

FINAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Amend Sections 6445.5, 6448.1, 6449.1, 6450.1,
6452.2, 6452.3, 6452.4, 6536, and 6626
Pertaining to Field Fumigant Use Requirements

UPDATE OF THE INITIAL STATEMENT OF REASONS

The originally proposed regulatory action was noticed in the *California Regulatory Notice Register* on October 1, 2010.

During the 45-day public comment period, DPR received comments on the proposed text. The comments are discussed under the heading "Summary and Response to Comments Received" of this Final Statement of Reasons. Based upon the comments received from the public and for reasons below, DPR modified the text from that originally proposed.

Changes to the Text of Proposed Regulations

- Revised subsection 6452.2(a) to delete the amendment that provides DPR with the flexibility to implement fumigant limits even if the "trigger" for fumigant limits is not reached. The proposed criteria to be used to establish such a fumigant limit was unclear and DPR was unable to develop more objective criteria to establish a fumigant limit if the specified levels are not exceeded. Due to the lag in pesticide use reporting, DPR relies on two-year old data to determine the need for a fumigant limit in the upcoming year. DPR considered other methods for obtaining more up-to-date information, but the alternative methods were costly and still uncertain, particularly for the San Joaquin Valley. Therefore, DPR deleted this provision due to lack of clarity.
- Add subsection (a)(1) to require that if a VOC emission limit is in effect that limit must remain in effect until the commissioner does not condition a permit to include a fumigant emission allowance, and does not deny any permit or notice of intent in order to comply with the fumigant emission limit for two consecutive years. Current regulations require a fumigant limit in the Ventura ozone nonattainment area at least until 2012. Pesticide VOC emissions in Ventura were much lower than expected for the last two years. DPR is uncertain if the low emissions are due to the fumigant limit currently in effect, or a decrease in fumigant use for other reasons. This subsection provides objective criteria to determine if a fumigant limit is needed, or if decreased use negates the need for a fumigant limit.

PUBLIC HEARING

DPR scheduled and held a public hearing on November 16, 2010 in Bakersfield, California. A transcript of the hearing is contained in the rulemaking file.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING 45-DAY COMMENT PERIOD

Comments were received from the following: (1) Cynthia Cory, California Farm Bureau; (2) Henry Buckwalter, Western Plant Health Association; (3) John Guerard, Responsible Farmers Coalition; (4) Sonia Salas, Western Growers; (5) James Wells, Pesticide Ag-SIP Workgroup and the California Specialty Crops Council; (6) Michael S. Stanghellini, TriCal, Inc.; (7) Stephen Wilhelm, Chloropicrin Manufacturers' Task Force; (8) Brian L. Bret, Dow AgroSciences; (9) Ruben Arroyo, Kern County Agricultural Commissioner; and (10) Theresa DeAnda.

Comment Number	Comment and Response	Commenter
1	Support new application methods. <i>DPR agrees.</i>	1, 2, 3, 4, 5
2	Support revised post-water treatments based on soil type. <i>DPR agrees.</i>	1, 2, 8
3	Support the modification of determining the level at which a field fumigant VOC emission limit is triggered from 80 percent to 95 percent. <i>DPR agrees.</i>	1, 2, 4, 5, 7, 8
4	Concerned that in section 6452.2(a) the Director is given unlimited authority to establish a field fumigant emission limit, even if the emissions in the inventory report do not exceed the "trigger" level of 95 percent of the benchmark. While there are three examples of conditions that the Director could use to establish emissions limits, it is not restricted and is therefore, an open-ended authority. There is a lack of definition that could leave to subjective reasoning. <i>DPR agrees. This subsection has been deleted.</i>	1, 2, 4, 5, 7
5	In section 6452(a), the only public process proposed for establishing the emissions limits is an announcement of the reason for the decision in the annual inventory report giving no notice or comment opportunity for affected parties. <i>This subsection has been deleted.</i>	1, 4
5a	Under the proposal, the Director may require a field fumigant limit if the emissions are below the trigger level because emission limits are already in place. This provision is understandable, in that if emissions decrease only because an emissions limit is in place, it may be necessary to impose limits in successive years. However, this provision lacks a methodology for determining whether emission reductions are the result of emission limits set the prior year, or the result of changing practices, formulations, cropping patterns, etc. Without some further criteria or methodology for	2, 5, 7

	<p>making this determination, it is possible that once a limit is set in place, there will be no way to determine when it is no longer necessary to achieve the benchmark emission levels.</p> <p><i>DPR agrees and has modified the text to add subsection 6452.2(a)(1) with criteria for removing a fumigant emission limit.</i></p>	
6	<p>Under the proposal, the Director may require a field fumigant limit if she or he discerns an increasing trend in emissions. What constitutes a trend? Do emissions have to increase 1 percent per year, 10 percent per year, or 50 percent per year? The Director may also require limits if she or he anticipates changes in cropping or pesticide use patterns. What objective criteria will the department use to make this determination?</p> <p><i>DPR agrees that the criteria are vague, and this subsection has been deleted.</i></p>	5, 7
7	<p>The list of reasons is completely open ended, because the Director may establish emission limits for other, unspecified reasons. The only public process proposed for establishing the emissions limits is an announcement of the reason for the decision in the annual inventory report. This report is just that, a report, and while there is an opportunity for comment, it is not a formal Notice and comment process under California's Administrative Procedures Act. In effect, the inventory report could become an underground regulation.</p> <p><i>This subsection has been deleted.</i></p>	5, 7
8	<p>Requests that the circumstances leading to the Director's decision to establish a VOC emissions limit, even if the emissions do not exceed objective numerical thresholds, should be limited to a determination that the emission reduction was the direct result of previously imposed limits and that the regulation specify the criteria for making that determination. DPR should consider utilizing the language, "For areas in which a Field Fumigation Volatile Organic Compound Emission Limit has been established, the limit shall remain in effect until the difference between the benchmark and the emissions in the most recent inventory report for that area is 10 percent more."</p> <p><i>DPR modified the text to add subsection 6452.2(a)(1) to include alternative criteria for removing a fumigant emission limit.</i></p>	2, 5, 7
9	<p>The ultimate goal of the regulations is to meet overall air quality requirement for the San Joaquin Valley NAA. It has been documented through researchers that nitrogen oxide not VOCs are the limiting factor in ozone formation in the Central Valley. A 95 percent trigger for fumigant VOCs will not have an impact on air quality in the San Joaquin Valley.</p> <p><i>Comment not relevant to the proposed amendments - no response necessary.</i></p>	1, 2, 3, 5

