



March 28, 2013

Via Electronic Mail & Federal Express

Ann M. Prichard, Chief
Pesticide Registration Branch
Department of Pesticide Regulation
1001 I Street
Sacramento, CA 95814
Aprichard@cdpr.ca.gov

Re: Notice of Proposed Decisions to Register Pesticide Products and Public Reports (Vol. 2013-9, Mar. 1, 2013)

Dear Ms. Prichard:

We are writing on behalf of Pesticide Action Network North America, the American Bird Conservancy, VernalPools.org, and the Center for Food Safety regarding the proposed decision of the California Department of Pesticide Regulation (“DPR”) to approve the neonicotinoid insecticide Belay® for use on rice. As set forth below, DPR’s proposal would have a significant adverse impact on honeybees and other pollinators, water quality, aquatic invertebrates, and waterfowl. DPR’s proposal is also contrary to California law in numerous respects. We urge DPR to withdraw its proposed decision and to decline to register Belay for use on rice.

I. Background

Belay is the brand name for an insecticide marketed by Valent U.S.A Corporation that contains clothianidin as its active ingredient. Clothianidin belongs to a class of chemicals known as neonicotinoids, which are characterized by their persistence in water and high toxicity to invertebrates and birds. Clothianidin is systemic, meaning that it is absorbed by the plant’s vascular system and expressed through the plant’s tissues, including flowers, pollen and nectar.

DPR first registered Belay on January 20, 2009 to control aphids, weevils, and other pests on a number of crops – but not including rice – by means of ground and aerial spraying and chemigation. The following month, DPR began reevaluating its registration of neonicotinoid products, including Belay, based on mounting evidence that use of neonicotinoids is having a serious adverse impacts to honeybees and other pollinators. (See Cal. Notice 2009-02.)

On March 1, 2013, with the neonicotinoid reevaluation process still pending, DPR proposed to amend Belay’s registration to allow use on rice. (Vol. 2013-9.) The proposed new use is significant, because California is the second-largest rice producing state in nation, with over 500,000 acres planted each year primarily in the Sacramento Valley. California’s rice fields

alternative), there will be no significant adverse environmental impact anticipated from the lack of additional pest control options.” (*Ibid.*)

II. Regulatory Framework

A. Registration

Before a pesticide may be registered for use on a new crop in California, it must undergo a “thorough and timely evaluation” by DPR. (See DPR Pesticide Registration Desk Manual [May 2010] at 418; Food & Agr. Code § 12824.) At the conclusion of its evaluation, DPR is authorized to refuse to register a pesticide:

- (a) That has demonstrated serious uncontrollable adverse effects either within or outside the agricultural environment.
- (b) The use of which is of less public value or greater detriment to the environment than the benefit received by its use.
- (c) For which there is a reasonable, effective, and practicable alternate material or procedure that is demonstrably less destructive to the environment.

(Food & Agr. Code § 12825.)

“During the review and evaluation of proposed pesticide labeling and data to support registration,” DPR must “give special attention” to a number of factors including:

- “Potential for environmental damage, including interference with the attainment of applicable environmental standards (e.g., air quality standards and water quality objectives);”
- “Toxicity to aquatic biota or wildlife;” and
- “The availability of feasible alternatives.”

(Cal. Code Regs., tit. 3, § 6158.) “If any of these factors are anticipated to result in significant adverse impacts which cannot be avoided or adequately mitigated, registration will not be granted unless [DPR] makes a written finding that the anticipated benefits of registration clearly outweigh the risks.” (*Ibid.*)

B. The California Environmental Quality Act

DPR’s pesticide registration process operates as a “certified regulatory program” for purposes of the California Environmental Quality Act (“CEQA”). (Cal. Code Regs., tit. 14, § 15251, subd. (i)(1).) CEQA therefore provides that the written documentation prepared by DPR in connection with a decision to register a pesticide may be submitted in lieu of the environmental impact report (“EIR”) or negative declaration that CEQA would normally require. (Pub. Res. Code § 21080.5, subd. (a).) However, DPR’s written documentation must include, among other things, “a description of the proposed activity with alternatives to the activity, and mitigation measures to minimize any significant adverse effect on the environment of the activity.” (*Ibid.*, § 21080.5, subd. (d)(3)(A).)

