

Chapter 1

Pesticide Regulation: Authority, Structure, and Oversight

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Section 1 Pesticide Regulatory Authority

A. Federal and State Authority

Primary federal authority The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) establishes the United States Environmental Protection Agency (U.S. EPA) primary authority to regulate pesticides in the United States.

However, with the exception of pesticide labeling, FIFRA also gives U.S. EPA the authority to delegate pesticide enforcement authority to states by entering into cooperative agreements with state pesticide regulatory programs. Under these agreements, states are authorized to train their personnel to enforce pesticide laws and develop licensing, certification, and training programs for applicators using restricted use pesticides.

Federal delegation of authority to DPR

FIFRA section 26 delegates to the states responsibility for primary pesticide use enforcement provided the state has adopted adequate pesticide use laws and regulations. FIFRA section 11 authorizes U.S. EPA to certify state programs for the training, licensing, and certification of pesticide applicators to meet as meeting federal standards, and FIFRA section 23 allows U.S. EPA to enter into cooperative agreements with states to enforce the FIFRA training, licensing, and certification requirements and to assure that the state program in these areas are consistent with federal standards.

DPR has been delegated primary use enforcement authority in California under FIFRA, has been certified as meeting federal standards for training, licensing, and certification, and has a cooperative agreement with U.S. EPA. The U.S. EPA and DPR cooperative agreement helps ensure California continues to meet the requirements to retain primacy in this area.

Federal law controls pesticide labels

While states can regulate pesticide sales and use to the extent that it does not allow anything FIFRA prohibits, FIFRA section 24 (b) provides that a state cannot impose or continue in effect any requirements for labeling or packaging in addition to or different those required by FIFRA. This is referred to as the federal preemption of pesticide labeling.

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Pesticide Regulatory Authority, Continued

B. DPR and CAC Responsibilities

DPR and CAC roles Chapter 2 Section 3 *Roles and Responsibilities – CAC and DPR* gives an overview of DPR’s oversight role of each CAC pesticide enforcement program. DPR’s oversight authority comes from FAC section 2281, which outlines the roles and responsibilities of the State (DPR) and the county (CAC) for joint pesticide use enforcement, as follows:

DPR responsibilities:

1. Overall statewide enforcement
2. Issue instructions and recommendations to the county
3. Develop county priorities jointly with the CACs
4. Assist in planning/developing county programs focusing on:
 - Uniformity
 - Coordination
 - Training
 - Special services
 - Special equipment
 - Forms
 - Statewide publicity
 - Statewide planning
 - Emergency assistance
5. Develop a cost analysis of the county programs/activities
 - Identify underfunded programs/activities
6. Report to the Legislature

CAC responsibilities:

1. Administration of county programs/activities
2. Follow instructions and recommendations of DPR
3. Develop county priorities jointly with DPR

FAC section 12977 specifies that the CAC enforces the pesticide use enforcement provisions of Article 10 under the direction and supervision of DPR.

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Pesticide Regulatory Authority, Continued

**DPR and CAC
roles**
(continued)

FAC sections 12980, 12981 and 12982 place responsibility for safety in the pesticide workplace with DPR and specifies that the CAC enforces the provisions under the direction and supervision of DPR. The CAC may request the assistance of the local county health officers who may in turn request assistance of the Office of Environmental Health Hazard Assessment (OEHHA).

FAC section 11501.5 provides that the CAC enforces the county portion of the pest control licensing program under the direction and supervision of DPR.

FAC sections 2181 through 2187 provide that if DPR has satisfactory evidence that a CAC is guilty of neglect of duty, incompetence, or misconduct, DPR must convene a “trial board” that will hold a hearing to determine if the CAC should be removed from office.

**Mill assessment
funds the CAC
program**

FAC section 12844 outlines the authority and general criteria for distributing the mill assessment funds for pesticide use enforcement; it provides for:

1. Joint (DPR and CAC) responsibility for regulations on distributing money
2. Disbursement based upon:
 - Program effectiveness (overall)
 - Inspections performed
 - Amount of pesticide used
 - Number of persons using pesticides
 - Private applicators certified
 - Hours expended
 - Dollars expended
 - Other items agreed upon

FAC section 12844.5 authorizes the expenditure of mill assessment funds for structural pest control activities.

3 CCR section 6395 provides a structure for allocating mill assessment funds.

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Pesticide Regulatory Authority, Continued

CAC enforces restricted materials program

FAC section 14004 specifies that the Director and the CAC, under the direction and supervision of DPR, enforce the restricted materials program.

CAC, DPR, SPCB enforce structural pest control

FAC section 15201 outlines general responsibilities and roles of DPR, the Structural Pest Control Board, and CACs in licensing and pesticide use for structural pest control activities. It specifies that the CAC regulates pesticide use in structural activities under the direction and supervision of DPR.

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Pesticide Regulatory Authority, Continued

C. Authority of Other Local and State Agencies

No Local regulation allowed unless authorized by FAC Division 6 & 7

DPR has the authority to regulate the registration, sale, and use of pesticides under FAC Divisions 6 and 7 to the exclusion of all local regulation not specifically allowed by those provisions. This preemption of local regulation is set forth in FAC section 11501.1. If a local governmental agency attempts to regulate the sale or use of pesticides that is not allowed by the Food and Agricultural Code, DPR is required to notify the agency and, if not withdrawn, take legal action to have it declared null and void, and enjoin its enforcement.

No limit on State Agencies if mandated by statute

However this section specifically states that this preemption does limit the authority of another state agency to enforce or administer a law they are authorized or required to enforce.

State agencies with overlapping authority or related jurisdiction

A number of state agencies have overlapping authority to regulate pesticide use or have separate authority over a resource that is impacted by pesticide use. Generally, in these cases there is a formal agreement between the various entities on how to divide the primary authority between them or to define a level of cooperation. See Section 2 Part C below.

