

FILED
ALAMEDA COUNTY

DEC 03 2021

CLERK OF THE SUPERIOR COURT

By _____ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA
IN AND FOR THE COUNTY OF ALAMEDA

POLLINATOR STEWARDSHIP
COUNCIL and AMERICAN
BEEKEEPING FEDERATION

Petitioners,

v.

CALIFORNIA DEPARTMENT OF
PESTICIDE REGULATION and AAL
DILCINI, in his official capacity as
Director of Pesticide Regulation

Respondents.

DOW AGROSCIENCES LLC,
CORTEVA INC., SISKIYOU COUNTY
DEPARTMENT OF AGRICULTURE,
JAMES E. SMITH, in his official capacity
as Siskiyou County Agricultural
Commission, and DOES 1 through 10,
Real Parties in Interest.

Case No. RG20-066156

ORDER GRANTING
PETITION FOR WRIT OF MANDATE

The merits hearing for the Petition for Writ of Mandate came regularly before the
court on September 24, 2021 by remote hearing.

1 Gregory Loarie and Gregory Muren appeared for the petitioners, Marc Melnick
2 and Cory Moffat appeared for the respondents, and Kirsten Nathanson, Kristin Madigan
3 and Amy Simonds appeared for the Real Parties in Interest Dow AgroSciences LLC and
4 Corteva, Inc (“RPIs” hereafter.) Also appearing was Ed Kiernan, counsel for Real Parties
5 in Interest Siskiyou County Department of Agriculture and James Smith, in his capacity
6 as Siskiyou County Agricultural Commissioner, interested parties who relied on the
7 briefing and argument presented by the other Real Parties in Interest and the California
8 Department of Pesticide Regulation.
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10 The matter was argued and submitted, and the court took the matter under
11 submission.
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13 After review of the administrative record and consideration of the argument of
14 counsel the petition for writ of mandate is granted for the reasons stated herein.
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16 Respondent California Department of Pesticide Regulation (“DPR” or
17 “respondents” hereinafter) registered, (that is, approved the use of) a new pesticide
18 named Sulfoxaflor in three related registration decisions. The DPR concluded that the use
19 of Sulfoxaflor in the manner permitted by the DPR approved labels will cause no
20 significant impact to bees, other pollinators, or to the environment.
21

22 Petitioner Pollinator Stewardship Council and American Beekeeping Federation
23 (“Beekeepers” or “petitioners” hereinafter) filed suit challenging the three related
24 approval decisions, asserting that the DPR violated the California Environmental Quality
25 Act (“CEQA” hereinafter), (Public Resource Code sections 21000 et seq) and the DPR’s
26 certified regulatory program exempting the DPR from a portion of CEQA.

1
2 BACKGROUND

3 The DPR is responsible for regulating the distribution, sale, and use of pesticides
4 in California. State regulations seek to provide for the proper, safe, and efficient use of
5 pesticides essential for food production; to protect public health and safety; and to protect
6 the environment from harm by ensuring the proper stewardship of pesticide products.
7 (Food & Agri. Code, § 11501.)
8

9 All pesticides sold and used in California must be licensed or registered. (Food &
10 Agri. Code, § 12811.) Before a pesticide can be registered in California, it must first be
11 registered by the United States Environmental Protection Agency (the EPA). (7 U.S. §
12 136a.) Once the EPA registers a pesticide, it is eligible for the DPR's review. The DPR
13 must thoroughly evaluate the pesticide to ensure that, when used in conformance with its
14 labeling, it is effective and will not harm human health or the environment (Food & Agri.
15 Code, § 12824.)
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18 A pesticide that demonstrates "serious uncontrollable adverse effects either within
19 or outside the agricultural environment," presents a "greater detriment to the environment
20 that the benefit received by its use," or which has "a reasonable, effective, and
21 practicable alternate material... less destructive to the environment" may not be
22 registered. (Food & Agri. Code, § 12825, subds, (a), (b), (c).) The DPR may also place
23 appropriate restrictions on how, where, and in what quantities any registered pesticide
24 may be used. (Food & Agri. Code, § 12824.) To remain valid, pesticide registrations
25 must be renewed annually. (Food & Agri. Code, § 12817.)
26

1 The DPR is also obliged to continuously evaluate registered pesticides to ensure
2 they pose no danger to the environment. (Food & Agri. Code, § 12824.) The DPR must
3 investigate “all reported episodes and information [it receives] that indicate a pesticide
4 may have caused, or is likely to cause, a significant adverse impact, or that indicate there
5 is an alternative that may significantly reduce an adverse environmental impact. If the
6 DPR’s Director finds from the investigation that a significant adverse impact has
7 occurred or is likely to occur or that such an alternative is available, the pesticide
8 involved shall be reevaluated.” (Cal. Code, Regs., tit. 3, § 6220.) The DPR may cancel
9 the registration of a pesticide it determines presents serious uncontrollable adverse effects
10 to the environment. (Food & Agri. Code, § 12825.)

