SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

NORTH COAST RIVERS ALLIANCE, et al., **Petitioners/Plaintiffs,** **v.** **CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al.,** **Respondents/Defendants.**	Case Nos.: 34-2015-80002005 [Lead Case] 34-2016-80002424 [Consolidated for trial] 34-2017-80002594 [Consolidated for trial] [Alameda Case No. RG15755648 was transferred and consolidated for all purposes with Sacramento Case No. 34-2015-80002005. Sacramento Case Nos. 34-2016-80002424 and 34-2017-80002594 were consolidated for purposes of trial.]
ENVIRONMENTAL WORKING GROUP, et al., **Petitioners/Plaintiffs,** **v.** **CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al.,** **Respondents/Defendants.**	**CONSOLIDATED RULING ON SUBMITTED MATTERS** Hearing Held: Date: December 8, 2017 Time: 9:00 a.m. Dept.: 29 Judge: Timothy M. Frawley
AND RELATED ACTIONS.	

In this consolidated writ proceeding, plaintiffs and petitioners North Coast Rivers Alliance, Pesticide Free Zone, Inc., Health and Habitat, Inc., Californians for Alternatives to Toxics, and Gayle McLaughlin (the "North Coast Petitioners"), and Environmental Working Group, City of Berkeley, Center for Food Safety, Pesticide Action Network North America, Beyond Pesticides, California Environmental Health Initiative, Environmental Action Committee of West Marin, Safe Alternatives for Our Forest Environment, Center for Biological Diversity, Center for Environmental Health, Californians for Pesticide Reform, and Moms Advocating Sustainability (the "EWG Petitioners") allege that respondent and defendant California Department of Food and Agriculture (and its Secretary) violated the California Environmental Quality Act ("CEQA") by certifying the Program Environmental Impact Report ("PEIR") for the Statewide Plant Pest Prevention and Management Program and approving that project.

In related proceedings, certain North Coast Petitioners (namely, North Coast Rivers Alliance, Pesticide Free Zone, Inc., and Health and Habitat, Inc.) allege that the Department also violated CEQA by subsequently expanding the Statewide Plant Pest Prevention and Management Program to allow increased use of the "Merit 2F" and "Acelepryn" pesticides for the treatment of Japanese beetles, without adequate environmental review.

The court shall grant the petitions.

Background Facts and Procedure

The Department is charged with promoting and protecting the state's agricultural industry, and preventing the introduction and spread of injurious insect or animal pests, plant diseases, and noxious weeds. (Cal. Food & Agr. Code §§ 401, 401.5, 403.) To this end, the Department adopted the Statewide Plant Pest Prevention and Management Program (the "Project").

The Statewide Program is made up of a variety of focused programs for controlling targeted pests or pathogens. Activities conducted under the Statewide Program include pest rating (evaluation of a pest's environmental, agricultural, and biological significance); identification, detection, and delimitation of new pest populations; pest management response (which may include eradication and/or control of new or existing pest populations); and prevention of the movement of pests into and within California. The Program encompasses a range of prevention and management activities, including physical, biological, and chemical techniques to control or eradicate invasive pests, including aerial spraying of pesticides.[1] The principal goal of the Program is to allow the Department to rapidly detect, identify, and respond to actual and threatened harmful pest infestations throughout the state, using an integrated pest management approach. (AR 3958.)

In the past, the Department prepared environmental impact reports that were specific to the Department's particular pest management activities. In this case, the Department sought to comply with CEQA by preparing a single PEIR that provides a consolidated set of management practices and

[1] The Program is described in detail in Chapters 2 and 3 of the PEIR. (AR 3986-4108.)

mitigation measures to serve as a comprehensive management framework for proposed Program activities. The Department intends the PEIR to provide CEQA compliance for reasonably foreseeable pest prevention and management activities. The PEIR purports to be a program-level EIR, but also to provide project-level detail for certain activities where it is feasible to do so. (AR 3977.)

The Department issued a Notice of Preparation for the Project in June 2011, and released a Draft PEIR in August 2014. The Draft EIR was circulated for public review from August 25, 2014, through October 31, 2014. The Department received more than 15,700 comment letters during the public review period, and thousands more after the public review period ended. Both the North Coast Petitioners and the EWG Petitioners submitted comments.

On December 14, 2014, the Department released its Final PEIR. The Final PEIR included 18 "Master Responses" and specific responses to 39 individual comment letters. (AR 7600-03, 7605-8255.)

On December 24, 2014, the Department certified the Final PEIR, adopted findings of fact and a statement of overriding considerations, and approved the Project. The same day, the Department filed a Notice of Determination for the PEIR.

Nineteen days later, on January 12, 2015, the North Coast Petitioners filed their Petition/Complaint. As amended, the North Coast Petition contains two counts. Both counts allege that Respondent Department violated CEQA in approving the Statewide Program. Among other things, the Petition alleges that the Department failed to use an adequate project description; failed to adequately describe the project's environmental setting; failed to accurately describe the baseline environmental conditions; failed to adequately discuss, evaluate, and mitigate the site-specific and cumulative impacts of the Project; failed to adequately consider a reasonable range of alternatives to the Project; failed to consider feasible mitigation measures that would substantially lessen the significant environmental effects of the Project; improperly deferred the analysis of mitigation measures; failed to adequately respond to public comments; and improperly adopted a Statement of Overriding Considerations. The North Coast Petitioners seek a peremptory writ of mandate (and related declaratory relief) ordering the Department to set aside its actions certifying the Program EIR and approving the Project.

On January 22, 2015, the EWG Petitioners filed their own Petition/Complaint challenging the Department's certification of the PEIR and approval of the Project. As amended, the EWG Petition contains three counts. All three counts allege that the Department prejudicially abused its discretion in certifying the PEIR because the PEIR (i) improperly defers analysis of site-specific environmental impacts and allows the Department to carry out "substantially similar" subsequent activities with no further environmental review; (ii) reveals an intent not to issue a Notice of Determination for subsequent Program activities that are deemed adequately addressed under the PEIR; (iii) includes an inadequate project description; (iv) fails to adequately describe the baseline environmental conditions; (v) fails to adequately analyze the Project's environmental impacts (including biological, water, human health, and farming impacts); (vi) fails to adequately analyze cumulative impacts; (vii) contains legally inadequate mitigation measures and improperly defers analysis and formulation of mitigation measures; (vii) fails to

consider a reasonable range of alternatives; and because (viii) the Department failed to comply with public agency consultation and notice requirements. The EWG Petitioners seek a peremptory writ of mandate (and related declaratory and injunctive relief) ordering the Department to set aside its actions certifying the Program EIR and approving the Project.

The EWG Petition originally was filed in Alameda County Superior Court. The parties subsequently stipulated to transfer that case to this court for coordination with the North Coast proceeding. This court then ordered the two cases consolidated for all purposes under Sacramento Superior Court Case No. 34-2015-80002005. (The court refers to this consolidated case as "North Coast I.")

The North Coast and EWG Petitioners subsequently moved for a preliminary injunction enjoining the Department from carrying out subsequent project-level implementation activities under its Statewide Program and PEIR without first filing a notice of determination ("NOD"). The Department separately opposed the motions. After a hearing, the court denied the motions. The North Coast Petitioners appealed the court's order. The appeal is fully briefed and is awaiting argument.

On or about July 18, 2016, the Department issued a Notice of Determination for Addendum No. 1 to the PEIR. Addendum No. 1 expands the Statewide Program by adding application methods of the "Merit 2F" pesticide for the treatment of Japanese beetles. While the Program previously allowed the use of Merit 2F brand pesticide on bare soil along the drip line of host plants, the expanded Program increased the treatment area to include turf applications and to specifically allow the use of "boom sprayers." (Addendum 1 AR 5; see also AR 4047.)

On August 16, 2016, certain of the North Coast Petitioners (namely, North Coast Rivers Alliance, Pesticide Free Zone, Inc., and Health and Habitat, Inc.)[2] filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, challenging the Department's approval of Addendum No. 1 to the PEIR. (The court shall refer to this action as "North Coast II.") The North Coast II Petition alleges that, by virtue of Addendum No. 1 to the PEIR, the Department unlawfully expanded the Program to allow increased use of "Merit 2F" pesticide for the treatment of Japanese beetles, without adequate environmental review. The North Coast II Petition seeks a peremptory writ of mandate (and related declaratory and injunctive relief) ordering the Department to set aside its approval of the expanded Program and its certification of Addendum No. 1 to the PEIR.

After the North Coast II Petition was filed, this court ordered North Coast II related and consolidated for purposes of trial with North Coast I.

On or about April 17, 2017, the Department issued a Notice of Determination for Addendum No. 2 to the PEIR. Addendum No. 2 expands the Statewide Program by adding application methods (foliar and

[2] Except where it is necessary to make a distinction, the court shall refer to the various "North Coast Petitioners" collectively.

ground applications) of "Acelepryn" pesticide for the treatment of Japanese beetles. (Addendum 2 AR 2, 5-6.)

On May 16, 2017, the North Coast Petitioners filed a Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief, to challenge the Department's approval of Addendum No. 2 to the Program EIR. (The court shall refer to this action as "North Coast III.") The North Coast III Petition alleges that by virtue of Addendum No. 2 to the PEIR, the Department unlawfully expanded the Statewide Program to allow increased use of the "Acelepryn" pesticide for the treatment of Japanese beetles, without adequate environmental review. The North Coast III Petition seeks a peremptory writ of mandate (and related declaratory and injunctive relief) ordering the Department to set aside its approval of the expanded Program and its certification of Addendum No. 2 to the PEIR.

After the North Coast III Petition was filed, this court ordered North Coast III related and consolidated for purposes of trial with North Coast I and North Coast II. The court also deemed North Coast I to be a complex case.

Arguments of the Parties

Petitioners' objections to the Department's environmental review are numerous and wide-ranging. The court has summarized the objections below.