Section 2

The Regulatory Program: Protecting Workers, the Public, and the Environment

A. The Scope of the Regulatory Program

California State law mandates pesticide regulation

The California legislature has given DPR a broad mandate to regulate all aspects of pesticide sale, registration and use. FAC section 11501 sets forth the intent of the Legislature to provide for the proper, safe and efficient use of pesticides to protect the public, workers, and the environment.

Division 6, includes the regulation of pest control operations—pest control businesses, applicators, pilots, advisors, and dealers. Division 7 focuses on registration of pesticides, the regulation of pesticide residue, worker safety, restricted material pesticides, and restrictions to protect the people and the environment.

In FAC section 12980, the Legislature declared its intent for DPR and the Office of Environmental Health Hazard Assessment (OEHHA) to jointly develop regulations related to pesticides and worker safety.

The authority and process for the CACs to administratively enforce the code and implementing regulations related to licensing and pesticide use is found in FAC section 12999.5. Similar authority is provided for DPR to enforce violations of the laws or regulations related to registration and sales, and illegal residue is found in FAC section 12999.4.

State law authorizes regulations to implement the FAC

In addition enforcing the statutory provisions, the Director is given the authority to pass any regulations necessary to carry the provisions of the Division 6 and 7 in FAC section 11456. Throughout those divisions, numerous other sections provide specific authority to adopt regulation to implement particular code provisions.

Regulations adopted under the authority of Division 6 and 7 are found in Title 3 of the California Code of Regulations (3 CCR) from section 6000 through 6972. Implemented at the state level, they include regulations that cover pesticide registration, renewal, evaluation and reevaluation, research authorizations, mill assessment.

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The Regulatory Program, Continued

State law authorizes regulations to implement the FAC,
(continued)

More relevant to county pesticide use enforcement staff, these regulations cover:

- enforcement response (3 CCR sections 6128-6131),
 - inspection authority and investigation procedure (3 CCR section 6140-6141),
 - restricted materials and permitting (3 CCR sections 6400-6444),
 - special requirements on field fumigations and specific pesticide use requirements (3 CCR sections 6445-6489),
 - licensing and requirements for pest control operations (3CCR sections 6500-6686),
 - worker safety (3 CCR sections 6700-6795),
 - groundwater protection (3 CCR section 6800),
 - volatile organic compound restrictions and requirements (3 CCR sections 6880-6886), and
 - surface water protection (3 CCR sections 6960-6972).
-

CAC enforces pesticide use

The 55 CACs in California's 58 counties serve as the primary enforcement agents for enforcing State pesticide laws and regulations, with oversight by DPR. FAC section 2281 sets forth this delegation. As with DPR's authority to comprehensively regulate agricultural and non-agricultural pesticide use statewide, the CAC similarly regulates pesticide use within the boundaries of the CAC's appointed county. The CAC's important responsibilities for pesticide use enforcement include conducting inspections and investigating pesticide-related illness or injury: whether on the farm, in the workplace, at home or in structural pest control.

Pesticide laws and authorities sometimes overlap with other agencies for workplace safety or environmental protection relative to a specific incident or county topic of interest. Therefore, CACs may occasionally consult with other State agencies such as the Departments of Industrial Relations, Water Resources, Public Health, or Fish and Wildlife. CACs may also consult with other agencies such as the California Department of Forestry and Fire Protection about pesticide use on forest lands, and federal and tribal officials about pesticide use on federal and tribal lands.

Many of these cross-jurisdictional activities and responsibilities are outlined in MOUs with DPR, the California Agricultural Commissioners and Sealers Association (CACASA) and the applicable agency. See Section 3 Part C below.

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The Regulatory Program, Continued

B. Overlapping Jurisdiction with Cal/OSHA

Cal/OSHA has jurisdiction over the Pesticide Workplace

DPR does not preempt other mandated regulation of the pesticide workplace of other state agencies. This fact has required DPR and Department of Industrial Relations (DIR) Division of Occupational Safety and Health (better known as Cal/OSHA) and CACASA to come to an agreement on how to practically and efficiently divide up each agencies jurisdiction over the pesticide workplace.

DPR's jurisdiction to regulate worker safety around the pesticide workplaces

FAC section 12981 requires DPR to adopt regulations for, but not limited to, worker protection regarding the following subjects related to pesticides:

- 1) restricting worker reentry into areas treated with pesticides;
- 2) handling of pesticides;
- 3) hand washing facilities;
- 4) farm storage and commercial warehousing of pesticides;
- 5) protective devices; and
- 6) posting of fields, areas, adjacent areas or fields, and storage areas.

FAC section 12982 provides that DPR and CACs, under the direction and supervision of DPR, shall enforce pesticide and worker safety laws and regulations within their jurisdiction.

Cal/OSHA safety of workers handling pesticides

A Memorandum of Understanding between Cal/OSHA, DPR, and CACASA was reached to determine who has primary jurisdiction over the pesticide workplace. DPR and the CACs have primary jurisdiction over the safety of workers handling pesticides or working in pesticide-treated areas (not only fields) with DPR and the CACs. DPR is actively exercising its authority to regulate all handling of pesticides and the reentry of workers into treated fields. Cal/OSHA has primary authority in places of employment related to manufacturing, formulating and packaging, or commercial transportation of pesticides or the entry of workers into treated areas other than fields. Cal/OSHA also retains jurisdiction over the non-pesticide aspects of workplaces where pesticides are being used.

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The Regulatory Program, Continued

C. MOUs with Other Agencies

Introduction Other state agencies may have cross-jurisdictional responsibilities with DPR and the CACs.

