

REPORT BY THE
AUDITOR GENERAL
OF CALIFORNIA

**REVIEW OF THE CALIFORNIA
DEPARTMENT OF FOOD AND AGRICULTURE'S
PESTICIDE REGULATORY PROGRAM**

REPORT OF THE
OFFICE OF THE AUDITOR GENERAL
TO THE
JOINT LEGISLATIVE AUDIT COMMITTEE

934

REVIEW OF THE
CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE'S
PESTICIDE REGULATORY PROGRAM

AUGUST 1980



California Legislature

Joint Legislative Audit Committee

GOVERNMENT CODE SECTION 10500 et al

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The Honorable Speaker of the Assembly
The Honorable President pro Tempore of the Senate
The Honorable Members of the Senate and the
Assembly of the Legislature of California

Members of the Legislature:

Your Joint Legislative Audit Committee respectfully submits the Auditor General's report concerning the Department of Food and Agriculture's pesticide regulatory program.

We reviewed the department's administration of pesticide evaluation and registration, pesticide illness investigations and the pesticide mill tax auditing.

The auditors are W. Michael Zimmerling, Audit Manager; Georgene Williams; Mimi Quiett; Kirk Gibson.

Respectfully submitted,

S. FLOYD MORI
Chairman, Joint Legislative
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SUMMARY

We have conducted a review of the California Department of Food and Agriculture (CDFA) which regulates the use of pesticides through product registration and evaluation, use restrictions, and investigations. This regulatory program is primarily supported by the pesticide mill tax and the product registration fee.

During our review, we found that the department has had limited success in establishing an ongoing reevaluation program. Certain pesticides currently registered have not been evaluated to ensure their safety and effectiveness for use in California in accordance with the Food and Agricultural Code and the California Administrative Code. Until the department establishes an ongoing reevaluation program, it cannot ensure that the use of potentially harmful pesticides is being eliminated.

We also found that county agricultural commissioners are unable to promptly and thoroughly investigate pesticide illness cases because the two systems that notify the commissioners of pesticide incidents are inadequate. Without prompt notification, the commissioners cannot obtain complete, accurate information that the department uses to detect and prevent pesticide use violations.

Our review of the department's audits of pesticide registrants disclosed that more audits and additional audit selection criteria could enable the department to more effectively monitor the collection of the mill tax revenue. Further, additional sales information would enable the audit staff to better determine which registrants should be audited. Lastly, the department's system for recording product registrations warrants improvement so that the CDFA can document registration decisions.

To address these problem areas, we recommend that the department institute ongoing reevaluation procedures. The department should monitor both systems that notify county agricultural commissioners of pesticide illness cases to ensure that the commissioners receive prompt notification. Additionally, the CDFA should increase the audits of pesticide registrants and expand the criteria by which registrants are selected for audit. We also suggest that the Legislature consider providing the CDFA's director with the necessary authority to require more detailed sales data. And to better document registration decisions, the department should include evaluation comments with product files and note the registration number on the data files.

INTRODUCTION

In response to legislative request, we have reviewed selected areas of the pesticide regulatory program administered by the California Department of Food and Agriculture (CDFA). This review was conducted under the authority vested in the Auditor General by Section 10527 of the Government Code.

Each year, California uses approximately 334 million pounds of pesticides to control pests that attack agricultural products and that threaten our health and welfare.* Pesticides are beneficial to agricultural production, public health and sanitation, and protection of natural resources.** However, if used improperly or without sufficient knowledge of their side effects, pesticides can poison; cause cancer, birth defects, and other afflictions; and can harm wildlife and the environment.

The California Department of Food and Agriculture is responsible for registering pesticides and for monitoring their use within the State. In this report, we have addressed the

* This is the Environmental Assessment Team's estimate of 1977 usage.

** The term "pesticide" as used in this report refers to all economic poisons intended for preventing, destroying, repelling, or mitigating any pest or intended for defoliating plants, regulating plant growth, or for artificially accelerating the drying of plant tissue. This includes all fungicides, rodenticides, and herbicides.

department's administration of product evaluation and registration, pesticide illness investigations, and the control and auditing of the pesticide mill tax (PMT). Many aspects of pesticide registration and enforcement are vested in the Federal Government and thus were outside the scope of our review.

Methodology

To determine the department's compliance with statutes and regulations, we examined and analyzed files pertaining to registered pesticides. We studied legislation and regulations and reviewed the operations of various state and county agencies which cooperate in reporting and investigating pesticide illnesses. We also examined the department's logs documenting pesticide illness investigations to determine the length of and the reasons for delays in data transmittal.

In determining the effectiveness of the collection and control of the pesticide mill tax revenue, we reviewed and analyzed PMT disbursements to counties as well as the department's assessment and collection of additional PMT revenue resulting from completed audits. We also studied the department's procedures for auditing pesticide registrants who are required to pay the mill tax and the county expenditures upon which the PMT subventions are based.

We visited 14 county agricultural commission offices to verify pesticide illness investigations and mill tax information obtained from the department. These 14 counties collectively represent 50 percent of California's total pesticide enforcement expenditures for fiscal year 1978-79 and 54 percent of the total pounds of pesticides reportedly applied in the State during 1979.

BACKGROUND

In this section, we discuss federal and state regulation of pesticides and the organizational responsibilities and funding of the State's pesticide regulatory program.

Pesticide Regulation

The United States Environmental Protection Agency (EPA) regulates pesticides at the federal level. Its authority is contained in the Federal Insecticide, Fungicide, and Rodenticide Act as amended (Public Laws 92-516, 94-140, and 95-396). Under this law, pesticides generally cannot be sold, shipped, or delivered unless they have been registered by the EPA. The EPA can unconditionally register a pesticide only if it determines that the pesticide will perform its intended function without causing any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of the pesticide.

