

Chapter 3

Environmental Impact Report Functional Equivalency

Overview

Introduction

California has had a comprehensive pesticide regulatory program for decades, managed at the State level first by the California Department of Food and Agriculture, and since 1991, by the Department of Pesticide Regulation (DPR). County agricultural commissioners (CACs) handle local pesticide enforcement in each of California’s 58 counties. This chapter provides an overview of how the California Environmental Quality Act (CEQA) impacts California’s pesticide regulatory program.

Additional information

Information on *EIR (Environmental Impact Report) Functional Equivalency Evaluation Requirements* is located in Chapter 7, *Permit Evaluations*.

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Section 3.1

History of the Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency

California Environmental Quality Act

In 1970, California adopted CEQA as the State's main environmental law. The purpose of the act is to ensure that when public decisions are made, long-term protection of the environment is a major consideration. It mandates environmental impact review of development projects in California, and applies generally to activities of all State and local agencies and to those private activities that the agencies finance or regulate. CEQA requires, among other things, that an Environmental Impact Report (EIR) be developed that discloses the potential environmental impacts of a project. The act requires each public agency to consider the effects of their decisions and take every step necessary to provide California residents with clean air and water, and the enjoyment of California's nature, scenery, aesthetics, and history.

Provisions of the Act require an EIR for any project proposed or approved by a public agency, board, or commission that may have a significant effect on the environment. The EIR process must consider alternatives; develop mitigation to avoid adverse impacts; and is subject to public review and comment before a permit is issued for a project that might impact environmental quality.

Attorney General opinion

In 1976, the California Attorney General issued a formal opinion (SO 75/16)¹ that the State's pesticide regulatory program was subject to CEQA when registering a pesticide, or granting a license, permit, or certificate. This meant that an EIR would have to be prepared before registering any of the several hundred new pesticide products that come into the market each year. Of even greater significance, it meant that an EIR would have to be prepared before approving any of the several thousand restricted material permits issued annually by the county agricultural commissioners (CACs).

The California Legislature immediately adopted a moratorium on the application of CEQA to pesticide regulatory programs in order to provide State pesticide regulators with sufficient time to make necessary adjustments.

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¹ Opinion of Evelle J. Younger, California Attorney General, No. SO 75/16, May 4, 1976.

History of the Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency, Continued

Statutory resolution

It was determined that the preparation of EIRs for registration of pesticides and issuance of restricted material use permits was not feasible. Chapter 308, Statutes of 1978 (AB 3765), provided for an abbreviated environmental review as the functional equivalent to a full-scale EIR. Among other things, it amended PRC section 21080.5 to more clearly prescribe the procedure the Secretary of the Resources Agency must follow for the certification or withdrawal of certification (of programs in general). The Legislation also laid out a timetable for submission of the pesticide program for certification.

The Legislature made several findings and declarations in Chapter 308 relating to pesticides, pest control, and EIRs, including the following:

- Agriculture is a major and essential component of California's economy.
- The appropriate use of pesticides is essential for agricultural production and health protection.
- Timeliness of pesticide use is paramount in pest management and prevention of economic waste.
- Reasonable environmental review of pesticide use is prudent and appropriate.
- Permits must often be issued on short notice making impracticable (regular) environmental review and EIRs.
- Preparation of EIRs for pesticide permits would be an unreasonable burden on California agriculture and health protection agencies.
- Procedures for governmental review of pesticide use shall not unnecessarily burden permit applicants.

In Chapter 308, the California Legislature established as the policy of California, that environmental review of pesticide use be achieved through the procedures established in PRC Section 21080.5 rather than by EIRs².

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² Chapter 308, Statutes of 1978 (AB 3765).

History of the Pesticide Regulatory Program’s Environmental Impact Report Functional Equivalency, Continued, Continued

Environmental Assessment Team

In 1977, the State formed an Environmental Assessment Team to prepare a “master” (programmatic) EIR, pursuant to chapter 4.5 of CEQA, covering the use of all registered pesticides, in all areas of the State. After more than a year’s work, Environmental Assessment Team attorneys concluded it could not be done and advised that “the major problem facing California Department of Food and Agriculture and CACs is not CEQA, but the fact that they do not have a process. The major deficiency of the program is its probable failure to comply with the Food and Agricultural Code (FAC) in taking into account all of the established criteria prior to registration and permit decisions, as well as the inability of anyone other than the decision-maker to determine what is taken into account.”³

In response, the State’s pesticide regulators returned to the Legislature, obtained an extension of the moratorium, and took an entirely different approach. This new approach was to develop a regulatory program that could be certified as “EIR functionally equivalent.”⁴

Public Resources Code

Under what was then Public Resources Code (PRC) section 21080.5, regulatory programs which have protection of the environment among their principal purposes and which require a plan or other written documentation could be exempted from EIR requirements upon certification by the Secretary of the Resources Agency that the programs meet specified criteria. The PRC provided for functional equivalency for regulatory programs that involve the issuance of a permit, license, certificate, or other entitlement for use or for the adoption or approval of standards, regulations, or plans for use in the regulatory program.

