

April 15, 2019

*Via E-Mail, Facsimile, and Certified Mail*

Lauren Zeise, Ph.D., Director  
Office of Environmental Health Hazard Assessment  
Director's Office  
Post Office Box 4010  
Sacramento, CA 95812-4010  
Lauren.Zeise@oehha.ca.gov

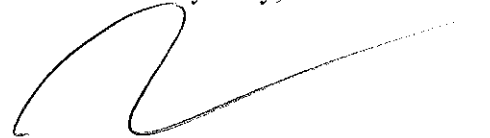
**Re: Petition Pursuant to Government Code §11340.6 for Adoption of  
Proposition 65 Regulation Setting a No Significant Risk Level for  
1,3-Dichloropropene**

Dear Lauren:

Please find enclosed Petitioner Californians for Pesticide Reform's Petition for Adoption of Proposition 65 Regulation Setting a No Significant Risk Level for 1,3-Dichloropropene.

Please contact me should you have any questions concerning this matter.

Yours very truly,



Howard Hirsch

Encl.

CC:

Carol J. Monahan Cummings (carol.monahan-cummings@oehha.ca.gov)

**BEFORE THE CALIFORNIA OFFICE OF ENVIRONMENTAL  
HEALTH HAZARD ASSESSMENT**

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**PETITION FOR ADOPTION OF PROPOSITION 65 REGULATION  
SETTING A NO SIGNIFICANT RISK LEVEL FOR 1,3-  
DICHLOROPROPENE**

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LEXINGTON LAW GROUP  
Howard Hirsch (SBN 213209)  
Lucas Williams (SBN 264518)  
503 Divisadero Street  
San Francisco, CA 94117  
Telephone: 415-913-7800  
Facsimile: 415-759-4112

*Counsel for Petitioner  
Californians for Pesticide Reform*

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## **INTRODUCTION**

Pursuant to California Government Code § 11340.6, Californians for Pesticide Reform (“Petitioner”) hereby petitions the California Office of Environmental Health Hazard Assessment (“OEHHA”) to adopt a regulation setting a No Significant Risk Level for 1,3-dichloropropene (“1,3-D”). 1,3-D is a highly toxic soil fumigant that has been listed as a carcinogen by the State of California since January 1, 1989. In 2016, in response to a request by Californians for Pesticide Reform, OEHHA agreed to initiate the regulatory process for establishing an NSRL for 1,3-D. To date, OEHHA has not done so.

An NSRL is necessary to ensure that clear and reasonable warnings are provided to individuals exposed to significant amounts of 1,3-D in California – particularly individuals living, working, and attending school near agricultural fields where 1,3-D is applied. An NSRL is also warranted given OEHHA’s disagreement with the California Department of Pesticide Regulation’s (“DPR”) “regulatory target” for addressing the cancer risk posed by 1,3-D air concentrations. DPR set the target concentration at 0.56 parts per billion (“ppb”). By contrast, OEHHA believes that the best available scientific evidence supports a regulatory target of 0.1 ppb<sup>1</sup> – which is over five times more protective of public health and Californians’ right to know about toxic exposures. For these reasons, this petition should be granted.

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<sup>1</sup> OEHHA Comments on DPR Draft Risk Management Directive Re: 1,3-D (September 20, 2016), at p. 7 *available at* <https://oehha.ca.gov/pesticides/document-comment/comments-dprs-draft-risk-management-directive-13-dichloropropene> (last visited April 15, 2019).

## **INTEREST OF PETITIONER**

Petitioner Californians for Pesticide Reform makes this request pursuant to Government Code § 11340.6, which provides that “any interested person may petition a state agency requesting the adoption, amendment, or repeal of a regulation . . . .” Petitioner is a non-profit, statewide coalition, headquartered in Berkeley, California. Petitioner’s mission is to protect public health, improve environmental quality and support a sustainable and just agricultural system by building a diverse movement across California to change statewide and local pesticide policies and practices. Founded in 1996, Petitioner is made up of more than 190 member organizations across California, including public health, children’s health, educational and environmental advocates; clean air and water organizations; health practitioners; environmental justice groups; labor organizations; farmers; and sustainable agriculture advocates, all interested in shifting the way pesticides are used in California. Petitioner engages thousands of community members around California through its organizational members. Accordingly, Petitioner is an “interested person” under Government Code § 11340.6.

## **DISCUSSION**

### **I. OEHHA’S AUTHORITY TO SET A PROPOSITION 65 SAFE HARBOR LEVEL FOR 1,3-D.**

Proposition 65 is a remedial statute that is intended to safeguard public health and therefore “should be broadly construed to accomplish its protective purposes.” *Cal. Chamber of Commerce v. Brown* (2011) 196 Cal.App.4th 233, 258 (*citing People ex rel. Lungren v. Superior Court* (1996) 14 Cal.4th 294)). OEHHA is the “lead agency” responsible for the regulatory implementation of the statute. 27 Cal. Code Regs. § 25102(o).

Proposition 65 prohibits business entities from exposing individuals to known carcinogens and reproductive toxins without providing a prior clear and reasonable warning unless that entity can prove that it fits within a statutory exemption. Health & Safety Code § 25249.6. As applicable here, a business entity is not required to provide a warning under Proposition 65 if it can prove that the “exposure poses no significant risk assuming lifetime exposure at the level in question for substances known to the state to cause cancer.” *Id.* § 25249.10(c). OEHHA is authorized to establish regulatory no significant risk levels (“NSRL”) for listed carcinogens such as 1,3-D. *See* 27 Cal. Code Regs. § 25705(b).

In July 2016, Petitioner requested that OEHHA establish an NSRL for 1,3-D. In October 2016, OEHHA responded to Petitioner’s request, stating that OEHHA intended to establish an NSRL for 1,3-D, and would publish a draft NSRL “in the coming months.”<sup>2</sup> To date, OEHHA has not published a draft NSRL for 1,3-D.

## **II. THE PROBLEM OF UNWARNED 1,3-D EXPOSURES IN CALIFORNIA.**

1,3-D is an extremely toxic fumigant that is manufactured by Dow AgroSciences LLC (“Dow”) under the trade name “Telone.”<sup>3</sup> It is one of the most heavily used pesticides in California. In 2016, the most recent year for which statewide data is available, over fourteen million pounds of

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<sup>2</sup> M. Ramirez Email to M. Freund (October 17, 2016) [Exh. 1].

<sup>3</sup> *See* DPR Risk Management Directive & Mitigation Guidance for Cancer Risk from 1,3-D (October 6, 2016) (“RMD”), at 4, *available at* [https://www.cdpr.ca.gov/docs/whs/pdf/1,3-d\\_directive\\_mitigation.pdf](https://www.cdpr.ca.gov/docs/whs/pdf/1,3-d_directive_mitigation.pdf) (last visited April 15, 2019).

1,3-D were applied in California.<sup>4</sup> 1,3-D is used as a soil fumigant to kill organisms present in the soil of crops.<sup>5</sup> It is applied either as a pre-plant treatment that is injected into the soil, or through drip irrigation.<sup>6</sup> Regardless of the application method, 1,3-D evaporates into the air, causing human exposures through inhalation.<sup>7</sup>

1,3-D use in California is subject to restrictions established by DPR. In 2017, new restrictions regarding 1,3-D use went into effect. Among other things, DPR made the regulatory target for 1,3-D air concentrations more lenient – moving the target from 0.14 ppb to 0.56 ppb.<sup>8</sup> DPR has delegated to Dow the primary responsibility of overseeing and enforcing the limits on 1,3-D use in California.<sup>9</sup> As the Alameda County Superior Court has observed, DPR’s delegation of its regulatory authority to the manufacturer of all 1,3-D used in California is “a questionable outsourcing of a government regulatory function.”<sup>10</sup>

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<sup>4</sup> DPR Summary of Pesticide Use Report Data 2016, at 27, *available at* <https://www.cdpr.ca.gov/docs/pur/pur16rep/chmrpt16.pdf> (last visited April 15, 2019).

<sup>5</sup> RMD at 1.

<sup>6</sup> RMD at 1.

<sup>7</sup> RMD at 1.

<sup>8</sup> RMD at 2.

<sup>9</sup> DPR Letter to County Agricultural Commissioners Re: Oversight of Use Limits For 1,3-D (January 9, 2017), at 1, *available at* <https://www.cdpr.ca.gov/docs/county/cacltrs/exec/2017/exec1701.pdf> (last visited April 15, 2019).

<sup>10</sup> *Vasquez v. DPR*, Alameda Superior Court Case No. RG17-847563, Order Granting Plaintiffs’ Motion for Summ. Judgment (entered March 28, 2018) [Exh. 2].

