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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)

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; STOP THE SPRAY SAN FRANCISCO,

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' OPENING 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 HONORBALE 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 opening brief in support of their Petition under the California Environmental Quality Act ("CEQA") filed on April 22, 2010 ("Petition").

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I. INTRODUCTION

The California Department of Food & Agriculture ("CDFA") intends to wage a statewide war against the Light Brown Apple Moth ("LBAM") by spraying pesticides to kill LBAM, widely distributing synthetic moth pheromones to confuse LBAM mating, releasing millions of parasitic wasps to destroy LBAM eggs, releasing millions of irradiated sterile moths from airplanes to prevent LBAM reproduction, and luring moths into toxic pesticides using LBAM pheromones. CDFA's aggressive attack is misguided, because this small Australian-native moth has been in California for thirty years (if not longer), causes little damage to plants (if any), and is readily controlled by natural predators, parasites, and integrated pest management techniques.

CDFA began its offensive in 2007, by aerially spraying synthetic moth pheromones and unknown chemical additives over portions of Santa Cruz and Monterey counties. Remarkably, CDFA aerially sprayed these populated areas without conducting the environmental review required by the California Environmental Quality Act ("CEQA").

Having since been ordered by two courts to comply with CEQA's mandate before pursuing chemical warfare against LBAM, CDFA has prepared what it calls a programmatic environmental impact report ("PEIR") for the "Light Brown Apple Moth Eradication Program" ("Program"). In doing so, CDFA misled the public and thwarted the opportunity for meaningful review of its battle against LBAM. The PEIR only considers a program to *eradicate* LBAM. CDFA insisted that LBAM eradication was feasible and dismissed many comments questioning this conclusion. CDFA also dismissed many alternatives proposed by the public that would control, rather than eradicate, LBAM. But, after circulating the Final EIR, CDFA abruptly reversed course, announced that eradication was not feasible, refused to reconsider any dismissed control alternatives, and certified the PEIR without updating its environmental analysis to reflect the new Program objective or allowing additional public comment. In a classic bait and switch, CDFA presented one program to the public but approved a significantly different program after the public review period had ended.

CDFA neglected to abide by CEQA's requirements in many other ways as well. For example, CDFA omits any environmental analysis regarding the specific places where the

chemicals, pheromones, wasps, and irradiated moths will be launched, instead relying on the title "programmatic EIR." But a programmatic EIR requires subsequent, more detailed site-specific analysis, and CDFA has made it clear that it intends to do no further environmental review before deploying the various chemicals, pheromones, wasps, and irradiated moths anywhere in the nearly statewide Program "area." The PEIR is also invalid because the alternatives analysis is misleading and contains many flaws, including baseless (and ridiculous) assumptions regarding private party pesticide use absent the Program. CDFA failed to analyze the chronic effects on humans, or the effects on native insects and animals, of the synthetic LBAM pheromones and pesticides it will use. And, CDFA did not even try to consider the cumulative impacts of the Program with other projects that utilize similar chemicals and pheromones.

Further, the Administrative Record demonstrates that CDFA not only ignored comments from the public and other agencies regarding the deficiencies in the PEIR, but CDFA also dismissed comments and serious concerns raised by its own environmental consultants. The Record reveals that the analysis CDFA presents in the PEIR is entirely ends-oriented; multiple documents include blatant admissions by CDFA's consultants regarding manipulation of risk assessments to arrive at "no significant impact" findings in the extremely compressed time period that CDFA allotted for preparation of the PEIR. For all of the reasons discussed herein, Petitioners respectfully request that CDFA's defective PEIR be set aside.

II. STATEMENT OF FACTS

A. The Light Brown Apple Moth

LBAM is a small lepidopteran moth native to Australia. (AR67541.)[1] LBAM also has lived in New Zealand and Hawaii since at least 1891 and 1896, respectively. (*Id.*; AR02082) LBAM is a "leafroller" and, like other leafroller moths, LBAM caterpillars create protective shelters around themselves by rolling leaves around their bodies. (AR67543; AR60905.) LBAM larvae rely on the structural integrity of these leaf cocoons for protection, and as a result the larvae generally do not defoliate plants and cause only superficial leaf damage. (AR60905.) Adult LBAM do not feed and cause no plant damage. (AR42921.)

[1] All references to the certified Administrative Record ("AR") are cited as: AR[bates number].

LBAM do not reproduce at a rapid rate. (AR60905.) While a female typically lays about 150 eggs during its one to two week lifespan, most eggs are eaten by predators or infested by parasites and never reach maturity. (*Id.*) LBAM also do not travel great distances; adult LBAM generally do not travel more than 100 meters from the plant on which they hatched. (AR60905.) LBAM populations therefore grow and spread geographically at a slow rate. (*Id.*; AR02169.)

LBAM is considered to be a pest primarily as a result of New Zealand's experience in the 1980s and 1990s. (AR60907.) During this time, New Zealand farmers used organophosphate insecticides[2] against LBAM and other insects. (*Id.*) LBAM quickly developed resistance to these pesticides, and the pesticides had the unintended effect of killing many natural LBAM predators. (AR67546.) As a result of heavy and widespread use of organophosphates, LBAM populations expanded, and LBAM caused significant damage to some New Zealand crops. (*Id.*) Beginning in the late 1990s, however, New Zealand farmers halted the use of organophosphates and instead adopted an integrated pest management ("IPM") approach. (AR60909.) The IPM program used beneficial predators and targeted applications of less-toxic pesticides to control LBAM populations. (AR67546.) Without organophosphates, the natural balance of LBAM and its predators was restored and LBAM numbers remained low. (*Id.*) LBAM now causes little crop damage there and is not considered a significant agricultural pest. (AR60908.)

In many respects, California and New Zealand are similar – they have similar climates and grow similar crops. (AR67541; AR60903-04.) California also has native populations of leafroller moths and their natural predators. (AR60911-12.) Because of these similarities, a biological control or IPM program modeled after New Zealand's could effectively control LBAM in California. (AR60913; AR67547-48.) An expert recently noted that, "[m]any fruit crops in California already receive control measures for native and introduced leafrollers, and these tactics may prove to be effective for [LBAM] without a great deal of modification." (AR67548.)

B. CDFA's "Emergency" Aerial Spraying Of LBAM Pesticides

In late 2007, CDFA began what it called an "emergency" effort to eradicate LBAM.

[2] Organophosphate pesticides act by disrupting nerve function of insects and are highly toxic to nearly all insects, as well as humans and many other animals. (AR60907.)

Although many experts believe LBAM has been living in California for up to 30 years, CDFA claimed LBAM had only recently entered California after a retired entomologist found LBAM in his backyard in Berkeley in 2006. (AR00068.) Deeming this so-called discovery an emergency, CDFA sprayed untested LBAM pheromones over Santa Cruz and Monterey counties using crop duster airplanes, all without conducting any environmental review. (*Id.*) Shocked residents and concerned citizens immediately filed two CEQA lawsuits challenging CDFA's aerial spraying. (AR60915.) CDFA argued that the spraying was a necessary emergency measure exempt from CEQA and, in any case, unlikely to have any significant environmental effects. Two courts disagreed with CDFA, granting motions for preliminary injunction and ordering CDFA to prepare an EIR before conducting any further aerial spraying of LBAM treatments. (*Id.*)

After the spraying, many Santa Cruz and Monterey residents complained of adverse effects, including shortness of breath, dizziness, headache, nausea, and vomiting. (AR61268.) Residents also experienced psychological trauma from being aerially sprayed with untested, synthetic moth pheromones and other chemicals without their consent. (AR06979-89.) And the adverse effects were not confined to humans; residents also reported a large number of dead sea birds floating in coastal waters. (AR08571; AR01775.) After investigating the sea bird deaths, the California Department of Fish and Game admitted it could not say definitively that the spraying did not cause the deaths. (AR08571.) CDFA has itself admitted that the effects of LBAM pheromones on animals and humans are not well understood. (AR01207-08.) In particular, the effect of chronic exposure to the pheromones is unknown. (AR00384; AR01209.)

C. The Draft EIR For LBAM Eradication Using Eight Treatments

Under court order to prepare an EIR, CDFA devised a "program" to continue its attack on LBAM. CDFA defined the goal of its program as the "eradication" of LBAM from California. (AR00163.) It defined the program area as "all portions of the state [of California] in which climatic conditions are suitable to the LBAM" (the "Program Area"). (*Id.*) According to CDFA, this includes the entire state except a few desert and mountain areas. (*Id.*) CDFA provided nothing adequate to show where in the vast Program Area eradication activities will occur. (*Id.*)

CDFA does not dispute that it has not analyzed the impacts of its eradication activities in the specific environments where the activities will occur. (*See, e.g.*, AR00486; AR00456-57; AR00275.) Instead, CDFA merely labeled its Draft EIR "programmatic," describing it as a "screening level" document that did not undertake "site-specific" analyses of the Program's environmental impacts. (AR00068; *see, e.g.*, AR00251; AR00486.)

To achieve its eradication goal, CDFA proposed eight treatment options (confusingly labeled as "alternatives"). According to CDFA, it would take "3 to 5 years" to eradicate LBAM using these treatment options. (AR00163.) Based on this assumption, CDFA purported to study the effects of these treatments on the environment for a seven-year period. (AR01257; AR01788.) The eight treatment options proposed in the Draft EIR include:

- **MD-1 ("IsoMate Twist Ties")**: involves deploying plastic twist ties infused with the synthetic LBAM pheromone[3] IsoMate. (AR00170.) Each twist tie contains the active ingredient pheromone in a porous plastic matrix designed to release the pheromone slowly. (AR00543.) IsoMate does not kill LBAM, rather it attracts male LBAM to the pheromone lure, thus reducing the probability that the male will find a mate. (AR01140.) CDFA proposes deploying roughly 250 twist ties per acre in a 200-meter radius around each detected LBAM population. (AR00170.) The areas where CDFA may deploy twist ties include private property and residential areas. (AR01754.)
- **MD-2 ("Hercon/SPLAT Ground Spray")**: consists of spraying the synthetic LBAM pheromone mixtures Hercon Bio-Flake ("Hercon") and "SPLAT"[4] from guns in trucks or backpacks. (AR00170.) Hercon consists of a synthetic LBAM pheromone embedded in a plastic laminate polymer flake (CDFA later changed this use to a biodegradable polymeric flake). (AR01488; AR03459.) SPLAT is a mixture of synthetic pheromone and "biologically inert" materials intended to provide for slow pheromone release. (AR01502.) CDFA proposes spraying Hercon and SPLAT on trees and shrubs in residential yards and on telephone poles and trees on public property alongside roadways.

[3] A pheromone is a chemical signal that triggers a natural response in another member of the same species.

[4] IsoMate, Hercon, and SPLAT are collectively referred to as the "Program Pheromones."

(*Id.*) CDFA would enter private property to apply the Hercon and SPLAT to residential vegetation. (AR64031.)

- **MD-3 ("Hercon/SPLAT Aerial Spray")**: consists of spraying either Hercon or SPLAT from a Beechcraft A90 plane flying at a height of 300 to 500 feet. (AR00171.) The Draft EIR provided no information about the location of any aerial spraying, other than that it would occur in "undeveloped" areas. (*Id.*) After many comments complained about this lack of specificity as to the location of aerial treatments, the Final EIR contained a series of maps "where aerial application of pheromones *might* occur" but also stated that exclusion of an area on these maps does not guarantee that the area would not be treated with Hercon/SPLAT Aerial Spray. (AR01753-66 (emphasis added).) Elsewhere, the PEIR defines the treatment area for aerial applications as a 1.5-mile radius around each location where an LBAM is detected. (AR00171.)
- **MMA ("SPLAT and Permethrin Spray")**: the "male moth attractant" treatment, involves using SPLAT to attract male LBAM and then the pesticide permethrin to kill the moth. (AR00171.) CDFA would apply the pheromone-pesticide mixture to street trees and utility poles using either a caulk gun, backpack-based gun, or truck-based gun. (*Id.*) CDFA contemplates application of SPLAT and Permethrin Spray in residential areas without regard for population density. (*Id.*)
- **Btk ("Btk Spray")**: involves application of the pesticide Bacillus thuringiensis kurstaki ("Btk") using backpack or truck-based spray guns. (AR00173.) Btk is a bacterium that contains proteins toxic to certain insects, including moths, butterflies, beetles, and flies. (AR01235.) Btk Spray is slated for use anywhere CDFA concludes "heavier larval populations" of LBAM exist. (AR00173.)
- **S ("Spinosad Spray")**: involves application of the pesticide spinosad using backpack or truck-based spray guns. (AR00173.) Spinosad is an insecticidal mixture derived from the soil bacterium Saccharopolyspora spinosa that is toxic to a wide variety of insects. (AR01228.) Spinosad Spray is also proposed for use wherever "heavier larval populations" of LBAM exist. (AR00173.)

