

2004 Structural Symposium Questions and Answers:

These questions were asked at the end of the 2004 Structural Symposium. The Department of Pesticide Regulation (DPR) staff researched the appropriate answer for each question and compiled the following answers. These questions were also forwarded to the Structural Pest Control Board (SPCB) and their answers are still pending.

Question 1: The term “expert witness” was mentioned several times. What is the legal definition of “expert witness”? Who can be an “expert witness”? If you are a party of the action (have an interest or involvement in), can you be an “expert witness”?

Answer: An “expert witness” is defined as a person with training and expertise in any given field. “Expert witnesses” may be called upon to state their opinions on a matter within their particular area of knowledge or skill, where the trier of fact itself cannot form an opinion, because special study, skill or experience would be required to do so. An “expert witness” can, based upon their special knowledge or skill, testify about things within the scope of their specialized knowledge or skill, they did not personally see or experience. Training, education and experience are the necessary tools to credit any person with the expertise and the knowledge to qualify him as an “expert witness”. There are some exceptions, but Advocates generally should not be qualified as “expert witnesses”.

Question 2: Can a person refuse to be an “expert witness”? Please explain more about establishing an inspector as an “expert witness”?

Answer: Yes. It’s important that an Advocate first discuss the matter with a potential “expert witness” before attempting to qualify the person as an “expert witness” during the hearing. If the Advocate feels that the person will help the county’s case, he or she should talk to him and assure him that he is doing the right thing if testifying, and make him feel comfortable in providing testimony and doing a good job. The Advocate should ask a series of questions to establish that the potential “expert witness” has the required training, experience, education, and job responsibilities. To save time during the hearing, the Advocate should attempt to obtain a stipulation during a pre-hearing conference about qualifying specific inspectors or biologists as “expert witnesses”. If a stipulation is not obtained, the Advocate will need to go forward with attempting to qualify inspectors, biologists, or other witnesses with some sort of expertise, as “expert witnesses” and rely upon the hearing officer to determine whether the witness is truly an expert.

Question 3: Who is the SPCB Specialist for Tuolumne, Calaveras, Amador, and El Dorado Counties?

Answer: Mr. Dennis Ohlsson is the Specialist for those Counties. He can be reached at (916) 567-8737 (voice), (916) 263-2469 (fax), or e-mail at <Dennis_Ohlsson@dca.ca.gov>.

Question 4: Do you have the “due process” rights when issued a notice of violation or a citation?

Answer: In its most basic interpretation, “due process” means an orderly proceeding adapted to the nature of the case, a proceeding in which the individual receives adequate notice of a proposed governmental action, and has the opportunity to be heard and defend his conduct. In essence, “due process” is fundamental fairness within the quasi-judiciary hearing.

When the county issues a violation notice, warning letter or other “compliance action”, it is not, at that time, proposing to take one’s property away (such as a monetary fine) from a person. In other words, there is no proposed governmental action, just “a notice” that a government entity has, in its opinion, observed a violation.

In the case of an administrative civil penalty action, the proposed governmental action attempting to “take away” the property of the respondent (e.g., a monetary fine) and “due process” is required.

One only has a right to due process when the government is proposing to take away one’s property away. Your rights to “due process” can be summarized in the following manner:

- Right to a fair and public hearing conducted in a competent manner
- Right to be present at the hearing
- Right to an impartial hearing officer
- Right to be heard in one’s own defense
- Laws must be written so that a reasonable person can understand what the violation is about
- Right to cross examine and confront your accuser with your own evidence

Question 5: What citable section should be used when a Branch II company applicator refuses to be inspected during an application at a residence?

Answer: If a licensee refuses to be inspected during any pesticide application (and no matter which type of pesticide use activity), you may cite the applicator or pest control business for violation of Title 3 California Code of Regulation (3 CCR) section 6140, Inspection Authority. Title 3 CCR section 6140 specifically provides that the Director or commissioner, may during business hours, or at any other reasonable time, enter and inspect, and/or sample. In addition, the person responsible for preparing/maintaining records shall make required records available during business hours. The authority for implementation of 3 CCR section 6140 is found in the Food and Agricultural Code sections 11456 and 12981 though, these are not the “citable sections.”

If an applicator refuses to be inspected during an application at a residence, they are, in fact, refusing to be inspected and are in violation of 3 CCR section 6140. The county should immediately convey this information to the licensee while still at the inspection site. The county must document this information, perhaps on an inspection report or by way of a letter, in a timely manner, if they wish to pursue the matter in a later enforcement action.

Question 6: Requiring a stamp on each use report each month can be a disincentive for a small business to expand into a new county. Is there a possibility that SPCB could allow small operators to only need to use a stamp on a report when a minimum of four applications have been made in a county? This would spur competition and encourage business expansion into new counties?

Answer: Unfortunately it's not possible and will require new legislation. Currently, operators are required only \$6 a stamp to register for the first job and can pay \$10 for any additional expansion into other counties.

