

1 DANA McRAE, State Bar No. 142331  
County Counsel, County of Santa Cruz  
2 JASON M. HEATH, State Bar No. 180501  
Assistant County Counsel  
3 CHRISTOPHER R. CHELEDEN, State Bar No. 181185  
Assistant County Counsel  
4 701 Ocean Street, Room 505  
5 Santa Cruz, California 95060-4068  
6 Telephone: (831) 454-2040  
Fax: (831) 454-2115

7 **Attorneys for Plaintiff/Petitioner County of Santa Cruz**

8  
9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SANTA CRUZ

<p>11</p> <p>12 COUNTY OF SANTA CRUZ</p> <p>13 Plaintiff/Petitioner,</p> <p>14 v.</p> <p>15 CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE; A.G. KAWAMURA, in 16 his official capacity as Secretary of the California Department of Food and Agriculture; 17 and DOES 1 through 100, inclusive,</p> <p>18 Defendants/Respondents.</p> <p>19</p>	<p>Case No. 158516</p> <p><b>MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE RE: PRELIMINARY INJUNCTIVE RELIEF</b></p> <p>Date: October 31, 2007 Time: 1:00 p.m. Dept: 8</p>
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1 **INTRODUCTION**

2 Plaintiff County of Santa Cruz (“the County”) seeks a Temporary Restraining Order  
3 (“TRO”) to prevent defendant California Department of Food and Agriculture (“CDFA”) from  
4 aerial spraying Santa Cruz County with the pesticide Checkmate, beginning this Sunday night.  
5 This pesticide – which is designed to control or eradicate the Light Brown Apple Moth (“LBAM”)  
6 – is a mixture of chemicals that has not been adequately tested or studied to determine its effects  
7 on humans or the environment when sprayed over an urban area. CDFa concedes that prior to last  
8 month in Monterey, Checkmate has never been aerially sprayed over homes, backyards, parks, and  
9 schools. CDFa has not conducted any environmental review of this project on the asserted  
10 grounds that an emergency exists; in reality, there is no emergency and CDFa is not entitled to  
11 evade the requirements of the California Environmental Quality Act (“CEQA”). Moreover,  
12 citizens of Monterey County have attributed health problems to this spraying.

13 In support of its request for a TRO, the County presents the declarations of qualified  
14 experts who state that no independent studies have been done to determine whether this pesticide  
15 is safe for humans or the environment as it will be applied, there is insufficient knowledge of how  
16 it is going to impact humans and the environment, and there is no need to aerially spray in  
17 November because there is no true emergency and the effectiveness in eradicating the LBAM will  
18 be limited. Accordingly, the County requests that this Court stop CDFa from aerial spraying the  
19 County until adequate third-party testing has been done to confirm the safety of this pesticide as  
20 applied and until CDFa has certified an Environmental Impact Report (“EIR”) assessing feasible  
21 alternatives and appropriate mitigation measures.

22 **STATEMENT OF FACTS**

23 On or about September 21, 2007 CDFa disclosed that it intends to aerial spray Checkmate  
24 on a large area in the County starting on November 4, 2007. (Declaration of Jason M. Heath  
25 (“Heath Decl.”), ¶ 2.) On October 3, 2007, without any noticed public hearings, CDFa filed a  
26 Notice of Exemption (“NOE”) from CEQA notifying the State Office of Planning and Research that  
27 it intended to embark on a project of aerial pesticide spraying in “the cities of Capitola, Santa Cruz  
28 and Scotts Valley as well as in the communities of Aptos, Felton, Live Oak, Opal Cliffs, Rio del

1 Mar, Soquel and Twin Oaks” to eradicate the LBAM. (Heath Decl., ¶ 2, Exh. A.) CDFA’s NOE  
2 states:

3 “The project will consist of the following: Aerial applications with a  
4 synthetic insect pheromone will be applied throughout the eradication  
5 area. The pheromone confuses the male moths, impairing their ability  
6 to find mates. Once the breeding cycle of the moth is broken, the light  
7 brown apple moth population is reduced and ultimately eradicated  
8 from the area. For monitoring, traps baited with the LBAM  
9 pheromone will be placed in the eradication area at the density of five  
10 traps per square mile. Additional traps may be added to further delimit  
11 the infestation and to determine the efficacy of treatments. All  
12 monitoring traps will be serviced on a regular schedule for a period of  
13 time equal to three generations beyond the date of the last LBAM  
14 detection. The project will benefit the community and agriculture  
15 producers in the area.”

16 (Heath Decl., Exh. A.)

17 The NOE alleged that the project was statutorily exempt from the requirements of CEQA as  
18 an “Emergency Project” under Public Resources Code section 21080(b)(4) and CEQA Guideline  
19 Article 18, section 15269(a). The NOE also alleged that the project was exempt from the  
20 requirements of CEQA under a “Categorical Exemption” per CEQA Guideline Article 19, section  
21 15308 (class 8). (Heath Decl., ¶ 2, Exh. A.)

