 3, § 2304 .....	12
9 Code Regs. tit. 3, § 6147 .....	12
10	
<b>Miscellaneous</b>	
11 Brown, Charles R., USDA Agricultural Research Service, <i>Scientists Use Old, New Tools to Develop Pest-Resistant Potato</i> (Apr. 2009), available at <a href="http://www.ars.usda.gov/is/AR/archive/apr09/potato0409.htm">http://www.ars.usda.gov/is/AR/archive/apr09/potato0409.htm</a> (last visited May 21, 2010) .....	16
12	
13 Darwin, Charles, <i>The Formation of Vegetable</i> <i>Mould Through the Action of Worms</i> (1881) .....	3
14	
15 Flint, M. L., Univ. of Cal. Statewide Integrated Pest Mgmt. Program, <i>Pests in Gardens and Landscapes: Aphids</i> (May 2000), available at <a href="http://www.ipm.ucdavis.edu/PMG/PESTNOTES/pn7404.html">http://www.ipm.ucdavis.edu/PMG/PESTNOTES/pn7404.html</a> (last visited May 21, 2010) .....	13, 15
16	
17 McGraw, Linda, USDA Agricultural Research Service, <i>New Plants Put a Hurt on Pests</i> (Feb. 18, 1999), available at <a href="http://www.ars.usda.gov/IS/pr/1999/990218.htm">http://www.ars.usda.gov/IS/pr/1999/990218.htm</a> (last visited May 21, 2010) .....	4
18	
19	
20 Merzendorfer, Hans & Zimoch, Lars, <i>Chitin Metabolism in Insects:</i> <i>Structure, Function and Regulation of Chitin Synthases</i> <i>and Chitinases</i> , 206 J. of Experimental Bio. 4393 (2003) .....	4
21	
22 <i>Ortho Home Gardener's Problem Solver</i> (2004) .....	15
23 Quiros, Carlos F., Univ. of Cal. Coop. Extension, Vegetable Research & Information Center, <i>Development of Fusarium Resistant Celery</i> , available at <a href="http://vric.ucdavis.edu/veg_info/fusarium_celery.htm">http://vric.ucdavis.edu/veg_info/fusarium_celery.htm</a> (last visited May 21, 2010) .....	16
24	
25	
26 Stats. 1988, ch. 161, § 4 .....	10
27	
28	



1 Gold, and certain derivative fertilizer products called Worm Gold Plus! and Worm Gold Premium  
2 Mix. Administrative Record (AR) 2:787. Worm Gold Plus! consists of worm castings added to  
3 rock mineral and fossilized kelp, to help increase plant growth. Worm Gold Premium Mix consists  
4 of worm castings, rock minerals, and a ready-to-use compost mix. *Id.* Tree And Plant Rescue also  
5 made a product called Tree & Plant Rescue Solution (TPRS), which was not sold to consumers,  
6 but which Tree And Plant Rescue used as part of its service of restoring the health of trees suffering  
7 from beetle infestations. *Id.* TPRS consists of Worm Gold Plus!, molasses, compost, and water.  
8 *Id.* Unless otherwise designated, Worm Gold, Worm Gold Premium Mix, Worm Gold Plus!, and  
9 TPRS will be referred to as “Worm Gold brand fertilizers.”

10 Worm Gold brand fertilizers are soil amendments or “plant foods,” properly registered as  
11 fertilizers with the California Department of Food and Agriculture, AR 1:477-78, 2:1039-40, and  
12 composed of worm castings—the fecal product of worms. AR 1:787. These products are applied  
13 to the soil surrounding a plant, AR 1:787, 2:604-15, 2:1038, 2:1066, although they can also be  
14 sprayed on the leaves, trunk, or stem (“foliar” application) to promote plant growth. AR 1:787,  
15 2:1038, 2:1067.

16 Worm castings are a natural component of all healthy soil, which is usually permeated by  
17 naturally occurring worms. Gardeners have long used worm castings as an organic plant food that  
18 can help improve plants’ natural resistance to infestation by insects and other pests. AR 1:451-54,  
19 1:573-74, 2:842. In the administrative hearing, DPR witness Dr. Don Koehler testified that worm  
20 castings can add nutrients to depleted or unhealthy soil. AR 2:884-85. He testified that “worm

21 \_\_\_\_\_  
22 <sup>3</sup> (...continued)  
23 was not responsible for the actions of these two businesses. AR 1:795. The only witness who  
24 testified that he was did so on the basis of hearsay and his own “assumptions,” AR 1:152. But the  
25 actual owner of these companies, Bill Irwin, testified that Hahn was not related in any way to  
26 Organic Tree Care and Home Chek Services. AR 2:1015-19. That testimony was substantiated  
27 by a letter from the City of Big Bear. AR 1:450, 1:762-65. The hearing officer ruled that there was  
28 insufficient evidence to hold Hahn responsible for these businesses, and dismissed all charges  
relating to the activities of these businesses. But while Hahn repeatedly moved that all evidence  
relating to Organic Tree Care and Home Chek Services be stricken and disregarded as unduly  
prejudicial and irrelevant, AR 2:147-48, 1:764 n.14, the DPR refused to do so, AR 1:148, and the  
Administrative Record is replete with confusing references to these companies. Hahn urges this  
Court to avoid relying on evidence relating to Organic Tree Care and Home Check Services, which  
he did not own or control, and for which he was not responsible.

1 | castings would be beneficial to a soil and to growing plants in it,” AR 2:884, and that although “if  
2 | you have a soil that is pretty adequate in structure and function and nutrition, then the [worm  
3 | castings] don’t necessarily add anything,” they would nevertheless be beneficial if they are  
4 | “contributing something that isn’t already in the soil.” AR 2:885.

5 | Hahn harvests the worm castings from “worm beds,” long tables full of dirt and worm food,  
6 | which can be used to sift the worm castings from the bottom. AR 2:609, 2:614, 1:467-68. Hahn  
7 | feeds the worms cardboard. AR 2:1035.

8 | The benefits of worm castings have been widely known to gardeners since at least the  
9 | Nineteenth Century, when Charles Darwin wrote a book on worms and worm castings. AR 1:456<sup>4</sup>,  
10 | AR 2:1032. Earthworms play a vital role in the breakdown of organic matter and the release of  
11 | nutrients into soil. AR 1:456-70, 2:1035. Worm castings (a.k.a. “vermicompost”) promote the  
12 | growth of plants, produce dramatic increases in germination, growth, flowering, and crop yield.  
13 | AR 2:1036. They also help plants to fend off attacks and pests. AR 1:471-76.

