

1 COOLEY GODWARD KRONISH LLP
KATHLEEN H. GOODHART (165659)
2 SUMMER J. WYNN (240005)
101 California Street, 5th Floor
3 San Francisco, CA 94111-5800
Telephone: (415) 693-2000
4 Facsimile: (415) 693-2222

5 EARTHJUSTICE
DEBORAH S. REAMES (117257)
6 426 17th Street, 5th Floor
Oakland, CA 94612-2807
7 Telephone: (510) 550-6725
Facsimile: (510) 550-6749

8
9 Attorneys for Petitioners and Plaintiffs OUR CHILDREN'S
EARTH FOUNDATION; MOTHERS OF MARIN AGAINST
THE SPRAY; STOP THE SPRAY EAST BAY; CITY OF
10 ALBANY; CITY OF BERKELEY; CITY OF RICHMOND;
CENTER FOR ENVIRONMENTAL HEALTH;
11 CALIFORNIANS FOR PESTICIDE REFORM; PESTICIDE
WATCH EDUCATION FUND; PESTICIDE ACTION
12 NETWORK NORTH AMERICA; CITIZENS FOR EAST
SHORE PARKS; STOP THE SPRAY SAN FRANCISCO

13 DENNIS J. HERRERA
14 CITY ATTORNEY
DANNY CHOU (180240)
15 1390 Market Street, 7th Floor
San Francisco, CA 94102-5408
16 Telephone: (415) 554-3807
Facsimile: (415) 554-3985

17 Attorneys for Petitioner and Plaintiff CITY AND COUNTY OF
18 SAN FRANCISCO

19 SUPERIOR COURT OF THE STATE OF CALIFORNIA
20 COUNTY OF ALAMEDA

21 OUR CHILDREN'S EARTH FOUNDATION;
22 MOTHERS OF MARIN AGAINST THE SPRAY;
STOP THE SPRAY EAST BAY; CITY OF
23 ALBANY; CITY OF BERKELEY; CITY OF
RICHMOND; CITY AND COUNTY OF SAN
24 FRANCISCO; CENTER FOR
ENVIRONMENTAL HEALTH;
25 CALIFORNIANS FOR PESTICIDE REFORM;
PESTICIDE WATCH EDUCATION FUND;
26 PESTICIDE ACTION NETWORK NORTH
AMERICA; CITIZENS FOR EAST SHORE
27 PARKS; STOP THE SPRAY SAN FRANCISCO,

28 Petitioners and Plaintiffs,

No.
**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

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v.

CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; A.G. KAWAMURA, in his official capacity as Secretary of the California Department of Food and Agriculture; and DOES 1 through 100, inclusive,

Respondents and Defendants.

Petitioners and Plaintiffs 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 EDUCATION FUND; PESTICIDE ACTION NETWORK NORTH AMERICA; CITIZENS FOR EAST SHORE PARKS; and STOP THE SPRAY SAN FRANCISCO (collectively, “Petitioners”) bring this action for writ of mandate under the California Environmental Quality Act (“CEQA”) and complaint for declaratory and injunctive relief (“Petition”) on behalf of Petitioners’ interested members and residents, and in the public interest. By this action against the CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE (“CDFA”) and A.G. KAWAMURA, in his official capacity as Secretary of CDFA (“Secretary”) (collectively, “Respondents”), the Petition challenges Respondents’ actions and decisions in certifying and approving the Final Programmatic Environmental Impact Report concerning CDFA’s Light Brown Apple Moth Eradication Program (the “Apple Moth Eradication Program” or “Program”).

INTRODUCTION

1. On March 22, 2010, CDFA’s Secretary certified that the Final Programmatic Environmental Impact Report for the Apple Moth Eradication Program (“Eradication EIR”) in the State of California is in compliance with the California Environmental Quality Act (“CEQA”).¹ Contrary to that certification, the Eradication EIR is critically flawed and clearly violates the requirements of CEQA.

¹ All references and citations to “CEQA” refer to California Public Resources Code section 21000, *et seq.*

1 2. In the Final Eradication EIR, CDFA fails to inform the public what “treatments” it
2 may employ in the future to eradicate the Apple Moth. The public is left wondering, after reading
3 what CDFA has certified as an “informative” document, whether CDFA will in the future ground
4 spray or possibly even aerially spray pheromone pesticides. Indeed, one has no way of guessing
5 *what* spraying or any of the other many approved treatments CDFA will use (or *what* the risks
6 and synergistic effects these treatments or any combination of treatments may have), *where*
7 CDFA will use the various treatments (e.g., in rural versus urban communities), *when* CDFA will
8 use what treatments, or even *why* CDFA will use whatever combination of treatments it may
9 decide to use for any specific place in the Program “area” (which is, effectively, the entire State).
10 CDFA has not even disclosed whether what it has described as a “programmatic” EIR is the end
11 of its public disclosures and analysis pertaining to its Apple Moth Eradication Program, or
12 whether CDFA will in the future conform with CEQA’s requirement to “tier” subsequent, site-
13 specific environmental analyses so that the public will in fact have the information to which it is
14 entitled regarding the “treatments” that CDFA will employ.

