

Memorandum 69-64

Subject: Study 52 - Sovereign Immunity (Injurious agricultural chemicals)

BACKGROUND

The following background material is extracted from the research study prepared by the Commission's consultant, Professor Van Alstyne:

In connection with damage claims arising from drifting chemical sprays used in governmental pest abatement work, where current statutory provisions appear to impose a large measure of strict liability,³²⁹ legislation again would be helpful to clarify applicability of the relevant provisions to public entities.³³⁰

³²⁹ Although governmental use of dangerous chemicals for pest control purposes is expressly authorized by statute, CAL. AGRIC. CODE §§ 14002, 14003, 14093, such authorization does not relieve the user from liability for property damage caused thereby. *Id.* §§ 14003, 14034. Moreover, use of pesticides in such a manner as to cause "any substantial drift" is a misdemeanor, the commission of which appears to be an actionable tort. *Id.* §§ 9, 12972; Note, *Crop Dusting: Two Theories of Liability?*, 19 *HASTINGS L.J.* 476, 486-87 (1968). However, the applicability of the Agricultural Code provisions to governmental entities, and their interrelationship to the Tort Claims Act of 1963, are in need of clarification. See note 330 *infra*.

³³⁰ For example, the legislature in CAL. AGRIC. CODE §§ 14003, 14093, has explicitly authorized governmental agencies to use certain dangerous chemicals in pest control operations, while the use of 2,4-D and other injurious herbicides in accordance with administrative regulations is authorized (apparently, but not explicitly, applicable to public entities) by a different section. *Id.* § 14033. Use of these chemicals may, of course, result in damage to private property. See Comment, *Crop Dusting: Two Theories of Liability?*, 19 *HASTINGS L.J.* 476 (1968). Legislative recognition of this risk is implicit in provisions declaring that authorized and lawful use of pesticides will not relieve "any person" from liability for damage to others caused by such use. CAL. AGRIC. CODE §§ 14003, 14034. Furthermore, in the interest of preventing improper and harmful methods from being employed, the legislature has delegated extensive authority to the director of agriculture to promulgate regulations, including a permit procedure, to govern the actual use of injurious agricultural chemicals. *Id.* §§ 14003-11, 14033. All users are under a mandatory duty to prevent substantial drift of economic poisons employed in the course of pest control operations and to conform to applicable regulations. *Id.* §§ 12972, 14011, 14032, 14063.

[footnote continued on next page]

It seems probable that the courts would hold governmental agencies subject to the cited statutory provisions. *Flournoy v. State*, 57 Cal. 2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (general statutory language held applicable to public entities absent legislative intent to contrary). However, this conclusion is open to some doubt. Express reference to public agencies in certain code sections, CAL. AGRIC. CODE §§ 14063, 14093, suggests the intended non-applicability of others in which no such reference is included. On the other hand, the code expressly makes the sections dealing with "Injurious Materials," *id.* §§ 14001-98, inapplicable to public entities while engaged in research projects. *Id.* § 14002. This impliedly indicates that it does apply in non-research situations. Legislation clarifying applicability would, if submitted, be helpful.

Assuming applicability of the code provisions, the scope of governmental tort liability resulting from violations is not entirely clear. In some instances, such violations, for example, the use of a method of chemical pest control which caused substantial drift in violation of section 12972 would presumably constitute a basis for entity liability for breach of a mandatory duty. CAL. GOV'T CODE § 815.6. In some instances, however, it may be questionable whether such property damage resulted from actionable negligence in applying the chemicals or from the immune discretionary determination to apply them under circumstances in which drift, and resultant damage, was inevitable. CAL. GOV'T CODE §§ 820.2, 835.4; A. VAN ALSTYNE, CALIFORNIA GOVERNMENTAL TORT LIABILITY 639 & n.4 (Cal. Cont. Educ. Bar ed. 1964). If no negligence is found or the discretionary tort immunity obtains, the question remains whether liability could be predicated upon inverse condemnation or nuisance theories. See *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App. 2d 7, 335 P.2d 527 (1959) (nuisance theory). On the need for legislative treatment of the scope of nuisance liability of public entities, in conjunction with inverse condemnation, see notes 188, 208-223 and accompanying text *supra*. Finally, it is not clear whether the special "report of loss" procedures, which may affect the injured party's ability to establish the extent of his damages from chemical drift, CAL. AGRIC. CODE §§ 11761-65, are applicable to governmental operations or are limited to private commercial pest control activities. Clarification of these doubtful areas by legislation would also be helpful.

At the last meeting, the Commission requested that this memorandum include a discussion of the liability provisions that apply to private persons, including the text of pertinent provisions. The statutory provisions are described in general terms in the footnotes from Van Alstyne's article which are set out above. The pertinent statutory provisions, referred to in the footnotes, are set out as Exhibit I (pink) attached. Also attached is a background research study.

The draft statute recommended by the staff is included in the Tentative Recommendation attached to this memorandum.

Respectfully submitted,

John H. DeMouilly
Executive Secretary

EXHIBIT I
AGRICULTURAL CODE PROVISIONS

Division 6

AGRICULTURAL PEST CONTROL BUSINESS

Chapter	Section
1. Definitions	11401
2. General Provisions	11501
3. Exemptions	11531
4. Regulation Generally	11701
5. Aircraft Operation Regulation	11901

A table is provided at the front of the Code showing disposition of the 1933 Agricultural Code sections in the revised Agricultural Code of 1967.

Chapter 1

DEFINITIONS

- Sec.
11401. Effect of definitions.
11402. License.
11403. Pest control.
11404. Pesticide.
11405. Registrant.

Cross References

Contracts by county for eradication and control of pests, see § 5405.
Cooperation with federal wildlife service, see Fish and Game Code § 3902.
Farmers and pest control operators, see § 12302.
Federal control and eradication of pests and plant diseases, see 7 U.S.C.A. § 147a.
Fest abatement districts, see Health and Safety Code § 2800 et seq.
Structural pest control operators, see Business and Professions Code § 8560 et seq.
Use and application of injurious materials, see § 14001 et seq.

Library References

Agriculture C=O.
C.J.S. Agriculture § 30 et seq.
Pesticide residues and agricultural chemicals in feedstuffs. Report of Assembly Interim Committee on Public Health, 1000-1001, p. 5, vol. 9, No. 20. Vol. 1 of Appendix to Journal of the Assembly, Reg.Sess., 1901.
Pesticides. Report of Senate Factfinding on Agriculture, 1003. Vol. 1 Appendix to Journal of the Senate, Reg.Sess., 1903.
Sovereign immunity study. Cal.Law Revision Comm. (1003) Vol. 5, p. 75.

§ 11401. Effect of definitions

Unless the context otherwise requires, the definitions in this chapter govern the construction of this division. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 150 (Stats. 1933, c. 25, p. 87, § 150, amended by Stats.1935, c. 498, p. 1500, § 1; Stats. 1945, c. 803, p. 1834, § 1; Stats.1947, c. 685, p. 1734, § 1; Stats.1949, c. 1043, p. 1941, § 2).
Pol.C. § 2322a, added by Stats.1907, c. 487, p. 801, § 1, amended by Stats.1908, c. 318, p. 187, § 2; Stats.1917, c. 508, p. 621, § 2; Stats.1921, c. 684, p. 1167, § 1; Stats.1923, c. 478, p. 1200, § 2; Stats. 1929, c. 145, p. 277, § 1; Stats.1931, c. 1193, p. 2305, § 1.
Agric.C.1933, § 100.1, added by Stats. 1949, c. 1043, p. 1983, § 1, amended by Stats.1951, c. 659, p. 1000, § 1; Stats. 1953, c. 674, p. 1943, § 1.

Administrative Code References

Administrative rules and regulations, see 3 Cal.Adm.Code § 3070 et seq.

Law Review Commentaries

Regulation of crop dusting; legal problems in a new industry. (1953) 6 Stan.L.R. 60.

Notes of Decisions

1. In general

If pests sought to be controlled represent a danger or are a detriment to agriculture, then agricultural pest control operator may lawfully act to control them, but control of ants on a potted plant within a residence or structure, not a green house or hot house, is too remotely related to agriculture and therefore such control cannot be engaged in by an agricultural pest control operator not licensed pursuant to the Structural Pest Control Act, Bus. & Prof. C. § 8300 et seq. 23 Ops. Atty.Gen. 287.

An agricultural pest control operator may lawfully advertise for the control of ants and roaches, though licensed pursuant to provisions of the Structural Pest Control Act. Id.

Agric.C.1933, §§ 100.1-100.96, 100.97 and 1090 did not, except for aircraft operators, provide means of protecting public against damage from pest control operations. 17 Ops.Atty.Gen. 114.

§ 11402. License

"License" means agricultural pest control license. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.1 (see Derivation under § 11401).

Cross References

Licenses and permits, see § 11701 et seq.

§ 11403. Pest control

"Pest control" means the use or application of any pesticide. It also means the use of any substance, method, or device to do any of the following:

- (a) Control pests.
- (b) Prevent, destroy, repel, mitigate, or correct any pest infestation or disorder of plants.
- (c) Inhibit, regulate, stimulate, or otherwise alter plant growth by direct application to plants. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.1 (see Derivation under § 11401).

§ 11404. Pesticide

"Pesticide" means any economic poison, as defined in Section 12753. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.1 (see Derivation under § 11401).

§ 11405. Registrant

"Registrant" means any person that registers pursuant to Section 11732. (Stats.1967, c. 15.)

Chapter 2

GENERAL PROVISIONS

Sec.

- 11501. Enforcement.
- 11502. Regulations by director.
- 11503. Regulations by commissioner.
- 11504. Notice of intention to adopt regulations; publication.
- 11505. Notice of intention to adopt regulations; contracts.
- 11506. Notice of intention to adopt regulations; mailing.
- 11507. Hearing; matter presentable.
- 11508. Hearing; consideration of matters presented.
- 11509. Oaths; continuances.
- 11510. Review of commissioner's regulations.
- 11511. Emergency regulations.
- 11512. Procedure.
- 11513. Disposition of money received.
- 11514. Monetary payment in lieu of serving all or portion of suspension.

Cross References

Rules and regulations, adoption, amendment and repeal, see § 14.

Library References

Agriculture ~~§ 2~~

C.J.S. Agriculture § 30 et seq.

§ 11501. Enforcement

The director, and the commissioner of each county under the direction and supervision of the director, shall enforce this division and the regulations which are issued pursuant to it. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.7, added by Stats.1949, c. 1043, p. 1941, § 1.

§ 11502. Regulations by director

The director shall adopt regulations which govern the conduct of the business of pest control. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.5, added by Stats.1949, c. 1043, p. 1940, § 1, amended by Stats.1953, c. 541, p. 1010, § 1; Stats.1957, c. 957, p. 1002, § 1.

Administrative Code References

Agricultural pest control operators, see 3 Cal. Adm. Code 3070 et seq.

§ 11503. Regulations by commissioner

The commissioner of any county may adopt regulations in addition to those adopted by the director, which govern the application of methods of pest control under local conditions. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.5 (see Derivation under § 11502).

§ 11504. Notice of intention to adopt regulations; publication

Prior to the adoption of regulations by a commissioner, a notice of intention to adopt regulations shall be published in the county, pursuant to Section 6061 of the Government Code, at least 10 days in advance of the time the regulations are to be adopted, amended, or repealed. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11505. Notice of intention to adopt regulations; contents

The notice of intention which is referred to in Section 11504 shall contain a statement of the time, place, and nature of proceedings for the adoption of the regulations, and either the express terms or an informative summary of the proposed regulations. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11506. Notice of intention to adopt regulations; mailing

At least 10 days prior to the date set for the adoption, amendment, or repeal of the regulations, the commissioner shall mail a copy of the notice of intention to every person who has registered with the commissioner in the manner required by Article 2 (commencing with Section 11731), Chapter 4 of this division, and to any other interested person that has filed with the commissioner a request to receive a notice of such proceedings. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11507. Hearing; matter presentable

On the date and at the time and place designated in the notice of intention, the commissioner shall afford any interested person or his duly authorized representative, or both, the opportunity to present statements, arguments, or contentions in writing, with or without opportunity to present them orally. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11508. Hearing; consideration of matters presented

The commissioner shall consider all relevant matter which is presented to him before he adopts any regulation. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11509. Oaths; continuances

In any hearing which is conducted pursuant to Section 11507, the commissioner or his duly authorized representative shall have authority to administer oaths or affirmations, and may continue or

postpone such hearing, from time to time, to such time and at such place as he shall determine. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11510. Review of commissioner's regulations

The regulations of the commissioner are subject to review and approval by the director as to reasonableness, and if approved they shall be filed with the director. The regulations shall become effective 30 days after they are approved by the director unless they are designated as emergency regulations. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11511. Emergency regulations

If, in the opinion of the commissioner, the public health, welfare, or safety requires that any regulation take effect immediately he shall designate it as an emergency regulation and specify in writing the facts which constitute the necessity. An emergency regulation shall become effective on the date it is approved by the director. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 160.5 (see Derivation under § 11502).

§ 11512. Procedure

The proceedings for all hearings pursuant to this division shall be conducted in accordance with Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code. The director shall have all of the powers which are granted in that chapter. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.8, added by Stats. c. 1043, p. 1041, § 1.

§ 11513. Disposition of money received

Any money which is derived under the provisions of Article 1 (commencing with Section 11701), Chapter 4 of, and Article 1 (commencing with Section 11901), Chapter 5 of, this division shall be paid into the State Treasury to the credit of the Department of Agriculture Fund. Any money in the Department of Agriculture Fund which is derived under the provisions of this division and Chapter 2 (commencing with Section 12751) and Chapter 5 (commencing with Section 14501) of Division 7 of this code may be expended for the administration and enforcement of this division and Chapter 2 and Chapter 5 of Division 7, notwithstanding any other provision of law which limits the expenditure of any such money to the specific purposes or to the administration or enforcement of each of these portions of this code separately. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.9, added by Stats.1949, c. 1043, p. 1041, § 1, amended by Stats.1963, c. 1027, p. 2302, § 3.

Cross References

Economic poisons, funds, see § 12784.

Chapter 3
EXEMPTIONS

Sec.

11531. Exempt activities.

§ 11531. Exempt activities

This division does not apply to any person while engaged in any of the following:

(a) Any activity that is defined as structural pest control and required to be licensed under Chapter 14 (commencing with Section 8500), Division 3 of the Business and Professions Code.

(b) Preservative treatment of fabrics or structural materials.

(c) Household or industrial sanitation services.

(d) Seed treatment which is incidental to such person's regular business. (Stats.1967, c. 15, as amended Stats.1967, c. 1482, § 2.)

Historical Note

The word "division" was substituted for "chapter" by the 1967 amendment.

Derivation: Agric.C.1033, § 100.15, added Stats.1951, c. 680, p. 1000, § 2, amended by Stats.1955, c. 1000, p. 3826, § 1.

Library References

Agriculture \Leftrightarrow 9.

C.J.S. Agriculture § 30 et seq.

Chapter 4
REGULATION GENERALLY

Article	Section
1. Licenses and Permits	11701
2. Registration	11731
3. Report of Damage From Pesticides	11761
4. Violations	11791

Article 1

LICENSES AND PERMITS

- Sec.**
- 11701. Necessity.
 - 11702. Applications.
 - 11703. Fee.
 - 11704. Qualifications.
 - 11705. Issuance.
 - 11706. Renewal.
 - 11707. Tardy fee penalty.
 - 11708. Refusal, revocation or suspension; hearing; grounds.
 - 11709. Permit for one serving own property and accommodating neighbors.
 - 11710. Tree surgeon.

Cross References

Disposition of money received under this article, see § 11513.
Structural pest control operators, issuance of licenses, see *Business and Professions Code*, § 8560 et seq.

Library References

Agriculture \Rightarrow 9.	C.J.S. Agriculture § 30 et seq.
Licenses \Rightarrow 11(1) et seq.	C.J.S. Licenses § 26 et seq.

§ 11701. Necessity

It is unlawful for any person to engage for hire in the business of pest control, unless such person has an agricultural pest control license for the then current calendar year issued by the director. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 100.2, added 1963, c. 1027, p. 2200, § 1; Stats.1963, c. Stats.1949, c. 1043, p. 1933, § 2, amended 882, p. 2480, § 1. by Stats.1937, c. 116, p. 702, § 1; Stats.

Administrative Code References

Rules and regulations, see 3 Cal. Adm. Code § 3075.

Notes of Decisions

Construction and application of Failure to procure license 2

1. Construction and application

Plaintiff, who was engaged in business of pest control, was compelled by legislative mandate to secure a license from the director of agriculture to so operate his business, and, therefore, there could not be any justiciable dispute with the director relating to license requirement, and action for declaratory relief would not lie. *Sohner v. Mason* (1955) 288 P.2d 616, 136 C.A.2d 449.

Pol.C. § 2322a (as it read in 1927), requiring certificates to engage for hire in business of eradicating or controlling animal pests was not binding on county destroying such pests on property in exercise of police power. *Contra Costa County v. Cowell Portland Cement Co.* (1932) 14 P.2d 606, 126 C.A. 267. In this case, the court said: "It is also contended that the county in this work employed persons not certificated as required by subdivision 8 of section 2322a of the Political Code (as said section read in 1927), which section provided that no person shall be permitted to engage for hire in the business of eradicating or controlling plant diseases, insect or animal pests, or noxious weeds injurious to the plant industry of the state 'who has not first secured a certificate' in the manner therein provided; and also provided that the horticultural commissioner shall have the power and authority to issue certificates to all persons whom he shall find to be duly qualified for engaging in such work. But in this case it was the county that was engaged in the work with which we are concerned, and obviously the county was under no necessity to secure a certificate or to secure a certificate for its agents or employees in the work. The county was not engaged for hire in any such business, but was doing the work as a governmental function and as an exercise of the police power of the state. Manifestly, the purpose of subdivision 8 was to require proper qualification on the part of persons who as a business engaged in and undertook the eradication of pests for the public generally, and to insure such proper

qualification on the part of such persons—required them to submit to examination and to be certificated—for the protection of the public against incompetent and unqualified persons. The said subdivision does not expressly or by any necessary implication require that the horticultural commissioner shall certificate himself or any of his deputies or agents, or that any agent of the county shall be so certificated, and, such being the case, the statute must be construed as not binding on the state and its agents."

If pests sought to be controlled represent a danger or are a detriment to agriculture, then agricultural pest control operator may lawfully act to control them, but control of ants on a potted plant within a residence or structure, not a greenhouse or hot house, is too remotely related to agriculture and therefore such control cannot be engaged in by an agricultural pest control operator not licensed pursuant to the Structural Pest Control Act. 23 Ops.Atty.Gen. 287.

An agricultural pest control operator may lawfully advertise for the control of ants and roaches, though licensed pursuant to provisions of the Structural Pest Control Act. Id.

Bureau of chemistry of the department of agriculture was authorized in insisting that pest control operators who mixed two or more separate economic poisons or diluted or altered any registered economic poison and then delivered such commodity to the premises where used, should be licensed and comply with statutory requirements. 2 Ops.Atty.Gen. 453.

2. Failure to procure license

Evidence of failure to procure license was admissible, in action for damages for negligent fumigation of lemon orchard. *Andreon v. Escudido Citrus Union* (1929) 260 P. 550, 93 C.A. 182.

Evidence established causal connection between failure to procure license to fumigate orchard and injury from negligent fumigation. Id.

Causal connection between failure to procure license to fumigate orchard and injury from negligent fumigation was fact question for jury. Id.

§ 11702. Applications

Applications for a license shall be in the form which is prescribed by the director, and shall state the name and address of the applicant and the type of pest control in which he intends to engage. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.2 (see Derivation under § 11701).

§ 11703. Fee

Except as otherwise provided in Section 11707, the application shall be accompanied by a fee of fifty dollars (\$50). (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.2 (see Derivation under § 11701).

§ 11704. Qualifications

Each applicant shall also satisfy the director of his character, qualifications, responsibility, and good faith in seeking to carry on the business of pest control. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.2 (see Derivation under § 11701).

§ 11705. Issuance

The director shall issue to each applicant that satisfies the requirements of this article a license which entitles the applicant to conduct the business described in the application for the calendar year for which the license is issued, unless the license is sooner revoked or suspended. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.2 (see Derivation under § 11701).

§ 11706. Renewal

The license may be renewed annually upon application to the director, accompanied by the proper fee, on or before the first day of January of the calendar year for which the license is issued. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.2 (see Derivation under § 11701).

§ 11707. Tardy fee penalty

To any fee which is not paid when due, there shall be added a penalty of five dollars (\$5). (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.2 (see Derivation under § 11701).

§ 11708. Refusal, revocation or suspension; hearing; grounds

The director may refuse to grant or renew a license and may revoke or suspend any license, as the case may require, if, after a hearing pursuant to this division, he is satisfied that one or more of the following things are true regarding the applicant or licensee:

(a) He is not qualified to perform the type of pest control under the conditions and in the locality in which he intends to operate.

(b) He has committed any act which is declared by Article 4 (commencing with Section 11791) of this chapter to be a violation of this division.

(c) He has violated any provision of Article 10 (commencing with Section 12971), Chapter 2, Division 7 of this code. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.2 (see Derivation under § 11701).

Cross References

Monetary payment in lieu of suspension, see § 11514.

Notes of Decisions

I. Validity

Provision of California Administrative Code that loss caused to others should be sufficient cause for partial or total revocation of any certificate issued under pro-

vision of Agricultural Code of 1933, relating to pest control operators was valid and within the authority granted to the director of agriculture by the Agricultural Code. 7 Ops.Atty.Gen. 290.

§ 11709. Permit for one serving own property and accommodating neighbors

A person not regularly engaged in the business of pest control that operates only in the vicinity of his own property and for the accommodation of his neighbors is not required to procure a license. Such person shall, however, obtain a permit from the director and register with the commissioner as provided in Section 11732, and he is subject to all other provisions of this division. The determination of the director that a person is engaged in the business of pest control beyond the vicinity of his own property or for the accommodation of others than his neighbors is final. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.2 (see Derivation under § 11701).

§ 11710. Tree surgeon

A person that is regularly engaged in the business of tree surgery is not required to procure a license to remove diseased or infested tissues or apply disinfectants to wounds or cavities incidental to tree surgery. If such person desires to engage in any other pest control operation, he shall procure a license from the director, shall register with the commissioner as provided in Section 11732, and is subject to all other provisions of this division. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.16, added by Stats.1951, c. 689, p. 1900, § 3, amended Stats.1961, c. 849, p. 2122, § 1.

Article 2

REGISTRATION

Sec.

- 11731. Commissioner.
- 11732. Necessity; form.
- 11733. Records.
- 11734. Fees.
- 11735. Cancellation or refusal; findings.
- 11736. Cancellation or refusal; appeal to director.
- 11737. Order to cease operation of equipment; grounds.
- 11738. Regulations; qualifications by examination.
- 11739. Regulations; cancellation for operation of equipment by unqualified personnel.
- 11740. Certificate of qualification; revocation; grounds.
- 11741. Certificate of qualification; appeal from revocation.

Library References

Agriculture ~~C-9~~.
Licenses ~~C-11(1)~~ et seq.

C.J.S. Agriculture § 30 et seq.
C.J.S. Licenses § 26 et seq.

§ 11731. Commissioner

"Commissioner," as used in this article, includes the director in any county in which there is no commissioner. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, §§ 160.3, 160.4, added by Stats.1949, c. 1043, p. 1940, § 1.

§ 11732. Necessity; form

It is unlawful for any person to engage for hire in the business of pest control in any county unless such person has registered for the then current calendar year with the commissioner.

The registration shall be in the form which is prescribed by the commissioner and shall show all of the following information:

- (a) Name and address of the registrant.
- (b) Number and kind of units to be operated in the county.
- (c) Type of pests which are intended to be controlled.
- (d) Any other information as the commissioner may require.

(Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.3, added by Stats.1949, c. 1043, p. 1940, § 1.

Cross References

Notice of intention to adopt regulations, mailing, see § 11506.
Permit required to service own and neighbor's property, see § 11709.
Registrant, see § 11405.
Tree surgeon, see § 11710.

§ 11733. Records

The registrant shall keep and maintain a record of each property treated that shows all of the following information:

- (a) Date of treatment.
- (b) Material and dosage used.
- (c) Number of units treated.
- (d) Any other information which the commissioner may require.

The registrant shall report the information to the commissioner or the director when and as required. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.3 (see Derivation under § 11732).

§ 11734. Fees

The board of supervisors of any county may establish reasonable fees for the registration. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.3 (see Derivation under § 11732).

§ 11735. Cancellation or refusal; findings

Registration may be canceled or refused, if the commissioner makes any of the following findings:

- (a) That the equipment of the registrant or applicant is unsuitable.
- (b) That the operators employed by him are incompetent or unqualified.
- (c) That the registrant or the applicant has not complied with any provision of this division, any regulation issued pursuant to it, or of any lawful order of the commissioner. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.3 (see Derivation under § 11732).

§ 11736. Cancellation or refusal; appeal to director

Any person whose registration has been canceled or refused may appeal to the director, within 10 days, for a hearing. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.3 (see Derivation under § 11732).

