SEDGWICK
DETERT, MORAN & ARNOLD LLP

One Market Plaza
Steuart Tower, 8th Floor
San Francisco, California 94105
Tel: 415.781.7900 Fax: 415.781.2635

www.sdma.com

September 27, 2007

VIA NATIONWIDE COURIER

Honorable Ronald M. George, Chief Justice and
Honorable Associate Justices of the
SUPREME COURT OF CALIFORNIA
350 McAllister Street
San Francisco, CA 94102-4797

Re: ***Starrh and Starrh Cotton Growers v. Aera Energy LLC***
Case No. S155780

LETTER BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER AERA ENERGY LLC

Dear Chief Justice George and Associate Justices:

This letter brief, submitted by amicus curiae International Association of Defense Counsel ("IADC"), respectfully urges the Court to grant the petition for review brought by Aera Energy LLC ("Aera"), and to decide on the merits the critically important issues raised by the petition and the opinion below. The IADC is an association of corporate and insurance attorneys whose practice is concentrated on the defense of civil lawsuits. The IADC is dedicated to the just and efficient administration of civil justice and the continual improvement of the civil justice system. The IADC supports a justice system in which plaintiffs are fairly compensated for genuine injuries, responsible defendants are held liable only for appropriate damages, and non-responsible defendants are exonerated without unreasonable cost.

A. FACTS

The facts which comprise this limited description, relevant to the issues discussed by IADC, are culled from the Court of Appeal's opinion and the briefs of the parties.

Starrh and Starrh Cotton Growers ("Starrh") owns agricultural property. Under the property is an aquifer containing water which, in its natural state, cannot be put to much practical agricultural use; it cannot be consumed, nor can it be used to irrigate most crops due

to excessive salinity. Efforts to mix this water with aqueduct water for the purpose of irrigating salt-tolerant crops have proven to be of very limited economic viability.

Aera owns adjacent land, on which it has for fifty years maintained state-authorized collection ponds for the disposal of deep-lying water which is brought to the surface along with oil as a consequence of normal oilfield operations. Some of this water migrated to the Starrh aquifer, which increased its salinity. The encroachment began in the 1980s, at the latest, and will continue for many decades even after the pond operations end.

When Starrh purchased the property, beginning in 1992, it knew of the Aera collection ponds, it had been informed that the groundwater, in its natural state, could not be used to irrigate crops, and it had access to Aera data documenting the encroachment.

The encroachment is not reasonably abatable. Starrh's expert witnesses conceded that it would cost more than $2 billion to restore the groundwater to its previous condition, and would require rendering the land unproductive for up to 60 years. Under no construction of the term "reasonable" could such economic waste be tolerated.

B. MANGINI v. AEROJET-GENERAL CORP.

In *Mangini,* a producer of solid fuels disposed of toxic wastes on land it leased from the Cavitts. (*Mangini v. Aerojet-General Corp.* (1996) 12 Cal.4th 1087, 1090-1091.) The dumping occurred, roughly, from 1960 until 1970. (*Id.* at 1091-1092.) Plaintiffs, who acquired the Cavitts's property in 1975, were aware as early as 1979 that the federal government was investigating property surrounding the Aerojet plant for chemical contamination. (*Id.* at 1092.) Plaintiffs sued Aerojet for nuisance, among other things, in 1988. (*Ibid.)*

The principal issue in *Mangini,* which was dispositive of Aerojet's statute of limitations defense, was whether the nuisance was permanent (not reasonably abatable) or continuing (temporary and reasonably abatable). Aerojet contended it was the former; plaintiffs produced no substantial evidence to the contrary. (*Id.* at 1095-1096.) Plaintiffs contended it was the latter, on the theory that "toxic chemicals continue to migrate within the soil itself, causing further damage to the land" (thus, the impact of the nuisance was alleged to vary over time). (*Id.* at 1093.)