13 Sulfoxaflor

14 Sulfoxaflor is the chemical that is the lethal ingredient in the two products
15 approved by the DPR and challenged in this action. Sulfoxaflor, as the active ingredient
16 in a product, has not heretofore been approved in California for pesticide use. It has been
17 approved by the Federal EPA, which is a prerequisite to approval by the DPR.

19 Sulfoxaflor is not a neonicotinoid. Neonicotinoids are a class of widely used systemic
20 pesticides that have been implicated as being a part of the cause of a dramatic loss of
21 honeybee (and other pollinator) populations over the last 15-20 years.

23 While Sulfoxaflor is not a neonicotinoid, they share some characteristics. Both
24 neonicotinoid pesticides and Sulfoxaflor pesticides kill insects by interfering with the
25 same nerve receptors in the insects that come into contact with the pesticides. Both are
26 “systemic” pesticides, that is, plant absorb the pesticide and distributes it throughout the

1 plant's tissues. Neonicotinoids and Sulfoxaflor are both lethal to bees and other
2 pollinators if the pesticide is sprayed on them, if they come into contact with the spray
3 residue on foliage, or if they eat a part of a plant that had absorbed the pesticide.

4 The challenge

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6 Beekeepers' challenge to the DPR approval of Sulfoxaflor asserts several CEQA
7 violations. The first argument is that the DPR's Public Reports fail to establish a proper
8 baseline from which the decision makers and the public could meaningfully assess the
9 environmental effect of the approval of the pesticide.

10
11 Beekeepers' second argument is that the Public Reports do not disclose the
12 environmental impact of any alternative mentioned in the Public Reports.

13 Beekeepers' third argument is that the Public Reports ¹ failed to consider
14 significant impacts to honeybees and other beneficial insects that could reasonably be
15 expected to occur as a result of the approval of Sulfoxaflor even though the
16 administrative record contains a "fair argument" of those significant impacts.

17
18 And finally, Beekeepers argue that DPR's Public Reports fail entirely to address
19 cumulative impacts consequent to the approval of Sulfoxaflor.

20 The response

21 Respondent DPR and the RPIs reject each of petitioners' arguments and argue that
22 1) the DPR appropriately described a proper baseline for the project, 2) that the
23 discussions of alternatives in the Public Reports were compliant with CEQA because the
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¹ The Public Reports are found in AR 2696-2705, 2673-2682, 6050-6057, 5024-5073-, 5078-5100
and 6457-6507.

1 analysis was adequate and that, in any event, an evaluation of alternatives when no
2 significant impacts need to be mitigated is not required by CEQA, 3) that the presentation
3 of evidence in the comments received by the DPR does not raise a fair argument of
4 possible significant impacts because the DPR determined, as a matter of fact, based on
5 substantial evidence, that the comments upon which beekeepers base their case are
6 “without scientific support” and “speculative or unlikely to occur” and thus “not
7 reasonably foreseeable,” and 4) that the cumulative impacts discussion in the Public
8 Reports was adequate within the “relaxed expectation” for a cumulative impacts analysis
9 by the DPR.
10

11 DISCUSSION

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13 The DPR is an agency which makes its environmental evaluation pursuant to a
14 “certified regulatory program.” Pursuant to Public Resource Code section 21080.5 state
15 regulatory programs which meet certain environmental requirements and are certified by
16 the Secretary of the Resources Agency are exempt from some of the usual CEQA
17 requirements. (Pub. Resources Code, § 21080.5.) There is no mandate for such programs
18 to prepare initial studies, negative declarations, and EIRs. (Cal. Code of Regs., tit.14,
19 section 15250.) Public Resource Code section 21080.5, subdivision (a) states that when a
20 certified program requires environmental documentation to be submitted in support of
21 certain activities “the plan or other written documentation may be submitted in lieu of the
22 environmental impact report required by this division.” (Pub. Resources Code, §21080.5,
23 subd. (a).) Accordingly, a certified program may use other documents which “are
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1 considered the ‘functional equivalent’ of documents CEQA would otherwise require”
2 (*City of Arcadia v. State Water Resources Control Bd. (2006) 135 Cal.App.4th 1392*) and
3 which serve as “substitute document[s] for the normal environmental review papers.
4 [Citation.]” (*Ross v. California Coastal Com. (2011) 199 Cal.App.4th 900, 930-931.*)
5
6 “The rationale for this rule is to avoid the redundancy that would result if environmental
7 issues were addressed in both program-related documents and an EIR.” (*POET, LLC v*
8 *State Air Resources Bd (2017) 218 Cal.App.4th 681, 709.*)

9 In 1979, the Secretary of the Resource Agency certified the DPR’s regulatory
10 program related to the “registration, evaluation, and classification of pesticides.”
11 (*Californians for Alternatives to Toxics v. Department of Pesticides Regulation (2006)*
12 *136 Cal.App.4th 1049, 1059.*) The Code of Regulations identifies the DPR’s pesticide
13 program as one “certified... as meeting the requirements of Section 21080.5.” (Cal. Code
14 of Regs., tit.14, § 15251, subd. (i).)² “The Legislature found certification warranted, in
15 part, because the ‘[p]reparation of environmental impact reports and negative
16 declarations for pesticide permits would be an unreasonable and expensive burden on
17 California agriculture and health protection agencies.’ “(*Californians for Alternatives to*
18 *Toxics, supra, 136 Cal.App.4th at p. 1059.*)

