



penalties for violation of these provisions and would provide that any employer who permits an unregistered person to perform any duties for which a registration is required shall be issued a warning notice for the initial violation and shall be assessed a civil penalty of between \$250 and \$2,000 for each subsequent violation. This bill, which would also exclude various governmental entities and any employee thereof from its coverage, is pending in the Assembly Labor and Employment Committee.

**AB 1184 (Floyd).** Existing law imposes specified civil penalties on employers, except those that are governmental entities or any employer for first-instance violations of occupational safety and health provisions (other than serious, willful, or repeated violations) resulting from the inspection of the employer's establishment or workplace, unless the establishment or workplace is cited, on the basis of the inspection, for ten or more violations. As introduced March 6, this bill would repeal the above exception.

**AB 1495 (Tanner).** SB 198 (B. Greene) (Chapter 1369, Statutes of 1989) requires every employer to establish, implement, and maintain an effective written injury prevention program including specified elements, and to provide specified training of employees in general safe and health work practices. As introduced March 7, this bill would additionally require an employer's injury prevention program to contain specific provisions that include, among the employees covered by an injury prevention program, the employees of a contractor whose employees perform work for the employer under the first-line supervision of the employer at his/her worksite or premises. This bill is pending in the Assembly Labor and Employment Committee.

**AB 1545 (Friedman).** Existing law imposes various civil penalties on persons convicted of violating certain occupational safety and health provisions. As introduced March 7, this bill would increase by 50% the amount of these civil penalties. This bill is pending in the Assembly Labor and Employment Committee.

**AB 1718 (Boland).** Existing law prohibits an elevator from being operated in this state unless a permit for its operation is issued by DOSH, and unless the permit remains in effect and is kept posted conspicuously in the elevator car. It also permits DOSH to issue elevator permits based upon a certificate of inspection by any qualified elevator inspector of any municipality, upon proof of its satisfaction that the safety requirements of the

municipality equal the minimum safety requirements for elevators adopted by OSB. As introduced March 8, this bill would permit the operation of an elevator if a permit for its operation is either issued by, or in behalf of, DOSH, in conformance with these provisions. This bill is pending in the Assembly Labor and Employment Committee.

**AB 1980 (Horcher).** Existing law provides that a petition for reconsideration is deemed to have been denied by OSB if the Board does not act upon the petition within 30 days from the date of filing. As introduced March 8, this bill would extend to 45 days from the date of filing the time within which OSB is to act upon a petition for reconsideration before the petition is deemed to have been denied. This bill is pending in the Assembly Labor and Employment Committee.

**AB 198 (Elder),** as introduced January 7, would require the Division of Labor Statistics within DIR to include in its 1992 annual report an analysis of the rate and frequency of injuries to oil refinery and chemical plant workers as

compared to other industrial occupational categories. This bill is pending in the Assembly Labor and Employment Committee.

**AB 383 (Tucker).** Existing law imposes criminal penalties on every employer or employee having direction, management, control, or custody of an employee or place of employment who is convicted of a willful violation of an occupational safety or health order that causes the death or prolonged impairment of any employee. As introduced January 30, this bill would instead impose those specified penalties on any person who has direction, management, control, or custody of any employment, place of employment, or other employee. This bill is pending in the Assembly Labor and Employment Committee.

#### FUTURE MEETINGS:

July 25 in San Diego.

August 22 in Sacramento.

September 26 in Los Angeles.

October 24 in San Francisco.

November 21 in San Diego.

December 19 in Sacramento.



## DEPARTMENT OF FOOD AND AGRICULTURE

### DEPARTMENT OF FOOD AND AGRICULTURE

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The California Department of Food and Agriculture (CDFA) promotes and protects California's agriculture and executes the provisions of Food and Agricultural Code section 101 *et seq.*, which provides for CDFA's organization, authorizes it to expend available monies, and prescribes various powers and duties. The legislature initially created the Department in 1880 to study "diseases of the vine." Today the Department's functions are numerous and complex. Among other things, CDFA is authorized to adopt regulations to implement its enabling legislation; these regulations are codified in Chapters 1-7, Title 3, Chapters 8-9, Title 4, and Division 2, Title 26 of the California Code of Regulations (CCR).

