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Agriculture; economic poisons—assessment

Food and Agricultural Code §§ 12115, 12115.1, 12115.2, 12115.3, 12115.4, 12115.5, 12115.6, 12848, 12848.1, 12848.2, 12848.3, 12848.4, 12848.5, 12848.6, 12848.7, 12848.8, 12848.9, 12848.10, 12848.11, 12971.5 (new); §§ 12841, 12841.1, 12847, 12848.9, 12848.10, 12848.11, 12971.5 (new); §§ 12841, 12841.1, 12847, 12999.4 (amended).

AB 770 (Areias); 1993 STAT. Ch. 1176

Existing law requires registrants1 of economic poisons2 to pay an assessment to the Director of Pesticide Regulation (Director)3 for all sales of registered and labeled economic poisons for use in this state.4 Chapter

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1. See CAL. FOOD & AGRIC. CODE § 11405 (West 1986) (defining registrant as any person that registers pursuant to the California Food and Agricultural Code §§ 11752, 12051); see also id. § 12755 (West 1986) (defining registrant as a person that has registered an economic poison and has obtained a certificate of registration from the department).
2. See id. § 12753 (West Supp. 1993) (defining economic poison as any spray adjuvant or substance which may infest or be detrimental to vegetation, man, animals, or households, or be present in any agricultural or nonagricultural environment).
3. See id. § 11454 (West Supp. 1993) (stating that the department is vested with all duties, powers, and jurisdiction as the Department of Food and Agriculture with regard to the regulation of pesticides).
4. Id. § 12841(a)(1) (amended by Chapter 1176); see Leslie’s Pool Mart, Inc. v. Department of Food & Agric., 223 Cal. App. 3d 1524, 1541, 273 Cal. Rptr. 373, 385 (1990) (stating that the clear purpose of requiring registrants to pay assessments is to help defray the administrative costs in enforcing the provisions of the Economic Poisons Act and other laws relating to the manufacture, sale, and use of pesticides), review denied, 1991 Cal. LEXIS 142 (Jan. 16, 1991); cf. 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990) (codifying the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and 1972 amendments known as the Federal Environmental Pesticide Control Act (FEPCA)); id. § 136a(a) (1988 & Supp. II 1990) (providing that no person in any state may distribute or sell any pesticide that is not registered); id. § 136a-1 (1988 & Supp. II 1990) (providing for the re-registration of registered pesticides); id. § 136e (1988) (listing the requirements for the registration of establishments that produce pesticides); ALA. CODE § 2-27-9(a) (1993) (providing that applicants shall pay an annual registration fee of $100 for each pesticide registered); COLO. REV. STAT. § 35-9-118(3)(a) (1993) (allowing the commissioner to determine annual pesticide registration fees for funding the groundwater protection fund and the pesticide fund); N.D. CENT. CODE § 19-18-04 (1991), OR. REV. STAT. § 634.016(1) (1992), VA. CODE ANN. § 3.1-249.40 (1993) (providing that any person selling or offering for sale any pesticides within the state must annually register such pesticides); Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2483 (1991) (stating that FIFRA does not expressly supersede local pesticide regulations, therefore FIFRA could be read as giving the states absolute discretion in their regulation of pesticides); N. Jonas & Co., v. EPA, 666 F.2d 829, 832 (3d Cir. 1981) (stating that a product is a pesticide under FIFRA, if a reasonable consumer would use it as a pesticide; the fact that the product may also have other uses does not affect the need to register); McGill v. EPA, 593 F.2d 631, 637 (5th Cir. 1979) (stating that FIFRA does not bar pesticide users from becoming registrants even though they are incapable of manufacturing the pesticide themselves); Marina M. Lolley, Comment, Carcinogen Roulette: The Game Played Under FIFRA, 49 MD. L. REV. 975, 982 (1990) (explaining that the 1988 FIFRA amendments allow the EPA to levy two different fees on manufacturers who want to register pesticides). The first fee is a one time active ingredient fee, while the other is a fee that the EPA can levy annually for each registration. Id. Pesticides, New Fees Said Needed to Address Shortfall of Full-Time EPA Employees, DAILY REPORT FOR EXECUTIVES, May 3, 1993, at 83 (discussing the need for a new fee structure.
1176 requires a pesticide dealer or pesticide broker to pay to the Director an assessment of nine mills ($0.009) per dollar, and until June 30, 1997, an assessment of twelve mills ($0.012) per dollar, for specified sales of economic poisons. Chapter 1176 also requires the pesticide dealer or broker to report its sales quarterly to the Director, and to maintain certain records relating to its sales. Chapter 1176 specifies that it will be unlawful for any person, other than the pesticide dealer or registrant, to sell or distribute economic poison products unless the person is licensed as a pesticide broker. Chapter 1176 also requires that a pesticide labeled for the re-registration of pesticides in order to generate revenue.