The regulations that govern DPR's certified regulatory program under CEQA direct DPR to prepare and make available for public comment a "public report" for any proposed registration. (Cal. Code Regs., tit. 3, § 6253.) The report must include "a description of the proposed action, a statement of any significant adverse environmental effect that can reasonably be expected to occur, directly or indirectly, from implementing the proposal, and a statement of any reasonable mitigation measures that are available to minimize significant adverse environmental impact." (*Ibid.*, § 6254.) The report must "also contain a statement and discussion of reasonable alternatives which would reduce any significant environmental impact." (*Ibid.*, § 6254, subd. (a).)

C. Reevaluation

DPR must provide "for the continuous evaluation of all pesticides actually registered." (Food & Agr. Code § 12824.) To this end, DPR must "investigate all reported episodes and information . . . that indicate a pesticide may have caused, or is likely to cause, a significant adverse impact, or that indicate there is an alternative that may significantly reduce an adverse environmental impact." (Cal. Code Regs., tit. 3, § 6220.) "If [DPR] finds from the investigation that a significant adverse impact has occurred or is likely to occur or that such an alternative is available," the pesticide must be "reevaluated." (*Ibid.*)

Once DPR places a pesticide into reevaluation, the registrant must submit "all data required for registration of a new pesticide by the U.S. EPA and by [DPR] which is relevant to the focus of the reevaluation and has not previously been submitted to the department." (*Ibid.*, § 6222, subd. (a).) DPR may "allow a reasonable time for the development and submission of such data, not to exceed a period of two years." (*Ibid.*) "Notwithstanding the lack of such data, [DPR] shall act expeditiously to protect against risks to human health and the environment." (*Ibid.*) At the conclusion of reevaluation, DPR must "determine if the pesticide [under reevaluation] should be classified as a restricted material. . . and if additional restrictions on use are necessary, or if action [to suspend or cancel registration] should be taken." (*Ibid.*, § 6224.)

II. DPR's Proposed Decision with Respect to Belay Is Contrary to Law.

A. DPR's Proposal Will Have Significant Adverse Impacts on the Environment.

The public report that accompanies DPR's proposed decision to register Belay for use on rice indicates that DPR completed an environmental "checklist" and on that basis concluded that the proposal will not have a significant impact on the environment. (Vol. 2013-9, at 2.) DPR's public report is therefore the "functional equivalent" of a negative declaration for purposes of CEQA. (See Cal. Code Reg., tit. 14, § 15252, subd. (b).)

As set forth below, there is abundant scientific evidence that registering Belay for foliar applications on rice will have significant adverse impacts on the environment. Accordingly, DPR's conclusion to the contrary and its decision to rely the functional equivalent of a negative

declaration was an abuse of discretion. (See, e.g., *City of Arcadia v. State Water Res. Ctrl. Bd.* (2006) 135 Cal. App. 4th 1392, 1426 [holding that the agency's reliance on the functional equivalent of a negative declaration was inappropriate where substantial evidence supported a "fair argument" that the proposal "may" have a significant impact]; *Friends of the Old Trees v. Department of Forestry & Fire Prot.* (1997) 52 Cal. App. 4th 1383, 1397 [same].)

1. Impacts to Pollinators

The evidence is overwhelming that neonicotinoids, including clothianidin, are acutely and chronically toxic to honeybees and other pollinators. (See generally Pilatic 2012; Kindemba 2009; U.S. EPA 2010.)¹ There is increasing evidence that neonicotinoids are contributing to the honeybee "colony collapse disorder" crisis, as well as to marked global declines in native pollinators. (Whitehorn et al. 2012; Lu 2012, Henry et al. 2012; Alaux et al. 2010.) The loss of bees is alarming for many reasons, not the least of which is that bee pollination of agricultural crops is estimated to account for about one-third of the U.S. diet. (Johnson 2010.)

