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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

SYNGENTA CROP PROTECTION, LLC, Plaintiff and Appellant, v. LAUREN ZEISE, as Director, etc., Defendant and Respondent.	C082128 (Super. Ct. No. 34-2014-80001809-CU-WM-GDS)

This appeal concerns the Safe Drinking Water and Toxic Enforcement Act of 1986 (Health & Saf. Code, §§ 25249.5-25249.13), enacted by the electorate as Proposition 65 in the November 1986 general election (hereafter referred to as Proposition 65). Plaintiff and appellant Syngenta Crop Protection, LLC (Syngenta), sought a writ of mandate precluding *both* Lauren Zeise in her official capacity as director of the Office of Environmental Health Hazard Assessment (OEHHA) *and* her agency from listing a group of chemicals used as agricultural herbicides and referred to as triazines as being known to

cause reproductive toxicity pursuant to Proposition 65.[1] The trial court denied Syngenta's petition in a lengthy order and entered judgment in favor of OEHHA in April 2016. Syngenta now appeals that judgment, requesting that we reverse the trial court's denial of its petition for writ of mandate and vacate OEHHA's action of listing triazines as reproductive toxicants. We will affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND[2]

On February 7, 2014, OEHHA issued a notice of intent to list atrazine, propazine, simazine, and their chlorometabolites DACT, DEA and DIA (collectively referred to as triazines) as reproductive toxicants pursuant to Proposition 65. OEHHA proposed to rely upon what it referred to as the "authoritative bodies listing mechanism," based on findings made by the United States Environmental Protection Agency (EPA). OEHHA indicated that EPA had formally identified triazines as reproductive toxicants in seven separate documents: Triazine Cumulative Risk Assessment; 2006 Decision Documents for Atrazine; Atrazine. Toxicology Disciplinary Chapter for the Reregistration Eligibility Decision Document (Second revision); Memorandum on Atrazine/DACT – Fourth Report of the Hazard Identification Assessment Review Committee; Reregistration Eligibility Decision Document for Simazine; Propazine: Revised HED [Health Effects Division] Risk Assessment for the Tolerance Reassessment Eligibility Decision Document (TRED); and Report of the Food Quality Protection Act (FQPA) Tolerance

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1 It is redundant to name both an agency and its director as defendants; we accordingly delete the agency as a party and amend the appellate title. (*Covarrubias v. Cohen* (2016) 3 Cal.App.5th 1229, 1231, fn. 3.) However, the parties and trial court referred to defendants and respondents collectively as OEHHA, and we adopt the same reference for respondent because Zeise is named in her role as director of that agency.

2 Both Syngenta and OEHHA have submitted requests that we take judicial notice of multiple documents. We decline to do so because the documents are neither relevant nor necessary to our resolution of the issues on appeal. (Evid. Code, §§ 452, 459.)

Reassessment Progress and Risk Management Decision (TRED) for Propazine. OEHHA also asserted that by setting reference doses for triazines "on the basis of reproductive and developmental toxicity, relying on endpoints that included luteinizing hormone (LH) surge suppression and estrous cycle alterations and delayed ossification of certain cranial bones in fetuses" EPA had formally identified triazines as reproductive toxicants for purposes of OEHHA's own listing of the chemicals pursuant to Proposition 65. OEHHA concluded that EPA had repeatedly identified a "common mechanism of action" for the triazines to function as reproductive toxicants—namely, "disruption of the hypothalamic-pituitary-gonadal (HPG) axis and suppression of luteinizing hormone (LH) surge." OEHHA invited comments from the public as to whether triazines met the criteria for listing set forth in Proposition 65.

Syngenta submitted a letter with multiple attachments to OEHHA explaining its position that triazines do not qualify for listing pursuant to Proposition 65. The three independent reasons set forth in the letter are: (1) the EPA did not " 'formally identif[y]' [triazines] 'as causing reproductive toxicity' " because that is not what the agency does and because its decision is not " 'final' "; (2) the animal studies referenced in the EPA documents relied upon by OEHHA do not "constitute sufficient evidence to indicate that adverse reproductive effects in humans are biologically plausible"; and (3) more recent studies than those referred to in the EPA documents and which were not considered by the EPA " 'clearly establish' " that triazines are not reproductive toxicants.

