

The logo for the Texas Sunset Advisory Commission is a semi-circular emblem. It features a thick black outer border and a white inner border. The center of the emblem is a solid black semi-circle containing the text "Texas Sunset Advisory Commission" in a white, bold, serif font, stacked in four lines.

**Texas
Sunset
Advisory
Commission**

STAFF EVALUATION

Texas Department of Agriculture

A Staff Report
to the
Sunset Advisory Commission

1988

Texas Department of Agriculture

Report Prepared by:

**Joey Longley
Bruce Crawford
Elizabeth Pyke
Joe Walraven**

Tim Graves, Senior Analyst

November 1988

Table of Contents

	<u>Page No.</u>
Background and Focus	
Creation and Powers	1
Policy-making Body	2
Funding and Organization	3
Programs and Functions	7
Focus of Review	21
Findings and Recommendations	
Policy-making Body	
Issue 1 - The department should be required to establish a pesticide committee to approve pesticide rules and regulations	27
Overall Administration	
Issue 2 - Fees charged should recover costs within program areas	31
Issue 3 - Certain license fees should be designated as non-refundable	33
Issue 4 - The department's late fee authority should be changed	35
Issue 5 - The department needs new fee authority in certain areas	39
Issue 6 - The department needs statutory authority to accept gifts, grants and donations	43
Issue 7 - The department should initiate a review of commercial activities performed in-house	45
Pesticide Regulation	
Issue 8 - Certification requirements for private applicators should be strengthened	47
Issue 9 - For-hire applicators under the supervision of commercial applicators should be licensed	51
Produce Recovery Fund	
Issue 10 - The department should have the authority to pay claims involving bankruptcy	55

Table of Contents

(Cont.)

	<u>Page No.</u>
Inspections	
Issue 11 - Annual inspection requirements should be removed	57
Enforcement Authority	
Issue 12 - Administrative and civil penalty authority relating to the pesticide program needs to be changed	59
Issue 13 - Increased enforcement powers are needed in certain regulatory programs	63
Issue 14 - Current misdemeanor penalty provisions need to be changed to match the Penal Code	67
Interagency Cooperation and Coordination	
Issue 15 - Cooperation and coordination with the Department of Commerce should be formalized	69
Issue 16 - Cooperation and coordination with Texas A&M University should be formalized and improved	71
State Seed and Plant Board	
Issue 17 - The State Seed and Plant Board should be continued without a separate sunset date	75
Across-the-Board Recommendations	77

Background and Focus

Creation and Powers

The Office of the Commissioner of Agriculture was created as an elected office in 1907. The commissioner is elected state-wide by popular vote for a four year term. The office was established to provide a separate elected official to deal with the agricultural needs of the state. The original purposes of the office were to:

- encourage the proper development of Texas agriculture;
- encourage improvements in agricultural methods and practices;
- investigate plant diseases and insects for remedies;
- investigate ways of increasing demand and broadening markets for Texas agricultural products;
- compile statistics and other information; and
- work with state and federal agencies and other countries for the benefit of agriculture in Texas.

Texas is one of 12 states that elects a commissioner of agriculture to head its agriculture department. The commissioner oversees the department which is responsible for administering most of the state's laws relating to agriculture. The original duties and responsibilities of the department have been expanded many times through the years but remain in the general categories of regulatory and marketing efforts. The department's regulatory responsibilities were originally aimed at protecting or assisting producers and enforcing standards that benefited agricultural commerce. These responsibilities included cotton grading and classification (1909), nursery and orchard inspections (1910), grain warehouse bonding and recordkeeping (1913 and 1917), cotton planting and plowing deadlines (1916), container standardization (1917) and seed inspection and labeling (1919). Beginning in 1919, the responsibilities of the department were expanded to include protection of consumers and the general public through the establishment of standards for scales, pumps and measuring devices. Additional consumer protection duties have continued to be added to the department's responsibilities. For example, in 1957, the department was given the task of enforcing laws relating to egg quality. More recently, the department's duties have been expanded to include protection of the state's natural resources was added. In 1972, legislation was passed requiring the registration of agricultural and urban chemicals (pesticides) and the regulation of their use. In 1987, the department was given the responsibility to enforce the Agricultural Hazard Communications Act (Right-to-Know) for the protection of the state's agricultural work force. The department now has the responsibility to administer 49 separate laws in state statute.

In the marketing area, the department's activities have also expanded over time. Early reports on department activities discuss efforts to organize growers' marketing associations and farmers' markets. Efforts were also made to organize promotional events to increase sales of agricultural products. In 1930, TDA, along with the USDA, established a radio market news service to provide needed information to farmers. This service was expanded in 1950 to provide a wide range of information for the agricultural community. In 1965, the Texas Agricultural Product Program (TAP) was established to improve the marketing of Texas products

worldwide. In 1967, the department was authorized to help oversee the creation of commodity boards for research, education, promotion and market development for the benefit of the state's producers of various agricultural commodities. Livestock facilities were established in 1972 to help increase the sale of Texas livestock. Recent efforts include the establishment of a Farmer's Market Program, a "Texas Grown" program, a "Taste of Texas" program and other programs to assist with agricultural diversification. All these newer programs expand the department's effort to assist agricultural producers to increase the demand for their products. The marketing program currently operates as a catalyst to help the Texas agricultural economy by assisting farmers and ranchers with marketing of existing products as well as diversification into alternative crops and increasing the processing of agricultural products within the state.

Policy-making Body

The department has no governing board or commission. Instead, policy and administrative direction is set by the commissioner of agriculture who is elected every four years as are other state-wide elected officials. The commissioner is required, by statute, to have knowledge of agriculture and manufacturing and is responsible for performing the duties assigned to the office of the commissioner of agriculture. These powers and duties include developing agriculture in Texas in general, developing domestic and foreign markets in particular, and administering federal and state laws regarding pesticides and pest management. In addition, the commissioner is responsible for ensuring that the department meets the agricultural needs of the state and oversees the provision of services to the agricultural community and the general public.

A deputy commissioner is created by statute and is appointed by the commissioner to be responsible for performing the statutory duties of the commissioner during his absence. The deputy commissioner is specifically responsible for conducting and directing outreach, advocacy and crisis intervention efforts for farmers, ranchers, farmworkers and consumers. The deputy commissioner also serves as primary liaison with federal, state, and local government agencies. Finally, the deputy commissioner is responsible for oversight of state commodity boards and for working directly with commodity and community organizations to:

- solicit input for improvement of the department's programs;
- identify and respond to problems agricultural producers and organizations are experiencing;
- address agricultural crises; and
- conduct a program of public education and outreach to inform these parties and the public of services available to them.

The department uses advisory boards, committees, and task forces in two ways to assist with development and implementation of its various programs. First, advisory bodies provide evaluation, guidance or technical assistance to the commissioner. For example, the Egg Marketing Advisory Board advises the commissioner on the administration of the laws regulating the sale and handling of chicken eggs in Texas. Other advisory bodies are directly involved in administering

some of the department's programs. For example, advisory boards are directly involved in administering the state's seed certification program and the Family Farm and Ranch Security Loan program, and in resolving claims made under the Agricultural Protective Act. Altogether, the department has 17 active advisory committees. Also used by the commissioner are district agricultural boards located in each of the department's 12 field districts. These boards are local advisory boards that act to inform and advise the commissioner and the department on matters of concern to the local agricultural community.

Funding and Organization

The department operates from headquarters in Austin and 13 district and three satellite offices throughout the state. In addition, the department operates nine laboratories and six export facilities statewide. Exhibit A shows the location of these field operations throughout the state.

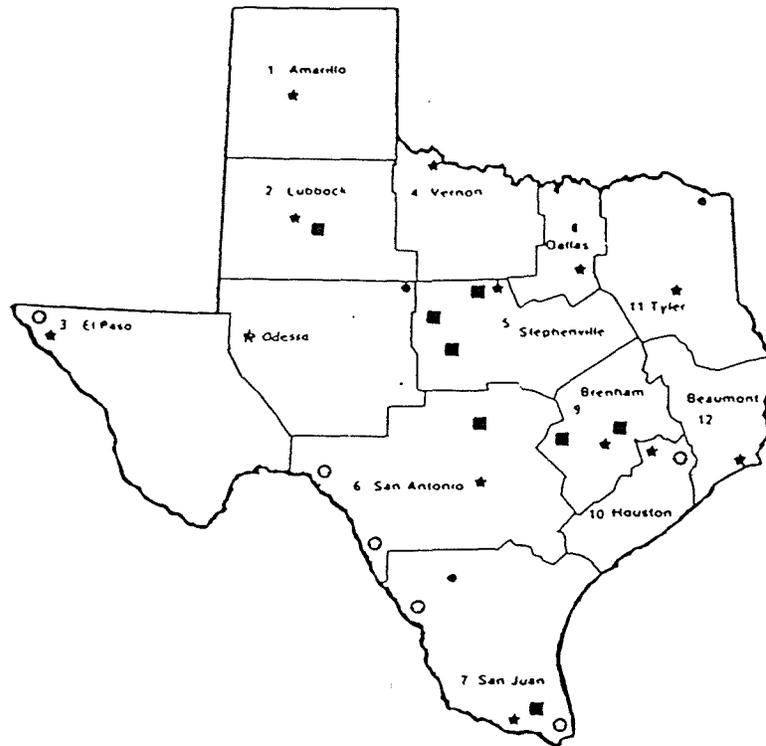
The department has approximately 600 employees with a budget of \$19.3 million for fiscal year 1988. Exhibit B shows the department's funding for 1988. Most of the department's funding, over \$16 million, comes from general revenue. The second largest source of funding is from the portion of fees assessed by the department which are reappropriated to TDA by the legislature. The department collects over 65 different fees, most of which are charged in its regulatory programs. In 1988, the department received approximately \$2.5 million or 13.2 percent of its funding in fee revenue reappropriated by the legislature which amounted to over one-third of the total fees collected by the department.

Federal funds make up the third largest source of revenue, comprising about 2.4 percent of the department's budget. Most of these federal funds come from a contract between the department and the Environmental Protection Agency for state enforcement of pesticide regulations. The department also receives a small amount of funding through interagency contracts for agricultural development and product promotion.

Exhibit B also shows the department's fiscal year 1988 budgeted expenditures. The department's regulatory programs account for most (66.8 percent) of the department's expenditures. Within the regulatory area, the largest expenditures are for consumer services and the various pest management programs. Marketing programs account for 22.2 percent of total expenditures, with most of this amount going for agricultural development and product promotion. Administrative costs require 11.0 percent of the department's total expenditures.

Exhibit A

District Offices, Laboratories and Export Facilities



District Offices ★

- District 1 - Amarillo
- District 2 - Lubbock
- District 3 - El Paso
- District 4 - Vernon
- District 5 - Stephenville
- District 6 - San Antonio
- District 7 - San Juan
- District 8 - Dallas
- District 9 - Brenham
- District 10 - Houston
- District 11 - Tyler
- District 12 - Beaumont
- District 13 - Odessa

Satellite Offices ●

- Cotulla
- New Boston
- Abilene

Export Facilities ⊛

- Brownsville
- Laredo
- El Paso
- Houston
- Del Rio
- Eagle Pass

Laboratories ■

- DeLeon - Aflatoxin & Nematology
- Gorman - Aflatoxin
- Austin - Metrology
- Lubbock - Metrology
- Brenham - Pesticides
- San Juan - Pesticides
- Giddings - Seed
- Lubbock - Seed
- Stephenville - Seed

Exhibit B

TDA Sources of Revenues
(FY 1988)

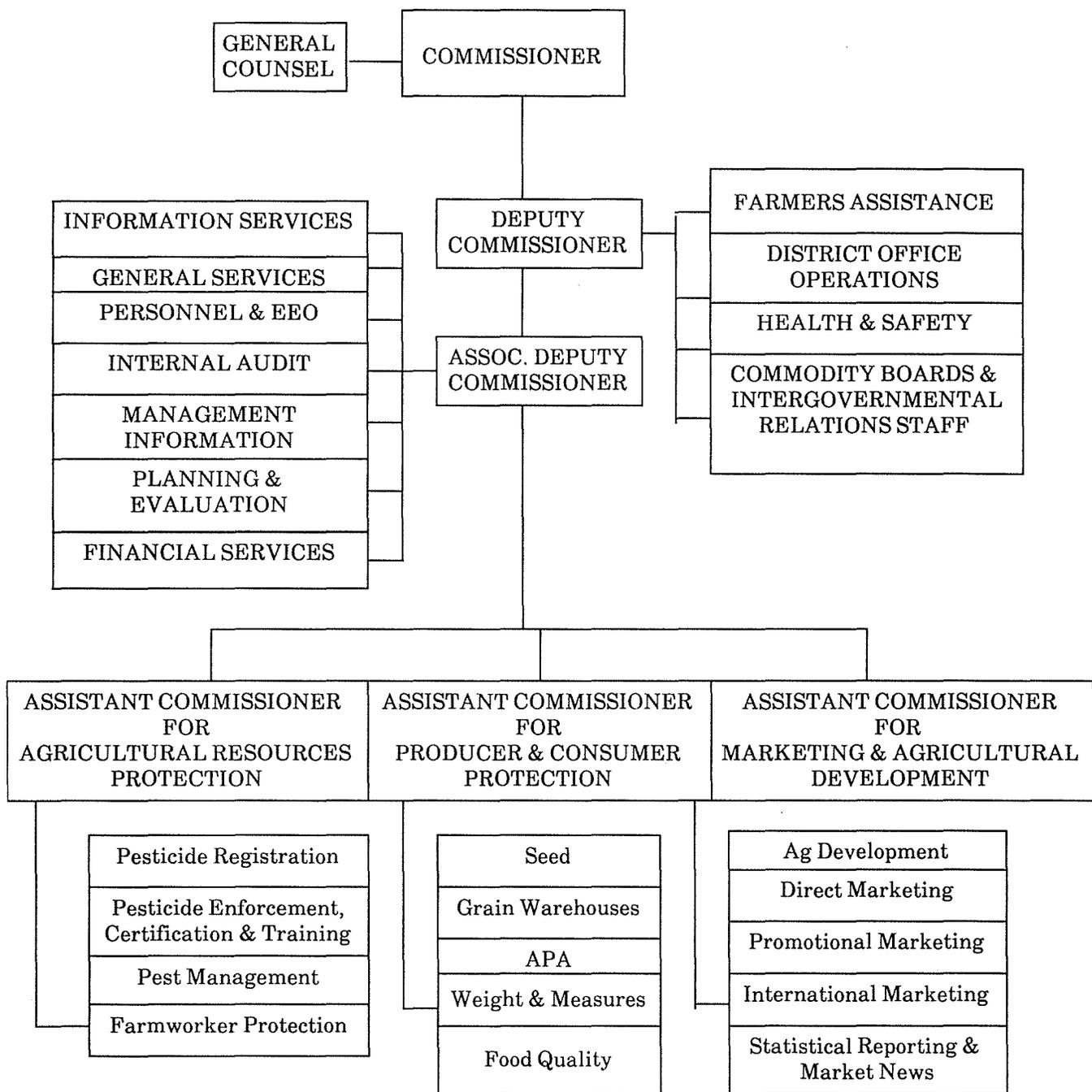
<u>Source</u>	<u>Amount</u>	<u>Percent</u>
General Revenue	\$ 16,070,899	83.3
Fees	2,540,010	13.2
Federal Funds	469,518	2.4
Interagency Contracts	<u>215,000</u>	<u>1.1</u>
TOTAL	\$ 19,295,427	100.0%

TDA Expenditures
(FY 1988)

<u>Expenditure</u>	<u>Amount</u>	<u>Percent</u>
Administration	\$ 2,127,151	11.0
Regulatory Programs:		
Seed and Grain Warehouse	1,678,651	8.7
Consumer Services	4,589,278	23.8
Pest Management	3,742,521	19.4
Pesticides	2,173,971	11.3
Laboratory Services	703,860	3.6
Marketing Programs:		
Agriculture Development and Product Promotion	3,022,241	15.7
International Marketing	473,200	2.5
Cooperative USDA Programs	<u>784,554</u>	<u>4.1</u>
TOTAL	\$ 19,295,427	100.0%

The department has recently undergone a reorganization which divides the department into three major programs: Marketing, Agricultural Resources Protection and Producer and Consumer Protection. Program staff in the field report directly to program directors in Austin. Administrative coordination of field staff is handled through an office reporting to the deputy commissioner. The new organizational structure of the department became effective September 1, 1988 and is shown in Exhibit C.

