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12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF SACRAMENTO

14 ENVIRONMENTAL WORKING  
GROUP; et. al.

15 Petitioners and Plaintiffs,

16 v.

17 CALIFORNIA DEPARTMENT OF  
18 FOOD AND AGRICULTURE; et al.

19 Defendants and Respondents.

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

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
PETITIONERS' MOTION FOR  
PRELIMINARY INJUNCTION**

Assigned for All Purposes to  
Hon. Timothy Frawley

Hearing Date: Not Set  
Time: Not Set  
Dept: 29

Action Filed: January 22, 2015  
Trial Date: Not Set

CEOA Case

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5 NETWORK NORTH AMERICA; BEYOND  
PESTICIDES; CALIFORNIA  
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1 **I. INTRODUCTION**

2 Petitioners and Plaintiffs Environmental Working Group, City of Berkeley, Center  
3 for Food Safety, Pesticide Action Network North America, Beyond Pesticides, California  
4 Environmental Health Initiative, Environmental Action Committee of West Marin, Safe  
5 Alternatives For Our Forest, Center for Biological Diversity, Center for Environmental  
6 Health, Californians For Pesticide Reform and Moms Advocating Sustainability  
7 (collectively, “Petitioners”) seek by this action a writ of mandate directing Defendant and  
8 Respondent California Department of Food and Agriculture (“CDFA”) to set aside its  
9 certification on December 24, 2014 of the Final Programmatic Environmental Impact  
10 Report (“PEIR”) for its Statewide Plant Pest Prevention Management Program (the  
11 “Project” or “Program”) based on numerous violations of the California Environmental  
12 Quality Act (“CEQA”).

13 The CDFCA prepared the PEIR to serve as an “overarching CEQA framework for  
14 efficient and proactive implementation of Statewide Program activities.” (Declaration of  
15 Alexander L. Merritt [“Merritt Decl.”], Exh. A [PEIR] at p. 1-4.) The CDFCA thus intends  
16 the PEIR to serve its stated goal of “rapid response by streamlining project-level  
17 implementation activities” that the CDFCA determines—in its sole discretion and without  
18 public notice—are adequately addressed in the PEIR and thus require no further site-  
19 specific environmental analysis prior to implementation. (*Id.*, Exh. A at p. 2-2.) As  
20 described in the PEIR, the Program encompasses a vast array of pest management  
21 activities, including spraying and other applications of numerous admittedly hazardous  
22 chemicals.

23 While the Project violates CEQA in multiple respects, this motion focuses on  
24 CDFCA’s erroneous and unlawful claim that it has no obligation under CEQA to provide  
25 public notice of its determinations to carry out project-level implementation activities  
26 under the Program where it determines that no further environmental analysis is required.  
27 The CDFCA’s position violates CEQA’s public notice requirement under Public Resources  
28 Code section 21108, subdivision (a), which requires that state agencies file a Notice of

1 Determination (“NOD”) with the Office of Planning and Research (“OPR”) following each  
2 approval or “determination” to “carry out” a project. CEQA Guideline 15094 imposes the  
3 identical obligation.

4 Without an injunction to keep the CDFA from proceeding in this unlawful manner,  
5 the public’s right to know and participate—a cornerstone of CEQA—will be defeated, and  
6 the potential harm from the Program will go undetected until after the fact. Petitioners  
7 therefore seek a preliminary injunction enjoining the CDFA to refrain from carrying out  
8 subsequent project-level implementation activities under the Program without first  
9 complying with CEQA’s statutory requirement to file an NOD regarding such  
10 determination. As we show, Petitioners have met their burden to obtain the injunctive  
11 relief they seek by this motion:

12 Petitioners are likely to prevail on the merits based on the plain language of Section  
13 21108(a). Notably, in *Committee for Green Foothills v. Santa Clara County Board of*  
14 *Supervisors* (2010) 48 Cal.4th 32, 56, the California Supreme Court stated that the  
15 language of the Section 21108(a) appears to require that agencies file an NOD whenever  
16 “an agency determines a subsequent activity is within the scope of a program EIR and  
17 requires no further environmental review.” That is precisely the case here.

