

Restricted Materials Permit Review

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Enforcement Letter

ENF 04-11

Referrals

If you have any questions concerning this document, please contact the Enforcement Branch Liaison assigned to your county.

Introduction

This document describes the Department of Pesticide Regulation's (DPR's) expectations for various aspects of the restricted materials permit review process. The information provided in this document supersedes previous directives issued by DPR pertaining to:

- Permit evaluation and review;
 - Due process, as it relates to permit actions; and,
 - Grounds for refusal, revocation, and suspension of a restricted materials permit.
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Future activities

In a future publication, DPR plans to use this Enforcement Letter along with Enforcement Letter ENF 04-04, *Department of Pesticide Regulation's Environmental Impact Report Functional Equivalency*, to update sections of the *Reference Manual for Restricted Materials Permits and Certification*. Once all sections of the reference manual have been updated, the finished document will be made available for your use.

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Restricted Materials Permit Review, Continued

About this document

This document is intended to help county agricultural commissioners (CACs) perform different aspects of the restricted materials permit evaluation, review, and appeal processes. It is divided into seven sections:

1. Restricted Materials Permit Review Background;
2. Permit Application and Evaluation;
3. Due Process as it Relates to Permits;
4. Grounds for Refusal, Revocation, and Suspension;
5. County Agricultural Commissioner's Permit Review;
6. Appeals to the Director for Additional Review; and
7. Appendix.

The Appendix contains two examples of Restricted Materials Permit Denial Record forms the CAC may consider using. It is not a required form or format. The third document is the California Restricted Materials Requirements Chart.

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Restricted Materials Permit Review Background

Background

The Restricted Materials Permit Program provides an abbreviated environmental review procedure that serves as the functional equivalent to a full-scale environmental impact report which would normally be required by the California Environmental Quality Act (also known as CEQA) found in the Public Resources Code section 21050, et seq. This program requires the CACs to issue time- and site-specific permits for the agricultural use of restricted materials.

Title 3CCR section 6428(c) requires permit applicants to identify all known areas that could be adversely affected by the use of restricted materials. In addition, growers/applicants are required to plan their needs in advance, consider reduced use of restricted materials, and promote open dialogue with the people who live near application sites before applying for their permits. CAC involvement will ensure that the public receives accurate and complete information.

Restricted materials defined

Title 3CCR section 6400 designates certain pesticides as “restricted materials.” Restricted materials may be defined as:

- Any pesticide labeled as a “restricted use pesticide” pursuant to section 3 of the Federal Insecticide, Fungicide, and Rodenticide Act [Title 7, United States Code, section 136(a)];
- Any pesticide used under an “emergency exemption” issued pursuant to section 18 of the Federal Insecticide, Fungicide, and Rodenticide Act [Title 7, United States Code, section 136(p)];
- Pesticides formulated as a dust, labeled to permit outdoor use, and packaged in containers of more than 25 pounds [3CCR section 6400(c) notes exceptions];
- Pesticide products containing active ingredients listed in 3CCR section 6800(a) (potential to pollute ground water), when labeled for agricultural, outdoor institutional, or outdoor industrial use; or
- Those pesticides listed in 3CCR section 6400(e).

A quick-reference list for pesticides listed in 3CCR section 6400(e) is located at <<http://www.cdpr.ca.gov/docs/enfcmpli/pml013a.pdf>> or Appendix C. *The most recent version of the codes should always be referenced before initiating an enforcement action.*

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Restricted Materials Permit Review Background, Continued

**Federal
restricted use
pesticide
classification**

The Administrator of the U.S. Environmental Protection Agency declares a pesticide to be a “restricted use pesticide” when he/she determines that when the pesticide is applied according to its directions for use, it may generally cause unreasonable adverse effects on the environment.

