

08 APR 17 PM 4:49



CITY OF OAKLAND
CITY COUNCIL

LEGISLATIVE ANALYST MEMORANDUM

To: Rules and Legislation Committee
From: Alice Glasner, Legislative Analyst
Date: April 24, 2008
Re: **Supplemental Information to Memorandum on Assembly Bills related to Light Brown Apple Moth**

On April 15 and April 16 several bills and resolutions pertaining to the Light Brown Apple Moth eradication effort were heard by State Assembly committees. As a result, AB2764 (Hancock) and AB 2892 (Swanson) are no longer active bills. AB2760 (Leno), AB2763 (Laird), and AB2765 (Huffman) continue to be active and will be scheduled for further committee consideration.

As a result of the changes indicated above, I have revised the City Council resolution, leaving only the active bills in the text. I have also attached analyses for AB 2760 and AB2765, which were not available last week. Further update with respect to these bills will be provided to the Rules and Legislation Committee on April 24.

DRAFT

City Attorney

OFFICE OF THE CITY CLERK
OAKLAND

OAKLAND CITY COUNCIL

RESOLUTION No. _____ C.M.S.

2008 APR 17 PM 5:02

REVISED

Introduced by Councilmember Nadel, Councilmember Brünner and Councilmember Reid

A RESOLUTION IN SUPPORT OF THE FOLLOWING STATE ASSEMBLY BILLS REGARDING PESTICIDE SPRAYING AND DIRECTING CITY LOBBYISTS TO ADVOCATE FOR PROVISIONS IN THESE BILLS THAT ENSURE INDEPENDENT VERIFICATION OF PROGRAM SAFETY PRIOR TO ANY AERIAL PESTICIDE APPLICATION OVER URBAN AREAS:

- A) AB2760 (LENO) WOULD REQUIRE THAT AN ENVIRONMENTAL IMPACT REPORT BE COMPLETED BEFORE THE STATE AGRICULTURAL DEPARTMENT COULD APPLY PESTICIDES IN URBAN AREAS FOR THE ERADICATION OF THE LIGHT BROWN APPLE MOTH.**
- B) AB2763 (LAIRD) WOULD REQUIRE THE STATE DEPARTMENT OF FOOD AND AGRICULTURE TO PREPARE A LIST OF INVASIVE SPECIES THAT MIGHT ENTER THE STATE AND PREPARE A WRITTEN ASSESSMENT FOR THE HIGH PRIORITY SPECIES, DESCRIBING ERADICATION, CONTROL, MANAGEMENT, INCLUDING WHICH CHEMICALS MIGHT BE USED.**
- C) AB2765 (HUFFMAN) WOULD REQUIRE A PUBLIC HEARING AND THE EXAMINATION OF ALTERNATIVES TO AERIAL SPRAYING BEFORE ANY DECISION TO DO SO. IT ALSO REQUIRES FULL DISCLOSURE OF ALL PESTICIDE COMPONENTS AND TO SEEK INDEPENDENT CERTIFICATION OF THEIR SAFETY; AND**

WHEREAS, the Light Brown Apple Moth (LBAM) is a pest subject to Federal and State quarantine and eradication orders; and

WHEREAS, there is a confirmed presence of LBAM in Alameda County; and

WHEREAS, the California Department of Food and Agriculture commenced an aerial pesticide spraying program in 2007, affecting parts of Santa Cruz and Monterey Counties; and

WHEREAS, the State plans to expand it aerial spraying program to Alameda County in the summer of 2008;

WHEREAS, on March 4, 2008 Oakland City Council unanimously adopted a resolution opposing this aerial spraying program due to the absence of a reliable, independent study determining the safety of this program; and

WHEREAS, several State legislators have introduced AB 2760 (Leno), AB 2763 (Laird), AB2765 (Huffman), which are related to the LBAM eradication effort; now, therefore, be it

RESOLVED: that the City of Oakland declares its support for all three bills, and be it

FURTHER RESOLVED: that the City Administrator and the City's state lobbyist are directed to advocate the City's position to the State Legislature.

