



(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

Executive Officer: James D. Boyd

Chair: Jananne Sharpless

(916) 322-2990

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.



activities as control measure development, air quality modeling, and the emission inventory mandates of the Air Toxics "Hot Spots" Information and Assessment Act of 1987.

Following the February public hearing, the Board adopted the proposed amendments with several minor modifications. ARB instructed staff to extend the 45-day comment period until March 13, and adopt the modified version after an additional 15-day comment period.

Update on Other ARB Regulatory Changes. The following is a status update on regulatory changes approved by ARB and discussed in detail in previous issues of the *Reporter*:

-In December 1990, ARB broke new regulatory ground by unanimously approving emission standards for gasoline-powered lawnmowers, leaf blowers, and other home and garden tools. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 115 for background information.) The new standards will require substantial modifications in utility engines, possibly including catalytic converters, to reduce emissions by 46% by 1994 and by 55% by 1995. The regulations, which will be codified at sections 2400-2407, Title 13 of the CCR, have not yet been submitted to the Office of Administrative Law (OAL) for approval.

-The Board's December 1990 amendments to section 2256, Title 13 of the CCR, which modify the procedures for certifying alternative diesel fuel formulations, have not been submitted to OAL for approval at this writing. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 115 for background information.)

-ARB's December 1990 amendment to section 93000, Titles 17 and 26 of the CCR, identifying chloroform as a toxic air contaminant (TAC), has not been submitted to OAL at this writing. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 116 for background information.)

-The Board's December 1990 amendment to section 93000, Titles 17 and 26 of the CCR, identifying vinyl chloride as a TAC, has not been submitted to OAL at this writing. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 116 for background information.)

-The Board's December 1990 amendments to its conflict of interest code, to cover newly-created positions and to delete coverage for obsolete positions, has not been submitted for OAL approval at this writing. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 116 for background information.)

-At this writing, ARB staff is still in the process of revising the Board's test procedures to detect excessive smoke emissions from heavy-duty diesel-pow-

ered vehicles and inspection procedures to detect tampered or defective emission control systems components on gasoline- and diesel-powered vehicles. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 114 for background information.) The new test procedures, which were adopted by ARB in November 1990, will be codified at sections 2180-2187, Title 13 of the CCR. Staff hoped to release the modified version of these regulatory changes for a 15-day comment period in late March or early April.

-In November 1990, the Board unanimously approved revisions to the area designation regulations contained in sections 60200-60209, Title 17 of the CCR. The revisions to the designation regulations came in response to new air quality data collected in 1989 regarding specific geographic areas. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 115; Vol. 10, No. 4 (Fall 1990) p. 139; and Vol. 9, No. 4 (Fall 1989) p. 108 for extensive background information.) At this writing, ARB has not yet submitted these regulatory changes to OAL.

-ARB's November 1990 amendments to sections 92000, 92200, 92220, 92400, 92500, 92510, 92520, 92530, and 92540, Title 17 of the CCR, have not yet been submitted to OAL for approval. These changes to ARB's abrasive blasting regulations would, among other things, require the use of a certified abrasive in all dry blasting not conducted in a permanent building; eliminate the obsolete opacity standard applied to the use of uncertified abrasives; impose a 40% opacity standard for all permissible outdoor blasting; and replace rules allowing the use of certified abrasives with a 40% opacity rating or uncertified abrasives with a 20% standard in outdoor blasting. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 115 for background information.)

-ARB's October 1990 adoption of new Article 2, Consumer Products (sections 94507-94516), new section 94503.3, and its amendment to section 94505, Title 17 of the CCR, which will reduce volatile organic compound (VOC) emissions from consumer products by establishing limits on VOC content effective 1993 for six categories and January 1994 for ten other categories and by requiring registration of selected products, has not been submitted for OAL approval at this writing. (See CRLR Vol. 11, No. 1 (Winter 1991) p. 113 for background information.)

-ARB's October 1990 amendment to section 93000, Titles 17 and 26 of the CCR, identifying trichloroethylene as a TAC, was approved by OAL on February 27. (See CRLR Vol. 11, No. 1 (Win-

ter 1991) p. 114 for background information.)

