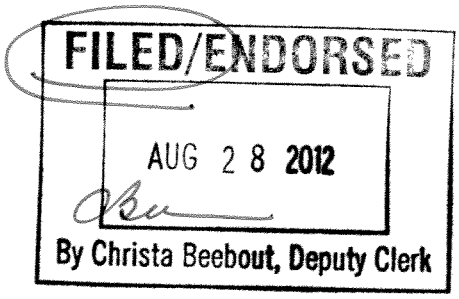

SUPERIOR COURT OF CALIFORNIA

COUNTY OF SACRAMENTO

NORTH COAST RIVERS ALLIANCE, et al., Petitioners and Plaintiffs, A.G. KAWAMURA, Secretary of the California Department of Food and Agriculture, et al., Respondents and Defendants. ABERDEEN ROAD COMPANY et al., Real Parties in Interest	Case No. 34-2010-80000518 RULING ON SUBMITTED MATTER
OUR CHILDREN'S EARTH FOUNDATION; et al., Petitioners and Plaintiffs, v. CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, et al., Respondents and Defendants.	Case No. 34-2010-80000638 RULING ON SUBMITTED MATTER

On March 22, 2010, respondent Director of Food and Agriculture approved a program to control and eradicate the Light Brown Apple Moth ("LBAM Program"). (Administrative Record ("AR") 48.)[1] The Director approved the LBAM Program after

[1] Citations to the Administrative Record in this ruling consist of "AR" followed by the applicable page number(s).

certifying a programmatic environmental impact report ("PEIR") prepared for the program pursuant to the California Environmental Quality Act ("CEQA"). (AR 46.) The group of petitioners led by North Coast Rivers Alliance in Case No. 34-2010-80000518 (collectively "NCRA") and the group of petitioners led by Our Children's Earth Foundation (collectively "OCEF") in Case No. 34-2010-80000638 challenge the adequacy of the PEIR under CEQA and the validity of the approval based the PEIR.

BACKGROUND

The LBAM is a pest endemic to Australia that feeds on a broad range of agricultural, horticultural, and forest plants. When its discovery in Berkeley, California, was brought to the attention of the Department of Food and Agriculture ("Department") in February 2007, the Department undertook a series of actions to carry out its responsibility for protecting the state's agricultural crops and other plant life from injurious pests. (See Food & Agr. Code §§ 3, 403.) In taking these actions, it coordinated with the Animal and Plant Health Inspection Service ("APHIS") of the U.S. Department of Agriculture ("USDA") and various other agencies with overlapping responsibilities.

After a trapping project initiated by the Department in Alameda and Contra Costa Counties identified additional LBAMs, the Department and the USDA each ordered quarantines of Bay Area Counties in April and May 2007 respectively. In addition, APHIS convened a Technical Working Group ("TWG") of biological experts to study and recommend measures for combating the LBAM infestation.

Pursuant to recommendations of the TWG (AR 4822-4826, 58830-58834) and authorization by the California Legislature (Stats. 2007, ch. 190), the Department, in cooperation with APHIS, began emergency actions to eradicate the LBAM in June 2007. The Department also developed an action plan comprised of control and eradication measures and initiated CEQA review of a program of measures to combat the LBAM in 2008. The resulting PEIR was certified by the Director in March 2010 in conjunction with his approval of the LBAM Program.

The program evaluated in the PEIR and approved by the Director is a seven-year statewide program to contain, suppress and eradicate the LBAM and to thereby protect the state's native and ornamental plants, forest species, and agricultural crops from damage by this invasive species. (AR 114-115.) More broadly, the program seeks to protect the nation's food supply, economy and environment and to prevent the LBAM's spread to other states and the neighboring countries of Mexico and Canada. (*Ibid.* See Stats. 2007, ch. 190, § 1 (legislative findings regarding risks posed by LBAM to California's natural environment and agricultural industry).)