OEHHA issued its response to Syngenta's comments, inter alia, in March 2015. In its response, OEHHA found that triazines meet the criteria for listing pursuant to Proposition 65 via its authoritative bodies listing mechanism based on conclusions by the EPA that triazines cause developmental and reproductive effects, EPA's adoption of reference doses for triazines based on female reproductive and developmental endpoints, and scientific evidence relied upon by the EPA. OEHHA stated that it had "reviewed the conclusions and statements" in certain identified EPA documents and determined they

met the regulatory requirements that the chemicals to be listed—triazines—"are the subject of reports published by the authoritative body that conclude that the triazines cause reproductive toxicity" and, alternatively, that triazines had been " 'otherwise identified as causing reproductive toxicity' " thus satisfying the formal identification criteria of Proposition 65. OEHHA outlined the specific portions of the documents on which it relied, and also identified the body of scientific studies on which EPA relied and which OEHHA reviewed, in support of its conclusion that EPA had formally identified triazines as causing reproductive toxicity.

OEHHA further stated that upon examining the body of evidence on which the EPA relied, "OEHHA has concluded that there are sufficient data, taking into account the adequacy of the experimental design and other parameters such as, but not limited to, route of administration, frequency and duration of exposure, numbers of test animals, choice of species, choice of dosage levels, and consideration of maternal toxicity, indicating that an association between the adverse reproductive effects in humans and the toxic agent in question is biologically plausible, thus meeting the sufficiency of evidence criteria" set forth in the regulations. Finally, OEHHA stated that it had "reviewed all of the comments and accompanying materials submitted." It further devoted approximately 30 pages directly responding to and rejecting comments presented by Syngenta, including the post-2006 studies which Syngenta indicated disproved that triazines are a reproductive toxicant. Ultimately, OEHHA concluded that nothing in the post-2006 studies proffered by Syngenta changed its determination.

On March 27, 2015, OEHHA issued a notice to interested parties that triazines would be listed as chemicals known to cause reproductive toxicity for purposes of Proposition 65, effective August 3, 2015.[3] It indicated that it had made its determination,

[3] OEHHA did not ultimately list these chemicals pursuant to Proposition 65 as known to cause reproductive toxicity until July 15, 2016.

pursuant to the authoritative bodies listing mechanism, to list triazines based on a formal identification by the EPA that these chemicals cause reproductive toxicity.

Syngenta filed with the trial court its verified complaint for declaratory and injunctive relief and its petition for writ of mandate, in which it sought a writ of mandate, a declaration, and an injunction prohibiting OEHHA from listing triazines as reproductive toxicants. Syngenta argued that OEHHA, in the notice of intent to list triazines pursuant to Proposition 65, did not address the information and arguments Syngenta submitted to OEHHA as comments, that triazines did not meet the requirements for listing, that they had not been formally identified as causing reproductive toxicity in humans, that the animal studies relied upon were not sufficient to show it was biologically plausible for triazines to cause reproductive toxicity in humans, and listing triazines as reproductive toxicants would be an abuse of discretion.

After hearing the petition for writ relief, the trial court, on April 1, 2016, entered its order and judgment denying Syngenta's petition for writ relief, as well as its claims for declaratory and other relief.[4] It concluded Syngenta had failed to show OEHHA abused its discretion in listing triazines as reproductive toxicants pursuant to Proposition 65. It rejected Syngenta's arguments that the reports on which OEHHA relied did not constitute formal identification because they were neither final nor did they conclude that exposure to triazines will cause reproductive toxicity in humans, that OEHHA failed to find that it was biologically plausible for triazines to cause reproductive toxicity in humans, and that OEHHA erred in failing to consider post-2006 studies which show it is not biologically plausible that triazines will cause reproductive toxicity in humans.

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[4] Syngenta does not dispute the trial court's denial of its claims for declaratory or injunctive relief on appeal, so we do not discuss those claims any further.