22 CDFA’s website contains a document entitled “Light Brown Apple Moth (LBAM) Questions  
23 and Answers.” (Heath Decl., ¶ 3, Exh. B.) This document purports to summarize the available  
24 information concerning the aerial application of pheromone substances. It states that the LBAM is  
25 “a recent arrival in California” and that the populations of LBAM “are still relatively small and are  
26 considered by an international panel of expert scientists to be eradicable if significant action is taken  
27 promptly.” (Heath Decl., Exh. B, p. 3.) The document also states that the pheromone treatments are  
28 a central part of a “multi-year project that will require multiple tools to be successful” and that  
CDFA has “already contained the infestation by imposing quarantine restrictions and inspections on  
plant and crop shipments, and . . . [has] suppressed the infestation by pheromone twist-ties in  
several locations around the fringes of the infested areas.” (Heath Decl., Exh. B, p. 8.)

1 On September 9, 10, 11, and 12, CDFA aerial sprayed Monterey County with Checkmate  
2 OLR-F. Many people in that County have reported adverse health reactions after the spraying.

3 These complaints include:

- 4 ■ an 11 month-old with no previous adverse health symptoms taken to the  
5 hospital on September 11 due to labored breathing, congestion, and loss of  
6 appetite, and diagnosed with Reactive Airway Disease (Decl. of Timothy  
7 Wilcox, Del Ray Oaks);
- 8 ■ a man suffers from severe chest and sinus congestion and shallow breathing  
9 on September 12 (Decl. of Brook Sebok);
- 10 ■ a thirteen year old and her father experience intense vomiting after the  
11 spraying, and a woman and her daughter experience dry stinging in their  
12 eyes after the spraying (Decl. of Katherine Koviak);
- 13 ■ a man had severe trouble breathing and developed an intense chest cold  
14 after the spraying occurred, his daughter developed red and irritated eyes  
15 after playing on the grass after the spraying, and his wife developed a sore  
16 throat (Decl. of Kristy Sebok, Pacific Grove);
- 17 ■ a man suffers breathing problems and feels a burning sensation and has  
18 interacted with others in his community with breathing difficulties  
19 (Testimony of Barton Bruno [Heath Decl., Exh. C, p. 28]);
- 20 ■ a man develops chest pains, sore throat, and irritated tongue that he  
21 attributes to the spraying (Testimony of Steven Brunner [Heath Decl., Exh.  
22 C, p. 30-31]);
- 23 ■ a man had sore throat symptoms after the spraying; he visited his doctor  
24 and was diagnosed with pharyngeal irritation and otis external, which are  
25 reportedly symptoms consistent with irritation caused from aerial spraying  
26 (Decl. of Gordon Smith, Monterey).<sup>1</sup>

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27  
28 <sup>1</sup> The County is currently in the midst of collecting additional declarations and expects to submit additional declarations to the Court as they are received.

1 On October 16, 2007, defendant/respondent CDFA Secretary A.G. Kawamura and his staff  
2 appeared before the Santa Cruz County Board of Supervisors (“the Board”) to present their plans to  
3 spray Santa Cruz County with Checkmate starting November 4<sup>th</sup> (a true and correct uncertified copy  
4 of the recorded transcript of the Board’s hearing is attached to the Heath Declaration as Exhibit C.)  
5 At the meeting, CDFA conceded that prior to the Monterey County spraying, aerial spraying of  
6 Checkmate had never before been done over an urban population. (Heath Decl., Exh. C, p. 42; 52-  
7 53.) CDFA staff’s responses to the Board’s questions about the safety of this pesticide were  
8 extremely lacking. (Heath Decl., Exh. C, pp. 38-39; 44; 46, 57.) Many members of the public  
9 testified at the hearing in protest to the intended spraying, as did two citizens from Monterey County  
10 who personally experienced adverse health effects after the spraying. (Heath Decl., Exh. C, pp. 17-  
11 38.)

12 On October 26, 2007, CDFA requested that Santa Cruz County Agricultural Commissioner  
13 Ken Corbishley issue a restricted materials permit to allow spraying to commence on November 4,  
14 2007. (Heath Decl., Exh. D.) According to the application, CDFA intends to treat Santa Cruz  
15 County from November 4 to November 9, between the hours of 8:00 p.m. and 5:00 a.m., weather  
16 permitting. (*Id.*) Contrary to its representations to the community that it intends to spray Santa Cruz  
17 County with only Checkmate LBAM-F, CDFA has applied to use *both* Checkmate LBAM-F and  
18 Checkmate OLR-F in this round of spraying. (*Id.*, p. 2; Heath Decl., Exh. C, p. 7-8 [CDFA Division  
19 Director John Connell’s comments].)

20 With this memorandum, the County has submitted expert opinion evidence supporting its  
21 position that aerial spraying should not go forward absent third-party testing and in the absence of a  
22 certified EIR. Dr. Richard Philp, a long-time professor of Pharmacology and Toxicology, attests that  
23 no chronic toxicity study of Checkmate has been conducted, that the statements of the USDA and  
24 EPA are filled with contradictory statements regarding the toxicity of pheromones, and that this  
25 product should not be aerially sprayed as intended at this time. (Declaration of Dr. Richard Philp  
26 (“Philp Decl.”), ¶¶ 3-8 .) Dr. Daniel Harder, a botanist and the Executive Director of the U.C. Santa  
27 Cruz Arboretum, attests that there has been no reported, quantifiable damage done by the LBAM in  
28 Santa Cruz County, aerial spraying for this moth is not necessary in November because it will have



1 little effect on controlling the LBAM population, much less eradicating it, and that not enough  
2 testing has been done to ensure that Checkmate is safe for humans or the environment in the manner  
3 in which CDFA intends to use it. (Declaration of Dr. Daniel Harder (“Harder Decl.”), ¶¶ 3-15.)

