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COUNTY OF SANTA CRUZ

COUNTY OF SANTA CRUZ and CITY OF SANTA CRUZ Plaintiffs/Petitioners, 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, Defendants/Respondents.	Case No. 158516 **MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE** Date: April 24, 2008 Time: 8:30 a.m. Dept: 4

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ..... i-iii

INTRODUCTION 1

STATEMENT OF FACTS 1

A. CDFA's Aerial Spraying Project 1

B. Background: The LBAM Has Been Coming To The United States For Years 2

C. The LBAM IS Discovered In Berkeley In 2006 And Identified Throughout California in 2007 3

D. CDFA Conducts An Unsupported "Analysis" Of The Potential Economic Consequences Of The LBAM In California 3

E. A Technical Working Group Is Established To Address The LBAM And CDFA Passes Emergency Regulations To Establish Eradication Areas 4

F. CDFA Starts To Receive Pressure From Trading Partners 4

G. A Multi-Year Eradication Strategy Is Developed 5

H. CDFA Adopts Mating Disruption Via Aerial Spray Of Pheromone As The Primary Eradication Tool 6

I. The Record Contains No Evidence Of Damage Related To The LBAM 7

STANDARD OF REVIEW 7

ARGUMENT: CDFA IS VIOLATING CEQA 8

A. The General Rules Of CEQA 8

B. The Emergency Exemption Does Not Apply To This Project 8

C. The Categorical Exemption Does Not Apply To This Project Either 12

CONCLUSION 15

TABLE OF AUTHORITIES

CASES **Page (s)**

California Farm Bureau Federation v. California Wildlife Conservation Bd.
(2006) 143 Cal.App.4th 173, 183-184 ..... 8, 13

Californians for Alternatives to Toxics v. Department of Food and Agriculture
(2005) 136 Cal.App.4th 1 12

CalBeach Advocates v. City of Solana Beach
(2002) 103 Cal.App.4th 529 ..... 11, 12

Castaic Lake Water Agency v. City of Santa Clarita
(1995) 41 Cal.App.4th 1257, 1260-1265 ..... 7, 10

County of Amador v. El Dorado County Water Agency
(1999) 76 Cal.App.4th 931, 966 13

Davidon Homes v. City of San Jose
(1997) 54 Cal.App.4th 106, 115 13

Int'l Longshoremen's, etc. v. Board of Supervisors, etc.
(1981) 116 Cal.App.3d 265, 275-277 14

Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.
(1988) 47 Cal.3d 376, 392, fn. 5 7

Los Osos Valley Associates v. City of San Luis Obispo
(1994) 30 Cal.App.4th 1670, 1674-1682 10

Mountain Lion Foundation v. Fish & Game Comm.
(1997) 16 Cal.4th 105, 112 ..... 8, 13

Save Our Carmel River v. Monterey Pen. Water Management Dist.
(2006) 141 Cal.App.4th 677, 693 ..... 7, 14

Western Mun. Water Dist., etc. v. Sup. Court
(1986) 187 Cal.App.3d 1104, 1113 ..... 9, 10

Western States Petroleum Assn. v. Superior Court
(1995) 9 Cal.4th 559, 568 ..... 7, 15

Wildlife Alive v. Chickering
(1976) 18 Cal.3d 190, 205-206 14

TABLE OF AUTHORITIES - Continued

STATUTES **Page (s)**

Public Resources Code

Section 21001.1 8

Section 21060.3 9

Section 21061 8

Section 21080(b)(4) 2, 9

Section 21080(d) 8

Section 21084 12

Section 21168 7

Section 21168.5 7

Section 21168.9 1

OTHER AUTHORITIES

California Code of Regulations (CEQA Guidelines), Title 14

Section 15269(c) 9

Section 15300 ..... 12, 13, 14

Section 15300.2 13

Section 15300.2 (b) 14

Section 15300.2 (c) 14

Section 15308 ..... 2, 12, 13

Section 15384(a) 7

INTRODUCTION

Respondent California Department of Food and Agriculture ("CDFA") is illegally operating an aerial pesticide spray program in Santa Cruz County to eradicate the Light Brown Apple Moth ("LBAM"). CDFA failed to comply with the California Environmental Quality Act ("CEQA") before conducting this operation, under the guise that the discovery of the LBAM constitutes an "emergency." In reality, the LBAM has been expected for years, the LBAM has been arriving for years, and CDFA believes it will take years to eradicate it. Put simply, the LBAM's arrival is not a "sudden, unexpected occurrence" such as a fire or flood that qualifies it as an emergency under CEQA, allowing CDFA to evade environmental review of the program designed to combat it. CEQA does not authorize the use of "emergency" and "categorical" exemptions to authorize, without environmental review, a long-term pest eradication program to combat economic concerns, especially where the program calls for widespread aerial spraying of pesticides over urban populations.