14 | **B. How Worm Gold Brand Fertilizers Make Plants Resistant to Pests**

15 | Worm Gold brand fertilizers are not intended to be ingested by pests, and do not kill insects.  
16 | AR 2:1049; 2:1147. They do not act directly on pests at all, either to kill them or to bar them from  
17 | approaching or lighting on a plant. Instead, Worm Gold brand fertilizers cause plants to flourish,  
18 | fostering their natural resistant properties. Healthy plants are naturally more resistant to pest  
19 | attacks. AR 2:988. Worm Gold brand fertilizers are not poisonous to humans; users are not  
20 | required to use gloves when handling them, and they are not dangerous if they get in the eyes.  
21 | AR 2:1048. They cannot contaminate vegetables. AR 2:1052.

22 | The specific method by which Worm Gold brand fertilizers work is as follows:<sup>5</sup> once a  
23 | plant ingests soil enriched by Worm Gold brand fertilizers, the plants increase their production of

24 | \_\_\_\_\_  
25 | <sup>4</sup> Charles Darwin, *The Formation of Vegetable Mould Through the Action of Worms* 312 (1881)  
26 | (“Worms prepare the ground in an excellent manner for the growth of fibrous-rooted plants and for  
seedlings of all kinds.”).

27 | <sup>5</sup> As the hearing officer correctly concluded, “the efficacy of Wormgold products was not an issue  
28 | in this hearing, and whether or not they work is unnecessary to resolution of this case.” AR 2:787  
(n.8).

1 a naturally occurring enzyme called chitinase, which helps degrade a polymer called chitin. Chitin  
2 (pronounced “kite-in”) is a material found in the guts of insects, AR 2:1050, 2:869-71, or as part  
3 of their exoskeletons. AR 2:870. Chitin functions like a “scaffold material, supporting the cuticles  
4 of the epidermis and trachea as well as the peritrophic matrices lining the gut epithelium.” Hans  
5 Merzendorfer and Lars Zimoch, *Chitin Metabolism in Insects: Structure, Function and Regulation*  
6 *of Chitin Synthases and Chitinases*, 206 J. of Experimental Bio. 4393, 4393 (2003). Chitinase can  
7 “put[] a ‘chink in the armor’ of the insect’s stomach by causing chitinous membranes to  
8 disintegrate. Without this membrane, insects are helplessly vulnerable to microbial infections.”  
9 Linda McGraw, USDA Agricultural Research Service, *New Plants Put a Hurt on Pests* (Feb. 18,  
10 1999).<sup>6</sup>

11 Insects can sense the presence of chitinase in a plant’s vascular system, through something  
12 akin to the sense of smell, and they will choose to avoid that plant. AR 2:1049 (Q: “Do the bugs  
13 ingest Wormgold?” Hahn: “No. The bugs avoid Wormgold. If you put Wormgold down, ants  
14 won’t cross it.” Q: “Do you know whether it actually kills insects?” Hahn: “Have no  
15 instance—there is no relationship that it kills insects. The insects will avoid—the insects will  
16 avoid worm castings.”); AR 2:608 (patent materials describing the product working through pests’  
17 natural “strong aversion” to chitinase). As Hahn expressed it in a Worm Gold advertisement, “The  
18 bugs’ reaction to chitinase is similar to our reaction to sour milk. One drop of sour milk mixed into  
19 a glass of sweet milk and you will drink the glass with no negative reaction. However, mix in three  
20 tablespoons and no one has to convince you to not drink the milk.” AR: 1:368. Or, in a statement  
21 released by Tree And Plant Rescue, “[o]nce the systemic level of chitin degraders is such that  
22 chewing and sucking bugs can detect it, the bugs will avoid the plants.” AR 1:422. Worm Gold  
23 brand fertilizers do *not* poison pests, or cause them not to eat, or prevent them from landing on a  
24 plant. Instead, pests detect the plant’s natural production of chitin-degrading chitinase and avoid  
25 the plant. *See also* AR 2:626 (Advertisement: “tests revealed that chewing and sucking insects  
26 ///

27 \_\_\_\_\_  
28 <sup>6</sup> Available at <http://www.ars.usda.gov/IS/pr/1999/990218.htm> (last visited May 21, 2010).

1 avoid plants that were mulched with worm castings . . . . [T]his product increases the plant’s  
2 natural defensive ability. This product is NOT a pesticide and no chemicals are used.”).

3 Many plants carry chitinase as part of their natural immune system. But when grown in soil  
4 that is organically depleted and/or has few earthworms, plants produce chitinase in amounts  
5 insufficient to resist most infestations. When worm castings are plentiful in the soil, they are  
6 absorbed by a plant’s roots, causing the plant to increase its natural chitinase production, thus  
7 helping to make the plant less appetizing to insects. The natural boost in chitinase caused by worm  
8 castings enables the plant to produce signals that discourage insects from loitering around or eating  
9 the plants. AR 1:128-32 (newspaper article: “Bark beetles and other pests who sense the presence  
10 of chitin will not bore into the trees, Hahn discovered.”); AR 2:604-15 (patents describing how  
11 Worm Gold brand fertilizers work); AR: 2:471-76 (articles describing insects’ aversion to  
12 vermicomposts).

13 In short, Worm Gold brand fertilizers are natural fertilizers that promote plant robustness,  
14 making plants more resistant to infestation. Because worm castings are non-toxic, they provide a  
15 non-poisonous alternative to chemical pest treatments and do not harm other valuable organisms  
16 in the soil.

17 **C. Worm Gold Sales and Advertising**

18 Beginning in 1998, Hahn sold Worm Gold brand fertilizers to nurseries, AR 2:1053,  
19 promoting them with advertisements that touted their power to foster plants’ natural resistance to  
20 pest infestations. AR 1:94-98, 1:146-47, 1:360, 1:362-79, 1:384-86. These advertisements  
21 promoted Worm Gold brand fertilizers’ capacity to make plants healthy and strong, truthfully  
22 stating that insects would choose to leave or would avoid such plants. One advertisement, for  
23 example, noted that “worm castings improve health of plants when used with a quality compost,”  
24 AR 1:371; another touted Worm Gold as “The Ultimate Soil Amendment,” noting that “aphids,  
25 spider mites, white flies, bark beetles, and other pest insects have left plants when they were fed  
26 WORMGOLD,” AR 1:634; another noted that “[b]ark beetles will avoid and not attack trees when  
27 the root zone bark and needles have been treated with the proper beneficial microorganisms.”  
28 AR 1:97. Still another noted that “[b]eetles will avoid confiders . . . that have been treated with

