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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

OUR CHILDREN'S EARTH FOUNDATION; MOTHERS OF MARIN AGAINST THE SPRAY; STOP THE SPRAY EAST BAY; CITY OF ALBANY; CITY OF BERKELEY;	No. 34-2010-80000638 (Related Case: No. 34-2010-80000518)

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Petitioners and Plaintiffs,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; A.G. KAWAMURA, in his official capacity as Secretary of the California Department of Food and Agriculture; and DOES 1 through 100, inclusive,

Respondents and Defendants.

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF MANDATE UNDER CEQA

Date: May 11, 2012
Time: 10:30 a.m.
Dept: 33

ASSIGNED FOR ALL PURPOSES TO THE HONORABLE LLOYD G. CONNELLY, DEPARTMENT 33

Our Children's Earth Foundation, Mothers of Marin Against the Spray, Stop the Spray East Bay, City of Albany, City of Berkeley, City of Richmond, City and County of San Francisco, Center for Environmental Health, Californians for Pesticide Reform, Pesticide Watch, Pesticide Action Network North America, Citizens for East Shore Parks, and Stop the Spray San Francisco (collectively, "Petitioners") respectfully submit this reply brief in support of their Petition under the California Environmental Quality Act ("CEQA") filed on April 22, 2010 ("Petition").

I. THE CHANGE FROM ERADICATION TO CONTROL ALTERED THE PROGRAM'S DURATION AND FUNDAMENTAL PURPOSE.

CDFA attempts to defend its after-the-fact change to the Program goal by characterizing it as merely a "modification" or a "reduction" in the Program's scope. But there is no support in the Record for these assertions. To the contrary, CDFA rejected numerous control alternatives before, and after, changing the goal, and in so doing, expressly rejected an opportunity to truly reduce the scope of the Program or lessen its environmental impacts. Moreover, the change to "control" altered the fundamental nature of the Program, rendering much of the PEIR's analysis obsolete. The public had no chance to comment on the change to the Program's purpose or any corresponding changes to its environmental effects. The new control Program will last beyond seven years (i.e., indefinitely), and the Opposition cites no evidence in the Record to the contrary. CDFA's vague statement in the Findings that if it "wishes" to continue the Program beyond seven years, additional environmental review "may be" be necessary is not a limitation of the Program to seven years; rather, it is an admission that CDFA indeed envisions a program lasting beyond seven years, but has not bothered to conduct the necessary environmental analysis in this PEIR.

A. Analysis Of A Seven-Year Eradication Program Cannot Support CDFA's New "Control" Program That Is Likely To Last Longer Than Seven Years.

CDFA's made-for-litigation position that the new control Program will only last seven years is disingenuous. CDFA maintains LBAM will cause "considerable" "long-term impacts to the environment and agricultural production." (AR00111.) CDFA also claims LBAM feed on over 2,000 different plant species and could cause up to $620.6 million in damage to California crops annually. (*Id.*; AR00198.) CDFA even contends that damage caused by LBAM may increase the severity of wildfires. (AR00111.) Yet, in order to defend its shift from eradication, CDFA asserts that its new "control" Program will end in 2017, after which time it will apparently allow LBAM to grow freely and feed at will on California's crops. (*See* Opp. at 20-21.)

This assertion is neither credible nor supported by CDFA's statements in the Record. By abandoning the Program's original goal, CDFA acknowledged that LBAM is established in California and cannot be eradicated. As a result, control measures will likely be "permanent" and

last indefinitely. CDFA's Chief Entomologist and Program Director, Robert Dowell, admitted:

> [I]f an exotic pest becomes permanently established in California, **control measures will be needed forever**. Eradication programs treat the entire pest population with the goal of eliminating it. If successful, the pest is gone and additional, **permanent control measures** are no longer needed.

(AR01694 (emphasis added).) CDFA cannot point to anything in the Record stating otherwise.

The Findings also reveal that CDFA anticipates the Program lasting beyond seven years. (*See* AR00048 ("**Should CDFA wish to continue implementing** the Program's alternative tools beyond the seven-year period analyzed in the existing risk assessments, additional CEQA review **may be** required." (emphasis added)); AR00013-14 ("Since the starting date of the Program will be 2010, the Program could be implemented through 2017 within the scope of the analysis of the risk assessments.").) There is not a single statement in the Findings **confirming** that the Program will definitely end in 2017, or that CDFA will in fact do more review at that time.

CDFA's claim that the Program will end after seven years is further contradicted by its practices for controlling other pests. For example, CDFA's Pink Bollworm Program "has been in continual operation since 1967." (*See* Supplemental Request for Judicial Notice at 2.) Similarly, the glassy-winged sharpshooter first caused severe damage in California in the late 1990s, and CDFA is still "controlling" this insect, too. (*Id.*) CDFA's efforts to "control" other invasive insects have lasted for decades, and there is no reason to think that a program to control LBAM would be any different.

The Findings expressly acknowledge that the studies in the PEIR do not consider the effects of the Program beyond seven years, and the change from eradication to control resulted in CDFA approving a Program reasonably likely to continue indefinitely. (*See* AR00048.) The Opposition's claim that CDFA only approved a "seven-year" Program is therefore nothing more than a request that the Court sign off on its deferral of inevitable environmental review.

City of Santee v. County of San Diego is on point. There, the agency approved a purportedly temporary prison facility to house an overflow of inmates until permanent facilities could be constructed. 214 Cal. App. 3d 1438, 1441-43 (1989). The EIR only analyzed environmental impacts in the short term and noted that if the construction of the new facilities

were delayed, "additional environmental review addressing the impacts of continued operation of the interim facility . . . would be required." *Id.* at 1443-44. Also, in a resolution, the agency stated that the temporary expansion project "shall be removed in a maximum of 7 years from the date the project begins operating." *Id.* at 1446. The Court of Appeal found the EIR invalid because it was "reasonably foreseeable" that the project would continue beyond seven years and thus the failure to consider those future impacts violated CEQA. *Id.* at 1450-55.

Similarly, here, CDFA now argues that it approved a "temporary" Program to control LBAM, but CDFA nowhere limits the duration of the Program. (*See* AR00004-48.) The Record states that a control program is indefinite (AR01694 ("control measures will be needed forever")), and it is reasonably likely that CDFA will use Treatments to control LBAM beyond the seven years studied in the PEIR. It is undisputed that CDFA conducted no environmental review beyond the arbitrary seven-year deadline and, instead, stated only—as did the agency in *City of Santee*—that it "may" do more review after seven years. (AR00014; AR00048.) Deferring environmental review of agency action that is reasonably foreseeable violates CEQA. *City of Santee*, 214 Cal. App. 3d at 1451-55; *see also Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal. (Laurel Heights I)*, 47 Cal. 3d 376, 394 (1988) (invalidating EIR for failure to consider environmental effects of a reasonably foreseeable future phase of the approved project).

B. Changing The Goal Fundamentally Altered The Nature Of The Program.

The PEIR confirms that control is "fundamentally different" than eradication. The expert report relied on by CDFA states: "The goal of the [] Eradication Program is the elimination of breeding populations of the moth from California. **This is fundamentally different than controlling the pest**." (AR01694 (emphasis added).) The Opposition's attempt to escape this admission by referring to Robert Dowell, the Program Director and author of several reports on which the PEIR relies, as merely a "staff person" (Opp. at 18:10-11, 20:14-15) is unpersuasive.