The North Coast Petitioners allege that the Department's PEIR is deficient for the following reasons:

- The PEIR's "project description" is impermissibly vague in that it fails to identify the Program's "technical, economic, and environmental" characteristics, and fails to indicate when, where, and how the Department will implement the Program in response to any particular pest.
- The PEIR's description of the Project's "baseline" environmental setting is flawed because it (i) varies by resource, and (ii) improperly includes the Department's existing, ongoing pest prevention and management activities, precluding meaningful consideration of the Project's environmental impacts.
- The PEIR fails to adequately address and mitigate the Project's impacts on noise, water quality, pollinators, and organic farming.
- The PEIR fails to adequately consider, analyze, and adopt feasible alternatives to the Program.
- The PEIR improperly defers the formulation and adoption of mitigation measures.
- The PEIR adopts an unlawful "tiering" strategy.
- The Department failed to adequately respond to public comments made during the comment period on the Draft PEIR.

In separate actions, the North Coast Petitioners also allege that the Department's approval of Addendum No. 1 and Addendum No. 2 to the PEIR violated CEQA because the Department was required to prepare a supplemental or subsequent EIR.

The EWG Petitioners allege that the Department's PEIR is deficient for the following reasons:

- The PEIR relies on an inaccurate and misleading baseline. EWG Petitioners argue that the PEIR's baseline is defective because it (i) fails to explain which of the Department's ongoing activities were included in the baseline and how their inclusion affected the baseline, and (ii) relies solely on "reported" commercial uses of pesticides and fails to make any adjustments for "unreported" pesticide uses. EWG Petitioners argue that the lack of a valid baseline taints the PEIR's cumulative impacts analysis.
- The PEIR fails to adequately analyze the Project's biological, water quality, human health, and cumulative impacts. EWG Petitioners argue that the Project's analysis of these impacts is incomplete, inaccurate, and unsupported by substantial evidence.
- The PEIR unlawfully defers analysis and formulation of mitigation measures.
- The PEIR understates Project impacts by including mitigation measures as components of the Project itself.
- The PEIR adopts a legally defective "tiering" strategy that grants the Department authority to implement a broad range of practices without evaluating the site-specific conditions to determine whether the environmental impacts were covered in the PEIR.
- The Department violated mandatory public notice and consultation requirements by (i) refusing to file a NOD following its determination to approve a subsequent activity under the Program without further CEQA review, and (ii) failing to notify and consult with all responsible and trustee agencies prior to certifying the PEIR. EWG Petitioners object that, despite listing hundreds of responsible and trustee agencies affected by the Project, the Department notified and consulted with only a fraction of these agencies, and failed to provide the NOD for the PEIR to all of the agencies.

The Department defends the tiering strategy adopted under the PEIR. Contrary to what Petitioners argue, the Department asserts the tiering strategy ensures site-specific review is completed before any subsequent activity is approved. (Citing AR 6335, 6337, 6356-58.) The Department argues that its tiering strategy includes a "Checklist," which is used to determine whether the subsequent activity is within the scope of the Program analyzed in the PEIR, and whether new or more significant effects could occur. The Department contends the standard is not, as Petitioners argue, merely whether the activity was mentioned in the PEIR.

The Department rejects the argument that an NOD is required every time the Department decides to approve or carry out a subsequent activity under the Program. The Department contends that Petitioners made the same argument in their motions for preliminary injunction, which were rejected by the court. Simply stated, not every subsequent activity carried out under the Program constitutes a new "project" for which an NOD is required. If the subsequent activity previously was covered by the PEIR, and the activity will not cause new significant impacts or increase the severity of the significant impacts identified in the EIR, then no new environmental document is required, and the NOD requirement does

not apply. The Department contends that the dicta in *Committee in Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, is not binding or persuasive, and is contrary to the requirements of CEQA.

The Department defends the PEIR's project description. The Department argues that the PEIR includes all of the information required by CEQA Guidelines § 15124, including the location of the Project, the Project objectives, a general description of the Project's technical, economic, and environmental characteristics, and a brief description of the PEIR's intended uses. (Citing AR 3988-90, 3987, 4008-12, 4020-21.) The Department further argues that chapters 2 and 3 of the PEIR provide a very detailed description of the process that the Department will use to determine the appropriate response to particular pests.

While the PEIR does not discuss precise locations for individual pest applications, the Department argues this is acceptable for a program-level EIR since the precise locations for individual pest applications will depend on unknown future events. The PEIR provides the specificity possible at this stage of the analysis, by including a boundary map and identifying "priority pests" and their likely range. (Citing AR 3990, 3995, 4000-01, 6994-7026.) Further, the Department contends it cannot move forward with individual pest responses without first conducting a site-specific analysis, which will determine whether the impacts of the activity were fully disclosed in the EIR.[3] (Citing AR 3979.) The Department admits that the PEIR did not disclose the locations of existing pest programs, but the Department contends this was reasonable since the intent of the Statewide Program was to update and replace those programs with a comprehensive framework. (Citing AR 3986.)

The Department likewise defends the PEIR's description of the baseline environmental setting. While the Department admits that some of the detail relating to the environmental setting is contained in appendices, the Department argues this is permitted and reasonable given the size and scope of the Program and the PEIR. (See *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 423-24.)

The Department rejects the argument that the PEIR's description of the baseline environmental conditions is flawed or inadequate because it is based on "existing conditions." (See *Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 327-28; *Neighbors for Smart Rail v. Exposition Metro Line Construction Auth.* (2013) 57 Cal.4th 439, 445-46.) The Department argues that agencies have discretion to decide how the existing physical conditions most realistically can be measured. The Department did not abuse its discretion in using existing conditions.

While Petitioners argue the PEIR did not adequately describe existing pesticide use, the Department contends Petitioners have failed to identify any specific deficiencies, other than the lack of "unreported" pesticide use, which the Department contends was reasonably left out of the PEIR due to its speculative

[3] The Department contends the PEIR includes sufficient detail where a project-level analysis has been performed. (Citing AR 4109-30, 4202-27, 4283-87, 4294-305, 4319-20, 4333-42, 4183, 4302, 4303, 4266-68.)

nature. (See AR 4142-43, 4131-82; see also *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 635 [agency not required to engage in speculation].)

The Department contends that the PEIR adequately analyzes all of the Project's environmental impacts, including noise, water quality, biological, human health risk, and cumulative impacts.

The Department also contends the PEIR did not improperly defer formulation of mitigation measures, and did not conceal mitigation measures as Program features.

The Department argues that the PEIR analyzed a reasonable range of alternatives to the proposed Project, including a "No Program" Alternative, a "No Pesticide" Alternative, the "USDA Organic Pesticide" Alternative, and the "No Eradication" Alternative. The Department contends the analysis is sufficiently detailed. (Citing AR 4371-79, 4380-88.) The Department rejects the suggestion that a "quantitative" analysis was required since this was a programmatic-level EIR.

The Department contends that it also complied with CEQA in responding to comments on "significant environmental issues." (Citing Cal. Pub. Res. Code § 21091; 14 CCR §§ 15002, 15088.) The Department was not obligated to respond to Petitioners' comments about the LBAM [Light Brown Apple Moth] program because that program was not relevant to the PEIR's environmental analysis. In any event, the LBAM program is no longer in existence, so there is no longer any potential for cumulative impacts involving that program. The Department appropriately decided not to respond to comments submitted orally at the hearing, and CEQA allows this. (Citing 14 C.C.R. § 15202.)

According to the Department, it also complied with CEQA's public notice and consultation requirements. The Department argues that Petitioners are conflating the requirement to prepare an agency list with the consulting and notification requirements.

Finally, the Department denies that it violated CEQA by approving Addendum No. 1 and Addendum No. 2 to the PEIR. The Department argues that, under *Friends of the College of San Mateo v. San Mateo County Community College District* (2016) 1 Cal.5th 937, its decision to modify the EIR via addendum is subject to the deferential "substantial evidence" standard. Here, the Department contends, its decision is supported by substantial evidence in that the PEIR analyzed the same pesticides, same equipment, and same settings (urban/residential) discussed in the Addenda. The Program modifications simply added variations on already-analyzed application methods and involved different combinations of treatment components. (Citing AR 5939, 5973, 5983, 5999, 6002, 6345, 6183, 6216, 6219, 6234-35, 6269, 6298; Addendum 1 AD 18, 89; Addendum 2 AR 2, 5-6.)

To determine whether a new EIR was required, the Department conducted Human Health Risk Assessments and Ecological Risk Assessments for both Addendum No.1 and No. 2 to evaluate any potential health or environmental impacts, and specifically to determine if the modifications would result in any additional or more severe environmental impacts than those addressed in the PEIR.

(Citing Addendum 1 AR 8-14, 18, 29, 31, 45, 95, 102, 104, 116; Addendum 2 AR 8-154.) These analyses concluded that the Program modifications would not have any new significant effects beyond those identified in the PEIR and would not substantially increase the severity of any significant effects identified in the PEIR. (Citing Addendum 1 AR 48, 89, 133; Addendum 2 AR 54, 144.) Thus, the Department concluded that no additional subsequent or supplemental EIR was required, and an Addendum was appropriately prepared.

The Department argues that it is Petitioners' burden to show there was not substantial evidence to support the Department's determination. The Department contends that Petitioners have failed to meet that burden. Petitioners' claims that the modifications "will" have significant effects are unsubstantiated, and ignore substantial evidence supporting the Department's determination that the changes will not result in new significant impacts. (Citing, e.g., Addendum 1 AR 20; Addendum 2 AR 19 [evidence that boom sprayers are forms of mechanically pressurized sprayers]; AR 4291-92.)

The Department denies it was required to issue an NOD for the Addenda. As described above, the Department contends CEQA does not require the filing of an NOD for a subsequent activity that does not constitute a separate "project."

Standard of Review

In a mandate proceeding to review an agency's decision for compliance with CEQA, the court reviews the administrative record to determine whether the agency prejudicially abused its discretion. Abuse of discretion is shown if the agency has not proceeded in the manner required by law, or the determination is not supported by substantial evidence. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1106.) Judicial review differs significantly depending on whether the claim is predominantly one of improper procedure or a dispute over the facts. (*Ebbets Pass Forest Watch v. California Dept. of Forestry & Fire Prot.* (2008) 43 Cal.4th 936, 945.)