- **Bio-P ("Parasitic Wasp Release")**: consists of releasing Trichogramma wasps known to parasitize LBAM eggs. (AR00174.) CDFA would release roughly 1 million wasps per square mile by attaching wasp pupae in host LBAM eggs to index cards, which would be attached to foliage where LBAM is detected. (*Id.*) CDFA proposes Parasitic Wasp Release anywhere CDFA makes "moderate to heavy LBAM detections." (*Id.*)
- **Sterile Insect Technique / SIT ("Irradiated Moth Release")**: involves the aerial release of LBAM that have been sterilized using heavy doses of radiation. (AR00174.) CDFA believes SIT will interfere with LBAM mating by causing wild LBAM to mate with sterilized LBAM, rather than other viable wild moths. (*Id.*) CDFA proposes releasing at least 20 million sterile moths per day at approximately 500,000 moths per square mile. (*Id.*) CDFA would release the moths using a Beechcraft twin engine A90, flying at about 2,000 feet. (*Id.*) CDFA characterizes SIT as the "primary" eradication tool, when available. (*Id.*) Irradiated Moth Release may occur anywhere in the Program Area. (*Id.*)

D. Comments Identified Numerous Deficiencies In The Draft EIR

In response to CDFA's Draft EIR, numerous agencies, organizations, and individuals – including Petitioners – submitted written comments and spoke at public hearings expressing concerns and alerting CDFA to numerous CEQA deficiencies in the Draft EIR, some of the most egregious being that the Draft EIR:

- Failed to disclose where, when, how, and in what combination CDFA would employ its arsenal of Program Treatments;
- Failed to consider a reasonable range of alternatives or to consider feasible alternatives in sufficient detail;
- Failed to consider the cumulative impacts of the Program with other related past, present, and future projects;
- Failed to adequately analyze the Program's impacts on human health and ecological health because CDFA's analyses were insufficient and flawed;
- Failed to disclose the inert ingredients of the Program Chemicals; and
- Improperly assumed that eradication of LBAM was necessary or feasible (tellingly, to date, there is no reasonable or credible evidence that LBAM has caused damage to crops in California or that eradication of the moth is possible).

(*See* AR01798-3449.)

Most of the comments fell on deaf ears, and, on February 26, 2010, CDFA released the final LBAM Program EIR ("Final EIR") that consisted of cursory responses to public comments and some immaterial revisions to the Draft EIR. (AR01725-3517.) In the Final EIR, CDFA approved statewide use of IsoMate Twist Ties, Hercon/SPLAT Ground Spray, Hercon/SPLAT Aerial Spray, SPLAT and Permethrin Spray, Btk Spray, Spinosad Spray, Parasitic Wasp Release, and Irradiated Moth Release (collectively referred to as the "Program Treatments").[5]

E. CDFA Admits Some Errors (But Ignores Many Others) In The Final EIR

Two changes CDFA made in the Final EIR highlight the uncertainties surrounding the use of the Program Chemicals among human populations and call into question CDFA's assertion that "[t]he safety of the biological and chemical pesticides proposed for use in the LBAM Eradication Program was evaluated in the [human health risk assessment]." (AR01771.) First, CDFA admitted it had miscalculated the risk to children from permethrin by using an inaccurate cancer risk factor. (AR01747.) When CDFA applied the correct risk factor, the permethrin exposure from SPLAT and Permethrin Spray exceeded acceptable risk levels for children. (*Id.*) Thus, in the Final EIR, CDFA conceded that it had "withdrawn the Male Moth Attractant Alternative from the list of potential tools to be used in the LBAM eradication Program." (*Id.*)

CDFA also revised the Program Treatments to preclude application of IsoMate, Hercon, or SPLAT at schools. (AR01748.) CDFA had concluded that these Program Pheromones posed no threat to humans based on its flawed and conclusory analysis. But, after releasing the Draft EIR, CDFA realized that the Department of Pesticide Regulation listed the Program Pheromones on its *List of Pesticide Products Prohibited from Use in Schools and Child Care Facilities*. (*Id.*) As a result, CDFA had to change its Program to exclude these chemicals from use near children.

F. CDFA's Radical Change On The Day It Certified The Program EIR

After issuing the Final EIR, CDFA made a dramatic and sweeping change to the Program in its findings of fact ("Findings") – CDFA changed the Program goal from "eradication" to "control and suppression" of LBAM. (AR00010-11.) With this momentous last-minute change, CDFA certified the operative document for the Program (the "PEIR") and issued its Findings on

[5] IsoMate, Hercon, SPLAT, Btk, and spinosad are collectively referred to as the "Program Chemicals."

March 22, 2010. (AR00004.) Up until this point, CDFA's entire environmental analysis was predicated on eradication as a feasible program goal, despite numerous comments advising that it was not. (*See, e.g.*, AR01751-52.) CDFA had even rejected numerous feasible and environmentally superior alternatives solely or primarily because they were "not eradicative." (*See, e.g.*, AR01699.) Further, despite this significant change, CDFA did not conduct any further environmental review of the Program, nor did CDFA recirculate the PEIR to allow public comment on the critical change to the Program goal. (AR00014; AR00046.) Instead, CDFA concluded that "these changes do not trigger any need for additional environmental review [because] the PEIR analyzed a more intense Program than CDFA is now proposing to implement." (AR00013.)

CDFA also ambiguously stated in the Findings that Hercon/SPLAT Aerial Spray was "infeasible *at this time*" and that "Alternative MD-3 will not be implemented as part of the proposed Program..." (AR00028 (emphasis added).) CDFA claimed this was based on its (unsupported) conclusion that LBAM population densities and geographic scope had increased, making the area subject to aerial application "large" and adjacent to urban areas. (*Id.*) Because the Findings qualified the decision not to use aerial spraying as "*at this time*" and because the PEIR evaluated aerial spraying, CDFA's apparent view is that it could implement Hercon/SPLAT Aerial Spraying without any further environmental review. (*Id.*; *see, e.g.*, AR00452-54.)

CDFA rushed to certify the PEIR the day before the California Senate Committee on Food and Agriculture held a public hearing for the purpose of "Evaluating the Need for [CDFA's] Light Brown Apple Moth Eradication Program." At this hearing, Senator Dean Florez expressed significant concerns regarding the need for the Program, the change from eradication to control, and the possibility that CDFA would revert to using aerial spraying in the future. By certifying the PEIR the day before this critical hearing, CDFA was obviously attempting to exclude the issues raised at the Senate hearing from inclusion in this Administrative Record.

III. STANDARD OF REVIEW

Judicial review of an EIR should ensure its sufficiency as an informational document. *Laurel Heights Improvement Ass'n of San Francisco, Inc. v. Regents of Univ. of Cal. (Laurel*

Heights I), 47 Cal. 3d 376, 392 (1988). The adequacy of an EIR is reviewed for a prejudicial abuse of discretion. *Id.*; *see also* CAL. PUB. RES. CODE § 21168.5. A prejudicial abuse of discretion occurs if the agency (1) has not proceeded in a manner required by law or (2) makes a determination or decision not supported by substantial evidence. *Id.*

A. Agencies Must Strictly Comply With CEQA's Informational Requirements.

Review of an agency's compliance with CEQA is *de novo* and courts are charged with "scrupulously enforc[ing]" all legislatively mandated CEQA requirements. *Vineyard Area Citizens for Responsible Growth, Inc. v. City of Rancho Cordova*, 40 Cal. 4th 412, 435 (2007) (alteration in original). Noncompliance with CEQA's requirements is a prejudicial abuse of discretion when the omission of relevant information precludes informed decision-making and public participation, even if the same outcome would have resulted. *City of Long Beach v. Los Angeles Unified Sch. Dist.*, 176 Cal. App. 4th 889, 898 (2009). An EIR that fails to include information necessary for informed decision-making and public participation thwarts the primary goals of CEQA. *Concerned Citizens of S. Cent. Los Angeles v. Los Angeles Unified Sch. Dist.*, 24 Cal. App. 4th 826, 838 (1994). The agency's analysis must be both reasonable and sufficient to enable the public to meaningfully consider the issues raised by the proposed project. *Id.* at 839; *Kings County Farm Bureau v. City of Hanford*, 221 Cal. App. 3d 692, 711-12 (1990).

B. Factual Determinations Must Be Supported By Substantial Evidence.

The substantial evidence standard governs review of an agency's conclusions, findings, and determinations, and other challenges to an EIR that involve factual questions. *City of Long Beach*, 176 Cal. App. 4th at 898. "Substantial evidence" means "enough relevant information and reasonable inferences from this information that a fair argument can be made to support a conclusion, even though other conclusions might also be reached." CAL. CODE REGS. tit. 14 ("CEQA GUIDELINES") § 15384(a); *Laurel Heights I*, 47 Cal. 3d at 393 (1988). Substantial evidence includes "facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts," but does not include "[a]rgument, speculation, [or] unsubstantiated opinion." CEQA GUIDELINES § 15384(a)-(b); *see Sunnyvale West Neighborhood Assn. v. City of Sunnyvale City Council (Sunnyvale)*, 190 Cal. App. 4th 1351, 1384 (2010). Moreover, logic is not supported

by substantial evidence if it "is flawed, or if it is contrary to the evidence." *Cal. Unions for Reliable Energy v. Mojave Desert Air Quality Mgmt. Dist.*, 178 Cal. App. 4th 1225, 1241 (2009).

IV. STANDING AND EXHAUSTION OF ADMINISTRATIVE REMEDIES

Petitioners are local non-profit environmental and health organizations and municipalities concerned about the potential adverse environmental effects of CDFA's LBAM Program. As alleged in detail in the Petition, each Petitioner satisfies CEQA's standing and exhaustion of administrative remedies requirements. (Pet. ¶¶ 11-23; *see also* AR01820-26; AR01842; AR02044-48; AR02073-74; AR02139-286.)

V. ARGUMENT

A. CDFA Violated CEQA By Changing The Program Goal From "Eradication" To "Control" *After* The Comment Period And *After* Releasing The Final EIR.

The Draft EIR that CDFA presented for public comment clearly stated that the Program goal was to ***eradicate*** LBAM:

> LBAM eradication from California is the CDFA's goal because eradication is preferable to control and can reasonably be expected to be accomplished while the moth populations are concentrated within coastal counties.
>
> Eradication of LBAM populations will likely take 3 to 5 years to accomplish using several treatment tools.

(AR00163.) It was not until long after circulating the Final EIR — which also described the goal as eradication[6] — that CDFA changed the Program goal to ***controlling*** LBAM:

> CDFA has determined that current LBAM population densities and the extent of the contiguous spread of LBAM require CDFA to focus Program resources on control and suppression. The Program will continue to suppress populations to the fullest extent, and, where possible and feasible, eradicate outlying small and discrete infestations.

(AR00010.) This late change is a clear violation of CEQA's informational and procedural requirements. An "accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR." *County of Inyo v. City of Los Angeles ("County of Inyo I")*, 71 Cal. App. 3d 185, 193 (1977). Such a significant change to the Program Description after the comment period requires either a new or supplemental EIR, or at least recirculation.

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[6] The only change to the Program Description in the Final EIR was to clarify that the Program would use both male and female sterile moths for the Irradiated Moth Release (as opposed to only male moths). (AR03452-53.)

1. The Change From Eradication To Control Created A New Program Significantly Different From The One Analyzed In The PEIR.

The Program's original eradication goal affected every aspect of the Draft and Final PEIR. For example, the PEIR concluded that the Program would last no more than seven years because "[e]radication of LBAM populations will likely take 3 to 5 years to accomplish..." (AR00163.) The PEIR's analysis of environmental impacts also assumed exposure to the Program Chemicals for only a maximum duration of seven years. (*See, e.g.*, AR01257; AR01788.) And, in many instances, CDFA concluded that the Program Chemicals would have no significant impacts solely because of the "short" duration of the eradication Program. (*See, e.g.*, AR00608.)