4 In short, no studies have been done to determine whether this pesticide is safe for CDFA to  
5 spray over schools, parks, and backyards, there is insufficient knowledge of how it is going to  
6 impact humans and the environment, the efficacy of the intended treatment is limited at this time of  
7 year, and more research needs to be done before Checkmate is aerially sprayed over this community.  
8 People that have already been sprayed in Monterey County believe that this pesticide is hurting  
9 them. The County respectfully asks that the Court stop this spraying.

### 10 III.

#### 11 **THE LEGAL STANDARD FOR ISSUING A TEMPORARY RESTRAINING ORDER**

12 Under California Code of Civil Procedure section 526, an injunction may be granted in any  
13 of the following cases:

- 14 ■ When it appears by the complaint that the plaintiff is entitled to the relief  
15 demanded, and the relief consists of restraining the commission of the act  
16 complained of, either for a limited period or perpetually;
- 17 ■ When it appears by the complaint or affidavits that the commission of some  
18 act during the litigation would produce great or irreparable injury to a party  
19 in the action;
- 20 ■ When it appears that, during the litigation, a party threatens or is about to  
21 do some act in violation of the rights of another party respecting the subject  
22 of the action, and tending to render the judgment ineffectual; or
- 23 ■ When pecuniary compensation would not afford adequate relief or it would  
24 be very difficult to ascertain the amount of compensation that would afford  
25 adequate relief.

26 (Cal. Code of Civ. Proc., § 526(a)(1-5).)

27 The legal standard governing the issuance of preliminary injunctive relief is guided by two  
28 factors. The first is the “likelihood that the plaintiff will prevail on the merits at trial.” The second

1 is “the interim harm that the plaintiff is likely to sustain if the injunction were denied as compared to  
2 the harm that the defendant is likely to suffer if the preliminary injunction were issued.” (*IT*  
3 *Corporation v. County of Imperial* (1983) 35 Cal.3d 63, 69-70.)

4 With regard to the first factor, the County is not required to show that it will necessarily  
5 prevail on the merits; instead, only a reasonable probability of success is required. (*Baypoint*  
6 *Mortgage Corporation v. Crest Premium Real Estate Investments Retirement Trust* (1985) 168  
7 Cal.App.3d 818, 824.) The trial court’s determination “must be guided by a “mix” of the potential-  
8 merit and interim harm factors; the greater the plaintiff’s showing on one, the less must be shown on  
9 the other to support an injunction.” (*Butt v. State of California* (1992) 4 Cal.4<sup>th</sup> 668, 677-678.)<sup>2</sup>

10 **IV.**

11 **THE COUNTY HAS SATISFIED THE BURDEN NECESSARY TO OBTAIN A**  
12 **TEMPORARY RESTRAINING ORDER**

13 Here, the County has satisfied the burden necessary to obtain a temporary restraining order.  
14 CDFA has not complied with CEQA and has no valid basis for failing to do so. Moreover, CDFA’s  
15 intended spraying will act as both a trespass and a nuisance and numerous people are claiming that  
16 they are suffering adverse health effects from the aerial spraying that occurred in Monterey County.  
17 In short, the County has demonstrated a probability of success on the merits and that the harm the  
18 County is likely to suffer absent issuance of a temporary restraining order is greater than that CDFA  
19 will suffer if a temporary restraining order is granted.

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24  
25 <sup>2</sup> CDFA will likely cite to *Tahoe Keys Property Owners' Association v. State Water Resources*  
26 *Control Board* (1994) 23 Cal.App.4th 1459, 1471 for the proposition that a higher standard should  
27 be applied when a public agency's actions are to be enjoined by the Court. However, the dispute in  
28 *Tahoe Keys* involved an injunction seeking to prohibit collection of additional per lot mitigation fees  
relating to construction permits paid to the public agencies. The dispute involved payment of money  
and not the dire public health and safety concerns at issue here. In any event, the County believes  
that it has fully met the *Tahoe Keys* standard.

1           **A. The County Has Demonstrated A Probability Of Success On The Merits**

2           The County is suing CDFA for violation of CEQA, trespass, nuisance, and declaratory  
3 relief.<sup>3</sup> As to these claims, the County has demonstrated a probability of success.

4                       **1. CDFA Is Violating CEQA**

5           CDFA’s NOE states that this aerial spraying project is exempt from CEQA because it is in  
6 response to an “emergency” and because it is an action for “protection of the environment.” Neither  
7 of these exemptions apply in this case, and consequently CDFA is violating CEQA by pushing  
8 forward with this project without first certifying an EIR.

9           CEQA requires that all projects that may have an effect on the environment be rigorously  
10 analyzed to ensure that feasible alternatives and feasible mitigation measures have been adequately  
11 considered and utilized to the extent possible to lessen the project’s environmental impact. Projects  
12 carried out by public agencies are subject to the same level of review and consideration as private  
13 projects. (Pub. Resources Code, § 21001.1.) Under CEQA, if there is substantial evidence that a  
14 project may have a significant impact on the environment, unless an applicable exemption applies  
15 the lead agency in charge of approving a project must prepare an Environmental Impact Report  
16 (“EIR”) to analyze the environmental issues and provide a basis for public discussion and  
17 information concerning the environmental consequences of a relevant project. (Pub. Resources  
18 Code, §§ 21061; 21080(d).)