§ 11737. Order to cease operation of equipment; grounds

The commissioner may order any registrant, or any person that is required by this division to be registered, or the agent or employee of such registrant or person, to cease operation of any equipment which he finds unsuitable, or which he finds being operated in any of the following ways:

- (a) By an incompetent or unqualified person.
- (b) In violation of this division or any regulation issued pursuant to it.
- (c) In a manner or under conditions likely to interfere with proper control of the pest for which treatment is applied.
- (d) In a manner or under conditions likely to cause injury to the crop or property being treated, or to persons or property of others. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.4, added by Stats.1949, c. 1043, p. 1940, § 1.

Notes of Decisions

i. In general

Complaint against owners of crops and operators of airplanes, which alleged that operators negligently dusted crops with chemical poisons to bees without giving notice that poison would be exposed on the premises, and which alleged that plaintiff's bees while gathering pollen on crop owners' property and that of others were poisoned, but which failed to allege that failure to give notice was proximate cause or that apiaries were contiguous to defendants' lands or that poison floated into the hives, did not state a cause of action for damages. *Jeanes v. Holtz* (1949) 211 P.2d 925, 94 C.A.2d 826.

Evidence of failure to procure license was admissible, in action for damages for negligent fumigation of lemon orchard. *Andreen v. Escondido Citrus Union* (1928) 200 P. 556, 93 C.A. 182.

Evidence established causal connection between failure to procure license to fumigate orchard and injury from negligent fumigation. *Id.*

Causal connection between failure to procure license to fumigate orchard and injury from negligent fumigation was fact question for jury. *Id.*

§ 11738. Regulations; qualification by examination

The regulations of the commissioner may provide for the qualification, by examination or otherwise of the following persons:

- (a) Registrants.
- (b) Persons in charge of the pest control operations of registrants within the county.
- (c) Persons employed by registrants to operate pest control equipment, other than aircraft, within the county. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.65, added by Stats.1951, c. 689, p. 1001, § 5.

§ 11739. Regulations; cancellation for operation of equipment by unqualified personnel

The regulations of the commissioner may provide that it is a ground for cancellation of registration to operate pest control equipment within the county unless either:

- (a) A person qualified pursuant to Section 11738 is in charge of the operations.
- (b) Each unit which is operated within the county is under personal direction of a person qualified pursuant to Section 11738. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 160.65 (see Derivation under § 11738).

§ 11740. Certificate of qualification; revocation; grounds

Any certificate of qualification which is issued pursuant to Section 11738 may be revoked or suspended, or its issuance or renewal refused, if the commissioner finds that the applicant or holder of the certificate is incompetent or has violated any provision of this division, or any regulation which is issued pursuant to it, or has not complied with any lawful order of the commissioner. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.65 (see Derivation under § 11738).

§ 11741. Certificate of qualification; appeal from revocation

Any person whose certificate has been revoked, suspended, or refused may appeal to the director within 10 days for a hearing. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 160.65 (see Derivation under § 11738).

Article 3

REPORT OF DAMAGE FROM PESTICIDES

Sec.

- 11761. Verified report; duty to file; time.
- 11762. Damage to growing crop; time for report.
- 11763. Contents of report.
- 11764. Effect of failure to file report.
- 11765. Failure to file report as evidence of no loss.

Library References

Poisons C-6.

C.J.S. Poisons §§ 5, 6.

§ 11761. Verified report; duty to file; time

Any person that suffers any loss or damage as a result of the use or application by others of any pesticide, or of any substance, method, or device for pesticidal purposes; or for the purpose of preventing, destroying, repelling, mitigating, or correcting any disorder of plants; or for the purpose of inhibiting, regulating, stimulating, or otherwise altering plant growth by direct application to plants shall, within 60 days from the time that the occurrence of such loss or damage became known to such person, file with the commissioner of the county in which the loss or damage, or some part of the loss or damage, is alleged to have occurred, a verified report of loss. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 160.96 added by Stats.1951, c. 1572, p. 3574, § 1, amended by Stats.1953, c. 574, p. 1826, § 1. Agric.C.1933, § 160.97, added by Stats. 1959, c. 986, p. 3011, § 1.

§ 11762. Damage to growing crop; time for report

If a growing crop is alleged to have been damaged as a result of the activities which are described in Section 11761, the verified report of loss shall be filed prior to the time 50 percent of the crop is harvested, unless the loss or damage is not then known. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.97 (see Derivation under § 11761).

§ 11763. Contents of report

The verified report of loss shall set forth, so far as known to the claimant, all of the following:

- (a) Name and address of the claimant.
- (b) Type, kind and location of property which is allegedly injured or damaged.
- (c) Date the alleged injury or damage occurred.
- (d) Name of pest control operator that is allegedly responsible for the loss or damage.

(e) Name of the owner or occupant of the property for whom the pest control operator was rendering labor or services. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 100.97 (see Derivation under § 11761).

§ 11764. Effect of failure to file report

The filing of the verified report, or the failure to file it, need not be alleged in any complaint which may be filed. The failure to file the verified report of loss is not a bar to the maintenance of a civil action for the recovery of damages for the loss or damage. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 100.97 (see Derivation under § 11761).

§ 11765. Failure to file report as evidence of no loss

The failure to file a verified report of loss is evidence that no loss or damage occurred. (Stats.1967, c. 15, as amended Stats.1967, c. 262, § 7.)

**Legislative Committee Comment—Senate
1967 Amendment**

A presumption is not an appropriate method of accomplishing the purpose of Section 11765. Under the Evidence Code, the only effect of a rebuttable presumption is to shift either the burden of proof or the burden of producing evidence. See Evidence Code Sections 601, 604, and 606 and the *Comments* thereto. Since the person required to file the report of damage from pesticides under this article already has the burden of proof and the burden of producing evidence, Section 11765 can have no effect.

Prior to the enactment of the Evidence Code, the presumption that arose upon proof of failure to file the report was itself evidence that no loss or damage occurred. This resulted from the former rule that a presumption was evidence that had to be weighed against conflicting evidence. *Smellie v. Southern Pac. Co.*, 212 Cal. 540, 299 Pac. 529 (1931). Section 600 of the Evidence Code abolished this rule. Hence, Section 11765 has been amended to restore the substantive effect that this provision had before the Evidence Code was enacted.

Historical Note

As enacted by Stats.1967, c. 15, this section read "Proof of failure to file the verified report of loss creates a rebuttable presumption that no loss or damage occurred".

Derivation: Agric.C.1033, § 100.97 (see Derivation under § 11761).

Article 4
VIOLATIONS

- Sec.**
11791. Unlawful acts.
11792. Additional unlawful acts.

Library References

Agriculture \Leftrightarrow 9.

C.J.S. Agriculture § 30 et seq.

§ 11791. Unlawful acts

It is unlawful for any person that is subject to this division to do any of the following:

(a) Make any false or fraudulent claim, or misrepresent the effects of material or method to be applied, apply any worthless or improper material, or otherwise engage in any unfair practices.

(b) Operate in a faulty, careless, or negligent manner.

(c) Refuse or neglect to comply with any provision of this division, or any regulation issued pursuant to it, or any lawful order of the commissioner.

(d) Refuse or neglect to keep and maintain the records which are required by this division, or to make reports when and as required. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.2 (see Derivation under § 11701).

Cross References

Misdemeanor, see § 9.

Refusal, revocation or suspension of license, see § 11703.

§ 11792. Additional unlawful acts

It is also unlawful for any person that is subject to this division to do any of the following:

(a) Make any false or fraudulent record or report.

(b) Operate in any county without first having registered with the commissioner.

(c) Operate equipment with incompetent or unqualified persons in charge of the equipment.

(d) Use any fraud or misrepresentation in making application for a license or for renewal of a license.

(e) Fail to comply with the provisions of Chapter 3 (commencing with Section 14001), Division 7 of this code. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.2 (see Derivation under § 11701).

Law Review Commentaries

Regulation of crop dusting; legal problems in a new industry. (1953) 6 Stan.L.R. 69.

Notes of Decisions

I. In general

State statutes regulating pest control operations for hire do not indicate legislative intent to displace the exercise of local

police power with respect to indemnification for loss as result of such operation except in case of operators using aircraft. 17 Ops.Atty.Gen. 114.

§ 11902. Fee

A fee of twenty-five dollars (\$25) shall accompany each application for any certificate which is issued pursuant to this chapter. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.6 (see Derivation under § 11901).

§ 11903. Examination

Before a certificate of qualification may be issued, the applicant shall pass an examination to demonstrate to the director his ability to conduct pest control operations and his knowledge of the nature and effect of materials which are used in pest control. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.6 (see Derivation under § 11901).

§ 11904. Certificate of qualification; contents

The certificate of qualification which is issued to a successful candidate shall disclose in which of the following three general classes of pest control operations he is qualified:

(a) The use of herbicides and defoliant.

(b) The use of dust pesticides other than herbicides and defoliant.

(c) The use of liquid pesticides other than herbicides and defoliant. (Stats.1967, c. 15, as amended Stats.1967, c. 25, § 8.)

Historical Note

The 1967 amendment repositioned words "dust" and "liquid" from parentheses following defoliant in (b) and (c) to modifying position before pesticides in (b) and (c).

Derivation: Agric.C.1933, § 160.6 (see Derivation under § 11901).

§ 11905. Authority of holder of certificate of qualification

The holder of a certificate of qualification is authorized to conduct only those pest control operations in which he is found qualified. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.6 (see Derivation under § 11901).

§ 11906. Apprentice certificate as prerequisite to certificate of qualification

A certificate of qualification shall not be issued to any applicant, other than the holder of a valid apprentice certificate, who has not had in effect a valid certificate of qualification issued to him by the director within the previous two calendar years. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.6 (see Derivation under § 11001).

§ 11907. Apprenticeship; duration

A certificate of qualification shall not be issued to the holder of an apprentice certificate until he has served as an apprentice under a certificate issued pursuant to this chapter for one year and until he presents to the director satisfactory documentary proof consisting of a certified statement by a licensed agricultural aircraft operator of his completion of not less than 150 hours of operation of fixed-wing aircraft or 50 hours of operation of nonfixed-wing aircraft within the past two calendar years in agricultural pest control activities. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 100.6 (see Derivation under § 11001).

§ 11908. Examination for apprentice certificate

Before an apprentice certificate may be issued, the applicant shall pass an examination to demonstrate to the director his ability to conduct the specific pest control operations which are listed in his application. A successful candidate for an apprentice certificate may conduct only the specific kinds of pest control operations in which he is found qualified. The pest control operations for which an applicant qualifies shall be listed on his apprentice certificate. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.6 (see Derivation under § 11001).

§ 11909. Employment of applicant for apprentice certificate

The applicant for an apprentice certificate shall also satisfy the director, through documentary evidence or other suitable information, that he shall be both:

(a) Employed by a person that holds a license currently in effect.

(b) Employed under the direct and personal supervision of a person that holds a valid certificate of qualification. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 100.6 (see Derivation under § 11001).

§ 11910. Employment of apprentice

It is unlawful for the holder of an apprentice certificate to conduct pest control operations in accordance with the provisions of his cer-

Article 2

FINANCIAL RESPONSIBILITY

Sec.

- 11931. Definitions.
- 11932. Satisfaction of judgment; deposit.
- 11933. Suspension of license for failure to satisfy judgment.
- 11934. Duration of suspension.
- 11935. Proof of financial responsibility.
- 11936. Diminished security.
- 11937. Copy of judgment or docket entries.
- 11938. Relief from suspension; insurance.
- 11939. Proof of insurance coverage.
- 11940. Effect of adequate insurance.

Library References

Aviation ~~C~~ 121 et seq.

C.J.S. Aerial Navigation §§ 6 et seq., 15 et seq.

§ 11931. Definitions

As used in this article:

(a) "Judgment" means a final judgment of any court of competent jurisdiction in this or any other state, or of the United States, against a person as defendant upon a cause of action which arises out of any pest control operation.

(b) "Operator" means any person that is required to be licensed pursuant to this division who is authorized to apply any pest control material or substance by dusting, spraying, or any other manner whereby such material or substance is applied through the medium of aircraft.

(c) "Pest control operation" means the application of any pest control material or substance by an operator. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.91, added by Stats.1950, 1st Ex.Sess., c. 57, p. 518, § 2, amended by Stats.1959, c. 957, p. 2987, § 1.

Law Review Commentaries

Regulation of crop dusting; legal problems in a new industry. (1953) 6 Stan.L.R. 60.

Notes of Decisions

1. In general
County ordinance requiring pest control operators to carry public liability insurance was invalid insofar as it pertained to airplane pest control operation. 17 Ops. Atty.Gen. 114.

§ 11932. Satisfaction of judgment; deposit

For the purposes of this article:

(a) A judgment is satisfied when twenty-five thousand dollars (\$25,000) has been credited upon any judgment in excess of that amount which arises out of any one accident or occurrence.

Ch. 5 AIRCRAFT OPERATION REGULATION § 11936

(b) A deposit of bond or other obligation for the payment of which the full faith and credit of the United States or of this state is pledged is considered a deposit of money. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 160.92, added by Stats.1950, 1st Ex.Sess., c. 57, p. 513, § 2; 513, § 2, amended by Stats.1959, c. 957, p. 2957, § 2. Agric.C.1933, § 160.93, added by Stats. 1950, 1st Ex.Sess., c. 57, p. 513, § 2; Stats.1951, c. 604, p. 1763, § 1; Stats. 1959, c. 957, p. 2957, § 3.

Administrative Code References

Aircraft pest control operator's financial responsibility bond, approved form, see 11 Cal. Adm.Code 20(n).
Rules and regulations, see 3 Cal. Adm.Code § 3100.

Law Review Commentaries

Regulation of crop dusting: legal problems in a new industry. (1953) 6 Stan.L.J. 69.

§ 11933. Suspension of license for failure to satisfy judgment

The director shall suspend the license of any operator upon receiving a copy of a judgment and a certificate of facts relative to such judgment, upon a form that is provided by the director, which indicate that the operator has not for a period of 30 days satisfied a final judgment rendered against him. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.92 (see Derivation under § 11932).

§ 11934. Duration of suspension

The suspension shall remain in effect and no license shall be issued to the operator unless and until the judgment is satisfied, or the operator submits to the director proof of his financial ability to respond in damages pursuant to the judgment. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.92 (see Derivation under § 11932).

§ 11935. Proof of financial responsibility

Proof of such financial responsibility may be made by furnishing security in an amount not less than twenty-five thousand dollars (\$25,000). The security may consist of any of the following:

- (a) A deposit of money.
- (b) A surety bond in favor of any person that may suffer damage by reason of any pest control operation by the operator which is issued by a corporate surety company that is qualified and authorized to do business in this state.
- (c) An insurance policy which insures the operator against liability for damages pursuant to the judgment. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.93 (see Derivation under § 11932).

§ 11936. Diminished security

If the security which is required by Section 11934 is diminished in amount by reason of any recovery against it, the security shall

be replenished so that it amounts to not less than twenty-five thousand dollars (\$25,000). (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.93 (see Derivation under § 11932).

§ 11937. Copy of judgment or docket entries

Upon the expiration of 30 days after any judgment becomes final, which is not stayed or satisfied in any action which results in a judgment for damages, the clerk of a court, or the judge of a court which has no clerk, shall forward to the director a certified copy of the judgment or a certified copy of the docket entries in the action, and a certificate of facts relative to such judgment, on a form which is provided by the director. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.94, added by Stats.1959, 1st Ex.Sess., c. 57, p. 514, § 2, amended by Stats.1959, c. 937, p. 2988, § 4.

§ 11938. Relief from suspension; insurance

Any person whose license has been suspended, is about to be suspended, or becomes subject to suspension pursuant to this article, may relieve himself from the suspension by filing with the director an affidavit which states all of the following:

(a) That at the time of the incident upon which the judgment was rendered he was insured.

(b) That the insurer is liable to pay the judgment.

(c) The reason, if known, why the insurance company has not paid the judgment. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.95, added Stats.1959, 1st Ex.Sess., c. 57, p. 514, § 2, amended by Stats.1959, c. 937, p. 2988, § 5.

§ 11939. Proof of insurance coverage

The person that files the affidavit pursuant to Section 11938 shall also file the original policy of insurance or a certified copy of the policy, if available, and such other documents as the director may require to show that the loss, injury, or damage for which the judgment was rendered, was covered by the policy of insurance. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 160.95 (see Derivation under § 11938).

§ 11940. Effect of adequate insurance

If the director is satisfied from the papers which are filed pursuant to Sections 11938 and 11939 that the insurer was authorized to issue the policy of insurance in this state at the time of issuing the policy and that the insurer is liable to pay the judgment,

at least to the extent and for the amounts which are provided in this article, the director shall not suspend the license or, if the license has already been suspended, he shall reinstate it. (Stats. 1967, c. 15.)

Derivation: Agric.C.1033, § 160.95 (see Derivation under § 11035).

§§ 11941 to 12500. Reserved for future legislation

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END OF VOLUME

Chapter 2

ECONOMIC POISONS

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Article 1

DEFINITIONS

Sec.	
12751.	Effect of definitions.
12752.	Defoliating.
12753.	Economic poison.
12754.	Insect.
12755.	Registrant.
12756.	Regulating plant growth.
12757.	Rodent.
12758.	Spray adjuvant.
12759.	Weed.

Library References

Druggists ~~§~~ 2 et seq.
Poisons ~~§~~ 2 et seq.

C.J.S. Druggists § 2 et seq.
C.J.S. Poisons § 2 et seq.

§ 12751. Effect of definitions

Unless the context otherwise requires, the definitions in this article govern the construction of this chapter. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1033, § 1061 1951, c. 641, p. 1821, § 1; Stats.1965, c. 565, p. 1800, § 7).
(Stats.1933, c. 25, p. 237, § 1061, amended by Stats.1935, c. 334, p. 1157, § 1; Stats. 1921, c. 729, p. 1260, § 7.

Cross References

Disposition of money received under this chapter, see § 11513.
Exemption of economic poison from livestock remedy provisions, see § 14263.
General definitions, see § 25 et seq.
Federal laws relating to economic poisons, see 7 U.S.C.A. § 135 et seq.
Structural pest control, noncompliance with this article as ground for discipline of licensees, see Business and Professions Code § 8647.

Notes of Decisions

Construction and application 2
Validity of prior laws 1

1. Validity of prior laws

Economic Poison Act of 1921, Stats. 1921, p. 1230, regulating sale and manufacture of economic poison, was not a delegation of judicial power, violative of Const. art. 3, or article 6, § 1, by conferring on director of agriculture duty of regulating manufacture, sale, and use of economic poisons, together with means of enforcing act by licensing or revoking licenses of dealers. *Gregory v. Hecke* (1925) 238 P. 787, 73 C.A. 268.

Economic Poison Act of 1921, Stats. 1921, p. 1230, regulating manufacture, sale and use of economic poison, was not violative of Const. art. 1, § 14, or Const. U.S. Amend. 14, prohibiting taking of private property without due process of law. *Id.*

General right to engage in a trade, profession or business is subject to the power, inherent in the state to make necessary rules and regulations respecting use and enjoyment of property necessary for the preservation of the public health,

morals, comfort, order, and safety, and such regulations do not deprive owners of property without due process of law. *Id.*

Economic poison manufacturer was estopped to question validity of Economic Poison Act of 1921, regulating sale, manufacture, and use of economic poison, where for several years he had registered his economic poison product, and had been licensed to manufacture and sell the same, and was enjoying protection of the statute at the time of challenging its constitutionality. *Id.*

2. Construction and application

This statute regarding economic poisons must be read as a whole, rather than by individual sections, in order to properly ascertain what it was intended to cover. *People v. Worst* (1943) 136 P.2d 137, 57 C.A.2d Supp. 1028.

Under statutory definition of economic poison, tuberculin used in diagnosing tuberculosis in cattle is not an "economic poison" required to be kept in a container to which is affixed imprinted label containing certain facts. *Thome v. Superior Court in and for Merced County* (1939) 90 P.2d 361, 32 C.A.2d 521.

§ 12752. Defoliating

"Defoliating" includes killing or artificially accelerating the drying of plant tissues, with or without causing abscission. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 1061 (see Derivation under § 12751).

Library References

Words and Phrases (Perm.Ed.)

§ 12753. Economic poison

"Economic poison" includes any of the following:

(a) Any spray adjuvant.

(b) Any substance, or mixture of substances which is intended to be used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any and all insects, fungi, bacteria, weeds, rodents, or predatory animals or any other form of plant or animal life which is, or which the director may declare to be, a pest, which may infest or be detrimental to vegetation, man, animals or households, or be present in any environment whatsoever. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 1061 (see Agric.C.1933, § 1061.2, added by Stats. 1949, c. 505, p. 864, § 2.
Derivation under § 12751).

Cross References

Pesticide, see § 11401.
Pesticide chemical, see § 12503.

Library References

Words and Phrases (Perm.Ed.)

Notes of Decisions

1. In general

Where defendant treated bushes with certain vitamins to develop root growth and without obtaining license from state department of agriculture sold bushes for represented purpose of repelling gophers through natural underground root odors,

defendant did not violate statute regulating "economic poisons" defined in this section as including any substance or mixture of substances intended to be used for repelling rodents. *People v. Worst* (1943) 136 P.2d 137, 57 C.A.2d Supp. 162S.

§ 12754. Insect

"Insect" means any animal within the class of animals which are known as "Insecta" or any similar animal such as a centipede, spider, mite, tick, or louse. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1061 (see Derivation under § 12751).

Library References

Words and Phrases (Perm.Ed.)

§ 12755. Registrant

"Registrant" means a person that has registered an economic poison and has obtained a certificate of registration or license from the department. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1061 (see Derivation under § 12751).

Library References

Words and Phrases (Perm.Ed.)

§ 12756. Regulating plant growth

"Regulating plant growth" includes, but is not limited to, the use of any hormone, auxin, enzyme, or other material for reducing preharvest drop of fruit or the use of any material for promoting rooting of cuttings. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, §§ 1061, 1062 (see Derivation under §§ 12751, 12901).

Library References

Words and Phrases (Perm.Ed.)

§ 12757. Rodent

"Rodent" means all members of the order Rodentia and all rabbits and hares. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1001 (see Derivation under § 12751).

Library References

Words and Phrases (Perm.Ed.)

§ 12758. Spray adjuvant

"Spray adjuvant" means any wetting agent, spreading agent, deposit builder, adhesive, emulsifying agent, deflocculating agent, water modifier, or similar agent, with or without toxic properties of its own, which is intended to be used with another economic poison as an aid to the application or effect of the other economic poison, and sold in a package that is separate from that of the economic poison other than a spray adjuvant with which it is to be used. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1061.2, added by Stats.1949, c. 505, p. 864, § 2.

Library References

Words and Phrases (Perm.Ed.)

§ 12759. Weed

"Weed" means any plant which grows where not wanted. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 1001 (see Derivation under § 12751)

Cross References

Hazardous weeds, see Health and Safety Code § 14875.

Library References

Words and Phrases (Perm.Ed.)

Article 10

RECOMMENDATIONS AND USAGE

Sec.

12971. Written recommendations; necessity; delivery to customer; conflicts with label.
12972. Drift prevention; manner of use.

Library References

Poisons \S 2.

C.J.S. Poisons \S 2 et seq.

\S 12971. Written recommendations; necessity; delivery to customer; conflicts with label

It is unlawful for any person to make any recommendation regarding the agricultural use of an economic poison, other than the recommendations or directions on the label or in supplementary printed directions, either in connection with a sale of an economic poison or in connection with an advisory service for hire or for a fee, unless such recommendation regarding the use of the economic poison is given in writing to the customer. The written recommendation shall be delivered not later than the time of delivery of the material to the customer, or the time of use by the customer. A copy of the written

recommendation shall be retained on file by the party making the recommendation for a period of a year. No written recommendation shall be in conflict with the label or with supplementary printed directions delivered therewith unless authorized by the director or the commissioner. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 160.08, added by Stats.1965, c. 832, p. 2400, § 2.

Cross References

Refusal, revocation or suspension of pest control license for violation of this article, see § 11708.

Administrative Code References

Form of the written recommendation, see 3 Cal.Adm.Code 3112.
Words and phrases defined, see 3 Cal.Adm.Code 3110.

Library References

Pesticides. Report of Senate Factfinding on Agriculture, 1965. Vol. 1 Appendix to Journal of the Senate, Reg.Sess., 1965.

§ 12972. Drift prevention; manner of use

Unless otherwise expressly authorized by the director or the commissioner, the use of any economic poison by any person in pest control operations shall be in such a manner as to prevent any substantial drift to other crops and shall not conflict with the manufacturer's registered label or with supplementary printed directions which are delivered with the economic poison and any additional limitations applicable to local conditions which are contained in the conditions of any permit or the written recommendations that are issued by the director or commissioner. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 160.09, added by Stats.1965, c. 832, p. 2400, § 2.

Administrative Code References

Authorized use of economic poison, see 3 Cal.Adm.Code 3111.
Experimental use of pesticide, see 3 Cal.Adm.Code 3114.

Article 11

VIOLATIONS

Sec.

- 12991. Unlawful acts.
- 12992. Sale of adulterated or misbranded economic poison; defense.
- 12993. Unlicensed manufacture or sale; exports.
- 12994. Quarantined economic poisons; permit.

Cross References

Misdemeanor, see § 9.

Chapter 3

INJURIOUS MATERIALS

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Article 1

GENERALLY

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- 14001. Injurious material.
 - 14002. Exclusion of state and federal agencies.
 - 14003. Liability.
 - 14004. Enforcement.
 - 14005. Regulations; adoption.
 - 14006. Regulations; scope.
 - 14007. Permits; conditions.
 - 14008. Permits; refusal, revocation or suspension; grounds.
 - 14009. Permits; issuance, refusal, revocation or suspension; hearing; proceedings.
 - 14010. Sales; necessity of user's permit.
 - 14011. Application of materials.