When CDFA shifted the Program goal from eradication to control, most of the PEIR became irrelevant and inapplicable. For example, the "Completion of Applications" description for IsoMate Twist Ties states: "After two life cycles without any LBAM detections, the twist ties are removed... If no additional LBAMs are detected, this area will be declared LBAM free and trapping levels would return to detection levels." (AR00170.) Now that the goal is control, however, it is unclear whether twist ties would remain in use indefinitely, or whether they would be removed after LBAM populations drop to a certain level, and if so, what that level is. Similarly, the description of the Irradiated Moth Release (CDFA's alleged "primary" treatment option) states that, "Eradication applications are applied for a time interval equal to at least two LBAM life cycles beyond the last LBAM detected within that treatment area." (AR00174.) Because the goal is no longer eradication in a given area, but instead to "lower the pest populations," these treatments would **never** meet the conditions specified in the PEIR for cessation. No one knows whether CDFA will continue to apply these treatments in a given area indefinitely, or if it will stop when the number of LBAM in that area reaches some (as yet undisclosed) level. (*See also* AR00173 (Btk and Spinosad Spray treatment protocols based on eradication); AR00171 (Hercon/SPLAT Aerial Spray treatment protocol based on eradication).)

The PEIR does not explain, and certainly did not consider, the new "control" Program. CDFA did not articulate how the Program Treatments would change in light of the new control goal. Nor does the PEIR disclose how long the control Program will last, even though it is clear

that it will not end in seven years. (*See, e.g.*, AR01694 [CDFA's resident expert Robert Dowell stating: "*control measures will be needed forever*"].) These glaring omissions are particularly egregious given CDFA's admissions regarding the fundamental differences between eradication and control: "[t]he goal of the [LBAM] Eradication Program is the elimination of breeding populations of the moth from California. *This is fundamentally different than controlling the pest.*" (AR01694 (emphasis added).) Indeed, CDFA's own statements make clear that the differences between a program designed to control and one designed to eradicate are critical:

> For [integrated pest management] programs, the goal is to use one or more control measures to lower the pest populations within the defined area below economically damaging levels... *For our eradication programs, the goal is the elimination of the pest so that control measures will not be needed at all.*
>
> *[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.

(*See, e.g.*, AR01695, AR01694 (emphasis added).) In short, by changing the goal to control, CDFA significantly changed the entire Program.

2. The Change From Eradication To Control Resulted In A Misinformed Public And Meaningless Public Input.

"In reviewing an EIR a paramount consideration is the right of the public to be informed in such a way that it can intelligently weigh the environmental consequences of any contemplated action and have an appropriate voice in the formulation of any decision." *Envtl. Planning & Info. Council v. County of El Dorado*, 131 Cal. App. 3d 350, 354 (1982). Accordingly, "[a] curtailed, enigmatic or unstable project description draws a red herring across the path of public input." *County of Inyo I*, 71 Cal. App. 3d at 198.

In *County of Inyo I*, the court invalidated an EIR where the project description failed to accurately and consistently describe the proposed project objectives. The EIR described the project's objectives in several different ways, such as increased extraction of groundwater in the Los Angeles area, and changes to the operation of the Los Angeles Area Aqueduct system, and operating the aqueduct system in an environmentally sensitive manner. 71 Cal. App. 3d at 189-

90. The court held that these "incessant shifts among different project descriptions [vitiated] the city's EIR process as a vehicle for intelligent public participation." *Id.* at 197.

CDFA's conduct here was similar, but even more egregious. Whereas the agency in *County of Inyo* was ambiguous, CDFA appears to have engaged in a conscious bait and switch. By describing the Program goal as eradicating LBAM, the PEIR misdirected public comment towards a Program that, in the end, never existed. Numerous members of the public, organizations, and agencies focused on infeasibility and other problems with the PEIR's eradication goal. (*See, e.g.*, AR01822; AR01835; AR01935-36; AR02066; AR02073; AR02080; AR02149-51; AR02321; AR02329-33.) Worse, CDFA avoided public comments on reasonable alternatives by curtly dismissing them as not "eradicative," rather than providing the reasoned response that CEQA requires. (*See, e.g.*, AR001752-53; AR01828; AR01925; AR02033; AR02052; AR02071; AR02100-01; AR02295; AR02324; AR02406.) CDFA's last-minute shift in the Program goal and failure to consider comments related to the new goal frustrated the PEIR's purpose of providing informed public participation in the planning process and constitutes gross misconduct in violation of CEQA. *See Laurel Heights I*, 47 Cal. 3d at 392 ("If CEQA is scrupulously followed, the public will know the basis on which its responsible officials either approve or reject environmentally significant action, and the public, being duly informed, can respond accordingly to action with which it disagrees.").

In reality, the public never had an opportunity to comment on the Program that CDFA actually approved. Thus, CDFA must prepare a new or supplemental EIR to analyze, and inform the public about, its new "control" Program. *See Concerned Citizens of Costa Mesa, Inc. v. 32nd Dist. Agric. Assn.*, 42 Cal. 3d 929, 938 (1986) (noting that when the project approved differs substantially from the project described in the EIR, "the agency's failure to prepare a supplemental or subsequent EIR effectively deprive[s] the public of any meaningful assessment of the actual project chosen by the agency").

3. The Change From Eradication To Control Invalidated The PEIR's Risk Assessments.

Changing the Program goal – and thereby altering the duration, purpose, and scope of the Program – rendered the PEIR's analysis of environmental impacts obsolete and meaningless.

a. The PEIR Fails To Address Human Health Impacts From Chronic Exposure To Program Chemicals After Seven Years.

The PEIR's purported analysis of the Program Treatments' chronic impacts to human health is based on a seven-year exposure duration. (*See* AR01257; AR01788; AR44023 (email from CDFA's human health consultant admitting that "[f]or chronic exposures, I did use a 7-year exposure period… That value was based on the proposed length of the LBAM eradication program.").) In its Findings, CDFA admits that the PEIR does not account for chronic exposure duration greater than seven years. (*See* AR00013-14; AR01788 ("The calculations of chronic intake [for the human health risk assessment] were based on an assumed exposure period of 7 years, which corresponds to the Program's estimated duration.").) The PEIR is defective because CDFA and the public have no idea what the chronic effects of the Program will be; the PEIR simply does not contain this information. *See City of Santee v. County of San Diego*, 214 Cal. App. 3d 1438, 1454-55 (1989) (invalidating an EIR that failed to consider the reasonable possibility of the project lasting beyond the seven years described); *San Joaquin Raptor/Wildlife Rescue Center v. County of Stanislaus (San Joaquin Raptor)*, 27 Cal. App. 4th 713, 730 (1994) ("[T]he selection and use of a 'truncated project concept' violate[s] CEQA…").

b. CDFA's Findings Of No Significant Impacts Based On "Short" Program Duration Are Now Obsolete.

Throughout its risk assessments, the PEIR concludes that the Program Treatments will have no significant effects because of the "short Program duration." (*See, e.g.*, AR00547 ("Based on the low acute toxicity reported for straight chained lepidopteran pheromones, and *the low potential for long-term exposure*, the USEPA (2007f) did not require chronic testing."); AR000559 (no significant impacts on native insects because "*the impact would be short term and localized* and should not affect nontarget species at a population level. As any nontarget insect

populations would be expected to recover from any population-level effects under the proposed application regime, long-term effects are not anticipated."); AR00608 ("[A]ny disruption to pollinators/honeybees and pollination would be highly localized to the treatment area and temporary, *lasting only during the eradication period.*"); AR00285 ("*Given the Program's short-term and statewide character*, the CDFA has not established quantitative significance thresholds for such a project."); AR01610 ("[W]hile these impacts may occur, under CEQA, *short term impacts, as would be applicable to interpretations of Program alternatives, are considered less than significant.*"); AR00599 (finding no significant impacts from greenhouse gas emissions in part because "[t]he generation of the *GHG emissions would be temporary as the emissions would terminate with the completion of the Program prior to 2020* when the state must meet AB 32 goals"); AR00602 (finding no cumulative impacts from greenhouse gases because "the incremental contribution of these Program emissions would not be cumulatively considerable *because they occur in the short term and would conclude by 2015*") (emphasis added throughout).) Indeed, all of CDFA's risk assessments are based on a key assumption that no longer exists. These assessments, and CDFA's conclusions about them, are misleading, inaccurate, and not supported by substantial evidence.

c. The Exposure Levels Are Based On Stale Treatment Protocols.

The PEIR calculates human health and ecological health risk by developing a hazard index or hazard quotient based on toxicity and exposure. (AR01451-52; AR1294-96.) Because this calculation is in large part mechanical, changing any of the inputs will alter the result of the risk assessment. (AR01451.) Throughout the risk assessments, the PEIR assumes the number of treatment applications for an **eradication** Program. (*See, e.g.*, AR01250 ("To determine the number of applications for each treatment alternative, the Program calls for up to two life cycles without LBAM being detected before treatment is halted… it was assumed that each treatment alternative would be applied 3 times. *If the number of applications increases or decreases, then the resulting concentrations and depositions would also increase or decrease.*" (emphasis added)); AR01550 ("Soil Concentration and Assumptions" based in part on "total days of exposure period"); AR00296 ("[T]he Program calls for up to two life cycles without LBAM

being detected before treatment is halted... it was assumed that each treatment alternative would be applied 3 times."); AR00488 ("Number of treatments for eradication goal...3."); AR00514 ("Assumed three applications per treatment option.").) Because "control" will require a different treatment strategy, these assumptions about the number of treatments in a given area—and therefore the amount of chemical exposure—have changed. (*See* AR01694 ("[T]he elimination of breeding populations... *is fundamentally different than controlling the pest.*" (emphasis added)).) The risk assessments based on these stale assumptions did not inform CDFA or the public of the actual environmental consequences of the Program CDFA ultimately approved.

4. The Change From Eradication To Control Invalidated The PEIR's Alternatives Analysis.

The PEIR purported to consider eighteen alternative "tools" and cursorily rejected at least six of them outright because they were not "eradicative." (AR01695-1704.) The PEIR then justified its rejection of alternatives offered during the public comment period based on the same eradication-only argument. (AR01828 ("*Control is not a Program objective*, and [IPM] is a control measure..."); AR01925 ("The Program alternatives considered in the Draft PEIR do represent a reasonable range of both chemical and nonchemical treatments after careful evaluation of a wide range of possible treatment tools.... *The goal of the Program is eradication of LBAM from California.*"); AR02052 ("The objective and purpose of the Program is eradication of LBAM from California. CDFA has evaluated a reasonable range of potentially feasible alternatives to achieve this objective..."); AR02406 ("Eradication was defined as the Program's objective based on substantial evidence, and CEQA does not require that the PEIR analyze outcomes or Program components that are not capable of meeting that objective. *For this reason, the PEIR was not required to analyze LBAM control strategies.*") (emphasis added throughout).)

CDFA's entire alternatives analysis is now invalid. CDFA rejected many alternatives for reasons that are no longer relevant given the change in the Program goal. For example, IPM is a control method effective at "lower[ing] the pest populations within the defined area below economically damaging levels." (*See* AR01695.) CDFA rejected IPM as not "eradicative," but the change in the Program goal to "control" made IPM a perfect alternative candidate. CDFA did

nothing to reconsider this alternative after its shift in the program goal.[7] Likewise, biological control would achieve the revised Program objectives. (*See* AR00040; AR66102-111.) Indeed, New Zealand has successfully used classic biological control for over a decade to control LBAM populations. (*See* AR67541.) Other control-aimed alternatives are also again feasible. (*See* AR01695-704.) Thus, at a minimum, CDFA must redo its alternatives analysis. *See County of Inyo I*, 71 Cal. App. 3d at 203 ("[B]ecause [the] list of alternatives is not tied to a reasonably conceived or consistently viewed project, the ... EIR does not comply with CEQA's demand for meaningful alternatives.").

5. CDFA's Proffered Reasons For Changing The Program Goal After The Comment Period Do Not Justify Violation of CEQA's Procedural And Informational Requirements.

The excuses made by CDFA for its belated change to the Program goal fall far short. First, CDFA's contention that the control Program is somehow less intense or will have lesser impacts on the environment is necessarily incorrect. (*See* AR00013.) The new control Program will last much longer than the three to five year eradication Program originally proposed. (*See, e.g.,* AR01694 [CDFA expert Dowell admitting that "*control measures will be needed forever*"].) A longer and potentially indefinite Program means more chronic impacts and, in the end, more Program Chemicals released into the environment. (*See* AR44023.) Further, the control Program will unavoidably impact a much larger portion of the State than a targeted eradication Program.