Where the alleged defect is that the agency has failed to proceed in the manner required by law, the court's review is de novo. (*Ibid.*) Although CEQA does not mandate technical perfection, CEQA's information disclosure provisions are scrupulously enforced. (*Ibid.*) A failure to comply with the requirements of CEQA that results in an omission of information necessary to informed decision-making and informed public participation constitutes a prejudicial abuse of discretion, regardless whether a different outcome would have resulted if the agency had complied with the disclosure requirements. (*Bakersfield Citizens for Local Control v. City of Bakersfield* (2004) 124 Cal.App.4th 1184, 1198; *Association of Irritated Residents v. County of Madera* (2003) 107 Cal.App.4th 1383, 1392.) However, the reviewing court does not pass upon the correctness of the EIR's environmental conclusions, but only upon its sufficiency as an informative document. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392.)

Where the alleged defect is that the agency's factual conclusions are not supported by substantial evidence, the reviewing court must accord deference to the agency's factual conclusions. Substantial

evidence to support an agency's decision means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support the agency's conclusion, even if other conclusions might also be reached." (*Joy Road Area Forest & Watershed Ass'n v. Cal. Dept. of Forestry & Fire Prot.* (2006) 142 Cal.App.4th 656, 677.) The reviewing court may not weigh conflicting evidence to determine who has the better argument and must resolve all reasonable doubts in favor of the administrative decision. The court may not set aside an agency's factual conclusions on the ground that an opposite conclusion would have been equally or more reasonable. (*Ebbets Pass, supra*, at p.945; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 946.) A court's task is not to weigh conflicting evidence and determine who has the better argument. (*Laurel Heights, supra*, 47 Cal.3d at p.393.)

Regardless of what is alleged, the agency's actions are presumed legally adequate, and the party challenging such actions has the burden of showing otherwise. (*Santa Clarita Organization for Planning the Environment v. County of Los Angeles* (2007) 157 Cal.App.4th 149, 158; *Gilroy Citizens for Responsible Planning v. City of Gilroy* (2006) 140 Cal.App.4th 911, 919.)

The Supreme Court repeatedly has observed that CEQA is to be interpreted to afford the fullest possible protection to the environment within the reasonable scope of its statutory language. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1315.)

Discussion

Does the PEIR's tiering strategy violate CEQA?

Both the North Coast and EWG Petitioners argue that the PEIR violates CEQA because it adopts an unlawful tiering strategy, granting the Department authority to implement a broad range of practices without evaluating the site-specific conditions to determine whether the environmental impacts were covered in the PEIR. The court agrees with Petitioners.

The central purpose of CEQA is to ensure that public agencies and the public are adequately informed of the environmental effects of proposed agency action. (*Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, 951.) The heart of CEQA is the EIR. (*Rio Vista Farm Bureau Center v. County of Solano* (1992) 5 Cal.App.4th 351, 368.) The EIR is intended to act as an "environmental alarm bell," informing the public and government officials of the environmental consequences of decisions before they are made. (*Ibid; County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.)

An EIR must be prepared on any "project" an agency intends to approve or carry out. (*Sierra Club v. County of Sonoma* (1992) 6 Cal.App.4th 1307, 1315.) The term "project" is broadly defined to include any activity which has the potential for resulting in an adverse physical change in the environment, directly or indirectly. (*Ibid.*) Thus, the definition encompasses a wide spectrum of activities, ranging

from the adoption of a general plan, which is by its nature general and subject to change, to activities with a more immediate impact, such as a site-specific development. (*Ibid.*)

The degree of specificity required in an EIR corresponds to the degree of specificity involved in the underlying project. An EIR on the adoption of a general plan need not be as precise as an EIR on the specific projects which might follow. (*Al Larson Boat Shop, Inc. v. Board of Harbor Commissioners* (1993) 18 Cal.App.4th 729, 746.)

The project EIR is the most common and most detailed type of EIR. It examines the environmental impacts of a specific development project. (*Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency* (2000) 82 Cal.App.4th 511, 527-528.) Once a project EIR has been certified by a lead agency, Public Resources Code § 21166 prohibits the agency from requiring additional environmental review on that project unless: substantial changes are proposed in the project which will require major revisions of the environmental impact report; substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report; or new information of substantial importance becomes available showing (i) the project will have new, significant environmental effects, (ii) a substantial increase in the severity of previously identified significant effects, (iii) mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects, or (iv) mitigation measures or alternatives considerably different from those analyzed in the prior EIR would substantially reduce one or more significant effects. (Cal. Pub. Res. Code § 21166; CEQA Guidelines § 15162.)

In contrast, for projects consisting of a policy, plan, or program, CEQA encourages agencies to "tier" EIRs whenever feasible. (*Friends of Mammoth, supra,* 82 Cal.App.4th at pp.527-528; *Sierra Club, supra,* 6 Cal.App.4th at p.1318; see also Cal. Pub. Res. Code § 21093(b).) Tiering refers to incorporating the analysis of general matters contained in an earlier, broader EIR (such as one prepared for a policy, plan, or program) into subsequent narrower EIRs or site-specific EIRs. (*Sierra Club, supra,* 6 Cal.App.4th at p.1319; see also Cal. Pub. Res. Code § 21068.5; CEQA Guidelines §§ 15152, 15385.) Tiering allows the agency to focus on issues specific to the later project and exclude from consideration the issues already analyzed in the first-tier EIR. (CEQA Guidelines § 15385.)

The CEQA Guidelines provide that tiering is appropriate when the sequence is from an EIR prepared for a general plan, policy, or program to an EIR or negative declaration for another plan, policy, or program of lesser scope, or to a site-specific EIR or negative declaration. (CEQA Guidelines §§ 15152.) Tiering does not excuse the lead agency from adequately analyzing the reasonably foreseeable significant environmental effects of a project. However, where it is not feasible to evaluate detailed, site-specific impacts at the first-tier, programmatic level, tiering allows the evaluation of such impacts to be deferred until such time as the lead agency prepares a future environmental document in connection with a project of a more limited geographical scale. (*Ibid; see also Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 431.)

The standard for determining whether to engage in additional CEQA review under a tiered EIR is governed by Public Resources Code § 21094. Subdivision (a) of that section provides, in relevant part:

> Where a prior environmental impact report has been prepared and certified for a program, . . . the lead agency for a later project that meets the requirements of this section shall examine significant effects of the later project upon the environment by using a tiered [EIR], except that the report on the later project is not required to examine those effects that the lead agency determines were . . . [e]xamined at a sufficient level of detail in the prior [EIR] . . . .

For purposes of compliance with this section, subdivision (c) provides that "an initial study shall be prepared to assist the lead agency in making the determinations required by this section. The initial study shall analyze whether the later project may cause significant effects on the environment that were not examined in the prior environmental impact report." (Cal. Pub. Res. Code § 21094(c); see also CEQA Guidelines § 15168(c)(4).)

CEQA Guidelines § 15152 implements Public Resources Code section 21094. Section 15152 provides, in relevant part:

> (d) Where an EIR has been prepared and certified for a program, plan, policy, or ordinance consistent with the requirements of this section, any lead agency for a later project pursuant to or consistent with the program, plan, policy, or ordinance should limit the EIR or negative declaration on the later project to effects which: (1) were not examined as significant effects on the environment in the prior EIR . . . ; or (2) are susceptible to substantial reduction or avoidance by the choice of specific revisions in the project, by the imposition of conditions, or other means. . . .
>
> (f) A later EIR shall be required when the initial study or other analysis finds that the later project may cause significant effects on the environment that were not adequately addressed in the prior EIR. A negative declaration shall be required when the provisions of section 15070 are met. . . . (CEQA Guidelines § 15152(d), (f).)

The CEQA Guidelines provide that significant environmental effects have been "adequately addressed" in a prior EIR if they either (i) have been mitigated or avoided as a result of the prior EIR, or (ii) have been examined at a sufficient level of detail in the prior EIR to enable those effects to be mitigated or avoided by site specific revisions, the imposition of conditions, or by other means in connection with the approval of the later project. (CEQA Guidelines § 15152(f).)

Tiering under section 21094 applies only to a "later project" that the agency determines is consistent with the program, policy, or plan, for which a prior EIR has been certified. (Cal. Pub. Res. Code § 21094(b)(1).) If a "later project" is not consistent with the program, policy, or plan, section 21094 does not apply, and the project must be evaluated as an entirely "new project" for purposes of CEQA.

(*Friends of Mammoth, supra*, 82 Cal.App.4th at pp.528-29.) By its own terms, section 21094 also does not apply when a "later project" actually is the *same (or essentially the same) project* reviewed in the prior EIR. (*Id.* at p.529; Cal. Pub. Res. Code § 21094(b).) If a subsequent activity is determined to be an extension or modification of the same or essentially the same project described in a prior EIR, then Public Resources Code section 21166 applies, and the activity cannot be subjected to further environmental review unless the requirements of section 21166 are satisfied. (*Friends of Mammoth, supra*, 82 Cal.App.4th at p.529; *Sierra Club, supra,* 6 Cal.App.4th at p.1320; see also *American Canyon Community United for Responsible Growth v. City of American Canyon* (2006) 145 Cal.App.4th 1062, 1073.)

The standard for determining whether to engage in additional CEQA review of subsequent projects under a tiered EIR is more exacting than the standard governing additional environmental review under section 21166. When an agency has already prepared an EIR, the reviewing court will uphold an agency's decision not to prepare a subsequent EIR (SEIR) if the administrative record as a whole contains substantial evidence to support the determination that the changes in the project or its circumstances were not so substantial as to require major modifications of the EIR. (*Sierra Club, supra,* 6 Cal.App.4th at pp.1316–1317; *Santa Teresa Citizen Action Group v. City of San Jose* (2003) 114 Cal.App.4th 689, 702.) This deferential standard is a reflection of the fact that in-depth review already has occurred. (*Santa Teresa, supra*, 114 Cal.App.4th at p.703.)

If a proposed subsequent activity constitutes a new project, the "fair argument" test applies, and an agency will be required to prepare a tiered EIR whenever there is substantial evidence of a fair argument that the project may have significant environmental impacts that were not examined in the prior EIR. (*Sierra Club*, *supra*, 6 Cal.App.4th at p. 1319.) The fair argument test establishes a low threshold for preparation of an EIR, which reflects a preference for resolving doubts in favor of environmental review. (*Id.* at pp.1316-17.)