15 3. The Final Eradication EIR issued by CDFA proposes a program to *eradicate* the
16 Apple Moth from California. Many of the comments during the public comment period
17 following CDFA’s issuance of the Draft Eradication EIR objected to CDFA’s insistence that
18 eradication was both necessary and feasible. CDFA refused to legitimately consider numerous
19 Apple Moth “*control*” treatments urged by the public, local governments, and independent
20 experts solely because the objective of its program, as defined by CDFA in its Draft and Final
21 Eradication EIR, was to *eradicate* the Apple Moth from the State, not merely to *control* or
22 *minimize* its populations. After the public comment period closed, however, and after the Final
23 Eradication EIR had been circulated, CDFA remarkably abandoned the project objective it told
24 the public it was pursuing – i.e., *eradication* of the Apple Moth. In certifying the Final
25 Eradication EIR and approving what it still calls the “Eradication” Program, CDFA now finds the
26 *eradication* objective to be infeasible “at this time,” and instead states that the objectives of the
27 Program are to “*control, contain and suppress*” the Apple Moth, with eradication efforts confined
28 only to small, discrete Apple Moth populations.

1 4. This about-face on the most basic objectives of the Program renders the Final
2 Eradication EIR deficient both as to the project description and as to the necessary consideration
3 of alternatives. CDFA may not change the stated objective of the Program *after* the Final EIR
4 issues, or after all public and other agency comment opportunities (and its legal responsibility to
5 fully respond to such comments) have ceased. CDFA must now prepare and circulate for
6 comment an EIR with an accurate (and its current) project objective of “minimizing the impact of
7 [the Apple Moth] in California,” that adequately considers all feasible alternatives to that project.

8 5. CDFA’s cavalier approach to its CEQA compliance obligations is particularly
9 troubling in light of its outrageous actions over the last three years pertaining to the Apple Moth.

10 6. The Apple Moth exists in established populations in many areas, including its
11 native Australia, and New Zealand, the United Kingdom, New Caledonia, Hawaii, and California.
12 Some scientists specializing in the study of such “leaf roller” moths report that the Apple Moth
13 has existed in California for thirty years or more, and there is no disagreement among the experts,
14 even those on which CDFA relies, that the Apple Moth has existed as an introduced species in
15 other countries for over one hundred years. According to scientists and agriculturalists who have
16 studied the Apple Moth in these other countries, the Apple Moth poses no significant threat to
17 agriculture and is managed almost exclusively by its natural predators (notably, those natural
18 predators have become increasingly effective in control of the Apple Moth since these countries
19 stopped using nerve agent insecticides that tended to kill those natural predators).

20 7. CDFA nonetheless has a different view of the *potentially* harmful effects of the
21 Apple Moth. In early 2007, after a retired Bay Area entomologist discovered an Apple Moth in
22 traps he had set in his backyard in Berkeley, CDFA panicked. CDFA declared that the Apple
23 Moth, if it spread, could devastate California agriculture, despite the absence of any evidence of
24 actual damage caused by the moth. Accordingly, CDFA claimed an “emergency” exemption
25 from CEQA and began an aggressive eradication campaign through various means, including the
26 spraying of untested, synthetic pheromone-based chemicals from the air over heavily populated
27 areas in Monterey and Santa Cruz counties, with no knowledge or analyses concerning the
28 potential adverse health or environmental impacts associated with its aerial spray campaign.

1 for its reduction. OCE, on behalf of its members, works to enforce environmental laws at both
2 federal and state levels, to reduce pollution, and to educate the public concerning those laws and
3 their enforcement. * OCE members are concerned about the potential adverse health and
4 environmental effects of the Apple Moth Eradication Program, they have actively opposed and
5 objected to the Program, and they have submitted comments during the public comment period
6 for the Eradication Program EIR.

7 **12.** Petitioner and Plaintiff MOTHERS OF MARIN AGAINST THE SPRAY
8 (“MOMAS”) is a nonprofit group of Marin County mothers and families committed to creating
9 healthy communities for children by reducing the use of household and environmental toxins.
10 MOMAS believes that every child deserves a healthy future, and the chance to reach his or her
11 full potential, without unnecessary exposure to pesticides in our communities. MOMAS formed
12 in April 2008 as an effort by four Marin County mothers to organize and prevent CDFA’s plans
13 for aerial pesticide spraying to eradicate the Apple Moth. MOMAS believes that the Program is
14 not necessary, not safe, and will not work, and that it is a waste of taxpayer dollars. MOMAS has
15 educated the community and the press about this Program, has written comment letters and held
16 meetings with elected officials, and has objected to the Program at public hearings. MOMAS is
17 comprised of over 500 mothers and families in Marin County.

18 **13.** Petitioner and Plaintiff STOP THE SPRAY EAST BAY is a non-profit, grassroots
19 organization formed in 2007 in response to the threat of aerial pesticide spraying of the Bay Area
20 as part of CDFA’s plan to eradicate the Apple Moth. STOP THE SPRAY EAST BAY strongly
21 opposes the Apple Moth Eradication Program as unnecessary, unsafe, and ineffective. STOP
22 THE SPRAY EAST BAY also aims to address other pesticide-related issues with a focus on
23 bringing together producers and consumers to support safe food and safe farms. STOP THE
24 SPRAY EAST BAY members are concerned about the potential adverse health and
25 environmental effects of the Apple Moth Eradication Program, they have actively opposed and
26 objected to the Program, and they have submitted comments during the public comment period
27 for the Eradication EIR. STOP THE SPRAY EAST BAY members include about 500 Bay Area
28 residents.

