

FINAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations
Adopt Section 6695

Pertaining to Carbon Monoxide Pest Control Devices Used to Control Burrowing Rodent Pests

UPDATE OF THE INITIAL STATEMENT OF REASONS

The proposed regulatory action was noticed in the *California Regulatory Notice Register* on July 23, 2021. During the 45-day public comment period, DPR received comments on the proposed text. The comments are discussed under the heading “Summary and Response to Comments Received During 45-Day Comment Period” of this Final Statement of Reasons.

No changes were made to the proposed regulations following the public comment period.

In October 2021, Assembly Bill 1346 (Berman, Chapter 753, Statutes of 2021) was signed into law, requiring the California Air Resources Board (CARB) to adopt regulations to prohibit engine exhaust and evaporative emissions from new small off-road engines, as defined by CARB, by July 1, 2022. It is possible that some carbon monoxide pest control devices (CO pest control devices) will be subject to the above requirements. However, DPR’s proposed regulations for the use of CO pest control devices for control of burrowing rodent pests are necessary to control existing CO pest control devices as well as those that may be exempt from the new law and subsequent regulations.

DPR has adopted Title 3, California Code of Regulations (3 CCR) section 6695. In summary, this action ensures that each person using a CO pest control device to perform pest control uses a device bearing the U.S. Environmental Protection Agency (U.S. EPA) establishment number; does not use the device inside any structure; uses the device at specified distances away from structures; does not use the device on a burrow known or believed to contain non-target vertebrate animals; and does not use the device for purposes other than to control for burrowing rodent pests. It also requires employers of employees performing pest control for hire or for a local government to ensure protective eyewear is worn by employees, keep records of use, and report any adverse effect that occurs from use of the devices.

PUBLIC HEARING

No public hearing was scheduled or held, and none was requested.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED DURING 45-DAY COMMENT PERIOD

1. Rebecca Dmytyk, CEO, Humane Wildlife Control Inc.

Comment no. 1: Section 6695(a)(1) prohibits a company from building their own CO delivery system for their own commercial use unless registered as an establishment with the EPA, and could have an economic impact.

Response: The proposed regulations allow the use of CO pest control devices that bear an EPA Establishment Number. This requirement is necessary to ensure that both the company and the manufacturing establishment are registered with U.S. EPA (40 CFR section 167.20) and are meeting federal requirements, and that the device falls under federal authority (40 CFR section 152.500). Currently, U.S. EPA requires devices to be labeled with the EPA Establishment Number of each establishment in which the device was manufactured (FIFRA section 2(q)(1)), and therefore this requirement will not have an increased economic impact. Any CO pest control device that is built, then moved, sold or distributed already requires an EPA Establishment Number under federal law.

Comment no. 2: The distance limits seem arbitrary. Distances should be based on foundation and type of animal.

Response: The proposed distances are based on the U.S. Department of Agriculture (USDA) study listed in the documents relied upon. (Eismann et. al. “The Use of Forced Gas Rodent Burrow Fumigation Systems and the Potential Risk to Humans” 411-418 USDA APHIS WS, Fort Collins, CO 2016) As described in the study, the distances are based on type of rodent and the lengths of their burrows. The study does not address use based on foundation types, so this regulation is based on distances from structures regardless of foundation type.

Comment no. 3: Rabbits and hares are not considered rodents. There should be specific requirements for lagomorphs. For the purposes of this article, burrowing rodent pests should be burrowing animals from the Order Rodentia, including mice, rats, gophers, and ground squirrels.

Response: FAC section 14160 defines “carbon monoxide pest control device” to mean any method or instrument using carbon monoxide to prevent, eliminate, destroy, or mitigate burrowing rodent pests. FAC section 14161 directs DPR to regulate the use of carbon monoxide pest control devices. FAC section 12757 defines “rodent” to mean all members of the order Rodentia and all rabbits and hares. Data to support specific requirements for lagomorphs is not available at this time, and this regulation refers to the FAC definition.

Comment no. 4: There is a need for additional safety protocols prior to, during, and immediately after the treatment of rodent burrows, including evacuating the living space of people and pets for at least two hours after the fumigation has been performed or until the technician declares it safe to return; all windows and doors opened during the fumigation and for up to an hour or two afterwards; and installation of a sufficient number of CO detectors (plugged in) for all treatments within 50 feet of an inhabitable structure regardless of foundation.

