

# MONTEREY COUNTY

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**TO:** Board of Supervisors

**FROM:** Eric Lauritzen, Agricultural Commissioner  
(original signed)

**DATE:** October 23, 2015

**SUBJECT:** Pesticide Use Near Schools/Authority of the Agricultural Commissioner

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## Introduction

As Monterey County Agricultural Commissioner (CAC), one of my responsibilities is to enforce state and federal laws that protect the health and safety of our residents and the environment; this enforcement provides a particular emphasis on those who are most vulnerable to harm from pesticides. This memorandum is intended to provide your Board some background and understanding of current issues related to pesticide law and limitations on local authority. Specifically, it:

- Addresses questions that have arisen about the authority of a CAC to impose broad regulatory requirements on use of agricultural pesticides near schools;
- Includes information on local and state initiatives for pesticide safety as they apply to local schools, including efforts to enhance communication between agricultural interests and schools; and,
- Offers summary conclusions for your consideration. It is my belief that statewide regulations can best address health and safety concerns about school children in a manner that is fair and consistent.

## Background

In recent years, interest groups have criticized agricultural pesticide use near schools statewide. A 2014 report by the state Department of Public Health, "Agricultural Pesticide Use Near Public Schools in California"<sup>1</sup>, attempted to quantify those pesticide applications, while stating its "methodology does not attempt to measure schoolchildren's exposures to pesticides and, therefore, study results cannot be used to predict possible health impacts." The report also contains outdated pesticide use data for Monterey County, as well as serious errors, prompting an analysis and response by my office.<sup>2</sup> Nonetheless, the report frequently has been cited by interest groups that seek to further restrict agricultural pesticide use near schools, and who contend that I have broad authority to do so.

The CAC is the local agent responsible for enforcing state law related to pesticide use in California. Our Department dedicates approximately 24,000 licensed staff hours and \$3.0 million to pesticide enforcement annually in Monterey County. This enforcement role is fundamentally rooted in the registration and labeling of pesticides at the federal level by the U.S. Environmental Protection Agency (U.S. EPA) under the Federal Insecticide Fungicide & Rodenticide Act.

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<sup>1</sup> [http://cehtp.org/projects/ehss01/pesticides\\_and\\_schools/Pesticides\\_Schools\\_Report\\_April2014.pdf](http://cehtp.org/projects/ehss01/pesticides_and_schools/Pesticides_Schools_Report_April2014.pdf)

<sup>2</sup> <http://www.co.monterey.ca.us/home/showdocument?id=1509>



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In California, the Department of Pesticide Regulation (DPR) has been given primary enforcement responsibility to regulate the use of pesticides based upon a determination by U.S. EPA that its laws and regulations adequately meet the standards of federal law. This authority is implemented by a Memorandum of Understanding between DPR and the CACs on behalf of the state and U.S. EPA. Under federal law, any pesticide used in the United States must be evaluated and meet labeling requirements and be registered by U.S. EPA. In addition, unlike most states, California has a comprehensive secondary registration process that must be met before a pesticide can be used in the state. DPR often adds additional regulatory requirements appropriate for California, with federal law establishing the foundation. Both EPA and DPR's registration processes include rigorous scientific risk assessments used as the basis for regulation designed to protect the most vulnerable populations.

DPR also has the responsibility to continue to evaluate pesticides even after registration has been granted. Under this authority, DPR conducts environmental monitoring to inform decisions on the need for additional regulatory action; for example, air monitoring for pesticides in the first program of its kind in the United States. With my support and encouragement, one of three air-monitoring stations in California was sited in Monterey County in 2011 and data has been collected continuously since then. This air-monitoring network was developed to provide data to assist in assessing (chronic and sub-chronic) potential health risks associated with pesticide concentrations in ambient air. The 2014 results from the Salinas Station indicate that none of the 37 targeted chemicals exceeded any of their screening levels.<sup>3</sup>

Under direction of DPR, CACs regulate pesticide use pursuant to, and consistent with state law and regulations within their respective counties. In other words, U.S. EPA and DPR review pesticides and establish requirements for use via a thorough registration and review process. They evaluate human health risk and environmental risk, develop the use directions on labels and establish laws and regulations. These regulations are intended to mitigate risks to people and the environment. CACs are tasked with enforcing the law within their jurisdiction. CACs also have clearly prescribed authority, with limitations, to establish additional local permit conditions for "Restricted Use Materials"; these local conditions must be product, time and site-specific and cannot be "one size fits all" as explained in greater detail later in this document. Therefore, this authority delegated to CACs is neither broad enough, nor intended, to allow for restrictions, as called for by some interest groups.

