



CITY ATTORNEY DENNIS HERRERA

STATEMENT

FOR IMMEDIATE RELEASE
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Herrera Submits Comments on State's Plans to Eradicate Light Brown Apple Moth

***City's response to Draft Environmental Impact Report calls analysis
'not good enough' to protect public health, the environment***

SAN FRANCISCO (Sept. 28, 2009)—City Attorney Dennis Herrera today filed comments on a draft report by the California Department of Food and Agriculture that endeavors to analyze potential environmental and public health effects of the state's Light Brown Apple Moth Eradication Program. The controversial program was modified last year in the face of mounting public health concerns over aerial spraying until an environmental impact study could more thoroughly assess the effects of—and possible alternatives to—plans to eradicate the invasive pest in more than a dozen counties in California.

The five-page letter from Herrera's office to the staff environmental scientist at CDFA details a range of concerns about the inadequacy of the draft report in satisfying the legal requirements of the California Environmental Quality Act, or CEQA, to facilitate fully informed decision-making, and to provide public disclosure of potential environmental effects of governmental decisions.

In releasing the letter late this afternoon, Herrera issued the following statement:

“While I was encouraged by the state's decision last year to halt aerial spraying for the light brown apple moth until it could complete a more thorough analysis, I'm concerned that this draft report is far from thorough. California law guarantees residents that they will have an opportunity to fully understand projects such as these, to evaluate their consequences on our environment and public health, and to consider alternatives wherever possible. So far, this draft report falls short on all counts. I'm particularly concerned by the inadequate disclosure of chemical formulas of pesticides to be used in the program, and by vague statements about state bureaucrats who will appropriately determine when and where aerial spraying is necessary. That's not good enough to protect the public health, and it's not good enough for CEQA.”

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September 28, 2009

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California Department of Food and Agriculture
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Re: City and County of San Francisco's Comments on the *Draft Programmatic Environmental Impact Report for the Light Brown Apple Moth Eradication Program* (State Clearinghouse No. 2008022076)

Dear Mr. Rains:

This letter provides comments from the City and County of San Francisco ("City") on the Draft Environmental Impact Report ("DEIR") for the Light Brown Apple Moth Eradication Program ("LBAM Eradication Program" or "the Program.") The City appreciates the California Department of Food and Agriculture ("CDFA")'s decision last year to modify the Program from a strategy based primarily on aerial application with pheromones to the release of sterile male LBAM to disrupt the mating population. (See Notice of Preparation of a Draft Programmatic Environmental Impact for the Light Brown Apple Moth Eradication Program, dated July 21, 2008.) The City recognizes the importance of early intervention to limit the spread of exotic plant pests, and values CDFA's efforts to accomplish eradication "in an effective and environmentally safe manner." (DEIR, p. 1-6.)

However, the City is concerned that the DEIR fails to satisfy the twin goals of the California Environmental Quality Act ("CEQA") to facilitate informed decision-making and to provide public disclosure of the potential environmental effects of governmental decisions. (*Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392 (explaining that "[a]n EIR is an environmental 'alarm bell' whose purpose it is to alert the public and its responsible officials to environmental changes before they have reached ecological points of no return").) Specifically, the City believes the DEIR falls short of CEQA's requirements for the following reasons.

1. The DEIR's Project Description is Inadequate. CEQA mandates that the description of a proposed project in an EIR contain a) the precise location and boundaries of the proposed project; b) a statement of the objectives sought by the proposed project and c) "a general description of the project's technical, economic, and environmental characteristics...." (14 Cal. Code Regs. ("Guidelines") § 15124.) The description must be sufficiently detailed "to allow the public and reviewing agencies to evaluate and review its environmental impacts. A project description that omits integral components of the project may result in an EIR that fails to disclose the actual impacts of the project." (*Dry Creek Citizens Coalition v. County of Tulare* (1999) 70 Cal.App.4th 20, 26, citing *Santiago County Water Dist. v. County of Orange* (1981) 118 Cal.App.3d 818, 829.)