The Administrator shall classify the pesticide, or the particular use or uses to which the determination applies, to be a “restricted use (pesticide).”
Section 3(d)(1)(C)(i-ii) of the Federal Insecticide, Fungicide, and Rodenticide Act [Title 7, United States Code, section 136(a)].

Permit Application and Evaluation

Permit application and evaluations

The CAC will evaluate the permit applicant’s request for a restricted materials permit (3CCR section 6432).

Permit required

“ . . . no person shall use or possess any pesticide designated as a restricted material for any agricultural use except under a written permit of the commissioner.” (FAC section 14006.5)

Permit evaluation

The CAC shall determine whether a substantial adverse environmental impact may result from the use of a pesticide before issuing any permit to use a pesticide and when evaluating the Notice of Intent (NOI). The CAC shall take appropriate action to assure compliance. (3CCR section 6432)

If the CAC determines ...	Then,
the pesticide’s use would likely cause a substantial adverse environmental impact,	the CAC shall determine if there is a mitigation measure to substantially reduce the adverse impact or a feasible alternative.
mitigation measures or a feasible alternative exists;	the permit or intended pesticide application shall be conditioned on utilization of the mitigation measure <u>or</u> the permit shall be denied.

Local conditions

The CAC is responsible for knowing local conditions and using his or her knowledge to make these determinations. Each CAC should also consider, and where appropriate, utilize:

- FAC section 14006.5;
 - Other applicable FAC sections;
 - 3CCR;
 - Pest management guides;
 - Pesticide Safety Information Series (or its equivalent);
 - Information from monitoring other pest control operations; and
 - Information required by the Director.
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Permit Application and Evaluation, Continued

Additional permit evaluation requirements

In addition to the information required by 3CCR sections 6428 and 6430, the permit shall contain any appropriate conditions and limitations on the pesticide(s), including:

- Appropriate conditions or limitations on the use of the pesticide(s);
 - Requirements, if any, for notice (to the CAC) to apply before an agricultural use pesticide application (for nonagricultural use, notice shall be required to the extent it is necessary to comply with inspection and monitoring requirements of 3CCR section 6436); and
 - Appropriate conditions and limitations such as those described in pest management guides.
-

Key points for the evaluation process

The purpose of the NOI is to provide specific and critical information that was not available at the time the preliminary permit was issued.

The “permit evaluation” process is initiated with the restricted materials permit application.

- The permit evaluation process is not completed simply because the application paperwork has been accepted by the CAC.

The permit evaluation process continues with the CAC’s review of **each** NOI and possible pre-application site inspection.

- The permittee keeps the permit evaluation process in play by timely filing a NOI with the CAC so the CAC may evaluate the proposed application.

The CAC’s NOI review and acceptance or denial signals the completion of the evaluation process for that use of the restricted material at the proposed site and time.

- The evaluation process is not complete until the CAC has reviewed the NOI for each proposed application.

If the approximate date(s) or crop stage(s) of intended restricted material application(s); expected method of application (including dilution, volume per acre or other units, and dosage); and name of the pest control business (if any), name, business address, and license or certificate number with expiration date of the certified private or commercial applicator responsible for supervising the possession or use of the restricted material(s) are not on the preliminary restricted materials permit (application), they must be included on the NOI. (3CCR section 6434)

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Permit Application and Evaluation, Continued

- Notice of Intent**
- The CAC is required to review all NOIs submitted to determine whether the:
- Location(s) of the proposed application matches the permit locations;
 - Environmental conditions have changed since the permit was issued (this is the “local knowledge” of the CAC, or, it is specified by the permittee on the NOI);
 - Permittee has a history of noncompliance; and
 - Proposed application should be included in the CAC’s pre-application site or application inspection monitoring activities. (3CCR section 6434)
-

“Time- and site-specific”

To assess the effects of restricted use pesticides on the environment, it is necessary to make the permit time- and site-specific. Accordingly, the grower is responsible to ensure that the CAC is notified at least 24 hours prior to commencing the use of a restricted material.

