

Enforcement Response Workshop Questions and Answers

1. What happens when Department of Pesticide Regulation (DPR) disagrees with a decision report from a county?

Answer: If DPR disagrees with the *clarity* of a decision report, we would ask the county to include additional information to satisfy the requirements outlined in Title 3, California Code of Regulation (3CCR) section 6128(d)(1-7). The county should make any necessary revisions and resubmit the decision report to the regional office.

- If DPR disagrees with the decision itself, we will specify our reasons for denial and would direct the county to take an enforcement action per 3CCR section 6128(d). DPR will evaluate its denials of decision reports for each county and will address specific issues and concerns during county evaluations.

2. Will DPR change county decision reports?

Answer: No. If DPR disagrees with the County Agricultural Commissioner's (CAC) decision, we will inform the CAC of our reasoning within 30 calendar days, as required under 3CCR section 6128(d), and request the CAC provide additional documentation or take an appropriate enforcement action.

3. Will the Enforcement Response Committee evaluate all decision reports and actions?

Answer: No. The Enforcement Response Committee (which includes DPR and CAC representatives) is charged with reviewing the implementation and impacts of the enforcement response regulations over the next two years. The committee will then provide feedback and recommendations to the Director.

4. Who may write decision reports?

Answer: Any CAC inspector or biologist may write decision reports. However, the decision report requires the "(s)ignature of the agency official responsible for the decision" per 3CCR section 6128(d)(7). This may either be the official or an upper-level management designee.

5. What happens if the CAC is unable to submit each decision report to DPR within the 30 days, as required?

Answer: According to 3CCR section 6128(d), a decision report must be submitted to DPR within 30 calendar days of the date of the compliance action. DPR will review submissions as one of the enforcement response implementation issues. If a county's decision reports are consistently late, this may be noted in their county evaluation.

6. Are CAC decision reports and DPR responses public information?

Answer: Yes. Final CAC decision reports are public information and are available to anyone by request.

7. If a county does not hear from DPR within 30 days of submittal of the decision report, does that mean that DPR concurs with the CAC's decision report and no changes are necessary?

Answer: Yes. 3CCR section 6128(d) states "the Director shall notify the commissioner within 30 days of the receipt of the decision report with the specific reason for denial."

8. If a headquarter (HQ)/records inspection is part of the follow-up to a non-compliance, should the CAC wait to send a decision report until after the HQ/records inspection is completed? Are the two separate inspections considered one incident relative to compliance history?

Answer: Yes to both questions.

- When a HQ/records inspection is considered a follow-up inspection, the CAC may submit the decision report after the HQ/records inspection is complete. The HQ/records inspection is required to be performed in a timely manner.
- The two separate inspections (initial and follow-up) may be considered one incident in determining the compliance history.

9. Can you combine multiple violations found as a result of one incident into one fine (enforcement) action?

Answer: The enforcement response regulations do not change existing policy and CAC discretion to combine multiple violations found as the result of one incident. Again, it varies depending on the compliance history, as well as the severity and circumstances of the incident. Incidents with exposure and injuries warrant more careful analysis of the violations and may justify multiple counts and/or referral to other agencies for enforcement actions.

10. Does the new 3CCR section 6128 affect combining multiple violations for a single "incident" into one fine?

Answer: No. 3CCR section 6128 implements the Enforcement Response Policy of August 2005 that states "an incident is an occurrence when one or more violations are discovered."

11. In one scenario, violation(s) were identified during an incident and additional violation(s) were identified in a follow-up inspection. Can the CAC fine for the first set of violation(s) in one class and then elevate the fine level for the second set of violation(s) found during the follow-up?

Answer: No. Title 3, CCR section 6130(C)(2) defines a repeat violation as a violation that "occurs within two years of a violation for which a civil penalty was levied against that person in the same county and of the same class."

A violation cannot be used to increase subsequent fines until the initial violation has progressed to a final decision. A violation can be considered a repeat violation only after a previous civil penalty action is closed and the violation was upheld. Therefore, this scenario may be considered a single incident.

12. What is the appropriate classification for failure to submit a notice of intent (NOI)? Are there any situations where failure to submit an NOI would be a Class C violation?

Answer:

- Failure to submit an NOI is *generally* classified as either a Class A or Class B violation. However, depending on the circumstances of the incident (for example, toxicity of the pesticide, method of application, whether there were any sensitive sites, etc.), there could be occasions where it would be a Class C.
- In **non-agricultural use**, this violation could be classified as Class C if the CAC has determined the failure to submit the NOI does not pose any potential hazard. An example would be procedural NOIs for the purpose of inspecting at least one non-agricultural application as required by 3CCR section 6436.