Although most pesticides are first registered by the EPA, California's Department of Food and Agriculture also regulates the sale and use of pesticides, under the authority contained both in the Food and Agricultural Code and in certain regulations of the California Administrative Code. As part of

its pesticide regulatory program, the CDFA registers pesticides to determine whether they can be used safely and effectively under California's climate and conditions. Approximately 12,000 products have been registered in California.

Organizational Responsibility

California's pesticide regulatory program is administered by the Division of Pest Management, Environmental Protection, and Worker Safety. This division, created in 1977, is one of seven in the Department of Food and Agriculture. Its fiscal year 1978-79 expenditures of approximately \$8.5 million constitute about 17 percent of the department's total expenditures.

The objectives of this division are to

- Strengthen enforcement to protect agricultural workers and the public from the hazards of exposure to pesticides;
- Expand pest control technology using biological and integrated pest management systems; and
- Balance needed pest control methodology with environmental protection needs.

To accomplish these objectives, the department is required (1) to register and evaluate products to determine that they are safe and effective for use in California; (2) to monitor pesticide use and investigate pesticide incidents, including pesticide-related illness or death; and (3) to investigate adverse environmental concerns, such as wildlife and aquatic kills, water contamination, and damage to crops.

Funding

In 1972, a tax on the sale of pesticides was established to provide revenue to administer and enforce the pesticide regulatory program. This is a self-reported tax of 8 mills per dollar (\$.008) on all sales of registered and labeled pesticides sold for use in California. Five-eighths of the pesticide mill tax is subvned to counties as partial reimbursement for pesticide enforcement expenditures. The remaining three-eighths of the pesticide mill tax, together with license and registration fees and other funding, helps support the CDFA's costs of administering the pesticide regulatory program.

AUDIT RESULTS

THE CALIFORNIA DEPARTMENT OF FOOD AND AGRICULTURE SHOULD ESTABLISH REEVALUATION PROCEDURES

The California Department of Food and Agriculture is required by Section 2367 of the California Administrative Code to continuously evaluate all registered products. Yet the CDFA has not successfully established an ongoing reevaluation program. Such a program is important because in the past, the department registered certain products based upon EPA registration without determining whether those products were safe for use in California. Additionally, the department did not maintain complete evaluation files to document why registration decisions were made. The department also lacked adequate registration procedures as well as sufficient scientific personnel.

Registration Objectives and Procedures

The CDFA registers pesticides after it determines if products registered by the EPA can be used safely and effectively in California. To comply with regulations, product manufacturers must submit to the CDFA scientific information that supports their products' safety to man and to the environment. The data submitted should include the results of

tests made to establish the product's effectiveness, gauge its acute and chronic toxicity, and identify any environmental hazards that could occur from its use.* When the department receives this information, its registration evaluation unit should conduct a scientific evaluation to determine whether the data submitted are valid and whether the product can be safely and effectively used under the climate and conditions within California.

Product registrations expire on December 31 of each year and must be renewed. Manufacturers seeking registration renewal must submit any required data which have not been submitted previously. The manufacturer must also submit an adverse effects disclosure statement--the manufacturer's certification that any factual or scientific evidence of any adverse effect or risk of the pesticide to human health or the environment has been submitted to the department.

Reevaluation Procedures Needed

Section 12824 of the Food and Agricultural Code requires that the CDFA continuously evaluate pesticides. Also, regulation changes made in January 1980 include criteria to identify products in use which may be hazardous. While the department has reevaluated products based upon evidence of

* Environmental hazards may include injury to humans, crops, fish or wildlife; the problems of drift onto adjacent areas; or the contamination of bodies of water.

problems, it has not established procedures to reevaluate those pesticides registered before safety and efficacy data were required or for which insufficient information is currently on file.

The department's regulations list factors which should initiate product reevaluations. For example, a product should be reevaluated if a member of the general public or a worker were poisoned or killed because of exposure to a pesticide which was used according to label instructions and regulations. Less serious incidents may also trigger a product reevaluation if an investigation discloses that a pesticide has caused or is likely to cause a significant adverse impact.

During our review, we found certain conditions that indicate a need for product reevaluation. Specifically, the department had no evidence that it received or evaluated safety data from the manufacturers supporting the registration of all products. In addition, the CDFA has not always scientifically evaluated pesticides before they are registered. We reviewed 25 currently registered pesticides to determine whether the manufacturers submitted the required data to support registration of their products and to ascertain whether division scientists evaluated the data submitted for safe and effective use in California.

The division's files showed that it had received and evaluated data for only 3 of the 25 products we reviewed. There is no record of data being received or evaluations made for 6 of these products. For the remaining 16 products, manufacturers apparently had submitted no data; however, the division did have information on file relating to the active ingredients in these products.* The data had been submitted by other manufacturers for other products. According to department personnel, it is unknown whether the evaluation team consulted these data when considering registration of the 16 products.

In one instance, evaluators checked the separate ingredients of a product rather than examining its combined formulation. The product, one of the 16 products for which the department had data by active ingredient submitted by other manufacturers, contained three active ingredients. Department personnel referred to information about each of the active ingredients rather than reviewing these three ingredients in their combined formulation. Consequently, evaluators failed to determine that this product was safe and effective as formulated.

* Active ingredients are those ingredients within the pesticide that produce the desired effect. Pesticides also contain inert ingredients such as water.

Department officials cited various reasons for these problems. Prior to 1980, no adequate evaluation procedures existed. Some of the products reviewed were registered as early as 1971, before the department had developed specific evaluation procedures. Department officials stated that for many products they simply accepted the EPA review and did no further evaluation. Yet in 1971, Section 12824 of the Food and Agricultural Code required a "thorough evaluation before registering a product for the first time." Department officials also stated that they were not required to maintain documentation on product evaluations. Thus, they may have conducted an evaluation but may not have retained any records supporting the decision to register a product.