“Time-specific” and “site-specific” defined

“Time-specific” means a pesticide permit that specifies the date the intended application is to commence or a NOI requirement.

The pesticide use may be delayed for up to four days without refileing a NOI **only if delays are caused by uncontrollable conditions** such as adverse weather or unavailability of equipment. This is an emergency provision and should not be viewed as a convenience.

“Site-specific” means a pesticide permit that identifies the specific area to be treated, the size of that area, and the commodity(ies) or site(s) on that area to be treated.

- Adjustment to the 24 hours notice**
- The CAC may allow less than 24 hours notice for the NOI when it is determined that:
- Because of the nature of the commodity or pest problem, effective pest control cannot be attained; and/or
 - 24 hours are not necessary to adequately evaluate the application.
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Permit Application and Evaluation, Continued

Forms

Each application and permit to possess or use a restricted material shall be on a form approved by the Director. All information required for a written NOI shall also be on forms approved by the Director. (3CCR section 6424)

Restricted Materials Permit Program software provided to CACs by DPR has been approved by the Director and is consistent with the requirements of 3CCR section 6424.

The only substantive difference between the software and paper versions of application forms is that some software versions may not have a mechanism to document permit denials/refusals. CACs may augment the permittee's file with a separate paper document to complete the record of actions relating to the permit.

For those CACs who choose to document the denial using a separate paper document, the paper document should contain the following minimum information:

- Permit applicant's name;
- Denial date;
- Permit number;
- Crop and commodity;
- Pesticide;
- Pest;
- Reason for denial/refusal;
- Feasible mitigation and or alternative (if any); and
- Signature of CAC staff authorized to deny/refuse a permit.

CACs may develop their own form to document refusals or denials, adopt and/or modify one of the examples provided in the Appendix, or use the NOI form when the permit is denied at the time of the NOI.

References

- FAC sections 12825, 14006.5, 14008, and 14009
 - 3CCR section 6424 - Forms
 - 3CCR section 6428 - Agricultural Permit Applications
 - 3CCR section 6432 - Permit Evaluation
 - 3CCR section 6434 - Notice of Intent
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Due Process as it Relates to Permits

Overview

About this section This section discusses due process as it relates to:

- Refusals and Denials
- Suspensions and Revocations

Due process defined “Due process” means an orderly proceeding, adapted to the nature of the case, in which the individual receives adequate notice of a proposed governmental action, and given the opportunity to be heard to defend his/her conduct. In essence, “due process” is fundamental fairness within our quasi-judiciary hearing process.

General authority FAC section 11512.5 authorizes the CAC to refuse, suspend, or revoke a permit pursuant to FAC section 14008, and also describes the processes required when the CAC refuses, suspends, or revokes a permit pursuant to FAC section 14008.

FAC §14008 Pursuant to FAC section 14008, any permit may be refused, revoked, or suspended for violating any conditions of the permit, a previous permit, or any provision of Division 7 or regulations issued pursuant to it; or for failing to pay a civil penalty or comply with any lawful order of the CAC, once that order is final.

References • FAC sections 11512.5, 12825, and 14008

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Due Process as it Relates to Permits -- Refusals and Denials

“Deny” is the same as “refuse”

The Merriam-Webster Collegiate® Dictionary, Tenth Edition, defines “deny” as “to refuse to grant.” To “deny” a permit is the same as to “refuse” to issue a permit. In practical terms, because of due process requirements, there really is no such thing as a “simple denial.”

Due process is required for “denials”

The CAC must provide “notice and an opportunity to be heard” or “due process” when denying or refusing a permit, unless the applicant or activity does not meet an objectively determined minimum requirement.