Unlike many crops, rice is wind-pollinated and does not rely on bees. However, scientists have found that bees often collect and consume pollen from rice and other wind-pollinated crops. (Gealy et al. 2003; Krupke et al. 2012; Lin et al. 1993; Schmidt and Bothma 2005; Suwannapong et al. 2012; Terrell and Batra 1984.) Thus, foliar applications of clothianidin to rice are likely to have a significant direct adverse impact on honeybees and other pollinators.

Moreover, numerous crops that depend upon bees for pollination are grown in close proximity to rice fields in the Sacramento Valley. For example, approximately 20% of California's almonds are grown in the Sacramento Valley, and California accounts for over two-thirds of the world's almonds. (Connell 1999.) California also produces 92% of the U.S. plum crop, much of which is grown in the Sacramento Valley. Neither almonds nor plums will produce fruit unless pollinated by bees. Aerial and ground applications of Belay to rice in the Sacramento Valley will result in significant drift of the pesticide onto nearby almond and plum orchards and pollinator habitat and will adversely impact pollinators. (Cal. DPR 2010; Salyani and Cromwell 1993.)

The Sacramento Valley is also home to a number of honey bee queen-rearing operations that provide queens for beekeepers all over California and the United States. The majority of the California Bee Breeders Association members raise their queens in the Sacramento Valley.² Aerial sprays of clothianidin have the potential to damage these queens, which form the basis of an important beekeeping industry in California and the United States.

¹ A CDROM that contains electronic copies of all studies and reports referenced accompanies this letter.

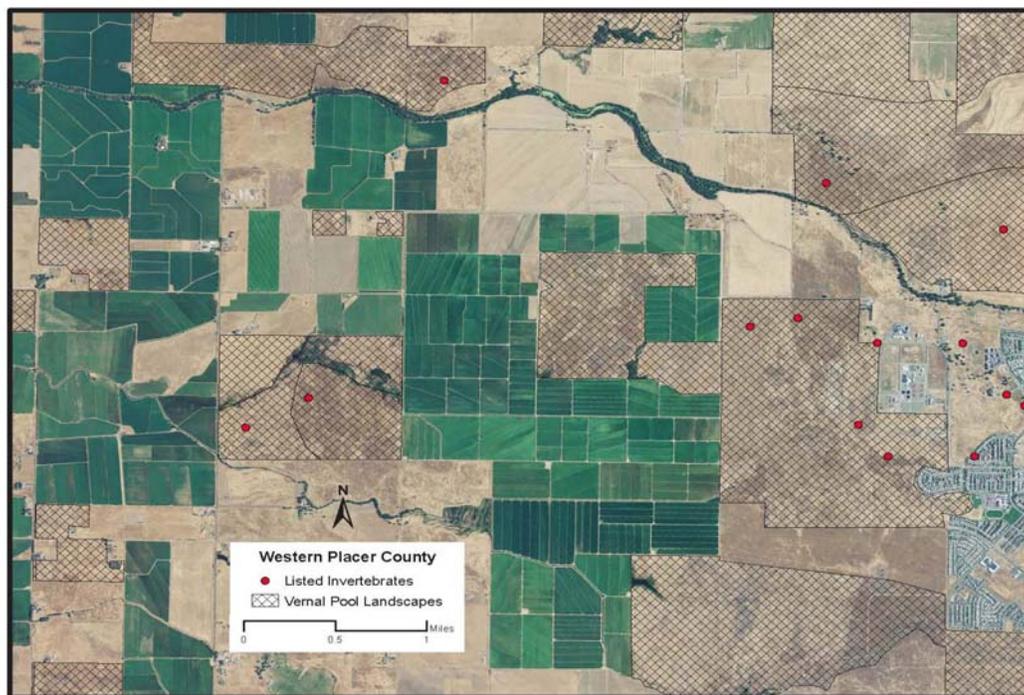
² California Bee Breeders Association, Inc. <http://www.cvbeekeepers.org/resources/cbba>.