Prior to DPR's issuance of the new 1,3-D guidelines, OEHHA objected to the proposed 0.56 ppb regulatory target. OEHHA observed that the best available science supports a much lower regulatory target of 0.1 ppb.<sup>11</sup> OEHHA further commented that, among other things, DPR's target failed to address: (1) exposures to sensitive populations such as children and the elderly; and (2) the increased 1,3-D cancer risk caused by the fact that 1,3-D is often used in tandem with another carcinogenic pesticide, chloropicrin.<sup>12</sup> Nevertheless, DPR disregarded OEHHA's comments and proceeded with finalizing the 0.56 ppb target level.

DPR's monitoring data has demonstrated alarming concentrations of 1,3-D in the air. Indeed, recent data shows significant exceedances of even DPR's relaxed 0.56 ppb target air concentration. For example, in Parlier, the 1,3-D average air concentration for 2017 was 0.62 ppb.<sup>13</sup> DPR has also recorded concentrations as high as 111 ppb for twenty-four hour periods in 2018 at the same monitoring site in Parlier – which is adjacent to a UC Merced facility.<sup>14</sup> Similarly, in Shafter, there was a single-day concentration of 50.5 ppb recorded in January 2018 caused by applications of 1,3-D at a field located near Shafter High School.<sup>15</sup> Neither Dow nor

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<sup>11</sup> See OEHHA Comments on DPR Draft Risk Management Directive Re: 1,3-D (September 20, 2016), at 7.

<sup>12</sup> See OEHHA Comments on RMD at 10, 18.

<sup>13</sup> DPR Modeling Re: 1,3-Dichloropropene Applications at Parlier, CA on October 9, 2018 (dated March 15, 2019), at 1, *available at* [https://www.cdpr.ca.gov/docs/emon/pubs/ehapreps/analysis\\_memos/modeling\\_1,3-d\\_parlier\\_2019.pdf](https://www.cdpr.ca.gov/docs/emon/pubs/ehapreps/analysis_memos/modeling_1,3-d_parlier_2019.pdf) (last visited April 15, 2019).

<sup>14</sup> *Id.*

<sup>15</sup> DPR Modeling a 1,3-Dichloropropene Application at Shafter, CA on January 21, 2018 (dated August 6, 2018), at 1, *available at*



Telone applicators have provided any clear and reasonable warnings regarding these and other significant exposures to 1,3-D to individuals living, working, and attending school nearby.

### **III. THIS PETITION SHOULD BE GRANTED.**

Pursuant to Government Code § 11340.6, Petitioner requests that OEHHA adopt a regulation setting an NSRL for 1,3-D. As discussed above, OEHHA has express authority to set an NSRL for 1,3-D as the lead agency responsible for implementing Proposition 65. *See* 27 Cal. Code Regs. § 25705(b). Moreover, establishing an NSRL for 1,3-D is especially warranted given the significant unwarned exposures to 1,3-D occurring across California, and the need for guidance regarding the appropriate level at which clear and reasonable warnings are required. Finally, although in October 2016 OEHHA agreed to publish a draft NSRL for 1,3-D in response to Petitioner's request, OEHHA has not done so. Therefore, this petition should be granted.

### **CONCLUSION**

For the foregoing reasons, Petitioner asks that OEHHA notify Petitioner in writing within 30-days of the receipt this petition, and schedule the matter for a public hearing or indicate why the petition was denied. *See* Gov. Code § 11340.7(a).

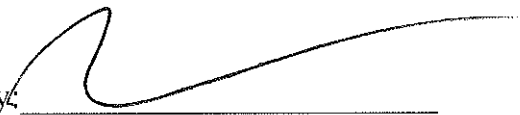
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[https://www.cdpr.ca.gov/docs/emon/pubs/ehapreps/analysis\\_memos/modeling\\_1,3-d\\_shafter.pdf](https://www.cdpr.ca.gov/docs/emon/pubs/ehapreps/analysis_memos/modeling_1,3-d_shafter.pdf) (last visited April 15, 2019).

Dated: April 15, 2019

Respectfully submitted,

LEXINGTON LAW GROUP

A handwritten signature in black ink, appearing to be "Howard Hirsch", written over a horizontal line.

By \_\_\_\_\_  
Howard Hirsch (SBN 213209)  
Lucas Williams (SBN 264518)  
Counsel for Petitioner  
Californians for Pesticide Reform

# **EXHIBIT 1**

**Lucas Williams**

---

**Subject:** Fwd: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium

**From:** MICHAEL FREUND <[freund1@aol.com](mailto:freund1@aol.com)>  
**Subject: Re: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium**  
**Date:** October 17, 2016 at 11:55:45 AM PDT  
**To:** [Michelle.Ramirez@oehha.ca.gov](mailto:Michelle.Ramirez@oehha.ca.gov)  
**Cc:** [sarah@pesticidereform.org](mailto:sarah@pesticidereform.org), [mark@pesticidereform.org](mailto:mark@pesticidereform.org), [carolyn@ceh.org](mailto:carolyn@ceh.org), [P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)

Dear Ms. Ramirez,

On behalf of CPR, thank you.

MICHAEL FREUND  
[freund1@aol.com](mailto:freund1@aol.com)

-----Original Message-----

From: Ramirez, Michelle@OEHHA <[Michelle.Ramirez@oehha.ca.gov](mailto:Michelle.Ramirez@oehha.ca.gov)>  
To: MICHAEL FREUND <[freund1@aol.com](mailto:freund1@aol.com)>  
Cc: sarah <[sarah@pesticidereform.org](mailto:sarah@pesticidereform.org)>; mark <[mark@pesticidereform.org](mailto:mark@pesticidereform.org)>; carolyn <[carolyn@ceh.org](mailto:carolyn@ceh.org)>; P65Public Comments <[P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)>  
Sent: Mon, Oct 17, 2016 11:08 am  
Subject: RE: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium

Dear Mr. Freund,

Thank you for your note. OEHHA has considered this request and intends to establish safe harbor levels for these three chemicals. We will publish draft safe harbors for these three chemicals in the coming months. The best way to be notified of publication would be to sign up for our listserv:<http://oehha.ca.gov/about/listserv>.

Sincerely,

Michelle Ramirez  
Environmental Scientist  
Proposition 65 Implementation Program  
External and Legislative Affairs  
Office of Environmental Health Hazard Assessment  
Phone: 916.327.3015  
Fax: 916.323.2265  
[michelle.ramirez@oehha.ca.gov](mailto:michelle.ramirez@oehha.ca.gov)  
[www.oehha.ca.gov](http://www.oehha.ca.gov)  
[www.P65warnings.ca.gov](http://www.P65warnings.ca.gov)

**Please note: OEHHA is subject to the California Public Records Act. E-mail communications with OEHHA staff are not confidential and may be produced to members of the public upon request.**

**From:** MICHAEL FREUND [<mailto:freund1@aol.com>]  
**Sent:** Friday, September 16, 2016 1:07 PM  
**To:** Ramirez, Michelle@OEHHA <[Michelle.Ramirez@oehha.ca.gov](mailto:Michelle.Ramirez@oehha.ca.gov)>  
**Cc:** [sarah@pestidereform.org](mailto:sarah@pestidereform.org); [mark@pestidereform.org](mailto:mark@pestidereform.org); [carolyn@ceh.org](mailto:carolyn@ceh.org)  
**Subject:** Fwd: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium

Dear Ms. Ramirez,

On July 28, 2016, on behalf of Californians for Pesticide Reform ("CPR"), I sent an email to OEHHA requesting that the agency establish safe harbor levels for three pesticides - 1,3 dichloropropene, metam sodium, and metam potassium. On August 5, 2015, in response to my email update request, you informed me that senior management had received the request and the matter was under consideration. Approximately six weeks have passed and I have not heard back about whether OEHHA will act on the matter. Given the urgency of the request, CPR seeks a response with a decision as to whether the agency will create safe harbor levels for these dangerous chemicals and if so, a target date when the levels will be established.

Thank you.

MICHAEL FREUND  
[freund1@aol.com](mailto:freund1@aol.com)

-----Original Message-----

From: Ramirez, Michelle@OEHHA <[Michelle.Ramirez@oehha.ca.gov](mailto:Michelle.Ramirez@oehha.ca.gov)>  
To: MICHAEL FREUND <[freund1@aol.com](mailto:freund1@aol.com)>  
Cc: P65Public Comments <[P65Public.Comments@oehha.ca.gov](mailto:P65Public.Comments@oehha.ca.gov)>; Questions, P65@OEHHA <[P65.Questions@oehha.ca.gov](mailto:P65.Questions@oehha.ca.gov)>  
Sent: Fri, Aug 5, 2016 1:46 pm  
Subject: RE: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium

Dear Mr. Freund,

Thank you for following up.

Your request on behalf of Californians for Pesticide Reform was forwarded to OEHHA senior management and is currently under consideration.

