FINAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Adopt Section 6722; Amend Sections 6000, 6618, 6619, 6720, 6723, 6723.1, 6724, 6726, 6732, 6734, 6738.3, 6738.4, 6744, 6761, 6761.1, 6762, 6764, 6766, 6768, 6769, 6770, 6771, 6776, and 6782
Pertaining to Worker Protection Standard

UPDATE OF THE INITIAL STATEMENT OF REASONS

As authorized by Government Code section 11346.9(d), the Department of Pesticide Regulation (DPR) incorporates by reference the Initial Statement of Reasons prepared for this rulemaking. No changes were made to the proposed regulations nor are any changes necessary to the Initial Statement of Reasons following the 45-day public comment period.

The proposed regulatory action was noticed in the *California Regulatory Notice Register* on April 22, 2016. 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.

DPR has adopted Title 3 California Code of Regulations (3 CCR) section 6722; and amended sections 6000, 6618, 6619, 6720, 6723, 6723.1, 6724, 6726, 6732, 6734, 6738.3, 6738.4, 6744, 6761, 6761.1, 6762, 6764, 6766, 6768, 6769, 6770, 6771, 6776, and 6782. In summary, this action amends existing worker safety regulations to align with the newly revised federal Worker Protection Standard (WPS) regulations [Title 40 Code of Federal Regulations, Part 170 (40 CFR)] that become effective January 2, 2017. The proposed action revises requirements for training, notification, pesticide safety and hazard communication information, use of personal protective equipment, and emergency decontamination when using a pesticide for the commercial or research production of an agricultural commodity.

This regulation will go into effect on January 2, 2017.

PUBLIC HEARING

No public hearing was scheduled or held.

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

- *Tom Boster, Cal Ag Safety*

Comment no. 1: DPR proposed to require that field postings be made when the material used has a restricted entry interval (REI) greater than 48 hours in section 6776, and keeping the phrase "after adjustment pursuant to section 6774" as part of the language. For the most part, section

6774 adjustments will have little additional effect on agricultural operations with the new regulation as most of the materials listed already have label REI's of three days or more.

Response: Comment is out of scope of the proposed regulations. DPR is currently only implementing the changes required under the revised WPS. No response necessary.

Comment no. 2: Recommend DPR review all of its findings on sulfur use in grapes and either change the adjustment in section 6774 to two days for sulfur on grapes, or provide an exemption for posting when sulfur is used on grapes in the San Joaquin Valley.

Response: DPR made the determination that a three-day restricted entry interval is necessary to protect workers from sulfur used on grapes in certain areas of California. Changing the length of this restricted entry interval is outside of the scope of implementing changes required under the revised WPS. In order to be consistent with the new federal field posting requirements, posting is necessary for products with restricted entry intervals greater than 48 hours.

Comment no. 3: The chart in section 6774 should be updated and corrected.

Response: Comment is outside the scope of the proposed regulations. No response necessary.

- *Christopher Valadez, California Fresh Fruit Association*

Comment no. 4: "Application exclusion zone" is a new term constructed to identify an area where fieldworkers shall avoid that is specific to the proximity of application equipment. To avoid or reduce the likelihood for confusion, its definition in section 6000 narrowly refers to the zone as an area around the equipment applying the pesticide while the pesticide is being applied. However, in section 6762 the application exclusion zone is more clearly defined by setting as a specific area measured in feet from the application equipment in all directions, in inches when applying aboveground, and as applicable under different application methods. The application exclusion zone that is specified in section 6762(c)(1)(A)-(B) and (c)(2)(A)-(B) for enclosed space production, should be used consistently and should replace the vague definition of "application exclusion zone" in section 6000.

Response: DPR's proposed definition of "application exclusion zone" in 3 CCR section 6000 is U.S. EPA's definition of the "application exclusion zone" under 40 CFR part 170. Proposed 3 CCR sections 6762(1) and (2) specify the required application exclusion zone distances according to the method of application.

Comment no. 5: The information request made on behalf of an employee by their representative in section 6723(d)(3) and 6761(d)(3) requires an ambiguous written statement confirming that an employee consents to the request but fails to require a disclosure of the representative nature between the employee and the requestor. This lack of required description creates concern over who will be making the request, the purpose for which the request was made, and how the information may be used against an employer. Permitting open-ended access generates new potential for employer exposure to claims and allegations. As an alternative, by requiring the

request to be accompanied by a description of the relationship between the employee and representative (ex: attorney-client, collective bargaining representative) the employer will have a clearer understanding of the potential purpose for which the information has been requested, thereby affording the opportunity to comply with a request in a more appropriately sensitive manner.

