

September 9, 2021

The Honorable Rob Bonta
Attorney General, State of California
1300 I Street, Sacramento, CA 95814-2919

RE: County Agricultural Commissioners' Challenge to the Statutory Authority of the California Department of Pesticide Regulation

Dear Attorney General Bonta,

We, residents and allies of San Joaquin Valley farmworking communities, urge you to take action on behalf of your clients the California Department of Pesticide Regulation (DPR) and the California Environmental Protection Agency (CalEPA) to require the Kern County Agricultural Commissioner to implement the pilot notification program in the Kern County town of Shafter, as promised in the Shafter AB 617 Community Emissions Reduction Program (CERP) plan adopted by CARB on February 13, 2020, and as ordered by former DPR Director Val Dolcini on December 17, 2020.

We write to alert you of the increasingly lawless defiance of DPR's authority by a number of San Joaquin Valley agricultural commissioners, as described below, most recently by the Fresno Agricultural Commissioner. These instances of defiance are a violation of Food and Ag Code sections 11501.5, 12977, 12982, and 15201, all of which state that CACs work "under the direction and supervision of the director" of DPR.

DPR's acquiescence to the defiance of the Kern County Agricultural Commissioner has stoked a culture of impunity among his peers, which will only fester unless it is challenged. We fear that DPR will find itself irrevocably weakened, leaving farmworking communities entirely without recourse, if the State does not urgently and forcefully assert its undoubted legal authority.

County Agricultural Commissioners serve as DPR's local enforcement arm in the fifty-eight counties. That DPR's "enforcers" would so candidly promote the interests of the agricultural industry over those of the predominantly low-income communities of color they are sworn to protect is perhaps the strongest reason yet for the state to assert its authority over these unaccountable local officials.

Shafter Notification

Under AB 617, the Kern County town of Shafter was selected for a CERP plan, which was finalized and adopted by CARB on February 13, 2020. Among its provisions, the

Kern County CAC was directed to work with the community and the Air District to develop a pilot pesticide notification program for the 7-mile radius around Shafter. On December 17, 2020, with no progress made on development of the pilot, then-DPR Director Val Dolcini sent a letter to the Kern CAC ordering him to provide DPR with all Notices of Intent (NOIs) to apply four Restricted Material fumigants in advance of applications in Shafter. The letter, which cited DPR's statutory authority to make such a demand, is attached below as Appendix 1.

Defiance by Kern CAC

Via a Public Records Act request, we now know that the Kern County Agricultural Commissioner announced his intention to disregard DPR's lawful orders as early as the day after the Shafter CERP was approved. In a February 14, 2020 email addressed to Kern County growers, Ag Commissioner Glenn Fankhauser called the previous evening's CARB board meeting in which the Shafter CERP was finalized "quite a train wreck" but reassured growers "I am not bound by AB 617 and DPR cannot force me to do anything." The emails are attached below as Appendix 2.

In his January 12, 2021 response to DPR's December 17, 2020 demand letter, Mr. Fankhauser was even more explicit, although he noted that he was refusing to comply not on legal grounds, but rather because he just didn't like the notification pilot. His letter (attached below as Appendix 3) enumerates his objections to notification in great detail, but on the legal point of DPR's authority, he has only this to say: "To be clear, technical legal disagreements over authority have little to do with my decision not to supply DPR with the requested 'reports.'" In other words, the law is of no concern to him. Mr. Fankhauser is daring DPR to compel him to comply. To our great disappointment, to date DPR has not done so. We trust, however, that the law IS of concern to you.

Defiance by Fresno CAC

This challenge to DPR's authority now appears to be spreading through the ag commissioner ranks. On Tuesday September 7, 2021, in the presence of several community members in Cantua Creek, Fresno Agricultural Commissioner Melissa Cregan stated to Acting Director Julie Henderson that DPR was not her boss and that she didn't have to do what DPR said. This statement was not challenged or refuted by Ms. Henderson or anyone else from DPR. Our members were so stunned by this brazen statement of insubordinate intent that they asked Ms. Cregan to repeat it, which she did. When asked whether funding from DPR conferred any obligation to comply with their directives, Ms. Cregan replied that the funding her office received from DPR was minimal. Ms Cregan is perhaps aware, but likely unconcerned, that CCR Section 6394 authorizes DPR to reduce a CAC's funding as a corrective measure for abuse of discretion.

Defiance by Tulare CAC

The dismissive behavior of Tulare Ag Commissioner Tucker toward the communities he serves was documented in a March 4, 2021 letter sent to DPR, attached below as Appendix 4. This was followed by a dangerous escalation when Mr. Tucker issued an alert advising growers to call law enforcement on residents participating in a UC Davis-led community air monitoring study. That incident is described in a letter to DPR dated June 25, 2021 (attached as Appendix 5)

We find it unsurprising that these atrocious attitudes among CACs toward DPR and community members are spreading. As long as they go unchallenged, they will persist.

DPR's authority under the plain meaning of state law

We also find it unsurprising that Mr. Fankhauser did not bother, and apparently felt no need, to make a legal argument regarding DPR's authority to request NOIs in advance, because the plain statutory language is clear and unambiguous. Food and Ag Code sections 11501.5, 12977, 12982, and 15201 all state that CACs work "under the direction and supervision of the director" of DPR. DPR's own letter to Mr. Fankhauser dated December 17, 2020 (Appendix 1) and a legal analysis provided to DPR by the Center on Race, Poverty and the Environment (attached as Appendix 6) further delineate the legal basis for DPR's authority to request NOIs.

We urge you to aggressively reaffirm and enforce the state's legal authority, for the sake both of the predominantly Latinx farmworking communities you and they are sworn to protect, and for the state's future authority to direct ag commissioners in the performance of their work. As outlined above, these Ag Commissioners have repeatedly tested the resolve of the state to assert their authority, and so far the state has blinked.

Where does this end? What act of insubordination is so egregious that DPR will finally say "enough"? We argue that there is ample cause of action for challenging the ag commissioners' defiant stance in the continued failure to implement the pilot notification program in Shafter. By failing to act to curb this lawless defiance, DPR finds its authority undermined not just in Kern but across the state.

Thank you for your consideration of this matter. We recognize that your office has a variety of legal options available to it to pursue, and **we respectfully request a meeting** with you to discuss possible remedies.