Exhibit C
TDA Organization Chart



Programs and Functions

The department's operations are divided into three main divisions. These divisions and the major programs within them are outlined below.

Producer and Consumer Protection

- Weights and Measures
- Food Quality
- Agricultural Protective Act
- Seed and Grain Warehouses

Agricultural Resources Protection

- Pesticide Regulation
- Pest Management
- Farmworker Protection
- Natural Resources

Marketing and Agricultural Development

- Promotional Marketing
- Agricultural Development
- Direct Marketing
- International Marketing
- Cooperative Programs
- Commodity Boards

These programs along with central administration are briefly described in the following material:

Producer and Consumer Protection

The department administers a number of laws aimed at protection of agricultural producers and consumers. The department enforces these laws through the Producer and Consumer Protection division which contains four main programs: Weights and Measures, Food Quality, Agricultural Protective Act and Seed and Grain Warehouses. The department has 200 full time equivalent employees assigned to this division with 70 specified for the Seed and Grain Warehouse program. The other 130 employees perform work in all three of the programs. Most of these are field employees who perform inspections for all three programs.

Weights and Measures

The weights and measures program is responsible for ensuring fair commerce by imposing national standards of accuracy on commercial weighing and measuring devices used in Texas and on goods sold by weight or volume. The main effort of the weights and measures program is the annual registration and inspection of over 179,000 commercial weighing and measuring devices. Devices covered include gasoline pumps (119,500), scales (56,500), liquid petroleum gas mixers (2,600) and

bulk fuel meters (900). Device owners must pay a annual inspection fee(\$5 to \$80) for each device operated. The weights and measures law also provides for the regulation of public weighers by the department. Public weighers are persons authorized to certify an official weight of a commodity. They must be bonded and approved by the department before they can issue an official certificate of weight and measure. Approximately 1,300 public weighers were licensed in fiscal year 1987. In addition to inspecting devices, the department also inspects the accuracy of the net weight of packaged goods offered for sale. This is usually done in grocery stores. Approximately 1,000,000 packages were checked for weight accuracy in 1988. Finally, the weights and measures law authorizes cities and counties to establish their own device inspection programs. Currently only Dallas and Fort Worth have their own programs.

The department's weights and measures activity is supported by its metrology laboratories. The laboratories calibrate the test weight and measuring devices used by the department for inspections. The laboratories also calibrate standards, on a fee basis, for scale manufacturers, service companies and corporations using precision equipment. Over 25,000 calibrations are performed per year.

Food Quality

The department's food quality program involves the inspection of eggs, citrus and other agricultural commodities to ensure that the products meet established standards of quality. Efforts related to egg quality are designed to ensure that eggs produced and offered for sale comply with standards established by the USDA. Wholesalers and retailers of eggs are licensed by the department with approximately 450 wholesalers and 350 retailer licenses issued in fiscal year 1987. Eggs are inspected by department personnel at packing plants, distribution centers and retail outlets with approximately 8.2 million dozen eggs inspected in 1987.

Citrus efforts are designed to ensure that grapefruit and oranges sold in the state comply with minimum standards of ripeness. The major effort involved is the testing of fruit imported from out of state for compliance with Texas citrus maturity standards.

Agricultural Protective Act

This program involves administration of the Agricultural Protective Act (APA). The purpose of the APA is to protect Texas fruit and vegetable producers from non-payment by dealers, shippers and retailers to whom they sell their produce. The protection is provided through the licensing and regulation of persons who handle, sell or deal with Texas grown fruits and vegetables and the administration of a fund which is used to pay producers if a dealer fails to do so. The fund, the Produce Recovery Fund, consists of fees paid each year by licensees who transact business on credit. In fiscal year 1988, this was 463 of the 1,700 of licensees. Producers may make a claim against the fund if a dealer fails to pay for produce bought on credit. To be eligible for payment, the transaction must involve an action of a licensee and Texas-grown fruits or vegetables. The department investigates the claim and determines the amount, if any, that should be paid out of the fund. Disputes involving the department's findings are reviewed by the Produce Recovery Board, a six member independent board appointed by the governor.

The board conducts a hearing and makes the final decision on disputed claims. Payments are made as follows:

- full amount up to \$1,000;
- 60 percent of claims over \$1,000;
- \$20,000 maximum for all claims from the same transaction;
- \$50,000 total claims against one licensee in any one year.

In 1988, \$113,000 was paid into the fund, 69 claims were made against the fund and approximately \$160,000 in payments were made from the fund. Once a claim is paid, the department attempts to recover the claim amount from the licensee as well as any outstanding amount owed to the producer.

Seed and Grain Warehouses

The objective of the Seed and Grain Warehouse program is to help ensure successful production of food and fiber by protecting seed buyers and grain producers. Efforts are directed at three specific areas: administering and enforcing seed label laws, administering the state's seed certification laws and regulating the activities of state licensed grain warehouses.

Under the seed label law, the department administers and enforces the truth in labeling section of the Texas Seed Law to ensure that farmers get the seed they purchase, that the seed will germinate and will produce the variety as stated, and that the seed is not contaminated with large amounts of noxious weeds. The department's activities are supported by its laboratories located in Giddings, Lubbock and Stephenville. Testing of seed is conducted by the department to determine if seed dealers, sellers and certified seed growers are complying with the statute. In fiscal year 1987, approximately 7,000 official seed samples were taken by the department. Seed is also tested for farmers on a fee basis to determine the purity and germination of the seed. This helps the farmer determine if their seed should be used for feed or for planting. In fiscal year 1987, approximately 37,500 samples were tested for farmers.

The department also administers the state's certified seed program. The purpose of this program is to provide verification of certified varieties of seed and plants as established in the Federal Seed Act and the Texas Seed Act. The State Seed and Plant Board, a statutory board established within the department, assists in administering the seed certification program. The State Seed and Plant Board licenses certified seed and plant growers, determines if new varieties of seed and plant meet criteria for production as certified seed, plant or plant material, and promulgates seed and field certification standards. The State Seed and Plant Board licensed 575 certified growers in fiscal year 1987. In addition, the board approved 150 new varieties of certified seed. The department conducts inspections to ensure that crop varieties comply with seed and plant certification standards. In fiscal year 1987, TDA inspected 4,200 fields and 237,392 acres of certified seed.

Regulation of the activities of grain warehouses is the final function of the program. The department licenses and inspects all grain warehouses in the state that are not regulated by the federal government (720 out of the total number of approximately 940 warehouses operating in the state in fiscal year 1988.). All grain warehouses regulated by the department are required to be inspected at least once a year to ensure that a warehouse does not purposely or accidentally end up with a

shortage of grain and is unable to pay farmers for the grain they have stored. In fiscal year 1987, 752 grain warehouses were licensed and 954 inspections were conducted by the department.

Agricultural Resources Protection

The department administers several laws aimed at protecting the state's resources as they relate to agriculture and protecting workers involved in agriculture. The department enforces these laws through the Agricultural Resources Protection division which contains four main programs; pesticide regulation, pest management, farmworker protection and natural resources.

Pesticide Regulation

The Texas Department of Agriculture regulates pesticides under the authority of the Texas Pesticide Control Act, which was passed in 1975. The act was passed in part to ensure that the state would be delegated authority over pesticides from the Environmental Protection Agency (EPA) under the provisions of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). Under these provisions, each state is responsible for regulating the sale and use of pesticides in accordance with federal laws, certifying pesticide applicators, and enforcing state law regarding pesticide use violations. The EPA approves state plans to regulate pesticides based on the guidelines contained in FIFRA and the regulations adopted under FIFRA. The federal guidelines serve only as minimum standards. State regulatory programs must be at least as stringent as the federal guidelines, but may be more stringent if the state desires. For example, the state requirement that commercial applicators must have liability insurance is more stringent than federal requirements on commercial applicators. The EPA has given states considerable flexibility in developing state pesticide plans in order to establish a nationwide pesticide program as quickly as possible. As a result, all but two states - Colorado and Nebraska - regulate pesticides under their own state laws (EPA regulates pesticides in those two states). However, another result has been a wide variation among the states regarding pesticide regulations. Once the pesticide plan is approved by EPA, the state enters into a cooperative agreement with EPA, under which EPA provides federal funding for state enforcement and training and certifying of applicators. In 1987, TDA received \$419,200 in federal funds for these purposes. The EPA periodically evaluates the state plan and may order corrective action or withdraw its support for the state plan. The most recent evaluation, conducted in 1988, indicated that TDA's pesticide program was in overall compliance with federal requirements.

The department's pesticide activities fall into three specific areas. First, the department is responsible for registering and setting use restrictions for all pesticides in Texas. Second, the department certifies applicators for the agricultural use of pesticides in the state. Third, TDA has enforcement responsibility for pesticide use violations under the state Pesticide Control Act. The department has 51 full time equivalent employees assigned to this program.

All pesticides marketed in the U.S. must be registered by EPA under FIFRA. The EPA is authorized to register pesticide products, specify the terms and conditions of their use before they may be marketed, and remove unreasonably hazardous pesticides from the marketplace. The registration generally sets the terms and conditions for the use of each pesticide product. The EPA requires this information to be contained on the product's label as a primary means of regulating

use. Through labeling requirements, EPA may, for example, restrict the use of pesticides to certified applicators; it may impose reentry time frames for individuals to reenter an area treated with pesticides; or, it may require other precautionary statements regarding pesticide use. To help guide the use of pesticides, federal and state governments recognize three general categories:

- General-use -- pesticides that EPA determines will not cause unreasonable adverse effects on the environment, when used as directed. Generally, anyone may use these pesticides in accordance with the directions on the label.
- Restricted-use -- pesticides that EPA determines require additional regulatory restrictions than can be included on a label to prevent unreasonable adverse effects on the environment and injury to the applicator. Restricted-use pesticides may only be used by certified applicators or persons under the supervision of a certified applicator.
- State-limited-use -- pesticides that TDA determines require additional restrictions than can be included on a label to prevent unreasonable risk to human health or the environment. A state-limited-use pesticide may be a general-use pesticide that requires more regulation at the state level because of special conditions or localized problems. For example, TDA made chlordane a state-limited-use pesticide because of problems resulting from its misuse. Like restricted-use pesticides designated by EPA, state-limited-use pesticides may only be used by certified applicators or persons under their supervision.

The department also has the authority to regulate the time, place, manner, method, amount or concentration of pesticide applications. Under this authority, the department has adopted rules regarding notification requirements before aerial spraying of pesticides and reentry guidelines (in addition to label requirements) for workers returning to fields after pesticides have been applied. Both of the rules are the result of state initiatives. Neither federal law nor EPA regulations address these issues.

Effectively anyone who applies pesticides (including farmers and homeowners) is regulated in the sense that they must comply with a product's use instructions found on the label. The department is responsible for enforcing this compliance. However, persons who want to use more dangerous restricted - or limited-use pesticides must meet additional requirements. The following is a description of pesticide applicators regulated by the department:

- A commercial applicator is a person, licensed by the department, to operate a business to apply pesticides to another person's land for hire or compensation. Commercial applicators must pass an examination before they may be licensed and must provide proof of financial responsibility and have liability insurance before they may be licensed. Applicants must pay a \$150 licensing fee and must renew the license each year. In 1988, the department licensed 1,433 commercial applicators.
- A non-commercial applicator is a person, also licensed by TDA, who does not qualify as either a commercial or private applicator. Non-commercial applicators are generally employees who apply pesticides for a government agency or a business that is not a commercial pest control company. These applicators must pass an examination before

they may be licensed, but they do not have to carry liability insurance. Applicants must pay a \$100 licensing fee and must renew the license each year. In 1988, the department licensed 4,211 non-commercial applicators.

- A private applicator is a person who is not licensed by TDA who may use pesticides for the purpose of producing an agricultural commodity either on his or her own land or on another person's land if applied without compensation. These applicators do not have to pass an examination or have liability insurance before becoming a private applicator. The department has established a voluntary certification program for them but no registration or training of these applicators is required in statute. The department has certified approximately 150,000 private applicators. Because this is a one-time certification, however, the department does not know how many of these private applicators are currently involved in applying pesticides.

In addition to these applicators, the state act allows an individual under the supervision of a commercial, non-commercial or private applicator to apply restricted- or state-limited-use pesticides without testing or licensing. The state act also authorizes TDA to license dealers of restricted and state-limited-use pesticides. Dealers must pay a \$100 licensing fee, which must be renewed each year. In 1988, the department licensed 1,685 pesticide dealers.

In addition to registration of pesticides and applicators the department has primary enforcement responsibility for pesticide use violations in the state. The department's primary enforcement efforts are aimed at applicators who misuse pesticides. Enforcement actions are generally triggered by complaints of pesticide misuse from the public, though the department may also initiate complaints on its own or it may receive complaints from the EPA. Generally, the department investigates all complaints, or "incidents", of alleged pesticide misuse that it receives. On the average, TDA receives 500 to 600 complaints each year, most of which are received in the district offices. In processing these complaints, TDA gives highest priority to incidents involving human exposure.

To assist in the investigation of pesticide complaints TDA has established pesticide laboratories in Brenham and San Juan. These laboratories analyze pesticide residue from samples collected in the course of a complaint investigation. Results from this testing become part of the file in complaint investigations and are used in making enforcement decisions.

Pest Management

The purpose of the department's pest management program is to develop and implement both short and long term strategies to help farmers, ranchers and urban residents control pests, animal predators and plant diseases. The department has 95 full time equivalent employees assigned to this program.

The regulation of the nursery/floral industry is a major part of the department's pest management program. In this particular area, the department is concerned with enforcing pest management laws and quarantines pertaining to the nursery/floral industry and with monitoring fire ant infestation. All nursery and floral establishments are required by statute to be licensed and inspected by TDA. In fiscal year 1987, the department issued 20,000 certificates and inspected approximately 16,000 nursery and floral operations. A large component of the

nursery/floral program is the department's fire ant control activity which is designed to develop and implement an integrated program involving education, enforcement, demonstration and outreach activities. The department inspects nurseries, sod growers, and other agricultural commodities to enforce state and federal fire ant quarantines. If plant materials or a particular commodity are found to be free of fire ants, the department issues a permit which makes the material eligible for shipment.

Another part of the department's pest management effort relate to establishing, maintaining and enforcing quarantines. The department is involved in administering both federal and state quarantines of agricultural pests and diseases that would be either imported from other states and countries or exported from Texas. There are 12 statewide or regional quarantines, including fire ants mentioned above.

