

Alternatives Worksheet

Frequently Asked Questions

The California Department of Pesticide Regulation (Department) has developed an alternatives worksheet to be completed by Restricted Material Permit (RMP) applicants (typically, growers). The worksheet will document the grower's consideration of alternatives (Alternatives Worksheet), which is required by regulation. Information to assist growers in completing the form is provided with the Alternatives Worksheet. This Frequently Asked Questions provides background and information to assist CACs in implementing the Alternatives Worksheet at the local level.

1. *California Environmental Quality Act, Background and Requirements:* The California Environmental Quality Act (CEQA) became law in 1970. (Public Resources Code (PRC), § 21000 et seq.; Cal. Code Regs., tit. 14, ch. 3, § 15000 et seq. (CEQA Guidelines).) As the Legislature stated, the purpose of CEQA is to provide major consideration to preventing environmental damage, while providing a decent home and satisfying living environmental for all Californians.¹ The process of achieving this goal is through environmental review.

Under CEQA's environmental review process, government decision-makers must consider all feasible alternatives and adopt all feasible mitigation measures capable of lessening or avoiding adverse environmental impacts when considering whether or not to approve a project. This is called CEQA's "substantive mandate."² The environmental review process is typically documented in an Environmental Impact Report (EIR).³ The EIR is a public document. The decision-makers must independently review and certify the EIR. By making this information available to decision-makers and the public, an EIR furthers CEQA's core principles of environmental protection and informed self-government.⁴

2. *Is CDPR exempt from CEQA? No.* The Department's decision-making process is subject to CEQA.⁵ However, CEQA does provide a mechanism to allow government agencies to implement their own CEQA procedures, under a Certified Regulatory Program (CRP).⁶ A CRP must be approved by the Secretary of Natural Resources.⁷ For over 30 years, the Department's

¹ PRC, § 21000(g).

² CEQA Guidelines, § 15002(a)(3) (purposes of CEQA include requiring the use of alternatives and mitigation measures).

³ Prior to drafting an EIR, an agency may evaluate the project in an Initial Study. The Initial Study may conclude that an EIR is not required, and that the project can be analyzed in another CEQA document such as Negative Declaration or Mitigated Negative Declaration.

⁴ *Laurel Heights Improvement Assn. v. Regents of the Univ. of Calif.* (1988) 47 Cal.3d 376, 392.

⁵ Here, DPR and the office of the agricultural commissioner, who is appointed to act as the state agency for this purpose.

⁶ PRC, § 21080.5.

⁷ PRC, § 21080.5(e)(1).

environmental review process has operated under an approved CRP.⁸ The Department's CRP for the RMP process is at California Code of Regulations, title 3 (3 CCR) sections 6400 to 6444.

3. How does the Department's Certified Regulatory Program regulate the RMP process?

Issuing a RMP is considered a "project" under CEQA and is subject to the CRP. The CAC is the decision-maker, as the person who receives and evaluates the RMP permit application (and later, Notice of Intent), considers alternatives and mitigation measures, and decides whether or not to issue the permit. Under the CRP, a CAC does not have to draft an EIR for each permit application, and so is exempt from that specific procedural requirement.

But, as discussed above, a CAC is still required to comply with CEQA's substantive requirements. The CEQA Guidelines, Section 15250 discusses an agency's obligations to comply with CEQA under a CRP:

Section 21080.5 of the Public Resources Code provides that a regulatory program of a state agency shall be certified by the Secretary for Resources as being exempt from the requirements for preparing EIRs, negative declarations, and initial studies if the Secretary finds that the program meets the criteria contained in that code section. A *certified program remains subject to other provisions in CEQA* such as the policy of avoiding significant adverse effects on the environment where feasible. ...⁹

In a 2017 decision, *Pesticide Action Network North America v. California Department of Pesticide Regulation (PANNA)* the First District Court of Appeals applied this interpretation to the Department's own obligations under CEQA, finding that while the CRP provides a mechanism to streamline and customize CEQA's procedures, "the Department's programs - and the environmental review documents it prepares - remain subject to the broad policy goals and substantive standards of CEQA."¹⁰

4. Doesn't the Department have a CEQA exemption that provides that CACs are not required to record or document their decision-making process? Chapter 308, Statutes of 1978, Sections 5 and 7 authorized the Department to exempt the RMP process from certain procedural requirements of a CRP, as described in Public Resources Code, Section 21080.5, subsection (d). Because of this exemption the CAC is not required to draft an "EIR alternative" document or circulate the "EIR alternative" for public review and comment as part of the RMP process. However, this exemption does not prohibit the agency from documenting or otherwise keeping a record of their decision-making, nor does it place any limitations on the permit

⁸ CEQA Guidelines, §§ 15251(i); 15251(i)(4).