1 Tree and Plant Solution.” AR 1:420. Still another emphasized “Improved Growth With Worm  
2 Castings.” AR 1:373.

3           Neither Mr. Hahn nor his companies ever advertised Worm Gold brand fertilizers with the  
4 word “pesticide,” nor were claims ever made that they killed pests. AR 2:1055, 2:1063, 2:1147.  
5 On the contrary, advertisements consistently explained that “[t]his product is NOT a pesticide.”  
6 AR 1:492; *see also* AR 1:115 (contrasting TPRS with pesticides and describing it as “a  
7 dramatically different approach” than pesticides); AR 1:363 (“[I]t’s not a nasty pesticide . . . [or]  
8 a fungicide but those soil problems are gone.”). On some occasions before government officials  
9 informed Mr. Hahn that such advertising statements were not allowed, advertisements for Worm  
10 Gold brand fertilizers did include statements implying that Worm Gold brand fertilizers *themselves*  
11 repel pests. One advertisement, for instance, stated: “Repels Bark Beetles Naturally,” AR 1:94,  
12 although it went on to explain that this effect was an indirect consequence of the fact that Worm  
13 Gold products “*reintroduce beneficial microorganisms* to your trees that were lost under adverse  
14 conditions such as drought,” and thereby “Revitalize[s] the Health of Trees.” AR 1:94. At least  
15 one retailer over whom Mr. Hahn had no control did place a sign beside the products advertising  
16 them as poisonous to slugs and snails (which they are not). AR 1:158.<sup>7</sup> But with these relatively  
17 minor exceptions, advertisements for Worm Gold brand fertilizers emphasized that the products  
18 *improved plant health* and thereby strengthened the plants’ resiliency against attacks—and did not  
19 claim that Worm Gold products would affect pests. One client testimonial, for example, noted that  
20 “our vines treated with WORMGOLD and WORMGOLD Premium Mix have thicker, greener  
21 leaves, with more terminal bud growth and positive vigorous cane growth. The overall health of  
22 the vines are showing less stress . . . . [S]tress[ed] plants are turning around and starting to show  
23 more robustness.” AR 2:645.

24 \_\_\_\_\_  
25 <sup>7</sup> Bizarrely, the DPR acknowledged that this sign was “likely . . . created in the store, and not by  
26 [Hahn],” but nevertheless found it “telling that the retailer identified the product as a pest killer.”  
27 AR 2:790 n.12. But if Hahn did not identify the product as a pest killer—which it is not—it cannot  
28 “tell” anything that a third party, unknown to him, chose to designate his product by an inaccurate  
name. The nursery in question might have inaccurately identified the product as anything it  
wished, but that would have no bearing on whether Worm Gold brand fertilizers qualify as  
“pesticides” under Section 12753.

1 California Vermiculture operated a dba called Tree And Plant Rescue. AR 2:1026. In  
2 2001, Tree And Plant Rescue was hired by some tree owners in the San Bernardino National Forest  
3 to apply TPRS to their pine trees in an effort to prevent the further destruction of the forest by bark  
4 beetles. AR 2:1065-67. These efforts were successful. AR 2:1067. Beetles will attack a tree that  
5 is distressed or unhealthy, and because TPRS improved the health and strength of the trees, the  
6 beetles chose to avoid the treated trees. AR 2:1068-69. TPRS was applied to the trees as a plant  
7 food to strengthen the trees, and not a pesticide. AR 2:932, 2:1071-1072. *See also* AR 2:1069  
8 (Hahn: "It was our intent to bring the tree[s] back to a healthy status. And our testing showed once  
9 we had new growth showing that improved health status, the bark beetles would not touch those  
10 trees.").

11 **D. DPR's Investigations and Citations of Hahn**

12 In the fall of 2004, the DPR, and the Agriculture Commissioners of San Bernardino and  
13 Riverside Counties initiated investigations of Mr. Hahn and his companies. AR 1:133, 1:178-88.  
14 These investigations resulted from publicity about Hahn's treatment of beetle-infested trees in the  
15 San Bernardino National Forest, and from advertisements on Mr. Hahn's websites. AR 1:189-92,  
16 1:388. Ultimately, Hahn was fined by the Riverside County Agriculture Commissioner (CAC),  
17 AR 1:178, although not by the San Bernardino CAC, which, after explaining state pesticide  
18 regulations to Mr. Hahn, rescinded its notice of violation. AR 21073, 2:1111. Hahn requested a  
19 hearing regarding the Riverside fine, and the fine was upheld by the Riverside CAC, who noted that

20 [Mr. Hahn] asserts that he made every effort to comply with Federal, State and local  
21 law. I am persuaded that Hahn made substantial proactive efforts to get information  
22 so that he could be in full compliance with all laws and regulations. There were  
several different government agencies involved in his information gathering  
process, giving seemingly contradictory and/or incomplete information.

23 AR 1:187, 2:1111. Finding that there was no evidence that Worm Gold brand fertilizers were  
24 harmful to humans, the Riverside CAC reduced the fine. AR 1:188. On appeal, the DPR affirmed  
25 the Riverside CAC's finding that Mr. Hahn had violated the statutes and increased the fine to \$500,  
26 on the basis that the fact that these products are not harmful to humans was irrelevant. AR 2:668.  
27 The Director did not disturb the finding that Mr. Hahn acted in good faith. Mr. Hahn paid this fine  
28 on March 13, 2006.

1 On April 18, 2007, the DPR initiated a new proceeding against Mr. Hahn, this time on the  
2 grounds that he had sold unregistered pesticides. AR 1:7. After various procedural delays, and  
3 after denying motions to dismiss, DPR convened a hearing for May 13 and 14, 2009. The Hearing  
4 Officer took evidence and testimony, and ruled on a number of objections from both parties. On  
5 September 13, 2009, the Hearing Officer issued a decision holding Hahn liable for the sale of an  
6 unregistered pesticide, and fined him \$100,000. AR 2:785-802. The Director of the DPR issued  
7 a judgment in accordance with the decision, and this petition timely followed.

### 8 QUESTION PRESENTED AND STANDARD OF REVIEW

9 Although several factual questions were presented to the hearing officer below, this Court  
10 is confronted only with one question, and that is a legal one: Do Worm Gold brand fertilizers  
11 qualify as “pesticides” under the relevant statute? As the DPR has statutory jurisdiction only over  
12 “pesticides,” Mr. Hahn challenges the DPR’s assertion of jurisdiction on the grounds that these  
13 natural, non-poisonous plant foods are not “pesticides.”