-In September 1990, the Board adopted new regulations which will coordinate the introduction of low-emission vehicles meeting substantially more stringent exhaust emission standards and the availability of commensurate volumes of clean-burning fuels for those vehicles. The regulations also provide new specifications for "Phase I Reformulated Gasolines." (See CRLR Vol. 11, No. 1 (Winter 1991) p. 113 for detailed background information.) These new emission standards will be incorporated into amendments of sections 1900, 1904, 1956.8, 1960.1, 1960.1.5, 1960.5, 2061, 2111, 2112, 2125, and 2139, Title 13 of the CCR. The new clean fuel rules include new sections 2251.5, 2253.4, and 2257, and amendments to sections 2251, 2252, 2253.2, and 2254, Title 13 of the CCR. Test procedures for the emission impacts of using new cleaner fuels are incorporated into an amendment to section 1960.1, and in new sections 2300-2345, Title 13 of the CCR. At this writing, these rules have not yet been submitted for approval to OAL.

-ARB's September 1990 amendments to sections 90700-90704, Titles 17 and 26 of the CCR, which include both a list of substances that present a chronic or acute threat to public health determined by reference to Health and Safety Code section 44321 and a fee schedule, were submitted to OAL for approval on February 21. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 140 for background information.)

-ARB's August 1990 amendments to section 1976, Title 13 of the CCR, which specify standards for running losses and extend the durability requirements for evaporative emission control systems to be the same as those for exhaust hydrocarbon systems, were revised and released for a 15-day public comment period ending on March 15, after which the rulemaking record will be submitted to OAL for approval. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 142 for background information.)

-New section 93104, Titles 17 and 26 of the CCR, which provides airborne toxic controls for dioxin emissions from medical waste incinerators and was adopted by ARB in July 1990, is still awaiting submission to OAL at this writing. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 141 for background information.)

-ARB's July 1990 amendment to section 93000, Title 17 and 26 of the CCR, which adds inorganic arsenic to the list of TACs with no identified threshold exposure level below which no



REGULATORY AGENCY ACTION

significant adverse health effects are anticipated, is awaiting completion of the rulemaking file by the Department of Health Services prior to submission to OAL. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 141 for background information.)

-On February 13, OAL approved ARB's adoption of new sections 70700-70704, Title 17 of the CCR, which were modified at the Board's July 1990 meeting. These new regulations set forth emission accounting procedures to be employed by nonattainment districts in demonstrating adherence to state ambient air quality standards. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 141 for background information.)

-ARB's June 1990 amendments to sections 93300-93347, Titles 17 and 26 of the CCR, which identify two classes of facilities which make, use, or release toxic emissions subject to the Air Toxics "Hot Spots" Information and Assessment Act of 1987, were approved by OAL on January 22. (See CRLR Vol. 10, No. 4 (Fall 1990) pp. 139-40 for background information.)

-ARB's June 1990 amendments to sections 1956.8 and 1960.1, Title 13 of the CCR, regarding hydrocarbon, carbon monoxide, and nitrogen oxides exhaust emission standards for light-duty trucks, medium-duty vehicles, and light heavy-duty vehicles, have not yet been submitted to OAL for approval. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 140 for background information.)

-ARB's June 1990 amendments to section 1900, Title 13 of the CCR, regarding the definition of medium-duty vehicles and the test procedures for current medium-duty vehicles and light heavy-duty vehicles, have not yet been submitted to OAL for approval. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 140 for background information.)

-ARB's June 1990 amendments to sections 1968.1, 2061, 2112, and 2139, Title 13 of the CCR, regarding revisions to the in-use enforcement and on-board diagnostic regulations to make emission regulations applicable and more practical for medium-duty vehicles and light heavy-duty vehicles, have not yet been submitted to OAL for approval. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 140 for background information.)

-ARB's June 1990 amendments to sections 70303-70304, Title 17 of the CCR, which define the conditions which an area must meet to be classified as "nonattainment-transitional," set forth conditions under which a nonattainment area may be redesignated as attainment when monitoring at the site with the highest concentration is discontinued,

and provide methods for identifying extreme concentration events as highly irregular or infrequent violations that should not be considered in the designations, were approved by OAL on January 2. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 139 for background information.)

-ARB's May 1990 adoption of new section 90800.1 and amendments to sections 90800, 90802, and 90803, Title 17 of the CCR, which require the collection of permit fees from specified nonvehicular source facilities, was approved by OAL on March 6. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) pp. 163-64 for background information.)

-On March 6, OAL approved ARB's May 1990 adoption of new section 90621.1 and amendments to section 90620-90623, Title 17 of the CCR, which require local air pollution control and air quality management districts to collect permit fees from major nonvehicular sources of sulfur oxides and nitrogen oxides to fund ARB's Atmospheric Acidity Protection Program for fiscal year 1990-91. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 164 for background information.)