### **Local Authority to Establish Regulations**

It has been suggested by local interest groups that pursuant to California Food & Agriculture Code (FAC) Sections 11503 and 11503.5, CACs have broad authority to adopt local regulations. Recently, some have called for the CACs to establish "buffer zones" of up to one mile from schools, and to require one-week notification to schools, for applications of pesticides. Furthermore, these suggestions were made without regard to type/toxicity of pesticide, method of application or other important factors that substantially affect risks of exposure. This suggested "broad authority for CACs to regulate" is simply not true. For reference, the applicable sections are provided below:

*11503. The commissioner of any county may adopt regulations applicable in his or her county which are supplemental to those of the director which govern the conduct of pest control operations and records and reports of those operations. The regulations may include provisions pertaining to any matter related to the accomplishment of the purposes of Section 11737. The provisions of Chapter 3.5 (commencing with Section 11340) of Part 1 of Division 3 of Title 2 of the Government Code shall be followed insofar as practicable in the adoption of the regulations by the commissioner. The regulations shall be filed with the director who*

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<sup>3</sup> [http://www.cdpr.ca.gov/docs/emon/airinit/air\\_network\\_results.htm](http://www.cdpr.ca.gov/docs/emon/airinit/air_network_results.htm)

*shall compile them. Each regulation of the commissioner shall be approved by the director before it becomes operative. The director, in his or her review of the commissioner's regulations, shall consider, but not be limited to considering, the necessity, authority, clarity, and consistency of the regulations, as these terms are defined in Section 11349 of the Government Code (emphasis added).*

*11503.5. The county agricultural commissioner may apply Section 11503 to the agricultural use of any pesticide for agricultural production within one-quarter mile of a school with respect to the timing, notification, and method of application (emphasis added). Any regulations adopted pursuant to this section shall become operative unless specifically disapproved in writing by the director within 30 calendar days of their submission by the commissioner.*

When considering the local authority to restrict “use of any pesticide for agricultural production,” or to add additional regulatory requirements, it is also important to understand that state law prohibits the regulation of pesticides by any local government entity unless specifically allowed by statute or implementing regulations.

Both FAC Sections 11503 and 11503.5 were established to provide authority to CACs in situations where state laws and regulations might not effectively mitigate acute (near-term) exposure risk or unique environmental risks. Please see attached article (*Los Angeles Times*, 9-3-02)<sup>4</sup> outlining the background for SB 947 – Jackson, which established FAC 11503.5. Both sections of law were established to deal with problems such as an incident that occurred in Ventura County. An application of Lorsban, a “non-restricted” material applied by air blast sprayer to a citrus grove adjacent to a school caused acute exposures to schoolchildren. In this example, state law did not provide sufficient authority to restrict the use of that material in a way (timing, method or buffer) that could have prevented that incident.

In addition, it is important to note that even with this authority delegated to CACs, there are clearly established rulemaking provisions for local regulations. For your reference, see the “Guidelines for County Agricultural Commissioners’ Authority for Adoption of Local Pest Control Operation Regulations.”<sup>5</sup> Keeping in mind that CACs are charged with enforcement of laws and regulations aimed at preventing acute exposures, refer to page 4, “Necessity,” which states: “There is substantial evidence to show that the regulations are needed.” Such evidence does not exist in Monterey County to demonstrate that existing regulations are not effective in providing protections from acute exposures, as shall be discussed later in this memorandum.

Only one county, San Bernardino, has established local regulations pursuant to FAC Section 11503.5.<sup>6</sup> In summary, that regulation applies to commercial agricultural sites adjacent to school sites; restricts the use of aircraft, specific application methods and more toxic materials; and requires 24-hour notification for certain classes of pesticides to the CAC. These regulations were crafted to reduce the highest risk of acute exposure based on methods of application and toxicity of materials specific to San Bernardino County.

Note: This discussion of FAC Sections 11503 & 11503.5 is not intended to suggest that DPR cannot, or should not, apply its broader authority to establish additional statewide standards. Statewide standards are highly desirable to maintain a level playing field for business, to prevent inadvertent violations when businesses operate in multiple counties, as is the case with many agricultural enterprises, and provide the same level of protection for school children regardless of where they live.