DISCUSSION

Syngenta contends OEHHA prejudicially abused its discretion when it listed triazines as reproductive toxicants because (1) the EPA's Office of Pesticide Programs did not so identify triazines as required; (2) OEHHA failed to determine whether the studies on which the EPA relied indicate a biologically plausible connection between exposure to triazines and adverse human reproductive effects; and (3) OEHHA failed to consider post-2006 studies which demonstrate triazines are not human reproductive toxicants. We conclude Syngenta has failed to establish an abuse of discretion by OEHHA because it has not shown that the authoritative body must find the chemical causes reproductive toxicity in humans to qualify for listing, and it has forfeited any challenge based on a claim that there is insufficient evidence to support OEHHA's findings.

1.0 Standard of Review

As this appeal arises from the denial of a petition for writ of mandate, we apply the familiar abuse of discretion standard of review to determine whether a writ of mandate should issue. (*Exxon Mobil Corp. v. Office of Environmental Health Hazard Assessment* (2009) 169 Cal.App.4th 1264, 1276 (*Exxon*).) Under this standard, an abuse of discretion occurs when the respondent agency has not proceeded in the manner required by law, if its order or decision is not supported by the findings, or if its findings are not supported by the evidence. (*Ibid*.) In resolving this inquiry, we do not defer to the trial court's conclusions, but rather engage in a de novo review of the record to determine " 'whether the agency complied with the required procedures and whether the agency's findings are supported by substantial evidence.' " (*Ibid.*)

However, in this instance our review is limited as a result of the manner in which Syngenta prepared its opening brief. It is incumbent on the appealing party to provide this court with a "summary of the significant facts limited to matters in the record." (Cal.

Rules of Court, rule 8.204(a)(2)(C).) In its 77-page opening brief, despite providing this court with 22,435 pages of administrative record, and 3,858 pages of a joint appendix, Syngenta dedicated less than four pages to what it dubbed "Legal & Factual Background" to summarize the significant facts of this case. It made scant references even related to OEHHA's decision to list triazines as reproductive toxicants, acknowledging only that the EPA's Office of Pesticide Programs had, beginning in 2013, engaged in a review of scientific studies and data regarding triazines, including both pre- and post-2006 studies and data. Nowhere in this factual background does Syngenta recount for this court what OEHHA's decision to list triazines was, what it relied upon in making that decision, or what OEHHA identified as the EPA's formal identification of triazines as human reproductive toxicants. Nor in the remainder of its discussion did it provide a fair summary of the facts before this court. By shirking its obligation to this court, in failing to provide a summary of both its and any conflicting evidence, Syngenta forfeits any challenge to the sufficiency of the evidence. (*Foreman & Clark Corp. v. Fallon* (1971) 3 Cal.3d 875, 881 (*Fallon*) [when challenging sufficiency of the evidence to support findings, failure to recite evidence in record in support of those findings results in waiver of the claim of error]; see *Doe v. Roman Catholic Archbishop of Cashel & Emly* (2009) 177 Cal.App.4th 209, 218.) Therefore, to the extent any of Syngenta's claims relies upon a challenge to the sufficiency of the evidence, we disregard that claim.

Nevertheless, one of the central issues in this case involves the interpretation of governing regulations for OEHHA. That is a question of law in which we will engage. However, the applicable standard of review demands that we defer to the agency's interpretation of its own governing regulations, " 'particularly when the interpretation involves matters within the agency's expertise and does not plainly conflict with a statutory mandate.' " (*Exxon*, *supra*, 169 Cal.App.4th at pp. 1276-1277.) While we have the final responsibility for construing a statute or regulation, " ' "[a]s a general rule, [we] defer to the agency charged with enforcing a regulation when interpreting a regulation

because the agency possesses expertise in the subject area." ' " (*Id.* at p. 1277.) Thus, " '[w]e will not disturb the agency's determination [of the meaning of a regulation] without a demonstration that it is clearly unreasonable.' " (*Ibid.*)

2.0 Fundamentals of Proposition 65 Listing Process

As Syngenta's claims are all dependent on an understanding of the statutory and regulatory provisions that control whether chemicals are listed pursuant to Proposition 65, some background describing the relevant legal framework is helpful. We begin by noting that Proposition 65 mandates that the state "publish[] a list of those chemicals known to the state to cause cancer or reproductive toxicity" and to update that list annually. (Health & Saf. Code, § 25249.8, subd. (a).)[5] For purposes of Proposition 65, "[a] chemical is known to the state to cause cancer or reproductive toxicity . . . if in the opinion of the state's qualified experts it has been clearly shown through scientifically valid testing according to generally accepted principles to cause cancer or reproductive toxicity, or if a body considered to be authoritative by such experts has formally identified it as causing cancer or reproductive toxicity, or if an agency of the state or federal government has formally required it to be labeled or identified as causing cancer or reproductive toxicity."[6] (§ 25249.8, subd. (b).)