The department is also involved in joint federal-state efforts to control pests such as the boll weevil, Mexican fruit fly and the Mediterranean fruit fly. These efforts specifically involve inspections, development and enforcement of quarantines and other pest management methods including annual surveys of cotton acreage for the presence of boll weevils. Another effort involves inspection by the department and the USDA of med and mex fruit fly traps to determine the presence of these pests. In fiscal year 1987, approximately 50,000 med fly traps and 66,000 mex fly traps were inspected.

The department is also involved in demonstrating and providing to the producer and consumer cost-effective, integrated pest management strategies. These strategies combine current agricultural practices (eg. field preparation and post harvesting practices) and alternatives to pesticides to reduce both the costs and the environmental risk associated with traditional pest management efforts. Alternatives to pesticides include encouraging crop rotation, deep plowing and the use of disease resistant crop varieties, the use of beneficial insects and parasites that attack pests and releasing sterilized pests.

The department's predatory management efforts are designed to assist farmers and ranchers to control sheep, goat and cattle predators. The department's focus in this area is educating producers on predator management methods including alternative methods to lethal devices. The other major effort is regulating the use of the M44 device and the Compound 1080 Livestock Protection Collar. The M44 device is a mechanical device that propels cyanide powder into the mouth of an animal that pulls on the baited device with its teeth. The Compound 1080 Livestock Protection Collar is a rubber container holding a liquid toxicant that is attached with straps around the throat of sheep or goat. Ideally, predators that attack animals wearing the collar puncture the container and receive a lethal dose of the toxicant. Users of the M44 device must be trained and certified.

In fiscal year 1987, approximately 4,500 individuals were certified as M44 applicators and 180 individuals obtained training in the use of the device. The department requires users of the 1080 collar to take an examination on the use of the collar. In 1988, 137 individuals were tested and 70 passed and were licensed.

Farmworker Protection

The department administers two laws through this program that provide specific protection to farmworkers involved in harvesting of agricultural products:

The Agricultural Hazard Communications Act (Right-to-Know) and a section of the Texas Minimum Wage Act which relates to wages paid for harvesting agricultural products. The department has 13 full time equivalent employees in this program.

In 1987, Texas became the first state in the nation to enact an agricultural "right-to-know" law when the legislature passed the Agricultural Hazard Communications Act. This law directs the department to establish formal procedures for informing farm workers about exposure to hazardous chemicals.

The law applies to larger agricultural employers who use or store more than 55 gallons or 500 pounds of chemicals each year and have a gross annual payroll over \$15,000 for seasonal labor or more than \$50,000 for labor that is not seasonal. The law places much of the responsibility for agricultural hazard communications on these employers. Under the law, these agricultural employers must:

- maintain lists of chemicals kept in the work place and keep information regarding the hazards and safe handling of each chemical;
- make this information available, upon request, to farm employees or their designated representative, treating medical personnel, or any member of the community;
- provide workers with crop sheets containing basic information about pesticides used on each crop;
- provide emergency information about work place chemicals to local fire chiefs; and,
- provide workers with protective clothing or devices as required for the safe handling of agricultural pesticides.

The law also requires the department, in conjunction with the Texas Agricultural Extension Service, to develop and provide training to agricultural employers and workers regarding the effects and safe use of agricultural chemicals.

The other effort carried out by the farmworker protection program is the establishment of piece rates for use in payment of wages for harvesting agricultural products. The Texas Minimum Wage Act establishes a mechanism to provide a separate minimum wage for agricultural workers. To ensure that agricultural workers receive at least a minimum hourly wage, TDA is given the responsibility to establish piece rates to be paid for harvesting work performed. The department conducts field surveys and establishes an appropriate piece rate for most crops. Currently 70 separate piece rates are in use.

Natural Resources

The department's natural resources program conducts research for the commissioner on issues affecting agriculture and the environment. These efforts have resulted in the publication of various studies including the following:

- Agriculture and the Unregulated Natural Gas Utilities;
- Back to the Land: On Site Treatment of Domestic Wastewater;

- Protecting Texas Groundwater;
- Challenge of the Colonias, Small Community Wastewater Management in the Lower Rio Grande;
- Renewable Energy for Texas: Needs Assessment and Policy Recommendations for the Texas Renewable Energy Industries;
- Agricultural Land and Water Contamination; and,
- Hazardous Waste in Texas.

The activities of the office are used by the department to improve its operations, call attention to certain problems, coordinate its efforts with other state and federal agencies and to identify areas that require legislative action.

Marketing and Agricultural Development

In recent years, the department has placed a strong emphasis on the marketing and promotion of Texas agricultural products. Agriculture has suffered in Texas as it has nationwide. The Texas Department of Agriculture, as well as its counterpart in other agricultural states, has responded by increasing its efforts to support especially the small producer and agribusiness (businesses involved not only in the production, but in the processing and retailing stages of agricultural food products) in getting their commodities and products to the marketplace through a variety of marketing and promotional programs.

Through its marketing and promotion efforts, TDA attempts to raise revenues for producers in three ways. First it attempts to increase sales of existing products by helping introduce those products to new markets. For example, the department has helped introduce Texas products to new markets throughout the United States and foreign countries. Another strategy concentrates on new ways to diversify the production and processing base of agriculture in the state. Diversification in production involves introducing new commodities into Texas, such as blueberries for the retail market, or kenaf as a new alternative to paper milling or to introduce new products based on alternative production methods, such as organic products. The third effort is to find new ways to penetrate the retail market, either by creating new avenues for consumers to purchase agricultural products, such as farmers markets and "pick-your-own" farms or by establishing new means for the producer to reach established markets, such as direct wholesaling by producer cooperatives.

The goal of the department's marketing division is to act as a catalyst in each of the above areas by using economies of scale and department expertise to encourage the diversification of Texas' agricultural production; promote greater awareness and use of Texas products in and out of the state; and develop opportunities for the smaller farmer and agribusiness to reach new, previously unavailable or untapped markets. To that end, the agency has divided its efforts into five program areas: promotional marketing, agricultural development, direct marketing, international marketing and cooperating marketing information programs with the USDA. In addition, the department is involved with oversight of agricultural commodity boards which promote specific agricultural products.

Promotional Marketing

The goal of the promotional marketing program is to increase awareness of and demand for native Texas agricultural products, by helping producers with promotional programs, including advice on packaging, media, and retail strategies. The staff is also involved in specific promotional marketing activities which include food shows in major cities around the country and media campaigns in cities around the state. The department has 52 full-time equivalent employees assigned to this program.

The Taste of Texas (TOT) program is one of the department's key efforts to raise consumer awareness of Texas products. Taste of Texas is a product advertising and identification campaign centering on the Taste of Texas slogan and identification logo which is used by qualified companies on packaging and for advertising purposes. By identifying Texas products in this way, consumers can know when they are buying native Texas goods and Texas producers can capitalize on the unique, inherent characteristics of Texas as the theme in promotions.

All harvested commodities are automatically eligible to be TOT participants as well as any packaged products which use Texas grown ingredients for at least 80 percent of the product. Agency staff verify the use of the ingredients with the companies' suppliers. To date, 525 food companies and 48 retail food chains are registered as Taste of Texas participants. Taste of Texas companies participate in national food shows organized by the department which provide Texas companies with a cost effective opportunity to introduce their products to buyers in previously untapped markets. To date, 113 companies have participated in at least one show.

Texas Grown is a similar, although newer, program designed to increase sales of Texas nursery plants. An identification logo is also used for Texas Grown products. To be eligible, plants must either be germinated and reach the stage of maturity in Texas or must have spent 50 percent of their growing life in Texas by the time they are sold. Over 595 member firms have signed up for the program since its inception in 1987. Primary activities of the Texas Grown program include the initiation of promotions in major retail chains and development of markets for water conserving native Texas plants.

Agricultural Development

The goal of the agricultural development program is to assist farmers and ranchers with diversification into new and alternative crops and increase the processing of agricultural products within the state. Diversification is an effort to provide the producer with options and alternatives to the traditional crops produced in Texas. The agricultural development program has eight full-time equivalent staff. The two primary activities performed by the staff are market research and oversight of several low-interest bond programs for agricultural development. Program staff conduct research to support the marketing initiatives of the department's other marketing programs aimed at diversifying the state's agricultural production. This research tries to determine the market potential of new crops or alternative processing as well as the viability for new businesses to succeed in local settings. This gives the producer a concrete basis for deciding whether to enter into the new venture. While most of the projects are undertaken at the request of producers who are interested in exploring a new crop or processing option, others are initiated by the department to assess the potential to promote various new crops in Texas. The department reports 85 agricultural development

projects have been completed to date with 43 others underway. These reports include expansion of existing products and markets and possible development of new ones.

The second major activity of the program is to help producers find funding for agricultural diversification. Lending institutions have become wary of making agricultural loans in recent years and the legislature has responded by creating various financing programs which are administered by the department. These programs are the Family Farm and Ranch Security Program, the Agriculture Development Bond Program, the Texas Agricultural Diversification Program and the Texas Agricultural Finance Authority.

The Family Farm and Ranch Security Program was created in 1979 and provided authority for \$10 million in bonds to be used to help farmers and ranchers purchase land for agriculture. The Agricultural Development Bond program was established in 1983 to allow counties to form agricultural development corporations with tax-exempt bonding authority. Because of problems with the structure of the programs and changes in federal tax law, the department has had difficulty implementing both of these programs. In response to these problems, the 70th Legislature created two additional programs to promote agricultural development. The Texas Agricultural Diversification Program was established to provide grants totaling \$450,000 for diversification projects. The program also provides for \$5 million of state funds to be deposited by the state treasurer with private lenders. The state will receive interest of two percent less than the market rate from the lenders who will pass the savings on to eligible agricultural borrowers who are loaned money at a discount. The second program established by the 70th Legislature is the Texas Agricultural Finance Authority. Under this program, the authority can issue up to \$500 million in revenue bonds to make long-term, reduced interest loans for eligible agricultural projects.

Direct Marketing

The direct marketing program is designed to help producers sell their products directly to consumers, retailers, or restaurants. The goals of the direct marketing effort are to by-pass the middle man, or broker, for the purpose of keeping the profits the broker would have earned in the hands of the producer and small agribusiness and to provide access to new markets for those products.

The direct marketing program has eight full-time employees that are involved in helping producers both at the direct retail and direct wholesale level. Three components make up the direct retail program: farmers markets, farm trails and pick-your-own. Generally, farmers markets provide producers with an outlet to supplement their income by selling their secondary, alternative crops or the excess from their primary harvests. The department's role is to help the producers organize and meet legal requirements including the legal procedures of incorporation and obtaining any required local permits. In the four years since the farmers market program has been in place, 58 markets have been established with TDA's help in 49 towns and cities. In 1986, over 2,000 producers participated in a farmers market. Gross sales from the markets combined exceeded \$6 million.

The second area of retail assistance is farm trails. Three farm trails have been organized by the department around the state. Farmers set up individual roadside or farm stands from which to sell their produce. All such stands in the area are printed on farm trail maps distributed by the department for tourists and the local

community alike. The third retail effort is "pick-your-own". "Pick-your-own" farms are individual operations where consumers can go to pick their own produce. Producers are saved the labor costs and consumers get less expensive, fresh produce. TDA marketing field staff have helped to organize 129 pick-your-own businesses. Assistance the staff provide includes helping a grower start a business, find markets and assist with promotion.

International Marketing

The international marketing program is similar to the other marketing programs but is geared to international sales. The program has 19 full-time employees. The goal of this program is to gain access to international markets for Texas producers and agribusinesses to increase profitable exports. To that end, TDA has on their staff four regional specialists who conduct trade missions, develop contacts, and identify trade opportunities and market potential for Texas products in four geographic regions: Latin America, the Middle East and Africa, Asia, and Europe. To date, TDA has export development projects in over 30 countries.

A primary activity of the international marketing staff is to facilitate direct sales of livestock and commodities to Mexico and other nations. The staff act as a clearinghouse for buyers and sellers by publishing buyer's guides for specific commodities which they distribute domestically and overseas. The other aspect of the the international marketing program is the operation of six livestock export facilities located in Brownsville, Laredo, Eagle Pass, Houston, El Paso, and Del Rio. All livestock being shipped out of the country via Texas must pass through one of these pens. In 1983, 72,000 head of livestock were exported through the facilities, representing \$6 million. In 1985, the number increased to 300,000, with a value of \$77.5 million.

Cooperative Market Information Programs

The Texas Department of Agriculture participates in two cooperative programs with the USDA to gather and disseminate agricultural production and market news. The main objective of these cooperative efforts is to collect, compile and distribute timely and accurate information to enable the agricultural community to make informed production and marketing decisions. These information efforts are carried out by two programs, the Federal-State Market News Service and the Texas Agriculture Statistics Service.

The news service deals with the daily reporting of agricultural prices for grain, poultry, eggs, fruits and vegetables. The news service is part of a nationwide program operated by the Agricultural Marketing Service of the USDA in cooperation with state agencies across the county. In Texas, TDA is the state agency that coordinates with the USDA to provide a funding structure for the news service. Both agencies provide staff support, market news reporters and other support staff. The program is operated by 15 full-time state employees and 10 federal employees. The primary function of the news service is to gather information, compile it into various forms and disseminate it to the agricultural community, other interested parties and the general public.

The statistics service is the other program that TDA cooperates with the USDA to provide agricultural information. The statistics service differs from the market news in that it reports, not on current activities, but on past information. Reports are generated on past production and prices paid and projections are made on acres

to be planted using past production figures. The service is located and operated within the USDA. The statistics service is jointly funded by the USDA and TDA. The service is required by federal mandate to collect information on certain commodities (currently 72) on a statewide basis. Federal funding is provided for this purpose. State funding allows the service to collect data which provides crop information on a district and county basis. State funding also allows information collected on commodities not included in the national program but are important to Texas. Finally, state funding provides staff support for information dissemination (currently nine employees). Funding from the state was approximately \$200,000 for the fiscal year 1988. Dissemination is provided through news releases, a weekly production of crop progress and conditions and a bi-weekly publication of price and inventory statistics. Yearly compilations are also published on a statewide basis. Information on a county and/or district basis was also published until recent cuts in legislative appropriations reduced the state's contribution to the service's budget. Currently, information is not collected at this level of detail.

Commodity Boards

The department has certain responsibilities relating to Texas commodity producers boards, under the Texas Commodity Referendum Law. The law grants authority for producers of a particular commodity to form producer boards and assess a levy on all sales of that commodity. The purpose of the law is to allow producers to "tax" themselves to raise money to conduct research and promotion. Commodity producer boards are state agencies and their accounts are subject to audit by the state auditor.

The governing bodies of the commodity boards are elected in biennial referendums. The law provides that each board file a proposed budget with the commissioner and that funds may only be expended after the commissioner has approved the budget. The law permits funds to be expended on programs of research, disease and insect control, predator control, education and promotion. Funds are prohibited from being used for lobbying or other political influence. Budgets of the nine boards range from \$100,000 to \$1,000,000 annually. All funds are raised solely by a levy collected at the first point of sale. In addition to budget oversight, the department helps the boards organize and conduct referendums as needed.

Exhibit D shows the commodity boards which currently exist in Texas, the sponsoring organization, the year of incorporation, the region affected by the check-off, and the levy assessed.