14 The issue of whether an administrative agency proceeded in excess of its jurisdiction is a  
15 question of law. *Schneider v. Cal. Coastal Comm’n*, 140 Cal. App. 4th 1339, 1343-44 (2006). It  
16 is therefore subject to *de novo* review, *id.*, and this Court must not defer to the DPR’s determination  
17 of whether the agency’s action lies within the scope of authority delegated to it by the Legislature.  
18 *Burke v. Cal. Coastal Comm’n*, 168 Cal. App. 4th 1098, 1006 (2008).

19 Courts should avoid construing administrative jurisdiction in a manner that “add[s]  
20 language” to the statute in question. *Schneider*, 140 Cal. App. 4th at 1345. Indeed, courts should  
21 avoid expansive interpretations of statutes that grant jurisdiction to administrative agencies.  
22 *Pitney-Bowes, Inc. v. State*, 108 Cal. App. 3d 307, 321 n.12 (1980).

23 Normally, the Court must “examine the words of the statute itself, attributing the usual,  
24 ordinary, and common sense meaning to them.” *Santa Ana Unified Sch. Dist. v. Orange County*  
25 *Dev. Agency*, 90 Cal. App. 4th 404, 409 (2001). The individual words and phrases of a statute must  
26 not be read in isolation, or read so as to “extend” a word “to the outer limits of its definitional  
27 possibilities.” *Abuelhawa v. United States*, 129 S. Ct. 2102, 2105 (2009) (citation omitted). Courts  
28 are not bound by a “literal interpretation” that “would result in absurd consequences the Legislature

1 did not intend.” *Coal. of Concerned Communities, Inc. v. City of Los Angeles*, 34 Cal. 4th 733, 737  
2 (2004). Context matters, because if statutory language permits more than one reasonable  
3 interpretation, courts may consider other aids, including the statute’s purpose, legislative history,  
4 and public policy. *Id.*

5 **ARGUMENT**

6 **I**

7 **THE DPR LACKS JURISDICTION IN THIS MATTER BECAUSE**  
8 **WORM GOLD BRAND FERTILIZERS ARE NOT “PESTICIDES”**

9 Food and Agricultural Code sections 12993 and 12996 give the DPR jurisdiction over  
10 violations of the Code, including selling an unregistered pesticide. The term “pesticide” is defined  
11 in section 12753, and it does not encompass the sale of worm castings. The DPR therefore lacks  
12 jurisdiction over Worm Gold brand fertilizers.

13 The statute defines a pesticide as:

14 (a) Any spray adjuvant.

15 (b) Any substance, or mixture of substances which is intended to be used for  
16 defoliating plants, regulating plant growth, or for preventing, destroying, repelling,  
17 or mitigating any pest . . . which may infest or be detrimental to vegetation, man,  
animals, or households, or be present in any agricultural or nonagricultural  
environment whatsoever.

18 Food & Agric. Code § 12753.

19 Worm Gold brand fertilizers do not defoliate plants, or regulate plant growth (except insofar  
20 as it acts as a fertilizer), and are not intended to be used to prevent, destroy, repel, or mitigate pests  
21 by themselves. Instead, they are intended to be ingested by plants, in order to cause plants naturally  
22 to become strong and to resist pests through their natural process of chitinase production and other  
23 natural bioresistance mechanisms. While in this sense Worm Gold products do indirectly cause  
24 plants to ward off attacks by pests, so, too, do water, sunlight, and other components of soil. Worm  
25 Gold products themselves are simply not intended for use in any of the ways described by  
26 Section 12753. They do not repel pests; they cause plants to repel pests through their own natural  
27 resistant qualities. *See further* AR 2:1148 (Q: “Does [Worm Gold], in fact, cause plants to repel  
28 insects?” Hahn: “Absolutely. Very efficiently.”). Worm Gold products are not pesticides.

1 The fact that a plant food, when properly used, causes a plant to undergo a natural process  
2 that makes it resistant to pests, does not make that plant food a pesticide. On the contrary, the  
3 language of Section 12753(b) contemplates substances which are directly applied to, or ingested  
4 by, pests. It refers to a “substance, or mixture of substances which is intended to be used for  
5 defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating  
6 any pest”—not substances which are intended for use in improving plant health and thereby  
7 encouraging a plant’s normal resistance to pests. The language of Section 12753 does not apply  
8 to a plant food which, as a secondary, indirect consequence, causes plants to deter pests.

9 In *People v. Worst*, 57 Cal. App. 2d Supp. 1028 (1943), the court determined that the DPR  
10 has no statutory authority to require registration of natural products of which the “active  
11 ingredient . . . is produced by nature and not by chemicals or other artificial means.” *Id.*  
12 at 1030-31. That case involved a plant commonly known as “gopher purge,” the naturally  
13 occurring odor of which repels gophers. The City claimed that the seller of the plant was required  
14 to register it with the Department of Agriculture before selling it, but the court found that “this law  
15 was never intended to, and does not, include a growing bush of the character here under  
16 consideration.” *Id.* at 1030. The plant was not an “economic poison,” *id.* at 1029, and was “never  
17 represented as being a poison, or as being physically injurious to the gopher, or to be eaten by him,  
18 but only as being so obnoxious to his sense of smell as to discourage his presence in the immediate  
19 vicinity.” *Id.* at 1031. It would be unreasonable, the court concluded, to interpret the law so  
20 broadly. *Id.* Thus the plant and its odor could not qualify as “substances” under the statute, *see*  
21 *id.*, and did not have to be registered under Section 12753.

22 The *Worst* case was reaffirmed in *Leslie’s Pool Mart, Inc. v. Dep’t of Food & Agric.*, 223  
23 Cal. App. 3d 1524, 1534 (1990), which described *Worst* as a case in which the Department  
24 “overstepped its statutory authority.” The *Leslie’s Pool Mart* decision noted that when the  
25 Legislature amended Section 12753 after *Worst*, it chose not to change that case’s interpretation  
26 of the statute; the amendment was merely ““declaratory of existing law and [did] not constitute a  
27 change in the law.”” *Leslie’s Pool Mart*, 223 Cal. App. 3d at 1538 n.12 (citing Stats. 1988, ch. 161,  
28 § 4). The Legislature’s acquiescence in the *Worst* court’s conclusion that purely natural products

1 are not subject to the registration requirement in Section 12753 reinforces Hahn’s position in this  
2 case. In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Tel. Co.*, 20 Cal. 4th 163, 178  
3 (1999), the Supreme Court noted that although “[l]egislative inaction is often not a convincing  
4 reason to refuse to change a statutory interpretation,” it was sufficient where the judicial  
5 interpretation in question had stood unchanged “for almost half a century,” was unambiguous, and  
6 where the Legislature had amended other portions of the statute. These factors are all present here.  
7 The DPR regarded *Worst* as outdated, but the longevity of that decision, and the Legislature’s  
8 choice not to disturb it, actually weigh *against* the DPR’s expansion of its authority.

