

# The Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency

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## Purpose

### Disclaimer on Use of Information Provided

This overview is not intended to be a legal analysis of the functional equivalency provisions of the Public Resources Code (PRC), the Food and Agricultural Code or Title 3, California Code of Regulations (3CCR) and should not be relied upon as a legal document. It is suitable for general familiarization purposes only. It is a simplified general summary of the requirements and how the State's pesticide regulatory program complies with them.

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## Introduction

There has been a comprehensive pesticide regulatory program in California for decades, managed at the state level first by the California Department of Food and Agriculture, and since 1991, by the Department of Pesticide Regulation (DPR). Local pesticide enforcement has been handled by the county agricultural commissioners (CACs) in each of California's 58 counties.

DPR's mission is to protect human health and the environment by regulating pesticide sales and use and by fostering reduced-risk pest management. DPR's strict oversight begins with product evaluation and registration, and continues through statewide licensing of commercial applicators, dealers, consultants, and other pesticide professionals; evaluation of health impacts of pesticides through illness surveillance and risk assessment; environmental monitoring of air, water, and soil; field enforcement (with CACs) of laws regulating pesticide use; and residue testing of fresh produce. The requirement for permits, issued by CACs for possession and use of most restricted materials, is an important aspect of the pesticide regulatory program.

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**Topics discussed** This paper contains discussions on the following topics:

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# History of the Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency

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## **California Environmental Quality Act signed into law**

The California Environmental Quality Act (CEQA) was adopted in 1970 and is the State's principal environmental law. It mandates environmental impact review of development projects in California and applies generally to activities of all State and local agencies and to those private activities that the agencies finance or regulate. CEQA requires, among other things, that an Environmental Impact Report (EIR) be developed that discloses the potential environmental impacts of a project. The EIR process must consider alternatives; develop mitigation to avoid adverse impacts; and is subject to public review and comment before a permit is issued for a project that might impact environmental quality.

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## **Attorney General opinion**

In 1976, the State Attorney General issued a formal opinion (SO 75/16)<sup>1</sup> that the State's pesticide regulatory program was subject to CEQA. This meant that an EIR would have to be prepared before registering any of the several hundred new pesticide products that come into the market each year. Of even greater significance, it meant that an EIR would have to be prepared before approving any of the several thousand restricted material permits issued annually by the CACs. The Legislature immediately adopted a moratorium on the application of CEQA to pesticide regulatory programs in order to provide State pesticide regulators with sufficient time to make necessary adjustments.

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## **Environmental Assessment Team**

In 1977, the State formed an Environmental Assessment Team to prepare a "master" (programmatic) EIR, pursuant to chapter 4.5 of CEQA, covering the use of all registered pesticides, in all areas of the State. After more than a year's work, the Environmental Assessment Team attorneys concluded it could not be done and advised that "the major problem facing California Department of Food and Agriculture and CACs is not CEQA, but the fact that they do not have a process. The major deficiency of the program is its probable failure to comply with the Food and Agricultural Code (FAC) in taking into account all of the established criteria prior to registration and permit decisions, as well as the inability of anyone other than the decision-maker to determine what is taken into account."<sup>2</sup>

In response, the State's pesticide regulators returned to the Legislature, obtained an extension of the moratorium, and took an entirely different approach. This new approach was to develop a regulatory program that could be certified as "EIR functionally equivalent."<sup>3</sup>

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# History of the Pesticide Regulatory Program’s Environmental Impact Report Functional Equivalency, Continued

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**Public  
Resources Code**

Under what was then section 21080.5 of the PRC, regulatory programs which have protection of the environment among their principal purposes and which require a plan or other written documentation could be exempted from EIR requirements upon certification by the Secretary of the Resources Agency that the programs meet specified criteria. PRC provided for functional equivalency for regulatory programs that involve the issuance of a permit, license, certificate, or other entitlement for use or for the adoption or approval of standards, regulations, or plans for use in the regulatory program.

**Note: Section 21080.5 does not confer complete CEQA functional equivalency. There are other CEQA requirements, discussed below, that still apply, even to a certified functional equivalent program. For this reason, this overview refers to “EIR functional equivalency” rather than “CEQA functional equivalency.”**

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# History of the Pesticide Regulatory Program’s Environmental Impact Report Functional Equivalency, Continued

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**Statutory resolution**

Chapter 308, Statutes of 1978 (AB 3765) was enacted to facilitate the functional equivalency approach. Among other things, it amended PRC section 21080.5 to more clearly prescribe the procedure the Secretary of the Resources Agency must follow for the certification or withdrawal of certification (of programs in general). The Legislation also laid out a timetable for submission of the pesticide program for certification.