19 Elements of the DPR’s certified program can be found in title 3 of the California
20 Code of Regulations, section 6254, which describes the documentation the DPR must
21 prepare for a registration decision. (Cal. Code of Reg., tit.3, § 6254.) The required public
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² The CCR Regulations related to CEQA (“Guidelines”) are found at CCR Title 14 §§ 15000-15387.

1 report must include “a statement of any significant adverse environmental effect that can
2 reasonably be expected to occur, directly or indirectly, from implementing the proposal,
3 and a statement of any reasonable mitigation measures that are available to minimize
4 significant adverse environmental impact.” (Cal. Code of Reg., tit.3 § 6254.) It must also
5 contain “a statement and discussion of reasonable alternatives which would reduce any
6 significate environmental impact.” (Cal. Code of Reg., tit. 3, § 6254.)
7

8 The certified program exemption exempts the DPR only from CEQA chapters 3
9 and 4 and from Public Resources Code section 21167, “[o]therwise the Department’s
10 [DPR’s] program - and the environmental review documents it prepares – remain subject
11 to the broad policy goals and substantive standards of CEQA not affected by the limited
12 exemption set forth in section 21080.5, subdivision (c).” (*Pesticide Action Network North
13 America v. California Department of Pesticide Regulations*, (2017) 16 Cal. App. 5th 224,
14 242 (“PANNA” hereinafter).)
15

16 Among other CEQA mandates required in the DPR’s environmental review is the
17 requirement that the documents that operate as a functional equivalent to an EIR contain
18 a meaningful consideration of alternatives, or a statement that the agency’s review of the
19 project showed that the project would not have any significant or potentially significant
20 effects on the environment. Such a statement “shall be supported by a checklist or other
21 documentation to show the possible effects that the agency examined in reaching this
22 conclusion.” (CEQA guidelines § 15252 (a)(2)(B)).
23
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25 The DPR is also obligated in its environmental review documents to describe the
26 environmental baseline against which the project is considered (Public Resource Code §

1 21002.1, Guidelines § 15125) and finally, as relevant here, the DPR is obligated to
2 include a cumulative impacts analysis in its environmental documents which must be
3 substantively meaningful (*PANNA, supra, 16 Cal. App. 5th*, at p.248-250).

4
5 Petitioners argue that the DPR's documents that comprise the "functional
6 equivalent" to an EIR (Public Reports and the Notices of Final Decisions ("Public
7 Reports" hereafter) fail to satisfy four separate and independent requirements and that
8 each of the four alleged failures are prejudicial abuses of discretion.

9
10 **Standard of Review**

11 "In evaluating an EIR [or substitute environmental document] for CEQA
12 compliance, a reviewing court must adjust its scrutiny to the nature of the alleged defect,
13 depending on whether the claim is predominantly one of improper procedure or a dispute
14 over the facts." (*Vineyard Area Citizens for Responsible Growth v. City of Rancho*
15 *Cordova, 40 Cal.4th 412 (2007)*) When the claim is predominantly one of procedure,
16 courts conduct an independent review of the agency's action, but when a challenge is
17 made to a factual finding of the agency, the court will review the record to determine
18 whether the finding is supported by substantial evidence. (*POET LLC. v State Air*
19 *Resources Board (2013) 218 Cal.App.4th 681, 713.*) When the information requirements
20 of CEQA have not been met, an agency has failed to proceed in a manner required by law
21 and has therefore abused its discretion. (*California Sportfishing Protection Alliance v. CA*
22 *SWRCB (2008) 160 Cal.App.4th 1625, 1644.*) In assessing such a claim, courts apply an
23 independent or de novo standard of review to the agency's action. (*Communities for a*
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1 *Better Environment v. City of Richmond* (2010) 184 Cal.App.4th 70, 83; *John R. Lawson*
2 *Rock & Oil v. State Resource Board* (2018) 20 Cal.App.5th 77, 96.)

3 In this case the court must use the de novo standard of review to evaluate if an
4 abuse of discretion has occurred. This includes the evaluation of the question of law of
5 whether the DPR relied on substantial evidence to determine if the facts it reviewed
6 support a determination that a “fair argument” was not made that the registration of
7 Sulfoxaflor might cause a significant impact on the environment. (*Sierra Club v. County*
8 *of Fresno* (2018) 6 Cal. 5th 502, 512-510; *Wollman v City of Berkeley* (2009) 179 Cal.
9 *App. 4th 933, 939.*)

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12 Baseline:

13 Guidelines § 15125 codified the baseline requirement describing it in general
14 terms. It states, in relevant part:

15 An EIR must include a description of the physical environmental conditions in the
16 vicinity of the project. This environmental setting will normally constitute the baseline
17 physical conditions by which a lead agency determines whether an impact is significant.
18 The description of the environmental setting shall be no longer than is necessary to
19 provide an understanding of the significant effects of the proposed project and its
20 alternatives. The purpose of this requirement is to give the public and decision makers the
21 most accurate and understandable picture practically possible of the project’s likely near-
22 term and long-term impacts.