The Department works to improve the quality of the environment and farm community through regulation and control of pesticides and through the exclusion, control, and eradication of pests

harmful to the state's farms, forests, parks, and gardens. The Department also works to prevent fraud and deception in the marketing of agricultural products and commodities by assuring that everyone receives the true weight and measure of goods and services.

CDFA collects information regarding agriculture and issues, broadcasts, and exhibits that information. This includes the conducting of surveys and investigations, and the maintenance of laboratories for the testing, examining, and diagnosing of livestock and poultry diseases.

The executive office of the Department consists of the director and chief deputy director, who are appointed by the Governor. The director, the executive officer in control of the Department, appoints two deputy directors. In addition to the director's general prescribed duties, he/she may also appoint committees to study and advise on special problems affecting the agricultural interests of the state and the work of the Department.

The executive office oversees the activities of seven operating divisions:

1. Division of Animal Industry—provides inspections to assure that meat and



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dairy products are safe, wholesome, and properly labeled, and helps protect cattle producers from losses from theft and straying;

2. Division of Plant Industry—protects home gardens, farms, forests, parks, and other outdoor areas from the introduction and spread of harmful plant, weed, and vertebrate pests;

3. Division of Inspection Services—provides consumer protection and industry grading services on a wide range of agricultural commodities;

4. Division of Marketing Services—produces crop and livestock reports, forecasts of production and market news information, and other marketing services for agricultural producers, handlers, and consumers; oversees the operation of marketing orders and administers the state's milk marketing program;

5. Division of Pest Management—regulates the registration, sale, and use of pesticides and works with growers, the University of California, county agricultural commissioners, state, federal and local departments of health, the U.S. Environmental Protection Agency (EPA) and the pesticide industry;

6. Division of Measurement Standards—oversees and coordinates the accuracy of weighing and measuring goods and services; and

7. Division of Fairs and Expositions—assists the state's 80 district, county, and citrus fairs in upgrading services and exhibits in response to the changing conditions of the state.

In addition, the executive office oversees the Agricultural Export Program and the activities of the Division of Administrative Services, which includes Departmental Services, Financial Services, Personnel Management, and Training and Development.

The State Board of Food and Agriculture is an advisory body which consists of the Executive Officer, Executive Secretary, and fifteen members who voluntarily represent different localities of the state. The State Board inquires into the needs of the agricultural industry and the functions of the Department. It confers with and advises the Governor and the director as to how the Department can best serve the agricultural industry and the consumers of agricultural products. In addition, it may make investigations, conduct hearings, and prosecute actions concerning all matters and subjects under the jurisdiction of the Department.

At the local level, county agricultural commissioners are in charge of county departments of agriculture. County agricultural commissioners cooperate in the study and control of pests that may exist

in their county. They provide public information concerning the work of the county department and the resources of their county, and make reports as to condition, acreage, production and value of the agricultural products in their county.

### MAJOR PROJECTS:

*Governor's Reorganization Plan.* At this writing, Governor Wilson has yet to flesh out the details of his plan to create the California Environmental Protection Agency (Cal-EPA), which would involve the reorganization of the Resources Agency and the transfer of pesticide regulation from CDFA, and possibly the removal of toxics and hazardous waste regulation from the Department of Health Services (DHS), to the new agency. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 112 for background information.) Although two bills have been introduced in the legislature to create Cal-EPA (see *infra* LEGISLATION), neither of them are sponsored by the Wilson administration.

However, on January 29, Governor Wilson named James E. Strock to head the new agency. Strock is currently the Assistant Administrator for Enforcement of the U.S. Environmental Protection Agency.

At this writing, it is not known whether the Governor will seek to accomplish Cal-EPA's creation through legislation or through "executive reorganization" pursuant to Government Code section 12080 *et seq.* Under the latter procedure, the Governor must submit a reorganization plan to the legislature during a regular session, which must include findings of fact on the nature, purposes, and advantages of the proposed reorganization plan. Upon receipt of such a plan, both the Senate and the Assembly must study it and issue a report within 60 days. The Governor's plan will become effective unless, within the 60-day period, either house adopts by majority a resolution rejecting the plan; the legislature is unable to amend the plan.

