Third Civil No. C072617
(Related Appeal No. C072067)

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

OUR CHILDREN'S EARTH FOUNDATION, *et al.*,

Appellants,

v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE, *et. al*,

Respondents.

On Appeal from the Superior Court of Sacramento County,
Case No. 34-2010-80000638
The Honorable Lloyd G. Connelly, Department 33

APPELLANTS' OPENING BRIEF

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TO BE FILED IN THE COURT OF APPEAL

APP-008

COURT OF APPEAL, Third APPELLATE DISTRICT, DIVISION	Court of Appeal Case Number: C072617
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APPELLANT/PETITIONER: Our Children's Earth Foundation, et al. RESPONDENT/REAL PARTY IN INTEREST: California Department of Food & Ag,	

CERTIFICATE OF INTERESTED ENTITIES OR PERSONS

(Check one): ☑ INITIAL CERTIFICATE ☐ SUPPLEMENTAL CERTIFICATE

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1. This form is being submitted on behalf of the following party (*name*): Appellants

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Date: July 1, 2013

Summer Wynn
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(SIGNATURE OF PARTY OR ATTORNEY)

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Appellants 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, "Appellants") respectfully submit this opening brief in support of their appeal under the California Environmental Quality Act ("CEQA").[1]

I. INTRODUCTION

After being ordered by two courts to prepare an environmental impact report, the California Department of Food & Agriculture ("CDFA") cursorily went through the motions and certified a program environmental impact report ("PEIR") for the Light Brown Apple Moth ("LBAM") Eradication Program ("Program"). This so-called CEQA document sanctions unspecified use of pheromones and other pesticides throughout the entire state of California for the purpose of exterminating LBAM, a moth species that has not caused any actual damage to California plants. CDFA's perfunctory PEIR did not comply with CEQA for several reasons.

First, CDFA misled the public with a classic bait and switch. Throughout the environmental review process, CDFA discussed a program designed to "eradicate" LBAM. Both the draft and final PEIR circulated for public review defined the Program goal as LBAM "eradication" and considered only those pesticide protocols that CDFA found to be "eradicative." After public comment closed, however, CDFA changed the

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[1] Citations to "CEQA" refer to California Public Resources Code section 21000, *et seq.*

Program's goal from eradication to "control." This change was significant because, as CDFA admits, eradication is "fundamentally different" than control in terms of viable treatments, available alternatives, and duration. Notwithstanding this fundamental change, CDFA did not reconsider its environmental impact analysis or consider whether there were any new feasible alternatives. Nor did CDFA account for the fact that control measures are needed indefinitely, or allow the public to comment on the new control Program. Rather, CDFA attempted to sweep this change under the rug by announcing it the day it certified the PEIR.

CDFA also violated CEQA because the PEIR did not consider any true alternatives to the Program. CDFA performed only a screening-level "scoping" process to identify various "tools" it could use to eradicate LBAM. During this process, CDFA rejected several alternatives simply because they were "not eradicative" and without conducting any sort of reasoned analysis. Also, the No Program alternative analysis was flawed because it rested on unreasonable assumptions that private parties would spray large amounts of highly toxic pesticides to combat LBAM if the Program was not approved. At the same time, CDFA assumed that there would not be any private pesticide use if the Program was approved. CDFA therefore artificially skewed the No Program alternative to make the Program's effects appear environmentally superior.

The PEIR also falls short because CDFA did not conduct any site-specific environmental analysis. The Program area is nearly the entire state and CDFA admits the PEIR does not undertake any site-specific analysis. But, instead of performing any sort of tiered or subsequent environmental review, CDFA is relying solely on its "screening level" program document to conduct pesticide treatments anywhere in the statewide Program area.

CEQA requires analysis of specific environments – not broad assumptions purporting to cover the entire state.

CDFA also failed to use either of the two mandated methods for analyzing cumulative impacts. Worse, CDFA did not even attempt to consider the cumulative effects of this Program and its own, closely related insect treatment programs occurring throughout California.

In sum, the PEIR fails to satisfy CEQA's most basic requirements. CDFA took numerous shortcuts during the environmental review process, and, by blessing these shortcuts, the trial court ignored violations of CEQA. Petitioners therefore respectfully request that this Court reverse the decision below, set aside the PEIR, and order CDFA to fully comply with CEQA.

II. STATEMENT OF APPELLATE JURISDICTION

The trial court issued its ruling on August 28, 2012 (AA456-470) and entered judgment for respondents on September 12, 2012. (AA485-486.) CDFA served Appellants with a notice of judgment on September 18, 2012. (AA492.) Appellants filed a timely notice of appeal on November 16, 2012. (AA611-19; *see* Cal. Rules of Court, Rule 8.104(a)(1); Cal. Code Civ. Proc. § 904.1(a)(1).)

III. STATEMENT OF THE CASE

A. Factual Background

1. The Light Brown Apple Moth

The Light Brown Apple Moth ("LBAM") is a small moth native to Australia. (AR67541.)[2] LBAM belongs to a family of moths known as "leafrollers," which derive their name from the behavior of their larvae "rolling" leaves into a protective shelter around themselves. (AR67543;

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

AR60905.) Because LBAM larvae rely on these leaf cocoons for protection, they typically cause only superficial leaf damage. (AR60905.) Adult LBAM do not feed and cause no plant damage. (AR42921.)

LBAM do not reproduce or spread quickly. Most of the 150 eggs typically laid by female LBAM during their one to two-week lifespan are eaten by predators or infested by parasites and never reach maturity. (AR60905.) Adult LBAM are incapable of traveling long distances and do not travel more than 100 meters from the plant on which they hatch. (*Id.*) For these reasons, LBAM populations are not prone to rapid numerical or geographical growth. (*Id.*; *see also* AR02169.)

In the 1980s and 1990s, LBAM caused some damage to agricultural crops in New Zealand. This damage was due largely to New Zealand farmers' overuse of broad-spectrum organophosphate insecticides,[3] which killed most of LBAM's natural predators. (AR60907.) When LBAM eventually developed a resistance to these organophosphates, no natural predators remained to regulate LBAM's population growth, and LBAM populations expanded. (AR60909; AR67546.)

Beginning in the late 1990s, however, New Zealand farmers stopped using organophosphates in favor of an integrated pest management ("IPM") approach to control LBAM populations. (AR67546.) The IPM approach involved using beneficial predators and monitoring in conjunction with targeted applications of less-toxic pesticides to reduce LBAM numbers to a non-destructive level. (*Id.*) The change to an IPM strategy restored the natural balance between LBAM and its predators, and LBAM is no longer a significant agricultural pest in New Zealand. (*Id.*)

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[3] Organophosphate pesticides disrupt nerve function and are highly toxic to nearly all insects, as well as humans and many other animals. (AR60907.)

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

It is unknown when LBAM first arrived in California. According to some scientists, LBAM has been living undetected in California for decades. (AR02169.) But, according to CDFA, LBAM has only been in California since 2006. (AR00068.) Despite dispute among experts (and in the record) as to whether LBAM causes any harm, CDFA undertook an "emergency" effort to eradicate LBAM in 2007. CDFA sprayed untested LBAM pheromone pesticides over Santa Cruz and Monterey Counties using crop duster airplanes. (*Id.*) Shocked residents and concerned citizens immediately filed two CEQA lawsuits challenging CDFA's aerial spraying. (AR60915.) Each of the courts rejected CDFA's arguments that the spraying was an emergency measure exempt from CEQA or unlikely to have any significant environmental effects. Both courts granted motions for preliminary injunction and ordered CDFA to prepare an EIR before any further spraying for LBAM. (*Id.*)

3. The Draft PEIR For LBAM "Eradication" Using Eight Treatments.

Under court order to prepare an EIR, CDFA devised a "program" to "eradicate" LBAM from California. (AR00163.) CDFA defined the program area to include "all portions of the state [of California] in which climatic conditions are suitable to the LBAM" (the "Program Area"). (*Id.*) Because LBAM are expected to live everywhere in California except desert areas and elevations above 5,000 feet, the Program Area effectively includes the entire state except a few desert and mountain areas. (*Id.*) The only guidance CDFA provided as to where specific treatments would occur was the following vague and ambiguous statement: "[S]pecific treatment

area boundaries are determined based on trapping within any infested counties within California. The 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." (*Id.*)

CDFA's stated goal in the PEIR was "to eradicate LBAM from the state of California within 5 to 7 years of its introduction, by 2015." (AR00114.) CDFA stated that LBAM eradication was **necessary** to "protect the state's native plants, forest species, agronomically important crops, and ornamental plants from damage by this invasive species." (AR00115.) CDFA also stated that eradication was **feasible**, despite numerous comments, including those from the City of Albany, the County of Santa Cruz, the Bolinas Community Public Utility District and others demonstrating otherwise. (*See, e.g.*, AR01822; AR01835; AR01935-36; AR02066; AR02073; AR02080; AR02149-51; AR02321; AR02329-33.)