CDFA now argues that "control" necessarily means it will use less pesticides at a lesser intensity, but there is nothing informing the public as to how or by what metric CDFA intends to decrease the intensity of the Treatments (that is, by duration, or by amount, or by frequency, or by treatment area), or if the Program's effects will in fact be less intense (chronic effects of lower

intensity use could be more severe or require different mitigation than effects from short term, higher intensity use). For example, the PEIR's description of how CDFA will apply Treatments is based entirely on eradication. (AR00170-71 (Treatments used until no LBAM detected in area); AR00173 (same).) Now that the goal is only to control, it is unclear whether CDFA will continue to apply Treatments until no LBAM are detected, or apply Treatments at some level indefinitely, or apply Treatments "to lower pest numbers below the economic injury level in the crop areas." (AR01752.) CDFA simply has not disclosed how it will apply and cease Treatments under the new control Program, and its vague assurances that Treatment applications will be "more modest" in a litigation brief (after the Record is closed) do not satisfy CEQA.

Further, the Opposition misstates the Record in suggesting that CDFA eliminated two "tools" due to the changed goal, therefore showing that CDFA approved a "reduced" program. (Opp. at 11:22-25, 17:24-26.) The Record does not attribute CDFA's failure to approve Male Moth Attractant ("MMA") and Aerial Spray to the new objective. Rather, the Findings show that CDFA eliminated MMA because it failed to account for the unacceptable significant cancer risks associated with it (AR00036-37) and that CDFA has only said that Aerial Spray "is infeasible at this time" (AR00028). Clearly fiction manufactured for litigation, there is nothing substantive in the Record to support CDFA's conclusory claim that it approved a program "smaller in scope."

CDFA's reliance on *Dusek* is therefore misplaced, and its characterization of the case is misleading. In *Dusek*, the EIR described the project as demolition of all existing improvements on a parcel, including a historic monument, and construction of new office and retail uses. *Dusek v. Redevelopment Agency*, 173 Cal. App. 3d 1029, 1033-34 (1985). The agency later approved only demolition of the monument, and not redevelopment of the entire parcel. *Id.* at 1035. In rejecting a challenge to the final EIR, the court emphasized that "[r]etention or demolition of [the monument] was the focal point of the EIR," and that "[t]he adverse environmental impact of demolition was expressly recognized and considered and the public input directly concerned that question." *Id.* at 1041. Notably, CDFA omits the following from the holding: "[P]ublic attention was properly focused on demolition of the [monument,] and interested parties were provided with the opportunity to voice their opposition." *Id.* This shows how important it was to the court that

the public was aware of, and had a chance to comment on, the project ultimately approved.

By contrast, here, eradication—not control—was the "focal point" of the PEIR, and public attention was not "focused on" a control program. Unlike in *Dusek*, CDFA changed a central element of the Program without allowing public comment on the change. Also, the project in *Dusek* was concrete and divisible—the agency studied a larger project, but then approved one distinct portion of that larger project. This could not be further from what happened here. Moreover, there is nothing in the Record to support CDFA's assertion that the new control Program is "smaller in scope than the one [] originally proposed." (*See* Opp. at 17:9-16.)

Likewise, CDFA's reliance on *County of Inyo v. City of Los Angeles* falls short. (*See* Opp. at 19:2-20.) First, the proposition for which CDFA cites *Inyo* is dicta. 71 Cal. App. 3d 185, 199-200 (1977). Second, *Inyo* did not involve the change from a smaller program to a larger one, as CDFA suggests. Rather, *Inyo* involved an EIR that described the proposed program in several different and contradictory ways, and the court found the unstable program description violated CEQA by precluding public understanding. *Id.* at 189-91. Because CDFA also confused the public by changing the Program goal, *Inyo* supports Petitioners, not CDFA.

C. CDFA Was Required To Revise And Recirculate The PEIR.

Recirculation is required when circumstances disclose "[1] a feasible project alternative or mitigation measure that clearly would lessen the environmental impacts of the project, but which the project's proponents decline to adopt; or [2] that the draft EIR was so fundamentally and basically inadequate and conclusory in nature that public comment on the draft was in effect meaningless." *Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal.*, 6 Cal. 4th 1112, 1130 (1993) (citations omitted); *see also* CAL. PUB. RES. CODE § 21092.1; CEQA GUIDELINES § 15088.5. Both of these recirculation triggers are present here.

CDFA rejected several alternatives solely or primarily because they did not meet the goal of eradication, including classical biological control, integrated pest management ("IPM"), moth trapping, and quarantines. (*See* AR00072-73; AR01695-704.) When the goal changed to control, CDFA's basis for rejecting these alternatives became moot and these alternatives became "feasible." (*See* AR60908 (classical biological control used successfully to combat LBAM);

AR01699 (biological control used in California to control pests); AR47330 (same); AR68099-100 (same); AR64870 (IPM effective at controlling pests); AR58984 (removal of host and over-wintering sites may effectively control LBAM).) Despite the fact that these alternatives meet the new goal of controlling LBAM, and would lessen the Program's significant impacts to native insects and human and animal health, CDFA nonetheless rejected these control alternatives. As discussed below, CDFA's purported attempt to "reconsider" these alternatives in the Findings is conclusory and inadequate for failure to include the public. CDFA should have recirculated the PEIR and meaningfully considered the alternatives that would meet CDFA's new goal of control.

The PEIR is also "fundamentally and basically inadequate" because it analyzed a program very different from the one that CDFA actually approved. The PEIR focused public attention and all of its environmental analysis and disclosures on a finite Program to eradicate LBAM. (*See, e.g.*, AR00070; AR00114-15; AR01751-52.) The public commented on the eradication Program. (*See, e.g.*, AR01822; AR01935-36; AR02144-45.) By ultimately approving a control Program, CDFA's analysis of, and disclosures about, an eradication Program became largely meaningless. *See Mountain Lion Coal. v. Fish & Game Comm'n*, 214 Cal. App. 3d 1043, 1052 (1989) ("[T]o allow the deficient analysis in the [draft] to be bolstered by a [final document] that was never circulated for public comment . . . would be subverting the important public purposes of CEQA.")

Changing the goal after circulating the Final EIR precluded the public from reviewing critical information about the Program. *See Sutter Sensible Planning, Inc. v. Bd. of Supervisors*, 122 Cal. App. 3d 813, 818 (1981). *Sutter* is instructive. After circulating a final EIR, and in response to numerous critical public comments, the agency in *Sutter* prepared a revised final EIR which included new information regarding various environmental impacts to water, traffic, and pesticide residue. *Id.* 3d at 817. The agency did not, however, properly circulate the revised final EIR to the public. *Id.* at 818. The court held that the failure to circulate the revised final EIR—even though the agency expressly prepared it in response to public comments—violated CEQA. *Id.* at 817-18. The failure to allow public review and input "eviscerate[d] the fundamental requirement of public and agency review," which the *Sutter* court stressed was "the strongest assurance of the adequacy of the EIR." *Id.* at 823 (citation omitted).