Regardless whether a proposed subsequent activity is determined to be a new, related project, or an expansion/modification of an existing project, when a program EIR is used to avoid preparing subsequent EIRs, the public agency must examine site-specific program activities in light of the program EIR to determine whether an additional environmental document must be prepared. (CEQA Guidelines § 15168(c); *North Coast Rivers Alliance v. Kawamura* (2015) 243 Cal.App.4th 647, 680.) If a subsequent activity under a program may have (site-specific) environmental impacts that were not fully evaluated in the PEIR, a new initial study must be prepared, leading to either an EIR or a negative declaration. (CEQA Guidelines § 15168(c)(1).) If the agency finds that a subsequent (site-specific) activity will not create any new effects or require mitigation measures that were not discussed in the PEIR, the agency can approve the activity as being "within the scope" of the project covered by the program EIR, and no new environmental document will be required. (CEQA Guidelines § 15168(c)(2).)

In this case, Petitioners argue that the Department's tiering strategy is unlawful because it authorizes implementation of site-specific activities without the required site-specific environmental review. The court agrees.

The CEQA Guidelines state that where subsequent activities under a program involve site-specific operations, the agency should use a written checklist or similar device to document the evaluation of the site and the activity to determine whether the environmental effects of the operation were covered in the PEIR. (CEQA Guidelines § 15168(c)(4).) Here, consistent with the Guidelines, the Department developed a "Tiering Strategy Guidelines" and a "Checklist" to determine whether additional CEQA analysis would be required for subsequent activities under the Program. (AR 6335-71.) The Department argues that the Guidelines/Checklist ensures site-specific review is completed before any subsequent activity is approved. The court does not agree.

Under the PEIR's Tiering Strategy Guidelines/Checklist, the Department first inquires whether the proposed activity was "described and evaluated" in the PEIR. If the activity was "described and evaluated," the Department may proceed to "conduct" the activity, subject to compliance with the PEIR requirements (e.g., the management practices).

In such a scenario, the PEIR's tiering strategy never requires the Department to consider whether particular site-specific conditions may cause significant environmental impacts that were not covered in the PEIR. The only reference to "site-specific factors" is in Table 1, which requires the Department to consider whether there are site-specific factors applicable to chemical management activities which will "reduce" the potential for impacts compared to the scenario evaluated in the PEIR. (AR 6346.) As Petitioners point out, this is the wrong inquiry. The relevant inquiry asks whether there are any site-specific factors which will *increase* potentially significant environmental impacts.[4] Further, the tiering strategy does not require any consideration of site-specific factors relative to physical and biological management activities.

Under the PEIR's tiering strategy, consideration of site-specific environmental impacts is guaranteed only if the Department determines the proposed activity was not considered or was only partially considered in the PEIR. (See Tiering Strategy Guidelines, Part C; AR 6337, 6356.)

Relying on *Center for Biological Diversity v. Department of Fish & Wildlife* (2015) 234 Cal.App.4th 214, the Department argues that CEQA does not require additional site-specific environmental review if the site-specific impacts were sufficiently addressed in the PEIR. However, a first-tier PEIR may serve as a project-specific EIR for a subsequent activity under a program only if the first-tier PEIR contemplated and fully analyzed the potential environmental impacts of the activity. (See *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134

[4] More specifically, if a subsequent activity is determined to be "within the scope" of the PEIR -- meaning it was contemplated and fully evaluated at a project-level as part of the PEIR – the Department must consider whether the requirements of Public Resources Code section 21166 (and CEQA Guidelines section 15162) have been satisfied. Section 21166 and the CEQA Guidelines contemplate a subsequent EIR is required if there are substantial changes in the project or its circumstances or new information that will require major changes in the prior EIR. (*Natural Resources Defense Council, Inc. v. City of Los Angeles* (2002) 103 Cal.App.4th 268, 282.)

Cal.App.4th 598, 615; see also *Santa Teresa, supra,* 114 Cal.App.4th at p.704, fn. 11 [stating that project must fall within the scope of the previous EIR].)

It is insufficient for the Department to ask only whether an activity was "described" in the PEIR. For a PEIR to serve as a site-specific EIR for a subsequent activity, the impacts of the activity must have been examined at a sufficient level of detail in the PEIR to evaluate and mitigate the potential site-specific impacts of the future activity. (See *Center for Biological Diversity, supra,* 234 Cal.App.4th at pp. 233, 237-38 [the PEIR must be "sufficiently comprehensive and specific"]; CEQA Guidelines § 15152(f); see also CEQA Guidelines § 15168(c)(5) ["With a good and detailed analysis of the program, many subsequent activities could be found to be within the scope of the project described in the program EIR, and no further environmental documents would be required."])

In this case, the PEIR was prepared as a first-tier, program-level EIR, to serve as a foundation for "subsequent, more detailed analyses associated with individual activities conducted under the Proposed Program." (AR 3977.) The Department's goal was to minimize the amount of duplicate information that may be required in the future at a project level of environmental review by dealing, as comprehensively as possible, with "cumulative impacts, regional considerations, and similar overarching issues." (*Ibid.*)

The Department contends that the PEIR also may include project-level review, but it is not clear to the court that any portion of the Program was subjected to project-level review, except perhaps as part of prior EIRs for certain existing and ongoing Department activities. In its brief, the Department concedes that the PEIR generally has not considered site-specific impacts. (See, e.g., Opposition, pp.29-30.) The Department does not argue that the PEIR considered site-specific impacts of the Program activities. It merely argues the PEIR's Tiering Strategy Guidelines/Checklist will "ensure" adequate consideration of site-specific impacts prior to implementation of subsequent activities. (Opposition, pp.22-23, 30.) Thus, it appears to be undisputed that the PEIR has deferred analysis of the site-specific impacts of Program activities until those activities are approved. That is a crucial distinction between this case and *Center for Biological Diversity*.

Moreover, even if the PEIR provided project-level detail for Program activities, this would not alleviate the Department of the responsibility to determine whether each subsequent activity's particular impacts were, in fact, sufficiently analyzed and mitigated by the PEIR. (See *id*. at pp.238-39; *Kawamura, supra*, 243 Cal.App.4th at pp.680-81; see also *NRDC, supra*, 103 Cal.App.4th at p.282; *Citizens for Responsible Equitable Environmental Development v. City of San Diego Redevelopment Agency* (2005) 134 Cal.App.4th 598, 611; Cal. Pub. Res. Code § 21166; CEQA Guidelines §§ 15162, 15168(c).) Subsequent activities in a program "must be examined in light of the program EIR to determine whether an additional environmental document must be prepared." (CEQA Guidelines § 15168(c).) As described above, the PEIR's Tiering Strategy Guidelines/Checklist is inadequate to determine whether a particular activity's impacts were sufficiently analyzed in the PEIR.

Does CEQA require the Department to issue a Notice of Determination (NOD) anytime it carries out or approves a site-specific activity?

Petitioners argue that the PEIR's tiering strategy violates CEQA because it does not require the filing of an NOD when the Department approves subsequent activities under the Program. This issue requires the court to answer the following questions: (1) whether CEQA requires an agency to file an NOD for every subsequent activity under a program, and (2) whether the PEIR is consistent with CEQA's notice requirements.

The answers to these two questions are related because, while the PEIR states that the Department will file a NOD "when required," the PEIR also suggests that the Department does not intend to file an NOD when a subsequent activity is determined to be "within the scope of the activities analyzed" in the PEIR. (AR 7608.)

In its tentative ruling (and its ruling on the preliminary injunction motions), the court agreed with the Department that CEQA does not appear to require an agency to file an NOD each time the agency approves or carries out a subsequent activity under a program. The court reasoned that the term "project" is a term of art. Not every "subsequent activity" carried out under the Program necessarily constitutes a new "project" for which the Department must file a notice of determination. As described above, whether a subsequent activity constitutes a new "project" depends on whether the activity is "within the scope" of the project described in the prior EIR. If so, the subsequent activity is reviewed as a modification or extension of an existing project under Public Resources Code § 21166. If not, the activity is reviewed either as an entirely new project under Public Resources Code § 21100 (or § 21151), or as a "later project" under the tiering provisions of Public Resources Code § 21094.

After further review and analysis, the court has concluded that while its reasoning generally was correct, as far as it goes, the court erroneously concluded that an NOD is not required when a further discretionary approval is required for an existing "project."

Turning to the language of the statute, Public Resources Code section 21108 provides that "[i]f a state agency approves or determines to carry out a project that is subject to this division, the state agency shall file notice of that approval or that determination with the Office of Planning and Research." (Cal. Pub. Res. Code § 21108(a); CEQA Guidelines § 15373.) As described above, the court is not persuaded that every "subsequent activity" approved or carried out under a program constitutes a new project. However, the statute does not require a NOD only when the agency approves or determines to carry out a "new" project; it requires a NOD to be filed whenever the agency approves or determines to carry out any "project" that is subject to this division, including, it appears, an existing project.

CEQA provides that once a project has been approved, the lead agency's role in project approval is complete, "unless further discretionary approval on that project is required." (CEQA Guidelines § 15162.) Thus, CEQA contemplates that there may be multiple discretionary approvals for a single "project." (See also CEQA Guidelines § 15168 [defining a program EIR as an EIR which may be prepared

on a series of related actions that can be characterized as "one large project"].) This is important because it supports the interpretation that section 21108 is triggered by any project "approval," not just by the approval of a "new" project. (See also CEQA Guidelines § 15075 ["For projects with more than one phase, the lead agency shall file a notice of determination for each phase requiring a discretionary approval."])

The statutory definition of "project" supports this construction, as it defines a project to mean any "activity" which may cause either a direct physical change in the environment or a reasonably foreseeable indirect physical change in the environment. (Cal. Pub. Res. Code § 21065; see also Cal. Pub. Res. Code § 21080(a) and 21081 [describing the scope of CEQA].)

In *Committee for Green Foothills v. Santa Clara County Board of Supervisors* (2010) 48 Cal.4th 32, the California Supreme Court pondered the question whether the filing of a NOD is mandatory for subsequent activities under a program EIR. The Court stated that although the CEQA statutes and Guidelines do not directly address this question, "such a notice would seem to be required under the general rule that an agency file an NOD '[w]henever [it] approves or determines to carry out a project that is subject to' CEQA." (*Committee for Green Foothills, supra*, 48 Cal.4th at p.56.)