If	Then,
the permit applicant meets the requirements for obtaining the permit, but the CAC decides to deny or refuse the permit,	the CAC must: <ol style="list-style-type: none"> 1. Provide due process in the form of a notice and an opportunity to be heard; and 2. Make findings to support the decision to refuse or deny the county registration or permit, <u>consistent with the requirements of FAC section 14008.</u>

Opportunity to correct permit application

When the CAC has objectively determined from the person’s application or other public record that the person or activity does not meet a requirement necessary to qualify for the permit or if the person has an incomplete application, the CAC may deny that person without a hearing; however, the applicant should be given notice of the application’s defect and provided with an opportunity to correct the error or omission, if possible.

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Due Process as it Relates to Permits -- Refusals, Suspensions, and Revocations

Due process specifics for refusal, suspension, or revocation

The CAC must provide “notice and an opportunity to be heard” or “due process” when refusing, suspending, or revoking a permit. The following activities are required to ensure due process:

If	Then,
the person’s permit is to be refused, suspended, or revoked (and it is not possible to correct the permit application),	that person shall be given a written notice of proposed action (NOPA), including the basis for the action, and have the right to request a hearing before the CAC within ten days of receiving the NOPA to refuse, revoke, or suspend. In the case of an “immediate suspension,” the CAC shall inform the permittee, in writing, of the suspension as soon as practical, specifying the reasons for the immediate suspension.
a hearing is requested,	the notice of the time and place of the hearing shall be given at least ten days prior to the hearing date. The person will be given the opportunity to present any evidence or argument on his/her own behalf.
a hearing is not requested,	the CAC may take the proposed action without a hearing.
the person’s permit is refused, suspended, or revoked, and he/she had requested and appeared at the hearing,	he/she may appeal the CAC’s decision to the Director within ten days of mailing or personal service of the CAC’s decision.

Grounds for Refusal, Revocation, and Suspension

Introduction This section describes the process that occurs when a person submits an application to obtain a restricted materials permit or the CAC takes an action on an existing restricted materials permit.

Grounds The CAC is authorized to determine whether the permit will be issued or refused, or, an existing permit revoked or suspended. The CAC must be able to articulate a reason or a basis for refusing, revoking, or suspending a permit, and then provide due process. The procedural requirements for refusal, revocation, and suspension differ slightly, based upon the grounds (motive or reason) for the action.

FAC §11512.5 - grounds and time frames for immediate suspension Whenever the CAC has reason to believe that a continuance of a permit endangers the public health, safety, or the environment, the CAC, without prior notice, may immediately suspend the permit.

- The CAC shall inform the permittee, in writing, of the suspension as soon as practical, specifying the reason(s) for the immediate suspension.
- The CAC, within seven days of informing the permittee of the immediate suspension, shall issue a written NOPA.
- If a hearing is requested, it shall not be held later than seven days from the date the request for the hearing is received by the CAC.
- The CAC's decision shall be issued within ten days after the conclusion of the hearing.

FAC §12825 - grounds for refusal and application of FAC §14006.5 FAC section 14006.5 states, “. . . no permit shall be granted if the commissioner determines that the provisions of subdivision (a), (b), or (c) of section 12825 would be applicable to the proposed use.”

The “grounds” referred to FAC section 12825(a), (b), and (c) are:

- There are demonstrated serious uncontrollable adverse effects either within or outside the agricultural environment; or
- The use is of less public value or greater detriment to the environment than the benefit received by its use; or
- There is a reasonable, effective, and practicable alternative material or procedure that is demonstrably less destructive to the environment.

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Grounds for Refusal, Revocation, and Suspension, Continued

FAC §14008 - grounds for refusal, revocation, or suspension

Any permit may be refused, revoked, or suspended for violating any conditions of the permit, a previous permit, or any provision of FAC Division 7 or regulations issued pursuant to it, or for failing to pay a civil penalty or comply with any lawful order of the CAC, once that order is final.

Grounds based upon permit evaluation

If the CAC determines that a substantial adverse environmental impact will likely occur from the use of the pesticide, the CAC shall determine if there is a feasible alternative or a feasible mitigation measure that would substantially reduce the adverse impact. The permit or intended pesticide application shall be conditioned on the utilization of the feasible mitigation measure or be refused.

