

June 22, 2007

Dr. Robert F. Sawyer, Chairman
California Air Resources Board
1001 I Street
P.O. Box 2815
Sacramento, CA 95812

Re: Proposed Strategy for California's 2007 State Implementation Plan

We are writing on behalf of various registrants, applicators and users of soil fumigants in the State of California to comment on the Air Resources Board's Proposed State Strategy for California's 2007 State Implementation Plan (State Strategy). Specifically, we are commenting on the pesticide elements of the State Strategy, including the Department of Pesticide Regulation's (DPR) Proposed SIP Commitment (p 131), Appendix E, Potential Impacts of State Strategy Proposed New Measures, and Appendix H, Proposed Revision to the Pesticide Element of the 1994 Ozone SIP for the Ventura County Nonattainment Area. The information in the State Strategy does not provide detail on the pesticide reduction measures, but references DPR's proposed plan. DPR's proposed regulations were released for public comment on May 18, 2007, with comments due on July 13, 2007. We are in the process of reviewing DPR's inventory and proposed regulations. Our preliminary review indicates that (1) DPR's inventory seriously overestimates emissions; (2) application methods critical to growers are proposed for elimination even though a careful review shows that these methods do not have "high" emissions; (3) the economic impact of proposed regulations is significantly more severe and wide-ranging than DPR indicated; and, (4) the potential adverse impacts of the State Strategy are significantly underestimated. The issues from the preliminary review demonstrate why the public comment period is so important and why ARB cannot take actions that would incorporate DPR's information into the State Strategy until the public has had an opportunity to review and comment on DPR's proposal and DPR has considered the comments.

California law requires a public notice and comment period. Cal. Gov't Code § 11346. Moreover, the agency must consider these comments and respond to them. Cal. Gov't Code at § 11346.9. This requirement is not a formality, but is an integral part of the regulatory process.¹

¹ "One purpose of the APA is to ensure that those persons or entities whom a regulation will affect have a voice in its creation ..., as well as notice of the law's requirements so that they can conform their conduct accordingly.... The Legislature wisely perceived that the party subject to regulation is often in the best position, and has the greatest incentive, to inform the agency about possible unintended consequences of a proposed regulation. Moreover, public participation in the regulatory process directs the attention of agency policymakers to the public they serve, thus providing some security against bureaucratic tyranny." *Paleski v. State Dept. of Health Services*, 51 Cal. Rptr. 3d 28 (2006) quoting *Tidewater Marine Western, Inc., v. Bradshaw*, 69 Cal. Rptr. 2d 186, 927 P.2d 296 (1996) (citations omitted).

Federal regulations also provide that states must conduct a public hearing and meet certain minimum public participation requirements for any proposed SIP or SIP revision prior to

DPR has not completed this process and ARB cannot rely on an incomplete DPR process to meet its legal requirements.

The preliminary review of DPR's proposal shows the practical importance of the public comment period in providing information to the regulatory agency that has been overlooked or misinterpreted. For example, the data currently available for one application method for chloropicrin, deep non-tarped shank injection, indicate that the emission rate for that method is approximately six times less than that indicated by DPR. Overestimation of emissions could result in unnecessary restrictions on the use of soil fumigants, which could have disastrous economic impacts. DPR has assigned an emission factor of 64% to deep, non-tarped shank chloropicrin application method, an essential tool for controlling orchard replant disease in the San Joaquin Valley. We believe that a careful review of the existing facts will show that, given current agricultural practices, a 10% emission factor is more accurate. DPR's proposed elimination of this application method is not justified given the relatively low contribution to VOC emissions.

DPR's economic analysis does not accurately account for the tremendous economic impact of the proposal on agriculture. The severe economic consequences of the elimination of important pest control tools and loss in agricultural production must be understood and addressed.² Detailed comments on the economic impact will be provided as part of the DPR public comment process and ARB and DPR cannot adequately assess the significant economic impact until those comments have been considered and incorporated into the analysis. In addition, a further understanding of the economic and environmental consequences of the loss of agricultural land to development as a result of the regulations must be considered.

Appendix E, Potential Impacts of State Strategy Proposed New Measures (May 7, 2007), fails to adequately account for the significant potential impacts of the pesticide proposal. Appendix E states that "[t]he State Strategy is not expected to cause any adverse impact on agricultural resources (p 19). However, a preliminary analysis shows that impacts will be significant and potentially adverse. The assertion that DPR's proposed fumigant regulations will be negligible fails to adequately assess the impacts of the restrictions that will be placed on growers who may have to choose to either use a low emission application method, fumigate outside of the May to October "ozone season," or not fumigate at all. Similarly page 4 assumes

submitting the proposed SIP to EPA. 40 C.F.R. 51.102. EPA regulations governing the SIP approval process also provide that nothing in the regulations shall be construed to encourage a state to submit a proposed SIP which does not take cost effectiveness and social and economic impact into consideration. 40 C.F.R. 51.101.

² Health & Safety Code § 57005 (agency must consider whether there is a less costly alternative or combination of alternatives which would be equally effective in achieving increments of environmental protection).

that a “less than significant impact” is expected from the potential conversion of farm land to non-agricultural use. However, it appears that the impact to agricultural land use could be significant with the potential to impact the state’s economy and the thousands of jobs interlinked with production agriculture. Currently, the United States, and most notably California, farms on less land but produces more food and fiber on average than has been done historically. Agricultural production has excelled in yields and efficiency, in large part, because of fumigants. Efficacious use of fumigants results in healthy and resilient crops which allow growers to produce more food on less acreage and feed more people. There are also questions as to whether the analysis has captured the potential impact of various application methods.

As noted in DPR’s memorandum of April 6, 2007,³ DPR has indicated that it “is likely, if not certain, that DPR will revise its application method, adjustment factors, method use fraction estimates and the proposed regulations” after its review of the public comments. The above are only examples of the type of information that will come before DPR in the public comment period. DPR should and must consider this information. Cal. Gov’t Code § 11346.8.⁴ Likewise ARB cannot rely on DPR’s information until it is complete. Therefore, ARB must take no actions regarding the pesticide proposal from DPR including those that would prohibit various fumigant application methods or fumigant use generally prior to the completion of the DPR review process.

³ Memorandum on Pesticide Volatile Organic Compound Emission Adjustments For Field Conditions and Estimated Volatile Organic Compounds Reductions—Initial Estimates, From Barry, Spurlock and Segawa to Sanders. Section VI (April 6, 2007).

⁴ “The state agency shall consider all relevant matter presented to it before adopting, amending, or repealing any regulation.” Cal. Gov’t Code § 11346.8.

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If you have any questions, please contact Jim Wells at (916) 443-2793.

Respectfully Submitted,

California Bean Shippers Association
California Cotton Ginners and Growers
Associations
California Cut Flower Commission
California Grain and Feed Association
California Grape & Tree Fruit League
California Seed Association
California State Floral Association
California Warehouse Association
Chloropicrin Manufacturers' Task Force
Dow AgroSciences
Methyl Bromide Industry Panel
Nisei Farmers League
Trical, Inc.
Western Plant Health Association

cc: DPR