DPR and the CACs have Memoranda of Understanding (MOUs) with several other agencies to clarify responsibilities of each agency when there is an overlap in jurisdiction.

Definition of MOU A Memorandum of Understanding is a document that describes an agreement between two or more parties. It provides a general description of the responsibilities and guidelines for activities that are to be assumed by each party, to eliminate duplication of effort and inconsistency of action. DPR and CACASA are parties to several MOUs related to pesticides.

MOUs also include cooperative agreements, management agency agreements, interagency agreements, and joint policy statements.

Updating an MOU Regardless of the year an MOU became effective, it remains in effect until changed or inactivated. Updates to an MOU must be agreed upon and signed by the parties.

Some MOUs have not been updated to reflect the change in an agency's name; however, these MOUs remain in effect until changed.

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The Regulatory Program, Continued

MOU List There are currently several MOUs in effect which are relevant to the CACs pesticide enforcement program:

DPR and CACASA:

- Disbursement of Residual Mill Assessment Funds to Enhance Local Pesticide Enforcement Programs
- Control of Injurious Bird Species
- Control of Injurious Field Rodents

DPR, CACASA and the Department of Fish and Wildlife:

- Fish and Wildlife Protection
- Aleutian Canada Goose
- Rare or Endangered Species

DPR, CACASA and the California Department of Food and Agriculture:

- Adaptation of Reduced-Risk Pest Management Practices
- Agreement for Attaining Mutual Objectives

DPR, CACASA and the Department of Industrial Relations:

- Employee Protection at the Pesticide Workplace

DPR, CACASA and the California Department of Public Health:

- Protection of Human Health from the Adverse Effects of Pesticides

DPR, CACASA and the Structural Pest Control Board:

- Structural Pest Control Enforcement Program

DPR, CACASA and the U.S. EPA Region IX:

- Pesticide Episode Reporting, Investigation and Enforcement Action

DPR, the State Water Resources Control Board, the Central Valley Regional Water Quality Control Board and Butte CAC and Glenn CAC:

- Central Valley Regional Water Quality Control Board's Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands

The broad outlines of each of these MOUs follows.

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The Regulatory Program, Continued

MOUs between
CACASA and
DPR

Control of Injurious Bird Species - *Effective date:* August 25, 1983; provides reasonable means for relief from damage caused by depredating birds and with the least harm to non-offending species. The primary obligations of official agencies engaged in control of injurious bird species are: conservation, crop protection, and the preservation of public welfare.

Control of Injurious Field Rodents - *Effective date:* August 25, 1983; provides reasonable means of relief from damage with the least harm to non-offending species. The primary obligations of official agencies engaged in the control of injurious field rodents are: conservation, crop protection, and the preservation of public welfare.

Disbursement of Residual Mill Assessment Funds to Enhance Local Pesticide Enforcement Programs - *Effective date:* May 30, 2006; establishes processes and procedures to invoice for work performed, and distribution and accounting of the CACs' residual mill assessments funds, which are to be used to support county initiatives that will enhance local county pesticide enforcement programs. It establishes roles and responsibilities of DPR and CACASA to carry out mutually agreed upon objectives associated with expenditures of residual mill assessment funds.

MOUs between
DPR, CACASA
and Calif. Dept.
of Fish and
Game (now
Fish and
Wildlife)

Aleutian Canada Goose - *Effective date:* April 17, 1987; Joint Policy Statement sets guidelines to eliminate or mitigate hazards to the Aleutian Canada Goose during vertebrate pest control activities during October through April in Butte, Colusa, Contra Costa, Del Norte, Glenn, Humboldt, Merced, San Joaquin, Solano, Stanislaus, Sutter, and Yolo counties.

Fish and Wildlife Protection - *Effective date:* January 26, 1995; to ensure that registered pesticides are used in a manner that protects non-target fish and wildlife resources while recognizing the need for pest control. It defines the respective statutory authorities of each agency, principles of the agreement, communication and investigation of pesticide-related wildlife incidents through the Pesticide/Wildlife Incident Response Plan.

Rare or Endangered Species - *Effective date:* July 16, 1984; Joint Policy Statement sets guidelines to eliminate or mitigate hazards to rare or endangered species of mammals, birds, amphibians, reptiles and fish while recognizing need to preserve food supply.

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The Regulatory Program, Continued

MOU between DPR, CACASA and the Calif. Dept. of Food and Agriculture

Adaptation of Reduced-Risk Pest Management Practices - *Effective date:* June 25, 2001; to affirm the mutual commitment to facilitate and coordinate adoption of reduced-risk pest management practices, including biological control approaches, in a comprehensive statewide program. It clarifies the roles, relationships, and responsibilities of the parties in achieving this goal.

Agreement for Attaining Mutual Objectives - *Effective date:* April 16, 1984; outlines mutual objectives for communication, public relations, management, training programs, and program objectives and effectiveness measures. (Agencies in this MOU are the California Association of Weights and Measures Officials, California Agricultural Commissioners Association and the California Department of Food and Agriculture.)

MOU between DPR, CACASA and the Dept. of Industrial Relations

Employee Protection at the Pesticide Workplace - *Effective date:* January 6, 1993; protection of workers from the potential adverse impacts of pesticides in a coordinated and cohesive manner to eliminate overlap of activities, duplication of effort, and inconsistency of action.

MOU between DPR, CACASA and the Calif. Dept. of Public Health

Protection of Human Health from the Adverse Effects of Pesticides - *Effective date:* November 8, 2008; to protect public health in a coordinated and cohesive manner, eliminating unnecessary overlap of activities or duplication of effort. The cooperative program addresses problems of human health related to vector-borne disease and the use and reporting of pesticides.