*Sunset of Statute Requires CDFA to Prepare EIR on Pesticide Eradication Program.* On January 2, CDFA announced that it is preparing an environmental impact report (EIR) on its Mediterranean and Mexican fruit fly eradication programs involving the use of aerial spraying of malathion bait in California. The conduct of detailed environmental studies and preparation of an EIR is required by the California Environmental Quality Act (CEQA), Public Resources Code section 21000 *et seq.*, whenever a public agency engages in a project which will have a substantial

impact on the environment. However, since the 1985 enactment of Public Resources Code section 21080.5(k) through AB 1525 (N. Waters) (Chapter 1282, Statutes of 1985) (see CRLR Vol. 5, No. 4 (Fall 1985) p. 59 for background information), CDFA's pest eradication program has been exempt from the EIR requirement. Despite the efforts of CDFA to extend the life of section 21080.5(k), the statute expired on its own terms on December 31, 1990.

Thus, much to the delight of environmentalists, CDFA is now forced to conduct its first full-blown studies of its pesticide spraying programs. These studies will allow CDFA and outside scientists a chance to examine and debate the impact and effectiveness of pesticide spraying on soil, water, air, and public health.

*Fruit Fly Research Funding Awarded.* Last October, CDFA invited proposals for Mexican fruit fly and Medfly research programs. In AB 1166 (Hansen) (Chapter 1582, Statutes of 1990), the California legislature appropriated \$750,000 to fund the CDFA-approved research projects to enable the state to handle future pest infestations more efficiently.

On February 25, CDFA's Pest Management Research Committee selected four proposals out of eleven submitted. Three of the programs will focus on the improvement of pest trapping devices, while the fourth will examine alternatives to aerial spraying. Two university projects, sponsored by the University of California and the University of Hawaii, and two U.S. Department of Agriculture projects will receive their funding over the course of the next year. Participants in this research effort will be required to update CDFA periodically as to their progress.

*Freeze Devastates State's Orange Crop.* With the recent expansion into Japanese markets as a result of a 1988 international trade agreement, California orange growers were looking forward to a prosperous year. Their hopes were cut short by the late December freeze which devastated much of the state's orange crop. The California Farm Bureau (CFB) estimated that 80% of the crop had not yet been harvested when the freeze hit. Some producers claim to have lost up to 40% of their crop. At the January 3 meeting of the State Board of Food and Agriculture, officials said that accurate damage reports will not be available until late spring. Many California orange producers believe that they will not be able to provide any real competition in the international market until at least next year. A CFB representative



expressed concern over whether the fruit trees themselves will survive.

The freeze has also jeopardized the domestic supply of oranges. California bans the import of foreign oranges due to recent Medfly infestations, and generally uses oranges grown in other states for juice production only. Navel oranges, which are the best eating oranges, were especially damaged by the freeze. Navel orange prices have doubled and there is debate over whether the supply will run out long before the season is over.

Those hurt worst by the unfavorable weather were the employees of the citrus industry who lost their jobs. In the San Joaquin Valley alone, 450 employees of one orange packing plant were let go in December.

*Proposed Relaxation of Restrictions on Propanil Study.* On March 1, CDFA published notice of its intent to amend section 6462(b), Titles 3 and 26 of the CCR, pertaining to the restricted material propanil. This regulation prohibits the application of propanil in several counties of the state, but permits its use in a designated study area in Glenn and Colusa counties where its use is otherwise prohibited. The purpose of the study is to determine whether controlled and monitored propanil applications can be made without damage to susceptible crops such as prune trees, pistachios, and grapes. In accordance with the 1986 Propanil Field Trials Project Protocol, which is incorporated into the regulation by reference, propanil use in the study area is tightly controlled to prevent drifting of the chemical and damage to susceptible crops. In addition, the existing regulation requires modification or termination of propanil applications if air concentrations of propanil are detected in excess of 4.4 micrograms per thousand cubic meters per hour within one mile of susceptible crops.

After seven years of study, annual propanil monitoring reports indicate that limited propanil use under controlled conditions has not caused any reported damage to non-target crops, making it unnecessary to continue studying off-site movement of propanil from treated fields and reasonable to allow continuation of such propanil applications. The study has also shown that the air monitoring method used in the protocol is outdated, and that certain application conditions in use (e.g., wind velocity, temperature, timing of application) are no longer necessary.

