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Hearing Officer Roundtable Project--Detailed Table of Contents

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Section ii

Hearing Officer Roundtable Project Introduction

Background

In 2001 and 2002, nine Administrative Hearing Investigative Issues Roundtable "discussions" were held through out the State. Each California Agricultural Commissioners and Sealers Association area group held two Roundtables at different locations within their area group with the exception of the Northern area group, which held one Roundtable.

Purpose

The initial purpose of the Roundtable discussions was to discuss issues related to the County Agricultural Commissioners implementation of the Agricultural Civil Penalty Program authorized by Food and Agricultural Code section 12999.5 and of the Structural Civil Penalty Program authorized by Business and Professions Code section 8617.

A second, although indirectly-related, purpose was to discuss investigation issues and specific code section strategies related to the previously mentioned administrative penalty programs. The investigation and specific code section issues were not part of the original scope of the project, and were actually planned for a second part of the project, but the team was able to complete both items, primarily because of the support and interest of the Executive and Enforcement Branch sponsors.

Issues

Various issues pertaining to administrative hearings and investigations were discussed at each Roundtable. In addition, other suggestions and comments were submitted by the Roundtable facilitator, Gerald A. Benincasa, retired Tuolumne County Agricultural Commissioner, in addition to suggestions from DPR staff and county personnel who did not participate in the Roundtable discussions.

Attendance

Each session averaged 20 participants. Some Roundtables included large numbers of highly experienced pesticide use enforcement personnel, while others had less experienced personnel in attendance. A majority of personnel had previously acted as an Advocate on behalf of their county, or as a Hearing Officer on behalf of their county or another county. Some participants at the Roundtable discussions seemed to be unfamiliar with pesticide use enforcement activities -- we presume they were from other programs that may utilize an administrative civil penalty process.

Continued on next page

Hearing Officer Roundtable Project Introduction, Continued

Project objectives

Project objectives were to research, analyze, and develop responses pertinent to those hearing or investigation issues raised during the Roundtable discussions and to provide responses and guidance to be incorporated into the future Hearing Sourcebook revision.

Benefits and Outcomes

- New procedures for performing administrative civil penalty hearings were developed.
- Clearer policy statements emerged and two of DPR's long-held policies were reversed (homeowners and concurrent hearings).
- All documents containing legal theory or application were examined, poked, prodded, and approved by the two senior attorneys in DPR's Office of Legal Affairs (with over 50 years of law practice between them).
- It was another opportunity to build on staff understanding about how due process concepts relate to their daily activities.
- The Information Mapping® formatted documents can easily be incorporated into the future Hearing Sourcebook revision.
- The Information Mapped documents are "modular" and can be used by CAC staff if they desire to develop their own training programs.

Approach

Each question was analyzed and classified. When appropriate, questions were combined because of similar subject matter and/or processes.

Response development

- We performed research using known and reliable resources.
- We initiated consultations with Office of Legal Affairs staff, whenever necessary.
- Whenever possible, we used terminology from the existing Hearing Officer Sourcebook, 2002 version of the Enforcement Guidelines, Appeals to the Director (in Enforcement [ENF] letters beginning in 1997), or current laws and regulations. We also consulted Merriam-Webster's Collegiate® Dictionary, Tenth Edition, before defining new terms. The Glossary is a summation of the terminology we used for this project -- it is intended to be consistent with other terms used in the pesticide regulatory program.
- Whenever possible, we attempted to utilize the Appeals to the Director or ENF letters after 1997 (post-Federal Worker Protection Standard implementation) when providing specific advice about application of code sections.

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Project dedication

The Project Team wishes to dedicate this entire project to honor and thank Patty Kershell, for all the times she typed, retyped, and reformatted the Hearing Officer Sourcebook, dozens of other Enforcement manuals, and thousands of investigative reports. She typed a huge amount of the initial text of the future Hearing Sourcebook revision, without complaining once, despite numerous and continual software and equipment failures during the nineties. Patty was hard-working and dedicated to making sure Enforcement Branch documents always looked good. Patty passed away in December 1999. We still sincerely miss her and thought about her many times while working on this project.

Section iii

Roundtable Facilitator's Introduction

Introduction

Mr. Gerald (Jerry) Benincasa, former Tuolumne County Agricultural Commissioner and a hearing officer under contract with the Department of Pesticide Regulation (DPR), facilitated the Hearing Officer and Investigative Roundtable discussions with county agricultural commissioner and DPR staff.