1 **14.** Petitioner and Plaintiff CITY OF ALBANY (“Albany”) is a city of approximately
2 17,000 residents in the metropolitan Bay Area. Albany has an interest in challenging the
3 Eradication EIR for several reasons. Apple Moths have been trapped in Albany. In 2008, Albany
4 was within the aerial pesticide spray zone for the Apple Moth. The city remains within an Apple
5 Moth quarantine area and thus it would be potentially subject to any of the treatments proposed in
6 the Eradication EIR. Such treatments include ground spraying of public and private property with
7 pesticides whose formulas have not been disclosed, and, in the case of pheromone pesticides, are
8 virtually untested for human exposure risks. Several of the proposed treatments involve attaching
9 pesticide emitters (twist ties) or pesticide products to bushes and other landscaping using sticky
10 adhesive. These treatments would expose child and adult residents, as well as domestic animals,
11 to these pesticides with unknown health consequences. Albany is well known in the Bay Area for
12 its exceptional schools; families seek to live in Albany so their children can attend Albany
13 schools, and homes in Albany command higher prices than in other local cities and hold market
14 value because of the desirability of the city’s schools. Albany could, therefore, suffer direct
15 economic harm as a result of pesticide applications to schools, as provided for in the Apple Moth
16 Eradication Program. The Program also threatens violations of Albany residents’ civil and
17 property rights with the provision for forced spraying of private property if owners refuse.
18 Albany has a strict pest management ordinance, developed through a long process of community
19 consensus-building, that allows almost no pesticide use on public property; the treatments
20 proposed in CDFA’s Program violate the community values codified in that ordinance. Further,
21 thanks to the alertness and quick action of the Albany resident who chaired the city’s Integrated
22 Pest Management Task Force at the time aerial spraying was first proposed for the Apple Moth in
23 the Bay Area, Albany was the first Bay Area city to take action opposing the Apple Moth
24 Eradication Program in 2008, and led other cities and the Bay Area Mayors’ conference to take a
25 unified stand against the Program.

26 **15.** Petitioner and Plaintiff CITY OF BERKELEY (“Berkeley”) is a charter city
27 formed under and in accordance with the constitution and laws of the State of California.
28 Berkeley and its approximately 110,000 residents have a strong interest in the preservation,

1 protection, and defense of the health of all Berkeley residents and visitors, as well as air quality,
2 water resources, biological resources, and other environmental qualities. Berkeley provides
3 municipal services, including its own health department, to its residents, visitors, and businesses.
4 Berkeley's City Council is responsible for regulating land use and environmental effects within
5 its borders, and it is charged with protecting the public health and safety and promoting the
6 general welfare and quality of life of its citizens. Since CDFA first proposed its plans to eradicate
7 the Apple Moth, members of the City Council of Berkeley and numerous Berkeley residents have
8 been concerned about the potential adverse health and environmental effects of the Program, and,
9 particularly, the aerial spraying of pheromone pesticides. Berkeley officials and residents have
10 actively opposed and objected to the Apple Moth Eradication Program, and they have submitted
11 comments during the public comment period for the Eradication EIR.

12 **16.** Petitioner and Plaintiff CITY OF RICHMOND ("Richmond") is a charter city
13 formed under and in accordance with the constitution and laws of the State of California.
14 Richmond and its more than 100,000 citizens have a strong interest in the preservation,
15 protection, and defense of the health of all Richmond residents and visitors, as well as air quality,
16 water resources, biological resources, and other environmental qualities. Richmond's City
17 Council is responsible for regulating land use and environmental effects within its borders, and it
18 is charged with securing the wellbeing of its citizens. Since CDFA first proposed its plans to
19 eradicate the Apple Moth, members of the Richmond City Council and numerous citizens have
20 been concerned about the potential adverse health and environmental effects of the Program, and,
21 particularly, the aerial spraying of pheromone pesticides. Richmond's City Council has actively
22 opposed and objected to CDFA's Apple Moth Eradication Program. Richmond is within an
23 Apple Moth quarantine area and thus it would be potentially subject to any of the treatments
24 proposed in the Eradication EIR for the Program.

25 **17.** Petitioner and Plaintiff CITY AND COUNTY OF SAN FRANCISCO ("San
26 Francisco") is a charter city and a county formed under and in accordance with the constitution
27 and laws of the State of California. San Francisco has approximately 809,000 residents and has a
28 strong interest in protecting the health and safety of all its residents and visitors, as well as the

1 quality of its air, water, biological, and other environmental resources. San Francisco's Board of
2 Supervisors is responsible for regulating land use and environmental effects within its borders,
3 and is charged with protecting the public health and safety and promoting the general welfare and
4 quality of life of its citizens. Since CDFA first proposed its plans to eradicate the Apple Moth,
5 the Board of Supervisors, the Mayor, and numerous San Francisco residents have been concerned
6 about the potential public health and environmental effects of the Program, and, particularly, the
7 aerial spraying of pheromone pesticides. In April, 2008, the Board of Supervisors unanimously
8 approved, and the Mayor signed, two resolutions opposing aerial spraying of pesticides, and
9 urging CDFA to take a safe approach to controlling the Apple Moth. Since then, San Francisco
10 and many of its residents have urged CDFA to proceed with caution in its efforts to control the
11 Apple Moth, and they have submitted comments during the public comment period on the
12 Eradication EIR.

13 **18.** Petitioner and Plaintiff CENTER FOR ENVIRONMENTAL HEALTH ("CEH")
14 is a non-profit organization formed in 1996 to protect people from toxic chemicals. One of
15 CEH's current campaigns focuses on safe food, air, and water. CEH strongly opposes the Apple
16 Moth Eradication Program as unnecessary, unsafe, and ineffective. CEH is concerned about the
17 potential adverse health and environmental effects of the Apple Moth Eradication Program, has
18 actively opposed and objected to the Program, and has submitted comments during the public
19 comment period for the Eradication EIR. CEH has about 10,000 active supporters, and about
20 3,000 of CEH's members live in California.