IN COUNCIL, OAKLAND, CALIFORNIA, _____, 20____

PASSED BY THE FOLLOWING VOTE: BROOKS, BRUNNER, CHANG, KERNIGHAN, NADEL, QUAN, REID, and PRESIDENT DE LA FUENTE

NOES-

ABSENT-

ABSTENTION-

ATTEST _____

LaTonda Simmons
City Clerk and Clerk of the Council,
City of Oakland, California

Date of Hearing: April 14, 2008

ASSEMBLY COMMITTEE ON NATURAL RESOURCES
Loni Hancock, Chair
AB 2760 (Leno) - As Introduced: February 22, 2008

SUBJECT : California Environmental Quality Act (CEQA): pest eradication.

SUMMARY : Requires the preparation of an environmental impact report (EIR) for a project involving the application of a pesticide by the Department of Food and Agriculture (CDFA) in an urban area for the eradication of the light brown apple moth (LBAM).

EXISTING LAW , CEQA, requires lead agencies with the principal responsibility for carrying out or approving a proposed discretionary project to prepare a negative declaration, mitigated declaration, or environmental impact report (EIR) for this action, unless the project is exempt from CEQA. CEQA mandates the preparation of an EIR for certain projects specified by the Legislature, such as hazardous waste facilities and base reuse plans.

FISCAL EFFECT : Unknown

COMMENTS :

1)Background. Last year, a retired entomologist in Berkeley trapped a LBAM in his backyard. This LBAM find alarmed federal, state, and local agricultural officials. The moth has proven to be a pervasive pest in its native Australia and areas where it has migrated (including New Zealand and Hawaii). The pest has been found in several California counties - primarily in the Bay Area and Monterey Bay region. CDFA, in conjunction with the United States Department of Agriculture (USDA), developed a plan designed to eradicate the insect from the state. Last year, that program included quarantine, and ground and aerial applications of control agents including pheromones. Aerial application proved controversial in Monterey and Santa Cruz counties. The 2008 CDFA program proposes to spray in the Bay Area - including Golden Gate Park, Alameda County, and Marin County.

2)Is dictating an EIR appropriate in this case? Ordinarily,

CEQA requires a lead agency to prepare an initial study to assess the likelihood that the proposed project will have a significant effect on the environment. The lead agency then decides whether an EIR is required, or whether a negative declaration or a mitigated negative declaration will do. There are exceptions where discretion is taken away from the lead agency. For example, the section amended by this bill mandates an EIR for specified hazardous waste facilities and base reuse plans. The author and the committee may wish to consider whether discreet pesticide application projects rise to the level of mandatory EIR.

3) The other side. Family Winemakers of California opposes this bill on the basis that it will delay state response to new invasive pest threats and LBAM pesticide application does not rise to the level of environmental impact as hazardous waste facilities currently subject to mandatory EIRs.

4) Related legislation:

AB 2763 (Laird) requires CDFA to develop and maintain a list of invasive animals, plants, and insects likely to enter California, and requires CDFA to plan for appropriate responses to these possible pests.

AB 2764 (Hancock) prohibits the Secretary of Food and Agriculture from approving the application of a pesticide in an urban area, unless the Governor has proclaimed a state of emergency.

AB 2765 (Huffman) sets new limits on the Secretary of Food and Agriculture's emergency pest eradication powers with respect to aerial spraying in urban areas. Requires a public hearing and bars emergency spraying in an urban area unless there is full disclosure of all elements in any pesticide product, and a certification of the safety of the product by state health officials.

AB 2892 (Swanson) requires voter approval of aerial spraying of pesticide.

5) Governor's emergency powers. A declaration under the Emergency Services Act would supersede existing law and any of these bills, if enacted.