MOU between DPR, CACASA and Structural Pest Control Board

Structural Pest Control Enforcement Program - *Effective date:* December 17, 1998; identifies areas of responsibility, jurisdiction, enforcement, training, and coordination for structural pest control, and reimbursement procedures for training and pesticide enforcement/compliance action activities.

Cooperative Agreement between DPR, CACASA and U.S. EPA, Region 9

Pesticide Episode Reporting, Investigation and Enforcement Action - *Effective date:* April 25, 2005; to ensure a unified and coordinated program of pesticide episode reporting, investigation, and enforcement action in California. It sets criteria for priority investigations including human and environmental effects (water, air, land, animals and wildlife), economic loss, episodes.

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The Regulatory Program, Continued

**MOU between
DPR, State
Water
Resources
Control Board,
Central Valley
Reg. Water
Quality Control
Board, CACs of
Butte, Glenn**

Central Valley Regional Water Quality Control Board’s Conditional Waiver of Waste Discharge Requirements for Discharges from Irrigated Lands - *Effective date:* June 29, 2005; this was for a pilot program in Butte and Glenn Counties in the Sacramento River Basin under jurisdiction of the Regional Water Board, but the two counties may undertake activities related to this MOU throughout the Sacramento River Basin. It is solely related to activities in support of the “Irrigated Lands Program” with interaction between the Regional Water Board and the CACs as well as with growers on a local level to protect water quality from non-point sources of pollution.

Section 3

CAC and DPR Authority to Conduct Inspections

Authority to inspect - general

The CACs conduct thousands of pesticide use inspections and investigations each year.

The statutory authority for DPR and CAC inspections, in general, is found in Government Code section 11180 ("The head of each department may make investigations and prosecute actions concerning: (a) All matters relating to the business activities and subjects under the jurisdiction of the department. ...").

Additionally, the Legislature has granted DPR authority to enter premises to conduct inspections (FAC section 11456) and sample produce for residue (FAC section 12581). 3CCR section 6140 provides DPR and CACs with authority to enter, inspect and/or sample and require records to be produced. Furthermore, when the CAC issues an Operator ID or Permit, the boilerplate text authorizes CAC/DPR entry and inspections at reasonable times. For structural activities, the Legislature granted CACs authority to conduct inspections and investigations on licensees in B&PC section 8616.5 and 8616.7 provided that other requirements in the law are met.

During an inspection

Whenever possible, the inspector should seek the consent of the property owner or his/her representative. Tact and good judgment must be exercised in all instances. Absent such consent, the right to inspect without a warrant, such as during an inspection, will depend on the nature of the area to be inspected and whether or not the person is licensed.

It is important to remember that all investigative work must be conducted at a reasonable time and in a reasonable manner.

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CAC and DPR Authority to Conduct Inspections, Continued

Rights protected by Constitution

Certain constitutional protections regarding searches and seizures must be observed. A visual reconnaissance of a field may, under certain circumstances, constitute a search. Collecting physical evidence, such as residue samples, may be a seizure. If CAC or DPR staff search or seize in violation of someone's constitutional rights, all of the evidence collected will be inadmissible.

If an inspector has a right to be in an area, his/her observation of things in plain sight does not constitute an unlawful search. This would include observations over a fence from a public road, aerial observations from a reasonable altitude, and observations from these areas made with binoculars.

Both the State and federal constitutions forbid unreasonable searches and seizures of people's houses, persons, and effects. This does not mean that all inspections require warrants. There is a threshold question of whether the area searched was protected by the Fourth Amendment of the U.S. Constitution. The Fourth Amendment protects a person's reasonable expectation of privacy; it protects people, not places. The constitutional analysis is as follows: (1) Has the person exhibited an expectation of privacy? (2) Is the expectation reasonable? and, (3) If the answers to 1 and 2 are yes, has this expectation been violated by unreasonable governmental intrusion?

Authority to inspect private or non-licensee property

A related issue is the scope of the CAC's authority to conduct such inspections on the premises of parties other than a licensee. Tact and good judgment must be exercised in these instances.

Authority to inspect licensee

The FAC deals with a closely regulated industry employing dangerous materials under specific licenses and permits. Numerous legal cases hold that those who hold such licenses have, as a matter of law, consented to the warrantless inspection of their premises, vehicles, equipment, and records maintained in connection with the regulatory scheme.

3 CCR section 6140 authorizes DPR and CACs to enter and inspect, and requires any person responsible for keeping records, to make those records available for inspection.

Note: 3CCR section 6140(a) is not a citeable section for administrative civil penalties, but you may cite it on a cease & desist order.

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CAC and DPR Authority to Conduct Inspections, Continued

Authority to inspect licensee
(continued)

Where a licensee or permittee refuses to allow inspection of an area and it is not a dwelling, its appurtenant structures, nor an area where an actual expectation of privacy has been exhibited, there may be a violation of the FAC. The licensee *may* be charged with a violation, either by direct citation, Notice of Violation, or through the District Attorney.

Hazardous situation exists. If there is reason to believe that a hazardous situation exists, it may be necessary to issue a cease and desist order or to seize the produce until the inspection is completed. This authority is in FAC sections 11896, 11897, 13101, and 13102. Cease and desist orders may be signed by DPR or a CAC.

Various 3 CCR sections require records to be kept; section 6140(b) requires they be produced for inspection. Refusal to allow inspection of records would be a violation.

Authority to inspect private property

In agricultural areas, things such as locked gates, fences, and nearby buildings will usually be found to be an indication of private ownership manifesting a reasonable expectation of privacy. Under these circumstances, it may be a better practice to seek the owner's consent, absent an emergency. In contrast, open fields, common paths leading around or on to the property, roads, such as those used by irrigation districts, and other rights-of-way are generally regarded as accessible without permission.