Petitioners County and City of Santa Cruz ("Petitioners") seek an order under Public Resources Code ("PRC") section 21168.9 requiring CDFA to comply with CEQA. Specifically, petitioners seek an order (1) invalidating CDFA's October 3, 2007 Notice of Exemption ("NOE") and the underlying exemption determination; and (2) prohibiting CDFA from aerially spraying pesticides throughout the County until it complies with CEQA.

STATEMENT OF FACTS

A. CDFA's Aerial Spraying Project

On October 3, 2007 CDFA filed the NOE at issue, stating that it would begin aerial spraying "a synthetic insect pheromone" throughout the County. (Administrative Record ("AR") 1787.1.)[1]

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[1] All evidentiary citations are to the Administrative Record, a copy of which has been filed with the Court. The Administrative Record contains 50 volumes. Volumes 1-15 contain documents detailing CDFA's internal communications and its formation of eradication plans. Volumes 16-21 contain Daily Situation Reports addressing LBAM identification and response activities on a daily basis. Volumes 22-48 contain records establishing the identification of LBAMs in traps throughout California. Volume 48 contains LBAM Maps. Volume 49 and 50 contain scientific articles concerning the LBAM.

The point of the project is to confuse male LBAMs, impairing their ability to find mates, and ultimately leading to their eradication. (AR 1685; 1787.1.)

The NOE asserted that the project was statutorily exempt from the requirements of CEQA as an "Emergency Project" under Public Resources Code section 21080(b)(4) and associated regulations. The NOE also asserted that the project was exempt from the requirements of CEQA under a "Categorical Exemption," per CEQA Guidelines section 15308, as an action benefiting the environment. (AR 1787.1.)

It is undisputed that in mid-November 2007, CDFA aerial sprayed the County with the pesticide "Checkmate" for several nights pursuant to this NOE. CDFA has widely publicized its intention to resume its aerial spraying program beginning in approximately June 2008.

B. <u>Background: The LBAM Has Been Coming To The United States For Years</u>

The LBAM is a native pest of Australia and is now widely distributed in New Zealand, Hawaii, the United Kingdom, Ireland, and New Caledonia. (AR 145-146; 315.) The moths generally fly only up to 100 meters, and it is recognized that the threat of long distance spread is through human-assisted movement of infested plants. (AR 83; 180.)

Prior to its discovery in Berkeley, LBAM was intercepted at United States ports at least 55 times since 1984. (AR 149.) About 3 interceptions have been reported annually; the moth has been intercepted at Honolulu, Los Angeles, and San Francisco. (*Id.*) Since at least 1995, LBAM was considered "highly likely" of becoming established in the United States and the consequences of its introduction into United States agriculture and natural ecosystems was likewise judged to be high. (AR 145.) Specifically, LBAM caterpillars cause damage by feeding on plants; they destroy, stunt or deform young seedlings, spoil the appearance of ornamental and native plants, and injure deciduous fruit-tree crops, citrus and grapes. (AR 84; 128.) The LBAM also has the potential to cause economic damage to California's agricultural industry via increased trade restrictions and quarantines. (AR 84.)

In 2005, CDFA began monitoring traps for LBAM throughout California. (AR 30-31.) As of June 2006, corrective action procedures were supposedly in place to prevent the pest from coming from Australia. (AR 136-139.)

C. The LBAM Is Discovered In Berkeley In 2006 And Identified Throughout California In 2007

In June and November 2006, a retired U.C. Berkeley professor trapped two LBAMs in his backyard. (AR 37; 251-252; 5683.) The LBAMs were not identified until on or about February 6, 2007. (AR 27, 251.)

CDFA, in conjunction with the United States Department of Agriculture ("USDA") began setting traps, attempting to define the scope of the infestation, and planning a response to it. (AR 250-252; 1829-5682.) By March 19, 2007, 27 male LBAMs had been trapped at 26 sites in two counties. (AR 40-41.) By May 17, 2007, 2,097 male LBAMs had been trapped at 593 sites in nine different counties. (AR 779.) By July 12, 2007, 3,614 male LBAMs had been trapped at 752 sites in eleven different counties. (AR 1245.) By August 15, 2007, 7,414 male LBAMs had been trapped in 1,397 sites in eleven different counties, ranging from San Francisco to Los Angeles. (AR 1577.)