Among other things, the proposed regulatory action would change the term "propanil study area" to "propanil use monitoring area"; establish leaf sampling as an alternative method of moni-

toring for propanil that may drift outside the use monitoring area; require further modification or termination of propanil applications in a use monitoring area if propanil residue in excess of 0.1 parts per million is detected in leaves from two successive samples taken from a known susceptible crop within five miles of the use monitoring area; update the air monitoring method used to determine whether propanil residues trigger further modification or termination of its application in a use monitoring area; and specify the time interval and general location of air and leaf samples taken during propanil applications. In addition, the Protocol would be revised to update and clarify its requirements and incorporate the proposed regulatory changes.

CDFA was scheduled to hold a public hearing on these proposed regulatory changes on April 18 in Sacramento.

*CDFA Proposes Regulations for the Establishment of Hazard Communication Procedures Between Employers and Employees.* On March 8, CDFA published notice of its intent to amend sections 6618 and 6724, and adopt sections 6723 and 6761, Titles 3 and 26 of the CCR, pertaining to hazard communication procedures between employers and their employees who may be exposed to pesticides during the course of their work. Pursuant to section 12980 of the Food and Agricultural Code, the proposed changes would establish formal procedures to provide employees, their representatives, and physicians with access to certain information regarding pesticides. In addition, the changes would supplement current regulations dealing with hazard communication to employees and ensure that CDFA has a hazard communication program which is equivalent in all respects to the federal hazard communication standard which was revised in 1988.

The amendment to section 6618 would clarify who must give notice of a pesticide application. Section 6723 would require employers of employees who handle pesticides to make certain information regarding pesticides accessible to those employees, their representatives, or physicians. The amendment to section 6724 would clarify the training which employers are required to give their employees who handle pesticides. Section 6761 would require the operator of the property or, in some cases, the labor contractor to make certain information regarding pesticides accessible to field workers, their representatives, or physicians.

The Department was scheduled to hold public hearings on these proposed changes on April 24 in Sacramento,

April 26 in Fresno, and April 30 in San Diego. The written public comment period closed on May 3.

*Criteria for Identifying Pesticides as Toxic Air Contaminants.* On January 16, the Office of Administrative Law (OAL) approved CDFA's proposed adoption of section 6890, Titles 3 and 26 of the CCR, pertaining to toxic air contaminants (TACs). Existing law requires CDFA to evaluate the health effects of pesticides which may be, or are, emitted into the ambient air and which may be determined to be TACs. A TAC is an air pollutant which may cause or contribute to an increase in mortality or serious illness, or which may pose a present or potential hazard to human health. If a pesticide is listed as a TAC, the CDFA Director is required to determine the need for control measures for that pesticide. The adopted regulation establishes specific criteria to be used by the Director in determining whether a pesticide is a TAC. Pesticides which meet the criteria established in the new regulation are identified as TACs, not as health hazards. The adopted section is intended to identify those airborne pesticides that might have the potential to become health hazards for consideration of further monitoring or other controls.

*Status Update on Other Proposed Regulatory Changes.* The following is an update on the status of other regulatory changes proposed and/or adopted by CDFA and discussed in recent issues of the *Reporter*:

-Regulations for the Prevention of Injurious Plant Diseases. CDFA has postponed action on its proposal to adopt sections 3008 and 3553 and amend section 3407, Title 3 of the CCR, pertaining to psorosium-free citrus seed sources, citrus moving and cutting permits, and citrus tristeza virus interior quarantine, pending input from the California Agricultural Commissioners' Association's Committee on Pest Prevention. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 135 for background information.) The proposal is aimed at preventing the artificial spread of certain citrus virus diseases. According to Barbara Hass of CDFA's Division of Plant Industry, Pest Exclusion Branch, an escalation last fall in the occurrence of the diseases addressed in the proposed regulatory changes has prompted CDFA to reevaluate the entire program. The Department is considering several options, including increasing the frequency of testing, and is awaiting input from the Committee before taking action.

-Direct Marketing. CDFA submitted its proposal to amend section 1392 and several of its subsections in Title 3 of the



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CCR, pertaining to direct marketing, to OAL on February 26. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 136 for detailed background information.)