2. Impacts to Aquatic Invertebrates

Invertebrates such as insects, shrimp and other crustaceans are the foundation upon which aquatic ecosystems are built. Because clothianidin is water soluble, extremely persistent, and highly toxic to aquatic invertebrates, the pesticide has great potential to result in significant adverse impacts to the aquatic environment. (Starner and Goh 2012; Roessink et al. in press; U.S. EPA 2010; Mineau and Palmer 2013.) Foliar applications of clothianidin to rice are especially likely to impact aquatic invertebrates both in the rice fields and in the downstream waterways that receive water discharged from rice fields, because rice is grown in flooded paddies.

Use of clothianidin on rice in the Sacramento Valley will also have an adverse impact on several species of imperiled and federally protected aquatic invertebrates that inhabit vernal pool ecosystems in the Sacramento Valley. (Keeler-Wolf et al. 1998; Witham et al. 2013.) Figure 2 below is an aerial photograph of a portion of the Sacramento Valley in Placer County, which shows green rice fields in close proximity to vernal pools and federally protected invertebrates.

Figure 2.



Invertebrates: California Natural Diversity Database, 2012.

Vernal Pools: Witham et al., 2013.

Aerial: National Agricultural Imaging Program, 2012.

3. Impacts to Waterfowl

California's rice fields provide sustenance for approximately half of the 5 million ducks and other waterfowl using the Pacific Flyway, a critical migration route. By some estimations,

60% all the food consumed by wintering waterfowl in the Sacramento Valley comes from rice fields. (Cal. Rice Comm'n. 2012.)

Use of clothianidin on rice is likely to have a significant adverse impact on ducks and other waterfowl that visit rice fields. (Mineau and Palmer 2013.) Because aquatic invertebrates make up a substantial portion of the food consumed by waterfowl in rice fields, particularly during the winter, the impact of clothianidin on aquatic invertebrates will have a corresponding adverse impact on waterfowl. (Miller 1987, Mineau and Palmer 2013.)

B. DPR Has Failed to Analyze Alternatives.

CEQA requires that the written documentation in a certified regulatory program include “a description of the proposed activity *with alternatives to the activity.*” (Pub. Res. Code § 21080.5, subd. (d)(3)(A).) Consistent with CEQA, the California Supreme Court has ruled that “the public agency bears the burden of affirmatively demonstrating that, *notwithstanding a project’s impact on the environment*, the agency’s approval of the proposed project followed meaningful consideration of alternatives.” (*Mountain Lion Found. v. Fish & Game Comm’n* (1997) 16 Cal. 4th 105, 134, emphasis added.)

Moreover, DPR’s own regulations direct the agency to give “special attention” to the “availability of feasible alternatives” during the registration process. (Cal. Code Regs., tit. 3, 6158.) DPR defines the term “feasible alternative” to mean “other chemical or non-chemical procedures which can reasonably accomplish the same pest control function with comparable effectiveness and reliability, taking into account economic, environmental, social, and technological factors and timeliness of control. (*Ibid.*, § 6000.)

Contrary to CEQA and DPR’s own regulations, the public report that accompanies DPR’s proposed decision with respect to Belay does not identify and evaluate alternatives to the proposal. Instead, the public report concludes that no alternatives analysis is necessary based on legal boilerplate developed by DPR in the wake of recent litigation involving methyl iodide, *Pesticide Action Network N. America v. Dep’t of Pesticide Reg.*, No. RG10553804 (Alameda Co. Superior Ct.)

By letter dated February 13, 2013, we explained that DPR’s new boilerplate regarding alternatives mischaracterizes the law and fails to comply with CEQA. Our February 13, 2013 letter is attached hereto, and we incorporate those comments by reference. Despite the methyl iodide litigation, DPR has persisted in an illegal pattern and practice of failing to conduct a meaningful evaluation of alternatives when registering pesticides, in clear violation of CEQA and the agency’s own regulations.³

³ Transcripts of the pertinent hearings in the methyl iodide litigation are included on the CDROM that accompanies these comments.