9 This case is similar to *Worst* in every relevant respect. Worm Gold brand fertilizers are  
10 composed of naturally occurring products formed by worms in soil. They are not artificial  
11 chemicals or economic poisons. The DPR has not alleged that Hahn represented Worm Gold brand  
12 fertilizers as poisons, or as being physically injurious to any pest or as intended for ingestion by  
13 pests. *Cf. Worst*, 57 Cal. App. 2d Supp. at 1031. Hahn advertised these products only as being so  
14 obnoxious to pests as to discourage their presence in the vicinity. The DPR contended only that  
15 Hahn advertised Worm Gold brand fertilizers as “suppress[ing] pathogens . . . repel[ling] harmful  
16 insects but no[t] beneficial insects, and allow[ing] plants and trees to thrive in adverse conditions,”  
17 and as “causing bark beetles to avoid and not attack trees.” AR 1:4-5. Thus, as with the natural  
18 odor of the plant in *Worst*, Worm Gold brand fertilizers simply discourage the presence of pests  
19 in the vicinity in which the products are applied. They do not qualify as “pesticides” or “economic  
20 poisons.” A product that “allows plants and trees to thrive in adverse conditions” is a fertilizer, not  
21 a pesticide.

22 It makes no difference that Hahn’s worms are fed cardboard. Although the DPR relied  
23 heavily on this fact to distinguish *Worst*, *see* AR 2:798-99, the court in *Worst* actually addressed  
24 this consideration and found it irrelevant. The government contended that gopher purge was not  
25 wholly natural because its gopher-repelling smell was enhanced by feeding the plant special  
26 fertilizers: “It is argued that because defendant fed vitamins to the bush to develop its root growth,  
27 it is therefore chemically treated and thus becomes an economic poison.” 57 Cal. App. 2d Supp.  
28 at 1031. The court rejected this argument as, again, too expansive; because herbicides were

1 included in the definition of pesticides, such an argument would mean that weed-preventative  
2 grasses would also qualify as “pesticides” and require DPR registration:

3 If this is true, as “weeds” are listed along with “rodents” in section 1061, one could  
4 not, without first complying with section 1071, grow a lawn clover, with the aid of  
5 a fertilizer, and sell it under the representation that it is more rugged than devil’s  
grass and will prevent the growth of the latter when planted in a lawn. We cannot  
agree that this law was ever intended to be, or is, so inclusive.

6 *Id.* In short, natural products that merely deter pests indirectly by producing a smell or taste that  
7 pests find obnoxious—be it gopher purge or Worm Gold brand fertilizers—are not pesticides, even  
8 if the smell is enhanced by the addition of nutrients.

9 Hahn’s interpretation of Section 12753 is buttressed by the administrative regulations  
10 interpreting the statute. Title 3, section 6147, of the California Code of Regulations provides a list  
11 of exemptions to the registration requirement; that list includes only natural products which are  
12 used *directly* to repel pests, such as garlic or cinnamon. It does not include any products which,  
13 like Worm Gold fertilizers, are only used to encourage plant health, and thereby indirectly prevent  
14 pest infestation.

15 Title 3, section 2304, of the Code of Regulations, by contrast, is a regulation governing  
16 *fertilizers*, not pesticides, and it does explicitly contemplate fertilizers or plant foods that have  
17 secondary effects like those caused by Worm Gold. That regulation states: “All fertilizing  
18 materials for which claims are made relating to organisms, *enzymes* [e.g., chitinase] or organisms  
19 by-products are auxiliary soil and plant substances.” (emphasis added). Because the relevant  
20 statutes and regulations should be read as a whole wherever possible, these regulations support  
21 Hahns’ interpretation: The term “pesticide” does not include plant foods that encourage plants’  
22 natural strength against pest attacks.

23 Worm Gold brand fertilizers *do* fall within the statutory definition of “fertilizer” in Food  
24 and Agriculture Code section 14533<sup>8</sup> and of “natural organic fertilizer” in Section 14548.<sup>9</sup>

25 \_\_\_\_\_  
26 <sup>8</sup> “[A]ny commercial fertilizer, agricultural mineral, auxiliary soil and plant substance, or packaged  
soil amendment.”

27 <sup>9</sup> “[M]aterials derived from either plant or animal products containing one or more nutrients other  
28 (continued...)

1 Respondents never advertised Worm Gold brand fertilizers as “pesticides,” AR 2:1147, or claimed  
2 that the product killed insects, AR 2:1063, but instead advertised the product as “the ultimate soil  
3 amendment.” *Id.* Mr. Hahn testified that his products were used “to bring the tree [or plant] back  
4 to a healthy status. And our testing showed once we had new growth showing that improved health  
5 status, the bark beetles [or other pests] would not touch those trees [or plants].” AR 2:1049.

6 **II**

7 **THE DPR’S EXPANSIVE INTERPRETATION**  
8 **OF “PESTICIDE” MUST BE REJECTED**

9 The DPR concluded below that Worm Gold brand fertilizers are pesticides because  
10 “pesticidal claims in whatever form *converted the products into pesticides under the law.*”  
11 AR:2:793 (emphasis added). Indeed, the DPR held that the “marketing claims” alone sufficed to  
12 transform Worm Gold brand fertilizers into a pesticide and bring them within DPR jurisdiction.  
13 Any product or substance which is “‘intended to’ mitigate or repel any pest,” the DPR held,  
14 qualifies as a pesticide, and “[i]t is ‘intended’ to do so if the seller claims, states, or implies, by  
15 labeling or otherwise, that the substance can or should be used as a pesticide.” AR 2:791.

16 This interpretation of “pesticide,” however, is erroneous, for at least three reasons.

17 First, such a broad reading would transform even obvious non-pesticides, such as water,  
18 into “pesticides” under the statute. As Hahn observed in the proceedings below, many gardeners  
19 recommend using sprays of water to eradicate pests such as whiteflies or thrips.<sup>10</sup> The DPR’s  
20

21 \_\_\_\_\_  
22 <sup>9</sup> (...continued)

23 than carbon, hydrogen, and oxygen, which are essential for plant growth, which may be subjected  
24 to biological degradation processes under normal conditions of aging, rainfall, sun-curing, air  
25 drying, composting, rotting, enzymatic, or anaerobic/aerobic bacterial action, or any combination  
of these, which shall not be mixed with synthetic materials or changed in any physical or chemical  
manner from their initial state except by physical manipulations such as drying, cooking, chopping,  
grinding, shredding, or pelleting.”

