State Mandated Pesticide Application: Due Process Rights of Organic Farmers

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The control of pests plays a critical role in agricultural production in California. The California Department of Food and Agriculture (CDFA) recently embarked upon an apple maggot fruit fly eradication program involving the mandatory spraying of pesticides in infested areas throughout a six-county area in northern California. The serious impact of this type of program on organic farmers raises questions regarding the constitutional adequacy of the statutory notice requirements for pest control programs. In 1985, the sole notice to the public of the apple maggot spray program consisted of a press conference held four days before the initiation of spraying, precluding any effective or meaningful discussion between opponents of the program and responsible officials. Notification of impending mandatory pesticide application, for other than aerial spraying in an urban area, is only required by means of publication in a general circulation newspaper.

The apple maggot fruit fly controversy exemplifies the conflict between environmental interests and traditional agricultural interests. The California State Legislature dealt with this conflict in 1985 by exempting from environmental review, under the California Environmental Quality Act (CEQA), state sponsored pest eradication and control programs involving the mandatory application of pesticides. Under the new law, which is the focus of this comment, an organic farmer who is subject to a state mandated spraying program is not provided with notice or hearing prior to the promulgation of the decision by the CDFA Director to embark on a pest eradication or control program, nor is the farmer guaranteed notice and an opportunity to protest prior to actual spraying.

2. CAL. FOOD & AGRIC. CODE §§5771-5780.
3. CAL. PUB. RES. CODE §§21000-21177.
4. A.B. 1525, 1985-86 Reg. Sess. (proposed addition to add §1085.5 to the CAL. CIV. PROC. CODE; to repeal CAL. FOOD & AGRIC. CODE Chapter 1.5 commencing with §5050; to add §§5051-5064 to the CAL. FOOD & AGRIC. CODE; proposed amendment to amend CAL. FOOD & AGRIC. CODE §14006; to amend CAL. PUB. RES. CODE §21080.5).
5. CAL. FOOD & AGRIC. CODE §5051; CAL. PUB. RES. CODE §21152.
The new legislation was a response to the case of *Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture.* The court, in *Citizens,* determined that the CDFA had violated the requirements of CEQA by not preparing an environmental impact report (EIR) on the apple maggot eradication program. *Citizens* was followed shortly by the enactment exempting all CDFA pest eradication and control programs from CEQA environmental review, and setting forth procedures for judicial challenge of these activities. The law recently has been changed to apply the EIR exemption to eradication projects only.

The new law contains only minimal notice requirements after the CDFA Director promulgates a decision on a pest eradication or control program, and requires no notice before the decision. The publication of the decision to spray in a general circulation newspaper is the only mandatory notice required under the new law. Thus, the legislature has eliminated any realistic opportunity for early public awareness and review of these projects.

Serious due process questions are raised by the legislation because organic farmers are unable to market produce as "organic" if the crops have been sprayed with synthetic pesticides. Although public outcry convinced the CDFA to allow most organic farmers to utilize organic pest control methods for the apple maggot eradication effort in 1986, no guarantee of such cooperation exists in future years or programs. The new law applies to all state sponsored pest eradication and control efforts.

Although the plight of the organic farmer is demonstrated by the economic impact of mandatory spraying, other citizens who reside in the affected areas also may be deprived of adequate notice and avenues to address their health concerns. Both groups are affected equally by the limits on access to the courts imposed by the new legislation. The new law puts the state on a collision course with established environmental policy and the due process clause of the United States and California Constitutions.

The purpose of this comment is to inquire into the constitutional rights of organic farmers who object to the use of synthetic pesticides

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6. *Citizens for Non-Toxic Pest Control v. California Dep't of Food and Agric., No. 75602* (Humboldt County Superior Court, July 25, 1985).
8. Early notification is now particularly important because of the new requirement that any action challenging the decision to spray be brought within 30 days of the filing of the notice of decision with the local city or county. See *CAL FOOD & AGRIC. CODE §§5051 and 5052.*
on their property, and to propose an alternative method of notification, hearing, and environmental assessment. This comment will show that organic farming involves constitutionally protected property and liberty interests that are threatened by CDFA pest eradication and control programs. Repeated mandatory application of synthetic pesticides by the CDFA in the context of a pest control or nonemergency eradication program deprives the organic grower of the fragile ecosystem that characterizes an organic farm. Organic produce that has been sprayed with pesticides cannot, under most circumstances, be labeled "organic," and may have to be destroyed or sold at a loss. As a result, the organic farmer may lose access to the specialized organic foods market, resulting in serious economic loss. Since state pest control and eradication programs may impair property or liberty rights, these programs must meet constitutional due process standards for notice and hearing and should conform with California environmental policy. Adequate public review would provide for a more thorough analysis of the impacts of and alternatives to the mandatory application of synthetic pesticides. Adoption of adequate due process and environmental review procedures would also protect the public from being subjected to arbitrary state action in similar situations.

ORGANIC FARMING IN CALIFORNIA

Organic farming in California is a small but viable industry that supplies a specialized market with produce grown without the application of synthetic pesticides, herbicides, or fertilizers. The number of organic farms in California is estimated at between 200 and 300, encompassing nearly ten thousand acres. These farms range from

9. See supra notes 139-70 and accompanying text.
10. See Pimentel and Edwards, Pesticides and Ecosystems, 32 BIOSCIENCE 595, 595 (1982) [hereinafter cited as Pimentel] ("Orchards are complex ecosystems easily perturbed by the extensive use of pesticides, and there are many instances of increased pest attack in orchards after the use of pesticides. ... [C]hemicals reduce populations of ... natural enemies" of pests.).
12. See infra notes 34 and 35 and accompanying text (organic farmers indicate that switching from the organic to the regular produce market is extremely difficult).
13. CAL. FOOD & AGRIC. CODE §11501(f) (one of the purposes of the code division relating to pesticide registration is to encourage the application of biological and cultural pest control techniques with selective pesticides when necessary to achieve acceptable levels of control with the least possible harm to nontarget organisms and the environment); California Environmental Quality Act (CEQA), PUB. RES. CODE §§21000-21177.
one-half acre to one thousand acres in size and produce nearly every type of crop that is grown in the state.\textsuperscript{16} Organic farming in California is a multi-million dollar industry\textsuperscript{17} that is increasing in size and sophistication.\textsuperscript{18} This industry is threatened by California pest eradication and control projects that include the mandatory application of synthetic pesticides to organic fields and orchards. The following discussion of the nature of organic farming provides the background for an analysis of the constitutional due process rights of the organic farmer under recently adopted state law.

\textbf{A. The Statutory Definition of Organic Agriculture}

Scientific studies\textsuperscript{19} documenting the serious hazards of pesticides to human health and wildlife justify a cautious approach to pest management through the application of pesticides.\textsuperscript{20} Widespread use of these chemicals leads to pesticide resistant strains of insects\textsuperscript{21} and, more importantly, endangers human health\textsuperscript{22} and wildlife.\textsuperscript{23} Organic farmers offer consumers an alternative to produce grown under traditional pest control methods, for somewhat higher prices.\textsuperscript{24} Organic farming in California: A Preliminary Study, I Biological Agriculture and Horticulture, 97, 98 (1983) [hereinafter cited as Altieri].

16. Id.


18. Altieri, supra note 15, at 98 ("In spite of the smaller farm size and production diversity, 78\% of the surveyed organic farmers utilize modern irrigation systems and most operate one or more tractors.").


20. The term "pesticides" will be used to denote synthetic pesticides, which are manmade compounds not found in the natural environment. Many do not readily break down into basic components or substances less toxic than the original pesticide. See supra note 19, E.A.T. Report, summary and recommendations at s-5 to s-12.


22. The threat of contact pesticides to human health has been documented in numerous scientific reports. See, e.g., U.S. Dep't of Health, Educ. and Welf., Report of the Secretary's Commission on Pesticides and their Relationship to Environmental Health 4 (1969).

23. See supra note 19, E.A.T Report, Summary and Recommendations at S-13. Thousands of fish and waterfowl have been poisoned by pesticides in the water or on treated land. Between 1961 and 1976, 79 fish kills were traced to specific pesticides. Peregrine falcons, brown pelicans, ospreys, and western grebes have been virtually eliminated from parts of California as a result of pesticide poisoning that causes female birds to produce eggshells too weak to survive incubation. Id.

24. Prices for organic fruits and vegetables are usually 10\% to 15\% higher than prices...
foods are subject to strict labeling regulations set forth in the California Health and Safety Code.25 The Organic Foods Act26 restricts the use of the adjectives, “organic,” “organically grown,” “wild,” “ecologically grown” or “biologically grown” in labeling or advertising to fruit or vegetables to which no synthetic pesticides27 have been applied by the grower for twelve months prior to the appearance of flower buds.28 In the case of annual or two year crops, the prohibition begins twelve months prior to seed planting or transplanting.29 When legally mandated application of substances prohibited under the Organic Foods Act has occurred, as in a CDFA pest control program, organic farmers may market their products as organic if the products contain less than ten percent of the level of pesticide regarded as safe by the federal Food and Drug Administration.30 This residue requirement cannot be met, however, when the fruit or vegetables are sprayed directly.31 Further, CDFA eradication programs involve repeated applications of pesticides at ten to fourteen day intervals32 making unlikely, if not impossible, the chance that the sprayed crops would contain less than ten percent of the level of pesticides considered safe by the FDA.33 Therefore, spraying organically grown crops with a prohibited substance under a state program renders that produce unmarketable as “organic.”

The problems created for the organic farmer by mandatory state sponsored spraying are exacerbated by the inability of organic farmers for conventionally grown produce. ORGANIC MARKET NEWS AND INFORMATION SERVICE, ORGANIC WHOLESALE MARKET REPORT, Vol. 1, No. 10, Nov. 21, 1985. The differential may be closer to 50% for certain types of wholesale produce. For example, during the week of November 17, 1985, wholesale prices for standard nonorganic apples (Red Delicious) ranged from $6.00 to $10.00 per tray pack as compared with prices of $13.20 to $21.70 for organically grown apples of the same variety. Id. Nonorganic head lettuce sold for $6.25 to $6.75 per carton and organic head lettuce sold for $9.00 to $12.50. Id.