In preparing the PEIR, CDFA **never** considered any true alternatives to its eradication program. Instead, CDFA conducted a cursory "scoping" study to identify tools for inclusion in its eradication Program. (AR01694-1720.) Because CDFA's goal was LBAM eradication, it cursorily dismissed any tools that would only control, but not eradicate, LBAM. (*See, e.g.*, AR01695; AR01699; AR01703.) Through this scoping process, CDFA identified eight tools that it considered effective for eradicating LBAM. (AR01720.) The Draft PEIR labeled these eight tools as "alternatives," although they were nothing more than the suite of tools that CDFA intended to use together **as part of the eradication Program**. (*See* AR00632.)

The eight tools that CDFA considered in the PEIR are: (1) twist-tie application of LBAM pheromone, (2) ground-spray application of LBAM

pheromone, (3) aerial spraying of LBAM pheromone, (4) "male moth attractant" using LBAM pheromone and the pesticide permethrin, (5) spraying of the pesticide Btk, (6) spraying of the pesticide spinosad, (7) distribution of parasitic wasp eggs, and (8) the release of millions of sterile LBAM. Each of these tools is discussed in more detail below.

(1) Twist-tie application of LBAM pheromone ("Twist Ties"). This tool uses plastic twist-ties infused with the synthetic LBAM pheromone[4] pesticide IsoMate. (AR00170.) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (*Id.*)

(2) Ground spray application of LBAM pheromone pesticide ("Ground Spray"). This tool consists of spraying the synthetic LBAM pheromone pesticide mixtures Hercon Bio-Flake ("Hercon") and "SPLAT" from spray guns mounted on trucks or carried in backpacks. (AR00170.) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (*Id.*)

(3) Aerial spray of LBAM pheromone pesticides ("Aerial Spray"). Aerial spray consists of spraying either Hercon or SPLAT from a crop duster airplane. (AR00171.) The only information CDFA provided about the location of aerial spraying was a series of maps indicating "where aerial application of pheromones **might** occur." (AR01753-54 (emphasis added).) CDFA also stated, however, that even if an area did not appear on

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

these maps, that did not necessarily mean that CDFA would not aerially spray there. (*Id.*) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (AR00171.)

(4) Male moth attractant using LBAM pheromone and permethrin pesticides ("MMA"). This tool uses a combination of SPLAT to attract male LBAM and the pesticide permethrin to kill male LBAM.[5] (AR00171.) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (AR00173.)

(5) Spraying of Btk ("Btk Spray"). This tool involves the spraying of Btk (Bacillus thuringiensis kurstaki), which is a bacterium containing proteins toxic to certain insects, including moths, butterflies, beetles, and flies. (AR00173; AR01235.) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (AR00173.)

(6) Spraying of the pesticide spinosad ("Spinosad Spray"). This tool involves the spraying of spinosad, which is an insecticidal mixture derived from the soil bacterium Saccharopolyspora spinosa that is toxic to a wide variety of insects. (AR00173; AR01228.) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no

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[5] Although CDFA initially assured the public in the Draft PEIR that MMA was safe, **CDFA subsequently removed MMA from the Program after it was advised by other agencies and the public that permethrin posed an unreasonable cancer risk to children.** (AR01747.)

LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (AR00173.)

(7) Distribution of parasitic wasp eggs ("Wasp Release"). This tool consists of the mass release of Trichogramma wasps, which are known to parasitize and kill LBAM eggs. (AR00174.) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (*Id.*)

(8) Release of sterile LBAM ("Sterile Moth Release"). This tool involves the aerial release of LBAM that have been sterilized using heavy doses of radiation to disrupt mating among wild LBAM. (AR00174.) CDFA stated that Sterile Moth Release will be the "primary" eradication tool when it becomes available, and may occur anywhere in the Program Area. (*Id.*) To achieve LBAM eradication, the PEIR stated that this treatment would be used only until no LBAM were detected in the treatment area for a period equal to two LBAM life cycles. (*Id.*)

In sum, CDFA assumed that each of these eight treatment tools (collectively, the "Program Tools") would **only be used until LBAM no longer existed in a treatment area**. (AR00170-74.) For several of these Program Tools, CDFA only analyzed the impacts from three applications of the treatments because it assumed that only three treatments would be necessary to achieve eradication. (AR00173.) Further, because CDFA assumed that eradication was feasible in three to five years, CDFA only purported to consider the environment impacts of the Program Tools for a seven-year period. (AR01257; AR01788.)

4. The Public Identified Numerous Deficiencies In CDFA's Draft PEIR.

CDFA released its Draft PEIR to the public on July 31, 2009. Numerous agencies, organizations, and individuals submitted written comments and spoke at public hearings expressing concerns and alerting CDFA to numerous CEQA deficiencies in the Draft PEIR. (*See* AR01798-3449.) The public was particularly concerned about the overbroad program scope and CDFA's failure to provide the public sufficient information about where, when, how, and in what combination CDFA would deploy its Program Tools throughout the state. (*See* AR01805; AR01810; AR01825; AR01835; AR01894; AR01916; AR02045; AR02054; AR02074; AR02118; AR02142.) The public also criticized CDFA's No Program alternative, because it was unrealistic and based on flawed data, and informed CDFA that it had failed to consider a reasonable range of actual alternatives. (*See* AR01809; AR01821; AR01824; AR01835; AR01915; AR01920; AR01935-36; AR01938-39; AR02047-48; AR02066-67; AR02074; AR02085; AR02151-53; AR02162; AR02313; AR02321; AR02327; AR02350-51.) The public raised numerous valid criticisms of CDFA's superficial attempt at an EIR; only a representative sample of those criticisms is cited here. (*See* AR01798-3449.) CDFA dismissed most of the public's comments with cursory responses and made almost no changes to the Draft PEIR. (*See id.*; AR03452-3484.)

On February 26, 2010, CDFA released the Final PEIR. (AR01725.) In the Final PEIR, CDFA approved statewide use of seven of the Program Tools: Twist Ties, Ground Spray, Aerial Spray, Btk Spray, Spinosad Spray, Wasp Release, and Sterile Moth Release. CDFA removed MMA

from the Program because it had finally acknowledged that MMA posed an unacceptable cancer risk to children. (AR01747.)

5. CDFA Radically Changed The Program The Day It Certified The PEIR.

After the public comment period on the Final EIR had closed, CDFA made a dramatic and sweeping change to the Program in its findings of fact (the "Findings"). In the Findings, CDFA abandoned its stated Program goal of LBAM "eradication" and switched to the entirely different goal of LBAM "control and suppression." (AR00010-11.) CDFA's change from eradication to control shocked the public because CDFA had: (1) told the public that control was "fundamentally different" than eradication; (2) expressly conditioned its analysis of environmental impacts on a brief and finite eradication program; and (3) rejected numerous alternatives proposed by the public because they were, in CDFA's own words, "not eradicative." (*See, e.g.*, AR01699; AR01751-52.)

Notwithstanding the significant change to the LBAM Program goal, **CDFA conducted no further environmental review, and did not even recirculate the PEIR to allow public comment on this critical development**. (AR00014; AR00046.) CDFA cursorily assumed that the change did not require additional environmental review or public comment, certified the Final PEIR, and issued its Findings on March 22, 2010. (AR00013; AR00046.)

In its Findings, CDFA also made the cryptic statement that Aerial Spray was "infeasible **at this time**." (AR00028 (emphasis added).) Because CDFA qualified this additional change by using the phrase "**at this time**," CDFA provided the public absolutely no assurance as to whether or

when it would implement Aerial Spray sometime in the future without any further notice or environmental review. (*Id.*; *see, e.g.*, AR00452-54.)

B. Summary Of Trial Court Proceedings

Appellants filed their petition for writ of mandate (the "Petition") on April 22, 2010, in the Superior Court of California, County of Alameda. (AA:1-59.)[6] Several days earlier, another set of petitioners had filed a petition against CDFA in the Superior Court of California, County of Sacramento, alleging similar CEQA violations regarding the LBAM PEIR (Case No. 34 2010 80000518, hereinafter, the "NCRA Action"). On July 2, 2010, Appellants and CDFA stipulated to transfer this case from Alameda County to Sacramento County, and on July 9, 2010, Judge Roesch of the Alameda Superior Court ordered that this case be transferred to Sacramento Superior Court. (AA:67-68.) On October 13, 2010, Judge Connelly ordered the cases related, but declined to consolidate the two cases. (AA:80-81.)

Appellants and the appellants in the NCRA Action agreed with CDFA that a single administrative record would be prepared for use in both actions. CDFA certified the administrative record (which contains more than 70,000 pages) and lodged the record with the trial court on or around April 20, 2012. (AA:290.)

After the parties filed briefs in both actions (AA:128-230, AA:231-288, AA:292-375), the trial court held a coordinated hearing on the merits on May 11, 2012. (*See* Recorder's Transcript ("RT").) At this hearing, Judge Connelly immediately inquired about the potentially infinite duration of the Program given CDFA's about-face from eradication to control.

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[6] References to the Appellants' Appendix are cited as "AA:[PAGE:LINE]."

Indeed, the trial court noted that this was "a fulcrum issue." (RT:19:1-4.) The trial court correctly observed that the PEIR was ambiguous as to whether CDFA would perform additional environmental review after seven years, and noted that "it is a horse of a different color if you are doing this for seven years versus if you are doing this for 30 years..." (RT:18:2-5; RT19:12-15.)