CDFA's conduct here was even more egregious. In *Sutter*, the agency at least prepared a revised final EIR, which analyzed the impacts stemming from the changes. Here, CDFA altered the Program goal **in its Findings** without any real analysis or any public review regarding how the change impacted the Program's environmental effects, duration, or available alternatives.[1]

Moreover, there is nothing in the Record to support the claim that CDFA changed the goal "in response to public comments." (*See* Opp. at 18:25-19:1.) The Findings, the only document addressing the change, do not attribute the changed goal to public commentary. (*See* AR00010.) Rather, the Findings expressly attribute the change to two facts: (1) the increasing number and geographic distribution of LBAM; and (2) the sunset of Food & Agriculture Code section 6050.1. (*Id.*) Attempting to alter the Record for litigation, the Opposition now claims these were not the reasons, even though the Findings are quite clear on this point. (Opp. at 24:1-16; *see* AR00010.) This is not surprising because, as both facts were apparent long before CDFA circulated the Final EIR, they do not support CDFA's decision to forego recirculation.[2] (*See* Open. Brf. at 18-19.)

II. THE PEIR IS NOT VALID AS EITHER A PROGRAM OR PROJECT EIR.

The PEIR contains no location-specific analysis and CDFA has performed no subsequent review before starting treatments in a new area. As such, the PEIR is neither a "project" nor a "program" EIR, and CDFA's betwixt or between approach does not comply with CEQA.

A. The PEIR Contains No Discussion Of Site-Specific Impacts.

The PEIR readily admits that CDFA did **not** consider site-specific impacts. (*E.g.*, AR00251; AR00347; AR00486.) Nor did CDFA consider "all types of land use and topography." (Opp. at 25:16.) The PEIR is clear that it analyzed impacts at the "programmatic level" and did not consider specific locations, land-use types, or topographies. (*See, e.g.*, AR00239 ("The noise models provided are programmatic and do not represent actual locations or conditions within the Program Area."); AR00285 ("To provide a basis for the Program's significance determination, the CEQA guidance for *a representative group* of air districts was

[1] CDFA's claim that it did not know eradication was infeasible until after releasing the Final EIR on February 26, 2010 is false. The Record proves CDFA knew it would change the goal to control by February 18, 2010. (AR42375.)

[2] CDFA may not have recirculated the PEIR because it was under pressure to quickly approve the Program and begin treating LBAM. (AR20620; AR16054.) But, as the *Sutter* court recognized, "we may not permit such considerations to eviscerate the fundamental requirement of public and agency review." 122 Cal. App. 3d at 823 (citation omitted).

surveyed." (emphasis added)); AR00347 ("The [human health risk assessment] was necessarily broadly focused, as the statewide extent of the Program precludes characterization of potential effects to specific individuals or populations."); AR00410 ("Results of the [aquatic resources] evaluation are provided at the programmatic level."); AR00445 ("*Representative* special-status wildlife and plant species . . . as well as *representative* common species, were selected for evaluation." (emphasis added)).) This is a clear violation of law because CEQA directs that agencies consider impacts on the specific locations where their actions will occur:

> **Knowledge of the regional setting is critical to the assessment of environmental impacts.** Special emphasis should be placed on environmental resources that are rare or unique to that region and would be affected by the project. The EIR must . . . permit the significant effects of the project to be considered in the full environmental context.

CEQA GUIDELINES § 15125(c) (emphasis added). CDFA cites no authority to support its novel assertion that agencies may avoid considering the impact of their actions on specific locations as long as they consider generic land uses and abstract exposure assumptions. (*See* Opp. at 24-26.)

In the Opposition, CDFA attempts to rely on the testing of the Program Chemicals by the Environmental Protection Agency ("EPA") and Department of Pesticide Regulation ("DPR") and general compliance with "applicable laws and regulations" as a basis for contending that the PEIR adequately analyzed site-specific impacts. (*See* Opp. at 26:12-23, 28:15-23.) But CDFA's reliance on registration and regulations as a substitute for review of site-specific impacts has already been rejected by a California court. In *Californians for Alternatives to Toxics v. Department of Food and Agriculture*, the court **struck down** CDFA's EIR for a prior program because it failed to analyze the impacts of its proposed use of pesticides. 136 Cal. App. 4th 1, 20 (2005). The court rejected CDFA's reliance on agency regulations and pesticide registrations as a substitute for the independent review and analysis required by CEQA, holding that "sole reliance on DPR's registration of pesticides and its regulatory program . . . , is inadequate to address environmental concerns under CEQA." *Id.* at 16. The court even considered and rejected CDFA's argument—that CDFA makes again in this litigation (*see* Opp. at 26:14-18)—that DPR's CEQA compliance relieved CDFA from considering the environmental impacts of proposed pesticide use. *Id.* at 18-20.

Nor does *Sacramento Old City Association v. City Council of Sacramento* help CDFA.

229 Cal. App. 3d 1011 (1991). CDFA cites *Sacramento* for the proposition that agencies need not conduct subsequent site-specific review (Opp. at 25:10-13), but nowhere in the opinion does the court hold this. *See* 229 Cal. App. 3d at 1023-30. Rather, the court held that the agency could *defer* selection of site-specific *mitigation measures* until a later date. *Id.* at 1025-26. This does not mean that agencies may entirely decline to consider site-specific impacts, as CDFA has done.

Under CDFA's reasoning, a developer could prepare an EIR for a project to be located anywhere in the state, so long as the EIR discussed a representative sampling of regional impacts. This obviously would not pass muster under CEQA and, in reality, the PEIR is no different.

B. CDFA Must Follow The CEQA Procedures For Program-Level Review.

CDFA contends it was not required to perform site-specific review because it did not know where LBAM infestations will occur. (Opp. at 24:27-25:13, 28:3-14.) At the same time, CDFA contends it is not required to perform any *subsequent* site-specific review because the PEIR is a "program" EIR. (Opp. at 27.) These contentions are irreconcilable under CEQA.

Contrary to CDFA's characterization, Petitioners do not contend that CDFA was required to both discuss site-specific impacts in the PEIR *and* conduct subsequent site-specific environmental review. (*See* Opp. at 27:22-23.) Rather, Petitioners have pointed out that CDFA had to do one or the other to satisfy CEQA: CDFA must have prepared either an adequate EIR that discussed site-specific impacts *or* a first-tier EIR (that does not discuss site-specific impacts) followed by site-specific subsequent environmental review. CDFA did neither.