D. CDFA Conducts An Unsupported "Analysis" Of The Potential Economic Consequences Of The LBAM In California

Despite the fact that in 1995 the consequences of an LBAM infestation were deemed to be "high," apparently no one conducted an actual economic analysis of the potential consequences. After the LBAM was discovered in Berkeley, on March 13, 2007, a CDFA entomologist used a 2000 Australian report concerning the potential effect of climate change on estimated damages from LBAM in that country to extrapolate about the potential economic damages that could be caused by LBAMs in California. (AR 34; 183-221; 461.) In a one-paragraph e-mail, CDFA simply took the estimated total production value lost for four fruit crops in Australia due to LBAM (1.3%), from this single academic study, and applied that same number to California fruit crops to arrive at an estimated annual economic loss of $70.2 million. (AR 34; 205.) The "estimate" did not include economic losses to a variety of other crops and ornamental plants. (*Id.*) Although CDFA concedes the analysis was not "comprehensive," the same numbers show up repeatedly throughout the administrative record as justification for CDFA's immediate actions to eradicate LBAM. (*See, e.g.*, AR 120-121; 461; 764; 1171-1173.) Later CDFA estimates for economic damage range wildly with no actual analysis (compare CDFA's September 1, 2007 estimate of up to $133 million a year in

crop damage and control costs to its September 11, 2007 estimate of up to $640 million in the eleven affected counties, or $2.4 billion state-wide). (AR 2023; 2028.)[2]

E. A Technical Working Group Is Established To Address The LBAM And CDFA Passes Emergency Regulations To Establish Eradication Areas

In March 2007, a Technical Working Group ("TWG") comprised of scientists and academics was established to address the emerging California LBAM problem. (AR 32-33; 35-39; 119; 385.) The TWG agreed that it would be best to try to eradicate the pest, but that it was too early to determine if that goal was realistic or even feasible. (AR 37.) The group discussed five separate control methods for the LBAM, ranging from mating disruption to insecticides. (AR 38-39.)

At around the same time, CDFA promulgated regulations to establish eradication areas for LBAMs in Alameda and Contra Costa Counties and initiated other regulatory actions to try to contain its spread. (AR 42-54; 67-97; 376-379.) As LBAM was discovered in other counties, the regulations were amended to add eradication areas. (AR 801-808.) The Initial Statement Of Reasons for the regulations concludes that the LBAM could cause significant irreparable harm to California's agricultural industry and some possible adverse environmental impacts. (AR 83-86.) The Statement notes that there is no comprehensive estimate of the total losses that could be caused by the LBAM to the environment and the agricultural industry in California. (AR 86.)

Over the next few months, the TWG continued working on recommendations for responses to the LBAM infestation. (*See, e.g.*, AR 486-492; 498-499; 523-527; 557-559; 792-796; 1626-1627.) CDFA and USDA continued to assess the applicability and efficacy of various response tools and formulate research priorities. (AR 479-485; 494-497; 574-576, 599-604; 609-613; 629-644.)

F. CDFA Starts To Receive Pressure From Trading Partners

In the spring of 2007, CDFA began receiving increasing political pressure concerning the LBAM infestation. On March 28, 2007, the Canadian government inquired about the status of the LBAM discovery and questioned quarantine procedures for exports to Canada. (AR 361-363; 366-

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[2] Much later in the process (November 2007) USDA issued an economic analysis of the risk to U.S. apple, grape, orange and pear production from LBAM, concluding that the mean total annual costs if LBAM were introduced in at-risk areas would be $105 million. (AR 1203-1217.)

375.) On April 3, 2007, the Washington Agriculture Department contacted CDFA to express concern about the LBAM and alluded to "pending decisions" that would be made about the issue. (AR 395.) In April 2007, Florida instituted new export and certification requirements due to LBAM and the cut flower industry began raising concerns about the requirements being instituted just in advance of Mother's Day. (AR 585-586; 606; 652-654; 675-680.) A federal quarantine order was soon issued pertaining to products from infested counties. (AR 725-735.) In May, Mexico indicated concern over the LBAM and raised the possibility of a potential quarantine of California fruits. Later that month, Mexico issued quarantine restrictions. (AR 736-738; 745-759; 763.) In June, Canada also implemented quarantine regulations. (AR 1097-1105; 1112-1117.) Nine other states began requesting pre-shipment notification for LBAM-regulated materials. (AR 761-762; 1160.)

At the same time CDFA began experiencing this political pressure, the USDA was down-playing the impacts of the LBAM discovery. On March 22, Richard Dunkle wrote that if left unchecked, LBAM has the potential to cause significant economic losses to California due to increased production costs and the possible loss of export markets but "these impacts can be effectively mitigated through production-level management practices. At this point, this pest is considered to be transient: actionable and under surveillance." (AR 241-242.) On May 10, 2007, USDA sent a letter to Mexico requesting that it withhold all restrictive actions, stating that the LBAM "is a transient pest, and through our standard phytosanitary export procedures, [it] will not pose a threat to any of our importing countries." (AR 750-751.)