The trial court then asked CDFA if it would agree to a stipulation or order that "if any one of the five [*sic*] enumerated activities [i.e., the Program Treatments] continued beyond March 2017, that an environmental review, whatever it is, but environmental review will be required." (RT:18:17-25.) Petitioners objected to the notion that any after-the-fact stipulation could remedy the deficient PEIR or the flawed public review process. (RT:20:15-21:26.) Nevertheless, the trial court requested that CDFA submit a stipulation "that would resolve the potential ambiguity in the environmental document that CDFA would not continue the control program as described and authorized in the EIR beyond [March 2012,] absent other appropriate environmental review consistent with the law." (RT:56:9-21.)

On May 17, 2012, CDFA submitted a proposed stipulation regarding the length of the Program that did nothing more than confirm that CDFA would abide by its flawed and ambiguous Findings. (AA:376-383.) Petitioners objected to CDFA's proposed stipulation on the grounds that it was legally improper for CDFA to attempt to correct its deficient PEIR in the context of litigation two years after it certified that document, and that, in any event, the stipulation did not actually limit the duration of the Program as the trial court had improperly requested. (AA:384-452.) On May 30, 2012, the trial court took the case under submission. (AA:453-

455.) On August 28, 2012, the trial court issued an order denying the petitions in both actions (the "Order"). (AA:456-470.)

In its Order, the trial court found that CDFA had not violated CEQA. This conclusion was erroneous for several reasons. First, the trial court found that the revised Program would not last beyond seven years (AA:451), notwithstanding the court correctly recognizing at the hearing that the control Program's indefinite duration was a "potential ambiguity in the environmental document." (RT:56:9-21.) The trial court had even requested a stipulation from CDFA to limit the Program to seven years. (*Id.*) Nevertheless, the trial court erroneously upheld CDFA's approval based on certain cursory and ambiguous statements in CDFA's Findings. (AA:461.) In effect, the trial court rewrote the PEIR to state that "the program will expire in 2017, and additional CEQA review will be required to continue all or part of the program." (AA:462.) Neither of these findings is supported by the record.

Second, the trial court erred by stating that CDFA's statements about Aerial Spray in the Findings "definitely remove the aerial releases from the scope of the LBAM Program. Absent additional CEQA evaluation by the Department regarding the feasibility of using aerial releases of pheromones as a management strategy, the statements foreclose the Department from reinstating the aerial releases to the LBAM Program." (AA:460.) Neither the PEIR nor the Findings contain any such limitation on the use of Aerial Spray, which was one of the defects pointed out by Petitioners.

The trial court therefore erroneously ordered revisions and limitations to the Program, including that the Program cannot continue beyond seven years, and that CDFA may not use Aerial Spray without

additional environmental review. (AA:460-462.) These limitations and clarifications were among Petitioner's specific criticisms of the PEIR and the CEQA process, but the trial court wrongly found that CDFA had completely "prevailed" and awarded CDFA costs. (AA:486.) The trial court further erred in finding, among other things, that the PEIR adequately discussed site-specific impacts, considered alternatives, including the No Program alternative, and analyzed cumulative impacts. (AA:462-467.)

IV. STANDARD OF REVIEW

An appellate court's review of the administrative record for legal error and substantial evidence in a CEQA case is de novo. (*Vineyard Area Citizens v. City of Rancho Cordova* (2007) 40 Cal.4th 412, 427.) Further, all courts must interpret the requirements of CEQA "in such manner as to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Friends of Mammoth v. Board of Supervisors* (1972) 8 Cal.3d 247, 259.) Thus, a court must find an abuse of discretion if the agency's decision is not supported by substantial evidence or if the agency failed to proceed in the manner required by CEQA. (*Vineyard Area Citizens*, 40 Cal.4th at 427.)

A. Public Participation Is The Heart of CEQA.

The Legislature enacted CEQA to "take all action necessary to protect, rehabilitate, and enhance the environmental quality of the state." (CEQA § 21001(a).) The EIR is CEQA's primary means of achieving the Legislature's goal of environmental protection. (Guidelines[7] § 15003(a); *County of Inyo v. Yorty* (1973) 32 Cal.App.3d 795, 810.) An EIR functions as an "alarm bell" whose purpose is "to alert the public and its responsible

[7] Citations to "Guidelines" refer to California Code of Regulations, title 14, section 15000, et seq.

officials to environmental changes before they have reached ecological points of no return." (*Laurel Heights Improvement Ass'n v. Regents of Univ. of Cal. (Laurel Heights I)* (1988) 47 Cal.3d 376, 392.)

CEQA achieves its goal of protecting the environment by involving the public in the environmental review process and by identifying and disclosing environmental impacts to the public before an agency takes action. The public holds a "privileged position" in the CEQA process, which is "based on a belief that citizens can make important contributions to environmental protection and on notions of democratic decision-making...." (*Concerned Citizens of Costa Mesa v. 32nd Dist. Agric.* (1986) 42 Cal.3d 929, 936.)

As this Court has stated, "[i]n 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." (*Envt'l Planning & Info. Council v. County* (1982) 131 Cal.App.3d 350, 354.) In other words, if agencies scrupulously follow CEQA, "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." (*Laurel Heights I*, 47 Cal.3d at 392.)

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

Just as important as ensuring public participation is the role that an EIR plays in "provid[ing] decisionmakers with information which enables them to make a decision which intelligently takes account of environmental consequences." (*Envt'l Planning & Info. Council*, 131 Cal.App.3d at 355.)

"The purpose of an environmental impact report is to provide public agencies and the public in general with detailed information about the effect which a proposed project is likely to have on the environment; to list ways in which the significant effects of such a project might be minimized; and to indicate alternatives to such a project." (CEQA § 21061.) The EIR also serves to "demonstrate to an apprehensive citizenry that the agency has, in fact, analyzed and considered the ecological implications of its action." (GUIDELINES § 15003(d).) (*Laurel Heights I*, 47 Cal.3d at 392.)

Because CEQA can perform its informational function only if agencies rigorously follow its procedural requirements, courts strictly interpret the legal duties CEQA imposes. (*Mira Monte Homeowners Ass'n v. County of Ventura* (1985) 165 Cal.App.3d 357, 366.) Moreover, because of the importance of CEQA's procedural requirements, the usual "harmless error" standard does not apply when an agency has failed to proceed as CEQA requires. (*Rural Landowners Assn. v. City Council* (1983) 143 Cal.App.3d 1013, 1019-1023.)

C. An Agency's 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 v. Los Angeles Unified Sch. Dist.* (2009) 176 Cal.App.4th 889, 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." (GUIDELINES § 15384(a); *Laurel Heights I*, 47 Cal.3d at 393.) 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." (GUIDELINES § 15384(a)-(b).) 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.* (2009) 178 Cal.App.4th 1225, 1241.)

V. ARGUMENT

A. Changing The LBAM Program Goal After The Public Review Period Violated CEQA.

The PEIR that CDFA disclosed to the public described a Program designed to "eradicate" LBAM. (*E.g.*, AR00163.) Indeed, in preparing the PEIR, CDFA purported to analyze the impacts of and alternatives to an eradication Program. And the public had an opportunity to comment on the eradication Program. On the day that it certified the PEIR, however, CDFA changed the primary goal of its Program from eradication to control. This change violated CEQA because: (1) insect control programs differ fundamentally from eradication programs; (2) the change to a control program rendered the project description inaccurate and unstable; and (3) CDFA excluded the public from any consideration or analysis of the control program it actually approved.

1. As CDFA Admitted, Control Is "Fundamentally Different" than Eradication.

CDFA's record statements admit that, when it comes to insects, eradication "is **fundamentally different** than" control. (AR01694 (emphasis added).) Thus, the trial court erred in accepting CDFA's litigation position that the change "did not expand or fundamentally change the nature of the program." (*See* AA:460:8-10.) The control program that

CDFA approved is not simply a "reduced" version of the eradication Program, but an entirely different approach to LBAM.

As CDFA acknowledged throughout the public review period, control differs significantly from eradication in at least the following ways: (1) goal or endpoint, (2) amount or type of treatment used, (3) feasible alternatives, and (4) duration.

a. Control Programs Have Different Targets Than Eradication Programs.

A key difference between control and eradication is the desired endpoint. In control programs, "the goal is to protect a specified area such as a crop from the damage caused by the moth." (AR01694.) To achieve this goal, it is only necessary to reduce insect populations: "[t]he control measures are applied to the area to be protected and it is assumed that some damage is acceptable." (*Id.*) By contrast, eradication seeks to completely eliminate the target insect wherever it is detected. (AR01694 (eradication programs "treat the entire pest population with the goal of eliminating it").)

The PEIR described a treatment strategy based entirely on the endpoint of complete eradication of LBAM wherever it may be detected. For example, the PEIR states that its Twist Tie treatment would conclude "[a]fter two life cycles without any LBAM detections." (AR00170.) Similarly, CDFA would stop its Irradiated Moth Release only after "two LBAM life cycles beyond the last wild LBAM detected within that treatment area." (AR00174; *see also* AR00173 (Btk and Spinosad Spray treatment protocols based on eradication); AR00171 (Hercon/SPLAT Aerial Spray treatment protocol based on eradication).) These defined endpoints were offered, and defended by CDFA, as part of an eradication program, where the goal was complete elimination of LBAM.