18 The balance of interests supports the granting of injunctive relief. The CDFA will  
19 suffer no injury, and only minimal burden, should the Court grant this motion because the  
20 CDFA would be required to do nothing more than what the law otherwise requires of it,  
21 i.e., to file an NOD with the OPR following its determination to carry out subsequent  
22 activities under the Program. (Pub. Res. Code § 21108 (a); CEQA Guideline 15094(c).)

23 On the other hand, absent injunctive relief, the public will have no notice and thus  
24 no opportunity to challenge the CDFA’s determinations to implement pest management  
25 activities that utilize admittedly hazardous chemicals without further site-specific  
26 environmental review until after these activities have been implemented and caused  
27 significant and potentially irreparable injury to humans, animals, and the environment. In  
28 other words, once it is too late. Moreover, the risk of such significant and irreparable

1 injury is heightened here because the PEIR’s “Tiering Strategy” included as Appendix C to  
2 the PEIR—which is intended to guide the CDFA’s evaluation of whether subsequent  
3 project-level implementation activities were sufficiently addressed in the PEIR and thus  
4 require no further analysis—violates CEQA by failing to adequately consider site-specific  
5 conditions. (*See* Merritt Decl., Exh. B [Tiering Strategy].)

6 For all these reasons, Petitioners respectfully request that the Court grant this  
7 motion for a preliminary injunction.

## 8 **II. RELEVANT FACTS**

9 The CDFA through the Program conducts or oversees numerous pest management  
10 programs and activities throughout the State of California. On December 24, 2014, the  
11 CDFA certified the PEIR which purports to encompass most of the CDFA’s future  
12 statewide pest management practices. The PEIR explains that it is a “program-level” EIR,  
13 or first tier EIR that is intended to “provide a foundation for subsequent, more detailed  
14 analyses associated with individual activities conducted under the Proposed Program.”  
15 (Merritt Decl., Exh. A at p. 1-4.) The PEIR is intended to “serve as an overarching CEQA  
16 framework for efficient and proactive implementation of Statewide Program activities,”  
17 (*Id.*, Exh. A at p. ES-1), and thus support the “CDFA’s goal of rapid response by  
18 streamlining project- level implementation activities . . . .” (*Id.*, Exh. A at p. 2-2).

19 The PEIR is incredibly broad in scope. Proposed Program activities may occur  
20 anywhere that a pest is or may be found throughout the state of California and sometimes  
21 outside of California. (*Id.*, Exh. A at p. 23.) The Statewide Program encompasses a vast  
22 array of pest management activities, including physical management activities, biological  
23 management activities, and chemical management activities, e.g., aerial spraying of  
24 pesticides. (*Id.*, Exh. A at pp. 2-23–2.27.)

25 Despite its purposefully broad scope, the PEIR states that: “[s]ubstantial efforts  
26 have been made to provide project-level detail for those activities where it is feasible to do  
27 so. To the extent that the potential impacts of the activities have been addressed in the  
28 Final PEIR, no additional CEQA compliance would be necessary.” (*Id.*, Exh. A at p. 1-4.)

1 The PEIR admits, however, that site specific analysis of several potential impacts of the  
2 Proposed Program were *not* evaluated. For example, specific species impacts were not  
3 analyzed because “the geographic area under consideration is large and varied.” (*Id.*, Exh.  
4 A at p. 6.0-16.)

5 The PEIR admits that the CDFA also did not quantify the cumulative exposure to  
6 multiple pesticide application scenarios for sensitive receptors because “the number of  
7 possible combinations would be so large as to be prohibitive to calculate.” (*Id.*, Exh. A at  
8 p. 6.2-17.) Similarly, the PEIR did not review site-specific water impacts because “the  
9 exact location of Proposed Program activities would be determined in the future in  
10 response to specific pest infestations.” (*Id.*, Exh. A at pp. 6.7-9.)