✓Note: Section 21080.5 does not confer complete CEQA functional equivalency. There are other CEQA requirements discussed below, that still apply, even to a certified functional equivalent program. For this reason, this overview refers to “EIR functional equivalency” rather than “CEQA functional equivalency.”

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³ Memo from Katherine Striemer to Dan Dooley, February 17, 1979, Administrative Feasibility of Complying with CEQA.

⁴ Questions and Answers in Regard to AB 3765, Assembly Resources Land Use and Energy Committee, April 18, 1978 (ENF 78-28).

History of the Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency, Continued, Continued

Program certified

The pesticide regulatory program was submitted to the Secretary of the Resources Agency on November 1, 1979, and was certified on December 28, 1979, as "EIR functionally equivalent." This meant that the State and CACs did not have to prepare an EIR (or negative declaration) on each activity, product, or permit approved. Instead of an EIR, documentation of local environmental impacts, mitigation measures, and alternatives was required⁵.

The Secretary of the Resources Agency can withdraw the functional equivalency if DPR and the CACs fail to carry out the program as prescribed.

Key elements of certification

Public Resources Code section 21080.5 established requirements the permit process must meet in order to comply with EIR functional equivalency.

Key elements of the program include:

- Documentation of local environmental impacts;
- Consideration of mitigation measures or feasible alternatives; and
- Consultation with other agencies.

It is essential that these three elements are included in every county restricted material permit program or certification of the state program may be in jeopardy.

Regulatory changes

The State's pesticide regulators recognized that changes in regulations were necessary to meet the requirements of functional equivalency. Proposed changes were developed in the areas of:

- Pesticide registration, evaluation, and classification procedures;
 - Consultation with other agencies, consideration of feasible alternatives, and noticing of proposed registration actions and decisions;
 - The consideration of feasible alternatives and mitigation measures when determining when to use, and obtaining a permit to use, a restricted material.
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⁵ History of Events Leading up to AB 3765 Pesticide Regulations, Department of Food and Agriculture, Circa 1980.

History of the Pesticide Regulatory Program's Environmental Impact Report Functional Equivalency, Continued, Continued

Regulatory changes (continued)

The proposed regulations were developed by the State's pesticide regulators working with many groups, including: CACs; other state agencies and departments; and environmental, agricultural, consumer, and pesticide producer interests. The regulations did not represent a consensus of all individuals serving on the various groups, but did involve considerable "give-and-take" on specific issues. In 1979, hearings on the proposed regulations generated a great deal of oral and written testimony. Agriculture and the pesticide industry charged that the regulations went too far, while environmental groups testified the regulations did not go far enough.

New regulations

After substantial rewriting, the provisions pertaining to State operations were adopted and became effective on January 4, 1980. Provisions relating to pesticide permits were postponed until July 1, 1980, when funding could be appropriated to the counties for the costs of new permitting activities.

Section 3.2

How Requirements of Public Resources Code Section 21080.5 Are Addressed by the Program

Requirements for a functionally equivalent program

Public Resources Code section 21080.5(d)(1) provides for EIR functional equivalency when the regulatory program of a State agency operates under a plan that includes a description of the proposed activity that addresses both alternatives to the activity and mitigation measures to minimize any significant adverse effect of the activity on the environment. For purposes of this section, the CAC is a State agency. (*PRC section 21080.5*)

Scope

This discussion will focus on the permit program and briefly discuss the registration program. The Administrative Procedure Act, found in the Government Code beginning at section 11340 (administered by the Office of Administrative Law), specifically controls the adoption of regulations. This parallel process includes many of the aspects required of a functionally equivalent program, and will not be addressed here.