Mr. Benincasa's knowledge and expertise in the area of administrative civil penalty hearings, authorized by Food and Agricultural Code section 12999.5 and Business and Professions Code section 8617, is well respected. His insight about challenges facing county programs is appreciated by both county and DPR staff.

Mr. Benincasa's findings from the Roundtable discussions and his recommendations form the basis for the questions and issues addressed in the Hearing Officer Roundtable Project.

Section iv

Roundtable Facilitator's Message

Jerry's message

DPR and the County Agricultural Commissioners and Sealers Association diligently pursued a mechanism to fill the penalty violation void between a violation notice and prosecution by the district attorney. Serious violations were often too egregious for a violation notice, but did not necessarily warrant criminal action by the district attorney. In some instances, serious violations or repeated violations were not prosecuted.

After many meetings between DPR and the commissioners, as well as the regulated industry and concerned groups, the Legislature authorized the administrative civil penalty processes in use today.

We will always be concerned with certain fundamental matters, specifically relating to integrity, fairness and justice.

- Can a Hearing Officer affiliated with the County Agricultural Commissioner's Office adhere to a high moral principle and maintain a professional standard?
- Can the Hearing Officer be unbiased, impartial, fair and reasonable?
- In addition, will an appeal of the Commissioner's decision by the Director of DPR be unbiased, impartial, fair and reasonable?

The system has maintained its integrity, fairness and adherence to high moral principles and professional standards. Simply stated, when the evidence presented satisfies the elements of the alleged violation as well as the fine classification for that violation, the proposed penalty was upheld. When the evidence does not support the alleged violation, the proposed penalty is dismissed. If an error in judgment occurs during the hearing process, the appeal to DPR results in a second review using similar standards.

Although the system has maintained its integrity, some persons occasionally feel they have been treated unfairly. In most of these instances, emotions expressed by county and/or DPR staff, and/or the alleged violator, inaccurately created a perception that the system is less than fair. The perceptions of all parties, whether accurate or inaccurate, are important because they go back to the concerns voiced before implementation of this process.

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Jerry's message (continued)

As the issues become more complex and their outcome potentially more severe, it is important to maintain all the skills necessary to provide a fair process, from investigative techniques and case preparation, to advocate presentation and Hearing Officer decisions. Enhance your skills by attending discussions, workshops or training, and stay familiar with the Sourcebook and appeal decisions. The administrative civil process is important and will continue to be a necessary component of violation actions.

Gerald (Jerry) A. Benincasa

Administrative Adjudication*

Section 1.1

Administrative Agencies Within Our Legal System

Administrative agencies within our legal system

Perhaps the most significant legal trend of the last century was the rise of powerful and expansive administrative agencies. As a result, the average person is much more directly and frequently affected by the administrative process than by the judicial process. Many citizens go through life without ever being a party to a lawsuit, but the administrative process affects nearly every one daily.

What the administrative process protects against

The pervasive effects of administrative agencies can quickly be appreciated by considering a few examples of what the administrative process protects against: air and water pollution; false advertising; unreasonableness in the rates, schedules, and services of airlines, railroads, and buses; excessive prices for electricity, gas, telephone, and other utilities; unwholesome meat and poultry or other deceptive practices; adulteration of food and drugs; inadequate safety in appliances; unfair labor practices; uncompensated injuries relating to employment; subminimum wages; and physically unsafe means of public transportation, bridges, and elevators.

Our daily involvement with administrative agencies

The preceding list, containing only a few of the numerous examples, is adequate to demonstrate the exceedingly far-reaching involvement of administrative agencies in our daily lives. It is not surprising that today California has more than 100 State agencies and municipal bodies, each playing its part in the administrative process.

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Administrative Adjudication*

Section 1.2

Development of Due Process

Development of due process

The concepts embodied in the phrase "due process of law" are not new. As early as 1215 A.D., they were clearly expressed in the Magna Carta (Latin for the 'Great Charter'), a document signed by King John of England guaranteeing he would not execute or jail his subjects, nor seize their property unless done according to the "law of the land." In time, this concept grew to be called "due process" and became one of the cornerstones of American jurisprudence.

Procedural due process

As a result of the phenomenal growth of administrative agencies, several dramatic developments in constitutional law have occurred, particularly in the area of "procedural due process." Although much has been written concerning procedural due process, the term is often used with little understanding of its origin and tremendous impact upon the activities of governmental agencies.