Library References

- Agriculture \S 16.
- Druggists \S 2 et seq.
- Poisons \S 2 et seq.
- C.J.S. Agriculture \S 5.
- C.J.S. Druggists \S 2 et seq.
- C.J.S. Poisons \S 2 et seq.
- Pesticide residues and agricultural chemicals in foodstuffs. Report of Assembly Interim Committee on Public Health, 1956-1961, p. 5, vol. 6, No. 20. Vol. 1 of Appendix to Journal of the Assembly, Reg.Sess., 1961.
- Proposals relating to injurious materials. Report of Joint Legislative Committee on Agricultural and Livestock Problems, 1957, p. 67. Vol. 1 of Appendix to Journal of the Senate, Reg.Sess., 1957.

§ 14001. Injurious material

As used in this article, "injurious material" means any material which the director, pursuant to Section 14005, finds and determines is injurious. (Stats.1967, c. 15.)

Cross References

Noncompliance with this section as ground for revoking license to engage in business of pest control, see \S 11702.

Library References

Words and Phrases (Perm.Ed.)

§ 14002. Exclusion of state and federal agencies

This chapter does not apply to any agency of the United States or of this state, or to any officer, agent, or employee of any such agency who is acting within the scope of his authority, while he is engaged in, conducting, or supervising research on any injurious material. (Stats. 1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 1080, added 1; Stats.1957, c. 212, p. 874, § 1; Stats. by Stats.1949, c. 1295, p. 2277, § 1, 1959, c. 57, p. 1020, § 1. amended by Stats.1953, c. 749, p. 2009, §

Administrative Code References

Injurious materials, see 8 Cal. Adm. Code 2400-2461.

§ 14003. Liability

This article does not relieve any person from liability for any damage to the person or property of another person which is caused by the use of any injurious material. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 1080 (see Derivation under § 14002).

Notes of Decisions

1. In general

No additional liability is imposed upon persons applying injurious material for pest control or for other agricultural purposes in the manner required than would exist under the ordinary laws of negligence. 18 Ops. Atty. Gen. 221.

Nothing in Agric.C.1933, §§ 1060.7, 1080, required that one who had secured the necessary permit to apply injurious

material for pest control and for other agricultural purposes and who had observed all the established rules and regulations should be blameless for any negligent act in applying such materials and mere fact that such person followed the rules and regulations would not in itself guarantee that he was free of negligence. Id.

§ 14004. Enforcement

The director, and the commissioner of each county under the direction and supervision of the director, shall enforce this chapter and the regulations issued pursuant to it. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 1080.9, added by Stats. 1953, c. 749, p. 2011, § 6.

§ 14005. Regulations; adoption

The director, after investigation and hearing, shall adopt regulations which govern the application, in pest control or other agricultural operations, of any material which he finds and determines is injurious to any person, animal, or crop, except the pest or vegetation which it is intended to destroy. (Stats. 1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 1096.7, added by Stats.1949, c. 1294, p. 2276, § 1, repealed by Stats.1953, c. 740, p. 2011, § 7. Agric.C.1933, § 1080 (see Derivation under § 14002).

Cross References

Rules and regulations, adoption, amendment and repeal, see § 14.

Administrative Code References

Injurious materials, see 3 Cal. Adm. Code 2400-2401.

Notes of Decisions

1. Construction and application
Purpose of Agriculture Code sections dealing with pest control operators, and rules and regulations by Director of Agriculture, is prevention of injury in application of materials. 17 Ops. Atty. Gen. 114.

§ 14006. Regulations; scope

The regulations shall prescribe the time when, and the conditions under which, an injurious material may be used in different areas of the state. They may provide that an injurious material shall be used only under permit of the commissioner or under the direct supervision of the commissioner, subject to any of the following limitations:

- (a) In certain areas.
 - (b) Under certain conditions.
 - (c) When used in excess of certain quantities or concentrations.
- (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080 (see Derivation under § 14002).

§ 14007. Permits; conditions

Every permit which is issued under the regulations adopted pursuant to this chapter is conditioned upon compliance with the regulations and upon such other specified conditions as may be deemed necessary to avoid injury. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.2, added by Stats.1953, c. 749, p. 2010, § 2.

Administrative Code References

Use of injurious herbicides, application form, see 3 Cal. Adm. Code § 2452.

§ 14008. Permits; refusal, revocation or suspension; grounds

Any permit may be refused, revoked, or suspended for violation of any of the conditions of the permit, or of a previous permit, or for violation of any provision of this chapter or of the regulations which are issued pursuant to it. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.2 (see Derivation under § 14007).

§ 14009. Permits; issuance, refusal, revocation or suspension; hearing; proceedings

Any interested person, upon request, is entitled to a hearing before the director to review the action of a commissioner in issuing, refusing, revoking, or suspending a permit, or in imposing any condition which is not expressly specified in the applicable regulations. The proceedings for the hearing shall be conducted in accordance with Chapter 5 (commencing with Section 11500), Part 1, Division 3, Title 2 of the Government Code. The provisions of Sections 11505 and 11506 of the Government Code shall not, however, apply to the proceedings, and the statement of issues or accusation, as the case may be, shall be delivered or mailed to the parties as provided in Section 11509 of the Government Code. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 1050.2 (see Derivation under § 14007).

§ 14010. Sales; necessity of user's permit

It is unlawful for any person to sell or deliver any injurious material to any person that is required by the regulations, which are adopted by the director, to have a permit to use such injurious material unless such person, or his agent to whom delivery is made, signs a written statement, in a form which is prescribed by the department, that the person holds a valid permit to use the kind and quantity of such injurious material which is delivered. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 1050.3, added by Stats.1955, c. 852, p. 1467, § 1.

§ 14011. Application of materials

It is unlawful for any person to apply any injurious material for which regulations have been adopted except as provided in the regulations which are adopted by the director. (Stats.1967, c. 15.)

Derivation: Agric.C.1033, § 1050 (see Derivation under § 14002).

Article 2

2,4-D AND OTHER HERBICIDES

Sec.

- 14031. 2,4-D.
- 14032. Prohibited use.
- 14033. Regulations for use.
- 14034. Liability.
- 14035. Sales; necessity of user's permit.

Library References

Agriculture ⇨16.
Druggists ⇨2 et seq.
Poisons ⇨2 et seq.

C.J.S. Agriculture § 5.
C.J.S. Druggists § 2 et seq.
C.J.S. Poisons § 2 et seq.

§ 14031. 2,4-D

As used in this article, "2,4-D" means any form of 2,4-dichlorophenoxyacetic acid. (Stats.1967, c. 15.)

§ 14032. Prohibited use

Except as otherwise provided in this article and in the regulations which are adopted by the director, it is unlawful for any person to use any form of 2,4-D or any other herbicide which the director finds and determines, after hearing, is injurious to any crop. (Stats. 1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 1066.7, added by Stats.1949, c. 1204, p. 2270, § 1, repealed by Stats.1953, c. 749, p. 2011, § 7.

Agric.C.1933, § 1090.1, added by Stats. 1953, c. 749, p. 2010, § 2.

§ 14033. Regulations for use

The director, after investigation and hearing, shall adopt regulations which govern the use of 2,4-D and any other herbicide which he finds and determines is injurious to any crop that is being grown in any area of the state. The regulations of the director may prescribe the time when, and the conditions under which, an injurious herbicide may be used in different areas of the state. They may provide that an injurious herbicide shall be used only under permit of the commissioner or under the direct supervision of the commissioner, subject to any of the following limitations:

(a) In certain areas.

(b) In excess of certain quantities or concentrations. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 1090.1 (see Derivation under § 14032).

§ 14034. Liability

This article does not relieve any person from liability for any damage to the property of another person which is caused by the use of any herbicide which is named in the regulations which are adopted by the director. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1090.1 (see Derivation under § 14032).

Notes of Decisions

1. In general

No additional liability is imposed upon persons applying injurious material for pest control or for other agricultural purposes in the manner required, than would exist under the ordinary laws of negligence. 18 Ops.Atty.Gen. 221.

Nothing in statutes requires that one, who has secured the necessary permit to apply injurious material for pest control and for other agricultural purposes and who has observed all the established rules and regulations, shall be blameless for any

negligent act in applying such materials and mere fact that such person follows the rules and regulations does not in itself guarantee that he is free of negligence. Id.

Under Agric.C.1933, §§ 109.95 (see, now, Agric.C.1967 §§ 11938-11940) and 1090 (see, now, Agric.C.1967, §§ 14005,

14006) and Agric.C.1933, § 1068.7, which required airplane agricultural pest control operators for hire to furnish evidence of financial responsibility, county ordinance requiring pest control operators to carry public liability insurance was invalid insofar as it pertained to airplane pest control operation. 17 Ops.Atty.Gen. 114.

§ 14035. Sales; necessity of user's permit

It is unlawful for any person to sell or deliver any herbicide for which regulations have been adopted by the director to any person that is required by such regulations to have a permit to use such herbicide unless such person, or his agent to whom delivery is made, signs a written statement, in a form which is prescribed by the department, that such person holds a valid permit to use the kind and quantity of the herbicide which is delivered. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1090.3 (see Derivation under § 14010).

Article 3

COMPOUND 1080

Sec.

14061. Compound 1080.

14062. Prohibited sale, use or possession.

14063. Authorized sale, use or possession.

Library References

Agriculture ⇨ 10.
Druggists ⇨ 2 et seq.
Poisons ⇨ 2 et seq.

C.J.S. Agriculture § 5.
C.J.S. Druggists § 2 et seq.
C.J.S. Poisons § 2 et seq.

§ 14061. Compound 1080

As used in this article, "Compound 1080" means sodium fluoroacetate or any preparation of sodium fluoroacetate. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.6, added by Stats.1953, c. 749, p. 2011, § 5.

Administrative Code References

Other definitions, sec 3 Cal.Adm.Code §§ 2470 et seq.

Library References

Words and Phrases (Perm.Ed.)

§ 14062. Prohibited sale, use or possession

Except as otherwise provided in this article, it is unlawful for any person to sell, use, or possess any Compound 1080. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.6 (see Derivation under § 14061).

§ 14063. Authorized sale, use or possession

Subject to regulations of the director, any of the following persons may sell, use, or possess Compound 1080 for the purposes or uses which are specified:

(a) Any federal, state, county, or municipal officer or employee, in his official capacity, or any person under the immediate supervision of such officer or employee, may possess Compound 1080 for use for pest control purposes.

(b) Any research or chemical laboratory may possess Compound 1080 for use for the purposes of such laboratory.

(c) Any person duly licensed as a structural pest control operator under Chapter 14 (commencing with Section 8500), Division 3 of the Business and Professions Code, may possess Compound 1080 for use in his business.

(d) Any wholesaler or jobber of any economic poison may sell Compound 1080 to any person included within the above classifications, or for export. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.6 (see Derivation under § 14081).

Article 4

THALLIUM

Sec.

14091. Thallium.

14092. Prohibited sale, use or possession.

14093. Possession for pest control purposes.

14094. Possession for professional use.

14095. Possession by metallurgist or alloy manufacturer.

14096. Possession for use in research or chemical laboratory.

14097. Ant poison; use in.

14098. Sale to one authorized to possess material.

Library References

Agriculture \hookrightarrow 16.
Druggists \hookrightarrow 2 et seq.
Poisons \hookrightarrow 2 et seq.

C.J.S. Agriculture § 5.
C.J.S. Druggists § 2 et seq.
C.J.S. Poisons § 2 et seq.

§ 14091. Thallium

As used in this article, "thallium" includes any preparation of thallium or of the salts of thallium. (Stats.1967, c. 15.)

Historical Note

Derivation: Agric.C.1933, § 1080.5, added by Stats. 1943, c. 952, p. 2822, § 3, amended by Stats.1945, c. 168, p. 649, § 1. Agric.C.1933, § 1080.5, added by Stats. 1953, c. 749, p. 2910, § 4.

Library References

Words and Phrases (Perm.Ed.)

§ 14092. Prohibited sale, use or possession

Except as otherwise provided in this article, it is unlawful for any person to sell, use, or possess thallium. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

§ 14093. Possession for pest control purposes

Any federal, state, county, or municipal officer or employee, in his official capacity, or any person under the immediate supervision of such officer or employee, may possess thallium for use for pest control purposes. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

§ 14094. Possession for professional use

Any licensed physician, surgeon, pharmacist, or veterinarian may possess thallium for use in his profession. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

§ 14095. Possession by metallurgist or alloy manufacturer

Any metallurgist or manufacturer of any alloy of which thallium is a component part may possess thallium for laboratory use or manufacture of alloys. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

§ 14096. Possession for use in research or chemical laboratory

Any person that operates a research or chemical laboratory may possess thallium for use for the purposes of such laboratory. (Stats. 1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

§ 14097. Ant poison; use in

Any registered manufacturer of ant poison may manufacture and sell, and any dealer in ant poison may sell, ant poison which contains not more than 1 percent of thallium, expressed as metallic thallium, prepared, packaged, and sold in accordance with such regulations as the director may deem necessary to protect the public health. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

§ 14098. Sale to one authorized to possess material

Any wholesaler or jobber of any economic poison may sell thallium to any person that is authorized to possess it pursuant to Sections 14093 to 14097, inclusive, or for export. (Stats.1967, c. 15.)

Derivation: Agric.C.1933, § 1080.5 (see Derivation under § 14091).

EXHIBIT II

CALIFORNIA ADMINISTRATIVE CODE PROVISIONS

Article 20. Injurious Herbicides

2448. Injurious Herbicides. The director finds and determines that herbicidal preparations containing any of the following substances, or compounds thereof, referred to in these regulations as "injurious herbicides," are injurious to many plants and crops grown in various areas of the State:

- (a) 2,4-dichlorophenoxyacetic acid (2,4-D)
- (b) 2,4,5-trichlorophenoxyacetic acid (2,4,5-T)
- (c) 2-methyl-4-chlorophenoxyacetic acid (MCP)

- (d) 2,4-dichlorophenoxypropionic acid (2,4-DP)
- (e) 2,4,5-trichlorophenoxypropionic acid (Silvex)
- (f) 2,4-dichlorophenoxy butyric acid (2,4-DB)
- (g) 4-amino-3,5,6-trichloropicolinic acid (Picloram) (Tordon), except that Sections 2453, 2454 and 2455 shall not apply to use of products containing this herbicide, and it shall not be applied by aircraft within a hazardous area; provided however, any permit issued pursuant to Section 2451 may include one or more of the proscriptions specified in Sections 2453, 2454 and 2455.

- (h) 3,4 dichloropropionanilide (propanil), except that Sections 2453, 2454 and 2455 do not apply to injurious herbicides containing only propanil.

Note: New authority cited: Sections 407 and 14005, Agricultural Code.

- History:* 1. New Article 20 (§§ 2448 to 2452, inclusive) filed 12-21-49 (Register 18, No. 9).
- 2. Amendment filed 10-3-55; effective thirtieth day thereafter (Register 55, No. 15).
 - 3. Amendment filed 5-31-66; effective thirtieth day thereafter (Register 66, No. 16).
 - 4. Amendment filed 4-12-67; effective thirtieth day thereafter (Register 67, No. 15).
 - 5. Amendment adding subsection (h) filed 4-18-68, as an emergency; effective upon filing, Certificate of Compliance included (Register 68, No. 10).

2449. Hazardous Areas. The director finds that risk of injury to extensive plantings of susceptible crops is likely to attend the use of injurious herbicides within the following-described areas, hereinafter referred to as "hazardous areas":

- (a) Those portions of San Joaquin County and Sacramento County bounded by a line beginning at the most northeasterly corner of San Joaquin County at the point where said county line converges with the Sacramento and Amador County lines; thence southeasterly along the San Joaquin County line to where said county line intersects State Highway 88; thence following said highway in a southwesterly direction to its point of intersection with Ione Road; thence in a southwesterly direction on the Ione Road to its point of intersection with State Highway 88 near the town of Clements; thence in a northeasterly direction on the State Highway 88 to its point of intersection with the Clements-Linden Road; thence due south on the Clements-Linden Road to its intersection with the Calaveras River; thence generally northwesterly along the meanderings of the Calaveras River

to its first intersection with Eight Mile Road; thence due west along Eight Mile Road to Telegraph Road (Thornton Road, Lower Stockton Road); thence south along Telegraph Road to its intersection with Disappointment Slough; thence in a westerly direction following the meanderings of Disappointment Slough to its convergence with the Stockton Deep Water Channel; thence northwesterly along the Stockton Deep Water Channel to its convergence with Little Connection Slough; thence in a northerly direction along Little Connection Slough to its convergence with Potato Slough; thence in a northwesterly direction along Potato Slough to its convergence with the San Joaquin River; thence northwesterly along the San Joaquin River to its convergence with the Mokelumne River; thence generally northerly along the Mokelumne River to its convergence with Georgianna Slough; thence in a northerly direction following the meanderings of Georgianna Slough to its convergence with the Sacramento River near Walnut Grove; thence northwesterly along the Sacramento River to its intersection with the first Standard Parallel north (near the Paintersville Bridge); thence due east along the first Standard Parallel north to its point of intersection with the Sacramento-Amador County line; thence south along the Sacramento-Amador County line to the point of beginning.

(b) All of Merced County, except those portions thereof bounded and described as follows:

(1) Commencing at a point where the Stanislaus County-Merced County line crosses the westerly line of Section 13, Township 5 south, Range 11 east, M. D. B. & M., and from said point of beginning southerly along said westerly line of Section 13 to a section corner common to Sections 13, 14, 23, and 24, Township 5 south, Range 11 east; thence easterly along the northerly line of Section 24, Township 5 south, Range 11 east, and easterly along the northerly line of Section 19, Township 5 south, Range 12 east, to a section corner common to Sections 17, 18, 19, and 20, Township 5 south, Range 12 east; thence southerly along the west line of said Section 20 to a section corner common to Sections 19, 20, 29, and 30, Township 5 south, Range 12 east; thence easterly along the northerly line of said Section 29 to a section corner common to Sections 20, 21, 28, and 29, Township 5 south, Range 12 east; thence southerly along the west line of said Section 28 to a section corner common to Sections 28, 29, 32, and 33, Township 5 south, Range 12 east; thence easterly along the northerly line of Sections 33, 34, and 35, Township 5 south, Range 12 east, to a point where said line crosses Dry Creek; thence northeasterly along the meanderings of the northerly bank of said Dry Creek to a point where said Dry Creek crosses the Turlock Road in Section 25, Township 5 south, Range 13 east; thence northeasterly along the northerly edge of said Turlock Road to a point where the said Turlock Road meets the Merced-

Snelling Road in Section 13, Township 5 south, Range 13 east; thence southerly along said Merced-Snelling Road (State Highway 123B) to where said Merced-Snelling Road crosses the northerly line of Section 26, Township 6 south, Range 13 east; thence easterly along the northerly line of Sections 26, 25, and 30, Township 6 south, Range 13 east, to the Hornitos Road; thence northeasterly along the Hornitos Road to a point where said Hornitos Road crosses the Merced County-Mariposa County boundary line; thence northwesterly along said Merced County-Mariposa County boundary line to the intersection of the said Merced County-Mariposa County boundary line with the Merced County-Stanislaus County boundary line; thence southwesterly along said Merced County-Stanislaus County boundary line to the point of beginning.

(2) All of Sections 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 16, 17, 20, 21, Township 8 south, Range 13 east; and Sections 1, 2, 9, 10, 11, and 12, Township 8 south, Range 12 east.

(c) All of Madera County west and south of a line drawn in a southeasterly direction from the northwest corner of Section 15, Township 9 south, Range 16 east, to the southwest corner of Section 15, Township 12 south, Range 19 east; thence continuing said line east along the south boundary of Section 15, Township 12 south, Range 19 east and its continuation to the San Joaquin River; also Sections 2, 3, 4, 8, and 9 of Township 11 south, Range 18 east, and Section 20, Township 9 south, Range 17 east, and Section 9, Township 12 south, Range 20 east.

(d) All of Fresno County lying west of a line beginning at Friant Dam and continuing southeasterly along the Friant-Kern Canal to its point of intersection with the north boundary of Section 35, Township 13 south, Range 23 east (near its crossing of the Kings River); thence due east along said boundary line to its intersection with the east boundary of Township 13 south, Range 24 east; thence south along said east boundary of Township 13 south, Range 24 east and continuing south along the east boundary of Township 14 south, Range 24 east to the county boundary line.

(e) All of Kings County.

(f) All of Tulare County lying west of a line drawn southeasterly from the northwest corner of Township 15 south, Range 25 east on the Fresno-Tulare County line to the southeast corner of Township 17 south, Range 27 east; thence due south along said east boundary of Range 27 east to the Kern County boundary line.

(g) Those portions of Kern County described as follows:

(1) Devils Den Area. All of Township 25 south, Range 18 east, Township 25 south, Range 19 east, Township 26 south, Range 19 east, and all of Township 26 south, Range 18 east, north of State Highway No. 466.

(2) All that area bounded by a line commencing at a point on Tulare-Kern County line at northeast corner of Township 25 south, Range 27 east; thence south along the east boundary of Range 27 east to the north boundary of Township 29 south;

thence east along the north boundary of Township 29 south to the east boundary of Range 29 east; thence south along the east boundary of Range 29 east to the north boundary of Township 30 south; thence east along the north boundary of Township 30 south to the east boundary of Range 30 east; thence south along the east boundary of Range 30 east to the south boundary of Township 32 south; thence southwesterly to the northwest corner of Section 1, Township 10 north, Range 18 west; thence continuing southwesterly to the southeast corner of Township 10 north, Range 19 west if so projected; thence west along the south boundary of Township 10 north to the west boundary of Range 20 west; thence north along the west boundary of Range 20 west to the south boundary of Township 11 north; thence west along the south boundary of Township 11 north to the west boundary of Range 21 west; thence north along the west boundary of Range 21 west to the south boundary of Township 12 north; thence west along the south boundary of Township 12 north to the west boundary of Range 22 west; thence north along the west boundary of Range 22 west to the south boundary of Township 32 south; thence west along the south boundary of Township 32 south to the west boundary of Range 25 east; thence north along the west boundary of Range 25 east to the south boundary of Township 29 south; thence west along the south boundary of Township 29 south to the west boundary of Range 23 east; thence north along the west boundary of Range 23 east to the south boundary of Township 28 south; thence west along the south boundary of Township 28 south to the west boundary of Range 22 east; thence north along the west boundary of Range 22 east to the north boundary of Township 27 south; thence east along the north boundary of Township 27 south to the west boundary of Range 23 east; thence north along the west boundary of Range 23 east to the north boundary of Township 26 south; thence east along the north boundary of Township 26 south to the west boundary of Range 24 east; thence north along the west boundary of Range 24 east to the Kern County line; thence east along said county line to the point of commencement.

(4) Rosamond Area. Includes all of Township 9 north, Range 14 west, Township 9 north, Range 13 west, and Township 9 north, and Range 12 west.

- History:* 1. Amendment filed 3-25-63; effective thirtieth day thereafter (Register 63, No. 5). For prior history see Register 60, No. 25.
2. Amendment filed 5-6-65; effective thirtieth day thereafter (Register 65, No. 7).

2450. General Regulations. The following provisions apply to all uses of injurious herbicides, whether or not a permit is required:

(a) Packages of injurious herbicides shall not be opened or exposed, and opened containers or leaky containers or equipment in which injurious herbicides have been used shall not be stored or handled, at any place where they may contaminate other pesticides, fertilizing materials, planting seed, nursery stock, or plants for sale to or owned by another person.

(b) Injurious herbicides, or emptied containers or parts thereof shall not be dumped or left unattended at any place where plants of value may be injured by the vapor or by water flowing through or over the material, or where contaminated soil is likely to be transported or used in proximity to susceptible crops.

(c) Equipment used for injurious herbicides shall not be stored in any place nor used for any purpose whereby susceptible crops may be affected.

(d) All equipment for application of injurious herbicides shall be suitable for such purpose and shall be properly adjusted and regulated when in use so as to prevent drift of the herbicide outside the treated area. Equipment for application of injurious herbicides by aircraft shall be leakproof, with flow of liquid to nozzles controlled by a positive shutoff system whereby each individual nozzle is equipped with a check valve and the flow of liquid controlled by a suck-back device or a boom pressure release device; or each individual nozzle equipped with a positive action valve.

(e) No injurious herbicide shall be discharged directly over or upon any property without authorization from the owner or operator of such property.

(f) Nothing in these regulations shall be construed to permit use of injurious herbicides in any of the following forms:

(1) Aerosol.

(2) Highly volatile liquid, such as methyl, ethyl, propyl (isopropyl), butyl or amyl (pentyl) esters, except as provided in Section 2455.

(3) Dust or powder, except:

(A) As a constituent in a fertilizer applied solely to lawns.

(B) As a "dustless powder" or in granular or pelleted form applied by hand.

(g) Unless expressly authorized by permit, no application of an injurious herbicide shall be made when wind velocity exceeds 10 miles per hour; nor at a height greater than 10 feet above the ground when wind velocity exceeds five miles per hour.

(h) No injurious herbicide shall be used under circumstances where injury is likely to result to plants of value on property other than the property to be treated, either through drift of the herbicide during application or through subsequent movement of vapor or contaminated dust in the wind; nor at any time when the form of the herbicide, the method of application, the condition of surrounding crops, weather conditions, or other circumstances present risk of injury to crops.