26 <sup>10</sup> See M. L. Flint, Univ. of Cal. Statewide Integrated Pest Mgmt. Program, *Pests in Gardens and*  
27 *Landscapes: Aphids* (May 2000), available at [http://www.ipm.ucdavis.edu/PMG/PESTNOTES/](http://www.ipm.ucdavis.edu/PMG/PESTNOTES/pn7404.html)  
28 [pn7404.html](http://www.ipm.ucdavis.edu/PMG/PESTNOTES/pn7404.html) (last visited May 21, 2010). Simultaneously with their motion for judgment, Plaintiffs  
and Petitioners have requested that the Court take judicial notice, pursuant to Evidence Code  
sections 452(g) and (h), of the fact that this publication recommends the use of water to repel or  
eliminate pest infestations.

1 witnesses even admitted that under the broad interpretation of “pesticide” used here, water would  
2 qualify. AR 2:889 (Q: “If water was sold and it was sold on the basis it kills or repels insects, is  
3 it your opinion that it would be registered?” Dr. Koehler: “A direct answer to that specific  
4 question would be yes.”); AR 2:988 (Mr. Dearmin: “If they’re marketing [water] as a pesticide,  
5 we would pursue it.”). Indeed, if any product which is sold with a claim that it is intended to repel  
6 or mitigate any pest qualifies as a pesticide, even backyard fences, barbed wire, rat traps, or  
7 scarecrows would qualify.<sup>11</sup> Such a dramatic expansion of the definition of “pesticide” would  
8 contradict the holding in *Worst*, would result in an unwarranted expansion of DPR authority, and  
9 would “add language” to the agency’s statutory jurisdiction. *Schneider*, 140 Cal. App. 4th at 1345.

10 This Court should reject the DPR’s expansion of its jurisdiction. “[A]bsent a clear  
11 legislative mandate, in the interest of the wise public policy of avoiding uncalled for and  
12 unnecessary regulation in the free market place, courts should exercise judicial restraint and refrain  
13 from scratching administrative agencies’ itch to expand their regulatory powers.” *Pitney-Bowes*,  
14 108 Cal. App. 3d at 321 n.12.

15 In *Schneider*, the court of appeal rejected the Coastal Commission’s assertion that its  
16 statutory authority to regulate property to protect the view “to and along” the shoreline also gave  
17 it power to regulate property that might be seen from a boat at sea. The court explained that while  
18 as a matter of grammar, the “view to” the shoreline might be construed in that way, “it is  
19 unreasonable to assume that the Legislature meant to include ocean-based views to the shore when  
20 it enacted [the Coastal Act] 30 years ago.” 140 Cal. App. 4th at 1345. The court noted that the  
21 authority of administrative agencies should not be expanded without justification, *id.* at 1348, and  
22 concluded that there was no statutory warrant for such an expansive interpretation of the agency’s  
23 power.

24 So, too, in *Pitney-Bowes*, the Department of Food and Agriculture asserted administrative  
25 authority over postal scales which were used for determining the cost of postage. 108 Cal. App.

26 \_\_\_\_\_  
27 <sup>11</sup> In fact, all these items are *more* like pesticides than is Worm Gold, because they all act directly  
28 on pests, whereas Worm Gold only acts on a plant, causing the *plant* to become unattractive to pests.

1 3d at 310. The Department argued that it had statutory authority over “all scales of any kind,” Bus.  
2 & Prof. Code § 12210(a), including postage scales. The court of appeal, however, rejected this  
3 interpretation as “shak[y].” 108 Cal. App. 3d at 319. Although read literally, the statute might  
4 have granted the Department such power, the statute had to be read in context to effect the  
5 Legislature’s reasonable intent, and to avoid overstretching its language. *Id.* at 313-14.

6 Here, the DPR held that the public interest required it to reject the precedent of *Worst* and  
7 to regulate Worm Gold brand fertilizers, because the products might be harmful. AR 2:798. But  
8 Hahn does not contend that Worm Gold products should not be subject to licensing requirements;  
9 these fertilizers are already subject to licensing and registration requirements, and are already  
10 properly licensed. AR 1:477-78, 2:1039-40. There is no danger that a finding that Mr. Hahn’s  
11 product is not a pesticide will create a loophole for dangerous products to be used without proper  
12 oversight. Worm castings occur naturally in the environment because they are the feces of worms  
13 that inhabit normal soil and have done so since time immemorial. They are not poisonous or  
14 dangerous to humans, and a person need not even use gloves when handling them. AR 2:1047-48.

15 Indeed, the danger is that under the DPR’s interpretation, any product that might have an  
16 indirect effect on a pest would be subject to DPR authority. All other fertilizers or plant foods  
17 would be subject to the registration requirement, as they also cause plants to flourish and thereby  
18 to deter pests. Not only would tap water or scarecrows qualify as pesticides, AR 2:889, 2:988, but  
19 so would other obvious non-pesticides. U.C. Davis recommends using Teflon or duct tape to  
20 prevent aphids from infesting plants.<sup>12</sup> Gardeners often paint tree trunks to prevent insects from  
21 boring into them, *see Ortho Home Gardener’s Problem Solver* 271 (2004), or wrap tree trunks with  
22 strips of metal to prevent squirrels from climbing them. *Id.* at 496. Under the DPR’s expansive  
23 interpretation of Section 12753, duct tape, paint, metal strips, and Teflon would qualify as  
24 “pesticides.” U.C. Davis is currently breeding fusarium-resistant celery, and the USDA’s  
25 Agricultural Research Service is developing a potato that is bioresistant to the Columbia Root-knot  
26 ///

27 \_\_\_\_\_  
28 <sup>12</sup> Flint, *supra* note 10.

1 Nematatode.<sup>13</sup> These, too, would be subject to the registration requirement under the DPR’s theory  
2 that the mere intent to use a product to deter pests turns that product into a pesticide.

3 This is not an exaggeration: In addition to contending the water would qualify as a  
4 pesticide, DPR witness Koehler testified that under his interpretation, plants bred to resist pests  
5 would also have to be registered as pesticides. AR 2:871 (“[T]here have been attempts to  
6 genetically engineer plants with an insect chitinase which went in to protect the plant.” Q: “Now  
7 if you’re modifying a product so that it would have this chitinase activity, would that need to be  
8 registered as a pesticide?” A: “Well . . . yes.”).

