

1 I. INTRODUCTION AND SUMMARY OF ARGUMENT

2 The Petitioners seek a halt of the aerial spraying of the  
3 pheromone "Checkmate" over the Monterey Peninsula designed to  
4 eradicate the Light Brown Apple Moth(LBAM) unless and until an  
5 environmental impact report(EIR) has been completed and  
6 considered pursuant to the requirements of the California  
7 Environmental Quality Act(CEQA), Public Resources Code §21000 et  
8 seq by the Respondent Secretary of the California Department of  
9 Food and Agriculture prior to approving such aerial application  
10 of this substance, the toxicity of which for human subjects is  
11 unknown. The determination of an emergency necessitating the  
12 decision to proceed with the project without first preparing  
13 such an EIR is an abuse of discretion inasmuch as there is no  
14 substantial evidence to indicate this type of "emergency" comes  
15 within the statutory definition of an emergency under the  
16 guidelines of CEQA.

17 Petitioner contends that when a community is asked to bare the  
18 consequences of an untried and untested, on a human population,  
19 vector control, the officials charged with allowing such a  
20 comprehensive trespass to the properties of every resident of  
21 the Monterey Peninsula, should be fully informed of the  
22 potential environmental consequences of that decision prior to  
23 it being made. That has not occurred with regard to the project  
24 sub judice. No EIR informing the public officials and the public  
25

1 of the environmental consequences of this aerial spraying of the  
2 Monterey Peninsula with Checkmate has been prepared.

3 Submitted with this request for preliminary injunctive relief  
4 are dozens of declarations setting forth personal observations  
5 of deleterious consequences to human and animal health evidently  
6 caused by the aerial spraying. Detailed therein are numerous  
7 instances of respiratory and other illnesses triggered by the  
8 aerial spraying. Whether the cause was the spraying, or a  
9 psychosomatic response to the knowledge of having one's house  
10 and property sprayed, the result is the spraying is causing a  
11 health issue on the Monterey Peninsula which constitutes  
12 irreparable injury which should not be permitted to occur when  
13 it is being done in violation of state law.

## 14 II. STATEMENT OF FACTS

15 On or about August 20, 2007, the California Department of Food  
16 and Agriculture Secretary A. G. Kawamura caused to be filed with  
17 the State Office of Planning and Research a Notice of Exemption  
18 which indicated the Department was proceeding with a project  
19 consisting of the aerial application of a synthetic insect  
20 pheromone targeting the Light Brown Apple Moth (LBAM) over the  
21 project area defined on an accompanying map as the areas of a  
22 part of Marina, all of Seaside, Monterey, and most of Pacific  
23 Grove. Notice of Exemption attached as Exhibit A to Declaration  
24 of Alexander Henson. The goal of the project is to disrupt the  
25 breeding cycle of the LBAM by confusing the male moths,

1 impairing their ability to find mates. Id. Once the breeding  
2 cycle is broken, the LBAM population is reduced "and ultimately  
3 may be eradicated from the area." Id

4 The Respondent has available on its website a document, "Light  
5 Brown Apple Moth (LBAM) Questions and Answers" Exhibit B to  
6 Declaration of Alexander Henson This document purports to sum up  
7 the available information concerning experience throughout the  
8 world in the aerial application of a pheromone substance upon a  
9 semi-urban community such as Monterey or Seaside or Pacific  
10 Grove, and presumably it was this information that was relied  
11 upon by Respondents in making this decision sub judice.

12 Therein it is stated that the LBAM is a "recent arrival to  
13 California. The populations of LBAM are still relatively small  
14 and are considered by an international panel of expert  
15 scientists to be eradicable if significant action is taken  
16 promptly." Id.p.2

17 The document also states, "Agency policy requires that we  
18 choose the most environmentally sensitive approach that will be  
19 effective against the infestation." Id.p.3

20 It also states, "The pheromone treatments are a central part  
21 of a multi-year project that will require multiple tools to be  
22 successful. We have already contained the infestation by  
23 imposing quarantine restrictions and inspections on plant and  
24 crop shipments, *and we have suppressed the infestation by*

1 *deploying pheromone twist-ties in several locations around the*  
2 *fringes of the infested areas.” Id.p.7 (Emphasis added.)*

3 Evidently the proposed area of application has changed while  
4 the project was under consideration. In a letter dated Sept. 5,  
5 2007, NOAA wrote to Respondent indicating its concern that the  
6 project area had expanded since a July consultation to the west  
7 side of Highway 1 whereas it had been previously proposed only  
8 for the inland side of the Highway. Letter of Sept.5, 2007, from  
9 Monterey Bay National Marine Sanctuary (MBNMS) to Respondent,  
10 Exhibit C to Declaration of Alexander Henson.

