

FINAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Adopt Section 6621
Pertaining to Public Health Exemption

UPDATE OF THE INITIAL STATEMENT OF REASONS

The proposed regulatory action was noticed in the *California Regulatory Notice Register* on June 7, 2019. During the public comment period, the Department of Pesticide Regulation (DPR) received comments on the proposed text. The comments are discussed under the heading “SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD” of this Final Statement of Reasons.

No changes were made to the proposed regulations following the public comment period. DPR updated the number of confirmed or probable cases of Hepatitis A reported in San Diego County, number of cases hospitalized, and number of confirmed deaths contained in the Initial Statement of Reasons. These numbers were updated to reflect the numbers in the document relied upon, *County of San Diego Declaration of Local Health Emergency*. The declaration stated that there were more than 378 confirmed or probable cases of Hepatitis A reported in San Diego County, with approximately 70 percent of those cases (approximately 265) having been hospitalized and 15 confirmed deaths.

DPR has adopted Title 3, California Code of Regulations (3 CCR) section 6621. In summary, when a health emergency is declared by the Director of the Department of Public Health or a local health emergency is declared by a local health officer, the proposed action exempts a public agency or its contractor, from the requirements of getting consent from and providing notice to, a property owner (or operator) before directly discharging a pesticide on the property owner’s (or operator’s) property.

PUBLIC HEARING

No public hearing was scheduled or held.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING THE COMMENT PERIOD

- *Nan Wishner, California Environmental Health Initiative; Caroline Cox, Center for Environmental Health; Pesticide Action Network*

Comment no. 1: There is a lack of evidence that requiring notice to property owners has ever in the past created an obstacle to carrying out necessary activities in a timely manner to respond to a public health emergency.

Response: The County of San Diego Declaration of Local Health Emergency on September 1, 2017 stated that, in San Diego alone, there had been a reported 378 confirmed or probable cases of infection with the hepatitis A virus (HAV), with about 70 percent of those cases hospitalized and 15 deaths. HAV is highly contagious and transmitted via the fecal-oral route through person-to-person contact or through consumption of contaminated food or water. The 2017 outbreak largely affected persons experiencing homelessness and illicit drug users, many of whom had encampments on private properties as well as public lands. The encampments became contaminated and facilitated the spread of infection. In these situations, public health agencies recommend clean up and disinfection activities of contaminated areas. Health and Safety Code section 101080 provides for the declaration of a health emergency or local health emergency “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” Thus, with an outbreak such as this, the length of the delay does not matter. Rather, any delay, including providing notice in accordance with 3 CCR section 6618, in implementing time-sensitive mitigation and clean-up measures is a potential impact to public health and safety by posing a risk of further spread of the contagion.

DPR also consulted with the San Diego County Agricultural Commissioner’s office who was deeply involved in the response to the HAV outbreak. Based on DPR’s conversations with the San Diego County Agricultural Commissioner’s office, DPR learned that during the 2017 outbreak, necessary clean-up activities of homeless encampments on San Diego County property, mostly in rural areas like river beds, were delayed several days (up to a week in some cases). This was done in part so the county could ensure that the residents of the homeless encampments had adequate notice of the pesticide applications, which were going to occur to their personal property if they remained. Similar delays were noted for applications in city jurisdictions, which were mostly in urban areas. Such delays pose a serious threat to human health and safety by increasing the number of potential people exposed, which could lead to a corresponding increase in hospitalizations and deaths. The exemptions provided by this rulemaking would allow public health agencies and their contractors to focus on executing their mandate to protect public health and safety. The San Diego County Agricultural Commissioner’s office has also shown support of this regulatory action.

Comment no. 2: There is a failure to analyze or consider the potential public health risks of exposing property owners and employees who work on treated property to the pesticides or disinfectants that would be used without notice or consent.

Response: Pesticide products are registered for use in California after they have been evaluated by both the U.S. Environmental Protection Agency and DPR for potential environmental and human health effects. After registration, DPR is charged to continuously evaluate all pesticides actively registered and remove from use any pesticides that meet the criteria listed in Food and Agricultural Code (FAC) section 12825, including any pesticide that, when used properly, is detrimental to public health and safety. Beyond DPR’s mandates, the public agency and its contractor using pesticides under this exemption must still follow other requirements, including, but not limited to: product labeling (FAC section 12973), applicator and business licensing (FAC Division 6 and 3 CCR sections 6500, *et al.*), General Standards of Care (3 CCR section 6600), Protection of Persons, Animals and Property (3 CCR section 6614), and Handler Training (3 CCR section 6724).