Exhibit D
Commodity Boards

<u>Crop</u>	<u>Sponsor</u>	<u>Year/Region</u>	<u>Levy Amount</u>
Corn	Texas Corn Growers Association	1980 - 7 counties	1/2 cents/bushel
Wheat	Texas Wheat Producers Association	1971 - 34 counties 1985 - statewide	1/2 cents/bushel
Grain Sorghum	Texas Grain Sorghum Producers Association	1969 - 29 counties 1985 - statewide	8 cents/hundred weight
Mohair*	Mohair Council of America	1976 - 54 counties	4 1/2 cents/pound
Peanuts	Southwest Peanut Growers Association	1969 - statewide	\$1/net farmer stock ton
Pork*	Texas Pork Producers Association	1974 - statewide	.3 of 1 percent of total dollar value of market hogs
Cotton	Scurry County Cotton Producers Association	1984 - 1 county	1/2 cents/pound
Soybean	Texas Soybean Producers Association	1970 - 32 counties	2 cents/bushel
Rice	Texas Rice Council and Texas Rice Research Foundation	1987 - 11 counties	8 cents/hundred weight

*Federal subsidy program, in effect, replaces state program.

Central Administration

Administrative activities which support the entire agency are located in the department's Austin headquarters. In fiscal year 1988, 71 employees worked in the department's central administration. Generally, these activities are divided between the deputy commissioner and the associate deputy commissioner.

The activities which report to the deputy commissioner primarily involve the department's outreach efforts with agricultural constituency groups. These activities include assistance for farmers with problems that do not relate to the department's other programs, such as drought assistance. Other activities that report to the deputy commissioner include the department's district office operations, the office of health and safety, and intergovernmental relations efforts.

The associate deputy commissioner is responsible for the day-to-day operations of the department. The activities which report to the associate deputy commissioner include information services, general services, personnel and EEO, internal audit, management information, planning and evaluation, and financial services.

Central licensing, though not a part of the department's central administration, does provide administrative support for the department's two regulatory programs. The central licensing program has 10 employees involved in processing all licenses which the department issues.

Focus of Review

The review of the department included all aspects of its activities. A number of efforts were undertaken by staff to gain an understanding of the department and its programs. These activities included:

- review of documents developed by the department, legislative reports, other states' and federal reports and books containing background resource material;
- interviews with department staff in the central office;
- visits to district offices, laboratories and an export facility;
- accompanying field personnel on inspections of eggs, weights and measures devices, LP gas tanks, grain warehouses, pesticide dealers and applicators and nursery businesses;
- accompanying marketing field personnel on visits with persons, businesses and organizations that the department works with in the marketing area;
- interviews with other state and federal agency personnel that interact with the department;
- phone interviews with other states' and federal agriculture officials; and,
- meetings with interest groups and individuals affected by the department.

These activities yielded a basic understanding of the purpose and objectives of the department and identification of the many issues affecting its operations.

While a number of issues were identified, the review of the department focused on four general areas. First, continuing need for the department was examined. The assessment of the continuing need for an agriculture department concluded that:

- The department was created in 1907 to encourage and promote proper agricultural development. This purpose has been expanded over the years to also include protecting consumers and the public's interest.
- Almost every state (45 of 50) has an agriculture department.
- Agriculture in Texas is the second largest industry.
- The department's efforts have been instrumental in developing and promoting the agricultural interests of the state. These efforts will continue to be important as Texas works to establish a more diversified economy.

The review concluded that a separate agency is needed to continue the focus and concentration on agriculture in the state. In determining the need for the agency, no attempt was made to address the merits of an elected commissioner versus an appointed commission. This is a political judgment that cannot be determined by staff analysis.

The second area of inquiry related to the transfer of functions from other agencies. During the review certain functions performed by other agencies were identified which could be considered for transfer to the department. The functions of the Texas Forest Service and the Structural Pest Control Board were specifically examined to see whether a transfer were justified. The review of this area indicated the following:

- The Texas Forest Service is part of the Texas A&M University System and is involved in all aspects of forest management. Its activities include assistance to private forest owners, management of state forests, fire control, growing of seed trees and forest research.
- The service also has general forest pest control authority.
- The only direct connection that TDA has with the service is its authority over the types of pesticides used in forest pest control.

During the review it was suggested that the functions of the TFS be transferred to the department. A review of this possibility did not reveal any overlap of functions that could be corrected or any substantial cost savings that could be realized from a merger. Based on these findings, no recommendation was made in this area.

The possibility of transferring the authority to the Structural Pest Control Board (SPCB) to the department was also examined. The SPCB shares

responsibility with the department for regulating pesticide applicators. The board licenses commercial applicators of pesticides for control of pests in and around homes and structures. The Texas Department of Agriculture regulates most other applicators - those using pesticides for agricultural purposes, both commercial (for-hire) and non-commercial. The department also regulates all pesticides used in the state including those used by licensees of the SPCB.

During the review issues were raised regarding the possible duplication of effort between the two agencies and the need to consolidate the regulation of pesticides. Regarding the first issue, some overlap and duplication was identified as both agencies arguably have the same or overlapping authority over certain applicators. This problem is currently being reviewed by the attorney general's office in response to requests for an opinion by both agencies. The attorney general opinion has not been issued, to date, but should provide a clear separation of the two agencies' authority and responsibility.

Regarding consolidation, the SPCB is scheduled for sunset review in 1991 and a decision as to the need for a separate agency to regulate structural pest control operators will be made as part of that review. Also, an interim committee of the legislature, the Special Committee on the Organization of State Agencies, is studying the consolidation of a number of agencies including the SPCB into TDA. Therefore no recommendations were made regarding the merger of SPCB and the department.

The third area of inquiry related to the regulation of pesticides. The review focused on the pesticide program because of the importance of the program, increased public awareness of the environmental and public health risks of pesticides and the fact that recent changes in federal and state law and regulations have caused controversy among the groups and individuals most affected by the changes. The review indicated improvements were needed in several areas. First, the department does not have a routine process in place to ensure that all interests and viewpoints are represented when pesticide regulations are developed and adopted. Because of the difficulty of striking a balance between the different and competing interests a specific structured approach is needed to provide that balance. The review concluded that a committee structure to govern the development of program rules can better ensure that the needed balance is provided. A recommendation to this effect is included in the Findings and Recommendations section of the report.

The review of pesticide regulation also indicated that applicators of restricted-use pesticides need better training before they are allowed to use these more dangerous pesticides. First, certification requirements for private applicators should be strengthened. Private applicators are typically farmers who use pesticides in agricultural production. Current statutes do not require training to ensure that these applicators are competent to properly apply restricted-use pesticides. A recommendation to address this problem is contained in the report. Second, for-hire applicators under the supervision of commercial applicators should also receive standard training to ensure that they can use pesticides properly. Commercial applicators are required to pass a test and be licensed to apply pesticides as a for-hire business. However, individuals under supervision of a licensed commercial applicator do not have to be trained or licensed before they may use the same pesticides. The supervision requirements do not ensure that the assistants applying these pesticides are qualified to do so. A recommendation requiring training and licensing can be found in the report.

The review of pesticides also examined the relationship of the various agencies with responsibility for regulation. The review indicated the following:

- The Texas Department of Agriculture is the lead agency with responsibility over the use of pesticides and most applicators.
- The SPCB, has authority over structural pest control applicators.
- The Department of Health licenses applicators of pesticides for health related control (e.g. mosquito control), has authority over pesticides and other contaminants in food and has responsibility to work with TDA and other agencies to evaluate health risks from pesticides.
- The Texas Water Commission regulates disposal of pesticide wastes as part of its responsibility for hazardous waste disposal. The commission also has overall responsibility for surface and groundwater quality. If pesticides are the cause of water contamination, the commission can become involved.

The review of the interaction of the various agencies involved in pesticide regulation indicated that the jurisdiction and responsibility of these agencies overlap and that difficulties have arisen when the agencies have attempted to resolve problems. Three interagency committees currently exist that can handle jurisdictional problems when they occur. These committees deal with pesticides, toxic substances, in general, and groundwater protection. The agencies mentioned above are included on one or more of these committees. The committees have been used to coordinate the member agencies' activities and to develop joint plans of action. These committees can also be used to work out potential jurisdictional problems, therefore, no recommendation was made in this area.

The final area of pesticide regulation examined during the review was the department's enforcement authority. The department's statute provides a range of enforcement tools to ensure compliance with the state's pesticide law and rules and regulations. The review indicated that the department's administrative and civil penalty structures were inadequate when compared to other state environmental agencies and federal law. Administrative penalties can only be assessed as an alternative to license suspension and cannot be applied to non-licensees. The maximum penalties are also low when compared to federal and other state agencies' authority. Civil penalties are also comparatively low. A recommendation to address these problems is contained in the report. The review of the department's enforcement authority for its other regulatory programs indicated that changes related to civil penalties and injunctive relief were also needed. A recommendation to provide these changes is contained in the report. A related general enforcement concern is also addressed in the recommendations of the report. The department's statutory provisions relating to misdemeanor penalties for all its enforcement programs are out of date and need to be modernized and aligned with the state's current Penal Code.

The fifth area of inquiry related to changes needed in the department's other programs. Several areas were identified where adjustments were needed to improve the department's operations. First, in the administrative area, the review indicated that the department's fee authority needs to be changed. Unlike many state regulatory programs, TDA does not recover a majority of the costs of its regulatory

efforts through fees charged. Also, the department is not mandated by its statutes to recover costs and no systematic review of its fee levels is required. Other fee authority changes identified included the designation of certain fees as non-refundable, additional late fees and creation of new fees in certain areas. Recommendations to address these needs are contained in the report. Other administrative changes identified included the need for specific statutory authority to accept gifts, grants and donations from public and private sources to supplement program funding. Also, the department is not required to conduct a systematic review of commercially available support activities performed in-house to determine the cost benefit of contracting for those services. Recommendations in these two areas are also included in the report.

The second program area reviewed was the administration of the Produce Recovery Fund. The review of the fund focused on changes needed to improve the payment of claims from the fund. The review indicated that the department is unable, in most cases, to pay legitimate claims out of the fund when the licensee involved has been granted bankruptcy. The fund was established to pay producers to help offset losses from bad transactions. This payment is currently prohibited when the licensee has declared bankruptcy. A recommendation is included in the report to address this problem.

The third program area reviewed was the department's inspection efforts. The department conducts inspections to enforce a number of laws for which it has responsibility. The review indicated that the department is required to conduct annual inspections in three programs. In two of these programs, weights and measures and nursery/floral, the annual requirement reduces the department's ability to concentrate enforcement efforts where needed to ensure compliance. A recommendation to remove this requirement is included in the report.

The fourth program area reviewed relates to the department's cooperation and coordination with other agencies which are involved in marketing and outreach, specifically the Department of Commerce (TDOC) and Texas A&M University. With regard to TDOC, the review focused on whether and how the department and TDOC coordinate and cooperate in implementing their programs. The review indicated that the two agencies share responsibility for economic development in the state; however, no formal mechanism exists to define the current division of efforts or to ensure that the level of cooperation which now exists continues in the future. A recommendation which requires a formal agreement in these areas is included in the report.

The review of the department's interaction with Texas A&M University focused on the role of the department and the Extension Service and Experiment Station with the agricultural community and to what extent the agencies cooperate in their outreach efforts. The review also sought to determine whether there were overlap between efforts of the Extension Service and the department's marketing division. The review indicated that a mechanism is needed to ensure that the agencies coordinate their efforts to provide the best assistance and advice possible to the agricultural community. Recommendations to address these problems are contained in the report.

Finally, the review examined the State Seed and Plant Board. The board assists the department in administering the state's seed certification program. The review indicated that several other states also use a separate board to license growers, approve varieties of seed for certification and set seed certification

standards. The review indicated that the expertise provided by the board is valuable and needed. Therefore, the board should be continued to meet the responsibilities for which it was created. Also, the review concluded that a separate sunset date was unnecessary as the board would be reviewed as part of future sunset reviews of TDA.

The recommendations contained in the report would have a net positive fiscal impact of approximately \$1.9 million per year.

Findings and Recommendations

Policy-making Body

ISSUE 1: The department should be required to establish a pesticide committee to approve pesticide rules and regulations.

BACKGROUND

Pesticide regulation has historically been a controversial area with a number of strong interests which need to be heard and considered. Farmers and other agricultural producers, agricultural chemical interests, agricultural workers, environmental interests, public health interests and consumer groups all have strong beliefs and much invested in the issues surrounding pesticide regulations. While all of these groups can agree on the goal of producing quality agricultural goods economically without adversely affecting human health or environmental safety, each of these groups tends to feel that the others give undue emphasis to their own interests without giving adequate consideration to all concerns involved in producing an agricultural commodity.

The review indicated the following:

- ▶ The issues and concerns surrounding the costs and safety aspects of pesticides have grown during the last decade and will likely continue to do so in the coming decade.
- ▶ The department has sought input from interested parties on both an informal and a formal basis. However, some of these efforts were initiated outside the department. Also, no mechanism exists to assure that such efforts will continue and that all interested groups will continue to have equal access to the department's process.
- ▶ In recent years, the department has attempted to use informal meetings with the interested parties, and, in some cases, more formal advisory committees to identify issues and to resolve areas of disagreement among the parties on specific issues. For example, the department has informally consulted with interested groups in developing rules regarding pesticide applicator recertification and rules on the use of Compound 1080 for predator control. In addition, the department established an advisory committee to address issues of pesticide drift after a drift incident in the Panhandle.
- ▶ The department has also established advisory committees that have continued efforts that were initiated outside the department. For example, the department's advisory committee to develop rules for the agricultural hazard communication program has basically the same composition as a committee formed by the Lt. Governor that drafted the legislation for the program.
- ▶ Other advisory committees have been established outside the department to help the department develop pesticide rules and regulations. For example, when TDA developed regulations regarding prior notification of pesticide applications and reentry into fields after pesticide applications, it drew heavily on the assistance and expertise of a citizen's advisory committee in making its original proposals more

workable. However, this committee was not established by the department, but by the Speaker of the House of Representatives in consultation with the chairman of the House Agriculture and Livestock Committee.

- ▶ A survey of 19 states, with characteristics similar to Texas, found that five states -- Alabama, Illinois, North Carolina, North Dakota and Wisconsin -- have established separate advisory bodies to approve pesticide rules and regulations before they may be adopted.

PROBLEM

Because of the number of interested parties and because of their strongly held beliefs, the department can have difficulty balancing the different interests in regulating pesticides. An alternative approach should be developed to provide a balance to assure that the department's process is fair and that interested parties have the same opportunity to participate. The review concluded that a committee structure can provide the needed balance.

RECOMMENDATION

The department's statute should be modified to:

- establish a nine-member pesticide committee within TDA to approve pesticide rules and regulations before they may be proposed and published in the Texas Register.
- specify that membership on the committee include the following persons or their representatives:
 - a person directly involved in agricultural production;
 - a pesticide applicator;
 - a person involved in the agricultural chemical industry;
 - a person directly involved in agricultural labor;
 - a person with a demonstrated interest in protecting the environment;
 - a person involved in consumer issues;
 - the director of the Texas A & M Agricultural Extension Service;
 - the commissioner of the Texas Department of Health; and,
 - the commissioner of the Texas Department of Agriculture.
- specify that members be appointed by the agriculture commissioner, who shall also chair the committee.

Providing a committee to guide the department on pesticide rules and regulations would ensure that a proper balance of interests is obtained during the development and implementation of pesticide regulations.