To accomplish these objectives and purposes, the LBAM Program takes a systemic approach that would be implemented over several years and that would use a variety of tools to contain, suppress or eradicate the LBAM to the extent feasible in an environmentally safe manner. (AR 4, 115.) The tools, which are evaluated as program alternatives in the PEIR, include measures to disrupt and diminish LBAM reproduction (e.g. mating disruption through pheromone dispersion or the release of sterile male moths in infested areas), biological control through the release of LBAM egg parasite wasps, and two organically approved insecticides (*Bacillus thuringiensis kurstaki* ("Btk") and spinosad ("S")). (AR 71-72, 169-174.)

These alternatives would be used alone or in combination with one or more of the other alternatives, as appropriate to the specific conditions of infested sites, to accomplish the programmatic objectives of containing, controlling, suppressing and eradicating LBAM infestations in an environmentally safe and effective manner. (AR 17-18) During their use, the "no-program alternative," comprised of the Department's regulatory actions of quarantine, inspection and detection, would continue. (AR 2, 18, 72, 115.)

Assessment of the potential environmental impacts of the tool alternatives in the PEIR concludes that the alternatives would have less than significant impacts or potentially significant but mitigatable impacts and are environmentally superior to the no-program alternative. (AR 22-36, 44, 73-74.) The required mitigation measures are

set forth in a Mitigation Monitoring Plan adopted by the Director when he approved the LBAM Program. (AR 48, 52-62.)

ANALYSIS

Modification of Program Objectives

When the Department undertook the environmental review of the LBAM Program in 2008, it proposed LBAM eradication within seven years as the primary program objective. (AR 70, 71, 114-115, 10685-10869.) Although the LBAM had never been successfully eradicated in Australia or other countries where it exists, the TWG and the Department's experts determined that its eradication from California, using tools known to be effective in controlling LBAMs, was feasible in light of the relatively small LBAM infestations in the state at the time. (AR 7, 1751-1752, 4822, 58830.)

During the ensuing two-year course environmental review process, LBAMs spread to more areas of California, and the density of LBAM populations increased significantly. (AR 10.) These increases in infested areas and population densities led the Department to conclude that its resources should be focused on LBAM control and suppression. (AR 10, 43.) Accordingly, the Department shifted the primary objective of the LBAM Program from eradication to containment, control and suppression in areas where current LBAM population densities and the extent of its contiguous spread make eradication infeasible at the time. (AR 10-11.) The Department retained eradication as a program objective for small and discrete LBAM populations within California. (AR 11, 43.)

Petitioners contend that this revision of program objectives fundamentally expands the project from a short-term eradication program with a length of seven years to a long-term control program of indefinite duration. According to petitioners, this program expansion changes the nature and scope of the program, a change which renders obsolete and inadequate the evaluation of the program's impacts in the PEIR. In petitioners' view, CEQA requires additional evaluation addressing the potential long-term and reasonably foreseeable impacts of the expanded program and the circulation

of the additional evaluation for public comment. Petitioners contend that, without such additional evaluation and its circulation to the public, the Department has failed to proceed in accordance with CEQA requirements for an accurate and stable project description (Guideline 15124)[2], for evaluation of the whole of an action (Guideline 15165), and for informed decision-making with public participation. (See *Laurel Heights Improvement Assn. v. Regents of the University of California* (1988) 47 Cal.3d 376, 390-391.)

Contrary to petitioners' contentions, the Department's revision or reordering of the LBAM Program objectives did not expand or fundamentally change the nature of the program. Rather, the revision retained but reduced eradication to a secondary objective and focused on containment, control and suppression as the primary objective. (AR 11, 13.) Aerial releases of pheromones, a mating disruption tool, were eliminated from the tools selected for program implementation, while all other selected tools remain the same.[3] (AR 13, 28.) These remaining tools are to be used for controlling and suppressing LBAM populations without completely eradicating the populations, resulting in a less intensive program which does not differ in kind from the program with a primary objective of eradication. (*Ibid.*) Thus, the revision of primary objectives from eradication to control and suppression reduces rather than expands the intensity and scope of the program and, as the Director reasonably inferred, almost

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[2] The Guidelines are regulations set forth as Sections 15000 through 15387 in Title 14 of the California Code of Regulations to interpret and implement the provisions of CEQA, Public Resources Code section 21000 et seq. Citations to the Guidelines in this ruling include "Guideline" followed by the applicable section number.