CEQA authorizes program EIRs, but "[d]esignating an EIR as a program EIR also does not by itself decrease the level of analysis otherwise required in the EIR." *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 533 (2000). CDFA cannot avoid analyzing site-specific impacts simply because it prepared a "Program" EIR. The authority cited by the Opposition makes clear that CDFA's position is flawed:

> [P]rogram EIRs also can serve another important function: providing a single environmental document that can allow an agency to carry out an entire "program" without having to prepare additional site-specific EIRs or negative declarations. **To effectively serve this second function, a program EIR must be very detailed** . . . it must include **enough site-specific information** to allow an agency to plausibly conclude that, in analyzing "the big picture," the document also addressed **enough details to allow an agency to make informed site-specific decisions within the program.**

MICHAEL H. REMY ET AL., GUIDE TO THE CALIFORNIA ENVIRONMENTAL QUALITY ACT (GUIDE TO CEQA) 637-38 (2007) (emphasis added). The CEQA GUIDELINES also confirm that agencies must perform subsequent environmental review when site-specific actions are not adequately addressed in a program EIR: "Subsequent activities in the program must be examined in the light of the program EIR to determine whether an additional environmental document must be prepared. . . . If a later activity would have effects that were not examined in the program EIR, a new initial study would need to be prepared leading to either an EIR or a negative declaration." CEQA GUIDELINES § 15168(c). The PEIR admits it contains no site-specific review; thus, CDFA cannot rely on the PEIR alone. CDFA must do some level of subsequent environmental review.

California courts routinely affirm that program EIRs are not exempt from the requirement of site-specific environmental review. *See In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings*, 43 Cal. 4th 1143, 1169-73 (2008) (noting lack of specificity in program EIR permissible only if a first-tier EIR to be followed by second-tier review); *Rio Vista Farm Bureau Ctr. v. Cnty. of Solano*, 5 Cal. App. 4th 351, 371 (1992) (holding failure to identify particular project locations was permissible because the EIR was tiered and such locations would be analyzed in "subsequent 'project EIR's'"). The single case cited by CDFA for the proposition that it did not need to undertake site-specific review is inapposite. In *Surfrider Foundation v. California Coastal Commission*, the sole CEQA issue was whether the project was exempt, and the court held the project was exempt from CEQA's requirements. 26 Cal. App. 4th 151, 155-56 (1994). Here, CEQA's requirements indisputably apply and thus *Surfrider* has no bearing on this case. CDFA was not excused from performing site-specific environmental review just because it chose to title its document a "program" EIR.

C. CDFA Could Easily Have Tiered Its PEIR Or Performed Some Sort Of Site-Specific Environmental Review, But Chose Not To Do So.

CDFA's contention that it should be excused from site-specific review because it does not know where LBAM infestations will occur is without merit. (Opp. at 25:5-12, 28:3-14). CEQA has procedures that can address all of CDFA's alleged concerns about unknown LBAM locations. CDFA argues its own "local process" is a substitute for CEQA review (Opp. at 26:1-8, 28:8-9),

but CEQA does not allow agencies to ignore CEQA's requirements for their own convenience.

The PEIR's "local process" is a "Public Outreach and Communication Effort" that consists of providing treatment area maps to local officials, sending notices to area residents, and holding informational open houses. (AR00176; AR01754.) These "notice" procedures do not involve any environmental review, i.e., any consideration of whether the environmental impacts of the Treatment(s) at that specific location, including on sensitive receptors, were adequately analyzed by the PEIR. Indeed, CDFA has not conducted any form of subsequent environmental review at the locations where it has already started applying Program Treatments.

CDFA is wrong to suggest it has no other viable option. CEQA has procedures that agencies may use, such as initial studies, mitigated negative declarations, and second-tier EIRs, to address site-specific impacts not covered by a prior or program-level EIR. CEQA GUIDELINES § 15168(c). Petitioners are not asking the Court to order CDFA to do the impossible. Petitioners ask that CDFA follow up its vastly overbroad program EIR with a procedure for site-specific review authorized by CEQA.

III. CDFA'S ALTERNATIVES ANALYSIS IS WHOLLY INADEQUATE.

The Opposition fails to save CDFA's alternatives analysis, which is inadequate for three independent reasons. First, by calling each Program Treatment an "alternative," CDFA misled the public. Second, CDFA improperly refused to legitimately consider numerous feasible control alternatives. Third, the "No Program" is misleading and not based on substantial evidence.

A. CDFA Misled The Public By Calling The Treatments "Alternatives."

CDFA muddled its alternatives analysis by confusingly referring to the various Program Treatments as "alternatives," and then comparing these so-called alternatives against each other. (AR00167-74.) CDFA contends no confusion occurred (Opp. at 37), but the comments on the Draft EIR prove otherwise. (*See* AR01920 (City of Oakland comment: "[d]efining the individual treatment methods to be used in the eradication program as 'alternatives' is misleading and misrepresents the true nature of the CDFA's eradication program"); AR02047 (San Francisco City Attorney comment that PEIR considered no alternatives "other than the 'alternatives' which constitute parts of the proposed Program"); AR02151 (Earthjustice comment: "[d]efining the

individual treatment methods as 'alternatives' misrepresents the nature of the eradication program").) CDFA completely failed to provide a clear informational document to the public that accurately and fairly disclosed the proposed Program. *See Laurel Heights I*, 47 Cal. 3d at 391.

B. CDFA Did Not Truly Consider Any "Control" Alternatives.

To the extent that CDFA considered actual alternatives (and not just the Treatments), its analysis was cursory and based entirely on the goal of eradication. And, after changing the goal, CDFA excluded the public from further alternatives analysis. Because the alternatives analysis is the heart of an EIR and the point at which public participation is most crucial, these defects alone render the PEIR invalid. *See Sutter*, 122 Cal. App. 3d at 823 (public participation "is the strongest assurance of the adequacy of the EIR"); *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990) ("The core of an EIR is the mitigation and alternatives sections.").

During public comment, many members of the public recommended classic biological control, IPM, mass moth trapping, egg-laying repellent, and quarantines as alternatives to the Program. CDFA summarily rejected these alternatives, in most instances providing the cursory response that these alternatives were not "eradicative." (*See, e.g.*, AR00072-73; AR01695-704; AR01752-53; AR01828; AR02076; AR02100; AR02295-96; AR02324.) After changing the Program goal, CDFA made no effort to involve the public in any further analysis of these previously rejected alternatives. Instead, CDFA superficially mentioned and rejected these control alternatives **in the Findings**. (AR00037-42.) But the Findings were not circulated for public comment and thus CDFA received no public input on its post-Final EIR analysis. Therefore, when CDFA again rejected classic biological control, mass trapping, IPM, egg-laying repellent, and quarantines, public input and review—the "strongest assurance of the adequacy of the EIR"—was completely missing.

To make matters worse, much of CDFA's analysis of these alternatives in the Findings makes no sense. For example, CDFA rejected classic biological control because it could only "reduce the pest's numbers" and therefore did not eliminate the need for other treatments. (AR00040.) But the goal of CDFA's new "control" Program is precisely that—to reduce LBAM numbers. (AR00010-11.) There is no rational argument that classic biological control will not

satisfy the new Program objective, and CDFA does not provide any relevant analysis in the Findings. Accordingly, CDFA's rejection of classic biological control was defective.

Similarly, for IPM, CDFA made the perplexing statement that "control measures are used to lower the pest populations within the defined area below economically damaging levels. . . . These features of IPM are inconsistent with the Program's objectives of containing, controlling, suppressing, and eradicating LBAM. . . ." (AR00037.) In effect, CDFA justified its rejection of IPM because it is only effective at controlling LBAM, even though the primary goal of the Program is now controlling LBAM. CDFA also contends it did not need to consider IPM because it is not a "tool." (Opp. at 31:12-22.) But CEQA speaks of "alternatives" not "tools," and strategies such as IPM are certainly alternatives to the Program. CEQA GUIDELINES § 15126.6. Indeed, by CDFA's own description of it, IPM appears to be perfectly suited for CDFA's control Program: "IPM is not a tool but an approach to controlling pests. . . . the goal is to use one or more control measures to lower the pest populations." (AR01752-53.)