REGISTERED SUPPORT / OPPOSITION :

Support

Albany for Environmental Health
Asian Immigrant Women Advocates
Breast Cancer Action
Butte Environmental Council
California Nurses Association
California Indian Environmental Alliance
Center for Environmental Health
Center for Third World Organizing
Citizens for the Albany Shoreline
Citizens for East Shore Parks
Coalition for Clean Air
Environmental Law Foundation
Healthy San Leandro
Learning Disabilities Association of California
Parents for a Safer Environment
Pesticide Watch
Planning and Conservation League
Santa Cruz Women's International League for Peace and Justice
Sequoia Audubon Society
Sierra Club California
StopTheSpray.ORG
The Ecological Options Network
Vote Health

Opposition

Family Winemakers

Analysis Prepared by : Lawrence Lingbloom / NAT. RES. / (916)
319-2092

Date of Hearing: April 16, 2008

ASSEMBLY COMMITTEE ON AGRICULTURE

Nicole Parra, Chair

AB 2765 (Huffman) - As Introduced: February 22, 2008

SUBJECT : Pest eradication: aerial use of pesticide: public hearing: notice.

SUMMARY : Requires the Secretary (secretary) of California Department of Food and Agriculture (CDFA) or county Agricultural Commissioner (commissioner) prior to aerial application of a pesticide under an eradication project in an urban area, to hold at least one public meeting as described, and list all ingredients of the pesticide used in its formula. Specifically, this bill :

- 1) Requires the secretary, upon declaring an eradication project and before any aerial application of a pesticide to the eradication project, to do all of the following:
 - a) Conduct at least one public hearing in the affected project area to consider all alternatives to the aerial pesticide application; and,
 - b) Seek certification of the safety of all elements of any proposed pesticide by an appropriate state department or agency that is not part of CDFA.
- 2) Requires, in the public notice, a listing of every ingredient in the pesticide, including its common and scientific name and chemical formula.

EXISTING LAW requires, upon the secretary's declaration of an eradication project in an urban area, the secretary or the commissioner to notify residents and physicians practicing in the area, and local broadcast and print media (Food and Agricultural Code (FAC) 5771). Requires the notice to contain all of the following:

- 1) date and approximate time of all proposed pesticide applications in the eradication area;
- 2) the type of pesticide to be applied;
- 3) any health and safety precautions that should be taken; and,
- 4) a telephone number and address of public health personnel who are familiar with the eradication project (FAC 5776).

The Department of Pesticide Regulation (DPR) has exclusive authority over sales and use of pesticides in the state. DPR is required to review all scientific data required for registration in California and to register all pesticides used in California (FAC 11501 et. seq.), and requires the Office of Environmental Health Hazard Assessment (OEHHA) to review DPR's conclusions of the scientific data presented for registration. Registered products have proprietary protection for their ingredients composition and formularies, and the Federal Insecticide,

Fungicide and Rodenticide Act (FIFRA) specifically prohibits the disclosure of the identity or percentage quantity of any deliberately added inert ingredient of a pesticide (FIFRA 10(d)(1), and Government Code (GC) 6254.2 (California Public Records Act)). Likewise, California law prohibits the disclosure of trade secrets (Civil Code 3426.1(d) (Uniform Trade Secret Act)).

GC provides for the process for the adoption of emergency regulations when situations call for immediate action to avoid serious harm to the public peace, health, safety or general welfare, and recognizing that time is of importance, does not require public hearings and certification from other agencies (GC 11342.545, 11346, 11346.1, and 11349.6).

Commissioners are required to permit certain chemical applications and to investigate complaints of pesticide poisoning and to investigate incidents of possible pesticide poisoning, in cooperation with DPR. County Health Officers are required to receive doctor's reports of pesticide poisoning and inform OEHHA.

FISCAL EFFECT : Eradication projects are funded by general funds and/or federal funds. Any additional requirements to the current statute would increase the cost to either the general fund and/or federal fund costs, potentially taking funds away from eradication activities.