Response: To be consistent with the newly revised WPS requirement, DPR must adopt the requirement that an employee's representative make a request for information about the employee in writing. Additionally requiring the employee's representative to describe the relationship is outside the scope of this proposed regulation. DPR is not proposing any additional requirements beyond what will become effective nationwide by U.S. EPA in January 2017.

Comment no. 6: In proposed sections 6724(c) and 6764(d), training for employees must be reasonably "free from distraction." It appears this requirement is prescriptive without being descriptive as to what qualifies as reasonably free. The burden placed on the employer for ensuring a learning environment is reasonably distraction free is prescriptive in nature without consideration of individual responsibility for attentiveness. Moreover, the ever-present requirement for the trainer is not well framed within a scope that should more appropriately be focused on providing employees an opportunity to access the trainer during the training session. As written, the employer would hold a disproportionate level of responsibility over ensuring the trainer was "always present" throughout the duration of the training presentation. Any segment in a training in which a trainer is not present, for whatever reason, could negatively impact employer compliance with the employee training responsibility. This section should be reconsidered to focus the requirement on affording employees the opportunity for sufficient access to the trainer during the session.

Response: The proposed amendments are consistent with the newly revised federal WPS. The term "reasonably free from distraction" means a location in which worker's hearing and sight are not impaired by the environment. Trainers are required to be present throughout the training in order to answer questions. DPR does not agree that these requirements impose unreasonable responsibility on the employer for employee attentiveness and trainer presence during trainings.

• *Simone Hardy – Solano County Assistant Agricultural Commissioner*

Comment no. 7: The regulations include language about the end of an application. The problem is that the end of an application may be several days or in the case of some types of applications weeks from the start. Although there is an unwritten assumption within the law that applications are completed on the same day, this is not always feasible. As pesticide specific posting is based on completion, a field may be treated and subject to re-entry restrictions but still not listed as completed for the purposes of fieldworker protections. To be meaningful it would be helpful to address partially completed fields or address the concept of what completed means for pesticide applications. Suggest definition that draws a distinction between start and stop, and completion.

R***esponse:*** DPR is currently only implementing the changes required under the revised WPS.

- *Virginia Ruiz, Farmworker Justice; Anne Katten, California Rural Legal Assistance Foundation; Eve C. Gartner, Earthjustice; Michael Meuter, California Rural Legal Assistance Inc.; Margaret Reeves, Pesticide Action Network*

Comment no. 8: DPR needs to amend the definition of "employer" in section 6000 for consistency with the WPS revisions and to prevent agricultural employers from avoiding their responsibilities through using labor contractors or other intermediaries.

"Employer" means any person who obtains, directly or through a labor contractor, the services of a person in exchange for a salary or wages, including piece rate wages, without regard to who may pay or who may receive the salary or wages. ~~exercises primary direction and control over the work, services, or activities of an employee~~. A foreman, crew leader, supervisor, or similarly situated person represents the employer when hiring an employee or when exercising, or having responsibility for exercising, the primary direction and control, but is not considered the employer himself or herself. (40 CFR section 170.305.)

Response: DPR's definition of employer preceded the revised WPS and as currently written is more inclusive than the WPS requirements by including all persons who exercise primary direction and control over the work, services, or activities of an employee irrespective of wage. Revising the definition of employer to only include wages would potentially exclude groups working for other forms of compensation.

DPR's current definition of "employer" in 3 CCR section 6000 encompasses all forms of employment relating to agricultural operations and/or pesticide use. This includes employers who meet the U.S. EPA's definition of "agricultural employer," "handler employer," and employers who meet U.S. EPA's new definitions of "commercial pesticide handler employer" and "labor contractor" in the newly revised WPS.

Under the general provisions of the Labor Code (section 6400, et.seq.) and California regulations, every employer is responsible for employee safety. Encompassing all forms of employment under one definition does not absolve any individual employer from his/her responsibilities, even in situations where there are multiple employers. DPR intends to interpret and exercise its enforcement discretion to be consistent with the requirements of the newly revised WPS.

Comment no. 9: Amend section 6744 to require workers who clean, repair, or adjust pesticide application equipment to be trained as handlers. This is an important protection that U.S. EPA added to the WPS and it should be included in California's regulations.

Response: The definition of "handle" in 3 CCR section 6000 includes maintaining, servicing, repairing, cleaning, or handling equipment used in the application of pesticides that may contain residues. Under 3 CCR section 6724 employers are required to make sure all employees who handle pesticides are trained in accordance with the requirements of that section. Therefore, in order to comply with 3 CCR section 6724, employees who clean, repair, or adjust pesticide application equipment must be trained as handlers.