History: 1. Amendment filed 2-14-52; effective thirtieth day thereafter (Register 27, No. 4).

2. Amendment filed 6-2-54; effective thirtieth day thereafter (Register 54, No. 12).

3. Amendment filed 10-3-55; effective thirtieth day thereafter (Register 55, No. 15).

4. Amendment filed 1-19-56; effective thirtieth day thereafter (Register 56, No. 2).

5. Amendment filed 5-6-65; effective thirtieth day thereafter (Register 65, No. 7).

2451. Permits. (a) Injurious herbicides shall be used only under permit of the agricultural commissioner or under his direct supervision in any county in which there is a commissioner, or under permit of the Director in any county in which there is no commissioner, except as follows:

(1) No permit shall be required to use an injurious herbicide delivered in a quantity of not more than one gallon of liquid formulation in any 24-hour period if the formulation delivered contains not more than 1 $\frac{1}{4}$ percent by weight of injurious herbicide.

(2) No permit shall be required to use an injurious herbicide delivered in a quantity of not more than one pint of liquid or one pound of dry formulation in any 24-hour period regardless of the percentage of the active ingredient in the material.

(3) No permit shall be required to use a commercial fertilizer, agricultural mineral or granular material, containing less than 10 percent of injurious herbicide, prepared for use as a dry material without further dilution and delivered in a quantity of not more than 50 pounds in any 24-hour period.

(4) No permit shall be required to use an injurious herbicide impregnated in a wax block intended for application to weeds in grass.

(5) No permit shall be required to use an injurious herbicide when sold as a diluted, ready-to-use solution in a container of one quart or less.

(6) No permit shall be required of any agency of the State of California, or of its officers, agents, or employees acting within the scope of their authority while engaged in or

conducting or supervising research on materials subject to these regulations.

(7) No permit shall be required to use an injurious herbicide containing only 2,4-dichlorophenoxy butyric acid (2,4-DB) or compounds thereof, outside the hazardous area described in Subsection 2449 (a).

(b) Every applicant for a permit shall furnish to the commissioner such information as the commissioner may require concerning his equipment, facilities, and plan of operations for using an injurious herbicide, and the location and condition of susceptible crops in the vicinity of the area proposed to be treated. Prior to the granting of any permit to use an injurious herbicide, the commissioner may cause an inspection to be made of the equipment to be used, the facilities for disposal of empty containers and for storage or handling of unused materials, and the crops and properties in the vicinity of any area to be treated, in order to determine the conditions, if any, to be specified in the permit.

(c) Either the grower or the pest control operator or both may apply for a permit, but no permit is valid for use by any operator or person not named in the permit.

(d) Permits to use injurious herbicides within hazardous areas during the period from March 15th to October 15th shall be issued for a term of not more than one week. Permits to use injurious herbicides, except within hazardous areas during the period from March 15th to October 15th, may provide for use on one or more properties, at one or more times, and by one or more methods, in the discretion of the commissioner; but no permit shall be valid for more than one year from the date of issue. A copy of each permit shall be retained by the commissioner.

(e) If, at any time, symptoms of an injurious herbicide shall appear generally throughout commercial plantings of susceptible crops in any area, the director shall cause a field inspection to be made. If, as a result of such inspection, it shall appear to the director that substantial injury will result to such commercial plantings if application of an injurious herbicide continues within such area, the director shall cause all permits issued for applications within such area to be canceled, and shall provide that no additional permits shall be issued therein until future order by the director.

- History:* 1. Amendment filed 2-19-62; effective thirtieth day thereafter (Register 62, No. 4). For prior history see Register 58, No. 3.
 2. Amendment filed 5-6-65; effective thirtieth day thereafter (Register 65, No. 7).
 3. Amendment filed 5-31-66; effective thirtieth day thereafter (Register 66, No. 16.)

2452. Forms. (a) Applications for permits to use an injurious herbicide shall be substantially in one of the following forms, to be attached to or incorporated in each permit:

(1) APPLICATION TO USE INJURIOUS HERBICIDES

Application is hereby made for a permit to use approximately _____ pounds of _____ on approximately _____ acres of _____ (Brand name of herbicide), owned by _____ and located _____, (Crop) application to be made by _____

_____ (Type of equipment) operated by _____ on or about _____ (Date)

Applicant declares that he has read and understands and acknowledges the conditions specified in the rules and regulations of the Director of Agriculture pertaining to the use of injurious herbicides, and the further conditions specified in the permit to be issued upon this application.

Applicant further declares that he understands and acknowledges that such permit does not operate to relieve him from liability for any damage to the property of another caused by such use.

_____ (Date)

_____ (Applicant's signature)

_____ (Mailing address)

(2) APPLICATION TO USE INJURIOUS HERBICIDES (SEASONAL)

Application is hereby made for a permit to use injurious herbicides containing _____ within the County of _____ during the calendar year 19_____

Applicant declares that he has read and understands and acknowledges the conditions specified in the rules and regulations of the Director of Agriculture pertaining to the use of injurious herbicides, and the further conditions specified in the permit to be issued upon this application.

Applicant further declares that he understands and acknowledges that such permit does not operate to relieve him from liability for any damage to the property of another caused by such use.

_____ (Date)

_____ (Applicant's signature)

_____ (Mailing address)

(b) Permits to use injurious herbicides shall be substantially in the following form:

PERMIT

No. _____

Permission is hereby given to use injurious herbicides as specified in the attached application. This permit is conditioned upon compliance with all laws, rules, and regulations applicable to the use of such herbicides, and upon the following additional conditions: _____

_____ This permit is valid only for the use and under the conditions herein stated or implied, and shall be void upon breach or failure of any such condition.

This permit expires _____ unless sooner revoked.

_____ (Agricultural Commissioner)

_____ County

By _____

_____ (Date)

(c) A statement certifying that the person to whom delivery of an injurious herbicide is made holds a valid permit to use such herbicide, incorporated in, endorsed upon, or attached to a copy of the invoice, delivery slip, permit, or other document specifying the kind and quantity of injurious herbicide delivered and the date of delivery, shall be retained by the seller and made available for inspection by

the director or the commissioner during regular business hours. Such statement shall be substantially in the following form:

A valid permit, No. _____, issued by the Agricultural Commissioner of _____ County, to use the kind and quantity of herbicide containing _____, described herein, is held by the person whose name is subscribed, to whom delivery of said herbicide is made.

By -----
(Date) (Permittee) (Agent)
History: 1. Amendment filed 6-2-54; effective thirtieth day thereafter (Register 54, No. 12).
2. Amendment filed 10-3-55; effective thirtieth day thereafter (Register 55, No. 15).

2452.1. Propanil. (a) No herbicide containing propanil shall be applied by aircraft on any area situated within one-half mile of any cultivated commercial prune orchard belonging to any person other than the owner of the property being treated, unless there is a continuous air flow of not less than three miles per hour away from such prune orchard during application, nor on any area situated within two hundred feet of any such planting regardless of direction of air flow.

(b) No herbicide containing propanil shall be applied by ground equipment on any area situated within one-fourth mile of any cultivated commercial prune orchard belonging to any person other than the owner of the property being treated, unless there is a continuous air flow away from such orchard during application, nor on any area situated within one-hundred feet of any such orchard regardless of direction of air flow.

(c) A continuous smoke column or other device satisfactory to the commissioner shall be employed to indicate to the operator of the application equipment the direction and velocity of the air flow, and indicate a temperature inversion by layering of smoke, at the time and place of treatment.

(d) Nozzles shall conform to specifications approved by the California Department of Agriculture as to design, arrangement, and operating conditions for the purpose of minimizing drift.

Note: Authority cited: Sections 107 and 14005, Agricultural Code.

History: 1. New section filed 4-18-68, as an emergency; effective upon filing. Certificate of Compliance included (Register 68, No. 16).

2453. Central Valley Operations. In addition to the regulations set forth in Section 2450, the following provisions apply to the use of injurious herbicides in the Sacramento and San Joaquin Valleys outside the hazardous areas during the period from March 15th to October 15th of each calendar year;

(a) A continuous smoke column or other device satisfactory to the commissioner shall be employed to indicate to the operator of the equipment the direction and velocity of the air flow at the time and place of treatment.

(c) No injurious herbicide shall be discharged more than 10 feet above the crop. Discharge shall be shut off whenever it is necessary to raise the equipment over obstacles such as trees or poles.

(d) Nozzles shall conform to specifications approved by the State Department of Agriculture as to design, arrangement, and operating conditions for the purpose of minimizing drift.

(e) No injurious herbicide shall be applied by aircraft when the temperature five feet above the ground exceeds 80° Fahrenheit, except that operations may continue six hours after sunrise, regardless of temperature.

Note: Additional authority cited: Section 1080.1 (renumbered 14032, 14033 and 14034, 1967 Stats. c. 15), Agricultural Code.

History: 1. New section filed 6-2-54; effective thirtieth day thereafter (Register 54, No. 12).
2. Repealer of subsection (b) filed 4-12-55, as an emergency; effective upon filing (Register 55, No. 6).
3. Amendment filed 5-6-65; effective thirtieth day thereafter (Register 65, No. 7).

2454. Hazardous Area Operations. (a) In addition to the provisions specified in Section 2450, the following provisions apply to the use of injurious herbicides within hazardous areas by means of ground equipment:

(1) Within those hazardous areas described in Section 2449, that portion of San Joaquin County described in Subsection (a) and Subsections (b), (c), and (d), no injurious herbicide shall be applied by ground equipment between March 15 and October 15 of any calendar year on any area situated within two miles of any cultivated commercial vineyard or cotton planting belonging to any person other than

the owner of the property being treated, unless there is a continuous air flow away from such vineyard or cotton planting during application, nor on any area situated within one-half mile of any such vineyard or cotton planting regardless of direction of air flow.

(2) Within those hazardous areas described in Section 2449, that portion of Sacramento County described in Subsection (a) and Subsections (e), (f), and (g), no injurious herbicide in ester form shall be applied by ground equipment between March 15 and October 1 of any calendar year on any area situated within two miles of any cultivated commercial vineyard or cotton planting belonging to any person other than the owner of the property being treated, unless there is a continuous air flow away from such vineyard or cotton planting during application, nor on any area situated within one-half mile of any such vineyard or cotton planting regardless of direction of air flow; and no injurious herbicide in any form shall be applied by ground equipment between March 15 and October 1 of any calendar year on any area situated within one-half mile of any cultivated commercial vineyard or cotton planting belonging to any person other than the owner of the property being treated, unless there is a continuous air flow away from such vineyard or cotton planting during application, nor on any area situated within 100 feet of any such vineyard or cotton planting regardless of direction of air flow.

(3) No injurious herbicide shall be applied by ground equipment within a hazardous area at any time when wind velocity exceeds seven miles per hour.

(4) No injurious herbicide shall be applied within a hazardous area by ground equipment with nozzles having an orifice less than 0.059 inch in diameter nor at a pressure greater than 30 pounds per square inch nor at a rate less than 25 gallons of mixed material per acre.

(b) In addition to the provisions specified in Section 2450, the following provisions apply to the use of injurious herbicides within hazardous areas by means of aircraft:

(1) No injurious herbicide shall be applied by or loaded into any aircraft between March 15 and October 15 of any calendar year at any place situated within a hazardous area, except as provided in Subsections (e), (d), (f), and (g).

(2) No injurious herbicide shall be applied by aircraft within a hazardous area when wind velocity exceeds five miles per hour.

(3) No injurious herbicide shall be applied by aircraft within a hazardous area with nozzles having an orifice less than 0.0625 inch in diameter, nor with any device or mechanism which would cause a sheet, fan, cone or other dispersion of the discharged material, nor at a pressure greater than 45 pounds per square inch. Orifices shall be directed backward

with the slip stream or not more than ten degrees downward from the horizontal axis of the wing section.

(4) No injurious herbicide shall be discharged from aircraft within a hazardous area at an altitude greater than 10 feet above the crop.

(c) Within that portion of the hazardous area situated in Sacramento County as described in subsection (a) of Section 2449 injurious herbicides may be applied by aircraft between March 15 and October 15 of any calendar year under the following conditions:

(1) Such application may be made only when, in the opinion of the Commissioner, it is safe and feasible to do so, taking into account, among other things, the proximity of susceptible plants, and only under the direct supervision of the Commissioner.

(2) At the time of each such application a record shall be made and signed by the permittee, and also signed by the commissioner, showing:

(A) The date and time of application.

(B) The direction and velocity of the wind, including all changes during application.

(C) Temperature and humidity readings, taken at a height of five feet above the ground on the premises being treated, at the beginning and the end of each day's application.

(D) A description of the manner of application and the condition of the equipment used.

(E) Time, kind, concentration, and quantity of herbicide and of each diluent, carrier, and additive used.

(F) Names of agricultural pest control licensee and pilot operating the aircraft, and name of the grower for whom the injurious herbicide is applied.

A copy of the record shall be submitted by the permittee to the commissioner within 48 hours of each application, and shall be retained by the commissioner as a public record for three years.

(3) No injurious herbicide in an ester form shall be applied.

(d) Within the hazardous areas described in Section 2449, subsections (d), (e), (f), and (g), injurious herbicides may be applied by or loaded into aircraft between October 15 and March 31, subject to all conditions of the permit.

(e) In addition to all of the provisions of this Article 20, the following special provisions apply to the use of injurious herbicides within the hazardous area described in Section 2449, Subsection (a) except that portion situated within Sacramento County, between March 15 and October 15 of any calendar year:

(1) No injurious herbicide shall be applied on any property situated within two miles of any cultivated commercial vineyard;

(2) No injurious herbicide in an ester form shall be applied.

(f) Injurious herbicides may be applied by aircraft between March 15 and October 15 of any calendar year upon the conditions set forth in this Subsection (f) within that portion of the hazardous area defined in Section 2449 (a) bounded and described as follows:

Commencing at the intersection of the prolonged east line of the dredger cut on the east side of the Bishop Tract and the center line of Disappointment Slough and running thence northerly and westerly along the east and north side of the dredger cut to the northeasterly corner of Bishop Tract, thence northwesterly along the east line of the dredger cut on the east side of Rio Blanco Tract to the center line of White Slough, thence westerly along the center line of White Slough to the center line of Little Potato Slough, thence southerly along the center line of Little Potato Slough to the center line of Little Connection Slough, thence southerly along the center line of Little Connection Slough to the center line of the San Joaquin River, thence easterly along the center line of the San Joaquin River to the center line of Disappointment Slough, thence easterly along the center line of Disappointment Slough to the point of commencement of the herein described parcel which contains Bishop Tract, Rio Blanco Tract, King Island and Empire Tracts.

(1) Injurious herbicides may be used and applied by aircraft only when, in the opinion of the Agricultural Commissioner of San Joaquin County, it is safe and feasible to do so, and he issues a permit therefor.

(2) No application of an injurious herbicide by aircraft may be made during the period from March 15 to October 15 of any calendar year in the area above described unless such application is under the direct supervision of the Agricultural Commissioner of San Joaquin County.

(3) At the time of each such application a record shall be made and signed by the permittee showing the information required by Subsection (c)(2) of this Section, and signed by the commissioner. A copy of the record shall be submitted by the permittee to the commissioner within 48 hours of each application, and shall be retained by the commissioner as a public record for three years.

(g) Injurious herbicides may be applied by aircraft between March 15 and October 15 of any calendar year upon the conditions set forth in Section 2454 (c) within that portion of the hazardous area in Merced County defined in Section 2449 (b) bounded and described as follows:

(1) Commencing where the Merced-Fresno County line intersects the northerly line of Section 14, Township 11 south,

Range 12 east, M.D.B. and M.; thence southwesterly along said County line to its intersection with the westerly line of Section 12, Township 12 south, Range 11 east; thence northerly along said line and the westerly line of Section 1, Township 12 south, Range 11 east, and the westerly line of Sections 36, 25, 24, and 13, Township 11 south, Range 11 east, to a section corner common to Sections 11, 12, 13, and 14, Township 11 south, Range 11 east; thence easterly along the northerly line of said Section 13 and the northerly line of Sections 18, 17, 16, 15, and 14, Township 11 south, Range 12 east, to the point of origin.

(h) Injurious herbicides containing 2,4-dichlorophenoxy butyric acid in ester form shall not be applied within that portion of the hazardous area described in Subsection 2449 (a) of this Article 20 between March 15 and October 15.

NOTE: New authority cited: Sections 407 and 14003, Agricultural Code. Reference: Section 14003, Agricultural Code.

HISTORY: 1. Amendment to subsection (b)(3) filed 2-6-68 as an emergency; effective upon filing (Register 68, No. 6). For prior history, see Register 67, No. 15.

2. Certificate of Compliance--Section 11422.1, Government Code, filed 4-18-68 (Register 68, No. 16).

2455. Highly Volatile Liquids. Permits may be issued for the use of injurious herbicides in highly volatile liquid form only within the areas and under the conditions specified in this section.

(a) In addition to the regulations set forth in Section 2450, every permit for the use of injurious herbicides in highly volatile form shall be subject to the following conditions:

(1) Such herbicides shall be delivered in unopened non-returnsable containers directly from the registrant to a point within the area hereinafter described, and shall not thereafter be transported outside said area.

(2) Equipment used for applying such herbicides shall not be moved outside said area while carrying such herbicides either in concentrated or in dilute form.

(3) Emptied containers of such herbicides shall not be transported outside said area or used for any purpose other than the handling of injurious herbicides within said area, and immediately following such use shall be destroyed by crushing and burying.

(b) The provisions of this section apply to the following described area:

All that area in San Luis Obispo County bounded by a line beginning at the northeast corner of Township 25 south, Range 16 east; thence south and east along the San Luis

Obispo County-Kern County boundary line to the southeast corner of Section 31, Township 10 north, Range 24 west; thence west and northwesterly along the San Luis Obispo County-Santa Barbara County boundary line to the west line of Township 32 south, Range 18 east; thence north along the west line of Township 32 south, Range 18 east to northwest corner of this Township; thence along the divide of La Panza Range, that is along an approximately straight line drawn through Branch Mountain Lookout Station and Black Mountain Lookout Station, to the northwest corner of Township 29 south, Range 15 east; thence west along the north line of Township 29 south, Range 14 east to west line of Township 28 south, Range 14 east; thence along the west line of Township 28 south, Range 14 east and Township 27 south, Range 14 east to southwest corner of Township 26 south, Range 14 east; thence west along the south line of Township 26 south, Range 13 east, to southwest corner of said Township; thence north along the west line of Township 26 south, Range 13 east and Township 25 south, Range 13 east to the Monterey County line; thence east along the San Luis Obispo County-Monterey County boundary line to point of beginning.

(c) The provisions of this section apply to the following described area during the period from December 1 to March 1:

That portion of Merced County described in Section 2449, subsection (b)(1), and that contiguous portion of Stanislaus County described as follows:

Commencing at a point where the Stanislaus County-Merced County line crosses the westerly boundary of Section 22, Township 5 south, Range 11 east, M.D.B.&M.; thence northerly along the westerly line of Sections 22, 15, 10, and 3, Township 5 south, Range 11 east M.D.B.&M.; thence northerly along the westerly line of Sections 34, 27, 22, 15, 10, and 3, Township 4 south, Range 11 east, M.D.B.&M. to a point where the said westerly line of said Section 3 as extended crosses the tracks of the Oakdale Branch of the Southern Pacific Railroad Company; thence northwesterly along said Oakdale Branch of the Southern Pacific Railroad Company tracks to a point where the said Oakdale Branch of the Southern Pacific Railroad Company tracks cross the Tuolumne River; thence northeasterly along the meanderings of the said Tuolumne River to a point where the said Tuolumne River crosses the Stanislaus County-Tuolumne County line; thence southeasterly along the Stanislaus County-Tuolumne County line to a point where it crosses the Stanislaus County-Merced County line; thence southwesterly along said Stanislaus County-Merced County line to the point of beginning.

(d) The provisions of this section apply to the following described area:

All of Lassen County.

(e) The provisions of this section apply to the following described area:

All of Plumas County.

(f) The provisions of this section apply to the following described area:

All of Sierra County.

(g) The provisions of this section apply to the following described area:

All of Modoc County, except the Tulalake area described as Townships 46, 47, and 48 north, Range 5 east, and the west half of Townships 46 and 47 north, Range 6 east.

(h) The provisions of this Section apply to the following described area:

All of Inyo County.

(i) The provisions of this Section apply to the following described area:

All of Mono County.

NOTE: Authority cited: Sections 16, 1080 and 1080.1, Agricultural Code.

History: 1. Amendment filed 2-21-63; effective thirtieth day thereafter (Register 63, No. 2). For prior history see Register 61, No. 8.

Article 21. Injurious Materials

2460. Findings of Fact. The director finds and determines that the injurious materials listed in these regulations must necessarily be applied in pest control and other agricultural operations for the production of various crops of major economic importance to enable growers of California to produce crops and livestock products of good quality at costs that enable the consuming public to obtain such products at reasonable prices; that unless carefully used, such injurious materials are likely to cause injury to persons, animals or crops, other than the pest or vegetation which it is intended to destroy; that these regulations governing the application of such materials in pest control and other agricultural operations are reasonably calculated to avoid such injury, and are necessary for the proper use of such materials.

Note: Authority cited for Article 21 (§§2460 to 2464, inclusive): Sections 16 and 1080, Agricultural Code. Additional authority cited: Sections 1080.1 and 1080.3, Agricultural Code.

History: 1. New Article 21 (§§2460 to 2464, inclusive), filed 9-8-50; effective thirtieth day thereafter (Register 21, No. 6).

2461. Injurious Materials. The director finds and determines that the materials specified in this section are "injurious materials" within the findings and determinations of Section 2460. Said injurious materials are:

- (a) Certain arsenic compounds, to wit:
- (1) Calcium arsenate
 - (2) Standard lead arsenate
 - (3) Copper acetoarsenite (Paris green)
 - (4) Sodium arsenite, including any preparation of arsenic trioxide or arsenous acid with sodium hydroxide or sodium carbonate which contains as an active ingredient arsenic all in soluble form.
- (b) Certain organic phosphorus compounds, to wit:
- (1) Tetraethyl pyrophosphate (TEPP)
 - (2) O,O-diethyl O-para-nitrophenyl thiophosphate (parathion)
 - (3) O,O-dimethyl O-para-nitrophenyl thiophosphate (methyl parathion)
 - (4) O-ethyl O-para-nitrophenyl thionobenzenephosphonate (EPN)
 - (5) Octamethyl pyrophosphoramidate (OMPA)
 - (6) O,O-diethyl O-2(ethylmercapto)-ethyl thiophosphate (demeton) (Systox)
 - (7) 2-Carbomethoxy-1-methylvinyl dimethyl phosphate (Phosdrin)
 - (8) O,O-diethyl S-(ethylthiomethyl) phosphorodithioate (Thimet)
 - (9) O,O-diethyl S-2-(ethylthio) ethyl phosphorodithioate (Di-Syston), except that pesticide formulations in granular form containing not more than 2% thereof, or dry commercial fertilizers in granular form containing not more than 1%

thereof, shall not require a permit under the provisions of Section 2463.

(10) Dimethyl Phosphate of 3-Hydroxy, N,N-Dimethyl-Cis-Crotonamide (Bidrin Insecticide)

(c) Chloropierin

- History:** 1. Amendment filed 8-7-61; designated effective 1-1-62 (Register 61, No. 16). For prior history, see Register 60, No. 14.
2. Amendment filed 10-18-63; effective thirtieth day thereafter (Register 63, No. 18).
3. Amendment filed 5-11-64; effective thirtieth day thereafter (Register 64, No. 10).
4. Amendment filed 1-28-66; effective thirtieth day thereafter (Register 66, No. 3).

2461.1. Restricted Materials. The director further finds and determines that the injurious materials specified in Section 2461 require regulation in a manner differing from the regulation required for the injurious materials specified in this section to the extent provided in this article. To facilitate the identification thereof, the materials specified in Section 2461 are designated "injurious materials" and those specified in this section are designated "restricted materials." Said designations are used hereafter in this article and shall be applied accordingly.

The director finds and determines that the materials specified in this section and referred to in this article as "restricted materials" are injurious materials within the findings and determinations of Section 2460. Said restricted materials are:

- (a) Certain chlorinated organic pesticides, to wit:
- (1) Dichlorodiphenyltrichloroethane (DDT)
 - (2) Dichlorodiphenyldichloroethane (DDD) (TDE)
 - (3) Dieldrin
 - (4) Endrin
 - (5) Heptachlor
 - (6) Toxaphene

History: 1. New section filed 5-11-64; effective thirtieth day thereafter (Register 64, No. 10).

2462. Time and Conditions for Use. No injurious material or restricted material shall be used in pest control or other agricultural operations in any area of this State in violation of any of the following conditions:

(a) No injurious material or restricted material shall be applied under any circumstances or in any location where damage, illness or injury appears likely to result, through direct application, drift or residue, to persons, animals (including honeybees) or crops other than the pest or vegetation which the material is intended to destroy.

(b) Application of injurious materials and restricted materials shall be substantially confined to the property to be treated, and no injurious materials or restricted materials shall be discharged onto any property without the consent of the owner or person in possession thereof. Consent of the owner or person in charge thereof will not be required if the application is performed by any local district or other public agency which has entered into a cooperative agreement with the

California Department of Public Health under authority of Division 3, Chapter 5.5, Section 2426 of the Health and Safety Code.