Pest control for hire customer. Customers of the business hired to conduct pest control provide the licensed business with permission to control and have access to their property (usually a home) for purpose of the application. In this case, inspectors obtain permission from the business to enter and inspect these houses and properties to determine the business' compliance with the requirements. The consent in these cases is indirect – from the owner to the licensee to the inspector. The licensee is, in effect, an agent of the owner.

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CAC and DPR Authority to Conduct Inspections, Continued

Consent to inspect

Whenever possible, the inspector should seek the consent of the property owner or his/her representative who may be the licensee. Absent such consent, the right to inspect without a warrant will depend on the nature of the area to be inspected. If it is an open field, orchard, or similar area and the inspection is to be made at reasonable time and in a reasonable manner, the inspection would not violate the party's right to be free from unreasonable searches guaranteed by the 4th Amendment to the U.S. Constitution and the California Constitution.

If the property to be inspected belongs to a party who is not a licensee, for example a private dwelling, or in the situation where a grower is using a non-restricted material, or in a commercial structure not involved in pest control operations, the inspector should obtain consent from the owner or his/her representative before entering the premises over the fumigator's objections. This may be oral consent, but if it is refused, the inspector should contact his/her supervisor for assistance.

Conducting an inspection

When conducting an inspection, the inspector should identify himself/herself and indicate their official capacity. The inspector should explain his/her intent to conduct an inspection under the legal authority of FAC section 2281 (CAC joint responsibility), section 11456 ("Director may enter ..."), section 12581 (residue) and/or 3 CCR section 6140 (inspection authority). If the party then refuses to allow the inspection, it should be explained that the refusal is a violation of the terms of the license and a misdemeanor (*FAC sections 11891 and 12996*). The person should be asked, "Are you refusing to allow this inspection?" If the answer is "yes," the inspector should then ask, "Do you understand that your refusal is a violation of the law?" If the person admits that they understand, or merely denies that the inspector has the authority to proceed, a citation or Notice of Violation should be issued or a complaint may be filed with the District Attorney.

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CAC and DPR Authority to Conduct Inspections, Continued

Obtaining assistance to inspect

It may be necessary to seek an inspection warrant from the superior court with the assistance of DPR's Office of Legal Affairs or county counsel (See Gov. Code section 1822.50 et. seq.).

Administrative subpoena to inspect. As a final resort, records may be obtained by administrative subpoena duces tecum obtained from DPR legal staff pursuant to Government Code section 11131. These subpoenas are signed by DPR legal staff. If a subpoena is refused, a court order to enforce must be obtained.

If a question arises

State and county field staffs should consult their supervisors, their county counsel, DPR Regional Offices, and/or DPR's Office of Legal Affairs if a serious question arises. When appropriate, direct communication between the local county counsel or District Attorney, county personnel and DPR legal staff should be established to quickly resolve entry and inspection issues.

Section 4

Adopting County Pest Control Regulations

Introduction FAC section 11501.1 prohibits local regulation of the registration, sale, transportation, or use of pesticides, except as specifically provided in the FAC. However, FAC sections 11503 and 11503.5 provide a limited exception to allow for the adoption of CAC regulations.

CAC authority in to adopt regulations FAC sections 11503-11511 in Division 6, Pest Control Operations allows CACs to adopt regulations supplemental to those of DPR. FAC sections 11504-11511 specifically spell out the required process.

Suggested county consultation DPR encourages the CAC to consult with county counsel, county administrator, or any other county authority normally consulted when making a decision of this magnitude before proceeding with the proposed regulation.

When developing a regulation that supplements DPR’s pest control operation regulations, CACs should consult with the appropriate county agency with responsibility for county California Environmental Quality Act (CEQA) compliance.

DPR encourages the CAC to review the “notice of intention to adopt regulations” and the text of the proposed regulation with their EBL prior to publishing the notice.

Applicable sections for CAC regulations FAC section 11503 authorizes the CAC to adopt regulations to supplement those of DPR concerning the conduct of pest control operations and records and reports of those operations. The development and adoption of commissioner regulations must follow to the extent practicable the process required for adoption of regulations at the state level. They must also be reviewed and approved by DPR before they are operative.

Section 11503.5 pertains only to agricultural production within ¼ mile of schools. Regulations adopted under the authority of section 11503.5 become effective in 30 days, unless disapproved by DPR.

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Adopting County Pest Control Regulations, Continued

Applicable sections for CAC regulations, (continued)

Under FAC section 11738, a CAC’s supplemental pest control operation regulations may provide for qualification by examination of pest control business registrants, persons in charge of the pest control operations of those registrants, and persons employed by those registrants to operate pest control equipment (other than aircraft) within the county.

Under FAC section 11739, a CAC’s regulations may provide grounds for cancellation of a pest control business’s county registration to operate pest control equipment within the county unless a person qualified pursuant to FAC section 11738 is in charge of the operations, or each unit that is operated within the county is under the personal direction of a person qualified pursuant to FAC section 11738.

Emergency regulations

If, in the opinion of the CAC, the public health, welfare, or safety requires that any regulation take effect immediately, the CAC shall designate it as an emergency regulation. The CAC specifies in writing the facts which constitute the necessity for the emergency regulation. The CAC should forward the written “Statement of Emergency” together with the completed regulation action to DPR. An emergency regulation becomes effective on the date it is approved by DPR (FAC section 11511).

Publishing and mailing the notice

The CAC must publish in a newspaper of general circulation in the county the “Notice of Intention to Adopt Regulations” at least 10 days in advance of a hearing where the regulations are to be adopted, amended or repealed (FAC section 11504). The notice shall contain a statement of the time, place, and nature of the proceedings and the entire regulation or an informative summary (FAC section 11505). Also 10 days before, the CAC must mail a copy of the “notice of intention to adopt regulations” to all registered Pest Control Advisers and Pest Control Businesses as well as any other interested party.