9 If Worm Gold brand fertilizers are subject to DPR control, then all fertilizers or other  
10 products which foster plant strength and plants’ normal resistance to pests would also be subject  
11 to the registration requirement. Indeed, all products that are advertised as indirectly causing pests  
12 to avoid plants would be subject to DPR registration. This cannot be the proper interpretation of  
13 the statute. While there may be products of such a nature that courts should defer to the DPR’s  
14 determination that they are pesticides, Worm Gold brand fertilizers are not such products. They  
15 are natural plant foods, made of substances found in all normal garden soil, and are marketed for  
16 their ability to promote plants’ robustness and capacity to resist infestation. They do not act  
17 directly on pests at all. This is not a close case—Worm Gold products are fertilizers, not  
18 pesticides.

19 Second, the DPR’s expansive interpretation of “pesticide” was rejected in *Worst*, 57 Cal.  
20 App. 2d Supp. at 1031. Although the hearing officer considered *Worst* outdated, that decision is  
21 still valid law. See *Leslie’s Pool Mart*, 223 Cal. App. 3d at 1534. Moreover, *Worst* was correctly  
22 decided. There is no reason to believe that Section 12753 was intended to prohibit naturally

23 ///

---

24 <sup>13</sup> See Carlos F. Quiros, Univ. of Cal. Coop. Extension, Vegetable Research & Information Center,  
25 *Development of Fusarium Resistant Celery*, available at [http://vric.ucdavis.edu/veg\\_info/fusarium\\_celery.htm](http://vric.ucdavis.edu/veg_info/fusarium_celery.htm) (last visited May 21, 2010); Charles R. Brown, USDA Agricultural Research Service,  
26 *Scientists Use Old, New Tools to Develop Pest-Resistant Potato* (Apr. 2009), available at  
27 <http://www.ars.usda.gov/is/AR/archive/apr09/potato0409.htm> (last visited May 21, 2010).  
28 Simultaneously with their motion for judgment, Plaintiffs and Petitioners have requested that the Court take judicial notice, pursuant to Evidence Code sections 452(g) and (h), of the fact that these organizations are breeding pest-resistant forms of these plants.

1 | occurring products that simply cause plants to produce a pest-detering odor—let alone products  
2 | that are already a natural ingredient of the soil.

3 |         The purpose of California’s pesticide regulations is to “promot[e] and protect[] the  
4 | agricultural industry of the state and . . . protect[] . . . the public health, safety, and welfare.” Food  
5 | & Agric. Code § 3. These purposes are not accomplished by defining as a pesticide a product  
6 | whose active ingredient is

7 |             an odor, and is produced by nature and not by chemicals or other artificial means,  
8 |             excepting so far as the introduction of vitamins thereto might tend to enlarge the  
9 |             roots and thereby enhance the root odor. The [product] was never represented as  
10 |             being a poison, or as being physically injurious to the [pest], or to be eaten by him,  
11 |             but only as being so obnoxious to [him] . . . as to discourage his presence in the  
12 |             immediate vicinity.

11 | *Worst*, 57 Cal. App. 2d Supp. at 1031. But under the DPR’s unreasonably broad interpretation,  
12 | gopher purge, as well as water, scarecrows, rat traps, fencing materials, and any number of other  
13 | products, would qualify as pesticides because they are advertised as preventing or repelling pests.

14 |         Unlike gopher purge or worm castings, the products at issue in *Leslie’s Pool Mart* were  
15 | pesticides because they are artificial chemicals, 223 Cal. App. 3d at 1530, which were “intended  
16 | to be used to kill or reduce bacteria or weeds (algae) in swimming pools.” *Id.* at 1537. The  
17 | products were specifically marketed as a way of killing bacteria. This distinguishes *Leslie’s Pool*  
18 | *Mart* from *Worst* and from this case, in which the products were entirely natural and sold merely  
19 | as an indirect way of causing pests to avoid an area. Worm Gold brand fertilizers also differ from  
20 | the anti-fire ant product at issue in the Texas case of *Turner v. State*, 850 S.W. 2d 210 (Tex. App.  
21 | 1993). There, the court of appeals found that the product qualified as a pesticide<sup>14</sup> because it  
22 | “immobilize[d] the ants for a while so that they cannot eat.” *Id.* at 213. The producer argued that  
23 | the product’s purpose was only to level ant mounds, but the court concluded that it “kills the fire  
24 | ants by preventing them from eating and this reaches the same end result as any other pesticide.”  
25 | *Id.* at 213. Here, the product does not kill insects, or immobilize them, or prevent them from

26 | ///

27 | \_\_\_\_\_  
28 | <sup>14</sup> The Texas law’s definition of “pesticide” was virtually identical to California’s in this case. *Id.*  
at 214.

1 eating; it does not act directly on insects at all. It simply boosts a plant’s natural capacity to “smell  
2 bad” to pests.

3 This case is closer to *Gulf Oil Corp. v. EPA*, 548 F.2d 1228 (5th Cir. 1977),<sup>15</sup> in which the  
4 federal court found that citronella oil was not a pesticide, despite the fact that it was (and still is)  
5 a widely used pest repellent. *Id.* at 1230. Citronella, the court found, was primarily used as a  
6 perfume, but it can deter pests. *Id.* at 1231. Noting that where a product presented no danger to  
7 the environment, it should apply “more careful scrutiny [to the] administrative finding that a  
8 product makes a pesticidal claim,” *id.* at 1230 n.3, the court concluded that citronella was not a  
9 pesticide under federal law. Like citronella, worm castings are an entirely natural product, not a  
10 threat to the public, and produce their pest deterrent effects only indirectly.

11 Third, the DPR’s expansive interpretation would threaten important First Amendment  
12 rights. Businesses have a First Amendment right to make truthful claims about their products. *See*,  
13 *e.g.*, *Byrum v. Landreth*, 566 F.3d 442, 447 (5th Cir. 2009) (state could not bar interior designers  
14 from truthfully describing themselves as “interior designers”). To bar Hahn from stating the true  
15 fact that his fertilizers (though non-poisonous, not intended for use on pests, and composed of an  
16 element found naturally in all normal garden soil) do help plants to deter pests would infringe on  
17 these free speech rights.

18 Courts should avoid interpreting statutes in a manner that will raise serious constitutional  
19 questions. *Canon v. Justice Court*, 61 Cal. 2d 446, 452 n.5 (1964) (“A statute [that may] imping[e]  
20 on the right of free speech should be construed no more broadly than is absolutely necessary to  
21 accomplish its purposes.”); *accord, Welton v. City of Los Angeles*, 18 Cal. 3d 497, 505-06 (1976)  
22 (“[A] statute or ordinance suffering overbreadth may be construed so as to avoid conflict with the  
23 Constitution . . . [and] limit its effect and operation to matters that may be constitutionally regulated  
24 or prohibited . . . [and] not create uncertainty inhibiting exercise of a constitutional right.”). To  
25 expand the definition of “pesticide” to include any substance which is promoted as deterring pests,  
26 or causing plants to resist pests, would threaten important constitutional freedoms.