Question 7: Please discuss structural licensing requirements, if any, for real estate companies and property management companies that have their maintenance person do pest control in rentals they manage for absentee owners? If these companies do not need to be licensed, would tenant notification requirements be applicable?

Answer: This question has been forwarded to the SPCB and the answer is pending.

Question 8: Can you have more than one Advocate in one session? For appeal purposes, can the Respondent have the copy of the taped hearing?

Answer: Yes, you could have more than one Advocate per session, however it might appear intimidating to the respondent. DPR recommends against having more than one Advocate in a hearing because the administrative civil penalty process is actually intended to be a person-friendly process. In addition, having more than one Advocate seems to suggest that the county agricultural commissioner (CAC) may not be using its resources well.

In most cases, hearings are taped. The county is not required to provide a copy of the tape free of charge to the Respondent and may charge reasonable duplication costs to the Respondent. Also, if the Respondent wishes to make their own copy of the tape, he or she should be advised that they should make arrangements, (if possible, before the hearing) to have an additional tape made. In no case should the Respondent's taping activity disrupt the hearing. The county is not required to provide written transcripts. If the Respondent wishes to make arrangements for a transcription service to transcribe the hearing, they must make arrangements to do so before the hearing, and they must pay the transcription service.

Question 9: When an investigation that has been completed and sent to State (*sic*) office, the CAC usually does not receive any information back regarding the investigation. Why can't we receive a short review result?

Answer: A county may forward an investigation to its regional office. The regional office, after review, forwards it to the Enforcement Branch Headquarters Office and then to the Director's Office. The Director and the Office of Legal Affairs (OLA) may then review it to determine whether prosecution is the most effective course of action. If the Director and OLA determine that the evidence in the case does not support a civil action, or the statute of limitations has tolled so close to the end that further prosecution is not possible, DPR may drop the case and return it to the CAC, who has a longer statute of limitations.

The problem with a “short review” as suggested, is that in order for the review to be “short” it would have to be reviewed only by regional office staff and not be forwarded through normal review chain, which can take several weeks to reach OLA. The regional office staff has investigative training and is generally qualified to provide feedback about an investigation and the case file, but they are not specifically trained to determine whether or not the case is sufficient to result in civil prosecution. Unfortunately, DPR does not have resources necessary for its staff attorneys to provide an individual review of each case submitted. When there is a serious problem or defect with a case, the staff attorney usually conveys that information back to the liaison assigned to the particular county. It is the liaison’s responsibility to convey that information back to the county.

Question 10: How is testing done to assure the proper amount of chemical was used, for example, in Arizona or Texas?

Answer: Testing is done based on pre-treatment charts that use square foot, linear foot and amount of product being used. Some undercover testing consists of sampling hose ends for lab analysis, soil, and fill tank samples are very common too. Also, you can trace the amount being used by checking purchase records and deducting the amount purchased from what is left on the lot.

Question 11: Can one field representative or operator be the office manager at more than one branch office? Any limits distance or number of offices?

Answer: Business and Profession section 8611 states that each office shall have a branch supervisor designated by the registered company to supervise and assist the company’s employees who are located at that branch.

Question 12: To solve the live capture exemption, will SPCB consider banning live capture of rats, mice and pigeons?

Answer: This question has been forwarded to SPCB. The answer is pending.

Question 13: For budgeting purposes, we need to know now where next year’s training location will be held. We can then budget for airfares, rooms etc.

Answer: The training committee, which consists of staff from DPR, the California Agricultural Commissioners and Sealers Association, and SPCB, usually decide on which location to conduct the annual structural training once the contract between DPR and SPCB is approved. We typically schedule it in the spring as requested by the California Agricultural Commissioners and Sealers Association for this particular training. Because of state budget issues, we cannot forecast where we will be conducting such training next year. You might wish to look at your own county’s reimbursement costs per diem and car travel for previous years to come up with an estimate for next year, as these costs generally do not fluctuate greatly from year-to-year. Costs involving air travel can vary widely. We suggest you use whatever method your county budget office uses to estimate future air travel costs for determining your air travel costs.

Question 14: If the CAC takes a Structural Civil Penalty (SCP) action, can the CAC then refer the case to SPCB for licensing action?

Answer: No, the SCP information can be used as prior violation, but a different non-compliance action would have to be initiated and recorded for a new action to be taken.

Question 15: Is there consideration by either agency that if DPR or SPCB cannot take a case for prosecution that the case will be sent back to the CACs in a timely manner (before statute of limitations expires to allow CACs to review it again and make further decision)?

Answer: DPR asks CACs not to send the actual case file to DPR for enforcement action because then the statute of limitation clock starts. However, the CAC may send a summary of the incident(s), summary of the evidence and inquire about whether the case is worth pursuing. DPR could then comment on it without triggering the one-year statute of limitations imposed upon the Director once he receives the file.

Answer from SPCB on how they will handle such case is pending.