CDFA's stated reasons for rejecting other alternatives are equally absurd. (*See* AR00041 (rejecting trapping of female moths because of concern with urban residents imbibing port-wine lure in traps); *id.* (rejecting quarantines only because they would not suppress or eradicate LBAM and not discussing control); AR00039-40 (rejecting egg-laying repellent despite admitting its effectiveness at protecting crops); AR00037-42 (no discussion of male moth trapping).) CDFA's tardy and half-baked alternatives analysis in the Findings is not the sort of reasoned analysis meant to withstand public scrutiny, review, and comment. Rather, the analysis appears to be flimsy and post-hoc argument purporting to justify not recirculating the PEIR after changing the Program goal. Accordingly, it cannot stand.

C. The "No Program" Is Flawed And Not Supported By Substantial Evidence.

As shown in the Opening Brief, CDFA inflated the No Program's impacts by selecting two of the most harmful pesticides available and assuming an unreasonable amount of private use of those pesticides to combat an insect that has caused no confirmed damage in California. CDFA also failed to consider any increased private pesticide use under the Program, thereby **deflating** the impacts of the Program Treatments. Neither the PEIR, nor the Opposition, provides

any reasoned analysis or evidence to support CDFA's No Program determinations.

1. It Was Unreasonable To Assume Rampant Private Pesticide Use.

CDFA assumed private individuals will use permethrin and chlorpyrifos to fight LBAM, but there is no substantial evidence to support this conclusion. For permethrin, the Opposition takes issue with Petitioners' characterization of the reasons CDFA selected permethrin, but CDFA ignores that the statement in the Opening Brief is nearly a direct quote from the Findings.[3] (*See* AR00019 ("Permethrin was selected as the representative insecticide because it is a broad-spectrum insecticide that will kill LBAM larvae and is readily available.").) CDFA's reference to EPA statistics about permethrin—taken nearly verbatim from the Dowell report—show only that permethrin is "readily available." (AR08593.) This does nothing to support an assumption that homeowners will use permethrin to attack LBAM. As for chlorpyrifos, the PEIR unequivocally includes it in the No Program. (AR00019; AR00167; AR02304.) CDFA is wrong when it states otherwise in the Opposition, and CDFA does not address the more important question of how private individuals could use chlorpyrifos when the EPA has not approved any homeowner products containing chlorpyrifos since 2000. (*See* AR02162; AR01146.) Indeed, homeowners are much more likely to use low-toxicity insecticides, if any at all. (*See* AR58987.)

CDFA tries to downplay the email exchange between its consultants who drafted the PEIR regarding the toxicity of these pesticides by characterizing it as mere disagreement. (*See* Opp. at 33:18-19 (citing AR15487-89).) To the contrary, the emails reveal an attempt by CDFA to manipulate the PEIR's conclusions. CDFA does not even address the most incriminating portion of the exchange where one of the lead toxicologists preparing the PEIR admitted that "the [No Program] assumptions have really overstated the risks." (AR15487.) Only space constraints prevented Petitioners from quoting emails in their entirety and citing all such emails in the Record. (*See, e.g.*, AR32188 (email from Susan Hootkins, senior PEIR consultant, discussing how to ensure that the public viewed the Treatments more favorably than the No Program).)

The PEIR continues in its drastic overstatement of the No Program's impacts by relying

[3] CDFA's citation to three copies of the **same** Dowell report and a single document cited within that report highlights the lack of evidence supporting its position. (*See* Opp. at 33:3-6 (citing AR08593; AR11547; AR61300; AR57243).)

on the flawed Dowell reports. CDFA attempts to deflect criticism of these reports by insisting that it relied upon "several" studies to estimate private pesticide use, but these studies were merely referenced in the Dowell reports, not independently considered by CDFA. (*See* Opp. at 34:10-12.) The University of California surveys cited are outdated estimates of private pesticide use in different areas. (AR61300 (citing Flint 2003; Wilen 2001, 2002).) The first Dowell report used these data, and applied a flawed methodology, to arrive at an increased amount of private pesticide use attributable to LBAM. There is no reason to assume that the three to seven percent of homeowners who supposedly target foliage pests will also target LBAM. (AR61300.) And there is nothing to show that these individuals, who are already spraying for other insects, will use **additional** broad-spectrum insecticide to treat LBAM. (*See* AR58987 ("Although LBAM attacks many types of plants, it is not likely to cause serious damage to them in backyard situations.").)

Trying to resurrect its agricultural study, CDFA cites a University of California report (the "UC Report"). (Opp. at 35:9-12; AR58969.) But the UC Report contradicts CDFA's assertion that farmers will need to use significant amounts of pesticides to control LBAM.[4] (AR58969.) Although the UC Report assumes LBAM might cause a limited increase in pesticide use, the extent of the increase is far less than that predicted by Dowell.[5] For example, CDFA defends its conclusion that Btk use on avocados could increase 700 to 2,838% by stating this change "is so high. . . only because avocado growers ordinarily use almost no Bt on their crops." (Opp. at 36:5-9.) This ignores the UC Report, which states "[LBAM] is likely to be a minor pest [in avocado] as long as natural enemies aren't severely disrupted by broad-spectrum pesticides." (AR58986.) The UC Report also notes that farmers already control existing native pest populations and will therefore be unlikely to use much if any additional treatment to control LBAM. (AR58983-86.)

Even more damaging are the emails authored by CDFA's own environmental consultants, questioning Dowell's assumptions. (*See* AR36856 (concern about saying there is no way to

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[4] CDFA's criticism that Petitioners used a "sound bite" from the Dowell report is beside the point. (*See* Opp. at 35:20-26.) It is undisputed that "[t]he exact number of single-family dwellings that will be treated to prevent or remedy LBAM damage is unknown." (AR61299.)

[5] Contrary to the Opposition's assertion, Dowell's report did assume that all farmers in coastal counties will treat five percent of their crops for LBAM. (*See* AR63789 ("LBAM presence will trigger additional pesticide applications to 5% (1 in 20) acres each year."); AR01768).)

accurately predict usage of No Program chemicals because that would contradict Dowell's report); AR12892 (uneasiness about 5% and 2.5% statistics in the crop study because those estimates "are taken directly from the Australian experience with LBAM, and it is not at all clear that such assumptions are valid in California").) CDFA does not effectively address this evidence that clearly renders the Dowell reports unreliable.