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Adopting County Pest Control Regulations, Continued

APA requirements

However, the CAC should make the newspaper publication and mailing of the notice so that it will be received at least 45 days in advance of the closing date by which the interested persons can submit statements, arguments, or contentions to the CAC in writing or orally at a public hearing, since the CAC's "Notice of Intention to Adopt Regulations" will provide for at least a 45-day public comment period.

The APA requires a minimum 45-day public comment period, and that is an APA provision that is practicable for the CAC to follow.

Hearing and consideration of comments

If a hearing is requested, the CAC shall allow any interested person to present information, and the CAC shall consider all relevant matter which is presented (FAC sections 11507 and 11508). The CAC should respond to the relevance and merit of all comments made either in writing or orally before adopting any regulation. The hearing may be continued or postponed as determined by the CAC (FAC section 11509).

Documents and approval for CAC regulations

To adopt county regulations, the CAC prepares and submits the following documents, with the proposed pest control regulations, to DPR for review, as specified in the Administrative Procedure Act and FAC:

- "Notice of intention to adopt regulations" referenced in FAC sections 11504 and 11505, which contains an "informative summary" referenced in FAC section 11505 and information similar to that found in a DPR notice of proposed adoption of regulations
 - An initial statement of reasons
 - The text of the CAC's regulations as proposed and as adopted
 - A final statement of reasons in which the CAC responds to all comments received during the comment period.
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Adopting County Pest Control Regulations, Continued

Documents and approval for CAC regulations
(continued)

FAC section 11503 requires that DPR review and approve a regulation of the CAC before it becomes operative. DPR considers the necessity, clarity, authority, and consistency of the regulation, as defined by Government Code. CCR section 6110(a) also requires DPR to prepare a report and post for public comment 45 days prior to approval. If approved, the CAC's regulation will be filed with DPR. (FAC section 11510). Upon notification by DPR that a CAC's regulation has been approved, the CAC should notify all affected parties that the regulation has been approved and indicate the regulation's effective date. The CAC should keep a complete record of the proceedings.

Note: All of the above also applies to FAC section 11503.5, except that the CAC's regulation becomes effective 30 days after submittal by the CAC, unless expressly disapproved by DPR. (FAC section 11510)

Sample regulations

Please contact the DPR Office of Legal Affairs.

Section 5

Pesticide Use on Federal Facilities & Tribal Land

Introduction There are three types of reserved federal lands: military, public, and Indian (tribal). This section describes pesticide use on federal facilities, federal land, and tribal land.

A. Federal Facilities & Federal Lands

Background U.S. EPA monitors compliance by federal facilities to assure they obey environmental laws and regulations through on-site inspections and by reviewing information submitted by U.S. EPA, states, and tribes. U.S. EPA works in partnership with other federal, state, tribal, and local agencies to ensure federal facilities meet their environmental requirements. Federal facilities, like all other regulated facilities, are responsible to comply with environmental requirements, including following pesticide laws on federal land.

Guidance The following guidance should be followed relative to pesticide use on federal facilities. It also outlines the administrative actions that may be taken against persons who violate the State's pesticide laws when working on federal facilities. This guidance summarizes DPR's research on this issue and has been reviewed by the Legal Office. U. S. EPA, who coordinates the federal facilities program, has also reviewed this guidance and indicated they have no issue with it.

Where the term "federal facilities" is used, it includes all property under the control of the federal government and federal employees. The term "state laws" includes implementing regulations, and the terms "the State" and "states" include CACs.

Scope This section can be used to interpret a variety of pesticide use scenarios encountered by CACs relative to pesticide use by federal employees on federal facilities. This includes, but is not limited to:

- Investigations (drift, illnesses, etc.)
- Use monitoring inspections
- Maintaining pesticide use records
- Operator identification numbers & pesticide use report submission

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Pesticide Use on Federal Facilities & Tribal Land, Continued

A. Direct regulation and civil penalties

Only Congress or the President, if authorized by federal statute, can require the federal government to comply with state regulatory laws on federal facilities. However, even where the federal government is required to comply with certain state laws, states cannot levy penalties against the federal government for violation of those laws unless clearly authorized by federal statute to do so.

At present, Congress has not required the federal government to comply with state pesticide laws and has not authorized states to levy civil penalties against the federal government for violation of those laws. Apart from the exceptions listed below, the State cannot directly regulate pesticide use by federal employees on federal facilities. Nor can the State impose civil penalties against federal agencies, officials, or employees for violations of state pesticide laws on federal facilities. Constitutional law also shields private contractors from direct regulation and civil penalties when they are hired by a federal agency to operate a federal facility to satisfy a federal mandate.

Policy:

Pest control operators who work on federal facilities are not private contractors who *operate* federal facilities. Pest control businesses do not operate federal facilities; they are hired to perform some of the tasks necessary to the operation of the facility under the supervision of the facility operator. Also, to our knowledge, there are no federal mandates that specifically require the use of pesticides on federal facilities. Therefore, DPR and the CACs have authority to directly regulate private persons who conduct pest control activities on federal facilities at the request of, or under contract to, a federal agency or the operator of the federal facility. DPR and the CACs can also impose penalties on these private persons for violations of state pesticide laws.

DPR and the CACs also have regulatory and penalty authorities over private persons and the applicators they hire, who lease or use federal facilities for personal purposes rather than to fulfill a federal mandate.

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Pesticide Use on Federal Facilities & Tribal Land, Continued

B. Executive Order 12088 – Federal Compliance with Pollution Control Standards

Executive Order 12088, “Federal Compliance with Pollution Control Standards,” requires federal agencies to comply with pollution control standards established pursuant to specified federal statutes, including the Federal Insecticide, Fungicide, and Rodenticide Act. It became effective in 1978 and has not been withdrawn or superceded.