25. CAL. HEALTH & SAFETY CODE §§26469, 26569.11-26569.17.
26. Id.
27. Id. at §26569.11(a)(2) (prohibition includes synthetically compounded fertilizers, pesticides, or growth regulators).
28. This restriction includes the entire growing and harvesting season of the commodity. Telephone interview with John C. Laboyteaux III, supra note 1.
29. CAL. HEALTH & SAFETY CODE §26569.11(a)(3).
30. Id. at §26569.12(b).
31. Telephone interview with John Dach, organic apple farmer (Feb. 27, 1986) (notes on file at the Pacific Law Journal); telephone interview with John C. Laboyteaux III, supra note 1. This exception was adopted during the mandatory malathion spraying program for the Mediterranean fruit fly in 1981. Organic growers assert that the 10% residue level can only be met when the source is drift from neighboring fields or orchards rather than direct spraying. Id.
32. Citizens for Non-Toxic Pest Control v. California Dep’t of Food and Agric., No. 75062, at 5 (Humboldt County Superior Court, July 25, 1985); DOWELL, STATE OF CAL. DEP’T OF FOOD AND AGRIC., ANALYSIS AND IDENTIFICATION UNIT, ENVIRONMENTAL ASSESSMENT OF APPLE MAGGOT AND ITS ERADICATION IN CALIFORNIA, at 23 (Dec. 1985).
33. Telephone interview with John Dach, supra note 31; telephone interview with John
to switch easily from the organic produce market to a regular agricultural market, especially on short notice. Different wholesalers and distributors serve these two markets. The business relationships within each market depend upon a continuity of contacts between growers and distributors. The loss of organic certification often means the loss of access to this specialized market and therefore the inability to sell the crop at all.

The California Certified Organic Farmers (CCOF) is the organization responsible for promoting the Organic Foods Act and for monitoring compliance among members. The CCOF is the only statewide organization of organic growers and the organization has approximately 200 members and 10 chapters. Certification as an organic farmer, granted by the CCOF, guarantees that the certified grower's produce meets the requirements of the Organic Foods Act and can be labeled as organic.

Organic farmers use a variety of pest control techniques, including the release of beneficial insects, microbial agents, botanical insecticides, traps, and soaps or oils. Organic farmers claim that their

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C. Laboyteaux III, supra note 1; telephone interview with Warren Webber, supra note 14; telephone interview with Kate Burroughs, Pest Management Consultant (Nov. 21, 1985) (notes on file at the Pacific Law Journal).

34. See supra note 33.

35. See supra note 33. This is especially true of apples because apples are produced in surplus in California. Id.


37. Telephone interview with Warren Webber, supra note 14. CCOF representatives estimate the number of organic farms in California at between 200 and 300. Id.

38. Id.


40. Certification by the CCOF is accomplished at the chapter level by certification committees that visit each member grower to conduct soil tests and to check record keeping. Organic farms are monitored to ensure compliance with the Organic Foods Act and the stricter standards of CCOF. The State Department of Health Services investigates violations of the Act on a complaint basis only. CCOF acts as watchdog in this regard for the protection of CCOF members who sell and label food in compliance with the law. Telephone interview with Warren Webber, supra note 14.

41. Altieri, supra note 15, at 103 (beneficial insects used by organic farmers include green lacewings, trichogramma wasps, predaceous mites, fly parasites, ladybugs, greenhouse whitefly parasites, encarsia formosa, mealybug destroyers, black and red scale parasites, and pink bollworm parasites).

42. Id. Microbial agents include bacillus thuringiensis, nosema locustae, and heliostis nuclear polyhedrosis virus, all of which are selective, acting against only a small range of insects. Id.

43. Id. Botanical insecticides include rotenone, pyrethrum, ryania, nicotine sulfate, sabadilla, neem, quailia, and wormwood, all of which are preferred because of their relatively low toxicity and their rapid decomposition into safe compounds. Id.

44. Fruit fly traps include "sticky red balls" or "sticky yellow panels" that are covered with a substance that both attracts and traps the flies. These devices are hung from trees that host the pest. The red spheres are the more effective traps in commercial orchards. Brunner and Howitt, Tree Fruit Insects, 14 (March 1981) (published by Coop. Extension Serv., Mich. St. Univ.) [hereinafter cited as Brunner].

45. Altieri, supra note 15, at 103. Oils smother the eggs of various insects. Id.
pest management techniques are compatible with conventional state pest control programs. Despite state policy and statutory language encouraging alternative pest control methods the CDFA provides organic farmers with no guarantee of an opportunity to meet with responsible officials to present these organic alternatives to mandatory spraying of synthetic pesticides. The recent apple maggot eradication program demonstrates this problem.

B. Organic Farmers and the Apple Maggot Fruit Fly Eradication Program

On July 24, 1985, a Humboldt County Superior Court judge blocked a fifteen million dollar, seven-year CDFA pest eradication program to combat the apple maggot fruit fly (apple maggot). The apple maggot has threatened the California apple industry since the first fly was discovered in the state in 1983. Normally a major pest of apples in the northeast United States, the apple maggot now has been found in Washington, Oregon, and California. The fly causes injury to fruit by depositing eggs underneath the skin. The larvae live

46. Telephone interview with Warren Webber, supra note 14; The 1986 CDFA policy that allows organic apple growers to strip fruit from their trees instead of submitting to spraying indicates that organic methods might be compatible with certain eradication programs. Although the CDFA traditionally excluded organic methods of pest control from eradication programs, the December 1985 report on the apple maggot by CDFA stated that a nonchemical program utilizing trapping, destruction of fallen fruit, and cold treatment processing of harvested fruit might be as effective as pesticide sprays against the apple maggot. No data is available to indicate whether this alternative method is as effective as the use of synthetic pesticides. DOWELL, supra note 32, at 13.

47. CAL. FOOD & AGRIC. CODE §§11501(f) (encourages biological and cultural pest control techniques).

48. Citizens for Non-Toxic Pest Control v. California Dep't of Food and Agric., No. 75602 (Humboldt County Superior Court, July, 1985).

49. On August 24, 1983, an apple maggot fruit fly was found in the Smith River vicinity of Del Norte County. DOWELL, supra note 32, at 7. Since that time, both adults and larvae have been found in Mendocino, Shasta, Trinity, Del Norte, Siskiyou, and Humboldt Counties. Id. In 1984, CDFA reported 1766 apple maggot fruit flies trapped at 512 sites scattered throughout these six counties as part of the CDFA monitoring program to delimit the area of infestation. Id. at 1. In 1985, 8119 traps captured 165 flies. One spray treatment had been completed. Id. at 3. One organic farmer claims that growers have been aware of the presence of the apple maggot fruit fly in California since the 1940s, and suggests that some natural biological or climatic condition might keep the apple maggot population in check in California. Interview with John Dach, supra note 31.

50. The pest travels most quickly by human movement of infested fruit. DOWELL, supra note 32, at 5.

51. The apple maggot fruit fly lays eggs in the host fruit of apple and pear trees and hawthorne bushes. The larvae of the fly hatch and feed on the fruit. The larvae then drop to the ground with the damaged fruit where they pupate in the soil for one or two winters before emerging as adult flies. See BRUNNER, supra note 44, at 12; Joos, Allen, & Van Steenwyk, Apple Maggot: A threat to California Agriculture, CAL. AGRIC., July-Aug. 1984, at 9, 10 [hereinafter cited as Joos]. The ovipositor of the female fly punctures the skin of the fruit causing dimpling in the skin. Id.
off the fruit and cause the fruit to soften and decay. 52

1. The Eradication Program

The proposed apple maggot eradication program involved the mandatory application of the pesticide Imidan 53 to private property over a six-county area. 54 Legislative authorization for the effort had been approved more than a year earlier. Senate Bill 2076, 55 adopted April 9, 1984, provided authorization for the CDFA to embark upon an apple maggot eradication program, should eradication prove feasible. The CDFA was authorized to study the range of the apple maggot infestation and to report on whether the maggot was an eradicable agricultural pest, in which case the legislature would appropriate funds for this purpose. 56 If the pest proved to be merely controllable, no funds would be appropriated. 57 In December 1984, the CDFA and the Apple Maggot Committee 58 submitted the required report to the

52. Id. Damage to the fruit is caused by the larvae tunneling through the apple flesh leaving threadlike trails. As the larvae grow, the tunnels enlarge and bacterial decay sets in. Eventually the apple rots. Id.

53. The use of this chemical has raised health concerns among citizens who would be exposed to drift and residue. See infra note 54.

54. This program involved the use of Imidan (also known as Phosmet), a nonsystemic organophosphate used to control several fruit and vegetable crop pests. Imidan was developed by the Stauffer Chemical Company in 1954. Dowell, supra note 32, at 14. Imidan is somewhat selective and is considered to have "moderate" toxicity. Id. at 15. Yet the lack of information on this pesticide raises serious doubts as to the wisdom of widespread use before further study. Auditor General, The State Lacks Data Necessary to Determine the Safety of Pesticides, Aug. 1984. Imidan is known to kill honeybees and beneficial parasites, such as certain wasps, that are crucial to the success of organic farming. Interview with Mary Louise Flint, Ph.D, entymologist, University of California Cooperative Extension, IPM Specialist (Nov. 18, 1985) (notes on file at the Pacific Law Journal). Bees are also necessary for pollinization of orchards. Id. A 1984 State Auditor General's Report to the California Legislature revealed that the CDFA had no data summaries on file with respect to the chronic toxicity of Imidan, the reproductive hazards of the chemical, or information on any of the relevant areas of toxicological risk. The Auditor General's report indicated a serious lack of information on most pesticides in California. Auditor General, The State Lacks Data Necessary to Determine the Safety of Pesticides, August 1984. The effect of Imidan on sensitive populations such as pregnant women, the elderly, children, and pets has not been documented. Yet Imidan is known to cause serious neurological problems upon skin contact and may cause birth defects. Brief for the plaintiffs at 12-13, Citizens for Non-Toxic Pest Control v. California Dep't of Food and Agric., No. 75602 (Humboldt County Superior Court, July, 1985) (declaration of Dr. Marc Lappe, Ph.D, experimental pathologist, formerly adjunct associate professor of health policy at the University of California, Berkeley). But see Dowell, supra note 32, at 16 (studies conducted by Stauffer Chemical Company and the EPA showed no developmental abnormalities in the offspring of pregnant rats, rabbits, and monkeys exposed to Imidan; the CDFA stated that because the studies used standards that are no longer acceptable today that further investigation may be necessary).