FISCAL IMPACT

Additional costs would result from expenses incurred by members of the committee as they attend meetings to approve pesticide regulations. Based on one-day, quarterly meetings, the expenses of the committee should not exceed \$10,000 annually.

Overall Administration

ISSUE 2: Fees charged should recover costs within regulatory program areas.

BACKGROUND

TDA administers 49 different laws, the majority of which are regulatory in nature. Many of the laws were developed to assist various segments of the agriculture industry address specific needs, such as the threat of pest infestation and the requirements of interstate commerce. Others are designed to safeguard the public from hazardous chemicals, contaminated food products, or fraudulent business practices. Most of the laws provide for licensure or certification of various segments of the regulated industry as well as an enforcement system of oversight and inspection by the department. Fees to defray the cost of the programs are required of the regulated persons and businesses in most cases.

The review of the department's fee structure and ability to recover costs through fees indicated the following:

- ▶ The department's regulatory division currently generates fee revenue which recovers approximately one-half of its direct costs. Some programs recover substantially less than the 50 percent level while others recover substantially more.
- ▶ The legislature has changed the department's cost recovery in recent years to recover costs of regulatory activities through fees paid by the regulated industries. Nine fees were increased and three new fees were authorized by the legislature in 1985. In 1987, 15 fees were increased above their statutory level and set in the appropriations bill pursuant to legislation passed in 1983 allowing statutory fee levels to be suspended and set at a higher level in the appropriations bill to allow for greater cost recovery.
- ▶ In a few areas, the department's statutes allow it to set fees by rule with the goal of recovering the costs of operating the program. Overall, however, the department has no statutory directive requiring it to recover a certain percentage of its costs through fees imposed on the regulated industries.
- ▶ Given its current fee authority, with maximum levels set in statute in many programs and without fee authority in others, the department cannot recover costs in its programs and cannot equitably distribute costs within programs.

PROBLEM

TDA does not recover a majority of the costs of its regulatory programs through fees imposed on the regulated industries. The department is not mandated by its statutes to recover costs and no systematic review of its fee levels is required.

RECOMMENDATION

The department's statute should be changed to:

- require the department to submit a fee schedule as part of its legislative appropriations request which provides for cost recovery in its regulatory programs as follows:
 - within four years the fee schedule should provide for at least 50 percent cost recovery in each of its programs;
 - subsequent fee schedules submitted should strive toward the goal of 100 percent cost recovery; and
 - specific programs would be exempted from increased cost recovery if the increase was contrary to the purpose of the program.

This change would require the department to determine and submit to the legislature the cost of administering each regulatory program. It would also require the department, by statute, to recover at least 50 percent of these costs, minus the department's overall administrative costs. The department could exempt a program from the requirement if cost recovery would be contrary to the purpose of the program. If the fees currently charged under a program do not result in the recovery of 50 percent of costs and the statutory maximum has been reached, then the legislature, under recently granted authority, could increase them through the appropriations process.

Implicit in this recommendation is the need for the agency to justify the level of fees within program areas. Specifically, the department often conducts numerous inspections or tests as part of regulation required under one law. The department would have to determine and justify in the appropriations process that the costs associated with each activity are properly and equitably allocated among the members of the industry who are impacted by the department's efforts.

For the most part, the specific fee amounts now paid by regulated industries would not be immediately affected since most of the programs currently recover 50 percent of costs. There might be some shifting of fee levels within programs depending on the outcome of any cost allocation analysis undertaken by the department, as discussed above. Several areas were identified where fee increases could be required to ensure 50 percent cost recovery. These included the weights and measures, nursery/floral and seed and grain warehouse programs and the metrology laboratory services.

Finally, this recommendation would require the department to work toward the goal of recovering 100 percent of overall program costs, where reasonable.

FISCAL IMPACT

If a fee schedule is adopted which provides for at least 50 percent cost recovery, revenue will increase by at least \$350,000 annually.

ISSUE 3: Certain license fees should be designated as non-refundable.

BACKGROUND

The department currently issues over 55 licenses and certifications which require payment of a fee to help recover the cost of regulation. Most of these are refundable if the application is unsuccessful even though most or all of the processing has been completed and associated costs have been incurred. In many instances, the processing is solely a clerical function of checking the application for completeness and the related costs are not significant. However, for some applications, a significant amount of time and technical expertise is required to determine whether or not the license or certification should be approved. In these cases, the department is not authorized to retain the fee to cover the costs of investigation. Further, the applications that generally take the most processing time are those where a problem is found. These applications will more likely be rejected or withdrawn and the fee refunded.

The review of the department's refundable fee authority indicated the following:

- ▶ Four non-refundable fees are currently authorized in the department's statutes: registration of plant breeders (\$100), license for pesticide dealers (\$100), testing fee for pesticide applicators (\$20), and \$5 of the fee for an agricultural product broker's license.
- ▶ Seven other areas were identified where the fee could be designated as non-refundable because of the time and technical expertise involved in issuing the registration or license. These are:
 - pesticide registration (\$100): verification that the wording of the label and the chemical ingredients match the EPA-approved label for that product and its uses in Texas;
 - pesticide and herbicide applicator licenses (\$100,\$150): verification of insurance requirements and other information, such as a prior criminal record;
 - nursery/floral certification (\$25-\$150): inspection of facilities;
 - public weighers certification (\$100,\$400): verification of bonds;
 - certified seed grower's license (varies based on acreage): field inspection; and,
 - grain warehouse license (\$75): field inspection to verify the capacity of the elevator and evaluation of the required bond and financial records.
- ▶ In fiscal year 1988, 153 applications were withdrawn and/or rejected in these areas. As a result, over \$18,000 was refunded.

- ▶ A number of other agencies, including the Air Control Board, the Railroad Commission, the Department of Health, and the State Board of Insurance have non-refundable fee authority for examinations and for applications which take a significant amount of time or particular expertise to process.

PROBLEM

The department issues a number of refundable licenses and certifications which require technical expertise and a significant amount of time to process. When an application is withdrawn or rejected, the department must refund the application fee even though technical staff have spent time investigating the requirements for licensure or certification.

RECOMMENDATION

The department's statutes should be modified to:

- designate the following fees as non-refundable because of the time and expense involved in the processing and investigation of the application:
 - pesticide registration;
 - pesticide and herbicide applicator licenses;
 - nursery/floral certification;
 - public weighers certification;
 - certified seed grower's license; and
 - grain warehouse license.

This recommendation would designate certain license and certification fees as non-refundable. The applications which would be affected are those from the areas specified above which are submitted and then withdrawn or rejected by the department.

FISCAL IMPACT

An estimated \$18,800 per year would be kept by the department rather than be refunded if the fees mentioned above are designated as non-refundable.

ISSUE 4: The department's late fee authority should be changed.

BACKGROUND

The department issues over 55 different licenses and certifications. Many represent authority to conduct business in the state, such as the license issued to a commercial pesticide applicator and a grain warehouse operator. One use of licenses or registrations is to administratively track persons or objects (such as scales) regulated by law. Payment of a license fee is required in most cases. However, in only a few cases is the department authorized to penalize the applicant who is delinquent in renewing a registration or license. A late renewal not only causes additional paperwork for the processing staff but hampers the department's ability to maintain accurate records.

The review of the department's late fee authority indicated the following:

- ▶ Six late fees are authorized by the department's statutes:
 - Agricultural Protective Act (APA) licenses (\$25/day)
 - pesticide registration (\$5)
 - pesticide dealers licenses (\$5)
 - combination pesticide/herbicide licenses (\$5)
 - seed inspection fee and permit (\$10 or 10% of fee due)
 - registration of pumps and scales (authorized in 1985 although not yet implemented)

Also, an additional late fee was authorized by the legislature in 1985 for the registration of pumps and scales under the weights and measures program, but TDA has not yet implemented the fee.

- ▶ Additional areas were identified in the statutes where late fees are justified, based on the practical and legal necessity of registrants remaining current with the department. These are:
 - grain warehouse license;
 - egg broker, dealer, wholesaler and processor licenses;
 - pesticide applicator license;
 - herbicide dealer license;
 - nursery/floral certificate; and,
 - livestock protection collar license
- ▶ The department estimates 20 percent of all renewals are late. In some of the areas identified above, such as the egg and grain warehouse programs, late renewals are estimated at 50 percent of total annual renewals.

PROBLEM

The department has authority to charge late fees for licenses and certifications only in a few specified areas. No authority exists in other areas which have a justifiable need for late fees.

RECOMMENDATION

The department's statutes should be modified to:

- require late fees for the following licenses and registrations:
 - grain warehouse license,
 - egg broker, dealer, wholesaler and processor licenses,
 - pesticide applicator license,
 - herbicide dealer license,
 - nursery/floral certificate,
 - livestock protection collar license.
- base the late fee on the following schedule:

<u>Time Elapsed</u>	<u>Late Fee Amount</u>
1 to 30 days	20% of the original fee
31 to 90 days	50% of the original fee
91 to 365 days	100% of the original fee
Over one year	Cannot renew; must reapply

- replace the current late fee authority for pesticide registrations, pesticide dealer licenses and combination pesticide/herbicide licenses with the schedule above.

This change would require the department to charge a late fee when a license or registration renewal is delinquent in the areas indicated above. The late fee would be set as a percentage of the original license or registration fee according to the length of time an applicant is delinquent. The late fee schedule proposed is similar to that for most regulatory agencies, particularly those that have gone through the sunset process, and is based on the schedule provided in the sunset across-the-board (ATB) recommendation on standard time frames for delinquent renewals. The schedule is modified somewhat because of the different, often seasonal, nature of the regulated businesses. Also, the ATB fee schedule is based on examination fee rates; however, with two exceptions, there are no examinations for the licenses involved in this recommendation.

The above late fee schedule would replace the statutory late fees for three of the five currently authorized programs. One exception would be the Agricultural Protective Act where the current penalty is \$25 per day. Failure to renew a license under the APA prevents the provisions of the act from being activated because the broker's license must be current before a claim against the licensee can be paid. The higher late penalty is justified in this case. The other exception would be the seed inspection fee and permit. Because the fee is based on the number of inspected acres and the time period for inspection is short, the late fee schedule above would not be appropriate.

All renewal notices would forewarn applicants of the penalty and all invoices subsequent to the original renewal notice would include the late fee in the total amount due to the department.

FISCAL IMPACT

Based on current delinquency rates, an estimated \$413,000 in additional revenue would be generated from additional late fees. This figure should decline as the late fees charged encourage more timely renewals.

ISSUE 5: The department needs new fee authority in certain areas.

BACKGROUND

The department's regulatory and marketing staff conduct investigations and perform other activities for which certain industries or individuals benefit but for which there are no fees authorized in statute. As part of the effort to increase overall cost recovery, the department's activities were examined for the purpose of identifying new areas where fees could be reasonably charged.

The review of the possible new fee areas indicated the following:

- ▶ Some activities were identified, such as the imported fire ant management program, which can be argued to serve the public overall and should, therefore, not be the burden of specific individuals or a particular industry.
- ▶ In other areas, such as the department's direct marketing or agricultural development programs, the imposition of a fee would run contrary to the purpose of the programs and would also be difficult to allot equitably among all who benefit.
- ▶ Several areas were identified where agency personnel perform activities for which fees are not authorized but for which at least some costs can justifiably and equitably be recovered from those persons who benefit. These possible new fee areas are as follows:
 - Authority to charge for laboratory analyses requested by farm groups or individuals on a walk-in basis. In fiscal year 1988, 792 walk-in requests were made for tests for pesticide residue, milk butterfat content and protein analyses. Other state-funded laboratories, universities and several river authorities, charge for walk-in analyses requests;
 - Authority to charge a fee for certification under the newly-established organic and lean beef certification programs. Under these programs, producers who raise organic crops and livestock or who sell beef with a specified standard of leanness are certified by the department. Certification involves inspection and approval of production methods used by the applicant. Once certified, the producer may use the TDA "certified organic" and the forthcoming "lean beef" logos on their packaging and in their marketing efforts;
 - Authority to charge a fee for participation in the "Taste of Texas" and "Texas Grown" programs. Membership is limited to those products which are grown in Texas or made from Texas-grown ingredients. The department currently has 570 participants in the TOT program and 595 in Texas Grown. Department marketing personnel promote Taste of Texas and Texas Grown

products in retail outlets and in the media. Also, Taste of Texas members are eligible to participate in the out-of-state food shows organized by the department's promotional marketing staff.

- ▶ The activities identified above should have fees authorized to allow the department to recover at least a portion of the costs to the department of running the programs. However, full cost recovery is not contemplated because it could be contrary to the purposes of these programs.

PROBLEM

Certain activities undertaken by the department benefit particular industries or individual producers and ranchers for which the agency is not authorized to charge fees to recover any costs.

RECOMMENDATION

The department's statutes should be modified as follows:

- create fee categories for certain laboratory analyses, participation in the department's new organic and lean beef certification programs and membership in the Taste of Texas and Texas Grown programs.
- structure the fee authority as follows:
 - Laboratory analyses for walk-in requests:

A range of \$5 - \$150 per analysis should be set in statute. The specific fee for each type of analysis would be set by the department in rules at an amount necessary to recover at least 50 percent of the cost of running the analysis.
 - Organic and lean beef certification:

A statutory limit of \$150 should be set in statute. A fee would be imposed by rule to recover the cost of the inspection required for certification.
 - Taste of Texas and Texas Grown membership:

A statutory limit of \$50 should be set in statute. A fee would be established by rule which reasonably recovers the costs of publications and other promotional materials.
- fees for organic and lean beef certification and Taste of Texas and Texas Grown membership should be set by the department at levels sufficient to recover a reasonable percentage of the department's costs but not so high as to harm the overall purpose of the programs.

This change would require TDA to levy fees for certain programs where fee authority is not currently available. The fees charged would be set to recover a reasonable percentage of the costs to the department from those individuals and businesses which receive the service. Fees for laboratory services should be set using the guidelines for cost recovery outlined in Issue 2. The fees charged in the organic and lean beef certification and Taste of Texas and Texas Grown programs should be set so that smaller farmers and businesses can continue to participate.

FISCAL IMPACT

An estimated \$60,000 in additional fee revenue would be generated by this recommendation.

ISSUE 6: The department needs statutory authority to accept gifts, grants and donations.

BACKGROUND

The department has indicated that support from public and private sources is available to the agency and would supplement funding the department receives from fees and general revenue. The areas of support range from the sponsoring of conferences, meetings, and seminars for marketing and agricultural development to gifts grants, and donations that can be used to fund demonstration projects such as the Texas-Israel demonstration farm in Laredo.

The review indicated the following:

- ▶ Current state policy allows agencies that are authorized under the appropriations act to accept gifts and grants to do so if they also have specific authority in their statute to accept gifts grants, and donations. Examples of state agencies authorized in both the appropriations act and in their enabling statutes to accept gifts, grants, and donations include the Commission for the Deaf, the Commission for the Blind, the Aeronautics Commission, and the Adult Probation Commission. The Land Commissioner, who is an elected official, is also authorized to accept gifts and grants.
- ▶ Rider number eighteen in the department's current appropriations bill pattern authorizes the department to accept and expend gifts, grants, and donations for the purpose specified by the donor, provided that it is consistent with the statutory purposes of the department. Currently, the agriculture commissioner has statutory authority to accept gifts and grants to help provide funding for projects approved under the department's agricultural diversification program. The Agricultural Finance Authority Board, one of TDA's advisory committees, is also authorized in statute to accept gifts which are to be used to help provide financing for agricultural projects approved by the board. Finally, the Fire Ant Advisory Board, another advisory committee under the department, is authorized to accept gifts and grants to support research projects regarding fire ant control and eradication. However, the commissioner is still prohibited from accepting gifts and grants for other department programs because it lacks specific statutory authority to do so.
- ▶ The department indicates that this authority would have allowed the department to receive between \$300,000 to \$400,000 in donations on an annual basis.