[3] The CEQA Mandated Findings on which the Director based his approval of the LBAM Program include the following finding: "CDFA finds that Alternative MD-3 is infeasible at this time. Alternative MD-3 will not be implemented as part of the proposed Program; CDFA will not be making any aerial releases of insect pheromone as a management strategy for the LBAM Program." (AR 28.) Section IV of the CEQA Mandated Findings, titled "Conclusions Regard[ing] Implementation of Proposed Program" reiterates: "CDFA will not be making any aerial releases of insect pheromone as a management strategy for the LBAM Program." (AR 43.) This finding and this conclusion about implementation of the LBAM Program in the CEQA Mandated Findings definitively remove the aerial releases from the scope of the LBAM Program. Absent additional CEQA evaluation by the Department regarding the feasibility of using aerial releases of pheromone as a management strategy, the statements foreclose the Department from reinstating the aerial releases to the LBAM Program.

certainly reduces the environmental impacts of the LBAM Program. (AR 13, 1752. See *Dusek v. Redevelopment Ag.* (1985) 173 Cal.App.3d 1029, 1040)

Further, the Department's revision or reordering of the LBAM Program objectives did not extend the seven-year duration of the program or convert it to a long-term program of indefinite duration. To the contrary, when the Director certified the PEIR and approved the LBAM Program, he expressly recognized that the analysis in the PEIR of potential impacts associated with implementation of the program was based on risk assessments having a duration of seven years. (AR 13, 48.) Given that recognition, he confirmed the seven-year duration of the program and revised its starting date from 2008 to 2010, the date of program approval. (AR 13-14, 48.) He expressly recognized that the LBAM Program can be implemented through 2017 within the scope of the PEIR analysis of existing risk assessments and that additional CEQA review may be required in the event that the Department wishes to continue implementing the program's alternative tools beyond the seven-year period. (AR 48.)

Such additional CEQA review of the LBAM Program in 2017, before any program continuation, is required by the Director's confirmation of the seven-year duration of the program ending in 2017. The experimental nature of the LBAM Program also requires such additional review before program continuation. In developing, proposing and evaluating the program in conjunction with APHIS and TWG, the Department has made educated decisions about the type of tools to use and the length of time to use them, but it has been required to revise its decisions as information regarding the spread of the LBAM and its increased density has become available during the CEQA process. There is no evidence that the Department has been able to identify with any certainty the effectiveness of particular strategies in containing, controlling, suppressing or eradicating the LBAM. Thus, there is no evidence that the Department is now in a position to predict the location, extent or density of LBAM populations in 2017 and thereafter or to determine which tools and strategies to continue using in the LBAM Program. Absent such data, the Department is not now

able or required by CEQA to evaluate any environmental program impacts. CEQA does not require evaluation of the future effects of a project based on speculation. (*Sacramento Old City Assn. v. City Council of Sacramento* (1991) 229 Cal.App.3d 1011, 1025-1026.)

Thus, the Department need not conduct additional evaluation of the impacts of the LBAM Program and circulate the additional evaluation for public comment. As the Director has confirmed, the program will expire in 2017, and additional CEQA review will be required to continue part or all of the program.

Program Alternatives

--Reasonable range

Alternative tools were selected for inclusion in the LBAM Program on the basis of screening criteria to determine whether they could feasibly meet the program objectives, specifically the objective of eradication. (AR 632, 1694.) When program objectives were revised and refocused on control and suppression at the time of PEIR certification and program approval by the Director, alternative tools previously rejected for inclusion were further discussed and the reasons for their rejection was explained. (AR 37-42.)