Here, OEHHA, as the agency charged with implementing Proposition 65, relied upon the second option—"a body considered to be authoritative by [the state's qualified]

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5 Undesignated statutory references are to the Health and Safety Code.

6 The Developmental and Reproductive Toxicant Identification Committee acts as the "state's qualified experts" who advise and assist OEHHA in implementing section 25249.8 by opining whether a certain chemical has been shown to cause reproductive toxicity. (*Baxter Healthcare Corp. v. Denton* (2004) 120 Cal.App.4th 333, 346; Cal. Code Regs., tit. 27, §§ 25102, subds. (c), (t), 25302, subd. (a), 25305, subd. (b).) (Further references to title 27 of the California Code of Regulations are referred to herein as Regulations or "Regs.")

experts has formally identified [the chemical] as causing cancer or reproductive toxicity"—as the basis for its decision to list triazines as chemicals known to cause reproductive toxicity pursuant to Proposition 65. (*Exxon, supra,* 169 Cal.App.4th at pp. 1268-1269.) Under that listing mechanism, "expert committees identify bodies they consider to have expertise in the identification of chemicals causing cancer or reproductive toxicity." (*California Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 244 (*Brown*); Regs., § 25306, subd. (b).) The EPA is one such designated authoritative body. (*Western Crop Protection Assn. v. Davis* (2000) 80 Cal.App.4th 741, 748 (*Western Crop*); Regs., § 25306, subd. (*l*)(4).)

Next, in applying this listing mechanism, OEHHA must determine whether the designated authoritative body has "formally identified" the chemical "as causing cancer or reproductive toxicity by including it on a list, in a published report, or other final document." (*Brown, supra,* 196 Cal.App.4th at p. 245; Regs., § 25306, subd. (c).) For purposes of this inquiry, a chemical is "formally identified" if it "has been included on a list of chemicals causing cancer or reproductive toxicity issued by the authoritative body; or is the subject of a report which is published by the authoritative body and which concludes that the chemical causes cancer or reproductive toxicity; or has otherwise been identified as causing cancer or reproductive toxicity by the authoritative body in a document that indicates that such identification is a final action." (Regs., § 25306, subd. (d)(1).) Additionally, "the list, report, or document [must] accurately identif[y] the chemical," and must have been either "(A) [r]eviewed by an advisory committee in a public meeting, if a public meeting is required, or [¶] (B) [m]ade subject to public review and comment prior to its issuance, or [¶] (C) [p]ublished by the authoritative body in a publication, such as, but not limited to, the federal register for an authoritative body which is a federal agency, or [¶] (D) [s]igned, where required, by the chief administrative officer of the authoritative body or a designee, or [¶] (E) [a]dopted as a final rule by the authoritative body, or [¶] (F) [o]therwise set forth in an official

document utilized by the authoritative body for regulatory purposes." (Regs., § 25306, subd. (d)(2).)

The regulations further provide that "causing reproductive toxicity" means either that "(1) [s]tudies in humans indicate that there is a causal relationship between the chemical and reproductive toxicity, or [¶] (2) [s]tudies in experimental animals indicate that there are sufficient data, taking into account the adequacy of the experimental design and other parameters such as, but not limited to, route of administration, frequency and duration of exposure, numbers of test animals, choice of species, choice of dosage levels, and consideration of maternal toxicity, indicating that an association between adverse reproductive effects in humans and the toxic agent in question is biologically plausible." (Regs., § 25306, subd. (g).)

3.0 Authoritative Body Findings

With this statutory and regulatory framework in mind, we thus turn to the first crucial question raised by Syngenta in this appeal: To constitute a formal identification for purposes of use as a basis for Proposition 65 listing, must the authoritative body find the chemical causes reproductive toxicity *in humans*, or need it only find that it causes reproductive toxicity in animals and that it is biologically plausible that it would cause reproductive toxicity in humans? For the reasons detailed below, we conclude Syngenta has failed to demonstrate any error by the agency or the trial court.