55. 1984 Cal. Stat. c. 77, at ___.

56. Id.

57. Id. If the pest could not be entirely eliminated from the state it would be deemed merely "controllable." Id.

58. The Apple Maggot Committee was chaired by apple maggot expert Dr. Ronald J. Prokopy, Ph.D., University of Massachusetts.
legislature. The report estimated a better than eighty percent probability of success in eradicating the pest over a seven year period and concluded that the permanent presence of the apple maggot in California would lead to economic and environmental losses. The report also noted that no other state had successfully eradicated the pest.

Senate Bill 354, adopted July 22, 1985, provided funding for the apple maggot eradication project. The first notification of the project to those affected was provided by a press conference. This notification occurred four days before spraying activity began.

2. Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture

A citizens' group, individuals, and organic farmers sought relief by filing for a writ of mandamus and a preliminary injunction to halt the spraying. The petitioners in Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture objected to the CDFA program due to the health risks posed by Imidan, the failure of the CDFA to provide reasonable or adequate notice of the decision to spray and, most importantly, the failure of the CDFA to comply with the terms of CEQA.

CEQA was adopted by the California Legislature in 1972. The Act requires public agencies to consider the environmental effects of projects that are either directly undertaken by the agency, or supported by the agency through grants, loans, or other assistance or the issuance of a permit, license, certificate, or other entitlements. The required environmental analysis is achieved by preparation of a document that analyzes the impacts of the project on the environ-

60. 1984 Cal. Stat. c. 228, at __.
61. Citizens for Non-Toxic Pest Control v. California Dep't of Food and Agric., No. 75602 (Humboldt County Superior Court, July 25, 1985); telephone interview with John C. Laboyteaux III, supra note 1.
62. Petitioners were a coalition of citizens concerned with the quality of the environment, organic produce growers, and private citizens concerned about the effects of spraying on themselves and their neighborhoods. Telephone interview with John C. Laboyteaux III, supra note 1.
63. No 75602 (Humboldt County Superior Court, July 25, 1985).
64. CAL. PUB. RES. CODE §§21000-21177.
66. CAL. PUB. RES. CODE §21065. See also 14 CAL. ADMIN. CODE tit. 14, §15378 (1986) (definition of "project" for the purpose of CEQA compliance).
ment, project alternatives, and impact mitigation measures. This document is called an environmental impact report (EIR). Significant environmental impacts caused by the project must, under CEQA, be reduced to less than significant levels unless overriding economic, social, or other considerations preclude mitigation. A high degree of public involvement in the EIR process is an important element of the Act.

In Citizens for Non-Toxic Pest Control v. California Department of Food and Agriculture, the CDFA, as respondent, asserted that the project was exempt from the EIR requirement because the program fell within the "functional equivalent" status as set forth in CEQA at Public Resources Code section 21080.5. Therefore, no EIR, negative declaration, or initial study on the apple maggot eradication program was prepared or published. Section 21080.5 provides a method of addressing environmental concerns without the formal EIR requirement.

The court determined that the apple maggot eradication project did not fall within the functional equivalent exception. The project should have been the subject of an EIR and a prejudicial abuse of discretion by the CDFA Director was established by this failure to proceed in the manner required by law. The CDFA was ordered to prepare an EIR on the eradication project.

67. Cal. Pub. Res. Code §21061. See also 14 Cal. Admin. Code tit. 14, §§15126(c) and (d); County of Inyo v. City of Los Angeles, 71 Cal. App. 3d 185, 200-03, 139 Cal. Rptr. 396, 406-08 (1977) (the EIR for a project to extract groundwater should have included reasonable alternatives, and a "no project" alternative); Wildlife Alive v. Chickering, 18 Cal. 3d 190, 197, 132 Cal. Rptr. 377, 380, 553 P.2d 537, 540 (1976) (CEQA, and the requirement of an analysis of project alternatives, is applicable to the State Fish and Game Commission).


70. See State CEQA Guidelines, Cal. Admin. Code tit. 14, §§15002(a)(4), 15003(b), 15003(d), 15003(e), 15073, 15086, 15087, and 15088.

71. No. 75602 (Humboldt County Superior Court, July 25, 1985).

72. Cal. Pub. Res. Code §21061. An environmental impact report (EIR) is a detailed statement that sets forth significant environmental effects of a proposed project, mitigation measures, alternatives, growth inducing impacts, cumulative impacts, and irreversible environmental changes as a result of the project. Id.

73. Cal. Pub. Res. Code §21064. A negative declaration is a written statement describing the reasons that a proposed project will not have a significant effect on the environment and therefore does not require the preparation of an EIR. Id.

74. State CEQA Guidelines, Cal. Admin. Code tit. 14, §§15060, 15063. An initial study is the first step taken by a public agency in the evaluation of a project for environmental effects under CEQA, unless a determination of the need for an EIR is made at the earlier preliminary review stage. In either case, a local agency is required to conduct an analysis to determine whether an EIR or a negative declaration will be required, or whether the project is exempt from CEQA requirements. Id.

75. See infra notes 211-36 and accompanying text.

76. Citizens for Non-Toxic Pest Control v. California Dep't of Food and Agric., No. 75602, at 12 (Humboldt County Superior Court, July 25, 1985).

77. Id. at 16.

78. Id. at 21.
Compliance with CEQA would have provided the public with better notice and opportunity for a hearing, as well as an in-depth study of the environmental impacts of the program. CEQA also requires an analysis of those impacts that can be mitigated and those that cannot, and a discussion of the cumulative impacts of the program plus less harmful alternatives than the project as proposed. The Humboldt County decision stressed the importance of the availability of alternative nontoxic pest control methods and the legal obligation to consider these alternatives under CEQA.

3. Alternative Organic Pest Control Methods

Alternative apple maggot control methods, such as sticky red ball traps, were advanced by the petitioners in the Humboldt County case. Sticky fly traps hung from apple trees appear to be effective in controlling fruit fly populations in backyards or small orchards. Other important methods of apple maggot control include careful border inspections or roadblocks and quarantines.

Newly developed botanical insecticides also show promise for the control of the apple maggot and could be considered for use in eradication.

81. Id. §15091.
82. Id. §15130.
83. Id. §15126(d).
85. The sticky yellow pherocon trap used by the CDFA as an apple maggot fruit fly monitoring device is attractive to the flies because the trap is treated with ammonium acetate and protein hydroxylate to simulate food. However, the yellow panel traps are most effective near abandoned orchards and wooded areas where the fruit fly feeds. By the time the fruit fly reaches an orchard, the fly is in search of mating and egg-laying sites on fruit. Therefore, sticky red traps which resemble large apples are most effective in orchards. The sticky red ball consists of a sphere painted red and coated with a sticky substance called tangle foot stickum. The device is particularly effective when the ball is also coated with an apple extract and hung so that the sphere is not obscured by leaves or branches. See Brunner, supra note 43, at 14.
86. Apple maggot expert Dr. Ronald J. Prokopy claims that use of the sticky red balls can achieve commercial suppression of the apple maggot population. Prokopy, Apple Maggot Control by Sticky Red Spheres, 68 J. Econ. Entomology 197 (1975).
87. Joos, supra note 51, at 10. An apple maggot fruit fly infestation area expands very slowly and, when fruit is available, populations of flies tend to stay in the same area year after year. When less fruit is available, the flies move from tree to tree at a rate of only about one-quarter mile per year. The greatest dispersion of the pest is due to the transportation of contaminated fruit across state lines by car. A quarantine area has been established by the CDFA. Vehicles traveling through the area are subject to inspection, and movement of commercial fruit is strictly regulated. Cal. Dep’t of Food and Agric., Apple Maggot Eradication Project Report to the Legislature (December 1985).
Another alternative, the "clean culture" method, consists of clearing the orchard of all fallen fruit to prevent the movement of the apple maggots from the contaminated fruit to the ground. Organic farmers contend that interception of the larvae before pupation begins is more effective than attempting to kill all adult flies. These or other alternatives to the widespread use of synthetic pesticides would have been considered if CDFA had complied with CEQA during the 1985 apple maggot eradication program. One important purpose of statutory and due process hearing provisions under CEQA and the United States and California Constitutions is the opportunity for citizens to advance alternatives to the proposed project that may lessen potential harm to property or the environment.

4. Assembly Bill 1525

The Humboldt County decision that CDFA pest eradication and control programs must comply with the provisions of CEQA triggered a legislative response in the form of AB 1525. This bill was introduced and adopted in the final few days of the 1985 legislative session.
AB 1525, now codified in various sections of the Code of Civil Procedure,14 the Food and Agricultural Code,96 and the Public Resources Code,97 sets forth a notification process for pest eradication and control programs that reflects the CDFA approach in Humboldt County. The new law, as amended by subsequent legislation,98 also exempts these programs from CEQA requirements by classifying the decision of the CDFA Director to embark on a pest eradication program as a functional equivalent to an EIR.99 A program deemed to be a functional equivalent to a full EIR is exempt from the requirement of EIR preparation if certified by the Secretary of the Resources Agency.100

The new law provides a thirty day time frame for filing an action in mandamus to challenge the proposed action.101 The program may last seven years or more and the types of pesticides used may vary from year to year. Yet opponents have only one opportunity at the outset of the program to challenge the state action.