Comment no 10: Recommend that DPR require employers to inform their workers of the workers' right to file confidential complaints if they face unsafe labor conditions under California's Labor Code section 6704. This right is essential to enable government agencies to know whether employers are violating the law and for enforcement purposes. Farmworkers, like most workers, are not properly informed about their rights, even though they face the most dangers in the workplace.

Response: DPR already requires employees to be informed of their worker rights as they relate to pesticides under 3 CCR 6724(b)(16) and 6764(b)(11).

Comment no. 11: We are concerned about DPR's decision to amend sections 6723 and 6761 to require employee representatives to submit detailed written requests to obtain application and hazard information. We believe that this weakens current California regulation on employee representatives' access to pesticide information. Employee representatives should continue to be able to request application and hazard information from employers orally and in writing without the addition of more burdensome requirements.

Response: DPR has not lessened its requirement for documents to be provided to employee representatives; DPR only implemented the WPS requirement for documentation if the records are requested. DPR does not agree that documenting an employee representative's request weakens employee access.

Comment no. 12: In California some farms operate in multiple counties, so some fields are very remote from farm headquarters. DPR should add a requirement that the central location where pesticide specific information is displayed must be within five miles of the pesticide handler or fieldworkers' worksite. Alternatively, if smart phones can access the specific pesticide application information through a scan code on the PSIS A-9 posted at the worksite, the central location could be more remote.

Response: As stated in the Initial Statement of Reasons, U.S. EPA granted DPR primacy for pesticide enforcement in California. Primacy is supported by the fact that DPR's worker protection regulations are equivalent to the federal requirements. Because the federal regulations will become effective on January 2, 2017, the scope and purpose of these proposed regulations was intentionally limited to amendments necessary to provide the same level of protection as will be required by the newly revised federal WPS to protect DPR's primacy. Further, it will be confusing to stakeholders and create the potential for noncompliance with federal law if the state regulations are not as stringent as the federal requirements that will be enforceable in January 2017. The inclusion of requirements that are substantially different from the newly revised federal WPS in this rulemaking would have required workshops, more in depth analysis, and subsequently an economic analysis of any requirement that went the beyond the revised federal law. It would have been unlikely that DPR could have met the January 2017 deadline. Your comment will be considered in future rulemaking.

Comment no. 13: We support amending section 6618 to require commercial pesticide handlers to include application start and estimated end times in the notice of a scheduled application provided to the operator of the property to be treated. However, we believe workers, as well as

residents of farmworker housing and other housing on properties adjacent to application sites, need protection too, and it is DPR's obligation to protect them. DPR should require advance notice to operators of adjacent properties that an application will occur if the application exclusion zone will reach across property lines. Protection for workers and residents who are at adjacent farms is absolutely crucial, given the evidence from Washington and California that most acute drift exposures happen across property lines. In addition, such notice is needed in order for an operator of an adjacent property within an application exclusion zone to comply with the requirement to prevent people from entering the application exclusion zone.

Response: DPR is currently only implementing the required changes according to the revised WPS (see response to comment no. 12). The WPS does not require advance notice to operators of adjacent properties that an application will occur if the application exclusion zone will reach across property lines.

Comment no. 14: Support amending the DPR regulations to require employers to maintain a record of trainings for each farmworker for two years, and to provide access to these records and a copy of the record to any worker or handler upon request. However, we are concerned that workers may be denied employment based on their failure to show proof of prior training. DPR should therefore require training records to be provided to workers automatically rather than on request, and should prohibit employers from refusing to hire a worker who does not have proof that he or she has already received a WPS safety training.

Response: DPR is currently only implementing the changes required under the revised WPS (see response to comment no. 12). The WPS only requires employers to provide training records on request. Employees are allowed to request these records at any time within the two year record keeping requirement.

Comment no. 15: Concerned about potential misinterpretations of section 6762(c)(1) and (2), which specify application exclusion zone sizes. Some pesticides labels, or permit conditions may set larger buffer zones than those provided in section 6762(c) (which are in effect during and sometime after application). Thus, a qualification should be written into the regulations as follows:

> If the pesticide is applied for outdoor production, <u>the application exclusion zone is defined as follows, except for cases where a larger buffer zone is specified on the pesticide label or in permit conditions.</u>

Response: Buffer zones and application exclusion zones are two independent requirements. Application exclusion zones are transient and exist around the application equipment as it moves through the field. Buffer zones are measured from the edge of the application block. Regardless of the application exclusion zone size, pesticide label or restricted material permit buffer zone requirements are still in effect.