Inter-disciplinary approach

The EIR functionally equivalent program must use an interdisciplinary approach that will ensure the integrated use of the natural and social sciences in decision-making. The permitting process, administered by the CACs, relies on the data submission and evaluation conducted on pesticide products during the registration process to identify potential hazards and suggest example mitigation measures if pesticide labeling and regulations do not adequately mitigate the hazard. Use of a pesticide under a restricted materials permit must be in compliance with the registered labeling.

DPR scientists use an interdisciplinary approach working closely with other state agencies, including the California Department of Fish and Wildlife and California Department of Public Health, as well as agencies within the California Environmental Protection Agency, including the Air Resources Board, Department of Toxic Substances Control, Office of Environmental Health Hazard Assessment, and State Water Resources Control Board. DPR regularly consults with members of at least three committees which are composed of representatives from many different disciplines, including environmental interest groups, farm labor organizations, and consumer advocates. The CACs use the determinations made about the pesticide to properly consider environmental impacts and appropriately condition permits to mitigate any significant adverse impacts.

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How Requirements of Public Resources Code Section 21080.5 Are Addressed by the Program, Continued

Protection of the environment

The enabling legislation of the regulatory program must include protection of the environment among its principal purposes. The overall purposes of the pesticide regulatory program are found in FAC section 11501. They include protection of the environment from environmentally harmful pesticides by prohibiting, regulating, and ensuring proper stewardship of those pesticides. The implementation of pest management systems to achieve acceptable levels of control with the least possible harm to the environment is also encouraged.

The criteria for designating pesticides as restricted materials in FAC section 14004.5 includes hazard to the environment from drift and hazard of persistent residues that could lead to contamination of the environment. Food and Agricultural Code section 14006.5 requires the CAC to consider local site-specific environmental conditions before issuing any permit. Food and Agricultural Code section 14006.5 also prohibits the CAC from issuing a permit if the pesticide:

- Has demonstrated serious uncontrollable adverse effects;
- Use is less of a public value or greater detriment to the environment than the benefit received from its use; or
- Has a feasible alternative that is demonstrably less destructive to the environment (*FAC section 12825*).

Food and Agricultural Code sections 12824 and 12825 require DPR to eliminate from use any pesticide that:

- Endangers the environment;
- Is not beneficial;
- Is misrepresented;
- For which the detriment is greater than the benefit;
- For which there is a less detrimental alternative;
- Outlines general criteria to evaluate pesticides.

Food and Agricultural Code section 12824 also authorizes the Director to establish specific criteria to evaluate pesticides. Reevaluation criteria are found in 3 CCR section 6221.

Food and Agricultural Code section 14102 requires DPR to "... take whatever steps are necessary to protect the environment."

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How Requirements of Public Resources Code Section 21080.5 Are Addressed by the Program, Continued

Authority to adopt regulations

The administering agency must have the authority to adopt regulations for the protection of the environment.

General regulation adoption authority is found in FAC sections 11456 and 12976. Food and Agricultural Code section 14004.5 provides specific authority to adopt by regulation, a list of restricted materials, and FAC sections 14005 and 14006 authorize regulations governing the conditions of possession and use of restricted materials. There are several other sections which grant other specific authority to adopt regulations in specific areas that are not relevant to permit issuance.

The authority to adopt regulations establishing registration procedures is found in FAC section 12781. This is a general grant of authority for the entire pesticide registration program. There are other specific grants of regulatory authority that are largely duplicative and are not listed here.

Section 3.3

Specific Procedural Requirements of Public Resources Code Section 21080.5(d)(2) and (3)

**Environmental
impact report
functional
equivalency
requirements**

There are specific procedural requirements that must be included in the program or regulations that approximate the CEQA requirements of an EIR.

**1. Orderly
evaluation**

The EIR-equivalent program must contain guidelines for the orderly evaluation of proposed activities and the preparation of a plan* or other written documentation in a manner consistent with the environmental protection purposes of the regulatory program.

Title 3, CCR, Chapter 2, Subchapter 4, Article 3, Permit System, beginning with section 6420, outlines the procedures for the orderly evaluation of permit applications. It outlines the information that the application must contain (3 CCR sections 6428 and 6430), and requires the CAC to evaluate the potential environmental impact, based on his/her knowledge of local conditions (3 CCR section 6432).

Permits issued with “incomplete” data are made “site and time specific” when missing data are submitted through a “Notice of Intent” (3 CCR section 6434), which is considered part of the permit.

A directly affected person may petition the Director to have a permit, issued by the CAC, reviewed by the Director. Title 3, CCR section 6442, outlines how the Director will handle those reviews.