The narrowed scope of court inquiry in the new law may also diminish the ability of opponents to block spraying through court action.102 The inquiry of the court in any action to attack, review, or set aside a CDFA pest eradication or control program may extend only to whether a prejudicial abuse of discretion occurred. The new law provides that ordering the use of a registered pesticide in a manner consistent with the registration, label restrictions, applicable regulations, and federal law is not an abuse of discretion. Yet, subsequently adopted language adds "nothing herein shall limit review of a decision of the director to proceed with a control or eradication pro-

The measure was taken off the consent calendar by Senator Nicholas Petris (D-Oakland) in an unsuccessful attempt to obtain a vehicle for his own set of unrelated amendments. Environmental organizations and consumer groups rallied against the bill. These groups suggested amendments that Assemblyman Waters agreed to include in subsequently adopted legislation in return for support of AB 1525 and quick passage through the Senate. The bill was cleared through the Senate and was signed by the Governor a few days later, but the separate environmentalist and consumer-backed amendments never materialized. Interview with Jeffrey Shellito, Consultant, Assembly Natural Resources Committee (Sept. 16, 1985) (notes on file at the Pacific Law Journal). See Wolinsky, Plan to Curb Pesticide Challenges Revived, L.A. Times, Sept. 14, 1985, part I, at 21, col. 3; Editorial, Fast Shuffle in Sacramento, L.A. Times, Sept. 11, 1985, part II, at 4, col. 1; Bill to Curb Challenges to State Pest Spraying Pushed, L.A. Times, Sept. 10, 1985, part I, at 1, col. 1; Farm-Safety Bill Revived: Lawmaker Seeks Tradeoff with Agribusiness, Sacramento Bee, Sept. 11, 1985, pt. A11, col. 2.

95. CAL. CIV. PROC. CODE §1085.5.
96. CAL. FOOD & AGRIC. CODE §5051.
97. CAL. PUB. RES. CODE §21080.5(k).
98. 1986 Cal. Stat. c. 20, at _____.
99. CAL. PUB. RES. CODE §21080.5(k).
100. CAL. PUB. RES. CODE §21080.5(a).
102. Id. §5054.
ject.' 103 The original language had the effect of preventing a court from issuing an injunction against any aspect of the application of pesticides under a CDFA eradication or control program so long as the CDFA, in essence, followed the directions on the pesticide label. The success of the amended version in broadening the scope of review is uncertain. The law does not clearly state whether or not the wide range of circumstances under which the use of pesticides may be inappropriate may be considered by the court. 104 The narrow definition of abuse of discretion set forth in AB 1525 105 precluded collateral attack upon the validity of the registration or an examination of the hazards of using certain pesticides in particular situations, but this type of review may now be possible. 106

The combination of the potentially narrow scope of inquiry left to the court, limitations on notice, lack of hearing, and the relatively short statute of limitations period seriously hamper citizens’ access to the courts. Citizens concerned about the effects of specific pesticides on the environment may be able to voice their concerns only at pesticide registration hearings, 107 and not when their own property is threatened with mandatory spraying. Procedural due process problems and conflicts with existing state statutes, regulations, and policy are raised by the new law.

5. Notice of Pesticide Spraying

Newly adopted Food and Agricultural Code section 5051, neither provides for prior notice of pesticide spraying nor requires public hearings for CDFA pest control or eradication programs. 108 Under the new

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103. 1986 Cal. Stat. c. 20, at __________.
105. For example, the presence of sensitive populations, such as elderly people or pregnant women, may call for restraint in the application of pesticides. Public opposition to the program or the option of effective organic pest control alternatives should also trigger the need for court review for abuse of discretion.
106. 1986 Cal. Stat. c. 20, at __________.
107. Under the Federal Environmental Pesticide Control Act of 1972 (FEPCA), the federal Environmental Protection Agency (EPA) has the authority to register pesticides and set forth standards for use and labeling. 7 U.S.C. §136. FEPCA also permits states to regulate the sale or use of federally registered pesticides to the extent that the state standards are more stringent. Id. §136(v)(a). Under the California law, the Director of the CDFA must forbid the use of any pesticide found to endanger the environment and may refuse to register any pesticide that causes serious uncontrollable adverse environmental impacts. If the director finds that registration cannot be permitted due to noncompliance by a pesticide manufacturer with federal and state regulations, the CDFA director may call a hearing on the matter. Cal. Food & Agric. Code §§12811-12828. See also Note, The Regulation of Pesticide Use in California, 11 U.C.D. L. Rev. 273 (1980).
law, the CDFA Director exercises authority with regard to a control
or eradication project without prior notification or hearings. The
written decision of the CDFA Director is to be made available to
the public upon request. Notice of the decision must also be publish-
ed in a newspaper of general circulation in the affected county,
although no mandatory time for publication is required by the law.
Therefore, spraying conceivably could commence before the publica-
tion of notice. The decision of the CDFA Director must also be
filed with the affected city or county clerk in accordance with CEQA
procedures that have been incorporated into the new law. These
procedures include posting at the office of the clerk within five days
of the determination by the CDFA Director. The posting, however,
is required five days after the decision of the CDFA director rather
than a particular number of days before actual spraying begins. Again,
spraying could occur before notice is posted. An organic farmer may
be deprived of a significant property interest with only constructive
notice of the decision to embark upon the pest eradication program
and only thirty days to challenge the decision based on this notice.

A confusing and troublesome aspect of the new law is the reference
to the CEQA posting procedures in Public Resources Code section
21152. This section contains permissive language that gives the local
agency the option of filing notice of the CDFA Director’s determina-
tion with the city or county clerk for the purpose of public inspection
and posting when the local agency determines that a project is
not exempt from CEQA as a functional equivalent to an EIR. The
new law purports to designate CDFA pest eradication and control
projects as fulfilling goals that are functionally equivalent to en-
vironmental impact reports, and therefore exempts these programs from

or hand delivered notice of eradication projects declared in urban areas to each resident and
all physicians practicing in the affected area. Notice must be given at least 72 hours prior
to the aerial spraying of pesticides or 24 hours before spraying in an emergency situation.
CAL. FOOD & AGRIC. CODE §5772. The notice must include the date and time of application,
the types of poison to be used, health and safety precautions that can be taken, and the telephone
number and address of public health personnel familiar with the eradication program. Id. §5776.
109. CAL. FOOD & AGRIC. CODE §5051.
110. Id.
111. Perhaps the haste with which the legislation must have been drafted to meet the deadline
for submission before the end of the legislative session contributed to this oversight. See supra
note 94.
112. CAL. PUB. RES. CODE §21152. This section refers only to filing and notice provisions.
113. CAL. FOOD & AGRIC. CODE §5051.
114. CAL. PUB. RES. CODE §21080(b)(16). Projects undertaken by a local agency to imple-
ment a rule or regulation imposed by a state agency under a certified regulatory program pur-
suant to section 21080.5 may be deemed functional equivalents to EIRs.
the CEQA requirement of an EIR. Assuming the permissive language of the Public Resources Code section applies, no filing or posting of the CDFA decision to mandate pesticide application is required.

If posting is required, the notice must be posted on a weekly basis for a minimum of thirty days and must include a determination by the Director regarding the likelihood that the project will have a significant impact on the environment. The determination of the CDFA Director must be made available for public inspection upon request. The decision must also contain findings as to the need for the action, the statutory basis for the action, and notification that any legal challenge shall be brought within thirty days. This statute of limitations for bringing an action in mandamus to challenge the decision to spray is a significant change in the law.

The CDFA decision includes a list of pesticides, any of which could be used in the eradication or control project. Concerned farmers and citizens have no way of knowing which chemical will be sprayed on their land.

The short statute of limitations under the new law, the potentially restricted scope of court review, and only token notice of the impending program are particularly harsh measures under the circumstances.

116. CAL. PUB. RES. CODE §§21152(a), (b).
117. CAL. FOOD & AGRIC. CODE §5051.
118. Id.
119. Letter from Judith Bell, Policy Analyst, Consumers Union of U.S., Inc. to Senator William Lockyer (Sept. 2, 1985) (The Consumers Union analyzed the notice and timing provisions in AB 1525 and suggested that the new law would, in fact, reduce the time in which to challenge the Director's decision to only 17 days after the decision is filed with the City or County Clerk. Id. California Food and Agricultural Code section 5051 requires filing an action in mandamus within 30 days of the filing of the decision with the clerk. CAL. PUB. RES. CODE §5052. Assuming spraying begins at the end of the 30-day period (although there is no assurance that spraying would not begin sooner) section 5058 requires a hearing no less than three days prior to the beginning of the activities which are the subject of the challenge. CAL. PUB. RES. CODE §5058. Section 5058 requires responding papers to be filed no later than two days prior to the hearing. This section also requires responsive papers to the original complaint and supporting affidavits to be filed no later than five days before the hearing. The original complaint and supporting documents are to be filed no later than 10 days prior to the hearing. Id. Therefore, a potential plaintiff has 17 days to file an action, and probably will have fewer days of actual notice of the impending program. This provision in the new law effectively precludes discovery. Before the adoption of the new law, plaintiffs were not constrained by time limits within which to file an action in mandamus.
6. Effect of Protest Against the Apple Maggot Program

The latest chapter in the apple maggot eradication program contains a new twist. The CDFA, in reaction to strong organic farmer opposition to the program and acting upon advice from a science advisory panel for the apple maggot project, announced that commercial\(^{121}\) and backyard\(^{122}\) organic apple growers will have the option of utilizing organic pest control methods in 1986. The advisory panel analysis occurred in the wake of continued protest of the spray program by residents and organic farmers. Yet, organic farmers will remain subject to the provisions of the 1985 legislation in other years and other CDFA pest eradication or control projects.\(^{123}\)

The pest control methods allowed for backyard organic growers are either destruction of the trees or stripping the immature fruit. These growers joined a lawsuit filed on March 7, 1986, in the Humboldt County Superior Court to halt the eradication program until a number of issues are settled.\(^{124}\) The complaint claims that the apple maggot eradication program violates CEQA requirements,\(^{125}\) sections of the Food and Agricultural Code,\(^{126}\) and State and Federal Constitutional guarantees.\(^{127}\)

In response to pressure by consumer groups and organic growers, the legislature adopted AB 1833. This measure may have broadened the scope of court review of challenges to CDFA pest or eradication programs.\(^{128}\) The legislation also limited the exemption from CEQA EIR requirements to eradication programs only.\(^{129}\)

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121. A commercial apple grower means a California producer who annually sells not less than $250 worth of organically grown apples, all of which are of his or her own production from not fewer than 10, 3 year, and older bearing trees. Cal. Dep’t of Food and Agric., Statement of Decision Regarding the Apple Maggot Eradication Project (Jan. 29, 1986).