(c) Injurious materials and restricted materials, or emptied containers or parts thereof, shall not be dumped or left unattended at any place or under any conditions where they may present a hazard to persons, animals (including honeybees) or crops.

(d) Before any injurious material or restricted material is applied, the person responsible for making the application shall give warning to all persons known to be on the property to be treated. Said warning shall be adequate to advise each such person of the nature of the material to be applied and the precautions to be observed, as printed on the label of the container of the injurious or restricted material. Such warning will not be required if the application is performed by any local district or other public agency which has entered into a cooperative agreement with the California Department of Public Health under authority of Division 3, Chapter 5.5, Section 2426 of the Health and Safety Code.

(e) After any pest control material containing parathion, methyl parathion, or O-ethyl O-para-nitrophenyl thionobenzenephosphonate (EPN) is applied at a rate greater than one pound of actual parathion, methyl parathion, or O-ethyl O-para-nitrophenyl thionobenzenephosphonate (EPN) singly or in combination, per acre, the treated property shall be kept posted by the person who authorized the application for two weeks in such manner as to provide adequate warning to persons who enter the property by the point or points of normal entry. The warning notice that is posted shall be of such size that it is readable at a distance of 25 feet and be substantially as follows:

**WARNING
DO NOT ENTER**

This property treated with (Parathion) (Methyl parathion) (EPN) on
----- (date) and all persons are warned to stay out for two weeks.

(f) Before any employee engages in handling or applying injurious materials or restricted materials or is required to work in areas where residues of such materials remain in injurious amounts, he shall be informed by his employer of the precautions recommended by the manufacturer and by all appropriate industrial safety orders; and shall be provided with adequate protective devices as specified in such recommendations.

(g) (1) Before any injurious material or restricted material known to be harmful to animals (including honeybees) is applied, notice shall be given by the person responsible for making the application, to the owner of any animals (including honeybees), on the property to be treated.

(2) Injurious materials or restricted materials known to be harmful to honeybees shall be applied on blossoming crops in which bees are working only during the hours and under the conditions, if any, provided on the permit.

(A) If the material is to be applied over plants or crops in bloom, notice shall be given by the person responsible for making the application to each owner of

apiaries located within one mile of the property to be treated.

(3) The notice provided for in this Subsection (g) shall be given prior to treatment, allowing a reasonable time, not exceeding 48 hours, to protect the animals (including honeybees), providing the owner of the animals (including honeybees) has previously made a request in writing to the agricultural commissioner for such notification. Such notice shall be given to the owner of the animals (including honeybees) by the person responsible for making the application by collect telephone or telegraph message or other means provided by the owner of the animals (including honeybees), and at the owner's expense.

(h) No injurious material or restricted material shall be used for any purpose not specified on the label of the container thereof or on supplemental printed directions delivered therewith nor used in a manner contrary to such label or directions, unless such application is expressly authorized by a permit issued by the agricultural commissioner for the particular application involved.

(i) No injurious material or restricted material in dust form shall be applied when wind velocity exceeds five miles per hour at the time and place of application unless such application is expressly authorized by a permit issued by the agricultural commissioner for the particular application involved.

- History:*
1. Amendment filed 10-3-55; effective thirtieth day thereafter (Register 55, No. 15).
 2. Amendment filed 7-2-57 as an emergency; effective upon filing (Register 57, No. 10).
 3. Amendment filed 5-11-64; effective thirtieth day thereafter (Register 64, No. 10).
 4. Amendment filed 6-1-67; effective thirtieth day thereafter (Register 67, No. 22).

2463. Permits. Injurious Materials. (a) The injurious materials specified in Section 2461 shall be applied only under permit of the agricultural commissioner or under his direct supervision in any county in which there is a commissioner, or under permit of the director in any county in which there is no commissioner, except as follows:

(1) No permit shall be required to use a pesticide in which the only injurious material is calcium arsenate, standard lead arsenate, or copper acetoarsenite (Paris green), unless the pesticide is in a form suitable for application as a dust without further dilution or mixing and is delivered or applied in a quantity of more than 50 pounds in any 24-hour period.

(2) No permit shall be required to use parathion-treated cord sold for control of flies.

(3) No permit shall be required to use chloropicrin, except as provided in Section 2463.1.

(4) No permit shall be required to use pesticides containing sodium arsenite when sold as diluted ready-to-use syrups or dry baits registered and labeled for use as poison baits for the control of insects and other arthropods, snails and slugs, or rodents.

(b) Either the grower or the pest control operator of both may apply for a permit, but no permit is valid for use by any operator or person not named in the permit.

(c) A permit to use injurious materials shall be valid for the calendar year for which issued, unless sooner revoked or suspended, or unless an earlier date of expiration is specified. A copy of each permit shall be retained by the issuing officer.

History: 1. Amendment filed 5-11-64; effective thirtieth day thereafter (Register 64, No. 10). For prior history see Register 63, No. 18.

2463.1. Chloropicrin. (a) The provisions of this section shall apply only in the following described areas, except that subsection (f) of this section shall not apply in Merced County:

- (1) All of Orange County.
- (2) All of Ventura County.
- (3) All of Merced County.

(b) Chloropicrin shall be applied only under permit of the agricultural commissioner, except as follows:

(1) No permit shall be required to apply any preparation containing not more than five percent chloropicrin.

(2) No permit shall be required to apply chloropicrin in a fumigatorium, agricultural warehouse, mill, or grain storage facility.

(3) No permit shall be required to use chloropicrin delivered in a quantity of not more than 12 pounds in any twenty-four hour period.

(c) Chloropicrin for field fumigation of soil shall be placed at a minimum depth of six inches below the surface. Equipment for application shall be operated in such a manner as to minimize drip when the nozzles are lifted from the soil.

(d) The soil shall be packed or firmed immediately following application.

(e) When the chloropicrin is applied within 1,000 feet of any occupied dwelling, other than one occupied by the permittee or by a householder who has given his consent in writing to such application, the area shall be covered with a gas-confining covering immediately following treatment. The covering shall remain in place until all of the following conditions are met:

(1) Not less than twenty-four hours have elapsed since any chloropicrin has been applied to the area under the covering.

(2) The covering shall not be removed except during the hours from 8:00 a.m. until noon.

(3) The covering shall not be removed at any time when the surface wind speed is less than five miles per hour.

(4) The covering shall not be removed on any day when the atmospheric conditions described in paragraph (f) are forecast.

(5) Any other conditions which the commissioner deems necessary to avoid injury to persons, animals, or crops in the vicinity.

(f) Not more than five acres shall be treated with chloropicrin on any day when all of the following atmospheric conditions concurrently are forecast by the Air Pollution Control Officer:

(1) The inversion base at 4:00 a.m., Pacific Standard Time will be lower than 1,500 feet, and

(2) Such inversion will not break or the maximum mixing height will not rise above 3,500 feet, and

(3) The average surface wind speeds between 6:00 a.m. and 12:00 noon Pacific Standard Time, will not exceed five miles per hour.

History: 1. New section filed 6-13-60; effective thirtieth day thereafter (Register 60, No. 14).

2. Amendment filed 12-24-63; effective thirtieth day thereafter (Register 63, No. 26).

3. Amendment filed 2-21-67; effective thirtieth day thereafter (Register 67, No. 8).

2463.2. Sodium Arsenite. (a) No pesticide containing sodium arsenite shall be applied on exposed vegetation (other than dormant grapevines) unless the vegetation to be treated is enclosed within a good and sufficient fence or otherwise made inaccessible to grazing animals, pets, and children.

(b) No pesticide containing sodium arsenite shall be applied on soil or vegetation (other than dormant grapevines) in any area penetrated by roots of any plant of value, without the written consent of the owner of such plant.

(c) No pesticide containing sodium arsenite shall be kept or placed in drinking cups, pop bottles, or other containers of a type commonly used for food or drink.

(d) No pesticide containing sodium arsenite, whether in concentrated or dilute form, shall be stored, placed, or transported in any container or receptacle which does not bear on the outside a conspicuous poison label which conforms to the label required to be placed on all packages of arsenic compounds and preparations sold or delivered within the State.

History: 1. New section filed 7-8-61; designated effective 1-1-62 (Register 61, No. 16).

2463.3. Permits. Restricted Materials. (a) Any pesticide containing one of the restricted materials or a mixture of the restricted materials described in Section 2461.1 shall be applied only under the permit of the agricultural commissioner, except as follows:

(1) No permit shall be required to use a pesticide containing a restricted material in granular form, or suitable for application as a dust without further dilution or mixing, unless it is delivered in a quantity of more than 50 pounds in any 24-hour period. A permit shall be required to apply

more than 50 pounds of such dust or granules in any 24-hour period.

(2) No permit shall be required to use a pesticide containing a restricted material, in liquid form, unless it is delivered in a quantity of more than one gallon in any 24-hour period.

(3) No permit shall be required to use a pesticide containing a restricted material in wettable powder form, unless it is delivered in a quantity of more than four pounds in any 24-hour period.

(4) No permit shall be required to use a pesticide containing a restricted material for any non-agricultural application; or when application is to be made directly to livestock, other than dairy animals.

(b) Either the grower or the pest control operator or both may apply for a permit, but no permit is valid for use by any operator or person not named in the permit.

(c) A permit to use restricted materials shall be valid for the calendar year for which issued, unless sooner revoked or suspended, or unless an earlier date of expiration is specified. A copy of each permit shall be retained by the issuing officer.

History: 1. New Section filed 10-18-63; effective thirtieth day thereafter (Register 63, No. 18).
2. Amendment filed 5-11-64; effective thirtieth day thereafter (Register 64, No. 10).

2464. Forms. (a) Applications for permits to use injurious materials shall be substantially in one of the following forms, to be attached to or incorporated in each permit:

(1) APPLICATION FOR PERMIT TO USE INJURIOUS MATERIALS

Application is hereby made for a permit to use approximately _____ pounds of _____ for control of _____ on _____ acres of _____ owned by _____ and located _____; application to be made on or about _____ by (Crop) _____ by (aircraft) (ground rig) operated by _____

Applicant declares that he has read and understands and acknowledges the conditions specified in the rules and regulations of the Director of Agriculture pertaining to the use and application of injurious materials, and the further conditions specified in the permit to be issued upon this application.

Applicant further declares that he understands and acknowledges that such permit does not operate to relieve him from liability for any damage to persons or property caused by the use of such material.

(Applicant's signature)

(Date)

(Applicant's address)

(2) APPLICATION FOR PERMIT TO USE INJURIOUS MATERIALS (SEASONAL)

Application is hereby made for a permit to use pesticides containing _____ within the County of _____ during the calendar year 19____

Applicant declares that he has read and understands and acknowledges the conditions specified in the rules and regulations of the Director of Agriculture pertaining to the use and application of injurious materials, and the further conditions specified in the permit to be issued upon this application.

Applicant further declares that he understands and acknowledges that such permit does not operate to relieve him from liability for any damage to persons or property caused by the use of such material.

(Applicant's signature)

(Date)

(Applicant's address)

(b) Permits to use injurious materials shall be substantially in the following form:

PERMIT TO USE INJURIOUS MATERIALS

No. _____

Permission is hereby given to use injurious materials as specified in the attached application.

This permit is conditioned upon compliance with the rules and regulations of the Director of Agriculture applicable to the use of injurious materials, and upon the following additional conditions deemed necessary to avoid injury: _____

If permittee is hereby expressly authorized, subject to all conditions of this permit, to apply said material in dust form when wind velocity exceeds five miles per hour, issuing officer initial here: _____

This permit is valid only for the use and under the conditions herein stated, and shall be void upon breach of or failure to comply with any such conditions.

This permit expires _____ unless sooner revoked.

County of _____
By _____
Agricultural Commissioner

(Date) _____

(c) A statement certifying that the person to whom delivery of an injurious material is made holds a valid permit to use such material, incorporated in, endorsed upon, or attached to a copy of the invoice, delivery slip, permit, or other document specifying the kind and quantity of injurious material delivered and the date of delivery, shall be retained by the seller and made available for inspection by the director or the commissioner during regular business hours. Such statement shall be substantially in the following form:

A valid permit, No. _____, issued by the Agricultural Commissioner of _____ County, to use the kind and quantity of material containing _____, described herein, is held by the person whose name is subscribed, to whom delivery of said material is made.

(Date) _____ By _____ (Permittee)
(Agent)

- History: 1. Amendment filed 7-25-52; effective thirtieth day thereafter (Register 29, No. 3).
- 2. Amendment filed 10-3-55; effective thirtieth day thereafter (Register 55, No. 15).

Article 22. Sale, Use, and Possession of Sodium Fluoroacetate *

2470. Definitions. As used in this article, unless a different meaning is apparent from the context:

(a) Terms defined in the Agricultural Code have the meanings therein set forth.

* NOTE:
Sale of poisons is regulated by Chapter 2 of Division 15 of the Health and Safety Code administered by the State Board of Pharmacy, and Articles 3 and 4 of Chapter 7 of Division 5 of the Agricultural Code administered by the Bureau of Chemistry, State Department of Agriculture.
Standards of safety applicable to poisons in places of employment are regulated by Title 8 of the California Administrative Code, administered by the Division of Industrial Safety.
Exposure of poisons in food- and drug-handling establishments is regulated by Title 17 of the California Administrative Code, administered by the Bureau of Food and Drugs, State Department of Public Health.
Use of pesticides for control of pests which may invade households or other structures is regulated by Chapter 4 of Division 3 of the Business and Professions Code administered by the Structural Pest Control Board.

GROUP 3. AGRICULTURAL PEST CONTROL OPERATORS

Originally published June 25, 1945

Revision filed August 30, 1951

Article	Article
1. Definitions and Construction	5. Operations
2. Licenses	6. Financial Responsibility
3. Permits to Operate Without a License	7. Recommendations and Usage
4. Aircraft Pilots	

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3070. Definitions

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3075. Qualifications
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Article 7. Recommendations and Usage

Section
3110. Definitions
3111. Authorized Use

Section
3112. Written Recommendation
3114. Experimental Use

Article 1. Definitions and Construction

3070. Definitions. (a) As used in this group, all terms defined in the Agricultural Code have the same meaning as therein defined, unless a different meaning is specified in this group or is apparent from the context.

(b) "The commissioner" means the county agricultural commissioner having jurisdiction in the county where the pest control operations for hire are performed.

NOTE: Authority cited for Group 3: Sections 16 and 160.5, Agricultural Code. Reference: Section 160.1-160.9, Agricultural Code. Issuing agency: Director of Agriculture.

History: 1. Originally published 6-25-45 (Title 3).

2. Repealer and new Group 3 (Sections 3070-3100) filed 8-30-51; effective thirtieth day thereafter (Register 25, No. 4). For history of repealed Group 3, see Register 19, No. 2.

Article 2. Licenses

3075. Qualifications. (a) Every applicant for a license, upon reasonable notice, shall appear at a time and place designated by the director and shall submit to the director such information as may be required to satisfy the director of the character, qualifications, responsibility, and good faith of the applicant in seeking to carry on the business of pest control. The applicant may appear in person, if a natural person, or by agent. Appearance by agent constitutes representation that said agent is authorized to act for and on behalf of the applicant in matters relating to the business of pest control. The person or agent designated to appear for the applicant shall be named in the application if other than the applicant in person.

(b) **Change of Status.** Every person to whom a license is issued shall immediately notify the director of any change of the status or authority of any person or agent so named, or of any change in the business firm name, organization, address, or any other matter shown in the application. Licenses are not transferable, and in case of a change of business ownership a new application and fee are required. No fee is required for change of business name if the application for such change is accompanied by a declaration under penalty of perjury that there is no change of ownership.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

3076. Applications. Applications shall be made on forms to be supplied by the director, and shall show the following:

(a) Name under which the applicant is engaged in the business of pest control, together with his mailing address and principal place of business within the State.

(b) Name and mail address of the person or agent designated to appear for the applicant, as provided in Section 3075.

(c) Name and mail address of all partners, if a partnership; or of all officers, if a corporation.

(d) Type of pest control in which applicant intends to engage.

(e) Conditions under which applicant intends to operate (e.g., crops, pests or materials to which operations are restricted).

(f) Locality in which applicant intends to operate.

(g) Counties in which applicant was registered for the preceding calendar year.

(h) The name of applicant's workmen's compensation carrier, if any.

3077. Type of Pest Control. Type of pest control shall be shown as follows:

TYPE OF PEST CONTROL	METHOD (Check method used)					OTHER METHOD OR CONDITION (Describe)
	AIRCRAFT		GROUND			
	Spray	Dust	Spray	Dust	Fumigation	
1. Weed control.....						
2. Defoliation.....						
3. Pests other than weeds in commercial plantings of:						
(a) Field and truck crops.....						
(b) Orchards.....						
(c) Vineyards, berries, hops.....						
(d) Nurseries.....						
4. Pests in gardens, home plantings, and ornamental plantings.....						
5. Soil pests (nematodes, wireworms, oak-root fungus).....						
6. Pests of agricultural products (weevils, rats, mice).....						
7. Livestock and poultry pests (flies, lice, cattle grubs).....						
8. Other types of agricultural pest control.....						
Describe.....						
.....						
.....						
.....						

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

3078. Fee and Penalty.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

2. Repealer filed 3-19-65; effective thirtieth day thereafter (Register 65, No. 5).

3079. Supplemental Applications. A licensee at any time may apply to the director for amendment of his license to include additional types of pest control, conditions or localities, and upon satisfying the director of his qualifications, shall be entitled to have his license so amended without additional fee.

Article 3. Permits to Operate Without a License

3080. Neighborhood Operators. Every applicant for a permit to operate without a license in the vicinity of his own property and for the accommodation of his neighbors, before the permit is issued, must satisfy the director:

(a) That the applicant operates farm property and operates and maintains pest control equipment primarily for his own use.

(b) That he is not regularly engaged in the business of pest control, and does not solicit such business nor hold himself out as engaged therein.

(c) That he operates his pest control equipment for hire only in the vicinity of his own property and for the accommodation of his neighbors.

(d) In addition, the applicant shall state the location and acreage of the applicant's property and the names and mail addresses of the neighbors for whose accommodation applicant intends to operate, together with the crop, acreage, and location of each property.

3081. Tree Surgeons.

History: 1. Repealer filed 3-19-63; effective thirtieth day thereafter (Register 63, No. 5).

Article 4. Aircraft Pilots

3085. Qualifications.

History: 1. Repealer filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

3086. Apprentices.

History: 1. Repealer filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

3087. Applications. Applications for aircraft pilot's pest control certificate of qualification, or apprentice certificate, shall be made on forms to be supplied by the Director. Each new application, whether for a certificate of qualification or for an apprentice certificate, shall be accompanied by the required fee. Each application for renewal, whether of a certificate of qualification or of an apprentice certificate, shall be accompanied by the required renewal fee. Each new application shall show the following:

(a) Name and mail address of the applicant.

(b) Category, class rating and serial number of commercial pilot certificate.

(c) Number of flying hours completed in agricultural pest control or similar operations such as seeding or fertilizing.

(d) Names and addresses of operators, if any, holding California agricultural pest control licenses for whom applicant has operated.

History: 1. Amendment filed 3-19-63; effective thirtieth day thereafter (Register 63, No. 5).

3088. Examinations. Applicants who fail to pass the written examination may be re-examined without additional fee not less than 10 days nor more than one year after such examination. After the examination, the applicant shall be entitled to review his examination papers and to consult with a member of the director's staff as to his rating.

Article 5. Operations

3090. General. All persons engaged for hire in the business of pest control shall:

(a) Keep pest control equipment, when in use, in a state of good repair.

(b) When measuring concentrate materials, use only devices which are accurately calibrated to the smallest unit in which the material is being weighed or measured.

(c) Maintain a uniform mixture at all times, both in operating rigs and service rigs, when using mixtures of materials.

(d) Perform all pest control work in a good and workmanlike manner.

(e) Thoroughly clean all equipment when necessary to prevent injury to crop plants or livestock from residues of materials previously used in the equipment.

(f) Employ any pilot holding an apprentice certificate to operate aircraft in any pest control operation only under the direct and personal supervision of a person holding a valid certificate of qualification. The person responsible for this supervision shall direct and control the time, conditions and manner of application.

(g) Keep and maintain a record of each property treated, as required by Section 160.3 of the Agricultural Code, showing the date of treatment, the material and dosage used, the number of units treated, and such other information as may be required by the commissioner. In addition, for aircraft operations such record shall show the location of the property, the crop or thing treated, the identity of the equipment used, the name of the pilot or pilots who applied the treatment, the time of application, the temperature and the direction and estimated velocity of the wind at such time. Such record shall be kept available for inspection for three years after it is made, and shall be reported to the commissioner or the director when and as required.

(h) Keep each ground rig used in the application of pesticides and each nurse rig conspicuously and legibly marked with the name

and address of the operator and the deliverable capacity of the tank or hopper.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

2. Amendment filed 3-10-65; effective thirtieth day thereafter (Register 65, No. 5).

3091. Standard Operations. Except as otherwise provided in the regulations of the commissioner, or as specifically authorized in writing by the commissioner, all persons engaged for hire in the business of pest control shall:

(a) Use only methods and equipment capable of performing the functions necessary to insure proper application of materials.

(b) Operate only when climatic, pest, and crop conditions are proper for controlling pests in the locality.

(c) Use materials, dosages, formulas, devices, and methods of application only in conformance with standard practice or common usage for the locality, in accordance with the written recommendation of the manufacturer or registrant of the material or device, within the limitations applicable to local conditions contained in the written recommendations of the commissioner or the State Department of Agriculture, the University of California Agricultural Experiment Station, the United States Department of Agriculture, or the United States Department of the Interior, applicable to local conditions.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

2. Amendment filed 3-10-65; effective thirtieth day thereafter (Register 65, No. 5).

3092. Special Operations. Except for experimental purposes under the direction and supervision of qualified federal, state or county personnel, or of research workers employed by the manufacturer where no charge is made to the grower or owner, no person engaged for hire in the business of pest control shall use for pest control:

(a) Any economic poison, commercial fertilizer, agricultural mineral not registered in this State.

(b) Any registered economic poison for a purpose or in a manner or amount not authorized by the registrant in writing or in printed directions on the label, as required by Section 1065 of the Agricultural Code, unless such use has been authorized by the director or commissioner.

Each application for such authorization shall be submitted in writing and signed by the owner or grower.

(c) Any material, dosage, formula, device, or method not generally recognized among experts qualified by scientific training and experience to evaluate the effectiveness thereof to be effective for the purpose for which it is used.

NOTE: Authority cited: Section 16 and 160.5, Agricultural Code. Reference: Sections 160.1-160.9, Agricultural Code.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

2. Amendment filed 4-8-66; effective thirtieth day thereafter (Register 66, No. 9).

3093. Precautions. (a) All persons engaged for hire in the business of pest control, when using a method, or a material containing any substance, known to be harmful to persons, animals (including honey bees), crops, or property, shall exercise reasonable precautions to protect persons, animals, crops and property from damage, or contamination, and to confine the material applied substantially to the premises, crops, animals, or things intended to be treated.

(b) Pesticides, or emptied containers or parts thereof, shall not be dumped or left unattended at any place where they may present a hazard to persons, animals (including honey bees), crops, or property, nor disposed of in a manner that may cause injury or contamination.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

2. Amendment filed 3-19-65; effective thirtieth day thereafter (Register 65, No. 5).

3094. Protection of Persons. All persons engaged for hire in the business of pest control, when using a method or device, or a material containing any substance known to be harmful to persons, shall:

(a) Provide employees with information as to all appropriate Industrial Safety Orders and precautions recommended by the manufacturer of the device or material and with adequate protective devices as specified in such orders or recommendations.

(b) Give reasonable warning to all persons likely to enter or known to be within the area to be treated or within the area over which the material is likely to drift in harmful amounts.

(c) Post conspicuous warning notices while fumigating any enclosure or agricultural product, and while fumigating soil with methyl bromide or chloropicrin.

History: 1. Amendment filed 3-19-65; effective thirtieth day thereafter (Register 65, No. 5).

3095. Protection of Animals. All persons engaged for hire in the business of pest control, when using a material containing any substance known to be harmful to animals (except bees), shall:

(a) Give notice to the owner of any animals known to be on the property to be treated or on property where the material appears likely to drift in harmful amounts, within a reasonable time prior to treatment allowing 48 hours to enable the owner to protect the animals.

(b) Exercise reasonable precautions to prevent access of animals to areas where harmful residues remain.

(c) In applying materials harmful to fish, exercise reasonable precautions to avoid contamination of waters containing fish.

3096. Protection of Bees. (a) No person engaged for hire in the business of pest control shall apply any pesticide known to be harmful to bees on blossoming crops in which bees are working except under the following conditions:

(1) He shall inquire of the agricultural commissioner of the county in which the work is to be done if any beekeeper

has requested notice of such operations for apiaries located on the property to be treated or within one mile of such property.

(2) If he is so advised by the commissioner, he shall notify the beekeeper by collect telephone or collect telegraph message, or other expedient means provided by the beekeeper and at the beekeeper's expense, of the time and place the application is to be made, of the crop and acreage to be treated, and the identity and amount of the pesticide to be applied.

(3) He shall give the notice provided for in this Section 3096 prior to application of the pesticide, allowing a reasonable time, not exceeding 48 hours, to move, cover or otherwise protect the bees; provided, however, the commissioner in his discretion may reduce such time.

