



News Release 2012-01-03

Apple Moth Lawsuit Opening Brief: State's Analysis Gives License to Spray Pesticides Indefinitely without Studying Health Effects

Attorneys for cities and citizen groups say flawed state environmental analysis should start over

SACRAMENTO (Jan. 3, 2012) -- Attorneys for a coalition of cities and health, environmental and mothers' groups have filed opening arguments in a lawsuit challenging the California Department of Food and Agriculture's (CDFA) statewide light brown apple moth eradication program.

The coalition's opening brief, filed in late December, charges that CDFA violated state law by:

1. Misrepresenting or failing to evaluate health effects of the program,
2. Making a last-minute change in the program that would allow spraying to go on indefinitely, and
3. Pursuing an unnecessary program because there remains no documented evidence of apple moth damage in California although the moth has been in the state for many years.

The lawsuit challenges the environmental impact report (EIR) that CDFA belatedly prepared under court order. CDFA was forced to prepare the EIR after it repeatedly sprayed residents of densely populated Santa Cruz and Monterey counties from low-flying airplanes with a largely untested pesticide for the apple moth in 2007, following which hundreds of residents reported illness.

According to documents highlighted in the plaintiffs' argument, scientists hired to prepare the EIR warned CDFA against trying to cover up health effects of apple moth pesticides, manipulated calculations to minimize health risks, and tried -- without success -- to obtain evidence of apple moth damage.

The EIR consultants also struggled to avoid contradicting two in-house "reports" prepared by CDFA staff that exaggerated the amounts of pesticide the agency claimed private homeowners would use to combat the moth if CDFA did not carry out its apple moth spray program. The CDFA reports were used to make CDFA's program of statewide pesticide treatments appear less dangerous.

CDFA finally completed the apple moth EIR in 2010, approving it with last-minute changes in the program, including: (1) eliminating a pesticide from the program because CDFA had inaccurately calculated the cancer risk as less than the actual risk, and (2) eliminating another pesticide from use at schools because CDFA had failed to realize it was on the list of pesticides that the state Department of Pesticide Regulation prohibits from use around children.

The most significant last-minute change was in the apple moth program objective, from "eradicating" to merely "controlling" the moth. Bizarrely, and despite this change, the EIR dismisses non-toxic control methods because those approaches "control" rather than "eradicate" the moth.

According to attorneys for the coalition, now that the program's goal is to control rather than eradicate the apple moth, the state must start over and, at a minimum, consider non-toxic control methods and redo the risk assessments to account for the control program's indefinite duration.

"CDFA presented one program to the public but approved a significantly different program after the public review period had ended. By engaging in such a classic bait and switch, CDFA violated the California Environmental Quality Act's fundamental public comment policies and abused its discretion," said coalition attorney Summer Wynn of Cooley LLP.

"In addition to disregarding CEQA's public disclosure and review requirements, CDFA did everything possible to avoid looking at non-toxic control while instead manipulating the facts to misrepresent their toxic program as safer than any alternative," said Tom Kelly, Board Member of the California Environmental Health Initiative (formerly Stop the Spray East Bay).

"California law requires that citizens be fully informed about potential risks that projects like aerial spraying pose to public health and our environment," said San Francisco City Attorney Dennis Herrera. "Yet the evidence is clear that the state agency pushing the controversial light brown apple moth program is falling short of its legal mandate. San Francisco continues to have grave concerns about the