Sincerely,

Byanka Santoyo, Shafter Steering Committee
Angel Garcia, Organizing Director, Californians for Pesticide Reform
Jane Sellen, Co-Director, Californians for Pesticide Reform
Sarah Aird, Co-Director, Californians for Pesticide Reform
Anabel Marquez, Shafter Steering Committee
Felipa Trujillo, Shafter Steering Committee
Socorro Guzman, Shafter Steering Committee
Minerva Hernandez, Shafter Steering Committee
Gustavo Aguirre, Jr, Shafter Steering Committee
Cesar Aguirre, Shafter Steering Committee
Angelica Lopez, Shafter Steering Committee
Antonio Lopez, Shafter Steering Committee
Nayamin Martinez, Executive Director, Central California Environmental Justice
Network
Lorena San Pedro, Fresno County Organizer, Central California Environmental Justice
Network
Silvia Zamora, Cantua Creek Resident
Margarita Alonzo, Cantua Creek Resident

CC:

Catherina Nou, Director, Office of CARE, Office of Attorney General Rob Bonta,
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Maheen Ahmed, Deputy Director, Office of CARE, Office of Attorney General Rob
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Julie Henderson, julie.henderson@calepa.ca.gov
Jared Blumenfeld, jared.blumenfeld@calepa.ca.gov
Karen Morrison, karen.morrison@cdpr.ca.gov



December 17, 2020

Sent via email to fankhauserg@kerncounty.com

Mr. Glenn Fankhauser
Agricultural Commissioner
Kern County Department of Agriculture
1001 S. Mount Vernon Avenue
Bakersfield, California 93307

Subject: Shafter Community Pesticide Notification Pilot

Dear Mr. Fankhauser:

Glenn

The purpose of California's pesticide regulatory program is to protect public health and safety, ensure growers use pesticides properly and safely, and encourage the development and implementation of integrated pest management systems. The Department of Pesticide Regulation (DPR) and county agricultural commissioners (CACs) have a longstanding history of working cooperatively to support this statutory purpose. Together, DPR and CACs are responsible for enforcing pesticide laws and regulations—including requirements applicable to restricted material pesticides that are toxic air contaminants (TACs)—to minimize any potential adverse effects on the communities and environments in which they are used.

Implementation of community notification of hazardous pesticide applications as a pilot project in Shafter, and on a statewide scale, will work to improve the enforcement of pesticide requirements that protect public health and safety and to enhance public transparency. DPR, the California Air Resources Board (CARB), and the San Joaquin Valley Air Pollution Control District (Air District) have engaged since February 2020 with you and the Shafter Community Steering Committee to help develop a Shafter community notification pilot. Those efforts include CARB Member Dean Florez's meeting with you and the Shafter Community Steering Committee to discuss development of a pilot.

Despite these efforts, agreement has not been reached on an appropriate community notification pilot for Shafter. As a result, DPR is requiring you to submit regular reports of approved Notices of Intent (NOIs) for the use of pesticide products containing 1,3-dichloropropene (1,3-D), chloropicrin, or methyl isothiocyanate (MITC) in and within seven miles of Shafter to DPR so that DPR can provide notice to the community for the pilot project. This requirement is detailed further below.

I want to recognize the recent contributions and assistance that you and others provided in evaluating new application methods to reduce emissions from 1,3-D. This iterative process resulted in a more refined proposal that incorporated helpful input from local CACs and pesticide

applicators and met DPR's objective of identifying practical application methods with emissions reduction potential that may inform future statewide mitigation. I believe this is a good model of collaboration between government and private industry.

I. Public Notification Improves Enforcement of Public Health and Safety Protections and Enhances Public Transparency

Public notification improves enforcement of state and local public health and safety protections and enhances public transparency in the following ways: increasing general awareness of pesticide use in the community; allowing the public to take precautions to avoid potential exposure; ensuring first responders have access to information about nearby pesticide applications; increasing transparency of the restricted materials process by providing regular notification of upcoming applications; and encouraging local communication between the public and growers. These are important and necessary public policy goals.

While NOIs are public documents, the public does not currently receive notification of upcoming pesticide applications in their area. To provide this public notification, we would like to model the Shafter community notification pilot on the grower notification program that your office implemented successfully in Kern County. I believe that the elements of your grower notification program—growers' submission of NOIs to your office at least 48 hours before application; your review and approval of the NOI; and your office's email notice to growers surrounding the area to be treated—provide a strong foundation for a community notification pilot project.

Further, the goal of the grower notification program—protecting persons working in neighboring fields from potential pesticide exposure—naturally extends to broader community notification. In fact, the event underlying the implementation of grower notification—a major 2003 chloropicrin incident near Arvin, California—resulted in illnesses to both workers and nearby residents. And we understand that you identified community notification as a potential future feature of the grower notification program.

In 2019, the Shafter Community Steering Committee prepared a Community Emissions Reduction Program (CERP) under the rubric of Assembly Bill 617 legislation identifying strategies for reducing potential exposure to TACs in the San Joaquin Valley. The CERP, which CARB approved on February 13, 2020, incorporates complementary pesticide measures in the community, including a public notification system to be developed in coordination with your office. CARB and the Air District have committed funds toward this public notification system. Unfortunately, as noted above, repeated attempts to reach a voluntary arrangement to provide the community with the notification contemplated by the CERP have failed.

Based on the commitment under the CERP, existing infrastructure in Kern County for notification, and the public health and safety, enforcement, and transparency benefits public

notification can provide, DPR is requiring you, as indicated above, to submit regular reports of approved NOIs for the use of pesticide products containing 1,3-D, chloropicrin, or MITC in and within seven miles of Shafter to DPR so DPR can provide notice to the community.

II. Community Notification Pilot Project in Kern County

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 1,3-D, chloropicrin, or MITC in and within seven miles of Shafter. These reports must be provided to DPR at least 24 hours before the intended pesticide application. In the spirit of cooperation and collaboration on this community notification pilot project, DPR will then post information from those NOIs on its own website and provide email or other electronic notification to anyone who requests notice. The pilot project will run for two years. DPR will work directly with you to address the logistics of sending these NOIs to DPR in a timely fashion.

DPR will include at least the following elements in the pilot project:

- **Location:** Applications occurring in and within a seven-mile radius around Shafter in Kern County.
- **Duration:** Two-year pilot.
- **Pesticides:** 1,3-dichloropropene, chloropicrin, and MITC.
- **Information provided in the public notice:**
 - The coordinates or address of the area to be treated,
 - The pesticide(s) to be applied,
 - The date the intended application is to commence, and
 - The contact information for your office.
- **Form:** The public notice will be provided electronically by posting the information on a publicly accessible website and by providing email or other electronic notification of the information to anyone who requests notice.
- **Timing:** Notice will be provided before the intended application.

DPR estimates that the costs of providing the required reports to DPR will be minimal. To the extent this results in increased costs, DPR encourages you to provide any relevant information to DPR for additional analysis and to utilize the funding identified by CARB and the Air District.

III. Next Steps

DPR is fully committed to taking steps necessary for implementation of this community notification pilot project to improve enforcement of public health and safety protections and

Mr. Glenn Fankhauser
December 17, 2020
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enhance public transparency in Kern County. DPR requests your written confirmation that you will comply with this directive by January 8, 2021. DPR will then schedule a meeting with you to discuss next steps. In the meantime, if you have any questions, you may contact me, or Mr. Daniel Rubin, DPR's Chief Counsel, at <daniel.rubin@cdpr.ca.gov> or 916-324-2666.