A word about 3CCR §6444

Title 3CCR section 6444 - Generalized Effects, states, “If at any time pesticide residues, symptoms, or health hazards appear generally throughout the area, the director or commissioner may cause a field inspection to be made. If it appears that substantial loss, damage or injury is likely to result from continued application of a specific pesticide within such an area, the director or commissioner may cause all permits for applications of that pesticide within such area cancelled and specify that no additional permits be issued.”

Title 3CCR section 6444 is intended to be used when the Director of DPR or an individual CAC makes a finding, based upon facts, and wants to cancel or deny restricted materials permits for “generalized effects” **in an area** (such as a county or a portion of a county). Title 3CCR section 6444 is not intended to be used as the grounds for canceling or denying the permit of an individual.

In addition, DPR recommends that CACs first consult with DPR before attempting to use 3CCR section 6444 to address “generalized effects” because the matter may actually be of statewide significance.

References

- FAC sections 11512, 11512.5, 12825, 14006.5, 14008, and 14009
 - 3CCR section 6432 - Permit Evaluation
 - 3CCR section 6444 - Generalized Effects
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County Agricultural Commissioner's Permit Review

**FAC §14009 -
CAC's review
of a permit
action**

Any interested person may ask the CAC to review his/her decision in issuing, refusing, revoking, suspending, or conditioning a permit to use or possess a restricted material. The CAC may affirm, modify, or cancel the permit decision.

A review pursuant to FAC section 14009(a) is typically requested by persons who have had a permit refused, revoked, or suspended with the purpose of having the CAC reissue or reinstate the permit. Occasionally, the request comes from other interested persons seeking to have the CAC refuse, revoke, suspend, or further condition a permit.

**CAC review
criteria**

Each request for review shall be submitted in writing to the CAC and include the following:

- Location of persons, property, or areas affected and the location of the property being treated;
 - The name of the restricted material;
 - Name and address of the person in charge of the property being treated, if different from the person filing the request for review; and
 - Any other information the person filing the request for review or the CAC determines to be relevant.
-

Time frames

The CAC will review the request and provide a written response within ten days, or as soon as it is practicable. The CAC shall conduct each review in an expeditious manner so that needed pest control measures are not adversely affected.

**Appeal to the
Director**

A person directly affected by the CAC's decision may thereafter appeal to the Director for review. The CAC's review of a permit is a process which must precede an appeal to the Director regarding the CAC's review.

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County Agricultural Commissioner's Permit Review, Continued

**Director's
appeal criteria**

In an appeal of the CAC's decision to the Director, the issues are limited to whether the:

- Proposed permit's use is consistent with the applicable pesticide label restrictions and applicable regulations;
 - CAC properly considered the provisions of FAC section 14006.5;
 - CAC abused his/her discretion in issuing, refusing, revoking, or conditioning the permit.
-

Appeals to the Director for Additional Review

Overview

About this section

This section describes the Director's three legal authorities when reviewing an appeal.

Three review authorities

An appeal to the Director to review a permit previously reviewed by a CAC may cite one or more legal authorities. The authorities for each of the three review processes may have slightly differing requirements which the appellant and Director must follow.

References - review authority sections

- FAC sections 11512.5 and 14009
 - 3CCR section 6442 - Permit Review (by the Director)
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Appeal to the Director -- FAC section 11512.5

FAC §11512.5 - Appealing the decision to the Director An appeal pursuant to FAC section 11512.5 shall be in writing and signed by the appellant or his/her authorized agent and state the grounds for the appeal. The CAC's decision shall remain in place pending the outcome of the Director's decision.