Another reason for these inadequate evaluations relates to staffing. During the early years of product registration, the department did not have sufficient scientific staff to evaluate products. The registration program manager stated that only two staff members were handling product registration in 1970. At that time, California registration was generally a rubber stamp of the EPA's product registration. In 1976, the department began hiring scientific staff, including a toxicologist, an entomologist, and a plant physiologist. Although the department has continued to broaden its scientific staff to also include a microbiologist, chemist, and an agricultural

service biologist, it still employs only one scientist in each of these disciplines. Department officials stated that more scientists are needed to reevaluate all products.

The department reevaluated several products prior to the January 1980 regulations because of evidence of adverse effects. However, since the new regulations became effective January 4, 1980, the department has formally reevaluated only one product. The registration program manager stated that insufficient scientific personnel and increased workload has precluded the unit from implementing a comprehensive reevaluation program. He told us, however, that unit staff members are currently reviewing a small number of products to determine if reevaluation is warranted.

The department was recently authorized additional scientific staff to conduct product evaluations and reevaluations; however, no new staff had been hired at the completion of our field work. This additional staffing combined with the recent regulation changes can, if properly implemented, address some of the problems outlined above.

CONCLUSION

Product reevaluation is important because certain products which were registered several years ago have not been adequately reviewed by the department's scientific staff. In addition, as products are used, more information about their use and effectiveness is available. Therefore, an effective reevaluation program will allow the department to review those products which have not been adequately reviewed and to use new information developed through product usage to improve pesticide regulation.

RECOMMENDATION

The California Department of Food and Agriculture should establish operating procedures to implement an ongoing reevaluation program.

PROMPT INVESTIGATION OF
PESTICIDE ILLNESS CASES IS NEEDED

County agricultural commissioners, who are responsible for investigating pesticide illness cases, are not always able to promptly and effectively conduct their investigations. Neither reporting system that notifies the commissioners of these cases is effective. Timely investigations are important for gathering meaningful, complete information which is used for statistical and enforcement purposes. Recently revised procedures should alleviate some of the problems of delayed notification; however, the CDFA should follow up to ensure that these procedures are effective.

Two systems exist to notify commissioners of pesticide illness cases. One system requires physicians to notify local health officials within 24 hours. These officials are then to notify county agricultural commissioners immediately. The Department of Industrial Relations (DIR) administers the other system. Physicians are required to send a Doctor's First Report of Work Injury to the DIR within seven days. By agreement, the DIR then sorts all potential pesticide cases from the doctors' reports and sends them to the CDFA.* The CDFA's Worker Health and Safety Unit then forwards these reports to the county agricultural commissioners for investigation.

* The DIR receives about 2 million doctors' reports each year; approximately 1,500 of these are potential pesticide cases.

Neither reporting system to notify county agricultural commissioners is effective. Department officials stated that physicians do not always notify county health officials. The DIR's processing of doctors' reports has been backlogged; thus, reports of pesticide cases have been delayed.

One of the department's objectives is to provide increased protection for workers and the general public from the potentially harmful effects of pesticide products in the environment. It is important that the CDFA is quickly apprised of any adverse effects on humans due to pesticide use so that county agricultural commissioners can promptly investigate. Department officials stated that pesticide exposure incidents should be investigated within a few days. Details of the exposure, such as the type of pesticide used, location, weather conditions, handling procedures, and safety equipment used should be documented.

The department uses the information from these investigations to modify use restrictions or regulations and to promote safer use of pesticides. Pesticide illness cases also trigger inspections by county agricultural commissioners. These inspections may disclose pesticide use violations or unsafe pesticide use practices and conditions. With timely information, inspectors can better pinpoint whether a pesticide incident is caused by an error in product formulation, the

applicator's incorrect mixing or handling, poor supervision on the part of growers or labor supervisors, or the workers' failure to follow instructions.

Most county agricultural commissioners we interviewed complained of delays in receiving notification of pesticide illnesses (particularly doctors' reports) and stated that they are unable to effectively investigate cases without timely notification. To determine the extent of the delays in notification, we reviewed 11 of the 109 pesticide illness cases investigated in one county in 1979. The period between the date of the injury and the county agricultural commissioner's receipt of notification from county health officials ranged from one to three weeks--an average of two weeks. But through the DIR system, it took from two to seven months or an average of four months for doctors' reports to reach the county agricultural commissioner after the date of the pesticide exposure. Moreover, this county received approximately 30 percent of the reports solely through the DIR's system rather than through the county health notification system.

Department officials stated that delays of over one month may yield poor information; after three months, investigations have little value. Because of workers' transiency, persons involved in pesticide exposure may be unavailable or difficult to reach. One county agricultural

commissioner stated that his staff is unable to investigate 10 to 20 percent of the cases it receives because of the age of the case. Likewise, the Worker Health and Safety Unit at the CDFA has not requested an investigation in some cases; unit staff stated that information necessary for conducting an investigation would likely be unavailable because of the age of the reports.

Actions Taken

Labor Code amendments and procedural changes have recently been made which should speed report processing at the Department of Industrial Relations. As of May 1, 1980, physicians need file only pesticide illness cases with the DIR. This department has also amended the doctor's report form so that it states specific requirements for reporting pesticide illness cases to the DIR.

CONCLUSION

Because county agricultural commissioners are not receiving prompt notification of pesticide cases, they are unable to thoroughly investigate the circumstances surrounding pesticide exposures. Without prompt investigations, the CDFA is unable to detect pesticide use violations and to gather data that will be used to modify regulations and thus promote safer use of pesticides.

RECOMMENDATION

The California Department of Food and Agriculture should follow up to ensure that county agricultural commissioners are receiving timely notification of pesticide illness cases through county health officials. Further, the department should ensure that the Department of Industrial Relations is forwarding required reports expeditiously.