-The Board's April 1990 adoption of new section 93106, Titles 17 and 26 of the CCR, which sets forth an airborne toxic control measure regulating permissible levels of asbestos-content serpentine rock used in surfacing applications, was submitted to OAL for approval on February 21. (See CRLR Vol. 10, Nos. 2 & 3 (Spring/Summer 1990) p. 163 for background information.)

-On January 28, OAL approved ARB's November 1989 adoption of new sections 94500-94506, Title 17 of the CCR, which will reduce volatile organic compounds from aerosol anti-perspirants and deodorants. (See CRLR Vol. 10, No. 4 (Fall 1990) p. 143 and Vol. 10, No. 1 (Winter 1990) p. 124 for background information.)

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) by reorganizing the Resources Agency and transferring functions of agencies outside the Resources Agency to the new Cal-EPA. *AB 1122* would include within Cal-EPA the 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 those agencies except the Energy Commission. In addition, both bills

would create the Department of Toxic Substances Control within Cal-EPA and transfer to it the duties of the Department of Health Services (DHS) with regard to hazardous waste, hazardous substances, and radioactive materials, and the duties of the California Department of Food and Agriculture (CDFA) with regard to pesticide regulation.

Governor Wilson has announced his intent to establish Cal-EPA; at this writing, however, it is unknown whether he will accomplish its creation through legislation or through "executive reorganization" under Government Code section 12080 *et seq.* (See *supra* agency report on CDFA for related discussion.)

AB 295 (Calderon), as introduced February 5, would impose an additional \$1 for motor vehicle Smog Check Program certificates; the amounts collected from this fee would be used to fund a program for individuals to report to ARB, through a toll-free telephone number or on printed forms, vehicles which emit unusual amounts of pollutants. ARB would be required to adopt regulations for the program. This bill is pending in the Senate Transportation Committee.

SB 431 (Hart), as introduced February 21, would enact the Demand-based Reduction in Vehicle Emissions (Plus Reductions in CO₂) (DRIVE) Program of 1991; require ARB to adopt implementing regulations; and apply sales tax credits and surcharges on the sale or lease of new automobiles and new light- and medium-duty trucks on the basis of the level of specified pollutants emitted. This bill is pending in the Senate Revenue and Taxation Committee.

AB 187 (Tanner). Existing law requires that pesticides and other substances which have been identified as hazardous air pollutants under specified provisions of the federal Clean Air Act be identified by the CDFA Director in the case of pesticides, or ARB as to other substances, as toxic air contaminants. As introduced January 4, this bill would instead provide that substances listed in recently-enacted amendments to the Clean Air Act are toxic air contaminants, and would require ARB to compile and maintain a list of those substances. This bill is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

AB 212 (Tanner), as amended March 14, would make various findings and declarations relating to the need to develop a plan for state action to determine the risks posed by exposure to indoor air pollution, and would require that ARB and DHS submit a specified report to the Governor and the legislature by January



1, 1993. This bill is pending in the Assembly Ways and Means Committee.

AB 280 (Moore). Existing law requires ARB, by regulation, to prohibit the use of heavy-duty motor vehicles determined to have excessive smoke emissions or other emissions-related defects. ARB may issue citations for violations; the vehicle owner is required to correct deficiencies identified in the citation, and pay a civil penalty and an additional \$300 penalty. As amended February 28, this bill would require that \$300 penalty to be imposed only upon an owner who fails to take corrective action and would impose a \$25 civil penalty in other cases. This bill is pending in the Assembly Transportation Committee.

AB 405 (Eaves). Existing law authorizes air pollution control districts and air quality management districts to establish a system whereby reductions in air contaminant emissions may be banked and used to offset future increases. As introduced February 4, this bill would instead authorize the districts, with respect to mobile and stationary sources, to establish and implement a system to use emission reductions to offset future increases; impose various restrictions on the use of offsets; and establish a state panel to develop guidelines for mobile source offset programs, which the bill would require ARB to adopt. This bill is pending in the Assembly Natural Resources Committee.

AB 484 (Connelly). Existing law prohibits agricultural burning without a permit issued by an agency designated by ARB. As introduced February 12, this bill would require ARB to study the need for and alternatives to rice straw burning, and report to the legislature by January 1, 1993. This bill is pending in the Assembly Natural Resources Committee.