122. Backyard Growers must strip their trees of fruit prior to June 15, 1986, or elect to have their trees sprayed with Imidan. Id.

123. The new CDFA policy was promulgated by the Director of the CDFA in the Statement of Decision Regarding the Apple Maggot Eradication Project dated January 29, 1986. The CDFA gives property owners the option of having their trees sprayed with Imidan every 10 to 14 days from June through September, or property owners may elect to strip the fruit from host trees prior to June 15, 1986. All commercial apple growers in the areas determined to have an apple maggot infestation must make application for commercial orchard status. Applicants who prefer to use organic methods must sign a compliance agreement with the CDFA in which the grower agrees to remove and dispose of fallen apples daily, to harvest all apples of any variety expeditiously when ripe, and to process all harvested apples by either juicing, saucing, or cold treatment. Id.

124. California Coalition for Alternatives to Pesticides v. California Dep’t Food and Agric., No. 77060 (Humboldt County Superior Court Mar. 7, 1986).


126. Cal. Food and Agric. Code §5051 (requires certain findings by the CDFA Director).


PROCEDURAL-DUE PROCESS

The United States\textsuperscript{130} and California\textsuperscript{131} Constitutions prohibit the state from depriving any person of life, liberty, or property without due process of law.\textsuperscript{132} When constitutionally protected property or liberty interests exist, due process requires that persons who may be deprived of those interests be given notice of the action and an opportunity to be heard.\textsuperscript{133} Under the new law, a CDFA mandatory pesticide application program raises significant due process questions because of possible injury to organic farmers.

A. Prerequisites for Procedural Due Process Guarantees for Organic Farmers

Procedural due process is not a static concept, but is a flexible standard for providing those who are affected by a governmental action with notification of that action and means of being heard.\textsuperscript{134} The nature of the claimed procedural rights, the extent of the interference with the private interest, and the governmental interest all coalesce to define the requirements of procedural due process.\textsuperscript{135}

Two criteria must be met as a prerequisite to a legitimate claim of a right to due process by organic farmers in the context of a CDFA pest eradication or control program. First, the United States Constitution requires procedural due process only when the action in question affects some constitutionally protected property or liberty interest.\textsuperscript{136} A property interest in the products of organic farming or

\begin{itemize}
\item \textsuperscript{130} U.S. CONST. amend. V, XIV.
\item \textsuperscript{131} CAL. CONST. art. 1, \S 1.
\item \textsuperscript{132} See Fuentes v. Shevin, 407 U.S. 67 (1972) (repossession of a stereo phonograph triggered procedural due process requirements); In Re Watson, 91 Cal. App. 3d 455, 461, 154 Cal. Rptr. 151, 156 (1979) (commitment to an institution as a developmentally disabled person invoked due process rights).
\item \textsuperscript{134} See Goss v. Lopez, 419 U.S. 565, 583 (1975) (flexible procedures are allowed to ensure fair school suspensions); Horn v. County of Ventura, 24 Cal. 3d 605, 617, 596 P.2d 1134, 1140 156 Cal. Rptr. 718, 724 (1979) (notice and hearing procedures for land use entitlements depend on the resulting administrative burden and the affected interests of property owners).
\item \textsuperscript{136} Matthews v. Eldridge, 424 U.S. 319 (1976). In California, on the other hand, a more flexible test for determining procedural due process requirements was set forth in People v. Ramirez, 25 Cal. 3d 260, 599 P.2d 622, 158 Cal. Rptr. 316 (1979). Ramirez involved the due process claims of a convicted burglar who was committed to the California Rehabilitation Center (CRC) for drug treatment after pleading guilty to a charge of possession of heroin. Ramirez was granted outpatient status. He was later arrested and charged with disturbing the peace.
\end{itemize}
in the farmland itself, or a liberty interest in the practice of organic farming must be shown to invoke the rights of notice and hearing. The second criterion for recognition of a right to due process is that the government determination be adjudicatory rather than legislative in nature.131 The distinction between legislative and adjudicatory actions is often difficult to make. The action of the CDFA Director is best described as a combination of both types of actions.

Organic farmers meet the first criterion for procedural due process protection since they have constitutionally protected property interests in various components of organic farming, all of which may be

The Director of Corrections determined that Ramirez was not a fit subject for confinement in the CRC and sent a letter to the superior court to that effect, recommending that Ramirez be removed from CRC and that criminal proceedings be resumed. Id. at 264, 599 P.2d at 624, 158 Cal. Rptr. at 318. Ramirez received a copy of this exclusion letter but did not have an opportunity to respond to a CRC official before the superior court held a hearing to determine whether there was legal cause for transferring Ramirez from the CRC program to state prison. The superior court determined that the procedure had been proper and sentenced Ramirez to state prison. On appeal, Ramirez contended that the procedure used to exclude him from CRC constituted a violation of his fourteenth amendment procedural due process rights. Id. The California Supreme Court agreed, but based the decision on the California Constitution and a new due process test. The analysis in Ramirez focused upon the harm to an individual caused by governmental action. Ramirez may have eliminated the need to find a protected liberty interest in California. Note, People v. Ramirez: A New Liberty Interest Expands Due Process Protections, 69 CALIF. L. REV. 1073, 1085 (1981). It is not clear whether or not this test is applicable to property interests as well, although the court in Schultz v. Regents of the Univ. of Cal., stated, "Ramirez's right to be free of 'arbitrary adjudicative procedures' has been mainly applied in criminal, juvenile and mental health cases where an individual asserted a statutory right and faced possible loss of liberty in the proceeding . . . However, in Laird v. Workers' Comp. Appeals Bd. [147 Cal. App. 3d 198, 202-03, 195 Cal. Rptr. 44, 46-47 (1983)] the court relied on Ramirez to conclude a disabled worker was denied due process when his statutory vocational rehabilitation benefits were terminated without a hearing." Schultz v. Regents of the Univ. of Cal., 160 Cal. App. 3d 768, 781 n.7, 206 Cal. Rptr. 910, 918-19 n.7 (1984). See also Willson v. State Personnel Bd., 113 Cal. App. 3d 312, 317, 169 Cal. Rptr. 823, 826 (1980) (termination of civil service employment). The Ramirez due process test first inquires whether there has been any government action causing harm to the individual (a "deprivatory" action), rather than requiring an initial determination of a narrowly defined property or liberty interest. Ramirez, 25 Cal. 3d 260, 268, 599 P.2d 622, 627, 158 Cal. Rptr. 316, 320; Note, People v. Ramirez: A New Liberty Interest Expands Due Process Protections, 69 CALIF. L. REV. 1073, 1088 (1981). Although the California Supreme Court has not formally eliminated the traditional property or liberty interest requirement, the Ramirez decision renders the requirement ineffective as a limit on the scope of due process. See Note, People v. Ramirez: A New Liberty Interest Expands Due Process Protections 69 CALIF. L. REV. 1073, 1087 (1981); Hernandez v. Department of Motor Vehicles, 30 Cal. 3d 70, 81 n.12, 634 P.2d 917, 923 n.12, 117 Cal. Rptr. 566, 572 n.12 (1981). Therefore, the rights of organic farmers are more easily protected under California law than federal law. Organic farmers risk the loss of their livelihood by government mandated pesticide spraying. See supra notes 139-57 and accompanying text. Unlike criminal proceedings, the risk of erroneous deprivation is not great, but the risk of needless deprivation is possible. The importance of providing a forum for discussion of alternative pest control methods before responsible CDFA officials is clear in light of the potential losses faced by organic farmers.

threatened by state sponsored mandatory pesticide application. Constitutionally protected property interests extend beyond real property and chattels. A whole panoply of property interests are protected from summary termination by procedural due process.\(^{138}\) Both organic produce and the ecologically balanced organic farmland can be considered protected property for the purpose of due process.

1. The Property Interest in Organic Crops

Mandatory destruction of fruit and vegetables, only some of which may contain the targeted pest, constitutes a clear taking of property, although, in emergency situations, the state may abate nuisances and destroy property without incurring liability.\(^{139}\) Fruit or vegetables in an infested area may be destroyed under orders from the CDFA.\(^{140}\) A less obvious taking, but an injury to organic crops nevertheless, is the damage incurred by spraying. The sprayed produce, which is now no longer organic under California statutory requirements, is virtually unmarketable to consumers of organic produce. Nonorganic agricultural markets may not offer an opportunity for the organic farmer to recoup this loss since many agricultural products are subject to oversupply. In this situation, a newcomer to the nonorganic markets will have difficulty finding buyers.\(^{141}\) Therefore, the organic farmer will have to sell crops at a loss, or may not find a buyer at all, if forced to switch from dealing with the wholesalers and distributors in the specialized organic food market.\(^{142}\)

California established a broad definition of a compensable property taking in *Rose v. California*.\(^{143}\) Under *Rose*, injury to property may constitute a taking. The severe reduction of the economic value of organic crops, therefore, is a potential compensable taking that


\(^{140}\) Telephone interview with John C. Laboyteaux III, supra note 1; telephone interview with Kate Burroughs, supra note 33.

\(^{141}\) Telephone interview with John C. Laboyteaux III, supra note 1.

\(^{142}\) Id.