2. CDFA Did Not Consider Increased Private Pesticide Use Under The Various Program Treatments.

CDFA's response to the fact that it failed to consider increased private pesticide use under the Program misses the mark. (Opp. at 36:19-37:2.) The problem is that CDFA admitted private pesticide use would increase under both the Program and the No Program, but it failed to account for this increase when describing the Program's environmental impacts. (*See* AR00164 ("[P]rivate pesticide use component[] of No Program would continue until LBAM eradication is achieved."); AR13986-87 (under the Program, "[h]omeowners who see plant damage will spray or not spray/treat as they choose"); AR13317 (under the Program, "farmers and horticulturalists would have to treat in order to ship their produce if it were infested, under the quarantine regs"); AR00169-74 (no mention of private pesticide use under description of Program impacts); AR00079-88 (same).) This failure to account for increased private pesticide under the Program skewed CDFA's alternatives analysis in favor of the Program Treatments. And now that the goal is control, this omission is even more glaring.

IV. CDFA FAILED TO PROPERLY ANALYZE CUMULATIVE IMPACTS.

CDFA claims its cumulative impact analysis was adequate because the Program will have no incremental impacts and it would have been "difficult" to determine which other projects may have cumulative impacts in relation to the Program. (Opp. at 38-39.) These claims are without merit and characteristic of the approach CDFA took throughout; namely, that CDFA did not need to follow CEQA procedure because doing so would have been "difficult." (*See, e.g.*, AR00606.)

CEQA mandates a two-step process for analyzing cumulative impacts. First, the agency must determine the existing cumulative effect by listing other projects that exist or are reasonably foreseeable. Second, the agency must determine whether "'any additional amount' of effect

[from the project] should be considered significant in the context of the existing cumulative effect." *Cmtys. for a Better Env't v. Cal. Res. Agency (Cal. Res. Agency)*, 103 Cal. App. 4th 98, 120 (2002) (footnote omitted). For step one, "[t]he following elements are **necessary** to an adequate discussion of significant cumulative impacts: (1) Either: (A) A list of past, present, and probable future projects producing related or cumulative impacts . . . , or (B) A summary of projections contained in an adopted local, regional or statewide plan, or related planning document, that describes or evaluates conditions contributing to the cumulative effect." CEQA GUIDELINES § 15130(b) (emphasis added). The failure to use one of these two methods is an abuse of discretion. *San Joaquin Raptor/Wildlife Rescue Ctr. v. Cnty. of Stanislaus (San Joaquin I)*, 27 Cal. App. 4th 713, 739-41 (1994). For step two, "'the relevant question' . . . is not how the effect of the project at issue compares to the preexisting cumulative effect, but whether 'any additional amount' of effect should be considered significant in the context of the existing cumulative effect." *Cal. Res. Agency*, 103 Cal. App. 4th at 120 (footnote omitted).

Here, CDFA failed at both steps. *Kings County Farm Bureau v. City of Hanford (Kings County)* is on point. 221 Cal. App. 3d 692 (1990). As here, the agency in *Kings County* failed at both steps of the cumulative impacts analysis. In step one, the agency listed some related projects, but did not list another 116 planned projects in the region. *Id.* at 723-24. In step two, the agency determined that, because the project would contribute less than one percent to total regional emissions, the project's incremental cumulative impacts were insignificant. *Id.* at 718-19. The court invalidated the EIR based on these two flaws. *Id.* at 724. The court held that failure to list **all** similar projects rendered the EIR defective because it prevented the agency (and the court) from determining whether the project would have cumulatively considerable impacts when considered in combination with those other projects. *Id.* Additionally, the court rejected the "ratio method," by which the agency improperly compared the ratio of the program's impacts to the existing impact to determine cumulative significance. *Id.* at 721.

CDFA's cumulative impacts analysis fails for the same reasons. CDFA contends it did not need to consider cumulative impacts because the Program "has no incremental effect on the environmental baseline conditions." (Opp. at 38:11-12.) This puts the cart before the horse.

CDFA was required to determine the existing cumulative effect **before** determining that the Program had no incremental impacts. *See Cal. Res. Agency*, 103 Cal. App. 4th at 120. Instead, CDFA did precisely what CEQA prohibits: it concluded (wrongly) that the Program has no significant impacts and therefore has no cumulative impacts. For example, CDFA concluded that Twist Ties, Ground Spray, and Aerial Spray would have no cumulative impacts because the LBAM Pheromones were not toxic to bees and native moths could recolonize affected areas. (AR00617-18; *see also* AR00609-10 & AR00619 (finding no cumulative impact from Btk and Spinosad Spray because the amount of pesticide used was small in relation to the average amount sold in California); AR00614 (finding no cumulative impact from Parasitic Wasp Release because the impacts are allegedly insignificant).) But, as courts have noted, this approach "allows the approval of projects which, when taken in isolation, appear insignificant, but when viewed together, appear startling." *Kings County*, 221 Cal. App. 3d at 721. CDFA needed first to consider the combined, cumulative impact of all pesticide spraying and pest control programs on native insects, human health, and other resources, and then make a determination as to whether, in light of the combined pressure on these resources, the Program's incremental impact was cumulatively considerable. The distinction is important, as courts and commentators have noted. *See, e.g., id.*; GUIDE TO CEQA 468 ("[T]he lead agency must *add* the project's incremental impact to the anticipated impacts of other projects.").

CDFA further contends it did not need to either list related projects or use the summary of projections method. (Opp. at 39:5-11.) CDFA is incorrect. *See San Joaquin I*, 27 Cal. App. 4th at 739-41 (holding that failure to use either the list or summary of projections methods was an abuse of discretion). CDFA's error was not harmless; it led directly to the failures discussed above. Because CDFA did not identify known pest control programs and projects (including its own), it was unable to determine what cumulative impacts existed in the Program area. Instead, CDFA was forced to guess at the total amount of pesticides and chemicals used in California and conclude that, in comparison, the use of Program Chemicals seemed relatively minor. (*See* AR00619; AR00614; AR00609-10.) CEQA expressly prohibits this sort of superficial cumulative impacts analysis.

V. CDFA DID NOT PROPERLY DETERMINE ADEQUATE BASELINE CONDITIONS.

Attacking some strawmen, CDFA oversimplifies a few of Petitioners' baseline arguments, and completely fails to address others. The Opposition is unconvincing, and it remains the case that the PEIR does not comply with CEQA's requirement to establish the baseline conditions.

First, it is well-settled that the **existing** environmental setting, not a hypothetical future setting, must be used as the baseline for assessing potential impacts. CEQA GUIDELINES §§ 15125(a), 15126.2(a); *Cnty. of Amador v. El Dorado Cnty. Water Agency*, 76 Cal. App. 4th 931, 955 (1999) (EIR should focus on existing environment, not hypothetical settings). In direct contravention of this requirement, however, CDFA only considered each of the Program Treatments against (1) regulations or (2) the artificially inflated "No Program" alternative, which assumes rampant **future** pesticide use by individuals, farmers, and nurseries in the absence of the LBAM Program.[6] (AR00020-34; AR00167-69; AR00075-78.) The No Program is not an accurate environmental baseline of the existing conditions on the ground, and using it as such is a clear abuse of discretion under CEQA. *See* CEQA GUIDELINES § 15126.6(e) ("The no project alternative analysis is not the baseline . . . ."); *Cmtys. for a Better Env't v. S. Coast Air Quality Mgmt. Dist.*, 48 Cal. 4th 310, 321-22 (2010) (abuse of discretion to "compar[e] the proposed project to what *could* happen, rather than to what was actually happening").

