



May 15, 2020

CalEPA Secretary Jared Blumenfeld
jared.blumenfeld@calepa.ca.gov
Via email

Dear Secretary Blumenfeld,

We request your intervention in the rulemaking process now underway at the Department of Pesticide Regulation regarding 1,3-dichloropropene (1,3-D). We are increasingly concerned about what we perceive as a lack of involvement in the process on the part of OEHHA.

Our concerns are heightened by DPR's decision to file a respondent brief in the Vasquez case challenging the legal mandate to partner with OEHHA in this rulemaking, by arguing both that the regulation is only intended to protect residential bystanders, with any protection of worker bystanders being incidental, and that DPR is not required to involve OEHHA in development of regulations intended to protect workers from pesticide drift. In previous litigation regarding the regulation of methyl bromide, DPR made similar arguments that were rejected by the First District Court of Appeal in the *Fernandez v. DPR* case.

The stakes, as you know, are high. Although DPR's 2015 Risk Characterization Document includes both systemic and portal of entry potency factors, DPR chose to use the portal of entry potency factor in the subsequent Risk Management Document (RMD) to justify a fourfold increase in the allowable lifetime 1,3-D exposure level, and thus a 50% increase in the township use cap. This potency factor was chosen as the regulatory target over the strenuous objections of OEHHA. Curiously, the RMD also stated that this regulatory target concentration was established to guide development and adoption of mitigation measures to protect both residents and worker bystanders performing fieldwork in and around fumigated fields, although DPR is now claiming the regulations are designed to protect only residents.

Food and Ag Codes 12980 and 12981 make clear the "joint and mutual responsibility" of DPR and OEHHA:

- § 12980: The Legislature further finds and declares that the development of regulations relating to pesticides and worker safety should be the joint and mutual responsibility of the Department of Pesticide Regulation and the Office of Environmental Health Hazard Assessment.
- § 12981: The Office of Environmental Health Hazard Assessment shall participate in the development of any regulations adopted pursuant to this article. Those regulations that relate to health effects shall be based upon the recommendations of the office.

Both the *Fernandez* Appellate Court opinion and the 2018 decision from the Alameda County Superior Court in the Vasquez case have rejected DPR's efforts to unreasonably narrow the scope of what is classified as a worker safety regulation requiring statutorily mandated heightened OEHHA participation:

The Alameda County Superior Court decision dated March 16, 2018 in the Vasquez case includes the following findings:

- "If DPR develops and adopts regulations concerning the worker safety, the DPR must develop the regulations in concert with the Office of Environmental Health Hazard Assessment"
- "Given that the DPR did not adopt the Township Cap Program as a regulation, it is undisputed that DPR did not comply with Food & Ag 12981 and include OEHHA in the development of any regulation."
- "The undisputed evidence demonstrates that if the DPR had adopted the Township Cap Program as a regulation, then the regulation would 'relate to health effects' because the regulation would 'affect' worker safety and the regulation would regulate the use of a pesticide 'to protect those who may come into contact with it.'"

In the wake of the Vasquez judgment, we were gratified that DPR appropriately chose not to appeal and instead took up regular rulemaking as ordered by the judge in the case. Since then, however, the regulatory proceedings have been held up repeatedly with unacceptable delays, even while the highest ambient air levels ever recorded were measured in Shafter and Parlier - far higher than the levels that resulted in a total ban in 1990.

We were hopeful that under your administration, 1,3-D rulemaking would be prioritized and the delays would end. Instead, DPR has reinserted itself into the Vasquez case, filing a respondent brief in February that, among other things, argued against OEHHA's joint and mutual responsibility for developing these regulations.

We therefore ask that you:

1. Advise DPR, at a minimum, to end their support of Dow's appeal in the Vasquez case.
2. Provide us with a written assurance of the extent of OEHHA's court-ordered and legally mandated participation in development of regulations to mitigate exposure of residential and worker bystander exposure to 1,3-D, including the following requirements:
 - DPR must actively involve OEHHA in determining the regulatory target for cancer risk, developing mitigation measures including revisions to geographic use limits, buffer zones, acreage, application rate and method limits, and other aspects of the regulation related to worker health effects of 1,3-D exposure.

- DPR must obtain concurrence from OEHHA on the draft regulation before it is officially proposed, and the regulation must “be based upon the recommendations of” OEHHA, pursuant to Food & Ag Code § 12981.

Sincerely,

Handwritten signatures of Jane Sellen and Sarah C. Aird in blue ink.

Jane Sellen and Sarah Aird, Co-Directors, Californians for Pesticide Reform

Handwritten signature of Caroline Cox in black ink.

Caroline Cox, Research Director, Center for Environmental Health

Handwritten signature of Anne Katten in black ink.

Anne Katten, Director of the Pesticide and Worker Safety Program, California Rural Legal Assistance Foundation

Handwritten signature of Medha Chandra in black ink.

Medha Chandra, Organizer and Policy Advocate

Cc: Julie Henderson, Deputy Secretary for Health and Public Policy, CalEPA

Val Dolcini, Director, Department of Pesticide Regulation

Jeremy Brown, Assistant General Counsel, CalEPA