5. See CAL. FOOD & AGRIC. CODE § 11407 (West 1986) (defining pesticide dealer as any manufacturer, distributor, or retailer who sells pesticides for agricultural use, sells any method or device for control of agricultural pests, solicits sales of pesticides by making agricultural use recommendations through field agents, or sells a pesticide pursuant to California Food and Agricultural Code § 14004.5 as a restricted material that requires a permit for possession and use); see also id. § 11407.5 (West 1986) (listing exclusions from the definition of pesticide dealer).

6. See id. § 12848 (enacted by Chapter 1176) (permitting a licensed pesticide broker to sell or distribute economic poison products that have been registered by the Director and labeled for agricultural use); id. § 12841.1(a) (enacted by Chapter 1176) (listing information required for the application for a pesticide broker's license which shall be in a form presented by the Director).

7. Id. §§ 12115(a)-(b), 12848.6(a)-(b) (enacted by Chapter 1176); see id. § 12115(a) (enacted by Chapter 1176) (stating that pesticide dealers will be charged this assessment for the dealer's acquisition price or the registrant's sale price, whichever is higher, for all sales by the dealer into or within this state of economic poisons registered by the dealer, and labeled for agricultural use where the dealer is the person who first sold the economic poison into or within this state); id. § 12848.6(a) (enacted by Chapter 1176) (requiring licensed pesticide brokers to pay this assessment for all sales by the broker into or within this state of economic poisons registered by the director and labeled for agricultural use where the broker is the person who first sold the economic poison into or within this state); see also id. § 11408 (West 1986) (defining agricultural use).

8. Id. §§ 12115.3(a)-(b), 12848.9(a)-(b) (enacted by Chapter 1176); see id. (providing that the pesticide dealer and pesticide broker must maintain at their principal place of business the records of their purchases, sales, and distributions of economic poisons, and must report quarterly to the Director the dealer's acquisitions price, the registrant's sale price, the total dollars of sales, and total pounds or gallons sold of economic poisons registered by the Director); cf. 7 U.S.C. § 136f(a) (1988) (requiring producers, registrants, and applicants for registration to maintain records regarding operations and pesticide use); id. § 136i-l(a)(l) (Supp. II 1990) (requiring certified applicators of restricted use pesticides to maintain records comparable to records maintained by commercial applicators of pesticides in each state); IDAHO CODE § 22-3406(2)(a)(b) (1993) (stating that a pesticide dealer must maintain accurate sale and distribution records).

9. CAL. FOOD & AGRIC. CODE § 12848 (enacted by Chapter 1176); see id. (providing that this article does not apply to persons who operate as sellers or distributors of economic poisons that are labeled only for nonagricultural uses); cf. FLA. STAT. ANN. § 487.048(1) (West Supp. 1993) (requiring persons holding, selling, or distributing restricted use pesticides to obtain a dealer's license); IDAHO CODE § 22-3406 (1993); IOWA CODE ANN. § 205.81 (West 1987 & Supp. 1993); N.H. REV. STAT. ANN. § 430:35 (1991); N.C. GEN. STAT. § 143-448(a) (1990); OHIO REV. CODE ANN. § 921.13(A) (Anderson 1992); S.C. CODE ANN. § 46-13-50(A)(1) (Law. Co-op. 1987) (providing that no person may act in the capacity of a pesticide dealer unless the person obtains a license annually); KAN. STAT. ANN. § 2-2469 (1991) (requiring each person who is a pesticide dealer to register with the state board of agriculture). See generally Nagel v. Thomas, 666 F. Supp. 1002, 1007 (W.D. Mich. 1987) (stating that the rights of nonregistrants of pesticides must be limited to express statutory provisions); Canterbury Termite Control, Inc. v. Structural Pest Control Bd., 207 Cal. App. 3d 422, 430, 254 Cal. Rptr. 873, 877 (1989) (holding that a pest control company violated or aided and abetted in the violation of structural pest control laws by allowing unlicensed personnel to quote prices and make arrangements for the
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for agricultural use that is to be used in this state to be purchased from a registrant, licensed pesticide dealer, or licensed pesticide broker. The Director is authorized to levy a civil penalty of up to $5000 for each violation of these provisions.

MBB

Agriculture; economic poisons—penalties

Food and Agricultural Code § 12999.5 (amended).
AB 2104 (Harvey); 1993 STAT. Ch. 737

Existing law allows a county agricultural commissioner (Commissioner) to levy a civil penalty against a person violating the provisions of the Food and Agricultural Code that pertain to pest control operations and agricultural chemicals. Existing law also provides that

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performance of household pest control work); Sarah E. Redfield, Chemical Trespass? - An Overview of Statutory and Regulatory Efforts to Control Pesticide Drift, 73 Ky. L.J. 855, 876 (1985) (providing that pesticide registration is an aspect of pesticide regulation in which state legislation is generally patterned after the federal model).