19                       **a. The Emergency Exemption Does Not Apply To This Project**

20           Under CEQA, an “emergency” is

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

25 (Public Resources Code, § 21060.3.) The CEQA Guidelines add that this exemption “does not  
26 include long-term projects undertaken for the purpose of preventing or mitigating a situation that has  
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28 <sup>3</sup> A true and correct copy of the County’s complaint in this case is attached to the Heath Declaration  
as Exhibit M.

1 a low probability of occurrence in the short-term.” (CEQA Guidelines, Cal. Code of Regs., Title 15,  
2 § 15269(c).)

3 In *Western Municipal Water District v Superior Court* (1986) 187 Cal.App.3d 1104, the  
4 court analyzed the emergency exemption in section 21080(b)(4). Although the following quote is  
5 lengthy, it is absolutely on point here:

6 “The ‘emergency’ exemption of section 21080, subdivision (b)(4) is  
7 obviously extremely narrow. ‘Emergency’ as defined by section  
8 21060.3 is explicit and detailed. We particularly note that the  
9 definition limits an emergency to an ‘*occurrence*,’ not a condition, and  
10 that the occurrence must involve a ‘*clear and imminent danger,*  
11 *demanding immediate action.*’ . . .

12 The theory behind these exemptions is that if a project arises for which  
13 the lead agency simply cannot complete the requisite paperwork  
14 within the time constraints of CEQA, then pursuing the project without  
15 complying with the EIR requirements is justifiable. For example, if a  
16 dam is ready to burst or a fire is raging out of control and human life is  
17 threatened as a result of delaying a project decision, application of the  
18 emergency exemption would be proper. . . .

19 Although SBVMWD urges that ‘CEQA, including its environmental  
20 impact report requirements, shall not apply to specific actions  
21 necessary to prevent or mitigate earthquakes or other soil or geologic  
22 movements,’ this interpretation is unsupported by the text of the  
23 exemption. Such a construction completely ignores the limiting ideas  
24 of ‘sudden,’ ‘unexpected,’ ‘clear,’ ‘imminent’ and ‘demanding  
25 immediate action’ expressly included by the Legislature and would be  
26 in derogation of the canon that a construction should give meaning to  
27 each word in the statute. Moreover, in the name of ‘emergency’ it  
28 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  
careful drafting of 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]; see also *Castaic Lake Water Agency v. City of  
Santa Clarita* (1995) 41 Cal.App.4<sup>th</sup> 1257, 1266-1269 [quoting this passage and ordering

1 respondents to vacate their notice of emergency exemption]; *Los Osos Valley Associates v. City of*  
2 *San Luis Obispo* (1994) 30 Cal.App.4<sup>th</sup> 1670 [striking finding of emergency exemption to cover  
3 groundwater pumping, finding that exemption is limited to immediate action demanded by a sudden  
4 occurrence].)

5 CDFA will likely claim that the Legislature has already determined, via the Light Brown  
6 Apple Moth Act of 2007 (“the Act”), that an “emergency” exists sufficient to allow it to evade the  
7 requirements of CEQA. CDFA is ignoring the legislative history of the Act. The Senate Bill that  
8 proposed this legislation was amended several times before it was passed. The June 21, 2007  
9 amendments included a provision that “During the first 36 months of the operation of the Light  
10 Brown Apple Moth Program the department’s actions pursuant to this act shall be deemed an  
11 emergency response for the benefit of the environment under Division 13 (commencing with Section  
12 21000) of the Public Resources Code. During this period, the department shall complete the  
13 statutorily required environmental documentation.” (Heath Decl., Exh. E, p. 5 [proposed section  
14 6050.1(d)].) By the September 4, 2007 amendment the time limit had been dropped from 36 months  
15 to 24 months and was ultimately amended out of the proposed statute altogether. (Heath Decl., Exh.  
16 E, pp. 9, 12 [proposed section 6050.1(d)].) By the time the Act was passed and Chaptered, the above  
17 language had been replaced entirely with the following: “Eradication activities undertaken pursuant  
18 to this article shall comply with all applicable laws and regulations and ***shall be conducted in an***  
19 ***environmentally responsible manner.***” (Heath Decl., Exh. E, p. 15 [final version of Light Brown  
20 Apple Moth Act, Food and Agriculture Code section 6050.1(c)(2)(C)] [emphasis added].)

21 In other words, *the Legislature had an opportunity to exempt CDFA from CEQA and*  
22 *purposefully chose not to do so.* CDFA cannot legitimately argue that the Legislature has sanctioned  
23 its intended evasion of CEQA. The Legislature specifically commanded that CDFA comply with all  
24 applicable laws and that the LBAM eradication program be conducted in an environmentally  
25 responsible manner; this indicates the Legislature’s desire for full CEQA review of projects  
26 undertaken to eradicate the LBAM.