\(^{143}\) 19 Cal. 2d 713, 123 P.2d 505 (1942). *Rose v. California* involved the construction of a subway by the city along the front of the plaintiff's property. The construction impaired access by the plaintiff to the street and depreciated the market value of the property by $5000. The court determined that injury to the property right of ingress and egress could not occur without compensation. *Rose*, 19 Cal. 2d at 727-28, 123 P.2d at 514. The organic farmer has a stronger case since the injury from the synthetic pesticides occurs directly on and to the farmer's land. See also Conelly Dev., Inc. v. Superior Court, 17 Cal. 3d 803, 553 P.2d 637, 132 Cal. Rptr. 477 (1976). The property deprivation need not reach the magnitude of a physical taking in order to require due process protections. Id.
invokes procedural due process requirements. Governmental interference with property, which causes harm to an individual, may impair property rights to the extent that procedural due process requirements must be met. This is true even though the interference is temporary.144

That a complete deprivation of property is not required to invoke procedural due process guarantees is demonstrated by a series of cases involving towed automobiles.145 These cases held that some type of notice or hearing, or both,146 is required when property is merely interfered with and an owner is deprived of an automobile for even a few hours.147 Likewise, the organic farmer does not have to prove a taking in order to assert these rights since the court is not required to consider or resolve the substantive merits of the case in ruling on a procedural due process claim.148

2. The Property Interest in Organic Farmland

The organic nature of farmland is another constitutionally protected property interest that can be damaged by the application of synthetic pesticides. The application of these chemicals will leave a residue on the crops and, in many cases, may leave persistent residues in the soil.149 Spraying pesticides, particularly broad spectrum compounds,150 on an organic farm will alter the ecological balance of the farm so that, after spraying, years may elapse before an organic farm can properly function. This damage to the property could result in a compensable injury under two theories. First, serious economic loss to
organic farms due to the disruption of the ecological balance and the potential loss of organic certification is likely to occur. Second, the permanent or long term deposit of a chemical residue on land constitutes a physical occupation of the land and may be a taking. In the case of Loretto v. Teleprompter Manhattan CATV, the United States Supreme Court determined that a permanent physical occupation of property, no matter how minor, can constitute a "taking" of property. The existence of chemicals on property seems to be a more serious imposition on the property owner than the cable television equipment attached to the side and roof of an apartment building in Loretto, especially when the pesticide residue is the cause of serious economic loss. Organic farmers must be careful to limit pesticide residues from drift or other sources since many pesticides take years to biodegrade into nontoxic compounds. Therefore, the impairment of property interests in organic farmland by governmental action in mandatory spraying programs should be treated as a compensable injury.

3. Application of the Nuisance Standard

Several cases have held that no constitutional protection exists for a condition on or off property that itself constitutes a nuisance.

151. Organic farmers depend upon an ecological balance that limits populations of harmful pests by encouraging the survival of predators. Synthetic pesticides tend to kill both the target pest and predator. A beneficial combination of organisms may not be recreated for several years. See Allman, Pesticides: An Unhealthy Dependence?, 6 Sci. 14 (Oct. 1985); Pimentel, supra note 10, at 598.

152. Telephone interview with Warren Webber, supra note 13.

153. Pimentel, supra note 10, at 598 (once a pesticide reaches the soil, it may persist from a few days to many years, depending on the chemical, its dosage, the formulation, and the characteristics of the environment).


155. The physical "taking" in Loretto consisted of the installation of cable television equipment (lines, boxes, plates, bolts, and screws) across the roof and along an exterior wall of the plaintiff's apartment building. Loretto, 458 U.S. at 423. The total space occupied by the cable TV facilities was only slightly in excess of one and one-half cubic feet. Id. Like the apartment owner in Loretto, organic farmers find themselves with an unwanted burden upon their property.

156. 458 U.S. 419, 423 (1982).

157. Pimentel, supra note 10, at 598.

158. See Miller v. Schoene, 276 U.S. 272 (1928) (In Miller, red cedar trees infected with cedar rust were ordered destroyed since the cedar rust endangered neighboring apple orchards. Miller, 276 U.S. at 277. The facts in Miller can be distinguished from the situation involving CDFA pest eradication programs. Organic farmers seek to protect income producing crops or trees, rather than ornamental vegetation; therefore, the harm to organic farmers incurred by government action is greater. Further, organic farmers can offer effective alternatives to the destruction of their crops, especially since only a portion of the organic crops are likely to be contaminated. See supra notes 85-91 and accompanying text. The trees in Miller were declared a nuisance. Miller, 276 U.S. at 277.)
Yet under California law, even destruction of contaminated property by a state or local agency requires notice and hearing. The California Court of Appeal, in *Leppo v. City of Petaluma*, held that the owner of a dilapidated building had a right to notice and hearing before the city initiated demolition of the structure. Application of the nuisance standard to organic crops and orchards would at least allow organic farmers to suggest alternative methods of pest control or eradication for their fields and orchards.

### B. Organic Farming as a Protected Expectation Created by State Law

The United States Supreme Court, in *Vitek v. Jones*, held that a state statute may create liberty interests that entitle the holder to the procedural protections of the due process clause of the fourteenth amendment. *Vitek* held that an "objective expectation" fixed in state law creates a constitutionally protected interest. The expectation created by the state protected organic foods market gives rise to protected property and liberty interests that a governmental agency may not impair without adequate procedural due process.

The Organic Foods Act establishes standards and expectations for organic growers and buyers. If organic fields are sprayed with synthetic pesticides, the legitimate expectations of organic farmers are frustrated. A farmer who, relying on the language of the act, becomes "certified" as an organic grower, should be entitled to pro-

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159. CAL. FOOD & AGRIC. CODE §§5401, 5421-5436.
160. See *Leppo v. City of Petaluma*, 20 Cal. App. 3d 711, 717, 97 Cal. Rptr. 840, 843 (1971). The official duty of a City in a case in which they [sic] seek to abate a nuisance is to afford the property owner a due process hearing which consists of an opportunity to be heard . . . Although it is elementary that an owner may not maintain it as a public nuisance, it is equally elementary that he has a clear constitutional right to have it determined by due process whether in fact and in law it is such a nuisance.

162. *Id.* at 717, 97 Cal. Rptr. at 843.
163. 445 U.S. 480, 488 (1980) (transfer of a prisoner to a mental hospital without adequate notice or opportunity to be heard).
164. *Id.* at 488.
166. *Id.*
167. Although the law includes a section that recognizes the possibility of mandatory spraying by the state, the provision for this occurrence is not adequate for those farmers who have their fields sprayed since the pesticide residue levels on the sprayed produce will exceed the level allowed on organic food by the statute. Telephone interview with John C. Laboyteaux III, *supra* note 1; Telephone interview with Kate Burroughs, *supra* note 33.
cedural due process before the state takes action that could deprive the farmer of benefits of certification.

Generally, the right to engage in the “common occupations” is protected from state impairment because the pursuit of an occupation is considered a “fundamental interest.” Farming is a lawful enterprise and is therefore protected as a property or liberty interest by the fourteenth amendment. Organic farming has been recognized and encouraged by the California State Legislature and should receive the same due process guarantees as other legitimate occupations. Adequate notice and hearing for affected property owners would ultimately allow the CDFA to make more informed decisions responsive to divergent agricultural interests.

Organic farmers enjoy constitutionally protected property and liberty interests in their land and farm products, as well as a right to the continued enjoyment of organic farming as an occupation. Procedural due process protections for these interests are therefore required. The form of notice and hearing depend on the nature of the state action.

C. The Nature of the State Action: Adjudicatory or Quasi-Legislative?

As previously mentioned, the second step in determining due process rights involves an inquiry into the legislative or adjudicatory nature of the state action. The United States and California Constitutions require due process guarantees when a governmental decision affecting a fundamental interest is adjudicatory in nature, however, legislative proceedings do not require notice and hearing. Therefore, to establish their rights to notice and an opportunity to be heard, organic farmers must show that the CDFA decision to engage in pest eradication or control measures is adjudicatory rather than quasi-legislative in nature.

The distinction between these two types of action is often difficult to establish. In the context of administrative decisions, a number of characteristics are offered to distinguish legislative from adjudicatory

169. See United States v. Causby, 328 U.S. 256 (1946) (chicken farming as a lawful enterprise protected against arbitrary government action).
171. See Horn v. County of Ventura, 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).
proceedings. Legislative or quasi-legislative decisions may be the product of an "administrative process that resembles a legislature's enactment of a statute," while adjudication may be considered "part of the administrative process that resembles a court decision of a case." Another approach to distinguishing the two types of decisions is the standard that legislative decisions are those which apply to a large number of people and involve the adoption of broad, generally applicable rules of conduct based on general public policy. Thus, adjudicatory matters can be defined as those which involve the rights of an individual and the application of general standards to specific situations or specific parcels of real property. The problem with defining actions by the size of the group affected is the occasional adjudication that affects thousands of people or the legislative bills designed to solve the problem of an individual or a small group. To further confuse the issue, the same function may be legislative for one purpose and adjudicatory for another purpose. Quasi-legislative decisions may best be defined as those affecting the rights of individuals in the abstract. These decisions do not directly affect individuals until applied in further proceedings, while adjudicatory decisions operate directly upon individuals in a given situation. The decision to apply pesticides in a CDFA pest eradication or control program does not seem to fit neatly into any of these definitions, although the decision is best described as adjudicatory in nature. Applying a criterion based upon mere head counting is an arbitrary method of identifying the nature of a decision for the purpose of establishing due process rights. One commentator has suggested that the best solution to the problem of classifying borderline activities

173. Id.
174. Id. at 7.
176. Id.
177. K. Davis, supra note 172, at 5.
178. K. Davis, supra note 172, at 5. The United States Supreme Court established that although fixing future railroad rates is "legislative" in nature, such rate fixing for the future was also "quasi-judicial" for the purposes of deciding what procedure was required. See Morgan v. United States, 298 U.S. 468, 480 (1936); Prentis v. Atlantic Coast Line Co., 211 U.S. 210, 226 (1908). Cf. Mountain Defense League v. Board of Supervisors, 65 Cal. App. 3d 723, 135 Cal. Rptr. 588 (1977). The court in Mountain Defense League had similar difficulties in categorizing a county general plan amendment. 65 Cal. App. 3d at 730, 135 Cal. Rptr. at 591. The court never reached a conclusion on the issue, but reflected that while the adoption of a general plan is legislative in nature, general plan amendments are more closely related in their effects to zoning variances, which are adjudicatory. The court did determine that where an agency is simultaneously disposing of two legally required functions with one decision, the review must be by the more stringent standard. Id. This concern for the protection of private interests when the standards are in doubt should be applied to due process questions, as well.
may be to avoid classifying them. Under this formulation, lawyers and decisionmakers should skip the labeling and proceed directly to the specific procedural problem. For instance, if the problem is to determine the appropriate procedure for a particular activity, the decision should not be based upon analysis of the meaning of terms but should be based upon practical procedural needs. The commentator asserts that courts should attempt to contribute to achievement of the ideal that every affected person should have the opportunity to participate in administrative policymaking. Therefore, the CDFA action should be treated as an adjudicatory action for notice and hearing purposes.