(4) He shall make any such application of pesticides only during the hours and under the conditions provided in the regulations and permit, if any, of the commissioner.

(b) Each beekeeper who desires notice as provided for in this section shall report to the commissioner of the county in which his apiaries are located, on a form approved by the commissioner, of each location of apiaries for which notification is sought. Said report shall be mailed within the 72-hour period before locating or relocating the apiaries, but not later than five days after such movement as required by Section 29121 of the Agricultural Code. If the beekeeper fails to submit such written report before locating or relocating his apiaries, he shall not be entitled to notification by the pest control operator as provided in paragraph (a) until receipt and processing of the written report is made by the commissioner.

(c) The commissioner shall not be required to give notice to pest control operators pursuant to this section until said written report by the beekeeper has been received and processed by him. Late notification by the beekeeper not complying with Section 29121 of the Agricultural Code shall, however, be effective for purposes of this section upon receipt and processing by the commissioner.

(d) The request for notification pursuant to paragraph (b) shall be effective until the following October 31, if there has been no subsequent report of relocation.

History: 1. Amendment filed 3-19-65 as an emergency; designated effective March 29, 1965 (Register 65, No. 5).
2. Amendment refiled 11-1-67 as an emergency; effective upon filing. Certificate of Compliance included (Register 67, No. 41).
3. Amendment filed 12-20-68; effective thirtieth day thereafter (Register 68, No. 48).

3097. Protection of Crops. Except as otherwise provided in the regulations of the commissioner, or at the written request of the grower filed with the commissioner, no person engaged for hire in the business of pest control shall:

(a) Apply any material in, on, or near any crop or planting in a form, concentration, or amount, or at a time or stage of growth, or under any condition, where serious injury to the crop or planting appears likely to result, either from direct injury or from the deposit of undesirable residues.

(b) Apply any material containing arsenic, boron, chlorate, sulfamate, trichloroacetate compounds, or any other chemical, in an amount likely to leave an injurious residue in the soil in any orchard, vineyard, garden, or other location where injury to plants of value is likely to occur through root absorption.

History: 1. Amendment filed 4-21-60; effective thirtieth day thereafter (Register 60, No. 9).

3000. Protection of Property. All persons engaged for hire in the business of pest control when using carbon bisulphide, chlorate compounds, petroleum oil, sulfur dust, or other flammable or explosive material, shall take reasonable precautions to prevent fire hazard during application and to provide adequate warning of such hazard thereafter.

Article 6. Financial Responsibility

3100. Surety Bond. A form of aircraft pest control operators financial responsibility bond approved by the Attorney General is published as subsection (n) of Section 26 of Title 11 of the California Administrative Code.

Article 7. Recommendations and Usage

3110. Definitions. (a) As used in Section 160.98 of the Agricultural Code the phrase "agricultural use" means the use of a pesticide in connection with the commercial production of any animal or plant crop.

(b) As used in Section 160.98 of the Agricultural Code the phrase "other than the recommendation or directions on the label, or in supplementary printed directions" means a recommendation for the use of a pesticide that is additional to or differs from the information on the registered label or supplementary printed directions and includes, but is not limited to

(1) A recommendation to mix two or more chemicals unless shown on the label or supplementary printed directions.

(2) A recommendation to use a dosage rate lower than that shown on the label or supplementary printed directions.

(c) As used in Sections 160.98 and 160.99 of the Agricultural Code the word "conflict" applies to a use or a written recommendation that

(1) Increases the maximum rate of application as shown on the registered label or supplementary printed directions.

(2) Changes the method, time of application, or other conditions of use shown on the label or supplementary printed directions.

(3) Includes a crop to be treated or a pest to be controlled that is not shown on the registered label or supplementary printed directions.

Each recommendation and each usage which conflicts with the label or supplementary printed directions must be authorized by the director or commissioner. Each application for such authorization shall be submitted in writing and signed by the owner or grower, unless a blanket authorization has been given by the director and the use conforms with the authorization.

Note: Authority cited: Sections 16, and 160.5, Agricultural Code. Reference: Sections 160.98 and 160.99, Agricultural Code.

History: 1. New Article 7 (§§ 3110-3112 and 3114) filed 4-8-66; effective thirtieth day thereafter (Register 66, No. 9).

3111. Authorized Use. The use of an economic poison for a purpose and in a manner which corresponds with the authorized current printed recommendations of the University of California, issued in compliance with the Division of Agricultural Sciences Communication No. 18, dated July 12, 1963, is authorized by the director within the meaning of Sections 160.98 and 160.99 of the Agricultural Code, provided the economic poison is registered for use on the crop to be treated. The dosage rate shall not exceed that shown on the registered label or supplementary printed directions.

3112. Written Recommendation. The written recommendation required by Section 160.98 of the Agricultural Code shall be signed and dated by the person making the recommendation and shall, on request, be made available to the director or commissioner of the county in which the recommendation is made, or the county in which the material is sold or used. Such written recommendation shall identify the pesticide chemical to which reference is made by clearly describing the name or brand and composition.

3114. **Experimental Use.** The use of a pesticide for experimental purposes under the direction and supervision of qualified federal, state or county personnel, or by research workers employed by the manufacturer where no charge is made to the grower, or person whose property is undergoing treatment shall not require the express authorization of the director or commissioner within the meaning of Section 160.99 of the Agricultural Code. No substantial drift shall be permitted to other crops.

[new Agric. C. § 12972]

4/25/69

TENTATIVE

RECOMMENDATION OF THE CALIFORNIA

LAW REVISION COMMISSION

relating to

SOVEREIGN IMMUNITY

Number 13--Liability for Damage From Use of Pesticides

BACKGROUND

¹
The use of pesticides to control weeds or insects may be of great value to the user but can result in substantial harm to others. A chemical that destroys weeds may destroy cotton, grapes, or tomatoes equally as effectively. One that kills the boll weevil may also kill livestock and bees. Legislative recognition of this risk is reflected in California statutes ² and administrative regulations ³ which provide a comprehensive regulatory scheme for adjusting the competing interests.

To prevent improper or harmful use of pesticides, the Legislature has given broad authority to the Director of Agriculture to adopt regulations governing their use, ⁴ and county agricultural commissioners have been given similar authority to deal with local conditions. ⁵ The statute and regulatory provisions are detailed and complex. They cover such diverse

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1. The term "pesticides" includes not only chemicals used to control, destroy, or mitigate pests, but also weed and brush killers, defoliants, and desiccants.
 2. Agri. Code §§ 11401-11404, 11501-11513, 11531, 11701-11710, 11731-11741, 11761-11765, 11791-11792, 11901-11913, 11932-11940, 11971-11972, 14002-14006, 14011.
 3. 3 Cal. Admin. Code §§ 2448-2455, 2460-2464, 3070-3114.
 4. Agri. Code §§ 11502, 14005, 14006, 14033, 14063. See also Agri. Code § 12792.
 5. Agri. Code § 11503. See also Agri. Code § 12792.

matters as the licensing of crop dusting pilots and persons engaged in the pest control business for hire,⁷ a permit system applicable to persons who engage in pest control activities,⁸ standards for equipment and chemicals,⁹ procedures for use and application of chemicals,¹⁰ and financial responsibility requirements.¹¹ The authority of the Director of

6. Agri. Code §§ 11901-11913. The pilot is required to serve an apprenticeship, have prescribed agricultural flying experience, and pass an examination to demonstrate his competence in crop dusting techniques and his knowledge of the nature and effect of the chemicals he will use. See also 3 Cal. Admin. Code §§ 3075-3079, 3087-3088.
7. Agri. Code §§ 11701-11710; 3 Cal. Admin. Code §§ 3075-3079. See also Agri. Code §§ 11731-11741 (registration in county where business conducted).
8. Agri. Code §§ 14006-14010, 14033, 14035. See also 3 Cal. Admin. Code §§ 2451 (injurious herbicides), 2463 ("injurious materials"), 2463.3 ("restricted materials"), 3080 (neighborhood operators). Permits may be limited to use to particular farms or be of short duration. See 3 Cal. Admin. Code § 2451(d).
9. For example, the regulations prescribe such matters as the maximum nozzle diameter and spray pressure that may be used to apply injurious herbicides in hazardous area operations. 3 Cal. Admin. Code §§ 2454(a)(4) (ground equipment), 2454(b)(3)(aircraft). For other equipment requirements and specifications, see, e.g., 3 Cal. Admin. Code §§ 2450(d), 2451(b), 3091(a).
10. See 3 Cal. Admin. Code §§ 3110-3114. Often whether a permit is required depends upon whether the particular chemicals to be used fall within a standard specified in the regulations. See, e.g., 3 Cal. Admin. Code §§ 2450(f), 2451(a), 2461, 2461.1, 2463(a), 2463.3. In some cases, the precautions required to be taken by the user depend on whether the material used contains a higher concentration of a particular chemical than is specified in the regulation. E.g., 3 Cal. Admin. Code § 2462(e).
11. E.g., Agri. Code § 12972 (must use in such a manner as to prevent any "substantial drift"). The regulations prescribe in great detail the manner of application and precautions to be taken. E.g., 3 Cal. Admin. Code §§ 2450-2464, 3090-3098, 3110-3114. They may severely restrict or prohibit entirely activities in a particular area at a specified time or under specified conditions. E.g., 3 Cal. Admin. Code §§ 2450(g) ("Unless expressly authorized by permit, no application of an injurious herbicide shall be made when wind velocity exceeds 10 miles per hour; nor at a height greater than 10 feet above the ground when wind velocity exceeds five miles per hour."), 2453(e) ("No injurious herbicide shall be applied by aircraft when the temperature five feet above the ground exceeds 80° Fahrenheit, except that operations may continue six hours after sunrise, regardless of temperature."), 2463.1 (detailed atmospheric conditions described).
12. Agri. Code §§ 11931-11940.

Agriculture is extensive. For example, he has adopted regulations that prohibit the application of certain chemicals by aircraft in large areas of the state during the growing season¹³ and prohibit ground spraying within two miles of susceptible crops in certain areas during the growing season.¹⁴ Users of pesticides are under a mandatory duty to prevent substantial drift¹⁵ and to conform to all applicable regulations.¹⁶

Section 12972 of the Agricultural Code¹⁷ appears to impose strict liability¹⁸ for loss or damage resulting from failure to use pesticides

13. E.g., 3 Cal. Admin. Code § 2454(b)(1).

14. E.g., 3 Cal. Admin. Code § 2454(e)(1).

15. E.g., Agri. Code § 12972; 3 Cal. Admin. Code §§ 2450(d), (h), 2452.1, 2453, 2454, 2462(a), 3093-3097, 3114.

16. Agri. Code §§ 12972, 14011, 14032, 14063. Violation of regulations is a misdemeanor. See Agri. Code § 9. Also, it is a ground for revocation of the user's permit or license. E.g., Agri. Code §§ 11735, 11737, 11740, 14008.

17. Section 12972 provides:

12972. Unless otherwise expressly authorized by the director or the commissioner, the use of any economic poison by any person in pest control operations shall be in such a manner as to prevent any substantial drift to other crops and shall not conflict with the manufacturer's registered label or with supplementary printed directions which are delivered with the economic poison and any additional limitations applicable to local conditions which are contained in the conditions of any permit or the written recommendations that are issued by the director or commissioner.

18. See Comment, 19 Hastings L.J. 476, 486 (1968). Violation of the section is a misdemeanor. Agri. Code § 9. At the very least, violation of Section 12972 will almost always constitute a failure to use due care. See Evidence Code § 669.

in such a manner "as to prevent any substantial drift to other crops" or from the failure to comply with any limitations contained in the user's permit. For all practical purposes, it appears that strict liability would also be imposed for damage caused by failure to comply with the regulations governing the conditions and procedures for use of pesticides.¹⁹ In addition, it is specifically provided by statute that compliance with the standards prescribed by regulation for the use of pesticides does not relieve the user from liability for damage to others.²⁰ It thus appears that the California regulatory scheme results in the imposition of a large measure of strict liability.²¹

It is fairly clear that the provisions just discussed apply to public entities²² and that liability is imposed for damage resulting from

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19. See, e.g., Agri. Code §§ 14011, 14032, 14063 (conformance with regulations required). Violation of regulations is a misdemeanor. See Agri. Code § 9.
20. Agri. Code §§ 14003, 14034.
21. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 504 (1969). In *Adams v. Henning*, 117 Cal. App.2d 376, 255 P.2d 456 (1953), there is no indication of the theory of liability. It was held error to grant a nonsuit where some of the chemical which defendants released from an airplane over defendant's land "was deposited on at least a part of the plaintiff's land, and . . . some damage resulted therefrom." *Id.* at 378, 255 P.2d at 457. Other cases base liability on failure to act as a reasonable and prudent person. See *Parks v. Atwood Crop Dusters, Inc.*, 118 Cal. App.2d 368, 257 P.2d 653 (1953). However, even under this standard, little in the way of negligence need be shown. E.g., *Miles v. A. Arena & Co.*, 23 Cal. App.2d 680, 73 P.2d 1260 (1937) (crop dusting in "light wind" a half mile from plaintiff's land). None of the cases discuss the effect of failure to comply with standards set by statute or regulation.
- Several legal writers have suggested that strict liability for harm caused by crop dusting should be imposed on the theory that it is an ultrahazardous activity. E.g., Comment, 19 Hastings L.J. 476 (1968); Note, 6 Stan. L. Rev. 69, 81-85 (1953).
22. *Flournoy v. State*, 57 Cal.2d 497, 370 P.2d 331, 20 Cal. Rptr. 627 (1962) (general statutory language imposing tort liability held applicable to public entities absent legislative intent to the contrary). It is significant, for example, that one of the regulations specifically provides that some--but not all--of its requirements are not applicable to certain public entities under certain circumstances. 3 Cal. Admin. Code § 2462(b), (d). See also Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 505 n.330 (1969).

the failure of a public entity to comply with their requirements. If the California courts take this view, the burden of proof imposed on the plaintiff in an action against a public entity ordinarily will be met if he can establish that the pest control operation caused his loss.

Nevertheless, in the unlikely event that the provisions are held not applicable to a public entity or that violation of the provisions does not result in liability, several other theories of liability might result in the imposition of liability for damages resulting from pest control operations of public entities. The 1963 California Tort Claims Act makes a public entity vicariously liable for the acts or omissions of its employees and, subject to several significant immunities, public employees are liable to the same extent as private persons.²⁵ It would appear, therefore, that a public employee would be liable if he is negligent or if he violates any applicable statute or regulation governing pest control operations and that the public entity would be vicariously liable.²⁶ If it cannot be established

23. Govt. Code § 815.6 (liability for breach of mandatory duty imposed by statute or regulation). But see Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 505 n.330 (1969), concluding that the scope of governmental tort liability under these circumstances is not entirely clear and suggesting that clarification by legislation would be helpful.

The fact that the public entity hired an independent contractor to conduct the pest control operation apparently would not relieve it from liability. See *Miles v. A. Arena & Co.*, 23 Cal. App.2d 680, 73 P.2d 1260 (1937)(crop dusting). See also *Van Arsdal v. Hollinger*, 68 Cal.2d 245, 66 Cal. Rptr. 20, 437 P.2d 508 (1968).

24. Govt. Code § 815.2.

25. Govt. Code § 820.

26. Specific immunities, such as the immunity for discretionary acts provided by Government Code Sections 820.2 and 815.2(b), might preclude liability in some cases. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 Hastings L.J. 431, 505 n.330 (1969).

that any particular employee is liable or if some specific immunity precludes liability, liability might be imposed under some circumstances based upon inverse condemnation²⁷ or nuisance²⁸ theories.

RECOMMENDATIONS

The Commission concludes that there is no substantial justification for differentiating the liability of a public entity engaged in pest control operations from that of a private person engaged in the same activity. Accordingly, the Commission recommends the enactment of legislation to provide that public entity is liable for injuries caused by the use of pesticides to the same extent as a private person.²⁹ This clarification would eliminate the uncertainty that now exists and would avoid unnecessary litigation to determine the proper theory upon which liability might be based in particular cases. More importantly, it would assure that losses resulting from the use of pesticides by public entities would be spread over the public generally rather than be left to be borne by an unfortunate few.

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27. Inverse condemnation liability cannot be based on mere routine negligence. *Neff v. Imperial Irrigation Dist.*, 142 Cal. App.2d 755, 299 P.2d 359 (1956). But a deliberately adopted plan for the use of pesticides that includes the prospect of damage as a necessary consequence of the use of such chemicals is a basis for inverse liability. See Van Alstyne, Inverse Condemnation: Unintended Physical Damage, 20 *Hastings L.J.* 431, 481 (1969). Inverse liability is, of course, limited to property damage and would not provide relief in case of death or personal injury.
 28. See *Bright v. East Side Mosquito Abatement Dist.*, 168 Cal. App.2d 7, 335 P.2d 527 (1959). Since enactment of the Tort Claims Act in 1963, there is doubt whether liability can be based on a theory of nuisance. See Van Alstyne, *California Government Tort Liability* § 5.10 at 126 (Cal. Cont. Ed. Bar 1964). But see *Granone v. County of Los Angeles*, 231 Cal. App.2d 629, 650-651, 42 Cal. Rptr. 34, 48 (1965).
 29. The fact that public entities may reasonably be exempt from some of the requirements established by regulations should be recognized as an exception to this general standard.

The Commission also recommends that the special "report of loss" procedure provided by Sections 11761-11765 of the Agricultural Code (which may limit the injured party's ability to establish the extent of his damages from pesticides) be made clearly applicable to actions against public entities.

The Commission's recommendations would be effectuated by the enactment of the following measure:

An act to add Chapter 8 (commencing with Section 862) to Part 2 of Division 3.6 of the Government Code, and to amend Section 14002 of the Agricultural Code, relating to liability of public entities.

The people of the State of California do enact as follows:

Section 1. Chapter 8 (commencing with Section 862) is added to Part 2 of Division 3.6 of the Government Code, to read:

Chapter 8. Injurious Agricultural Chemicals

Section 862. "Injurious agricultural chemical" defined

862. As used in this chapter, "injurious agricultural chemical" means an economic poison as defined in Section 12753 of the Agricultural Code or an injurious material as defined in Section 14001 of the Agricultural Code or any other material used for the same purpose as material referred to in those sections.

Comment. Section 862 defines "injurious agricultural chemical" to include chemicals used to control, destroy, or mitigate pests and chemicals used as weed and brush killers, defoliants, and desiccants.

Section 862.2. Liability for damages from use of injurious agricultural chemicals

862.2. A public entity is liable for injuries proximately caused by the use of an injurious agricultural chemical to the same extent as a private person.

Comment. Section 862 makes public entities subject to the same rules of liability that govern private persons engaged in pest control activities. See discussion, supra at 1 - 4 .

Section 862.4. Applicability of statutes and regulations

862.4. Nothing in this chapter imposes liability upon a public entity for its failure to comply with a provision of a statute or regulation that by its terms is not applicable to the public entity.

Comment. Section 862.4 is included to make clear that Section 862.2 does not impose a duty on a public entity to comply with a statute or regulation that is not applicable to the public entity.

Some statutes, by their terms, do not apply to public entities. For example, the requirement of Agricultural Code Section 11701 that a person obtain an agricultural pest control license if he is "to engage for hire in the business of pest control" would not be applicable to a public employee who is engaged in pest control in the course of his employment since he is not engaged "for hire in the business of pest control." Cf. Contra Costa County v. Cowell Portland Cement Co., 126 Cal. App. 267, 14 P.2d 606 (1932). On the other hand, statutes such as Agricultural Code Section 12972 (prevention of any substantial drift of chemicals to other crops) and Sections 14001-14011 (application of chemicals to be in accordance with regulations issued by Director of Agriculture) are applicable to public entities.

To a considerable extent, the regulations adopted by the Director of Agriculture governing the use of injurious agricultural chemicals are applicable to public entities. However, some regulations by their terms are made not applicable to certain public entities or their employees. E.g., 3 Cal. Admin. Code §§ 2451 (permit not required by state or state employees to engage in research on injurious herbicides), 2462(b), (d) (public agencies engaged in mosquito control under cooperative agreement

§ 862.4

with California Department of Public Health exempt from some, but not all, of the conditions prescribed by regulation governing time and conditions for use of pest control chemicals). Compare 3 Cal. Admin. Code § 3114 (departure from certain requirements, but no substantial drift, permitted when pesticide used for experimental purposes under direction and supervision of qualified federal, state, or county personnel).

Section 862.6. Report of damage from use of agricultural chemicals

862.6. Sections 11761 to 11765 of the Agricultural Code, relating to a report of loss or damage, apply in an action against a public entity under Section 862.2.

Comment. Failure to file the report referred to in Section 862.6 within the time prescribed by statute is evidence that no loss or damage occurred. Agri. Code § 11765. The general statute that governs claims against public entities is, of course, also applicable. See Section 911.2 (claim for "death or for injury to person or to personal property or growing crops" must be presented not later than the 100th day after the accrual of the cause of action).

Agricultural Code Section 14002. Conforming amendment

Sec. 2. Section 14002 of the Agricultural Code is amended to read:

14002. Except as otherwise provided in Sections 862 to 862.6, inclusive, of the Government Code, This this chapter does not apply to any agency of the United States or of this state, or to any officer, agent, or employee of any such agency who is acting within the scope of his authority, while he is engaged in, conducting, or supervising research on any injurious material.

Comment. The amendment of Section 14002 makes clear the relationship of this section to the provisions of the Government Code imposing liability upon public entities for damage resulting from the use of injurious material. Section 14002 merely provides an exception to the requirement that a permit be obtained and authorizes departures from the standard prescribed by the regulations governing the manner and use of injurious material when research is being conducted on such materials. The section does not provide an immunity from liability for damage or loss to others. This construction of the section probably is consistent with prior law. See Section 14003 ("This article does not relieve any person from liability for any damage to the person or property of another person which is caused by the use of any injurious material."); 3 Cal. Admin. Code § 3114.

CROP DUSTING: TWO THEORIES OF LIABILITY?

THE aerial application of pesticides has become the farmer's most potent weapon against crop-killing pests.¹ In California, over 75 percent of all commercial agricultural pest control work is done by aircraft.² The use of pesticides³ has also become an important aid to the farmer in controlling weeds and harvesting crops.⁴ Yet the crop dusting⁵ program for one crop may mean destruction to a neighboring crop.

*Gotreaux v. Gary*⁶ was the first case to impose strict liability upon a landowner for crop damage resulting from crop dusting. Two other courts have since adopted the theory of strict liability.⁷ However, most of the courts that have considered the question have proceeded to discuss liability in terms of negligence. How serious is the apparent disagreement among the courts? Within which theory of liability, whether negligence or strict liability, does crop dusting properly fall? The purpose of this comment is to seek an answer to these questions. The means employed in this search are to review briefly the hazards encountered in crop dusting, to examine the cases to determine how the theories of liability have been applied to crop dusting and, from the perspective afforded by such endeavors, to consider some of the factors involved in deciding which theory ought to be applied to this activity.

The Hazards of Crop Dusting⁸

An awareness of the hazards encountered in crop dusting is essential to fully appreciate the challenge of conflicting interests presented to the courts by this activity. Two features, unique to crop dusting,

¹ Tozer, *Farmer's Air Force*, FLYING, Aug. 1960, at 22-25.

² CALIFORNIA DEPT OF AGRICULTURE, BULL. NO. E-82-8 (Sept. 23, 1960).

³ The term "pesticides" includes not only all chemicals used to control, destroy, or mitigate pests, but also herbicides (weed and brush killers, defoliants, and desiccants). PESTICIDE HANDBOOK-ENTOMA 21 (18th ed. D. Frear 1966).

⁴ Tozer, *supra* note 1, at 23.

⁵ The term "crop dusting" is used throughout this comment to denote the aerial application of pesticides, both in dust and spray forms. Occasionally, the technical distinction between these two forms will be made for the sake of clarity and emphasis.

⁶ 232 La. 373, 94 So. 2d 293 (1957), noted in 32 Tul. L. Rev. 146 (1967).

⁷ *Young v. Darter*, 363 P.2d 829 (Okla. 1961); *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961).

⁸ For a good introduction to this subject, see Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69, 70-72 (1953); Comment, *Crop Dusting—Scope of Liability and a Need for Reform in the Texas Law*, 40 TEXAS L. REV. 527 (1962).

combine to make it an inherently dangerous activity.⁹ One unique feature may be classified as the chemical hazard. For example, a commonly used chemical, known as 2,4-D, produces beneficial results when applied to rice or wheat, but is deadly poison to cotton, tomatoes and grapes.¹⁰ Arsenicals that save cotton from destruction by insects may also destroy livestock and colonies of bees.¹¹

The other unique feature is drift. Drift of chemicals to neighboring land is largely responsible for damage caused by crop dusting.¹² Control of drift and the accurate prediction of the extent of drift are the two interrelated, though separate, problems which frustrate efforts to prevent such damage. The extent to which particles will drift depends on many factors, the most important of which include: altitude, the size of the released particles, air movement (wind and convection), temperature, and humidity.¹³

To some degree, the altitude from which particles fall can be controlled. The lower the particles are released, the better are the chances that they will land on target since adverse atmospheric forces have less time to affect distribution under such circumstances. Air disturbances created by the airplane, however, hamper efforts to control this critical altitude.¹⁴ Even though a plane flies low over the ground as it releases a spray or dust, the aerodynamic turbulence lifts some of the material 10 to 20 feet above the level of flight.¹⁵ The higher the particles are lifted, the longer it takes for them to fall to the ground, and the greater is the danger that they will be carried away by the air flow.