Here, the DEIR describes the Program's objective as "LBAM eradication from California," in 3 to 5 years. (DEIR, p. 2-1.) The Program is described as "an integrated systems approach using multiple tools: releases of sterile insects, applications of pheromone for mating

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disruption (ground and aerial treatments), male moth attractant treatment technology (ground treatment), use of insecticide treatments, and implementation of biological control agents." (*Id.*) The DEIR explains that "the Program anticipates using all of the chemical and nonchemical alternatives (and options) in combination as a part of an integrated pest management Program." (DEIR, p. 2-2.) The document adds that the current approach to LBAM control, characterized by quarantine, inspection, detection, and private pesticide use "would continue until LBAM eradication is achieved." (*Id.*)

Nowhere does the DEIR disclose, however, how these different approaches may be combined, or whether, and under what criteria, some approaches may be preferred over others. As a result, the DEIR does not satisfy CEQA's objective of providing "sufficient specific information" to enable decision-makers and the public to evaluate the Program's potential environmental impacts. This is particularly troublesome in the case of aerial spraying with pheromones. The DEIR states simply that aerial application of pheromones may occur in "agricultural or undeveloped areas (...) where ground applications of the pheromone are not feasible." (DEIR, p. 2-11.) While the DEIR suggests that aerial spraying may be limited to "remote" or "unpopulated" areas (*see also* DEIR, pp. 1-6 and 6-45 (stating that "aerial application may be used for heavily infested, remote areas (heavily forested and agricultural)" and that "aerial application of the pheromone in undeveloped and essentially unpopulated areas may be considered where ground applications of the pheromone are not feasible.")), it does not explain what regions are considered *forested, agricultural, remote* or *undeveloped*, to allow for aerial application of pheromones. Nor does it explain what criteria will be used to make these determinations. Indeed, these statements are not only vague; they appear contradictory. For example, forested and agricultural areas in the state are not necessarily "unpopulated" or "remote." As a result, the DEIR fails to provide the public a meaningful opportunity to evaluate whether CDFA is considering the appropriate criteria when deciding whether to aerially spray, or whether the CDFA has adequately considered the public health impacts when making this decision.

Similarly, the DEIR states that "buffer areas ... around sensitive habitats will be defined by responsible governmental agencies ... for each tool/alternative in the LBAM program." (DEIR, p. 2-16.) However, the document fails to provide any details as to how these buffer areas will be determined. Because these and other critically important concepts are vague and ill-defined in the document, the description of the Program, as presented in the DEIR, simply does not allow the public and reviewing agencies to *understand* what the Program would entail, much less to evaluate and review its potential environmental impacts, particularly around sensitive habitats and less populated areas.

To meet CEQA's requirements, the project description in the DEIR should have described how CDFA would utilize and blend the different approaches in specific geographical areas, explaining what criteria would be followed to use or mix together different approaches in different areas. More specifically, the DEIR should have described how environmental factors and existing conditions such as climate, population density, building densities and environment, or urbanization would be used to select specific approaches. And if some of the proposed approaches would be considered incompatible with some specific areas (such as, for example, aerial application of pheromones in urban areas), then the DEIR should have clearly stated so. Finally, the DEIR should have explained how buffers would be created.

2. The DEIR's Impacts Analysis is Inadequate. CEQA applies to public agency decisions to carry out, authorize or approve projects that could have adverse effects on the environment. (Pub. Res. Code § 21065; Guidelines § 15378.) The regulations define "project" to mean "the whole of an action" that may result in either a direct or a reasonably foreseeable indirect physical change in the environment. (Guidelines § 15378(a).) The law gives the term "project" a broad interpretation, to maximize protection of the environment, and to avoid

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overlooking a project's impact by separately focusing on isolated parts of the whole. (*McQueen v. Board of Directors* (1988) 202 Cal.App.3d 1136, 1143-44, overruled on other grounds by *Western States Petroleum Assn. v. Superior Court* (1995) 9 Cal.4th 559, 570; see also *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 396-97.)

The DEIR's impact analysis falls short of CEQA's mandate to analyze all potentially significant impacts of the Program for three main reasons. First, the DEIR improperly segments the proposed Program into its smaller components, and fails to assess the potential impacts of the Program *as a whole*. This failure is due in great part to the inadequacy of the project description, as described above. The DEIR analyzes each proposed treatment method individually, even though, as explained above, the Program "anticipates using all of the chemical and nonchemical alternatives (and options) in combination as part of an integrated pest management Program." (DEIR, p. 2-2.) Thus, the DEIR fails to analyze the combined effects of the different treatment programs, or the possible effects of exposure to multiple products simultaneously. Interestingly, the DEIR does consider the combined effects of different pesticides that could be used under each particular approach. It analyzes, for example, the potential health effect of the pesticides that could be used under the Male Moth Attractant (MMA) alternative, because "they would be applied together as a formulation." (DEIR, p. 8-46.) It also considers, and ultimately dismisses, the possibility of any health effects of the combined pesticides that could be used in the Male Disruption (MD) alternative, stating that because of the similarity of the active ingredients present in the pesticides proposed to be used "no reason exists to use any of these products in combination and, consequently, the potential health effects of exposure ... were evaluated individually, not in combination." (DEIR, p. 8-39.) What the DEIR altogether fails to consider, however, is the combined effect of the chemical products of the different components of the Program.