The Legislature made several findings and declarations in Chapter 308 relating to pesticides, pest control, and EIRs, including the following:

- Agriculture is a major and essential component of California’s economy
- The appropriate use of pesticides is essential for agricultural production and health protection
- Timeliness of pesticide use is paramount in pest management and prevention of economic waste
- Reasonable environment review of pesticide use is prudent and appropriate
- Permits must often be issued on short notice making impracticable (regular) environmental review and EIRs
- Preparation of EIRs for pesticide permits would be an unreasonable burden on California agriculture and health protection agencies
- Procedures for governmental review of pesticide use shall not unnecessarily burden permit applicants.

It is the policy of California that environmental review of pesticide use be achieved through the procedures established in PRC Section 21080.5 rather than by EIRs.<sup>4</sup>

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# History of the Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency, Continued

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## **Regulatory changes**

The State's pesticide regulators recognized that changes in regulations were necessary to meet the requirements of functional equivalency. Proposed changes were developed in the areas of:

- Pesticide registration, evaluation, and classification procedures
- Consultation with other agencies, consideration of feasible alternatives, and noticing of proposed actions and decisions
- The consideration of feasible alternatives and mitigation measures when determining when to use, and obtaining a permit to use, a restricted material.

The proposed regulations were developed by the State's pesticide regulators working with many diverse groups, including: CACs, other state agencies and departments, and environmental, agricultural, consumer, and pesticide producer interests. The regulations did not represent a consensus of all individuals serving on the various groups, but did involve considerable give-and-take on specific issues. In 1979, hearings on the proposed regulations generated a great deal of oral and written testimony. Agriculture and the pesticide industry charged that the regulations went too far while environmental groups testified they did not go far enough.

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## **New regulations**

After substantial rewriting, the provisions pertaining to state operations were adopted and became effective on January 4, 1980. Provisions relating to pesticide permits were postponed until July 1, 1980, when funding could be appropriated to the counties for the costs of new permitting activities.

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## **Program certified**

The pesticide regulatory program was submitted to the Secretary of the Resources Agency on November 1, 1979, and was certified on December 28, 1979, as "EIR functionally equivalent." This meant that the State and CACs did not have to prepare an EIR (or negative declaration) on each product or permit approved. Instead of an EIR, documentation of environmental impacts, mitigation measures, and alternatives was required.<sup>5</sup>

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# Requirements of Public Resources Code Section 21080.5 and How Those Requirements are Addressed

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**Requirements for a functionally equivalent program**

PRC section 21080.5 (d) (1) provides for EIR functional equivalency when the regulatory program of a State agency operates under a plan that includes a description of the proposed activity that addresses both alternatives to the activity and mitigation measures to minimize any significant adverse effect of the activity on the environment. For purposes of this section, the CAC is a State agency. (PRC section 21080.5).

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**Inter-disciplinary approach**

This discussion will focus on the permit program and touch lightly on the registration program. The Administrative Procedure Act, found in the Government Code beginning at section 11340, (administered by the Office of Administrative Law), specifically controls the adoption of regulations. This parallel process includes many of the aspects required of a functionally equivalent program, and will not be addressed here.

1. The EIR functionally equivalent program must use an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decision-making.

The permitting process, administered by the CAC's, relies on the data submission and evaluation conducted on pesticide products during the registration process to identify potential hazards and suggest example mitigation measures if pesticide labeling and regulations do not adequately mitigate the hazard.

DPR's scientists use an interdisciplinary approach working closely with other state agencies, including the Departments of Fish and Game and Health Services, as well as agencies within California Environmental Protection Agency, including the State Water Resources Control Board, Department of Toxic Substances Control, Office of Environmental Health Hazard Assessment, and Air Resources Board. The CACs use the determinations made about the pesticide to properly consider environmental impacts and appropriately condition permits to mitigate any significant adverse impacts.

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## Requirements of Public Resources Code Section 21080.5 and How Those Requirements are Addressed, Continued

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### Protection of the environment

2. The enabling legislation of the regulatory program must include protection of the environment among its principal purposes.

The overall purposes of the pesticide regulatory program are found in FAC section 11501. They include protection of the environment from environmentally harmful pesticides by prohibiting, regulating, and ensuring proper stewardship of those pesticides. The implementation of pest management systems to achieve acceptable levels of control with the least possible harm to the environment is also encouraged.

Specific to the pesticide permit system, the criteria for designating pesticides as restricted materials in FAC section 14004.5 includes hazard to the environment from drift and hazard of persistent residues that could lead to contamination of the environment. FAC section 14006.5 requires the CAC to consider local site-specific environmental conditions before issuing any permit. FAC section 14006.5 also prohibits the CAC from issuing a permit if the pesticide:

- Has demonstrated serious uncontrollable adverse effects
- Use is less of a public value or greater detriment to the environment than the benefit received from its use
- Has a feasible alternative that is demonstrably less destructive to the environment (FAC section 12825).