But, now that the goal is control, CDFA presumably will apply these treatments in some unspecified and different manner to merely reduce LBAM populations, presumably forever. The specifics regarding such an approach were **never disclosed** to the public and were **never analyzed** by CDFA under CEQA. For example, CDFA never disclosed what level of LBAM population would be acceptable for a control endpoint, or when treatments would stop in a given area. The PEIR is inadequate without such information.

b. CDFA Only Studied Chemical Exposure Levels For A Finite Eradication Program, Not A Control Program.

Similarly, many of the assumptions underlying CDFA's conclusions that the treatments would have no significant environmental impacts were expressly based on treatment protocols for eradication. These assumptions are unsupportable in a control program, thus CDFA's analyses and conclusions regarding environmental impacts are outdated and inapplicable.

For example, CDFA repeatedly cited the fact that it would only apply treatments for a short duration in a given area (i.e., until it eradicated LBAM in that area) to conclude that the impacts from the treatments would not be significant. (*See, e.g.*, AR000559 (finding 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." (emphasis added)); 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**." (emphasis added)); *see also* AR00285; AR00547; AR01610; AR00599; AR00602.) In other words, eradication involves short-term but intense treatment to eradicate a

population of LBAM. Control, on the other hand, involves treatment that could theoretically be less intense, but is ongoing, to maintain LBAM populations at a certain "controlled" level. Prolonged exposure to the Program chemicals vitiates the PEIR's assumption that any exposure would be "short term and localized."

Similarly, CDFA assumed chemical exposure levels for people and animals based exclusively on the treatment protocols from its 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.**"); *see also* AR00488; AR00514.)

As discussed above, the underlying treatment protocols of only three treatments in a given area no longer apply because CDFA would presumably have to continue to treat in a given area for years to maintain LBAM populations below certain levels. (*See* AR49978.) As a result, CDFA's environmental impact assessments are completely unreliable and inapplicable for the approved "control" Program. While it could theoretically be true that "less" treatment would be applied to convert the Program Tools into "control" protocols, nothing in the PEIR binds CDFA to applying less treatments. **CDFA never informed the public what any**

such "lesser" control protocols would be or how anything about their application would be different than what was defined in the PEIR, and the public has no assurance that there will in fact be lesser controls. All the public knows is that the longer control treatment duration has potentially different and undefined impacts on the environment that CDFA admitted, but never studied.

c. CDFA Only Considered Eradication Tools, Not Control Alternatives.

The types of treatments capable of eradicating LBAM are also very different than those that could effectively control LBAM. In the PEIR, CDFA only considered the former; it summarily rejected the latter.

CDFA noted eighteen treatment options during the scoping process. The primary criteria used by CDFA for determining whether to advance a given treatment to consideration in the Draft PEIR was whether the treatment would eradicate LBAM. (*E.g.*, AR10694 (the information used "to select the tools to be evaluated further" included each treatment's "known or likely effectiveness in an LBAM eradication program").) Indeed, CDFA rejected many treatments out of hand because they would only control and not eradicate LBAM. (*See, e.g.*, AR01695 ("IPM, as a control strategy, was not evaluated further..."); AR01699 ("Classical biological control is not eradicative and thus not a useful tool in this eradication program."); AR01703 ("Quarantines are not eradicative.").) CDFA cannot escape its own words confirming that different pest treatments are available for consideration in a control program than for an eradication program.

The administrative record confirms that Dr. Dowell (CDFA's chief scientist at the time) acknowledged in the Draft PEIR that eradicating

LBAM "is **fundamentally different** than controlling [LBAM]." (AR01694 (emphasis added).) The trial court was wrong to accept CDFA's litigation claims to the contrary.

d. Control Programs Last Longer Than Eradication Programs.

CDFA's eradication Program had a finite duration of seven years. CDFA arrived at a seven-year duration based on its claim that it would take three to five years to eradicate LBAM, plus what was presumably a two-year cushion. (*See* AR00163 ("Eradication of LBAM populations will likely take 3 to 5 years to accomplish using several treatment tools.").) But now that CDFA has changed its goal to control, LBAM will presumably continue to exist in California indefinitely, thereby necessitating ongoing, indefinite control efforts by CDFA.

CDFA recognized this exact distinction between control and eradication in the Draft PEIR: "[I]f an exotic pest becomes permanently established in California, **control measures will be needed forever**. Eradication programs treat the entire pest population with the goal of eliminating it. If successful, the pest is gone and additional, permanent control measures are no longer needed." (AR01694.) In other words, control programs for agricultural pests, by definition, last forever. (*Id.*) CDFA also tacitly admitted in the Findings that the control Program is likely to last longer than seven years: "[s]hould CDFA wish to continue implementing the Program's alternative tools beyond the seven-year period analyzed in the existing risk assessments, additional CEQA review may be required." (*See* AR00048; *see also* AR00013-14 ("[T]he Program could be

implemented through 2017 **within the scope of the analysis of the risk assessments**." (emphasis added)).)

This difference in duration is critical because the PEIR only purports to analyze the environmental impacts for a finite, seven-year program. (*See* AR00013-14 ("The risk assessments for the PEIR analyzed the potential impacts associated with implementing the Program for seven years."); 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."); AA:461:6-8 ("[T]he analysis in the PEIR of potential impacts associated with implementation of the program was based on risk assessments having a duration of seven years."); *see also* AR01257; AR01788; AR44023.) This finite duration assumption underlying every part of CDFA's environmental impact analysis is no longer valid.

In light of CDFA's own statements in the administrative record regarding the "destructive" nature of the pest, the serious nature of the perceived threat to California agriculture, and the indefinite need for pest control measures (*e.g.*, AR00069-70; AR00197-203; AR01694), the trial court erred in accepting CDFA's litigation-compelled claim to limit the Program to only seven years before conducting additional CEQA review. An agency may not defer environmental review where it is reasonably likely that the activity will occur for a period of time longer than that studied. (*See Stanislaus Natural Heritage Project v. County of Stanislaus* (1996) 48 Cal.App.4th 182, 195 (invalidating an EIR that only studied impacts of the first five years of a twenty-five year project and holding that the agency had to figure out "to some reasonable degree" the environmental consequences of the full duration of its proposed action). Further, no

matter how long the Program lasts, the different endpoint, treatment protocols, and available alternatives for a control program render the PEIR's discussion of these Program elements inadequate.

2. CDFA's Change To The Goal Rendered The Program Description Fundamentally Inaccurate.

Given the fundamental differences between eradication and control, CDFA's description of the Program as an "Eradication Program" rather than a "Control Program" misled the public. An EIR must accurately and consistently describe a project throughout the environmental review process. (*County of Inyo v. City of Los Angeles (County of Inyo I)* (1977) 71 Cal.App.3d 185, 193.) An inaccurate or unstable project description precludes intelligent public participation in the environmental review process, and prevents the agency from meaningfully considering the project's impacts and alternatives to the project. (*See City of Santee v. County of San Diego* (1989) 214 Cal.App.3d 1438, 1454-55.)

CDFA described its Program as an "eradication" Program in the Notice of Determination, the Draft PEIR, and the Final PEIR (i.e., every single CEQA document circulated for public review). (*See* AR00002 ("CDFA's objective is to eradicate LBAM from the state of California."); AR00163 ("LBAM eradication from California is the CDFA's goal."); AR01751-52 (defending goal of eradication).) Yet, the Program that CDFA actually approved, is for the "control and suppression" of LBAM, not eradication. (AR00010.) This bait and switch from an eradication program to a control program rendered the PEIR's project description inaccurate, unstable, and misleading.

The Court of Appeal rejected such a change to a program's description in *County of Inyo I*. The proposed project in *County of Inyo I*

was a proposal to increase the amount of subsurface groundwater extracted by pumping in the Los Angeles area. (71 Cal.App.3d at 188.) The EIR provided at least three different project descriptions, including increased extraction of groundwater, a reappraisal of the rate of export in the Los Angeles aqueduct system, and operating the aqueduct system in an environmentally sensitive manner. (*Id.* at 189-90.) The court held that such changes to the project description violated CEQA because it "[drew] a red herring across the path of public input." (*Id.* at 198.) Specifically, the court held that, because the EIR failed to inform the public what program the agency actually proposed, "[t]he incessant shifts among different project descriptions [] vitiate the city's EIR process as a vehicle for intelligent public participation." (*Id.* at 197.)

CDFA's conduct here was even worse. In *County of Inyo I*, the EIR at least disclosed all versions of the program to the public (although the court still held the EIR invalid). Here, CDFA did not even disclose its control Program to the public until the Findings, which was far too late for intelligent public participation or meaningful analysis of the control Program approved by CDFA. This unstable and inadequate description of the Program violated CEQA. (*See id.* at 199 (holding that an "accurate, stable and finite project description is the *sine qua non* of an informative and legally sufficient EIR"); *see also City of Santee*, 214 Cal.App.3d at 1454-55 (holding that if a final EIR does not "adequately apprise all interested parties of the true scope of the project for intelligent weighing of the environmental consequences of the project," informed decision-making cannot occur under CEQA and the EIR is inadequate as a matter of law).)