And, where the PEIR purports to discuss the baseline, it is inadequate. As to noise, CDFA insists that "general ambient noise levels are provided," but the page CDFA cites for this assertion contains no such discussion. (Opp. at 40:10-11 (citing AR00236).) Moreover, the PEIR **admits** that "[e]xisting baseline ambient noise levels are not provided." (AR00252.) CDFA attempts to correct this by contending it compared each Treatment to "ambient noise levels," and evaluated whether it would "result in exceedance of state noise guidelines," but without defining these "ambient noise levels," the analysis is completely meaningless. *See Cmtys. for a Better Env't v. City of Richmond*, 184 Cal. App. 4th 70, 89 (2010) (EIR "failed its informational purpose" when it did not "properly establish, analyze, and consider an environmental baseline").

[6] CDFA misstates Petitioners' argument, and CDFA is wrong about Petitioners not raising it below. (*See* Opp. at 34 n.18; AR01835; AR02074; AR02162.) Petitioners assert that the PEIR avoided the baseline altogether by comparing the Treatments and the No Program **to each other**, rather than comparing to existing conditions.

As to surface and groundwater, contrary to CDFA's contention, this argument was raised. (AR01808-11 (questioning assumptions behind surface and groundwater impacts), AR1824-25.) And, although the PEIR provides "some" baseline concentrations of the pesticides used, CDFA's bald assertion that "[e]xisting baseline ambient water quality data . . . are very limited," (AR00486), does not excuse it from providing and considering an adequate baseline. *See San Joaquin Raptor Rescue Ctr. v. Cnty. of Merced*, 149 Cal. App. 4th 645, 659 (2007) (agency's determination fell short of good faith effort at full disclosure because EIR did not clearly identify baseline assumptions and existing conditions). CDFA's conclusions finding no significant impacts do not alter this outcome. *See Cnty. of Amador*, 76 Cal. App. 4th at 952-54 (baseline inadequate even though agency concluded program would cause no impact on water resources).

On the whole, CDFA made no attempt to set forth an adequate baseline. The PEIR therefore fails as an informational document. *See id.*

VI. CDFA'S ENVIRONMENTAL EFFECTS ANALYSES ARE FLAWED AND BIASED.

CDFA argues substantial evidence supports its conclusions that the Treatments will have no significant impacts to human health, ecological health, or aquatic health. (Opp. at 43-47.) But the evidence in the Record directly contradicts CDFA's conclusions and shows that CDFA relied only on speculation and unsupported assumptions. *See* CEQA GUIDELINES § 15384(a)-(b) ("Argument, speculation, [and] unsubstantiated opinion [do] not constitute substantial evidence").

A. The Record Demonstrates That CDFA Guided Its Risk Assessments To A Preordained Conclusion Of No Significant Impacts.

The Record shows that CDFA manipulated analyses and data to ensure the Program had no significant impacts. (*See, e.g.*, AR15487; AR21757; AR16054; AR18638; AR20617; AR20620; AR20824; AR21881; AR23622; AR36856; AR12892; AR13316.) In its Opposition, CDFA attempts to minimize these harmful documents by characterizing them as internal discussions and disagreements, but the documents uniformly show a concerted effort to arrive at a conclusion of no significant impacts. (Opp. at 42:6-24, 45:17-46:1.) For example, CDFA contends that an email where a consultant advised changing Btk exposure data to avoid a significant impact finding for "Child Recreational Park User" is benign because CDFA will not

apply Btk in parks. (*Id.* at 42:11-24, 46:25-26; *see* AR21757; AR21881.) This argument misses the point. CDFA used the Child Park User as a proxy for sensitive receptor populations generally (*e.g.*, the elderly, immuno-compromised persons, etc.). (AR01262 ("[C]hild Recreational Park User represents the second sensitive receptor population evaluated.").) In other words, CDFA concluded that the Program Treatments would have no impacts to sensitive receptors based solely on its conclusions for Child Recreational Park User (and Child Resident). (*Id.*) Therefore, whether or not CDFA will apply Btk in parks is beside the point because sensitive receptors are located everywhere, not just in parks. Even worse is CDFA's blatant effort to ensure that—except for the No Program—no significant impacts would be found. The PEIR should be invalidated for this reason alone. *See Envtl. Def. Fund v. Coastside Cnty. Water*, 27 Cal. App. 3d 695, 706 (1972).

B. CDFA Did Not Adequately Consider Chronic Effects On Human Health.

The Opposition merely restates CDFA's unsupported assumption that, because the Program Pheromones have few short-term (i.e., seven day) impacts to human health, they must also not have long-term impacts. (Opp. at 43:23-28.) But chronic impacts can result from distinct physiological pathways and interactions that are absent in short term exposure scenarios. (AR60832-38.) Despite this, CDFA only relied on seven-day animal tests to conclude that the Pheromones will have no chronic effects on human health. (AR00377-385; AR00363; AR01308-17.) Nothing cited in the Opposition adequately addresses chronic impacts from LBAM Pheromones. (*See* AR50876-82; AR51377; AR57554-68; AR65358-63; AR65910; AR67535; AR70676-77.) CEQA requires more. *See Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs (Berkeley)*, 91 Cal. App. 4th 1344, 1382 (2001) (invalidating EIR and directing agency to "obtain the technical information needed to assess" the nature and extent of potentially significant impacts); CEQA GUIDELINES § 15144 ("[A]n agency must use its best efforts to find out and disclose all that it reasonably can.").

C. CDFA Ignored Evidence That The Program Pheromones And Btk Will Significantly Impact Human Health.

CDFA ignores the evidence that the Program Pheromones will cause dermal sensitization

to humans, and instead repeats the flawed argument that the Program Pheromones will have no significant impacts to human health because the "Health Index" for the Program Pheromones is below 1. (*See* Opp. at 44:16-20; AR00378-81.) But CEQA requires that agencies "consider qualitative factors as well as economic and technical factors." CAL. PUB. RES. CODE § 21001(g); *see also Berkeley*, 91 Cal. App. 4th at 1379-80 (invalidating EIR for failing to consider qualitative impacts from noise exposure in addition to technical standards). CDFA's hyper-technical conclusion that "HIs are lower than 1" ignores the qualitative impacts of human dermal irritation, which the PEIR admits the Program Pheromones have been known to cause. (*See* AR00377-85 (noting "the pheromones may have the potential to cause sensitization reactions from contact," but containing no analysis of resulting impacts of sensitization to human health).)

Nor does CDFA adequately address the reports of adverse impacts from the 2007 aerial spraying in Santa Cruz and Monterey counties. CDFA points to a lack of information regarding whether the spraying caused the reported adverse reactions, but it ignores that DPR and the Office of Environmental Health and Hazard Assessment were concerned enough with the reports to recommend that CDFA undertake a "well designed formalized study and tracking program" to "address the question of causality." (*Id.*; AR09062.) CDFA did not undertake any such study.

The Opposition also fails to address instances of Btk infection in humans that are documented in the very reports on which the Opposition relies. (Opp. at 46:2-17; *e.g.*, AR01240.) As with the Program Pheromones, CDFA's use of a mathematical "Health Index" precluded reasoned consideration of potential health impacts beyond simple toxicity. (*See* AR11395-421.)