11 The federal Marine Sanctuary agency had numerous concerns  
12 about whether the proposed aerial spraying would adversely  
13 impact the marine sanctuary of Monterey Bay. Id. Evidently these  
14 concerns were not addressed, requiring the MBNMS to demand in a  
15 follow-up letter that the spraying plan provide for no spraying  
16 within 300 meters of the shoreline. Letter of Sept. 7, 2007,  
17 MBNMS to Respondent, Exhibit D to Declaration of Alexander  
18 Henson. Respondent refused to provide the buffer requested,  
19 Id., and still refuses to do so, see current project map  
20 attached to Exhibit A to Dec. of Alexander Henson

21 On September 9, 10, 11, and 12, the aerial spraying of the  
22 Monterey Peninsula occurred. Declaration of David Dilworth.

23 The responses of the people who experienced adverse reactions  
24 they attribute to the spraying are as follows:

1 11 month old son taken to hospital Sept. 11, 2007, due to  
2 labored breathing, congestion and loss of appetite, diagnosed  
3 with Reactive Airway Disease. Previously no adverse health  
4 symptoms. Dec. of Timothy Wilcox of Del Rey Oaks.

5 Mother taken to hospital on Sept. 15 due to breathing  
6 difficulty. Declarant suffering from bad sore throat, rash on  
7 throat, stuffy nose and feeling flue-like. Brother exhibited  
8 same symptoms. Dec. of Gina Aiken

9 Robert T. Ouye experienced extreme difficulty breathing about  
10 midnight, Sept. 9, 2007, taken to hospital by wife where he was  
11 treated. Dec. of Joan Ouye

12 Her husband moved tarps protecting playground equipment from  
13 aerial spraying. That night had severe trouble breathing. Next  
14 day had intense chest cold. Had asthma as a child but last 15  
15 years had seen no occurrence until this episode. Her daughter  
16 played on a neighbors' lawn after the spraying the night before.  
17 Within 15 minutes the girl developed red eyes and irritation.  
18 She also developed a sore throat as did the declarant. Dec. of  
19 Kristy Sebok of Pacific Grove.

20 Declarant experienced being sprayed with neighbor on 9-11-07.  
21 The next day declarant and neighbor both complained of sore  
22 throat. Declarant also developed sore throat cough so he visited  
23 Doctor's on Duty. He was diagnosed with pharyngeal irritation  
24 and otis external. Symptoms consistent with irritation caused  
25 from spray. Dec. of Gordon Smith, Monterey.

1 Declarant returned to area after spraying to experience an  
2 almost immediate flare-up of Declarant's condition of  
3 blepharitis, eyelids itching and discharging. This usually  
4 occurs only in relation to blooming acacia and pine trees. Also  
5 declarant's condition of psoriasis became inflamed with  
6 attendant itching. Both conditions are extremely uncomfortable  
7 and seemed to be triggered by returning home where spraying had  
8 occurred. There must be something in the air after spraying  
9 which clogs the ducts around the eyelashes setting off the  
10 blepharitis. Dec. of Bob Evans

11 Family members each complained of sore throat after spraying  
12 and being outside. Son came down with strep throat, taken to  
13 doctor who indicated it was a secondary infection from some  
14 irritant. My son never had strep throat before. Dec. of Emily  
15 VanLandingham

16 During the week of the aerial spray, declarant suffered from  
17 sore throat, headache, severe fatigue and muscle aches. Also  
18 felt a distinct lack of clarity. Declarant believes that these  
19 symptoms were due to the spraying, as they were unlike anything  
20 he had ever felt before. He felt a strange and unusual fatigue  
21 in his body and just sick all over -- very difficult to  
22 concentrate and keep focus when riding his motorcycle, too,  
23 which was dangerous enough to cause Declarant to stop riding the  
24 motorcycle. Declarant never experienced anything like it.  
25 Declarant did not go see a doctor because he could not afford to

1 take the time off from work and really didn't want to pay the  
2 \$35 co-pay either, but he felt really miserable for over a week.