11 The CDFA’s stated objective of “streamlining” and “efficiently” implementing  
12 project-level activities is accomplished through the PEIR’s “Tiering Strategy,” included as  
13 Appendix C to the PEIR. The PEIR explains that the Tiering Strategy will guide the  
14 CDFA’s evaluation of whether subsequent activities have been sufficiently analyzed in the  
15 PEIR and therefore require no further CEQA compliance. (*Id.*, Exh. A at pp. 2-35–2-36.)  
16 “The CEQA Tiering Strategy includes a series of questions or directions to: determine  
17 whether a given activity would be subject to CDFA’s discretion under the Statewide  
18 Program; determine if the activities were considered in the Final PEIR; identify any  
19 applicable Final PEIR requirements; and determine tiering needs for activities partially  
20 considered or not considered in the Final PEIR.” (*Id.* Exh. A at p. 1-6; Exh. B [Tiering  
21 Strategy].)

22 The Tiering Strategy, however, discloses that in evaluating whether subsequent  
23 project-level activities were analyzed under the PEIR, the CDFA will not adequately  
24 consider site specific conditions before implementing each activity. (*Id.*, Ex. B, at p. C-3  
25 [Tiering Strategy Flow Chart] and C-12 [Tiering Strategy, Table 1].)

26 The PEIR further discloses that the CDFA will not file an NOD following its  
27 determination to carry out a subsequent project-level activity under the Program where it  
28 determines—again, in its sole discretion and without public notice or participation—that



1 the activity was covered under the PEIR and requires no further environmental analysis or  
2 merely an addendum. (*Id.*, Exh. A at pp. 1-6–1-7 [stating the CDFG’s position that  
3 CEQA’s public participation requirements for tiered documents apply only to subsequent  
4 EIRs and negative declarations].) The CDFG confirms this erroneous and unlawful  
5 interpretation of CEQA’s requirements in the PEIR’s Master Response To Comment No.  
6 1:

7           Some commentators allege that CDFG must prepare an Initial  
8           Study and file a Notice of Determination for all subsequent  
9           site-specific activities conducted under the Proposed Program.  
          However, this allegation is only true for site-specific activities  
          that are not covered under the PEIR as further described below.

10 (*Id.*, Exh. C [PEIR Responses To Comments] at p. 2-5.)

11           As the PEIR itself demonstrates, unless enjoined the CDFG will be allowed to take  
12 future site-specific actions unilaterally and without prior notice to the public, some of  
13 which involve the potential use of admittedly hazardous chemicals. As we show, an  
14 injunction is necessary and appropriate to compel the CDFG to comply with CEQA’s most  
15 fundamental requirements for public notice prior to the taking of such actions by  
16 compliance with Section 21108(a) and the timely issuance of an NOD.

17 **III. ARGUMENT**

18 **A. Legal Standards**

19           “In determining whether to issue a preliminary injunction, the trial court considers  
20 two related factors: (1) the likelihood that the plaintiff will prevail on the merits of its case  
21 at trial; and (2) the interim harm that the plaintiff is likely to sustain if the injunction is  
22 denied as compared to the harm that the defendant is likely to suffer if the court grants a  
23 preliminary injunction.” (*Take Me Home Rescue v. Luri* (2012) 208 Cal.App.4th 1342,  
24 1350.) “The trial court’s determination must be guided by a mix of the potential-merit and  
25 interim-harm factors; the greater the plaintiff’s showing on one, the less must be shown on  
26 the other to support an injunction.” (*Law School Admission Council, Inc. v. State of*  
27 *California* (2014) 222 Cal.App.4th 1265, 1280.)

28

1           **B.     Petitioners Are Likely To Prevail On The Merits**

2           Under CEQA, the CDFA must file an NOD whenever it determines to carry out a  
3 subsequent activity under the PEIR. Public Resources Code section 21108, subdivision  
4 (a), states as follows:

5                     If a state agency approves or determines to carry out a project  
6 that is subject to this division, the state agency shall file a  
7 notice of that approval or that determination with the Office of  
8 Planning and Research. The notice shall identify the person or  
9 persons in subdivision (b) or (c) of Section 21065, as reflected  
10 in the agency’s record of proceedings, and indicate the  
11 determination of the state agency whether the project will, or  
12 will not, have a significant effect on the environment and shall  
13 indicate whether an environmental impact report has been  
14 prepared pursuant to this division. [Emphasis supplied].