-Lettuce Container Weight Requirements. On December 11, CDFA held a public hearing on its proposal to repeal section 1380.19(u), which specifies the standard net weight units for salad products; section 1438.42, which specifies that nonconsumer containers of salad products hold standard net weight units of five, ten, or fifteen pounds; and section 1438.43, which specifies the weight requirements for consumer containers of salad products. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 111 for background information.) At this writing, the Department is still reviewing the public comments received and has not yet submitted the rulemaking record to OAL for approval.

-Economic Poison Registration Procedures. On February 6, the public comment period ended on CDFA's proposal to renumber existing sections 6151, 6152, and 6153 to sections 6150, 6151, and 6152, respectively; amend new section 6152 and section 6154; and adopt new sections 6153, 6153.5, and 6155, Titles 3 and 26 of the CCR. Pursuant to sections 12811 and 12821 of the Food and Agricultural Code, these proposed regulatory changes would establish procedures to be followed by registrants when there is a change in the ownership of an economic poison, a change in the name of the registrant of an economic poison, or a change in the formulation of an economic poison. At this writing, CDFA is preparing the rulemaking package for submission to OAL.

-The Addition of Bentazon to the Groundwater Protection List. On February 8, CDFA held a public hearing on its proposal to amend sections 6800(a), 6400(n)(10), 6416, and 6570(a), adopt section 6486.6, and repeal section 6484, Titles 3 and 26 of the CCR. These changes would add bentazon (also known as Basagran) to the Groundwater Protection List established under the Pesticide Contamination Prevention Act of 1985 (PCPA), Food and Agricultural Code section 13141 et seq., and modify its use statewide. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 111 for background information.) According to Marshall Lee of the Department's Environmental Monitoring and Pest Management Branch, CDFA is planning to conduct a thorough review of the complex public comments before submitting the rulemaking package to OAL.

### LEGISLATION:

*AB 1122 (Sher)*, as introduced March 5, and *SB 51 (Torres)*, as introduced December 4, would both create the California Environmental Protection Agency (Cal-EPA). AB 1122 would include within that agency the existing Air Resources Board, the California Integrated Waste Management and Recycling Board, the California Energy Commission, and the Water Resources Control Board; SB 51 would include all of these except the Energy Commission. Additionally, both bills would create the Department of Toxic Substances Control and would transfer to that Department the duties of the Department of Health Services (DHS) with regard to hazardous waste, hazardous substances, and radioactive materials, and the duties of CDFA with regard to economic poisons. AB 1122 is pending in the Assembly Committee on Environmental Safety and Toxic Materials; SB 51 is pending in the Senate Appropriations Committee.

*AB 1854 (Connelly)*. Under existing law, CDFA's Director is authorized to establish permissible tolerances for pesticide chemicals in or on produce, and to perform related duties. As introduced March 8, this bill would repeal those provisions and would require the Director to adopt permissible tolerances, and would require those tolerances to be the tolerances determined by DHS. This bill would prohibit CDFA's Director from registering or renewing a registration for a food use economic poison, unless the applicant for registration has set a tolerance for the food use economic poison and demonstrated to the satisfaction of DHS that the tolerance meets certain requirements. This bill is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

*AB 1742 (Hayden)*, as introduced March 8, would, commencing January 1, 1995, prohibit the registration of any pesticide which contains an active ingredient known to cause cancer or reproductive harm, for which a mandatory health effects study has not been filed with CDFA or, if filed, has been determined by CDFA to be inadequate. This bill is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

*AB 1685 (Chandler)*. Under existing law, any person who violates specified pesticide provisions relating to agriculture chemicals, livestock remedies, and commercial feeds is civilly liable in an amount not to exceed \$10,000. As introduced March 8, this bill would impose a minimum penalty of \$1,000 for violating these provisions. This bill is pending in the Assembly Agriculture Committee.

*AB 1213 (Jones)*. Existing law requires CDFA and DHS to jointly review the existing federal and state pesticide registration and food safety system and determine whether existing programs adequately protect infants and children from dietary exposure to pesticide residues, and to submit a report to the Governor and the legislature. As introduced March 6, this bill would recast and revise those provisions, and would require CDFA's Director to commence a statewide survey of food consumption among children, taking into account variations in consumption based on age, ethnic origin, socioeconomic, and geographic location. This bill is pending in the Assembly Agriculture Committee.