Prior to *Mangini,* the law's distinction between a permanent nuisance and a continuing nuisance was muddled. Courts had adopted alternative tests which included, in addition to reasonable abatability, whether there was "continuing" use or activity, and whether the alleged nuisance-creating activity had an impact that varied over time (*See, Beck Development Co. v. Southern Pacific Transportation Co.* (1996) 44 Cal.App.4th 1160, 1217-

1290.) These tests, if they were in fact the law, and if plaintiffs provided substantial evidence that the tests were applicable, could seemingly support a jury finding of continuing nuisance under plaintiffs' contention that Aerojet's activities resulted in continuing harm through ongoing migration and a continuing impact which varied over time.

This Court, by negative implication, rejected these vague alternative tests and adopted a straightforward, rational, consistently applicable, and unqualified standard for determining whether a nuisance is permanent or continuing:

> Whether contamination by toxic waste is a permanent or continuing injury turns on the nature and extent of the contamination. The ***crucial*** test of the permanency of a trespass or nuisance is whether the trespass or nuisance can be discontinued or abated.

(*Id.* at 1097 [internal citation, brackets, ellipsis, and quotation marks omitted; emphasis supplied].) "[A]batable means that the nuisance can be remedied at a reasonable cost by reasonable means." (*Id.* at 1103.)

Mangini establishes a principle of law which governs this and similar cases, of which there are many. The Court in *Mangini* nowhere suggests that other tests could have been employed, notwithstanding that "continuing harm"-styled tests were facially implicated by the plaintiffs' contentions. To the contrary, the Court mandated one rule which is "crucial" to the outcome in every such case.

C. THE COURT OF APPEAL'S DECISION

The Court of Appeal, in its analysis of the damages issues, came to the brink of finding that the trespass here was not reasonably abatable as a matter of law. (Opn. at 18-20 ["The evidence of unreasonableness in this case is sufficiently strong that we are tempted to conclude that the [abatement] project is unreasonable as a matter of law."].) Even had it so found, however – a finding which would have mandated a further finding of permanent trespass – the finding would have been of no moment with respect to the statute of limitations issue under the court's analysis of the permanent/continuing trespass question.

The Court of Appeal concluded that the holding of *Mangini* was narrowly limited in scope, addressing only one of several alternative tests for determining the permanence or continuing nature of a trespass – the other tests being viable but inapplicable – and simply found there was no substantial evidence to support the one test there in-issue. (*Id.* at 9-11.) The purportedly viable but unaddressed tests (that is, continuing activity and impact that will vary over time) support, the court concluded, the trial court's finding that the trespass here

was continuing in nature. The court further concluded that a pre-*Mangini* case, *Baker v. Burbank-Pasadena-Glendale Airport Authority* (1985) 30 Cal.3d 862, stands for the proposition that the feasibility of partial abatability may support a finding of continuing trespass. (*Id.* at 11-12.)

IADC agrees with petitioner that the Court of Appeal adopted too cramped a reading of *Mangini*. The Court certainly was aware of both the impact its decision would have on state-wide environmental contamination litigation, and of the uncertainty in the existing law due to various vague and not altogether consistent or compatible standards adopted by the lower courts. The contentions of the parties in *Mangini* provided ample space for the Court to expound on viable tests other than reasonable abatability to decide the permanent/continuing trespass issue had the Court believed there were such tests. What the Court did, however, was adopt a single test which can be readily and consistently applied, and which should result here in a determination that the trespass was permanent as a matter of law.[1]

D. WHY THE PETITION SHOULD BE GRANTED

IADC believes that petitioner's reading of *Mangini* is correct, and that the Court of Appeal erred in applying inconsistent principles from earlier cases. Regardless of the outcome, however, it can scarcely be doubted that petitioner's view of the *Mangini* holding is reasonable and fully justified by the clear, unambiguous, and unqualified language of the opinion. Many, if not most, attorneys, judges, and justices would read *Mangini* just as petitioner has read it. The Court of Appeal's decision cannot but add confusion and uncertainty in this important area of the law.