Sincerely,



Val Dolcini
Director
916-445-4000

*I look forward to working
with you on behalf of
the residents of Shafter
and greater Kern County.*

cc: Mr. Daniel Rubin
Ms. Donna Marciano, Enforcement Regional Branch Chief
Mr. Joseph Damiano, Enforcement Headquarters Branch Chief
Mr. Joe Marade, DPR County/State Liaison

1/27/2020 10:13am
1/30/2020 11:57am

APPENDIX 2

1,3-D DPR Notification Meeting ✕

From: "Kern County, CA" <kerncounty@service.govdelivery.com>

Subject: 1,3-D DPR Notification Meeting

To All Kern County Farmers:

As a result of both an ongoing air quality bill (AB 617) and one air monitoring spike of the pesticide 1, 3-D in the Shafter area, the Department of Pesticide Regulation is proposing a pilot project regarding this fumigant. The scope and extent of the project has yet to be determined. As part of the lead up to the project's implementation, DPR has requested a meeting with growers to determine both the desire and feasibility of the project. The current proposal involves a notification system for residents within a certain buffer zone around applications near the city of Shafter.

For the most part I am opposed to such a notification system. However, I don't want to make that decision for growers who would be impacted by the proposed project. Therefore, I believe that it is prudent to allow DPR to solicit comments from Kern growers in relation to the proposal. Because I believe that such a pilot project has the potential to eventually expand to include all growers in the county, I am extending this invitation to all county growers and 1,3-D dealers rather than simply those growers that might apply 1,3-D around the Shafter area.

I realize that this notice does not give you much time to prepare, but DPR is under a tight timeline to come to some kind of agreement and have requested a meeting quickly. So, the meeting has been scheduled for Tuesday, February 4 beginning at 2pm. The meeting location will be the Kern Agricultural Pavilion, 3300 East Belle Terrace, which is located directly across the street from my office.

DPR will give a short presentation about the need for this project and then open it up for comments from growers. The intent of this meeting is to let your opinions be heard by DPR.

Please keep in mind that this meeting is by invitation and is only meant to be attended by Kern County farmers and pesticide dealers or pesticide manufacturers of 1,3-D.

Just so we know how many people to expect, I would respectfully request that you RSVP to this invitation if you intend to attend. Regrets are not necessary to convey, however, should you wish to voice your opinion about such a pilot program, please feel free to respond to me through email or phone call over the next few days.

Also, so that we can get a general ideal about how many people wish to attend, I would very much appreciate it if you could call my office (661) 868-6300 to tell us that you plan on coming to the meeting.

Sincerely,

Glenn Fankhauser
Agricultural Commissioner
Sealer of Weights and Measures
fankhauserg@kerncounty.com

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GOVDELIVERY 

sent 2/12/2020 10:20 am

Air Resources Board Meeting on 2/13/2020 at 4pm

✕

From: "Kern County, CA" <kerncounty@service.govdelivery.com>
Subject: Air Resources Board Meeting on 2/13/2020 at 4pm
Attachments: Carb_AB617_announcement.pdf

Dear Kern County Growers,

Thank you to those of you who attended our meeting on a notification program with the Department of Pesticide Regulation (DPR). As I have mentioned previously, one of the primary pushes for this notification system is coming from the activist groups that are associated with the AB 617 Shafter Steering Committee. Attached you will find a flyer for the San Joaquin Valley Air Pollution Control District/California Air Resources Board combined meeting in Shafter on Thursday. If you can find the time to attend this meeting I would very much appreciate it. The head of DPR will be there to talk about what they are trying to do with regards to pesticides in Shafter and will most likely try to paint the picture that a notification system is in the works and will happen even though nothing has been agreed to by me. I will be there to speak if necessary.

Surprisingly, I was contacted by a representative of the SJV Air Pollution Control District to make sure that I was going to attend and also to express concern that grower's voices might not be well represented. They were worried that The California Air Resources Board (CARB) would only hear the side of the activists. I'm sending out this notice to try to alleviate this problem. This is a chance to make your voice heard as an industry and to emphasize a science-based approach rather than one that is more reactionary. A single spike of 1,3-D from many thousands of data points does not justify a notification project. The single spike is an anomaly and just proves that adequate measures are already in place to keep the public safe. Please feel free to ask me any questions and I hope to see you on Thursday.

Sincerely,
Glenn Fankhauser
Agricultural Commissioner
Sealer of Weights and Measures
Kern County
(661)868-6300

- [Carb_AB617_announcement.pdf](#)

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GOVDelivery 

Sent 2/14/2020 4:09pm

Air Resources Board Meeting Update



From: "Kern County, CA" <kerncounty@service.govdelivery.com>

Subject: Air Resources Board Meeting Update

Hello All,

I wanted to give you an update on Thursday's CARB meeting that I had previously told you about. It was quite a train wreck (although Jesse's comments speaking for the Farm Bureau were a highlight and I do think that a combined spray safe type event for the concerned citizens of Shafter is a definite feel good that the activists should sign off on. I think that educating most people on exactly how they are being protected would go a long way). CARB focused a lot on the pesticide issue and notification and saw essentially no problem with offering it. They also didn't like wording in their resolution that stated that DPR would work with or consult with the commissioner on notification. They wanted stronger language that cemented that DPR would have to implement something. However, as I've mentioned before, I am not bound by AB 617 and DPR cannot force me to do anything. I think that it might be helpful to revisit the discussion with CARB at their '6 month' update meeting. I'll make sure to follow up on this.

For the next steps regarding both notification and other projects, here is an update.

I have agreed, along with Merced and Fresno counties, to participate in 1,3-D mitigation pilot projects which will begin sometime this summer and last for a year. This is to see if emissions can be reduced by utilizing various methods, which so far rely mostly on some type of soil moisture requirements. These would be for four townships around Shafter and would only be for 1,3-D. We are still in discussions on how this will be set up and exactly what types of application changes this would entail.

DPR will continue to court me on the notification issue. There is a meeting on Tuesday with DPR, activist groups, and a few commissioners that I will be attending in Fresno and this issue will be coming up. I'm open to continuing these discussions, but I feel that we are far apart from what each side is willing to take. I think right now, the most I could agree to would be something like a physical notification/contact with persons living within 100 feet of an application of Telone and I'm unlikely to go further than that. My take on the whole issue is that if notification is so important, then DPR needs to make it a regulation that is Statewide.

I wanted to thank you for your attendance at the meeting we had with DPR earlier this month, as well as the show of force the growers made at the CARB Shafter meeting. While you did not change the outcome of their decision, it was definitely a win for letting them hear the other side of the issue from growers. Please let me know if you have any questions.

Thanks,

Glenn Fankhauser
Agricultural Commissioner
Sealer of Weights and Measures
Kern County
(661)868-6300

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APPENDIX 3



DEPARTMENT OF AGRICULTURE AND MEASUREMENT STANDARDS

GLENN FANKHAUSER
Agricultural Commissioner
Sealer of Weights and Measures

1001 South Mount Vernon Avenue · Bakersfield, California 93307
Telephone 661-868-6300 · Fax 661-868-6301 · agcomm@kerncounty.com
website - www.kernag.com

January 12, 2021

Mr. Val Dolcini
Director
California Department of Pesticide Regulation
1001 I Street
P.O. Box 4015
Sacramento, CA 95812-4015

Subject: Shafter Community Pesticide Notification Pilot

Dear Mr. Dolcini,

Val

The purpose of this letter is to respond to the directive to implement a pilot notification system for pesticides in and around the city of Shafter. I agree with your characterization of the long-standing beneficial relationship between county agricultural commissioners and the Department of Pesticide Regulation (DPR) in being partners in protecting the general public from exposure to harmful pesticides. To that end, I feel that the work we do in cooperation with DPR in enforcing the current strict and rigorous requirements that are scientifically based directly results in a public that is more protected than in any other state. As I'm sure you are well aware, DPR has multiple ongoing air monitoring stations in addition to many other studies which serve the overall purpose of continual research. Any time that unusual readings occur, DPR reacts by adjusting their regulations and/or suggested permit conditions to ensure safety to the highest extent possible. I applaud these studies which serve to provide data driven justification for regulations rather than those that are based on reactionary public opinion.

