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VIA U.S. MAIL AND E-MAIL

Brian Leahy, Director
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**RE: Public Comment Regarding DPR Regulation No. 16-004 for Pesticide Use
Near Schoolsites**

Dear Director Leahy and Coordinator Irokawa-Otani:

We are writing on behalf of the ACLU of California and El Quinto Sol, a Tulare County-based environmental justice organization. Our letter proposes recommendations to ensure student health and learning environment are the focal point of the proposed regulations. The ACLU has a substantial interest in the proposed regulations because exposure to hazardous pesticide use around schools has a severe and deleterious impact on students' health and safety. As currently drafted, the regulations fail to protect students sufficiently and likely will lead to a deterioration of student health, a reduction of classroom instructional time, and a decrease in California students' overall success. Further, the regulations will disproportionately impact marginalized and vulnerable populations, including students of color.

El Quinto Sol has in-depth knowledge of pesticide use, including the exposure to pesticide use and drift damage to Central Valley children, and has tracked community complaints regarding pesticide use and drift. Community advocates, environmental scientists, parents, and children have requested that the Department of Pesticide Regulations ("DPR") draft regulations to protect students from chemicals that have short-term and long-term impacts on their health and ability to excel in school. We appreciate that DPR drafted proposed regulations to amend Chapter 3, Article 5, §§6690 – 6693 of the California Code of Regulations to protect the health and welfare of children and that it takes seriously its critical role in protecting California children

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from harm based on pesticide exposure. The proposed regulations, however, do not adequately protect students.

Under the Food and Agricultural Code section 11501(b), DPR must “protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of those pesticides.” Additionally, as DPR is aware, the dangers children face are particularly acute because they are more vulnerable to health threats from pesticide exposure.¹ For children, being exposed to higher concentrations of pesticides can result in: reproductive problems; immune system problems; increased likelihood of asthma; nervous system issues, such as learning disabilities; and cancer among other serious concerns.² Children face these risks at all stages of their lives, even before they are born.³ For example, in a Central Valley study, pregnant mothers who were exposed to certain types of pesticides had children who were six times more likely to be on the autism spectrum.⁴

Despite the seriousness of the harms to children, DPR has consistently eluded its responsibility to enact clear and strong regulations by shirking that responsibility to County Ag Commissioners. Specifically, DPR claims that children will be adequately protected because County Ag Commissioners can implement stronger regulations. *See* Initial Statement of Reasons pages 4, 6, and 9. However, based on statements from a local Ag Commissioner and the Tulare Ag Commissioner’s position during the November 16, 2016 public hearing, it is certain that they will not do more than they are required to by DPR. As such, any discretion DPR provides to Ag Commissioners will only undermine the purpose of its regulations; DPR can only accomplish its obligation to protect children by including sufficient protections in its own regulations.

Accordingly, we urge DPR to revise six critical aspects of its proposed regulations.

- First, because the majority of the affected student population are Latino, the regulations likely will disproportionately impact students of color.
- Second, DPR should expressly extend protections to charter and private school students. Under Education Code § 47612, charter schools must receive the same protections as other public schools, and the regulations’ language should reflect

¹ Beyond Pesticides “Children and Pesticides Don’t Mix” *available at* <https://beyondpesticides.org/assets/media/documents/lawn/factsheets/Pesticide.children.dontmix.pdf>.

² Kegley, S., et al. 2003. Secondhand Pesticides: Airborne Pesticide Drift in California. Pesticide Action Network North America, California Rural Legal Assistance Foundation, Pesticide Education Center, and Californians for Pesticide Reform. San Francisco, CA. at page 10.

³ *Supra* note 2.

⁴ Kristin S. Schafer, MA Emily C. Marquez, PhD “A Generation in Jeopardy: How pesticides are undermining our children’s health & intelligence” PANNA <http://www.panna.org/sites/default/files/KidsHealthReportOct2012.pdf>.

these protections. DPR should protect private school students as well, because California enrolls over 500,000 private school students at roughly 3,174 private schools, and those students are equally at risk.⁵

- Third, DPR should remove the notification opt-out provision and alternative agreement provisions in the regulations because they will likely have a negative impact on students. DPR should not allow growers to have discretion to create less favorable alternative agreements with County Ag Commissioners and school districts at the expense of student safety.
- Fourth, DPR should provide full-time protections, 24 hours a day, instead of limiting pesticide protections from only 6 a.m. to 6 p.m. because pesticides linger and harm students well after they are applied and because students are frequently present on campuses before 6 a.m. and after 6 p.m.
- Fifth, DPR should provide a one-mile buffer zone as opposed to a one-quarter mile buffer zone. Prevailing research demonstrates that a one-quarter mile buffer zone is grossly insufficient to protect students from pesticide drift harm.
- Lastly, DPR must consider the numerous complaints that the Tulare County Ag Commissioner failed to record. Those testimonies, provided by local parents, students, and organizations, should inform DPR's decision to have stronger regulations and reasons to implement those strong regulations.