D. The Specific Procedural Requirements of Due Process

When a constitutionally protected property or liberty interest is threatened by state action, various procedures are used to guarantee due process. Generally, these procedures include notice and hearing. No single rule exists for determining the appropriate procedure in every instance. In Matthews v. Eldridge, the United States Supreme Court set forth a balancing test in which the costs and inconvenience to the state in requiring certain procedures are weighed against the benefit to the individual of notice and an opportunity to be heard. The stake of the individual and the importance of the procedure in insuring that no erroneous deprivation of liberty or property occurs are balanced against the cost of the procedure to the state. Due process usually requires notice and hearing or some other opportunity to present views to a responsible official before the governmental action occurs.

The legislature may define procedures under which an individual may be deprived of a right or entitlement when the affected interest is not central to the concept of liberty or property. No single procedure is appropriate to every situation. Because procedural safeguards

179. K. Davis, supra note 172, at 7.
180. K. Davis, supra note 172, at 7.
183. Id. at 335.
184. Id.
186. See L. Tribe, American Constitutional Law 515 (1978). Courts often distinguish between "core" and "noncore" interests. The former include those that are most central to
are flexible and depend upon the nature of the protected interest, post deprivational hearings, notice alone, or other alternatives may be available. Due process guarantees for organic farmers need not involve individual hearings, for example, but may be satisfied by any number of types of procedures, including countywide or regional hearings.

1. The Horn Standard

The California Supreme Court recently set forth a strict standard for procedural due process in Horn v. Ventura County. Specifically, the court in Horn determined that the combination of posted notice and mailed notice on a request basis was an inadequate method of notifying neighbors of a hearing on a tentative subdivision map. The Horn standard of due process approaches the ideal that every affected person, including those living outside of the property subject to the decision, should have an opportunity to be heard during the decisionmaking process.

Horn establishes strict and thorough notice requirements, as well as a broad definition of "persons to whom notice is due." Neighboring landowners now have a right to be notified and heard on projects affecting their constitutionally protected property interests. The court stated that prior notice was constitutionally required and must have been reasonably calculated to afford affected persons a realistic opportunity to protect their interests. Organic farmers have a stronger case than the plaintiffs in Horn because their croplands are directly affected by the administrative decision of the CDFA director.

Other cases have also held that failure to send notice by mail to those affected by a governmental decision can constitute a deprivation of property or liberty and are most likely to be protected by due process. Id. Possession of tangible property, such as crops, would be a core interest and would be safeguarded by due process procedures that would probably be constitutional rather than statutory in derivation. The argument can be made, however, that the right to produce organic crops is a noncore interest, and that the right or procedures for protecting that right may be withdrawn or changed by the legislature.

187. See, e.g., Arnett v. Kennedy, 416 U.S. 134 (1974). The Arnett court determined that a civil service employee had a right to a dismissal hearing but only after the discharge had occurred. Id. at 167-71. In Fuentes v. Shevin, 407 U.S. 67 (1972), the court concluded that debtors have a right to a hearing before private creditors can use the state judicial process to take possession of their property. Fuentes, 407 U.S. at 84.

188. 24 Cal. 3d 605, 596 P.2d 1134, 156 Cal. Rptr. 718 (1979).

189. Horn, 24 Cal. 3d 605, 617, 596 P.2d 1134, 1140, 156 Cal. Rptr. 718, 724, (1979).

190. K. Davis, supra note 154, §7:6, at 33.


192. Id.

193. Id.

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tion of due process.\textsuperscript{194} Published notice alone is inadequate when some method of actual notice is feasible if the action will adversely affect legally protected interests.\textsuperscript{195} The new law regarding CDFA pest eradication and control projects guarantees only published notice of these programs. Yet the hardships and economic loss due to the spraying of synthetic pesticides on organic fields affect constitutionally protected interests. When notice and hearing are required under due process, the best possible notice must be provided and both the notice and the hearing must be appropriate to the situation.\textsuperscript{196}

Although the CDFA may encourage local agricultural commissioners to notify affected growers, without statutory notice requirements, due process standards are not met.\textsuperscript{197} Because voluntary provision of notice and hearing alone does not meet constitutional requirements, due process must rest on something more than the favor or discretion of state administrators.\textsuperscript{198} Those affected by a governmental decision cannot be expected to place themselves on a mailing list or “haunt” county offices in order to intercept any pending action that would challenge their constitutional interests.\textsuperscript{199} The court in \textit{Horn} stated that CEQA notice provisions were inadequate to meet due process requirements in the circumstances of that case.\textsuperscript{200} The new pest eradication and control statute patterns notice provisions after a section of CEQA.\textsuperscript{201} The court in \textit{Horn} suggests that, depending on the size of the project and the degree of the potential harm to property interests, acceptable notification techniques might include mailed notice to property owners or posting at the site or both.\textsuperscript{202}

The courts have stressed that due process is a flexible concept that should not prescribe a specific formula for the details of notice and hearing, but should instead respond to the practical considerations of each situation.\textsuperscript{203}In the case of CDFA spraying programs, due process procedures should be appropriate to the exigency created by the

\textsuperscript{194} See Adkins v. Kessler, 97 Cal. App. 3d 784, 159 Cal. Rptr. 231 (1979) (respondents received no notice of sale of property to satisfy a street improvement assessment lien).
\textsuperscript{196} \textit{Id}.
\textsuperscript{197} Coe v. Armour Fertilizer Works, 237 U.S. 413, 424 (1915); Security Trust & Safety
\textsuperscript{198} \textit{Id}.
\textsuperscript{199} \textit{Horn} v. County of Ventura, 24 Cal. 3d 605, 618, 596 P.2d 1134, 1141, 156 Cal. Rptr. 718, 725 (1979).
\textsuperscript{200} \textit{Id.} at 617-19, 596 P.2d at 1141-42, 156 Cal. Rptr. at 725-26.
\textsuperscript{201} CAL. PuB. RFs. CODE §21152.
\textsuperscript{202} \textit{Horn}, 24 Cal. 3d at 618, 596 P.2d at 1141, 156 Cal. Rptr. at 725.
pest infestation. Some pests may pose a serious and immediate threat to California agriculture and thereby create emergencies that are not amenable to combined traditional and organic pest control practices. Other pests may be impossible to eradicate and subject to control at best. Yet the notice and hearing requirements set forth in the new Food and Agriculture Code section 5051 apply equally to pest eradication and control programs. In addition, procedures for judicial challenge under the new law do not differentiate between types of programs or the level of emergency that triggers the challenged program. Therefore, nonemergency eradication, and control programs should comply with both procedural due process and CEQA EIR requirements.

The terms “eradication” and “control” are not defined within California statutes or regulations. “Eradication” is generally accepted as meaning the elimination of all members of a species of pest from the state under a relatively short term program including, as a component, the application of pesticides. Control programs, on the other hand, are longer term projects designed to contain the pest within as small an area as possible and to maintain the population at an acceptable level. Depending on whether a program is aimed at con-


204. For example, the Mediterranean fruit fly triggered an emergency eradication program. Telephone interview with Valerie Brown, Senior Economic Entomologist, CDFA project leader for the Apple Maggot Programs, Mar. 24, 1986 (notes on file at the Pacific Law Journal). CAL. PUB. RES. CODE §21080(b)(4) states that CEQA EIR requirements do not apply to specific actions necessary to prevent or mitigate an emergency. See Farmers Insurance Exchange v. State, 175 Cal. App. 3d 494, 221 Cal. Rptr. 225 (1985).

205. Apple maggot fruit flies are likely to fit into this category unless the infestations are localized. See Joos, supra note 51, at 11. The CDFA, after investigating the extent of apple maggot infestation in California, determined that there was a better than 80% probability of successful eradication of the apple maggot over a seven year period. CDFA, APPLE MAGGOT FRUIT FLY REPORT 14 (Dec. 1974). Ronald J. Prokopy, Ph.D., University of Massachusetts, an expert on the apple maggot and Chairman of the 1984 Apple Maggot Committee established by the State Legislature to determine the extent of apple maggot fruit fly infestation and the possibility of eradication, commented on the results of the 1984 evaluation as an expert witness for the plaintiffs in Citizens for Non-Toxic Pest Control: “Based on the extensive trap and fruit monitoring activities for apple maggot abundance and distribution in California in 1984 . . ., I remain unconvinced that it is economically, environmentally, and biologically feasible to ‘eradicate’ the apple maggot fruit fly from California.” Brief for the Plaintiffs at 22, Citizens for Non-Toxic Pest Control v. California Dept. of Food and Agric. (Humboldt County Superior Court, July 25, 1985).

206. CAL. FOOD & AGRIC. CODE §5051.

207. Id.; CAL. CIV. PROC. CODE §1085.5.

208. Interview with Mary Louise Flint, Ph.D., supra note 54; telephone interview with Valerie Brown, supra note 204.

209. Id.
control, total eradication or the emergency destruction of a pest, different standards for environmental review and hearing might be appropriate. Hearings should be waived in emergency situations when swift action is needed.\textsuperscript{210} The opportunity to include organic farming methods in an eradication or control program should be available to local farmers, unless the emergency nature of the eradication program precludes the use of organic pest control techniques. The CEQA EIR process would provide a forum for analysis and discussion of the impacts of pesticide spraying on organic farmland. Individual notice and regionwide public hearings would also ensure public input and adequate procedures under due process requirements.

**The CEQA Functional Equivalent**

The new law purports to bring CDFA pest eradication or control programs under the category of "functional equivalents" to EIRs. Functional equivalents are regulatory programs that have been certified by the Secretary of Resources\textsuperscript{211} as meeting the requirements of CEQA\textsuperscript{212} and therefore are not subject to the EIR requirement.\textsuperscript{213} Under the new law, state eradication and control programs seemingly escape the requirement of an initial study\textsuperscript{214} and the preparation of an EIR. The exemption\textsuperscript{215} from the CEQA EIR requirement further erodes the ability of the public, and affected organic farmers in particular, to express views and offer alternatives regarding CDFA pest eradication and control programs.