10	<p>We have strong disagreements with the proposal, both scientific and administrative. The proposed regulation is to control the amount of emissions for ozone purposes, not for worker safety or residential considerations. (DPR has implemented regulations for buffer zones and U.S. Environmental Protection Agency [U.S. EPA] is in the process of implementing national buffer zones for worker and residential safety purposes.) However, an attempt to prevent an increase in emissions should not be confused with the fumigant's level of reactivity which is the goal of the Clean Air Act and the States' state implementation plan. Assuming a soil fumigant has an acceptable maximum incremental reactivity, the Director could be prohibiting a reduction of a soil fumigant and not reduce the nonattainment area's ozone, thereby resulting in no benefit. We strongly recommend DPR implement the recommendations made in the U.S. EPA Interim Guidance (Federal Register/Vol. 70, No. 176/Tuesday, September 13, 2005/Notices, p. 54046)</p> <p>The proposed administrative procedure for allocating the soil fumigant cannot result in a program that will accommodate the growers' production requirements for the following reasons:</p> <ul style="list-style-type: none"> - Growers do not have unlimited field options for planting, and detailed work is required to select the appropriate field. Part of the growers' field selection process is the availability of soil fumigants for soil pests. - Should the grower learn the grower's allowance is insufficient or at worst not available, planting may fail for the season. - The reporting period will be two years in arrears thereby having no rational relationship to the year the soil fumigant is required. - There is no appeal process to the Director's decision to allocate less than the 18.1 tpd. - Finally, when the State is experiencing significant budget problems, DPR staff will have to be moved into record keeping and away from their real purpose in the agency. <p><i>Comments not relevant to the proposed amendments. Accounting for reactivity is not an option under the current State Implementation Plan. The only proposed changes to the administrative procedures for the fumigant limit and allowances program make it less burdensome to growers. For example, DPR has added two other options for enforcing a fumigant limit, in addition to the allowances program. Also, the growers are required to provide less information to agricultural commissioners when requesting an allowance. The comments on the allowance program are not relevant to the proposed amendments.</i></p>	3
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11	<p>Under the Economic Impact Statement, a cost of “0” was determined for businesses and individuals. How would this vary if a new field fumigant VOC emission limit is established? If there is not a clear public process for establishing emission limits, there will not be an opportunity for affected parties to comment, which could produce significant financial loss through reduced acreage and crop damage. We believe additional criteria for establishing emission limits should be included that do not ignore an economic impact as well as the input of affected parties.</p> <p><i>DPR’s legal obligations under the State Implementation Plan do not allow revisions to VOC reduction levels based on economic impact.</i></p>	4
12	<p>DPR has yet to integrate or revise VOC emissions ratings for chloropicrin and methyl bromide based on the new data that has been developed specifically at the request of DPR.</p> <p><i>Comments not relevant to the proposed amendments - no response necessary.</i></p>	6
13	<p>The proposed regulations are enforceable.</p> <p><i>DPR agrees.</i></p>	9
14	<p>Why have you lowered the trigger point when you would have to set the restrictions to 95 percent or more of the limit?</p> <p><i>DPR revised the trigger for fumigant limits and allowances because the original trigger was unnecessarily restrictive. The original trigger likely would have required a fumigant limit and allowances when they were not necessary to achieve the VOC reductions required by the State Implementation Plan. For example, had the original trigger been in effect, pesticide VOC emissions during 2007 in the San Joaquin Valley would have triggered a fumigant limit and allowances program for 2009. In 2007, pesticide VOC emissions were 29 percent less than the 1990 base year, much greater than the 12 percent reduction required by the State Implementation Plan.</i></p>	10
15	<p>Object to focusing the majority of your changes on field fumigant methods basically requiring growers to do what most are doing already.</p> <p><i>Most growers were not using “low-emission” fumigation methods prior to the implementation of the regulations in 2008. A comparison of the VOC emissions between 2007 and 2008 shows a decrease of approximately 40 percent in fumigant VOC emissions due to the growers’ change to low-emission fumigation methods.</i></p>	10

COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD

No comments were received during the 15-day comment period.

MANDATE 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 requiring 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 B of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from this regulatory action.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative considered by DPR would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less burdensome to affected private persons or businesses than the proposed regulatory change.

POSTING REQUIREMENT

Title 3, California Code of Regulations, section 6110, states in part that, “The public report shall be posted on the official bulletin boards of the Department, and of each commissioner’s office, and in each District office of the DPR [Division of Pest Management, Environmental Protection and Worker Safety] for 45 days.” DPR has posted its Initial Statement of Reasons and Public Report on its official bulletin board, which consists of the Department’s Internet Home Page <<http://www.cdpr.ca.gov>>. In addition, copies were provided to the offices listed above for posting.