This Executive Order obliges federal agencies to comply with applicable pollution control standards; to take steps necessary to prevent, control or abate environmental pollution that occurs on their facilities; and to work cooperatively with federal, state, and local agencies to resolve disputes.

The Executive Order does not provide DPR or the CACs with authority to compel federal agencies' compliance with state pesticide laws or to take civil penalty actions against a federal agency, official, or employee for violations of these laws. Instead, it allows state and local agencies to request the Administrator of U.S. EPA to resolve conflicts that arise concerning federal agency compliance with state and local pollution control standards.

Since the Executive Order does not clearly define “pollution control Standards”, the courts, federal agencies, and regulatory agencies have been left to determine the applicability of environmental requirements on a case-by-case basis. In *Sierra Club v. Peterson* (consolidated with *Coalition for Alternatives to Pesticides in Northern California v. Block*), the federal appellate court found California's restricted material permit program to be a pollution control standard under this Executive Order and that the U.S. Forest Service was required to obtain a permit before using 2,4-D on property under their control located in California.

Policy:

Using this case as a guide, DPR determined that the following are pollution control standards within the context of the Executive Order:

1. The pesticide registration program;
2. The restricted material permit program;
3. The pesticide storage, transportation, and disposal program;
4. The general standards of care regarding pesticide applications listed in 3 CCR sections 6600, and 6602 - 6616;
5. The ground and surface water protection programs; and
6. The toxic air contaminants program.

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Pesticide Use on Federal Facilities & Tribal Land, Continued

C. Federal agencies' applicator certification

Federal law requires U.S. EPA to designate the pesticides they register as general or restricted use. Only certified applicators may handle or supervise the use of restricted use pesticides so designated by U.S. EPA. U.S. EPA approves applicator certification plans proposed by states, tribes, and federal agencies. Federal agencies may qualify federal employees under an approved Federal Agencies Plan or they may obtain applicator certification from the states where their facilities are located. For example, pesticide applications at U.S. Geological Survey facilities “will be made only by properly trained and State certified applicators.” Alternatively, the Secretary of Defense submits a plan to U.S. EPA for certifying Department of Defense (DoD) employees to apply restricted-use pesticides and the plan is approved by U.S. EPA. DoD employees certified in accordance with the plan may, without obtaining any additional state certification, use and supervise the use of restricted use pesticides while engaged in performance of their official duties

Federal regulations require states to accept federal employees qualified under approved federal plans or to describe any additional requirements in the State's Plan for Certification of commercial and Private Applicators of Restricted Use Pesticides. California's approved plan requires federal agencies to “provide assurance that their applicators are knowledgeable concerning California laws and regulations pertaining to pesticides.”

Policy:

At present, DPR accepts applicator certification from agencies approved by the U. S. EPA. Federal employees certified under their agency's approved federal plan must present a current certificate to the CAC when applying for a restricted material permit and to a licensed pesticide dealer when purchasing restricted use pesticides.

U.S. EPA brochure

U.S. EPA has written a brochure, *Federal Facilities Inspections: A Guide to EPA's Access and Inspection Authorities*. The brochure may be viewed at <https://www.epa.gov/sites/production/files/2013-09/documents/accessbrochureapril2013.pdf>

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Pesticide Use on Federal Facilities & Tribal Land, Continued

**Federal facility
policy summary**

- b. Federal employees performing pest control on federal facilities:**
- i. Regulatory Requirements:
 1. Must comply with federal, state, and local pollution control standards established pursuant to the Federal Insecticide, Fungicide, and Rodenticide Act per Executive Order 12088.
 2. Must obtain applicator certification prior to the purchase and use of restricted use pesticides.
 3. Must comply with requirements on the registered pesticide label.
 - ii. Administrative Actions and Civil Penalties:
 1. DPR and CACs cannot assess civil penalties against federal agencies or their employees for violations of state or federal law.
 2. DPR and CACs can refuse, revoke, or suspend any license, certificate, registration, or permit issued by DPR or the CAC for violations of state laws.
 3. Executive Order 12088 provides that U.S. EPA is responsible for dispute resolution between a federal facility and a federal, state, or local regulatory agency. The CAC should inform DPR when they determine that a federal agency violated a pollution control standard and failed to cooperate in the investigation or correction of the problem.
- c. California laws apply to the following people:**
- Persons who are not federal employees and who are hired by or under contract to a federal agency or the facility operator to perform pest control on a federal facility
 - Private persons who lease or contract for the use of federal facilities for private activities
- i. DPR and CACs can take administrative actions for violations of state laws. Administrative civil penalty action would be taken in lieu of criminal prosecution or civil penalties by DPR through the Attorney General. CAC's administrative action against a county-issued registration or permit and DPR administrative action against a DPR-issued license or certificate, can be in addition to any other CAC and/or DPR administrative civil penalty action, criminal prosecution, or DPR civil penalty action through the Attorney General.
 - ii. DPR or CACs can seek criminal prosecution.
 - iii. DPR can seek civil penalties through the Attorney General (in lieu of criminal prosecution).

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Pesticide Use on Federal Facilities & Tribal Land, Continued

Inspections on federal facilities **To conduct a pesticide use related inquiry on a federal facility**, contact the lead person of the property. Although FIFRA requires that anyone applying restricted-use pesticides be certified as a pesticide applicator by his/her state pesticide agency, the pesticide applicator on a federal facility may or may not be state-certified.

Follow-up The CAC should inform DPR when they find that a federal agency violated a pollution control standard (pesticide law or regulation) and fails to cooperate in the investigation or correct the problem. DPR will work with the CAC and the federal agency to resolve the problem or will forward the information to U.S. EPA for resolution.