G. <u>A Multi-Year Eradication Strategy Is Developed</u>

Ultimately, the TWG recommended that CDFA should adopt "a long-term goal of eradicating" the LBAM. (AR 792-796.) The TWG recognized that successful eradication would require the "refinement and adaptation of multiple control and regulatory tactics." (*Id.*) The recommended area-wide suppression strategies included mating disruption (the primary strategy), pesticides, sterile insect technique, and biological control. (*Id.*) John Connell of CDFA acknowledged that the eradication attempt "will require multiple years and require different eradicative tools to achieve the program goals." (AR 1052.) The July 3, 2007 LBAM Area-wide Eradication Strategy California, 2007-2011, disclosed that it was "expected to take approximately

four years to eradicate this pest." (AR 1221-1223.) Cost estimates of $200 million spread over a five to seven year period were discussed. (AR 1176.)

H. CDFA Adopts Mating Disruption Via Aerial Spray Of Pheromone As The Primary Eradication Tool

As early as March 30, 2007, CDFA began discussing aerial spray of pheromone as an eradication tool ("looks like mating disruptant treatment would likely have to go on by air.") (AR 390.) Between March and June CDFA investigated and sought registration for various mating disruption products and ultimately settled on Checkmate as the primary tool for aerial application. (AR 2; 475-478; 519-521; 656-661; 684-685; 1090-1092; 1121-1124; 1522-1532; 1636-1638.)

The administrative record discloses that not everyone was convinced about the effectiveness of mating disruption as an eradication tool. In an August 2007 e-mail discussing the experimental nature of dispersing Checkmate via aerial spray, David Lance of USDA states "[It] is being applied in a way that we believe may seriously compromise its effectiveness, which may have been problematic to start with." (AR 1637.) A later e-mail from Mr. Lance states "Although mating disruption is a proven control technique with LBAM, using it for eradication of LBAM, as well as use of aerially applied formulations, are both largely untested strategies." (AR 1590.)

After deciding to aerially spray Checkmate over portions of Monterey and Santa Cruz counties, CDFA endeavored to compile a list of questions and answers from public meetings concerning the planned eradication efforts. (AR 275-283.) In response to a question as to why the eradication process was being done on an emergency basis (and therefore exempt from CEQA), CDFA had no cogent answer, stating that "CDFA might want to insert the history of the creation of CDFA and DPR as a way for the State of California to regulate the use of pesticides in lieu of EIR's, and unlike the majority of other states in the US, DPR individually reviews and registers all pesticides focusing on their potential impact on CA's environment." (AR 279.) Although this passage is taken from what appears to be an unfinished document, it is telling that CDFA was wholly unable, even in a draft form, to articulate a cogent argument as to why this project was exempt from CEQA. Specifically, there is not even a mention of how the arrival of the LBAM constitutes an emergency or why the bypassing of environmental review is warranted.

I. The Record Contains No Evidence Of Damage Related To The LBAM

The record discloses that LBAM has been in Berkeley since at least 2006. Despite this, petitioners were unable to find any evidence in the record whatsoever showing that the LBAM has done any actual damage to property, plants, or crops in California to date. Instead, it appears the damage has been solely economic in nature so far, related to quarantine and trade restrictions.

STANDARD OF REVIEW

In any CEQA case, judicial review is limited to the question of whether the respondent agency prejudicially abused its discretion, either by failing to proceed in the manner required by law, or because its decision is not supported by substantial evidence. (PRC, §§ 21168, 21168.5; *Laurel Heights Improvement Assn. v. Regents of the Univ. of Cal.* (1988) 47 Cal.3d 376, 392, fn. 5.)

The applicable standard of review here is set forth in PRC section 21168.5. (*See, e.g., Save Our Carmel River v. Monterey Pen. Water Management Dist.* (2006) 141 Cal.App.4th 677, 693 [City's exemption determination was a quasi-legislative action where no hearing was held or required, subject to judicial review under the abuse of discretion standard in section 21168.5].) PRC section 21168.5 provides in relevant part that in an action or proceeding, other than one under section 21168, "to attack, review, set aside, void or annul a determination, finding, or decision of a public agency on the grounds of noncompliance with this division, the inquiry shall extend only to whether there was a prejudicial abuse of discretion."

Abuse of discretion is established if the agency has not proceeded in a manner required by law or if the determination or decision is not supported by substantial evidence. (*Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 568; *Castaic Lake Water Agency v. City of Santa Clarita* (1995) 41 Cal.App.4th 1257, 1264.) "Substantial evidence" is defined by the CEQA Guidelines as: "[E]nough 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. Whether a fair argument can be made is to be determined by examining the entire record. Mere uncorroborated opinion or rumor does not constitute substantial evidence." (Cal. Code Regs. ("CCR"), tit. 14, § 15384(a); *Castaic Lake Water Agency, supra*, 41 Cal.App.4th at 1264-1265.)

