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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

NORTH COAST RIVERS ALLIANCE, et al.

Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; et al.

Defendants and Respondents.

ENVIRONMENTAL WORKING GROUP; et al.

Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; et al.

Defendants and Respondents.

Case No: 34-2015-80002005-CU-WM-GDS

EWG PETITIONERS' REPLY BRIEF

Hearing Date:	December 8, 2017
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CEQA Case

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I. INTRODUCTION

CDFA's Opposition Brief confirms that the Program Environmental Impact Report (PEIR) for the agency's Statewide Plant Pest Prevention and Management Program (Program) is legally deficient. First, the PEIR's Tiering Strategy fails to comply with CEQA's requirement for evaluation of current site conditions and comparison of those conditions against the PEIR to determine if additional study is required, prior to approval of subsequent Program activities, as illustrated by the tiering strategy approved in *Ctr. for Biological Diversity v. Dept. of Fish & Wildlife* (2015) 234 Cal.App.4th 214, 238–239 (*CBD*)). Second, the PEIR's baseline is ambiguous and misleading because it fails to explain which "ongoing" CDFA programs are included in the baseline. Additionally, the PEIR admits that its baseline omits all *unreported* pesticide use (accounting for ***approximately 66 percent*** of actual pesticide use in the state), with no explanation, much less substantial evidence supporting the CDFA's failure to apply reasonable forecasting or estimates to adjust the baseline to account for this usage, as required by CEQA Guideline section 15144. The PEIR's grossly inaccurate baseline necessarily infects and invalidates the PEIR as a whole by understating the Program's potential impacts from adding substantially more pesticides to existing levels of pesticide use that are *far greater than assumed in the PEIR's impacts analysis*. Third, CDFA failed to notify and consult with other governmental agencies during the administrative process as required by CEQA, a failure to proceed in the manner required by law that is presumed prejudicial. Fourth, the PEIR fails to adequately analyze the Program's biological, water quality, human health, and cumulative impacts, and is legally deficient as an informational document. Finally, the PEIR improperly defers mitigation and conceals mitigation measures as Program features. For each of these reasons, the Court should grant EWG's Petition and issue a writ of mandate directing CDFA to set aside its approvals of the Program and PEIR and refrain from further Program activity pending compliance with CEQA.

II. ARGUMENT

A. THE PEIR'S TIERING STRATEGY IS UNLAWFUL

1. The Tiering Strategy Authorizes Implementation Of Subsequent Project Activities Without Site-Specific Environmental Review

"Subsequent activities in the program must be examined in light of the program EIR to determine whether an additional environmental document must be prepared." (CEQA Guidelines, § 15168.) "Where the subsequent activities 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 program EIR." (CEQA Guidelines, §§ 15168(c)(4), 15152(c).) *CBD*, *supra*, 234 Cal.App.4th at 238–239 is instructive. There, petitioners challenged the Department of Fish and Wildlife's certification of a program EIR for its fish hatchery and stocking program in part on the grounds that the EIR failed to ensure sufficient analysis of subsequent activities under the program. The Court of Appeal rejected petitioners' challenge, reasoning as follows:

> *Before the Department will stock a high mountain lake*, it will **[1]** utilize the evaluation protocol to determine if any decision species are present in that water body. If a decision species is present, the Department will **[2]** determine whether stocking will have a substantial environmental effect on the species. This review will by necessity will include application of the impacts analysis contained in the EIR, as well as a determination of any other impacts that may not have been addressed in the EIR. This is exactly the type of process CEQA requires an agency to utilize outside of public review when it intends to approve a site-specific project that is part of a program previously reviewed in a program EIR. If the Department upon using the evaluation protocol discovers an impact that was not sufficiently addressed in the EIR, it will then be obligated to begin a CEQA process, *but only if the Department intends to approve the activity*.

(*Id.* at 239 [italics and bold numbered brackets added].) Here, in contrast to the tiering procedure approved in *CBD*, the Tiering Strategy omits evaluation of the site (*see* item **[1]** in *CBD* above) and the proposed activity to determine whether its environmental effects were covered in the PEIR (*see* item **[2]** in *CBD* above), *prior to authorizing implementation of the activity*. (*See* italics in *CBD* above); *See also* EWG's Opening Brief at pp. 13-16.)