23 The importance of a baseline in an EIR was described by the Supreme Court as
24 follows: “The fundamental goal of an EIR is to inform decision makers and the public of
25 any significant adverse effects a project is likely to have on the physical environment.
26 [citation] To make such an assessment, an EIR must delineate environmental conditions
prevailing absent the project, defining a “baseline” against which predicted effects can be

1 described and quantified”. (*Neighbors for Smart Rail v. Exposition Metro Line*
2 *Construction Authority* (2013) 57 Cal. 4th 439, 447)

3 The agency has the discretion to determine how the existing “baseline”
4 conditions prior to the implementation of the project can most reasonably be measured
5 (*Citizens for a Better Environment v. South Cost Air Quality Mgt District* (2010) 48 Cal.
6 4th 310, 328), but the baseline must describe the environmental setting into which, in this
7 instance, the new pesticide will be introduced. Absent an adequately defined baseline
8 neither the decision makers nor the public have the foundational information against
9 which predicted effects can be described and quantified.
10

11 The baseline found in DPR’s Public Reports can be succinctly summarized as
12 follows: 1. DPR currently registers almost 14,000 pesticide products (with no further
13 elaboration) 2. Sulfoxaflor has been used in California pursuant to a number (18) of
14 “emergency exemptions”, and 3. The total amount of Sulfoxaflor use in those emergency
15 exemptions was a modest amount.
16

17 Petitioners argue that such a cursory discussion of baseline conditions does not
18 satisfy the CEQA requirement that the description of the environmental setting must
19 provide a baseline against which the environmental impacts of Sulfoxaflor can be
20 measured.
21

22 Petitioners argue that honeybee populations are in a precarious situation and that
23 the failure to include such information as part of the defined baseline, when it is conceded
24 that Sulfoxaflor is lethal to honeybees, renders the baseline used in the Public Reports as
25 inadequate for CEQA. The argument is that a significant impact consequent to the
26

1 registration of Sulfoxaflor affecting bees cannot be evaluated in comparison to the
2 baseline if there is no baseline component stating the condition of the bee populations'
3 health status.

4 Petitioners further argue that the baseline is inadequate for CEQA because it does
5 not describe the environmental setting into which Sulfoxaflor will be introduced absent a
6 description of the other pesticides of the related neonicotinoid family of pesticides which
7 may be used for the same purposes as are proposed for Sulfoxaflor. Petitioners argue that
8 the purpose of an adequate baseline is to provide description of the present environmental
9 setting in order to compare the effects of the project against it so as to determine the
10 existence of any significant effects consequent to the project. Petitioners argue that the
11 failure to include the status of the use of noenicitinoids in the baseline does not satisfy
12 CEQA. Petitioners further argue that the purpose of a baseline has not been met by the
13 DPR's cursory baseline of an extremely modest use of the pesticide having been used in
14 the last few years.

15 The DPR and the RPIs dismiss petitioners' argument, arguing that Sulfoxaflor is
16 not a neonicotinoid therefore neither it nor bees, whose populations are impacted by
17 neonicotinoids, should be included in the baseline for the evaluation of the registration of
18 Sulfoxaflor. They argue that the use of Sulfoxaflor in California to date is an adequate
19 and sufficient baseline and that the defined baseline is the Public Report is within the
20 discretion of the DPR.

21 The petitioners are correct. The cursory baseline description called "Existing
22 Environmental Condition" (see e.g. AR 2678) does not define a CEQA adequate
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1 description of the environmental setting into which the new Sulfoxaflor pesticides will be
2 introduced nor does it provide an adequate comparator to use to evaluate if there are
3 significant impacts consequent to DPRs approval of the pesticide.
4

5 The failure to adequately define the baseline in the Public Reports is an abuse of
6 discretion on the part of the DPR.

7 Alternatives:

8 CEQA Guidelines § 15252 prescribes an alternatives requirement for CEQA-
9 exempt regulatory programs such as the DPR's. It requires a description of the proposed
10 activity and either alternatives to avoid or minimize potential significant effects on the
11 environment, or a statement that the agency's review of the project showed that the
12 project would not have any significant or potentially significant effects on the
13 environment. CEQA Guidelines § 15252 permits the agency that makes the statement
14 that the project will cause no significant or potentially significant effects on the
15 environment to skip any evaluation of alternatives in its EIR functional equivalent
16 documents, but requires a check list or other documentation listing the possible effects
17 that the agency examined in reaching its negative determination.
18
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20 The Public Reports make the negative statement, asserting that the approval of
21 Sulfoxaflor will cause no significant effects or potentially significant effects on the
22 environment.
23

24 The Public Reports also contain a two-page long section entitled "Discussion of
25 Feasible Alternatives and Mitigation" (see e.g. AR 2676-2678). The Public Reports also
26 contain a section entitled "Environmental and Human Health Checklist" (See e.g.