10. CAL. FOOD & AGRIC. CODE § 12115.6 (enacted by Chapter 1176).

11. Id. § 12999.4(a) (enacted by Chapter 1176); see also 7 U.S.C. § 136(a)(1) (1988) (providing that any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor who violates any provision of FIFRA to be assessed a civil penalty not to exceed $5,000 for each offense); id. § 136(b) (1988) (stating that criminal prosecution may follow a knowing violation of FIFRA); N. Jonas & Co. v. EPA, 666 F.2d 829, 834 (3d Cir. 1981) (concluding that the EPA’s assessment of a $2500 penalty against a chemical producer for failing to register a swimming pool oxidizer as a pesticide was not an abuse of discretion); Johnson v. Odom, 536 So. 2d 541, 548-49 (La. Ct. App. 1988) (stating that a $5000 penalty for applying pesticides without a license was excessive since the pesticide applicator may have been entitled to have its license reissued under the Commissioner of Agriculture’s own decision; therefore, a penalty of $500 for each offense is the maximum amount that can be imposed), cert. denied, 537 So. 2d 213 (1989). See generally Mary Lee A. Howarth, Comment, Preemption and Punitive Damages: The Conflict Continues under FIFRA, 136 U. PA. L. REV. 1301, 1306 (1988) (specifying that when a pesticide manufacturer violates either the general requirements of FIFRA or the specific guidelines created by the EPA for particular products, then the EPA will notify the United States Attorney General who will institute criminal or civil proceedings against the violator).

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1. See CAL. FOOD & AGRIC. CODE § 2001 (West 1986) (establishing a county department of agriculture in each county); id. § 2002 (West 1986) (stating that the county department of agriculture is under the control of the county agricultural commissioner).


3. Id. § 12999.5(a) (amended by Chapter 737); see id. §§ 12501-15201 (West 1986 & Supp. 1993) (setting forth provisions concerning agricultural chemicals, livestock remedies, and commercial feeds); CAL. CODE REGS. tit. 3, § 6130 (1991) (establishing guidelines for agricultural commissionerson when determining types of violations for which fines may be assessed and the amounts of the fines); cf. 7 U.S.C. §§ 136-136y (1988

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the Commissioner must grant a hearing on the matter if requested by the person being cited. Existing law further specifies that the penalty levied by the Commissioner may be appealed to the Director of the Department of Pesticide Regulation (Director).

Chapter 737 specifies that a notice of a proposed action that is sent by certified mail to the last known address of the person charged shall be considered received even if delivery is refused or the notice is not accepted at that address. The person will be given an opportunity to be heard if the

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4. CAL. FOOD & AGRIC. CODE § 12999.5(b) (amended by Chapter 737); see id. (providing that the opportunity to be heard shall include the right to review the Commissioner's evidence and a right to present evidence on the cited person's behalf); cf. 7 U.S.C. 136I (prohibiting the assessment of a civil penalty if the person charged has not been given notice and an opportunity to be heard, and specifying the maximum penalties for civil and criminal violations).

5. CAL. FOOD & AGRIC. CODE § 12999.5(c) (amended by Chapter 737); see id. (listing procedural guidelines for appeal of the Commissioner's decision); see also id. § 11454 (West Supp. 1993) (stating that the department is vested with all duties, power, and jurisdiction as the Department of Food and Agriculture regarding the regulation of pesticides); id. § 12752.2 (West Supp. 1993) (listing chapters where department is defined as Department of Pesticide Regulation); cf. 7 U.S.C. § 136n(b) (1988) (providing that any person may obtain judicial review by petitioning the United States Court of Appeals); ALA. CODE § 2-2-18(c) (Supp. 1993) (providing that the fine assessed by the Commissioner may be appealed to the Board of Agriculture and Industries within 15 days of the time the penalty was assessed).

6. CAL. FOOD & AGRIC. CODE § 12999.5(b) (amended by Chapter 737); see Katzson Bros., Inc. v. EPA, 839 F.2d 1396, 1398 (10th Cir. 1988) (establishing that the EPA followed proper procedures in serving a producer of pesticides prior to levying a penalty for failing to file an annual report as required by FIFRA by sending the complaint by certified mail); Hankla v. Governing Bd., 46 Cal. App. 3d 644, 655, 120 Cal. Rptr. 827, 834 (1975) (stating that when a statute provides for service by registered or certified mail, the addressee cannot assert failure of service when he willfully disregards a notice of certified mail delivered to his address.
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person requests a hearing within twenty days after receiving notice of the proposed action. Chapter 737 further provides that the Director is required to decide the appeal of the Commissioner’s decision solely on the basis of the hearing’s written record, and to affirm the decision if there is substantial evidence to support the Commissioner’s decision. Chapter 737 also permits the Director to increase the amount of the civil penalty if the penalty is not greater than the penalty proposed in the Commissioner’s notice of proposed action.