ARGUMENT: CDFA IS VIOLATING CEQA

A. The General Rules Of CEQA

CEQA is a "comprehensive scheme designed to provide long-term protection to the environment." (*Mountain Lion Foundation v. Fish & Game Comm.* (1997) 16 Cal.4th 105, 112.) It is to be "interpreted to afford the fullest possible protection to the environment within the reasonable scope of the statutory language." (*Id.*; *California Farm Bureau Federation v. California Wildlife Conservation Bd.* (2006) 143 Cal.App.4th 173, 183-184.)

CEQA requires that all projects that may have an effect on the environment be rigorously analyzed to ensure that feasible alternatives and feasible mitigation measures have been adequately considered and utilized to the extent possible to lessen the project's environmental impact. Projects carried out by public agencies are subject to the same level of review and consideration as private projects. (PRC, § 21001.1.) Under CEQA, if there is substantial evidence that a project may have a significant impact on the environment, unless an applicable exemption applies the lead agency in charge of approving a project must prepare an Environmental Impact Report ("EIR") to analyze the environmental issues and provide a basis for public discussion of the environmental consequences of a project. (PRC, §§ 21061; 21080(d); *California Farm Bureau Federation, supra*, 143 Cal.App.4th at 184-185 [describing process to determine whether, and how, project is subject to CEQA].)

CDFA's NOE states that this aerial spraying project is exempt from CEQA because it is in response to an "emergency" and because it is an action for "protection of the environment." Neither of these exemptions apply in this case, and consequently CDFA is violating CEQA by continuing with this project without first certifying an EIR.

B. The Emergency Exemption Does Not Apply To This Project

CEQA defines an "emergency" as:

> "[A] sudden, unexpected occurrence, involving a clear and imminent danger, demanding immediate action to prevent or mitigate loss of, or damage to, life, property, or essential public services. 'Emergency' includes such occurrences as fire, flood, earthquake, or other soil or geologic movements, as well as such occurrences as riot, accident, or sabotage."

(PRC, § 21060.3.) The CEQA Guidelines state that this exemption "*does not include long-term projects* undertaken for the purpose of preventing or mitigating a situation that has *a low probability of occurrence in the short-term.*" (CEQA Guidelines, CCR, tit. 14, § 15269(c) [emphasis added].) Where an agency seeks to avoid an EIR under CEQA's "emergency exemption," the Court "must determine if there exists substantial evidence in the record to support the agency finding of an emergency." (*Western Mun. Water Dist., etc. v. Sup. Court* (1986) 187 Cal.App.3d 1104, 1113.) "At a minimum, the administrative record must disclose substantial evidence of every element of the contended exemption as defined in section 21060.3 . . ." (*Id.*)

Here, based on the governing statute and the guidelines alone, the LBAM response does not qualify for an emergency exemption. Was the LBAM's arrival a sudden, unexpected occurrence? The LBAM has been arriving at California ports since at least 1984, the possibility of an infestation was considered high in 1995, traps were set in 2005, and the moth was discovered in Berkeley in 2006. Is this project long-term? CDFA concedes that eradication will take approximately four years, and that is if it works at all. Is there a low probability of the LBAM causing damage in the short-term? The record contains no evidence of any damage caused by the LBAM in California to date, despite the fact that the LBAM was in Berkeley as of 2006 at the latest. The emergency exemption as applied to this project does not pass the straight-face test.

In *Western Municipal Water District, supra*, the court analyzed the emergency exemption in section 21080(b)(4). There, petitioner challenged a decision to drill and operate two "dewatering" wells to pump groundwater from the aquifer beneath the city. Respondent had granted an emergency exemption to the project based on the theory that dewatering was necessary to prevent liquefaction in the event of an earthquake. (187 Cal.App.3d at 1107-1108.)

The court first laid out the parameters of the emergency exemption:

> "The 'emergency' exemption ... is obviously extremely narrow. 'Emergency' as defined by section 21060.3 is explicit and detailed. We particularly note that the definition limits an emergency to an '*occurrence*,' not a condition, and that the occurrence must involve a '*clear and imminent danger, demanding immediate action.*' . . .
>
> The theory behind these exemptions is that if a project arises for which the lead agency simply cannot complete the requisite paperwork within the time constraints of CEQA, then pursuing the project without complying with the

> EIR requirements is justifiable. For example, if a dam is ready to burst or a fire is raging out of control and human life is threatened as a result of delaying a project decision, application of the emergency exemption would be proper . . .
>
> [Respondent's construction of the statute] . . . completely ignores the limiting ideas of 'sudden,' 'unexpected,' 'clear,' 'imminent' and 'demanding immediate action' expressly included by the Legislature and would be in derogation of the canon that a construction should give meaning to each word in the statute. Moreover, in the name of 'emergency' it would create a hole in CEQA of fathomless depth and spectacular breadth. Indeed, it is difficult to imagine a large-scale public works project, such as an extensive deforestation project or a new freeway, which could not qualify for emergency exemption from an EIR on the grounds that it might ultimately mitigate the harms attendant on a major natural disaster. The result could hardly be intended by . . . the Legislature, and is unmistakably opposed to the policy of construing CEQA to afford the maximum possible protection of the environment."