21 **19.** Petitioner and Plaintiff CALIFORNIANS FOR PESTICIDE REFORM ("CPR") is
22 a statewide coalition of over 180 health, labor, education, environmental justice, and
23 environmental organizations formed in 1996 to end use of the most dangerous pesticides, reduce
24 all pesticide use, fight for the right to know about pesticides in our environment, and promote
25 least-risk pest management alternatives. CPR's principle programs are reduction of smog causing
26 and highly toxic pesticides in agricultural areas, misuse and overuse of pesticides in low income
27 housing, buffer zones around schools and other sensitive sites, and promoting sustainable
28 agriculture. Many of CPR's members will be deeply affected by possible spraying to eradicate

1 the Apple Moth. CPR has actively opposed the Apple Moth Eradication Program since the 2007
2 spraying by CDFA and its members have submitted comments during the public comment period
3 for the Eradication Program EIR.

4 **20.** Petitioner and Plaintiff PESTICIDE WATCH EDUCATION FUND (“PWEF”)
5 works side-by-side with communities to prevent pesticide exposure, promote local farming, and
6 build healthier communities. Since 2007, PWEF has worked on behalf of its several thousand
7 California members to stop aerial pesticide spraying, as well as other unsafe and ineffective
8 treatment methods for the Apple Moth, by supporting community-based organizations from
9 Monterey to Marin Counties, including the Coalition for Sustainable Action, Stop the Spray East
10 Bay, Stop the Spray Marin, and StopTheSpray.org. In particular, PWEF helped raise the profile
11 of victims of pesticide spraying in Monterey County. Since then, PWEF has worked with
12 officials to develop legislative solutions to the problems with the Program, and look for longer-
13 term solutions to creating healthier farms and ecosystems without the use of pesticides. PWEF
14 members are concerned about the potential adverse health and environmental effects of the Apple
15 Moth Eradication Program, they have actively opposed and objected to the Program, and they
16 have submitted comments during the public comment period for the Eradication Program EIR.

17 **21.** Petitioner and Plaintiff PESTICIDE ACTION NETWORK NORTH AMERICA
18 (“PANNA”) is a San Francisco-based non-profit organization that serves as an independent
19 regional center for Pesticide Action Network International, a coalition of over 600 public interest
20 organizations in more than 90 countries. For more than 20 years, PANNA has worked to replace
21 hazardous and unnecessary pesticide uses with ecologically sound pest management across North
22 America. PANNA provides scientific expertise, public education, access to pesticide data and
23 analysis, policy development, and other support to its approximately 225 member organizations.
24 PANNA has approximately 2,700 individual members nationwide and approximately 90
25 organizational members in California alone. PANNA’s U.S. membership includes a number of
26 groups who directly represent or advocate on behalf of farmworkers and whose membership
27 includes farmworkers and persons living on or near farms. PANNA members are concerned
28 about the potential adverse health and environmental effects of the Apple Moth Eradication

1 Program, they have actively opposed and objected to the Program, and they have submitted
2 comments during the public comment period for the Eradication EIR.

3 **22.** Petitioner and Plaintiff CITIZENS FOR EAST SHORE PARKS (“CESP”) is
4 dedicated to creating shoreline parks and open space in the East Bay, from the Oakland Estuary to
5 the Carquinez Strait, and to working with others in ringing the Bay with shoreline parks and open
6 space. CESP works to protect open space and expand parklands along the East Bay shoreline
7 through advocacy, outreach, and education. Protecting healthy habitats as well as the health of all
8 who visit the shoreline is paramount to CESP. CESP strenuously opposes the use of any
9 materials that risk the health of the people or creatures along the shoreline. CESP believes that
10 the treatments in the Program that may be used in the East Bay include unacceptable risks and,
11 further, that the studies that have been done so far have neither adequately identified the risks, nor
12 proposed reasonable steps to reduce and eliminate those risks. CESP has a mailing list of about
13 3,500 households. Its 28-member Board is comprised of government officials, environmentalists,
14 and concerned citizens. CESP members are concerned about the potential adverse health and
15 environmental effects of the Apple Moth Eradication Program, they have actively opposed and
16 objected to the Program, and they have submitted comments during the public comment period
17 for the Eradication Program EIR.

18 **23.** Petitioner and Plaintiff STOP THE SPRAY SAN FRANCISCO is a non-profit,
19 grassroots organization formed in response to CDFA’s announcement that it would expand to the
20 Bay Area the aerial pesticide pheromone spray program in Monterey and Santa Cruz counties.
21 STOP THE SPRAY SAN FRANCISCO activists strongly oppose the Apple Moth Eradication
22 Program as unsafe, unnecessary, ineffective, and a waste of taxpayer dollars. STOP THE
23 SPRAY SAN FRANCISCO activists submitted comments during the public comment period for
24 the Eradication EIR and spoke at public hearings in Sacramento about the Program. In May
25 2008, more than 1,000 citizens marched over the Golden Gate Bridge in protest of the Apple
26 Moth Eradication Program in an event organized and promoted by STOP THE SPRAY SAN
27 FRANCISCO in collaboration with Marin County activists. STOP THE SPRAY SAN
28 FRANCISCO members include about 550 San Francisco and Bay Area residents.

1 47. CDFA defined its Draft and Final EIRs for the Apple Moth as “programmatic.”
2 The CEQA Guidelines allow a programmatic EIR for a series of related actions if those actions
3 appropriately are characterized as one large project; however, the CEQA Guidelines require
4 “tiered” or additional site-specific EIRs following certification of a programmatic EIR to cover
5 site-specific plans when such plans will be implemented. Here, CDFA has attempted to provide
6 itself with boundless flexibility to use virtually any or all of the treatments addressed in the
7 Eradication EIR, including aerial spraying, even though in certifying the document CDFA now
8 claims it will not be doing aerial spraying “at this time.” Indeed, the entire Program is premised
9 on the notion that CDFA does yet not know what it will actually do, where it will do what, when
10 it will do it, or why it will use various combinations of treatments in different areas. Despite the
11 clear CEQA mandate for site-specific environmental and public review in this instance, CDFA
12 has offered no indication that it will so comply with CEQA, and it has failed to respond to
13 inquiries as to whether it intends to prepare and provide site-specific EIRs prior to implementing
14 the various treatments or “tools” referenced in the Final Eradication EIR.