Specific to the registration process, FAC sections 12824, and 12825, require the elimination from use of any pesticide that endangers the environment; is not beneficial; or is misrepresented; for which the detriment is greater than the benefit; or for which there is a less detrimental alternative; and outlines general criteria to evaluate pesticides. FAC section 12824 also authorizes the Director to establish specific criteria to evaluate pesticides. Reevaluation criteria are found in 3CCR section 6221.

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## Requirements of Public Resources Code Section 21080.5 and How Those Requirements are Addressed, Continued

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### Authority to adopt regulations

3. The administering agency must have authority to adopt regulations for the protection of the environment.

General regulation adoption authority is found in FAC, sections 11456 and 12976. FAC section 14004.5, provides specific authority, to adopt by regulation, a list of restricted materials, and FAC sections 14005 and 14006, authorize regulations governing the conditions of possession and use, of restricted materials. There are several other sections which grant other specific authority to adopt regulations in specific areas that are not relevant to permit issuance.

The authority to adopt regulations establishing registration procedures is found in FAC section 12781. This is a general grant of authority for the entire pesticide registration program. There are other specific grants of regulatory authority that are largely duplicative and are not listed here.

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## Specific Procedural Requirements of Public Resources Code Section 21080.5 (d) (2)

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### **Environmental impact report functional equivalency requirements**

There are specific procedural requirements includes citation for these requirements that must be included in the program or regulations that approximate the CEQA requirements of an EIR.

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### **Evaluation guidelines**

1. The EIR-equivalent program must contain guidelines for the orderly evaluation of proposed activities and the preparation of a plan or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program.

Title 3 CCR chapter 2, subchapter 4, article 3, Permit System, beginning with section 6420, outlines the procedures for the orderly evaluation of Permit Applications. It outlines the information that the application must contain (3CCR sections 6428 and 6430), and requires the CAC to evaluate the potential environmental impact, based on his or her knowledge of local conditions (3CCR section 6432).

Permits issued with “incomplete” data are made “site and time” specific, and missing data are submitted through a “Notice of Intent” (3CCR section 6434), which is considered part of the permit.

A directly affected person may petition the director to have a permit, issued by the CAC, reviewed by the director. Title 3 CCR section 6442, outlines how the director will handle those reviews.

If adverse impacts occur generally throughout any area, the director or CAC may cancel all permits in that area (3CCR section 6444).

Title 3 CCR chapter 2, subchapter 1, article 8, Reevaluation Criteria, beginning with section 6220, requires continuous evaluation of all registered pesticides and provides for formal reevaluation of pesticides that, upon investigation, are found to cause a significant adverse environmental impact.

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## Specific Procedural Requirements of Public Resources Code Section 21080.5 (d) (2), Continued

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### **Registration and Use Permits: feasible alternatives**

2. EIR-equivalent programs must require that an activity not be approved as proposed if there are feasible mitigation measures available that would substantially lessen any significant adverse effect that the activity may have on the environment or feasible alternatives.

Title 3 CCR section 6432 of PRC 21080.5, requires that a permit be conditioned to require use of mitigation measures, if the CAC determines that there are feasible alternatives mitigation measures, or denied. In addition, 3CCR section 6426 requires agricultural users of pesticides to consider and adopt any feasible alternative that would lessen any significant adverse environmental impact.

Title 3 CCR section 6116 requires the director to reject any “standard” or regulation that would cause a significant adverse environmental impact if there is a feasible mitigation measure or feasible alternative that would substantially reduce that impact.

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### **Consultations**

3. There must be a requirement for the administrating agency to consult with all public agencies that have jurisdiction, by law, with respect to the proposed activity.

Title 3 CCR section 6122 requires the CAC to routinely consult with other agencies that have responsibility over resources in the county that may be affected by the use of pesticides. The CAC is also required to maintain his or her knowledge of local conditions on 3CCR sections 6122 and 6432, to more effectively implement the permit program.

Title 3 CCR sections 6252 and 6256 provide for consultation with other agencies and the public, on pesticide registration and general program issues. FAC sections 12042, 12047, and 12980, provide for consultation in specific program areas.

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**Specific Procedural Requirements of Public Resources Code  
Section 21080.5 (d) (2) of Public Resources Code Section  
21080.5, Continued**

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**Respond to  
issues raised**

- 4. The final action on the proposed activity must include the written responses of the issuing authority to significant environmental points raised during the evaluation process.

FAC section 14009 authorizes any person to request “reconsideration” of the commissioner on any permit. The CAC must respond with a written decision within ten days. This must take place before the appeal is made to the Director.