CDFA's review procedures prior to authorizing implementation of a subsequent activity are limited to Part A of the Tiering Strategy. (AR 6049.) At Part A, Step 2, the CDFA inquires

whether the proposed activity is described in the PEIR. Table 1 assists the CDFA in making this determination with respect to proposed physical, biological and chemical management activities, respectively. (AR 6057-6058.) Fatally, however, Table 1 provides for no evaluation of any site-specific conditions with respect to physical and biological management activities, and presents only one, optional inquiry regarding site-specific factors as to chemical management activities. (AR 6058.) The Tiering Strategy therefore is legally deficient because it omits site-specific evaluation prior to authorizing subsequent activities. (CEQA Guidelines, §§ 15168(c)(4); *CBD*, *supra*, at 239, item **[1]**.)

The Tiering Strategy is further deficient because it omits comparison of site specific conditions with the PEIR to determine whether additional environmental review is required, prior to approving the activity (CEQA Guidelines, §§ 15168(c)(4), 15152(c); *CBD*, *supra*, 234 Cal. App. 4th at 239, item **[2]** and italics.) If the CDFA concludes based on Table 1 (which again, requires no evaluation of site-specific conditions) that the subsequent activity was considered in the PEIR, the CDFA proceeds to implementation of the subsequent activity, pursuant to Part B of the Tiering Checklist. (AR 6049.) Part B, titled "Determine Applicable PEIR Requirements," directs CDFA to PEIR's requirements for *implementation* of the activity set forth in Tables 2-4. (AR 6052 [Part B], 6437-6352 [Tables 2-4.) CDFA argues that Tables 2–4 ensure the required site-specific analysis. (CDFA pp. 22–23.) Not so. These tables specify the various management practices and mitigation measures required under the PEIR to govern implementation of subsequent activities.[1] They do not provide for any comparison of site-specific conditions to the

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[1] CDFA's additional claim that its review of three databases will ensure adequate review of site-specific impacts lacks merit for the same reasons and more. (CDFA Br. p. 23; AR 6356.) This review similarly supports implementation of already approved activities. There is no evidence that the databases are reviewed to compare existing site conditions against the PEIR to determine whether additional study is necessary prior to approving the activity. Nor could the databases be relied on for this purpose because they only include information about the locations of plant and wildlife species, existing polluted waters, and existing hazardous materials sites. (*Id.*) They provide no information regarding dozens of other potential impacts identified in the PEIR (*e.g.*, human health, agricultural resources, air quality, noise, climate change, or other types of biological, water quality, or hazards or hazardous materials impacts). Additionally, the databases are the proverbial "black box," a mystery to the public with respect to their content, geographic scope, and accuracy in light of ever-changing site-specific conditions throughout the State. (*See e.g., Habitat & Watershed Caretakers v. City of Santa*

PEIR to determine whether additional environmental review is required prior to approval of the activity. Nor could they because at this stage in CDFA's Tiering Strategy (Part B), CDFA has already authorized implementation of the subsequent activity.

Because as shown, in contrast to the facts in *CBD*, the Tiering Strategy does not ensure evaluation of site specific conditions, followed by a comparison of those conditions with the PEIR to determine whether further environmental review is required, prior to approving the activity, the Tiering Strategy is "exactly the type of process" that CEQA *prohibits*. The Court therefore should grant EWG's Petition.

2. The Tiering Strategy Violates CEQA's Public Notice Requirements

CDFA's contention that Notices of Determination (NODs) need only be filed following initial project "approval" is refuted by the plain language of Public Resources Code section 21108(a) extending the filing requirement to agency "determinations" to "carry out" projects. CDFA's approvals of subsequent activities under the program constitute "determinations" to "carry out" CDFA's program. (*See also Comm. for Green Foothills v. Santa Clara County Bd. of Supervisors* (2010) 48 Cal.4th 32, 56.) CDFA's alternative claim that no harm results from its refusal to file NODs lacks merit because "harmless error" provides no legal defense to CDFA's violation of CEQA's mandatory notice requirements. (*East Peninsula Ed. Council, Inc. v. Palos Verdes Peninsula Unified School Dist.* (1989) 210 Cal.App.3d 155, 174 ["[T]he conventional 'harmless error' standard has no application when an agency has failed to proceed as required by the CEQA."]) CDFA's claim also is untrue. NODs do not merely shorten limitations periods for challenge. "The purpose of these filings is to alert the public about environmental decisions," ensure disclosure and notification to the public and numerous other agencies, and facilitate public participation in the process. (*Comm. for Green Foothills* at 43). The need for such notice under a statewide program such as this, where site-specific impacts were not evaluated by the PEIR, is only heightened. Courts "cannot overemphasize the importance of full compliance with all notice

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Cruz (2013) 213 Cal.App.4th 1277, 1293 9 ["report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis . . .'"].)

provisions of applicable law . . . ." (*Ultramar, Inc. v. S. Coast Air Quality Mgmt. Dist.*, 17 Cal.App.4th 689, 705.)