C. DPR's Reevaluation Is Contrary to Law.

1. DPR Has Failed to Conduct Its Reevaluation in a Timely Manner.

As discussed above, once DPR places a pesticide into reevaluation, it may “allow a reasonable time” for the development and submission of data relevant to that reevaluation, “*not to exceed a period of two years.*” (Cal. Code Regs., tit. 3, § 6222, subd. (a), emphasis added.) Here, DPR placed neonicotinoids into reevaluation in February 2009 – over four years ago. And yet neonicotinoids remain under reevaluation today. DPR’s failure to conduct its reevaluation in a timely manner is contrary to law.

2. DPR Has Failed to Act Expeditiously to Protect Human Health and the Environment.

While a pesticide is under reevaluation, notwithstanding the available data, DPR must “act expeditiously to protect against risks to human health and the environment.” (Cal. Code Regs., tit. 3, § 6222.) There is overwhelming evidence – including but not limited to the evidence cited earlier in these comments – that neonicotinoids are having a substantial and imminent adverse impact on pollinators, birds, and aquatic ecosystems. DPR’s failure to act expeditiously to address these impacts pending reevaluation is contrary to law.

3. DPR Has Engaged in a Pattern and Practice of Failing to Conduct Pesticide Reevaluations in a Timely Manner.

DPR has engaged in an illegal pattern and practice of failing to conduct its reevaluations in a timely manner. DPR’s most recent Semiannual Report Summarizing the Reevaluation Status of Pesticide Products During the Period January 1, 2012 Through June 30, 2012 (Cal. Notice 2012-09) indicates that numerous pesticides have been under reevaluation for many years, with DPR failing to act expeditiously to prevent well-documented risks to human health and the environment. Table 1 below provides a summary of several pesticides currently under reevaluation.

Table 1.

Pesticide	Reevaluation Initiated	Reasons for Reevaluation
Cyfluthrin	1998	Adverse Health Effects
Brodifacoum	1999	Impacts to Wildlife
Chloropicrin	2001	Adverse Health Effects
Diazinon	2003	Water Quality Impacts
Chlorpyrifos	2004	Water Quality Impacts
Neonicotinoids	2009	Impacts to Pollinators

IV. Conclusion

For the foregoing reasons, we urge DPR to withdraw its proposed decision and decline to register Belay for use on rice. In addition, DPR must act expeditiously to protect pollinators, birds, and aquatic invertebrates from neonicotinoid pesticides. Please do not hesitate to contact us should you wish to discuss any of the foregoing.

Sincerely,



Gregory C. Loarie
Earthjustice

*Counsel for Pesticide Action Network North America
American Bird Conservancy, VernalPools.org,
and Center for Food Safety*

Encl. (CDROM with copies of all references cited)

cc: (via e-mail) Polly Frenkel, Chief Counsel
Department of Pesticide Regulation

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ATTACHMENT



February 13, 2013

Via Electronic & U.S. Mail

Ann M. Prichard, Chief
Pesticide Registration Branch
Department of Pesticide Regulation
P.O. Box 4015
Sacramento, CA 95812-4015

Re: Notice of Proposed Decision to Register Pesticide Products [Vol. 2013-4, Jan. 25, 2013] – Violations of the California Environmental Quality Act

Dear Ms. Prichard:

In the wake of the litigation that concluded last year involving the registration of methyl iodide-based pesticides, *Pesticide Action Network N. America v. Dep't of Pesticide Reg.*, No. RG10553804 (Alameda Co. Superior Ct.), the California Department of Pesticide Regulation (“DPR”) has begun employing new boilerplate language regarding its authority and responsibility to analyze alternatives when registering pesticides. (See Notice of Proposed Decision to Register Pesticide Products [Vol. 2013-4, Jan. 25, 2013] at 5.) We are writing on behalf of Pesticide Action Network North America, Californians for Pesticide Reform, the American Bird Conservancy, and the Center for Biological Diversity to advise you that DPR’s new boilerplate continues to mischaracterize DPR’s duty to analyze alternatives prior to registration and fails to satisfy DPR’s legal obligations under the California Environmental Quality Act (“CEQA”) and implementing regulations. We urge DPR to bring its pesticide registration process into compliance with law to avert further litigation over this issue.