15 48. The Draft Eradication EIR stated that Apple Moth “eradication from California is
16 the CDFA’s goal because eradication is preferable to control and can reasonably be expected to
17 be accomplished ...” The Draft Eradication EIR proposed and discussed numerous different
18 “tools” or “treatment alternatives” that CDFA identified as capable of eradicating the Apple
19 Moth. Those “treatments” described in the Draft Eradication EIR are:

- 20 (1) Alternative MD-1 – Mating Disruption using Twist Ties – plastic twist ties infused
21 with Apple Moth pheromone placed in areas of isolated populations either as a stand-
22 alone treatment or in conjunction with larval treatments of *Bacillus thuringiensis kurstaki*
23 (Btk) or spinosad [which are chemical pesticides];
- 24 (2) Alternative MD-2 – Mating Disruption with Ground Application of Pheromones –
25 Apple Moth pheromone treatments applied using ground-based equipment [such as truck-
26 mounted spray guns] and pheromone pesticide flakes or other formulations attached to
27 bushes and other plants with sticky adhesive;

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1 (3) Alternative MD-3 – Aerial Application of Pheromones – the release, from aircraft, of
2 Apple Moth pheromone treatments [similar to CDFA’s spraying in 2007 in Monterey and
3 Santa Cruz];

4 (4) Alternative MMA – Male Moth Attractant – Apple Moth pheromone treatments plus
5 permethrin [a chemical pesticide] to target and kill male moths;

6 (5) and (6) Alternatives Btk and S – Organically Approved Insecticides – foliar ground
7 treatments of Btk or spinosad [chemical pesticides] applied by either truck-based or
8 backpack-based spraying equipment;

9 (7) Alternative Bio-P – Inundative Parasite Wasp Releases – the release of, up to one
10 million per square mile, commercially available stingless wasps [which are Apple Moth
11 parasites]; and

12 (8) Alternative SIT – Sterile Insect Technique – the release, from aircraft, of up to 20
13 million sterile male³ moths per day to disrupt mating and eradicate the population;

14 **49.** The Draft Eradication EIR stated that CDFA could implement any one, any
15 combination of, or even all of the above alternative “tools,” for seven years following initiation
16 of the Program, anywhere within what CDFA defined as the Program Area. CDFA defined the
17 overall Program Area to potentially include all portions of the State with climatic conditions
18 “suitable” to the Apple Moth (this excludes only areas of extreme desert in the southeast and
19 extensive cold at elevations above 5,000 feet in portions of the Sierra Nevada).

20 **50.** Hundreds of agencies, organizations, and individuals submitted written comments
21 and spoke at scoping hearings expressing concerns, asking questions, and advising of numerous
22 CEQA deficiencies in the Draft Eradication EIR, including:

23 (a) the absence of any substantial or credible analysis of the assumptions on
24 which the eradication program is based, including objective and scientifically credible review of
25 the reasons for attempting eradication, the conclusions drawn by CDFA about Apple Moth
26 behavior and status in the State, and the evidence that eradication is both possible and feasible;

27 _____
28 ³ CDFA amended this alternative tool after the public comment period to note that it would include the release of both sterile male and female moths.

1 (b) the failure to disclose where within the Program Area the different
2 alternative “tools” would be applied and how CDFA would determine which tools to apply,
3 where, and when;

4 (c) the failure to disclose the precise locations planned for spray treatments,
5 including whether the “agricultural” and “forested” areas proposed are inhabited by humans,
6 whether any of the areas are adjacent to populated areas, or whether the areas shelter endangered
7 species of animals, fish, or birds;

8 (d) the failure to disclose the complete chemical formulas of the pesticides to
9 be used in the program, including both the active and “inert” chemical ingredients, their
10 concentrations, and all information related to the acute and long-term toxicity of all such chemical
11 ingredients;

12 (e) the failure to provide a complete analysis of the health and environmental
13 impacts of chronic exposure to the chemical pesticides, including a credible analysis of the
14 impacts on children, the elderly, people with chemical sensitivities, and people with immune
15 disorders;

16 (f) the failure to reasonably consider feasible and environmentally preferable
17 alternatives to the “treatments” proposed by CDFA, including, for example, Integrated Pest
18 Management (“IPM”) (the preferred approach in New Zealand for controlling Apple Moth
19 populations to meet U.S. Apple Moth restrictions for New Zealand’s exported produce) and
20 classic biological controls, among others.

21 **51.** In response to the comments received, CDFA did not revise its Draft Eradication
22 EIR and re-circulate it for public comment. Instead, CDFA issued a document entitled “Response
23 to Comments” in February 2010, providing only a ten-day review period to public agencies that
24 had submitted comments on the Draft Eradication EIR. The Response to Comments, along with
25 the Draft EIR, constitutes the Final Eradication EIR pertaining to CDFA’s Apple Moth
26 Eradication Program.