COMMENTS : The history of emergency actions for eradication of exotic pests and disease have been to identify the pests or disease, delineate its locations, convene a task force of national and world wide experts and develop a plan of action to address the problem. Typically these incidents require

immediate action in order to stop the problem and to prevent further infestations or spread of disease. The actions can range from regulatory restriction of movement of commodities or animals, to various types of pesticide or vaccine applications, to destroying crops or depopulating animal flocks or herds.

In February 2007 an exotic moth was discovered in a Berkeley yard that was later confirmed by CDFA and U.S. Department of Agriculture (USDA) to be an exotic pest known as the Light Brown Apple Moth (LBAM). Both CDFA and USDA identify LBAM as an exotic pest of quarantine significance and are reported to attach more than 2,000 host plants. Due to this determination by CDFA and USDA, an eradication program was developed after USDA convened a LBAM Technical Working Group (TWG) that reviewed California's infestation and concurred that it should be eradicated. The TWG provided recommendations for the eradication program that included a multi-faceted program involving detection protocols, regulatory actions, treatment strategies and research priorities. The treatment strategies include a combination of regulatory movement restrictions, ground and aerial treatment, and trapping. Some areas have been treated with an organic insecticide, others with twist tie ropes infused with a pheromone and larger areas by aerial application of a pheromone.

CDFA held 14 public forums prior to the start of the aerial applications in August of 2007.

Most of the large infestation areas consist of highly populated urban locations that contain residential homes. Many of these areas received aerial pheromone treatment(s) last fall and are scheduled for additional applications in the coming months. There has been an outcry of objection to the aerial applications, because of disputes over the significance of LBAM to cause an economic threat to California, that there are not alternative options for treatment to aerial treatment, that the pheromone used is safe for aerial application over urban areas or the environment, and that there have been hundreds of reported health related illness incidents due to the aerial applications. Further, there are concerns over the tracking and follow through of these illness incidents reported.

Due to concerns raised by individuals and local governments within the aerial treatment zones, Assembly Member Huffman and Senator Simitian have held information hearings on LBAM within

their districts which are impacted by the aerial spray applications. The Chair of this Committee also held an informational hearing for members on LBAM.

Local governments, and the public within the treatment areas, have asked that the aerial treatment be stopped. There has been disagreement from the locals and others regarding the length of time the pest has been in California, that it is a pest that can cause significant damage to plant hosts, and that there are alternative options for treatment rather than the aerial spraying. Post aerial application last year, there were reported over six hundred illness incidents.

A recent OEHHA, DPR and DPH summary of the illness incidents state's that "Our most significant conclusion is that we were unable to link the reported symptoms with exposure to the pheromone formulation." As per the opponents of the spraying, none of the individuals that filed illness reports were interviewed or contacted, creating little confidence in the findings of the report.

Additional issues have arisen within the aerial treatment areas dealing with real estate sales and the requirement for disclosure regarding the aerial treatment and the associated liability if it is not disclosed. There are concerns over aerial treatments causing reduced tourism and the resulting economic impacts to businesses and local governments.

The intent of AB 2765 is to provide for community (public) input into the decision for any aerial application treatment of an urban population and to seek alternative treatment methods to aerial applications. The bill requires the full disclosure of all chemical ingredients and "certificate of safety for all elements of any proposed pesticide" by a state agency, validating that the product is safe for aerial treatment purposes.

Other current eradication projects occurring in urban areas for the Oriental Fruit Fly, Japanese Dodder, Mediterranean Fruit Fly, Diaprepes Root Weevil, and the South American Sponge plant. Additionally, other potential invasive specie eradication efforts that may need to take place in the near future include the Guava fruit fly, Gypsy Moth, and Mexican fruit fly.

There are a number of other eradication efforts, being conducted other state agencies, throughout the state that may also utilize pesticides in urban areas, including aerial applications. Examples include the California Department of Fish and Game's Pike eradication program, and the New Zealand Mud Snail eradication program; and the California Coastal Conservancy's Spartina eradication project; and various California Department of Transportation vegetative control programs aimed at roadside application for fire safety and visibility, landscaping applications to prevent invasive weeds, and noxious weed eradication, the latter of which is usually in conjunction with the CAC.