If adverse impacts occur generally throughout any area, the Director or CAC may cancel all permits in that area (3 CCR section 6444).

Title 3, CCR Chapter 2, Subchapter 1, Article 8, Reevaluation Criteria, beginning with section 6220, requires continuous evaluation of all registered pesticides and provides for formal reevaluation of pesticides that, upon investigation, are found to cause a significant adverse environmental impact.

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Specific Procedural Requirements of Public Resources Code Section 21080.5(d)(2) and (3), Continued

2. Minimize adverse impacts

EIR-equivalent programs must require that an activity not be approved as proposed if there are feasible mitigation measures or feasible alternatives available that would substantially lessen any significant adverse effect that the activity may have on the environment.

Title 3, CCR section 6432 requires that a permit be conditioned to require use of mitigation measures, if the CAC determines that there are feasible mitigation measures. If there are no feasible mitigation measures, alternatives must be considered. Serious, uncontrollable adverse impacts may require refusal of the permit. In addition, 3 CCR section 6426 requires agricultural users of pesticides to consider and adopt any feasible mitigation measures or feasible alternatives that would lessen any significant adverse environmental impact.

Title 3, CCR section 6116 requires the Director to reject any “standard” or regulation that would cause a significant adverse environmental impact if there is a feasible mitigation measure or feasible alternative that would substantially reduce that impact.

3. Consultations

There must be a requirement for the administering agency to consult with all public agencies that have jurisdiction, by law, with respect to the proposed activity.

Title 3, CCR section 6122 requires the CAC to routinely consult with other agencies that have responsibility over resources in the county that may be affected by the use of pesticides. The CAC is also required to maintain his/her knowledge of local conditions in 3 CCR sections 6122 and 6432, to more effectively implement the permit program.

Title 3, CCR sections 6252 and 6256 provide for consultation with other agencies and the public on pesticide registration and general program issues. Food and Agricultural Code sections 12042, 12047, and 12980, provide for consultation in specific program areas.

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Specific Procedural Requirements of Public Resources Code Section 21080.5(d)(2) and (3), Continued

4. Respond to issues raised

The final action on the proposed activity must include the issuing authority's written responses* to significant environmental points raised during the evaluation process.

Food and Agricultural Code section 14009 authorizes any person to request "reconsideration" by the CAC on any permit. The CAC must respond with a written decision within ten days. This must take place before the appeal is made to the Director.

Title 3, CCR section 6119 requires the Director to respond to environmental points raised during the evaluation process for any registration action or adoption of a standard.

5. File decision with Secretary of Resources Agency

The decision by the administering agency on the proposed activity must be filed with the Secretary of the Resources Agency*. These notices shall be available for public inspection. Each list shall remain posted for a period of 30 days.

Decisions on individual pesticide use permits are not filed with the Secretary of the Resources Agency. The need for timely pest control makes this delay impractical. The permits are available in the CAC's office for review.

Title 3, CCR section 6116 requires the Director to forward a copy of any Notice of Decision adopting a standard to the Secretary of the Resources Agency for posting for 30 days.

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Specific Procedural Requirements of Public Resources Code Section 21080.5(d)(2) and (3), Continued

6. Notice available for comment

The Notice of Decision must be available for a reasonable time for review and comment* by the public and other agencies.

Generally, there is no routine notice to other agencies for review and comment when an individual permit is issued. If other agencies have an interest in any particular permit, this could be discussed during the CAC consultation, pursuant to 3 CCR section 6122. The need for timely pest control makes this delay impractical.

The permits are available in the CAC's office for review and request for reconsideration provided in FAC section 14009. Any person who will be directly affected by the proposed application may appeal the CAC's final decision to the Director.

Title 3, CCR sections 6110, 6116, and 6118 all relate to decisions of the Director relating to the adoption of standards being available to the public and other agencies for review and comment.

7. Description of proposed activity

The plan or other written document must include a description of the proposed activity*.

Food and Agricultural Code section 14006.5 and 3 CCR sections 6430 (non-agricultural) and 6438 (agricultural) outline the requirements for the information describing the proposed activity that must be provided to the CAC with the application for a permit.

The proposed labeling for the product submitted with the application for registration describes the scope of the legal uses that would be allowed (cite).

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Specific Procedural Requirements of Public Resources Code Section 21080.5(d)(2) and (3), Continued

8. Mitigation measures

The plan or other written document must describe mitigation measures* that would lessen the environmental impact of the proposed activity.

