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15 EARTH FOUNDATION; MOTHERS OF MARIN AGAINST  
16 THE SPRAY; STOP THE SPRAY EAST BAY; CITY OF  
17 ALBANY; CITY OF BERKELEY; CITY OF RICHMOND;  
18 CENTER FOR ENVIRONMENTAL HEALTH;  
19 CALIFORNIANS FOR PESTICIDE REFORM; PESTICIDE  
20 WATCH EDUCATION FUND; PESTICIDE ACTION  
21 NETWORK NORTH AMERICA; CITIZENS FOR EAST  
22 SHORE PARKS; STOP THE SPRAY SAN FRANCISCO

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SAN FRANCISCO

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

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

Petitioners and Plaintiffs,

No.

**VERIFIED PETITION FOR WRIT OF  
MANDATE AND COMPLAINT FOR  
DECLARATORY AND INJUNCTIVE  
RELIEF**

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v.

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

Respondents and Defendants.

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

**INTRODUCTION**

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

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

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

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

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

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

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

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



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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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







1 thresholds being reached,” and to “[e]nsure that the long-term protection of the environment,  
2 consistent with the provision of a decent home and suitable living environment for every  
3 Californian, shall be the guiding criterion in public decisions.” CAL. PUB. RES. CODE §§  
4 21000(d), 21001(d).

5 **42.** To accomplish these purposes, CEQA requires public agency decision-makers to  
6 document and to consider the environmental implications of their actions. Most importantly,  
7 CEQA requires that agencies prepare an EIR “[i]f there is substantial evidence” that an action or  
8 “project” “may have a significant effect on the environment.” CAL. PUB. RES. CODE § 21080(d).

9 **43.** An EIR is an informational document that must provide “meaningful public  
10 disclosure” to inform agency decision-makers and the public generally of the proposed project  
11 and its potentially significant effects on the environment, including direct, indirect and  
12 cumulative effects, to identify possible ways to minimize the significant effects, and to describe  
13 reasonable alternatives to the project. CAL. PUB. RES. CODE §§ 21002.1(e), 21100; CEQA  
14 GUIDELINES § 15121.

15 **44.** In addition to requiring that agencies consider the environmental effects of their  
16 actions, CEQA specifically states that agencies may not approve a project “if there are feasible  
17 alternatives or feasible mitigation measures available which would substantially lessen the  
18 significant environmental effects of such projects.” CAL. PUB. RES. CODE § 21002.

19 **45.** The California Supreme Court has directed that CEQA procedures be  
20 “scrupulously followed,” and it has emphasized the importance of the EIR as the “heart of  
21 CEQA,” “an environmental alarm bell,” and a “document of accountability.” *Laurel Heights*  
22 *Improvement Association v. Regents of the University of California* 47 Cal. 3d 376, 392 (1988)  
23 (internal citations and quotations omitted).

#### 24 **FACTUAL BACKGROUND**

25 **46.** Having been ordered by two courts to comply with CEQA, CDFA published the  
26 Draft Eradication EIR for its Apple Moth Eradication Program in July 2009 and initiated a 60-day  
27 public comment period.

28

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

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

20           (1) Alternative MD-1 – Mating Disruption using Twist Ties – plastic twist ties infused  
21           with Apple Moth pheromone placed in areas of isolated populations either as a stand-  
22           alone treatment or in conjunction with larval treatments of *Bacillus thuringiensis kurstaki*  
23           (Btk) or spinosad [which are chemical pesticides];

24           (2) Alternative MD-2 – Mating Disruption with Ground Application of Pheromones –  
25           Apple Moth pheromone treatments applied using ground-based equipment [such as truck-  
26           mounted spray guns] and pheromone pesticide flakes or other formulations attached to  
27           bushes and other plants with sticky adhesive;

28

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

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

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

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

12 (8) Alternative SIT – Sterile Insect Technique – the release, from aircraft, of up to 20  
13 million sterile male<sup>3</sup> moths per day to disrupt mating and eradicate the population;

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

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

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

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

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

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

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

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

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

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

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

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

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

1 spraying. CDFA also failed to offer anything more than a statement that any of the other “tools”  
2 “may be considered for use anywhere an [Apple Moth] infestation is determined to exist.”