B. THE PEIR'S BASELINE IS UNDEFINED, MISLEADING, AND INACCURATE

"To fulfill its information disclosure function," "an EIR must delineate environmental conditions prevailing absent the project, defining a baseline against which predicted effects can be described and quantified." (*Neighbors for Smart Rail v. Exposition Metro Line Constr. Auth.* (2013) 57 Cal.4th 439, 447.) CDFA fails to adequately respond to either of EWG's arguments that the PEIR's baseline is legally deficient. (EWG Br., p. 17; CDFA Br., pp. 31–34.)

First, the PEIR's baseline is ambiguous and misleading. The PEIR states that "many" Program activities are ongoing and therefore included within the baseline. (AR 4184–4185.) Fatally, however, the PEIR does not specify which Program activities are included in the baseline and which activities are treated as new activities and compared against the baseline. CDFA responds in a conclusory manner that "the PEIR includes all information Petitioners seek" and then cites to hundreds of pages in the PEIR without explaining their relevance. (CDFA Br., p. 31 [citing AR pages].) Those citations are simply to the "environmental setting" discussion for each environmental topic. (*Id.*) Nothing cited by CDFA clarifies which Program activities were treated as ongoing and included in the baseline and which were treated as new and analyzed in the impact analysis. (*Id.*) CDFA also points to the PEIR's discussion of previous CEQA documents prepared for its pest management activities, but this discussion does not clarify the PEIR's chosen baseline(s). (AR 4109–4130.) If anything, this approach further confuses the baseline because it purports to incorporate by reference six previous CEQA documents dating back to 1974, each with its own baseline. (*Id.*)

Second, the PEIR's baseline grossly understates actual existing conditions regarding the amount of pesticide used in the state because the baseline includes only *reported* commercial pesticide use, and it excludes *unreported* use which encompasses most residential and industrial uses. (AR 4142.) CDFA's argument that it would be unreasonable to speculate regarding the amount of unreported pesticide use is defeated by the PEIR itself, which estimates that approximately two-thirds of all pesticide use is unreported. (AR 4142.) CEQA Guidelines section

15144 provides that "[d]rafting an EIR...involves a degree of forecasting," and "[therefore], an agency must use its best efforts to find out and disclose all that it reasonably can." CDFA abused its discretion by omitting all unreported pesticide use from the PEIR's baseline despite the agency's *demonstrated ability* to reasonably estimate and forecast such use.[2] By failing to account for and include within the baseline some reasonable forecast or estimate of unreported pesticide use (which the PEIR itself admits was feasible), the PEIR's baseline grossly understates (by approximately 66 percent) existing pesticide use in the state. The PEIR's grossly inaccurate baseline in turn necessarily infects and invalidates the PEIR's impact analyses as a whole because the Program will add substantially more pesticides to baseline conditions of pesticide use that are approximately 66 percent greater than assumed in the PEIR's baseline analysis. These two baseline deficiencies render the PEIR legally deficient as an informational document.

C. CDFA VIOLATED MANDATORY AGENCY NOTICE REQUIREMENTS

CDFA failed to adequately notify and consult with numerous governmental agencies in preparing and approving the PEIR, in violation of multiple statutory requirements. (EWG Br., pp. 30–31.) CDFA does not dispute that the list of responsible and trustee agencies it identified for EWG to notify of this action (at EWG's expense) pursuant to Section 21167.6.5(b) included hundreds of federal, state, and local agencies, including every municipality and special district in California (the "Listed Agencies"). (CDFA Br., pp. 66–67; First Amended Petition, Ex. E.) CDFA further admits that it failed to: (1) provide the NOD for the PEIR to all Listed Agencies (as required by Pub. Res. Code § 21080.4; CEQA Guidelines, § 15082); (2) consult with all Listed Agencies and adjoining cities and counties before completing the Draft PEIR (as required by Pub. Res. Code §§ 21104, 21153); (3) provide all Listed Agencies with notice of availability of the Draft PEIR (as required by Pub. Res. Code §§ 21092, 21092.3 and CEQA Guidelines, § 15087);