Best regards,

Michelle Ramirez  
Environmental Scientist  
Proposition 65 Implementation Program  
External and Legislative Affairs  
Office of Environmental Health Hazard Assessment  
Phone: 916.327.3015  
Fax: 916.323.2265  
[michelle.ramirez@oehha.ca.gov](mailto:michelle.ramirez@oehha.ca.gov)  
[www.oehha.ca.gov](http://www.oehha.ca.gov)  
[www.P65warnings.ca.gov](http://www.P65warnings.ca.gov)

**Please note: OEHHA is subject to the California Public Records Act. E-mail communications with OEHHA staff are not confidential and may be produced to members of the public upon request.**

**From:** MICHAEL FREUND [<mailto:freund1@aol.com>]

**Sent:** Friday, August 05, 2016 11:47 AM

**To:** Ramirez, Michelle@OEHHA <[Michelle.Ramirez@oehha.ca.gov](mailto:Michelle.Ramirez@oehha.ca.gov)>

**Subject:** Fwd: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium

Dear Ms. Ramirez,

Please confirm receipt of CPR's request below and that the request has been forwarded up the OEHHA chain so that the request will be reviewed expeditiously.

Thank you.

MICHAEL FREUND  
[freund1@aol.com](mailto:freund1@aol.com)

-----Original Message-----

From: MICHAEL FREUND <[freund1@aol.com](mailto:freund1@aol.com)>

To: michelle.ramirez <[michelle.ramirez@oehha.ca.gov](mailto:michelle.ramirez@oehha.ca.gov)>

Cc: sarah <[sarah@pestidereform.org](mailto:sarah@pestidereform.org)>; mark <[mark@pestidereform.org](mailto:mark@pestidereform.org)>; carolyn <[carolyn@cch.org](mailto:carolyn@cch.org)>

Sent: Thu, Jul 28, 2016 3:49 pm

Subject: Californians for Pesticide Reform's Request to OEHHA to Establish Safe Harbor Levels for 1,3-dichloropropene, metham sodium and metam potassium

Dear Ms. Ramirez,

On behalf of Californians for Pesticide Reform (CPR) this is to request that OEHHA establish safe harbor levels for 1,3-dichloropropene, metham sodium and metam potassium. These pesticides are used extensively throughout California and continue to expose farm workers, residents and school children at levels of concern. These three chemicals have been listed by OEHHA pursuant to Proposition 65 for substantial periods of time, yet no safe harbor levels have been enacted yet. 1,3-dichloropropene has been listed as a carcinogen since January 1, 1989. Metham sodium has been listed as a carcinogen since November 6, 1998 and as a developmental toxicant since May 15, 1998. Metam potassium has been listed as a carcinogen since December 31, 2010. CPR requests OEHHA to immediately begin establishing these levels so that applicators are aware of their obligations under Proposition 65 and enforcers can act to protect the public interest where warranted.

CPR has focused much of its activities toward the protection of California school children from pesticide exposure. The concern was highlighted in the California Department of Public Health's 2014 report entitled "Agricultural Pesticide Use Near Public Schools in California," that found significant quantities of agricultural pesticides of public health concern being used in very close proximity to hundreds of public schools. The report also found that Latino school children were 91% more likely than white children to attend schools within one-quarter mile of the highest use of pesticides of public health concern.

1,3-dichloropropene is one of the most heavily used pesticides in California. The most recent Department of Pesticide Regulation ("DPR") 2014 Pesticide Use Reporting disclose that 13,212,360 pounds of the active ingredient was used in the State. The chemical is a gas or fumigant that is injected into the ground to sterilize the soil prior to planting. The gas evaporates easily and may pose a cancer risk to nearby receptors. The European Union began phasing it out in 2007 because of its risk to humans and animals. In California, usage is increasing. (<http://www.cdpr.ca.gov/docs/emon/pubs/fatememo/13-d.pdf>).

In a study by the Department of Pesticide Regulation entitled "Air Monitoring Network Results for 2014", Volume 4, published October 2015, DPR conducted air monitoring to measure pesticides in various agricultural communities throughout California. (See attachment). Of the 37 pesticides monitored, one pesticide, 1,3-dichloropropene, was detected at levels far exceeding the other pesticides that were studied for both 24 hours

concentrations and 4-week rolling concentrations. At the Salinas site, this pesticide was detected at higher levels than all other pesticides during 2011 and 2012. At the Ripon site, the pesticide was detected at higher levels than all other pesticides during 2011, 2013 and 2014. At the Shafter site, the pesticide was detected at higher levels than all other pesticides during 2012, 2013 and 2014. Tables 35 and 36, pages 48-49. In the comparison of the 1-year average concentrations, 1,3-dichloropropene had the highest overall average concentrations at the Salinas site in 2011, 2012, 2013 and 2014; the highest overall average concentrations at the Ripon site in 2013 and 2014; and the highest overall average concentrations at the Shafter site in 2012, 2013 and 2014. Table 37, page 50. The report concludes that "[t]he data from the Shafter site showed that for the 4 years of monitoring, 1,3-dichloropropene was detected at an average concentration of 1,135 ug/cubic meter. If this level continued for 70 years, it would exceed DPR's cancer risk regulatory goal by 1.7 times."

Metham sodium is the third most used agricultural pesticide in the United States. (Journal Toxicology Environ Health, B Crit Rev. 2001 April-June; 4 (2): 207-22 "Toxicology of Metam Sodium," Pruet et al.) The chemical is used as a soil fumigant, pesticide, herbicide and fungicide. DPR's 2014 Pesticide Use Reporting disclose that 4,142,910 pounds of the active ingredient was used in California.

One example of demonstrating the vast use of these pesticides occurs in Ventura County which has the largest strawberry fields in the State. Oxnard is home to more than one-quarter of the schools located next to fields with the highest pesticide use. Rio Mesa High School has approximately 29,000 pounds of pesticides applied within one-quarter mile of the school. There are about 2,100 students and teachers at this school. Strawberry fields surround the campus on four sides. A loophole allowed growers to use 901,500 more pounds of 1,3-dichloropropene over a 12 year period. Fields in front of the school used 72,100 pounds of 1,3-dichloropropene and 81,400 pounds of metham sodium over a 10-year period ending in 2012. Fields to the east used 202,600 pounds of 1,3-dichloropropene during this period. (Center for Investigative Reporting, 3/20/15, Andrew Donohue, "How a Pesticide Loophole Increased Cancer Risk at a California School").

Metam potassium (Potassium N-Methyldithiocarbamate) is a fumigant that was the 5th most commonly used pesticide near California schools according to the California Department of Public Health's 2014 report. DPR's 2014 Pesticide Use Reporting disclose that 7,707,984 pounds of the active ingredient was used in California.

Please inform me of OEHHA's intention with respect to these requests.

Thank you.

MICHAEL FREUND  
[freund1@aol.com](mailto:freund1@aol.com)

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Sarah Aird, Esq., Co-Director  
Californians for Pesticide Reform  
1611 Telegraph Ave., Suite 1200, Oakland, CA 94612  
Phone: 510-788-9025 x5  
[www.pesticidereform.org](http://www.pesticidereform.org)  
***Working together for a just & sustainable food system since 1996***

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# **EXHIBIT 2**



**FILED**  
ALAMEDA COUNTY

MAR 28 2018

CLERK OF THE SUPERIOR COURT

By *CWJ* Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

JUANA VASQUEZ, et al,

Plaintiffs/Petitioners,

v.

CALIFORNIA DEPARTMENT OF  
PESTICIDE REGULATION, et al,

Defendants/Respondents.

No. RG17-847563

ORDER (1) GRANTING MOTION OF  
PLAINTIFF FOR SUMMARY JUDGMENT  
AND (2) DENYING CROSS-MOTIONS  
FOR SUMMARY JUDGMENT

Date: March 16, 2018

Time: 10:00 a.m.

Dept.: 21

The cross-motions of the parties for summary judgment or summary adjudication for came on for hearing on March 16, 2018, in Department 21 of this Court, the Honorable Winifred Smith presiding. Counsel appeared on behalf of Plaintiff and on behalf of Defendant. After consideration of the points and authorities and the evidence, as well as the oral argument of counsel, IT IS ORDERED: The motion of Petitioners Vasquez et al for summary judgment or summary adjudication is GRANTED. The motion of the California Department of Pesticide Regulation (“DPR”) for summary judgment or summary adjudication is DENIED. The motion of Dow Agrosiences (“DAS”) for summary judgment or summary adjudication is DENIED.

///

1  
2 EVIDENCE.

3           The court GRANTS all requests for judicial notice. The court has considered all the  
4 evidence submitted.

5  
6 INTRODUCTION

7  
8           The DPR is responsible for the regulation of pesticides in California. (Food & Ag 11454,  
9 11501. (*Gregory v. Hecke* (1925) 73 Cal.App. 268, 280 [historical context].)

10           The DPR updated its regulatory plan regarding 1, 3 Dichloropropene (“1,3-D”) and  
11 adopted the Township Cap Program in 2016 and 2017. The DPR’s Township Cap Program has  
12 two primary components: (1) the “annual limit” and (2) the “prohibition in December.” The  
13 Township Cap Program set out in three places. First, the DPR’s 10/6/16 Risk Management  
14 Directive (“RMD”). (RMD at p 5.) Second, the Memorandum of Understanding (“MOU”)  
15 between DPR and DAC, which by contract obligates DAS to implement the Township Cap  
16 Program. Third, the update to Compendium Appendix J, recommends to County Commissioners  
17 in mandatory language that they implement the Township Cap Program.