27 As Dr. Harder attests, there has been no reported, quantifiable damage done by the LBAM in  
28 Santa Cruz County. (Harder Decl., ¶ 3.) In other areas of the world, such as New Zealand and

1 Hawaii, even after more than 100 years of observation the LBAM is considered to be a minor pest.  
2 (*Id.*) According to Dr. Harder, the LBAM will not be breeding in the winter months beginning in  
3 November, as the rains begin and the temperature drops. Instead, throughout November and most of  
4 the winter months the moths will remain as caterpillars and not become adults. (Harder Decl., ¶ 4;  
5 *see also* Light Brown Apple Moth in California: Quarantine, Management and Potential Impacts,  
6 University of California Agriculture and Natural Resources Program, September 12, 2007 [Heath  
7 Decl., Exh. F, p. 6] [“Cold winter temperatures slow larval development considerably.”]; comments  
8 of CDFA Division Director John Connell (Heath Decl., Exh. C, p. 4) [“. . . it depends on the  
9 temperatures at the time of year the cooler it gets, the slower that generation or lifecycle will go.”] In  
10 addition, few crops and produce leave this area during winter, which further reduces the chance that  
11 moths will be exported from Santa Cruz County between now and spring 2008. Moreover, since the  
12 confirmed discovery of LBAM in Alameda County in early 2007, nurseries have been under  
13 quarantine in all counties where LBAM has been found (including Santa Cruz County) to contain  
14 and limit the distribution of the insect through the transportation of agricultural products. This also  
15 further reduces the chance that moths are leaving this County or that failing to aerial spray this  
16 winter will lead to a spread of the LBAM. (Harder Decl., ¶ 5.) There is no emergency.

17 The LBAM infestation, and the need to control it, is not an unexpected “sudden occurrence.”  
18 The fact that the infestation is already being contained and suppressed in fringe areas indicates that  
19 this is a condition, not an “occurrence.” (United States Department of Agriculture (“USDA”)  
20 Environmental Assessment (“EA”) [Heath Decl., Exh. G, pp. 1-3].) The moth’s presence in this  
21 state was documented (at the very latest) in February 2007; steps commenced in March 2007 to  
22 address the population. (*Id.*) This is in no way a “sudden occurrence” justifying evasion of CEQA.  
23 CDFA’s determination that there is an “emergency” that requires Checkmate to be aerielly sprayed  
24 in November is simply not supportable.

25 If history is any indication, CDFA will likely place great weight on the case of *Californians*  
26 *for Alternatives to Toxics v. Department of Food and Agriculture* (2005) 136 Cal.App.4th 1, in order  
27 to support their emergency exemption argument. That case contains one sentence, in the factual  
28 background section, relating to CDFA’s reliance on an emergency exception: “Because the

1 emergency regulations and program were created in response to an emergency, they were exempt  
2 from CEQA." (*Id.* at 7.) There is no indication from the appellate opinion that the emergency  
3 exemption was challenged or that the court evaluated the validity of the claim of an emergency  
4 exemption. To that extent, the sentence should be considered dicta and disregarded.

5 In fact, a close reading of the case indicates that the court condemned exactly what CDFA is  
6 trying to get away with here. The central holding of the case is that CDFA could not forego analysis  
7 under CEQA relating to the use of pesticide products by relying on the certified regulatory and  
8 registration program operated by the California Department of Pesticide Regulation ("DPR"). The  
9 appellate court specifically condemned CDFA's reliance on DPR and struck down CDFA's EIR  
10 because DPR's regulatory program did not deal with the "specific uses of pesticides in the program,  
11 such as the specific chemicals used, their amounts and frequency of use, specific sensitive areas  
12 targeted for application and the like" and therefore CDFA could not rely on it. (136 Cal.App. 4<sup>th</sup> at  
13 16.) The Court specifically explained that CDFA's error in relying on DPR infected the analysis of  
14 the impact from exposure to pesticides on people in nonagricultural areas. (*Id.* at 16-20.) If  
15 anything, the *California Alternative to Toxics* case stands for the proposition that CEQA does not  
16 allow CDFA to take the approach that it is taking with regard to this aerial spraying program, i.e.  
17 CDFA cannot legitimately rely on DPR and US EPA to say that Checkmate is safe and therefore that  
18 no further analysis is necessary as to its effects on human health and the environment.

19 **b. The Categorical Exemption Does Not Apply To This**  
20 **Project**

21 Indicating CDFA's lack of confidence in its "emergency" exemption, the NOE also purports  
22 to rely on a "categorical exemption" to CEQA, referencing "Class 8, Section 15308." This is a  
23 reference to the CEQA Guidelines (Cal. Code of Regulations, title 14), section 15308. Public  
24 Resources Code section 21084 requires the CEQA Guidelines to include a list of classes of projects  
25 that have been determined not to have a significant effect on the environment and which shall,  
26 therefore, be exempt from the provisions of CEQA. In response to that mandate, the Secretary of  
27 Resources has determined certain classes of projects as categorically exempt from CEQA. (Cal.  
28 Code of Regs., title 14, §15300.)

1 Here, CDFA relies on the Class 8 “environmental” categorical exemption. Specifically, Title  
2 14, section 15308 states:

3 “Class 8 consists of actions taken by regulatory agencies, as authorized  
4 by state or local ordinance, to assure the maintenance, restoration,  
5 enhancement, or protection of the environment where the regulatory  
6 process involves procedures for protection of the environment.  
7 Construction activities and relaxation of standards allowing  
8 environmental degradation are not included in this exemption.”

9 By definition, so-called “categorical exemptions” cannot have impacts to the environment.  
10 CDFA’s admission that it is currently working on an EIR severely undercuts reliance on a  
11 categorical exemption and indicates that CDFA recognizes that this project will have significant  
12 unmitigated environmental impacts (the EIR CDFA has allegedly begun to work on has a target  
13 completion date of December 2008 [Heath Decl., Exh. K, p. 4].)