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[2] CDFA's citation of *North Coast Rivers Alliance v. Marin Municipal Water Dist. Bd. of Directors* (2013) 216 Cal.App.4th 614, 635 for the proposition that CEQA does not require the lead agency to analyze a "worst case scenario" has no application here. That proposition concerns the standards for an impact analysis rather than the standards for an adequate baseline. CDFA was required under CEQA Guidelines section 15144 to include CDFA's reasonable estimate/forecast of unreported pesticide use in the PEIR's baseline to more accurately describe actual existing conditions and therefore more accurately describe the Project's potential impacts.

and (4) consult with all Listed Agencies and adjoining cities and counties about the Draft PEIR (as required by CEQA Guidelines, § 15086). (CDFA Br., pp. 66–67).

CDFA instead argues that it was not required to discharge this "laundry list" of CEQA requirements for all Listed Agencies because Section 21167.6.5(b) is broader than the above-referenced statutes and covers more agencies. (CDFA Br., pp. 66–67.) That claim is incorrect. The notice requirements under Section 21167.6.5(b) encompass all "responsible agencies and a public agency having jurisdiction over a natural resource affected by the project." Contrary to CDFA's contention, the scope of agencies that must receive notice and/or the opportunity to consult under CEQA's provisions governing the PEIR's preparation and approval process is virtually identical. As examples, Sections 21104 and 21153 required CDFA to consult with "each responsible agency, trustee agency, any public agency that has jurisdiction by law with respect to the project" and any bordering city or county. Under CEQA Guidelines section 15086, CDFA was required to consult on the DEIR with "Responsible Agencies," "Trustee agencies with resources affected by the project," "any other state, federal, and local agencies" with jurisdiction with respect to the project, and any bordering city or county. Finally, under Section 21080.4(a), CDFA was required to provide its NOD for the PEIR to "each responsible agency . . . and those public agencies having jurisdiction by law over natural resources affected by the project that are held in trust for the people of the State of California."

CDFA's admitted failure to comply with these statutory mandates as to each of the Listed Agencies it identified for EWG at the outset of this litigation constitutes a failure to proceed in the manner required by law and is an independent ground to grant EWG's Petition. California law is clear that CEQA's procedural requirements must be "scrupulously enforced." (*Vineyard Area Citizens for Responsible Growth, supra,* 40 Cal.4th at 435; *Ultramar, supra*, 17 Cal.App.4th at 702 ["full compliance with the letter of CEQA is essential to the maintenance of its important public purpose."].)

D. THE PEIR'S ENVIRONMENTAL IMPACT ANALYSIS IS FLAWED

1. The PEIR Fails To Adequately Analyze Biology Impacts

CDFA concedes that the PEIR does not analyze the Program's impacts on native habitats

and their species. (EWG Br., pp.18, CDFA Br., p. 41.) It dismisses this omission by arguing that Program activities will "generally" occur away from native habitats and will more often occur in agricultural, residential, and urban areas. (*Id.*) This argument fails, however, because it admits that at least some Program activities will occur in native habitats, the impacts of which went unstudied. Moreover, many special-status species, including burrowing owl, San Joaquin kit fox, and least Bell's vireo, occur in the very agricultural, residential, and urban areas identified by CDFA. (AR 4265–4268, 4272–4273, 4279.) CDFA argues that future site-specific analysis and mitigation will cure these deficits, but, as explained herein, the Tiering Strategy fails to ensure site-specific analysis prior to implementation of activities, and mitigation is improperly deferred and lacks specific performance standards.

Likewise, CDFA attempts to cure the PEIR's failure to analyze impacts from pesticide drift by arguing that implementation of "drift reduction techniques" will eliminate all potential impacts. (EWG Br., p. 18; CDFA Br., pp. 41–42.) The PEIR does not impose these techniques as enforceable mitigation measures, however, and it fails to disclose the potential for drift and the severity of impacts both with and without the techniques. (See AR 4265–4281.) It thus violates CEQA by relying on unqualified assumptions and by concealing mitigation measures. (Pub. Resources Code, § 21082.2(c); *Lotus v. Dept. of Trans.* (2014) 223 Cal.App.4th 645, 656)