18  
19           The petition asserts (1) the Township Cap Program as described and implemented in the  
20 10/6/16 Risk Management Directive is an unlawful underground regulation (APA) and (2) the  
21 DPR adopted the Township Cap Program in violation of worker safety regulations requiring  
22 consultation with the OEHHA (Food and Ag 12980 and 12981). (Petition, para 23.)

23  
24           The fundamental issue in this case is whether DPR could update its oversight of 1,3-D  
25 use through the pesticide registration and reevaluation process under Food and Ag 12811 et seq  
26

1 and 3 CCR 6252-6255 or whether the DPR was required to do so through an APA compliant  
2 regulation under Govt Code 11340 et seq.

3  
4 **FACTUAL BACKGROUND**

5 DAS is the only seller of 1,3-D in California.

6 In 1990 the DPR suspended the use of 1,3-D California. (RJN, A-1, page 0002)

7 In 1995, DPR and DAS entered into an agreement that permitted the reintroduction of  
8 1,3-D to California. DAS suggests that the reintroduction was due in part to the need to find a  
9 replacement for methyl bromide, which needed to be phased out completely by 2005 due to its  
10 ozone depleting properties. (DPR Exh B, pp 24-25.)

11 In 1997, DPR issued a risk assessment for 1,3-D. (RJN, A-1.)

12 Starting in 1999, the DPR imposed as a condition of continued registration a township  
13 cap on the use of 1,3-D. (DAS Supp RJN, Exh 3 p2.) The township cap was a limit of 90,250  
14 adjusted pounds per year on any given 6x6 square mile area, (DPR Ex B, p19,)

15 In 2002, the DPR reevaluated the conditions of registration for 1,3-D and adopted the  
16 2002 Management Plan. (DAS Supp RJN, Exh 10, p3.) The 2002 Plan permitted townships to  
17 bank unused amounts of 1,3-D and use up to 180,500 pounds per year if they had allotment in the  
18 bank. (DAS Supp RJN, Exh 10, p3.) At this time, DAS was the sole seller of 1,3-D and under  
19 the 2002 Plan, persons had to submit notices of intent to use 1,3-D to a DAS "authorized advisor,  
20 who kept track of township use and would submit applications to County Commissioners. (DAS  
21 Supp RJN, Exh 10, p3-4.)

22 On 8/31/15, DPR sent a draft Risk Characterization Document to OEHHA. (Pltf RJN  
23 Exh 2, 3, A-4 at p1, A-5 at p ii) This appears to be part of the 3 CCR 6252 consultations.  
24  
25  
26

1 On 12/31/15, DPR finalized the Risk Characterization Document. (Pltf RJN Exh 3, 6, A-  
2 5, A-12)

3 On 8/6/16, OEHHA sent its comments on the Risk Characterization Document to DPR.  
4 (Pltf RJN Exh 4, A-6.) OEHHA recommended calculating cancer risk based on systemic ode of  
5 action ("MOA"). This appears to be part of OEHHA's consultation under 3 CCR 6252.

6 On 8/30/16, DPR sent OEHHA a draft Risk Management Directive. (Pltf RJN, Exh 9,  
7 Exh A-15 at 1-5.) DPR proposed changing the regulatory target from 0.14 ppb to 0.56 ppb. The  
8 draft Risk Management Directive proposed changing the annual limit of 90,250 adjusted pounds  
9 per year (with banking) to 136,000 per year with no banking and a prohibition in December.

10 On 9/20/16, OEHHA gave its recommendations to DPR. (Pltf RJN, Exh 7, A-13.)  
11 OEHHA continued to assert the target level of 0.16 ppb and the use of the systemic MOA.  
12 Again, this appears to be part of OEHHA's consultation under 3 CCR 6252.

13 On 10/6/16, DPR issued the final Risk Management Directive (the "RMD"). The RMD  
14 revised the target to 0.56 ppb. (Pltf RJN, Exh 9, A-15.) The RMD stated that the Township Cap  
15 Program included both the change in the annual limit and the prohibition in December. (RMD  
16 at page 5.)

17 On 10/6/16, DPR issued a summary FAQ memo called "Changes in the Management of  
18 1,3-D." The FAQ memo stated, "Why does DPR regulate the use of 1, 3-D," "DPR's current  
19 regulations allow..." and "Why is DPR changing the Rules ..." (Pltf RJN, Exh C.)

20 On 12/16/16, DPR and DAS entered into the Memorandum of Understanding ("MOU").  
21 (Pltf RJN, Exh 10, A-18.) (Hanger Dec, Exh C.) The MOU assumed that the DPR would  
22 adopt the Township Cap Program as set out in the Risk Management Directive and  
23 set out DAS's obligations for monitoring use of 1,3-D under the Township Cap Program.  
24  
25  
26

1 On 1/9/17, DPR announced the Township Cap Program as a change to 1,3-D  
2 recommended permit conditions as stated in the DPR's Pesticide Use Enforcement Program  
3 Standards Compendium. "The *Pesticide Use Enforcement Program Standards Compendium* is a  
4 series of eight manuals that contain pesticide use enforcement directives, interpretations,  
5 recommendations, and expectations. The *Compendium* represents the Pesticide Use Enforcement  
6 Program's "standard operating procedures."<sup>1</sup>

8 On 1/9/17, DPR released a letter to the County Agricultural Commissioners in certain  
9 high-use counties announcing the Township Cap Program and stating that going forward the use  
10 of more than 136,000 pounds per year was prohibited. The 1/9/17 letter instructed the County  
11 Agricultural Commissioners to provide "greater oversight" so they could compare their data with  
12 DAS's data. (Pltf RJN, Exh 11, A-19.)

13 On 1/10/17, DPR released a letter to the County Agricultural Commissioners that had  
14 attached an update to Compendium Appendix J, which was a change in the 1,3-D Recommended  
15 Permit Conditions. The update to Compendium Appendix J set out permit conditions for  
16 meeting a target of 0.56 ppb and the Township Cap Program. (Pltf RJN, Exh 12, A-20A.)

18 The update to Compendium Appendix J is part of the DPR's "Pesticide Use Enforcement  
19 Program Standards Compendium."<sup>1</sup> Compendium Volume 3 concerns "Restricted Materials and  
20 Permitting." Volume 3 includes several Appendixes that state "Recommended Permit  
21 Conditions" for several individual pesticides, including Appendix D [Rice pesticides], F  
22 [Tribufos], H [Aluminum and Magnesium Phosphide], I [Methyl Bromide], J [1, 3-D], K  
23

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26 <sup>1</sup> Court sua sponte takes judicial notice of the Compendium. (Order of 2/2/18.)

1 [Chloropicrin and Chloropicrin], L [Metam Sodium, Metam Potassium, and Dazomet], M  
2 [Methyl Bromide], and O [Chlorpyrifos].  
3

4 PROCEDURE AND FRAMING THE ISSUE

5 The Petition filed 1/31/17 asserts that the 10/6/16 RMD established the Township Cap  
6 Program and is an underground regulation. (Ptn, para 23.) Petitioner's opening brief referred to  
7 the "township cap program" as the underground regulation and identified the new rules as being  
8 in the 10/6/16 RMD, the 12/16/16 MOU, and in the 1/10/17 updated Appendix J. (Ptnr brief  
9 filed 7/27/17 at 1:27-28 and 10:17-21.) DPR and DAS argued that the DPR did not adopt and  
10 implement the Township Cap Program in any of those documents.  
11

12 The court's order of 2/2/18 reviewed the DPR's regulatory structure and raised the issue  
13 of whether the Township Cap Program was actually a condition of registration. The DPR and  
14 DAG then asserted the Township Cap Program was a condition of registration and provided  
15 supporting evidence. (DPR brief filed 2/21/18 at 1:8-9 and 3:17-22; DAS brief filed 2/28/18 at  
16 5:17-6:15.) DPR now argues that the court cannot grant Petitioner's motion for summary  
17 judgment because the petition did not assert that the underground regulation was located in either  
18 the MOU or as a condition of registration. (DPR brief filed 2/21/18 at 8:23-9:8.)  
19

20 The court can decide motions on undisputed evidence even if the parties did not identify  
21 the issues in their briefs. The court must, however, provide the parties the opportunity to address  
22 any new issue of law identified by the court. (*Bacon v. Southern Cal. Edison Co.* (1997) 53  
23 Cal.App.4th 854, 860; *Juge v. County of Sacramento* (1993) 12 Cal.App.4th 59, 69, 70.) The  
24 court's order of 2/2/18 identified issues regarding the location of the alleged underground  
25 regulation in the DPR's regulatory scheme. The court invited supplemental briefing on the issues  
26

1 as re-framed. The court is satisfied that the parties have had a fair opportunity to address the  
2 issues.