Petitioners contend that alternative tools excluded from the LBAM Program as not eradicative should have been rescreened for inclusion in the program once control and suppression became the primary program objective. Petitioners point out that, under CEQA, an EIR must include alternatives that could feasibly accomplish most of the basic objectives of a project and could avoid or substantially lessen one or more of the significant effects (Guideline 15126.6(c)); the range of alternatives must be sufficient to permit a reasonable choice among potentially feasible alternatives presenting possible environmental advantages. (See *San Bernardino Valley Audubon Society v. County of San Bernardino* (1984) 155 Cal.App.3d 738, 750.) Petitioners assert that a number of the alternative tools originally excluded from the program as not eradicative may meet these CEQA requirements for alternatives. Petitioners

specifically identify the rejected alternative tools of classic biological control, male mass trapping, female mass trapping, egg-laying repellent, integrated pest management, and quarantine.

Review of the analyses rejecting these alternative tools does not support petitioners' contentions. The Department had substantial reason to reject each of the tools before and after the shift in primary program objective from eradication to control and suppression.

- *Classical biological control* uses a pest's natural enemies to control its numbers below economically damaging levels, but the natural enemies of the LBAM are under research by the Department in collaboration with the USDA and the University of California and have not yet been identified; thus it has not been demonstrated to be capable of feasibly achieving the program's objectives and environmentally superior to the alternatives included in the program. (AR 40, 633, 1699-1700.)
- *Male mass trapping*, the dispersal of large numbers of pheromone-baited traps throughout an infested area, was rejected on the basis of expert assessment that mass trapping is less effective than the alternative tools of pheromone mating disruption and sterile insect technique included in the program, requires a very high density of traps, and has not been demonstrated to be effective. (AR 1702, 1718, 8616-8619.) As a less effective tool than alternative tools included in the program to combat LBAMs, male mass trapping was properly rejected from the range of alternatives selected for the program.
- *Female mass trapping*, the use of traps baited with diluted port wine to catch female LBAMs, was rejected for lack of data to demonstrate its effectiveness as a control tool and concerns about operational limitations of using port wine baited traps in an urban setting. (AR 41, 633, 1702.) Absent evidence of effectiveness in controlling LBAM populations, female mass trapping could not be found to achieve program objectives of control.

- *Egg-laying repellents*, kaolin clay applied to crops to protect them from egg-laying by pest insects, was rejected because it drives off pests and, for polyphageous pests like LBAM which eat almost any kind of plant, the pests would disperse to the nearest untreated plants and begin laying eggs. Thus, the repellents would tend to disperse LBAMs and increase their spread into a larger area and would not achieve program control objectives. (AR 39-40, 633, 1698.)
- *Integrated pest management* is an approach to controlling pests which assesses a pest situation, evaluates the merits of pest management options, and implements a system of complementary management actions to mitigate pest damage while protecting human health, the environment and economic viability within a defined area. (AR 1695.) The goal of an integrated pest management program is to lower the pest population within the defined area below economically damaging levels by using one or more control measures, including biological control, chemical controls such as insect pheromones, and pesticides. (*Ibid.*) The LBAM Program uses an integrated approach that resembles that of an integrated pest management program but is not such a program because it uses tools to eradicate LBAM populations where it is feasible to do so. (AR 38, 1695, 1752-1753.) In addition, an integrated pest management program may use pesticides and toxins that have potentially adverse impacts on biological resources and water quality and thereby conflict with the LBAM Program objective of using methods that can be effectively applied in an environmentally safe and responsible manner. (*Ibid.*) Because integrated pest management does not meet LBAM Program objectives, it was properly rejected from inclusion as an alternative tool in the LBAM Program.
- *Quarantines* impose regulatory restrictions on the movement of LBAMs within and out of an infested area; they are not tools to control, suppress or eradicate LBAM populations and thus are not properly included in an alternative tool in the LBAM Program. However, quarantines were instituted before the LBAM Program was

proposed, constitute part of existing baseline conditions, and continue as part of the no-program alternative. (AR 41, 1703.)

