

TITLE 3. DEPARTMENT OF PESTICIDE REGULATION
Field Fumigant Emission Limits
DPR Regulation No. 08-006

NOTICE OF PROPOSED REGULATORY ACTION

AND

NOTICE OF PUBLIC HEARING
ON A PROPOSED OZONE STATE IMPLEMENTATION PLAN AMENDMENT
REGARDING PESTICIDE EMISSIONS IN THE
SAN JOAQUIN VALLEY NONATTAINMENT AREA

The Department of Pesticide Regulation (DPR) proposes to amend section 6452.2 of Title 3, California Code of Regulations. This proposed action would revise the total pesticide (fumigant and nonfumigant) volatile organic compound (VOC) emissions benchmarks in the Sacramento Metro, San Joaquin Valley, South Coast, Southeast Desert, and Ventura ozone nonattainment areas (NAAs), and delay fumigant limits and allowances in all ozone NAAs except Ventura until 2011.

DPR will conduct a public hearing to accept comments on amendment to the ozone state implementation plan. DPR proposes a new commitment to reduce VOC emissions from agricultural and commercial structural pesticide applications in the San Joaquin Valley ozone NAA. Opportunity to comment and hearings on the proposed amendment are being provided in conjunction with this rulemaking.

SUBMITTAL OF COMMENTS

Any interested person may present comments in writing about the proposed action to the agency contact person named below. Written comments must be received no later than 5:00 p.m. on January 15, 2009. Comments regarding this proposed action may also be transmitted via e-mail <dpr08006@cdpr.ca.gov> or by facsimile transmission at (916) 324-1452.

Public hearings have been scheduled for the time and place stated below to receive oral comments regarding the proposed regulatory changes.¹

DATE: January 12, 2009
TIME: 5:00 p.m.
PLACE: Kern Agricultural Pavilion
3300 E. Belle Terrace
Bakersfield, California 93307

¹ If you have special accommodation or language needs, please notify DPR. TTY/TDD speech-to-speech users may dial 7-1-1 for the California Relay Service.

DATE: January 14, 2009
TIME: 1:00 p.m.
PLACE: California Environmental Protection Agency Headquarters Building
Sierra Hearing Room
1001 I Street
Sacramento, California 95814

A DPR representative will preside at the hearing. Persons who wish to speak will be asked to register before the hearing. The registration of speakers will be conducted at the location of the hearing from 4:30 to 5:00 p.m. in Bakersfield, and from 12:30 to 1:00 p.m. in Sacramento. Generally, registered persons will be heard in the order of their registration. Any other person who wishes to speak at the hearing will be afforded the opportunity to do so after the registered persons have been heard. If the number of registered persons in attendance warrants, the hearing officer may limit the time for each presentation in order to allow everyone wishing to speak the opportunity to be heard. Oral comments presented at a hearing carry no more weight than written comments.

EFFECT ON SMALL BUSINESS

DPR has determined that the proposed regulatory action does affect small businesses.

INFORMATIVE DIGEST/POLICY STATEMENT OVERVIEW

State and federal law mandates that DPR protect human health and the environment by regulating pesticide sales and use and by fostering reduced-risk pest management. VOCs can contribute to the formation of ground-level ozone, which is harmful to human health and vegetation when present at high enough concentrations. The federal Clean Air Act requires each state to submit a State Implementation Plan (SIP) for achieving and maintaining federal ambient air quality standards for ozone. An ozone NAA is a geographical region in California that does not meet either federal or state ambient air quality standards. The U.S. Environmental Protection Agency (U.S. EPA) designates NAAs in Title 40, Code of Federal Regulations (CFR) section 81.305. In 1994, California's Air Resources Board and DPR developed a plan to reduce pesticidal sources of VOCs in five NAAs--Sacramento Metro, San Joaquin Valley, South Coast, Southeast Desert, and Ventura--as part of the California SIP to meet the one-hour ozone standard.

In 2006, a federal court found that DPR had violated this pesticide element of the 1994 SIP and ordered DPR to adopt regulations by January 26, 2008, to achieve a 20 percent reduction of pesticide VOC emissions from 1991 levels in the five NAAs. (Court Order concerning remedies, No. Civ. S-04-822 [E.D. Cal. filed April 6, 2006], enforcing *El Comite Para el Bienestar de Earlimart v. Helliker*, 416 F. Supp. 2d 912 [E.D. Cal. 2006].) Regulations (Office of Administrative Law File No. 2007-1219-01S) were developed and adopted January 25, 2008, to comply with the court order. Those regulations, in part, require the Director to establish field fumigant VOC emission limits for NAAs that exceed 80 percent of the emissions benchmarks to make sure those benchmarks are not exceeded. The benchmarks are based on each NAA's emissions in 1991, and are set 20 percent below that level.