14 In any event, CDFA relies on this exemption with no analysis whatsoever. There is no  
15 explanation of how CDFA is assuring the maintenance, restoration, enhancement, or protection of  
16 the environment by spraying a never-tested pesticide over people’s homes. There is also no  
17 identification of what “regulatory procedure” CDFA is relying on to protect the environment. At  
18 this point, CDFA’s use of this exemption is baseless.

19 **c. The Anticipated Effectiveness Of The Intended**  
20 **Spraying Is Dubious At Best**

21 The purpose of pheromone application is to disrupt the mating cycle of the LBAM – not to  
22 kill it. (Harder Decl., ¶ 6.) Pheromones are intended only to control populations of pests and are not  
23 able to eradicate them. Pheromones, as a mating disruption tool, have never been shown to  
24 completely eliminate any insect pest anywhere in the world. The protocol CDFA is using here,  
25 aerially spraying pheromones over urban populations, is without precedent. (Harder Decl., ¶ 6.)

26 Within areas off-limits to spraying (such as over open water, in the terrestrial buffer zones of  
27 the Monterey Bay National Marine Sanctuary, etc.) populations of the moth will remain viable and  
28 intact before, during, and after the aerial spraying. Any LBAM present during the winter months in  
these areas will be able to effectively re-infect treated areas. (Harder Decl., ¶ 7.)



1 As there are no known studies or reports on the effectiveness of using pheromones as an  
2 eradication tool as CDFA intends to use them here, there should be no expectation that the proposed  
3 aerial spraying will be effective. As Dr. Harder attests, there is no basis to conclude that when  
4 CDFA finishes spraying the County several years from now, the LBAM will be eliminated from our  
5 environment. (Harder Decl., ¶ 8.) Given that, CDFA has no reasonable basis for rushing in to spray  
6 this County before testing can be completed as to the efficacy of the program.

7 **d. CDFA's Own Researchers Have Concluded That No**  
8 **One Tool Is Going To Eradicate The LBAM**

9 CDFA would like the Court to believe that aerial spraying is the only alternative to eradicate  
10 or control the LBAM. However, that is not correct. CDFA's Technical Working Group ("TWG")  
11 met in San Jose on May 16-18, 2007 to discuss a response to the LBAM infestation. The group's  
12 recommendations were released on June 8, 2007. (Heath Decl., Exh. H.) The group noted that:

13 "Eradication will require the integration of several control tactics,  
14 which may include mating disruption pheromone formulations,  
15 insecticide treatments (e.g. Bt spinosyns) sterile insects and other  
16 techniques (e.g., biological control). *Ground and aerial application* of  
17 these materials should be used as needed. Some of these tactics are  
18 either in the development stage or have not been used on the scale that  
will be required to eradicate this pest from California. As a result,  
successful eradication will rely on refinement and adaptation of  
multiple control and regulatory tactics."

19 (Technical Working Group Recommendations, p. 1; Heath Decl., Exh. H [emphasis added].)

20 In his September 28, 2007 "Proclamation of an Eradication Project Regarding the Light  
21 Brown Apple Moth," CDFA Undersecretary George Gomes listed options that he "considered" for  
22 the eradication of LBAM in Monterey County. (Heath Decl., Exh. I.) They included: 1) foliar  
23 application of an organic pesticide by ground; 2) foliar application of an organic pesticide or a  
24 pheromone by air; 3) mating disruption using pheromone-infused plastic twist ties; 4) mass trapping;  
25 and 5) quarantine measures. Despite the fact that these alternatives are identified, they are not  
26 sufficiently analyzed and are basically glossed over in jumping to an immediate conclusion that  
27 aerial spraying is necessary.

1 As recently recognized by one academic group “no single control technique currently exists  
2 that can be practically, safely and effectively implemented over the entire LBAM-infested area.”  
3 (Heath Decl., Exh. F, p. 8.) Thus, CDFA cannot legitimately state that the fate of eradicating LBAM  
4 depends on this one November aerial spraying in Santa Cruz County in light of the unknown factors  
5 that CDFA’s own TWG recognizes.

6 Dr. Harder attests that there are options to aerial spraying that have not been fully considered.  
7 Sticky board traps and twist-ties are some of the better alternatives presented so far. (Harder Decl., ¶  
8 10; Heath Decl., Exh J [CDFA News Release – “Pheromone “Twist Ties” to Aid in Eradication of  
9 Light Brown Apple Moth”].) However, under CDFA’s current protocol, environmental review will  
10 be delayed, no controls are being established to determine the effectiveness of the sticky board traps  
11 and twist-ties currently in place, and effective monitoring is not designed into the project. (Harder  
12 Decl., ¶ 10.) CDFA’s actions simply do not make sense.