1 AR2676) which lists five categories with boxes checked, but which contains no
2 discussion of the content of any evaluations. The Public Reports do contain, in the section
3 of the Public Reports entitled "Conclusion," some evaluation of each category checked in
4 the checklist without linking it to the discussion of alternatives.
5

6 On its face, the Public Reports would each appear to fall within the parameters of
7 Guidelines § 15252(a)(2)(b) leading to the absence of any requirement to evaluate
8 alternatives to the project of the registration of Sulfoxaflor.

9 Nonetheless, the DPR's Public Reports listed alternatives. The first alternative
10 listed is not an "alternative" as it is the project itself. "Alternative #2" is labeled "Require
11 revision of the proposed pesticide product label," but contains no other information on
12 what it may have seen as an alternative. This alternative is rejected by the DPR on the
13 grounds that the DPR may not allow a new pesticide use that is greater than that allowed
14 by the US EPA. "Alternative #3" is described as "Adopt a regulation" but contains no
15 other information that might be an alternative to the project. "Alternative #4" is the "no
16 project alternative" which is rejected without discussion other than the oft repeated
17 negative declaration regarding significant effects consequent to the approval of the
18 project.
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21 Petitioners first argue that an evaluation of alternatives is required here because,
22 notwithstanding DPR's declarations to the contrary in the Public Reports, there exists a
23 fair argument of a substantial effect on the environment which triggers the need to
24 evaluate alternatives. Petitioners further argue that the Public Reports fail to satisfy the
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1 requirement of a “meaningful considerations of alternatives” and omit most all of the
2 required analysis points found in Guidelines § 15252 .6.

3 DPR argues that its alternatives analysis was detailed enough and that the analysis
4 points found in Guidelines § 15252.6 do not apply to it. The RPIs argue that an
5 alternative analysis is not required in this case because, unlike the situation in the *PANNA*
6 case, the DPR has made a determination of no significant environmental effects
7 consequent to the registration of Sulfoxaflor. The RPIs further argue that in any event, the
8 DPR’s Public Reports clearly and sufficiently identified and analyzed multiple
9 alternatives.
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12 If substantial evidence of a fair argument that the project may have a significant
13 effect on the environment did not exist in the administrative record, the RPIs would be
14 correct that the alternatives analysis in the Public Reports would be mere surplusage.
15 However, as will be seen in the section that follows, the record does contain substantial
16 evidence of a fair argument of significant environmental effect, thus requiring
17 alternatives analysis in the Public Reports. (See *PANNA, supra, 16 Cal. App. 5th* at pages
18 245-247.)
19

20 The Public Reports state that they analyze four alternatives to the project, though
21 they actually only list three alternatives to the project. The Public Reports do not disclose
22 the reasoning underpinning the choice of the two “alternatives” that were not the no-
23 project alternatives, and the descriptions of those two “alternatives”, (# 2 & #3) are not
24 comprehensible. Neither of them describes an alternative proposal that might accomplish
25 some or most of the objectives of the project. The public, and this court, cannot determine
26

1 from the descriptions of Alternative#2 in the Public Reports what revisions of the product
2 label DPR considers to be an alternative to the project. As this alternative is rejected as
3 contrary to federal law one might surmise that the alternative is one with a broader use
4 than that permitted by the EPA, but one cannot base that speculation on anything else in
5 the alternative discussion. Nor can the public, or this court, determine from the
6 descriptions of Alternative #3 in the Public Reports what regulations the DPR might
7 propose as an alternative to the project even as the DPR rejects the alternative as
8 premature and speculative.
9

10
11 The third alternative (#4) is the “no project” alternative. The entire analysis is one
12 sentence stating that the DPR has not identified any adverse environmental impacts
13 consequent to the project and that the project creates an additional pest control option for
14 agriculture leading to the conclusion that it, as an option, is not a preferred alternative.
15

16 The Public Reports do not contain a meaningful consideration of alternatives.
17 They are devoid of any information about exactly what the designated alternatives are
18 and fail to inform about any environmental consequences that might follow if any of them
19 were approved in place of the project. The Public Reports do not satisfy the requirement
20 of a meaningful consideration of alternatives (*Mountain Lion Foundation v. Fish &*
21 *Game Commission, (1997) 16 Cal 4th 105, 134; PANNA, supra 16 Cal. App. 5th at p. 245;*
22 *Neighbors for Smart Rail v. Exposition Metro Line Const. Auth. (2013) 57 Cal 4th 439,*
23 *454)*
24