15           Applying California’s rules of statutory construction, the fundamental task of the  
16 court is to ascertain the intent of the lawmakers so as to effectuate the purpose of the  
17 statute. (*Burquet v. Brumbaugh* (2014) 223 Cal.App.4th 1140, 1145.) “[Courts] begin “by  
18 examining the statutory language, giving the words their usual and ordinary meaning. If  
19 the terms of the statute are unambiguous, [courts] presume the lawmakers meant what they  
20 said, and the plain meaning of the language governs.” (*Ibid*, citing *Estate of Griswold*  
21 (2001) 25 Cal. 4th 904, 910.) Courts appropriately may refer to the dictionary definition of  
22 words to determine the plain meaning of the statutory language. (*Id.* at 1146, citing  
23 *Wastch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1121–22.)

24           The ordinary meaning of the term “carry out” is “[t]o conduct duly to completion or  
25 conclusion; to carry into practice or to logical consequences or inferences.”  
26 (Oxford/English Dictionary Online (3d ed. 2013), available at: <http://www.oed.com>.)  
27 Thus, the plain meaning of the phrase to “carry out” may be properly understood to  
28 encompass a lead agency’s determination to conduct or implement a subsequent program  
activity. The Supreme Court in *Committee for Green Foothills, supra*, agreed. The Court  
explained:

                   When, as in this case, an agency determines a subsequent  
activity is within the scope of a program EIR and requires no  
further environmental review, must it file an NOD concerning

1 its approval of the activity? The CEQA statutes and  
2 Guidelines do not directly address this question, although such  
3 a notice would seem to be required under the general rule that  
4 an agency file an NOD “[w]hensoever [it] approves or determines  
5 to carry out a project that is subject to” CEQA. (§§ 21108,  
6 subd. (a), 21152, subd. (a).)

7 (*Committee, supra*, 48 Cal.4th at 56.) Petitioners thus more than satisfy their threshold  
8 burden of proof regarding this element. (*Law School Admission Council, supra*, 222 Cal.  
9 App.4th at 1280 [a trial court may not grant a preliminary injunction unless there is “some  
10 possibility that the plaintiff would ultimately prevail on the merits of the claim.”].)

### 11 **C. The Balance Of Interests Favors An Injunction**

12 The proposed injunction will not harm the CDFA and will cause only minimal  
13 burden as the CDFA would be required to do nothing more than what the law requires: to  
14 file a NOD with the OPR following each determination to carry out or implement the  
15 Program. (Pub. Res. Code § 21108, subd. (a); CEQA Guideline 15094; *Committee for  
16 Green Foothills, supra*, 48 Cal.4th at 56.)

17 On the other hand, without the proposed injunction, the public will have no notice  
18 and thus no meaningful opportunity to challenge the CDFA’s determinations to carry out  
19 subsequent activities under the Program potentially involving a vast array of hazardous  
20 pesticide chemicals under the Program with no further site-specific analysis of impacts  
21 until *after* they are implemented and cause significant, and potentially irreparable injury to  
22 humans, animals and the environment. The risk of such injury is heightened here because  
23 the PEIR’s “Tiering Strategy” shows that in many cases the CDFA will not adequately  
24 consider site specific conditions in determining whether subsequent project activities were  
25 analyzed under the PEIR and thus require no further analysis.

26 The PEIR explains that the Tiering Strategy is to be used “as a tool to assist in the  
27 timely implementation of Proposed Program activities.” (*Id.*, Ex. B at p. C-1.) “The  
28 intended audience and users of this Tiering Strategy are CDFA’s program staff.” (*Ibid.*)  
The Tiering Strategy Guidelines and Tiering Strategy Checklist (Attachment 1) were  
developed to assist the CDFA’s staff in determining whether an activity is consistent with

1 the PEIR; what management practices, mitigation measures or other requirements from the  
 2 PEIR may apply to the activity; and what additional CEQA analysis/documentation may  
 3 be necessary. (*Id.* at p. C-3.) A “schematic of the overall Tiering Strategy process” is  
 4 provided in Figure 1 (*Ibid.*), and set forth below for the Court’s convenience.