13 e. **CDFA Is, At The Very Most, Absolutely Unsure Of**  
14 **The Environmental Impacts Of Aerially Spraying**  
15 **This Pesticide**

16 In an October 4, 2007 letter to Assemblyperson John Laird, Secretary Kawamura stated that  
17 “[W]e have asked for a reevaluation of all health and environmental-related issues surrounding the  
18 use of pheromones from DPR [Department of Pesticide Regulation], the Office of Environmental  
19 Health Hazard Assessment, California Department of Health Services and California Department of  
20 Health.” (Heath Decl., Exh. K, p. 5.) Secretary Kawamura also emphasized that he has “begun the  
21 appointment process for an Environmental Advisory Task Force to provide the department with  
22 third-party advice regarding LBAM. This body will be comprised of representatives from  
23 environmental organizations, public regulatory and health agencies, organic and conventional  
24 agricultural entities as well as university researchers and scientists.” (*Id.*) First, this statement  
25 incorrectly assumes that all (or any) health and environmental-related issues were “evaluated” to  
26 begin with. Second, *these are actions that should be completed prior to, and not after,* spraying  
27 Santa Cruz County, particularly in light of the less-than-clear effectiveness of one spraying in  
28 November 2007. (*See* Harder Decl., ¶¶ 5-7.) Moreover, the Secretary’s comments are undercut and  
contradicted by the statements in his October 26, 2007 letter to Assemblyperson Laird, in which he

1 states that “the conduct of health studies is not within CDFA’s sphere of operational capacity.”  
2 (Heath Decl., Exh. L, p. 3.) In the same letter, Secretary Kawamura states that outside of a U.C.  
3 Davis test regarding impacts to fresh water and marine fish invertebrates (which at this point appears  
4 limited to mussels) that is expected to be completed by the end of the year, “neither CDFA nor  
5 USDA is currently considering another third-party review” of the toxicity of the ingredients in  
6 Checkmate. (Heath Decl., Exh. L, p. 2.)

7 No testing of CDFA’s proposed aerial spraying protocol or of Checkmate itself has been  
8 conducted and no peer-reviewed literature discusses the long-term health effects of aerial spraying  
9 this substance over parks, schools, sandboxes, and backyards. (Harder Decl., ¶ 9.) In New Zealand  
10 and Australia, aerially applied pheromones to control LBAM have been mostly restricted to  
11 agricultural areas and have not been used extensively over human populations or over natural areas.  
12 (*Id.*) As Dr. Harder notes, aerial spraying over urban areas includes rooftops and streets, which will  
13 allow the pheromone to become concentrated in drainpipes and along street drainage ways resulting  
14 in unknown and untested consequences. (Harder Decl., ¶ 11.) Moreover, given that Santa Cruz  
15 County has more than 30 species of Tortricid moths that will be attracted by this pheromone, use of  
16 this pesticide may have unintended consequences for non-target species (this is particularly  
17 disturbing given that CDFA’s restricted materials permit application requests permission to spray  
18 both Checkmate LBAM-F *and* Checkmate OLR-F, contrary to earlier representations by CDFA that  
19 it would only be spraying Checkmate LBAM-F). Finally, although CDFA Undersecretary Gomes  
20 states that “The Department will not apply pesticides to water bodies, riparian habitat areas or areas  
21 lacking host plants,” he fails to state how he plans to accomplish that effectively in Santa Cruz  
22 County, which is brimming with water bodies and riparian habitat, especially compared to Monterey  
23 County. (Heath Decl., Exh. I, p. 2.) Also, unlike in Monterey County, CDFA has yet to provide the  
24 public with evidence of a permit from the Monterey Bay Marine Sanctuary.<sup>4</sup>

25 The USDA’s EA is peppered with vague and non-committal assertions about the safety of  
26 this product. The “available” toxicity data “suggests” that lepidopteran pheromones have “very low”

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28 <sup>4</sup> Furthermore, the County is informed and believes that CDFA has not yet obtained the necessary  
clearance to begin spraying from the United States Fish and Wildlife Service (“USFWS”), as it  
relates to the impacts of spraying on endangered species in the County.

1 chronic toxicity to mammals. (Heath Decl., Exh. G, p. 10). Exposure to humans, domestic and  
2 other nontarget animals, and the environment is “expected to be minimal.” (Heath Decl., Exh. G, p.  
3 11.) “Cumulative effects from potential pheromone use over several years is “not expected” to occur  
4 based on the known toxicity data. (Heath Decl., Exh. G, p. 12.) In his testimony before the Board of  
5 Supervisors, Jim Ryan from the USDA stated that the pesticide is “practically non-toxic.” (Heath  
6 Decl., Exh. C, p. 12.) These are hardly ringing endorsements about the safety of aerial spraying  
7 Checkmate over this County’s neighborhoods.

8 The bottom line is that CDFA has no idea what the long-term impacts of aerially spraying  
9 this pesticide will be. Until it learns what they are, the Court should not allow this spraying to go  
10 forward.

11 **2. CDFA’s Actions Will Act As A Nuisance And A Trespass**

12 In order to succeed on its trespass claim, the County must prove that 1) it owns and controls  
13 the property at issue; 2) that CDFA intentionally, recklessly, or negligently entered the County’s  
14 property; 3) that CDFA did not have the County’s permission to enter its property; 4) that the  
15 County was actually harmed by such entry; and 5) that CDFA’s entry was a substantial factor in  
16 causing the harm. (California Civil Jury Instructions, CACI 2000, Trespass.)

17 Here, elements 1, 2, 3, and 5 are not even at issue: it should be undisputed that CDFA will  
18 intentionally spray the County’s property and its employees without its permission, and that, to the  
19 extent the County suffers harm related to the spraying, CDFA’s actions will substantially cause it.  
20 While CDFA will likely dispute the fourth element at this point, CDFA cannot legitimately say that  
21 this product is safe as it is proposed to be applied, because it has never been sprayed aerially over an  
22 urban population and they therefore have no solid confirmation of what it is going to do to the  
23 County or its inhabitants.