3 Dec. of Mathew Palady

4 Declarant's family and Declarant were all affected by the  
5 aerial apple moth spraying. Her 3.5 year old son and she began  
6 experiencing wheezing and shortness of breath on  
7 Monday. Declarant developed achy legs & back whenever she went  
8 outside. The family was still experiencing difficulty breathing  
9 a week later. Declarant's younger son developed a runny nose  
10 and was unusually irritable. Declarant's husband experienced  
11 digestive problems and a constrictive feeling in the chest. Dec.  
12 of Jennifer Lambert Hamrick of Monterey.

13  
14  
15  
16  
17 In addition to adverse human reactions to the spraying the  
18 following additional adverse impacts were observed to occur with  
19 animals reacting to the spraying:

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21  
22 The danger to aquatic life of spraying pheromones in a manner  
23 that allows contact with ocean waters is referenced in the USDA  
24 Environmental Assessment, attached as Exhibit E to the  
25 Declaration of Alexander Henson, p.8 ("aquatic invertebrate

1 toxicity values in the upper ppb to low ppm range") as aptly  
2 described in the declaration of Dr. \_\_\_\_\_Seuss.

3 III. THE STANDARD FOR ISSUANCE OF PRELIMINARY INJUNCTIVE  
4 RELIEF IN CASES ARISING UNDER THE CEQA

5 The standard governing the issuance of a preliminary  
6 injunction is guided by two factors. "The first is the  
7 likelihood that the plaintiff will prevail on the merits at  
8 trial. The second is the interim harm that the plaintiff is  
9 likely to sustain if the injunction were denied as compared to  
10 the harm that the defendant is likely to suffer if the  
11 preliminary injunction were issued." *IT Corporation v. County of*  
12 *Imperial* (1983) 35 Cal.3d 63, 69-70.

13 With regard to the first factor, it has been held that this  
14 standard does not require a showing that plaintiff will  
15 necessarily prevail on the merits; instead, only a reasonable  
16 probability of success is required. *Baypoint Mortgage*  
17 *Corporation v. Crest Premium Real Estate Investments Retirement*  
18 *Trust* (1985) 168 Cal.App.3d 818, 824.

19 It has also been held that the trial court's determination  
20 "must be guided by a mix of the potential-merit and interim harm  
21 factors; the greater the plaintiff's showing on one, the less  
22 must be shown on the other to support the injunction." *Butt v.*  
23 *State of California* (1992) 4 Cal.4<sup>th</sup> 668, 677-678.

24 III. THE FACTS OF THIS CASE WARRANT PRELIMINARY INJUNCTIVE RELIEF  
25

1           A. Petitioner Has Demonstrated A Probability of Success on  
2           the Merits

3           The Notice of Exemption filed with the State Office of  
4 Planning and Research by the Department of Food and Agriculture  
5 for this project states the project is exempt from the  
6 requirements of CEQA because it consists of specific actions  
7 necessary to mitigate or prevent an emergency. Notice of  
8 Exemption, Exhibit A attached to Declaration of Alexander  
9 Henson. The notice of exemption also states the project is  
10 exempt because it consists of actions taken by a regulatory  
11 agency, as authorized by state statute, to assure the  
12 maintenance or protection of the environment where the  
13 regulatory process involves procedures for the protection of the  
14 environment. Id

15           1. The Emergency Exemption Does Not Fit This Project

16           Regarding the definition of an emergency under CEQA, one is  
17 guiding by the statute which state an "emergency" is "a sudden,  
18 unexpected occurrence, involving a clear and imminent danger,  
19 demanding immediate action to prevent or mitigate loss of, or  
20 damage to, life, property, or essential public services.  
21 'Emergency' includes such occurrences as fire, flood,  
22 earthquake, or other soil or geologic movements, as well as such  
23 occurrences as riot, accident, or sabotage." Public Resources  
24 Code §21060.3.

1           The CEQA Guidelines add that this exemption "does not  
2 include long-term projects undertaken for the purpose of  
3 preventing or mitigating a situation that has a low probability  
4 of occurrence in the short-term." CEQA Guidelines, Calif. Code  
5 of Regulations, Title 15, §15269(c).

6           The Courts have held this exemption must be narrowly  
7 construed. To do otherwise would be to "create a hole in CEQA of  
8 fathomless depth and spectacular breadth," stated the Court in  
9 *Western Municipal Water District v. Superior Court* (1986) 187  
10 Cal.App.3d 1104, 1112, while striking a finding of an emergency  
11 exemption.