The trial court wrongly adopted the false premise argued by CDFA that the control Program was just a "reduced version" of its eradication

Program. (*See* AA:460:17-19 ("[T]he revision of primary objectives from eradication to control and suppression reduces rather than expands the intensity and scope of the program..." (citing *Dusek v. Redevelopment Agency* (1985) 173 Cal.App.3d 1029).) As discussed above, control differs from eradication in critical ways, such that control is not necessarily an eradication program with fewer or lesser treatments. Critically, CDFA never told the public during the CEQA review process what a control program would look like or how the Program Tools would be applied to achieve a control purpose, so *Dusek* does not apply.

Dusek involved the reduction in size of a demolition project, and the EIR focused public scrutiny precisely on the project the agency ultimately approved. The EIR in *Dusek* described the project as demolition of all existing improvements on a 7.55 acre parcel, including the historic Pickwick Hotel, and construction of new office and retail space. (173 Cal.App.3d at 1033-34.) **The "focal point of the EIR" was the demolition of the Pickwick Hotel**, and the "adverse environmental impact of demolition was expressly recognized and considered and the public input directly concerned that question." (*Id.* at 1041 (emphasis added).) Although the agency subsequently approved only demolition of the Pickwick Hotel, the court held that the agency "did not draw the infamous 'red herring across the path of public input'" because the agency had focused public attention precisely on the project it actually approved. (*Id.*)

Here, CDFA did not focus public attention on a control Program. Nor did CDFA consider the environmental impacts of a control Program. Rather, CDFA focused public attention on, and only considered, the treatments it considered "eradicative" and the environmental impacts of its proposed eradication Program. For these reasons, *Dusek* does not apply,

and the trial court was wrong to let CDFA hide behind a case intended for very different facts.

3. CDFA Prevented Public Review Of The Control Program.

Essentially, CDFA created and analyzed a new program in the Findings. CDFA's first attempt to describe the control Program is in the Findings (AR00010-11), its first purported consideration of the control program's environmental impacts is in the Findings (AR00013), and its first supposed analysis of alternatives to the control program is in the Findings (AR00037-42.) The problem is that all of this "analysis" occurred after public participation in the environmental review process was over. CDFA's seemingly deliberate exclusion of the public from the CEQA process contravened CEQA's fundamental principles. (*See Envt'l Planning & Info. Council*, 131 Cal.App.3d at 355 ("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."); *Ocean View Estates Homeowners Ass'n, Inc. v. Montecito Water Dist.* (2004) 116 Cal.App.4th 396, 400 ("Environmental review derives its vitality from public participation.").) Specifically, CDFA precluded public participation in three ways, each of which violates CEQA.

First, the public never had a chance to comment on CDFA's control Program. Courts have recognized that public input is critical to prevent "stubborn problems or serious criticism from being swept under the rug," to alert public decisionmakers of public controversy over planned action, and to permit the public and other agencies to identify objective errors in the agency's analysis. (*Sutter Sensible Planning, Inc. v. Bd. of Supervisors of*

Sutter County (1981) 122 Cal.App.3d 813, 820-22.) The lack of public input here means that CDFA improperly approved a control Program that the public has never reviewed or scrutinized. The resulting flaws are obvious. For example, CDFA continued to use eradication-based treatment protocols even though its goal is no longer LBAM eradication. (*See* AR00170-74.) CDFA also effectively approved an indefinite control program but only studied environmental impacts for a period of seven years. (*See* AR01694.) CDFA's exclusion of the public from consideration of the control Program permitted these serious flaws to be "swept under the rug." (*See Sutter Sensible Planning, Inc.*, 122 Cal.App.3d at 820-22.)

In addition to these tangible failings, CDFA's exclusion of the public violates the fundamental principles of CEQA review. (*See Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829 ("[T]he ultimate decision of whether to approve a project, be that decision right or wrong, is a nullity if based upon an EIR that does not provide the decision-makers, and the public, with the information about the project that is required by CEQA.").)

Second, CDFA's belated change to the Program violated CEQA by diverting public attention toward an eradication Program that, in the end, was only a mirage. Numerous public comments addressed the infeasibility and other problems with CDFA's goal of eradication. (*See, e.g.*, AR01822; AR01835; AR01935-36; AR02066; AR02073; AR02084; AR02149-51; AR02321; AR02329-33.) CDFA responded to all of these comments simply by affirming that the goal of the Program was eradication and that eradication was feasible **without addressing the substance of the public's criticisms**. (AR01829; AR02030; AR02071; AR02076; AR02099-100; AR02293-95; AR02323; AR02389-90.) CDFA even included a "Master

Response" in the PEIR defending the goal of eradication. (AR01751-52.) By asserting the strawman of an "eradication" Program, CDFA deflected public comment and diverted public attention from other serious flaws in the Program, including its defective alternatives analysis and its overbroad scope. As in *County of Inyo I*, CDFA's inaccurate Program description thwarted any meaningful public comment. (*See also Concerned Citizens of Costa Mesa, Inc.*, 42 Cal.3d at 938 (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").)

Third, CDFA deprived the public of any assurance that CDFA had actually considered the public's concerns. The California Supreme Court has recognized that one primary purpose of an EIR is to "demonstrate to an apprehensive citizenry that the agency has in fact analyzed and considered the ecological implications of its action." (*No Oil, Inc. v. City of Los Angeles*, (1974) 13 Cal.3d 68, 85-86.) Here, by performing an entirely cursory and inadequate analysis of the environmental impacts and alternatives to a control Program in the Findings, CDFA failed to provide the public any assurance that its concerns had been considered and addressed. Further evidence of CDFA's failing is the sheer number of petitioners that filed lawsuits challenging the Program, which in this case alone include four cities and eight citizen organizations. (*See No Oil*, 13 Cal. 3d at 86.)

The harm from CDFA's failure to allow public participation with respect to the control Program is not merely academic or technical. By excluding the public, CDFA has established a dangerous precedent of

avoiding public participation, which is the "strongest assurance of the adequacy of the EIR." (*Mountain Lion Coalition v. Fish & Game Comm.* (1989) 214 Cal.App.3d 1043, 1051. CDFA's failure to comply with CEQA's informational requirements was necessarily prejudicial and an abuse of discretion. (*Resource Defense Fund*, 191 Cal.App.3d at 897-98.)

B. CDFA Improperly Segmented The Program Into Seven-Year Stints.

Another consequence of CDFA's switch to a control Program is that the PEIR only considers the first seven years of a Program that is virtually certain to last much longer. Because continuation of the Program beyond seven years is reasonably likely to occur, and will have impacts beyond those studied in the PEIR, the trial court erred when it concluded that CDFA did not impermissibly segment the Program into a seven year segment and a post-seven year segment. (*See* AA:461:15-28.)

"[A]n EIR must include a [*sic*] analysis of the environmental effects of future expansion or other action if: (1) it is a reasonably foreseeable consequence of the initial project; and (2) the future expansion or action will be significant in that it will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights I*, 47 Cal.3d at 396.) The prohibition on segmentation arises from the danger that if "postapproval environmental review were allowed, EIR's would likely become nothing more than *post hoc* rationalizations to support action already taken." (*Id.* at 394.) Agencies must therefore study the environmental impacts of the full duration of a program. (*Stanislaus Natural Heritage Project*, 48 Cal.App.4th at 188; *see also Sundstrom v. County of Mendocino* (1988) 202 Cal.App.3d 296, 307.)

It is reasonably certain that the control Program will last longer than seven years. CDFA admitted that control programs, by their very nature, "will be needed forever." (AR01694.) Additionally, CDFA's control programs targeting other insects have lasted for decades. (*See* AR051133.) The Findings also suggest that this control Program will last longer than seven years. (*See* AR00048 ("Should CDFA wish to continue implementing the Program's alternative tools beyond the seven-year period analyzed in the existing risk assessments, additional CEQA review may be required.").) Indeed, the trial court acknowledged this strong likelihood by finding it necessary to hold that "additional CEQA review will be required to continue all or part of the program." (AA:462:7-8.)

Continuation of the Program beyond seven years will have impacts not considered in the PEIR. In fact, CDFA tacitly admitted this fact when it expressly based its "no significant impacts" conclusion as to insects, animals, greenhouse gases, and air quality on the fact that the eradication Program would only last for seven years. (*See, e.g.*, AR00547 (no chronic testing of pheromone pesticides required due to **"the low potential for long-term exposure"**); AR000559 (no significant impacts on native insects from Btk and spinosad because "the impact would be **short term** and localized"); AR01610 (same); AR00608 (no significant cumulative impacts because the Program would "**last[] only during the eradication period**"); AR00285 (no quantitative significance thresholds established for air quality because of "the Program's **short-term and statewide character**"); AR00599 (no significant impacts from greenhouse gas emissions in part because "GHG emissions would be **temporary**"); AR00602 (same) (emphasis added throughout).) By using these justifications, CDFA admitted that long-term use of the Program Tools

could have significant environmental impacts, but concluded that these impacts did not apply to its eradication Program because it would end after seven years. This key assumption no longer holds. CDFA's indefinite control Program "will likely change the scope or nature of the initial project or its environmental effects." (*Laurel Heights I*, 47 Cal.3d at 396.)