Related to the rubric of Assembly Bill 617 (AB617) which you have referenced, as I have mentioned several times, the goal of AB617 and the Community Emissions Reduction Plan (CERP) is to reduce toxic emissions into the atmosphere near and around selected communities. Indeed, the title of the document prepared by the Community Steering Committee (CSC) and approved by the California Air Resources Board (CARB) contains the words "emissions reduction." Regardless of a community notification program being included in the CERP, notification of residents does not reduce emissions but only provides notification and thus is clearly not within the scope of AB617.

Nonetheless, in the interest of cooperation, transparency, and the desire to provide residents of Kern with useful information, I agreed to engage in continuing discussions with CARB, DPR, members of the CSC, as well as with representatives of the Kern County Farm Bureau to develop a reasonable and workable notification pilot that would provide the residents with the information they desired.

When these discussions reached an impasse, I welcomed the leadership and participation of former Senator Dean Florez because of his past experience in being instrumental in the development of our grower notification system, but primarily because of his family connection and having grown up in Shafter. He truly wished to see a program developed that would benefit these residents. His participation was both a laudable and heartfelt desire to aid the Shafter populace. However, Senator Florez cancelled a second planned meeting when it became clear that some stakeholders in the process were not negotiating in good faith. While continuing to participate in discussions, they were at the same time preparing and sending letters complaining of my absence at the negotiating table without acknowledgement of their rejection of two iterations of a program that I proposed that specifically addressed their purported concerns.

I believe it became clear to Senator Florez that there was an overarching agenda of the statewide activists that was more important than actually addressing the needs of Shafter residents. I also mirror

this experience in the fact that I, as well as my predecessor, have been asked for many years by these groups to provide resident/public notification. This is why I believe that the idea for notification did not develop organically within the process of the AB617 Shafter CSC meetings, but was rather improperly seeded by the activist groups in furtherance of a long-held agenda. An example in support of this is the fact that one of the requests of the CSC was to provide online posting of rejected Notice of Intents (NOIs) as well as those that were approved. What possible useful information would be provided by letting residents know about pesticide applications which would NOT occur?

Accordingly, I'm sure you can understand my confusion at the implication that DPR must now require my compliance with its directive because I have been unwilling to implement a notification program. Such could not be further from the truth. I have offered two different workable notification programs that have fallen on deaf ears. Neither CARB, DPR, nor the activist representatives have wavered nor compromised on their initial requirements as to exactly what a Kern notification system must entail.

You have cited the collaboration of other valley commissioners, industry, and DPR in developing a pilot program to analyze different application methods for 1,3-D with the goal of reducing emissions by developing new permit conditions. You also reference that this is a good model of cooperation between government and private industry. I am therefore also confused as to why this collaboration was not extended in the case of public notification. The Kern County Farm Bureau, in addition to my office, offered a form of notification in addition to offering to host several informative public meetings in Shafter to educate residents on pesticide applications and regulations. These efforts were likewise disregarded. Instead, now DPR feels that the best collaboration with industry and other regulators is forced compliance utilizing questionable authority. Has DPR now abandoned cooperative measures?

The letter mentions several times how community notification will improve enforcement of pesticide requirements. Yet, none of the cited benefits improve enforcement in any way. Can you explain how increasing general awareness of pesticide use, allowing the public to take precautions, ensuring first responder access to information about pesticide applications, and/or increased transparency and communication improve *enforcement*? I fail to see how any of these measures will either increase compliance with regulations or increase my office's rate of inspection on these applications. Although I have mentioned before the programs that my department engages in to actually address these issues, perhaps now is a good time to reiterate them.

First, in the interest of protecting farmworkers, and by extension the general public, since 2008, Kern continues to be the ONLY county in the country that provides restricted material application information to neighboring growers. While this began as a pilot project in only ¼ of Kern's agricultural area, in 2018 I expanded it county-wide in full cooperation with all growers in Kern. As a result, we are also the only county in the country that requires a minimum of 48 hour NOIs for ALL restricted materials. Second, to ensure that first responders have access to the information they need to best respond to pesticide incidents, since 2010, we have hosted a proprietary website which is accessible to first responders in real time in the field. This site is called KernRED (Kern Rural Emergency Database) and provides Geographic Information System (GIS) location and contact information for growers and applicators so that emergency responders can immediately contact responsible parties, as well as provide them a link to the Safety Data Sheets (SDS) of the most commonly used pesticides particular to the registered crop at that site. This information is updated by my office to be seasonally specific. Again, we are the only county in the country that currently provides either of these services.

In terms of another 'pilot project' in Kern County, I question the necessity of such a project. DPR should require no additional data to determine the feasibility of public notification. As has been mentioned, since 2008, Kern has had grower to grower notification and has recently contracted with a company to rewrite the programming for our system. Therefore, programming exists for a statewide program without the need for an additional Kern pilot.

Second, Monterey County is in its second year of a pilot community notification program for fumigants. Feedback on both of these programs, collectively making up 13+ years of data should provide more than enough experience for DPR to determine how to proceed with statewide notification should it see fit.

Accordingly, it would seem that the two authorities in the state regarding notification would be the commissioners of Kern and Monterey counties. Accordingly, I find it confusing that none of the concerns of either of us are being listened to as DPR attempts to enforce new 'pilots.' Because these issues have been ignored, let me restate them:

- 1) NOIs have a "proposed" start time. Understandably, this time is flexible to allow for changes in conditions in the field. Current regulations allow for restricted material applications to begin as many as 96 hours (four days) after the proposed start time. Combined with the various restricted entry interval (REI) requirements, this would result in an unreasonable window for residents to supposedly change their behavior. For example, the 2003 chloropicrin incident (which you cite as the impetus for our notification pilot project, although it was only one of several incidents, the totality of which resulted in the pilot) occurred after the application but during the REI. The REI for chloropicrin at that time was 48 hours. In this instance, this would have amounted to a 6 day window during which notified residents would have needed to change their behavior to protect themselves from 'possible' exposure to toxic air contaminants (TACs). Is this likely and/or reasonable? Further, REI information is not included currently on an NOI and would require additional action on the part of a resident to determine a material's REI and change their behavior for the additional time frame. Also unlikely.
- 2) Online and/or opt-in email type notification results in notification to a large segment of the population which could never potentially be affected by a specific pesticide application. Data collected by Monterey County revealed that the vast majority of individuals that signed up for notification did not even live in Monterey County and 2,661 of the 4,778 users (56%) that signed up for notification were from out of state. What possible use could notification of a fumigant application in Monterey be to a resident of another state?
- 3) There is currently neither a fee for submitting an NOI, nor is there a fine for submitting a 'false' NOI. What this means is that a grower could conceivably submit NOIs for the same location every two days, essentially resulting in their ability to apply the material at any time that suits them, 24/7, 365 days a year. This would render the information useless to the person being informed, and would also negate the purpose of the notification. Indeed, this has occurred with one grower in Kern who wants to have this flexibility in their treatment schedule. Thankfully, this is not widespread, but I fear that forcing a public notification on the growers might make this the norm instead.
- 4) The general public does not differentiate among restricted, non-restricted pesticide use or fertilizer applications. For the few people who will be aware of this program, it is highly likely that they will see a pesticide application in the area, realize they weren't notified, and will contact my office to complain that they didn't receive such. My biologists will have to investigate, contact growers, applicators, etc., then contact the complainant to tell them that notification wasn't necessary for whatever reason. This will take away valuable man hours from our pesticide surveillance/compliance inspections and possibly put the public at greater risk as a result due to reduced oversight.
- 5) Due to fumigant application block size restrictions, often an application to one site can continue across a field over several days. This information would not be conveyed to the person being notified and could lead to confusion when they see the applications occurring on succeeding days and wonder why they didn't receive notice for each day.

Two of the additional reasons given for requiring this program are Kern's existing infrastructure for notification and to also encourage local communication between the public and growers. However, neither of these are components of the proposed pilot. Our current notification programming will not be used, nor will grower contact information be given to notified individuals. You have conversely not given a reason such as an unusual number of fumigation pesticide investigations/violations or toxic air readings as a direct result of specific applications, nor have you stated that my department is failing to enforce

certain regulations which would necessitate these special "reports" – something which one would assume to be the impetus for such an unprecedented directive from DPR.

I believe this would be a good time to bring up the pilot project which I have previously offered but has been ignored. My project addresses not only the concerns of CARB, DPR, the Shafter CSC, and the statewide groups, but also the concerns of Kern County growers and the Kern and Monterey county agricultural commissioners. I have proposed written notification to residents within 200 feet (double the current buffer) of proposed applications of 1, 3-D. This is modeled on our grower notification by ensuring that ONLY potentially affected individuals are notified. (Our system only notifies adjacent growers permitted by our office. This notification does not go to all growers in the county, nor does it go to a grower in south Texas who asks to be notified.) Also, because this is a physical notification, it better increases communication between residents and growers because it puts them in direct contact when the notification is made. The first proposal which fell on deaf ears involved notification within the same four townships that were to be used in the emissions mitigation pilot project. Subsequent to feedback from members of the Shafter CSC, I amended my proposal to the same 7 mile diameter area of influence outlined in AB 617 which encompassed a larger geographic area, resulting in a second iteration of a proposed pilot.

I apologize for the length of this letter, but it is a result of my frustration at having my concerns both dismissed and ignored. Among other issues I have with the Food and Ag Code Sections that you have cited, I disagree with both your interpretation of your authority to require this pilot project from my office and of the overly broad definition as to what constitutes a report, something of which I am sure you are aware because of the careful usage of this term as it relates to my office providing you with the NOIs. However, to be clear, technical legal disagreements over authority have little to do with my decision not to supply DPR with the requested "reports." I believe that my reasoning should have been apparent in the previous points which I outlined.

The safe application of pesticides in Kern County is one of my most primary concerns. The health of the residents of Shafter is of utmost importance. Were I to believe that there was any type of useful information that could be provided through these NOIs to the residents of Shafter, I would gladly comply. Further, there are no unique conditions, situations, or episodes that warrant this special reporting within the area of Shafter or within any other portion of Kern and certainly not to the extent that Kern should be singled out from the rest of the state in being the only county that should be required to provide NOIs to DPR. If I am wrong in this, please let me know. If this is a 'right-to-know' issue, then that issue exists statewide, not just 7 miles from the center of Shafter.

Pesticide regulations and rules must have a basis in science in order to engender compliance. This is what regulatory agencies should continually strive for. Arbitrary requirements which single out particular areas and/or industries without data to back them up have the potential to backfire. Therefore, my great fear is that by complying with this requirement I would actually be putting more of the public at risk because it would result in my office being flooded with NOIs which the growers have no intention of following through on. This would immediately render useless our current grower-to-grower notification because nobody would actually be able to tell when an application might occur, thus putting thousands of farmworkers in Kern at risk of being drifted upon. I humbly urge you to take into account the aforementioned unintended consequences and reconsider your directive.

Sincerely,



Glenn Fankhauser
Agricultural Commissioner/Sealer

I look forward to the uniform exercise of your authority statewide for the benefit of all Californians.



March 4, 2021

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

Re: Behavior of Central Valley Agricultural Commissioners

Dear Val:

We want to bring to your attention and request your help in addressing some extremely concerning behavior by two San Joaquin Valley County Agricultural Commissioners toward Latinx farmworking community members in recent months – part of a broader pattern of disrespect and disregard for community health by ag commissioners across the Valley.

Tulare County

Following up on a meeting over the summer, Angel Garcia, Coordinator of the Tulare County Coalition Advocating for Pesticide Safety and Organizing Director for Californians for Pesticide Reform, sent Tulare County Agricultural Commissioner Tom Tucker a list of local residents interested in being contacted by the Tulare CAC's office in advance of nearby pesticide applications. It was the understanding of Mr. Garcia that while the Tulare CAC office wouldn't institute a public notification program, Mr. Tucker had agreed, during the summer meeting, to provide this kind of notification to residents explicitly asking for it. That understanding was shared by Nayamin Martinez, Executive Director of the Central California Environmental Justice Network, who also attended the meeting. Accordingly, on December 21, 2020, Mr. Garcia sent Mr. Tucker a list of approximately 150 residents interested in receiving such notice, along with their addresses and telephone numbers.

In a December 30 email response to Mr. Garcia, Mr. Tucker insisted he had only ever offered to put residents in touch with applicators who spray directly adjacent to residents' homes in order that they might try and come to a mutual understanding, and accused Mr. Garcia of deceit and manipulation.

Mr. Tucker assumed pursuit of an "agenda" rather than an honest misunderstanding about an oral agreement on pesticide notification:

It sadness [sic] me to hear you make mention of this so-called agreement because one never existed ... you either didn't want to listen to what I said or you are trying to push ahead with your agenda and that of your supporting organizations

Mr. Tucker then further implied Mr. Garcia had been dishonest by "resorting to trickery":

We are not always going to agree on everything and we should respect each other enough to understand that point, without resorting to trickery.

CAC Tucker even accused Mr. Garcia of giving the CAC a false list of residents:

I am of the opinion that the list of names you gave me was probably a mailing list from your organization and not a list of people that asked to be put into contact with a nearby applicator

Mr. Tucker also insisted:

I have not changed in my position. I am not offering to start a notification program. I am not offering to notify any Tulare County residence of any pesticide application no matter the proximity. Not even just the restricted materials.