DPR's regulations must not have a negative disparate impact on students of color

In reviewing all of the proposed regulations, DPR has a duty to ensure that its regulations do not have a disparate impact on students of color.⁶ Numerous studies, including a recent report by the California Department of Public Health ("DPH"), demonstrate that Latino children are disproportionately impacted by pesticides.⁷

In Tulare and Fresno County school districts, students of color make up the majority of the student population. In 2010, according to the DPH report, 60.2% and 71.4% of Fresno and

⁵ See California Department of Education "Private School Enrollment as a Percentage of Total Enrollment in California Schools: 1996–97 Through 2014–15" *available at* <http://www.cde.ca.gov/sp/ps/cefprivinstr.asp>; *see also* California Department of Education, Educator Excellence Office "2015-16 Private School Affidavit Data - Schools with Enrollment of Six or More Students (September 1, 2016)" *available at* <http://www.cde.ca.gov/ds/si/ps/>.

⁶ See California Government Code § 11135; *see also* Crenshaw Subway Coalition v. Los Angeles Cnty. Metro. Transp. Auth., CV 11–9603 FMO (JCx), 2015 WL 6150847, at *26 (C.D. Cal. Sept. 23, 2015).

⁷ California Environmental Health Tracking Program "Agricultural Pesticide Use Near Public Schools in California" Department of Public Health (Apr. 2014) *available at* http://cehtp.org/file/pesticides_schools_report_april2014_pdf at page 20.

Tulare County students, respectively, were Latino.⁸ In the report, DPH found that Latino children are almost twice as likely as white children to attend schools near the heaviest agricultural pesticide use. By allowing growers to continue to spray very close to schools and for much of the day, DPR not only improperly permits this harm to California's school children, but also ignores state reports that demonstrate that spraying near schools will impact students of color more than other students in the state. Therefore, DPR must consider its civil rights duty to protect students of color in drafting proposed regulations and enact protections to ensure that pesticide use does not disproportionately harm students of color.

DPR's regulations should protect all students, including charter and private school students.

DPR's proposed regulations should protect students at private and charter schools. DPR's proposed regulations only describe and analyze protections for public schools and private school students, but do not mention charter schools. However, California law makes clear that charter schools are public schools and must receive the same consideration and protection. Charter schools are "public schools funded with public money. . . ." ⁹ The Education Code similarly states that a "charter school shall be deemed to be a 'school district.'" Educ. Code § 47612. As such, for County Ag Commissioners to protect all public school students, DPR must explicitly enact protections for charter school students, as it has for other school groups.

DPR should also protect private school students because they face the same harm as public school students. If DPR fails to amend its proposed regulations, over 500,000 private school students in California will not have similar DPR regulations protections for pesticide spraying and drift. DPR listed two reasons for excluding private schools, neither of which are sufficient. First, DPR's reason of "increase[ing] the cost to regulated entities" for excluding private schools should not be prioritized over children's safety. Initial Statement of Reasons page 15. While it is true that costs are one part of assessing regulations, they are not the deciding factor. Second, DPR's attempt to exclude private schools because it is purportedly consistent with the Healthy Schools Act is meritless. Initial Statement of Reasons page 15. The Healthy Schools Act requires the school district to create a pesticide management plan and outlines school district obligations to manage pesticide use at schoolsites. Educ. Code §17610. In contrast, DPR's proposed regulations primarily monitor the actions of growers and those who spray near schools. Moreover, school districts mostly have notification requirements based on the grower activity in the proposed regulations. In other words, the Healthy Schools Act only regulates pesticide spraying at school sites while the regulations govern pesticide use in the areas

⁸ California Environmental Health Tracking Program "Agricultural Pesticide Use Near Public Schools in California" Department of Public Health (Apr. 2014) *available at* http://cehtp.org/file/pesticides_schools_report_april2014.pdf at page 20.

⁹ Today's Fresh Start, Inc. v. Los Angeles Cty. Office of Educ., 57 Cal. 4th 197, 205 (2013).

that surround schools. As such, neither of DPR's reasons sufficiently justifies private school exclusion when DPR could easily regulate the actions of growers near private schools.