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<sup>4</sup> <http://articles.latimes.com/2002/sep/03/local/me-pest3>

<sup>5</sup> <http://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2003/2003atch/attch32/guideline.pdf>

<sup>6</sup> <https://www.documentcloud.org/documents/1369024-san-bernardino-county-ordinance-school.html>

As outlined later in this memorandum, I recommend that DPR should evaluate and decide whether to adopt broad buffer zone regulations as part of its regulatory role. I am aware of and sensitive to community perceptions and concerns, and I believe that statewide regulations are the most appropriate way to address these concerns.

In fact, I have already encouraged DPR to evaluate and consider new statewide regulations to protect schools. With CAC input, coupled with a comprehensive outreach effort this past spring, DPR is now developing a regulatory proposal to establish minimum standards around schools in California; the proposal is expected to be released for public comment this December.

### **Local Authority to “Condition the Use of Restricted Materials” (F & A Code Section 14006.5)**

Some have suggested that the authority provided to CACs under FAC Section 14006.5 to condition the use of some materials through the issuance of Restricted Materials Permits (RMPs) is more broad and overarching than it is actually. References by interest groups to other counties’ local regulation(s) likely refer to conditions imposed on specific “restricted use pesticides”<sup>7</sup> pursuant to FAC Section 14006.5. This code section is intended to provide authority to apply local conditions to use of designated restricted use pesticides on a site- and time-specific basis.

*14006.5. Except as provided in Section 14006.6, no person shall use or possess any pesticide designated as a restricted material for any agricultural use except under a written permit of the commissioner. No permit shall be issued for any restricted material for use in any manner other than pursuant to its registration without the approval of the director. In addition, no permit shall be granted if the commissioner determines that the provisions of subdivision (a), (b), or (c) of Section 12825 would be applicable to the proposed use.*

*Before issuing a permit for any pesticide the commissioner shall consider local conditions including, but not limited to, the following:*

- (a) Use in vicinity of schools, dwellings, hospitals, recreational areas, and livestock enclosures.*
- (b) Problems related to heterogeneous planting of crops.*
- (c) Applications of materials known to create severe resurgence or secondary pest problems without compensating control of pest species.*
- (d) Meteorological conditions for use.*
- (e) Timing of applications in relation to bee activity.*
- (f) Provisions for proper storage of pesticides and disposal of containers.*

*Each permit issued for any pesticide shall include conditions for use in writing.*

CACs must consider local conditions when applying Section 14006.5 for conditioning the use of RMPs. Many CACs establish standard RMP conditions that apply to the use of all restricted materials. However, even standard permit conditions are based on unique conditions in individual counties (type of agricultural production, typical methods of application, types of pesticides used, etc.). For example, pesticides applied to rice or cotton by fixed-wing aircraft, or air blast sprayers used in orchards and citrus groves, pose greater risk of drift compared to ground applications involving strawberries or vegetable crops. (Fixed-wing applications are uncommon in Monterey County, but local permit conditions forbid those applications less than 1,000 feet from schools.)

### **Local Situation**

Although some suggest a need for additional regulatory action, there are no new or historical acute exposure data to help justify using my limited authority to broadly restrict pesticide applications in the vicinity of schools. In Monterey County there have been only three (3) documented incidents affecting a school site related to pesticide use (off campus) in at least 15 years.

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<sup>7</sup> <http://www.cdpr.ca.gov/docs/enforce/dpr-enf-013a.pdf>

1. Helicopter application near a newly built school; applicator believed school had not yet opened
2. Herbicide (non-ag) application to vacant lot adjacent to a school
3. Ground application to strawberries within 500 feet of a school

The first was a mistake; the second was not an agricultural application; and the third was in violation of the county's long-standing, voluntary practice against spraying within 500 feet of a school during school hours. (See additional information below.\*) All three involved non-restricted materials (not subject to FAC Section 14600.5) and each resulted in enforcement actions. It is noteworthy that all of these incidents would likely have occurred despite a new buffer zone requirement.