The language and effect of the new CEQA section relating to exemption from EIR requirements is unclear. The new section states: "Any program for the regulation of pesticides certified [by the Secretary of the Resources Agency] shall apply to the use of pesticides by any state agency . . . in eradicating or controlling a plant or animal

\textsuperscript{210} Horn, 24 Cal. 3d at 617, 156 Cal. Rptr. at 724, 596 P.2d at 1140. "The general application of due process principles is flexible, depending on the nature of the competing interest involved." Id.

\textsuperscript{211} California Public Resources Code section 21080.5(a) states that the Secretary of the Resources Agency must certify the regulatory program of a state agency which is sought to be designated as a functional equivalent to an EIR. CAL. PUB. RES. CODE §21080.5(a).

\textsuperscript{212} Id §21080.5(k).

\textsuperscript{213} Id, §21080.5(a) (applies only to projects that already involve the preparation of a plan or other written documentation).

\textsuperscript{214} See supra note 73.

\textsuperscript{215} CAL. ADMIN. CODE tit. 14, §§15250-15251. Although status as a functional equivalent does not exempt a project from all requirements of CEQA, the California Administrative Code section (Title 14, Article 17) that addresses functional equivalents is entitled "Exemption for Certified State Regulatory Programs," referring to EIR exemption.
The previously mentioned program involves: (1) The registration, evaluation, and classification of pesticides, (2) the adoption of regulations and standards for the licensing and regulation of pesticide dealers and pest control operators and advisors, (3) the adoption of regulations for standards dealing with the monitoring of pesticides, and (4) the regulation of the use of pesticides through the permit system (for private applications of pesticides) administered by the county agricultural commissioners. The statute seems to apply one program to another unrelated program. Presumably, the intended meaning of this section is that certification for the pesticide regulation program would also serve as certification for state pest eradication projects. Thus, no separate certification would be required for these programs and the environmental impacts of state mandated spraying would not be analyzed on a case by case basis.

When a state regulatory program involves the preparation of a plan, the plan may be submitted to the Secretary of Resources for certification as a functional equivalent in lieu of the EIR required by CEQA. For a document to qualify as a functional equivalent, it must include environmental information, a description of the proposed activity, alternatives and mitigation measures to minimize any significant adverse impacts, and public responses to the report. The designation of a functional equivalent is conditioned upon certification of the program by the Secretary of the Resources Agency pursuant to the provisions of CEQA. The problem with designating CDFA pest eradication programs as functional equivalents is that these programs do not involve environmental analysis comparable to EIRs. Also, functional equivalents are supposed to apply only to regulatory programs that involve either the issuance of a permit or other entitlement, or the adoption of standards or plans in a regulatory program. The decision of the CDFA director to embark upon a pest eradication program does not fit into either category.

Certification of a regulatory program as a functional equivalent will be granted by the Secretary of Resources if the program requires

216. CAL. PUB. RES. CODE §21080.5(k).
217. CAL. ADMIN. CODE tit. 14, §15251(i).
218. Id. This program was certified in 1979.
219. CAL. PUB. RES. CODE §21080.5(a). When a regulatory program of a state agency ... requires a plan or other written documentation, containing [certain prescribed] environmental information, to be submitted in support of any of the activities listed in Public Resources Code section 21080.5(b), then the plan or written documentation may be submitted in lieu of the EIR required by CEQA. Id.
220. Id. 14 CAL. ADMIN. CODE tit. 14, §15087.
221. CAL. PUB. RES. CODE §21080.5(e).
222. Id. §21080.5(b).
use of the natural and social sciences in decisionmaking. In order to be deemed a functional equivalent, the enabling legislation of the regulatory program must include, as a primary purpose, protection of the environment and must contain authority for the administering agency to promulgate rules and regulations for the protection of the environment. The protection of the environment is not listed as a purpose or consideration in the Food and Agricultural Code sections relating to pest eradication. The decision to embark upon a pest eradication program does not involve the issuance of a permit to an individual, nor does the decision constitute an aspect of a regulatory program. The decision of the CDFA Director is instead a direct action by the State. Therefore, the CDFA action does not meet the definition of programs that may be treated as functional equivalents to EIRs and pest eradication programs should be reviewed for environmental consequences under CEQA.

The new statute declares, and Department representatives claim, that the new law merely clarifies existing law. CDFA pest eradication and control programs are claimed to have been included in the 1979 certification for other CDFA programs as functional equivalents. These programs include the registration of pesticides, regulations affecting pesticide dealers and pest control operators, and the County Agricultural Commissioners’ pesticide permit system. Careful reading of the list of certified programs indicates that state sponsored pest eradication programs were not included in the 1979 certification. The court in Citizens for Non-Toxic Pest Control also recognized that pest eradication and control programs were specifically excluded from the list of functional equivalents. By stating that CDFA pest eradication projects are, and have been, part of the entire pesticide program certified by the Secretary of Resources, the new law creates artificial meanings for terms in order to override the Public Resources

223. Id. §21080.5(d).
224. Id. §21080.5(d)(1)(i).
225. Id. §21080.5(d)(1)(ii).
226. CAL. FOOD & AGRIC. CODE §§5761-5764.
227. Telephone interview with Charles Getz, Deputy Attorney General, State of California (Nov. 27, 1985). Assembly Bill 1525, section 3(g) states: “The amendment of Section 21080.5 of the Public Resources Code contained in Section 4 of this act is necessary to clarify existing law and does not expand or diminish that law.”
228. CAL. ADMIN. CODE tit. 14, §15251(i).
229. CAL. PUB. RES. CODE §21080.5(d)(1)(ii).
230. Citizens For Non-Toxic Pest Control v. California Dep’t of Food and Agric., No. 76502 (Humboldt County Superior Court, July 25, 1985).
231. E.A.T. Report, supra note 19. This report was subjected to rigorous review by CDFA officials and over 140 technical experts. Id.
Code requirement that functional equivalents be certified by the Secretary of the Resources Agency. The inclusion of CDFA pest eradication and control projects within the previously certified functional equivalent programs, such as pesticide registration and the county permit system, will preclude case-by-case determinations of the environmental impacts of large scale pest eradication programs and an analysis of whether nonpesticide alternatives are feasible. Eradication programs will be deemed to have been previously analyzed for their environmental impacts even though the registration of pesticides and the issuance of permits to individual farmers has little relation to the environmental impacts of the widespread application of pesticides by a state agency in a concentrated multi-year program. The CEQA Guidelines expressly include public controversy as a factor in determining the need for the preparation of an EIR. Since the recent public concern generated over the CDFA apple maggot and gypsy moth programs, this factor is present in state spraying programs, but is not a component of individual permit applications because these involve voluntary private action. Therefore, CDFA pest eradication programs can be distinguished from the other certified programs on the basis of the public nature of the former, the language of the certification for the latter, and the intent of the CDFA at the time certification occurred. An environmental assessment of CDFA pest eradication programs should be required to determine if an EIR is needed. The functional equivalent section of the new law violates the spirit and intent of CEQA.

CONCLUSION

Organic farming is a growing industry that offers consumers an alternative to produce treated with synthetic pesticides. State sponsored pest eradication and control programs involve the mandatory spraying of pesticides. The programs fail to differentiate between organic and nonorganic fields. The injury to crops and farmland that

232. See CAL. PUB. RES. CODE §21080.5(a) (requires that the Secretary of the Resources Agency certify the regulatory program).
233. The state might argue that the CDFA should be characterized as a person (issuing permits to itself), to bring Food and Agriculture Code sections 11401 and 5051 under the functional equivalent certification, since the Secretary of Resources has certified regulations relating to “persons” engaged in the business of pest control. Telephone interview with Charles Getz, supra note 227.
234. State CEQA Guidelines, CAL. ADMIN. CODE tit. 14, §§15000-15387. These guidelines for agency compliance with CEQA are promulgated by the State Office of Planning and Research.
235. CAL. ADMIN. CODE tit. 14, §§5064(c), 15064(h)(1).
236. CAL. PUB. RES. CODE §21080.5(k).
is suffered by organic farmers should be treated as a compensable taking, or at least should trigger due process guarantees. This is especially true for growers who are in danger of losing their status as certified organic farmers if spraying occurs. The apple maggot fruit fly eradication program exemplifies the dilemma faced by organic farmers, as well as the state interest in the elimination of destructive pests by means of mandatory application of synthetic pesticides. Despite the 1986 CDFA policy to allow commercial apple growers to utilize pest control methods, organic farmers are unsure of the extent to which their property rights in organic farmland and their livelihoods are constitutionally protected from impairment by the state. This comment proposes that organic farmers have constitutionally protected property and liberty interests in the practice of organic farming. Because these interests are threatened by state sponsored nonemergency pest eradication and control programs, procedural due process safeguards should be required before pesticide spraying begins.

Defining the type of decision made by the CDFA director as legislative or adjudicatory should not obscure the real issue of the rights of the individual. California organic farmers should receive the best possible notice of CDFA pest eradication and control programs and decisions to spray. This notice should be legislatively mandated and should include mailed notice. This type of notice is required by law for thousands of residents affected by pesticide spraying in urban areas and should be required for farmers, as well. Farmers should also be afforded the right to a hearing before the government so that alternative pest control methods may be considered. Although individual hearings would not be practicable or desirable, a series of required public hearings within the affected counties would meet due process requirements and would comply with state environmental policy. This proposal is sufficiently limited in scope to allow for exceptions in emergency situations. If necessary, emergency pest eradication programs may be declared under the existing emergency provisions of CEQA so that undue delay does not seriously damage California agriculture.

The tendency of state agencies to seek exemption from EIR requirements through the functional equivalent section of CEQA weakens California's environmental protection laws and deprives the public of an opportunity to hear and be heard on important environmental

237. See supra notes 203-17 and accompanying text.
238. Id.
issues. State pest eradication programs should not be deemed functional equivalents under section 21080.5 of the Public Resources Code because they have not been certified by the Secretary of Resources. Further, no “equivalent” report, analysis, or program exists that would substitute for an environmental impact report on the effects of pesticide spraying as part of an eradication or control program. The Secretary of the Resources Agency should not certify these programs as functional equivalents since their alternatives and environmental impacts should be analyzed and made public as a matter of state policy.

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