PROBLEM

The department cannot accept gifts, grants and donations from public and private sources for most of its programs because it lacks specific statutory authority to do so.

RECOMMENDATION

The department's statute should be amended to:

- provide specific statutory authority to the department to accept gifts, grants and donations for use in all its programs.

This authority would allow the agency to supplement its efforts, especially in the areas of marketing and agricultural development, with resources from sources other than general revenue. The manner in which gifts, grants, and donations would be accepted and expended would be controlled by a rider similar to rider number eighteen, which is in the department's current appropriations bill pattern.

FISCAL IMPACT

Authorizing the department to accept gifts and grants would provide the department with additional financial and non-financial support. This support could represent an additional \$300,000 to \$400,000 per year in program support.

ISSUE 7: The department should initiate a review of commercial activities performed in-house.

BACKGROUND

The department, like many state agencies, performs certain support activities that are commonly available through the private sector. These services include, for example, warehousing, printing, and data processing. In the last legislative session, a process was established to help agencies determine whether in-house provision of commercially available services was advantageous, based on cost as well as quality, when compared to contracting for those services in the private sector. This process is known as "competitive review" and is modeled after a program which is used by the federal government.

The federal competitive review process requires governmental agencies to: identify the commercial activities they perform; determine the cost of performing the activity in-house; and, accept competitive bids on those activities from the private sector. The activity can be retained in-house if the agency can provide the service at a cost which is less than the total cost of contracting for the service given the same level of quality. In the past nine years of operations, the federal government estimates that this requirement has reduced costs by an average of 20 percent.

This process is still in the early stages of implementation in Texas. As a result, the program has been limited to three major state agencies and has been focused on certain management and support services. In this way the program can be refined and limited to agencies that have considerable experience with contracting. Three agencies, the Texas Department of Mental Health and Mental Retardation, the Texas Department of Human Services and the Texas Department of Corrections were required by the legislature in 1987 to participate in the competitive review process. The process requires these agencies to determine the cost of certain commercially available activities performed in-house and compare the cost with the cost of purchasing those services. The agency is required to bring its costs in-line with those of the private sector if significant differences are found. The agencies required to participate in the review process are currently implementing procedures to perform the cost comparisons.

The review of the department's activities which are commercially available indicated the following:

- ▶ The department currently contracts for a variety of commercial services such as printing, janitorial services, maintenance, laundry, transportation and media services. These contracts primarily provide support services for the department's field offices and cost approximately \$270,000 per year.
- ▶ The department also performs many of these same activities in-house which would be appropriate to consider for competitive review. Commercial activities currently performed in-house include data processing, mail handling, warehousing, printing and media services.

These activities are located in Austin supporting the department's central office at a cost of approximately \$1,700,000 per year.

- ▶ The department has studied and pursued opportunities to contract for services currently provided in-house; however, there is no formal requirement in the department's statute which requires a cost review.

PROBLEM

The department performs several support activities in-house which are available through the private sector. These activities include data processing, mail handling, warehousing, printing and media services. While the department has contemplated contracting for these services, there is no requirement for a cost review.

RECOMMENDATION

The department's statute should be changed to:

- require the establishment of a competitive review process for commercially available support activities; and
- phase in the department's responsibility by limiting the review to warehousing and mail handling during the first two years.

This change will require the department to determine the cost of performing certain support activities in-house and accept competitive bids from the private sector. The process will require the department to bring its cost in-line with those of the private sector if significant differences are found. Including the department in the newly-established competitive review process will trigger a systematic review of certain support activities to decide whether there are advantages to contracting with private businesses for those services. Limiting the department's responsibility in the first two years will allow time to adequately develop and refine procedures.

FISCAL IMPACT

Cost savings are expected once the review process is implemented. However, some initial costs are likely to establish a cost estimate system and a bidding process.

Pesticide Regulation

ISSUE 8: Certification requirements for private applicators should be strengthened.

BACKGROUND

Private applicators are typically farm operators who use or supervise the use of pesticides for the purpose of producing an agricultural commodity. By statute, private applicators do not have to be licensed or certified to use certain, more dangerous pesticides, known as "restricted-use" or "state-limited-use" pesticides. These pesticides are those that the EPA or TDA has determined need additional regulation to prevent injury to applicators or damage to the environment. Safe use and handling of these pesticides cannot be assured through label requirements alone.

Because these pesticides are inherently toxic, applicators have a special responsibility to the public and to the environment to use them safely. For this reason, the federal government requires applicators--including private applicators--to be certified and show that they are competent to use restricted-use pesticides. The department has established a "voluntary" program for certifying private applicators to comply with the federal requirements. However, this voluntary program contradicts state law which specifically exempts private applicators from licensing or certification.

The review of the department's private applicator certification activities indicated the following:

- ▶ The department has established a "voluntary" program to comply with federal requirements that private applicators be certified before they can use restricted-use pesticides. However, this voluntary program contradicts state law which specifically exempts private applicators from licensing or certification.
- ▶ To be certified by the department, a person may either complete a home, self-study course using materials developed by the Texas A & M Agricultural Extension Service (TAES) or attend a three and one-half hour training session conducted by TAES. The Extension Service estimates that 95 percent of the persons seeking certification as private applicators do so through the home, self-study course. Because most training is self-directed, the department and the Extension Service cannot be sure that private applicators actually learn to use dangerous pesticides safely.
- ▶ Upon completion of the course or the training session, applicants must answer a questionnaire to show that they have completed the course. However, applicants are not tested to determine comprehension of the material covered. A survey of other states shows that 44 states provide for the testing of private applicators at least as an option for initial certification. Of these states, 30 require the testing of private applicators.

- ▶ The department estimates that 150,000 people are currently certified as private applicators, though it does not know how many of these are currently active applying pesticides because recertification is not required. Approximately 5,000 private applicators receive initial certification each year.
- ▶ Private applicators do not have to comply with the same regulations that are placed on licensed commercial and non-commercial applicators who use the same restricted-use and state-limited-use pesticides. In addition to the lack of testing requirements, private applicators do not have to pay a fee to obtain certification as do licensed applicators, even though they apply most of the restricted-use pesticides in the state. Such fees are used to help cover the costs of regulation. Private applicators account for about a quarter of the department's pesticide enforcement activities.
- ▶ Private applicators do not have to be recertified, as the department has recently proposed for licensed applicators. The department's proposed regulations would require commercial and non-commercial applicators to be recertified every three years and receive a certain amount of continuing education to be recertified. However, the proposed rules do not address the recertification of private applicators. Texas and Arkansas are the only states that do not have plans to recertify private applicators.

PROBLEM

Current statutory provisions related to private applicators do not require training and certification to ensure that these applicators are competent to properly use more dangerous restricted-use pesticides.

RECOMMENDATION

The department's statutes should be modified to:

- strengthen the certification requirements of private applicators as follows:
 - require private applicators to attend a training session conducted by TAES before they can be certified to use restricted-use and state-limited-use pesticides. The option for home, self-study would be eliminated. Private applicators would not be required to pass an examination for certification. The Extension Service would be responsible for certifying that each applicant has completed the necessary course work and would forward this information to TDA, which would issue the certification and maintain records on each certified private applicator;

- apply the certification requirement immediately to all new applicants for private applicator certification. Existing private applicators would be required to be recertified within five years;
- require continuing education at least every five years to achieve recertification, similar to the department's proposal for recertifying other applicators;
- require private applicators should be to pay a \$10 annual certification fee to defray training and related enforcement costs; and
- require the department to coordinate with TAES through a memorandum of understanding to implement the training requirements in this recommendation. The agreement between TAES and TDA would include procedures for sharing fee revenue generated from private applicator certification; a plan for certifying existing private applicators within five years; and, a plan for recertifying private applicators.

This change in certification will ensure that private applicators receive training on a periodic basis to be certified to apply restricted-use pesticides. The recertification of private applicators is as important as the recertification of other licensed applicators. Recertification is needed to keep these applicators up to date with changes in both the technology of pesticide applications and the requirements of pesticide laws and regulations. Recertification would also assure that applicators receive the latest information regarding the risks and the safe use and handling of pesticides. These applicators will be required to receive this training from the Extension Service, which has a program in place, instead of being allowed to self train through a home study course. The Extension Service has indicated that, with adequate funding, it has the capability to provide the needed training. Recertification will be provided in the same manner as the department's plans for all other applicators. The training requirements will not place an undue on persons needing certification because the extension service has county agents in all but two counties in the state which will make the training readily available. The \$10 certification fee which would be assessed, is consistent with fee amounts for private applicator certification in other states. Annual payment of this fee is needed to offset not only the cost of training but also the ongoing cost of enforcement.

FISCAL IMPACT

Requiring private applicators to receive formal training would increase the costs incurred by TDA and TAES, but any additional costs should be offset by the additional revenue from the \$10 annual fee certification fee which would generate approximately \$800,000 per year. Also, because the mechanism for providing this training is already in place, no additional development costs would result. The revenue generated will be used to offset the cost of this recommendation and pay for other costs related to regulation of private applicators.

ISSUE 9: For-hire applicators under the supervision of commercial applicators should be licensed.

BACKGROUND

For-hire applicators are generally commercial applicators who operate a business to apply pesticides to someone else's land for compensation. The statute requires commercial applicators to pass a test and be licensed to apply restricted-use and state limited-use pesticides. In fiscal year 1988, TDA licensed 1,433 commercial applicators. However, individuals under supervision of a licensed commercial applicator also apply restricted-use pesticides but do not have to be licensed or certified.

This provision reflects federal law which allows individuals who are not licensed to apply pesticides under the direct supervision of a certified applicator. However, the EPA has recently proposed regulations which would strengthen federal requirements on supervised applicators. The proposed regulations include protection standards for applicators and other workers in the pesticide business who may be exposed to pesticides on the job. Also included in the proposed standards is a requirement that these workers receive training in pesticide use and safety.

The review of the department's activities involving persons under the supervision of commercial applicators indicated the following:

- ▶ Persons under the supervision of commercial applicators do not have to be trained or tested in the safe use and handling of more dangerous restricted and limited-use pesticides. These pesticides are those that the EPA and the department have placed restrictions on because application following label requirements alone is not considered adequate to protect public health or the environment.
- ▶ The department does not have an estimate of the number of individuals applying pesticides under the supervision of a commercial applicator. However, if each of the 1,433 commercial applicators has two applicators under supervision, there would be approximately 3,000.
- ▶ These individuals may apply restricted-use pesticides if they are acting under the instructions and control of a certified applicator who is responsible for the actions of the individual and who is available "if and when needed." The supervising applicator does not have to be physically present when pesticides are being applied. These requirements do not guarantee that supervised applicators know what is necessary to handle and use pesticides safely. Improper application of these pesticides could result in damage to crops and the environment but, most importantly, could endanger someone's health. Training is needed to ensure the competence of these supervised applicators before they are allowed to use restricted-use pesticides.

- ▶ The department's enforcement efforts are impaired because it is limited in its ability to take action against unlicensed applicators. Although this problem relates to the more general issue of taking enforcement action against unlicensed persons addressed elsewhere in this report, additional problems result because supervised applicators are not licensed. Persons applying pesticides under the control of a commercial applicator do not have to be registered with the department or comply with other requirements placed on licensed commercial applicators. No fees are imposed to cover the cost of related enforcement efforts, even though the department estimates that problems with supervised applicators account for almost 20 percent of the enforcement actions against commercial applicators.
- ▶ The legislature addressed a similar concern with supervised applicators during the 70th legislative session when it strengthened regulatory controls on individuals who use pesticides under the supervision of certified applicators regulated by the Structural Pest Control Board. The legislature removed a provision in the board's statute that allowed unlicensed persons to apply pesticides to structures under the supervision of a licensed applicator. The applicators are now required to be "licensed technicians" and must satisfy a required amount of training before they may be licensed.
- ▶ An EPA survey of state pesticide programs shows that ten states have established programs for training persons using restricted-use pesticides under the supervision of certified applicators.

PROBLEM

The statute does not give TDA authority to ensure that all individuals who apply pesticides for hire are qualified to do so. Current supervision requirements are not sufficient to ensure that applicators working "under supervision" are adequately trained.

RECOMMENDATION

The department's statute should be modified to:

- remove the provision that allows unlicensed individuals to use pesticides as part of a business under the supervision of a commercial applicator. These individuals should be required to receive training to become "licensed technicians" before they may apply pesticides;
- require trainees to receive both formal training provided by the Texas A&M Extension Service and at least ten hours of verifiable on-the-job training before they may be licensed as technicians;

- require licensed technicians to pay an annual licensing fee to defray training and related enforcement costs and require them to be recertified through re-training in the same manner as the department will recertify other applicators. This fee should be set by the department at an amount, not to exceed \$30, to recover costs; and
- require the department and the Extension Service to develop a memorandum of understanding to implement the training requirements in this recommendation. This agreement should include details regarding training required to become a technician in each commercial use category; plans for licensing all persons currently under the supervision of commercial applicators; and procedures for sharing licensing fee revenue generated as a result of this recommendation.

These changes would require applicators working for a licensed commercial applicator to receive training and licensing as a technician. This requirement is similar to the change made to the Structural Pest Control Act and would ensure that all applicators working for hire receive training before they can use more dangerous restricted-use pesticides on someone else's land.

The Extension Service would provide training through its established training programs. Training would be provided in each commercial use category, such as field crop or fruit and vegetable pest control or predatory animal control. The Extension Service has indicated that, with adequate funding, it could provide the training needed. Licensed commercial applicators would be responsible for ensuring that technicians working for them receive at least ten hours of on-the-job training in each area of pesticide use in which the technician will work.

The annual fee of \$30 is the same amount which the Structural Pest Control Board is authorized to charge licensed technicians. This amount is necessary to cover the costs of the more specialized training that these technicians must receive in the different types of commercial applications. The fee is also necessary to cover the costs of enforcement efforts against these applicators who apply pesticides as part of a business.

FISCAL IMPACT

Requiring individuals under the supervision of commercial applicators to receive formal training to become licensed technicians would increase the costs incurred by the Extension Service, but any additional costs should be mitigated by the additional revenue from the annual licensing fee. Because the mechanism for providing this training is already in place, the additional impact on the Extension Service would be limited to providing the actual training. The \$30 annual fee would generate an estimated \$90,000 annually, which will be used to offset the cost of this training and costs of the department related to the regulation of persons applying pesticides under the supervision of commercial applicators.

Produce Recovery Fund

ISSUE 10: The department should have the authority to pay claims involving bankruptcy.

BACKGROUND

The department administers the Texas Agricultural Protective Act which helps protect producers of citrus and vegetables from financial loss when a credit transaction with a licensed produce broker goes bad. Brokers and handlers of these agricultural products who transact business on credit are required to be licensed and pay an annual fee (\$50 to \$100) into the Produce Recovery Fund. Currently 460 licensees pay the annual fee which generated \$ 113,000 in 1988. The fund is used to at least partially pay a producer if a licensed broker fails to make good on a transaction. Approximately \$160,000 was paid out of the fund in 1988 and the fund balance as of September, 1988 was approximately \$114,000.