WEAKNESSES EXIST IN THE AUDITING
OF THE PESTICIDE MILL TAX

The California Department of Food and Agriculture audits pesticide registrants to ensure that they comply with the Food and Agricultural Code provisions concerning the reporting requirements for registered pesticide sales and the assessment of the pesticide mill tax. However, the department has failed to ensure registrants' compliance with these provisions because

- The audit branch has not conducted sufficient audits of PMT registrants;
- The form used to report pesticide sales and to compute the mill tax is not detailed enough to allow evaluation prior to an audit;
- The selection of auditees is not always based upon the characteristics of the registrants.

Department Not Performing
Sufficient Audits

The CDFA has not performed sufficient audits of the pesticide registrants because the audit branch responsible for these audits is not adequately staffed.* Therefore, there is

* The Auditor General's Report No. 235.6, Review of the California Pesticide Regulatory Program, dated March 1977, also identified this problem.

no assurance that all registrants are complying with the Food and Agricultural Code and that all taxes due are being collected.

There are 1,259 pesticide distributors registered in California. The CDFA began auditing pesticide registrants in April 1974. Between 1974 and 1978, audits were conducted by one auditor who spent approximately one-third of the available time on pesticide registrants. In 1978, one full-time auditor was added. As of November 1979, more than five years after the auditing began, the department had audited only 197 pesticide registrants.

The department is empowered to audit pesticide registrants through provisions in the Agricultural Code. Section 12842 of the code states: "Each registrant shall maintain...an accurate record of all transactions subject to assessment. Such records shall be subject to audit by the director." The audits provide the department with a means to monitor registrants' compliance with the code provisions concerning the assessment of the PMT. The value of these audits is much greater if performed routinely within a reasonable period.

The internal auditor has attempted to increase the staff in the past. However, because of budget restrictions, only one of three requests for additional auditors has been filled.

Over the past five years, more than \$300,000 in additional tax revenues has been recovered from the 197 audits. These additional assessments are approximately 10 percent above the amounts reported by the registrants. Based upon this estimate, approximately \$400,000 in taxes may be unreported and uncollected for fiscal year 1978-79. Moreover, it would require over 20 years to audit all pesticide registrants at the present rate of auditing.

Assessment Form Inadequate

The Report of Economic Poison (Pesticide) Sales and Assessment form does not provide adequate sales information so that auditors can properly evaluate a prospective auditee prior to the field audit. The department stated that it could not require any information other than total pesticide sales on the assessment form. Presently, the form requires registrants to report only their total dollar sales for the quarter. For example, a registrant that distributes 50 registered products would report only one total dollar sales figure. Consequently, an auditor has no means by which to identify whether a registrant has included the proper assessment for each of its registered products.

Additional information on the form would enable the audit staff to better determine which registrants should be audited. This modification would increase the efficiency and effectiveness of the auditors in monitoring these returns. For example, if a registrant reported the total sales of each registered product for the quarter, the division could then compare the number of products registered by the distributor with the number on the tax form. This type of desk audit, used in conjunction with a field audit, could also increase the effectiveness of the auditor at the audit site.

We requested a Legislative Counsel opinion concerning the department's authority to request additional, more specific sales information. (This opinion appears as Appendix A of this report.) According to the May 27, 1980 Legislative Counsel opinion, the department

May not require a registrant...to report to the director the monthly volume and dollar amount of sales for each individual economic poison [pesticide] for which the registrant is required to pay an assessment.

Consequently, the department does not have sufficient authority to request additional data on the assessment form.

In 1979, the Legislature recognized the need for more detailed pesticide sales information and added Item 378 to the Budget Act of 1979. This item required the CDFA to adopt regulations for the "collection of funding and use-oriented information regarding economic poison (pesticide) sales in the state." In response to this mandate, the department adopted emergency regulations requiring additional use-oriented pesticide sales information.* However, there has been no request for additional funding information because the CDFA stated that it does not have the authority to obtain this information. The Legislative Counsel concurs.

Selection of Auditees

The department's present audit selection strategy is not always based upon the composite characteristics of the registrants. Although the department considers several factors in the auditee selection process, it selects most auditees based upon their geographical location. Audit branch officials believe that this selection process results in the most effective use of its staff. However, by selecting most auditees based upon this criterion, the department may not be able to maximize registrants' compliance.

* The new information requirement concerns the reporting of the pounds of active ingredients sold and their respective percentage of sales categorized into the following end-uses: agricultural, household, home garden, industrial, institutional, and structural.

Initially, the department selects a firm for audit based upon its composite characteristics; the CDFA then chooses additional firms because of their proximity to the first auditee. The first registrant is selected for audit based upon a specific request from enforcement or registration officials, an irregularity in the registrant's PMT payments, the density of companies in a geographical area, or information from other sources. In addition, some registrants have requested audits. The other sites are then chosen because they are located in the same geographical area.

The selection of audit targets should utilize a strategy that will assure an accurate representation of the registrants' composite characteristics. By using such factors as pesticide sales dollars and the number of registered products along with the location of the registrant, the department can more accurately determine and more efficiently monitor the level of registrants' compliance.

CONCLUSION

Because of limited staffing, lack of detailed data on the assessment form, and its method of selecting auditees, the California Department of Food and Agriculture cannot ensure that pesticide registrants are complying with the Food and Agricultural Code

provisions concerning the reporting requirements for registered pesticide sales and for the assessment of the pesticide mill tax.

RECOMMENDATION

To assure compliance with the provisions of the Food and Agricultural Code and to maximize pesticide mill tax collections, we recommend that the California Department of Food and Agriculture adopt these measures:

- Increase the number of audits performed on pesticide registrants so that each registrant will be audited within a reasonable period;
- Select auditees according to their composite characteristics as well as their geographical location.

MATTERS FOR CONSIDERATION BY THE LEGISLATURE

The Legislature should consider providing the Director of the CDFA with the necessary authority to require more detailed pesticide sales data.