Response: The proposed distance regulations are based on the data from the USDA study referenced in the documents relied upon and establishes specific requirements when using the devices. These requirements include specified distances away from structures that will ensure the devices are used in a manner that is protective of human health and the environment. By observing USDA's recommended distances, DPR negates the need to evacuate inhabited spaces and opening all windows and doors during and after a burrow is treated with carbon monoxide. Inhabited buildings should already have had a sufficient number of carbon monoxide alarms as required by the California Residential Code, Title 24, CCR, Part 2.5, section R315.3.

Comment no. 5: If you restrict use of CO devices to certain distances from structures, as being proposed will most certainly reduce the ability for companies to service smaller residential properties, resulting in a significant economic impact for certain businesses.

Response: Restricting use of the devices to specified distances from buildings was determined by the USDA study referenced in the documents relied upon and is necessary to ensure that the public is protected from the risks of CO. (Eismann et. al. "The Use of Forced Gas Rodent Burrow Fumigation Systems and the Potential Risk to Humans" 411-418 USDA APHIS WS, Fort Collins, CO 2016) In addition, DPR analyzed the impact of these proposed requirements in the memorandum, "Economic and Fiscal Impacts of Proposed Regulations for Carbon Monoxide Pest Control Devices Used to Control Burrowing Rodent Pests," which determined that no economic impacts will result from these limitations and are necessary to avoid inadvertent CO poisoning. DPR does not anticipate any economic impacts from the proposed distance restrictions as some carbon monoxide pest control device labels currently require distances (up to 100 feet) from structures.

Comment no. 6: By imposing strict limitations on the use of CO to certain distances from structures, you will be taking away one of the industry's most humane and environmentally sound methods of controlling burrowing rodents in residential areas.

Response: The proposed regulations will still allow the use of CO devices; however, the proposed limitations are necessary to ensure that operators of the devices as well as the public are protected from the risks of CO. The distances listed in the proposed regulations were determined by the USDA study referenced in the documents relied upon. (Eismann et. al. "The Use of Forced Gas Rodent Burrow Fumigation Systems and the Potential Risk to Humans" 411-418 USDA APHIS WS, Fort Collins, CO 2016)

Comment no. 7: The regulations should only apply to each person performing pest control for hire.

Response: CO devices can be used by anyone, and use is not limited to only persons who are performing pest control for hire. In order to protect all device operators and the public by minimizing the risks associated with CO exposure, it is necessary to regulate the use of CO pest control devices for all users, not just persons performing pest control for hire.

Comment no. 8: Proposed section (a)(1) should only apply to commercially manufactured carbon monoxide pest control devices.

Response: In order to protect all device operators and the public by minimizing the risks associated with CO exposure, it is necessary to require that all CO pest control devices bear an EPA Establishment Number. This will ensure that both the company and the manufacturing establishment are registered with U.S. EPA (40 CFR section 167.20) and are meeting federal requirements, and that the device falls under federal authority (40 CFR section 152.500). This added provision will also allow enforcement of this requirement by county agricultural commissioners (CACs).

Comment no. 9: The proposed distances should be removed and distances for certain types of structures, with specific safety measures based on type of structure, should be established.

Response: Please see response to comment nos. 2 and 5.

Comment no. 10: We highly recommend mandating applicators wear CO detectors and ear protection.

Response: DPR agrees that it is a good idea that applicators wear CO detectors and ear protection while using CO pest control devices, however, DPR does not have data to support requiring them to be worn during operation of CO pest control devices.

2. Joseph Ascuitto, VP of Quality Manufacturing & Distributing

Comment no. 11: The hazard associated with inhalation of colorless and odorless CO that is dispensed by CO pest control devices is mitigated by the devices themselves. Gopher X and Burrow RX have a smoke indicator so that CO is visible. There is also a detectable odor. This mitigates the concerns that the colorless, odorless gas could migrate undetected into enclosed spaces and cause harm.

Response: FAC section 14160 defines CO pest control devices as any method or instrument using carbon monoxide to prevent, eliminate, destroy, or mitigate burrowing rodent pests. DPR acknowledges that various CO pest control devices use different mitigation measures to prevent associated hazards with CO poisoning. FAC section 14161 requires DPR to regulate the use of carbon monoxide pest control devices, and adopt and enforce regulations for the protection of public health and safety, and the environment.

3. Tim Palmtier, ACE, Pest Rx

Comment no. 12: The proposed regulations regulates CO devices in the same manner as aluminum phosphide.