"Due process of law" today

Today, due process of law is embodied in the language of the Fifth and Fourteenth Amendments of the United States (U.S.) Constitution, which provide that neither the federal government nor the states shall "deprive any person of life, liberty, or property, without due process of law." In its most elementary sense, 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 or her conduct. In essence, due process is fundamental fairness.

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Development of Due Process, Continued

Court's primary focus of "due process"

Initially, the primary focus of the court in the area of due process related to judicial proceedings. But recent U.S. Supreme Court decisions, such as Goldberg v. Kelley, Morrissey v. Brewer, and Wolff v. McDonnell, have clearly established that due process is in no way limited to judicial proceedings, but extends to every case in which an individual may be deprived of life, liberty or property, whether the proceeding be judicial or administrative in its nature. The due process clause has as its fundamental goal, the protection of citizens from arbitrary governmental interference with their guaranteed constitutional rights.

Prior to 1970, the U.S. Supreme Court was reluctant to recognize due process protections unless a case involved the deprivation of a "right." If the deprivation consisted of what the Court termed a "privilege," due process protections were not to be afforded.

Morrissey v. Brewer case

Morrissey v. Brewer was a dramatic rejection of this distinction, holding that due process applies whenever an individual is being subjected to a "grievous loss." In that case, the U.S. Supreme Court concluded the loss of conditional liberty enjoyed by a parolee was a grievous loss, and was, therefore, entitled to due process of law before being deprived of this conditional liberty. However, the Court did not find the existence of a right to be irrelevant. In fact, an individual must have a right to something (such as conditional liberty) before its loss may be said to be grievous, such that due process would apply.

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Administrative Adjudication*

Section 1.3

What Process is Due?

What process is due?

Due process is often said to be a flexible concept. Its exact boundaries cannot be defined and its content varies according to the specific factual contexts in which it is considered. Thus, when any governmental agency makes a determination affecting the legal rights of an individual, we must look at the specific factual context in order to determine precisely what due process protections will apply.

Several factors must be weighed in order to determine whether the U.S. Constitution requires that a particular procedural protection be applied in a given proceeding, including the nature of the protection, the character of the proceeding, the interests of the parties, and the burden of implementing the procedural protection in that proceeding.

Within the framework of due process, each administrative agency in California must adopt specific procedures which are in accord with the statutory provision governing that agency.

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Administrative Adjudication*

Section 1.4

Role of the Hearing Officer in a Disciplinary Hearing

Introduction

Administrative tribunals were created to relieve the courts of the burden of adjudicating many thousands of actions, disputes, and other proceedings, and in many respects, have become an extension of our American judicial system. The administrative Hearing Officer occupies a primary position in this process and shoulders substantial responsibility.

Hearing Officer's responsibilities

Although not occupying the judge's chair in the traditional courtroom setting, the Hearing Officer is every bit as much a judge. Resolving conflicts and dispensing justice, the Hearings Officer's function is often indistinguishable from that of his/her judicial counterpart. These individuals are the keystone of the administrative law system, rendering judgments and decisions having far reaching effects upon the rights and obligations of everyone.

In many instances, Hearing Officers act as both judge and jury by making the determination as to the facts in a particular case, in addition to the ultimate decision as to the appropriate laws, rules, and regulations to be applied. An additional burden is placed upon the Hearing Officers when the claimant or accused is not represented. In that instance, Hearing Officers have a greater responsibility to develop evidence and to assist the unrepresented party in the presentation or his or her case.

U.S. Supreme Court opinion on administrative adjudication

Hearing Officers should heed the admonition of the U.S. Supreme Court when it noted that administrative adjudication should be simple, flexible, and adaptable to a variety of problems. These guidelines should be adhered to, as hearings are conducted within the appropriate standards of due process of law. Not only the Hearing Officer's attitude and conduct, but the procedures and the entire hearing process should make the persons involved feel that they are being dealt with fairly.

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Role of the Hearing Officer in a Disciplinary Hearing, Continued

Who *can* and *should* be the Hearing Officer?

The Hearing Officer *can* be anyone the county agricultural commissioner (CAC) or Director feels is qualified by training or experience to act in the capacity of a Hearing Officer. The Hearing Officer *should* be someone who can understand and is familiar with the elements of the law(s) or regulation(s) alleged to have been violated, has good analytical skills, can write well, is willing to make written findings of fact based on the evidence introduced at the hearing, can apply the facts to the violation(s) alleged, will put in writing how those facts show the alleged violation(s) occurred, and write a well-reasoned proposed decision.