As Agricultural Commissioner, I have for many years been focused on certain fumigant applications in the general vicinity of schools and other sensitive sites. While fumigants are already subject to the most stringent restrictions as Restricted Use Materials, they also pose unique hazards for potential off-site movement. My office has imposed very detailed and specific local requirements for fumigant use, especially in the vicinity of schools. I also have conveyed my concerns personally to growers and applicators, and emphasized that I have a zero tolerance for fumigant errors that put farmworkers, school children, and other members of the community at potential risk for acute exposure. My office will continue to closely scrutinize permit requests for fumigant applications in the vicinity of all sensitive sites. It should also be noted that no illness reports have linked fumigant applications to schools in Monterey County. This demonstrates the effectiveness of mitigating risk through time and site-specific conditions.

My office investigates every possible pesticide-related illness and complaint we receive. All illness findings are forwarded to DPR for its review as well. These may include incidents in which there is little or no evidence of a pesticide violation. For example, Salinas police received a 911 call on August 18, 2015, from an anonymous caller who said a farmer was spraying an unknown chemical near McKinnon School in Salinas while children were present. Police and my staff went to the scene where a worker was cultivating a field; no chemicals were in use. We later conferred with school officials to reassure them that no pesticide application had occurred.

\*As previously noted, our local school protective measures include a longstanding, voluntary practice by Monterey County growers to refrain from any pesticide application within 500 feet of a school during school hours, including chemicals used for organic farming. My office and local growers have long recognized that even the perception of risk from pesticide use near schools is a serious issue. Common sense and good agricultural practice dictate precautions near schools. My office has worked to facilitate improved communications between growers and school officials, especially in situations where questions or concerns have been raised. I continue to believe that transparency on the part of growers, coupled with good communication, will be much more practical and effective than a broad, prescriptive regulation such as a mandatory one-week notification prior to every application, as some have demanded. I have held meetings with growers to reinforce this point and reemphasize their need for awareness.

Communication is mandatory between grower and school in situations when Restricted Use Materials are used. I strongly believe that the best use of our resources is to promote this "good neighbor" policy in grower-school communications, as it is a key tool in preventing problems and promoting transparency and understanding. With or without a formal mandate from DPR's pending school regulations, I intend to continue emphasizing communication and cooperation between local growers and schools.

**Summary**

Our current regulatory program is very effective. Almost every day in Monterey County pesticides are used without incident in schools and in surrounding areas. With more than 165,000 agricultural pesticide applications annually and more than 70 schools within one-quarter mile of agricultural fields in Monterey County, it would seem logical that if current state and local rules were insufficient, there would be a significant number of confirmed incidents of pesticide misuse or acute illness.

Some suggest that pesticide incidents involving schools and schoolchildren go unreported; this is simply not true. The recent incident involving an application to strawberries (#3 above) was reported by teachers and demonstrates that teachers, along with their school administrators and parents, all pay close attention to what happens near their school. The recent 911 report to Salinas police further illustrates this fact.

Additional major points:

- With my strong support and encouragement, DPR has announced it intends to propose new, statewide standards for agricultural pesticide applications near schools in 2016. My preferred course is to allow the statewide regulatory process to play out; I shall ensure enforcement of any regulation promulgated by DPR.
- Given the absence of acute exposure data for local schools, action by my Department to impose additional restrictions on agricultural pesticide use near schools would be premature. It also could invite a legal challenge against the County from individual growers or industry associations.
- County Counsel reviewed this memorandum and concurs.
- As local interest groups have expressed concern about chronic pesticide exposures, I have recommended that they direct these concerns to DPR and U.S. EPA as the appropriate regulatory authorities; which local groups have done. In addition, at my invitation, top officials from DPR and U.S. EPA joined me at a recent community meeting where they provided an overview of the regulatory process, outlined their respective authorities, and answered questions.
- I will continue to pursue constructive dialog among all interested parties. It is my intention to encourage representatives from interest groups concerned about pesticide exposure to meet with agricultural interests (the regulated community). My Department will assist in facilitating dialog.
- Construction of new schools in proximity to agricultural operations poses potential concern and conflict in the future. For example, there apparently has been little notice that a new middle school surrounded by agricultural production is planned in North Salinas. Your Board may want to consider if such land use decisions should require additional scrutiny.

I will provide additional relevant information to your Board as it becomes available. In the meantime, I look forward to reviewing statewide regulatory proposals that DPR releases within two months. If you have specific questions or desire additional information, please let me know.

- c. Lew Bauman, County Administrator  
Charles McKee, County Counsel  
Brian Leahy, Director – DPR  
Kathy Taylor, U.S. EPA, Region IX  
Dr. Ed Moreno, Public Health Officer