Of greatest concern is the fact CAC Tucker abused the contact list Mr. Garcia shared with him. Clearly knowing he would not be providing notification to residents, and without first communicating with Mr. Garcia, CAC Tucker took the list of Latinx community residents entrusted to him for notification and used the list for other purposes. Rather than reaching out to residents expecting to be contacted about upcoming applications, CAC Tucker called residents, with no notice, to ask them about pesticides and their concerns. Many residents, especially in immigrant households, are suspicious of government entities calling out of the blue and feel intimidated by such outreach. Many other residents are concerned about pesticides but are not familiar with the County Agricultural Commissioner's office and didn't know who was calling or why. Many residents work in the fields and fear retaliation for speaking up about concerns they have about pesticides. Regarding his outreach, CAC Tucker wrote:

I pulled up many of the addresses you gave and found that many, if not most were not even directly adjacent to an agricultural field ... There were residences directly adjacent to agricultural properties and I took the time to make contact with some. Several would not answer their phones and those had mail boxes that were full. We spoke with others and asked if they were having problems or issues and they said no.

In a January 29, 2021, follow-up email, Mr. Garcia attempted to explain his understanding of the notification agreement, how the list was compiled by direct outreach to community members, and that residents may have been confused or felt threatened by the CAC's office calling them out of the blue without pesticide notifications. CAC Tucker's reply did not

acknowledge Mr. Garcia's explanations, nor did it address Mr. Garcia's concerns about Mr. Tucker using the list for other purposes:

Angel,

I too am sorry that you and I are misunderstanding each other. Even this email shows that you are not understanding what I meant. As I mentioned in the communication I will look forward to the time when you and I can have an in-person meeting and work this out. I truly have the best intentions for the people of this community, as you do as [sic] too I am sure.

Speak with you soon,

Tom.

Kern County

We strongly support and appreciate your initiation of actions to hold the Kern CAC Glenn Fankhauser accountable regarding notification promised to the town of Shafter in the AB 617 process. However, CAC Fankhauser continues to misrepresent the Latinx community in his letters to you, which have then been echoed in the media.

In his January 12 letter to DPR regarding the notification pilot in Shafter, CAC Fankhauser claims:

[S]ome stakeholders in the process were not negotiating in good faith. While continuing to participate in discussions, they were at the same time preparing and sending letters complaining of my absence at the negotiating table without acknowledgement of their rejection of two iterations of a program that I proposed that specifically addressed their purported concern ...
I believe that the idea for notification did not develop organically within the process of the AB617 Shafter CSC meetings,

While CAC Fankhauser does not name who "some stakeholders" are, any reader familiar with the AB 617 negotiations process over pesticide notification would know "stakeholders" refers to the Shafter Community Steering Committee, comprised almost entirely of Latinx residents. CAC Fankhauser accuses these Latinx Kern County residents of "not negotiating in good faith," that notification is a "purported concern," and that "the idea for notification did not develop organically within the process of the AB617 Shafter CSC meetings". Essentially, CAC Fankhauser has charged the Shafter Community Steering Committee with being dishonest and not capable of generating their own ideas.

CAC Fankhauser's misrepresentations disparaging Shafter's Latinx AB617 Steering Committee have been repeated in *Agri-Pulse* and *The Bakersfield Californian*.

Mr. Fankhauser has repeatedly stated, in public meetings with representatives from the Shafter Steering Committee, allies, and other public officials, that he doesn't believe in or support notification. In his January 12 letter, he reiterates this opposition to notification, ignoring the Shafter Steering Committee's assessment of NOIs' usefulness and expressed interest in receiving them, stating:

Were I to believe that there was any type of useful information that could be provided through these NOIs to the residents of Shafter, I would gladly comply.

DPR's Environmental Justice page notes that "Treating people fairly guides how DPR conducts its activities. Fair treatment means that no one group of people, including racial, ethnic, or socioeconomic groups, should be disproportionately impacted by pesticides. Anyone whose health or environment may be affected by pesticides holds a stake in DPR's decisions. We want to ensure that ALL have an opportunity to participate in the regulatory process."

With appreciation for your past support, we request DPR action on these concerns and respectfully ask that you let us know how DPR intends to address this unacceptable behavior on the part of these two San Joaquin Valley CACs.

Sincerely,

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

Sarah C. Aird and Jane Sellen
Co-Directors

CC:

Jared Blumenfeld, CalEPA
Yana Garcia, CalEPA
Suma Peesapati, CalEPA
Martha Sanchez, DPR
Nayamin Martinez, CCEJN



June 25, 2021

Director Val Dolcini, California Department of Pesticide Regulation

Via email: val.dolcini@cdpr.ca.gov

Secretary Jared Blumenfeld, CalEPA

jared.blumenfeld@calepa.ca.gov

Assistant Director Karen Morrison, California Department of Pesticide Regulation

karen.morrison@cdpr.ca.gov

Re: Discriminatory Behavior of Tulare and Kern County Agricultural Commissioners

Dear Director Dolcini, Secretary Blumenfeld and Assistant Director Morrison:

You must put a stop to the discriminatory and abusive behavior of the Tulare and Kern County Agriculture Commissioners toward the Latinx farmworker communities in their regions.

We [wrote](#) to you about this issue on March 4, 2021 and met with you via Zoom on May 3rd. It is now clear to us that your decision not to take more serious action so far has only served to embolden both Commissioners Tom Tucker and Glenn Fankhauser in their racially discriminatory actions toward the Latinx communities they are sworn to protect, ranging from callous disregard to actively fueling racist attacks.

We received an email on Wednesday from Nayamin Martinez, the director of the Central California Environmental Justice Network (CCEJN), alerting us to an official “urgent advisory” from Tulare County Ag Commissioner Tucker [attached and transcribed below for easier reading]. Ms. Martinez got the copy from a caller who verbally harassed her over the phone, one of several such calls resulting from inaccurate and ominous warnings about a legitimate community air monitoring study being led by Californians for

Pesticide Reform and UC Davis with funding from the California Air Resources Board. These warnings have come from industry groups and have now been amplified by at least one ag commissioner.

The notice from CAC Tucker is chilling and is nearly identical to industry's inaccurate and inflammatory messaging about the study. The notice calls for growers to "lookout for people trespassing onto orchards and farms in the unincorporated area of Tulare County during or immediately after pesticide applications" and concludes: "Should you see anyone attempting to enter your field or orchard for this purpose, we urge you to immediately contact the County Sheriff's office 559-802-9400 and the County Ag Commissioner 559-684-3350."

Despite the fact that the study is led by CPR and UC Davis, Tucker called out the local BIPOC-led organization CCEJN as "the organization ... recruiting volunteers who are potentially planning to carry backpacks with air monitoring equipment through orchards and fields in the County." The notice also states "The danger of this new effort is that these volunteers may attempt to test for pesticide exposures without the appropriate training or protective gear, potentially endangering themselves and the subject properties," implying that organizations involved with the study would ask volunteers to risk their own health and violate the law by trespassing onto recently-treated fields.