While DPR is required under law to consider reasonable alternatives to the proposed regulations and explain why DPR did not choose those options, DPR did not consider any reasonable alternatives in including private schools. For the reasons described supra, DPR should implement protections for private school students that are similar to public schools regarding a wide buffer zones and full-time pesticide spraying protections. At a minimum, DPR should allow for private schools to opt-in to any provisions that would allow for them to receive notifications. This would not require DPR to research any additional information regarding school location because CDE keeps a list of private schools with six or more students.¹⁰ For the foregoing reasons, DPR should explicitly list charter schools and extend protections to private schools when considering a child's exposure to pesticides.

DPR should clarify its language regarding opt-out provisions to ensure that agreements will strengthen, not undermine, base DPR regulations.

DPR's proposed regulations for notification ignore that providing schools and childcare facilities with the ability to opt-out of the notice requirements will obviously harm students. As currently drafted, schools and growers also have the ability to agree to different notification arrangements without ever consulting parents or the community. §6693 (e) – (f). The proposed regulations state “the principal or administrator may waive their right to receive application-specific notification by notifying the operator the property in writing...” and that “the application-specific notification requirements do not apply when there is a written agreement between the operator of the property, the principal or child day care facility administrator, and the commissioner that specifies alternative application-specific notification.” §6693 (e) – (f). DPR's reasons for allowing schools to opt out of receiving pesticide spraying notification include “cost of forwarding the notifications to parents” and “concerns about decrease in student attendance and associated decrease in school funding if they choose to provide the notification to parents.” DPR Initial Statement of Reasons pg. 14. DPR fails to explain how the cost of forwarding notification is prohibitive, but posting this information or sending robocalls are alternative cost-efficient ways for schools to notify parents and students of spraying. Additionally, DPR's reason that attendance and funding may decrease does not warrant allowing schools to waive knowledge of spraying. A regulation that is intended to protect children from pesticide exposure cannot contain an exception based on the likelihood that children or their families will use the notification to protect themselves from harmful exposure. Schools and childcare facilities can also utilize the notification information to limit outdoor activities during

¹⁰ California Department of Education, Educator Excellence Office “2015-16 Private School Affidavit Data - Schools with Enrollment of Six or More Students (September 1, 2016)” *available at* <http://www.cde.ca.gov/ds/si/ps/>.

nearby spraying which can reduce absenteeism from aggravation of asthma and other respiratory disorders.

Further, the language for voluntary agreements with growers and the County Ag Commissioner to have different provisions could encourage weaker agreements than the proposed regulations. As it stands, “the application restrictions do not apply when there is a written agreement between the operator of the property, the principal or child day care facility administrator, and the commissioner that specifies alternative application restrictions that the parties agree provide the *same* or a greater level of protection as provided by subsections (a) through (c).” §6693(f). The initial statement of reasons only states that §6693(f) “can be used” to make stronger requirements. Initial Statement of Reasons page 14. That means the agreements could create less favorable regulations, which has the potential to cause serious harm to students and families. DPR’s definition of similar protections gives complete discretion to parties, like growers and Ag Commissioners, who have already actively spoken against stronger regulations. Given the statements made by Tulare Ag Commissioner opposing stronger regulations at the hearing, it seems unlikely that Ag Commissioners will encourage stronger requirements for students. DPR should remove any ambiguity by only including language allowing for stronger regulations.

DPR should protect students from pesticide spraying and drift throughout the day.

DPR’s proposed regulations should protect students throughout the day, and not only for a portion of the day. Under FAC §11501(f), DPR must consider the “least possible harm to nontarget organisms and the environment” when regulating pesticides and pesticide systems. DPR’s proposed regulations would only protect students from 6 a.m. to 6 p.m., Monday through Friday, allowing growers to spray as late as an hour before some students arrive at school and up until the time some childcare centers open. §6691. Health-harming pesticides drift for hours, days, and even weeks after application.¹¹ Additionally, students are present at school outside of the 6 a.m. to 6 p.m., Monday through Friday time period for a number of reasons such as daycare, extracurricular activities, and athletics.¹² DPR must contemplate the vast number of hours that the proposed regulations will not protect students at or near schools by part-time application restrictions when drafting these regulations. Although under §6691(f), growers and Ag Commissioners have the authority to implement stronger 24-hour protections, these parties have indicated that they likely will not implement more stringent protections than DPR’s proposed regulations. As such, DPR cannot rely on local Ag Commissioners to provide more protection than the regulations provide. The regulations themselves must fully protect students.