Second, the DEIR also fails to properly analyze cumulative impacts. Cumulative impacts are impacts resulting from "closely related past, present, and reasonably foreseeable future projects . . . which, when considered together, are considerable or which compound or increase other environmental impacts." (Guidelines § 15355.) Here, the DEIR explains that the current approach to LBAM control, characterized by quarantine, inspection, detection, and private use of pesticides would continue while the Program is implemented. (DEIR, p. 2-2.) The continuous use of these pesticides, then, is clearly a reasonably foreseeable and closely related, present and future project. Yet, in the analysis of the potential impacts resulting from the Program, the DEIR fails to consider the potential cumulative impacts of these chemical treatments. (*See for example* DEIR Chapter 8, analyzing potential impacts to human health.)

In addition, the DEIR too easily rests on the lack of current scientific knowledge on the environmental and health effect of some pesticides to avoid analyzing the Program's impacts. Indeed, the DEIR acknowledges that its analysis of potential environmental and health impacts of the Program is limited by the scarce scientific knowledge we now have of the potential health impacts of some of the products that will be used. For example, addressing a concern from the public that the DEIR "[d]iscuss the impacts of synthetic moth pheromones on human hormonal levels and human behavior," the document responds that "no scientific data are available to support an assessment of the potential effects of synthetic moth pheromones on human hormonal levels and human behavior. Because of this fact, no further analysis of this concern is provided." (DEIR, p. 8-17.) CEQA requires more. Under the statute, the lack of scientific knowledge or universally accepted risk assessment methodologies do not excuse public agencies from their obligation to analyze the potential impacts of their actions. Agencies must "do the necessary work to educate [themselves] about the different methodologies that are available." (*Berkeley Keep Jets Over the Bay Committee v. Board of Port Com'rs* (2001) 91 Cal.App.4th 1344, 1370.) The Guidelines recognize that "[d]rafting an EIR ... involves some degree of forecasting. While foreseeing the unforeseeable is not possible, *an agency must use its best efforts to find out and disclose all that it reasonably can.*" (Guidelines, § 15144, italics added.) "If, after thorough

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investigation, a lead agency finds that a particular impact is too speculative for evaluation, the agency should note its conclusion and terminate discussion of the impact." (Guidelines, § 15145, italics added.) Nothing in the DEIR suggests that CDFA undertook this "thorough investigation" before dismissing this concern. (DEIR, p. 8-17.)

But even if CDFA did attempt to understand this impact and failed for lack of scientific data, the EIR should do more than simply end its analysis there. Instead, the EIR should include a new mitigation measure, which would create strict data collecting and health monitoring mechanisms to evaluate each of the approaches used as they are being implemented, and would require that the use of particular pesticides be immediately stopped if any adverse environmental or health impacts can reasonably be attributed to those pesticides are detected.

To comply with CEQA, the DEIR should have analyzed all of the Program's impacts, including any effects that may result from the combined use by CDFA of two or more of the proposed approaches, and the cumulative impacts that may result from application of the Program and the current quarantine. It should also have used its best efforts to find out and disclose all that it reasonably can regarding the health impacts of the pesticides it proposes to use, and it should have created appropriate mitigation measures to avoid any potential impacts.

3. The DEIR Fails to Analyze Reasonable Alternatives to the Proposed Program, as Required by CEQA. "CEQA requires that an EIR, in addition to analyzing the environmental effects of a proposed project, also consider and analyze project alternatives that would reduce adverse environmental impacts." (*In re Bay-Delta Programmatic Environmental Impact Report Coordinated Proceedings* (2008) 43 Cal.4th 1143, 1163.) According to the Guidelines: "An EIR shall describe a range of reasonable alternatives to the project, or to the location of the project, which would feasibly attain most of the basic objectives of the project but would avoid or substantially lessen any of the significant effects of the project, and evaluate the comparative merits of the alternatives." (Guidelines, § 15126.6 (a).) "An EIR need not consider every conceivable alternative to a project." (Guidelines, § 15126.6(a); *In re Bay-Delta*, 43 Cal.4th at p. 1163.) "Rather it must consider a reasonable range of potentially feasible alternatives that will foster informed decision-making and public participation." (Guidelines, § 15126.6(a).)