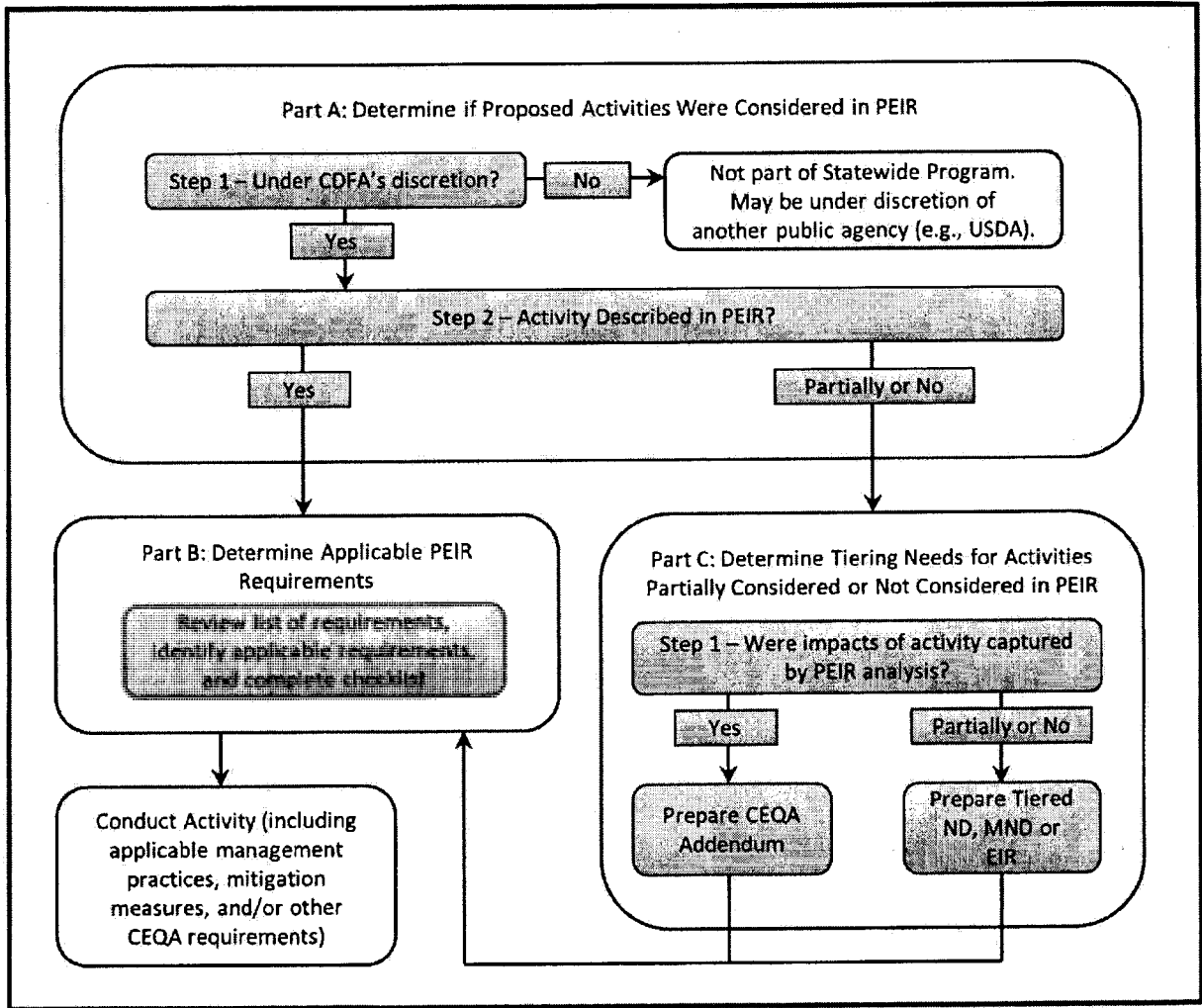


Figure 1. Flow Chart of Tiering Strategy Approach

23 The Tiering Strategy’s Flow Chart illustrates that in evaluating future  
 24 proposed project-level implementation activities under the Program, the CDFA first  
 25 determines whether the proposed activity falls under the CDFA’s discretion (Step 1). If so,  
 26 the second step in the Tiering Strategy is the critically important threshold question of  
 27 whether or not the proposed activity was “Described in the PEIR?” (*Id.*, Exh. B at p. C-3.)  
 28 If the answer is “yes,” no further CEQA analysis is performed. Instead, CDFA’s staff is

1 instructed to merely identify any applicable management practices, mitigation measures or  
 2 other requirements approved under the PEIR that may apply to the proposed activity.