25 The failure to provide a meaningful Alternatives analysis in the Public Reports is
26 an abuse of discretion.

1 Adequacy of Environmental Analysis in The Public Reports:

2 Petitioners argue that the Public Reports, taken in their entirety, are inadequate as
3 a functional equivalent of an EIR within the prescriptions of the DPR's regulatory
4 program. They contend that a fair argument was raised in the public comments found in
5 the Administrative Record that the registration of Sulfoxaflor may cause a significant
6 effect on honeybees and other pollinators.
7

8 Petitioners argue that the court's evaluation of whether a "fair argument" of
9 significant effect was raised within a CEQA context is the same evaluation that is used to
10 evaluate compliance of the DPR regulatory program's requirement that the Public
11 Reports identify any significant adverse environmental effects that "can reasonably be
12 expected to occur".
13

14 Petitioners argue that the failure to acknowledge the possibility of a significant
15 effect consequent to the registration of Sulfoxaflor and the resultant failure to address it
16 in the Public Reports misleads the public and agency decision makers, rendering the
17 Public Reports legally inadequate as the DPR's functional equivalent of an EIR.
18

19 DPR's response is that the evidence offered in support of a "fair argument"
20 regarding the possibility of an effect on honeybees or other pollinators is speculative or
21 unlikely to occur and, as a consequence, is "not reasonably foreseeable." DPR further
22 argues that the administrative record contains evidence supporting the DPR's factual
23 determination and that the existence of such evidence countervails the evidence of a fair
24 argument put forth by petitioners. DPR contends that, for that reason, the DPR had no
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1 obligations to analyze petitioners' evidence regarding what DPR calls "hypothetical
2 exposure pathways."

3 The RPIs join in respondent's argument that the DPR's factual determination of
4 "no significant effect" is supported by substantial evidence in the administrative record,
5 including evidence that registration of Sulfoxaflor will bring an environmental benefit
6 rather than any significant environmental effect.

7
8 In CEQA, the fair argument standard is considered when an agency makes a
9 negative declaration or a mitigated negative declaration. If an objector provides evidence
10 of a fair argument of an environmental effect, it is incumbent on the agency to prepare an
11 EIR to provide the evidence for the agency to consider as part of the approval (or not) of
12 a project.

13
14 In contrast, the DPR's certified regulatory program does not contain the negative
15 declaration or mitigated negative declaration process. The DPR's regulatory program
16 mandates a public report containing a "statement of significant adverse environmental
17 effect" (CCR Title 3, § 6254) and requires a written evaluation of each significant
18 adverse environmental point raised during the evaluation process (CCR Title 3, § 6254
19 (b).)

20
21 The holding in *PANNA, supra, 16 Cal. App. 5th*, at pp.246-247 makes clear that the
22 fair argument standard is the standard for the determination of whether an adverse
23 environmental effect can reasonably be expected to occur within the DPR's regulatory
24 program.
25
26

1 During the DPR's evaluation process, the Beekeepers and others submitted
2 scientific studies to support the contention that honeybees and other pollinators may be
3 significantly affected by the registration of Sulfoxaflor. On their face, these raise a fair
4 argument of a significant environmental impact on honeybees and other pollinators.
5

6 The DPR and RPIs cite the court to a number of spots in the Administrative
7 Record in which they assert one can find evidence which refutes the notion of any
8 environmental effect. However, most of those citations are not in the Public Reports. The
9 citations that are to a page in the Public Reports are all statements that do not satisfy the
10 requirement of a written evaluation of a significant adverse environmental point for
11 which a fair argument exists. In the citations to the Public Reports, there were only three
12 citations that were something other than unsupported conclusory statements, mere
13 recitations that the use of a pesticide is limited by its label, or that did not support the
14 point for which they were cited. The first of those, cited by the RPIs for the proposition
15 that petitioners have no evidence of adverse environmental effect based on the
16 persistence of Sulfoxaflor after six years of 18 special local need registrations and
17 emergency exceptions (AR 5031-32), was a response to comments. The second, cited by
18 the DPR and the RPIs at AR 5032-5034, relates to three scientific articles that raise a fair
19 argument that environmental impact may occur. The articles had been submitted to the
20 DPR in comments raising adverse environmental impact points. The third was a response
21 to a comment in the Public Report related to the Siskiyou Special Local Need approval
22 regarding a photo of blooming weeds in an alfalfa field to which honeybees would
23 allegedly be attracted. (AR 6460-6461).
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1 The first citation does not address or evaluate any specific adverse environmental
2 point and is of no help in informing the public of a factual basis to conclude that a fair
3 argument was not raised by the comments.
4

5 The second citation attacks the quality of the opinions and conclusions stated in
6 the three scientific studies that registration of Sulfoxaflor may cause a significant impact
7 on bees and other pollinators. The DPR's response to the comment dismisses the opinions
8 and conclusions in the scientific studies; dismissing them altogether before reaching its
9 conclusion that "[b]ased on DPR's scientific evaluation and mitigation incorporated into
10 the product labels, the substantial evidence continues to support the conclusion that the
11 proposed decision to register will not have significant adverse impacts on non-target,
12 beneficial organisms" (AR 5034). This comment, while sounding a great deal like a
13 mitigated negative declaration, does identify the "mitigations" found in the label but
14 never identifies any evidence upon which it bases its "scientific evaluation".
15