The Court also noted that CEQA specifically requires the filing of an NOD in the "analogous context" of subsequent projects to a master EIR. (See Cal. Pub. Res. Code § 21157.1(c) ["Whenever a lead agency approves or determines to carry out any subsequent project pursuant to this section, it shall file a notice pursuant to Section 21108 or 21152.")

The language in *Committee for Green Foothills* suggesting that a NOD "would seem to be required" is *dicta*. The issue in that case was whether the filing of a NOD triggered the shorter, 30-day statute of limitations under Public Resources Code section 21167. The court concluded the NOD triggered the 30-day statute of limitations because it is the fact of notice being given that triggers the shorter limitations period. The Court expressly declined to "decide whether CEQA requires an NOD for every subsequent activity approved as being within the scope of an earlier EIR," because the court found it "sufficient to observe" that NODs frequently are filed for that purpose. (*Ibid.*)

Some courts have held that when the impacts from a subsequent activity are sufficiently addressed in a program EIR, no further environmental documents will be required. (See *Committee for Green Foothills, supra*, 48 Cal.4th at p.55; CEQA Guidelines § 15168(c)(5).) However, the Supreme Court's decision suggests that the requirement to file a NOD applies even when the agency's decision to approve or carry out a project did not involve preparation of a new environmental document. (*Committee for Green Foothills, supra*, 48 Cal.4th at pp.55-56.) In other words, the obligation to give notice is not part of the environmental review. The Supreme Court suggested a NOD was required even in the absence of "specific authorization" for it, the absence of a new "project," and the absence of further environmental documents.

While the language in *Committee for Green Foothills* is not binding, this court finds it persuasive. (*People v. Superior Court (Tejeda)* (2016) 1 Cal.App.5th 892, 903.) Thus, even when a "subsequent activity" is part of the same project described in a prior program EIR, the court concludes that CEQA nevertheless requires an agency to file a NOD for any further discretionary approval of that project.

Moreover, because it is not clear to this court that any portion of the Statewide Program was subject to project-level review in the PEIR, as a practical matter, it would seem that any subsequent activities approved or carried out under the Program will constitute separate, site-specific "projects," because the impacts of the activities were not examined at a sufficient level of detail in the PEIR to be considered "within the scope" of the PEIR.

For all of these reasons, the court agrees with Petitioners that, to the extent the Department contends it has no obligation to file a NOD to provide public notice of its decisions to approve or carry out subsequent, site-specific activities under the Program, the Department's activities are contrary to CEQA.

Does the PEIR contain an adequate project description?

An accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR. (*County of Inyo v. City of Los Angeles* (1977) 71 Cal.App.3d 185, 193.) Petitioners contend that the Department's PEIR is impermissibly vague because it fails to identify when, where, and how the Department will implement the Program in response to any particular pest. (See North Coast Petitioners' Opening Brief, pp.12-13 [citing CEQA Guidelines § 15124].)

The Department admits the PEIR lacks details on how the Program will be implemented for specific pests at specific sites. (See AR 8011.) However, the Department contends this is permissible because the PEIR is a program EIR. According to the Department, the PEIR provides a detailed description of the *process* that the Department will use to determine the appropriate response to a pest infestation at a specific site. In particular, the PEIR describes how pests are rated, the range of pest management activities, and a detailed description, by pest, of the various techniques that may be implemented. (See AR 3992-4031.) The Department contends that the PEIR provides as much specificity as possible, but acknowledges that some of the details will be provided later since they are dependent on site-specific conditions. (Opposition Brief, p.29.)

The court agrees with the Department. For a program-level document, the court finds the PEIR's description of the Program to be sufficiently detailed, even though it lacks detailed information about how, when, and where the Program will be implemented in response to particular pest infestations. Of course, the detail that is missing from the PEIR will need to be provided before the Program is implemented at specific sites. The Department cannot move forward with individual activities "without considering site-specific analysis of those activities and whether they may result in impacts that were not disclosed in the PEIR." (Opposition Brief, p.30.)

Does the PEIR contain an adequate description of the baseline environmental setting?

Petitioners allege the PEIR's description of the baseline environmental setting is inadequate because it (i) includes ongoing Department activities as part of the baseline, (ii) fails to explain which of the Department's ongoing activities were included in the baseline and how their inclusion affected the baseline, and (iii) discusses only "reported" uses of pesticides and fails to make any disclosure of "unreported" uses.

Section 15125 of the CEQA Guidelines provides that an "EIR must include a description of the physical environmental conditions in the vicinity of the project, as they exist at the time the notice of preparation is published, or if no notice of preparation is published, at the time environmental analysis is commenced, from both a local and regional perspective. This environmental setting will normally constitute the baseline physical conditions by which a lead agency determines whether an impact is significant."

The impacts of a proposed project ordinarily are compared to the existing physical conditions -- the "real conditions on the ground" -- in the affected area. (*Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council* (2010) 190 Cal.App.4th 1351, 1374, overruled on other grounds in *Neighbors for Smart Rail v. Exposition Metro Line Construction Authority* (2013) 57 Cal. 4th 439, 450.) The California Supreme Court has recognized, however, that some flexibility exists for the determination of baseline conditions:

> Neither CEQA nor the CEQA Guidelines mandates a uniform, inflexible rule for determination of the existing conditions baseline. Rather, an agency enjoys the discretion to decide, in the first instance, exactly how the existing physical conditions without the project can most realistically be measured, subject to review, as with all CEQA factual determinations, for support by substantial evidence. (*Communities for a Better Environment v. South Coast Air Quality Management Dist.* (2010) 48 Cal.4th 310, 328.)

In this case, the court agrees with Petitioners that the Department's baseline is flawed. The problem with the PEIR's baseline is not that it includes ongoing Department activities as part of the baseline, but that it fails to identify which of the Department's ongoing activities were included in the baseline, and how their inclusion affected the baseline.

The purpose of describing the environmental setting is to establish the baseline environmental conditions by which the lead agency may determine whether a project's predicted environmental effects are significant. Ongoing activities occurring at the time CEQA review begins may be treated as a component of the existing conditions baseline. (*Communities for a Better Environment supra,* 48 Cal.4th at p.322; see also *Center for Biological Diversity, supra*, 234 Cal.App.4th at pp.248-52.) However, where ongoing project activities are part of the baseline, those activities should be defined and quantified so that the public and decision makers can ascertain the existing environmental conditions without the

project and thereby measure the significant environmental effects that the project is likely to have on the environment. (See *San Joaquin Raptor Rescue Center v. County of Merced* (2007) 149 Cal.App.4th 645, 659; see also *Poet, LLC v. State Air Resources Bd.* (2017) 12 Cal.App.5th 52, 80 [EIR must include a realistic baseline that gives the public and decision makers the most accurate picture possible of the project's likely impacts].)

Here, the PEIR adequately describes the total amount of reported pesticide use for each county, but fails to describe the amount of pesticides associated with ongoing Department activities. (AR 4142-67; see also AR 4109-30.) As a result, it is impossible to know the existing environmental conditions in the absence of the Project, and therefore impossible to evaluate what effects the Project might have on existing environmental conditions.[5]

The court also agrees with Petitioners that the PEIR should have disclosed figures for unreported pesticide use in the PEIR. The PEIR estimates that approximately 619 million pounds of pesticide active ingredients were sold in 2011, and indicates that sales data are posted online. However, the data reported in an EIR must not only be sufficient in quantity, it must be presented in a manner calculated to adequately inform the public and decision makers, who may not be familiar with the details of the project. (*Vineyard Area Citizens for Responsible Growth, supra,* 40 Cal.4th at p.442.) "[I]nformation 'scattered here and there in EIR appendices, or a report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis.'" (*Ibid* [concluding that agency violated CEQA by relying on information not actually incorporated or described and referenced in EIR].) The public and decision makers should not be forced to sift through obscure minutiae or appendices to ferret out fundamental baseline assumptions that are being used for purposes of the environmental analysis. (*San Joaquin Raptor Rescue Center, supra,* 149 Cal.App.4th at p.659; see also CEQA Guidelines § 15151 [CEQA requires a "good faith effort at full disclosure"].)

The Department has shown that it has the ability to estimate unreported pesticide use based on sales data. This information is material to the PEIR's cumulative impacts analysis. Thus, the Department should have disclosed the data in the PEIR.

Does the PEIR fail to adequately analyze significant environmental impacts?

Petitioners argue that the PEIR, in addition to its other flaws, is defective because it fails to adequately analyze the Project's environmental impacts on biological resources, water quality, human health, noise, and organic farming.

Petitioners argue that the PEIR fails to disclose and analyze impacts on sensitive biological resources because it (i) assumes spraying "generally" will not occur near sensitive resources and fails to analyze potential impacts from pesticide drift; (ii) concludes, without substantial evidence, that the Project will have less-than-significant impacts on sensitive species; (iii) concludes, without substantial evidence, that

[5] This information also is necessary for the PEIR's analysis of the No Program and No Pesticide alternatives.

traps and lures will not have significant impacts on non-target species; (iii) used improper thresholds of significance for impacts to pollinators and organic farming; and (iv) fails to define, disclose, and analyze impacts on wetlands.

The PEIR is not defective because it assumes spraying "generally" will not occur near wetlands and other sensitive natural communities. The PEIR is clear that proposed Program activities will not be "conducted in undeveloped areas of native vegetation." (AR 4266, 4280.) This is a limitation on the Program. If the Department subsequently modifies the Program to allow spraying in undeveloped areas, the Department likely will be required to conduct further environmental review to consider the potential environmental impacts, since those impacts were not considered in the PEIR.

The court is not persuaded that the PEIR failed to analyze the potential impacts of pesticide drift. The PEIR simply concluded that, with the implementation of the required management practices and mitigation measures, the Department will be able to avoid impacts related to drift. Petitioners have failed to show that this determination is not supported by substantial evidence. (AR 4015-18, 4276-78, 8029.)

The court also is not persuaded that the PEIR used an improper threshold of significance for impacts to organic farming. The PEIR discussed whether the Program would cause organic farms to convert to conventional farming – i.e., use conventional pesticides – and the PEIR found no evidence that would happen. (AR 7616.)