Title 3, CCR section 6426 requires pest control advisers and growers to consider and adopt any feasible mitigation measures for the proposed activity. Title 3, CCR section 6432 requires the CAC, when evaluating the permit application, to determine if there are feasible mitigation measures and if there are, to condition the permit upon use of those mitigation measures. Title 3, CCR section 6556 requires certification on the recommendation that any feasible mitigation measures have been considered and adopted.

Food and Agricultural Code section 12824 requires DPR to thoroughly evaluate each pesticide and place mitigating conditions upon its use to mitigate hazards.

9. Alternatives

The plan or other written document must describe alternatives* to the proposed activity.

Title 3, CCR section 6426 requires pest control advisers and growers to consider and adopt any feasible alternatives to the proposed activity. Title 3, CCR section 6556 requires certification on the recommendation that feasible alternatives have been considered. Title 3, CCR section 6432 requires the CAC, when evaluating the permit application, to determine if there is a feasible alternative.

Food and Agricultural Code section 12824 requires DPR to thoroughly evaluate each pesticide and eliminate from use any pesticide that endangers the environment. DPR is required to continuously evaluate all registered pesticides.

* Section 5, Chapter 308, Statutes of 1978 expressly exempts permits from the requirements to prepare and make public a plan or other written documentation, prepare written responses to significant environmental points raised, and file a notice of decision with the Secretary of the Resources Agency.

However, the issuance of a permit for pesticide use is subject to, and CACs must comply with, requirements that permits not be approved as proposed if feasible mitigation measures or feasible

Specific Procedural Requirements of Public Resources Code Section 21080.5(d)(2) and (3), Continued

alternatives are available that would substantially lessen any significant adverse environmental impact. Permits are also subject to the requirements that there be guidelines for the orderly evaluation of the proposed activity that there be consultation with all public agencies that have legal jurisdiction.

Section 3.4

Scope of Certified Activities

Background

A regulatory program certified pursuant to PRC section 21080.5 is exempt from Chapters 3 and 4, and section 21167 of CEQA. The Secretary of the Resources Agency has certified the following specified activities of the pesticide regulatory program administered by DPR and the CACs as EIR functionally equivalent:

- The registration, evaluation, and classification of pesticides.
 - The adoption, amendment, or repeal of specified regulations and standards.
 - The regulation of the use of pesticides through the permit system administered by the CACs.
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Not Exempt

A certified program is not exempt from Chapters 1, 2, 2.5, 4.5, and 5 of CEQA. These chapters are described below.

**CEQA:
Chapter 1**

Chapter 1 of CEQA contains the legislative intent. It declares that it is the policy of the State to “take all actions necessary to protect, rehabilitate, and enhance the environmental quality of the State.” It also declares that “all agencies of the State government which are found to affect the quality of the environment shall regulate their activities so that major consideration is given to preventing environmental damage, while providing a decent home and satisfying living environment for every Californian.”

Courts decisions^{6,7} have made it clear that these broad mandates apply to certified programs such as pesticide regulation. Chapter 1 of CEQA also contains a policy that agencies “should not approve projects (permits) if there are feasible alternatives or feasible mitigation measures available which would substantially lessen the significant environmental effects of the projects”

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⁶ EPIC v. Johnson (1985) 170 Cal. App. 3d 604.

⁷ Laupheimer v. State of California, 200 Cal. App. 3d 440.

Scope of Certified Activities, Continued

**CEQA:
Chapters 2, 2.5,
and 4.5** Chapters 2 and 2.5 establish the title of CEQA and the definitions. Chapter 4.5 provides for regulatory streamlining through a “Master (programmatic) EIR” for certain large projects. It also discusses reviews pertaining to pollution control equipment

**CEQA:
Chapter 5** Chapter 5 of CEQA states that an agency can require a permit applicant to submit “data and information which may be necessary to enable the agency to determine whether the proposed project may have a significant effect on the environment or to prepare an EIR.”

The California Supreme Court⁸ has confirmed that this authority applies to certified programs such as the DPR⁹ Restricted Materials Permit Program. This is significant additional authority for a CAC to require information from the applicant for a restricted materials permit, beyond that expressly listed in the regulations covering permit issuance.

⁸ Sierra Club v. State Board of Forestry, (1994) 7 Cal. 4th 1215.

⁹ *Are Certified Regulatory Programs “Functionally Equivalent” to CEQA?* Daniel Pollak, California Research Bureau, California State Library, March 2002.

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