



June 16, 2021

Director Val Dolcini
California Department of Pesticide Regulation
Via email: val.dolcini@cdpr.ca.gov

Re: Request to commence dismissal proceedings for the Kern County Agricultural Commissioner

Dear Director Dolcini,

In light of the continued refusal of Kern County Agricultural Commissioner (CAC) Glenn Fankhauser to implement a pilot notification in Shafter pursuant to the AB 617 Community Emissions Reduction Program plan adopted by the California Air Resources Board on February 13, 2020, the Center on Race, Poverty & the Environment, Californians for Pesticide Reform, and Central California Environmental Justice Network formally request that you exercise your authority under Section 2181 of the Food and Agriculture Code to convene a hearing to consider the dismissal of the Kern CAC. There is "satisfactory evidence" that Commissioner Fankhauser has 1) neglected his duty and 2) engaged in misconduct in office by defying a lawful order from the director of the California Department of Pesticide Regulation (DPR).

Food and Agricultural Code Section 2181 states:

"Upon satisfactory evidence presented to the Secretary or the Director of the Department of Pesticide Regulation that the commissioner of any county is guilty of neglect of duty, incompetence, or misconduct in office, the trial board that is selected, pursuant to this article, **shall** hold a hearing at the time and place specified by the trial board. [T]he director **shall** convene the trial board when the alleged offenses come under the jurisdiction of the Department of Pesticide Regulation" (emphasis added).

Commissioner Fankhauser's refusal to implement the notification pilot in Shafter, for which \$250,000 in state funding has been allocated, is a violation of his duty.

Commissioner Fankhauser's refusal constitutes not only neglect of duty, but also misconduct in office by refusing to implement a lawful order from the DPR director.

As explained in DPR's December 17, 2020 letter to Commissioner Fankhauser, "Under Food and Agricultural Code sections 11455, 2272, 2281, and 14004, you have a **legal duty** to submit reports required by DPR. Pursuant to its authority, DPR instructs and **requires** you to submit to DPR regular reports containing any approved NOIs for the use of pesticide products containing 1,3D, chloropicrin, or MITC in and within seven miles of Shafter." (emphasis added). Commissioner Fankhauser was mandated to submit the required reports to DPR. Commissioner Fankhauser's nonfeasance, or failure to abide by DPR's legal mandate, constitutes misconduct in office. California courts have long recognized that misconduct in office does not necessarily require or imply corruption or criminal intention. The doing of a wrongful act, or **official neglect to do an act which ought to have been done** will constitute misconduct in office, although there was no corrupt or malicious motive.¹ Commissioner Fankhauser's neglect and refusal to submit the required reports to DPR constitutes nonfeasance, and as such, he has committed and continues to commit misconduct in office.

DPR has broad, general authority over County CACs, which are "the field arm of the pesticide regulatory program."² Food and Agricultural Code sections 11501.5, 12977, 12982, 14004.5, and 15201 state that the CACs work under the direction and supervision of the Director of DPR. Food and Agricultural Code states that instructions and recommendations from DPR "**shall govern**" what procedures the commissioner follows. (Cal. Food & Agric. § 2281) (emphasis added). The current *Agreement for Obtaining Mutual Objectives* between DPR, CACASA, and the California Department of Food and Agriculture clarifies DPR's authority over CACs' decisions about how laws and regulations should be implemented.³

Under these broad, general powers, DPR has the authority to 1) instruct CACs to post Notices of Intent (NOIs) on CAC websites in advance of Restricted Material applications, along with approvals and denials, and 2) require that CACs share NOIs and approvals and denials with DPR in advance of applications, which DPR can post

¹ *Coffey v. Superior Ct. of Sacramento Cty.*, 147 Cal. 525, 529 (1905).

² California Department of Pesticide Regulation, *Pesticide Use Enforcement Program Standards Compendium Volume 8, Guidelines for Interpreting Pesticide Laws, Regulations, and Labeling*, (2019), at 18. Available at: https://www.cdpr.ca.gov/docs/enforce/compend/vol_8/chapter1.pdf.

³ California Agricultural Commissioners and Sealers Association, *Memorandums of Understanding*, (2018), at 6. Available at: https://www.cdfa.ca.gov/exec/county/documents/CACASA_MOUs.pdf ("if a decision made by a commissioner or sealer involving interpretation of law or regulation is reversed by the Cdfa/CDPR, it shall be thoroughly discussed with the commissioner or sealer involved prior to implementation").

on-line itself. DPR exercised this authority in a letter to Commissioner Fankhauser dated December 17, 2020.

Commissioner Fankhauser's refusal to comply with DPR's lawful directive constitutes neglect of duty and misconduct in office. As such, this refusal, neglect, and misconduct constitute the "satisfactory evidence" to initiate a dismissal hearing under Food and Agricultural Code Section 2181. **We hereby request that DPR take immediate steps to convene a dismissal hearing.**

Sincerely,

Paulina Torres, Staff Attorney, **Center on Race, Poverty & the Environment**
Sarah Aird and Jane Sellen, Co-Directors, **Californians for Pesticide Reform**
Gustavo Aguirre Jr., Kern County Director, **Central California Environmental Justice Network**

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