Nevertheless, the trial court held that CDFA did not need to consider these future impacts simply because CDFA could not "predict the location, extent or density of LBAM populations in 2017 and thereafter or [] determine which tools and strategies to continue using in the LBAM Program." (AA:461-462 (citing *Sacramento Old City Ass'n v. City Council of Sacrament* (1991) 229 Cal.App.3d 1011, 1025-26).) But CDFA is not excused from conducting environmental review now just because it may not be able to predict exact details of its future action. Rather, CEQA requires environmental review so long as the future action is "a reasonably foreseeable consequence" of the program.

For this reason, *Sacramento Old City Association* is inapposite. There, the court held that environmental review could be deferred because the city did not know which, if any, mitigation measures would be needed, and many of the proposed mitigations measures would have no environmental impacts anyway. (229 Cal.App.3d at 1023-26.) Here, by contrast, it is virtually certain that the Program will continue beyond seven years and will have environmental impacts at that time that were not studied in the PEIR. CDFA could easily have studied the long term impacts of the Program Tools in the PEIR, **but it chose not to do so** in the interests of hastening the Program approval. Then, when it changed to a control Program, CDFA could have gone back and considered the potential long term impacts of the Program Tools, **but it chose not to do so**. Instead,

CDFA simply said it would do more environmental review in the future. (*See, e.g.*, AR00048.) This is exactly what the Court in *Laurel Heights I* said was impermissible segmentation. (*See Laurel Heights I*, 47 Cal.3d at 394; *see also Stanislaus Natural Heritage Project*, 48 Cal.App.4th at 195, 199 (invalidating EIR that only studied impacts of the first five years of a twenty-five year project and holding that the agency had to figure out "to some reasonable degree" the environmental consequences of the full duration of its proposed action).)

C. CDFA Failed To Adequately Analyze Alternatives.

The alternatives analysis is "the core of an EIR." (*Citizens of Goleta Valley v. Bd. of Supervisors* (1990) 52 Cal.3d 553, 564.) Accordingly, an EIR must evaluate a reasonable range of alternatives, thoroughly assess all feasible alternatives, and consider a "no project" alternative. (Guidelines § 15126.6(c)-(e).) Here, CDFA's purported alternatives analysis fails on all three counts.

First, CDFA did not consider a reasonable range of alternatives. In actuality, it considered only one option: the eradication Program. Second, CDFA did not thoroughly assess any other purported alternatives, particularly after it changed the Program goal to control. Third, CDFA's No Program analysis is also flawed because it is based on unreasonable assumptions and fails to consider any private pesticide use occurring under the Program. Each of these deficiencies is discussed below.

1. CDFA Did Not Consider A Reasonable Range Of Alternatives.

CDFA did not actually consider any "alternatives" at all. Instead, CDFA only considered various tools for use **as part of** its eradication Program. This is a procedural and substantive violation of CEQA because

an EIR must "describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project...." (Guidelines § 15126.6.) Further, the EIR's discussion of alternatives must be "meaningful" and must "contain analysis sufficient to allow informed decision making." (*Laurel Heights I*, 47 Cal.3d at 403-04.) Here, CDFA did not consider any true alternatives to eradication, let alone the actual alternatives to its eradication Program that the public proposed.

As an initial matter, CDFA confusingly labeled the various tools included in its eradication Program as "alternatives." (*See, e.g.*, AR00632.) This misleading label did not, however, convert these tools into the true project alternatives required by CEQA. In reality, these so-called alternatives are just the various tools that CDFA chose for use in its Program. CDFA admits as much when it states that the "Alternatives" chapter in the PEIR only "presents a series of potential alternatives or 'tools' and screening criteria to produce a 'toolbox' of options to support the LBAM Eradication Program." (*Id.*; *see also* AR01694 (describing "tools ... for use in the light brown apple moth eradication program").)

Recognizing this fundamental flaw, the public proposed various alternatives to CDFA's eradication Program. For example, the City of Albany, Bolinas Community Public Utilities District, County of Santa Cruz, Citizens for East Shore Parks, Citizens for Health, and various other organizations and individuals proposed Integrated Pest Management ("IPM") as an alternative to the eradication Program. (*See* AR01821-22; AR01835; AR01936; AR02048; AR02073; AR02081; AR02151-52; AR02350-51.) Similarly, various cities, organizations, and individuals

proposed reclassification of LBAM as a non-actionable insect, classic biological control, and monitoring of LBAM as alternatives to the eradication Program. (*See* AR01911; AR01920; AR02066; AR02151-52.) In response, CDFA refused to consider the alternatives the public had proposed. CDFA simply dismissed IPM and classic biological control as "non-eradicative." (*See* AR01828; AR01838; AR02030; AR02052; AR02071; AR02076; AR02098; AR02295; AR02406.) With respect to reclassification, CDFA either suggested submission of a request for reclassification, or said reclassification was outside its jurisdiction. (AR01913; AR02295.)

Further, although CDFA listed IPM and classic biological control as potential tools in Appendix G, the cursory treatment of these alternatives in that scoping section of the PEIR does not satisfy CEQA's requirement of "meaningful" discussion of alternatives containing "analysis sufficient to allow informed decision making." (*Laurel Heights I*, 47 Cal.3d at 403-04.) For example, CDFA briefly described IPM, compared it to its own eradication Program, and then rejected IPM as non-eradicative. (AR01695.) CDFA failed to discuss how IPM could lower LBAM populations and protect California crops and plants, or how New Zealand has successfully used IPM to manage LBAM for decades. (*Id.*; *see* AR47516; AR60902; AR67541.) In fact, because California and New Zealand share similar climates, grow similar crops, and have similar insect predator populations, including native populations of leafroller moths and the natural predators of such moths, a biological control or IPM program modeled after New Zealand's IPM program could effectively control LBAM in California. (AR67547-48 ("Many 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."); *see also* AR67541; AR609006-07; AR60911-13; AR67541.) Nor did CDFA consider IPM's impacts on the environment and whether these would be less than or superior to the impacts of its eradication Program. (AR01695.)

CDFA dismissed classic biological control in the same manner, without considering that classic biological control is especially promising in California because native leafroller moths are present here along with their natural predators. (AR01699-1700; *see* AR60911; AR67543-47.) CDFA even admitted that the mention of IPM and classic biological control in Appendix G was nothing more than a "screening level" assessment of tools for use as part of its eradication Program – not analysis of true alternatives to the Program. (AR00632.)

2. CDFA Did Not Adequately Consider Alternatives After Changing the Program Goal to Control.

CDFA's lack of an alternatives analysis became even more troubling when it changed the Program goal to control. At that point, CDFA had no reason not to fully analyze and consider control-based alternatives like IPM, classic biological control, quarantines, and monitoring and trapping. Yet CDFA did not do so. Instead, CDFA hand-waved a supposed re-analysis of such alternatives in the Findings, rejected them for entirely illogical and unsupported reasons, and proceeded with certifying its Program without circulating any of this new analysis for public review.

For example, CDFA rejected classic biological control because it could only "reduce the pest's numbers" and therefore did not eliminate the need for other treatments. (AR00040.) But the goal of CDFA's new "control" Program is precisely that – to reduce LBAM numbers.

(AR00010-11.) There is no rational argument that classic biological control will not satisfy the new Program objective, and CDFA does not provide any relevant analysis of this feasible alternative in the Findings.

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

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

To make matters worse, after changing the Program goal, **CDFA made no effort to involve the public in any further analysis of these**

previously rejected alternatives. Instead, CDFA superficially mentioned and rejected these control alternatives **in the Findings**. (AR00037-42.) The Findings, however, were not circulated for public comment and thus CDFA received no public input on its post-Final EIR analysis. Therefore, when CDFA again rejected classic biological control, mass trapping, IPM, egg-laying repellent, and quarantines, public input and review – the "strongest assurance of the adequacy of the EIR" – was completely missing. (*Sutter Sensible Planning*, 122 Cal.App.3d at 823.) The lack of public scrutiny led directly to CDFA's failure to conduct any sort of plausible alternatives analysis in the Findings, because the public never had a chance to point out the flaws in CDFA's reasoning. (*See Laurel Heights I*, 47 Cal.3d at 405 ("Those 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.").) Accordingly, CDFA failed to conduct the meaningful analysis of alternatives required by CEQA.

3. CDFA's No Program Analysis Is Flawed.

CDFA deliberately inflated the No Program alternative's impacts, thereby precluding an accurate comparison with the eradication Program. A No Program analysis must reflect what "would be reasonably expected to occur in the foreseeable future" in absence of the proposed action, but, in doing so, it may not rely on unsupported assumptions or ignore existing conditions. (Guidelines § 15126.6(e)(2), (3)(B); *Planning and Conserv. League v. Dept of Water Res.* (2000) 83 Cal.App.4th 892, 915-16 (invalidating an EIR because its "no project" alternative failed to analyze existing conditions and relied on unsupported assumptions).) CDFA made these exact mistakes. Specifically, in formulating its No Program alternative, CDFA relied on unsupported assumptions about private

pesticide use, failed to consider factors that will limit private pesticide use, and failed to consider any private pesticide use that would occur under the Program.

a. CDFA's No Program Analysis Was Not Supported By The Evidence

In its No Program analysis, CDFA relied on two sets of studies ("Dowell Reports" and "UC Study") to assume that private pesticide use would increase and cause significant adverse impacts to the environment. (*See, e.g.*, AR00073; AR00168; AR00199; AR01767.) The trial court erred in accepting these studies as substantial evidence because the studies were themselves contradictory, and the Dowell Reports relied on layers of unsupported assumptions.