Producers may file a claim against the fund if a licensee fails to pay for Texas-grown fruit or vegetables bought on credit. The department investigates the claim and determines the amount, if any, that should be paid out of the fund. Disputes regarding the department's findings are settled by a six member independent board appointed by the governor. Payments are made as follows: full amount up to \$1,000; 60 percent of the amount over \$1,000; \$20,000 maximum for all claims from the same transaction; and, \$50,000 against a licensee in any one year.

The review of the Produce Recovery Fund indicated the following:

- ▶ The average claim amount that has been paid over the last ten years has been approximately \$8,000.
- ▶ In 1988, 69 claims were filed against the fund. Thirteen claims, mostly from previous years, were paid totaling approximately \$160,000.
- ▶ Once a claim is paid out of the fund the licensee involved must repay the fund or lose his or her license for a period of four years. The only exception to this requirement occurs when the licensee involved declares bankruptcy. If bankruptcy is filed for while a claim against the fund is being processed, the claim is suspended until a decision is made.
- ▶ Bankruptcy, if approved, prevents the department, in most cases, from paying a claim. Current law requires repayment once a claim is paid out of the fund and, with bankruptcy, a licensee cannot be required to repay a claim. If bankruptcy is approved, then the licensee is not required to repay the fund as this debt, along with most others, is excused. Since repayment is not possible, it is questionable whether the department can legally pay the claim. The Attorney General's office has indicated that the department should not pay claims that fall into this category.
- ▶ The department currently pays a claim involving bankruptcy if a decision on the claim was made before bankruptcy was filed. A claim is

also paid if the claim is filed after bankruptcy has been declared and the federal bankruptcy court authorizes payment of the claim in its judgment. In the last two years two claims totaling \$10,040 and seven claims totaling \$49,156 were paid under these two scenarios, respectively.

- ▶ The department currently has 40 claims that are pending because the licensee involved has filed for bankruptcy. The department has been given approval by a bankruptcy court to pursue nine of these claims. The other 31 claims cannot be pursued by the department at this time because of bankruptcy.

PROBLEM

The department is unable, in most cases, to pay legitimate claims out of the Produce Recovery Fund when the licensee involved has been granted bankruptcy. The fund was established to pay producers to help offset losses from bad transactions and payment should not be denied because the licensee involved declares bankruptcy.

RECOMMENDATION

The department's statute should be changed to:

- authorize payment of legitimate claims out of the Produce Recovery Fund regardless of whether the licensee involved has been granted bankruptcy.

This change would allow the department to pay claims even if repayment is not possible because the licensee has been relieved of the debt through bankruptcy. Repayments to the fund currently amount to less than ten percent of all claims that have been paid from the fund. Therefore, payment of claims with no repayment possibility will not substantially affect the fund's balance.

FISCAL IMPACT

This change would allow the payment of an estimated three additional claims per year. If three claims are paid based on the average claim amount of \$8,000 mentioned earlier, an additional \$24,000 per year would be paid out of the fund. The claims currently pending because of bankruptcy total approximately \$200,000 that could be paid from the fund if all the claims are justified and the full amount allowable on each claim is actually paid. No determination could be made as to the legitimacy of the claims because processing and investigation is suspended until a bankruptcy decision is made. However, based on the percentage of claims filed versus actually paid, about \$30,000 could be expected to be paid on the claims currently pending because of bankruptcy. Because of the low repayment percentage for claims, payment of claims involving bankruptcy, with no repayment possibility, will not substantially affect the solvency of the fund.

Inspections

ISSUE 11: Annual inspection requirements should be removed.

BACKGROUND

The department conducts inspections to enforce a number of laws for which it has responsibility. Major efforts occur in the weights and measures program, seed and grain warehouses, nursery/floral, eggs, citrus, fire ants and pesticide regulation.

The review of the department's inspection efforts indicated the following:

- ▶ In three of its programs, weights and measures, grain warehouses and nursery floral, the department is required by statute to conduct an annual inspection of all devices or businesses.
- ▶ The annual requirement is justified only in the grain warehouse program. The nature of grain warehouse businesses and the type of inspection performed requires at least an annual check although inspectors often check them more frequently.
- ▶ The requirement for annual inspections in the weights and measures and nursery/floral programs reduces the effectiveness of the inspections. The annual requirement places priority on finishing all the inspections every year rather than concentrating on problem areas, large businesses and areas where activity or devices are concentrated.
- ▶ The department has been unable to achieve more than a 80 percent completion rate in either program for the last two years. The department estimates that an additional 35 inspectors at a cost of over \$1 million would be required to approach a 100 percent completion rate.
- ▶ The department has already begun developing plans to target its inspection efforts despite the annual requirement. These plans provide for inspection of all weights and measures devices at least every other year. Also, larger nursery/floral businesses such as growers will be checked annually and all other permanent establishments will be inspected at least once every other year.

PROBLEM

The department is required to conduct annual inspections in its weights and measures and nursery/floral programs which reduces its ability to concentrate efforts where needed to ensure compliance.

RECOMMENDATION

The department's statutes should be changed to:

- remove the annual inspection requirement for the weights and measures and nursery/floral programs; and
- allow the department to conduct inspections to the extent necessary to ensure compliance.

This change will provide the department with flexibility that is currently available in most of its other programs. This flexibility will allow the department to target its inspection as necessary to ensure compliance. Trouble spots such as repeat violators will be checked more frequently. Under the targeting plans currently being developed and implemented, every business or device will be inspected at least every other year with more frequent spot checks possible. Larger businesses and areas of concentrated activity will be checked annually.

FISCAL IMPACT

Removal of the annual inspection requirement should allow the department to effectively deal with its weights and measures and nursery/floral programs without any additional funding for inspection personnel which would have been needed to meet current statutory annual inspection requirements.

Enforcement Authority

ISSUE 12: Administrative and civil penalty authority relating to the pesticide program needs to be changed.

BACKGROUND

TDA is responsible for regulating the agricultural use of pesticide in the state. The department's statute provides a range of enforcement tools to ensure compliance with the state's pesticide law and rules and regulations. These include the authority to suspend, revoke, or modify a license; issue stop-sale orders; assess administrative penalties; seek criminal action on the local level; and seek injunctive relief and civil penalties through the attorney general's office. Of the monetary penalties available to the department, administrative penalties are the most used. Under TDA's statute, the department can assess an administrative penalty in lieu of a license suspension. The administrative penalty for violations of the pesticide law and regulations is a minimum fine of \$25 and a maximum of \$50 per violation, per day. Regarding civil penalties, the department can refer cases to the attorney general's office to seek a maximum civil penalty of \$1,000 per day, per violation for violations of the pesticide law.

The review of the agency's administrative and civil penalty structure indicated the following:

- ▶ Administrative penalties have been used frequently in the pesticide program. In fiscal year 1987, administrative penalties were assessed eight times for pesticide violations for a total of \$9,175 in fines .
- ▶ The department's administrative penalty structure, as it relates to violations of the pesticide law, is significantly different from the authority available to other state and federal environmental agencies. These agencies assess administrative penalties separately or in conjunction with other enforcement activities. TDA can assess an administrative penalty only in lieu of license suspension.
- ▶ One state environmental agency, the Texas Air Control Board, can assess an administrative penalty against violators that are unlicensed as well as licensed. The department can assess an administrative penalty only in cases involving a licensed violator.
- ▶ For most environmental agencies, the maximum administrative penalty is significantly higher than the department's penalty for violations of the state's pesticide laws. The Texas Air Control Board, the Texas Department of Health, and the Texas Water Commission are authorized to assess a maximum administrative penalty of \$10,000 per violation, per day. Federal law provides a maximum administrative penalty for violations of federal pesticide laws of \$5,000 per violation, per day.
- ▶ The maximum civil penalty available to the department is also low when compared to the civil penalties found in the statutes of other state environmental agencies. For example, the Texas Air Control Board, the Texas Health Department and the Texas Water

Commission have maximum civil penalties of \$25,000 per violation, per day for violations of air quality and waste disposal laws, respectively. The Texas Water Commission has a maximum civil penalty of \$10,000 per violation, per day, for violation of water quality laws.

- ▶ Under the current civil penalty structure, the department has not referred many cases to the attorney general's office for civil penalty consideration. Currently only nine cases are on file with the attorney general's office. To date, none have been prosecuted. Discussions with the attorney general's office indicated that it does not seek civil penalties in the majority of pesticide cases because prosecution is not cost effective given the costs of investigating a case versus the low maximum penalty amounts provided in statute.

PROBLEM

The department's administrative and civil penalty structures, in the area of pesticide regulation, are inadequate when compared to other state environmental agencies and federal law. Administrative penalties can be assessed only as an alternative to license suspension. The penalty can only be applied to violators who are licensed, not to unlicensed individuals found in non-compliance. The administrative penalty for non-compliance with the pesticide program is quite low when compared to other state agencies' authority and federal law. The current maximum civil penalty is also significantly lower than the maximum penalty available to other state environmental agencies. The lower maximum civil penalty amount, as it relates to violations of the pesticide law, makes it difficult for the attorney general's office to prosecute pesticide cases in a cost effective manner.

RECOMMENDATION

The department's pesticide law should be changed to:

- authorize the use of administrative penalties independently or in conjunction with other enforcement actions;
- authorize the use of administrative penalties against any violator, licensed or unlicensed;
- increase the maximum administrative penalty amount to \$5,000 per violation, per day for violations; and
- increase the maximum civil penalty amount to \$10,000 per violation, per day.

These changes would provide the department with administrative and civil penalty authority for pesticide enforcement similar to that of other state environmental agencies and the federal government. The increased administrative penalty amount is the same as current federal limits regarding violations of the federal pesticide laws. The increased civil penalty amount is the same as current limits provided for violation of the state's water quality laws and would allow the attorney general's office to prosecute pesticide cases in a more cost effective manner.

FISCAL IMPACT

The increased ability to apply administrative penalties and the higher administrative penalty amounts would provide additional revenue to the department of approximately \$90,000 annually. The higher civil penalty amounts should provide additional revenue to the state of approximately \$10,000 per year.

ISSUE 13: Increased enforcement powers are needed in certain regulatory programs.

BACKGROUND

TDA is responsible for administering several regulatory programs including the weights and measures, egg, Agricultural Protective Act (APA) and pest management programs. The weights and measures program is designed to protect the consumer from economic losses caused by inaccurate pumps and scales and by improperly weighed and labeled packaged commodities. The egg program protects consumers from monetary losses and health risks due to improperly graded and poor quality eggs. The APA program gives fruit and vegetable farmers protection from economic losses caused by bad credit transactions with licensed produce brokers and handlers. The department's pest management program is responsible for developing strategies to help farmers, ranchers and urban residents to prevent or control pest and plant diseases. This program includes regulation of the nursery/floral industry and enforcement of pest and disease control quarantines. The pest management program also involves the enforcement of quarantines designed to protect Texas agriculture from destructive pests and plant diseases.

TDA has the authority to seek criminal penalties (Class B and C misdemeanors) for violations of the weights and measures, egg laws and regulations. The department is also authorized to use stop-sale orders and out-of-order tags in cases of non-compliance involving the weights and measures and egg laws.

Under the APA program, the department is authorized to use misdemeanor penalties (Class B misdemeanor) to force vegetable and fruit brokers to comply with program's licensing requirements.

The department has the authority under the pest management statutes, specifically in the nursery/floral law, to revoke certificates in response to violations of the nursery/floral law. The department also uses stop-sales in cases of non-compliance with nursery/floral law even though it lacks specific statutory authority to enforce them. In addition, the department can seize nursery or floral products and order that they be treated or destroyed when evidence of infestation or disease is discovered. Finally, the department can seek criminal penalties (Class C misdemeanor) under the nursery/floral program for violations of the nursery/floral law. Under the department's quarantine laws plant material can also be seized and ordered treated or destroyed if found infested with a pest or disease. The department can also seek criminal penalties (Class C misdemeanor) and a civil penalty (\$500 per violation, per day) against carriers of plant materials found in non-compliance with the states quarantine laws.

The review of the department's current enforcement authority in these programs indicated the following:

- ▶ Most state regulatory agencies have a sufficient range of enforcement powers including general civil penalty authority and the authority to seek injunctive relief to ensure compliance. Sunset reviews of regulatory agencies have included an examination of their

enforcement powers. Additional enforcement powers have been recommended in previous reviews of regulatory agencies if the current enforcement structure lacked certain powers needed to ensure compliance.

- ▶ The current enforcement structure for weights and measures and the egg programs is not sufficient to ensure compliance. Misdemeanor penalties have not been an effective tool in both of these programs. Local prosecutors are reluctant to prosecute violations because the penalties are low (Class C and B misdemeanors) and the standard of proof needed for convictions in criminal cases is often difficult to obtain in these types of cases. The department has indicated that its other enforcement tools -- stop-sales and out-of-order tags -- also are not always effective. In the weights and measures program businesses often ignore out-of-order tags. In the egg program, stop-sale orders do not encourage repeat offenders to comply with the program. When non-compliance with out-of-order tags and stop-sale orders occurs in the weights and measures and egg programs the only recourse available to the department is to seek criminal prosecution as mentioned above. The department currently lacks the ability to seek civil penalties or injunctive relief in these programs.
- ▶ Misdemeanor penalties used to enforce the Agricultural Protective Act have also been ineffective. The APA program is intended to protect fruit and vegetable farmers from economic loss due to bad credit transactions, but this law only works if brokers and handlers are properly licensed. Under statute, brokers involved in credit transactions with farmers who grow fruits, vegetables and nuts must be licensed by the department and contribute to the Produce Recovery Fund. In the event of a bad transaction, a farmer can file a claim for payment under the fund. Ensuring that individuals involved in these transactions are licensed is important because unlicensed brokers do not contribute to the fund and, therefore, claims can not be paid out of the fund. Approximately twenty percent of the claims filed in the last two years have been against unlicensed or improperly licensed individuals and have been rejected for consideration of payment. This number provides an indication that a number of brokers are operating without a license. The department indicated that misdemeanor penalties have not been a deterrent to unlicensed activity for the same reasons mentioned previously in the weights and measures and egg programs. The department lacks the authority to seek civil penalties or injunctive relief as an alternative to seeking criminal penalties.
- ▶ The enforcement structure used to force compliance with the nursery/floral and quarantine programs also suffers from some of the same problems found in the programs mentioned earlier. Nursery/floral establishments also often ignore stop-sales order or refuse to accept stop-sale orders issued under the nursery/floral program because the department is not specifically authorized to issue them. When this occurs the department can only require that the product be treated or destroyed if infestation or disease is found, revoke the establishments certificate of inspection or seek criminal penalties. Criminal penalties have not been an effective enforcement tool for the same reasons they have been ineffective in the weights and

measures, egg, and APA programs. In addition, if these enforcement efforts are not effective there are no enforcement provisions, such as an injunction, that would prevent the movement or distribution of plant materials that may be infested or diseased. This lack of authority could result in the spread of pests or disease that could adversely affect not only the state's nursery/floral industry but also Texas agriculture in general. The department also lacks civil penalty authority for this program.

