

Suits filed over light brown apple moth

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INDEX-TRIBUNE STAFF WRITER |

Opponents of the California Department of Food and Agriculture's plan to treat the light brown apple moth filed two separate lawsuits against the state agency last week for violating the California Environmental Quality Act.

The lawsuits are similar in the nature of the complaint, where plaintiffs contend the environmental impact report CDFA ascertained for its treatment program should be thrown out because, when the EIR was conducted, the department was seeking to eradicate the invasive pest but have since determined eradication is not feasible and switched focus to containing the pest.

The first lawsuit was filed in Sacramento on April 19 and plaintiffs include environmental groups, health agencies and elected city officials from Monterey to Fairfax. It is being handled by the Oakland-based environmental attorney Stephan Volker.

"They can't change a program and expect to use the same EIR," said Frank Egger, president of the North Coast Rivers Alliance, which is the lead plaintiff in that suit. "We're asking the court to throw it (the EIR) out and end the program."

The second lawsuit, filed in Alameda County on April 22, the 40th anniversary of Earth Day, also includes environmental and health agencies as plaintiffs along with the cities of Richmond, Berkeley and San Francisco. The lawsuit was filed by the San Francisco-based office of Cooley, Godward and Kronish.

"The California Department of Food and Agriculture has produced an environmental impact report that raises many more questions than it answers," said San Francisco City Attorney Dennis Herrera in a press release on the second lawsuit. "After combing through this document, it is literally impossible to say with certainty what CDFA plans to do, or when and where it plans to do it. To confuse matters further, the eradication program under review was subsequently morphed into a 'control, contain and suppress' program - whatever that means."

Steve Lyle, a spokesman for CDFA, said his department is working within the law and the science presented in the EIR is sound. "We stand behind the EIR and its robust process," Lyle said, adding that even though the final goal of the program has changed, the EIR is still valid. "The scope was wide enough with the EIR that it would apply to an eradication program or a control and containment program, which is what we're currently facing," he said.

Indirectly, the lawsuit also seeks to address the use of an aerial pheromone spray to treat the light brown apple moth. While Lyle said CDFA has no plans to use aerial sprays, Egger said the option is still listed as "viable" in the EIR, which he said is another reason the document should be thrown out.

When the light brown apple moth, an invasive pest native to Australia, was first discovered in 2007, CDFA and the United State Department of Agriculture determined it was a significant threat to the state's agriculture. CDFA called on an emergency provision in the law that allowed the organization to aggressively treat the pest without first conducting an EIR. In the summer of 2007, the department sprayed a pheromone aerial spray called CheckMate over Santa Cruz and Monterey counties. While CDFA contends the spray is safe, hundreds of residents ended up in the emergency room with breathing complaints and hundreds of seabirds were found dead.

In 2008, Egger's Alliance filed a lawsuit against the Environmental Protection Agency for allowing the use of CheckMate without properly vetting the product. Ultimately, the EPA admitted to no wrongdoing but did pull CheckMate off the market. "We sued the EPA over CheckMate in 2008. In 2009, the EPA removed it from the list of approved pesticides as a result of our lawsuit," Egger said. "But the EPA never said it was sorry. I think they just didn't want to end up paying our legal costs."

Meanwhile, CDFA continued to develop its treatment plan and subsequent EIR to eradicate the light brown apple moth. Lyle said the agency announced in 2008 that aerial spraying would not occur, but the EIR, completed in 2009, listed aerial spraying as one of the five potential treatment options over rural areas, described as areas with fewer than 100 residents, angering opponents who expected aerial sprays would be removed from the approved treatment options.

"CDFA says we're not going to spray, well, that's not enough. Your EIR says you can spray and that it's safe," Egger said, adding that the EIR contained a map of rural areas where spraying could occur that included sections of Sonoma County.

When CDFA sent the EIR out for public comment, numerous city and county governments wrote letters denouncing the use of spray. Egger said in response to that, CDFA added a signing statement, in affect altering the EIR, that stated the department would never use aerial spray and also changed the final goal of the program from eradication to containment.

"It stated unequivocally that we would not use aerial sprays," Lyle said. "That's a legal, binding document."

Opponents say its not enough. "Forty years ago, California's lawmakers passed CEQA to maintain a quality environment for the people of the state," said Kathleen Goodhart, an attorney in the second lawsuit. "CEQA requires full disclosure of a program's environmental and health impacts and meaningful consideration of less harmful alternatives, all supported by credible evidence. CDFA's EIR for apple moth eradication does not satisfy CEQA's mandates."

Much of Sonoma Valley has been under quarantine from the light brown apple moth since the pest was detected in the area in 2007. Growers are required to have their fields inspected and approved before product can be moved. This month part of the Valley was also put under quarantine from the European grapevine moth, a separate invasive pest, although the details of that quarantine have not yet been established.