In contrast, the court agrees with Petitioners that the PEIR improperly ignored potentially significant impacts to pollinators. The PEIR considered impacts to pollinators significant only if (1) the pollinator species impacted were "special status," or (2) the impacts would result in a secondary change in the physical environment (such as conversion of land from agricultural to non-agricultural use). (AR 7743; see also AR 4269, 4272, 7634, 7636.) The PEIR did not consider whether the Project might adversely impact non-special-status pollinators, despite acknowledging that "healthy pollinator populations are critical to protecting the environmental quality and agricultural resources of the state," and that "Colony Collapse Disorder" and "pollinator decline" are "ongoing . . . serious" problems. (AR 7743, 7634; see also AR 4269, 4272, 7636.)

The fact that a particular environmental effect meets a particular threshold of significance cannot be used as an automatic determinant that the effect is or is not significant. (*Protect the Historic Amador Waterways v. Amador Water Agency* (2004) 116 Cal.App.4th 1099, 1109.) CEQA defines a significant effect as a substantial, or potentially substantial, adverse change in the environment. (Cal. Pub. Res. Code § 21068.) "Environment" means the "physical conditions which exist within the area which will be affected by a proposed project, including land, air, water, minerals, flora, fauna, noise, objects of historic or aesthetic significance." (Cal. Pub. Res. Code § 21060.5.) A potentially substantial adverse impact to a non-special-status species is a "significant effect" on the environment.

The PEIR essentially did not consider impacts to bees significant because none of the bee species in California are special-status species. (See AR 7426, 7634-35.) The PEIR admits that the Program potentially could adversely affect non-special-status pollinators (such as honey bees). (AR 7429.) However, because impacts to non-special-status pollinators were deemed insignificant, the PEIR did not adopt any mitigation measures to address such impacts. (AR 7636.) Instead, the Department proposed "voluntary measures" intended to "minimize" the Project's potential adverse effects. (*Ibid.*) While admitting that the measures would not "completely eliminate all risk to bees and other pollinators," the Department found that they would "substantially reduce" those risks. (AR 7635.) Based on this (unsupported) finding, the Department determined that the contribution of the Program to pollinator declines is "likely to be [relatively] small." (AR 7430.)

The court agrees with Petitioners that the Department's "voluntary" actions to benefit pollinator species are not, by themselves, sufficient to justify the lack of analysis and *enforceable* mitigation measures for the potentially significant impacts to non-special-status pollinators.

The court rejects Petitioners' other challenges to the PEIR's analysis of biological impacts, including the PEIR's analysis of traps/lures and of the species evaluated in the Ecological Risk Assessment (ERA).[6]

Petitioners argue that the PEIR's discussion of water quality impacts is defective because it (i) fails to list and describe the specific water bodies impacted by the Program; (ii) assumes, without support, that existing restrictions and management practices will prevent any significant impacts to surface waters; (iii) fails to consider impacts from Proposition 65 chemicals and chemicals that are "generally regarded as safe" for discharges to waters; (iv) fails to analyze impacts on groundwater; (v) fails to analyze sediment quality impacts.

The court agrees with Petitioners that there is not substantial evidence to support the finding that the Project will not have cumulative impacts to impaired surface waters. The PEIR analysis reviewed applicable water quality standards and compared them with surface water concentrations of constituent chemicals modeled in the ERA. (AR 7640.) The modeling showed that certain pesticides used in the Program may exceed numerical water quality standards. (AR 4355-59; see also AR 7639.) The PEIR further acknowledges that some impaired water bodies would have no additional assimilative capacity for pesticides and, in those circumstances, any additional contribution would be a considerable contribution to a cumulatively significant impact. (AR 4366.)

Nonetheless, the PEIR concludes that modeling used in the ERA represents a conservative, "worst-case" analysis and, in most situations, the actual impacts will be lower than those indicated by the modeling. (AR 7640.) The PEIR states that, due to degradation, dilution, reductions in concentrations due to restrictions and management practices, modeled concentrations overstate the real-world concentrations of pesticides likely to be found in water bodies as a result of the Program. According to

[6] The court finds the PEIR adequately analyzed the potential impacts to such species. The question of whether the PEIR adopted adequate mitigation to reduce those impacts to less-than-significance is discussed below.

the PEIR, these factors would limit discharges to such extent that their contribution, even to impaired water bodies, would not be "detectable." (AR 7640, 7689.)

However, the PEIR's determination that such chemicals would not reach water bodies in any detectable concentration does not appear to be supported by any modeling data or other evidence. Rather, it is based on unsupported assumptions and speculation. This is not substantial evidence. (*Joy Road Area Forest & Watershed Assn., supra,* 142 Cal.App.4th at p.677.)

In addition, as discussed below, the court is persuaded that the mitigation measures adopted to address these impacts are defective.

The court rejects Petitioners' other challenges to the PEIR's discussion of impacts on water quality, human health, and noise.[7]

Does the PEIR fail to adequately analyze the Project's cumulative impacts?

EWG Petitioners argue the PEIR's description of cumulative impacts is flawed because it describes other pesticide programs only in extremely vague terms, and because the PEIR's conclusions about the Program's cumulative impacts are not supported by substantial evidence.

The court agrees with Petitioners that the PEIR's description of other pesticide programs is woefully deficient. Except for other Department activities and one federal program, which are specifically named, the PEIR makes only vague references to other agencies/jurisdictions and indicates that each uses "a variety of pesticides" with "many different application methods." The PEIR makes no effort to describe the particular programs, or to provide any meaningful information about the programs, such as the purpose of the programs, the types of pesticides used, etc.

As a result, the PEIR lacks the information required to allow informed decision making about the cumulative impacts of the Program. The PEIR's cumulative impacts analysis also is rendered invalid by the deficiencies in the PEIR's baseline assumptions, as discussed above. Thus, for both of these reasons, the court concludes that the PEIR fails to adequately evaluate the Project's cumulative impacts.

Having concluded that the PEIR's cumulative impacts analysis is flawed, the court finds it unnecessary to decide whether the PEIR's cumulative impact findings are supported by substantial evidence.

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[7] While the court agrees that the Human Health Risk Assessment's analysis of the "downwind bystander" and "post-application resident" pathways failed to consider impacts on adults over age 40, Petitioners have failed to show that this renders the Assessment defective as an informational document. The court declines to speculate whether the Assessment fails to adequately inform the public about human health risks of the Program because it omits consideration of impacts on adults over age 40.

Does the PEIR improperly defer mitigation measures or conceal them as Program features?

Petitioners argue that the PEIR improperly defers formulation of mitigation measures and conceals mitigation measures as Program features.

The court rejects the claim that the Department has improperly characterized the Program's management practices as Program features rather than mitigation measures. As the *Lotus* court recognized, the distinction between elements of a project and measures designed to mitigate impacts is not always clear. (*Lotus v. Department of Transportation* (2014) 223 Cal.App.4th 645, 656 fn.8.) Here, the court is persuaded that the management practices are inherent to the Program and appropriately classified as Program features, rather than concealed mitigation measures. (See *Save the Plastic Bag Coalition v. City and County of San Francisco* (2013) 222 Cal.App.4th 863, 883.)

Likewise, the court concludes that the Department's internal "biological control agent" process is properly treated as a Program feature rather than a concealed mitigation measure. (AR 4275-76.)

In contrast, the court agrees with Petitioners that the PEIR improperly defers the formulation of mitigation measures.

An EIR generally may not defer formulation of mitigation measures to the future. (CEQA Guidelines § 15126.4.) However, CEQA does not always require the details of mitigation measures to be laid out prior to project approval because, in some cases, the best method for mitigating an impact will not be known until after the project begins. "When, for practical reasons, mitigation measures cannot be fully formulated at the time of project approval, the lead agency may commit itself to devising them at a later time, provided the measures are required to 'satisfy specific performance criteria articulated at the time of project approval.'" (*Rialto Citizens for Responsible Growth v. City of Rialto* (2012) 208 Cal.App.4th 899, 944.)

The rule prohibiting deferred mitigation prohibits "loose or open-ended performance criteria." (*Id.* at p.945) Deferred mitigation measures must ensure the application will reduce impacts to less than significant levels. (*Ibid.*) If the measures are loose or open-ended, such that they afford the applicant a means of avoiding mitigation during project implementation, it is unreasonable to conclude that implementing the measures will reduce impacts to less than significant levels. (*Ibid.*)

Mitigation Measure BIO-CHEM-2 is defective because it defers formulation of specific mitigation measures without specific, enforceable performance standards. The PEIR states that pesticide applications have the potential to affect special-status animal species directly through chemical exposure and indirectly through ecological interactions. To mitigate these impacts, the PEIR adopts Mitigation Measure BIO-CHEM-2. It provides that the Department shall obtain technical assistance from USFWS, CDFW, and NMFS to identify habitat for special-status species and develop "treatment plans" that "will avoid or minimize substantial adverse effects on special-status species." (AR 4277-78; see also AR 4565 [use of a buffer "may" prevent concentrations in excess of what might be harmful].) The PEIR

explains that the technical assistance process is designed so that no "take" authorization will be needed. (AR 4278.) "[B]y using this performance standard, the technical assistance process would avoid any significant impact." (AR 4277.)

However, it is not a sufficient mitigation measure for the PEIR to state that a treatment plan will be developed in the future to avoid or "minimize" substantial adverse effects. Neither is avoiding a "take" authorization a sufficient performance standard to avoid significant impacts on special-status species. As Petitioners argue, even if the Department realizes this goal, avoiding "take" would not ensure impacts on special-status species would be less than significant because, among other reasons, the take protections do not apply to all special-status species. (See AR 4266-67.)

Mitigation Measure WQ-CUM-1 also is flawed. That measure was adopted because the PEIR recognized that Project activities could cause discharges of chemicals to impaired waters that have no additional assimilative capacity for any toxic substances. The PEIR recognized that any additional contribution to an impaired water body would be a considerable contribution to a cumulatively significant impact. To mitigate this impact, the PEIR adopted Mitigation Measure WQ-CUM-1, which requires the Department to identify whether applications may occur in proximity to impaired water bodies and, if so, implement the "relevant Proposed Program MPs [management practices]."[8] (AR 4366-67.)