Currently, all pesticides (including herbicides and rodenticides) are approved and registered by the U.S. Environmental Protection Agency (US/EPA) and for use in California by DPR. Neither of these entities is under the direction of CDFA but they work with CDFA, along with OEHHA and the Department of Public Health, on eradication projects.

There is not a definition for a "certificate of safety for all elements of any proposed pesticide" in this bill or in California Statute. The committee may wish to ask the author what is meant by a "certificate of safety" and if DPR is considered an independent state department or agency?

This measure would increase the public input into an urban eradication project and should provide more information to the public.

The requirement of disclosure of all ingredients of a pesticide product infringes on the both federal and state statutes. Federal statutes under FIFRA, state statutes under both the Civil Codes' Public Records Act and under Uniform Trade Secrets Act, shield pesticide products from disclosure of ingredients and formularies. The committee may wish to consider if elimination of this proprietary protection, and creating a precedent, is justified. All the ingredients and formularies are provided to US/EPA and DPR for approval and registration.

Related legislation :

AB 2760 (Leno) requires CDFA to complete an Environmental Impact Report prior to pesticide application in an urban area for eradication of LBAM. This bill is scheduled be heard in the Assembly Committee on Natural Resources on April 14, 2008.

AB 2763 (Laird) requires CDFA to plan for likely invasive animals, plants, and insects for which an eradication program may be needed. Passed Assembly Environmental Safety & Toxic Materials on April 1, 2008, on a vote of 5-0. This bill is scheduled to be heard in the Assembly Committee on Agriculture on April 16, 2008.

AB 2764 (Hancock) prohibits the Secretary from approving the application of a pesticide in an urban area, unless the Governor proclaims a state of emergency. This bill is scheduled to be heard in the Assembly Committee on Agriculture on April 16, 2008.

AB 2892 (Swanson) requires voter approval prior to an aerial

application of pesticides. To be passed the Assembly Elections Committee on April 10, 2008, on a vote of 4-2, and this bill is scheduled to be heard in the Assembly Committee on Agriculture on April 16, 2008.

ACR 117 (Laird) outlines the history of the LBAM activities and makes request of CDFA and others to answer concerns over health and environmental impacts of the pheromone pesticide and aerial applications, asks for an independent analysis of such impacts and the response to the recommendations made in the Consensus Report. This ACR is scheduled to be heard in the Assembly Committee on Agriculture on April 16, 2008.

PRIOR LEGISLATION

AB 556 (Wiggins) created the LBAM program within CDFA; created an account within the food and agriculture fund, and provided those funds shall be available for expenditure without regard to fiscal year; required CDFA to annually review the progress made by each local agency in eradicating LBAM, and make recommendations, as needed, to improve individual local agency eradication efforts; required an annual legislative report to be submitted on January 10, beginning in 2008; and required eradication activities conducted pursuant to this bill to comply with all applicable laws, and be conducted in an environmentally responsible manner.

REGISTERED SUPPORT / OPPOSITION :

Support

Breast Cancer Action
California Nurses Association
Center for Environmental Health
Center for Third World Organizing
Citizens for East Shore Parks
City of Albany
Coalition for Clean Air
Coalition of California Cities to Stop the Spray
Environmental Law Foundation
Marin County Board of Supervisors
Parents for a Safer Environment
Pesticide Free Zone Campaign
Pesticide Watch
Planning and Conservation League
Sequoia Audubon Society
Thimmakka.org
Vote Health
479 individuals

Opposition

California Citrus Mutual
California Chamber of Commerce
California Farm Bureau
California Grape and Tree Fruit League
California Nurseries and Garden Centers Association
California Pear Growers Association
California State Floral Association
California Seed Association
Western Growers Association
Wine Institute

Analysis Prepared by : Jim Collin / AGRI. / (916) 319-2084