24 In order to succeed on its nuisance claim, the County will have to prove that 1) it owns or  
25 controls the property at issue; 2) that CDFA created a condition that was harmful to health, or  
26 indecent or offensive to the senses, or an obstruction to the free use of the County’s property; 3) so  
27 as to interfere with the comfortable enjoyment of the property; 4) that the County did not consent to  
28 the conduct; 5) that an ordinary person would be reasonably annoyed or disturbed by the conduct; 6)

1 that the County was harmed; 7) that CDFA’s conduct was a substantial factor in causing the harm;  
2 and 8) the seriousness of the harm outweighed the public benefit of CDFA’s conduct. (California  
3 Civil Jury Instructions, CACI 2021, Private Nuisance – Essential Factual Elements.) The County  
4 will have to prove a substantial and unreasonable interference with the use and enjoyment of its  
5 property in order to succeed on this claim. (*Koll-Irvine Center Property Owners Assn. v. County of*  
6 *Orange* (1994) 24 Cal.App.4<sup>th</sup> 1036, 1041; *San Diego Gas & Electric Co. v. Superior Court* (1996)  
7 13 Cal.4<sup>th</sup> 893, 938.)

8 On the nuisance claim, the County submits that elements 1, 2, 3, 4, 5 and 7 should be  
9 undisputed: CDFA will intentionally spray the County with a product that is offensive to the senses,  
10 the County does not consent to it, plenty of ordinary people are reasonably disturbed by it, and to the  
11 extent the County is harmed, CDFA will have caused it. CDFA will likely dispute that the County is  
12 harmed by this and claim that even if it is, the benefits outweigh the detriments. However, CDFA  
13 has no foundation for saying that *when it cannot legitimately state what the actual, comprehensive*  
14 *“detriments” even are (much less the benefits).*

15 **B. In The Absence Of Testing Establishing That This Pesticide Is Safe, Because Of**  
16 **The Potential Consequences The Court Should Assume That The County And**  
17 **Its Residents Will Be Irreparably Harmed If This Spraying Takes Place**

18 The balance of hardships favors the issuance of immediate injunctive relief. Evidence  
19 provided by the residents of Monterey County indicate that if the Court does not stop this aerial  
20 spraying, residents of Santa Cruz County could very well suffer the same adverse health symptoms  
21 residents of Monterey County have experienced, including difficulty breathing, sore throats,  
22 headaches, dizziness, and skin and eye irritation. These symptoms cannot be summarily dismissed  
23 as minor or inconsequential because no one knows whether they are the tip of the iceberg of much  
24 larger problems that will not manifest themselves for years to come. Likewise, the physical  
25 symptoms of eleven-month-old babies cannot be simply rejected as “psycho-somatic.”

26 If the spraying is not performed, CDFA claims the moth will reproduce, expand its range,  
27 and cause crop damage. As set forth above, the evidence does not support that contention and the  
28 efficacy of one spraying in November is highly suspect. Moreover, the purported economic

1 consequences of this moth infestation alone do not outweigh the potential threat to human health and  
2 safety that must be assumed in the absence of verifiable data to the contrary.

3 CDFA is not considering alternatives that would reduce the threat to health and human  
4 safety. Clearly the use of scented sticky traps or twist-ties in designated locations would have less  
5 environmental impacts than the wholesale aerial spraying of the entire County. While twist-ties  
6 have evidently been rejected because of the cost and manpower necessary to apply them, there is no  
7 explanation, verification, or confirmation of the data used to justify this conclusion.

8 Aerial spraying of pheromones has never been successful in eradicating the LBAM. (Harder  
9 Decl., ¶ 6.) Accordingly, CDFA cannot possibly argue that its need to eradicate this pest, with this  
10 tool, outweighs the health and safety concerns of the residents of this community. CDFA will not be  
11 irreparably harmed if the Court grants the County injunctive relief in this case – but the residents of  
12 this County certainly could be – and by the time that irreparable harm is confirmed, it will be too late  
13 to do anything about it.

#### 14 CONCLUSION

15 CDFA is preparing to violate CEQA and engage in a trespass and nuisance by spraying an  
16 untested pesticide on most of the citizenry of Santa Cruz County. There is no real emergency here,  
17 and people in Monterey County believe they have been injured by the aerial spraying of this  
18 pesticide. The County has tried to negotiate with CDFA to consider feasible alternatives or  
19 mitigate the environmental impacts of this proposed spraying, but CDFA has refused to postpone  
20 its spraying program.

21 If this Court does not issue an order to stop the spraying, even temporarily until more data  
22 can be gathered, the rights of the County and its citizenry will be violated far before this matter  
23 ever comes to hearing. Thus, plaintiff and petitioner County of Santa Cruz respectfully requests  
24 that this Court grant its request for a temporary restraining order, and order defendant and  
25 respondent CDFA to refrain from aerial spraying the pesticide Checkmate over any portion of  
26 Santa Cruz County unless and until third-party testing has been accomplished to determine the

27 ///

28 ///

1 possible health effects of aerial application of this pesticide, including the actual effects on  
2 residents of Monterey County, and until an EIR has been certified by CDFA.

3  
4 Dated: October \_\_, 2007

DANA McRAE, COUNTY COUNSEL

5  
6 By \_\_\_\_\_

JASON M. HEATH  
Assistant County Counsel  
**Attorneys for Plaintiff**  
**COUNTY OF SANTA CRUZ**

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