We begin our inquiry by looking at the language of the applicable statute. (*Exxon*, *supra*, 169 Cal.App.4th at p. 1279.) As discussed above, section 25249.8 is the sole statutory source for OEHHA to make a decision whether to list a chemical pursuant to Proposition 65 as a "chemical known to the state to cause . . . reproductive toxicity" based on the "formal identification" of the chemical as one "causing . . . reproductive toxicity" by an authoritative body. (See *Exxon*, at p. 1279.) However, that section

contains no additional language to aid us in answering the question posed by Syngenta. Therefore, we turn to the language of the pertinent regulations.

As we noted above, it is for OEHHA to determine whether a chemical has been "formally identified by an authoritative body as causing . . . reproductive toxicity." (Regs., § 25306, subd. (c).) While interpretation of a regulation is generally subject to the same standard of review as interpretation of a statute, there is one notable distinction: if there is some ambiguity in the language of a regulation, we consider the agency's interpretation of that regulation in its area of expertise, and we defer to that interpretation " ' " 'unless the interpretation flies in the face of the clear language and purpose of the interpretive provision.' " ' " (*Exxon*, *supra*, 169 Cal.App.4th at p. 1280.) Thus, we are not called upon to determine the " 'correct' interpretation of Regulations, section 25306, subdivisions (c) and (g), but whether the interpretation offered by OEHHA is reasonable in light of the regulation's language and purpose." (*Exxon*, at p. 1280.)

Syngenta argues that to qualify for listing based on the authoritative body listing mechanism, "Regulation 25306 requires an authoritative body to formally identify a chemical as causing reproductive toxicity *in humans*." It argues that "a chemical cannot be listed as a reproductive toxicant merely because it causes adverse reproductive effects in laboratory rats at a deliberately high dose or level of exposure." In interpreting Regulation 25306, subdivision (g)(2), it asserts that the inclusion of a biological plausibility component means that to list a chemical as a reproductive toxicant under the authoritative body listing mechanism, the authoritative body must have formally identified the chemical as a "*human* reproductive toxicant[ ]." It argues it was error for OEHHA to find the triazines are reproductive toxicants based on what it deemed to be a formal identification by the EPA, because the EPA's Office of Pesticide Programs, which issued the reports on which OEHHA relied, "does not publish or issue scientific judgments about whether pesticide chemicals cause reproductive toxicity in humans."

OEHHA contends, based on *AFL-CIO v. Deukmejian* (1989) 212 Cal.App.3d 425 (*AFL-CIO*), *Western Crop, supra*, 80 Cal.App.4th 741, and *Exxon, supra*, 169 Cal.App.4th 1264, that a chemical must be listed as being a reproductive toxicant if the authoritative body has determined that the chemical is a reproductive toxicant in animals and OEHHA has further found that the animal data is sufficient to indicate it is biologically plausible the chemical could cause reproductive harm in humans. Based on *Western Crop* and *Exxon*, it argues that the determination whether the requirements of the regulatory scheme have been met is made by OEHHA and not by the authoritative body, therefore it is not relevant whether the authoritative body believes its actions satisfy the regulatory requirements. OEHHA has the better argument.

In *AFL-CIO*, we interpreted the language of section 25249.8 that requires "chemicals known to the state to cause cancer" for purpose of Proposition 65 listing to include chemicals that are "known to be carcinogenic as to animals only." (*AFL-CIO, supra*, 212 Cal.App.3d at p. 438, fn. 7.) We reasoned that this was the appropriate construction of the statute because of the ethical prohibition on testing humans, the broad scientific acceptance of the inference that results in animal testing were correlative of outcomes for humans, and the legislative history and purpose of Proposition 65. (*AFL-CIO*, at pp. 438-439, fn. 7.) In *Western Crop*, we extended this rationale to section 25249.8's phrase "causes . . . reproductive toxicity." (*Western Crop, supra*, 80 Cal.App.4th at p. 749.) We noted that the regulatory scheme expressly provided that the requirement could be established by " '[s]tudies in experimental animals [which] indicate . . . an association between adverse reproductive effects in humans and the toxic agent in question is biologically plausible.' " (*Ibid.*) We further concluded in *Western Crop* that OEHHA had the authority to examine the record of the authoritative body to determine whether the regulatory requirements for establishing that the chemical is one "causing reproductive toxicity" had been met. (*Id.* at pp. 753-754.)