AB 691 (Hayden), as introduced February 25, would make a statement of legislative intent regarding the manufacture and sale of specified chlorofluorocarbons (CFCs), and would, on and after January 1, 1993, except as specified, require the use of refrigerant recycling equipment approved by ARB in the servicing of vehicle air conditioners and other specified activities in the course of which specified refrigerants are or may be released. This bill is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

AB 859 (Vasconcellos), as introduced February 28, would make a statement of legislative intent; require specified reductions in the percentage of new motor vehicles equipped with air conditioners which utilize CFC-based prod-

ucts and which are sold, offered for sale, or certified for sale; and require ARB to adopt regulations to provide for the enforcement of those provisions. This bill is pending in the Assembly Committee on Environmental Safety and Toxic Materials.

SB 1166 (Hill). Existing law requires ARB to establish maximum standards for the volatility of gasoline sold in California at or below 9 pounds per square inch Reid vapor pressure, except that a blend of gasoline consisting of at least 10% ethyl alcohol is exempt, until October 1, 1993, from meeting the volatility standard if the gasoline used in the blend meets the volatility standard for gasoline. As introduced March 8, this bill would extend that exemption until January 1, 2000. This bill is pending in the Senate Transportation Committee.

SB 1211 (Committee on Energy and Public Utilities), as introduced March 8, would require ARB to adopt regulations requiring clean fuel producers, suppliers, distributors, and retailers to supply ARB with cost and price information, and require ARB to consult with other specified agencies and to report to the legislature concerning that information and whether clean fuels are being marketed at commercially reasonable terms. This bill is pending in the Senate Transportation Committee.

SB 1213 (Killea), as introduced March 8, would authorize air pollution control districts and air quality management districts designated as nonattainment areas for state ambient air quality standards for ozone or carbon monoxide by ARB to adopt regulations to require operators of public and commercial light- and medium-duty fleet vehicles, except as specified, when adding or replacing vehicles or when purchasing vehicles to form a new motor vehicle fleet, to purchase low-emission motor vehicles and to require, to the maximum extent feasible, that those vehicles be operated on a cleaner burning alternative fuel. This bill is pending in the Senate Committee on Governmental Organization.

LITIGATION:

In *South Coast Air Quality Management District v. Security Environmental Systems, Inc.*, No. B044023 (Feb. 21, 1991), in an unpublished, unanimous decision, the Second District Court of Appeal upheld an administrative order by the South Coast Air Quality Management District requiring an independent environmental impact statement (EIS) and health risk assessment to be conducted for the state's first proposed toxic waste incinerator. The \$29 million Ver-

non facility—surrounded by densely-populated minority neighborhoods 3.5 miles east of downtown Los Angeles—would burn up to 22,000 tons of pesticides, solvents, paints, and heavy metal residues per year, and create 19,000 tons of hazardous ash annually. In 1985, the plant had been permitted by the District without requiring an EIS. However, in the years after those permits were granted, new scientific data became available that indicate the incinerator may emit pollutants at a rate 12,000 times higher than originally thought. After the original permits expired and the project proponents sought extensions, the District imposed new conditions on the permits, including an EIS requirement. The project proponents, California Thermal Treatment Service, Inc., claimed that they had a vested right in the original permits, and that new conditions violated that interest. The appellate court disagreed, citing the new facts surrounding the plant and the public controversy which it has created. (See *supra* report on NATURAL RESOURCES DEFENSE COUNCIL for additional information.)

RECENT MEETINGS:

The California Clean Air Act of 1988 requires ARB to consider emission regulations for various types of mobile sources of pollutants (other than on-road motor vehicles). These vehicles include forklifts, light-duty farm and construction equipment, off-highway recreational vehicles, airport ground equipment, and generator sets. Emissions from these sources must be significantly reduced by January 1, 1992, including a 55% reduction in organic gases emissions and a 15% reduction in nitrogen oxides. In considering new regulations for these sources, ARB has recently held workshops to obtain feedback regarding the proposed use of advanced emission control technologies. Included among these technologies are redesigned combustion chambers, timing optimization, and use of alternative fuels. The proposed regulations, once drawn up by ARB staff, will take effect in 1995.

FUTURE MEETINGS:

August 8-9 in Sacramento (tentative).
September 12-13 in Sacramento (tentative).
October 10-11 in Sacramento (tentative).