3  
4 REGULATORY OVERVIEW AND PLACEMENT OF THE TOWNSHIP CAP PROGRAM IN  
5 THE REGULATORY SCHEME.

6  
7 In the court's initial review of the issues it appeared that the DPR did not follow any one  
8 of its defined regulatory process when it adopted the Township Cap Program. DPR had argued:

- 9 1. The Township Cap Program is not set out and implemented in the RMD because the  
10 RMD is an internal DPR document and only a proposal. (DPR brief filed 7/6/17 at 17  
11 and 19:4-18; DPR brief filed 11/3/17 at 6-7.) (See also DPR brief filed 2/21/18 at 3.)  
12 2. The Township Cap Program is not set out and implemented in the MOU because the  
13 MOU is a contract and not a regulatory plan. (DPR brief filed 7/6/17 at 6:24-25 and  
14 18:23-28; DPR brief filed 11/3/17 at 8-9.)  
15 3. The Township Cap Program is not set out and implemented in Appendix J because  
16 Appendix J is simply a restatement of the MOU and is a recommendation that has no  
17 binding effect. (DPR brief filed 7/6/17 at 21-22; DPR brief filed 11/3/17 at 12-23.)  
18 (See also DPR brief filed 2/21/18 at 9:11-10:24.)  
19

20 The court wanted to determine where the Township Cap Program existed in the DPR's  
21 regulatory process before turning to the issue of whether Township Cap Program should have  
22 been an APA compliant regulation under *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14  
23 Cal.4th 557. The order of 2/2/18 permitted and requested additional briefing regarding the  
24 DPR's regulatory tools and how the Township Cap Program fit into the regulatory structure. The  
25 court reviews the regulatory structure before turning to the claims in the case.  
26

1  
2 REGULATION BY PRIVATE CONTRACT

3           The DPR could not enter into the MOU as an alternative to exercising its regulatory or  
4 police power authority. *Mendly v. County of Los Angeles* (1994) 23 Cal.App.4th 1193, 1207,  
5 states: "A state is without power to enter into binding contracts not to exercise its police power in  
6 the future. ... The States must possess broad power to adopt general regulatory measures without  
7 being concerned that private contracts will be impaired, or even destroyed, as a result. Otherwise,  
8 one would be able to obtain immunity from state regulation by making private contractual  
9 arrangements. This principle is summarized in Justice Holmes' well-known dictum: "One whose  
10 rights, such as they are, are subject to state restriction, cannot remove them from the power of the  
11 State by making a contract about them."  
12

13           The Township Cap Program cannot, therefore, be a regulatory requirement that arises  
14 solely from the MOU. The DPR must act through one of its established means of regulating  
15 pesticides as provided by statute and regulation.  
16

17  
18 REGULATION.

19           The DPR may adopt regulations regulating pesticides. (Food and Ag 11456, 12781 and  
20 14005.) The DPR has specific authority to adopt regulations regulating pesticides and worker  
21 safety. (Food and Ag 12976, 12980-12981.) The DPR has regulations on many individual  
22 pesticides. (3 CCR 6445-6452.3 [Field fumigation use requirements]; 6453-6489 [use  
23 requirements].)  
24

25           If the DPR seeks to adopt a regulation, then under Govt Code 11340 et seq. it must  
26 comply with the APA. If the DPR seeks to adopt a regulation that concerns worker safety, then



1 the DPR must consult with the OEHHA. (Food & Ag 12980-12981; *Fernandez v. California*  
2 *Dept. of Pesticide Regulation* (2008) 164 Cal.App.4th 1214, 1228-1236.)

3  
4 The legislature has not expressly exempted the pesticide registration process and the  
5 issuance of "Recommended Permit Conditions" from the APA. In contrast, in *Tidewater Marine*  
6 *Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 569, the Court observed that in Labor Code  
7 1185 the legislature exempted the Industrial Welfare Commission's creation of wage orders from  
8 the APA.

9  
10 In this case, it is undisputed that the Township Cap Program as set out on the 10/6/16  
11 Risk Management Directive, the MOU, the 1/10/17 letter, and/or the update to Compendium  
12 Appendix J has not been adopted or implemented by the DPR in an APA compliant regulation.

13 REGISTRATION.

14  
15 The DPR supervises the registration of all pesticides, and all pesticides must be  
16 registered. (Food and Ag 12811, 12993.) (See generally *Pesticide Action Network North*  
17 *America v. California Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 232-233  
18 [explaining regulatory structure]; *Californians for Alternatives to Toxics v. Department of Food*  
19 *and Agriculture* (2005) 136 Cal.App.4th 1, 13-15 [same].) It is illegal to sell a restricted pesticide  
20 to a person who does not have a permit. (3 CCR 6302.) The DPR's authority to register  
21 pesticides is usefully examined at several stages or points in time.

22  
23 Initial registration. The DPR must evaluate pesticides before registration. (Food and Ag.  
24 12824-12826; 3 CCR 6170-6192, 6270.) If the DPR seeks to make a decision regarding  
25 registration then under 3 CCR 6252-6255 it must consult with an interagency advisory committee  
26

1 known as the Pesticide Registration and Evaluation Committee and must post the proposed  
2 decision for 30 days for public review and comment. The OEHHA is on the Pesticide  
3 Registration and Evaluation Committee. (3 CCR 6252(b).) As a condition of registration, the  
4 DPR may place “Appropriate restrictions ... upon its use including, but not limited to, limitations  
5 on quantity, area, and manner of application.” (Food and Ag. 12824.)  
6

7 Risk assessments. The DPR “shall conduct pesticide risk assessments as appropriate to  
8 carry out its responsibilities” to regulate pesticides. (Food & Ag 11454.1) The OEHHA “shall  
9 provide scientific peer review of risk assessments conducted by the [DPR] as appropriate to carry  
10 out its responsibilities.” (Food & Ag 11454.1)  
11

12 Investigation. If a registrant has “factual or scientific evidence of any adverse effect or  
13 risk of the pesticide to human health, livestock, crops, or the environment that has not been  
14 previously submitted to the department, the registrant shall submit the evidence to the director in  
15 a timely manner.” (Food and Ag. 12825.5.) “The [DPR] shall investigate all reported episodes  
16 and information received by the Director that indicate a pesticide may have caused, or is likely to  
17 cause, a significant adverse impact, or that indicate there is an alternative that may significantly  
18 reduce an adverse environmental impact. If the Director finds from the investigation that a  
19 significant adverse impact has occurred or is likely to occur or that such an alternative is  
20 available, the pesticide involved shall be reevaluated.” (3 CCR 6220.)  
21

22 Continuous evaluation. The DPR “shall develop an orderly program for the continuous  
23 evaluation of all pesticides actually registered.” (Food & Ag. 12824.) The DPR “may, at any  
24 time, evaluate a registered pesticide ...” (3 CCR 6220.)  
25  
26

1           Renewal of registration. DPR must renew the registration of registered pesticides every  
2 two years. (Food & Ag. 11456(c).) The registrant submits a renewal application with an adverse  
3 effect disclosure. (3 CCR 6215.) The DPR must issue a renewal in 60 days unless the DPR  
4 decides to reevaluate the pesticide. (Hanger Supp Dec, para.11.) The renewal of registration  
5 process is distinct from the reevaluation process. (Hanger Supp Dec, Exh L.)  
6

7           Reevaluation of registration. The DPR may decide to reevaluate a pesticide as a result of  
8 continuous evaluation or a renewal application. Under 3 CCR 6252-6255, DPR must consult  
9 with the Pesticide Registration and Evaluation Committee and its OEHHA member, must post  
10 the proposed decision for 30 days for public review and comment, and must issue a public report.  
11 (3 CCR 6252(b).) The DPR is required to notify the registrant that the pesticide has been  
12 designated for reevaluation and the basis for the reevaluation. (3 CCR 6223.) The DPR is also  
13 required to “publish a semi-annual report on pesticides reevaluated, under reevaluation, or which  
14 for factual or scientific information was received but no reevaluation was initiated.” (3 CCR  
15 6225.) The DPR must hold a hearing. (Food & Ag. 12816.)  
16

17           Cancellation of registration. The DPR may cancel a registration if new information  
18 warrants a change. (Food and Ag. 12825.) The DPR must hold a hearing before cancelling the  
19 registration of a pesticide. (Food and Ag. 12825, 12827.)  
20

21           The court’s order of 2/2/18 made a preliminary tentative finding that the Township Cap  
22 Program was implemented as a “recommendation” to County Commissioners. In the DPR brief  
23 filed 2/21/18 at 3:17-22 and 9:11-10:24 and at the hearing on 3/16/18, the DPR argued that the  
24 Township Cap Program was a condition of registration and was not implemented through the 1,  
25 3-D Recommended Permit Conditions in Compendium Appendix J. DPR asserted that under  
26