The PEIR fails to adequately analyze impacts on pollinators by assuming without evidence that impacts would be "minimal" and by relying on unenforceable mitigation measures buried in technical Appendix K. (EWG Br., p. 19; AR 4269, 4280, 4281.) CDFA claims that "[t]here is nothing improper about the PEIR listing these measures in an appendix." (CDFA Br., p. 40.) Not so. "[A] report 'buried in an appendix,' is not a substitute for 'a good faith reasoned analysis . . .'" (*Habitat & Watershed Caretakers v. City of Santa Cruz* (2013) 213 Cal.App.4th 1277, 1293.) Mitigation measures and impacts conclusions should be "discuss[ed] in the text of the EIR, where [they are] most readily accessible" (*Calif. Oak Foundation v. City of Santa Clarita* (2005) 133 Cal.App.4th 1219, 1239.) CDFA relies on *City of Maywood v. Los Angeles Unified School District* (2012) 208 Cal.App.4th 362, 388–389, 423–424, which approved the inclusion of a traffic study in an EIR appendix. (CDFA Br., p. 40.) EWG does not attack the common practice of including

technical studies in appendices. Rather, it argues that fundamental impact conclusions and mitigation measures must be included in the body of an EIR where the public, other agencies, and decisionmakers will be able to readily access them. Additionally, CDFA failed to even respond to EWG's arguments that Appendix K's measures are unenforceable and that the PEIR failed to analyze the 25 scenarios that admittedly "could result in risk that would exceed the level of concern for pollinators." (AR 4279; AR 4573–4736; EWG Br., p. 19; CDFA Br., pp. 40–41.)

Finally, the PEIR's analysis of wetland impacts is inadequate because (1) it declines to analyze direct impacts on wetlands based on the unsupported claim that no Program activities will occur near wetlands, and (2) it fails to consider indirect impacts on wetlands from pesticides sprayed elsewhere and carried downstream. (EWG Br. at 19–20; AR 4280.) CDFA offers no substantive response to these arguments. (CDFA Br. at 42–43.) Instead, without citing any supporting evidence in the record, CDFA claims that "the Program will not occur in any place remotely similar" to a wetland. (CDFA Br. at 42–43.) This statement is meaningless because the PEIR fails to include a list or map or detailed description of the sensitive areas to be avoided, much less a description of how they will be avoided. And it is contradicted by the PEIR's admission that "[s]ensitive natural communities are located in every county of California." (EWG Br. at 19–20; Pub. Resources Code, § 21082.2(c); AR 4268.)

2. The PEIR Fails To Adequately Analyze Water Quality Impacts

The PEIR fails to adequately analyze impacts on surface waters by assuming, without supporting evidence or analysis, that all impacts would be reduced through a combination of poorly defined and unenforceable MPs, mitigation measures, and permit and regulatory requirements. (EWG Br., p. 20–21.) Indeed, CDFA's own ecological risk assessment (ERA) shows that these pesticides have the potential to "exceed water quality standards/thresholds" when they reach waterbodies. (CDFA Br. at 37; AR 4355–4359.) In response, CDFA discredits its own model and dismisses the ERA as overly conservative, asserting without evidence that because the ERA did not account for certain factors that "it is unlikely that these [pesticides] would reach waterbodies in any substantial concentrations." (CDFA Br., p. 37; AR 4357.) The PEIR is refuted

by the ERA, fails to consider indirect impacts, and fails to disclose that the MPs are weaker than those in CDFA's NPDES permit. (AR 4015–4018, 6888–6890).

The PEIR's analysis of Proposition 65 chemicals is also deficient. (EWG Br. at 21–22.) CDFA is correct that the PEIR simply *mentions* the two chemicals listed under Proposition 65 as causing reproductive toxicity. (CDFA Br. at 38; AR 4148–4152.) CDFA's response to comments states that more information is in the "Dashboard database" (AR 8042). Once again, however, the serious human health implications of listed chemicals and Proposition 65's strict requirements "merit[] discussion in the text of the EIR, where it is most readily accessible." (*Calif. Oak Foundation, supra,* 133 Cal.App.4th at 1239.) CDFA's responses to comments are also inaccurate. For instance, CDFA's responses indicate carbaryl will be used only in interior quarantines, thus preventing "any significant amount of the . . . chemical to enter any source of drinking water." (AR 8043–8044.) But the PEIR itself contradicts this, indicating that carbaryl may be used for foliar spray treatments, "applied to the foliage of host plants using a backpack sprayer or mechanically pressurized system" to trees "in urban and residential areas and nurseries," and "applied . . . in a 656-foot . . . radius." (AR 4042, 4047.)