Response: CO devices are not regulated in the same manner as aluminum phosphide. As a registered pesticide, and a California restricted material, aluminum phosphide has many additional requirements for use. For example, aluminum phosphide products have pesticide

labeling, which is reviewed and accepted by U.S. EPA and DPR before the product can be sold or used in California, and end users must follow that labeling or they violate State and federal law. Additionally, the use of aluminum phosphide requires a permit from the local CAC to allow the evaluation of local conditions before the product can be used to ensure the product can be safely used under local conditions. CO devices have no similar product labeling or permit requirement. While proposed section 6695(a)(3) will have setbacks from inhabited structures, they are in most cases equal to or less than those required on aluminum phosphide labeling since 2010. These regulations are necessary to protect all device operators and the public by minimizing the risks associated with CO exposure.

Comment no. 13: DPR does not reference independent studies that support a closer distance to a structure.

Response: DPR routinely relies on other agency's determinations as the basis for its regulatory actions. The proposed regulations are based on available data, which demonstrate that the specified distances are protective of human health.

Comment no. 14: DPR suggests there are currently no enforceable field directives. Why are CO device labels not sufficient or considered a point of enforcement in the field?

Response: Unlike pesticides, carbon monoxide pest control devices do not have enforceable labeling, which is reviewed and accepted by U.S. EPA and DPR before the device can be sold or used in California. As a result, any stickers or similar affixed to the device, and any use instructions provided by the manufacturer are generally not enforceable by DPR or CACs under the Food and Agricultural Code and its implementing regulations. Additionally, federal law (FIFRA section 24(b)) preempts states, like California, from requiring labeling, which is different from, or in addition to, what is required by FIFRA. This would include device labeling and manufacturer instructions. FAC section 14161 requires DPR to adopt regulations for CO devices to ensure minimum safety standards are met to protect human health and the environment.

Comment no. 15: These proposed regulations will eliminate another tool in the battle for gopher control on small residential lots without significantly improving safety for consumers or industry.

Response: DPR does not aim to eliminate a tool to mitigate burrowing rodents when creating these regulations. These regulations are necessary to ensure the safe, proper, and efficient use of these devices.

4. Garrett Keating, Cal/OSHA

Comment no. 16: Proposed regulations allow for use of devices closer than the average burrow length.

Response: Distances are determined by the USDA study referenced in the documents relied upon and are based on type of rodent and their burrow length. (Eismann et. al. "The Use of Forced Gas

Rodent Burrow Fumigation Systems and the Potential Risk to Humans” 411-418 USDA APHIS WS, Fort Collins, CO 2016)

Comment no. 17: In 2012, a field study conducted at Lompoc Valley Middle School measured the concentration of CO at different locations while a CO pest control device was operated. Some of the data exceeds the Permissible Exposure Limit (PEL) specified in 8 CCR section 5155. 200 ppm was recorded at the exhaust and then various levels at burrow openings and ground level. The PEL for CO is 25 ppm with a ceiling of 200 ppm. It is likely the data were collected with direct reading instruments close to the ground and is not representative of breathing zone air, but was wondering if DPR knows any more about CO emissions from the CO pest control device used in the study.

Response: This comment is outside of the scope of the regulations. The PEL is not regulated by DPR and is an occupational exposure limit that represents the maximum average concentration a worker can be exposed to for 8 hours a day, five days per week, over the timespan of their career, and not exhibit any adverse health reactions. DPR reviewed the data from the study referenced in this comment. While some of the data in the study does exceed the PEL specified in 8 CCR section 5155, these data are inadequate to assess potential worker exposure as they do not include information specific to worker exposure scenarios (i.e., breathing-zone concentrations). The reported concentrations should not be compared to the PEL in the referenced study.

Comment no. 18: Based on the published information, the PERC system exceeds the allowable limit for engine exhaust. 2.3% CO is the allowable limit for engine exhaust but the materials for the PERC says it generates 2.5% CO.

Response: This is outside of the scope the regulations and has been noted.

5. Peter Kinnally, President, Quality Manufacturing & Distributing, Inc.

Comment no. 19: Section 6695(a)(1) is not in line with current EPA guidelines. EPA has classified CO devices as devices and not pesticides, and therefore, refuse to register devices.

Response: This section requires use of CO pest control devices bearing an EPA establishment number. Under federal law, U.S. EPA-regulated devices must have a U.S. EPA Establishment Number, which is a two-part number that includes a number specific to the manufacturer and a number specific to the establishment where the device is manufactured. Requiring this number is necessary to ensure that both the company and the manufacturing establishment are registered with U.S. EPA (40 CFR section 167.20) and are meeting federal requirements, and that the device falls under federal authority (40 CFR section 152.500). The proposed regulation does not require the device itself to have a U.S. EPA pesticide registration number or be registered as a pesticide with U.S. EPA.