*AB 936 (Areias)*. Existing law authorizes CDFA to establish a direct marketing program, including certified farmers' markets. As introduced March 4, this bill would require CDFA to establish demonstration projects in Sacramento and Santa Clara counties, and would authorize the issuance of nutrition coupons for use by recipients, as defined, to purchase fresh agricultural products from certified farmers' markets. This bill is pending in the Assembly Agriculture Committee.

*AB 884 (Areias)*. Existing law provides for the creation of a "California-grown" seal to promote the marketing and advertising of agricultural products produced in this state, and prohibits the use of the seal without the approval and certification of CDFA's Director or a county agricultural commissioner. As introduced February 28, this bill would recast these provisions to apply them to the marketing, advertising, or promotion of agricultural products except fruits and vegetables regulated under specified provisions and would transfer those provisions to an area of the law which authorizes the Director to provide various marketing services to improve, broaden, and extend the distribution and sale of products of this state throughout the world's market.

The bill would also provide for the creation of another "California-grown" seal for use in the marketing, advertising, or promotion of fruits and vegetables that have been produced in this state and which meet designated standards. The bill would require the Director to form a committee, with specified membership, to advise the Director on matters pertaining to these provisions and to make recommendations concerning the inspection services under these provisions. This bill would also provide that the fraudulent, misleading, or unwarranted use of the seal in violation of these



provisions is a misdemeanor. AB 884 is pending in the Assembly Agriculture Committee.

**AB 816 (Jones).** Existing law declares that designated provisions of the Food and Agricultural Code relating to pest control operations, agricultural chemicals, livestock remedies, and commercial feeds are of statewide concern and occupy the whole field of regulation regarding the registration, sale, transportation, or use of economic poisons to the exclusion of all local regulation. As introduced February 27, this bill would include the storage of economic poisons within those provisions, thereby preventing local governments from regulating any matter relating to the storage of economic poisons. This bill is pending in the Assembly Agriculture Committee.

**AB 207 (Jones),** as introduced January 8, would declare legislative findings relating to Mexican fruit flies, and authorize CDFA's Director to establish and operate a facility outside California to produce sterile Mexican fruit flies or enter into an agreement with any other public or private entity to jointly establish and operate such a facility. This bill is pending in the Assembly Agriculture Committee.

**SB 550 (Petris):** Under the Birth Defect Prevention Act of 1984, CDFA was required by December 31, 1985, to identify pesticide active ingredients with significant data gaps and to adopt a timetable for filling all data gaps. As introduced February 28, this bill would require CDFA to report pesticide active ingredient data gap and other specified information for those ingredients to the legislature on or before March 1, 1992; require CDFA's Director, not later than June 1, 1992, to adopt a timetable for the filling of those data gaps; and require the Director to suspend the registration of any pesticide on January 1, 1992, for which there remains a data gap on that date. The bill would also authorize the Director to cancel the suspension of the registration if the remaining data gap is filled. This bill is pending in the Senate Committee on Health and Human Services.

**SB 539 (Alquist).** Existing law makes it unlawful for any person to refuse to comply with any plant quarantine regulation adopted by CDFA's Director or to possess, propagate, plant, process, sell, or take any other action with regard to a plant or thing subject to a quarantine which has been imported or moved in violation of the quarantine. Under existing law, in addition to a civil penalty, any violation of this provision is an infraction for the first offense and a misdemeanor for certain subsequent offenses.

As introduced February 28, this bill would make any violation of that provision a misdemeanor. This bill is pending in the Senate Committee on Agriculture and Water Resources.

**SB 536 (Alquist)** and **SB 535 (Alquist).** The Budget Act of 1990 appropriated \$7,586,000 for the support of CDFA's plant pest disease prevention program. As introduced February 27, SB 536 would appropriate \$2,000,000 to CDFA in augmentation of that amount for the program. As introduced February 27, SB 535 would require the Controller to augment the budgeted amount in accordance with a specified formula. Both bills are pending in the Senate Committee on Budget and Fiscal Review.

The following is a status update on bills reported in detail in CRLR Vol. 11, No. 1 (Winter 1991) at page 112:

**AB 104 (Tanner)** would prohibit the CDFA Director, on and after July 1, 1992, from using specified pesticides and economic poisons in an aerial application in an urban area unless DHS first finds that the use of the material in the manner proposed by the Director will not result in a significant risk to the public health, and a scientific review panel established by this bill determines that the health risk assessment has been carried out in a scientifically acceptable manner. This bill is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

**SB 46 (Torres),** which would revise the definition of toxic air contaminant to delete an exclusion for pesticides, is pending in the Senate Committee on Toxics and Public Safety Management.