The PEIR also chooses not to analyze the impacts of chemicals "generally regarded as safe." (See EWG Br. at 22–23; CDFA Br. at 38; AR 4349.) But as CDFA admits, "generally regarded as safe" is a food classification by FDA, with no applicability to the environment. (See CDFA Br. at 38.) The PEIR states that these chemicals "easily degrade" and "have properties that make them inert" but presents no actual evidence of this for the many thousands of chemicals potentially included in these categories or a discussion of their impacts on aquatic species. (AR 4349–4350.) CDFA fails to include the required information in the PEIR, and instead refers to the Dashboard database "found in the record in a folder of native files (and can be reviewed using the common program Microsoft Access)." (CDFA Br. at 38; *Cal. Oak Foundation, supra*, 133 Cal.App.4th at 1239.) CDFA fails to respond to the argument that CDFA is "expressly prohibited from discharging such constituents to waters pursuant to its NPDES Permit. . .'" (EWG Br. at 22.)

The PEIR's one-paragraph evaluation of impacts on groundwater is grossly insufficient. (EWG Br. at 23–24; AR 4339.) The PEIR does not include any careful consideration of whether a

pesticide or its degradates could infiltrate to groundwater. (See AR 4339.) The PEIR presents no information on the varying infiltration rates of soils in areas where applications will occur, whether high groundwater tables are present, or where currently contaminated supplies exist. (*Id.*)

The PEIR also ignores CDPR's Groundwater Protection Regulations (Cal. Code Regs., tit. 3, § 6800 *et. seq.*), Groundwater Protection Areas which restrict pesticide use (Cal. Code Regs., tit. 3, § 6487.4), and the USGS guidance on groundwater. (AR 7972; EWG Br. at 23–24.) CDFA further violates CEQA by failing to specifically respond to the groundwater comments EWG submitted on the Draft PEIR. (See AR 7972, 8046.) CDFA notes that it described CDPR's Groundwater Protection Program, but this is a separate program. (CDFA Br. at 39; AR 8046.) CDFA argues that "it is hard to see how those prohibitions and restrictions . . . would have resulted in increased significant environmental effects . . ." (CDFA Br. at 39.) But this is not an excuse for failing to analyze whether the Program would comply with environmental regulations.

Finally, the PEIR's analysis of sediment toxicity is inadequate because it fails to consider sediment quality standards, such as the State Water Board's Water Quality Control Plan for Enclosed Bays and Estuaries–Part I Sediment Quality, (AR 7970; EWG Br. at 24.). (EWG Br. at 24; AR 7970.) CDFA's Opposition fails to address these standards. (See CDFA Br. at 39–40; AR 8045; AR 4467.) CDFA points to the PEIR's inclusion of sediment toxicity in the ERA but does not address the PEIR's failure to consider impacts on sediment quality aside from the risk to organisms. (*Id.*) Further, the PEIR should have discussed these impacts in the PEIR's body, not "[in] a report 'buried in an appendix . . .'" (*Cal. Oak Foundation, supra*, 133 Cal.App.4th at 1239.) The body of the PEIR refers to sediment toxicity only to state that monitoring shows widespread pesticide sediment toxicity, which should have merited further analysis. (See AR 4339.) The PEIR also fails to respond to comments on this point.

3. The PEIR Fails To Adequately Analyze Human Health Impacts

CDFA's opposition brief fails to adequately refute EWG's contention that the Human Health Risk Assessment (HHRA) is legally inadequate and fails to inform the public about the Program's human health risks. (EWG Br., pp. 24–26; CDFA Br., pp. 43–45.)

First, the HHRA's analysis of the "downwind bystander" (DWB) and "post-application-resident" (PAR) exposure pathways covered only three life stages (0 to 2 years old, 2 to 16 years old, and 16 to 40 years old), and omitted adults over 40 without any supporting explanation or evidence. (AR 5924–5925; 5925–5926; 7997–8001.) CDFA now claims that the PEIR did in fact analyze impacts to adults over 40 years old, but then it misleadingly cites to the HHRA's analysis of *different exposure pathways*, and not to the analysis of DWB or PAR. (CDFA Br. pp. 43–44; AR 5928 [ingestion of vegetation residues and soil; AR 5927 [ingestion of treated vegetation]; AR 5929 [vapor inhalation from traps and lures].) CDFA thus concedes that it failed to analyze the effects of DWB and PAR exposure on adults over 40 years old.