Likewise, CDFA's claim that it was justifiably reacting to supposedly "new" information is also incorrect. The Record establishes that CDFA knew the Program goal would be changing – before it released the Final EIR – but hid that information from the public until the day it certified the PEIR. (AR42375 (lead PEIR consultant Susan Hootkins' handwritten notes dated February 18, 2010 discussing the new control Program and admitting that "recirculation is a consideration"). Although CDFA's Findings attempt to justify the late goal change due to the expiration of Food and Agricultural Code section 6050.1 ("Section 6050.1") and alleged

[7] CDFA's finding that IPM is not feasible is nonsensical. CDFA found, for example, that IPM was infeasible because "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 populations within California." (AR00037-38.)

"significant" increase in LBAM populations (AR00007, AR00010), the Record shows that this information was known by CDFA long before it issued the Final EIR. *See County of Inyo I*, 71 Cal. App. 3d at 200 (holding that an agency may only change a project description without providing opportunity for public comment when the circumstances that resulted in the change are *not known* to the agency ahead of time). Indeed, CDFA has also known, since at least February 2009, that Section 6050.1 was set to expire on January 1, 2010. (AR13990-91.) The provision became inactive on October 1, 2009 and expired by its own terms on January 1, 2010 – at least four months before CDFA released the Final EIR. *See* CAL. FOOD & AGRIC. CODE § 6050.1(e).

And CDFA's claim that increased LBAM populations was "new" information justifying the late change to the Program goal is also disingenuous. CDFA expected LBAM populations to grow rapidly and spread quickly throughout coastal California before preparing the Draft EIR and circulating it for comment. (AR00111; AR01750.) Although CDFA's data on LBAM's population growth and geographic distribution are flawed (*see* Section V.H.1., *infra*), the fact remains that CDFA predicted rapid population growth long before it changed its Program goal. (*Id.*) CDFA detected 5,307 LBAM in June through September 2007, 11,352 LBAM in June through September 2008, and 81,875 LBAM in June through September 2009. (AR01750.) CDFA therefore knew by at least mid-2009—before it released the Draft EIR on July 31, 2009—that "the density of [LBAM's] populations has increased significantly." (AR00010; AR31518.) Numerous public comments also alerted CDFA that LBAM was widespread and numerous in California. (*See, e.g.*, AR01822; AR01835; AR01935-36; AR02066; AR02073; AR02081; AR02149-50.) Moreover, the geographic spread of LBAM has been roughly consistent since 2007, rebutting CDFA's claim that "LBAM['s] spread to more areas of California" justified when and how it changed the Program goal. (*See* AR00068-69.)

Accordingly, CDFA had no valid excuse for waiting until after the public comment period had closed and the Final EIR had been issued to change the Program goal in the Findings. Doing so served only to preclude informed public participation in the CEQA process. *See County of Inyo I*, 71 Cal. App. 3d at 199-200 ("[T]he selection of a narrow project as the launching pad for a vastly wider proposal frustrate[s] CEQA's public information aims.").

B. CDFA Improperly Deferred Full Review Of The Program's Impacts.

"CEQA requires that an agency determine whether a project may have a significant environmental impact, and thus whether an EIR is required, ***before*** it approves that project." *No Oil, Inc. v. City of Los Angeles*, 13 Cal. 3d 68, 79 (1974) (emphasis added). An agency may not approve a project subject to the condition of additional environmental review at a later date. *Sundstrom v. County of Mendocino*, 202 Cal. App. 3d 296, 307 (1988); *see Laurel Heights I*, 47 Cal. 3d at 394 ("If postapproval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken. We have expressly condemned this use of EIR's.").

In *Stanislaus Natural Heritage Project v. County of Stanislaus*, the EIR at issue was a first tier program EIR for a 5,000 residential unit community development project. 48 Cal. App. 4th 182, 188 (1996). Although the project was for 25 years, it had a guaranteed water supply for only five years. *Id.* at 195. Rather than analyze the water consumption impacts for the entire program duration, the agency attempted to justify deferring the review of water sources because future project-specific EIR's would address the issue. *Id.* at 199. The court rejected this argument and held that the agency had to know "to some reasonable degree" the environmental consequences of the full duration of the project. *Id.* Deferring environmental review defeated CEQA's "fundamental purpose" of 'inform[ing] the public and responsible officials of the environmental consequences of their decisions *before they are made*.'" *Id.* at 195 (emphasis added).

CDFA likewise has failed to assess and advise of the environmental consequences of the full duration of the Program. Because the originally proposed "eradication" Program was only to last for seven years, the PEIR only attempted to analyze the environmental impacts of the Program for a period of seven years. (*See* AR00164; AR01257 [Table D4-1]; AR00285-86 ("[G]iven the Program's short-term nature... this method does give a reasonable approach..."); AR01610 (concluding that Btk and Spinosad Spray would have no significant impacts on nontarget insects in part because of the short-term Program duration); *see also* AR00361 ("The toxicity of a material is related to ... the duration of time over which a dose is received...").) The

PEIR fails to disclose to either CDFA or the public the environmental and health impacts of exposure to the Program Chemicals beyond seven years.

CDFA knew about these undisclosed impacts when it certified the PEIR. (*See* AR00013-14 (acknowledging that the risk assessments were valid only for seven years, even though the Program would continue beyond that time).) For this reason, cases holding that EIRs may defer environmental review of *unknown* or *speculative* impacts to later EIRs, such as *Rio Vista Farm Bureau Center v. County of Solano*, do not apply. 5 Cal. App. 4th 351, 373 (1992) (holding that deferral of analysis of environmental impacts was proper only where "an EIR cannot provide meaningful information about a *speculative future project*") (emphasis added). Here, CDFA knew with certainty that the Program will last beyond seven years and there is no real question that there will be chronic impacts from extended exposure to the Program Chemicals as part of the Program. (*See* Section III.G.2, *infra*; AR00013-14.) By approving an indefinite Program without assessing its environmental consequences beyond seven years, CDFA violated CEQA.

C. The PEIR Is Not Adequate As Either A Program Or A Project EIR

CDFA purports to have certified a "programmatic" document, but CDFA is not conducting any second-tier or more site-specific analysis in places where it will use the Program Treatments. (*See, e.g.*, AR00486 ("Site-specific evaluation of water quality impacts are beyond the scope of this programmatic evaluation."); AR16644 (comment by lead PEIR consultant Hootkins on draft document that "[t]his is not a site specific EIR"); AR00275; *see also, e.g.*, AR01754 (demonstrating that CDFA will not conduct site-specific analysis in the future).) CDFA's generalized approach to the EIR process does not fully comply with CEQA.

1. The PEIR Is Deficient Because It Is Not A "Tiered" Program EIR.

Program EIRs may only use generalized and non-specific project descriptions and environmental impacts analyses when subsequent site-specific environmental review will occur. *Natural Res. Def. Council, Inc. v. City of Los Angeles*, 103 Cal. App. 4th 268, 285 (2002); CAL. PUB. RES. CODE § 21068.5. This process of deferring site-specific analysis is known as "tiering." *Id.* When undertaking site-specific activity after preparing a first-tier EIR, an agency must at least prepare an initial study to "analyze whether the later project may cause significant effects on

the environment that were not examined in the prior [program EIR]." CAL. PUB. RES. CODE § 21094; *see also In re Bay-Delta Programmatic Envtl. Impact Report Coordinated Proceedings (Bay-Delta)*, 43 Cal. 4th 1143, 1169-73 (2008).

In *Bay-Delta*, the California Supreme Court addressed the adequacy of a program EIR prepared for a program to restore the Bay-Delta water supply area. *Id.* at 1160-61. Among other contentions, the petitioners argued that the EIR did not identify with adequate detail the potential sources of water for the proposed projects or the environmental impacts of taking water from those sources. *Id.* at 1169. The Court held that the program EIR's identification of potential sources of water and analysis of the associated environmental impacts in "general terms" was permissible, but only "with the understanding that additional detail will be forthcoming when specific second-tier projects are under consideration." *Id.* at 1172-73. In other words, lack of specificity in a program EIR is permissible *only if* it is a first-tier EIR to be followed by second-tier environmental review. *Id.*; *see also Rio Vista Farm Bureau Ctr.*, 5 Cal. App. 4th at 371 (holding that failure to identify particular project locations was permissible because the EIR was tiered and such locations would be analyzed in "subsequent 'project EIR's'").

CDFA does not contemplate any subsequent or tiered environmental review. In alleged response to comments critical of CDFA's lack of specificity, the Final EIR outlined procedures CDFA will use before conducting any treatments. Notably absent is any environmental review:

> Prior to deploying the treatments CDFA will follow the notification procedures outlined in the Draft PEIR, Section 2.6, including providing maps of the treatment area to local elected officials, the agricultural commissioner, etc. Written notices will be provided to every residence within the proposed treatment area with a map of the boundaries. CDFA will also hold informational open houses for the residents of the treatment areas.

(AR01754.) Such "notice" procedures do not equate to the additional environmental review necessary to satisfy CEQA. *See* CEQA GUIDELINES §§ 15063-15081 (setting forth mandatory procedures for approval of site-specific projects); CAL. PUB. RES. CODE § 21094.

To date, CDFA has not conducted any additional environmental review in implementing its Program, although it has been actively deploying IsoMate Twist Ties in several counties since

certifying the PEIR. (*See* Request For Judicial Notice at ¶4, and CDFA LBAM website at http://www.cdfa.ca.gov/plant/pdep/lbam/treatment_maps.html.)

2. The PEIR Is Deficient Because It Lacks The Specificity Required Of Non-Tiered EIRs.

Non-tiered program EIRs are held to the same CEQA standards regarding program description and analysis of environmental impacts as project EIRs. *Friends of Mammoth v. Town of Mammoth Lakes Redevelopment Agency*, 82 Cal. App. 4th 511, 533-34 (2000) ("Designating an EIR as a program EIR also does not by itself decrease the level of analysis otherwise required in the EIR."); *see* CEQA GUIDELINES § 15168(c)(4). As a leading CEQA commentator noted, a program EIR "can allow an agency to carry out an entire 'program' without having to prepare additional site-specific EIRs or negative declarations [only if the] program EIR [is] very detailed. In other words, 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 638 (2006).

Here, the PEIR is too superficial and too broad to stand on its own. It fails to specify where treatments will occur, what treatments will occur, when treatments will occur, or how CDFA will decide where, when, and what treatments to use. Further, the PEIR fails to analyze impacts to specific locations and potentially sensitive or unique environments.

a. The Program Description Is Inadequate.

The descriptions of the Program location and treatments are too broad and indefinite to allow the public "an accurate view of the project." *City of Santee*, 214 Cal. App. 3d at 1454. An EIR must describe the location of a project with sufficient detail to allow "an accurate view of the project [so that] the public and interested parties and public agencies [may] balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives..." *Id.* at 1454. "Knowledge of the regional setting is critical to the assessment of environmental impacts." CEQA GUIDELINES § 15125(a), (c); *see also Friends of Eel River v. Sonoma County Water*

Agency, 108 Cal. App. 4th 859, 875 (2003) (stating that an "incomplete description of the [p]roject's environmental setting fails to set the stage for a discussion of the [project impacts]").

The PEIR describes the Program location as "all portions of the state in which climatic conditions are suitable to the LBAM." (AR00163.) The Program area is thus the entire state of California except for some desert regions in Southern California and areas above 5,000 feet in the Sierra Nevada and other mountain ranges. (AR00163 ("In summary the Program Area would not include the majority of Alpine, Inyo, or Mono counties but all or portions of the remaining counties in California have areas that could harbor LBAM."); *see also* AR00165 [Figure 2-1].) This Program description fails to apprise the public of where the environmental effects of the Program are likely to occur in *any* detail, let alone in sufficient detail to "balance the proposed project's benefits against its environmental cost, consider appropriate mitigation measures, assess the advantages of terminating the proposal and properly weigh other alternatives." *City of Santee*, 213 Cal App. 3d at 1454. In fact, even this overbroad description is not accurate because the PEIR includes the qualification that "[t]he detection of two or more moths within a 3-mile radius within a time period equal to one LBAM life cycle places the area within the Program Area." (AR00163.) Thus, any part of California may end up being included if LBAM is detected there.