Comment no. 16: Recommend that DPR adopt stricter requirements on the application exclusion zone than the revised WPS demands.

Response: DPR is not proposing any additional requirements beyond what will become effective nationwide by U.S. EPA in January 2017 (see response to comment no. 12).

Comment no. 17: DPR should revise the regulations to clarify how section 6762 will be enforced to ensure the safety of workers and their families if farmworker housing or other structures are within an application exclusion zone. We think that it is unsafe and infeasible to tell farmworkers or other individuals to shelter in place after a pesticide application until it is safe to leave a building. It is important to require pesticide applicators and agricultural employers to notify those who occupy structures within the application exclusion zone to evacuate until it is safe to enter and to provide those individuals compensation for costs associated with their evacuation (hotel room costs, transportation costs, and other miscellaneous charges).

Response: The operator of the property cannot allow or direct any person, other than appropriately trained and equipped handlers, into an application exclusion zone on his property including worker housing areas when they are in the application exclusion zone. DPR does not have legal authority to require compensation for an individual's cost associated with their evacuation.

Comment no 18: We support DPR's decision not to weaken the current requirement for entirely enclosed space production, which requires posted warning signs for an REI of any length. We recommend also that posting requirements for all enclosed pesticide applications should apply to all REIs, and not be limited to those with REIs of more than four hours.

Response: DPR appreciates your support in retaining the posting requirements for entirely enclosed spaces. However, requiring posting of enclosed spaces for reentry intervals (REIs) less than four hours is an expansion on the revised WPS requirements and DPR is not proposing any additional requirements beyond what will become effective nationwide by U.S. EPA in January 2017 (see response to comment no. 12).

Comment no. 19: DPR should amend section 6776 so that agricultural employers are required to remove signs within 24 hours, rather than three days, after an REI expires. Workers in many areas of the country report that employers keep signs posted indefinitely as a means of discouraging trespassers. This practice renders the signs meaningless to workers who have no way of knowing if an REI is currently in effect.

Response: DPR is not proposing any additional requirements beyond what will become effective nationwide by U.S. EPA in January 2017 (see response to comment no. 12). The WPS requires property operators to remove their signs within three days of the expiration of the REI.

Comment no. 20: We strongly support the change in section 6770(d)(2)(A), which deletes an existing dangerous loophole specifying that operation of a tractor with shields or enclosed cab within a field is a no-contact activity.

Response: No response necessary.

• *Roberta L. Firoved – California Rice*

Comment no. 21: We foresee possible problems the rice industry may have in complying with the field posting regulations in section 6776(a)(4), which could conflict with label and permit conditions, and request either clarification or specific exemption of the field postings requirement for rice fields.

The thiobencarb labels include seven-day REI with personal protective equipment requirements for entry within 24 hours after application to treated areas that are permitted under the current WPS. However, the field posting changes to the WPS would prohibit irrigator access to the field for checking the rice box – the weir at the edge of the field to control water levels and the regulatory point for water holding requirements. Irrigators are not included in the early entry requirements and checking the rice box could be interpreted as prohibitive under the WPS changes.

Response: Posting for REIs greater than 48 hours is a federal requirement under the WPS. DPR does not have the authority to grant exemptions to federal requirements. Under the proposed rule, as well as the current rule, irrigators are allowed to reenter fields under REI so long as they are trained on early-entry requirements and are wearing the PPE listed on the label for early entry.

Comment no. 22: An additional requirement for posting in rice fields would be virtually impossible where rice is contiguously planted and a ¼ mile distance does not exist around the field. The field postings do not provide any more protection for workers than the oral notifications currently in place.

Response: If access to a treated field is controlled in a manner which assures employees will not be within ¼ mile of the treated area during application or REI, posting is not required regardless of REI length. If access cannot be controlled within ¼ mile around the treated field the field must be posted if the REI is greater than 48 hours. This is a federal requirement under the new WPS with no specific exemptions for rice.

Comment no. 23: Field posting and additional buffer areas during REI would actually hamper and interfere with compliance of the water holding requirements.

Response: There are no new buffer zone requirements in the revised WPS. Comment is outside the scope of this rulemaking package.

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 adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of the law. These amendments are designed to align California worker safety regulation with the new federal WPS rules that become effective nationwide on January 2, 2017.

POSTING REQUIREMENT

3 CCR 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.