Second, the HHRA fails to adequately analyze health risks to children under two. Instead, it summarily concludes that children under two will have "inconsequential" or "negligible" exposure because they "spend most of their time indoors . . . ." (AR 5924, 5925–5926.) CDFA claims that EWG failed to exhaust its administrative remedies on this issue, but Dr. Warren Porter submitted detailed comments about the HHRA's failure to adequately analyze health impacts to "babies" and "small children." (AR 7999–8000.) The HHRA's cursory treatment of the Program's potential health impacts on children under two conflicts with the "Standard Operating Procedures for Residential Pesticide Exposure Assessment" (Oct. 2012) relied on by CDFA, which states that the most appropriate child life stage to analyze is one to two years old. (Declaration of Alexander L. Merritt, Ex. A., p. 1–6.) CDFA attempts to justify this failure of analysis by arguing that younger children will spend less time in treated areas. That argument is unsupported by substantial evidence. (CDFA Br. pp. 44–45.) CDFA's assumption is no substitute for health impacts analysis supported by evidence – particularly in light of the undisputed facts that the Program authorizes pesticide applications in residential yards, neighborhoods, and at day care and school facilities (AR 4298).

Additionally, CDFA claims that it was appropriate to analyze child exposure based solely on an uncommon behavior (pica), rather than the common, expected behavior (contact with contaminated soil), because pica poses a higher risk. (AR 5914, 5928.) But CDFA cites no evidence in support of this claim and does not account for the possibility that the more common

behavior could lead to more frequent exposure and thus greater health impacts. Indeed, the administrative record demonstrates that exposure to contaminated soil is a significant risk and results in multiple exposure pathways. (AR 7978 [citing Bradman et al., 2007; Beamer et al, 2008]; AR 7999–8000 [Dr. Warren Porter, Professor of Environmental Toxicology].) The foregoing omissions render the PEIR legally deficient as an informational document.

4. The PEIR Fails To Adequately Analyze Cumulative Impacts

The fundamental problem with the PEIR's cumulative analysis is that identifies a large number of other pesticide programs, run by many federal, state, and local agencies, which will substantially overlap and combine with the pesticide applications of CDFA's Program. Yet the PEIR provides no meaningful information about these other programs, including even basic data about the amount and types of pesticides used, the treatment areas, and how the environmental impacts of all these programs will combine. (*See* AR 4172–4175 [Table 5-15] [identifying at a dozen other CDFA programs, multiple USDA programs, programs run by seven other federal agencies, and a large but undisclosed number of locally-run programs, all of which "use a variety of pesticides" and "many different application methods" and occur over a broad geographic range].) CDFA argues that providing this additional information would confuse the public and be unhelpful and unnecessary because it would be a "maze of data" spanning "hundreds if not thousands of pages." (CDFA Br., pp. 45–46.) CDFA does not explain, however, why it could not provide a summary of the relevant information in the PEIR, with supporting data referenced in an accompanying appendix, as it did repeatedly in other chapters of the PEIR. CDFA is correct that the degree of specificity required in an EIR corresponds to the project's scope. (*In re Bay-Delta Programmatic EIR*, supra, 43 Cal.4th at 1176.) CDFA's error is that it provided no specificity whatsoever, thereby precluding the public and other agencies from having any meaningful understanding of the environmental impacts of the Program in combination with the many other pesticide programs already operating in California. The fact that the Program is large does not excuse CDFA from its obligation to make a good faith effort to analyze and disclose cumulative impacts. Further, CDFA restates the PEIR's bare conclusions that cumulative impacts to air quality, hazardous materials, and water quality would be less than significant, but it is unable to

cite any supporting evidence, much less substantial evidence in the record. (CDFA Br. p. 45.) The foregoing omissions render the PEIR legally deficient as an informational document.