1 the terms of the MOU, DAS had a contractual obligation to implement the Township Cap  
2 Program without regard to the actions of the County Commissioners. The MOU, Appendix J,  
3 and the flow chart presented at the hearing on 3/16/18 (filed 4/20/18) set out the procedure a  
4 person seeking to use 1,3-D must follow:

- 5 1. The prospective user must obtain the recommendation of a licensed Pest Control  
6 Advisor. (MOU, para 1.)  
7
- 8 2. The Pest Control Advisor must apply to DAS for approval of the recommended use of  
9 1,3-D. (MOU, para 2.)  
10
- 11 3. DAS will determine whether the proposed use is consistent with the Township Cap  
12 Program. (MOU, para 2-5.)  
13
- 14 4. DAS can approve the proposed use if the township limit is not exceeded. (MOU, para  
15 5.)  
16
- 17 5. DAS must advise the proposed user that applications in December are prohibited.  
18 (MOU, para 7.)  
19
- 20 6. DAS may then either approve the Pest Control Advisor's recommendation or deny the  
21 recommendation. (MOU, para 5-6.) (Appendix J at J-4.)  
22
- 23 7. If DAS approves the recommendation, then the potential user can seek a permit from  
24 the county commissioner, but if DAS denies the recommendation then the potential  
25 user cannot seek a permit from the county commissioner. (Appendix J at J-4; flow  
26 chart filed 4/20/18.)

Under this scheme, DAS implements the Township Cap Program before any potential user  
makes any application to a County Commissioner and the County Commissioner makes a

1 discretionary decision whether to approve the application. This demonstrates that the Township  
2 Cap Program was not implemented as a “recommendation” to County Commissioners in  
3 Appendix J.

4  
5 In this case, the undisputed facts demonstrate that DPR implemented the Township Cap  
6 Program as a condition of the registration of 1,3-D. The RMD stated that the Township Cap  
7 Program included both the change in the annual limit and the prohibition in December. (RMD  
8 at page 5.) The most relevant, and undisputed facts, are:

- 9 1. An Enforcement Letter to county commissioners dated 9/12/02 states “the management of  
10 chronic exposure through township caps is a condition of registration.” (Hanger Supp  
11 Dec, Exh K, at p9.)
- 12 2. The recommended permit conditions dated 11/29/07 states “The management of chronic  
13 exposure through a township limit (cap) is a condition of registration.” (Sagawa Dec, Exh  
14 D, at p C-5.)
- 15 3. An update to the compendium dated 7/10/13 states “the management of chronic exposure  
16 through a township limit (cap) is a condition of registration.” (Hanger Dec, Exh D, at pC-  
17 109.)
- 18 4. A revision to the township cap program was proposed in 2015-2016 as a condition of  
19 DAS’s continued registration of 1, 3 D products. (Segawa Supp Dec., para 8.)
- 20 5. In drafting the MOU, the DPR understood the MOU would be a condition of DAS’s  
21 continued registration of 1, 3D. (Segawa Supp Dec., para 9.)
- 22 6. The MOU dated 12/16/16 states that if “the continued use of 1, 3 D results in serious  
23 uncontrollable effects to the environment [then the DPR may] initiate a proceeding to  
24 cancel the registration pursuant to FAC Section 12824.” (Hanger Dec, Exh C, at p6.)  
25 Section 12824 is in the article concerning “Registration” and states, “The director shall  
26 endeavor to eliminate from use in the state any pesticide that endangers the agricultural or  
nonagricultural environment.”

1  
2 Petitioner notes that DPR did not issue a Notice of Decision to Initiate Reevaluation  
3 during the relevant time period. (3 CCR 6225.) This may show some failure in the DPR's  
4 process and may have deprived members of the public the opportunity to comment on the  
5 reevaluation. This does not, however, create a triable issue of whether the Township Cap  
6 Program was implemented through a regulatory mechanism other than a condition of registration.  
7

8  
9 RECOMMENDATIONS REGARDING PERMITS FOR RESTRICTED MATERIALS.

10 County Agricultural Commissioners are "responsible for local administration of the  
11 enforcement program." (Food and Ag 2281.) "[N]o person shall use or possess any pesticide  
12 designated as a restricted material for any agricultural use except under a written permit of [a  
13 County Agricultural Commissioner]." (Food & Ag 14006.5.) The County Commissioners are  
14 responsible for issuing site and time specific permits for regulated pesticides. (3 CCR 6420 et  
15 seq.) The County Commissioners can impose "Appropriate conditions or limitations." (3 CCR  
16 6432(b)(1))  
17

18 The DPR is "responsible for overall statewide enforcement and shall issue instructions  
19 and make recommendations to the commissioner." (Food and Ag 2281.) The court reads the  
20 word "recommendations" giving it its commonly understood meaning.

21 In the order of 2/2/18, the court considered whether to use the definition in Food and Ag  
22 11411 that " 'Recommendation' means the giving of any instruction or advice on any agricultural  
23 use as to any particular application on any particular piece of property." The court will not use  
24 the section 11411 definition for purposes of section 2281. Food and Ag. 11401 states "Unless  
25 the context otherwise requires, *the definitions in this chapter govern the construction of this*  
26

1 *division.*” (Emphasis added.) The division at issue is Food and Ag Code Division 6, which  
2 concerns “Pest Control Operations” and is Food and Ag Code sections 11401-12408. Section  
3 2281 is in Food and Ag Code Division 2, which concerns “Local Administration” and is Food  
4 and Ag Code sections 2001-2344.

5 In the order of 2/2/18, the court’s preliminary tentative decision was that the Township  
6 Cap Program was set out and implemented in the update to Compendium Appendix J. The court  
7 now finds that the undisputed evidence demonstrates that the DPR implemented the Township  
8 Cap Program as a condition of registration.  
9

10  
11 I. THE FIRST CAUSE OF ACTION (UNDERGROUND REGULATIONS)

12 A. THE ISSUANCE, RENEWAL, AND REEVALUATION OF REGISTRATION FOR  
13 PESTICIDES ARE NOT EXEMPT FROM THE APA UNDER FOOD AND AG. CODE  
14 11456(c).  
15

16 The court holds as a matter of law that the issuance, renewal, and reevaluation of the  
17 registration of pesticides are not exempt from the APA under Food and Ag Code 11456(c).

18 The order of 2/2/18 observed that the legislative creation and regulatory existence of the  
19 DPR’s pesticide registration, reevaluation, and renewal process indicates that if the DPR  
20 complies with the pesticide registration process then it might not need to comply with the APA  
21 regulatory procedure. Food and Ag Code 11456 states “The director [of the DPR] may do all of  
22 the following: (a) Adopt regulations [and] (c) Notwithstanding any other provision of law,  
23 provide, by rule or regulation, for the issuance and renewal on a two-year basis of licenses,  
24 certificates of registration, or other indicia of authority issued pursuant to the provisions of this  
25 code which the director is required or authorized to administer or enforce.” The  
26

1 “Notwithstanding any other provision of law” provision arguably suggests that the pesticide  
2 registration process is outside the scope of the APA.

3 The order of 2/2/18 observed that it would be consistent with the legislative decision that  
4 the DPR’s regulatory program related to the “registration, evaluation, and classification of  
5 pesticides” is a certified regulatory program that does not need to meet CEQA’s procedural  
6 requirements, if the legislature decided that the pesticide registration process has an adequate  
7 public review process in Food and Ag. 12824-12826 and in 3 CCR 6252-6255 and does not need  
8 to meet the APA’s requirements. (*Pesticide Action Network North America v. California*  
9 *Department of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 242.)

11 The legislature has, however, created express exceptions to the APA. (Govt Code  
12 11340.9.) The court will not recognize an implied exception from the APA in one statute where  
13 the legislature sets out express exceptions in another statute. In addition, it would be internally  
14 consistent to read Food and Ag Code 11456(c) as an exception to the APA given that Food and  
15 Ag Code 11456 permits the DPR to “provide, by rule or regulation” for pesticide registration.  
16 Where the legislature suggests that a pesticide registration can be by “regulation,” the court will  
17 not hold that pesticide registration is exempt from the APA requirements for creating regulations.  
18

19  
20 B. THE TOWNSHIP CAP PROGRAM IS NOT EXEMPT FROM THE APA UNDER  
21 GOVT CODE 11340.9(i)

22 The APA has certain express exemptions, including Govt Code 11340.9(i), which  
23 exempts “A regulation that is directed to a specifically named person or to a group of persons and  
24 does not apply generally throughout the state.” The Law Revision Comments state “Enactment  
25 of subdivision (i) is not intended to ratify or abrogate the opinion in *Tidewater Marine Western*,  
26



1 *Inc. v. Bradshaw*, 14 Cal.4th 557, 927 P.2d 296, 59 Cal.Rptr.2d 186 (1996).” ([29  
2 Cal.L.Rev.Comm.Reports 459 (2000).) *Wilson v. County of San Diego* (2001) 91 Cal.App.4th  
3 974, 982, mentions the statute in passing, but there is no case law interpreting or applying this  
4 section.