The Hearing Officer *should not* be someone who was involved in the inspection and/or investigation of the matter or involved in the decision that the evidence is sufficient to bring the action.

Delegated the role of Hearing Officer

If the CAC or Director has delegated the role of Hearing Officer to another person, the CAC or Director should adopt the proposed decision as his/her own decision.

Demeanor of the Hearing Officer

To a great extent, the tone of a hearing is determined by the demeanor of the Hearing Officer, who must assure that the hearing proceeds in a proper manner, that an adequate record is made, that all relevant evidence is received, and that all persons present are encouraged to speak freely about the issues under consideration. Not only must the hearing be a "fair" hearing, it must have the appearance of being a fair hearing.

Initially, the Hearing Officer should assume a calm, neutral, and business-like posture. All participants should be put at ease by being received in a respectful and courteous manner. Many of the people who may appear at an administrative hearing are doing so for the first time in their lives. It is not uncommon for them to be somewhat bewildered and confused or nervous. The Hearing Officer should give assistance to these people by explaining the hearing and questions to be decided. The hearing should be conducted in a patient, but deliberate fashion. The informality of the hearing should be readily apparent to all parties.

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Hearing Officer's obligation to the state, the county, and the Respondent

The Hearing Officer's obligation to the state, the county, and the Respondent is to be impartial, make written findings of fact based on the evidence, and decide whether a violation occurred based on facts brought before him or her.

The Hearing Officer must be above reproach at all times, be unbiased, and focus upon the particular issues at hand.

Impartiality

Assuming the position of a Hearing Officer means adopting a role of impartiality. A Hearing Officer must be sensitive to the way in which words and conduct affect others. Often, it is merely an innocent act of friendship which may create the suspicion of partisanship.

The Hearing Officer must not engage in *ex parte* consultation with persons involved on one side or the other. Not only do such consultations violate the concept of fundamental fairness, they give the appearance of favoritism.

It is highly inappropriate for the Hearing Officer to form or express any opinion on factual matters connected with the hearing until all the evidence is admitted. A chance remark by the Hearing Officer may tend to show that a conclusion has been formed prior to hearing all the evidence. A good Hearing Officer is ever mindful of this human tendency. Making a decision prior to receiving all the evidence is an absolute derogation of the Hearing Officer's duties and responsibilities.

Continued on next page

Impartiality (continued)

The Hearing Officer must always avoid any inclination to be either a partisan or an advocate for a particular position, listening with patience and fairness to all the testimony. Nor should the Hearing Officer be influenced by sympathy, passion, or prejudice towards any of the parties. In reaching a final conclusion, evidence to which a party has made a valid objection should be disregarded by the Hearing Officer. The Hearing Officer should never take as evidence the unsupported statements of an attorney or representative at the hearing. All the evidence should be heard and evaluated before the Hearing Officer begins the decision-making process.

U.S. Supreme Court's ruling on administrative hearing bodies

The importance of the Hearing Officer's impartiality has been emphasized by the U.S. Supreme Court's ruling on administrative hearing bodies.

A Hearing Officer who is believed to be biased, may be challenged. Bias is only found where the Hearing Officer has some type of personal involvement with the Respondent's case or where some other circumstance exists which may prejudice the case. The fact that the Hearing Officer conducted a hearing involving the same Respondent some time in the past is not sufficient to establish a finding of bias. However, if the Hearing Officer has formed opinions which would preclude objectivity towards this person as a result of prior contacts with the Respondent, the Hearing Officer should disqualify himself/herself.

Additionally, if the Hearing Officer has any personal interest in the outcome of a particular case or a close friendship with any of the parties, inferences of bias and prejudice may exist; the Hearing Officer should postpone the hearing and ask that another Hearing Officer be appointed.

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Proper decorum

Proper decorum includes the following:

- The County Advocate (Advocate) should support the authority and the dignity of the hearing by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward the Hearing Officer, the Respondent, witnesses, and others in the hearing room.
- When the hearing is in session, the Advocate should address the Hearing Officer, not the Respondent, on all matters relating to the case.
- It is unprofessional conduct for the Advocate to engage in behavior or tactics purposefully calculated to irritate or annoy the Respondent.
- The Advocate should comply promptly with all orders and directives of the Hearing Officer, but the Advocate has a duty to have the record reflect adverse rulings or conduct he/she considers prejudicial. The Advocate has a right to make respectful requests for reconsideration of adverse rulings.
- The Advocate should be punctual in all court appearances.
- The Advocate should take leadership in developing, with the cooperation of the Hearing Officer, a code of decorum and professional etiquette for proper hearing room conduct.