The selection of a reasonable range of alternatives to a project is determined by that project's objectives. The Guidelines explain that "[t]he range of potential alternatives to the proposed project shall include those that could feasibly accomplish *most of the basic objectives of the project* and could avoid or substantially lessen one or more of the significant effects." (Guidelines, § 15126.6(c), italics added.) Thus, "the discussion of alternatives shall focus on alternatives to the project or its location which are capable of avoiding or substantially lessening any significant effects of the project, *even if these alternatives would impede to some degree the attainment of the project objectives*, or would be more costly." (Guidelines, § 15126.6(b), italics added.)

Here, the DEIR fails to consider *any* alternatives other than the "alternatives" which constitute parts of the proposed Program. (DEIR, ps. 16-1 to 16-5.) Indeed, the DEIR states candidly that "many processes have been utilized to eradicate insect pests and a screening of those processes was required to concentrate the alternatives to only those that meet the LBMA Program's objective" of eradication of the LBAM from California by 2015." (DEIR, p. 16-1.) It then goes on to discuss why alternative approaches, such as an Integrated Pest Management approach, were not considered in detail "because [they] do not meet the objective of eradication." (*Id.*) In so doing, the DEIR disregards CEQA's mandate to select a "reasonable range of alternatives ... even if these alternatives would impede *to some degree* the attainment of the project objectives." Without adequate consideration of alternatives to the proposed Program, the DEIR cannot fulfill its purpose to "foster informed decision-making and public participation." (Guidelines, § 15126.6(a).)

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The DEIR should have considered alternatives that would have allowed the agency to partially attain its stated goal of eradicating the LBAM by 2015. (Guidelines, § 15126.6(b); *see also California Native Plant Soc. v. City of Santa Cruz* (2009) --- Cal.Rptr.3d ----2009 WL 2581275, stating that "there is no legal requirement that the alternatives selected must satisfy every key objective of the project.") Specifically, the City believes that the DEIR should have analyzed alternatives to the Program that do not involve aerial spraying of pheromones, and also other strategies aimed at effective control of the LBAM, but that do not necessarily depend on the more ambitious goal of total eradication.

In sum, for the reasons stated in this letter, the City believes the DEIR for the LBAM Eradication Program fails to comply with the basic requirements of CEQA, and as a consequence, fails to satisfy the statute's core goals of fostering informed decision-making and public disclosure of potential environmental impacts.

For the same reasons, we concur with many of the arguments set forth by EarthJustice in its comment letter on the DEIR, dated September 28, 2009, which we have had an opportunity to review. Specifically, we agree that the DEIR contains an inconsistent, inaccurate, and incomplete description of the Program alternative (Section I); that the DEIR does not analyze a reasonable range of alternatives (Section III); and that the DEIR does not analyze the combined and cumulative impacts of the Program alternatives (Section IV.G.) In addition, the City agrees that under AB 2763, CDFA should disclose the complete chemical formulas of each pesticide proposed to be used in the Program, including any "inert" materials.

When preparing an EIR, "[t]echnical perfection is not required [but] adequacy, completeness and a good-faith effort at full disclosure." (*Concerned Citizens of South Central L.A. v. Los Angeles Unified School Dist.* (1994) 24 Cal.App.4th 826, 836.) "The integrity of the process is dependent on the adequacy of the EIR." (*Save Our Peninsula Committee v. Monterey County Bd. of Supervisors* (2001) 87 Cal.App.4th 99, 117.) Because the DEIR has failed to provide the public with fundamental information about the Program, its impacts and possible alternatives, we believe that the DEIR must be recirculated. The DEIR must give the public a real opportunity to understand the Program, evaluate the potential environmental impacts of the Program, and to consider alternatives that may reduce its environmental impacts. This DEIR has failed on all counts and has deprived the public of a meaningful opportunity to evaluate the Program. (See Guidelines § 15088.5 (recirculation is required when "[t]he draft EIR was so fundamentally and basically inadequate and conclusory in nature that meaningful public review and comment were precluded." *See also Mountain Lion Coalition v. Fish & Game Com.* (1989) 214 Cal.App.3d 1043, 1053, explaining that the purpose of requiring recirculation is to encourage meaningful public comment.)

Very truly yours,

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