In sum, petitioners have not identified any error by the Department in rejecting the foregoing tools from inclusion in the LBAM Program when the program primary objectives shifted to control and suppression. The Department rejected these tools because they conflict with the program objectives, lack data demonstrating their effectiveness in controlling LBAM populations comparable to the established effectiveness of alternative tools included in the LBAM Program, and/or they are operationally impractical. Thus, the rejected tools are not properly part of a reasonable range of program alternatives to be considered by the Department under CEQA.

--No-program alternative

Pursuant to CEQA requirements, the discussion of alternatives in the PEIR includes an analysis of the environmental impacts of a no-project or no-program alternative and compares those impacts with the environmental impacts of the proposed alternative tools. (AR 72, 167, 627, 635. See Guideline 15126.6(e).) As described by the PEIR, the no-program alternative consists of existing conditions and uses without LBAM Program tools to control, suppress and eradicate LBAM infestations; quarantine, detection and inspection activities and corresponding trade restrictions by other states and countries would continue without applications or releases of pheromone, insecticides, sterile moths or parasitic wasps on an areawide basis by the Department or the USDA. (AR 18, 167.) Analyzing the impacts of these no-program baseline activities, the PEIR finds that LBAM infestations would increase in existing areas and spread to surrounding areas with adverse consequences for agriculture and a variety of environmental resources. (AR 18-22, 167-169, 627, 635.)

In particular, the PEIR relies on studies by the Department and the University of California to conclude that, in the absence of an integrated treatment program like the LBAM Program, homeowners, nurseries and agricultural operations may respond to a known and publicized LBAM infestation by increasing their use of approved

pesticides. (AR 72, 167-169, 1754-1767, 58969, 58980, 61300, 63788, 63790-63811.) Petitioners challenge this conclusion, contending that the technical studies on which it is based are flawed in a number of respects. As set forth clearly and thoroughly at pages 33 through 35 of respondents' opposition brief in Case No. 34-2010-80000518 and pages 34 through 37 of respondents' opposition brief in Case No. 34-2010-80000638, petitioners' contention is based on misinterpretation and distortion of the studies; the studies provide substantial evidentiary support for the conclusion that pesticide use would increase under the no-program alternative.

Petitioner NCRA also challenges two other conclusions in the PEIR regarding the no-program alternative by misreading or disregarding the evidentiary basis for the conclusions. NCRA disputes a conclusion in the PEIR that the no-program alternative would allow a significant increase in agricultural crop damage by the LBAM, but NCRA fails to acknowledge substantial evidence referenced in the PEIR that many agricultural crops are known to serve as LBAM hosts, including many fruits, vegetables, and nuts produced in California. (AR 182, 678-680. See also AR 1846, 1886.) NCRA also disputes a conclusion in the PEIR that the no-program alternative would lead to an increase in wildfire risk by allowing LBAM infestations to damage forest trees and plants already stressed by urbanization, pollution, insects and diseases, and thereby increasing the fuel for wildfires. (AR 224, 2388, 2409.) This conclusion is solidly based on a letter statement submitted to the Department by the Chief Deputy Director of the Department of Forestry and Fire Protection. NCRA's attempt to cast doubt that LBAMs would damage forest trees and plants fails in light of clear evidence that the LBAM has a large range of shrub, woodland and forest hosts in other countries. (AR 672-677, 2408.)

Contrary to petitioners' contentions, the conclusions in the PEIR regarding impacts of the no-program alternative are supported by substantial evidence.

Program EIR and Site-Specific Impact Analysis

Contrary to petitioners' contentions, the environmental impacts of the LBAM Program have been properly assessed under CEQA in a program EIR pursuant to Guideline 15168, and the program may properly be implemented on specific sites without site-specific environmental review. Guideline 15168(a)(4) permits the preparation of a program EIR for a series of individual activities that can be characterized as one project, are carried out under the same authorizing statutory or regulatory authority, and have generally similar environmental effects that can be mitigated in similar ways. Further environmental review of the individual activities is not required where the individual activities follow uniform procedures and criteria, and where the environmental impacts of the individual activities are adequately addressed in the program EIR.