Because effective dusting requires that a small amount of material be spread evenly over a large area,¹⁶ the size of the distributed particles, whether applied in powder or liquid form, is quite small;

⁹ Cases holding that crop dusting is an inherently dangerous activity include: *S. A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933); *Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953); *Leonard v. Abbott*, 357 S.W.2d 778 (Tex. Civ. App. 1962), *rev'd on other grounds*, 366 S.W.2d 925 (Tex. 1963); see *Miles v. A. Arena & Co.*, 23 Cal. App. 2d 680, 73 P.2d 1260 (1937). *Contra*, *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 931, 346 S.W.2d 598 (1961), criticized in Comment, *Crop Dusting—Scope of Liability and a Need for Reform in the Texas Law*, 40 TEXAS L. REV. 527, 536 (1962).

¹⁰ See D. FREAR, CHEMISTRY OF THE PESTICIDES 370 (3rd ed. 1955); PESTICIDE HANDBOOK-ENTOMA 22 (18th ed. D. Frear ed. 1966).

¹¹ See, e.g., *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1955); *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940); *McPherson v. Billington*, 399 S.W.2d 186 (Tex. Civ. App. 1965).

¹² *How to Reduce Spray Drift*, SUCCESSFUL FARMING, March 1967, at 87.

¹³ Bellomy, *Bugs are Big Business*, FLYING, June 1958, at 37, 73.

¹⁴ Rollins, *Drift of Pesticides*, AGRICULTURAL CHEMICALS, March 1961, at 34, 35.

¹⁵ *Id.*

¹⁶ Bellomy, *supra* note 13, at 71; Rollins, *supra* note 14.

particles range from less than 10 to over 400 microns¹⁷ in size.¹⁸ Because of their minute size and light weight, the slightest wind will carry these particles hundreds of feet.¹⁹ For example, when dropped from an altitude of 10 feet in a wind of 3 miles per hour, a 10-micron particle will travel 1 mile.²⁰ Given the wind velocity, the particle size, and the height of the drop, it is possible to predict the distance the particle will drift. Even with sophisticated nozzle equipment, however, the size of the particles cannot be completely controlled: droplet size in one application may vary as much as 400 microns.²¹ When droplet size varies this much, accurate prediction of drift is difficult.²²

Perhaps the most variable and unpredictable factor affecting drift is weather. Because of their small size and light weight, particles settle to the ground slowly. A wind of any velocity will tend to carry the particles away from the target area. Moreover, it is impossible for an applicator²³ to anticipate the sudden shifts of air currents which may affect the distribution of the particles he releases.²⁴

A dead calm, though, may present just as much difficulty as does wind.²⁵ When the air is still, temperature inversion frequently develops. Under such conditions, the particles settle to the ground more slowly than usual.²⁶ In fact, the particles tend to hang in the air and may vaporize.²⁷ While the particles remain suspended, diurnal winds may develop and carry them far from the target area.²⁸ It has been estimated that under such conditions drift propensities are five times greater than under normal conditions.²⁹

Even with specialized equipment and greater knowledge, the problem of controlling drift has not been solved, nor has the predic-

¹⁷ A micron is a unit of length. It signifies one-millionth of a meter. A 250-micron particle is about the size of the period at the end of this sentence.

¹⁸ Note, *Crop Dusting: Legal Problems in a New Industry*, 6 STAN. L. REV. 69, 73 (1953); see *ULV Will It Steal the Market?*, FARM CHEMICALS, July 1967, at 10, 58; Rollins, *supra* note 14, at 35.

¹⁹ Rollins, *supra* note 14.

²⁰ *Id.*

²¹ Note 18 *supra*.

²² Bellomy, *supra* note 13, at 73.

²³ The label "applicator" is generally placed upon those persons who are engaged in the business of serially applying pesticides to crops and other plant life.

²⁴ Note, *supra* note 13, at 74.

²⁵ Interview with Stuart W. Turner, Consulting Agrologist, Stuart W. Turner & Co., in San Francisco, Aug. 28, 1967 [hereinafter referred to as Interview with Stuart W. Turner]. It should be pointed out that Mr. Turner does not necessarily concur in the conclusions drawn by this writer.

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*; see Akesson & Yates, *Drift Residues*, FARM CHEMICALS, April 1962, at 44, 46.

tion of drift advanced to any certainty.³⁰

Status of Liability: A Survey³¹

For the foregoing reasons the Oregon Supreme Court in *Loe v. Lenhardt*³² held crop dusting to be an ultrahazardous activity and adopted the theory of strict liability. Four years earlier, Louisiana in applying civil law imposed strict liability upon crop dusting activities.³³ Shortly after the Oregon decision, the Oklahoma Supreme Court held crop dusting subject to the rules of strict liability. Some 52 cases involving actions brought by neighboring property owners against applicators and/or landowners for damage allegedly caused by the application of pesticides have been reported in 18 jurisdictions.³⁴ Yet, only three jurisdictions have declared crop dusting to be an activity subject to strict liability.³⁵

The remaining 15 jurisdictions approach the problem in terms of negligence whether the pesticide is released in the air or on the ground.³⁷ The results in these jurisdictions, however, are striking. In the 44 reported cases, the plaintiff has recovered on 30 occasions.³⁸

³⁰ Rollins, *supra* note 14; *ULV Will It Steal the Market?*, FARM CHEMICALS, July 1967, at 10, 16.

³¹ The liability of the manufacturer of crop dusting chemicals is beyond the scope of this survey. For cases on that subject see, e.g., *Walton v. Sherwin-Williams Co.*, 191 F.2d 277 (8th Cir. 1951); *Reasor-Hill Corp. v. Kennedy*, 224 Ark. 248, 272 S.W.2d 685 (1954); *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Burr v. Sherwin-Williams Co.*, 42 Cal. 2d 682, 268 P.2d 1041 (1954); *LaPlant v. E.I. DuPont de Nemours & Co.*, 346 S.W.2d 231 (Mo. Ct. App. 1961); *Rose v. Buffalo Air Serv.*, 170 Neb. 806, 104 N.W.2d 431 (1960); *McClanahan v. California Spray-Chemical Corp.*, 194 Va. 842, 75 S.E.2d 712 (1953); *Golden Gate Hop Ranch, Inc. v. Velsicol Chem. Corp.*, 68 Wash. 2d 469, 403 P.2d 351 (1965), cert. denied, 382 U.S. 1025 (1966).

³² 227 Ore. 242, 362 P.2d 312 (1961).

³³ *Gotreaux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957).

³⁴ *Young v. Darter*, 363 P.2d 829 (Okla. 1961).

³⁵ These jurisdictions are: Arizona, Arkansas, California, Florida, Idaho, Iowa, Kentucky, Louisiana, Mississippi, Missouri, New Jersey, New Mexico, North Carolina, Oklahoma, Oregon, South Carolina, Texas, and Virginia. See cases cited notes 32-34 *supra* and note 38 *infra*.

³⁶ Louisiana, Oklahoma, and Oregon. See notes 32-34 *supra*.

³⁷ Notes 35 and 36 *supra*.

³⁸ Recovery allowed: *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1955) (dairy herd injured by DDT and benzene hexachloride); *Crouse v. Wilbur-Ellis Co.*, 77 Ariz. 359, 272 P.2d 352 (1954) (cantaloupe damaged by insecticide containing sulfur); *Lundberg v. Bolon*, 67 Ariz. 259, 194 P.2d 454 (1948) (bees killed by arsenical); *S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 878 (1933) (bees killed by insecticide Dutox No. 20); *Heeb v. Frysock*, 219 Ark. 899, 245 S.W.2d 577 (1952) (cotton damaged by 2,4-D); *W.B. Bynum Cooperage Co. v. Coulter*, 219 Ark. 818, 244 S.W.2d 955 (1952) (cotton damaged by 2,4-D); *McKennon v. Jones*, 219 Ark. 871, 244 S.W.2d 138 (1951) (bees killed by R-H dust; R-H dust is DDT); *Kennedy v. Clayton*, 216 Ark. 851, 227 S.W.2d 934 (1950) (cotton damaged by 2,4-D); *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949) (cotton damaged by 2,4-D); *Chapman Chem.*

In five cases the plaintiff failed to establish causation.³⁹ In a sixth

Co. v. Taylor, 215 Ark. 630, 222 S.W.2d 820 (1949) (cotton damaged by 2,4-D); *Hammond Ranch Corp. v. Dodson*, 199 Ark. 846, 136 S.W.2d 484 (1940) (livestock killed by arsenical); *Parks v. Atwood Crop Dusters, Inc.*, 118 Cal. App. 2d 368, 257 P.2d 653 (1953) (immature cotton damaged by cyanamide dust); *Adams v. Henning*, 117 Cal. App. 2d 376, 255 P.2d 456 (1953) (potatoes damaged by 2,4-D; nonsuit reversed); *Miles v. A. Arena & Co.*, 23 Cal. App. 2d 680, 73 P.2d 1260 (1937) (bees killed by arsenical); *Kentucky Aerospray, Inc. v. Mays*, 251 S.W.2d 460 (Ky. 1952) (commercially raised minnows killed by toxaphene); *Lawler v. Skelton*, 241 Miss. 274, 130 So. 2d 565 (1961) (plaintiff injured by malathion); *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952); *Pendergrass v. Lovelace*, 57 N.M. 661, 282 P.2d 231 (1953) (cotton damaged by 2,4-D); *McPherson v. Billington*, 399 S.W.2d 186 (Tex. Civ. App. 1965) (hogs killed by arsenical); *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598 (1961) (cotton damaged by herbicide); *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 306 S.W.2d 433 (Tex. Civ. App. 1957) (cotton damaged by 2,4-D); *Dallas County Flood Control Dist. v. Fowler*, 280 S.W.2d 336 (Tex. Civ. App. 1955) (cotton damaged by 2,4-D); see *Stall Chem. Co. v. Boggs Farmers Supply, Inc.*, 404 S.W.2d 78 (Tex. Civ. App. 1966) (cotton damaged by 2,4-D); cf. *Schronk v. Gilliam*, 380 S.W.2d 743 (Tex. Civ. App. 1964) (cotton damaged by poisonous spray).

Recovery allowed but distinguishable on the facts: *Southwestern Bell Tel. Co. v. Smith*, 220 Ark. 223, 247 S.W.2d 16 (1952) (livestock killed by grazing on land sprayed with 2,4-D); *Brown v. Sioux City*, 242 Iowa 1186, 49 N.W.2d 853 (1951) (bees killed by ground spraying of chlorodane); *Bivins v. Southern Ry.*, 247 N.C. 711, 102 S.E.2d 128 (1953) (garden, fruit tree and pasture damaged by ground spraying of poisonous chemicals); *Smith v. Okerson*, 8 N.J. Super. 560, 73 A.2d 857 (Super. Ct. 1950) (livestock killed by ground spraying of 2,4-D); *Alexander v. Seaboard Air Line Ry.*, 221 S.C. 477, 71 S.E.2d 299 (1952) (cotton damaged by ground spraying of 2,4-D); *Shultz v. Harless*, 271 S.W.2d 696 (Tex. Civ. App. 1964) (cotton damaged by ground spraying of 2,4-D).

Recovery denied: *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953) (cotton and peanuts damaged by 2,4-D); *Bowden v. United States*, 200 F.2d 176 (4th Cir. 1952) (sheep allegedly killed by poisonous spray); *Gainey v. Folkman*, 114 F. Supp. 231 (D. Ariz. 1953) (cattle allegedly damaged by DDT); *Fruett v. Burr*, 118 Cal. App. 2d 188, 257 P.2d 690 (1953) (cotton damaged by 2,4-D); *Lenk v. Spezia*, 95 Cal. App. 2d 296, 213 P.2d 47 (1949) (bees killed by arsenical); *Jeanes v. Holtz*, 94 Cal. App. 2d 826, 211 P.2d 925 (1949) (bees killed by Cryolite 70); *Alm v. Johnson*, 75 Idaho 521, 275 P.2d 959 (1954) (pea crop damaged by weed killing spray); *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964) (cotton and bean crops allegedly damaged by 2,4,5-T); *Wall v. Trogdon*, 249 N.C. 747, 107 S.E.2d 757 (1959) (fish allegedly killed by poisonous spray); *Vrazel v. Bieri*, 294 S.W.2d 148 (Tex. Civ. App. 1956) (cotton damaged by 2,4-D); *Gamblin v. Ingram*, 378 S.W.2d 941 (Tex. Civ. App. 1964) (cotton damaged by 2,4-D).

Recovery denied but distinguishable on the facts: *Neff v. Imperial Irrigation Dist.*, 142 Cal. App. 2d 755, 299 P.2d 359 (1956) (cotton damaged by ground spraying of 2,4-D); *Rabin v. Lake Worth Drainage Dist.*, 82 So. 2d 353 (Fla. 1955), cert. denied, 350 U.S. 958 (1956) (pepper crop retarded by ground spraying of herbicide); *Dallas County Flood Control Dist. v. Benson*, 157 Tex. 617, 306 S.W.2d 350 (1957) (cotton damaged by ground spraying of 2,4-D).

³⁹ *Bowden v. United States*, 200 F.2d 176 (4th Cir. 1952); *Gainey v. Folkman*, 114 F. Supp. 231 (D. Ariz. 1953); *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964); *Wall v. Trogdon*, 249 N.C. 747, 107 S.E.2d 757 (1959); *Fruett v. Burr*, 118 Cal. App. 2d 188, 257 P.2d 690 (1953).

case he failed to establish damage.⁴⁰ Thus, where the plaintiff established his damage and that the defendant's dusting operation caused it, recovery was allowed in all but eight cases. Six of the eight remaining cases involved unusual circumstances. Four times governmental immunities barred recovery,⁴¹ and two decisions for the defendant turned on the questions of contributory negligence and the "trespassing bee" theory.⁴² In the seventh case the plaintiff lost on a procedural technicality.⁴³ In the last case, the plaintiff failed to establish that the defendant's conduct amounted to negligence.⁴⁴ The results are clear: except for unusual circumstances, the plaintiff almost always recovers when he has established causation and damage.

Moreover, the questions most frequently litigated before the appellate courts involve the proof of causation and the measure of damages, and not the manner in which the defendant's activities were carried out.⁴⁵ Thus causation and damage have been the key issues before the appellate courts.

This is not to suggest that the courts have held crop dusting per se an act of negligence. On the contrary, many of the courts⁴⁶ have followed the proposition propounded in the early case of *Miles v. A. Arena & Co.*⁴⁷

[I]n itself, dusting vegetables to kill pests that prey upon them is a necessary and lawful operation which the owner of the vegetables may perform, either himself or through his servants, or may have performed by an independent contractor. However, he should not do the dusting, or have it done, under conditions which would indicate to a reasonably prudent person that damage to his neighbors would result.⁴⁸

⁴⁰ *Alm v. Johnson*, 75 Idaho 521, 257 P.2d 959 (1954).

⁴¹ *Harris v. United States*, 205 F.2d 765 (10th Cir. 1953); *Neff v. Imperial Irrigation Dist.*, 142 Cal. App. 2d 755, 299 P.2d 359 (1956); *Rabin v. Lake Worth Drainage Dist.*, 82 So. 2d 353 (Fla. 1955), cert. denied, 350 U.S. 958 (1956); *Dallas County Flood Control Dist. v. Benson*, 157 Tex. 617, 306 S.W.2d 350 (1957).

⁴² *Lenk v. Spezia*, 95 Cal. App. 2d 296, 213 P.2d 47 (1949); *Jeanes v. Holtz*, 94 Cal. App. 2d 326, 211 P.2d 925 (1949). See text accompanying notes 90-98 *infra*; Note, *supra* note 18, at 76-77.

⁴³ See *Vrazel v. Bieri*, 204 S.W.2d 148, 151-52 (Tex. Civ. App. 1956). A careful reading of the opinion suggests that the plaintiff incorrectly challenged the jury's verdict. See note 55 *infra*.

⁴⁴ *Gamblin v. Ingram*, 378 S.W.2d 941 (Tex. Civ. App. 1964).

⁴⁵ Interview with Stuart W. Turner; see, e.g., *Lundberg v. Bolin*, 67 Ariz. 259, 194 P.2d 454 (1948); *Lawler v. Skelton*, 241 Miss. 274, 130 So. 2d 565 (1961); *Kentucky Aerospray, Inc. v. Mays*, 251 S.W.2d 460 (Ky. 1952); *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952); *Burke v. Thomas*, 313 P.2d 1082 (Okla. 1957); *McPherson v. Billington*, 399 S.W.2d 186 (Tex. Civ. App. 1968); *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598 (1961); *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 306 S.W.2d 433 (Tex. Civ. App. 1957).

⁴⁶ E.g., *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949); *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952).

⁴⁷ 23 Cal. App. 2d 680, 73 P.2d 1260 (1937).

⁴⁸ *Id.* at 633, 73 P.2d at 1262.

There have been many cases in which the defendant was held liable for truly negligent conduct. Defendants, for instance, have been liable on the basis of negligence, for the following activities: continuing to spray while flying over the plaintiff's land;⁴⁹ mistaking the plaintiff's land for that of the defendant;⁵⁰ and dusting in a "strong" wind blowing toward the plaintiff's land.⁵¹ In other cases the negligent character of the conduct is not quite as clear.⁵² Defendants have been held liable for dusting in adverse weather described as a "light wind,"⁵³ "light breeze,"⁵⁴ and "breeze."⁵⁵

The Negligence Theory Breaks Down

There are indications that where there is little or no evidence of fault on the defendant's part, the negligence theory breaks down. An examination of the Texas cases is particularly instructive on this point. The Texas courts have long and consistently rejected the doctrine of *Rylands v. Fletcher*⁵⁶ and have not yet professed to apply strict liability to activities causing property damage.⁵⁷ Accordingly, proper procedure requires that crop dusting cases be brought to the courts on the theory of negligence.⁵⁸

In the 1954 case of *Shultz v. Harless*⁵⁹ the defendant used a poisonous chemical to spray weeds in a ditch near the plaintiff's cotton. Some of the spray drifted onto the cotton and caused considerable damage. Upon these facts, the defendant was found negligent because he knew or should have known of the destructive effect the chemical would have on growing cotton and because he failed to confine the

⁴⁹ *McKennon v. Jones*, 219 Ark. 671, 244 S.W.2d 138 (1951); *Hammond Ranch Corp. v. Dodson*, 199 Ark. 848, 136 S.W.2d 494 (1940); *Pendergrass v. Lovelace*, 57 N.M. 861, 262 P.2d 231 (1953); *Burke v. Thomas*, 313 P.2d 1082 (Okla. 1957); *Heeb v. Prysock*, 219 Ark. 899, 245 S.W.2d 577 (1952).

⁵⁰ *Cross v. Harris*, 230 Ore. 398, 370 P.2d 703 (1962); cf. *Schronk v. Gilliam*, 386 S.W.2d 743 (Tex. Civ. App. 1964).

⁵¹ *Faire v. Burke*, 363 Mo. 562, 252 S.W.2d 289 (1952).

⁵² The following analysis was first suggested in Note, *supra* note 18, at 78.

⁵³ *Miles v. A. Arena & Co.*, 23 Cal. App. 2d 680, 682, 73 P.2d 1260, 1261 (1937).

⁵⁴ *Id.* at 685, 73 P.2d at 1263.

⁵⁵ *Burns v. Vaughn*, 216 Ark. 128, 129, 224 S.W.2d 365, 366 (1949).

⁵⁶ L.R. 3 H.L. 330 (1868). "The 'rule' of *Rylands v. Fletcher* is that the defendant will be liable when he damages another by a thing or activity unduly dangerous and inappropriate to the place where it is maintained, in the light of the character of that place and its surroundings." W. Prosser, *Torts* § 77, at 522 (3d ed. 1964).

⁵⁷ *Vrazel v. Bieri*, 294 S.W.2d 148 (Tex. Civ. App. 1956); *Standard Paving Co. v. McClinton*, 146 S.W.2d 466 (Tex. Civ. App. 1940); *Indian Territory Illuminating Oil Co. v. Rainwater*, 140 S.W.2d 491 (Tex. Civ. App. 1940); *Turner v. Big Lake Oil Co.*, 128 Tex. 155, 96 S.W.2d 221 (1936); *Gulf, C. & S.F.R.R. v. Oakes*, 94 Tex. 155, 58 S.W. 999 (1900).

⁵⁸ *Vrazel v. Bieri*, 294 S.W.2d 148, 152 (Tex. Civ. App. 1956).

⁵⁹ 271 S.W.2d 696 (Tex. Civ. App.).

poison to his land.⁶⁰ Two years later a case was litigated⁶¹ in which the defendant dusted his rice fields with 2,4-D. Some of the spray drifted several miles before it settled upon and injured the plaintiff's cotton. The only evidence of negligence was that the defendant failed to confine the spray to his field. In a special verdict, the jury concluded that this failure did not constitute negligence. Although the appellate court affirmed the decision, a careful reading of the opinion indicates that the result might have been different had the plaintiff properly challenged the jury's verdict.⁶²

Perhaps more revealing is *Aerial Sprayers, Inc. v. Yerger, Hill & Son*.⁶³ The defendant had his farm aerially sprayed with 2,4-D. At the time of spraying the "wind direction" (the velocity does not appear in the opinion) was toward the plaintiff's cotton which was 5 miles away. Several days later the plaintiff's cotton manifested signs of damage caused by 2,4-D. There was evidence that no other spraying of 2,4-D had been done in the vicinity during the period in question. From these facts the defendants were found to have caused the damage and were liable because they failed to confine the herbicide to the farm.⁶⁴ Failure to confine the herbicide to the defendant's land constituted a specific act of negligence!⁶⁵

The most extreme case of this kind was decided by the Texas Supreme Court in 1961.⁶⁶ An aerial spraying company treated a ranch with 2,4-D. Damage to cotton located from 7½ to 15 miles away was discovered about 16 days after the spraying. There was evidence that a wind of some velocity (5 to 8 miles per hour)⁶⁷ was blowing toward the plaintiff's cotton and that no other such operations were conducted in the area during the time involved. The record is devoid of any direct evidence that defendant's crop dusting operation caused the plaintiff's damage. The only negligence pleaded was that the defendants had allowed the herbicide to drift.⁶⁸ Recovery against the spraying company was allowed.

Since it not infrequently occurs in negligence cases that the mere fact of injury caused by the defendant's instrumentality under his control is enough to establish negligent conduct, it is possible that the Texas courts relied upon the principles of *res ipsa loquitur* to sup-

⁶⁰ *Id.* at 698.

⁶¹ *Vrazel v. Bieri*, 294 S.W.2d 148 (Tex. Civ. App. 1956).

⁶² The plaintiff should have asked the court to set aside the verdict either as lacking support in, or as being contrary to, the weight of the evidence. See, *id.* at 151, 152.

⁶³ 306 S.W.2d 433 (Tex. Civ. App. 1957).

⁶⁴ *Id.* at 436.

⁶⁵ *Id.*

⁶⁶ *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598.

⁶⁷ *Id.* at 337, 346 S.W.2d at 602.

⁶⁸ *Id.* at 333, 346 S.W.2d at 599.

port a finding of negligence. With one exception,⁶⁹ this possibility has not been mentioned in any of the cases, nor does it appear anywhere that the doctrine has been asserted in support of an allegation of negligence. Furthermore, the fundamental assumption behind *res ipsa loquitur*—that such damage normally does not happen without negligence—seems against the courts' understanding of the drift hazards inherent in crop dusting.⁷⁰ The conclusion seems inescapable—to the extent that the Texas courts hold that the failure to confine pesticides to the defendant's land is negligence, they are applying a standard of strict liability to crop dusting activities under the name of negligence.

Though only one crop dusting case has reached Kentucky's highest court,⁷¹ that case resembles the Texas pattern. Defendant aerially sprayed toxaphene on a tobacco patch about 110 feet from a pond teeming with commercially raised minnows. Some of the spray settled on the pond and poisoned the fish. The only reason given by the court for holding the defendant negligent and liable was that he had "allowed the chemical compound to settle in the pond in the spraying operation so that the minnows were poisoned."⁷² A possible explanation of this decision is that the risk of harm created by spraying 110 feet from a vulnerable target far outweighed the utility to be gained.⁷³ The dusting itself constituted negligence. However, there is nothing mentioned in the opinion to support such an explanation.

The standards formulated in the Arkansas cases do not coincide with the exacting limitations placed upon crop dusting in Texas and Kentucky. Nevertheless, liability has been found where the only evidence of fault lay in the dusting itself.⁷⁴ Also, the mere knowledge of the propensities of dusting chemicals to drift has been pointed to as evidence of negligence.⁷⁵ These results have occurred despite the court's insistence that a defendant who uses dusting chemicals "is not liable to his neighbor in every case; negligence must be shown."⁷⁶

The Arizona opinions, likewise, suggest a strict adherence to a showing of negligence before liability will attach to crop dusting

⁶⁹ *Vrazel v. Bieri*, 294 S.W.2d 148, 152 (Tex. Civ. App. 1956).

⁷⁰ See *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 306 S.W.2d 433, 435 (Tex. Civ. App. 1957). Crop dusting is an inherently dangerous activity. *Leonard v. Abbott*, 357 S.W.2d 778 (Tex. Civ. App. 1962), *rev'd on other grounds*, 366 S.W.2d 925 (Tex. 1963).