The PEIR also fails adequately to inform the public which of the Program Treatments CDFA will use (or in which combination), where CDFA will use the Treatments, or when CDFA will use them. For example, the PEIR states that CDFA will deploy the IsoMate Twist Ties in "[i]solated areas," "[a]reas that are further than 5 miles from a generally infested area," or "[a]reas with low-level populations." (AR00170.) But because the PEIR does not define what it means by a "generally infested area" or what a "low-level population" is, the locations targeted for IsoMate Twist Ties remain a mystery. (*Id.*) The descriptions of the other Treatments are similarly vague. (*See* AR00170 (location for Hercon/SPLAT Ground Spray: "trees and shrubs in residential yards" and "telephone poles and trees on public property alongside the roadways"); AR01754 (Hercon/SPLAT Aerial Spray: any "square mile having 100 or fewer persons in it"); AR00173 (Btk and Spinosad Spray: anywhere "heavier larval populations [of LBAM] are detected"); AR00174 (Parasitic Wasp Release: anywhere having "moderate to heavy LBAM

detections"); AR00174 (Irradiated Moth Release: any "large area such as a county or region").) The PEIR also fails to accurately describe when the Treatments would occur – or how long they might last. (*See* AR00170-00174.)

The failure to disclose when and where the treatments will occur precluded accurate assessment of the Program's environmental impacts. For example, Hootkins, again the lead consultant in charge of preparing the PEIR, admitted that the cumulative impacts analysis lacked a critical piece of information, i.e., how much Btk, Spinosad, and permethrin CDFA would use:

> I am not finding anywhere in our detailed discussions and appendices any mention of ***pounds of pesticides to be used under the Proposed Program alternatives***. The cumulative analysis needs to address past use plus future use from the Program alternatives. So I am thinking we need pounds of permethrin to address the Alternative MMA and pounds of Btk and spinosad to deal with those.

(AR23622 (emphasis in original).) Hootkins then said that CDFA needed estimates of private pesticide use because the statement "'the additional quantities of pesticides to be applied under the Program are unknown and thus the cumulative impacts are difficult to evaluate' … is not a very good statement to have to use," and that "[w]e do not have to put it up front in Chapter 2 and can bury it in the cumulative discussions if you prefer, but it is a hole I prefer us not to have in the document." (*Id.*) CDFA never filled this "hole." Instead, the PEIR simply stated that because "the additional quantities of pesticides that will be applied under the Program alternatives are variable, cumulative impacts are difficult to evaluate." (AR00607.)

In essence, CDFA purports to have carte blanche under the PEIR to use any treatment, anywhere in California that an LBAM is detected, in any combination, and at any time. This boundless generality in the Program Description does not satisfy CEQA.

b. The PEIR Fails To Analyze The Environmental Impacts Of The Program In Specific Locations.

In purporting to consider a Program area that is nearly the entire State, the PEIR fails to adequately analyze the Program's impacts on specific environments, plants, and animals. This failure constitutes yet another fundamental violation of CEQA because "[k]nowledge of the regional setting is critical to the assessment of environmental impacts…" CEQA GUIDELINES § 15125(c); *see also Galante Vineyards v. Monterey Peninsula Water Mgmt. Dist.*, 60 Cal. App.

4th 1109, 1122 (1997) (invalidating an EIR because, "inadequate description of the environmental setting for the project [made] a proper analysis of project impacts [ ] impossible"). CDFA's failure to consider the specific environments where the treatments will occur rendered its analyses regarding numerous environmental resources hopelessly superficial and overbroad.

For example, in its analysis of aquatic resources, the PEIR examines the impact of the Program Chemicals to only a handful of aquatic species. The PEIR lists 53 native fish species in California, but then analyzes the impact of the Program Chemicals on only *two* of these fish—rainbow trout and fathead minnow. (*See* AR00413-15; AR01488-1529.) And the risk assessments consider only two aquatic species besides fish – cladoceran and algae. (AR01488-1529.) Given that the Program Pheromones are toxic to cladoceran, they likely will impact other aquatic species, but the PEIR failed to determine these potential impacts. (*See* AR63140.)

Also, in its purported analysis of impacts to water quality, the PEIR improperly relies on generalizations and assumptions regarding runoff rates,[8] water flows, and human drinking water sources. (*See* AR00486 ("Site-specific evaluation of water quality impacts are beyond the scope of this programmatic evaluation."); *see also id.* ("Site-specific water quality evaluations are not conducted."); *id.* ("Mitigation measures for specific locations within the Program Area are not provided.").) The East Bay Municipal Utility District ("EBMUD") raised concerns with this approach in response to the Draft EIR, but CDFA failed to refine its analysis. (*See* AR01894 ("[T]his PEIR covers roughly two-thirds of the state… In Chapter 11, the drinking water supply watershed boundaries need to be clearly defined in the PEIR. This section of the document fails to identify any of the EBMUD local storage reservoirs in the identified areas.").

Similarly, CDFA limited its impact analysis to only four native insects: honeybees, two butterfly species, and one moth species. (*See* AR00520; AR01488-1529.) This sampling is not sufficient to account for all insects that may be impacted by CDFA's statewide Program. Worse, CDFA failed to analyze the Program's impacts on any native lepidopteran moths, the insects most

[8] The PEIR's faulty runoff analysis is discussed in detail in Section V.G.3. Because the PEIR failed to analyze specific locations, its conclusions regarding runoff are incomplete. Application of the Program Chemicals in a highly urban area like the County of San Francisco will lead to potentially much greater runoff, and greater Chemical concentrations in aquatic resources, than projected by the PEIR under its "statewide" assumptions.

closely related to LBAM and therefore most likely to be similarly (and thus severely) impacted by the Program Chemicals. (*See* AR01486-1514.)

CDFA's air quality analysis also attempts to cover the entire state by comparing average emissions rates against regional thresholds. (AR00307-08.) This method cannot account for discrete locations with high pollution levels or for ecologically sensitive locations in which even a small amount of additional air pollution could be significant. (*See* AR00301 (admitting that CDFA only used "screening-level models" so they "would be applicable statewide"); *see also* AR00275 ("Air quality impacts can occur over broad regions… or within local microclimates… Due to the Program's statewide nature, only regional air quality is discussed as part of this assessment.").) Additionally, because the PEIR failed to specify where and when treatments would occur, it could only assume that no more than 50 percent of Program operations would occur in a given air quality district. (AR00308.) This assumption is unfounded, given that much of the LBAM population is concentrated in the San Francisco Bay area, and therefore in a single air quality control district.[9] (AR00111.)

D. CDFA Failed To Adequately Analyze Alternatives.

The alternatives analysis is "the core of an EIR." *Citizens of Goleta Valley v. Bd. of Supervisors*, 52 Cal. 3d 553, 564 (1990). To satisfy CEQA, an EIR must contain a reasonable range of alternatives and thoroughly assess all feasible alternatives, including the "no project" alternative. CEQA GUIDELINES § 15126.6(c)-(e). Here, CDFA's alternatives analysis is inadequate because CDFA presented a flawed "no project" alternative, confusingly used the Program Treatments as so-called alternatives, and failed to adequately consider numerous feasible and environmentally superior alternatives.

1. CDFA's "No-Program" Analysis Is Flawed.

CDFA deliberately and improperly inflated the impacts of the "No Program" alternative to make its Program look better. Of course, this tactic misses the mark because the purpose of the "no project" alternative is to reasonably forecast the environmental impacts of maintaining the

[9] The Bay Area Air Quality Management District includes Marin, Sonoma, Napa, Solano, Contra Costa, Alameda, Santa Clara, San Francisco, and San Mateo counties. (http://www.baaqmd.gov/The-Air-District/Jurisdiction.aspx.)

status quo. *Id.* at § 15126.6(e)(2). Although it must anticipate future conditions, the no project analysis must be based on facts and supported by substantial evidence. *Planning & Conserv. League v. Dept. of Water Res.* 83 Cal. App. 4th 892, 919-20 (2000) (invalidating an EIR where the agency made unsubstantiated assumptions in its no project analysis). CDFA's alternatives analysis is fatally flawed because it is based on unreasonable and internally inconsistent assumptions about private pesticide use.

a. CDFA Unreasonably Assumed Rampant Private Pesticide Use Under The No Program Alternative To Make The No Program Alternative Appear More Damaging To The Environment.

CDFA based its "No Program" on the unrealistic and unsupported assumption that, without the Program, private homeowners, farmers, and nurseries would use large amounts of pesticides to combat LBAM. (*See, e.g.*, AR00167.) CDFA's wild assumption about private pesticide use is based solely on unpublished reports written by its own Program director, Robert Dowell. (AR61298.) Dowell's constructions are unsound, however, because he assumes, without any valid support, that individuals will use massive amounts of highly toxic pesticides in individualized wars against LBAM.[10] CDFA's reliance on Dowell's unsubstantiated assumptions drastically inflated the supposedly "significant" impacts under the No Program alternative and rendered the comparison of the Program to the No Program misleading.

(1) People Are Not Likely To Use Highly Toxic Permethrin Or Chlorpyrifos To Combat LBAM.

The Dowell report admits there are a "number of insecticides [] available for use by homeowners to control insects in their yards," but it selects permethrin (one of the most toxic options) as the pesticide that individuals will likely use, for no reason other than that this pesticide can kill LBAM larvae and is readily available. (AR08593; *see also* AR00168; AR00487.) It was totally unreasonable for Dowell to assume that private individuals would choose permethrin to attack LBAM under the No Program because there is no evidence of residential plant damage caused by LBAM and most people are more likely to use pesticides less toxic than permethrin.

[10] As discussed in Sections V.H.1&2, *supra*, Dowell's reports are also incorrect in assuming that LBAM will be widespread and cause significant damage.

Permethrin is in fact so hazardous that CDFA withdrew the Permethrin/SPLAT Spray treatment from the Program. (*See* AR01747.)

It was even more unreasonable for CDFA to assume that individuals would use chlorpyrifos under the No Program alternative. Chlorpyrifos can only be used by licensed applicators, and no homeowner products containing chlorpyrifos have been registered by the U.S. Environmental Protection Agency since 2000. (*See* AR00167; AR02162.) Dowell's baseless assumptions regarding private use of permethrin and chlorpyrifos are not substantial evidence.

Assuming significant private use of these highly toxic pesticides under the No Program created artificial, but significant impacts intended by CDFA to make its own Program look like the environmentally superior option. The Record confirms that CDFA deliberately inflated the No Program impacts. For example, a toxicologist consultant reviewing the EIR asked Hootkins:

> Is the unstated purpose of the risk assessments to endorse the use of the 'organic treatment' or 'mating disruption' alternatives and discourage the acceptance of the 'no project' alternative? Because the exposure assumptions border on the unreasonable... *the assumptions have really overstated the risks* – if EPA did this at one of our CERCLA[11] sites, our clients would have a fit... Again, if the purpose [of the No Program assessment] is to support acceptance of the alternatives, then this assessment achieves that goal.

(AR15488 (emphasis added).) Hootkins responded, "Yes... No Program's chlorpyrifos should be 'not preferable' and we expect it to have negative impacts." (AR15487.)

(2) The Amount Of Private Pesticide Use Assumed Under The No Program Is Unreasonable.

The Dowell reports also drastically overestimate the amount of new pesticide use attributable to LBAM. The first Dowell report claims private pesticide use by homeowners will increase by up to 34 percent as a result of individuals spraying for LBAM absent CDFA's Eradication Program. This is unreasonable and unsupported. The report admits that "[t]he exact number of single-family dwellings that will be treated to prevent or remedy LBAM damage is unknown." (AR61299.) The report then undertakes a flawed analysis using the number of homeowners who supposedly currently spray for foliage-feeding pests to determine those likely

[11] CERCLA is the Comprehensive Environmental Response Compensation and Liability Act.

to spray for LBAM. (AR61299-300.) But these persons are already spraying for other insects, and therefore would not need additional spray to treat LBAM.

The second Dowell report purports to address increased pesticide use by farmers, and its conclusions are unreasonable as well. The report assumes farmers would treat five percent of their crops per year for LBAM and, based on this arbitrary assumption, calculates that pesticide use in certain crops could increase a startling ***2,838 percent***. (AR63789, AR63810.) But every farmer in California is not likely to treat five percent of his or her crops, especially given the fact that LBAM has caused no significant crop damage in California to date. (AR00197.) Further, the report admits that farmers already treat for numerous native leafroller species, which means that they are unlikely to dump hundreds of thousands of *extra* pounds of pesticides onto their crops for a single additional leafroller moth species. (AR63789.)

CDFA's own environmental consultants questioned the assumptions made by the Dowell report. Commenting on CDFA's draft response to comments by East Bay Municipal Utility District, Jeff Fisher, one of the environmental scientists who prepared the PEIR, wrote: "I am not sure what to do here – I would like to say we didn't [do a qualitative fate analysis] with the No Program chemicals because there is not [a] way to accurately predict their usage, *but that would contradict Bob [Dowell]'s report. Help.*" (AR36856 (emphasis added).) Another internal document admits that Dowell's private pesticide use estimates "are taken directly from the Australian experience with LBAM, and it is not at all clear that such assumptions are valid in California." (AR12892.)

b. CDFA Did Not Consider Any Private Pesticide Use When Analyzing The Impacts Of The Program Treatments.