#### LITIGATION:

The consolidated *Medfly Eradication Cases*, No. 2487 (Los Angeles County Superior Court), in which numerous California cities challenge CDFA's aerial malathion spraying as a public nuisance, is still pending at this writing. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 112 and Vol. 10, No. 4 (Fall 1990) p. 137 for background information.) In early February, Judge John Zebrowski ruled on a demurrer filed by the San Joaquin Helicopter Company. The helicopter company, originally named as a defendant in *People v. Kizer*, No. BC005249 (Los Angeles Superior Court), allegedly violated Proposition 65 by spraying pesticides which contained prohibited heavy metals. Judge Zebrowski sustained the helicopter company's demurrer and dismissed it from this consolidated action because it was employed by the State of California, which is exempt from Proposition 65.

Unresolved discovery issues in the consolidated action should be settled by April, according to attorneys for the plaintiffs. Plaintiffs have also submitted a proposal for settlement of the entire action to the Attorney General's office. These negotiations will continue in an attempt to avoid complex litigation. According to Los Angeles Deputy City Attorney Keith Pritsker, the funding for this cause of action allocated by the city council is running low.

In related litigation, on January 14 the U.S. Supreme Court granted a petition for certiorari in *Mortier, et al. v. Town of Casey, Wisconsin, et al.*, 154 Wis. 2d 18, 452 N.W.2d 555 (1990). In this case, the strict aerial pesticide regulations of the small town of Casey, Wisconsin, were challenged by several local persons with agricultural interests. Plaintiffs brought this action under the Federal Insecticide, Fungicide and Rodenticide Act of 1972 (FIFRA), which they allege preempts local regulation of pesticide use. Although FIFRA contains no express language as to federal preemption of local regulation, the Wisconsin Supreme Court upheld the lower courts' decision and invalidated Casey's regulations on preemption grounds. The court based its decision on section 136(aa) of FIFRA, in which Congress authorized "states" to regulate pesticides but failed to include political subdivisions in the definition of "states." According to section 136(v), "states" are the only entities, besides the federal government, which have the authority to regulate in this area. The court found additional support for its holding in congressional committee reports, which it interpreted as indicating legislative intent to preempt local government regulation of pesticides.

This case is of interest to Californians concerned with recent pesticide activity in this state. As noted above, several challenges by local governments to state-ordered aerial malathion spraying are still pending, although they are grounded in public nuisance and not FIFRA. Should the U.S. Supreme Court find in favor of the town of Casey, the decision may revive the argument for local regulation of pesticides.

In *California v. Reilly*, No. 89-752, the U.S. District Court for the Eastern District of California recently ruled that a challenge to the U.S. Environmental Protection Agency's (EPA) dual system of regulating pesticides that cause cancer and leave residues in processed food could not be resolved from a review of the pleadings and is ripe for a judicial determination.

In a petition filed in May 1989, the State of California, several groups



(including the AFL-CIO and the Natural Resources Defense Council), and several individuals brought suit against the EPA challenging the agency's refusal to apply the Delaney Clause (Clause) of the Food, Drug, and Cosmetic Act (Act) to "old" pesticides. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 160; Vol. 10, No. 1 (Winter 1990) p. 123; and Vol. 9, No. 3 (Summer 1989) p. 98 for background information on this case.) Under the EPA's current system of regulation, "new" pesticides (those which have not yet received EPA approval) are barred from use on food if they concentrate during the processing of food and are not "safe" within the meaning of the Delaney Clause because they cause cancer when ingested by humans or animals. "Old" pesticides (those which the EPA originally found benign and registered for use in the nation's food supply) are not barred from food use even if subsequently found to cause cancer and violate the Clause's provisions. As a result, these pesticides have been registered for use, and do in fact exist, in the nation's food supply.