3 (*Ibid.*) Nothing more is required.

4 To assist the CDFA answer the critical, step 2, threshold question, Table 1 to the  
 5 Tiering Strategy lists “[q]uestions to assist in determining whether an activity was  
 6 described and evaluated in the PEIR.” Table 1 is set forth below for the Court’s  
 7 convenience:

8 **Table 1.** Questions to Assist in Determining Whether an Activity Was Described and evaluated in the  
 9 PEIR

| Activity Type                           | Questions   |
|---|---|
| <i>Physical Management Activities</i>   |   |
| Inspection                              | Inspection activities have generally been covered by the PEIR. Answer “yes.”  |
| Trapping                                | Was the type of trap, its method of use, and if applicable, the chemicals it contains, described in Chapter 3 of the PEIR?  |
| Pest Removal                            | Does the activity involve hand removal of egg masses or immersion in hot water?   |
| Host Removal                            | Does the activity involve removal of host fruit or flowers, or fruit stripping?<br>Is the host material going to be disposed of at a landfill, buried, or composted?  |
| Cleaning                                | Will equipment cleaning be conducted using a power washer?  |
| Restricted Movement (Quarantine)        | The quarantine itself would not have impacts; rather, the activities that would be conducted in response to the quarantine must be evaluated to determine PEIR coverage. Identify these activities and evaluate using this table.   |
| <i>Biological Management Activities</i> |   |
| Biological Control Agents (BCAs)        | Is the BCA to be released one of those listed in Chapter 3 of the PEIR, or has it been subjected to the approval process described in Chapter 2 of the PEIR?  |
| Sterile Insect Technique                | Is the sterile insect to be released using light aircraft or helicopter?  |
| <i>Chemical Management Activities</i>   |   |
| Ground-Based Spray Applications         | Is the activity described in one of the scenarios considered in the risk assessment document? Specifically, is the answer to the following questions “yes”:<br><ul style="list-style-type: none"> <li>• Are the active and inert ingredients in the chemical formulations to be used (including any adjuvants) the same?</li> <li>• Is the application method the same? Note that for scenarios involving a backpack sprayer, a groundboom may be used for foliar applications, and mechanically-pressurized sprayer may be used for either foliar or drench applications, as these methods would result in the same or reduced risk compared to the backpack sprayer.</li> <li>• Is the rate of application the same or less?</li> <li>• Is the area of application the same or less?</li> <li>• Is the number of applications the same or less?</li> <li>• Is the interval between applications the same or greater?</li> <li>• Is the application setting consistent with scenario’s Conceptual Site Model?</li> </ul> |
| Aerial Spray Applications               |   |
| Soil Applications                       |   |
| Fumigation                              |   |
| Mating Disruption                       |   |

| Activity Type | Questions  |
|---------------|--|
|               | <ul style="list-style-type: none"> <li>Are there site-specific factors relative to the proposed activity which reduces potential for impacts compared to the scenario evaluated in the PEIR (e.g., intervening topography between application site and receptors, absence of water bodies, absence of receptors, etc.)?</li> </ul> <p style="text-align: center;">AND/OR</p> <p>Does the activity comply with Mitigation Measure HAZ-CHEM-3 See Attachment 1 to this Tiering Strategy.</p> |
| Disinfection  | Does the activity consist of the application of steam, alcohol, bleach, or Lysol onto farm equipment or tools?   |

As shown, Table 1 poses no questions regarding the consideration of any site specific factors with respect to the implementation of all physical management and biological management activities. (*Id.*, Exh. B at p. C-11.) With respect to proposed chemical management activities, Table 1 poses only one optional question regarding site specific factors: “[a]re there site-specific factors relative to the proposed activity which reduces potential for impacts compared to the scenario evaluated in the PEIR (e.g. intervening topography between application site and receptors, absence of water bodies, absence of receptors, etc.)?” (*Id.*, Exh. B at p. C-12 [emphasis added].) The Tiering Strategy contains no inquiry, optional or otherwise, as to whether there are any site specific factors either not considered or not adequately analyzed under the PEIR. While the Court need not decide this issue for this motion, that glaring omission violates CEQA’s requirements. CEQA Guideline 15168, subdivision (c)(4), regarding Program EIRs, explains:

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.