⁹ 14 CCR, § 15250 (emphasis added).

¹⁰ *Pesticide Action Network North America v. Calif. Dept. of Pesticide Regulation* (2017) 16 Cal.App.5th 224, 242; see also *Californians for Alternatives to Toxics v. Calif. Dept. of Pesticide Regulation* (2006) 136 Cal.App.4th 1049, 1059 ("The Legislature found certification warranted, in part, because the 'preparation of environmental impact reports and negative declarations for pesticide permits would be an unreasonable and expensive burden on California agriculture and health protection agencies.'"); *W.M. Barr & Co. v. South Coast Air Quality Management Dist.* (2012) 207 Cal.App.4th 406, 408, fn. 6.

application process, including what type of information the agency can request from its applicants.

5. Where do the Department's regulations require any written analysis and documentation of alternatives? Written documentation can and has been used to verify compliance with various aspects of the CEQA process. Here, the Department's regulations and *Pesticide Use Enforcement Program Standards Compendium*¹¹ (*Compendium*) refer to CEQA's requirement to describe and analyze alternatives:

California Code of Regulations:

1. 3 CCR, § 6426 requires pest control advisors and growers to consider and adopt any feasible alternatives to the proposed application;
2. 3 CCR, § 6556 requires that pest control advisors certify in their written Pesticide Use Recommendations that feasible alternatives have been considered;
3. 3 CCR, § 6432 requires that the CAC, when evaluating the permit application, to determine if there is a feasible alternative to applying the pesticide.

Compendium:

1. Section 7-3 states that to determine compliance with the requirement to consider alternatives, the CAC should ask the permit applicant to identify the alternatives that were considered and document his/her response.
2. Section 3-14 states that the Department's CRP plan or other written documentation must describe alternatives to the proposed activity.

6. The Alternatives Worksheet is an entirely new requirement: No. While the Department is now recommending implementation of the Alternatives Worksheet state-wide, several local CACs already have applicants document their consideration of alternatives in order to assist the Commissioners in their CEQA-mandated role as informed, independent decision-makers.¹² Adoption of a state-wide recommendation for this documentation helps to ensure that the Department's CRP for the RMP program is implemented consistently across all 58 counties.

7. The Alternatives Worksheet is an underground regulation: No. State agencies, with few exceptions, are required to adopt regulations following the procedures established in the Administrative Procedure Act (APA). A regulation is defined in Government Code section 11342.600: "Regulation means every rule, regulation, order, or standard of general application or the amendment, supplement, or revision of any rule, regulation,

¹¹ The *Pesticide Use Enforcement Program Standards Compendium* is a series of eight manuals that contain pesticide use enforcement directives, interpretations, recommendations, and expectations. The *Compendium* is available at <https://www.cdpr.ca.gov/docs/enforce/compend.htm>.

¹² For example, County of San Luis Obispo, Department of Agriculture / Weights & Measures.

order, or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure.”¹³

As discussed above, all relevant requirements are already part of the adopted CRP and are reflected in Title 3 of the California Code of Regulations. Thus, this is not a new requirement or underground regulation as that term is defined.

8. *Where can applicants get assistance in describing the alternatives?* There are several resources available to assist applicants. An applicant’s pest control advisor is required to certify that all feasible alternatives have been considered, and so may have a list of alternatives that he or she considered for the applicant’s review. The University of California also maintains a list of Integrated Pest Management (IPM) practices at <http://ipm.ucanr.edu/>. This list describes alternatives to the use of restricted use materials in pest management in multiple settings (including home, garden, turf, landscape, and agricultural and natural environments).

¹³ Office of Administrative Law, *Underground Regulations*, https://oal.ca.gov/underground_regulations/ (last viewed Oct. 15, 2020.)