On July 18, 2008, U.S. EPA revised California's SIP by reducing the amount of the VOC emission reductions required from pesticides in Ventura in 2008 by 1.3 tons per day (tpd) (73 Federal Register 41277, 41278). That SIP revision steadily phases that 1.3 tons of reduction back in, so that by 2012 the 20 percent pesticide VOC reduction goal in Ventura is reinstated.

On August 20, 2008, the Ninth Federal Circuit Court of Appeals vacated the federal district court's order to achieve a 20 percent reduction from 1991 emissions in the five NAAs. [*El Comite Para El Bienestar de Earlimart v. Warmerdam*, ___F.3d___, 2008 WL 3853351, C.A. 9 (Cal.) August 20, 2008 (No. 06-16131, 06-16000)]. On September 3, 2008, DPR amended section 6452.2 (Office of Administrative Law File No. 2008-0828-01S) to make it consistent with the phase-in of 1.3 tons per day in Ventura approved by U.S. EPA.

To comply with the lower court's order, current regulation section 6452.2 sets the benchmarks for total VOC emissions (fumigant and nonfumigant) 20 percent below 1991 levels. DPR proposes to amend section 6452.2 by using 1990 emissions, instead of 1991, to establish the benchmarks. Additionally, the benchmark for the San Joaquin Valley ozone NAA is being revised to reflect a 12 percent reduction of pesticide VOC emissions from the 1990 levels. These proposed benchmarks are more consistent with our obligation under the 1994 SIP. While DPR proposes to make the benchmarks no more stringent than the SIP, it is taking other actions to reduce pesticide VOC emissions, particularly in the San Joaquin Valley.

DPR proposes to amend subsection (a) to delay fumigant limits and allowances in all ozone NAAs until 2011. The benchmarks in section 6452.2 serve to trigger implementation of an area-wide fumigant limit and allowance system, which would cap fumigant emissions in an area and allocate emissions to growers through use permit conditions. This fumigant allowance system in subsection (a) is triggered in an area if its overall emissions exceed 80 percent of the benchmark level. Allocating fumigants in order to control overall pesticide VOC emissions was a measure put in place to achieve immediate remedial action to meet the court order. Administering the allowance system requires substantial state and local government resources. Thus, this mechanism should only be used if no other measures will achieve emission reductions. Measures such as restrictions on fumigation methods and reformulation of nonfumigant pesticides are a more efficient use of regulatory resources. In addition, measures to reduce nonfumigants in the San Joaquin Valley ozone NAA should be implemented before this mechanism where nonfumigants emissions are a substantial part of the total. The fumigant limit and allowance process could nearly result in the elimination of fumigant use without achieving the desired reductions.

The proposed regulatory action pertains to the following seven fumigant active ingredients. Common brand names and/or alternative chemical names are given in parentheses as an aid to identification--methyl bromide, 1,3-Dichloropropene (Telone, Inline), chloropicrin, metam-sodium (Vapam, Sectagon), Potassium N-methyldithiocarbamate (also known as metam-potassium [K-Pam]), dazomet (Basamid), and sodium tetrathiocarbonate (Enzone).

IMPACT ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts, nor does it require reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the regulatory action does not constitute a "new program or higher level of service of an existing program" within the meaning of section 6 of Article XIII of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from the proposed regulatory action. DPR estimates that delay of implementing the emission limit and allowances in the Sacramento Metro, San Joaquin Valley, South Coast, and Southeast Desert ozone NAAs will save the county agricultural commissioners up to \$1.23 million per year in 2008-09 and 2009-10, in costs for workload associated with the allowance system.

COSTS OR SAVINGS TO STATE AGENCIES

DPR has determined that no increased costs to any state agency will result from the proposed regulatory action. However, the delay of implementing the emission limit and allowances in the Sacramento Metro, San Joaquin Valley, South Coast, and Southeast Desert ozone NAAs will save up to \$1.23 million per year in 2008-09 and 2009-10, in payments to the local county agricultural commissioners for workload associated with this allowance system. DPR resources allocated to implement this process would be available to develop and implement measures to reduce nonfumigant emissions.

EFFECT ON FEDERAL FUNDING TO THE STATE

DPR has determined that no costs or savings in federal funding to the state will result from the proposed action.