12           Similarly the Court in *Los Osos Valley Associates v. City*  
13 *of San Luis Obispo* (1994) 30 Cal.App.4<sup>th</sup> 1670, struck down a  
14 finding of an emergency exemption over groundwater pumping,  
15 finding the exemption is limited to immediate action demanded by  
16 a sudden occurrence. *Id.*, 30 Cal.App.4<sup>th</sup> at 1681-1682.

17           The spraying project sub judice is designed to be one of  
18 several tools of a multi-year project. Exhibit 3 to Dec. of  
19 Alexander Henson, p.7 The fact the pheromone lepidoptra  
20 synthetically exists in the form of "Checkmate", is proof the  
21 infestation, and the need for infestation removal, was not  
22 unexpected. The fact that the infestation has already been  
23 contained and suppressed in fringe areas indicates the  
24 occurrence is not "sudden". Evidently the moth's presence in the  
25 state was documented in February, 2007, and steps commenced in

1 June, 2007, to attack the invasion. USDA Environmental  
2 Assessment attached as Exhibit E to Declaration of Alexander  
3 Henson, pp. 1-2 If there has been time for such suppression  
4 efforts, how sudden has it been?

5 On the other hand, this response is likely to last years.  
6 Id. It is precisely this type of project which addresses a  
7 problem which has not come about "overnight" but is rather an  
8 issue of long-standing concern, with a multi-year response, that  
9 the courts have stated should not be granted an exemption from  
10 the environmental full disclosure requirements of CEQA. Herein  
11 the Respondent was aware a moth infestation from abroad was a  
12 possibility. Evidently New Zealand had faced similar outbreaks  
13 from this Australian Native Id.,p.8. The aerial application of  
14 Checkmate must have been known and proposed as a method of  
15 controlling this pest. Thus the outbreak should have and could  
16 have been anticipated, planned for, and the plan scrutinized in  
17 an EIR. As it is, the USDA Environmental Assessment states that  
18 when an eradication plan is finalized, an environmental  
19 assessment will be completed. EA, Exhibit E to Declaration of  
20 Alexander Henson. The question must be asked whether this  
21 spraying being undertaken now is part of a plan or not? The EA  
22 dated July 2007 asserts no plan yet exists, Id, while the  
23 Respondents' document asserts "The proposed aerial treatments  
24 are the next step in the eradication process." Exhibit X to  
25 Declaration of Alexander Henson, p.7 Similarly, there is no

1 reason to embark upon a multi-year plan without the prior  
2 preparation and consideration of an EIR on the environmental  
3 impacts associated with implementation of the plan of  
4 eradication.

5 2. The Regulatory Exemption Does Not Fit This Project

6 Petitioner is unable to locate any explanatory information  
7 as to just which regulatory program is referred to in the Notice  
8 of Exemption. Compare Exhibits B and E, Declaration of Alexander  
9 Henson. Presumably this reference is to a regulatory program  
10 where the process requires the preparation of a document that  
11 serves the functional equivalence of an EIR as allowed under  
12 CEQA, Public Resources Code §21080.5. However, such a process  
13 must be certified by the Secretary of the Resources Agency, and  
14 have a document which is equivalent to an EIR. CEQA Guidelines,  
15 §§15250-15253, *Mountain Lion Foundation v. Fish and Game*  
16 *Commission* (1997) 16 Cal.4<sup>th</sup> 105, 113-114. Petitioner has not  
17 been able to find any such approval for the proposed aerial  
18 spraying eradication of LBAM. Nor has any document been  
19 identified by Respondents as the functional equivalent of an EIR  
20 or the EIR process. Declaration of David Dilworth.

21 B. A Balancing of the Conveniences Dictates Injunctive  
22 Relief

23 The balancing of the conveniences certainly favors the  
24 issuance of immediate injunctive relief. If the relief is not  
25 granted residents of the Monterey Peninsula will be subjected to

1 the same kinds of harms experienced from the previous  
2 application. Those harms include

3       On the other hand, if the spraying is not performed,  
4 Respondents claim the moth will reproduce, expand its range, and  
5 cause untold millions in crop damage. Exhibit B, Declaration of  
6 Alexander Henson, pp. 5-6. However, Respondent states that it is  
7 required to use the most environmentally sensitive approach that  
8 will be effective against the infestation. Exhibit B,  
9 Declaration of Alexander Henson, p.3 Clearly the use of twist-  
10 ties in designated locations would have less environmental  
11 impacts than the wholesale aerial spraying of the entire  
12 peninsula. This alternative was evidently rejected because there  
13 do not presently exist a sufficient number of pheromone-injected  
14 twist-ties. Id., p.7. It was also rejected due to manpower  
15 shortage and cost. Id. There is no statement as to how long it  
16 would take to acquire the required amount of twist-ties. Id.