Title 3 CCR section 6119 requires the Director to respond to environmental points raised during the evaluation process for any registration action or adoption of a standard.

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**File decision  
with Secretary  
of Resources  
Agency**

- 5. The decision by the administering agency on the proposed activity must be filed with the Secretary of the Resources Agency. Those notices shall be available for public inspection. Each list shall remain posted for a period of 30 days.

Decisions on individual pesticide use permits are not filed with the Secretary of the Resources Agency. The need for timeliness of pest control makes this delay impractical. The permits are available in the CAC’s office for review.

Title 3 CCR section 6116, requires the director to forward a copy of any Notice of Decision, adopting a standard, to the Secretary of the Resources Agency, for posting for 30 days.

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# Specific Procedural Requirements of Public Resources Code Section 21080.5 (d) (2) Public Resources Code Section 21080.5, Continued

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**Notice available for comment** 6. The Notice of Decision must be available for a reasonable time for review and comment by the public and other agencies.

Generally, there is no routine notice to other agencies for review and comment when an individual permit is issued. If other agencies have an interest in any particular permits, this could be discussed during the CAC consultation, pursuant to 3CCR section 6122. The need for timeliness of pest control makes this delay impractical.

The permits are available in the CAC's office for review and request for reconsideration, provided in FAC section 14009. Any person who will be directly affected by the proposed application may appeal the CAC's final decision to the director.

Title 3 CCR sections 6110, 6116, and 6118, all relate to decisions of the director relating to the adoption of standards being available to the public and other agencies for review and comment.

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## Scope of Certified Activities

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### **Background**

A regulatory program certified pursuant to PRC section 21080.5, is exempt from chapters 3 and 4, and section 21167 of CEQA. The Secretary of the Resources Agency has certified specified activities of the pesticide regulatory program administered by DPR and the CACs as EIR functionally equivalent:

- The registration, evaluation, and classification of pesticides.
  - The adoption, amendment, or repeal of specified regulations and standards.
  - The regulation of the use of pesticides through the permit system administered by the CACs.
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### **Not Exempt**

A certified program is not exempt from chapters 1, 2, 2.5, 4.5, and 5 of CEQA. These chapters are described below.

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### **CEQA: Chapter 1**

Chapter 1 of CEQA contains the legislative intent. It declares that it is the policy of the State to “take all actions necessary to protect, rehabilitate, and enhance the environmental quality of the State.” It also declares that “all agencies of the State government which are found to affect the quality of the environment shall regulate their activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”

Courts decisions<sup>6,7</sup> have made it clear that these broad mandates apply to certified programs such as pesticide regulation. Chapter 1 of CEQA also contains a policy that agencies “should not approve projects (permits) if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the projects . . . ”

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### **CEQA: Chapter 2, 2.5, and 4.5**

Chapters 2 and 2.5 establish the title of CEQA and the definitions. Chapter 4.5 provides for regulatory streamlining through a “Master (programmatic) EIR” for certain large projects. It also discusses reviews pertaining to pollution control equipment.

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## Scope of Certified Activities, Continued

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**CEQA:  
Chapter 5**

Chapter 5 of CEQA states that an agency can require that a permit applicant submit “data and information which may be necessary to enable the agency to determine whether the proposed project may have a significant effect on the environment or to prepare an EIR.”

The California Supreme Court<sup>8</sup> has confirmed that this authority applies to certified programs such as DPR.<sup>9</sup> This is significant additional authority for a CAC to require information from the applicant, for a restricted materials permit, beyond that expressly listed in the regulations covering permit issuance.

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<sup>1</sup> Opinion of Evelle J. Younger, Attorney General, No SO 75/16, May 4, 1976

<sup>2</sup> Memo from Katherine Striemer to Dan Dooley, February 17, 1979 Administrative Feasibility of Complying with CEQA

<sup>3</sup> Questions and Answers in regard to AB 3765 Assembly Resources Land Use and Energy Committee, April 18, 1978 (ENF 78-28)

<sup>4</sup> Chapter 308, Statutes of 1978 (AB 3765)

<sup>5</sup> History of Events Leading up to AB 3765 Pesticide Regulations, Department of Food and Agriculture, Circa 1980

<sup>6</sup> EPIC v. Johnson (1985) 170 Cal. App. 3d. 604

<sup>7</sup> Laupheimer v. State of California, 200 Cal. App. 3d 440

<sup>8</sup> Sierra Club v. State Board of Forestry, 91994) 7 Cal. 4<sup>th</sup> 1215

<sup>9</sup> Are Certified Regulatory Programs “Functionally Equivalent to CEQA?” Daneil Pollak, California Research Bureau, California State Library, March 2002