1 **52.** The CDFA Response to Comments begins with the admission that the human
2 health risk assessment that it had prepared was deficient in that it utilized an inaccurate cancer
3 risk factor with respect to exposure to permethrin (a male moth attractant chemical), one of the
4 many “tools” for eradication contemplated in the Draft Eradication EIR. When considered in
5 light of the correct cancer risk factor, CDFA acknowledged that this treatment poses an
6 unacceptable cancer risk to children. CDFA’s failure to recognize this in its draft analysis is
7 remarkable and calls into doubt CDFA’s assertion in its Response to Comments that “the safety
8 of the biological and chemical pesticides proposed for use in the [Apple Moth] Eradication
9 Program was evaluated in the human health risk assessment.” Moreover, CDFA repeatedly states
10 in its Response to Comments that the human health risk assessment is limited to the substances
11 “known to the preparers” and the effects of those substances “if known.” CDFA does not
12 adequately respond to its failure to disclose, or its failure to thoroughly analyze the impacts of
13 exposure to, the complete chemical formulas of the pesticides that may be used in the Program.

14 **53.** CDFA also disclosed in its Response to Comments that it would not employ
15 Hercon Flakes, SPLAT, and Isomate, all pheromone-based products, at schools and childcare
16 facilities, because those products appear on the California Department of Pesticide Regulation
17 (“DPR”) list of products that are prohibited from use in schools and childcare facilities. Despite
18 this DPR prohibition, CDFA apparently will employ these products at other sites where children
19 may be present; however, because CDFA has not disclosed precisely where each “tool” and what
20 combinations of “tools” will be employed within the immense Program Area, the public cannot
21 ascertain when, where, and whether those products that DPR has barred from use at schools and
22 child care facilities will be utilized, or the risks to children from their use.

23 **54.** CDFA’s Response to Comments does not rectify the numerous other CEQA
24 deficiencies to which CDFA was alerted during the comment period. For example, in response to
25 the comments requesting clear information concerning which treatments would occur where,
26 CDFA responded with maps purporting to show where aerial spraying “might” occur, but then
27 warned that the maps could not be relied upon because other areas could still be subject to aerial
28

1 discretion. Respondents failed to proceed in the manner required by law and Respondents'
2 actions, decisions, approvals, and findings are not supported by substantial evidence.

3 **59. Inadequate Project Description:** CEQA requires that the nature and objectives
4 of a project be disclosed and fairly evaluated, and CEQA broadly defines “project” as “the whole
5 of an action.” CAL. PUB. RES. CODE § 21065; CEQA GUIDELINES §§ 15124, 15378(a). An EIR’s
6 project description must contain sufficient specific information to allow a complete evaluation
7 and review of its environmental impacts. CEQA GUIDELINES § 15124. The Eradication EIR fails
8 to provide the public with an accurate, stable, and finite description of the Program, which must
9 include, among other things, the precise location and boundaries of the area to be affected by the
10 Program, a clear written statement of the Program’s objectives, including the underlying purpose,
11 and the Program’s technical, economic, and environmental characteristics. *See* CEQA
12 GUIDELINES § 15124. According to CDFA, the “boundaries” of the Program Area are effectively
13 the State lines and thus CDFA can implement any of the Program’s several alternative tools
14 anywhere in the State with a “suitable” Apple Moth climate where two or more moths have been
15 detected. This is not sufficient or precise enough under CEQA to give adequate public notice of
16 where exactly CDFA will implement which alternative tools and in what combinations, or even
17 how CDFA will go about deciding these questions. Further, by changing the Program’s primary
18 objectives after the environmental “studies” were done, after the public comment period and
19 CDFA’s responses to comments were closed, and after the Final Eradication EIR was complete,
20 Respondents have significantly changed the purpose and potential scope of the Program in
21 violation of CEQA.

22 **60. Failure To Adequately Consider Feasible Alternatives:** CEQA provides that an
23 EIR must consider a reasonable range of potentially feasible alternatives to the proposed action
24 that could attain most of the action’s basic objectives while substantially lessening any of its
25 significant effects on the environment and it must evaluate the comparative merits of those
26 alternatives in contrast to the proposed action. CAL. PUB. RES. CODE § 21100(b)(4); CEQA
27 GUIDELINES §§ 15126(d), 15126.6(a)-(d). Although the Eradication EIR purports to analyze
28 numerous “alternative” tools, in reality, most of those “alternatives” are components or parts of

1 the Apple Moth Eradication Program itself (which means they are not really alternatives at all).
2 Further, CDFA dismissed numerous feasible alternatives proposed by Petitioners and other
3 members of the public and scientific, agriculture, and entomology communities that organic
4 growers and entities in other countries use to control and contain Apple Moths, such as IPM and
5 classic biological control, among others. CDFA rejected these and other feasible alternatives
6 without adequate consideration based on CDFA's position that they "did not meet the objective
7 of" eradication. CDFA's revision of the Program objective from eradication to "contain, control,
8 and suppress" after the Eradication EIR was complete renders the entire "alternatives" analyses
9 without foundation in substantial evidence. Failure to adequately analyze alternatives to the
10 Program is a significant CEQA violation and renders the entire Eradication EIR invalid.