I. Legal Background

A. CEQA

DPR’s pesticide registration process operates as a “certified regulatory program” for purposes of CEQA. (Cal. Code Regs., tit. 14, § 15251, subd. (i)(1).) CEQA therefore provides that the written documentation prepared by DPR in connection with a decision to register a pesticide may be submitted in lieu of the environmental impact report (“EIR”) or negative declaration that CEQA would normally require. (Pub. Res. Code § 21080.5, subd. a.) However, DPR’s written documentation must include, among other things, “a description of the proposed activity *with alternatives to the activity*, and mitigation measures to minimize any significant adverse effect on the environment of the activity.” (*Ibid.*, § 21080.5, subd. (d)(3)(A), emphasis added.)

B. DPR Regulations

“[I]n reaching a decision to register or not register the pesticide” regulations promulgated by DPR direct the agency to give “special attention” to a number of factors, including “the availability of feasible alternatives.” (Cal. Code Regs., tit. 3, § 6158, subd. (g).) DPR’s regulations also direct the agency to prepare a “public report” for any proposed decision to register a pesticide that includes, among other things, “a statement and discussion of reasonable alternatives which would reduce any significant environmental impact.” (*Ibid.*, § 6254.) DPR is precluded from registering a pesticide “if there is a feasible alternative or feasible mitigation measure available which would substantially lessen any significant adverse impact which [registration] may reasonably be expected to have on the environment.” (*Ibid.*, § 6254, subd. (a).)

II. DPR’s New Boilerplate Regarding Alternatives

In the wake of the methyl iodide litigation, DPR has begun employing the following new boilerplate regarding alternatives in its proposed registration decisions:

DPR evaluated these proposed products for their potential to create adverse environmental effects to human health, water, air, and non-target species (checklist). DPR’s review of this project, the registration of the above-identified products, has determined that use of each of these products in a manner consistent with its U. S. EPA-approved labeling will have no direct or indirect significant adverse environmental impact, and therefore no alternatives or mitigation measures are proposed to avoid or reduce any significant effects on the environment. Cal. Code of Regs., tit. 14, § 15252(a)(2)(B).

If DPR determines that the use of any product proposed for registration in a manner consistent with its U.S. EPA-approved label is anticipated to have a significant adverse environmental impact, the only alternative or mitigation to the project of registering the product under the label presented is to deny registration. However, even if an adverse impact is identified, the registration project can be approved if the Director makes a written determination that the benefit of registering the product in providing an additional pest control option outweighs the risk of a significant adverse environmental impact from its use (overriding considerations determination). Cal. Code of Regs., tit. 3, § 6158.

In an overriding considerations determination, a discussion of the lack of feasible pest control options, including product alternatives, for one or more of the pest problems targeted by a particular product, may be appropriate to support registration. However, that determination is not being made here as no significant adverse environmental impacts have been identified. Outside an overriding consideration determination, a discussion of product alternatives is irrelevant to a registration project.

If the proposed registration of any of these products is denied (no project alternative), there will be no significant adverse environmental impact anticipated from the lack of additional pest control options. The benefit of registering these products is that they provide additional pest control options for each specific proposed use, allowing the selection of the optimal pest tool for each unique situation.

(See, e.g., Notice of Proposed and Final Decisions [Vol. 2013-4, Jan. 25, 2013] at 5.)

III. DPR's Violations of Law

DPR's new boilerplate regarding alternatives mischaracterizes the law in numerous respects and does not satisfy DPR's obligations under CEQA and applicable regulations.