17       This raises a fundamental question about the need for the  
18 comprehensive spraying. If the spraying is designed so that LBAM  
19 males exhaust themselves chasing faux female pheromones, or  
20 become so confused they give up the search, then why wouldn't  
21 twist-ties on every telephone pole have the same confusing  
22 effect? What about spraying public streets instead of private  
23 homes and property? In other words, there is no statement  
24 anywhere indicating the necessary level of ambient pheromone  
25 required to be effective to achieve the stated purpose of

1 confusing the male moths until they have completed their life  
2 span. In the absence of this information, there is no way  
3 Respondent can claim the balance of conveniences compel the  
4 continuation of the comprehensive aerial spraying since  
5 logically a lesser intrusive means may be sufficient to meet the  
6 need.

7         Since there is no showing that application of spraying in a  
8 manner other than the comprehensive aerial spraying being done  
9 would not be efficacious, and it has been shown that treatments  
10 with twist-ties can work, and it has been shown that the  
11 comprehensive aerial spraying is sickening residents of the  
12 Peninsula, then the balance of the conveniences would favor the  
13 issuance of the requested injunctive relief to stop the aerial  
14 assault on this community at least until such time that  
15 Respondents have caused to be prepared and considered an EIR.

#### 16                 IV. ONLY A NOMINAL BOND SHOULD BE REQUIRED

17         While Code of Civil Procedure §529 seems to make the  
18 posting of a bond mandatory, in fact Courts have the common law  
19 discretion to require only a nominal bond in cases seeking to  
20 enforce a public interest. *Conover v. Hall* (1974) 11 Cal.3d 842,  
21 850-853. Under federal law precedents it has been stated that a  
22 judge may require only a nominal bond in recognition that a  
23 larger bond might be beyond the means of the public interest  
24 organization or other entity seeking enforcement of an  
25 environmental law. *People ex rel Van de Camp v. Tahoe Regional*

1 Plan (9<sup>th</sup> Cir. 1985) 766 F.2d 1319, 1325. That court went on to  
2 state that to require such a petitioner to file a substantial  
3 bond would effectively deny access to judicial review by closing  
4 the courthouse door in environmental litigation by imposing a  
5 burdensome security requirement on plaintiffs who otherwise have  
6 standing to seek enforcement of environmental statutes.

7 States courts have adopted the federal rule only to see  
8 such adoption depublished twice. *Mangini v. J,G. Durand*  
9 *International* (1994) 31 Cal.App.4<sup>th</sup> 214, 217-220 However, as the  
10 court therein indicated, depublishing cannot be deemed an  
11 expression of opinion on the correctness of the result reached  
12 by the decision. *Id.*, 31 Cal.App.4<sup>th</sup> at 219.

13 However it is clear the Court does have discretion to relax  
14 the bonding requirement, *Conover v. Hall*, supra, and see Henson  
15 and Gray, *Injunction Bonding in Environmental Litigation* (1979)  
16 19 Santa Clara L. Rev. 541

17 In this case it is clear Petitioner does not have the  
18 ability to post more than a nominal bond. Petitioner is a local  
19 non-profit association seeking to halt environmental harm  
20 pending an environmental analysis in an EIR. To condition  
21 injunctive relief upon posting more than a nominal bond is to  
22 effectively deny any such relief from the environmental harm  
23 necessitating the injunction. For these reasons it is requested  
24 the Court only condition injunctive relief on the posting of a  
25 nominal bond of no more than \$1000.00

1 V. CONCLUSION

2 The Monterey Peninsula is being assaulted from the air by  
3 the government with a little known chemical whose properties  
4 appear to be benign, but which direct experience brings into  
5 question as set out in the voluminous statements from residents  
6 of the Peninsula. For each of the reasons set out above  
7 Petitioner is entitled to an injunction to preserve the status  
8 quo and stop the trespass against every property on the  
9 Peninsula pending the completion of an EIR designed to  
10 demonstrate that the state government has truly understood the  
11 environmental ramifications of this project before forcing it  
12 upon this local community.

13  
14 Dated this 4<sup>th</sup> day of October,  
2007

15  
16 \_\_\_\_\_  
ALEXANDER T.  
HENSON, SB#53741