(187 Cal.App.3d at 1111-1112 [italics in original]. The court went on to determine that the record disclosed no substantial evidence that liquefaction was an imminent danger or that it demanded immediate action. Rather, respondent supported its decision with only generalized conclusions and assumptions regarding the probability and timing of a large earthquake. (*Id.* at 1113-1115.)

Castaic Lake Water Agency v. City of Santa Clarita (1995) 41 Cal.App.4th 1257, is also applicable. There, prior to the Northridge Earthquake the City had identified infrastructure improvements of approximately $911 million. Following the earthquake, the City took the opportunity provided by the earthquake to adopt a project with a five-year implementation timeline, at a cost of $1.7 billion. The Plan was not limited to repair of the earthquake damage of $211 million, but instead included widespread infrastructure improvements, economic development measures, etc. The City relied on the emergency exemption and the exemption related to the repair of earthquake damage as a basis for avoiding CEQA review. (41 Cal.App.4th at 1260-1264.) Based on the City's unsupported inclusion of numerous projects in the Plan that fell outside the context of the emergency exemptions, the court (relying heavily on the decision in *Western Municipal Water District, supra*) found that there was no substantial evidence in the record to support the determination that the Plan was exempt from CEQA. (41 Cal.App.4th at 1266-1269; *see also Los Osos Valley Associates v. City of San Luis Obispo* (1994) 30 Cal.App.4th 1670, 1674-1682 [City extracted groundwater from an aquifer, claiming that it was responding to emergency drought

conditions; court found City's reliance on the emergency exemption was misplaced, that the exemption is extremely narrow, is limited to an "occurrence" rather than a condition, and that the occurrence must involve a "clear and imminent danger, demanding immediate action."].)

The arrival of the LBAM, and the need to control it, is not an unexpected "sudden occurrence." The pest was identified at San Francisco and Los Angeles ports as early as 1984. By 1995 it was recognized that there was a high likelihood of the LBAM infesting the United States and traps were set to monitor for it in 2005. LBAM was discovered in 2006 in Berkeley, by 2007 it was discovered throughout California, and to this date there is no recorded damage from it. Applying the *Western States* standard to this case shows CDFA's position to be a non-starter. This is not a case where the lead agency "simply cannot complete the requisite paperwork within the time constraints of CEQA." Here, there is no dam ready to burst, fire raging out of control, or human life or property that would be significantly threatened by delaying a project decision in order to comply with CEQA.

CDFA may hope to rely on *CalBeach Advocates v. City of Solana Beach* (2002) 103 Cal.App.4th 529 to support its use of the emergency exemption, but that case is highly distinguishable. In *CalBeach*, the project involved constructing a seawall in a bluff below several existing homes. The wall was to be constructed in a "notch" between two existing seawalls in order to prevent further bluff collapses that threatened the structures built on top. The project engineer concluded that it was necessary for the homeowners "to take immediate action" to construct appropriate bluff armoring devices, or the cliff would collapse. The homeowners immediately sought issuance of a permit under CEQA's emergency exemption and the city quickly approved the permit on an emergency basis. CalBeach argued that the city's use of the emergency exemption was improper because "there was no sudden, unexpected occurrence and there was no need for immediate action." The court rejected petitioner's contention on the grounds that the distinction between an "occurrence" subject to the exemption and a "condition" not subject to the exemption "is not always a sharp one." Pointing to the professional opinion of two engineers, the court found that substantial evidence in the record supported the city's decision that "the notch that developed in the bluff required immediate action." (*Id.* at 534-538.)

CalBeach is distinguishable from this case in a number of respects. First, the outcome to be prevented in *CalBeach* was a single event – failure of a bluff – that would cause immediate and permanent damage to homeowners. Here, there is no event; instead, there is a state-wide *condition* (a pest infestation), the effects of which are speculative and not immediate. The fact that the administrative record includes no evidence of recordable damage from this pest underscores this point. Second, the remedy in *CalBeach* to avoid the emergency – building a seawall – was an immediate action that would stop the event from taking place. Here, there is no such immediate action that can be taken. LBAM has been here since at least 2006; eradication efforts are going to take years and involve multiple control techniques and regulatory strategies. Third, the event in *CalBeach* involved a small area of properties and a handful of people, and involved bridging the gap between two existing sea walls. On the contrary, the project in this case is huge, involves multiple regulatory agencies, and includes the aerial spraying of pesticides over entire communities of people with no end in sight. Overall, *CalBeach* is simply inapplicable to the facts of this case.[3]

Although government agencies have discretion in determining whether an event constitutes an emergency for purposes of CEQA, that discretion is not unbridled. There must be substantial evidence in the record establishing the basis for that decision. Here, there is none. The governing statute, the guidelines, and the published legal decisions all say the same thing – the emergency exemption is not applicable to eradication of the LBAM.