MBB
Agriculture; stolen economic poisons

Food and Agricultural Code §§ 12648.5, 12648.6, 14649, 14650 (new).
AB 774 (Areias); 1993 STAT. Ch. 848

Existing law provides that it is a public nuisance to use a pesticide¹ that is not registered for use on that specific plant,² crop,³ or commodity.⁴ Existing law additionally permits the Director of Pesticide Regulation⁵ to seize a crop if the pesticide used on the crop is not registered for use on that specific crop.⁶ Chapter 848 authorizes the use

1. See CAL. FOOD & AGRIC. CODE § 12503 (West 1986) (defining pesticide chemical as any substance which is used in the production, storage, or transportation of produce which is an economic poison according to California Food and Agricultural Code § 12753); id. § 12753 (West Supp. 1993) (defining economic poison as any spray adjuvant, or any substance, mixture of substances, which is used for defoliating plants, regulating plant growth, or for preventing, destroying, repelling, or mitigating any pest, as defined in California Food and Agricultural Code § 12754.5).

2. See id. § 5007 (West 1986) (defining plant).

3. See id. § 52001 (West 1986) (defining field crop products).

4. See id. § 12648(a) (West Supp. 1993); see id. § 58605 (defining commodity under the California Marketing Act of 1937); id. § 59504 (West 1986) (defining commodity under the Agricultural Producers Marketing Law); see also id. § 12504 (West 1986) (defining produce as any food in the raw or natural state which indicates that it is intended for consumer use with or without further processing); cf. 7 U.S.C. §§ 136-136y (1988 & Supp. II 1990) (codifying the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) and 1972 amendments known as the Federal Environmental Pesticide Control Act (FEPCA)); id. § 136a(a) (1988 & Supp. II 1990) (providing that no person in any state may distribute or sell any pesticide that is not registered); id. § 136a-1 (1988 & Supp. II 1990) (providing for the re-registration of registered pesticides); id. § 136e (1988) (listing the requirements for the registration of establishments that produce pesticides); id. § 136(ja)(1)(A) (1988) (providing that it is unlawful for any person to distribute, sell, offer for sale, or receive any nonregistered pesticide). See generally Wisconsin Public Intervenor v. Mortier, 111 S. Ct. 2476, 2483 (1991) (stating that FIFRA does not expressly supersede local pesticide regulations, therefore, FIFRA could be read as giving the states absolute discretion in their regulation of pesticides); N. Jonas & Co. v. EPA, 666 F.2d 829, 832 (3d Cir. 1981) (stating that a product is a pesticide under FIFRA, if a reasonable consumer would use it as a pesticide). Moreover, the product must still be registered even if it has other uses. Id.; Montana Pole & Treating Plant v. I.F. Laucks & Co., 775 F. Supp. 1339, 1343 (D. Mont. 1991) (providing that under FIFRA, the EPA is required to register pesticides if it determines the pesticides labeling and other materials comply with FIFRA's requirements), aff'd, 993 F.2d 676 (9th Cir. 1993).

5. See CAL. FOOD & AGRIC. CODE § 12752.5 (West Supp. 1993) (listing chapters under the Food and Agricultural Code where director is defined as the Director of Pesticide Regulation); see also id. § 11454 (West Supp. 1993) (stating that the department is vested with all duties, powers, and jurisdiction as the Department of Food and Agriculture with regard to the regulation of pesticides).

6. Id. § 12648(a) (West Supp. 1993); see id. § 12648(e) (West Supp. 1993) (providing that the director must give notice to the owner or person in control of the plant, crop, commodity, or site prior to seizure, unless the Director has reason to believe that notice would result in the Director's loss of control); see also id. § 12601 (West Supp. 1993) (providing that the director may seize and hold any lot of produce, or unharvested produce within one week of being in harvestable condition which carries or is suspected of carrying pesticide residue or other added deleterious ingredients); Menefee & Son v. Department of Food & Agric., 199 Cal. App. 3d 774, 780, 245 Cal. Rptr. 166, 170 (1988) (authorizing the director of the Department of Food and Agriculture to seize and destroy a crop or commodity which has been treated with an unauthorized economic poison); cf. 7 U.S.C.
of penalties against anyone who knowingly treats a plant, crop, or commodity with an economic poison or fertilizer that is stolen or acquired by illegal means. Chapter 848 also provides that any person who is licensed and is found by a court to have knowingly sold, applied, or provided economic poisons or fertilizer that was stolen or obtained illegally to have their licenses suspended for a minimum of eighteen months.

MBB

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