(1) There Is No Evidence That Private Pesticide Use Will Increase To Treat LBAM.

Unable to determine private pesticide use for LBAM (AR61301), the Dowell Reports relied on pre-LBAM surveys of other insects to infer that pesticide use would increase to treat LBAM. (AR61298-300.) This reliance was unreasonable, however, given the absence of any evidence that LBAM had damaged any residential plants and would even need to be treated. In fact, the UC Study concluded that "[a]lthough LBAM attacks many types of plants, it is not likely to cause serious damage to them **in backyard situations. In many cases, treatment would not be needed in backyards**." (AR58987 (emphasis added).) The UC Study's findings were supported by evidence that LBAM has not seriously defoliated native vegetation in two countries with much more wide-spread LBAM populations. (AR63812.) Further, any current pesticide spraying by

households or other private individuals for other typical backyard pests would likely be effective to treat LBAM as well, and there is no evidence in the record that additional spraying would be needed. (*See, e.g.*, AR51947-49; AR51958-67.) The Dowell Reports ignored these facts.

The Dowell Reports' assumption that rampant private pesticide use would occur state-wide to combat LBAM also lacked evidentiary support and belied existing conditions. (AR61301.) The Dowell Reports presumed that pesticide use would be proportional to the number of single-family residences across sixteen California counties. (AR61299.) However, application rates vary widely among regions, and the vast majority of LBAM reside in only two counties. (AR00111; AR61300.) These facts indicate that the actual number of residents that could even be likely treat for LBAM (if any) is only a small fraction of California residents assumed by the Dowell Reports.

Finally, with respect to agricultural use, the Dowell Reports assumed that farmers statewide would treat five percent of their total acreage per year for LBAM under the No Program alternative. (AR63789; *see also* AR00199.) This too was unreasonable as there was no evidence of crop damage as of the date of certification of the EIR (and that remains true today). (*See* AR00197-98.) Indeed, the PEIR cited only one purported incident of LBAM damage, which ultimately proved to be from a different insect. (AR00198; AR01767.) Again, LBAM is primarily located in two counties, so no evidence supports the Dowell Reports' conclusion that farmers would uniformly increase pesticide use across California to treat an insect that has caused no confirmed damage.

(2) There Is No Evidence that Residents Will Use Permethrin to Treat LBAM.

In addition to unreasonably assuming widespread pesticide use by private individuals to treat an insect that has caused no confirmed damage, the Dowell Reports speculated that those same residents would spray the highly toxic pesticides permethrin or chlorpyrifos.[8] (AR61300; *see also* AR00168.) The Dowell Reports' choice to use permethrin as a proxy for all private pesticide use was unreasonable in light of the existing evidence. First, the selection of this pesticide was not based on what individual homeowners currently use for LBAM or similar insects, because that information is unknown. (AR61300-01.) In fact, most Californians are moving away from permethrin and the use of permethrin has decreased in recent years. (AR00621; *see also* AR00401 (finding permethrin use in 2007 was the lowest since 2002).) Second, the environmental impacts of permethrin are so severe that CDFA rejected a permethrin-based treatment method in its Program. (AR01747.) Further, chlorpyrifos is not even registered for use by private individuals. (*See* AR00167; AR02162.) The only available evidence suggests that individuals are selecting less dangerous substances to treat insects. The Dowell Reports' assumptions regarding private pesticide use were even questioned by CDFA's consultants:

> Is the unstated purpose of the risk assessment to endorse the use of the 'organic treatment' or 'mating disruption' alternative and discourage the acceptance of the 'no project alternative? Because exposure assumptions border on the unreasonable...Again, if the purpose [of the No Program

[8] As the PEIR acknowledges, permethrin is toxic to humans and a wide variety of animals. (AR00356; AR00420; AR00447-48.)

> assessment] is to support acceptance of the alternatives, then this assessment achieves that goal."

(AR 15488.) This skepticism highlights the unreasonableness of the Dowell Reports' use of permethrin, and underlines the unbalanced approach CDFA took in measuring the No Program's impacts. (*See* CEQA § 21080(e)(2) ("Substantial evidence is not argument, speculation, unsubstantiated opinion or narrative, evidence that is clearly inaccurate or erroneous....").)

b. CDFA Ignored Existing Quarantines In Its No Program Analysis.

CDFA's No Program analysis assumed that LBAM would spread uncontrolled throughout California, triggering massive use of pesticides by private citizens. (AR61301 ("These projected increases in pesticide use to prevent LBAM damage for the 16 counties highlight the importance of eradicating LBAM before it becomes fully established and spreads statewide."); *see also* AA:271 (CDFA's opposition brief noting that the No Program analysis presumed that "LBAM was left uncontrolled and allowed to spread" throughout the state).) This assumption is unfounded.

To prevent LBAM spread, CDFA and the U.S. Department of Agriculture ("USDA") established quarantines in 2007 that required "trapping, inspection, and certification of all nursery stock and host commodities" in eight counties. (AR00110.) The quarantines have since expanded to thirteen counties, and will continue throughout the duration of the Program. (*Id.*; *see* AR00370 ("The No Program Alternative consists of maintaining the current state and federal Quarantine Orders without further action by the state or USDA); *see also* AR00002; AR00068; AR58987.) Yet CDFA did not consider how the quarantines would affect LBAM

spread under the No Program analysis. In particular, CDFA's conclusions regarding increased private pesticide use are all predicated on the assumption that LBAM would spread throughout California in the absence of the Program. Because CDFA and USDA's quarantines will prevent this spread, even if only to some extent, CDFA's conclusions about private pesticide use are wrong, and its No Program analysis is flawed. (*Planning and Conserv. League*, 83 Cal.App.4th at 915-16 (holding that an EIR proposing new water shortage protocols was deficient for failing to analyze the impact of existing water shortage protocols under the "no project" alternative).)

c. CDFA Failed To Evaluate Private Pesticide Use In Its Analysis Of Program Impacts.

Compounding these flaws in CDFA's No Program analysis, CDFA also artificially **increased** the impacts of the No Program alternative and **decreased** the impacts of the Program Tools by assuming private pesticide use would occur **only** under the No Program scenario. CDFA's theory for increased pesticide use under the No Program alternative was that, if LBAM exist in California, private parties will take steps to protect crops, gardens, and other plants. (*See* AR00167-68; AR00370.) Yet LBAM will continue to exist under the Program as well, especially now that CDFA's goal is only to control LBAM and not eradicate it. (AR00010.) In other words, **if CDFA is correct about pesticide use by private parties, such use will occur both under the No Program alternative and under the Program**. Yet CDFA only considered the impacts of such use in its No Program analysis. (AR00168; AR00199.) This inconsistency had the practical effect of skewing the results in favor of the Program by making it

appear as if more environmental damage would occur under the No Program alternative. (*See, e.g.*, AR00576.) Notably, also, CDFA performed no analysis of the cumulative impacts of increased private pesticide usage combined with the Program Tools. (*See* AR00575.)

In sum, the No Program analysis is not supported by substantial evidence and fails to accurately portray the environmental consequences of CDFA's Program. This failure constitutes a prejudicial abuse of discretion.

D. The PEIR Is Too Broad To Cover All Activities Under The Program.

CDFA admitted throughout the PEIR that the PEIR is only a "scoping level" document and that CDFA conducted **no** site-specific review. Nevertheless, CDFA contended during the proceedings below that the PEIR was sufficient to allow it to conduct any treatments, in any combination, at any time, anywhere in California, without conducting an iota of additional environmental review. This is an abuse of the program EIR provisions of CEQA. Accordingly, the trial court erred when it held that the PEIR was sufficiently detailed to permit CDFA to forgo any further environmental review.

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* (2000) 82 Cal.App.4th 511, 533-34 ("Designating an EIR as a program EIR also does not by itself decrease the level of analysis otherwise required in the EIR."); *see* GUIDELINES § 15168(c)(4).) Accordingly, unless a program EIR is sufficiently detailed to allow the public and the agency to adequately analyze the environmental impacts of the program and consider alternatives, the agency will have to perform additional site-specific

environmental review. (*See Center for Sierra Nevada Conservation v. County of El Dorado* (2012) 202 Cal.App.4th 1156, 1171 ("[A] program EIR does not always suffice for a later project. Sometimes a 'tiered' EIR is required."); *see also* Michael H. Remy et al., Guide to the California Environmental Quality Act 638 (2006) (noting that in order to "allow an agency to carry out an entire 'program' without having to prepare additional site-specific EIRs or negative declarations ... **a program EIR must be very detailed**" (emphasis added)).)

Here, CDFA's attempt to use a program-level document fails for three reasons. First, CDFA admitted that the PEIR was a scoping level document that did not address impacts to specific environments; therefore, the record does not support the trial court's finding that the PEIR addresses site-specific impacts. Second, the PEIR does not provide CDFA sufficient guidance regarding implementation of the Program to remove the need for future environmental review. Third, the Program will have site-specific impacts and feasible alternatives that CDFA did not analyze in the PEIR. Each of these failures is discussed in detail below.