As Petitioners correctly point out, WQ-CUM-1 is not mitigation at all. It merely requires the Department to implement appropriate management practices (MPs), which are Program features, not mitigation measures. The MPs are already part of the Program and are assumed to be implemented regardless of whether or not a listed impaired water body is nearby. Thus, Mitigation Measure WQ-CUM-1 does nothing to reduce the significance of the potential impacts to impaired water bodies.

The Department appears to argue that the potential water quality impact is based on "conservative" modeling that represents a "worst-case" scenario. The Department suggests that MPs, in combination with other "real-world" factors, will prevent significant discharges to impaired water bodies.

There are several problems with this argument. First, the PEIR states this impact will be less than significant "with mitigation," and the Department has argued, persuasively, that the MPs are not mitigation measures. So what is the mitigation?

Second, as described above, the PEIR's assertion that chemicals would not reach impaired water bodies in any detectable concentration does not appear to be supported by any modeling data or other substantial evidence.

[8] For a quarantine area, the mitigation measure also requires the Department to implement Mitigation Measure WQ-CHEM-5.

Third, the MPs do not ensure discharges to impaired water bodies will not occur. (AR 159, 4366.) They are only designed to ensure that such discharges are "minimized." (*Ibid;* see also AR 4563 [use of a buffer "may be sufficient" to lower the risk to tolerable levels].)

Does the PEIR fail to adequately consider a range of reasonable alternatives to the Project?

The purpose of an EIR is to provide agencies and the public with detailed information about the effect which a proposed project is likely to have on the environment, to list ways in which the significant effects of such a project might be minimized, and to indicate alternatives to such a project. (*Banning Ranch Conservancy v. City of Newport Beach* (2017) 2 Cal.5th 918, 937.) CEQA requires an EIR to describe a "range of reasonable alternatives" to the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives. (CEQA Guidelines § 15126.6(a).)

An EIR need not consider every conceivable alternative to a project, but it must consider a reasonable range of potentially feasible alternatives that will foster informed decisionmaking and public participation. (*Ibid.*) There is no ironclad rule governing the nature or scope of the alternatives to be discussed. (*Ibid.*) The range of alternatives required in an EIR is governed by a "rule of reason." (CEQA Guidelines § 15126.6(f).) The alternatives shall be limited to ones that would avoid or substantially lessen any of the significant effects of the project. (*Ibid.*) Of those alternatives, the EIR need examine in detail only the ones that the lead agency determines could feasibly attain most of the basic objectives of the project. (*Ibid.*) The lead agency is responsible for selecting a range of project alternatives for examination and must briefly describe the rationale for selecting the alternatives to be discussed. (CEQA Guidelines § 15126.6(a), (c).)

In this case, the PEIR considered four alternatives: the No Program Alternative, the No Pesticide Alternative, the USDA Organic Pesticide Alternative, and the No Eradication Alternative. Petitioners do not challenge the range of alternatives considered or the depth of analysis of the No Program and No Eradication Alternatives. However, the North Coast Petitioners argue that the PEIR's discussion of the Organic Pesticide Alternative and No Pesticide Alternatives is too vague and perfunctory, lacking any detailed "quantitative" comparison of the relative merits of the Program and the alternatives.

In general, the court agrees with the Department that a detailed, quantitative comparison of the Program and its alternatives is not required. The degree of specificity required in the PEIR corresponds to the degree of specificity involved in the underlying project. (*Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 733.) The Project at issue here is a broad, statewide Program. It is not feasible for the Department to provide specific details about future activities because the Department does not know how, when, and where the Program will be implemented in response to particular pest infestations.

On the other hand, the court agrees with Petitioners that the alternatives analysis should have included details about the Department's existing activities, and described how those ongoing activities would be

affected by the Organic Pesticide and No Pesticide Alternatives. Under the No Pesticide Alternative, the Department would no longer use pesticides to eradicate pest populations. While the Department may not be able to describe the amount and type of pesticides that will be used in the future, it knows the amount and type of pesticides that are currently being applied. Yet the PEIR fails to disclose this information.

Under the Organic Pesticide Alternative, the Department would, to the extent possible, substitute organic pesticides for conventional pesticides. For some pests, the Department would have to rely on physical and biological methods because there is no effective organic alternative. The PEIR fails to describe the extent to which organic pesticides might be used in place of conventional pesticides, or to identify the pests for which there is no alternative to conventional pesticide use. This information is necessary for decisionmakers to make an informed comparison of the expected changes in pesticide use, and corresponding environmental impacts, of the Program relative to the No Pesticide and Organic Pesticide Alternatives. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 404 [to facilitate CEQA's informational role, the EIR must contain facts and analysis, not just bare conclusions or opinions].)

Did the Department violate CEQA's notice and consultation requirements?

The court rejects the argument that the Department failed to comply with CEQA's notice and consultation requirements. The court agrees with the Department that Petitioners are conflating the requirement to prepare an "agency list" under Public Resources Code § 21167.6.5(b), with the notice and consultation requirements set forth in Public Resources Code §§ 21080.4, 21104, and 21108. Although there is some overlap in the statutes, Petitioners have failed to show that the Department failed to comply with its notice and consultation duties.[9] (See *Citizens for East Shore Parks v. State Lands Com.* (2011) 202 Cal.App.4th 549, 567-68 [agency sufficiently complies with consultation requirement by sending notice and draft EIR].) The court does not agree that the NOD was required to be served on all of the agencies on the list required by § 21167.6.5(b). Indeed, if the agencies were required to be served with the NOD, then both of these petitions arguably would be defective and subject to dismissal for failing to name those same agencies as real parties in interest under § 21167.6.5(a).

Moreover, even if the Department failed to fully comply with its notice and/or consultation duties, Petitioners have failed to persuade the court that this prejudicially interfered with CEQA's informational purposes. (*San Francisco Baykeeper, Inc. v. State Lands Com.* (2015) 242 Cal.App.4th 202, 230-31 [failure to consult with a trustee agency was harmless absent a showing that material information was not considered].)

[9] Petitioners generally allege that the Draft PEIR mailing list omits numerous trustee agencies, but Petitioners have failed to identify for the court the agencies that were improperly omitted. Thus, Petitioners failed to carry their burden to show the Department failed to proceed in the manner required by law.

Did the Department adequately respond to public comments on the Draft PEIR?

CEQA requires the lead agency to respond to comments on environmental issues that are received during the public comment period. The North Coast Petitioners contend that the Department violated CEQA by failing to adequately respond to public comments. The North Coast Petitioners contend that the Department violated CEQA by (i) failing to provide any substantive response to their comments about the PEIR's "inaccurate and misleading" description of the LBAM [Light Brown Apple Moth] program, and (ii) failing to respond to oral comments made at the public hearings on the Project.

The court rejects Petitioners' argument regarding the LBAM program. Petitioners have failed to show that the Department failed to sufficiently respond to the comments about the LBAM program.

Petitioners' comments about the LBAM were not, as Petitioners seem to suggest, directed to the PEIR's cumulative impacts analysis. Rather, the comments expressed a concern that the Department was using the PEIR as a "project-level" EIR to re-approve and continue the LBAM as part of the Statewide Program. Petitioners objected that the PEIR "lacks the analysis necessary for [the Department] to continue the LBAM Eradication Program as part of [the Department's] Plant Pest Prevention and Management Program." (AR 7868.)

The Department appropriately responded that Petitioners' comments are not relevant because the LBAM is an entirely different program, subject to its own EIR. (AR 7880.) The Department clearly stated that the LBAM is not included in the proposed Program and that the PEIR was not intended to supplant the LBAM EIR. (AR 7880-81.) With one limited exception (for quarantines), LBAM activities would continue to be conducted under the existing LBAM program, subject to the LBAM EIR. (*Ibid.*)

Because Petitioners' LBAM comments did not raise environmental issues related to the Program, the Department appropriately responded that the comments did not require a response.[10] (Cal. Pub. Res. Code § 21091(d)(2); CEQA Guidelines § 15088(c).) Further, even if the Department's response was insufficient, the LBAM program is no longer in existence, and compelling the Department to revise its response would be a meaningless exercise. Complaints about the description of the LBAM program are now moot.

Petitioners also complain that the Department violated CEQA by failing to respond to oral comments made at public hearings, despite representing that such comments would be addressed in the Final PEIR.

It is true that the Draft PEIR stated in the Executive Summary that written and oral comments received in response to the Draft PEIR would be "addressed" in the Final PEIR.[11] (AR 350.) However, the Department subsequently made clear that oral comments were not being transcribed and that the

[10] The court acknowledges that an erroneous description of the LBAM program could affect the PEIR's cumulative impact analysis, but this was not the point of Petitioners' comment.

[11] This was not necessary. Under the CEQA Guidelines, public comments may be restricted to written communications. (CEQA Guidelines § 15202.)

Department only would respond to written comments in the Final PEIR. (AR 8539; see also AR 8541 [form to allow interested persons to submit written comments at public meetings].)

In any event, the law is clear that a lead agency need not respond to each comment made during the review process. The agency only is required specifically to respond to the most significant environmental questions presented. (*Friends of the Eel River v. Sonoma County Water Agency* (2003) 108 Cal.App.4th 859, 878; *Browning-Ferris Indus. v. City Council* (1986) 181 Cal.App.3d 852, 862; CEQA Guidelines §§ 15088, 15204.) In this case, Petitioners have failed to show that the Department failed to respond to any significant environmental questions presented,[12] or that the lack of specific responses to oral comments at public meetings prejudicially interfered with CEQA's informational purposes.

Petitioners have failed to show that the Department violated CEQA by failing to respond to public comments.

Did the Department properly use addenda to modify the PEIR?

In North Coast II and III, the North Coast Petitioners allege that the Department violated CEQA by approving modifications to the Program by Addenda to the PEIR, without preparing a supplemental or subsequent EIR.