Further demonstrating a remarkable lack of consistency and desire to slant its analysis, CDFA assumed that zero private pesticide use would occur under its Program. But, as acknowledged by CDFA, even the eradication Program would not have immediately destroyed all LBAM. And this is particularly true now that the goal is control, not eradication. Nevertheless, CDFA excluded any private pesticide use from its analysis of the Program Treatments' impacts. In other words, CDFA made its Program look better than it really is by assuming that widespread

private pesticide use would occur only under the No Program alternative, even though similar levels of private pesticide use would occur with or without the Program.

Not only is this assumption internally inconsistent, CDFA's own documents contradict the assumed absence of private pesticide use while the Program is in effect. An economic consultant preparing the PEIR emailed lead PEIR consultant Hootkins and asked: "Fundamental question that I was hoping you can help answer.... Would farmers continue to treat their own fields under the action alternatives or would they rely on CDFA to treat using the treatment methods outlined in the project description?" (AR13316.) Hootkins replied that "[u]nder the eradication program, farmers and horticulturalists would have to treat in order to ship their produce if it were infested, under the quarantine regs. The hope is that under the program alternatives, the moth could be eradicated in 3-5 years due to Program treatment efforts.... Call me." (AR13317; *see also* AR13986-87.) CDFA clearly anticipated LBAM would continue to be present in the state for at least three to five years and that farmers would have to use private pesticides during this time. Yet, CDFA failed to take into account the cumulative or compounding effects of private pesticide use when assessing the environmental impacts of the Program Treatments. And now that the Program goal is to control, private pesticide use will, based on CDFA's assumptions, presumably continue under the Program indefinitely, further distorting CDFA's No Program analysis. (*See* AR16115 ("We are assuming that under all of the eradication alternatives that LBAM would be successfully eradicated and [the adverse effects or private pesticide use] would be avoided...").) Without an accurate or even theoretically consistent projection of private pesticide use under both the No Program and Program alternatives, CDFA's No Program analysis is meaningless.

2. CDFA Improperly Referred To Its Various Treatment Methods As "Alternatives."

In an apparent attempt to deflect attention from the deficient alternatives analysis presented in the PEIR, CDFA presented its various treatment methods or "tools" as alternatives. (*See, e.g.*, AR00115; AR00167.) But, CDFA intends to use each of these treatment methods as part of the Program. (*See* AR00164.) Therefore, the treatment methods are not really alternatives at all, and CDFA's presentation did nothing more than confuse and distract the public.

3. CDFA Improperly Rejected Control Alternatives.

The PEIR's analysis of alternatives also suffers from CDFA's failure to provide a sufficiently detailed explanation for its rejection of numerous "control" alternatives. Again, CDFA summarily rejected several alternatives simply because they were not "eradicative." (*See, e.g.*, AR00632 ("IPM, as a control strategy, was not evaluated further … because it does not meet the objective of eradication."); *see also* AR01695-704 (rejecting six alternatives during initial evaluation because they were not eradicative).) As the California Supreme Court held in *Laurel Heights I*, "[infeasible] alternatives and the reasons they were rejected … must be discussed in the EIR in ***sufficient detail*** to enable meaningful participation and criticism by the public." 47 Cal. 3d at 405 (1988) (emphasis added); *see also id.* at 404-06 (holding that a lead agency's discussion of alternatives must be "meaningful" and must "contain analysis sufficient to allow informed decision making" and finding the lead agency abused its discretion by cursorily rejecting alternatives). CDFA's cursory rejection of the control alternatives is far from the "meaningful" analysis required under *Laurel Heights I.*

CDFA's rejection of alternatives simply because they were not "eradicative" became even more problematic when CDFA changed its program objective from eradication to control. (*See* AR01695-04.) After changing the Program goal, CDFA should have at least reconsidered the control alternatives. Instead, CDFA made nonsensical statements as to why these control alternatives somehow fail to meet a control objective. (*See, e.g.*, AR00037-38 ("[C]ontrol 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…").)

Moreover, CEQA does not permit agencies to reject alternatives simply because they do not meet all of a project's objectives. In *Watsonville Pilots Association v. City of Watsonville*, the respondent city argued that it did not need to consider a reduced-development alternative because it would not have achieved the program objective of accommodating public growth. 183 Cal. App. 4th 1059, 1086 (2010). The court rejected the city's argument, stating that because alternatives naturally will not achieve all objectives, the EIR should focus on alternatives that will

avoid or substantially lessen the significant impacts of a project, "even if these alternatives would impede to some degree on the attainment of the project objectives...." *Id.* at 1087; *see id.* at 1086-90 (affirming trial court's decision that the City violated CEQA by rejecting alternatives because they purportedly did not meet all of the program's objectives); *see also Cal. Native Plant Soc'y v. City of Santa Cruz*, 177 Cal. App. 4th 957, 991 (2009) (stating that an alternative need not achieve even the project's primary goal to require consideration). Here, CDFA abused its discretion by failing to assess numerous feasible and less impactful control alternatives solely because they were not "eradicative."

E. CDFA Failed To Consider The Program's Cumulative Impacts.

The Program consists of spraying at least five different chemical compounds and the mass release of parasitic wasp eggs and irradiated/sterile LBAM throughout nearly the entire state of California. Despite this massive scope, CDFA failed to consider whether the impacts from these treatments, together with the impacts from related projects, would be significant.

When undertaking a cumulative impacts analysis, "'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." *Cmtys. for a Better Env't v. Cal. Res. Agency*, 103 Cal. App. 4th 98, 120 (2002) (footnote omitted). To ensure that agencies accurately assess a project's cumulative impacts, CEQA mandates that agencies use one of two methods: the "list method" or the "summary of projections" method. CEQA GUIDELINES § 15130(b) ("The 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."). Failure to use one of these two methods is an abuse of discretion. *San Joaquin Raptor*, 27 Cal. App. 4th at 739-41.

CDFA expressly refused to use either of these mandatory methods for assessing cumulative impacts in its PEIR. (*See* AR00607 ("The listing of all of the projects occurring in an

area is not practical for this evaluation.... The alternative 'summary of projections' method is also not practical....").) CDFA rejected the "list method" in particular because it would require that CDFA make "a very long list." (AR00606-07.) As a matter of law, CDFA's failure to list or adequately discuss past, present, and future related projects violated CEQA. *See San Joaquin Raptor*, 27 Cal. App. 4th at 741 ("[B]ecause other development projects are neither listed nor adequately discussed in the FEIR... the cumulative discussion is inadequate as a matter of law.").

Indeed, the PEIR did not discuss even known, closely related programs. For example, USDA is conducting an LBAM eradication program using twist ties, ground spray, and aerial spray of LBAM pheromone, as well as spinosad and Btk spraying. (AR04834-915; AR58921-67; AR60539-641; AR67142-251; *see* http://www.aphis.usda.gov/plant_health/ea/lbam.shtml.) CDFA itself is currently conducting eradication programs against several pests, including the Asian citrus psyllid, guava fruit fly, gypsy moth, Japanese beetle, Mediterranean fruit fly, melon fruit fly, Mexican fruit fly, Oriental fruit fly, and white-striped fruit fly using spinosad, Btk, and other pesticides in various regions around California. (*See* http://www.cdfa.ca.gov/plant/PDEP/target_pests.html.) CDFA also recently issued a notice of preparation for its "Statewide Plant Pest Prevention and Management Program Environmental Impact Report." (http://www.cdfa.ca.gov/plant/peir/; *see* Ex. A to the Declaration of Paul Batcher, filed concurrently herewith.) This proposed program contemplates using pesticides, pheromones and other methods to "[f]acilitate rapid and effective prevention, eradication and control of pest infestations statewide." (*Id.*) The failure to even mention these nearly identical programs by CDFA and USDA demonstrates the absolute inadequacy of the PEIR's cumulative impacts analysis. *See Kings County Farm Bureau*, 221 Cal. App. 3d at 724 ("Because the record does not provide information regarding similar energy developments in the San Joaquin Valley air basin, the agency could not, nor can we, determine whether such information would have revealed a more severe impact. Accordingly, the EIR is inadequate.").

Nor did CDFA summarize projections of growth contained in local or regional plans to determine whether the Program was consistent with any planning documents. (*See* AR00607.)

CDFA's failure to identify related projects or summarize projections prevented any effective analysis of cumulative impacts. For example, CDFA stated in its ecological risk analysis that "the use of the LBAM pheromone under Alternative MD represents a new use of the pesticide within the state (i.e., no historical or existing use outside the Program)." (AR00617.) This statement is inaccurate because USDA's LBAM program involves the release of LBAM pheromones. CDFA failed to analyze the combined effects of LBAM pheromones from these two programs on humans, native insects, aquatic life, and other plants and animals. CDFA also failed to consider the cumulative impacts of Btk and Spinosad Spray. Rather than determining the existing use of these two insecticides, CDFA concluded without further analysis that, because the impacts of the Program would supposedly be small, "[c]umulative impacts to nontarget species would not occur." (AR00614.) CDFA did not even attempt to quantify or describe the existing use of these pesticides. *Id.* CDFA's analyses of other cumulative impacts are similarly flawed. (*See, e.g.*, AR00607-08 (failing to consider cumulative impacts of related projects on organic farming); AR00614 (only comparing the ratio of permethrin used under the Program to existing permethrin uses); AR00617 (failing to consider cumulative impacts of related projects on honeybees).) CDFA's failure to adequately analyze the Program's cumulative impacts is an abuse of discretion. *See Citizens to Preserve the Ojai v. County of Ventura*, 176 Cal. App. 3d 421, 430 (1985) (holding that a cumulative impacts analysis was inadequate because the agency entirely failed to consider the impact of similar projects).

F. CDFA Failed To Establish Or Adequately Consider Environmental Baselines.

An EIR must include a baseline of the existing environmental conditions. CEQA GUIDELINES § 15125(a). "Establishing a baseline … is a fundamental requirement so that changes brought about by a project can be seen in context and significant effects can be accurately identified." *Cmtys. for a Better Env't v. City of Richmond*, 184 Cal. App. 4th 70, 89 (2010). Here, CDFA's impact analyses failed to comply with this fundamental requirement.

1. CDFA Improperly Used Its "No Program" Alternative As A Baseline.

CDFA abused its discretion because it only compared the Program Treatments to the No Program alternative and regulations, not baselines. *See County of Inyo v. City of Los Angeles*

(County of Inyo II), 124 Cal. App. 3d 1, 9-13 (1981) (invalidating EIR where agency compared the program alternatives to a hypothetical no-project alternative and not to existing conditions). Comparing projects to hypothetical conditions, like CDFA did here, causes "illusory" comparisons and "mislead[s] the public as to the reality of the impacts and subvert[s] full consideration of the actual environmental impacts ...." *Cmtys. for a Better Env't v. South Coast Air*, 48 Cal. 4th 310, 322 (2010). "An EIR must focus on impacts to the existing environment, not hypothetical situations." *County of Amador v. El Dorado County Water Agency*, 76 Cal. App. 4th 931, 955 (1999).

CDFA's No Program alternative assumes without support that private individuals, farmers, and nurseries will use highly toxic pesticides to control LBAM. (*See* AR00167.) These unreasonable assumptions are speculative and unsupported by facts and, in any event, are not a valid baseline. (*See* Section V.D.1.) CDFA nevertheless measured the environmental impacts of each of the Program Treatments against this No Program alternative. (*See* AR00214-15; AR00229; AR00265-66; AR00324-26; AR00343-44; AR00404-05; AR00429-30; AR00461-65; AR00495; AR00576; AR00603.) The effect of this comparison was to make the Program Treatments appear mild compared to the drastic private pesticide use projected under the unreasonable No Program alternative. In other words, comparing the Program Treatments to the No Program alternative – instead of an accurate baseline – artificially diminished the Program's apparent impacts.

2. The PEIR Fails To Conspicuously Identify Valid Baseline Conditions.

CDFA provided no baseline conditions for its noise and surface or groundwater resources impact sections. Regarding potential noise impacts, CDFA admitted: "Existing baseline ambient noise levels are not provided." (AR00252; *see also* AR00253; AR00255.) This is an abuse of discretion under *City of Richmond.* 184 Cal. App. 4th at 89 (without a baseline, the agency could not properly assess the project's impacts, and thus, "the EIR failed its informational purpose under CEQA.").