- ▶ The criminal penalty authority available for quarantine enforcement is also ineffective in most cases for the same reasons mentioned previously. In addition, the civil penalty authority available to the department under the quarantine law is limited because it pertains only to carriers of plant materials. The department also indicated that the maximum penalty is too low (\$500 per violation per day) and is nothing more than a cost of doing business for some violators.
- ▶ Other states have applied civil penalties against violations of their weights and measures, nursery/floral and quarantine laws. For example, California, Colorado, and Arkansas can seek civil penalties under their weights and measures statutes. California and Florida apply civil penalties to violations of their nursery floral and quarantine laws. Civil penalties require a lesser burden of proof and can be more effective in dealing with violations of these types of laws.

PROBLEM

The department's current enforcement structure is insufficient to ensure compliance in several of its regulatory programs.

RECOMMENDATION

The department's statutes should be changed to:

- provide the department with general authority to seek application of civil penalties for violations of the department's weights and measures, egg, APA, nursery/floral and quarantine programs. The maximum civil penalty for violations of the weights and measures, APA and egg law should be \$500 per violation, per day. The civil penalty for violations of the nursery/floral program should be a minimum of \$50 and a maximum of \$1000 per violation per day. The civil penalty for violation of the state's quarantine laws should be a minimum of \$250 and maximum of \$10,000;
- provide the department with specific statutory authority to issue stop-sale orders on nursery/floral products found to be in non-compliance with the department's statute or rules and regulations;

- authorize the department to seek injunctive relief through the attorney general in the weights and measures, egg, APA, nursery/floral and quarantine programs;

These changes would provide the department with a wider range of enforcement tools which would allow action to be taken against violations. Authorizing civil penalty authority would provide a penalty with a less stringent standard of proof allowing for a more effective enforcement tool. Authorizing injunctive relief would allow the department to stop unlawful or harmful activities when warranted. The penalty amounts recommended are comparable to amounts available in other states but are adjusted downward in some cases to better reflect the severity of the violations involved and match other penalty amounts available to the department for similar violations of other laws.

FISCAL IMPACT

These changes would result in an additional \$134,225 per year in revenue for the state. Any increased costs due to increased activity in the attorney general's office could diminish this revenue projection.

ISSUE 14: Current misdemeanor penalty provisions need to be changed to match the Penal Code.

BACKGROUND

The majority of the penalties found in the department's statutes are classified as misdemeanors. However, these penalty amounts are not aligned with limits for misdemeanors set out in the state's Penal Code. This condition exists because most of the department's penalty provisions were placed in the statute before the current Penal Code was adopted.

The review of the department's penalty provisions indicated the following:

- ▶ The violations to which the current misdemeanor penalty provisions are apply are relatively minor and include violations of the following: the weights and measures law; provisions relating to the labeling of seed; provisions relating to the quality, sale, inspection, transportation, handling, and marketing of vegetables, citrus, eggs and nursery and floral products. Misdemeanor penalties are also apply to violations of the pesticide law relating to the maintaining of herbicide records, violations of the brand and feed laws, violations of provisions relating to the buying and grading of cotton, and violations of provisions relating to the handling and sale of livestock and livestock products.
- ▶ While the department's current penalties are within the range of the penalty amounts set out in the Penal Code, they tend to be lower than the limits set out in the Code.
- ▶ Differences between the Penal Code and the misdemeanor penalties set out in the department's statute could cause confusion regarding which penalties are applicable to a violation.
- ▶ Any future amendments to the Penal Code regarding misdemeanor penalty limits would not be reflected in the department's statutes.

PROBLEM

The misdemeanor penalties amounts found in the department's statutes are not in-line with the limits for misdemeanors set out in the state's Penal Code.

RECOMMENDATION

The department's statutes should be amended to:

- change the current misdemeanor penalty provisions so that they match those set out in the Penal Code.

This change would involve removing references to specific penalty amounts and replacing them with the designation class A, B, or C misdemeanor. The actual penalty would be that provided in the Penal Code.

This change would make the department's penalties consistent with the Penal Code and would reduce any confusion regarding which set of penalties should be referred to when dealing with a violation. Future amendments to the Penal Code would thereby automatically update the department's statutory penalty provisions.

FISCAL IMPACT

The changes in the penalty structure could result in different penalty amounts being paid by violators for specific violations, but no fiscal impact is anticipated for the state from implementing these changes.

Interagency Cooperation and Coordination

ISSUE 15: Cooperation and coordination with the Department of Commerce should be formalized.

BACKGROUND

The Texas Department of Commerce (TDOC) and TDA both have statutory authority to perform economic development work in Texas. Currently, their areas of responsibility, in practice, are separate and distinct. The legislature has given TDA the responsibility for agricultural economic development and marketing, as much by inference as by statutory directive since the statute is brief and general in the authority of the department to undertake promotional efforts. No specific direction is provided about marketing programs the department should pursue. The legislature, on the other hand, has given TDOC broad as well as detailed authority to promote economic development in the state by recruiting businesses to relocate here and by helping new businesses start in Texas. In practice, TDOC has steered away from the agricultural sector, putting its emphasis instead on the manufacturing and service sectors even though it is not specifically directed to do so by statute. Nonetheless, because the Department of Commerce's statute is silent on involvement in the agricultural sector, there is the potential for an overlap of efforts between TDOC and TDA.

The review of whether and how the two agencies coordinate and cooperate in implementing their programs indicated the following:

- ▶ The program managers at TDA and the division directors at TDOC are in regular contact to share information and to plan cooperative programs. For instance, when TDOC staff conduct seminars in agricultural regions of the state or when they hold international trade seminars, they often invite TDA marketing staff to participate and discuss TDA's marketing programs.
- ▶ Both agencies coordinate certain activities which could result in duplication of effort. For instance, staff of each agency share trade leads, when appropriate, and cooperate while on overseas marketing trips.
- ▶ TDOC was recently given responsibility for the administration of an export finance program for which agricultural and non-agricultural businesses will be eligible. When the program is operational, it will be important for the two agencies to develop joint rules to facilitate access for agricultural applicants.
- ▶ No mechanism exists to ensure that the level of cooperation between the agencies continues in the future.

PROBLEM

TDOC and TDA share responsibility for economic development in the state; however, no formal mechanism exists to define the current division of efforts or to ensure that the level of cooperation which now exists continues in the future.

RECOMMENDATION

The department's statute should be changed to:

- require the department and the Texas Department of Commerce to develop memorandum of understanding to include the following:
 - define current areas of cooperation and coordination of effort between the agencies such as the sharing of international trade leads, the joint participation in local community trade and economic development seminars, and participation in periodic management level meetings;
 - specify other areas where the two agencies can improve coordination; and,
 - provide for the adoption of joint rules, where appropriate, to ensure that the clientele of both agencies have access to programs available through each agency.

Adoption of a formal agreement between TDA and the Texas Department of Commerce, published as rules, will result in a clear statement of the purpose and functions of the two agencies in areas where they share statutory authority. Further, the effort needed to develop the agreement will require the agencies to continue to cooperate thereby providing a sharing of expertise and preventing duplication of effort in the economic development of agriculture in the state. Because the efforts of the two agencies are so closely related, this cooperation will continue to directly benefit the clientele of both agencies as well as of economic development efforts in the state generally.

FISCAL IMPACT

No fiscal impact is anticipated from this recommendation because these cooperative efforts currently exist. Some minimal travel costs could be saved through the joint field efforts that could result.

ISSUE 16: Cooperation and coordination with Texas A&M University should be formalized and improved.

BACKGROUND

TDA and Texas A&M University Extension Service and Experiment Station are directly and primarily involved in agriculture. Although their roles are only briefly defined in state statute, each agency operates under a long-established history.

The review focused on the role of the three agencies with the agricultural community and to what extent the three agencies cooperate in their outreach efforts. Also, the review sought to determine whether there was overlap between the efforts of the Agricultural Extension Service and the department's marketing division. These efforts indicated the following:

- ▶ In its role as the regulatory agency for pesticides and other agricultural concerns, TDA's regulatory field staff conduct inspections under the numerous public safety and industry protection laws administered by the department.
- ▶ The department is also charged with promoting Texas agricultural products. The marketing staff promote Texas products in the media, help producers to identify and assess new business opportunities and help them find new local, national and international markets for their products.
- ▶ The Experiment Station conducts research on all facets of crop and livestock production, including the use of pesticides and herbicides.
- ▶ The Extension Service is a network of 675 county extension agents and about 300 technical specialists who act as a liaison between the scientific researchers at the Experiment Station and the agricultural community in an extensive educational outreach program.
- ▶ The roles of the three agencies, for the most part, are distinct, steering the agencies in different directions. However, they share statutory authority for some programs. For instance, TDA and Texas A&M are both responsible for farmworker and producer training under the new Agricultural Hazard Communications Act, or Right-to-Know law.
- ▶ Other areas were found where the agencies cooperate on an informal and sometimes infrequent basis, when their interest and activities converge. For instance:
 - the Extension Service wrote educational materials for the 1080 livestock protection collar program which TDA has used in their training;
 - the department and the Extension Service jointly produced an information booklet on fire ants;

- field staff have worked together to some degree in the organization of local farmers' markets; and
 - county extension agents occasionally invite TDA field staff to participate in local seminars when the topic is relevant to TDA's activities and expertise.
- ▶ While cooperation and coordination does exist, interaction could be strengthened. Since their respective statutes do not always clearly define duties and functions, each agency has some latitude in carving out its own role. This can result in the agencies developing similar, though divergent, programs which do not always promote the same direction for agriculture in the state. For an example, the Extension Service provides technical expertise and advice to farmers and ranchers on all aspects of agricultural production. The service generally promotes the production of crops that have traditionally been produced in the state. TDA, on the other hand, promotes expansion into production of new and alternative crops and diversification into alternative methods of processing and marketing. Decisions of farmers and ranchers on what to product and how to harvest, process and market these products can involve a considerable amount of money. Because of the importance of these decisions, the department and the extension service need to make sure that the information they provide to the agricultural community is as consistent as possible and does not result in decisions that cause financial harm to the farmer or rancher involved.

PROBLEM

The roles of TDA and Texas A&M University Extension Service and Experiment Station are for the most part, distinct, although some overlap and potential for conflict exists where their interests and efforts meet. No mechanism exists to require the agencies to coordinate their efforts so that the agricultural community receives the best assistance and advice possible.

RECOMMENDATION

The department's statute should be changed to:

- require the department and Texas A&M University to develop a memorandum of understanding which:
 - formalizes cooperation in areas of joint statutory responsibility;
 - formalizes current areas of informal coordination;
 - requires periodic discussions both at the administrative and field levels to provide a forum for continued development of coordinated efforts.

This recommendation would require the TDA and Texas A&M University to coordinate their approaches in areas of joint interest and concern and to formalize these areas through rules. A key element of this coordination would be the periodic discussions between the agencies.

At the administrative level, this dialogue could identify areas of education, market development, and community outreach where cooperation can be improved. One such area could be a joint approach to agricultural diversification incorporating A&M's scientific knowledge on production and market research and TDA's knowledge of market development as well as their activities in direct and promotional marketing.

At the field level, joint regional meetings could be held to allow A&M extension agents, TDA regulatory and marketing personnel, and the farming community to discuss policy approaches and needs regarding agricultural and rural economic development, pesticide use and other concerns of the agricultural community. This agreement could also result in the field staff of the department and A&M taking a more active role in each other's local programs, such as TDA's direct marketing seminars and A&M's citizen advisory committee meetings.

FISCAL IMPACT

A minimal fiscal impact is anticipated from this recommendation. Some travel and per diem costs could be associated with attending meetings in the agencies' field offices or in Austin and College Station.

State Seed and Plant Board

ISSUE 17: The State Seed and Plant Board should be continued without a separate sunset date.

BACKGROUND

The State Seed and Plant Board is one of several statutorily created advisory bodies that operate as part of the Texas Department of Agriculture. The board assists the department in administering the state's seed certification program, which is under the department's seed program. Specifically, the board licenses certified seed and plant growers, approves varieties of seed for certification and sets certification standards. These decisions are enforced by the department's seed program.

The review of the State Seed and Plant Board indicated the following:

- ▶ The board currently has its own sunset date and is required to be reviewed separately from the department even though it operates as part of the department's seed program.
- ▶ Several other states also use a separate board to license growers, approve varieties of seed for certification and set seed certification standards. Also, the review indicated that the expertise provided by the board is needed for the technical decisions required in the certified seed program. Finally, as a result of the board's efforts, the state has been in compliance with federal certification standards over the past four years.
- ▶ The sunset review of the State Seed and Plant Board concluded that the board should be continued to meet the responsibilities for which it was created.
- ▶ The review also concluded that a separate sunset date for the board was unnecessary. The board could be reviewed as part of the Texas Department of Agriculture if its sunset review date were removed from statute.

PROBLEM

The separate sunset review date for the State Seed and Plant Board is unnecessary.

RECOMMENDATION

The State Seed and Plant Board statute should be amended to:

- continue the board; and
- remove the specific sunset review date that applies to the board.

This change would allow the board to be examined as part of future sunset reviews of the Texas Department of Agriculture.

FISCAL IMPACT

No fiscal impact is anticipated from implementing this change.

Across-the-Board Recommendations

Texas Department of Agriculture

Applied	Modified	Not Applied	Across-the-Board Recommendations
			A. GENERAL
		X	1. Require public membership on boards and commissions.
X			2. Require specific provisions relating to conflicts of interest.
X			3. Provide that a person registered as a lobbyist under Article 6252-9c, V.A.C.S., may not act as general counsel to the board or serve as a member of the board.
		X	4. Require that appointment to the board shall be made without regard to race, color, handicap, sex, religion, age, or national origin of the appointee.
		X	5. Specify grounds for removal of a board member.
X			6. Require the board to make annual written reports to the governor, the auditor, and the legislature accounting for all receipts and disbursements made under its statute.
X			7. Require the board to establish skill-oriented career ladders.
X			8. Require a system of merit pay based on documented employee performance.
		*	9. Provide that the state auditor shall audit the financial transactions of the board at least once during each biennium.
X			10. Provide for notification and information to the public concerning board activities.
		*	11. Place agency funds in the treasury to ensure legislative review of agency expenditures through the appropriation process.
X			12. Require files to be maintained on complaints.
X			13. Require that all parties to formal complaints be periodically informed in writing as to the status of the complaint.
		X X	14. (a) Authorize agencies to set fees. (b) Authorize agencies to set fees up to a certain limit.
X			15. Require development of an E.E.O. policy.
X			16. Require the agency to provide information on standards of conduct to board members and employees.
		X	17. Provide for public testimony at agency meetings.
		X	18. Require that the policy body of an agency develop and implement policies which clearly separate board and staff functions.
X			19. Require development of accessibility plan.

*Already required.

Texas Department of Agriculture
(cont.)

Applied	Modified	Not Applied	Across-the-Board Recommendations
			B. LICENSING
		X	1. Require standard time frames for licensees who are delinquent in renewal of licenses.
X			2. Provide for notice to a person taking an examination of the results of the exam within a reasonable time of the testing date.
X			3. Provide an analysis, on request, to individuals failing the examination.
X			4. Require licensing disqualifications to be: 1) easily determined, and 2) currently existing conditions.
X		X	5. (a) Provide for licensing by endorsement rather than reciprocity. (b) Provide for licensing by reciprocity rather than endorsement.
X			6. Authorize the staggered renewal of licenses.
X			7. Authorize agencies to use a full range of penalties.
X			8. Specify board hearing requirements.
X			9. Revise restrictive rules or statutes to allow advertising and competitive bidding practices which are not deceptive or misleading.
X			10. Authorize the board to adopt a system of voluntary continuing education.