C. <u>The Categorical Exemption Does Not Apply To This Project Either</u>

The NOE also purports to rely on a "categorical exemption" provided under the CEQA Guidelines ("Class 8, Section 15308.") Pursuant to PRC section 21084, the Secretary of Resources has determined certain classes of projects to be categorically exempt from CEQA. (CCR, tit. 14, § 15300.) These exemptions are "construed narrowly," which "comports with the statutory directive that exemptions may be provided only for projects which have been determined not to have a

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[3] CDFA may also try to rely on *Californians for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal.App.4th 1 in order to support their emergency exemption argument. That case contains one sentence, in the factual background section, relating to CDFA's reliance on an emergency exemption. (*Id.* at 7.) There is no indication from the opinion that the emergency exemption was challenged or that the court evaluated the validity of the claim of an emergency exemption. To that extent, the sentence should be considered dicta and disregarded.

significant environmental effect." (*California Farm Bureau Federation, supra*, 143 Cal.App.4th at 187; *County of Amador v. El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 966.) In short, "exemption categories are not to be expanded beyond the reasonable scope of their statutory language." (*Mountain Lion Foundation, supra*, 16 Cal.4th at 125.)

Where "the specific issue is whether the lead agency correctly determined a project fell within a categorical exemption, [the Court] must first determine as a matter of law the scope of the exemption and then determine if substantial evidence supports the agency's factual finding that the project fell within the exemption." (*California Farm Bureau Federation, supra*, 143 Cal.App.4th at 185.) The lead agency "has the burden to demonstrate such substantial evidence." (*Id.* at 186) If the agency meets its burden to establish the project is within a categorically exempt class, "the burden shifts to the party challenging the exemption to show that the project is not exempt because it falls within one of the exceptions listed in Guidelines section 15300.2." (*Id.* at 186, quoting *Davidon Homes v. City of San Jose* (1997) 54 Cal.App.4th 106, 115.)

Here, CDFA relies on the Class 8 "environmental" categorical exemption, which consists of actions taken by regulatory agencies to "assure the maintenance, restoration, enhancement, or protection of the environment where the regulatory process involves procedures for protection of the environment." (CCR, tit. 14, § 15308.) The "relaxation of standards allowing environmental degradation [is] not included in this exemption." (*Id.*)

By definition, categorical exemptions cannot have impacts to the environment. CDFA's widely publicized admission that it is currently working on an EIR severely undercuts reliance on the Class 8 categorical exemption and indicates that CDFA recognizes that this project will have significant unmitigated environmental consequences. In any event, there is no substantial evidence in the record to support the argument that CDFA is assuring the "maintenance, restoration, enhancement, or protection of the environment" by spraying a never-tested pesticide over people's homes. If the record shows anything, it is that CDFA is trying to protect agricultural crops and California's economy – not the environment. There is also no identification in the record of what "regulatory procedure" CDFA is using to protect the environment when it aerially sprays pesticides over residential neighborhoods. In short, CDFA's assertion of this exemption is baseless.

In addition, as recognized by the court in *Save Our Carmel Rivers, supra*, the categorical exemptions are not absolute. Even if a project falls within the description of one of the exempt classes, "where there is any reasonable possibility that a project or activity may have a significant effect on the environment, an exemption would be improper." (*Id.*, 141 Cal.App.4th at 689, quoting *Wildlife Alive v. Chickering* (1976) 18 Cal.3d 190, 205-206; Guidelines, § 15300.2(b) ["[a]ll exemptions for these classes are inapplicable when the cumulative impact of successive projects of the same type in the same place, over time is significant"]; Guidelines, § 15300.2(c) ["a categorical exemption shall not be used for an activity where there is a reasonable possibility that the activity will have a significant effect on the environment due to unusual circumstances"].)