1. CDFA Admitted That It Did Not Conduct Site-Specific Review.

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.[9] (*Id*; *see also* AR00165 [Figure 2-1].)

[9] 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

In other words, the Program includes more than 100,000 square miles of California's environment, from coastal areas, to inland valleys, foothills, and redwood forests. Faced with this massive Program area, CDFA readily admitted that the PEIR was not site-specific. (*See, e.g.*, AR00486 ("Site-specific evaluation of water quality impacts are beyond the scope of this programmatic evaluation."); AR00275; AR00486 ("Site-specific evaluation of water quality impacts are beyond the scope of this programmatic evaluation."); *id.* ("Site-specific water quality evaluations are not conducted."); *id.* ("Mitigation measures for specific locations within the Program Area are not provided."); AR00301 (admitting that CDFA only used "screening-level models" so they "would be applicable statewide"); *see also* AR00275 ("Due to the Program's statewide nature, only regional air quality is discussed as part of this assessment."). Susan Hootkins, the lead environmental consultant who prepared the PEIR even admitted in an email that "[t]his is not a site specific EIR." (AR16644.) Accordingly, the only remaining question is whether the PEIR contains sufficient impacts analysis and guidance to allow CDFA to implement the Program Tools anywhere in the vast Program area. It does not.

2. The Program Will Have Site-Specific Impacts And Feasible Alternatives Not Considered in the PEIR.

The PEIR fails to consider environmental impacts and feasible alternatives unique to the specific locations where the Program will occur. For example, CDFA's analysis of impacts to water quality improperly relies exclusively on generalizations and assumptions regarding runoff

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Program Area." (AR00163.) Thus, any part of California may end up being included if LBAM is detected there.

rates, water flows, and human drinking water sources. (*See, e.g.*, AR00486 ("Site-specific evaluation of water quality impacts are beyond the scope of this programmatic evaluation."); AR00275; AR00486.) The East Bay Municipal Utility District ("EBMUD") raised concerns about 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.").) Because the PEIR failed to analyze specific locations, its conclusions regarding runoff are incomplete. Application of the Program Tools 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.

Similarly, CDFA limited its analysis of impacts on terrestrial creatures to only four native insects. (*See* AR00520.) This cursory analysis is not sufficient to account for the key insects that may be impacted by CDFA's statewide Program in any given specific area. Worse, CDFA failed to analyze the Program's impacts on any native lepidopteran moths, the insects most closely related to LBAM and therefore most likely to be similarly (and thus severely) impacted by the Program Tools. (*See* AR01486-1514.)

California courts have recognized the need for subsequent site-specific environmental review when an agency relies on a broad program EIR. 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. (*In re Bay-Delta Programmatic Envt'l Impact Report*

Coordinated Proceedings (Bay-Delta) (2008) 43 Cal.4th 1143, 1151-52.) 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 water sources and analysis of associated 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. v County of Solano* (1992) 5 Cal.App.4th 351, 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'").) Here, the PEIR's analysis of impacts and alternatives was far too broad to permit the use of the Program Tools in specific locations without any subsequent environmental review.

3. The PEIR Provides No Guidance Regarding Which Treatments CDFA Will Use Where.

The PEIR also fails to provide CDFA with sufficient guidance or direction regarding where, when, and how to apply the various Program treatments. The trial court found that further environmental review was not required because "the individual activities follow uniform procedures and criteria..." (AA:467:9-12.) The trial court pointed to the use of twist ties to treat "small isolated infections more than five miles from a generally infested area," the use of ground spray pheromones in "trees and shrubs in

residential yards," and the prohibition on the use of Btk and spinosad within one mile of federally listed moths or butterflies. (*Id.* at 13:1-6.)

But the PEIR does not define a "generally infested area" or "low-level population." (AR00170.) The descriptions of the other Treatments are similarly vague. For example, the PEIR permits Btk and Spinosad Spray: anywhere "heavier larval populations [of LBAM] are detected," but does not define a "heavier larval population." (AR00173.) Similarly, the PEIR permits Parasitic Wasp Release anywhere there are "moderate to heavy LBAM detections" without defining what constitutes a "moderate to heavy" detection. (AR00174.) Sterile Moth Release is completely unlimited, as it may occur in any "large area such as a county or region." (*Id.*) Nor does the PEIR determine which treatments CDFA should use in any given area. Rather, CDFA's use of treatments depends only on "conditions at specific locations." (AR00115.) The PEIR provides only illusory direction. In reality, nothing constrains CDFA's use of the various program treatments anywhere at any time.

Absent such direction, courts have held program EIRs inadequate. In *Center for Sierra Nevada Conservation v. County of El Dorado*, this Court held a program EIR invalid where it failed to provide sufficient guidance to the agency for creation of a subsequent fee-based monitoring plan. (202 Cal.App.4th 1156 (2012).) There, the program EIR failed to describe the fee rate, which parcels would require a fee, or how the fee would be used. (*Id.* at 1176-81.) The court held that the program EIR therefore failed to provide the agency with sufficient guidance and a tiered EIR was required. (*Id.*)

Similarly here, CDFA contends that it may use any treatment, anywhere, without conducting any further environmental review. This

limitless discretion requires some manner of environmental review. CDFA did not even bother to use the procedures provided by CEQA for site-specific review under a program EIR. (*See* GUIDELINES §§ 15063-15081 (setting forth mandatory procedures for approval of site-specific projects); CEQA § 21094.) Instead, CDFA confirmed that it will only use a "local notice" procedure that lacks **any** environmental review. (AR01754.) Such "notice" procedures do not equate to the additional environmental review necessary to satisfy CEQA. Nor has CDFA conducted any site-specific environmental review to date, even though it has been actively deploying IsoMate Twist Ties in several counties since certifying the PEIR. (*See* http://www.cdfa.ca.gov/plant/pdep/lbam/treatment_maps.html.) The trial court erred in holding that CDFA could simply decline to conduct any site specific review.

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

The PEIR's lack of site-specific analysis is compounded by CDFA's failure to properly consider the cumulative impacts of the Program with other similar programs.

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. (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/Wildlife v. City of Stanislaus* (1994) 27 Cal.App.4th 713, 739-41.)

CDFA 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, 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* AR042650; http://www.cdfa.ca.gov/plant/PDEP/target_pests.html.) The failure to mention other existing pest programs demonstrates the inadequacy of the PEIR's cumulative impacts analysis. (*See Kings County Farm Bureau v. City of Hanford* (1990) 221 Cal.App.3d 692, 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 adequately consider cumulative impacts renders the PEIR defective. *See Citizens to Preserve the Ojai v. County of Ventura* (1985) 176 Cal.App.3d 421, 430 (cumulative impacts analysis inadequate because agency failed to consider impact of similar projects).

VI. CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court reverse the decision of the trial court, set aside the PEIR, and order CDFA to comply with CEQA.

Dated: July 1, 2013

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CERTIFICATE OF COMPLIANCE

In compliance with California Rule of Court 8.204, I, Summer J. Wynn, certify that the foregoing Petitioners' Brief uses proportionally spaced typeface of 13 points or more, and contains 13,993 words (including footnotes and excluding the table of authorities and table of contents), as counted by Microsoft Word, the word processing software used to prepare this brief.

Dated: July 1, 2013

for Summer Wynn

Summer J. Wynn

PROOF OF SERVICE

I am a citizen of the United States and a resident of the State of California. I am employed in San Diego County, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of 18 years, and not a party to the within action. My business address is Cooley LLP, 4401 Eastgate Mall, San Diego, California 92121.

On July 1, 2013, I served the following documents on the parties listed below in the manner(s) indicated:

1. **APPELLANTS' OPENING BRIEF;**
2. **APPELLANTS' APPENDIX VOLS 1-3**

☐ (BY U.S. MAIL – CCP § 1013a(1)) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for mailing with the United States Postal Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at San Diego, California.

☐ (BY MESSENGER SERVICE – CCP § 1011) I consigned the document(s) to an authorized courier and/or process server for hand delivery on this date.

☒ (BY OVERNIGHT MAIL – CCP § 1013(c)) I am personally and readily familiar with the business practice of Cooley LLP for collection and processing of correspondence for overnight delivery, and I caused such document(s) described herein to be deposited for delivery to a facility regularly maintained by Federal Express for overnight delivery.

☐ (BY ELECTRONIC MAIL – CCP § 1010.6(a)(6)) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused such documents described herein to be sent to the persons at the e-mail addresses listed below. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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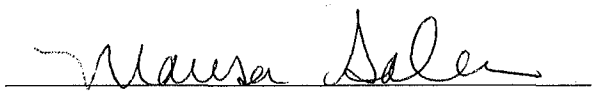
Sacramento Superior Court Hon. Lloyd G. Connerlly, Dept. 33 720 9 th Street Sacramento, CA 95814	**1 Copy Brief**
Supreme Court of California 350 McAllister Street San Francisco, CA 94102-4783	**Brief (electronic submission)**

I declare under penalty of perjury under the laws of the State of California that the above is true and correct. Executed on July 1, 2013, at San Diego, California.



Marisa Salas

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