FOLLOW-UP ON AUDITOR GENERAL'S
REPORT NO. 235.6

The Auditor General's Report No. 235.6, (Review of the California Pesticide Regulatory Program, Office of the Auditor General, California State Legislature) issued March 21, 1977, identified a need for an increased number of audits. Our review found that the CDFA has not conducted sufficient audits of registrants or of county expenditures. Since the publication of the 1977 Auditor General's review, the CDFA has added one auditor position to conduct audits of pesticide registrants. However, during this review, we again found that the CDFA has not conducted audits of county operations since fiscal year 1975-76. At that time, the CDFA audited 1972-73 fiscal year expenditures.

IMPROVEMENTS ARE NEEDED
IN THE ADMINISTRATION OF
PRODUCT REGISTRATION FILES

The department's product registration record system is inadequate. Administrators of the registration program cannot trace product files containing the application and certificate of registration to files containing the safety and efficacy data submitted with the application. Therefore, once the registration procedures have been completed and filed, the process cannot be easily reviewed, and program management can only assume that all procedures were followed.

When a product has been registered, the department maintains the registration application, product label, and certificate of registration in a product file. The safety and efficacy data submitted with the application, together with any evaluation notes made by the scientists, are filed separately in data files; however, these data are filed by active ingredient. Thus, if 50 products containing the same active ingredient are registered, they are all filed under the same identifying number. Three products, for example, contain the active ingredient pyrethrin. The data to support registration of all products containing pyrethrin are filed under .128 without reference to the product supported. As a result, program administrators cannot easily trace the procedures that were followed in evaluating those products.

This situation exists because the department has no procedures to note product numbers on data files. Nor are evaluation comments kept in product files. As a result, the department cannot always document the reason for its decision to register a product. Department personnel have stated they have difficulty retrieving data files and evaluation comments. They propose hiring a librarian to maintain data files.

Adequate records are necessary to effectively administer any program. To ensure that procedures are followed and to document registration decisions made, program administrators should be able to trace the actions taken during product registration.

CONCLUSION

The department does not have adequate procedures ensuring that its registration decisions are documented and that these decisions are based upon an appropriate review of products in accordance with department regulations.

RECOMMENDATION

The department should file a copy of the evaluation comments in the product file and should include the product registration number on the data files. These steps will aid the department in documenting its registration decisions.

OTHER PERTINENT INFORMATION

Other factors affecting the efficient administration of the pesticide regulatory program came to our attention during this review. In the following section, we discuss the recent regulation changes and the delay in implementing certain portions of the revised regulations.

The Department Has Made Numerous Regulation Changes

In November 1979, the department enacted regulations affecting the registration of pesticides and the enforcement of pesticide use restrictions. These regulations were to become effective January 4, 1980. The registration regulations were implemented January 4, 1980 as planned; however, to clarify data requirements and registration activities of the department, the regulations referred to the Operational Protocol for Pesticide Registration and Evaluation, a detailed procedures manual.

The Protocol has the effect of the regulations and is, by reference, a part of the regulations; thus, it must be enacted according to the Administrative Procedures Act. But, because the department failed to follow the Administrative Procedures Act, it was forced to adopt emergency regulations invalidating the Protocol.

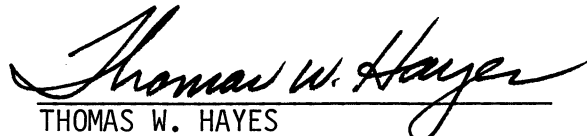
The permit portions of the regulations were also revised in November 1979. Implementation of the permit regulations was postponed from January 4, 1980 until July 1, 1980. However, in April 1980, these regulations were rewritten to reduce the paperwork required for county agricultural commissioners to issue use permits.

Certain sections of the November 1979 regulations were to remain in effect only until December 31, 1980, and other sections were to become effective January 1, 1981. In the April 1980 revision, those sections to be in effect only until December 1980 will not go into effect until January 1, 1981, and the other sections to become effective January 1, 1981 were repealed.

Several county agricultural commissioners told us the November 1979 regulations required excessive paperwork, that costs outweighed measurable benefit, and that on-site inspections of pesticide applications would suffer. Although these commissioners were able to express their concerns before final action was taken, the department was under time restrictions to revise its regulations by November 1, 1979. This revision allowed certification of the pesticide regulatory program to meet California Environmental Quality Act provisions.

Fewer regulation changes would provide improved continuity to the program and would enhance administrative effectiveness.

Respectfully submitted,


THOMAS W. HAYES
Auditor General

Date: August 25, 1980

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DEPARTMENT OF FOOD AND AGRICULTURE



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August 21, 1980

Mr. Thomas W. Hayes
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Dear Mr. Hayes

Your August draft report "Review of the California Department of Food and Agriculture's Pesticide Regulatory Program" has been carefully reviewed by myself and this Department's pesticide regulatory staff.

This draft is a minor improvement over the July draft and still disappoints me due to the criticism levied against this department based upon the previous pesticide registration program. Your draft report does not fully recognize the substantial improvement made in the program this year due to the new regulations and staffing being made available by the recently approved half-million-dollar budget increase.*

In our letters to your office dated July 21, 1980 and July 30, 1980, we responded to your previous draft report and specific questions concerning pesticide evaluations. In these responses we explained our previous evaluation process and reevaluations.

Throughout the pesticide registration and evaluation portion of your draft report, you chastised this department for activities during the 1970's, at a time when we had a small pesticide registration staff, minimal regulations, no documentation requirements and different interpretations of law.

We have recognized and admitted past weaknesses in our pesticide registration program and I do not think it is proper for your report to concentrate on past problems that have been corrected through comprehensive regulatory requirements and increased staffing. For example, we will this year increase our staff involved with the evaluation and reevaluation of pesticides by over 100 percent.