Likewise, CDFA did not provide a baseline to analyze surface or ground water resources. CDFA noted that discharge to surface or groundwater that exceeds ambient concentrations could

be a significant impact. (AR00485-86.) But, instead of providing any baseline concentrations, CDFA simply stated that ambient data were "limited." (AR00486.) This is an abuse of discretion. *See Sunnyvale*, 190 Cal. App. 4th at 1390-92 (invalidating EIR where agency relied on ambient data in its thresholds of significance, but failed to provide ambient data in its analysis). CDFA's ultimate conclusion that the Program Treatments would have no impact on water resources because the Program Chemicals are not continuously soluble does not exempt CDFA from providing and considering a baseline. (*See* AR00490-91.) As in *Sunnyvale*, CDFA's reliance on ambient data to establish significant thresholds and subsequent failure to provide such data render the EIR defective. *See County of Amador*, 76 Cal. App. 4th at 952-54 (requiring baseline even where agency concluded the program would cause no impact on water resources).

And where CDFA attempted to provide a baseline, its efforts fell short. For example, CDFA relied on dated information in summarizing existing conditions for numerous environmental impact analyses, including its impact analyses for land uses, aquatic resources, and air quality. (*See, e.g.*, AR00220-21 (2002 data); AR00410-12 (2002 data); AR00275-77 (2006 data).) An EIR based on outdated data is invalid. *See Berkeley Keep Jets Over the Bay Comm. v. Bd. of Port Comm'rs*, 91 Cal. App. 4th 1344, 1367 (2001) (invalidating an EIR because it relied on outdated data instead of existing conditions). Stale data do not provide the public with the information needed to consider the Program impacts on *current* (and thus anticipated future) environmental conditions.

Moreover, "[t]he decision makers and general public should not be forced to sift through obscure minutiae or appendices in order to ferret out the fundamental baseline assumptions that are being used for purposes of the environmental analysis." *San Joaquin Raptor Rescue Center v. County of Merced*, 149 Cal. App. 4th 645, 659 (2007). "[F]ailure to clearly and conspicuously identify the baseline assumptions for purposes of describing the existing environmental setting [] degrade[s] the usefulness of the EIR and contribute[s] to its inadequacy as an informational document." *Id.* Here, the baselines in CDFA's environmental analyses are nearly, if not actually, impossible to identify. True to form, CDFA failed to comply with a fundamental informational requirement by failing to provide the public with conspicuous and valid baseline conditions.

G. CDFA's Conclusions Regarding The Program's Impacts Are Not Supported By Substantial Evidence And Constitute An Abuse Of Discretion.

In addition to the deficiencies discussed above, CDFA also abused its discretion by finding that the Program, as mitigated, will have no significant adverse impacts.

1. CDFA Manipulated The Impact Analyses And Risk Assessments To Expedite Desired "No Significant Impact" Results.

The Record reveals that the risk assessments and environmental analyses relied on by CDFA to support its conclusions in the PEIR are highly suspect and cannot be regarded as valid expert opinion or reasonable assumption predicated on fact. Indeed, the Record demonstrates that CDFA engaged in a pattern of nondisclosure (to the public and its own consultants) and manipulation of data to arrive at no significant impact findings. For example, CDFA appears to have adjusted the inputs for its air quality analysis because the results generated by the original inputs were unfavorable. (*See* AR18638 ("The models themselves are still the same, but the inputs and settings have all been made less conservative… The methods from our initial report were resulting in unreasonably high health and eco risks."); *see also* AR20617 ("[I]f we were to revert to previous criteria estimates, the resulting impacts would no longer be less than significant (I think it was the 'threat' of having significant impacts that got CDFA to finally provide some of the information we had been asking for)."); AR21757 (altering assumptions underlying a human health risk assessment to change a prior significant impact finding to a no significant impact finding); AR20824 ("[D]id not like the Btk data… will look for alternative data."); AR21881 (revising assumptions to make Btk impacts appear less than significant).) Impact analyses and risk assessments tampered with to produce preordained results does not constitute substantial evidence.

The Record also reveals that CDFA was under intense pressure to complete the Draft EIR in an unrealistic timeframe, which lead to shortcuts in analyzing the Program's risks. Near the end of May 2009, Jeff Fisher, the consultant in charge of human health risks, wrote that: "The state [CDFA] is getting real pressure to have their final admin draft out the week of June 8th and they advised us to not rerun analyses under MMA, GHG, or the sections relevant to the [human

health risk assessment] to be totally consistent with OEHHA. I explained our concerns, and they clearly understand them, but feel their timing issues are more important at this point." (AR20620; *see also* AR16054 (email from Hootkins stating that "I am sorry there has been such a delay in the ecorisk assessment and that there is not sufficient time to wait for the public hazards and ecorisk sections of the PEIR to be written which would be the ideal way to go. We are running out of time to prepare the Admin Draft PEIR on this highly visible Project in the State...").) CDFA should not be permitted to stand on an environmental document rushed at the expense of thoroughness and accuracy.

2. CDFA's Conclusion That The Program Chemicals Will Not Significantly Impact Human Health Is Not Supported By Substantial Evidence.

CDFA's conclusions that IsoMate, Hercon, SPLAT, Btk, and spinosad will not have significant impacts on human health are not supported by substantial evidence. The Record shows that the long-term effects of many of these chemicals – including LBAM pheromones – are simply unknown; thus, CDFA's assumptions regarding chronic impacts are neither reasonable nor predicated on fact. The Record also shows that CDFA unreasonably ignored substantial evidence of skin, eye, and respiratory irritation and adverse impacts to sensitive receptors.

a. CDFA Has No Idea What Impacts Chronic Exposure To IsoMate, Hercon, And SPLAT Will Cause To Human Health.

Synthetic LBAM pheromones are a recent invention and no one knows how long-term exposure will impact human health. CDFA admits as much in the PEIR:

> No chronic data are available on [straight chain lepidopteran pheromones ("SCLPs")] in general, or the LBAM pheromones in particular, that can support a full understanding of potential health hazards of long-term exposures to these substances. While there is nothing in the structure of SCLPs or in the history of their usage to indicate that such health hazards are associated with long-term use, having this specific information available would have reduced this important uncertainty.

(AR01330.) Nevertheless, CDFA concluded that LBAM pheromones are "not expected to have adverse long-term human health effects." (AR000384; *see also* AR01314-15 (same).)

The only thing CDFA offered to support this conclusion was the dubious assumption that, because LBAM Pheromones seem to have little acute toxicity, they must have little chronic effect

as well. (*See* AR01209.) Dr. Richard Philp, Emeritus Professor of Pharmacology and Toxicology at the University of Western Ontario, pointed out the flaws in this logic shortly after the 2007 aerial sprayings. He reviewed USDA's 2007 Environmental Assessment for LBAM (AR58898-920) and concluded that the "acute toxicity studies conducted over a very short time span (hours or days) have *little relevance to the potential for adverse reactions when repeated exposure take[s] place over several months or years*." (AR60832 (emphasis added).) Dr. Philp recommended "[a] chronic toxicity study of at least 90 days and preferably six months duration, employing daily exposure to aerosol of the [pheromone compound] at a high exposure level…" (AR60837.) Although years had passed since the 2007 spraying, giving CDFA plenty of time to do an adequate chronic toxicity study, the PEIR still relied only on *seven-day* exposure tests. (*See, e.g.*, AR65872-82.) CDFA's conclusions regarding chronic impacts based on seven-day exposure tests are, at best, speculation.

Further, the change to a potentially infinite "control" Program exacerbated the problems with CDFA's chronic impacts analysis. The risk assessments for IsoMate, Hercon, and SPLAT were based on a seven-year exposure scenario – thus, the PEIR provides no information about how these chemicals may impact human health after seven years. (*See* AR01257; AR01788.) Especially now that the Program will last indefinitely (because of CDFA's shift from eradication to control), there is no substantial evidence to support CDFA's conclusion that the Program Pheromones will have no chronic impacts to human health.

b. CDFA Did Not Fairly Account For The Fact That Hercon, SPLAT, IsoMate, And Btk Cause Skin, Eye, And Respiratory Irritation.

CDFA non-sensically found that Hercon, SPLAT, and IsoMate will not have significant impacts on human health because their potential to cause skin and eye irritation supposedly "could not be quantitatively evaluated." (AR01130; *see also* AR01211-12; AR01221; AR01224; AR01312-14 [Tables D5-16 to D5-22].) Contrary to this finding, tests in the Record show that the pheromones cause skin, eye, and respiratory irritation in animals and nearly 500 people reported adverse reactions to CDFA's spraying of a nearly identical LBAM pheromone in 2007. (AR63967-70.) In arriving at its conclusion, CDFA dismissed this evidence, as well as the Office

of Environmental Health Hazard Assessment's ("OEHHA") conclusion that it "cannot dismiss the possibility that in sensitive individuals, contact with [Pheromone] particles could cause allergic-type responses." (AR01211; *see also* AR01312 ("[I]t is prudent to treat the LBAM pheromone-containing products as dermal sensitizers in the absence of additional data.").)

CDFA also summarily dismissed nearly 500 first-hand reports of adverse reactions following the 2007 aerial spraying of LBAM pheromones over Santa Cruz and Monterey, despite the fact that OEHHA concluded that the adverse symptoms may have been caused by the aerial spraying of LBAM pheromones.[12] (AR63960 ("The possibility that some of the symptoms were caused by the [pheromone] application could not be ruled out."); *see, e.g.*, AR01772-73; AR01946; AR03980-82; AR61266.)

Btk also causes skin and respiratory irritation. (*See* AR20574; AR01238-40; AR45702-05; AR69547-48.) Because these symptoms are not long-lasting, CDFA concluded that impacts from Btk were not significant. (*See* AR01238-40.) This ignores the reality of the Program that CDFA approved, which necessarily contemplates repeated, long-term application of Btk.

c. CDFA Did Not Fairly Account For The Fact That The Program Chemicals Will Cause Adverse Impacts To Sensitive Receptors.

CDFA's conclusion that Btk and the Program Pheromones are not harmful to humans is not supported by substantial evidence. Indeed, CDFA's initial assessment of the risk posed to children by Btk Spray resulted in a finding of significant impact. (*See* AR21757.) Without changing the Program in any way, CDFA apparently *altered* the assumptions underlying its risk assessment in order to produce a finding of no significant impacts to children. (*Id.*; *see also* AR20824 ("*[D]id not like the Btk data... will look for alternative data.*" (emphasis added)); AR21881 (revising assumptions to make Btk impacts appear less than significant).) Again, risk assessments tampered with to produce preordained results are not substantial evidence.

CDFA also acknowledged that Btk can infect immuno-compromised persons, but concluded that Btk's impacts on these sensitive receptors are not significant based on wholly

[12] Although the 2007 spraying involved a slightly different pheromone formulation, the pheromone was similar to Hercon, SPLAT, and IsoMate, and it produces the exact same sensitization results. (*See* AR01209-24.)

unreliable studies. (*See* AR01238-40.) One study counted only mortality and self-reported symptoms caused by Btk exposure and therefore failed to account for infections that people did not report. (AR01239.) Another study did not disclose where, when, or how Btk was applied, or the amounts of Btk exposure tested. (*See* AR45696-759.) The study that purported to address the health effects of Btk on children sampled only a small population (29 children), and its conclusion that Btk caused no significant health effects in children was based only on counting total emergency room visits before and after spraying. (AR01239.) And, none of the studies on which CDFA relied assessed the effects of long-term exposure to the Program Chemicals on sensitive receptors. Indeed, there has been no study of acute or subchronic exposure to LBAM pheromones in humans, and no study of chronic exposure in humans or animals. (AR01207-09; *see also* AR01330; AR63963.)

3. The Revised Control Program Will Significantly Impact Ecological Health, Terrestrial Resources, And Aquatic Resources.

CDFA admitted that IsoMate, Hercon, and SPLAT have the potential to disrupt mating in other moth species the same way they do in LBAM. (AR00548-51; AR01205; AR60093.) CDFA nevertheless concluded that, because LBAM was not widespread in California, any harm to native insects would be ameliorated by replenishment from outside the eradication area. (AR00451; AR60093.) The fatal flaw in this reasoning is that LBAM ***is*** widespread and established, which CDFA admitted when it changed the Program goal from eradication to control, and therefore any application of LBAM pheromones sufficient to "control, contain, and suppress" LBAM will necessarily have the same detrimental impact on native moths. (*See* AR00010 ("LBAM has spread to more areas of California, and the density of populations has increased significantly.").)[13]

[13] The PEIR also fails to account for the potential effects of the Program Pheromones on honeybees. The PEIR discloses that bees are averse to LBAM pheromones, which indicates that the pheromones interact with bees in some way. But the EIR fails to adequately analyze the cumulative effect of the Program chemicals when used in combination, and therefore fails to consider any combined effect of Program pheromones and Btk on honeybees (or other insects). (*See* AR01522 ("No cumulative effects will occur from the different treatments along with Btk on spring-feeding caterpillars, because other treatments will not be applied in the Program location."); AR58870-97.)