16 The third citation (response #3 to comment #3) is a dismissal of the assertion that
17 blooming weeds in an alfalfa field may attract bees which then would be placed at risk
18 from an application of Sulfoxaflor. The response to comments first cites to the label
19 restrictions as mitigations. While the comment response tacitly admits that bees may be
20 attracted to blooming dandelions, it dismisses the fact of the flowering weeds in the
21 alfalfa field on the basis that the "DPR lacks information regarding what stage in the
22 alfalfa growing season this picture was taken and whether this situation [as depicted in
23 the photograph] is "common place" in one of the ... Special Local Needs counties."
24
25
26

1 Two questions are raised here. First: is the assertion that the “mitigations” found
2 on the pesticides label plus the DPR determination of no significant impacts sufficient to
3 dismiss further consideration of the possibility that bees attracted to flowering weeds in
4 an alfalfa field sprayed with Sulfoxaflor might have an impact on them when considered
5 within the environmental review mandated by DPR’s certified program. Second: is the
6 evaluation of dismissal by the DPR of the scientific studies and the photograph of
7 blooming weeds in an alfalfa field sufficient to dismiss such evidence in its entirety as
8 raising a fair argument of possible environmental impact within the context of the DPR’s
9 certified program.
10
11

12 Addressing the second issue first,³ the court concludes that the scientific studies
13 presented to the DPR via comments was sufficient to raise a fair argument that the
14 registration of Sulfoxaflor may result in environmental impact. The scientific articles are
15 evaluated by the court as evidence coming from experts, not laypeople.
16

17 The dismissal by the DPR of the evidence found in those articles was cursory.⁴
18 The first basis is that the articles lack details. This looks like a classic dispute amongst
19 experts. The scientific studies say “yes” and the DPR scientists say “no.”
20

21 Taking the Public Reports as the EIR functional equivalent, the agency could
22 properly accept the evidence provided by its scientists or RPIs’ scientists to come to the
23

24 ³ In the absence of the studies and the photo, a “mitigated negative declaration” type of Public
25 Report based on no more than the conclusions of DPR’s scientists would likely be adequate if there were
no evidence to raise a fair argument of possible environmental impact.

26 ⁴ “overall, the three cited articles lack details in reporting that do[es] not allow independent
analysis of the result. Further, it is difficult or impossible to compare the level of exposure tested to the
level of exposure that may result in the field...”

1 determination of no significant environmental impact. However, here the Public Reports
2 do not contain such evidence. The only purported evidence consists of a conclusory
3 statement that “DPR’s scientific evaluation and mitigation incorporated into the product
4 labels” is what supports the determination of no significant impact.
5

6 With a fair argument of possible environmental impact and no substantial
7 evidence that the evidence supporting the fair argument is unmeritorious, the Public
8 Reports fail as an adequate EIR functional equivalent. This is a basic CEQA failure. It
9 does not satisfy Guidelines § 15002 (a)(1) in that it does not inform the decision makers
10 and the public about the potential environmental impacts, and it does not satisfy
11 Guidelines § 15002 (a)(4) in that it does not disclose to the public why the agency
12 approved the project after consideration of the potential environmental impacts of the
13 approval of Sulfoxaflor.
14

15 The DPR had determined, even at the time of the initial Public Reports prior to
16 comments, that with the “mitigations” found on the label there is no significant
17 environmental impact in registering Sulfoxaflor.
18

19 This determination is akin to a mitigated negative declaration for a CEQA agency.
20 Notwithstanding that the DPR’s regulatory program does not provide for a negative
21 declaration process, it does not proscribe the equivalent approximating a mitigated
22 negative declaration as the Public Report. Indeed, such is what is found here with the
23 initial Public Reports.
24

25 However, the comments from the public raised a fair argument of the possibility of
26 an environmental impact, which then obligated the DPR to evaluate the potential

1 environmental impacts. And, as discussed above, the Notice of Final Decisions did
2 address the comments raising a fair argument of environmental impact but failed to
3 inform the public of the facts underpinning the rejection of the commenter's concerns.
4

5 Moreover, the response to comments in the Public Reports dismisses the opinions
6 and conclusions for reasons other than evidence contrary to those opinions and
7 conclusions. The expert opinion in the scientific articles is dismissed on the ground that
8 the DPR could not consider the opinions because the underlying data used by the experts
9 was not fully set forth and that it could not evaluate the tested level of exposure in the
10 scientific articles with the level that might occur in the fields.
11

12 The Public Reports, in their responses to comments that dismissed the expert
13 opinions found in the scientific articles, have the effect of disregarding the evidence
14 found there of a fair argument of environmental effect without providing any evidence to
15 countervail and without sufficient evidence to support the complete dismissal of them.
16 An agency is entitled to disregard opinions, but only if the opinion is "clearly inadequate
17 or unsupported." (See *Save Round Valley Alliance v. County of Inyo* (2007) 157 Cal. App
18 4th 1437, 1467-68.)
19