11 **61. Failure To Adequately Consider The No Program Alternative:** CEQA
12 requires that an EIR's discussion and consideration of the "no project" or "no program"
13 alternative adequately address "existing conditions" as well as "what would be reasonably
14 expected to occur in the foreseeable future if the project were not approved, based on current
15 plans and consistent with available infrastructure and community services." CEQA GUIDELINES §
16 15126.6(e)(2). This discussion must be straightforward and intelligible, and it must be based in
17 substantial evidence to allow the decision-makers and the public to ascertain the potential
18 environmental consequences of doing nothing instead. As with the other alternatives mentioned
19 in the Eradication EIR, CDFA's formulation and rejection of the "No Program" alternative are
20 based on the prior stated objective of eradication and are thus inadequate now that the objectives
21 have changed. Further, CDFA's formulation of the No Program alternative is not based on
22 substantial evidence or reasonable and fair assumptions about current or future conditions. For
23 instance, CDFA had no reasonable basis to assume that private parties will use pesticides widely
24 on an insect that has so far not caused damage. Also, CDFA did not give equal treatment to the
25 projected effect of quarantines on private or commercial use of available pesticides when
26 comparing the No Program alternative with the Program – even though quarantines would
27 continue under both scenarios. This and other "selective" analyses and assumptions resulted in
28 the No Program alternative appearing likely to generate more effects such as more private

1 pesticide use, and the potential effects associated with such use, than the Program scenario. This
2 unfair slant in favor of the Program and CDFA's failure to adequately formulate and consider a
3 No Program alternative supported by substantial evidence violates CEQA and renders the
4 Eradication EIR invalid.

5 **62. Failure To Provide Adequate Information, Detail, And Specificity To Allow**
6 **Meaningful Public Involvement And Review:** CEQA requires that documents analyzing
7 environmental impacts be "organized and written in a manner that will be meaningful and useful
8 to decision-makers and to the public." CAL. PUB. RES. CODE § 21003(b). The California
9 Resources Agency has emphasized that "Public participation is an essential part of the CEQA
10 process." CEQA GUIDELINES § 15201. Further, an EIR must contain a sufficient degree of detail
11 and analysis to provide decision-makers with information that enables them to make a decision
12 that intelligently takes account of environmental consequences. CEQA GUIDELINES § 15151. In
13 addition to the inadequate and misleading disclosures with respect to the Program Area, the
14 Program's objectives and the No Program alternative alleged above, CDFA also failed to disclose
15 adequate information about the various pheromone pesticide chemicals and treatments that make
16 up the Program's alternative tools to allow full consideration of the potential adverse health and
17 environmental effects of both the active and so-called "inert" ingredients of the pesticides.
18 Regardless of whether certain aspects of some chemical formulas may be protectable trade
19 secrets, CEQA imposes on CDFA an obligation to adequately disclose sufficient information to
20 allow public review and consideration of the potential effects of the pheromone pesticides and the
21 treatments they intend to use. The discussion of the pheromone pesticides and treatments in the
22 Eradication EIR does not meet this standard. Moreover, as alleged above, CDFA's failure to
23 provide any specificity about how, when, and where they will implement the alternative tools
24 falls substantially short of its obligation to provide the public with information adequate to fulfill
25 the purpose of meaningful and open public review.

26 **63. Failure To Adequately Analyze And Mitigate Significant Environmental And**
27 **Public Health Impacts:** CEQA provides that, in any case where there is substantial evidence in
28 the administrative record that there is a fair argument that a project might produce significant

1 environmental effects, each such effect must be revealed and fully analyzed in the EIR, giving
2 due consideration to both short-term and long-term effects. CAL. PUB. RES. CODE §§ 21100(a),
3 21080(d); CEQA GUIDELINES § 15126.2(a). As raised by the hundreds of comments to the Draft
4 Eradication EIR, the analyses of risks to human health and, particularly, the risks to the health of
5 children, the elderly, people with chemical sensitivities, and people with immune disorders is
6 woefully inadequate. To illustrate, after the close of public comments, CDFA deleted
7 “Alternative MMA – Male Moth Attractant,” the tool that proposed using Apple Moth
8 pheromone treatments along with the pesticide chemical permethrin, due to an unacceptable and
9 significant cancer risk to children that CDFA had apparently missed in conducting their risk
10 analysis for the Draft Eradication EIR. This was not, however, the only area of inadequacy in
11 CDFA’s human health risk analyses. CDFA also failed to adequately analyze and mitigate
12 significant biological impacts, such as the risks to monarchs and other butterflies and other insect
13 classes from the use of Btk (one of the chemical pesticide alternatives that is also toxic to these
14 species), the risks to honeybees and pollinators from the use of spinosad (one of the chemical
15 pesticide alternatives that is also toxic to these species), and the impact of pesticide chemicals on
16 species living in water sources near or around treated areas. CDFA also did not sufficiently
17 address the potential impacts associated with the drift of pheromone pesticides. The few
18 assessments that CDFA did make about pesticide drift were arbitrary, are not supported by any
19 actual, let alone substantial, evidence, and are based on flawed estimations. It is not enough
20 simply to claim to have “considered” the potential impacts. CDFA’s failure to adequately define
21 and assess the risks of all potential effects to the environment and public health does not meet
22 CEQA’s requirement that CDFA either disclose, mitigate, or publicly override all potential
23 adverse effects associated with the Program.

24 **64. Inadequate Findings:** Pursuant to CEQA Guidelines, an agency must make
25 written findings describing the disposition of significant effects identified in the EIR and
26 explaining why the agency rejected mitigation measures or project alternatives. CEQA
27 GUIDELINES § 15091(a). These findings must be supported by substantial evidence in the record,
28 including “facts, reasonable assumptions predicated on facts, and expert opinion support by facts”

1 but not “argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is
2 clearly erroneous or inaccurate....” CEQA GUIDELINES §§ 15091(b), 15384. Several of
3 Respondents’ CEQA findings are conclusory, speculative, and unsupported by the evidence in the
4 record. Further, CDFA’s post Final Eradication EIR “finding” that aerial spray is “infeasible at
5 this time” is not supported or explained by anything else in the findings, and it certainly is not
6 explained by anything in the Eradication EIR (that happens to go to great lengths to justify the
7 feasibility and alleged usefulness of aerial spray).