Time frames

- At the time of filing the appeal or within ten days thereafter, any party may make a written application to the Director to present new evidence, stating the materiality of the evidence, and the reasons why the evidence was not presented at the hearing. The Director may allow additional evidence at his/her discretion.
- Thereafter, each party has ten days to rebut the evidence presented and present oral or written arguments.
- If an oral argument is granted, each party has ten days before the date is set to hear the arguments; if a written argument is granted, the Director shall specify the time.

Director's limits

- The Director shall decide the appeal upon the evidence received at the hearing before the CAC, the argument, and any new or additional evidence the Director may have admitted.
- Upon appeal, the Director may affirm, modify, or reverse the CAC's decision.

Director's decision A copy of the Director's decision will be given to each party.

Judicial review If the appellant disagrees with the Director's decision, they can seek court review of the decision within 30 days of the date of the decision. Judicial review of any of the Director's decisions pursuant to this section shall be pursuant to Code of Civil Procedure section 1094.5, and shall be limited to whether the proposed permit use is consistent with the applicable pesticide label restrictions and regulations, and whether the Director abused his/her discretion.

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Appeal to the Director -- FAC section 14009(b)

**FAC §14009 -
DPR Director's
review**

Pursuant to FAC section 14009, a person directly affected by the CAC's decision may appeal to the Director to review the CAC's action in issuing, refusing, revoking, suspending, or conditioning a permit to use or possess a restricted material. The Director may affirm, modify, or reverse the CAC's decision.

Time frames

The Director shall act on the appeal within ten days of receipt or as soon thereafter as is practicable. The Director may stay the operation of a permit until his/her review is complete.

**FAC §14009 -
Director's
limits**

In an appeal of the CAC's decision to the Director, the issues are limited to whether the:

- Proposed permit's use is consistent with applicable pesticide label restrictions and applicable regulations;
 - CAC properly considered the provisions of FAC section 14006.5;
 - CAC abused his/her discretion in issuing, refusing, revoking, or conditioning the permit.
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**Before the
public review**

- The Director shall notify directly, the affected person at least 72 hours in advance of the location and time of the public review.
 - Before acting on an appeal in a specified location open to the public, the Director shall review the information provided to him/her as specified in this section, if requested to do so in writing by any interested person.
 - The Director may request additional testimony or other evidence specified in this section at this public review from any interested person.
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Judicial review

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Appeal to the Director -- 3CCR section 6442

3CCR §6442 - Permit Review

FAC section 14009 provides for a review by the Director of the decision of a CAC in issuing, refusing, revoking, suspending, or conditioning a restricted materials permit.

Title 3CCR section 6442 states the standards and procedures applicable to a review by the Director. It also states that registration of a restricted material is DPR's determination that under appropriate local conditions, the CAC may grant a restricted materials use permit.

Director's limits

- The CAC's decision in issuing, conditioning, refusing, revoking, or suspending a restricted materials permit will be reversed by the Director only for a clear abuse of discretion by the CAC in applying applicable restricted materials provisions beginning with FAC section 14001 and regulations beginning with 3CCR section 6400. The burden of establishing abuse of discretion is on the person requesting the review.
 - The Director's review is limited to the particular permit involved.
 - The person requesting review may request the Director to stay the operation of the permit for a limited time, or, until the matter is finally decided. The Director determines whether the stay will be granted or refused as soon as practicable.
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 - Before acting on an appeal in a specified location open to the public, the Director shall review the information provided to him/her as specified in this section, if requested to do so in writing by any interested person.
 - The Director may request additional testimony or other evidence specified in this section at this public review from any interested person.
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Judicial review

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Appendix

Introduction

This Appendix provides sample Restricted Materials Permit Denial Record forms CACs may consider using and the California Restricted Materials Requirements Chart.

In this appendix

This Appendix contains the following topics.

Topic	See Appendix
Restricted Materials Permit Denial Record -- Short Form Example	A
Restricted Materials Permit Denial Record -- Long Form Example	B
California Restricted Materials Requirements Chart	C