First, DPR claims that an analysis of alternatives is unnecessary based upon its determination that "use of each of these products in a manner consistent with its U. S. EPA-approved labeling will have no direct or indirect significant adverse environmental impact." However, the California Supreme Court has ruled that "the public agency bears the burden of affirmatively demonstrating that, *notwithstanding a project's impact on the environment*, the agency's approval of the proposed project followed meaningful consideration of alternatives and mitigation measures." (*Mountain Lion Found. v. Fish & Game Comm'n* (1997) 16 Cal. 4th 105, 134, emphasis added; see also *Friends of the Old Trees v. Dep't of Forestry & Fire Prot.* (1997) 52 Cal. App. 4th 1383, 1404 [holding that the functional equivalent of a negative declaration must analyze alternatives to the proposed action].)

Second, DPR claims that if it "determines that the use of any product proposed for registration in a manner consistent with its U.S. EPA-approved label is anticipated to have a significant adverse environmental impact, the only alternative or mitigation to the project of registering the product under the label presented is to deny registration." Contrary to what DPR claims, the Food and Agricultural Code specifically authorizes DPR to place "[a]ppropriate restrictions" upon the use of a pesticide proposed for registration "including, but not limited to, limitations on quantity, area, and manner of application." (Food & Agr. Code § 12824.) DPR has in the past proposed to register pesticides subject to a "California only" label that includes additional mitigation measures beyond those imposed by U.S. EPA. (See, e.g., Notice of Proposed Decisions to Register Pesticide Products Containing Methyl Iodide [Vol. 2010-19, Apr. 30, 2010] at 5.)

Third, DPR claims that "[o]utside an overriding consideration determination, a discussion of product alternatives is irrelevant to a registration project." This is simply incorrect, and the trial court rejected precisely this argument in the methyl iodide litigation.¹ Consistent with CEQA, Pub. Res. Code § 21080.5, subd. (d)(3)(A), DPR's own implementing regulations

¹ Although the methyl iodide litigation was dismissed as moot prior to a written decision or judgment on the merits, the court stated orally at several junctures "that the alternatives and the no-project alternative were not studied and that that violates both CEQA as well as [DPR]'s own regulations." (Transcript [Mar. 21, 2012], at 4 lns 15-17.)

specifically require DPR to include “a statement and discussion of reasonable alternatives” in the public report that accompanies a proposed registration decision. (Cal. Code Regs., tit. 3, § 6254.) And consistent with Food and Agricultural Code section 12825, subd. (c), DPR must give “special attention” to “the availability of feasible alternatives” during the registration process. (Cal. Code Regs., tit. 3, § 6158, subd. (g).)

Finally, notwithstanding its disavowal of any duty to analyze alternatives, DPR claims that “[i]f the proposed registration . . . is denied (no project alternative), there will be no significant adverse environmental impact anticipated from the lack of additional pest control options.” This single sentence is in no way sufficient to discharge DPR’s duties under CEQA. It is well established that a certified regulatory program is subject to the same “substantive standards” as CEQA normally requires. (See *City of Arcadia v. State Water Res. Control Bd.* (2004) 135 Cal. App. 4th 1392, 1422; see also Cal. Code Regs., tit. 3, § 200 [providing that the CEQA Guidelines are “incorporated by reference” into DPR’s implementing regulations].) Thus, DPR’s public report must analyze a “range of reasonable alternatives” – including the “no project” alternative – in a manner that provides “sufficient information about each alternative to allow meaningful evaluation, analysis, and comparison with the proposed project.” (Cal. Code Regs., tit. 14, § 15126.6.)

IV. Conclusion

DPR’s new boilerplate regarding its duty to analyze alternatives during the pesticide registration process mischaracterizes the law and insufficient to discharge the agency’s legal obligations. We urge DPR to bring its pesticide registration process into compliance with CEQA and applicable regulations immediately. Please do not hesitate to contact me should you wish to discuss any of the foregoing.

Sincerely,



Gregory C. Loarie
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*Counsel for Pesticide Action Network North America, Californians for Pesticide Reform,
Center for Biological Diversity, and American Bird Conservancy*

cc: (via e-mail only) Polly Frenkel, Chief Counsel
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