Comment no. 3: The Initial Statement of Reasons does not provide any examples of actual public health emergencies in which the requirement to give notice before applying a pesticide or disinfectant prevented a timely response to the emergency. The fact that something “may” happen is not sufficient justification for overriding the public’s right to be informed and thus able to take appropriate actions to protect vulnerable individuals from potentially dangerous exposures to pesticides.

Response: As mentioned in response to comment no. 1 above, necessary treatment activities were delayed for up to a week during the 2017 HAV outbreak in San Diego. This rulemaking is not based purely on speculation, but based on actual events and feedback received from other agencies, such as the San Diego County Agricultural Commissioner’s office, responding to the 2017 outbreak. In addition, during a declared local health emergency pursuant to Health and Safety Code section 101080, the county Board of Supervisors or city council must review the need for the local health emergency within seven days and every 30 days thereafter. This review process provides a source of frequently updated public information about the need for the local health emergency.

Comment no. 4: No evidence is given of any actual past or current situation in which disinfection of a contaminated site has been delayed by the requirement to give notice to property owners or that a “serious threat to human health and safety” has been created by the need to give notice.

Response: The Director of the Department of Public Health or a local health officer may declare a health emergency or local health emergency for the reasons listed in section 101080 of the Health and Safety Code. For the purposes of the exemption covered by this rulemaking, these would be emergencies where “there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” as was shown during the 2017 HAV outbreak. Declaration of a health emergency or local health emergency by relevant authorities is evidence there is a “serious threat to human health and safety” and a corresponding need for swift response by relevant authorities to protect human health and safety is needed. Also, see response to comment no. 1 above.

Comment no. 5: In the County of San Diego’s May 2018 “Hepatitis A Outbreak After Action Report,” there is no evidence that the requirement to give notice of disinfection activities delayed or otherwise obstructed a timely response to the outbreak. The first disinfection activities did not take place until five months later and there does not seem to be a valid reason that five months would be insufficient time to provide property owners with notice that a disinfection activity could or would take place on their property.

Response: See response to comment no. 1. The intent of the exemption provided by this regulation is to allow for expedited disinfection in response to a declared health emergency or local health emergency. Health and Safety Code section 101080 provides for the declaration of a health emergency or local health emergency “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” The San Diego County Health Officer declared a local health emergency on September 1, 2017.

According to the document referenced in this comment, page 29 states that the declaration “supported the City of San Diego and other jurisdictions in their efforts to sanitize streets and sidewalks and to clean homeless encampments.” The report on page 48 indicated that clean-up and sanitization activities began in the unincorporated areas of the county in October 2017, only weeks, not months, after the County Public Health Officer declared an emergency. Additionally, as noted in response to comment no. 1, when certain sites, such as homeless encampments, were selected for clean-up, there were delays of up to a week to ensure the residents had sufficient notice of the pesticide application. As noted, any delay can pose a serious threat to human health and safety by increasing the risk for exposure and the number of potential people exposed, which could lead to a corresponding increase in hospitalizations and deaths. The County’s report on page 60, indicated support of the concept behind this rulemaking to streamline public health disinfection activities during declared emergencies.

Comment no. 6: According to the County of San Diego’s report, within the five-month period, the county reached out to tens of thousands of restaurants and other food-preparation establishments regarding sanitation procedures. It is unclear why providing notice of treatments to property owners would be more difficult or less feasible than such a broad outreach to thousands of food-preparation establishments.

Response: See response to comment no. 1 above. As noted on page 17 of the report referenced in this comment, there were more than 15,800 facilities permitted with the San Diego County Department of Environmental Health and County health inspectors conducted more than 13,250 food inspections during the outbreak. The process of reaching out to restaurants and businesses permitted with the county with known contact information and business hours is substantially different than reaching out to other property operators who may be absent or otherwise unaware they have situations on their property, such as a homeless encampment, requiring immediate attention by public health officials to protect public safety. Health and Safety Code section 101080 provides for the declaration of a health emergency or local health emergency “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” The immediacy of response to a declared health emergency or local health emergency may make a public agency’s, or its contractor’s, outreach to a property owner/operator prior to applying a pesticide, and thus compliance with current regulations, infeasible.

Comment no. 7: The County of San Diego’s report does not offer any evidence to justify overriding the public’s right to know about imminent application of potentially hazardous chemicals to public and private property.