¹¹ Kegley, S. *supra* note 2. at page 4.

¹² See e.g. Edison High School in Fresno had a Dream ACT program for parents and students from 5:30 p.m. to 8 p.m. on December 1, 2016 at the schoolsite and Valley Oak Middle School in Visalia Unified School District had a program to discuss the needs of “advanced students” from 7-8:30 p.m. on November 3, 2016.

Finally, DPR has failed to satisfy its obligation to consider all reasonable alternatives. When DPR analyzed three alternatives to the draft regulations, DPR failed to mention full-time protection, rather than 6 a.m. to 6 p.m., as a reasonable alternative. Initial Statement of Reasons page 15. As such, DPR must now consider including full-time protections in the regulations, particularly because doing so is the only way to protect students comprehensively.

DPR's regulations should require a one-mile buffer zone to effectively protect California's children.

The proposed quarter-mile buffer zones are too small to adequately protect children from hazardous pesticides applied by drift-prone methods. Additionally, DPR even allows for a smaller 25-foot buffer zones in certain instances. §6691 (a) – (c). A DPR study concluded that in a typical year, 45% of pesticide illness cases were related to pesticide exposure and that drift increased this number to a massive 68% of cases in one year.¹³ Notwithstanding its own studies, DPR now claims that a small buffer zone is sufficient to protect children. Initial Statement of Reasons page 8. DPR must implement one-mile buffers between schools and fields to protect California's students, especially from fumigants and other very toxic pesticides. Additionally, 25-foot buffer zones are far too small for other pesticide application methods, especially the more toxic pesticides that are known to cause cancer or damage to the nervous system.

Thousands of students will be harmed if DPR does not mandate a wide buffer zone. According to the California Environmental Health Tracking Program in 2014, 12,618 students were within a quarter-mile of cholinesterase inhibiting pesticides in Tulare County.¹⁴ In 2010, Fresno had the highest amount of active ingredients applied for agricultural use and Tulare had the third highest out of the 15 counties studied.¹⁵ In Tulare County, 63.4% of schools had pesticide sprayed within ¼ of a mile from a school, making it one of the highest rates in the state.¹⁶ Fresno County had the highest number of schools within ¼ mile of a pesticides used near

¹³ CDPR (California Department of Pesticide Regulation) Summary of Results from the California Pesticide Illness Surveillance Program 2006 (HS-1872). 2008. Available: <http://www.cdpr.ca.gov/docs/whs/pdf/hs1872.pdf> [accessed Nov. 29, 2016].

¹⁴ California Environmental Health Tracking Program “Agricultural Pesticide Use Near Public Schools in California” Department of Public Health (Apr. 2014) *available at* http://cehtp.org/file/pesticides_schools_report_april2014.pdf at page 28.

¹⁵ California Environmental Health Tracking Program “Agricultural Pesticide Use Near Public Schools in California” Department of Public Health (Apr. 2014) *available at* http://cehtp.org/file/pesticides_schools_report_april2014.pdf at page 6.

¹⁶ California Environmental Health Tracking Program “Agricultural Pesticide Use Near Public Schools in California” Department of Public Health (Apr. 2014) *available at* http://cehtp.org/file/pesticides_schools_report_april2014.pdf at page 17.

the school.¹⁷ Even though Tulare County has some of the highest amounts of pesticides use near schools in CA, the Tulare County Ag Commissioner has insisted that its office supports growers and fewer regulations. By allowing for small buffer zones, DPR ultimately concludes that business interests are more important than children, despite the high amounts of pesticides being used near agricultural school districts.

In analyzing a one-mile buffer zone as a reasonable alternative, DPR disregards scientific studies that demonstrate that larger buffer zones will significantly decrease pesticide exposure for children. Initial Statement of Reasons page 15. DPR incorrectly concludes that the buffer zone's margin of safety is "speculative" and not directly correlated with the size of the buffer zone. Initial Statement of Reasons page 15. The studies are conclusive. For instance, the UC Berkeley CHAMACOS study of Salinas Valley residents documented pesticide drift in homes 5 kilometers – over 3 miles – away from treated fields.¹⁸ Pregnant mothers in that 5 kilometers witnesses decreased birth weight during a critical time in fetal growth for their babies.¹⁹ The National Academy of Sciences found that pesticide drift is higher in agricultural communities and the Academy found reports of illness immediately after pesticide spraying.²⁰ Additionally, in at least two California counties, Tulare and San Joaquin counties, residents reported pesticide drift illness including eye and respiratory irritation and headaches for drift that occurred over one mile away from application.²¹ Moreover, for pregnant mothers who lived up to one mile away from organophosphate-treated fields, the UC Davis MIND Institute study documented a 60% increase in risk of developing an autism spectrum disorder for their children.²² Highly volatile pesticide drift in agricultural communities, illness caused by drift over one-mile, and increased likelihood of autism due to drift over one-mile mean that the size of the buffer zone and increase to one-mile will directly impact a student's likely exposure. Hence, DPR should revise the regulations to include a one-mile buffer zone.