20 In this instance, not only is the cursory dismissal inadequate to lead to a
21 conclusion that the expert opinion found in those articles was so clearly inadequate or
22 unsupportable that those opinions could be dismissed altogether, but it also fails to
23 provide any substantial explanation of why the DPR believes it impossible to compare
24 levels of exposure of lab v. field or that it could not perform an independent analysis due
25 to a lack of detail.
26

1 As the comments did raise a fair argument it was error to dismiss them without an
2 explanation of why the expert opinions were clearly inadequate or unsupported and in
3 addition it was error to not inform the public or the decision makers of the evidence
4 contrary to the expert opinions upon which the DPR relied to discount the evidence of a
5 fair argument of environment effect found in the comments.
6

7 The failure to substantively address the environmental points raised in the
8 comments to the Public Reports in the Notice of Final Decisions is a prejudicial abuse of
9 discretion.
10

11 Cumulative Impacts:

12 DPR takes the position that “it is not reasonably foreseeable to predict or analyze
13 cumulative impacts” that may arise from the registration of Sulfoxaflor. (AR2680,
14 AR2703, AR6055, AR5037)

15 The DPR asserts that it cannot do a cumulative impacts analysis because

- 16 1) it incorporates the consideration of cumulative impacts by its continuous
17 consideration of all pesticides that it has approved,
18
- 19 2) DPR only approves the sale of a pesticide product and is not able to predict if
20 any will actually be sold or used,
21
- 22 3) DPR assesses that it is too speculative to make any prediction regarding use of
23 Sulfoxaflor because the “precise parameters of future pesticide use cannot be
24 predicted”, and
- 25 4) DPR is unaware of chemical interactions between Sulfoxaflor and other
26 pesticides. (see e.g. AR2679-2680)

1 It appears to the court that the DPR is aware of the potential uses of Sulfoxaflor as they
2 are listed on the label. The DPR is also aware of the other pesticides which it has
3 approved for the same uses on the same crops.⁵ While it may not be an easy task and
4 while it may not be ultra-precise, neither a CEQA level of precision nor the level of
5 precision described in *PANNA* for a cumulative impacts evaluation by the DPR has been
6 met in the Public Reports.
7

8 This too is a prejudicial abuse of discretion.
9

10
11 Siskiyou Special Local Needs Approval:

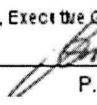
12 The Special Local Needs approval given the Siskiyou Department of Agriculture
13 has expired. While its approval may suffer from the same drawbacks as the general
14 registration of Sulfoxaflor, it is moot.

15 CONCLUSION

16
17 For the above stated reasons the Petition for Writ of Mandate is GRANTED with
18 regard to the registration of the two Sulfoxaflor pesticides approved by the DPR. The
19 Petition with regard to the Special Local Needs temporary approval requested by the
20 Siskiyou County Agriculture Commission is denied as moot.
21

22
23
24
25

⁵ The cumulative impact of using this pesticide instead of a more environmentally harmful
26 pesticide may be a positive result rather than a negative as argued at the hearing, but that discussion and
evidence is not found in the Public Reports.

SUPERIOR COURT OF CALIFORNIA COUNTY OF ALAMEDA	Reserved for Clerk's File Stamp
COURTHOUSE ADDRESS: Rene C. Davidson Courthouse 1225 Fallon Street, Oakland, CA 94612	FILED Superior Court of California County of Alameda 12/03/2021
PLAINTIFF/PETITIONER: Pollinator Stewardship Council et al	Chad Finke, Executive Officer / Clerk of the Court By:  Deputy
DEFENDANT/RESPONDENT: California Department of Pesticide Regulation et al	P. Bir
CERTIFICATE OF MAILING	CASE NUMBER: RG20066156

I, the below-named Executive Officer/Clerk of the above-entitled court, do hereby certify that I am not a party to the cause herein, and that on this date I served the upon each party or counsel named below by placing the document for collection and mailing so as to cause it to be deposited in the United States mail at the courthouse in Oakland, California, one copy of the original filed/entered herein in a separate sealed envelope to each address as shown below with the postage thereon fully prepaid, in accordance with standard court practices.

Edward J. Kiernan
Office of Siskiyou County Counsel
PO Box 659
Yreka, CA 96097-

Gregory C. Loarie
Earthjustice
50 California St.,
Ste. 500
San Francisco, CA 94111-

Marc N Melnick
Attorney General of California
1515 Clay Street
20th Floor, PO Box 70550
Oakland, CA 94612-

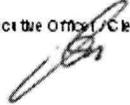
Richard J. McNeil
Crowell & Moring LLP
3 Park Plaza
20th Floor
Irvine, CA 92614-

Chad Finke, Executive Officer / Clerk of the Court

Dated: 12/03/2021

By:

Chad Finke, Executive Officer / Clerk of the Court


P. Bir, Deputy Clerk

CERTIFICATE OF MAILING