CDFA's shift from eradication to control also renders its conclusion that Btk and spinosad will not have significant impacts to native moths, butterflies, and honeybees obsolete and unfounded.[14] CDFA concluded that Btk Spray and Spinosad Spray will not have significant impacts because the spraying would end when LBAM was eradicated. (AR01610 (concluding that Btk Spray will not have significant impacts because "the impact would be localized and should not affect nontarget species at a population level" and "short term impacts... are considered less than significant if the effects are not permanent"); AR00456; AR00559 (concluding that the impact of spinosad on non-target insects would be less than significant simply because, "[b]ased on application methods, the impact would be short term and localized...").) But, the new control program necessarily contemplates indefinite (i.e., long-term) application of Btk and spinosad. And, as CDFA admits, long-term application of these pesticides under the Program will have significant impacts on native insects.[15] (AR00447-48.)

Similarly, the PEIR found that IsoMate, Hercon, SPLAT, Btk and spinosad will have no significant impacts on aquatic health because only small amounts of the pheromones and pesticides will make their way into bodies of water. (*See* AR00420-425; AR00490-93; AR01605.) But, CDFA underestimated the amount of IsoMate, Hercon, SPLAT, and spinosad that will enter aquatic environments. For example, as explained by the East Bay Municipal Utilities District, CDFA failed to account for runoff rates in urban environments. (AR01810; *see also* AR00170; AR00173; AR01893.) Further, the PEIR miscalculates how far Hercon/SPLAT Ground Spray, Hercon/SPLAT Aerial Spray, Btk Spray and Spinosad Spray will drift after application, leading to more of these chemicals entering waterways than stated in the PEIR. The PEIR also contains inadequate buffer zones around aquatic resources. Indeed, the PEIR contains

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[14] Given the impact of Colony Collapse Disorder on honeybee populations, it is hard to believe that a substantial reduction in honeybee population could be insignificant. (*See* AR58870-97; AR01610 ("[A]dult worker honeybees may be somewhat more sensitive than some nontarget lepidopterans to Btk exposure."); AR49915-29 [The Value of Honey Bees as Pollinators of U.S. Crops in 2000].)

[15] The PEIR proposes a mitigation measure for "federally listed moths and butterflies," but proposes no mitigation for honey bees or moths and butterflies that are not "special-status species." (*See* AR00031, AR00560-61.) Moreover, even for special-status species, the mitigation measure proposed is inadequate. The PEIR fails to explain how CDFA will ensure that it identifies the location of special-status species, or how a one-mile buffer is adequate given the potential for Btk and Spinosad to drift from the treatment area. (*See* AR00031, AR00560-61.)

no restrictions on Hercon/SPLAT Ground Spray near water bodies, and CDFA's flawed drift analysis renders its buffer zones for Hercon/SPLAT Aerial Spray, Btk Spray and Spinosad Spray inadequate. (*See* AR00170-71; AR00176; AR00292; AR36799.)

H. CDFA's LBAM Program Is Unnecessary: The EIR's Assumptions Regarding The Threat Posed By LBAM Are Unsupported And Unreasonable.

The serious flaws in CDFA's CEQA document are compounded by the fact that CDFA is wrong about the need for the Program at all. LBAM does not pose the threat that CDFA claims.

CDFA has asserted that "[t]he [LBAM] Program is needed to protect the state's native plants, forest species, agronomically important crops, and ornamental plants from damage by this invasive pest species." (AR00115.) This threat of damage is apparently based on CDFA's unfounded assumptions that LBAM is a "new pest to North America" whose "long-term impacts to the environment and agricultural production could be considerable." (AR00069.) But the Record shows that LBAM has been in California for many years and has not caused any confirmed damage to California's environment.

1. LBAM Has Been in California For Many Years.

CDFA bases its conclusion that LBAM is a recent invader of California on two pieces of information: (1) the lack of detection of LBAM prior to 2006 and (2) the detection of more LBAM in new locations over the last four years. The data on which CDFA relies are flawed.

First, CDFA's pre-2006 monitoring program was inadequate to detect the LBAM population existing in California at that time. Only 860 LBAM traps were used in the statewide monitoring program in 2005, and no traps were located in Marin, Monterey or San Francisco Counties, which are three of LBAM's primary locations.[16] (AR62904-06; AR02170.) The other county that harbors the most LBAM is Santa Cruz, but in 2005 CDFA placed only 20 traps in Santa Cruz County. (AR02170.) The trap density in Santa Cruz County was only one trap per 22 square miles, which is far less than CDFA's own LBAM trapping guidelines of five traps per square mile. (AR02170-71; *see also* AR62904 ("In Santa Clara County it appears that low trap

[16] By contrast, CDFA placed over 53,000 traps by the end of 2008 to detect LBAM. (AR65333.)

density (one per square mile relocated up to four times per season) and low LBAM populations ... may have prevented the moths from being trapped in 2005.").) The minimal number of LBAM traps CDFA deployed prior to 2006 was therefore insufficient for CDFA to detect LBAM.[17] (AR02010; *see also* AR12617 (identifying LBAM in California in 1997).) The National Academy of Sciences studied USDA's LBAM assessment and concluded that "the survey and trapping regimen used in California before 2007 was probably inadequate to determine the presence or absence of LBAM..." (AR02010.) Because CDFA did not employ an effective trapping program prior to 2005, and because LBAM larvae are virtually indistinguishable from larvae of native leafroller moths, LBAM simply blended into California's native moth population. (AR02283; AR02010.)

Second, the purported increase in the LBAM population since 2007 is primarily based on increased trapping activities rather than any objective increase in LBAM populations. CDFA has greatly increased the number of LBAM traps in California, resulting in increased LBAM detection. (AR62915.) CDFA is also finding LBAM in new geographic areas because it has increased the geographic scope of its trapping activities. (*See* AR67791; http://www.aphis.usda.gov/plant_health/plant_pest_info/lba_moth/updates-2007.shtml (USDA/CDFA increased trapping locations from 27 counties in April 2007 to 51 counties by December 2007).) In other words, what CDFA claims is an exploding LBAM population is actually just increasingly accurate detection of an existing, stable LBAM population. (*See* AR42921; AR02010.) Indeed, USDA's genetic testing does not support CDFA's conclusion that LBAM is a new pest. (*See* AR02010.)

Experts have pointed out the flaws in CDFA's methodology. University of California Entomology Professor James Carey, for instance, informed CDFA that no insect can spread geographically at the rate CDFA claims LBAM has spread. (AR02169.) Carey pointed out that the Mediterranean fruit fly has a greater rate of dispersion than LBAM, but multiple outbreaks of

[17] Indeed, CDFA admits that "[t]he majority of the 2005 LBAM traps were deployed in areas still lacking LBAM in 2007." (AR62910; *see also* AR01750 ("[M]ost of the [CDFA and USDA's joint 2005 statewide LBAM] survey was conducted in areas that still have no LBAM...").) In other words, the LBAM traps were located in areas that have no LBAM now and had no LBAM in 2005. The failure to detect LBAM in these areas in 2005 is not substantial evidence that LBAM was not in California at that time.

the Mediterranean fruit fly in Southern California in the 1980s and 1990s never spread beyond an area of 600 to 800 square miles. (*Id.*) Based on the available data, Dr. Carey concluded that LBAM has been in California for 30 to 50 years. (*Id.*) CDFA's conclusion that LBAM has spread to occupy an 8,000 to 10,000 square mile area in the space of several years is implausible. (*See id.*) The PEIR failed to respond to Professor Carey's comments about the massive discrepancy between supposed LBAM spread and the spread of the Mediterranean fruit fly. (AR01749; *see also* AR02011; AR02287-305.)

2. LBAM Has Caused No Confirmed Damage in California.

CDFA admits that LBAM has caused no damage to California's environment. (AR01751; *see* AR00197 ("[N]o direct crop damages have been experienced to date in areas subject to existing infestations.").) The PEIR attributed the lack of damage to LBAM's "recent" arrival, but this explanation is insufficient. As discussed above, LBAM has been in California for many years. But even if CDFA's own estimate that LBAM has been in California for only nine years is true, the fact that LBAM has caused no damage during that time proves that LBAM does not pose the "considerable" threat to the environment and agricultural production that CDFA asserts. (*See* AR02178 (May 2008 radio interview in which former CDFA Secretary A.G. Kawamura states that LBAM has been in California since 2001 or 2002).)

Notwithstanding the complete absence of damage to date, CDFA posited that LBAM has "the potential for damage to California ecosystems." (AR01751.) CDFA relied on two arguments to support its conclusion that LBAM will cause future widespread damage in California. First, it cited out-of-date damage caused by LBAM in Australia and New Zealand to infer similar damage in California. Second, CDFA cited two specific examples of damage to California plants it concluded was caused by LBAM. Neither of these arguments have merit.

As to crop damage in New Zealand and Australia, the PEIR relied primarily on reports from the 1980s and 1990s. (*See* AR00197; AR59250 (using crop damage in Australia for the 1993/1994 production year); AR16113 (using evidence of crop damage in Australia to presume crop damage in California).) During that time, these countries used organophosphate pesticides against LBAM and, because these pesticides killed LBAM's natural predators, this practice

actually fostered LBAM population growth. (AR67541.) Once New Zealand and Australia stopped using these pesticides, natural predators and environmental factors easily controlled LBAM populations within a few years. (AR02223; AR60907.) In the last decade, LBAM has caused little damage to crops in these countries and is not considered a significant pest. (*See* AR57232 ("LBAM populations in citrus orchards are normally kept at low levels by a combination of biological and environmental factors."); AR67541 (reporting little LBAM damage in New Zealand even in untreated crops); AR02281 (explaining that LBAM populations in New Zealand are now almost exclusively controlled by natural predators); AR60907 ("LBAM is currently considered a minor biological pest in New Zealand agriculture...").)

The PEIR's *only* direct evidence of damage purportedly caused by LBAM is (1) a report of plant damage in the Point Richmond area of Contra Costa County and (2) a blog report of damage to a berry crop in the Santa Cruz area. (AR01751.) These two damage reports are unreliable for several reasons. First, the report of damage in Contra Costa County was completely debunked when testing revealed the larvae were not LBAM. (AR37333 ("[T]he larvae [discussed in Contra Costa County's comments] were Id'd and were not LBAM.").) CDFA failed to disclose this fact in the Final EIR although it continued to cite to this Contra Costa County report as confirmed evidence of LBAM damage. (*See* AR01751.) Likewise, the supposed damage to the berry crop near Santa Cruz is also unreliable and unconfirmed. Without genetic testing, it is nearly impossible to distinguish damage caused by LBAM larvae from damage caused by larvae of the many native leafroller moth species. (AR42920.) For these reasons, the two instances of supposed LBAM damage – one definitively debunked and the other vague and unreliable at best – are not substantial evidence to support CDFA's wild speculation that LBAM will cause widespread damage in the future.

Rather than supporting a critical finding by CDFA to justify the purpose of the Program, the Record here actually reveals that the preparers of the EIR could not find any evidence of LBAM damage to support CDFA's assertion that LBAM poses a "considerable" threat to the environment. For example, one of the consultants that prepared the PEIR asked his supervisor whether it was permissible to cite CDFA's own website for evidence of damage (presumably

because he could find nothing else). (AR40829.) And an economist consultant working on CDFA's responses to comments complained that "[w]e cite the fact that no damages have been reported to date, and need to be able to defend our assumption of potential damages moving into the future." (AR39162; *see also* AR16111 ("The [Monterey County Agricultural Commissioner] stated that existing crop damage associated with LBAM has **not** yet been seen in the region...") (emphasis in original).) The absence of any evidence of damage is especially suspect given CDFA's claim that LBAM populations have significantly increased in recent years.

In sum, there is nothing in the Record to support CDFA's assertion that LBAM will cause considerable damage to California's environment if left untreated. CDFA's pursuit of such a massive pesticide Program against what is really a minor pest is in and of itself an abuse of discretion.

VI. CONCLUSION

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

Dated: December 23, 2011

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