8 **65. Inadequate Responses To Comments:** CEQA requires that agencies provide a
9 good faith, reasoned analysis in response to comments received on a draft EIR. Conclusory
10 statements unsupported by factual evidence will not suffice. CEQA GUIDELINES § 15088(c). Nor
11 will statements based on inaccurate and unsupported assumptions. Agencies must address
12 recommendations and objections raised in public comments in detail and explain why specific
13 comments and suggestions were not accepted. Most, if not all, of CDFA’s responses to
14 comments are based on the abandoned Program goal of eradication. For example, CDFA
15 responds to comments raising alternatives to the Program and comments raising issues about the
16 scope of the Program by relying on its abandoned position that eradication is the primary and
17 preferred objective. CDFA also glosses over the specific questions and issues in numerous
18 comments by responding to them in a broad and categorical manner.

19 **66. The Entire Eradication EIR Is Premised Upon And Purportedly Justified By**
20 **Unsupported And Unreasonable Assumptions:** An EIR cannot define a purpose for the
21 proposed action and then not consider those matters necessary to assess whether the purpose is in
22 fact necessary or achievable. CDFA’s assumptions that the Apple Moth was “new” to the state,
23 that the Apple Moth would cause immediate and significant damage, and that the Apple Moth can
24 be eradicated are not supported by substantial evidence and have been proven to be unfounded.
25 It has been four years since the retired entomologist identified an Apple Moth in his backyard in
26 Berkeley, and CDFA has yet to identify any actual damage caused by the Apple Moth. Two
27 courts considered CDFA’s proffered reasons for immediate action and both courts determined the
28 Apple Moth’s presence did not constitute a new “emergency.” To date, there is no reported

1 significant crop damage by the Apple Moth in California, and after existing for over one-hundred
2 years in New Zealand and Hawaii, the Apple Moth poses no significant threat to agriculture and
3 other resources there. Finally, CDFA's abandonment of eradication in favor of "control, contain
4 and suppress" is an admission that eradication of the Apple Moth is not possible or preferred.
5 CDFA's change in course undermines all of the assumptions in the Eradication EIR based on
6 eradication as the goal. As such, CDFA was required to make substantial revisions to the
7 Eradication EIR and re-circulate it for additional public review and comments before
8 Respondents could certify and approve it under CEQA.

9 **SECOND CAUSE OF ACTION**

10 (For Declaratory Relief)

11 **67.** Petitioners incorporate by this reference paragraphs 1 through 66 as though they
12 are set forth in full.

13 **68.** An actual controversy exists between the parties. Petitioners contend that
14 Respondents have acted in violation of CEQA and must vacate and set aside their approvals of
15 the Eradication EIR, and the findings related thereto, and revise, publicly re-circulate, and
16 consider a full and adequate EIR prior to granting any further approvals relating to CDFA's
17 efforts to eradicate or otherwise seek to contain, control, and suppress the Apple Moth.
18 Respondents dispute these contentions. A judicial resolution of this controversy is necessary and
19 appropriate.

20 **THIRD CAUSE OF ACTION**

21 (For Injunctive Relief)

22 **69.** Petitioners incorporate by reference paragraphs 1 through 68 as though they are set
23 forth in full.

24 **70.** Unless Petitioners obtain injunctive relief they will suffer irreparable harm in that
25 implementation of the Apple Moth Eradication Program will cause the adverse environmental and
26 public health effects previously described and cause permanent harm to Petitioners and their
27 respective members and residents, as well as other citizens of California and members of the
28 public.

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- 6. That Petitioners be awarded their costs of suit and reasonable attorneys fees; and
- 7. For such other and further relief as the Court may deem just and proper.

Dated: April 22, 2010

COOLEY GODWARD KRONISH LLP
KATHLEEN H. GOODHART (165659)
SUMMER J. WYNN (240005)

By: 
Kathleen H. Goodhart

Dated: April 22, 2010

EARTHJUSTICE
DEBORAH S. REAMES (117257)

By: _____
Deborah S. Reames

Attorneys for Petitioners and Plaintiffs
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; CENTER FOR ENVIRONMENTAL
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AMERICA; CITIZENS FOR EAST SHORE
PARKS; STOP THE SPRAY SAN FRANCISCO

Dated: April 22, 2010

DENNIS J. HERRERA
CITY ATTORNEY
DANNY CHOU (180240)

By: _____
Danny Chou

Attorneys for Petitioner and Plaintiff
CITY AND COUNTY OF SAN FRANCISCO

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EARTHJUSTICE
DEBORAH S. REAMES (117257)

By: Deborah S Reames
Deborah S. Reames

Attorneys for Petitioners and Plaintiffs
OUR CHILDREN'S EARTH FOUNDATION;
MOTHERS OF MARIN AGAINST THE SPRAY;
STOP THE SPRAY EAST BAY; CITY OF
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Attorneys for Petitioner and Plaintiff
CITY AND COUNTY OF SAN FRANCISCO

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EARTHJUSTICE
DEBORAH S. REAMES (117257)

By: _____
Deborah S. Reames

Attorneys for Petitioners and Plaintiffs
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Dated: April 22, 2010

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CITY ATTORNEY
DANNY CHOU (180240)

By:  _____
Danny Chou

Attorneys for Petitioner and Plaintiff
CITY AND COUNTY OF SAN FRANCISCO

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VERIFICATION

I, Nan Wishner, am a member and an officer of Petitioner STOP THE SPRAY EAST BAY in the above entitled proceeding, and I am authorized to execute this verification on behalf of Petitioner. I have read the foregoing Petition and know the contents thereof. The same is true of my own knowledge, except as to those matters that are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed this 22nd day of April, 2010, in Callahan, California.

Nan Wishner

Nan Wishner