5           The court interprets the phrase “directed to” as referring to a direction to the person who  
6 is the subject of the regulation. This is consistent with the common understanding of the phrase.  
7 An insult is “directed to” the person who is the subject of the insult, not to the person who relays  
8 the insult to the recipient. This also is consistent with the use of the phrase “directed toward” in  
9 Penal Code 6600(e). The Township Cap Program is “directed to” the persons who would apply  
10 1,3-D products. The Township Cap Program sets aggregate township use limits for 1,3-D  
11 application and precludes proposed users from applying 1,3-D products in December. These  
12 restrictions are “directed to” the persons who would apply 1,3-D products.  
13

14           The court appreciates that the Township Cap Program is “directed to” DAS in the sense  
15 that DAS is directed to implement the program as a condition of registration for DAS’s 1,3-D  
16 products. That simple characterization would elevate form over substance. (Civil Code 3528.)  
17 DAS assumed responsibilities under the MOU to implement those restrictions, but the  
18 restrictions are not “directed to” DAS.  
19

20           The court interprets the phrase “specifically named person or to a group of persons” as  
21 referring to a person or to a group of persons who can be specifically identified based on facts or  
22 attributes that are relevant to the substance of the regulation. In this case, the substance of the  
23 Township Cap Program regarding 1,3-D is the annual cap and the prohibition in December. It is  
24 immaterial to the substance of the Township Cap Program that DAS is the sole distributor in  
25 California. It would be unreasonable and unworkable if the exemption applied to DAS now as  
26

1 the only producer of a regulated product, then the exemption disappeared if AgriChem, a new  
2 low-price producer, entered the California market, and then re-appeared and applied to  
3 AgriChem if DAS exited the California market due to price competition. (*California Highway*  
4 *Patrol v. Superior Court* (2006) 135 Cal.App.4th 488, 507 [court should interpret statute so it is  
5 “workable and reasonable in practice”].) The Township Cap Program as described in the MOU  
6 states that if any other producer or registrant introduces a 1,3-D product then DPR must require  
7 that new producer or registrant to discharge the same tasks and duties that DAS has under the  
8 MOU. (MOU, para 9.) DAS is not a “specifically named person” for any reason other than that  
9 it happens to currently be the only producer and distributor of 1,3-D products in California.  
10

11 The Township Cap Program is therefore not “directed to” DAS simply because (1) DAS  
12 agreed in the MOU to implement the Township Cap Program and (2) DAS is currently the only  
13 company that markets 1,3-D products in California. The Township Cap Program does “apply  
14 generally throughout the state.”  
15

### 16 C. THE TOWNSHIP CAP PROGRAM IS A REGULATION SUBJECT TO THE APA

17 The court finds on the fact of this case that the Township Cap Program is a “regulation”  
18 subject to the APA.  
19

20 The APA provides that “[n]o state agency shall issue, utilize, enforce, or attempt to  
21 enforce ... a regulation” without complying with the APA's notice and comment provisions.  
22 (Gov. Code, § 11340.5 (a).) As used in the APA, “ ‘[r]egulation’ means every rule, regulation,  
23 order, or standard of general application or the amendment, supplement, or revision of any rule,  
24 regulation, order, or standard adopted by any state agency to implement, interpret, or make  
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26

1 specific the law enforced or administered by it, or to govern its procedure.” (Govt Code  
2 11342.600.)

3 “A regulation subject to the APA ... has two principal identifying characteristics. ...  
4 First, the agency must intend its rule to apply generally, rather than in a specific case. The rule  
5 need not, however, apply universally; a rule applies generally so long as it declares how a certain  
6 class of cases will be decided. ... Second, the rule must “implement, interpret, or make specific  
7 the law enforced or administered by [the agency], or ... govern [the agency's] procedure.” (Gov.  
8 Code, § 11342(g); *Tidewater Marine Western, Inc. v. Bradshaw* (1996) 14 Cal.4th 557, 571.)  
9 (See also *Morning Star Co. v. State Bd. of Equalization* (2006) 38 Cal.4th 324, 333-334)

11 The Township Cap Program does “apply generally.” The Township Cap Program limits  
12 whether any potential user of a 1,3-D product can use it in a township given the aggregate use of  
13 the product to date and that any potential user of a 1,3-D product cannot apply it in December.  
14 The MOU states that if any other producer or registrant introduces a 1,3-D product then DPR  
15 must require that new producer or registrant to discharge the same tasks and duties that DAS has  
16 under the MOU. (MOU, para 9.) The Township Cap Program is not limited to products sold by  
17 DAS given that Compendium Appendix J states that it applies generally to “pesticide products  
18 containing the active ingredient (a.i.) 1, 3 Dichloropropene.” (RJN, Exh A-20 at pJ-1.)

20 The Township Cap Program also serves to “implement, interpret, or make specific the  
21 law enforced or administered by [the DPR].” (Gov. Code, § 11342(g).) This is not contested.  
22

23 The court has considered whether for purpose of the *Tidewater* analysis it makes a  
24 difference whether a state agency regulates directly or indirectly. By adopting and implementing  
25 the Township Cap Program through the MOU, the DPR through DAS imposed restrictions on  
26 end-users indirectly rather than directly through regulations or recommendations to County

1 Commissioners. The court concludes that a state regulation that is implemented through a  
2 private intermediary is still a regulation. The DPR's use of the MOU as a condition of  
3 registration does not avoid application of the APA. "It is a fundamental precept of law that  
4 government may not do indirectly what the law does not allow to be done directly." (*Carmell v.*  
5 *Texas* (2000) 529 U.S. 513, 541 ["what cannot be done directly cannot be done indirectly".])  
6 (See also *Rossi v. Brown* (1995) 9 Cal.4th 688, 722-727 (Mosk, dissenting, and collecting  
7 cases)).

9 The Township Cap Program is similar in many aspects to the regulations regarding the  
10 use of methyl bromide. (3 CCR 6447 et seq.) The methyl bromide regulations state "County  
11 agricultural commissioners shall ensure that agricultural use of methyl bromide does not exceed  
12 171,625 pounds in a township in a calendar month." (3 CCR 6447(g).) The regulations also state  
13 the operator must notify neighboring hospitals and schools and the commissioner must set  
14 specified minimum buffer zones. (3 CCR 3447.1, 6447.2.) The DPR's decision to regulate  
15 methyl bromide through an APA compliant regulation does not require it to regulate 1,3-D  
16 through an APA compliance regulation, but the court gives some weight to an agency's  
17 established past practice, especially where it has been reduced to a formal regulation, (*Yamaha*  
18 *Corp. of America v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 14-15.)

21 DPR asserts that DAS's contractual obligation to implement the Township Cap Program  
22 is similar to the obligation of any pesticide manufacturer to label a pesticide properly. In  
23 *Patterson Flying Service v. Department of Pesticide Regulation* (2008) 161 Cal.App.4th 411,  
24 429, the court held that instructions on a label are not an underground regulation. *Patterson*  
25 *Flying Service* stated, "[Food & Ag Code 12973] makes it a violation of state law to use a  
26 pesticide in conflict with its registered labeling. The labeling is not intended to apply generally

1 rather than to a specific pesticide; it is not approved or registered to implement, interpret, or  
2 make specific the law enforced by the agency. Rather, the labeling is intended to accurately  
3 inform the user of the purposes for which the pesticide may be used, the manner in which it may  
4 be used, and the hazards involved in its use.” (161 Cal.App.4<sup>th</sup> at 429.)

5           The court is persuaded that the prohibition in December is similar to a labelling issue. If  
6 the label prohibits application in December and a user applies 1,3-D in December, then the user  
7 can be held liable under Food & Ag Code 12973 as was the aerial spraying business in *Patterson*  
8 *Flying Service*.

9           The court is not persuaded that the annual township limit and the implementation and  
10 administration of that limit are similar to a labelling issue. The township limit aspect of the  
11 Township Cap Program extends well beyond an instruction to a potential user as to the limits on  
12 when, how, and where she or he can use a pesticide. DAS’s oversight of the township limit  
13 requires DAS to review applications for use, maintain records regarding amount and location of  
14 use, and to deny approval if the aggregate use would exceed the township cap. DAS’s  
15 obligations under the MOU to implement the Township Cap Program are well beyond ensuring  
16 that products are labelled properly when they are placed in the stream of commerce.