Proper hearing room decorum

Proper decorum in the hearing room:

- Both the Advocate and the Respondent should support the authority and the dignity while in the hearing room by strict adherence to the rules of decorum and by manifesting an attitude of professional respect toward each other, the Hearing Officer, witnesses, and others.
- When the hearing is in session, the Respondent should address the Hearing Officer, not the Advocate directly, on any matter relating to the Advocate.
- It is unprofessional conduct for the Respondent to engage in behavior or tactics purposefully calculated to irritate or annoy the Hearing Officer or the Advocate.
- The Respondent should comply promptly with all orders and directives of the Hearing Officer, but he/she has the right to have the record reflect adverse rulings or judicial conduct which he/she considers prejudicial to his/her legitimate interests. The Respondent has a right to make respectful requests for reconsideration of adverse rulings.

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Role of the Hearing Officer in a Disciplinary Hearing, Continued

Preparing for the hearing

To be fully prepared, the Hearing Officer should carefully review all material submitted prior to the hearing, note the contested issues, and consider the pertinent rules and regulations involved in the case. This review must be made with an open mind, realizing that a "quickie" judgment may result in an erroneous conclusion. This review should merely enlighten the Hearing Officer as to the issues and serve as a guide to the conduct of the hearing. Instant judgment based only on the supporting evidence should never occur. The Hearing Officer must remain objective while gathering and considering all evidence presented in the fact-finding stage.

Selecting a hearing room

The location of the hearing is also important to the overall hearing process. The Hearing Officer should insist on suitable arrangements for the hearing. The hearing site should not be demeaning to the process. The hearing room should be quiet and private enough to maintain confidentiality. A noisy, well-trafficked area is not appropriate for a hearing.

Conduct and control of the hearing

The Hearing Officer has three basic duties with respect to the conduct and control of the hearing:

1. Gather all relevant evidence relating to the matters in controversy.
2. Evaluate all evidence admitted into the hearing.
3. Make a sound decision.

Opening the hearing

The Hearing Officer determines the tone of the hearing. A friendly, relaxed atmosphere is essential in order to maintain informality in administrative hearings. The Hearing Officer should introduce himself and others present to the parties at the beginning of the hearing. The name and position of each person present in the hearing room should be ascertained so that the parties can be referred to by name during the hearing. However, the Hearing Officer should refrain from appearing overly friendly with staff to prevent appearances of favoritism. All participants in the hearing should be treated in a similar manner and with respect.

The Hearing Officer should, at the outset, explain the procedures to be utilized in the hearing and discuss them with the parties, remain mindful of the duty to develop a good record of the hearing, and identify the hearing as to time, date, and place.

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Taking testimony

Frequently, a Hearing Officer will wish to take notes as testimony is given. Such notes are useful during a later determination although the Hearing Officer should avoid the appearance of constantly scribbling and not paying attention to the testimony itself. Note taking should also be done in such a manner as to not give the Hearing Officer the appearance of being passive; the participants in the hearing should feel that the Hearing Officer is in control of the hearing and is developing the case in a purposeful manner.

Personal preference determines how active a role the Hearing Officer will take during the hearing. It should appear that he or she is commanding the logical development of evidence, yet is not dominating the hearing, intimidating the parties, or misdirecting the testimony.

The Hearing Officer should not interfere with the case by making extraneous comments or observations, by adverting to collateral and irrelevant matters, or by breaking into testimony before an answer is completed. A sequential story obtained in an orderly fashion is the straightest and shortest line between the opening and closing of the hearing.

While gathering evidence in the hearing, great care must be exercised in the use of the Hearing Officer's questioning power. By asking leading questions or nodding sympathetically, the Hearing Officer may inadvertently suggest that a particular line or argument or evidence is decisive. The manner of questioning should encourage all persons to speak freely about the issues under consideration.