3 **55.** After the close of the public comment period on the Draft Eradication EIR and the  
4 subsequent issuance of the Final in February 2010, CDFA issued CEQA mandated “Findings”  
5 and certified the Final Eradication EIR in March 2010. In its Findings document, CDFA abruptly  
6 re-defined its Program objectives and, for the first time, disclosed that its goal is **not** to eradicate  
7 but to “contain, control and suppress” the Apple Moth. Having already rejected numerous  
8 feasible alternatives designed to achieve “control” rather than eradication during the comment  
9 period, CDFA dramatically changed course after the record had closed.

10 **56.** Also in its Findings document, CDFA cryptically states that it “will not be making  
11 any aerial releases of insect pheromone as a management strategy for the [Apple Moth]  
12 Program.” CDFA does not, however, make any findings of fact pertaining to aerial spray, nor  
13 does CDFA expressly “reject” aerial spray as an alternative option (as it does with respect to the  
14 male moth attractant permethrin that it now admits is an unacceptable cancer risk, for example).  
15 CDFA also does not explain what it means in stating that aerial spray will not be used as a  
16 “management strategy.” CDFA certified the Final Eradication EIR, which contains aerial spray  
17 as an alternative. As such, Petitioners are justifiably uncertain whether CDFA will pursue aerial  
18 spray again in the future at no more than a moment’s notice, as it did in 2007. CDFA must  
19 prepare and issue for public comment a new EIR absent aerial spray as an alternative, based on a  
20 complete and accurate project description of the new objectives to “contain, control and  
21 suppress,” with an appropriate analysis of feasible alternatives and all potential Program effects.

## 22 **FIRST CAUSE OF ACTION**

23 (For Violations of CEQA)

24 **57.** Petitioners incorporate by this reference paragraphs 1 through 56 as though they  
25 are set forth in full.

26 **58.** Respondents’ actions, decisions, and omissions in preparing, circulating, revising,  
27 certifying, and approving the Apple Moth Eradication Program and the Eradication EIR, in  
28 adopting findings, and in purporting to comply with CEQA, constitute a prejudicial abuse of

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

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

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

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

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

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

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

25 **63. Failure To Adequately Analyze And Mitigate Significant Environmental And**  
26 **Public Health Impacts:** CEQA provides that, in any case where there is substantial evidence in  
27 the administrative record that there is a fair argument that a project might produce significant  
28 environmental effects, each such effect must be revealed and fully analyzed in the EIR, giving

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

23 **64. Inadequate Findings:** Pursuant to CEQA Guidelines, an agency must make  
24 written findings describing the disposition of significant effects identified in the EIR and  
25 explaining why the agency rejected mitigation measures or project alternatives. CEQA  
26 GUIDELINES § 15091(a). These findings must be supported by substantial evidence in the record,  
27 including “facts, reasonable assumptions predicated on facts, and expert opinion support by facts”  
28 but not “argument, speculation, unsubstantiated opinion or narrative, [or] evidence which is

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

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

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

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

8 **SECOND CAUSE OF ACTION**

9 (For Declaratory Relief)

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

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

19 **THIRD CAUSE OF ACTION**

20 (For Injunctive Relief)

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

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

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

3     Dated: April 22, 2010

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

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By: \_\_\_\_\_  
Kathleen H. Goodhart

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8     Dated: April 22, 2010

EARTHJUSTICE  
DEBORAH S. REAMES (117257)

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By: \_\_\_\_\_  
Deborah S. Reames

11

12

Attorneys for Petitioners and Plaintiffs  
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STOP THE SPRAY EAST BAY; CITY OF  
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RICHMOND; CENTER FOR ENVIRONMENTAL  
HEALTH; CALIFORNIANS FOR PESTICIDE  
REFORM; PESTICIDE WATCH EDUCATION  
FUND; PESTICIDE ACTION NETWORK NORTH  
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PARKS; STOP THE SPRAY SAN FRANCISCO

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Dated: April 22, 2010

DENNIS J. HERRERA  
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DANNY CHOU (180240)

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By: \_\_\_\_\_  
Danny Chou

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Attorneys for Petitioner and Plaintiff  
CITY AND COUNTY OF SAN FRANCISCO

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**VERIFICATION**

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

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

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Nan Wishner