In the early 1970's, Section 12824 of the Food and Agricultural Code, that requires that a pesticide be thoroughly evaluated prior to registration, was understood to mean that the product had been federally registered. Even with this understanding it was common practice to consider readily available data concerning toxicity, persistence, fish

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* Auditor General Comment: The department objects to our criticism of past performance and cites "substantial improvement made" and "past problems that have been corrected." However, the department then credits these improvements to new regulations and an anticipated staffing increase. We cannot evaluate the impact of these future occurrences; nor can the department be sure that these changes will remedy the problems. Although the department's response criticizes the report, the department agreed with most of our recommendations.

Mr. Thomas W. Hayes
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and wildlife hazards and bee hazards found in University of California publications and others. When products containing a new active ingredient were under consideration it was, and still is, common practice to obtain and review the same data the applicant submitted to the Federal Environmental Protection Agency.

We agree with your recommendation that we establish procedures to implement an ongoing reevaluation program. With the new staff, and in cooperation with our Pesticide Registration and Evaluation Committee, we intend to prioritize the registered pesticides as to reevaluation needs and implement the program.

We share your concern over the problems that we and the county agricultural commissioners are encountering investigating pesticide related illness on a timely basis. Our efforts to get the Departments of Health Services and Industrial Relations and the County Health Officers to effectively carry out their responsibilities related to pesticide illness reporting has met with little success. Currently, the primary responsibility for pesticide illness reporting is, by law, with these agencies. In our July 21, 1980 letter to you, I described the pesticide reporting requirements and our efforts to gain compliance.

With this situation I am considering various alternatives including the requirement that persons holding a restricted materials permit or an agricultural pest control operator's license promptly report any known pesticide related illness to the county agricultural commissioner. In addition I intend to ask the Employment Development Department, who licenses farm labor contractors, to include pesticide safety in their licensing examinations and add a requirement to their regulations to require farm labor contractors to promptly report known pesticide related illnesses.

The following are specific responses to the pesticide mill assessment portion of your draft report.

Department Not Performing Sufficient Audits

The CDFA agrees there has been insufficient audit staff to establish and maintain a reasonable audit cycle.

Included in the FY 80/81 budget is the authority for five additional positions: three auditors, one Management Services Technician and one Office Assistant II. After these positions are filled and the incumbents are trained, the CDFA's capability to audit the economic poison registrants and effectively monitor the collection of the mill tax revenue will be substantially increased.

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To date, the audit staff has been extremely successful in terms of the amount of dollars returned to CDFA as the result of their audits. However, at some time in the future, the point of diminishing returns could be reached. It could be projected that less additional assessments may be collected as the registrants improve their data collection and reporting abilities. In addition, large refunds may have to be authorized because of overpayments such as the one authorized in May 1980 for \$32,000.

When the pesticide mill tax was established, it was legislated that 5/8 of the mill tax be returned to the counties and 3/8 be retained for administrative purposes. Therefore, the counties do not bear any of the costs of the audit staff. The audit staff under the present system must be supported by 3/8 of the mill tax.

Under this policy, the increased cost of the additional staff must be recovered by 3/8 of the additional assessments collected as the result of the audits completed.

Of the 1,259 current registrants, 73 firms or 5.8 percent of the total registrants paid 82.5 percent of the assessments received for calendar year 1979. Of these 73 firms, 66 percent have been audited during the past five years. The 66 percent represents less than one-fourth of the total audits conducted.

Assessment Form Inadequate

The CDFA is reviewing the assessment report form and will continue to evaluate suggestions for improving the report format within legal limitations.

The on-site audit has never been attempted without prior analysis and desk audit of the Department's records. It has been and is the practice for the auditors to review all records maintained by the Department prior to going out on a field audit. These records include the company's registered products and historical payment records. In the field, this information provides the auditor with the expertise to review the auditee's product line to ascertain that all products are registered, labeled properly and that assessments are being paid in compliance with the Food and Agricultural Code, Chapter 2, Article 4.5, Section 12841.

In the future, routine-type desk audits will be performed, under the direct supervision of an auditor, by the Management Services Technician position authorized in FY 80/81. This will provide a more economical and efficient use of personnel and increase the effectiveness of the auditor at the audit site.

Selection of Auditees

The CDFA disagrees that the selection of auditees is not always based upon the composite characteristics of the registrants and that most auditees are selected based upon their geographical location.

The selection of all auditees has always been made on such factors as pesticide sales dollars, the number of registered products and the location of the registrant. In addition, other factors were also considered in the selection process to efficiently monitor the level of compliance of the registrants and to effectively manage audit staff.*

Explanation of Criteria for Selection of Auditees

1. Amount of Dollars Paid in Assessment.

In order to maintain an equitable audit program, companies have been identified by amounts of assessments paid (see Attachment A). Auditees are then selected from the various dollar categories in order to represent large, medium, and small companies.

Note: The companies in the "no reports" category on Attachment A were reviewed for appropriateness. The majority were "exempt" registrants and the balance were discontinued registrations or new registrants who had not been required to submit a report at the time the analysis was made.

2. Density of Population of Companies in a Geographical Area.

Both companies located in California (Attachment B) and out-of-state companies (Attachment C) were identified as to city of location of records.

In order to obtain the highest cost-benefit for travel dollars expended, both in-state and out-of-state audits are considered geographically. For example, if the auditor is in the Los Angeles area, the surrounding suburbs could be included in the audit schedule. If the auditor travels out-of-state to New York, the states of New Jersey, Delaware, Pennsylvania and Connecticut could be included in the audit schedule.

3. Review of "Certificates of Registration for Economic Poisons."

An important part of the analysis prior to selection of a registrant for a field audit is the review of the documents in the department which list each registrant's registered products. Although dollar sales by product are not reported, comparison of the total sales dollars reported and the number of registered products has always been one of the primary methods of selection.

* Auditor General Comment: The department initially selects a registrant to audit based upon the listed criteria, then selects other proximate firms to audit to minimize travel costs (criteria #2 above). In the report, we recommend that the department select auditees by considering their other composite characteristics as well as their geographical locations.