EFFECT ON HOUSING COSTS

DPR has made an initial determination that the proposed action will have no effect on housing costs.

SIGNIFICANT STATEWIDE ADVERSE ECONOMIC IMPACT DIRECTLY AFFECTING BUSINESSES

DPR has made an initial determination that adoption of this regulation would have no significant, statewide adverse economic impact directly affecting businesses, including the ability of California businesses to compete with businesses in other states. This proposal reduces the adverse economic impact from current regulation. The revised overall emission limit for the Ventura NAA in 2012 will allow for more acreage to be treated.

COST IMPACTS ON REPRESENTATIVE PRIVATE PERSONS OR BUSINESSES

The DPR is not aware of any cost impact that a representative private person or businesses would necessarily incur in reasonable compliance with the proposed action. As discussed above, the revised overall benchmark emission limit in the Ventura NAA of 1,100,000 pounds in 2012 allows an additional 2,693 acres to be fumigated. The estimated value of the crops grown on those 2,693 fumigated acres is \$7.5 million. DPR also expects 1,000 and 500 acres to be removed from production in 2013 and 2014, respectively, and zero acres removed in 2015 and beyond. Fewer acres are lost due to the development and implementation of new fumigation methods, currently being researched, that will reduce VOC emissions in future years. The total benefit for the 2012-2015 is \$21.6 million.

IMPACT ON THE CREATION, ELIMINATION, OR EXPANSION OF JOBS/BUSINESSES

DPR has determined it is unlikely the proposed regulatory action will impact the creation or elimination of jobs, the creation of new businesses or the elimination of existing businesses, or the expansion of businesses currently doing business within the State of California.

CONSIDERATION OF ALTERNATIVES

DPR must determine that no reasonable alternative considered by the agency, or that has otherwise been identified and brought to the attention of the agency, would be more effective in carrying out the purpose for which the action is proposed or would be as effective and less burdensome to affected private persons or businesses than the proposed regulatory action.

AUTHORITY

This regulatory action is taken pursuant to the authority vested by FAC sections 11456, 12976, 14005, and 14102.

REFERENCE

This regulatory action is to implement, interpret, or make specific FAC sections 11501, 14006, and 14102.

AVAILABILITY OF STATEMENT OF REASONS AND TEXT OF PROPOSED REGULATIONS

DPR has prepared an Initial Statement of Reasons, and has available the express terms of the proposed action, all of the information upon which the proposal is based, and a rulemaking file. A copy of the Initial Statement of Reasons and the proposed text of the regulation may be obtained from the agency contact person named in this notice. The information upon which DPR relied in preparing this proposal and the rulemaking file are available for review at the address specified below.

AVAILABILITY OF CHANGED OR MODIFIED TEXT

After the close of the comment period, DPR may make the regulation permanent if it remains substantially the same as described in the Informative Digest. If DPR does make substantial changes to the regulation, the modified text will be made available for at least 15 days prior to adoption. Requests for the modified text should be addressed to the agency contact person named in this notice. DPR will accept written comments on any changes for 15 days after the modified text is made available.

AGENCY CONTACT

Written comments about the proposed regulatory action; requests for a copy of the Initial Statement of Reasons, the proposed text of the regulation, and a public hearing; and inquiries regarding the rulemaking file may be directed to:

Linda Irokawa-Otani, Regulations Coordinator
Office of Legislation and Regulations
Department of Pesticide Regulation
1001 I Street, P.O. Box 4015
Sacramento, California 95812-4015
(916) 445-3991

Note: In the event the contact person is unavailable, questions on the substance of the proposed regulatory action may be directed to the following person at the same address as noted above:

Randy Segawa, Environmental Program Manager
Environmental Monitoring Branch
(916) 324-4137

This Notice of Proposed Action, the Initial Statement of Reasons, the proposed text of the regulation, the proposed amendment to the ozone state implementation plan regarding pesticide emissions in the San Joaquin Valley NAA, and staff report are also available on DPR's Internet Home Page <<http://www.cdpr.ca.gov>>.

AVAILABILITY OF FINAL STATEMENT OF REASONS

Following its preparation, a copy of the Final Statement of Reasons mandated by Government Code section 11346.5(a)(19) may be obtained from the contact person named above. In addition, the Final Statement of Reasons will be posted on DPR's Internet Home Page and accessed at <<http://www.cdpr.ca.gov>>.

DEPARTMENT OF PESTICIDE REGULATION

Director

Date