

## Certified Regulatory Programs Must Comply with CEQA's Policies and Substantive Standards

A certified regulatory program, which is exempt from some of CEQA's requirements, must still comply with CEQA's core policies and standards, which include considering feasible alternatives and cumulative impacts and recirculating environmental review documents in certain circumstances, the court of appeal held in *Pesticide Action Network North America v. California Department of Pesticide Regulation*, 16 Cal. App. 5th 224 (2017).

**Background.** In 2014, the California Department of Pesticide Regulation approved amended labels for two previously registered pesticides which allowed the products to be used on additional crops. Both pesticides contained a neonicotinoid, a class of pesticides that recent scientific research indicates may be harmful to honey bees. As part of the amended label approval process, the Department prepared a public report for each pesticide that concluded that using the pesticides consistent with the new labels would have no significant adverse environmental impacts. The plaintiff challenged the Department's approval of the two amended labels. **The court's analysis.** The court began its analysis by noting that the Department's registration of pesticides is a certified regulatory program pursuant to Public Resources Code section 20180.5. Certified regulatory programs are exempt from some CEQA requirements, including the obligation to prepare initial studies, negative declarations, and EIRs. The court noted, however, that courts have construed the exemption for certified regulatory programs narrowly and environmental review documents prepared by a certified regulatory program "remain subject to the broad policy goals and substantive standards of CEQA not affected by the limited exemption." The court explained that the Department was still required to comply with CEQA's requirements to consider feasible alternatives and cumulative impacts and to recirculate environmental review documents in certain circumstances. The court first held that the Department had not adequately considered feasible alternatives that would reduce or avoid significant environmental impacts. The Department had not considered alternatives because it concluded that its action would not have any significant environmental impacts. The court found, however, that the Department's conclusion was not consistent with its ongoing reevaluation of the active ingredient in the two pesticides, as required by a Department regulation. Under that regulation, reevaluation is required if a substance "may have caused, or is likely to cause, a significant adverse impact, or that indicate there is an alternative that may significantly reduce an adverse environmental impact." The Department's decision that reevaluation was required under this regulation should have triggered a significance finding under the Department's certified program regulations; which require that environmental documents discuss "any significant adverse environmental effect that *can reasonably be expected to occur*, directly or indirectly, from implementing the proposal." In addition, the court held that the Department's conclusion was not adequately supported by evidence in the record. Although the public reports referred to a checklist evaluation of whether approving the amended labels would have the potential to cause significant adverse environmental impacts, no checklist or other supporting document was included in the record. Second, the court agreed with the plaintiff that the Department failed to adequately consider cumulative impacts to honey bees that may result from approving new uses for the two pesticides. Although the Department's certified program regulations do not require analysis of cumulative impacts, the court held that the Department was required to do so because CEQA requires that all agencies consider cumulative impacts. The court relied on prior cases that held that certified regulatory programs must consider cumulative impacts in environmental reviews that are subject to CEQA, even if the program is exempt from the requirement to prepare an EIR. Finally, the court held that the Department was required to recirculate the public reports after the close of the public comment period. Under CEQA, an agency must recirculate an EIR if the draft EIR was so inadequate and conclusory that public comment on the draft was in effect meaningless, among other reasons. The court applied this requirement to the Department's environmental

review documents. The court explained that the initial public reports were conclusory, with no analysis or explanation of the conclusion that there would be no significant adverse environmental impacts. "Given the Department refrained from explaining its decision until it responded to public comments, recirculation was required to allow meaningful public comment directed at the rationale for its decision." The court remanded with instructions to the superior court to issue a writ of mandate directing the Department to rescind its approvals of the pesticide label amendments.

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