27 \_\_\_\_\_  
28 <sup>15</sup> *Gulf Oil Corp.* was cited with approval in *Leslie’s Pool Mart*, 223 Cal. App. 3d at 1534.

1 In *Byrum*, the court held that a state may not restrict the use of certain terms pursuant to a  
2 licensing scheme and thereby deny businesses the right to make truthful statements about their  
3 products and services:

4 The State advances a circular argument that the speech inherently tends to mislead  
5 consumers. It runs: Texas created a licensing regime; therefore, unlicensed interior  
6 designers who refer to themselves as interior designers will confuse consumers who  
7 will expect them to be licensed . . . . This argument also proves too much, as it  
would authorize legislatures to license speech and reduce its constitutional  
protection by means of the licensing alone.

8 566 F.3d at 447. *Accord, Roberts v. Farrell*, 630 F. Supp. 2d 242, 249 (D. Conn. 2009)  
9 (Businesses have a First Amendment right “to describe themselves and their work by use of words  
10 that . . . accurately describe the professional services that [they] lawfully render to consumers in  
11 the State.”). So, too, the DPR may not deprive Hahn of his right to truthfully advertise by merely  
12 declaring his fertilizer a pesticide.

### 13 III

#### 14 HAHN DID NOT MAKE “PESTICIDAL CLAIMS” 15 FOR WORM GOLD BRAND FERTILIZERS

16 Throughout the proceedings below, the DPR employed the term “pesticidal claims” to  
17 describe the advertising statements made by Hahn. This term was never defined, despite Hahn’s  
18 objections that failing to define this term was misleading and prejudicial. AR 2:1123-24, 2:1135-  
19 38. This term is crucial because although Hahn did advertise Worm Gold brand fertilizers as  
20 capable of causing a plant to resist infestation, he did not advertise Worm Gold brand fertilizers  
21 as *pesticides*. For the DPR to conclude that the former qualify as “pesticidal claims” is circular  
22 reasoning. Yet one witness in the proceedings below identified an advertisement as making a  
23 “pesticidal claim” on the grounds that “the whole paragraph[] says there are many positive side  
24 effects *for the tree* caused by—there are many positive side effects *for the tree* caused by a  
25 solution.” AR 2:965 (emphasis added). Under this definition, all fertilizers would qualify as  
26 “pesticides,” because all fertilizers cause positive effects on plants, and those positive effects  
27 include helping a plant resist pests. Another witness, DPR investigator Dan Weerasakera,  
28 identified another advertisement as making “pesticidal claims” as follows:

1 Q: “. . . what did you find that would lead you to believe that there may be a  
2 pesticidal claim?”

3 A: “The first sentence insinuates that, pesticidal claim.”

4 Q: “Would you point out the language for me?”

5 A: “Healthy trees attacked by bark beetles. There is a qualified statement that for  
6 me insinuates this product *would make the trees healthy*. That is the rest of the  
7 sentence.”

8 AR 2:108-09 (emphasis added). These statements are typical of the ambiguous and overly broad  
9 interpretation of the term “pesticide” adopted by the DPR below. To say that a product “would  
10 make the trees healthy” is not to identify the product as a pesticide.

11 The DPR made no distinction between products advertised as the *agents of pest repellency*  
12 and products advertised as *strengthening natural bio-resistance*. Yet this distinction is crucial, to  
13 avoid sweeping a broad variety of non-pesticide products into the definition of pesticide. The DPR  
14 held that

15 “[b]y stating that Worm Gold products prevent[] further growth of pathogens and  
16 infection,” that pathogens and pests are “consume[d],” that testing shows “insect  
17 repellency” such that “aphids, spider mites, & white flies left” and that “you can  
18 repel insects [and] fight fungus problems,” there can be no question that insect  
19 control, mitigation, and repellency was touted in a way that makes the products  
20 pesticides.

21 AR 2:792. But this language does *not* claim that Worm Gold brand fertilizers work directly on  
22 pests, or repel pests, or cause pests to die. They simply (and truthfully) promote the fact, in the  
23 simplistic language common to pithy advertisements, that Worm Gold brand fertilizers promote  
24 a plant’s health and thus its natural capacity to resist pest infestation. For instance, the claim that  
25 “aphids, spider mites, & white flies *left*” plants after the use of Worm Gold products is simply a  
26 claim that pests chose to avoid the plants due to the boost in plant health caused by the application  
27 of fertilizer. The DPR erred in concluding that Worm Gold brand fertilizers were “advertised as  
28 pesticides,” when in fact they were advertised as plant foods that improved plants’ natural  
resistance to infestation. By adopting a prejudicially vague definition of “pesticidal claims,” the  
decision below incorporated a fundamental, and reversible error.

///

**CONCLUSION**

The decision of the DPR should be reversed, and judgment issued for the Petitioners and Plaintiffs.

DATED: May 24, 2010.

Respectfully submitted,

DEBORAH J. LA FETRA  
TIMOTHY SANDEFUR  
BRANDON M. MIDDLETON

By \_\_\_\_\_  
TIMOTHY SANDEFUR

Attorneys for Petitioners and Plaintiffs

PACIFIC LEGAL FOUNDATION  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(916) 419-7111 FAX (916) 419-7747

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

PACIFIC LEGAL FOUNDATION  
3900 Lennane Drive, Suite 200  
Sacramento, CA 95834  
(916) 419-7111 FAX (916) 419-7747

**DECLARATION OF SERVICE BY MAIL**

I, Barbara A. Siebert, declare as follows:

I am a resident of the State of California, residing or employed in Sacramento, California. I am over the age of 18 years and am not a party to the above-entitled action. My business address is 3900 Lennane Drive, Suite 200, Sacramento, California 95834.

On May 24, 2010, a true copy of PETITIONERS AND PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR JUDGMENT ON PETITION FOR WRIT OF ADMINISTRATIVE MANDATE AND COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF was placed in an envelope addressed to:

G. LYNN THORPE  
Deputy Attorney General  
State of California  
Department of Justice  
1300 "I" Street, Suite 125  
P.O. Box 944255  
Sacramento, CA 94244-2550

which envelope, with postage thereon fully prepaid, was then sealed and deposited in a mailbox regularly maintained by the United States Postal Service in Sacramento, California.

I declare under penalty of perjury that the foregoing is true and correct and that this declaration was executed this 24th day of May, 2010, at Sacramento, California.

\_\_\_\_\_  
BARBARA A. SIEBERT