Here, there is evidence throughout the record showing CDFA recognizes that there is a "reasonable possibility" of a significant effect on the environment by aerially spraying untested pesticides over huge swaths of the County. The record includes a "Screening Level Ecological Risk Assessment" for use of pheromones. (AR 1709-1715.) An issue was raised about the potential impacts of spraying on the banana slug population. (AR 1731.) Documents show that testing was conducted to determine the toxicity levels of Checkmate on fathead minnow larvae, water fleas, and mussels. (AR 1775-1785.) CDFA's internal working documents show that CDFA contemplated issues of "environmental compliance," prepared an "environmental assessment" and planned to conduct "environmental monitoring" of the spray program in Seaside. (AR 1515-1518.) CDFA's draft operational plan reflects that CDFA should consider monitoring water, soil, foliage, biological organisms, and air to determine the residual impacts of its activities. (AR 4.) Testing was done to determine potential damage of Checkmate at different concentration levels. (AR 1593-1595.) One look at the labels for the Checkmate products, which include precautionary statements and a specific warning that they are an environmental hazard depending on how they are used, dispels any notion that these products are unquestionably environmentally benign. (AR 1529-1532.)

There is clearly a reasonable possibility that wide-scale aerial deployment of pesticides over residential and agriculture areas will have a significant effect on the environment. (*See, e.g., Int'l Longshoremen's, etc. v. Board of Supervisors, etc.* (1981) 116 Cal.App.3d 265, 275-277 [proposed relaxation of nitrogen oxide emission standards was not exempt from CEQA under Class 8

exemption; no evidence that raising the allowable rate of nitrogen oxide emissions would "assure the maintenance, restoration, enhancement, or protection of the environment" and there was "manifestly" a reasonable possibility that doubling the nitrous oxide emissions allowed into the atmosphere may have a significant effect on the environment].). In fact – the program is specifically designed to have a significant effect on the environment, by eradicating a pest that has become established here, and that will likely remain here without intervention. The categorical exemption is simply inapplicable in this case.

CONCLUSION

This case is about money versus the environment, plain and simple. Petitioners acknowledge that the LBAM may become a significant potential economic problem if it becomes established. However, if the emergency exemption could be applied to evade CEQA every time that was true, as the Court recognized in *Western States*, it would create a hole in CEQA of "fathomless depth and spectacular breadth." The bottom line is that the administrative record contains no substantial evidence justifying the use of the emergency and categorical exemptions to spray Checkmate throughout the County before conducting environmental review. To the contrary, the record is replete with documentation establishing the distinct possibility, if not the likelihood, that the Checkmate product will indeed impact the environment. Thus, the County and City request that this Court issue an order requiring CDFA to withdraw the October 2007 NOE and refrain from aerial spraying until it complies with CEQA.

Dated: March 26, 2008

DANA McRAE, COUNTY COUNSEL

By: _____
JASON M. HEATH
Assistant County Counsel
Attorneys for Petitioner/Plaintiff
COUNTY OF SANTA CRUZ

ATCHISON, BARISONE, CONDOTTI & KOVACEVICH

By: _____
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CITY OF SANTA CRUZ

PROOF OF SERVICE

I, the undersigned, state that I am a citizen of the United States and employed in the County of Santa Cruz, State of California. I am over the age of 18 years and not a party to the within action. My business address is 701 Ocean Street, Room 505, Santa Cruz, California 95060. On the date set out below, I served a true copy of the following on the person(s)/entity(ies) listed below:

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF PETITION FOR WRIT OF MANDATE

☐ by **service by mail** by placing said copy enclosed in a sealed envelope and placing the envelope for collection and mailing on the date and at the place shown below following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service with postage fully prepaid.

☐ by **personal service** at a.m./p.m. at _____.

☒ by **express or overnight mail** by depositing a copy in a post office, mailbox, sub-post office, substation, mail chute, or other like facility regularly maintained by the United States Postal Service for receipt of express mail or a mailbox, mail chute, or other like facility regularly maintained by an overnight mail company, in a sealed envelope, with express mail postage paid addressed to the below listed person(s).

☐ by **express or overnight mail** by arranging for pick-up by an employee of an express/overnight mail company on:

☒ by **facsimile service** at the number listed below and have confirmation that it was received by:

William Jenkins, Esq. (*Attorneys for Defendant/Respondent*)
Anita Ruud, Esq.
Deputy Attorneys General
455 Golden Gate Ave., Suite 11000
San Francisco, CA 94102-7004

(facsimile number 415-703-5480)

I declare under penalty of perjury that the foregoing is true and correct. Executed on March 26, 2008, at Santa Cruz, California.

Maria H. Vargas
MARIA VARGAS

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FACSIMILE TRANSMITTAL SHEET

DATE: MARCH 26, 2008

To:

NAME	TELEPHONE	FACSIMILE
William Jenkins, Esq.		(415) 703-5480

From: Jason M. Heath, Assistant County Counsel

Re: County and City of Santa Cruz vs. California Dept. of Food and Agriculture

Pages: 21, including this cover sheet

☐ URGENT ☐ FOR REVIEW ☐ PLEASE COMMENT ☐ PLEASE REPLY ☐ PLEASE RECYCLE

NOTES/COMMENTS:

Please see attached memorandum of points and authorities in support of petition for writ of mandate.

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