As organizations who for decades have worked to protect community health, especially the health of communities on the very frontlines of pesticide exposure, this insinuation is preposterous and is being used by the Commissioner to argue for pre-emptive intimidatory actions that threaten the local Latinx community. Who will be entering fields and facing suspicion, potential intimidation and harassment from this "urgent advisory"? Farmworkers, who as we know, are primarily Latinx. Commissioner Tucker's dog-whistle to racist harassment – to "lookout" and "report" brown people because nobody in power has sought to stop him - is reprehensible. DPR and CalEPA need to hold Commissioner Tucker accountable for this unacceptable behavior.

Commissioner Tucker's statement misleads in other ways as well. It questions the validity of the study, expressing concern that it is being carried out by people without appropriate training and making the false claim that DPR's monitoring had found "very few detections of pesticides and none that exceeded any risk levels of actual concern." In fact, the study is led by UC Davis, one of the foremost academic institutions in the country. Like all research involving human participants, every aspect of this study has been reviewed and approved by UC Davis's Institutional Review Board. Furthermore, as you know, DPR's monitoring has found countless detections and numerous

exceedances. For example, the fumigant 1,3-D was detected in 82% of the samples collected at the Parlier monitoring site in 2019, where the average 1,3-D air concentration, at 1.24 ppb, was more than double DPR's lifetime target concentration of 0.56 ppb for preventing cancer risk. The fumigant breakdown product MITC was detected in 17.5% of community air samples collected statewide in 2019. As DPR's regulatory arm in Tulare County, Tucker's ignorance of these facts is truly alarming.

It would not be surprising if Commissioner Tucker is taking cues from Commissioner Fankhauser, who has also shown and indeed openly pledged his allegiance to big ag over community health in refusing to implement the pilot notification project in Shafter. He has defied your order to turn over pesticide NOIs to DPR for half a year now without consequence.

From a recent Public Records Act request [attached], we now know that Fankhauser never intended to fulfill the California Air Resources Board's promise of notification, made to the Shafter community in February 2020. He was determined to defy the AB 617 process, community agreements, and DPR. In a letter to Kern County growers dated February 14, 2020, Mr Fankhauser described the meeting the previous day in which CARB approved the Shafter CERP as "quite a train wreck," except for "Jesse's [Cuevas] comments speaking for the Farm Bureau." He assured the growers "I am not bound by AB 617 and DPR cannot force me to do anything." He wrote "the most I could agree to would be something like a physical notification/contact with persons living within 100 feet of an application and I'm unlikely to go further than that." He then thanked the growers for their "show of force" at the CARB meeting.

Will you take public action to condemn this behavior? It is essential that these Commissioners experience repercussions from their discriminatory behavior. It would also send an important signal to County Agricultural Commissioners that this administration is not playing around but really is committed to transformational change, including ensuring that pesticide regulators in this state value community health just as highly as a robust agricultural economy.

We've already joined the call for a dismissal hearing for Commissioner Fankhauser, which you received in previous letters. You have not responded to that.

We believe you received Nayamin Martinez's email about Commissioner Tucker's abusive behavior on June 23rd. You have not responded to that.

These men are bullies. You cannot stop bullies by ignoring them.

Will you protect the people?

Sincerely,

Handwritten signature in blue ink that reads "Sarah C. Aird Jane Sellen".

Sarah Aird and Jane Sellen, Co-Directors

CC: Richard Corey, CARB. richard.corey@arb.ca.gov
Trish Johnson, CARB, trish.johnson@arb.ca.gov
Julie Henderson, CalEPA, julie.henderson@calepa.ca.gov
Yana Garcia, CalEPA, yana.garcia@calepa.ca.gov
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Mike Maggard, Kern County Board of Supervisors, district3@kerncounty.com
David Couch, Kern County Board of Supervisors, district4@kerncounty.com
Leticia Perez, Kern County Board of Supervisors, district5@kerncounty.com
Nayamin Martinez, Director, Central California Environmental Justice Network,
nayamin.martinez@ccejn.org

ATTACHMENTS

1. Tulare County Agricultural Commissioner Urgent Advisory

8:56



Done

Urgent Matter.pdf



Tulare County Agricultural Commissioner/Sealer

Tom Tucker, Agricultural Commissioner
Sealer of Weights and Measures
Christopher Greer, Assistant Agricultural Commissioner
Sealer of Weights and Measures

This is an **urgent advisory** to be on the lookout for people trespassing onto orchards and farms in the unincorporated area of Tulare County during or immediately after pesticide applications. According to flyers distributed by an organization called the Central California Environmental Justice Network, the organization has been recruiting volunteers who are potentially planning to carry backpacks with air monitoring equipment through orchards and fields in the County from May through August. We are concerned these individuals may attempt to enter a field or orchard during a pesticide application or immediately thereafter to utilize their air monitoring equipment in an attempt to detect pesticide spraying. For years, the California Department of Pesticide Regulation (CDPR) has been conducting community air monitoring, with very few detections of pesticides, and none that exceeded any risk levels of actual concern. The danger of this new effort is that these volunteers may attempt to test for pesticide exposures without the appropriate training or protective gear, potentially endangering themselves and the subject properties.

Should you see anyone attempting to enter your field or orchard for this purpose, we urge you to immediately contact the County Sherriff's office 559-802-9400 and the County Ag Commissioner 559-684-3350.

TEXT:

This is an **urgent advisory** to be on the lookout for people trespassing onto orchards and farms in the unincorporated area of Tulare County during or immediately after pesticide applications. According to a flyer distributed by an organization called the Central California Environmental Justice Network, the organization has been recruiting volunteers who are potentially planning to carry backpacks with air monitoring equipment through orchards and fields in the County from May through August. We are concerned these individuals may attempt to enter a field or orchard during a pesticide application or immediately thereafter to utilize their air monitoring equipment in an attempt to detect pesticide spraying. For years, the California Department of Pesticide Regulation (CDPR) has been conducting community air monitoring, with very few detections of pesticides and none that exceeded any risk levels of actual concern. The danger of this new effort is that these volunteers may attempt to test for pesticide exposures without the appropriate training or protective gear, potentially endangering themselves and the subject properties. **Should you see anyone attempting to enter your field or orchard for this purpose, we urge you to immediately contact the County Sheriff's office 559-802-9400 and the County Ag Commissioner 559-684-3350.**

2. Communications between Kern County Agricultural Commissioner Glenn Fankhauser and Kern County Growers obtained via Public Records Act Request



CENTER ON RACE, POVERTY & THE ENVIRONMENT

5901 CHRISTIE AVE #208, EMERYVILLE, CA 94608 TEL 415-346-4179 FAX 415-346-8723
1012 JEFFERSON STREET, DELANO, CA 93215 TEL 661-720-9140 FAX 661-720-9483
WWW.CRPE-EJ.ORG

October 12, 2020

Daniel Rubin
Chief Counsel, Office of Legal Affairs
Department of Pesticide Regulation
1001 I Street
Sacramento, CA 95812

DPR has existing authority to make Notices of Intent public without a new regulation.