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4. Intercompany Relationships.

During the review of a registrant's product line or their sales records an intercompany relationship with other business entities may be revealed. It is usually necessary to audit any other business entities which are involved prior to the conclusion of the audit of the first company.

5. Special Requests from Program Management.

There have been occasions when program management has requested an audit be made of a particular company because of information obtained by enforcement personnel. Less than five percent of the audits completed during the past five years have been requested by program management.

6. Follow-up on Information Received from Various Sources.

The auditors receive information from various sources which require follow-up.

7. Registrants that Request Audits.

In the past, registrants have contacted CDFA and requested audits because of changes in personnel or corporate structure.

8. Random Selection.

The auditor may observe in reviewing the records maintained by CDFA that a company has a large number of registered products, but does not seem to be paying a proportionate amount of pesticide mill tax. That particular company would be selected for audit the next time a trip to the area was scheduled.

Any other method of selection may also be used.

(Note: Random selection as used in this category is not the statistical sampling method.)

Response to Recommendations

When the positions authorized in FY 80/81 are filled and the individuals are trained, the CDFA will have the capability to increase the number of audits performed on pesticide registrants. It will be the audit staff's goal to routinely audit each registrant within a reasonable period. A reasonable period is considered to be less than five years, or in other words, the audit staff will conduct more than 250 audits per year.

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The composite characteristics which have been identified previously will continue to be included in the audit selection strategy.

Follow-up on Auditor General's Report Number 235.6

The CDFA has increased the number of audits of registrants since this report was issued because of the one auditor position added in March 1978.

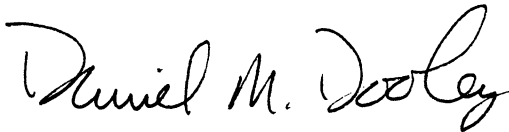
During FY 80/81, a minimum of ten county audits are scheduled to be completed.

Pesticide Mill Assessment Conclusion

The Auditor General's report affirms the CDFA's request for additional audit staff. By FY 1981/82, with the additional three auditors, the CDFA should be able to ensure that pesticide registrants are complying with the Food and Agricultural Code provisions concerning reporting requirements for registered pesticide sales and for the assessment of the pesticide mill tax.

If you have any questions concerning this response to your report, please let me know.

Sincerely



R. E. Rominger
Director
(916) 445-7126

for

Attachments

Pesticide Mill Tax
Analysis By Dollar Categories of Assessments Paid
During Calendar 1979

	California		Out of State		Total	
	No. of Firms	Percent	No. of Firms	Percent	No. of Firms	Percent
No Reports	104	16.94%	46	7.13%	150	11.91%
Zero Reports	54	8.79	111	17.21	165	13.11
\$.01 - 5.00	25	4.07	28	4.34	53	4.21
5.01 - 25.00	56	9.12	62	9.61	118	9.37
25.01 - 50.00	38	6.19	40	6.20	78	6.20
50.01 - 100.00	46	7.49	49	7.60	95	7.55
100.01 - 250.00	78	12.70	69	10.70	147	11.68
250.01 - 500.00	45	7.33	36	5.58	81	6.43
500.01 - 1,000.00	53	8.63	57	8.84	110	8.74
1,000.01 - 5,000.00	65	10.59	81	12.56	146	11.60
5,000.01 - 10,000.00	22	3.58	21	3.26	43	3.42
Over 10,000.00	28	4.57	45	6.97	73	5.78
Total	614	100.00%	645	100.00%	1,259	100.00%

Pesticide Mill Tax
 Analysis of Density of Population of
 California Companies by Geographic Area
 March 1980

<u>City</u>	<u>No. of Firms</u>	<u>Percent of California Companies (614)</u>
Los Angeles	248	40.39
Bay Area	156	25.41
Fresno	48	7.82
Sacramento	41	6.68
Santa Maria	19	3.09
San Diego	18	2.93
Monterey	16	2.61
Bakersfield	13	2.12
El Centro	11	1.79
Merced	10	1.63
Ventura	9	1.47
Chico	9	1.47
Santa Rosa	7	1.13
Eureka	4	.65
North Central and East	4	.65
Lancaster	1	.16
Total	<u>614</u>	<u>100.00</u>

Pesticide Mill Tax
 Analysis of Density of Population of
 Out-of-State Companies by Geographic Area
 March 1980

<u>State</u>	<u>No. of Firms</u>	<u>Percent of Out-of-State Companies (645)</u>
AL	2	.31
AZ	11	1.71
AR	1	.16
AK	1	.16
CO	11	1.71
CT	7	1.09
DE	3	.47
FL	14	2.17
GA	19	2.95
ID	5	.78
IL	95	14.73
IA	11	1.71
KS	16	2.48
KY	3	.47
LA	2	.31
MA	17	2.64
MD	7	1.09
MI	20	3.10
MN	20	3.10
MO	42	6.51
NE	6	.93
NB	1	.16
NV	2	.31
NJ	61	9.46
NY	87	13.49
NC	11	1.71
OH	25	3.88
OK	6	.93
OR	7	1.09
PA	25	3.88
SC	2	.31
TN	8	1.24
TX	57	8.84
UT	4	.62
VA	7	1.09
WA	8	1.24
WI	18	2.79
DC	1	.16
CD	2	.31
o/s	<u>645</u>	<u>100.09</u>

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RAY H. WHITAKER
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STANLEY M. LOURIMORE
EDWARD F. NOWAK
EDWARD K. PURCELL
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Legislative Counsel of California

BION M. GREGORY

Sacramento, California
May 27, 1980

Mr. Thomas W. Hayes, Auditor General
Office of the Auditor General
925 L Street, Suite 750
Sacramento, CA 95814

Assessments on Economic Poisons - #7909

Dear Mr. Hayes:

QUESTION NO. 1

May the Director of Food and Agriculture require that a registrant of an economic poison report to the director the monthly volume and dollar amount of sales for each individual economic poison for which the registrant is required to pay an assessment?