⁷¹ *Kentucky Aerospray, Inc. v. Mays*, 251 S.W.2d 460 (Ky. 1952).

⁷² *Id.* at 462.

⁷³ Note, *supra* note 18, at 80.

⁷⁴ *Kennedy v. Clayton*, 216 Ark. 851, 227 S.W.2d 934 (1950).

⁷⁵ *Burns v. Vaughn*, 216 Ark. 128, 224 S.W.2d 365 (1949).

⁷⁶ *Id.*

activities.⁷⁷ Arizona, however, was one of the first jurisdictions to declare crop dusting an inherently dangerous activity,⁷⁸ an activity that affords no relief to an employer from liability for damage caused by the negligence of his independent contractor. The opinion in *Gerard v. Fricker*⁷⁹ as to the dangerous nature of crop dusting activities was reiterated in *Crouse v. Wilbur-Ellis Co.*⁸⁰ where the court said:

It is settled law in Arizona that the risk of harm to neighboring property from dusting or spraying by airplane is very great⁸¹

Perhaps as a result little evidence is necessary to get a case to the jury. In one case⁸² the defendant had his land dusted with an arsenical compound, part of which "drifted" 880 feet over plaintiff's land and fell on his bees. Without more evidence, the defendant was held liable on the theory of negligence. In another case⁸³ a dairy herd consumed a poisonous insecticide⁸⁴ which was "carried over and on" plaintiff's feeding pen as a result of defendant's crop dusting operation. No other evidence of negligence appears in the opinion. Again the plaintiff recovered. It is, of course, possible that there was evidence, not included in the opinion, of some conduct, other than the crop dusting itself, which would support a finding of negligence.⁸⁵ But the stated facts and results are more consistent with the theory of strict liability.

In California, judicial attitudes toward crop dusting activities first became apparent in a 1937 decision.⁸⁶ Dusting was not a matter of negligence per se, for it was necessary to farmers and the agricultural economy in the battle to control pests.⁸⁷ In this case, however, defendant's failure to exercise reasonable care consisted of dusting in a "light wind" a half mile from the plaintiff's land.⁸⁸ *Adams v. Henning*⁸⁹ is another good example of how little evidence is required to make out a case of negligence where damage from crop dusting is alleged. It was there held error to grant a nonsuit where:

. . . a part of the evidence would justify an inference that some of this spray [which defendants released from an airplane over the defendant's land] was deposited on at least a part of the plaintiff's land, and that some damage resulted therefrom.⁹⁰

⁷⁷ *Crouse v. Wilbur-Ellis Co.*, 77 Ariz. 359, 272 P.2d 352 (1954); *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1954).

⁷⁸ *S.A. Gerrard v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933).

⁷⁹ *Id.*

⁸⁰ 77 Ariz. 359, 272 P.2d 352 (1954).

⁸¹ *Id.* at 365, 272 P.2d at 356.

⁸² *Lundberg v. Bolon*, 67 Ariz. 259, 194 P.2d 454 (1948).

⁸³ *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1955).

⁸⁴ DDT and benzene hexachloride. *Id.* at 69, 283 P.2d at 237.

⁸⁵ See *id.* at 72, 283 P.2d at 239.

⁸⁶ *Miles v. A. Arena & Co.*, 23 Cal. App. 2d 680, 73 P.2d 1260.

⁸⁷ *Id.* at 683, 73 P.2d at 1262.

⁸⁸ *Id.* at 682, 73 P.2d at 1261.

⁸⁹ 117 Cal. App. 2d 376, 255 P.2d 456 (1953).

⁹⁰ *Id.* at 378, 255 P.2d at 457.

The opinion does not mention any questionable conduct other than the dusting itself.

On the other hand, California courts have twice handed down decisions in favor of defendants. In *Jeanes v. Holtz*⁹¹ plaintiff's bees "trespassed" onto defendant's freshly dusted crops and were consequently killed. It may be inferred from the decision that the defendant did not owe a duty of care to trespassing bees.⁹² In *Lenk v. Spezia*⁹³ the defendant repeatedly warned a beekeeper to protect his bees from the drift hazard involved in defendant's crop dusting operation. Fully aware of the danger, the plaintiff ignored the warnings, refused defendant's help, then "deliberately" released his bees and permitted them to search the surrounding fields for nectar and pollen. He lost his bees and was barred from recovery for his contributory negligence.⁹⁴ Defendant admitted dusting his field with an arsenical powder, but this admission was the only evidence of negligence on his part accepted by the court.⁹⁵ It seems clear that the plaintiff voluntarily encountered a known danger; he conducted himself in a manner which bars recovery in both negligence and strict liability cases.⁹⁶ Normally a choice is not voluntary if the only available alternative involves the sacrifice of a valuable right.⁹⁷ The court may have concluded, however, that the slight effort involved in protecting his bees did not constitute such an intrusion or imposition upon the plaintiff as to amount to a taking of a valuable right. Had the plaintiff been warned against possible harm to growing crops, which cannot be as easily protected, certainly a different result should be expected.⁹⁸ In fact, there are indications in *Lenk v. Spezia* that contributory negligence had little effect upon the result and that the plaintiff actually lost because he failed to establish causation.⁹⁹

However confusing it is to determine the theory of liability applied by the California courts to past cases, the theory to be applied in the future seems clear. Legislation regulating crop dusting¹⁰⁰ has apparently culminated in a decision to subject those crop dusting activities which produce substantial drift to strict liability.¹⁰¹ Since the statute makes it a crime to crop dust in such a manner as to cause substantial

⁹¹ 94 Cal. App. 2d 826, 211 P.2d 925 (1949).

⁹² See *id.* at 830, 211 P.2d at 927, 928.

⁹³ 95 Cal. App. 2d 296, 213 P.2d 47 (1949).

⁹⁴ *Id.* at 305, 213 P.2d at 53.

⁹⁵ *Id.*

⁹⁶ W. PROSSER, *TORTS* § 78, at 539 (3d ed. 1964).

⁹⁷ *Id.* § 67, at 466.

⁹⁸ See *Cambell v. Seaman*, 63 N.Y. 568 (1876).

⁹⁹ 95 Cal. App. 2d 296, 305, 213 P.2d 47, 50 (1949).

¹⁰⁰ CAL. AGRIC. CODE §§ 11401-04, 11501-13, 11531, 11701-10, 11731-41, 11761-65, 11791-92, 11901-13, 11932-40, 12971, 14002-06, 14011; 3 CAL. ADM. CODE §§ 2448-55, 2460-64, 3070-3114.

¹⁰¹ CAL. AGRIC. CODE § 12972.

drift, the effect of its enforcement is to protect sensitive property from harm caused by the substantial drift of chemicals. In light of the many and detailed statutory provisions regulating crop dusting activities in existence prior to the enactment of this statute, it may easily be concluded that the purpose of the statute was to aid in making sensitive, neighboring property safe from harm caused by such drift. In California an unexcused violation of a criminal statute the purpose of which is to promote safety is negligence.¹⁰² Given the fact that substantial drift may result from crop dusting notwithstanding the exercise of all reasonable care,¹⁰³ the end result of the statute is to impose strict liability upon crop dusting activities producing substantial drift.

It can hardly be said that the weight of authority is against burdening crop dusting with strict liability. Even in jurisdictions which profess to require a showing of negligence, the margin of error permitted in the defendant's conduct is quite narrow.

Inadequacies of the Negligence Theory

Assuming for the moment that crop dusting is a proper subject for strict liability, the question may be asked whether the theory of negligence as applied in the cases is not adequate to cope with the damage produced by crop dusting activities.

The question must be answered in the negative, however, as there is at least one major, distinct difference between these two theories. In any case litigated under the theory of negligence, a finding of the failure to exercise reasonable care for the safety of the plaintiff's interest is a prerequisite for recovery.¹⁰⁴ The possibility that the trier of fact will not make such a finding always exists. In *Vrazel v. Bieri*¹⁰⁵ and *Gamblin v. Ingram*¹⁰⁶ the plaintiffs were faced with just this obstacle; they failed to overcome it. Thus, when a court proceeds upon the theory of negligence, it is quite possible for a plaintiff to establish causation and damage and still not recover.

Another objection to the theory of negligence as applied to the facts peculiar to crop dusting operations is found in the problem of proof. Where liability is predicated upon negligence, the plaintiff must prove more than that he suffered damage caused by the particular defendant's crop dusting activities. In addition, he must prove that the defendant owed him a duty to exercise reasonable care to

¹⁰² See *Satterlee v. Orange Glenn School Dist.*, 29 Cal. 2d 581, 177 P.2d 279 (1947); 18 Ops. CAL. ATT'Y GEN. 221 (1951).

¹⁰³ See text accompanying notes 8-30 *supra*.

¹⁰⁴ W. PROSSER, *TORTS* § 30, at 146 (3d ed. 1964).

¹⁰⁵ 294 S.W.2d 148 (Tex. Civ. App. 1956).

¹⁰⁶ 378 S.W.2d 941 (Tex. Civ. App. 1964).

avoid injury to him and that the defendant failed to meet that obligation.¹⁰⁷ In crop dusting cases, however, damage caused by 2,4-D and other harmful chemicals often is not readily apparent. It is not unusual for 10 to 14 days to elapse before damage is detectable.¹⁰⁸ Even then, an expert may be needed to discover the damage.¹⁰⁹ To the extent that there is a considerable lapse of time between the crop dusting and the manifestation of damage, the plaintiff loses the advantage of having immediate notice of the possibility of tortious conduct. The delay in acquiring notice may make it difficult for him to discover what conduct of the defendant led to his damage. It is believed that the ramification of this delay presents a problem of proof which the plaintiff does not encounter in other cases of property damage, such as automobile accidents or burned buildings, where the possibility of tortious conduct is readily apparent.

It is one major undertaking to trace his damage to the crop dusting activities of the defendant and to eliminate all other probable sources;¹¹⁰ and then another undertaking to establish that the pilot failed in some way to exercise reasonable care.¹¹¹ Moreover, the formidable aid¹¹² of *res ipsa loquitur* is not generally applicable to this dilemma, for chemical hazards and potential drift problems inhere in any crop dusting operation,¹¹³ and the courts in almost every jurisdiction recognize that poisonous chemicals may drift, at least for some distance, notwithstanding the exercise of all reasonable care.¹¹⁴

Another negative response to the question propounded lies in the general policy in favor of clarity in the law. To the extent that courts, professing to apply the theory of negligence, actually apply the theory of strict liability to crop dusting activities, confusion and uncertainty are added to the law of negligence. Furthermore, even in

¹⁰⁷ W. PROSSER, *Torts* § 30, at 146 (3d ed. 1964).

¹⁰⁸ See *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598 (1961).

¹⁰⁹ See *id.*

¹¹⁰ Interview with Stuart W. Turner; Note, *supra* note 18, at 85.

¹¹¹ Much dusting is done at night when it is more difficult for potential witnesses to ascertain negligent conduct. See Taylor, *Night Dusting*, *FLYING*, June 1959, at 37.

¹¹² See W. PROSSER, *Torts* § 40 (3d ed. 1964).

¹¹³ See text accompanying notes 8-30 *supra*.

¹¹⁴ See *S.A. Gerrard Co. v. Fricker*, 42 Ariz. 503, 27 P.2d 678 (1933); *Chapman Chem. Co. v. Taylor*, 215 Ark. 630, 222 S.W.2d 820 (1949); *Miles v. A. Arena & Co.*, 23 Cal. App. 2d 680, 73 P.2d 1260 (1937); *Gotreaux v. Gary*, 232 La. 373, 94 So. 2d 293 (1957); *Faire v. Burke*, 363 Mo. 582, 252 S.W.2d 289 (1952); *Council v. Duprel*, 250 Miss. 269, 165 So. 2d 134 (1964); *Smith v. Okerson*, 8 N.J. Super. 560, 73 A.2d 857 (Super. Ct. 1950); *Pendergrass v. Lovelace*, 57 N.M. 661, 262 P.2d 231 (1953); *Young v. Darter*, 363 P.2d 829 (Okla. 1961); *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961); *Alexander v. Seaboard Air Line Ry.*, 221 S.C. 477, 71 S.E.2d 299 (1952); *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 308 S.W.2d 433 (Tex. Civ. App. 1957).

the aggregate, the negligence cases do not delineate a standard of care which, if followed, would exonerate the applicator from liability for some unforeseen damage. The result of the negligence cases is confusion in pleadings,¹¹⁵ in requirements of proof,¹¹⁶ and in viable defenses to complaints.¹¹⁷

Is Crop Dusting an Abnormally Dangerous Activity?

Currently before the American Law Institute is a proposal¹¹⁸ to repeal the definition of an ultrahazardous activity as found in section 520¹¹⁹ of the 1938 *Restatement of Torts*, and to substitute in its place a list of factors to be considered in determining whether an activity is abnormally dangerous, and therefore, subject to strict liability. These factors are:

- (a) Whether the activity involves a high degree of risk of some harm to the person, land or chattels of others;
- (b) Whether the gravity of the harm which may result from it is likely to be great;
- (c) Whether the risk cannot be eliminated by the exercise of reasonable care;
- (d) Whether the activity is not a matter of common usage;
- (e) Whether the activity is inappropriate to the place where it is carried on; and
- (f) The value of the activity to the community.¹²⁰

Because the first two factors are closely related, they are best discussed together.

Risk and Gravity of Harm

It cannot be doubted that crop dusting exposes sensitive, neighboring property to a high degree of risk of serious harm. Because the distribution of the chemicals is inevitably subject to factors beyond the pilot's control,¹²¹ there inheres in every dusting operation the possibility that some of the chemicals will be carried far from the target area.¹²² Added to this possibility is the chemical hazard and, as a

¹¹⁵ See, e.g., *Reed v. Coyner Crop Dusters*, 83 Ariz. 153, 317 P.2d 944 (1957).

¹¹⁶ See e.g., *Adams v. Henning*, 117 Cal. App. 2d 376, 255 P.2d 456 (1953); *Pruett v. Burr*, 118 Cal. App. 2d 188, 257 P.2d 690 (1953). Compare *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 306 S.W.2d 433 (Tex. Civ. App. 1956), with *Gamblin v. Ingram*, 378 S.W.2d 941 (Tex. Civ. App. 1964).

¹¹⁷ See, e.g., *Heeb v. Prysock*, 219 Ark. 899, 245 S.W.2d 577 (1952).

¹¹⁸ RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

¹¹⁹ Section 520 reads: "An activity is ultra hazardous if it (a) necessarily involves a risk of serious harm to the person, land, or chattels of others which cannot be eliminated by the exercise of the utmost care, and (b) is not a matter of common usage."

¹²⁰ RESTATEMENT (SECOND) OF TORTS § 520 (Tent. Draft No. 10, 1964).

¹²¹ See text accompanying notes 8-30 *supra*.

¹²² *Id.*

result, every crop dusting operation involves the risk that valuable neighboring property may be seriously damaged, if not destroyed. Reported recoveries have run as high as \$10,000.¹²³ That the risk of causing damage to valuable property is very great is suggested not only by the numerous reported cases,¹²⁴ but also by the difficulty encountered by the applicator in obtaining liability insurance.¹²⁵ Moreover, the courts which predicate liability upon a showing of negligence generally concede that crop dusting is an activity that cannot be done safely without the exercise of the utmost care.¹²⁶

That the degree and gravity of the risk will be alleviated in the near future is doubtful. Even though the crop dusting industry in recent years has witnessed many technological advancements, the problems presented by the chemical and drift hazards continue to defy solution.¹²⁷ Though down draft produced by whirling rotor blades tends to reduce drift,¹²⁸ even helicopter pilots experience problems with drift.¹²⁹ Furthermore, the crop dusting industry has not yet settled on a consistent approach to the conflicting goals of efficient coverage and reduced drift. Increased nighttime dusting operations mark one recent attempt to reduce drift by working in more favorable weather conditions than prevail during the warmer daylight hours.¹³⁰ However, some of the advantages gained thereby are lost because reduced visibility impairs the pilot's ability to detect changing directions of air flow.¹³¹ On the other hand, to achieve more efficient coverage, experiments are now being conducted with ultra low volume (ULV)¹³² pesticides which involve the application of undiluted chemicals. The drift propensities of such treatment are not yet known,¹³³ although it is feared that drift hazards will be increased.¹³⁴

Risk Not Eliminated by Reasonable Care

The third factor requires little comment. Since drift can neither be accurately predicted nor completely controlled,¹³⁵ there

¹²³ *Crouse v. Wilbur-Ellis Co.*, 77 Ariz. 359, 272 P.2d 352 (1954); *Sanders v. Beckwith*, 79 Ariz. 67, 283 P.2d 235 (1954).

¹²⁴ Cases cited notes 32-34, 38 *supra*.

¹²⁵ Note, *Liability for Chemical Damage from Aerial Crop Dusting*, 43 MINN. L. REV. 531, 542 (1959).

¹²⁶ For cases holding that crop dusting is an inherently dangerous activity, see note 9 *supra*.

¹²⁷ See note 25 *supra* and accompanying text.

¹²⁸ *Invading Agricultural Market*, AVIATION WEEK, Nov. 25, 1963, at 112, 115.

¹²⁹ Interview with Stuart W. Turner.

¹³⁰ *Id.*

¹³¹ *Id.*

¹³² *ULV Will It Steal the Market?*, FARM CHEMICALS, July 1967, at 10-18.

¹³³ *Id.* at 16.

¹³⁴ *Id.*

¹³⁵ See text accompanying notes 3-30 *supra*.

remains in crop dusting activities a high degree of risk of serious harm to sensitive, neighboring property even though the applicator has taken all reasonable precautions in advance, and has exercised all reasonable care in his dusting operation.¹³⁶

Common Usage

The meaning of the term "common usage" and its application to crop dusting activities has not always been clear.¹³⁷ Fortunately, the comments to section 520 have been expanded in the Tentative Draft. It now appears that whether an activity is a matter of common usage depends upon the percentage of the population engaged in carrying on the activity. The comments, for example, suggest that the operation of a motor vehicle is not a proper subject for strict liability because many people engage in this activity; motor vehicle registrations, as an indication of this common usage, totalled over 90 million in 1965,¹³⁸ while over 98,000 drivers were licensed in that year alone.¹³⁹ On the other hand, crop dusting does not begin to qualify as a matter of common usage as only a small portion of the farm population is engaged in applying sprays and dusts from the air. About 5,000 airplanes and 4,000 applicators are employed in crop dusting in the United States.¹⁴⁰

Inappropriateness to Its Surroundings

The comments to the fifth factor suggest that the important thing about an activity burdened with strict liability is "not that it is extremely dangerous in itself, but that it is abnormally so in relation to its surroundings."¹⁴¹ It is economic suicide for a cotton, tomato, or grape grower to dust his crops with 2,4-D.¹⁴² The pesticide 2,4-D is neither a natural nor a common enemy of these crops. It presents an unusual threat to their existence. Thus, the dispersing of 2,4-D and other hazardous chemicals in the vicinity of these broad leaf crops presents an abnormal danger to them and, likewise, to other sensitive property such as livestock and colonies of bees.

This abnormal danger, however, is not merely limited to the immediate vicinity of sensitive property. For destructive herbicides occasionally drift miles before damaging valuable property. The appel-

¹³⁶ *Id.*

¹³⁷ Note, *supra* note 18, at 82-83.

¹³⁸ AUTOMOBILE MANUFACTURERS ASSOCIATION, 1967 AUTOMOBILE FACTS AND FIGURES 26 (1967).

¹³⁹ *Id.* at 53.

¹⁴⁰ FAA Crop-Dusting Crash Study May Result in Safer Pesticide, AVIATION WEEK, Oct. 22, 1962, at 35.

¹⁴¹ RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 520-3, at 57 (Tent. Draft No. 10, 1964).

¹⁴² Note 10 *supra*.

late reports include cases where the chemical drifted 3,¹⁴³ 10,¹⁴⁴ 15,¹⁴⁵ and 20¹⁴⁶ miles. In the light of these facts very few crop dusting operations are not abnormally dangerous in relation to their surroundings. Perhaps the dusting of wheat in the midst of a vast wheat belt, such as might exist on the Great Plains, would be so far removed from sensitive property as to qualify as an appropriate place to conduct this activity. Other, similar examples are difficult to conceive.

Value to the Community

Notwithstanding that crop dusting qualifies in the first five respects as an abnormally dangerous activity, according to the sixth factor, it may be that this activity is too valuable to the agricultural community to burden it with strict liability. Crop losses, caused by pests of all kinds, annually run into hundreds of millions of dollars.¹⁴⁷ One step toward eliminating this loss is to control, perhaps even eradicate, destructive pests. Since the aerial application of pesticides is the most efficient,¹⁴⁸ in some cases, the only way in which pest control can be accomplished,¹⁴⁹ the benefits to be gained from these operations are valuable to both the public and the farmer. This value has long been recognized by the courts. Beginning with a case¹⁵⁰ in 1937 the courts have generally held that crop dusting is not in itself a matter of negligence or, in other words, that the benefits derived from crop dusting outweigh the risk that damage to neighboring property may result.¹⁵¹

There is good reason to believe, however, that crop dusting is not an activity essential to the livelihood of the members of the agricultural community. In a mixed farming state such as California it is possible that as much harm as gain can result from crop dusting. In California, the aerial application of pesticides is not only strictly regulated,¹⁵² it is also prohibited in large areas of the state.¹⁵³ Even

¹⁴³ *Gotreaux v. Gary*, 232 La. 375, 94 So. 2d 293 (1957); *Dallas County Flood Control Dist. v. Benson*, 157 Tex. 617, 306 S.W.2d 350 (1957).

¹⁴⁴ *Aerial Sprayers, Inc. v. Yerger, Hill & Son*, 306 S.W.2d 433 (Tex. Civ. App. 1957).

¹⁴⁵ *Pitchfork Land & Cattle Co. v. King*, 162 Tex. 331, 346 S.W.2d 598 (1961).

¹⁴⁶ *Dallas County Flood Control Dist. v. Fowler*, 280 S.W.2d 336 (Tex. Civ. App. 1955).

¹⁴⁷ Assessable yield loss in California alone amounted to \$162,886,355 in 1965. CALIFORNIA DEP'T OF AGRICULTURE, BULL. No. E-82-8, at 8 (Sept. 23, 1966).

¹⁴⁸ *Tozer*, *supra* note 1.

¹⁴⁹ *Id.*

¹⁵⁰ *Miles v. A. Arena & Co.*, 23 Cal. App. 2d 690, 73 P.2d 1260 (1937).

¹⁵¹ See text accompanying notes 46-48 *supra*.

¹⁵² See CAL. AGRIC. CODE §§ 11401-04, 11501-13, 11531, 11701-10, 11731-41, 11761-65, 11791-92, 11901-13, 11932-40, 12971, 14002-06, 14011; 3 CAL. ADM. CODE §§ 2448-55, 2460-64, 3070-3114.

¹⁵³ *E.g.*, 3 CAL. ADM. CODE §§ 2449, 2461.

the ground application of pesticides is prohibited in certain places during the growing season.¹⁵⁴ Other states in which mixed farming is not as predominant as it is in California also have laws regulating the application of pesticides.¹⁵⁵

The aerial application of pesticides is not the only method of controlling pests. Ground application of pesticides, while not as economical as aerial application when done on a large scale,¹⁵⁶ is still recognized as a satisfactory method.¹⁵⁷ Any assertion that crop dusting is vital to the agricultural community is, therefore, open to question.

Conclusion

It is submitted that crop dusting is a proper subject for strict liability. The imposition of strict liability upon crop dusting does not result in liability for accidental damage. The element of fault in the defendant's conduct is that he has intentionally exposed the plaintiff's valuable property to a high degree of risk of serious harm.¹⁵⁸

It is believed that the courts rather than the legislatures should effect the change from a requirement of a showing of "negligence" to strict liability. It is well within the province of the judiciary to make such a change.¹⁵⁹ Also, if and when the weight of the factors listed in the Tentative Draft become favorable to the crop dusting industry, a corresponding change in the theory of liability—from strict liability to negligence—may be more readily accomplished by the courts than by the legislatures. However, whether the change is made by the courts or by the legislatures is a secondary matter. That the change be made is the primary consideration and the conclusion of this comment.

Richard S. Jensen*

¹⁵⁴ The ground application of pesticides is prohibited between March 15 and October 15 on any area within 2 miles of vineyards or cotton crops. 3 CAL. ADM. CODE § 2450(g).

¹⁵⁵ See statutes compiled in Comment, *Crop Dusting—Scope of Liability and a Need for Reform in the Texas Law*, 40 TEXAS L. REV. 527, 529 n.20 (1962); Note, *Regulation and Liability in the Application of Pesticides*, 49 IOWA L. REV. 133, 136-41 (1963).

¹⁵⁶ Brandes, *Aerial Application is Here to Stay*, AGRICULTURAL CHEMICALS, Jan. 1967, at 43-44.

¹⁵⁷ See *id.*

¹⁵⁸ *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961); W. PROSSER, TORTS § 74, at 508 (3d ed. 1964).

¹⁵⁹ *Loe v. Lenhardt*, 227 Ore. 242, 362 P.2d 312 (1961); RESTATEMENT (SECOND) OF TORTS, Explanatory Notes § 520, comment 1 at 68 (Tent. Draft No. 10, 1964).

* Member, Second Year Class.