Response: Health and Safety Code section 101080 provides for the declaration of a health emergency or local health emergency “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” When a health emergency or local health emergency is declared, there is an imminent and proximate threat to public health from the disease. As mentioned in the response to comment no. 1, there were delays of up to a week to ensure that adequate notice was provided. Due to these delays and the corresponding increase in risk of disease transmission, DPR believes there is sufficient justification to provide these limited exemptions during a declared health emergency to protect

public health and to allow responders to focus on their mandate to protect public health and safety. Please note that during a declared local health emergency pursuant to Health and Safety Code section 101080, the county Board of Supervisors or city council must review the need for the local health emergency within seven days and every 30 days thereafter. This review process provides a source of frequently updated public information about the need for the local health emergency. Also, see responses to comment nos. 2 and 5.

Comment no. 8: The fact that a pesticide is approved for use in California does not make that pesticide safe for every individual to be exposed to it even when the pesticide is used in accordance with the label.

Response: This comment is outside of the scope of this rulemaking.

Comment no. 9: We recognize that the language of Title 3, California Code of Regulations section 6620 is not part of the proposed new code section 6621, but believe the language reveals serious flaws in the fundamental assumptions and attitudes about protection of public health that underlie the concept of exemptions for vector control activities; exemptions formatted on the basis of these assumptions and attitudes should not be expanded as is proposed in the rulemaking 19-001.

Response: This comment is outside the scope of this rulemaking.

Comment no. 10: We believe a very strong justification is needed whenever government proposes abrogating or overriding the rights of individuals for what is generally termed the common good. Inconvenience, time and cost to agency staff, and unsupported assumptions about what “may” happen are not adequate reasons to fail to notify an owner before a pesticide is applied to his or her property, thereby enabling the property owner to take action to protect him/herself and others who access the property.

Response: See responses to comment nos. 1 and 2 above. In addition, during a declared local health emergency pursuant to Health and Safety Code section 101080, the county Board of Supervisors or city council must review the need for the local health emergency within seven days and every 30 days thereafter. This review process provides a source of frequently updated public information about the need for the local health emergency.

Comment no. 11: We question the validity of the existing 3 CCR section 6620. Section 6620’s exemption would seem to have even less potential justification than providing exemptions in an emergency.

Response: This comment is outside the scope of this rulemaking.

Comment no. 12: Sufficient evidence has not been provided to justify taking away the due process and property rights of parents, employers, and property owners to be informed before a potential exposure to a potentially harmful chemical on their own property.

Response: See response to comment no. 7. DPR believes that adequate information about the potential for applications needed to protect public health and safety will be provided through existing channels, such as the city or county government website and other readily available means of communication. No due process or property rights are infringed by this proposed exemption. As covered by response to comment no. 2, applications still must abide by many California laws and regulations, such as 3 CCR section 6614(b) which prohibits applications which may contaminate people not involved in the application, cause damage, or contaminate public or private property. Additionally, this proposed exemption is not intended to affect liability for any damage caused as a result of an application covered by this exemption.

Comment no. 13: Although we find it potentially persuasive that in rare, limited, extreme emergency situations, the need to locate a property owner to obtain written or verbal consent could in fact delay a potentially life-saving activity, we do not believe that this justifies an across-the-board exemption. Public health officials should not be entirely relieved of the responsibility to at least attempt to obtain consent from owners before discharging pesticides on the owners' property.

Response: See responses to comment nos. 6, 7, and 12. DPR disagrees with the assertion that this is an “across-the-board exemption” and believes that the exemption is targeted and limited in scope, time, and area affected. In practical terms, consent and notice generally work together as consent is obtained from and notice is provided to the property operator at the same time. Under the current regulations, for applications other than Vector Control Agency applications (3 CCR section 6620), the applicator must obtain consent from the owner/operator under section 6616 and then provide specific notice required under section 6618(b). An emergency may be declared whenever there is an imminent and proximate threat of the introduction of any contagious infectious or communicable disease. (Health & Safety Code s. 101080.) Under such circumstances, pesticides may need to be applied in a time sensitive manner as part of clean-up or mitigation measures that address the emergency condition. The potential delay involved with obtaining consent from the property owner poses a serious threat to human health and safety by increasing the number of potential people exposed, which could lead to a corresponding increase in hospitalizations and deaths. The concern regarding delays caused by the consent and notice requirements were raised in the San Diego example. As with the exemption from the notice requirement, DPR currently provides vector control with a regulatory exemption from the consent requirement. (3 CCR section 6620). As noted in response to comment number 1, there was a delay of up to a week in performing necessary treatment during the 2017 HAV outbreak in San Diego.