D. The Program Will Significantly Impact Native Insects.

It is undisputed that the Program Pheromones will disrupt the mating of native moths as well as LBAM. (AR00450-53; AR60093.) The only evidence CDFA cites to support its conclusion that this mating disruption will not significantly harm native moths is expressly predicated on the assumption that "LBAM is not established in California." (*See* AR60093.) Of course, now that CDFA has admitted LBAM is established in California, CDFA's assumptions that its treatments will be too "localized" and "short term" to significantly impact native insects no longer hold. (*See* AR00010.) CDFA's improper "Supplement to Administrative Record" only

adds further evidence that the Program Pheromones will harm native moths. The U.S. Department of the Interior responded to a request from CDFA in 2007 to concur that CDFA's proposed spraying of LBAM pheromones would not affect certain federally listed plants and animals. (AR70742.) The Department of the Interior refused, stating that:

> We do not concur with your determination that the proposed spraying is not likely to adversely affect Yadon's piperia. Because the CDFA proposes to use a non-specific pheromone that could disrupt the reproduction of an entire Family of moths, and because moths are the principal pollinators of Yadon's piperia, we conclude that over several years of spraying, the loss of this portion of the pollinator community could have an adverse effect on the seed set of Yadon's piperia.

(AR70745.) The Program Pheromones will impact native moths and the plants they pollinate.

CDFA does not meaningfully address Petitioners' argument that Btk and Spinosad Spray will significantly impact native insects. (*See* Opp. at 43-47.) As shown in the Opening Brief, CDFA's conclusions as to Btk and Spinosad Spray's impacts to native insects, including butterflies, fail because CDFA assumed the Treatments will be too short term and localized to impact populations of native insects. (AR00559; AR01610.) Because CDFA now has to treat a widespread and established LBAM population (AR00010), this assumption no longer applies.

E. More Program Chemicals Will Enter Waterways Than CDFA Assumed.

CDFA does not dispute that the Program Pheromones and spinosad may be toxic to aquatic life. (*See* Opp. at 47:11-25.) Instead, CDFA cites to the application method for one of the two Ground Spray Treatments to support its conclusion that the Program will not harm aquatic life. (*Id.* at 47:20-25.) CDFA does not address the application methods for Twist Ties, Ground Spray using Hercon, or Spinosad Spray, all of which may be used in urban areas and therefore subject to the PEIR's flawed runoff analysis. (*See id.*; AR00170; AR00173.) Because more of these chemicals will enter waterways than CDFA assumed, its analysis regarding impacts to aquatic life is flawed. (AR00420-25; AR00490-93.) CDFA's drift analysis is also defective because CDFA arbitrarily cut off the drift model at 800 meters, which was the distance limit of the computer model used. (AR00292.)

VII. THE PROGRAM IS UNNECESSARY AND CDFA'S CONCLUSIONS TO THE CONTRARY ARE NOT SUPPORTED BY SUBSTANTIAL EVIDENCE.

CDFA continues to cling to its unsupported assertions that LBAM is a recent arrival and will cause serious damage to California, despite overwhelming evidence to the contrary.

A. LBAM Has Been In California For Many Years.

CDFA's insistence that LBAM arrived in California in 2006 or 2007 is puzzling, given that even its former Secretary admitted that LBAM may have been in California since 2001 or 2002. (AR02169; AR02178.) In any event, CDFA's purported "evidence" of this fact is nonexistent. The single article CDFA cites actually supports Petitioners. (Opp. at 48:17-25.) This article is critical of CDFA's 2005 trapping survey and suggests it was inadequate to detect an existing LBAM population because most trapping occurred outside the presently known range of LBAM, and where trapping did occur in current LBAM range, "[LBAM] may have been overlooked owing to low trap density (1 per square mile) and/or low density populations." (AR32772-73.) Various other experts and organizations have debunked CDFA's 2005 survey as well. (*See* AR02010 (National Academy of Sciences: "[T]he survey and trapping regimen used in California before 2007 was probably inadequate to determine the presence or absence of LBAM"); *see also* AR02169-72; AR42921-22; AR62910; AR01750.) CDFA cites numerous documents for the proposition that "several organizations and individuals independently identified LBAM for the first time in 2006 or 2007." (Opp. at 48:15-17.) But each of these documents refers to the **same** LBAM discovery, not several different discoveries, as CDFA suggests. (*See* AR00110; AR28843; AR32762; AR32780-81; AR58969.) Different reports of the same instance of alleged LBAM identification is hardly substantial evidence that LBAM invaded California in 2006 or 2007. Moreover, neither the Opposition nor the PEIR address Dr. Carey's comparison between LBAM and the Mediterranean fruit fly, and his conclusion that LBAM could never have spread as quickly as CDFA claims. (AR02169.) CDFA's conclusion that LBAM, a moth that travels an average of 100 meters in its lifetime, could expand from a single location in Berkeley in 2006 to millions of individual specimens in sixteen California counties by 2009 defies logic and reason. (AR60905; AR32781.)

B. There Is No Evidence Of LBAM Damage In California.

CDFA's supposed evidence of damage attributable to LBAM does not fare any better. There is no evidence that LBAM caused any damage in Contra Costa County. CDFA's own internal documents confirm that the larvae in that location were not LBAM and the pest record CDFA references is not in the Administrative Record. (AR37333.) Nor does CDFA adequately explain how unverified comments on a blog about supposed LBAM damage count as substantial evidence. (AR66802.) Dowell's reports are likewise irrelevant because they contain only speculation about possible pesticide use, not documented instances of damage caused by LBAM. (*See* AR11545; AR61298; AR63787.) CDFA's other citations of supposed damage are only speculation about future damage or vague accounts of past damage in other countries. (*See, e.g.*, AR16111 (speculation about future damage); AR28843 (same); AR58969-89 (same); AR32765 (damage in Australia and New Zealand); AR52843 (damage in England); AR57978 (damage in Australia); AR57709 (potential damage in Australia); AR50084 (same); AR58300 (same).)

It is telling that LBAM exists in at least sixteen California counties, yet the only supposed evidence of damage that CDFA can muster is a single unverified blog posting and a single report that its own internal documents reveal was a mistaken LBAM identification. The substantial evidence that does exist is that LBAM has not caused and will not cause damage in California. (*See, e.g.*, AR00197 ("[N]o direct crop damages have been experienced to date in areas subject to existing infestation."); AR01751 (admitting "widespread damage has not yet occurred"); AR02173-74 ("There has been no documented crop damage from LBAM in California. Given the size of the LBAM population and area of infestation, one would expect to see negative effects on crops if LBAM was a significant pest, independent of how long ago LBAM entered California."); AR39162 ("We cite the fact that no damages have been reported to date."); AR40829 (seeking to cite CDFA's own website for evidence of damage).)

VIII. CONCLUSION

For the reasons above, those stated in Petitioners' Opening Brief, and those advocated by petitioners in the coordinated case, Petitioners respectfully request that the Court set aside CDFA's LBAM PEIR and issue a peremptory writ requiring CDFA to fully comply with CEQA.

Dated: May 4, 2012

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