The Department of Pesticide Regulation has broad, general authority over County Agricultural Commissioners (“CAC”). CACs are “the field arm of the pesticide regulatory program.”¹ As such, DPR uses its authority to “oversee, evaluate, and improve” CAC programs.² The Food and Agricultural Code states that instructions and recommendations from DPR “shall govern” what procedures the commissioner follows.³ The current *Agreement for Obtaining Mutual Objectives* between DPR, CACASA, and the California Department of Food and Agriculture clarifies DPR’s authority over CAC’s decisions about how laws and regulations should be implemented.⁴ According to DPR, “CACs work under the direction and supervision of the director.” In addition, several other FAC sections (11501.5, 12977, 12982, 14004.5, and 15201) state that the CACs work under the direction and supervision of the Director of DPR.⁵ DPR can exercise this broad and general authority in a number of ways. DPR has existing authority to make Notices of Intent public, in advance of Restricted Material applications, without triggering the requirement of adopting a new regulation. Under its broad, general powers, DPR has the authority to 1) instruct

¹ 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.

² California Department of Pesticide Regulation, *County Agricultural Commissioner (CAC) Work Plans, Pesticide Use Enforcement Program Planning Guidance*, (2017) at 14. Available at: <https://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2017/2017atch/attach0801.pdf>.

³ FAC § 2281

⁴ 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”).

⁵ California Department of Pesticide Regulation, *Pesticide Use Enforcement Program Standards Compendium Volume 8*, (2009). Available at: https://www.cdpr.ca.gov/docs/enforce/compend/vol_8/entire_manual.pdf



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CACs to post Notices of Intent (NOIs) on CAC websites in advance of Restricted Material applications, along with approvals and denials, and to 2) require that CACs share NOIs and approvals and denials with DPR in advance of applications, which DPR can post on-line itself.

DPR can make APA-exempt rules when they do not impose any new burden on the regulated entity.

Even rules of general application are exempt from the APA’s rulemaking requirement “where... the agency's rule does not require the individuals or entities affected to do anything they are not already required to do.”⁶ In this instance, the publication of Notices of Intent falls on the CACs and does not impose any new requirements on growers. Policies of general application that only require action from agency staff fall within the exception for internal management, even if they affect the public,⁷ because they relate “only to the internal management of a state agency.”⁸ In order to function efficiently, state agencies need to make management decisions without excessive procedural delays, and requiring a rulemaking for every decision would not further the due process goals of the APA.⁹

DPR can exercise its broad and general powers over CACs to dictate policy in specific cases without creating a regulation.

In the case of establishing a pesticide notification system for Shafter, the argument is bolstered even further as DPR has authorization to use its powers, absent a rulemaking, to make decisions that are specific to particular projects. If the policy “relates only to a particular [project]...and do[es] not purport to treat generally...any open class,” then a rulemaking isn’t necessary.¹⁰ This is true even if the results of the project might affect the public generally. In *Faulkner*, the court held that a policy that the California Toll Bridge Authority adopted in order to fund the construction of one bridge was specific and didn’t need to be made through a rulemaking.¹¹ Even though the policy did have the general effect of requiring everyone who used the bridge to pay

⁶ *Californians for Pesticide Reform v. Department of Pesticide Regulation*, 184 Cal.App.4th 887, 909 (2010).

⁷ *Id.* (“These necessary decisions may well affect individuals or entities outside the agency itself.”)

⁸ Gov.Code, § 11340.9, subd. (d).

⁹ *Californians for Pesticide Reform*, 184 Cal.App.4th at 909.

¹⁰ *Faulkner v. California Toll Bridge Authority* 40 Cal.2d 317, 323–324 (1953); see also *Pacific Gas & Electric Co. v. Department of Water Resources* 112 Cal.App.4th 477, 507 (2003).

¹¹ *Faulkner*, 40 Cal.2d at 323.



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the toll, the policy did not create an “open class” of future bridges that would be controlled by the decision.¹²

The list below includes a series of *additional* mechanisms DPR can use to reinforce its authority over CACs.

I. DPR can require CACs to change their policies through executive guidance.

DPR issues executive guidance to CACs that CACs are “strongly encouraged,” though not required, to implement.¹³ For instance, while children are learning at home during the pandemic, DPR issued guidance that CACs should consider the regulations regarding pesticide use around schools to apply around homes as well. This guidance isn’t mandatory, but DPR’s performance evaluations of CACs do take into account whether they are following the guidance.¹⁴

II. CAC’s pesticide use enforcement work plans are expected to implement DPR-identified priorities and must be approved by DPR.

CACs must develop work plans that are focused on core program implementation and DPR-identified priorities.¹⁵ If the CAC believes that any of the DPR-requested activities do not apply to their county, they must explain why in the workplan, and that judgement is subject to DPR review.¹⁶ Otherwise, the CAC work plan is expected to implement every DPR request.¹⁷

III. DPR’s enforcement powers include reducing funding to the CAC and holding hearings on removing CACs from office.

¹² *Id.* at 323-324.

¹³ California Department of Pesticide Regulation, *Covid-19 Pesticide Use Near/Around Schools and Homes*, (2020) at 2. Available at: https://www.cdpr.ca.gov/docs/county/cacltrs/exec/2020/exec_20-03.pdf.

¹⁴ *Id.* at 4 (“DPR will continue its regular performance evaluations of CACs to ensure the county’s effectiveness in implementing the state program as described in this guidance.”).

¹⁵ California Department of Pesticide Regulation, *County Agricultural Commissioner (CAC) Work Plans, Pesticide Use Enforcement Program Planning Guidance*, (2017) at 2. Available at: <https://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2017/2017atch/attach0801.pdf> (“DPR will approve county enforcement work plans that have clear goals and deliverables and are focused on core program implementation and any DPR identified priorities.”).

¹⁶ California Department of Pesticide Regulation, *County Agricultural Commissioner (CAC) Work Plans, Pesticide Use Enforcement Program Planning Guidance*, (2017) at 3. Available at: <https://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2017/2017atch/attach0801.pdf>.

¹⁷ *Id.* at 14.



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If DPR decides that CACs are abusing their discretion, DPR has the power to impose consequences. Corrective measures can include overturning an enforcement decision that the CAC made,¹⁸ reducing the CACs funding,¹⁹ or not approving the work plan.²⁰

If DPR believes a CAC is guilty of “neglect of duty, incompetence, or misconduct in office” for offenses that come under the jurisdiction of DPR, DPR is responsible for convening a hearing on the charges.²¹ The Director of DPR will be one of the four members of the trial board that will vote to decide if the Commissioner will be dismissed.²²

¹⁸ California Department of Pesticide Regulation, *Decisions on Appeal from County Administrative Actions*. Available at: <https://www.cdpr.ca.gov/docs/enforce/enfords/courtmenu.htm> (“[CAC] decisions levying agricultural civil penalties can be appealed to DPR.”).

¹⁹ 3 CCR 6394 (“[corrective] measures may include but are not limited to, a reduction of the county's annual mill assessment allocation under sections 6393 and 6395(a)”).

²⁰ California Department of Pesticide Regulation, *County Agricultural Commissioner (CAC) Work Plans, Pesticide Use Enforcement Program Planning Guidance*, (2017) at 2. Available at: <https://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2017/2017atch/attach0801.pdf>.

²¹ FAC § 2181

²² FAC § 2182