Comment no. 14: There does not appear to be any valid argument that agencies proposing to use pesticides on public or private property are not capable of posting highly visible notice of the imminent treatment as well as communicating this information via widely disseminated formats such as city or county government web pages, radio announcements, and other readily available means of communicating to a local regional or state population.

Response: See responses to comment nos. 1, 7, and 12. Additionally, DPR encourages public agencies and contractors covered by this exemption to, where appropriate, use “door hangers” or other similar forms of communication to provide information about the pesticides applied.

Comment no. 15: We would support modification of the Code of Regulations to include in the definition of “notice” forms of easily achieved and highly accessible or visible notification as a preferable alternative to simply exempting health officials from having to give notice at all.

Response: DPR does not currently have a definition of “notice” in 3 CCR Division 6. What the comment appears to be describing is an option to comply with the *current* requirements of 3 CCR section 6618(b). As outlined in response to comment no. 1, DPR believes any delay in implementing time-sensitive mitigation and clean-up measures is a potential impact to public health and safety by posing a risk of further spread of the contagion. The exemptions from the requirements of 3 CCR sections 6616 and 6618 provided by this rulemaking would allow public health agencies and their contractors to focus on executing their mandate to protect public health and safety. This exemption would be used only when there is a declared health emergency or local health emergency, and only for the limited duration of the declared emergency. Health and Safety Code section 101080 provides for the declaration of a health emergency or local health emergency “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” In addition, during a declared local health emergency pursuant to Health and Safety Code section 101080, the county Board of Supervisors or city council must review the need for the local health emergency within seven days and every 30 days thereafter. This review process provides a source of frequently updated public information about the need for the local health emergency. As outlined in responses to comment nos. 7 and 12, DPR believes there are adequate mechanisms in place to ensure notification of the public health agency’s treatment plans. However, DPR encourages public agencies and contractors covered by this exemption to, where appropriate, use “door hangers” or other similar forms of communication to provide information about the pesticides applied.

- *Nan Wishner, California Environmental Health Initiative*

Comment no. 16: Can DPR give any example from the past decade where the need to give notice actually delayed a treatment and thereby created a serious health risk, or is this example of a hypothetical possible risk being created in the San Diego incident the only one that the agency can cite?

Response: As stated in response to comment no. 1, there was a delay of up to a week in performing necessary treatment during the 2017 HAV outbreak in San Diego. Health and Safety Code section 101080 provides for the declaration of a health emergency or local health emergency “whenever there is an imminent and proximate threat of the introduction of any contagious, infectious, or communicable disease...” In addition, during a declared local health emergency pursuant to Health and Safety Code section 101080, the county Board of Supervisors or city council must review the need for the local health emergency within seven days and every 30 days thereafter. This review process provides a source of frequently updated public information about the need for the local health emergency. This rulemaking is intended to provide for needed treatments in situations where a health emergency or local health emergency has been declared, such as the 2017 HAV outbreak, while ensuring safe and effective disinfection using pesticides approved by DPR.

MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts.

ALTERNATIVES DETERMINATION

The Director has determined that no alternative considered by DPR would be more effective in carrying out the purpose for which these regulations are proposed, or would be as effective and less burdensome to affected private persons or businesses than the adopted regulations, or would be more cost effective to affected private persons and equally effective in implementing the statutory policy or other provision of the law. These exemptions will allow local public health agencies to respond rapidly to emerging biological threats to California residents by allowing pesticide applications to occur more quickly during a declared health emergency or local health emergency. A declared health emergency or local health emergency requiring use of this proposed exemption likely will occur unexpectedly and infrequently; California experienced only one health emergency that would have required the proposed exemption in the past five years. When a declared health emergency or local health emergency does occur, the response time to a public health outbreak is expected to be reduced, providing a benefit to the health and welfare of California residents.

POSTING REQUIREMENT

3 CCR section 6110, states in part that, "The public report shall be posted on the official bulletin boards of the Department, and of each commissioner's office, and in each District office of the DPR [Division of Pest Management, Environmental Protection and Worker Safety] for 45 days." DPR has posted its Initial Statement of Reasons and Public Report on its official bulletin board, which consists of the Department's Internet Home Page <<http://www.cdpr.ca.gov>>. In addition, copies were provided to the offices listed above for posting.