The Program modifications described in Addendum No. 1 expanded the use of "Merit 2F" pesticide for the treatment of Japanese beetles. Merit 2F pesticide is the brand name for the pesticide imidacloprid mixed with glycerin and undisclosed inert ingredients. Imidacloprid belongs to a class of pesticides called neonicotinoids. The Program initially contemplated the use of Merit 2F on soil along the drip line of host plants, and on the foliage of those plants. The modification allows use of Merit 2F on turf and broad-leaf groundcover. In addition, the modification expands the treatment application methods to include low pressure "boom sprayers." (Addendum 1 AR 5.)

The Program modifications described in Addendum No. 2 expanded the application methods of "Acelepryn" pesticide in residential and commercial settings. Acelepryn is the brand name for the pesticide chlorantraniliprole. Under the Program, Acelepryn was limited to nursery-based foliar sprays to address European Grapevine Moth and LBAM. With Addendum No. 2, the Program is expanded to include use of Acelepryn for the treatment of Japanese beetle on turf, mulch, bare soil, and plants in residential and urban settings. (Addendum 2 AR 2, 5-6.) Like Addendum No. 1, Addendum No. 2 allows the use of low pressure boom sprayers to apply the pesticide on turf applications.

In their Reply, Petitioners argue the changes described in the Addenda constitute second-tier "projects" for which the Department was required to prepare a "second-tier EIR" under Public Resources Code § 21094(c) and CEQA Guidelines § 15152. The court is not required to consider this argument because it

[12] A response to comments may take the form of a revision to the draft EIR or may be a separate section in the Final EIR. (CEQA Guidelines § 15088(d).)

was not alleged in the petitions and was raised for the first time in Petitioners' Reply. (*Opdyk v. California Horse Racing Bd.* (1995) 34 Cal.App.4th 1826, 1830 [a contention made for the first time in a reply brief may be disregarded]; *Chapman v. Superior Court* (2005) 130 Cal.App.4th 261, 271 [petition must allege facts showing entitlement to relief].) In any event, the argument is rejected. The Department's decision to treat the changes as modifications to the Program, rather than new, second-tier projects, is supported by substantial evidence.[13] (*Friends of the College of San Mateo Gardens v. San Mateo Community College District* (2016) 1 Cal.5th 937, 952-53.) The changes merely add variations on already-analyzed application methods, involving different combinations of treatment components.

Where, as here, an agency proposes changes to a previously-approved project, CEQA limits the circumstances under which a subsequent or supplemental EIR (SEIR) must be prepared. Once an EIR has been certified for a project, CEQA provides that no SEIR shall be required unless:

- Substantial changes are proposed in the project which will require major revisions of the environmental impact report due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects;

- Substantial changes occur with respect to the circumstances under which the project is being undertaken which will require major revisions in the environmental impact report due to the involvement of new significant environmental effects or a substantial increase in the severity of previously identified significant effects; or

- New information of substantial importance, which was not known and could not have been known at the time the environmental impact report was certified as complete, becomes available, shows any of the following: (1) the project will have one or more significant effects not discussed in the previous EIR; (2) significant effects previously examined will be substantially more severe than shown in the previous EIR; (3) mitigation measures or alternatives previously found not to be feasible would, in fact, be feasible and would substantially reduce one or more significant effects, or (4) mitigation measures or alternatives considerably different from those analyzed in the prior EIR would substantially reduce one or more significant effects.

  (Cal. Pub. Res. Code § 21166; CEQA Guidelines § 15162; see also *Moss v. County of Humboldt* (2008) 162 Cal.App.4th 1041, 1049.)

[13] Indeed, the North Coast II and III petitions admit the Addenda describe project modifications. (See North Coast II petition, at pp.2, 7, 9; North Coast III petition, at pp.2, 8, 9; see also *Barsegian v. Kessler & Kessler* (2013) 215 Cal.App.4th 446, 451-452 [facts established by pleadings as judicial admissions are conclusive concessions of the truth of those matters].)

If none of the three triggers for an SEIR exist, the lead agency may use an EIR addendum to make "minor technical changes or additions" to the prior EIR or to document the agency's determination that a SEIR is not required. (CEQA Guidelines § 15164(b), (e); see also *Bowman v. City of Petaluma* (1986) 185 Cal.App.3d 1065, 1081; *Mani Brothers Real Estate Group v. City of Los Angeles* (2007) 153 Cal.App.4th 1385, 1400.)

A deferential standard of review applies to the agency's determination that project changes will not require "major revisions" to its initial environmental document, such that no SEIR is required; the agency's decision must be upheld if it is supported by substantial evidence. (*Friends of the College of San Mateo Gardens, supra,* 1 Cal.5th 937 at p.953; CEQA Guidelines § 15162(a).)

Having made the initial determination that the original PEIR retains "informational value," the Department properly applied CEQA's "subsequent review provisions" (Pub. Res. Code § 21166 and CEQA Guidelines § 15162) to determine whether the proposed changes in the Project required a SEIR.

To determine whether a SEIR was required, the Department conducted Human Health Risk Assessments and Ecological Risk Assessments for both Addendum No.1 and No. 2 to evaluate any potential health or environmental impacts, and specifically to determine if the modifications would result in any additional or more severe environmental impacts than those addressed in the PEIR. Those analyses concluded that the Program modifications would not have any new significant effects beyond those identified in the PEIR and would not substantially increase the severity of any significant effects identified in the PEIR. Thus, the Department concluded no SEIR was required.

The North Coast Petitioners argue that the Department's findings are not supported by substantial evidence. First, Petitioners argue that the HHRA and ERA for Addendum No. 1 acknowledges risks to species that would exceed the acute and chronic exposure/use thresholds, but improperly assumes these risks will be reduced to less than significance through (unspecified and unenforceable) future mitigation plans. Second, Petitioners argue that the Department did not even consider whether the proposed modifications would alter other impacts that were identified as significant or potentially significant in the PEIR, including impacts on greenhouse gas emissions, noise, and water quality.

The Department responds that it is Petitioners' burden to show there is not substantial evidence to support the determination that no SEIR is required, and that Petitioners have failed to meet that burden. The Department contends that Petitioners' claims are unsubstantiated, and ignore substantial evidence supporting the Department's determination that the changes will not result in new significant impacts.

In general, the court agrees with the Department that Petitioners have failed to meet their burden. The Department determined that the modifications will not create potentially significant new impacts or exacerbate the severity of impacts previously identified in the PEIR. Petitioners have failed to show that the Department's determinations are not supported by substantial evidence, i.e., that the changes

introduced new significant effects that were not raised, analyzed, and discussed in the PEIR, or that the changes will exacerbate the severity of significant effects discussed in the PEIR.

There is substantial evidence in the record to support the Department's finding that the changes in the Program are not so "substantial" as to require "major" modifications to the PEIR. (*River Valley Preservation Project v. Metropolitan Transit Development Bd.* (1995) 37 Cal.App.4th 154, 166.)

However, the court agrees with Petitioners that, to the extent the Addenda rely on the PEIR's mitigation measures to reduce risks to a less-than-significant level, the Addenda suffer from the same flaws as the PEIR. Further, because the HHRA and ERA do not specifically refer to the mitigation measures in the PEIR, it is not clear which, if any, of the PEIR's mitigation measures are being relied upon – or whether the HHRA and ERA instead are proposing separate mitigation measures, which would not be enforceable.

Because the court has concluded that the Department's certification of the PEIR was fundamentally flawed and must be set aside, it is unnecessary to further consider whether the Department's modifications to the Program were properly approved by Addenda, rather than SEIR. The modifications are now part of the Program and will be considered as part of any future environmental review of the Program.

Remedy

Public Resources Code section 21168.9 vests extensive equitable discretion in the courts to determine the appropriate remedy for a CEQA violation. Section 21168.9(a) states that after a CEQA violation is found, the court shall enter an order that includes one or more of three options: void the finding or decision, in whole or in part, under subdivision (a)(1); suspend any or all project activity under subdivision (a)(2); and/or mandate that the agency take specific action to bring the finding or determination into compliance with CEQA under subdivision (a)(3). (Cal. Pub. Res. Code § 21168.9.)

In this case, the court shall grant Petitioners' request for a peremptory writ of mandate ordering the Department to set aside certification of the PEIR, approval of the Program, and approval of Addendum No. 1 and Addendum No. 2 to the PEIR; and an injunction suspending further activities under the Program unless and until the Department has certified an EIR that corrects the CEQA violations identified in this ruling.

The court's writ shall command the Department to file an initial return to the peremptory writ of mandate within 90 days describing what steps it has taken to comply with the writ. The court's judgment shall provide that it shall retain jurisdiction over this proceeding until the court has determined that the Department has complied with the writ.

Disposition

The EWF and North Coast Petitioners are directed to prepare formal judgments (for North Coast I, II, and III), attaching and incorporating this court's ruling, and peremptory writs of mandate; submit them to opposing counsel for approval as to form; and thereafter submit them to the Court for signature and entry of judgment.

Petitioners shall be awarded their costs of suit upon appropriate application.

Dated: January 8, 2018

Hon. Timothy M. Frawley
California Superior Court Judge
County of Sacramento

CASE NUMBER(S): 34-2015-80002005 (Consolidated for purposes of trial with related cases 34-2016-80002424 and 34-2017-80002594)
DEPARTMENT: 29
CASE TITLE(S): North Coast River Alliance v. Dept. of Food and Agriculture

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above entitled ORDER in envelopes addressed to each of the parties, or their counsel of record as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at Sacramento, California.

STEPHAN C. VOLKER
ALEXIS E. KRIEG
DANIEL P. GARRETT-STEINMAN
Laww Offices of Stephan C. Volker
950 Gilman Street, Ste. 100
Berkeley, CA 94710-1462

ARTHUR FRIEDMAN
ALEX MERRITT
Sheppard Mullin Law Firm
Four Embarcadero Center, 17th Floor
San Francisco, CA 94111-4109

CAROLYN N. ROWAN
GWYNNE B. HUNTER
ALI A. KARAOUNI
Office of the Attorney General
1300 I Street, Ste. 125
Sacramento, CA 95814

JASON R. FLANDERS, Esq.
Aqua Terra Aeris Law Group
828 San Pablo Ave., Ste 115B
Albany, CA 94706-1693

Dated: January 8, 2018

By: F. Temmerman
Deputy Clerk, Department 29
Superior Court of California,
County of Sacramento