Plaintiffs sought a judicial determination that the Act requires EPA to apply the Clause to all carcinogenic pesticides, old and new, and also sought to require the EPA to adopt a plan for obtaining and reviewing data to determine whether carcinogens are found in processed food. The EPA and defendant-intervenors, a group of several chemical and food processor organizations, filed motions to

dismiss and for judgment on the pleadings, contending that the trial court lacked jurisdiction because: (1) plaintiffs' claims fall outside the Act's provision for judicial review; (2) no final agency action exists under the Administrative Procedure Act; (3) the action plaintiffs seek is discretionary rather than mandatory under the mandamus statute; and (4) the matter is not ripe for judicial review because the agency has yet to establish a final policy, and/or because plaintiffs have failed to exhaust administrative remedies.

In an opinion filed on September 30, 1990, the District Court held: (1) the court has subject matter jurisdiction of the claim pursuant to the Act's provision for judicial review because the plain language of the provision gives courts of appeals exclusive jurisdiction only over final orders concerning specific pesticides, and not over challenges to an alleged systemic EPA policy of non-enforcement of a specific clause such as in the instant case; (2) the court has subject matter jurisdiction pursuant to the Administrative Procedure Act because the EPA's twenty-year-old approach to pesticide regulation constitutes a final agency determination for purposes of judicial review; (3) plaintiffs are not required to exhaust administrative remedies; and (4) the challenge is ripe for judicial review for the above reasons.

#### FUTURE MEETINGS:

The State Board of Food and Agriculture usually meets on the first Thursday of each month in Sacramento.

Board members have experience in chemistry, meteorology, physics, law, administration, engineering, and related scientific fields. ARB's staff numbers over 400 and is divided into seven divisions: Administrative Services, Compliance, Monitoring and Laboratory, Mobile Source, Research, Stationary Source, and Technical Support.

#### MAJOR PROJECTS:

*Amendments to Test Methods for Determining Nonvehicular Source Emissions.* After a February 14 public hearing, ARB adopted (with minor modifications) amendments to sections 94131, 94132, and 94142, Title 17 of the CCR, three test methods for determining emissions from nonvehicular sources.

Local air pollution control districts have the primary responsibility in California for controlling air pollution from nonvehicular sources. While all districts have adopted regulations establishing emission standards from such sources, ARB is required to adopt test procedures to determine compliance with its nonvehicular emission standards and those of the districts. Stationary source tests, or determinations of gaseous and particulate matter emissions from nonvehicular sources, are conducted to ascertain whether a source complies with air pollution control laws and regulations. They are also conducted to obtain emission data for the state emission inventory.

Since 1982, staff has developed and ARB has adopted 48 test methods for measuring air emissions from stationary sources, which are codified in sections 94101-94149, Title 17 of the CCR. The proposed regulatory amendments to the following test methods will expand existing ARB Test Methods to include gaseous fluoride, 1,3-butadiene and acetaldehyde: Method 421, Determination of Gaseous Chloride and Fluoride in Emissions from Stationary Sources (new name); Method 422, Determination of Volatile Organic Compounds in Emissions from Stationary Sources (new name); and Method 430, Determination of Formaldehyde and Acetaldehyde in Emissions from Stationary Sources (new name). The revisions will also update the test methods to improve their accuracy and precision, and clarify certain sampling, analytical, and quality control procedures.

Adoption of standardized test methods promotes uniformity and quality assurance in source testing activities by establishing a consistent data base of air pollution information to which all testing organizations contribute. The broadened data base afforded by the standardized test methods support and enhance such



## RESOURCES AGENCY

### AIR RESOURCES BOARD

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Pursuant to Health and Safety Code section 39003 *et seq.*, the Air Resources Board (ARB) is charged with coordinating efforts to attain and maintain ambient air quality standards, to conduct research into the causes of and solutions to air pollution, and to systematically attack the serious problem caused by motor vehicle emissions, which are the major source of air pollution in many areas of the state. ARB is empowered to adopt regulations to implement its enabling legislation; these regulations

are codified in Titles 13, 17, and 26 of the California Code of Regulations (CCR).

ARB regulates both vehicular and stationary pollution sources. The California Clean Air Act requires attainment of state ambient air quality standards by the earliest practicable date. ARB is required to adopt the most effective emission controls possible for motor vehicles, fuels, consumer products, and a range of mobile sources.

Primary responsibility for controlling emissions from stationary sources rests with local air pollution control districts. ARB develops rules and regulations to assist the districts and oversees their enforcement activities, while providing technical and financial assistance.