E. THE PEIR'S MITIGATION MEASURES VIOLATE CEQA

The PEIR improperly defers certain mitigation measures and conceals others as Program features, in violation of CEQA's requirements. Mitigation Measure BIO-CHEM-2 improperly defers mitigation of impacts on special-status species. It relies on the preparation of vague future "treatment plans," without specific performance criteria and on undefined "technical assistance" from state and federal wildlife agencies. (EWG Br. pp. 28–29; AR 4277–4278, 4272; *Preserve Wild Santee v. City of Santee* (2012) 210 Cal.App.4th 260, 281.) CDFA's response cites one purported performance standard—that the "technical assistance process has been designed so that no 'take' authorization will be needed." (CDFA Br., p. 50 [citing AR 4278].) However, that is not a legally adequate performance standard. It simply reflects CDFA's goal of implementing Program activities without needing to obtain "take permits" authorizing CDFA to harm special-status species. (See AR 3967.) Moreover, even if CDFA realizes this goal, this would not ensure that impacts on special-status species would be less than significant. For one thing, take protections only apply to certain species listed as threatened or endangered under the Federal or California Endangered Species Act. (See AR 4266–4267.) Take protections do not apply to a host of unlisted special-status species, including federal proposed (FP) species, state species of special concern (SSC), California Native Plant Society (CNPS) Rank 1 and 2 species, and other species that may have special status on a local or site-specific basis. (*Id.*) If not needing a take permit is the only performance standard, then CDFA would be able to kill these special-status species at will and without mitigation.

Mitigation Measure WQ-CUM-1 requires CDFA to determine whether a treatment location is near an impaired water body, and if so, to implement relevant Program MPs. (AR 4367.) There are two problems with this purported "Mitigation" Measure. First, it underscores the PEIR's failure to ensure site-specific analysis of potential impacts prior to implementation and instead defers any consideration of site-specific impacts to the implementation and mitigation phase, at which point it is too late to conduct any further CEQA review that may be warranted.

Second, by definition, the MPs are built into and part of the Program and thus are not Mitigation Measures. Thus, WQ-CUM-1 does not require CDFA to take any additional action to reduce potential impacts. CDFA effectively concedes this point.

Finally, the PEIR's use of MPs violates *Lotus v. Dept. of Trans.* (2014) 223 Cal.App.4th 645, 656, because (1) the PEIR relies on MPs to reduce environmental impacts (EWG Br. at pp. 30–31 [analyzing PEIR's use of MPs]); (2) the PEIR incorporates the MPs as components of the Program Description (AR 4015–4020), rather than as mitigation measures; (3) the PEIR "assumes" that MPs will be implemented without expressly making them enforceable *(id;* AR 4342, 4360); and (4) the PEIR fails to disclose the severity of the Program's environmental impacts both with and without the MPs (*id.*). CDFA attempts to avoid this problem by arguing that the MPs are not akin to mitigation measures but are instead inherent components of the program. (CDFA Br. at p. 57.) This claim does not withstand scrutiny. For example, MP-SPRAY-1 requires CDFA to note site conditions such as soil texture, slope, water bodies, host plants, irrigation, and storm drains; identify and make plans to avoid streamside management areas and surface water; consider integrated pest management methods to minimize the scale and number of pesticide applications; and to choose the least persistent and lowest toxicity pesticide. (AR 4015.) Like the program features in *Lotus* imposed to reduce impacts to redwood tree roots, this MP is clearly designed to reduce environmental impacts on water bodies, human health, and plants and animals. This makes it a mitigation measure, but CDFA does not make it enforceable and does not explain the impacts of the Program both with and without the MP. "By compressing the analysis of impacts and mitigation measures into a single issue, the EIR disregards the requirements of CEQA." (*Lotus* at 656.) The other MPs suffer the same problem. (AR 4015–4020.)

III. CONCLUSION

For the foregoing reasons, this Court should grant the Petition and issue a writ of mandate directing CDFA to set aside its certification of the PEIR and cease further activities under the Program pending compliance with CEQA's mandates as directed by this Court.

Dated: October 23, 2017

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PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO

At the time of service, I was over 18 years of age and **not a party to this action**. I am employed in the County of San Francisco, State of California. My business address is Four Embarcadero Center, 17th Floor, San Francisco, CA 94111-4109.

On October 23, 2017, I served true copies of the following document(s) described as **PETITIONERS' REPLY BRIEF** on the interested parties in this action as follows:

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BY FEDEX: I enclosed said document(s) in an envelope or package provided by FedEx and addressed to the persons at the addresses listed in the Service List. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of FedEx or delivered such document(s) to a courier or driver authorized by FedEx to receive documents.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Executed on October 23, 2017, at San Francisco, California.

Yolanda Hogan