

**STATE OF CALIFORNIA
OFFICE OF ADMINISTRATIVE LAW**

AGENCY: DEPARTMENT OF) PESTICIDE REGULATION)	DECISION OF DISAPPROVAL OF REGULATORY ACTION
)	
ACTION: Adopt in CCR, Title 3,) section 6452.3, subdivision (f).)	(Government Code section 11349.3)
)	
_____)	OAL File No. 2007-1219-01 S

BACKGROUND

The Department of Pesticide Regulation proposed the adoption and amendment of the California Code of Regulations, title 3, to provide restrictions on the practice of fumigating agricultural fields, specifically limiting materials, methods, seasons, and time of application in order to reduce the emission of volatile organic compounds used in fumigation and the resultant formation of ozone in the atmosphere. On December 19, 2007, the regulations were submitted to the Office of Administrative Law ("OAL") for review in accordance with the Administrative Procedure Act. On January 25, 2008, the majority of the regulations were approved by OAL and filed with the Secretary of State, however OAL disapproved the adoption of portions of sections 6452.3 and 6452.4. This Decision of Disapproval explains the reasons for OAL's action.

DECISION

OAL disapproved the proposed adoption of section 6452.3, subdivision (f); a coordinating provision at the beginning of section 6452.3, subdivision (a); and the adoption of section 6452.4, subdivision (a)(4) for failure to comply with the clarity standard of Government Code section 11349.1.

DISCUSSION

Section 6452.3 was adopted to create a system for the overall control of the amount of agricultural fumigants utilized between May 1 and October 31, in areas of California that have not attained the national ambient air quality standards for ozone. The regulation sets up a system whereby farmers would submit information to their county's agricultural commissioner describing their plans to fumigate fields in advance of the season when the activities would be performed. The Director of the Department of Pesticide Regulation would review the county collected information, consider the total demand and, when necessary, implement a system of proportional allocation or rationing whereby the total emissions of volatile organic compounds to the atmosphere from pesticides would be reduced by 20% from the level of emissions measured in the 1991 emissions inventory. The allowance for each permittee would be included in a restricted material permit that is necessary to perform the fumigation of a field. By limiting the emission of these volatile

organic compounds to the atmosphere, the Director would meet a requirement of the state's 1994 implementation plan for improving California's air quality.

Section 6452.3 included, in subdivision (f), a provision that would have authorized the Director to create an exemption from the requirement to obtain an allowance for the use of fumigant on fields that are no greater than five acres in size. It provided:

“The Director may establish an emission allowance acreage threshold, not to exceed five acres. A permittee is not required to obtain a field fumigant emission allowance if their total fumigated acreage is no greater than the threshold. The threshold will be published in the Annual Volatile Organic Compound Emission Inventory Report, pursuant to section 6452.4.”

The final statement of reasons indicates that this provision was included to lessen the burden of administering allocations of fumigant in situations unlikely to require a significant use of these materials. The actual acreage of the threshold has not been specified.

The adoption of regulations by the Department of Pesticide Regulation must satisfy requirements established by the part of the California Administrative Procedure Act ("APA") that governs rulemaking by a state agency. Any rule or regulation adopted by a state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, is subject to the APA unless a statute expressly exempts the regulation from APA coverage. Before any rule or regulation subject to the APA may become effective, OAL must review the proposed regulations for compliance with the substantive standards set forth in Government Code section 11349.1.

Among the substantive standards is the clarity standard, designed to assure that the meaning of proposed regulations will be easily understood by the affected public. (Gov. Code, sec. 11349(a)(3)). Proposed section 6452.3 subdivision (f), does not satisfy the clarity standard.

First, the rule does not answer the question of whether an exemption is established, and second, the maximum acreage threshold has not been specified. It appears that these decisions would determine standards intended for general application that ought to be included *in* the regulation. We also note that the procedure for announcing the allowance acreage threshold in the Annual Volatile Organic Compound Emission Inventory Report is not an acceptable substitute for compliance with the requirements of the Administrative Procedure Act. OAL has been informed that the actual threshold was omitted because the Director may want to set different standards for different parts of the state. If it is not possible to specify at this time whether there will be an exemption, where it will be available, and what the maximum acreage will be, then the Director may add some generally applicable criteria to the regulation for making the decisions on a case by case basis in the future. On the other hand, to the extent that the characteristics of the threshold the Director will propose are known, they should be specified in the rule.

Regional standards may be used if the necessity for this approach is supported by substantial evidence in the record.

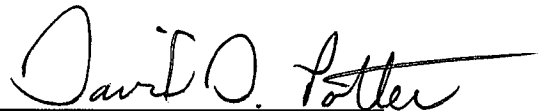
OAL has also learned that a reason for leaving the acreage threshold blank was the concern among county agricultural commissioners that the exemption might be misused to circumvent the requirement for obtaining an allocation by breaking down a fumigation project into smaller parcels. Another means of precluding that kind of activity might be to limit the number of times a person may use the exemption in a season or in a particular area. The language of the proposed rule describes "total fumigated acreage . . . no greater than the threshold," so there is at least a plausible argument that the rule already limits its use to one fumigation, but the matter is not entirely clear, and this too should be clarified.

In summary, while OAL understands the factors that influenced the Department not to fill the details of the emission allowance threshold, it is not an acceptable alternative to leave the regulation vague. In order to retain the concept, the Director may clarify the regulation by making it specific, or by establishing criteria within the regulation for making decisions about the threshold on a case by case basis later on. The Department has 120 days from its receipt of this Decision to make clarifying changes as needed, supplement the rulemaking file, and resubmit the proposal to OAL for review.

CONCLUSION

OAL disapproved proposed subdivision (f) of section 6452.3, because it does not meet the clarity standard of Government Code section 11349.1. The disapproval of subdivision (f) also required: (1) the deletion of a coordinating phrase at the beginning of subdivision (a) of section 6452.3, prior to approval of the rest of the regulation; (2) the deletion of proposed subdivision (a)(4) of section 6452.4, indicating that the threshold would be included in the Annual VOC Emissions Inventory Report; and (3) the renumbering of 6452.4(a)(5), to (a)(4).

Date: February 1, 2008



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