13. Do we still have the option of a civil penalty for a first offense Class B or Class C violation?

Answer: Yes. The CAC may choose to take an enforcement action for the first Class B or Class C violation per 3CCR section 6128(c)(2)(B) and (3)(A).

14. What is the appropriate classification for failure to have a copy of the product label at the application use site?

Answer: Generally, it would be appropriate to take an enforcement response in Class B. Continuation of an application without reviewing the pesticide label may pose a reasonable possibility of creating a health or environmental effect (for example, is adequate personnel protective equipment being used, is the mix rate in accordance to the label direction, and is the site listed on the label).

15. If multiple violations in multiple classes (Class A, B, and C) are found in one incident but you take an action against only some of the violations, how do you handle the other violations from this incident that are not included in the NOPA?

Answer:

- The NOPA should be written for the violations you are proposing to take an action on. There is no requirement to explain in the NOPA why you did not take an action on the other violations.
- Title 3, CCR section 6128(c)(2)(C) does not require a decision report when a compliance action is taken in addition to an enforcement action for the same incident.
- The county should follow up as they would in any case to ensure future compliance.

16. CAC consider a company's non-compliance history in another county when making a decision to classify the violation as a repeat violation?

Answer: No. See 3CCR section 6130(a)(2) for the definition of repeat violation. However, a CAC may consider all relevant information when setting the fine level within the appropriate classification.

17. Does the enforcement response regulations cover violations involving antimicrobials?

Answer: Yes. All pesticide use violations, including those involving antimicrobials, are covered under the enforcement response regulations. DPR recommends the CACs begin industry outreach efforts in those counties where antimicrobial uses and non-compliances are known to be high.

18. Is there currently a requirement to take a compliance action within 30 days of the violation?

Answer: No

19. Since the regulations became effective November 30, 2006, does the compliance history start over on this date for determining an enforcement response?

Answer: No. The enforcement response regulations are consistent with the enforcement response policy that has been in place since August 2005 and previous violations should be considered when taking an enforcement response.

20. In determining a repeat violation, would you clarify what the two-year history means? Does it start with the date of violation or the date of the NOPA issuance?

Answer: To determine a repeat violation, three conditions must be met:

- The second violation must have occurred within two years of the date of the first violation;
- The second violation must be in the same class of the first violation; AND
- The civil penalty action, NOPA, for the first violation is closed and any appeal rights have expired.

During the appeal process, you cannot consider a subsequent violation as a repeat violation. A NOPA is not considered "levied" until all appeal rights have been exhausted.

21. If the first action was appealed and overturned, can we use the first violation as a basis for determining a repeat violation? For example, the action is overturned because the hearing officer or DPR misinterpreted the section?

Answer: No. The subsequent violation would not meet the definition of repeat violation.

22. If a Class B action is appealed and downgraded to a Class C action, can that action (or violation) be used in determining a repeat violation of a subsequent Class B violation?

Answer: No. If the classification was downgraded during a hearing or an appeal, the subsequent violation may only be considered a repeat violation of the class in the final determination (Class C in the above example).

23. Under the new regulations, when determining if a violation is a repeat, does it matter if the past enforcement action was an agricultural civil penalty or a structural civil penalty?

Answer: No. Prior violations for which an agricultural civil penalty was taken and finalized can be used in determining a repeat violation for taking a structural civil penalty in that same class and vice versa.

Please Note: The regulations now provide for consistent application of enforcement responses between structural and agricultural violations. The guidance noted in the August 2005 Enforcement Response Policy, page 10 no longer applies.

24. If the CAC takes an action against a company for a repeat of a Class C violation, does it have to go to a Class B fine level?

Answer: Yes. You would fine at a Class B level because it is a repeat Class C violation.

25. If you fine at a Class B level because it is a repeat of a Class C violation and then you find a subsequent Class B violation, is this a repeat Class B violation and therefore fined at the Class A fine level?

Answer: No. First determine the violation class and then determine the fine classification. There is a difference between the violation classification and fine level classification. The subsequent violation was a Class B, however, the prior violation was a Class C that was elevated to Class B only by formula not by definition (health or environmental effects).

26. If you fine at the Class B level for a repeat Class C violation, do you stay at a Class B fine level for the next Class C violation?

Answer: Yes. If there is another Class C violation within two years, it would again elevate by formula to a Class B fine level since it would be a repeat of a Class C violation.

Only Class B violations that meet the definition of Class B violation (reasonable possibility of creating a health or environmental effect) are considered repeat Class B violations and would therefore be fined at the Class A fine level.