

**Bringing you HOPE -
Helping Our Peninsula's Environment**

Box 1495, Carmel, CA 93921
831/ 624-6500

Info7 at 1hope.org
www.1hope.org

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September 25, 2007

**LBA Moth is a False Alarm, Not an Emergency,
Request for Rescission of Checkmate Section 18 Exemption**

Good morning,

HOPE¹ respectfully requests that US-EPA remove or rescind the FIFRA Section 18 quarantine emergency exemption granted Jul 24, 2007 for Checkmate chemicals intended to eradicate the LBA moth (*Epiphyas postvittana*).

We base this on highly relevant facts, which USDA failed to provide when US-EPA considered a finding of emergency for the quarantine exemption. These facts overwhelmingly contradict USDA's claim that finding the LBA moth in California is an emergency.

- **The LBA moth has lived widely² across California for years³ maybe decades, is not spreading⁴, and has caused no documented damage to its crops or agriculture.**
- **In Hawaii, where the LBA moth has lived for more than a hundred years, it has done no serious damage.⁵**

While there is no evidence of harm from the Moth, the Checkmate pesticide has generated some.

As of today, some **90 Monterey Peninsula residents** have filled out forms describing symptoms which arose soon after the first aerial spraying of Checkmate began Sept 9, 2007. Symptoms include **severe respiratory ailments, asthma increases, skin rashes, muscle aches, headaches, and severe abdominal pain, some resulting in emergency room visits and hospitalizations. Others report illnesses in cats, and some 135 dead bees⁶.**

USDA's Misdeeds

Besides misleading EPA to obtain an emergency exemption and **prevent public comment⁷**,

¹ One of the successful litigants forcing US-EPA, US-FWS & NMFS to analyze impacts of pesticides on endangered species. Case 2:04-cv-01998-JCC

² The LBA Moth in California ranges from Napa to Los Angeles - some 300 miles. It has been found most densely and widespread in Santa Cruz County.

³ UC Davis Entomologist James R. Carey wrote the LBA moths were "*probably here a very long time prior to its discovery and it's probably far more widespread than currently delineated.*" Carey did not merely write "long time prior" he wrote "*very long time prior.*" Scientists typically choose their words very carefully and rarely use adjectives. <http://news.ucanr.org/storyshow.cfm?story=990>

⁴ USDA Spokesman Larry Hawkins on KRXX Radio Sept 10, 2007. The LBA moth typically flies no farther from its birthplace **in a lifetime** than you can throw a rock (**20-30 meters**), to a maximum of 100 meters).

⁵ The Hawaii Dept of Agriculture wrote on May 2, 2007 "[The LBA Moth] *was first detected in Hawaii more than a century ago, in 1896, but has not been a significant pest in Hawaii.* In fact, LBAM may actually be considered a biocontrol agent for serious invasive weeds, such as gorse and blackberry in Hawaii." http://www.hawaii.gov/hdoa/meetings_reports/news-releases/2007-news-releases/news-release-nr07-09-may-2-2007/

⁶ Important because pheromones can have toxic effects on related insects.

⁷ Federal Register -- Vol. 72, No. 129 / Friday, July 6, 2007

Founded in 1998, and known for helping with hundreds of environmental and democracy successes, H.O.P.E. is a non-profit, tax deductible, public interest group protecting our Monterey Peninsula's natural land, air, and water ecosystems and public participation in government, using science, law, education, news alerts and advocacy.

***after* getting NOAA's National Marine Sanctuary and the US-Fish & Wildlife Service to sign off on the project, USDA almost doubled the spraying area of cities from 33 to 60 square miles and added new ecosystems.**

NOAA withdrew their support after independently finding out about the expanded boundaries and the potential for the pesticide to kill aquatic invertebrates in very tiny amounts (parts per billion).

Law Matters

A genuine emergency is an event – not a condition and not speculation. Courts have taken a very narrow view of an emergency so that it is not used to create holes in public interest laws of "*fathomless depth and spectacular breadth*."⁸ "A legal emergency exists when there is an **immediate threat to life or property**."

Examining this - USDA has not claimed the moths pose any threat to humans. That leaves harm to property. While USDA waves their arms about potential of a hundred million dollars in agriculture losses, Hawaii's hundred years of experience with no significant harm, and zero documented harm in California from the LBA moth contradicts USDA's wild speculation as meaningless.

While EPA has broad authority to let chemicals avoid testing for emergency purposes, HOPE believes EPA was intentionally misled by USDA when they failed to provide, or hid, vital facts from you to obtain an emergency exemption. In addition, this is grossly unfair to the many chemical manufacturers who have spent hundreds of millions of dollars to comply with FIFRA.

In any case congressionally made laws, such as FIFRA, cannot and do not overpower our constitutional rights to personal and public health.

HOPE believes strongly that no untested chemical should be aerially sprayed on inhabited areas.

HOPE also believes it is highly relevant that ***USDA has never conducted a successful eradication program using pheromones.***

So, HOPE respectfully requests US-EPA remove or rescind the FIFRA emergency exemption granted Jul 24, 2007 for **Aerial** Spraying of Checkmate chemicals and **have USDA re-submit their application** because **there is no emergency and because USDA misled your agency and other agencies.**

With our best wishes,

David Dilworth, Executive Director

⁸ In Western Municipal Water District vs. Superior Court (4th district 1986) 187 Cal. App. 3rd 1104, the court of appeal insisted that in order not to "create a hole in CEQA of fathomless depth and spectacular breadth, the concept of 'emergency' should be interpreted narrowly."

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