DPR must consider the community and county complaints in evaluating next steps for proposed regulation.

¹⁷ California Environmental Health Tracking Program "Agricultural Pesticide Use Near Public Schools in California" Department of Public Health (Apr. 2014) *available at* http://cehtp.org/file/pesticides_schools_report_april2014.pdf at page 17.

¹⁸ Julia Barrett, "Getting the Drift: Methyl Bromide Application and Adverse Birth Outcomes in an Agricultural Area" Environmental Health Perspectives, June 1, 2013, *available at* <http://ehp.niehs.nih.gov/121-a198/>.

¹⁹ *Id.*

²⁰ National Academy of Sciences "Pesticides in the Diets of Infants and Children 3 -7" (1993) at 309.

²¹ *Supra* note 2 at 30.

²² Shelton, Janie F., et al. "Neurodevelopmental Disorders and Prenatal Residential Proximity to Agricultural Pesticides: The CHARGE Study." Environmental Health Perspectives, June 23, 2014 *available at* <http://ehp.niehs.nih.gov/1307044/>.

DPR must consider numerous complaints made locally and statewide regarding pesticide drift in drafting the proposed regulations and the impact of pesticides on the community. As DPR heard at the November 16, 2016 public hearing, students, parents, environmental scientists, and other residents want more protection than the proposed regulations. According to El Quinto Sol's reports, in Tulare County, parents have tried to file complaints regarding their children who have walked to and from school when pesticides were used within hours of the student's trip. The Tulare Ag Commissioner's office refused to document required information for follow up with many of the pesticide complaints.

Additionally, many Tulare County parents who call need a Spanish interpreter to make complaints regarding school pesticide use. The Ag Commissioner has rarely accommodated complaints in Spanish. Where the Ag Commissioner documents and follows up with a community member or parent, the Tulare Ag Commissioner waits too long before sending out a person to investigate a pesticide complaint. This lag time changes the conditions that the Ag Commissioner records for factual investigation and reduces the likelihood that the office will find drift at the site.

Complainants are required to present an unreasonable amount of proof to demonstrate spraying indeed happened at a location. For example, Ag commissioners expect complainants to keep the clothing in the exact form as it was when they were sprayed and must recount the exact location where it happened. Despite the lack of the Ag Commissioner's follow up on local complaints, other groups have tested to see whether pesticides were present on individuals near sites with pesticides. El Quinto Sol assisted in testing children's hair who lived near fields that were treated with pesticides; it found upwards of 50 pesticides in two students' hair samples and the findings were documented in various news sources.²³ Yet, Tulare County Ag Commissioner's office has failed to record and consider many calls regarding pesticide drift and spraying in its County.

Moreover, DPR must acknowledge that in communities with high populations of residents with undocumented status and immigration issues, submitting a public comment opens an uncomfortable door to allow the general public to access that community member's personal information. El Quinto Sol tracked and witnessed this difficulty as an integral component of community hesitancy in participating in the Central Valley hearings. We urge DPR to give special consideration to testimony from organizations and community members who represent undocumented community members and residents facing immigration issues when analyzing changes to the regulations.

²³ Cash Investigation. Produits chimiques : nos enfants en danger, FRANCEINFO (Feb. 2, 2016), http://www.francetvinfo.fr/replay-magazine/france-2/cash-investigation/cash-investigation-du-mardi-2-fevrier-2016_1286821.html.

Conclusion

In sum, DPR should not put business over its legal and civil rights obligations to protect students and their environment while at school. We urge DPR to revise its proposed regulations to include private and charter schools, remove discretionary opt-out and alternative agreements that do not include parents and other community members, create full-time protections for students, increase the buffer zone to one-mile protections, and consider community complaints to strengthen protections for California students. If you have additional questions, please contact Abre' Conner at aconner@aclunc.org. ACLU of CA and El Quinto Sol de America look forward to your revised regulations.

Sincerely,



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