The Hearing Officer's approach to evidence gathering may be affected by the presence of an attorney. The attorney should assume the primary obligation for organization and development of the case, and because of this, the Hearing Officer may be able to take a less active role in the proceedings. The Hearing Officer's own questioning is generally limited to areas not covered by counsel, but which are germane to the matters at issue. Where a party is not represented by counsel, the Hearing Officer assumes greater responsibility for developing the facts and for assisting in presenting the Respondent's case. The responsibility extends to a more vigorous cross-examination of adverse witnesses and more in-depth questioning as to all matters.

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Disruptions during the hearing

It is not unusual for a participant in a hearing to become angry or frustrated, and behave in a persistently disruptive manner. Verbal attacks on other participants will sometimes occur among the parties to a hearing. When such a tense situation develops, it is incumbent upon the Hearing Officer to maintain a deliberate calmness, even though he or she may also be angry and frustrated. Fairness or justice cannot be achieved in a hearing in which the parties are merely venting their hostilities. When facing difficult situations, the Hearing Officer should take extra care to discuss the issues and focus upon relevant evidence.

The Hearing Officer should immediately caution participants that proper order must always be maintained; insist on an orderly development of the testimony. A brief recess may be useful to restore tempers and allow the hearing to continue in a calmer and more orderly fashion. At such times, the Hearing Officer should display firmness, lack of emotional involvement, and make clear a determination to be neutral and impartial.

Under no circumstances should one person be allowed to verbally abuse or badger another. If the conduct of one or more participants is completely inappropriate and they appear unable to continue with the hearing, the Hearing Officer may want to exclude that person from the hearing or to grant a continuance, but this should occur very rarely.

If the Hearing Officer maintains control and handles tense situations correctly, the conclusion of the hearing will be possible.

Closing the hearing

The Hearing Officer usually extends a final opportunity to the participants of a hearing to add any last remarks to their testimony by asking if they have anything further to say before closing the hearing. This question gives witnesses a chance to complete their stories in their own way. Often, responses to such a question may be lengthy and irrelevant to the issues in the hearing; a Hearing Officer will have to tactfully limit such answers.

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Role of the Hearing Officer in a Disciplinary Hearing, Continued

The Hearing Officer's responsibilities after the hearing

After all the testimony has been presented, the Hearing Officer will begin the difficult process of evaluating the evidence and making decisions. The Hearing Officer should be familiar with relevant regulations, thorough in developing the record upon which the decisions will be based, and logical and clear in the expression of his or her opinion. Only with the fulfillment of these requirements will the role of the objective and impartial Hearing Officer be satisfactorily performed.

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Section 1.5

How to Read and Understand the Codes

Introduction

Sometimes, it may seem that laws and regulations are written just to confuse and befuddle us. Actually, laws and regulations are intended to address problems. However, after various interests and parties have had an opportunity to comment or "weigh-in" on the matter, the intended simple solution often becomes more complicated as the result of many compromises. After words and phrasings are added, deleted, and massaged, the original simple provision may be transformed into something quite different from the initial proposal.

Code analysis steps

The following analytical steps (guidance) may seem basic or obvious, but these steps are routinely used by successful paralegals, legal researchers, and attorneys. This guidance might also be helpful to you in your role of regulator, inspector, investigator, Advocate, or Hearing Officer.

Step	Action
1	Read the section over at least three times – then read it again. It is likely that you will more accurately understand the section with each reading.
2	Never ignore *"and," "or,"* and *"except."* These are the words that can partially or completely change the intention(s) and/or requirement(s) of the section(s).
3	Assume all words and all punctuation have meaning. Do not ignore words that you do not immediately understand; do not skip over words that do not serve your purpose; do not ignore punctuation. Punctuation can tell you whether you are reading part of a clause or idea, a continuation of a clause or idea, or a complete idea. Sometimes, punctuation seems inconsistent or redundant. This may be purposeful. You can be assured that if the Director of the Department of Pesticide Regulation (DPR), DPR's Office of Legal Affairs, or a court looks at the section, they will consider all of the words and all of the punctuation.

Continued on next page

Code analysis steps
(continued)

Step	Action
4	Interpret the section so that it is consistent with all of the State's other pesticide laws and regulations, and policies of DPR, if possible. If a section seems to completely disagree with another law, regulation, or written policy of DPR, you may not be interpreting the section correctly or you may have missed an exemption stated in another law or regulation.
5	Interpret ambiguities in ways that seem to best further the purpose of the Legislature's intent, or in the case of regulations, the intent of the authorizing statute. The Legislature authorizes DPR to operate for specific purposes. DPR promulgates regulations and develops written policies to ensure its actions are consistent with the Legislature's intent.
6	Interpret the code so that it makes sense and does not lead to absurd or improbable results. Although they sometimes may be difficult to read, the codes are not actually intended to be "tricky" or confusing.
7	Look at the titles, headings, or subheadings of the section. Then, read "up" to the name of the article or chapter. It is important to consider the context of the law or regulation. No law or regulation exists in a vacuum. Take a close look at the titles, headings, and subheadings leading to the code section you are referencing to make sure you are considering the section within its context.