As previously indicated, the LBAM Program approved by the Director is a systematic statewide program using five alternative tools to protect California's agriculture and environment from damage by the LBAM in an environmentally safe and responsible manner. (AR 4, 163-164.) The program represents an exercise of the Department's statutory and regulatory responsibility and authority to take actions necessary to the protection of the state's agricultural crops and other plant life from injurious pests. (See Food & Agr. Code §§ 3, 403.)

The five alternative tools -- sterile insect technique, mating disruption with pheromones using twist ties, mating disruption with pheromones by ground application, organically approved insecticides Btk and S, and egg parasite wasp releases -- are used alone or in combination at any site where trapping has detected LBAMs in accordance with criteria prescribed by the Department. (AR 4-5, 163.) Upon such detection, the site is brought within the program, and treatment is carried out in accordance with the Department's directions for the use of the five tools. (AR 4-5, 72, 163.) Although the use of a particular tool or combination of tools at a specific site of LBAM infestation depends on the site conditions, the Department's directions govern.

(AR 71.) For example, mating disruption with pheromone infused twist ties are to be used in small isolated infestations more than five miles from a generally infested area, while mating disruption with pheromones applied to the ground may be used for trees and shrubs in residential yards. (AR 170.) The organic insecticides Btk and S may not be applied within a one-mile buffer zone around a known population of federally listed moths or butterflies. (AR 466.)

The individual and cumulative impacts of the five tools on agricultural and horticultural resources, land uses, ambient noise, air quality, human health, aquatic and terrestrial resources, water resources, ecological health and climate change are evaluated in the PEIR. (15, 74-88.) The results of this evaluation indicate that use of the five tools would have no potentially significant impacts or that their impacts could be mitigated to a level of insignificance with appropriate measures. (73-75, 635-636.) Petitioners have provided no basis for a conclusion that application of the tools to any specific site, consistent with the Department's directions, might have impacts other than those analyzed in the PEIR.

Impact Analyses

Petitioners contend that substantial evidence in the administrative record does not support the analyses in the PEIR of the potential impacts of pheromone infused twist ties, ground application of pheromones in Hercon Bio-Flake and SPLAT, and applications of the Btk and S insecticides on human health and wildlife. Petitioners' contentions are refuted by the thorough analyses in the Human Health Risk Assessment and the Ecological Risk Analysis performed for the PEIR (AR 347ff. 378-381, 497ff.) and additional analyses performed by the Department of Fish and Game (AR 42385-42398) and the Office of Environmental Health Hazard Assessment (AR 15989). These analyses provide overwhelming evidence that neither pheromone infused twist ties, ground application of pheromones in Hercon Bio-Flake and SPLAT, nor applications of the Btk and S insecticides pose a risk to humans (including sensitive populations) or wildlife.

Similarly, petitioners' claims that the PEIR's analysis of the cumulative impacts of the LBAM Program failed to comply with CEQA requirements largely ignore the analysis in the PEIR properly discussing and determining that the cumulative impacts of the program tools were not cumulatively considerable.

CONCLUSION

The petitions in Case No. 34-2010-80000518 and in Case No. 34-2010-80000638 are denied. Counsel for respondents in these two cases are directed to prepare a judgment consistent with this ruling pursuant to Rule 3.1312 of the California Rules of Court.

Dated: August 28, 2012

SUPERIOR COURT OF CALIFORNIA COUNTY OF SACRAMENTO

LLOYD G. CONNELLY
Judge of the Superior Court

CERTIFICATE OF SERVICE BY MAILING (C.C.P. Sec. 1013a(4))

I, the Clerk of the Superior Court of California, County of Sacramento, certify that I am not a party to this cause, and on the date shown below I served the **RULING ON SUBMITTED MATTER** by depositing true copies thereof, enclosed in separate, sealed envelopes with the postage fully prepaid, in the United States Mail at 720 9th Street, Sacramento, California, each of which envelopes was addressed respectively to the persons and addresses shown below:

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I, the undersigned Deputy Clerk, declare under penalty of perjury that the foregoing is true and correct.

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

Dated: August 29, 2012

By: C. BEEBOUT, 
Deputy Clerk