Exxon further built upon *Western Crop* when it found that "[t]o list a chemical pursuant to Regulations, section 25306, . . . OEHHA must conclude that an authoritative body has determined that the chemical is a reproductive toxicant—i.e., that the experimental animal data are sufficient to support a conclusion that adverse effects in humans are biologically plausible." (*Exxon, supra,* 169 Cal.App.4th at p. 1280.) Contrary to Syngenta's assertion, this does not require that the authoritative body found that the chemical is a *human* reproductive toxicant. Neither does it matter whether the authoritative body discussed the Proposition 65 listing criteria in formally identifying a chemical as causing reproductive toxicity. (*Id.* at pp. 1284-1285.) Rather, the regulatory scheme requires that the authoritative body " 'found sufficient evidence of reproductive toxicity to qualify under the California definition,' " and that OEHHA can conclude, based on the authoritative body's report and the underlying scientific record, that the "authoritative body has identified a chemical as a reproductive toxicant and that the identification takes the regulatory criteria into account." (*Id.* at pp. 1281, 1284.)

Therefore, we conclude that to support a listing of a chemical as a reproductive toxicant pursuant to Proposition 65, the authoritative body's report need not find that chemical to be a reproductive toxicant in *humans*, so long as the entire record before OEHHA establishes that the authoritative body found, as required by the regulations, that the chemical is a reproductive toxicant in animals and "[s]tudies in experimental animals indicate that there are sufficient data, taking into account the adequacy of the experimental design and other parameters such as, but not limited to, route of administration, frequency and duration of exposure, numbers of test animals, choice of species, choice of dosage levels, and consideration of maternal toxicity, indicating that an association between adverse reproductive effects in humans and the toxic agent in question is biologically plausible." (Regs., § 25306, subd. (g)(2); *Exxon, supra*, 169 Cal.App.4th at pp. 1281-1282.) Thus, we conclude, the finding of reproductive

toxicity may be based solely on animal studies, if the record also supports a finding that it is biologically plausible that the chemical will cause reproductive toxicity in humans.

Normally, we would turn next to Syngenta's claims that the record does not support OEHHA's finding that the EPA made the requisite formal identification of triazines as chemicals causing reproductive toxicity or OEHHA's determination that the record supports a finding that it is biologically plausible for triazines to cause reproductive toxicity in humans. Addressing such claims that allege an agency has not made a required finding or that its findings are not supported by substantial evidence, calls for us to examine the record de novo. (*Exxon, supra*, 169 Cal.App.4th at p. 1276; see *Central Coast Forest Assn. v. Fish & Game Com.* (2018) 18 Cal.App.5th 1191, 1205-1206.) However, as we described above, due to Syngenta's failure to provide a fair and accurate summary of the evidence before OEHHA, it forfeited any challenge based on an assertion that there is insufficient evidence to support the agency's determination. (*Fallon, supra*, 3 Cal.3d at p. 881.) Therefore, we do not engage in any further analysis of these claims.

4.0 Consideration of Post-2006 Studies

For the same reasons, we do not reach Syngenta's additional contention that OEHHA abused its discretion by failing to consider a series of post-2006 studies, which were not considered by the EPA in its determination, and which Syngenta claims proves triazines do not cause reproductive toxicity in humans. There is no dispute that OEHHA must find the chemical is *not* a chemical causing reproductive toxicity "if scientifically valid data which were *not considered* by the authoritative body clearly establish that the chemical does not satisfy [either of these criteria]." (Regs., § 25306, subd. (h), italics added.) Here, however, OEHHA found that the post-2006 studies did not "clearly establish" that triazines are not reproductive toxicants. And we will not engage in a review of the record to determine whether it supports such a finding because Syngenta

forfeited any claim based on a claim of insufficiency of the evidence. (*Fallon*, *supra*, 3 Cal.3d at p. 881.)

DISPOSITION

The judgment is affirmed. OEHHA is entitled to its costs on appeal. (Cal. Rules of Court, rule 8.278(a)(1), (2).)

BUTZ, J.

We concur:

HULL, Acting P. J.

MURRAY, J.