(Emphasis added; *see also* CEQA Guidelines 15152, subd. (c) [“[w]hen an agency is using the tiering process in connection with an EIR...the development of detailed, site specific information may not be feasible but can be deferred...”].)

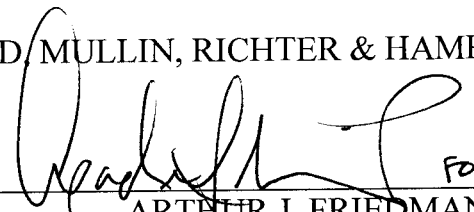
1 The Court need not rule on the legal adequacy of the PEIR's Tiering Strategy for  
2 purposes of this motion, and Petitioners are not requesting the Court do so. The multiple  
3 deficiencies in the Tiering Strategy are, however, the best evidence of why the CDFA must  
4 be compelled to comply with its legal obligation under Section 21108(a) and Guideline  
5 15094 prior to "carrying out" any determinations regarding site-specific pest management  
6 activities without further environmental review. The Tiering Strategy thus further tips the  
7 balance of interests in support of issuing the proposed injunction.

8 **IV. CONCLUSION**

9 Petitioners have demonstrated a likelihood of prevailing on the merits and that the  
10 balance of interests fully supports this motion. Accordingly, Petitioners respectfully  
11 request that the Court grant this motion in its entirety, enjoining the CDFA from  
12 implementing project-level activities under the Program without first complying with  
13 CEQA's public notice requirement to file an NOD.

14 Dated: May 18, 2015

15 SHEPPARD, MULLIN, RICHTER & HAMPTON LLP

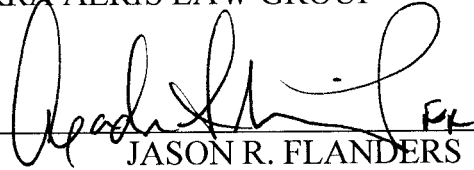
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24 NORTH AMERICA; BEYOND PESTICIDES;  
25 CALIFORNIA ENVIRONMENTAL HEALTH  
26 INITIATIVE; ENVIRONMENTAL ACTION  
27 COMMITTEE OF WEST MARIN; SAFE  
28 ALTERNATIVES FOR OUR FOREST  
ENVIRONMENT

1 Dated: May 18, 2015

2 AQUA TERRA AERIS LAW GROUP

3  
4 By

  
A handwritten signature in black ink, appearing to read 'Jason R. Flanders', is written over a horizontal line.

JASON R. FLANDERS

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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF SAN FRANCISCO**

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

5 On May 18, 2015, I served true copies of the following document(s) described as  
6 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF**  
6 **PETITIONERS' MOTION FOR PRELIMINARY INJUNCTION** on the interested  
7 parties in this action as follows:

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8 Kristin B. Peer  
9 Office of the Attorney General  
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10 Sacramento, CA 95814  
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16 **BY E-MAIL OR ELECTRONIC TRANSMISSION:** Based on a court order or  
17 an agreement of the parties to accept service by e-mail or electronic transmission, I caused  
18 the document(s) to be sent from e-mail address [amerritt@sheppardmullin.com](mailto:amerritt@sheppardmullin.com) to the  
19 persons at the e-mail addresses listed in the Service List. The document(s) were  
20 transmitted at or before 5:00 p.m. I did not receive, within a reasonable time after the  
21 transmission, any electronic message or other indication that the transmission was  
22 unsuccessful.

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

25 Executed on May 18, 2015, at San Francisco, California.

26   
27 \_\_\_\_\_  
28 Wanda Morris