As petitioner has noted (Petition at 3, fn. 1), hundreds of nuisance, trespass, and contamination claims were filed in California in the very recent past. There is no reason to believe the volume of such filings will diminish in the future. The stakes involved – as this case and *Mangini* illustrate – can be enormous. The bench and bar would greatly benefit from the Court's clarification of this critical and recurring issue, which is in a state of substantial disarray, at present, due to the Court of Appeal's decision.

---

[1] The Court also rejected the notion, relied upon by the Court of Appeal here (Opn. at 11-12) that *Baker* established a test other than reasonable abatability. (*Mangini*, 12 Cal.4th at 1101-1102.)

Moreover, this case squarely presents an issue of substantial importance that was expressly left open in *Mangini*; that is, whether a nuisance or trespass may be found to be continuing for the purpose of applying the statute of limitations, but permanent for the purpose of determining the correct measure of damages. As petitioner has shown, many courts, including the United States Supreme Court, have drawn this distinction. (Petition at 32.) It is an enormously important issue (in this case alone, it could mean the difference between a relatively small amount of damages, if any, and an award of billions (literally) of dollars. (Petition at 23.) Again, California courts, and the attorneys who litigate these complex, expensive, and resource-consuming cases, would find the Court's guidance substantially beneficial.

IADC's members, and their clients, have grave concerns about the implications of the Court of Appeal's opinion. As applied in this and other cases, the court's holdings may result in awards of damages that are wildly disproportionate to the actual injury sustained, that cause enormous economic waste without providing meaningful remediation of environmental contamination, and which are an inefficient means of accomplishing anything other than the enrichment of plaintiffs. IADC strongly urges the Court to grant Aera's petition for review.

Respectfully submitted,

SEDGWICK, DETERT, MORAN & ARNOLD LLP

By: _____
Frederick D. Baker
ATTORNEYS FOR AMICUS CURIAE
INTERNATIONAL ASSOCIATION OF
DEFENSE COUNSEL

FDB|/rdg

cc: All Counsel (Please see attached Proof of Service)

Starrh and Starrh Cotton Growers v. Aera Energy LLC
Supreme Court of the State of California, Case No. S155780

PROOF OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is Sedgwick, Detert, Moran & Arnold LLP, One Market Plaza, Steuart Tower, 8th Floor, San Francisco, California 94105. On September 27, 2007, I served the within document(s):

LETTER BRIEF OF AMICUS CURIAE INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL IN SUPPORT OF PETITIONER AERA ENERGY LLC

☐ FACSIMILE - by transmitting via facsimile the document(s) listed above to the fax number(s) set forth on the attached Telecommunications Cover Page(s) on this date before 5:00 p.m.

☒ MAIL - by placing the document(s) listed above in a sealed envelope with postage thereon fully prepaid, in the United States mail at San Francisco, California addressed as set forth below.

☐ PERSONAL SERVICE - by personally delivering the document(s) listed above to the person(s) at the address(es) set forth below.

☐ OVERNIGHT COURIER - by placing the document(s) listed above in a sealed envelope with shipping prepaid, and depositing in a collection box for next day delivery to the person(s) at the address(es) set forth below via First Legal Courier.

Patrick J. Osborn, Esq.
CLIFFORD & BROWN
Bank of America Building
1430 Truxtun Avenue, Suite 900
Bakersfield, CA 93301
Telephone: 661.322.6023

Stephen M. Kristovich, Esq.
Patrick J. Cafferty, Jr., Esq.
Paul J. Watford, Esq.
Michael J. Barsa, Esq.
MUNGER, TOLLES & OLSON LLP
355 South Grand Avenue, 35th Floor
Los Angeles, CA 90071-1650
Telephone: 213.683.9100

Ralph B. Wegis, Esq.
LAW OFFICES OF RALPH B. WEGIS, P.C.
1930 Truxtun Avenue
Bakersfield, CA 93301
Telephone: 661.635.2100

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on September 27, 2007, at San Francisco, California.

Rhonda D. Gillis

SEDGWICK DETERT, MORAN & ARNOLD LLP