17           The court grants petitioner’s motion for summary adjudication on the first cause of action  
18 based on the undisputed facts that (1) the Township Cap Program was a condition of registration;  
19 (2) condition of registrations are not exempt from the APA under Food & Ag. Code 1145(c); (3)  
20 the Township Cap Program was not exempt from the APA under Govt Code 11340.9(i); (4) the  
21 Township Cap Program is a rule that applies generally to all end users of 1,3-D products; and (5)  
22 the Township Cap Program implements the law enforced or administered by the DPR.  
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1 DPR argued at the 3/16/18 hearing that it lawfully implemented the Township Cap  
2 Program by making the supervision and operation of the Township Cap Program a condition of  
3 registration for DAS. DPR presented a helpful flow chart of the regulatory process and how the  
4 Township Cap Program fit in the process. The petition concerns whether the Township Cap  
5 Program was an unlawful underground regulation and not whether it was unlawful for other  
6 reasons. Therefore, the following discussion is arguably in the nature of dicta.  
7

8 As the court views the regulatory structure, DPR through the MOU outsourced to DAS  
9 the implementation of the Township Cap Program. Standing alone, a similar arrangement might  
10 be permissible, as DPR presumably could have entered in to a contract with a private third party  
11 vendor to collect information about proposed use of 1,3-D, to maintain data on the aggregate use  
12 per township per year, and to inform county commissioners whether they had exceeded the  
13 township cap.  
14

15 As adopted and implemented, however, the Township Cap Program was arguably  
16 unlawful because it removed oversight from the County Commissioners. County Agricultural  
17 Commissioners are “responsible for local administration of the enforcement program” (Food and  
18 Ag 2281), are responsible for issuing site and time specific permits for regulated pesticides (3  
19 CCR 6420 et seq), and can impose “Appropriate conditions or limitations” (3 CCR 6432(b)(1)).  
20 Under the Township Cap Program, DAS reviews Notices of Intent to apply 1,3-D products and  
21 DAS determines whether the proposed use would comply with the conditions of registration. At  
22 the hearing on 3/16/18, counsel for either DPR or DAS asserted that under the Township Cap  
23 Program, if DAS found that a proposed application did not comply with the Township Cap  
24  
25  
26

1 Program, then the application would never get to the County Commissioners. This suggests a  
2 questionable outsourcing of a government regulatory function.<sup>1</sup>

3  
4 THE SECOND CAUSE OF ACTION (COORDINATION WITH OFFICE OF HEALTH  
5 HAZARD ASSESSMENT)

6  
7 If DPR develops and adopts regulations concerning the worker safety, then DPR must  
8 develop the regulations in concert with the Office of Environmental Health Hazard Assessment.

9 Food & Ag. 12980 is a statement of intent. Food & Ag 12981 imposes specific  
10 requirements. This section states:” The Office of Environmental Health Hazard Assessment  
11 shall participate in the development of any regulations adopted pursuant to [Article 10.5, which  
12 is Food and Ag, Code 12980 et seq.]. Those regulations that relate to health effects shall be  
13 based upon the recommendations of the office.” *Fernandez v. California Dept. of Pesticide*  
14 *Regulation* (2008) 164 Cal.App.4th 1214, 1220, states: “We find DPR is required by statute to  
15 work jointly with OEHHA while formulating regulations relating to the safety of persons  
16 working with or around methyl bromide.”

17  
18 Food & Ag 12981 states that OEHHA “shall participate in the development of any  
19 regulations.” “Shall” is mandatory. Given that the DPR did not adopt the township cap program  
20 as a regulation, it is undisputed that DPR did not comply with Food & Ag 12981 and include  
21

22  
23  
24 <sup>1</sup> The MOU at page 4-5 discusses DAS’s obligation to report certain enumerated data to  
25 the DPR. DAS’s oversight of the Township Cap Program as a condition of registration does,  
26 however, present the collateral issue of whether the information collected and compiled by DAS  
regarding applications for the use of 1,3-D are public records or are DAS’s proprietary business  
information. (*City of San Jose v. Superior Court* (2017) 2 Cal.5th 608; *Regents of University of  
California v. Superior Court* (2013) 222 Cal.App.4th 383.)

1 OEHHA in the development of any regulations. The DPR's cooperation with the Pesticide  
2 Registration and Evaluation Committee and with OEHHA as a member of that committee in the  
3 pesticide reevaluation process as required by 3 CCR 6252 is not sufficient to meet DPR's  
4 obligation to cooperate with OEHHA in the adoption of regulation process as required by Food  
5 & Ag 12981. The court grants petitioner's motion for summary adjudication on the second cause  
6 of action on this ground.  
7

8 Food & Ag 12981 also states that "Those regulations that relate to health effects shall be  
9 based upon the recommendations of the [OEHHA]." The phrase "regulations that relate to health  
10 effects" is not defined. *Fernandez v. California Dept. of Pesticide Regulation* (2008) 164  
11 Cal.App.4th 1214, 1236-1237, strongly suggests that OEHHA must participate in the  
12 development of regulations that "affect" worker safety, and that OEHHA should be involved  
13 when DPR is regulating the use of a pesticide "to protect those who may come into contact with  
14 it." This definition of relate is based on the possibility of a causal relationship between exposure  
15 to a pesticide and the health of workers exposed to the pesticides. This causal definition is  
16 consistent with *Bay Cities Paving & Grading, Inc. v. Lawyers' Mutual Ins. Co.* (1993) 35 Cal.4th  
17 854, 868, which in the context of contract interpretation stated, "'Related' is a commonly used  
18 word with a broad meaning that encompasses a myriad of relationships. For example, a leading  
19 legal dictionary defines 'related' to mean 'standing in relation; connected; allied; akin.'" The  
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1 court concluded “We agree ... that the term “related” as it is commonly understood and used  
2 encompasses both logical and causal connections.” (35 Cal.4<sup>th</sup> at 873.)<sup>1</sup>

3  
4 The undisputed material facts demonstrate that the Township Cap Program related to  
5 health effects on workers. The evidence includes:

- 6
- 7 1. The DAS comments dated 10/16/5 address “occupational and non-occupational  
8 exposure scenarios (p4) and addresses occupational exposure at Appendix F and G.  
9 (Pltf RJN Exh 4, A-7.)
  - 10 2. The OEHHA recommendation dated 9/20/16 state “OEHHA does not believe that the  
11 proposed cap can assure adequate health protection for all residents of a given  
12 township” and noted that wind direction and velocity can expose “[r]esidents who live  
13 close and downwind from a field treated.” (Pltf RJN, Exh 7, A-13.)
  - 14 3. The RMD dated 10/6/16 states “This document outlines DPR’s management  
15 decisions ... to address cancer risk to bystanders (nearby workers and  
16 residential/public).” (Pltf RJN, Exh 9, Exh A-15.)  
17  
18  
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21 <sup>1</sup> In other contexts, the word can have a narrower meaning. In the context of compulsory  
22 cross-complaints, CCP 426.10( c) states: ““Related cause of action” means a cause of action  
23 which arises out of the same transaction, occurrence, or series of transactions or occurrences as  
24 the cause of action which the plaintiff alleges in his complaint.” (See also Ins Code 1871.7(e)(5)  
25 [similar definition ].) In the context of the phrase “related medical condition” in 2 CCR  
26 7291.2(p), the word “related “means something closely tied to the specific enumeration of  
pregnancy and childbirth. (*Williams v. MacFrugal’s Bargains* (1998) 67 Cal.App.4<sup>th</sup> 479, 482-  
483. In the context of gang related activity under Penal Code 186.22(b)(1), it means “for the  
benefit of, at the direction of, or in association with, a street gang.” (*People v. Gardeley* (1996)  
14 Cal.4<sup>th</sup> 605, 622.)

1 4. The Compendium Appendix J update dated 1/1/17 states "Applications are prohibited  
2 within 100 feet of any occupied structure.

3  
4 The undisputed evidence demonstrates that if the DPR had adopted the Township Cap  
5 Program as a regulation, then the regulation would "relate to health effects" because the  
6 regulation would "affect" worker safety and the regulation would regulate the use of a pesticide  
7 "to protect those who may come into contact with it." In the alternative, the court grants  
8 petitioner's motion for summary adjudication on the second cause of action on this ground.

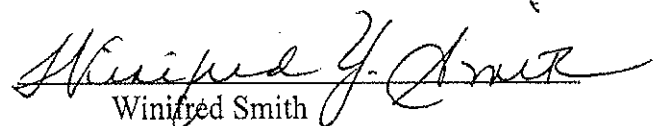
9  
10 CONCLUSION.

11 The motion of Petitioners Vasquez et al for summary judgment is GRANTED. The court  
12 will enter judgment in favor of Petitioners to the effect that the Township Cap Program is a  
13 regulation within the meaning of the APA and is void because DPR failed to comply with the  
14 APA before adopting the Township Cap Program as a condition of registration for 1,3-D  
15 products. The judgment will not limit or control in any way the discretion legally vested in the  
16 DPR regarding further proceedings. (CCP 1094.5(f).)

17  
18 The motion of DPR for summary judgment or summary adjudication is DENIED. The  
19 motion of DAS for summary judgment or summary adjudication is DENIED.

20  
21 Petitioner is to prepare a proposed judgment and proposed form of writ, confer with  
22 respondents, and submit them to the court. (CRC 1.312.)

23  
24 Dated: March. 28 2018

25   
26 Winifred Smith  
Judge of the Superior Court