If you are denied access to a federal facility during an investigation or if you determine that a federal agency is unwilling to correct noted violations, please contact your EBL immediately. Depending upon the nature of the issue, DPR will work with you and the federal agency to resolve the problem or will forward the information to U.S. EPA for resolution at their level.

Cross jurisdictional pesticide episode When the cause (application) and the effects (exposure, illness, or damage) occur in different jurisdictions (state, country, or tribal land), follow these guidelines during the investigation, as each jurisdiction has partial investigative responsibility:

- The jurisdiction suffering the effects is responsible to document the extent and seriousness of the effects and transmit that information to the jurisdiction where the application originated.
- The jurisdiction where the cause originated is responsible to investigate the circumstances of the application to determine if any laws or regulations were violated and to take appropriate enforcement action.

Communication and cooperation between the two jurisdictions is critical. DPR and U.S. EPA should be involved whenever appropriate. Consult with your EBL whenever there is a cross-jurisdictional episode.

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Pesticide Use on Federal Facilities & Tribal Land, Continued

U.S. government related links

The FedCenter web page provides a selection of enforcement-related links at <http://www.fedcenter.gov/enforcement/>

For information on federal government web sites, see <http://www.usa.gov/>.

Maps – federal land and tribal land

The *Federal Lands and Indian Reservations* and *California Tribal and Federal Lands* maps include Department of Defense (DoD) land. The DoD manages military reservations, such as army posts, marine bases, naval stations, and air force bases.

California map resources:

- https://nationalmap.gov/small_scale/printable/images/pdf/fedlands/CA.pdf (identifies name and location of military lands, as well as tribal and federal lands)
- http://www.parks.ca.gov/?page_id=862 (select a location from the right column of detailed regional and city maps of California)
- <http://www.visitcalifornia.com> (cursor down to detailed regional and city maps of California)

Neighboring state map resources:

- <http://www.epa.gov/region9/air/maps/>
 - <http://www.fws.gov/>
 - https://nationalmap.gov/small_scale/printable/fedlands.html (identifies name and location of military lands, as well as tribal and federal lands)
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Pesticide Use on Federal Facilities & Tribal Land, Continued

B. Tribal Land

**Tribal land –
pesticide use**

A federal Indian reservation is an area of land reserved for a tribe(s) under treaty or other agreement with the U.S., executive order, or federal statute or administrative action as permanent tribal homelands, and where the federal government holds title to the land in trust on behalf of the tribe.

Federal Indian reservations are generally exempt from state jurisdiction, unless specifically authorized by Congress.

Federal and state courts have declined to allow states to assert civil regulatory jurisdiction in a variety of areas. Historically the department has not attempted to enforce pesticide laws with regard to tribal activity.

To use restricted use pesticides (RUPs) within Indian Country, in 2014, the U.S. EPA adopted a federal plan to certify applicators to use RUPs (see DPR letter ENF 14-07). The 40 CFR sections 171.10 and 171.11 apply to certification of pesticide applicators on Indian reservations.

**Tribes - related
links**

This link offers a variety of California Indian Tribal Relations information.
<https://calepa.ca.gov/tribal/resources/>.

The link below to the California Governor's Office of the Tribal Advisor provides a variety of California Tribal Government links.
<http://www.tribalgovtaffairs.ca.gov/>.

Section 6

California Environmental Quality Act – CEQA

Background The law that assures that governmental decisions consider and operate to protect the environment is the California Environmental Quality Act (CEQA). Adopted in 1970, CEQA mandates environmental impact review of development projects in California, and applies generally to the activities of all State and local agencies and to those private activities that the agencies finance or regulate. CEQA requires, among other activities, that an Environmental Impact Report (EIR) be developed that discloses the potential environmental impacts of a project.

CEQA's impact on DPR and CACs DPR's regulatory program in the areas of pesticide registration, adoption of the regulations, and the issuance of restricted materials permits has been determined to satisfy CEQA section 21080.5. The certification of a regulatory program is the functional equivalent of the EIR process if it meets certain specified requirements. The three listed pesticide programs have been certified and have operated under functional equivalency since 1980. This certification is found in Title 14, CCR section 15251(i).

For a discussion of DPR's functional equivalency development and scope, see Compendium Volume 3 *Restricted Materials and Permitting*.

Section 7

Related DPR Pesticide Regulatory Programs

Introduction The Food Safety Program and the Pesticide Product Compliance Program are primarily DPR state level programs. The CAC may have some involvement in certain situations.

Food Safety Program

Food Safety Program The Food Safety Program is administered by DPR by sampling and analyzing produce for compliance with pesticide residue tolerances. The most common CAC involvement would be focused on potential pesticide use violations when the commodity was grown in California.

FAC sections 12534, 12535, and 12581 authorize DPR to sample produce for pesticide residue. FAC section 12561 authorizes DPR to adopt tolerances for pesticide residues on produce. However, as a practical matter, this authority is limited by preempting federal law (see Compendium Volume 8, Section 1.10 *Recognition of Federal Tolerances*).

Pesticide Product Compliance Program

Pesticide Product Compliance Program The pesticide product compliance program is administered by DPR, through a cooperative agreement with U.S. EPA, to inspect for product registration and labeling, inspect producing establishments, and collect product samples. The most common CAC involvement is in observation and reporting suspected violations found during field activities. If CACs observe potential product compliance issues, these should be referred to your county's EBL.

FAC section 12811 requires that pesticides be registered before they are sold or used in California. For a description of registration process, see Compendium Volume 8, Chapter 7. FAC sections 12851 – 12859 specify labeling and warranty requirements for pesticide products. Misbranding is defined in sections 12881 – 12885 and adulteration is defined in section 12911.

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