Comment no. 20: Sections 6695(a)(2) and 6695(a)(3) are not necessary. Current technologies and best practices mitigate the concerns that DPR addresses with the required distances from structures.

Response: For the safety of people and inhabitants, it is necessary to prohibit the use of CO devices within buildings and within a set distance of buildings depending on the pest. The proposed requirements are based on data in the documents relied upon.

Comment no. 21: Section 6695(b)(1) is not necessary. Devices have a visual indicator that mitigates this concern.

Response: The presence of a visual indicator does not provide the same protection as eyewear. Despite some devices having a visual indicator, this is not a guarantee that all current and future devices will have an indicator. It is necessary for employers to ensure protective eyewear is worn by employees during the operation of the device or the safety of operators. CO pest control devices use an internal combustion engine to force pressurized gas into the rodent burrow system. This creates a potential for debris to be sent into the air. The proposed requirement will also align with Cal/OSHA's requirement of employers providing employees with suitable eye protection anytime there is a risk of receiving eye injuries (8 CCR section 3382).

Comment no. 22: Section 6695(b)(2) places an unreasonable burden on device users, is not an efficient use of time, and will incur additional costs.

Response: Records are already required to be kept under many circumstances. In addition, records are used by CACs and DPR during audits and investigations to verify compliance with pertinent laws and regulations. They establish a history for each application site and ensure that products are not used more frequently than necessary for efficient use. DPR analyzed the cost of this proposed requirement in the memorandum "Economic and Fiscal Impacts of Proposed Regulations for Carbon Monoxide Pest Control Devices Used to Control Burrowing Rodent Pests" and determined it will incur minimal costs.

Comment no. 23: CO in our CO devices is not compressed or stored when used according to the label.

Response: DPR acknowledges that various CO pest control devices may use different mechanisms to deliver CO to burrows. FAC section 14161 requires DPR to regulate the use of carbon monoxide pest control devices, and adopt and enforce regulations for the protection of public health and safety, and the environment.

Comment no. 24: CO devices are not classified as pesticides and therefore the potential for pesticide poisoning is not the correct usage of the term pesticide.

Response: DPR agrees that CO devices are not considered pesticides, and is not attempting to regulate these devices as pesticides. While the device itself is not a pesticide, the device generates the pesticide, CO. CO is a poisonous, colorless, odorless, and tasteless gas that can be deadly, especially when confined in enclosed spaces, and is a leading cause of poisoning death and injury in the U.S.

Comment no. 25: The regulations will have a financial impact on schools and local agencies.

Response: DPR conducted an economic analysis on the proposed regulations that is listed in the documents relied upon. Schools and businesses who work at schools are required by the Healthy Schools Act to keep records on pesticide use. The additional recordkeeping required in this regulation should be a minimal increase in workload.

Comment no. 26: The regulations will impact CO device users and will cause employment adjustments at the manufacturing and the CO user level.

Response: DPR conducted an economic analysis on the proposed regulations that is listed in the documents relied upon. Businesses are already required to keep records on pesticide use. The additional recordkeeping required in these regulations should be a minimal increase in workload.

Comment no. 27: The regulations will have an impact on the creation/elimination/expansion of jobs of manufacturers of these devices.

Response: The proposed regulations do not prohibit or limit the sale of CO pest control devices and is specific to the use of these devices. DPR conducted an economic analysis on the proposed regulations, that is listed in the documents relied upon, and determined that these regulations will have a minimal impact on pest control operators and businesses using these devices. Therefore, significant impacts to manufacturers are unlikely as these devices may still be used in an enforceable manner that is more protective of the environment and human health.

Comment no. 28: The regulations will have an impact on the creation/elimination/expansion of jobs of pest control operators.

Response: DPR conducted an economic analysis on the proposed regulations that is listed in the documents relied upon. The proposed regulations are not likely to have an impact on the creation/elimination/expansion of jobs of pest control operators as this action is consistent with current law and will not significantly restrict or increase the use of carbon monoxide pest control devices. It will clarify and add limits for how CO pest control devices must be used. The proposed requirements are estimated to result in initial and annual costs of \$100 per business.

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 law. These regulations are required by FAC section 14161.

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. Documents incorporated by reference in this rulemaking were available upon request directly from the Department.