OPINION NO. 1

The Director of Food and Agriculture may not require a registrant of an economic poison to report to the director the monthly volume and dollar amount of sales for each individual economic poison for which the registrant is required to pay an assessment.

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JIMMIE WING
CHRISTOPHER ZIRKLE
DEPUTIES

ANALYSIS NO. 1

Article 4.5 (commencing with Section 12841) of Chapter 2 of Division 7 of the Food and Agricultural Code generally relates to assessments to be paid on the sales of registered economic poisons.

Section 12841 provides, in part, as follows:

"12841. Each registrant shall pay to the director an assessment not to exceed eight mills (\$.008) per dollar of sales for all sales of his registered and labeled economic poisons for use in this state. . . .

* * *

The section also specifies circumstances under which an assessment need not be paid, and describes procedures for determining the assessment on a combination product.

Section 12842 reads as follows:

"12842. Each registrant shall maintain in this state, or with the director's permission at another location, an accurate record of all transactions subject to assessment. Such records shall be subject to audit by the director."

Section 12843 provides, in part:

"12843. The payment required by Section 12841, together with a return in a form prescribed by the director, shall be made quarterly one calendar month after March 31, June 30, September 30, and December 31 of each year. . . ."

Article 4.5 requires that a registrant pay a specified assessment fee on the dollar amount of sales of all economic poisons which such person has registered, and requires that the registrant maintain accurate records of transactions subject to assessment. These records are specifically required to be maintained in the state, or with the permission of the Director of Food and Agriculture,* at another location. The director is authorized to audit the records. However, there is no statutory authorization for the director to require that the records, or part of the records, be brought to him. Consequently, he may not require that information which is part of the records be submitted to him by the registrant. We think that the authority to audit the records requires that the director go to the records, in such location as they are required to be kept, rather than authorizing the director to require that the records be brought to him.

The requirement that the assessment payment be paid quarterly and accompanied by a return in a form prescribed by the director does not give the director the discretion to require any information he may desire on the form; rather, the information may not exceed what is necessary to indicate that accurate payment is being made (i.e., the quarterly dollar sales upon which the assessment computation is based).

Consequently, it is our opinion that the director may not require a registrant of an economic poison to report to the director the monthly volume and dollar amount of sales for each individual economic poison for which the registrant is required to pay an assessment.

QUESTION NO. 2

Would a determination that information regarding volume of sales of particular economic poisons constitutes a trade secret affect the director's ability to require the information?

OPINION NO. 2

A determination that information regarding volume of sales of particular economic poisons constitutes a trade secret would not affect the director's ability to require the information. However, if the information were found to constitute a trade secret it may be protected from public disclosure pursuant to provisions of the California Public Records Act.

* Hereafter referred to as the director.

ANALYSIS NO. 2

As we have discussed above, the director is not authorized under existing law to require a registrant of an economic poison to report to the director the monthly volume and dollar amount of sales for each individual economic poison for which the registrant is required to pay an assessment. However, whether or not this information constitutes trade secrets is immaterial to the director's ability to require its submission. Trade secrets which become public records within the meaning of the California Public Records Act (Chapter 3.5 (commencing with Section 6250) of Division 7 of Title 1 of the Government Code) are protected from disclosure pursuant to subdivision (k) of Section 6254, if allowance of this exemption will not tend to conceal fraud or otherwise work injustice (see Uribe v. Howie, 19 Cal. App. 3d 194, 206-207).

Consequently, we conclude that a determination that information regarding volume of sales of particular economic poisons constitutes a trade secret would not affect the director's ability to require the information. However, if the information were found to constitute a trade secret it may be protected from public disclosure pursuant to provisions of the California Public Records Act.

QUESTION NO. 3

Do the provisions of Division 6 (commencing with Section 11401) or Division 7 (commencing with Section 12501) of the Food and Agricultural Code authorize the director to require that the registrant of an economic poison submit to the director the monthly dollar amount of sales of the poison?

OPINION NO. 3

There is no provision of Division 6 (commencing with Section 11401) or Division 7 (commencing with Section 12501) of the Food and Agricultural Code which authorizes the director to require that the registrant of an economic poison submit to the director the monthly dollar amount of sales of the poison.

ANALYSIS NO. 3

Section 14012 of the Food and Agricultural Code requires the registrant of an economic poison who sells or transfers any restricted material to keep accurate records of the amount and type of material involved in every sale or transfer. The section also requires that these records be open during ordinary business hours to the inspection of the director.

Thus, Section 14012 requires information regarding the quantity of various types of restricted materials, but does not require that the dollar value be recorded for the sales or transfers of restricted materials, or require that this information be submitted to the director.

As discussed above in Question No. 1, Section 12842 requires registrants to maintain records of transactions subject to assessment, which records may be audited by the director. However, it is our opinion that there is no provision of Division 6 (commencing with Section 11401) or Division 7 (commencing with Section 12501) of the Food and Agricultural Code which authorizes the director to require that the registrant of an economic poison submit to the director the monthly dollar amount of sales of such poison.

Very truly yours,

Bion M. Gregory
Legislative Counsel

By *Kathleen E. Gnekow*
Kathleen E. Gnekow
Deputy Legislative Counsel

KEG:vo

cc: Honorable S. Floyd Mori, Chairman
Joint Legislative Audit Committee

cc: Members of the Legislature
Office of the Governor
Office of the Lieutenant Governor
Secretary of State
State Controller
State Treasurer
Legislative Analyst
Director of Finance
Assembly Office of Research
Senate Office of Research
Assembly Majority/Minority Consultants
Senate Majority/Minority Consultants
California State Department Heads
Capitol Press Corps