Continued on next page

Tips for interpreting regulations

- Regulations should be fairly consistent with the mission of the agency; attempt to reconcile regulations with other regulations of the same agency.
- Strictly interpret regulations that can result in a punishment.
- Liberally interpret regulations that are intended to protect the general welfare.
- Do not interpret a regulation in a manner that is contrary to common sense.

Don't give up

As stated earlier: "Read the section again!" or try reading it aloud to a colleague. The CAC staff may contact its Senior Pesticide Use Specialist if the CAC staff is having difficulty understanding a particular State pesticide law or regulation

References

- Barclay's Official California Code of Regulations (Thompson West)
- Legal Research: How to Find and Understand the Law, by Steven Elias (Nolo Press)
- West's Annotated California Codes (West Group, A Thompson Company)

Section 2.1

What are the Main Points to Address in an Investigation?

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What are the main points to address in an investigation?
-

Note: This document is not intended to supersede DPR's *Investigative Techniques Manual* or *Investigative Training* courses.

Background

Investigation is an "art" and not a "science." It must be discussed in terms of perceptions and advice (art), rather than laws and rigid theories (science). In order to conduct a successful investigation, the investigator needs to plan the investigation, "operate in harmony with the rules," and, to the greatest extent possible, follow the investigation plan. Failure can result if unorthodox methods are used or the prescribed procedures are neglected.

The investigator's goals

An investigator is a person who collects information to accomplish several goals:

- Determine whether a violation occurred;
- Identify the violator(s);
- Locate the violator(s); and
- Provide evidence to prove his/her culpability for the violation.

The investigator's duties

Finding the violator of an offense is frequently the simplest part of the investigation, whereas obtaining the evidence to support the charge in a hearing is often the most difficult.

Planning the tasks and duties for an investigation is a key factor to the success or failure of the investigation. The lead investigator must be involved in the planning process and in delimiting the roles of other staff involved in the investigation (including progress reporting relationships and expectations). Investigators (such as inspectors, biologists, technicians, or any other appropriate civil service classification) assigned to a case are required to gather various parts of an investigation and form it into one complete "story."

Continued on next page

What are the Main Points to Address in an Investigation?,
Continued

The investigator's duties (continued)

Investigators must interview the complainant(s); search, collect evidence from and make observations of the site(s) where the violation(s) occurred; interview witnesses and suspects; collect, compile, and transmit the evidence; and perform all of the necessary functions of the investigation.

The investigation will be a success if the physical evidence is competently handled, witnesses are intelligently interviewed, the suspect or suspects are intelligently interviewed, all leads are properly developed, and all information gathered is clearly and accurately reported. The Hearing Officer's decision is not necessarily a valid measure of whether the investigation was a success or failure.

The three "I's"

For the sake of simplicity, investigators must practice and follow the three "I's." The three "I's" are:

- Information;
- Interrogation; and
- Instrumentation

Information -- Of the three "I's," *information* is the most important, since it answers the questions: "Who did it?"; "What did they do?"; and, "How did they do it?" Information is used to describe the knowledge the investigator obtains from other persons. There are two types of information. The first is information gathered from sources including conscientious citizens, company records, files from various organizations, etc. The second kind of information is the knowledge the experienced investigator gathers from other sources, such as informants, current and former employees, acquaintances, etc.

Interrogation -- Interrogation includes the skillful questioning of both witness and suspect. Success of an interrogation varies with the skill, craft, logic, and insight the investigator uses when he/she questions a person who may possess information relevant to the case. A good investigator excels in the "art" of interrogation by being able to establish a rapport with the witness or suspect.

Continued on next page

What are the Main Points to Address in an Investigation?,
Continued

The investigator's duties (continued)

The investigator should look upon a reluctant witness or suspect as a person who will provide the information requested if he/she is questioned with skill, persistence, and patience. An investigator who possesses common sense and a capacity for perseverance will become a good investigator if he/she has insight into personalities and has acquired knowledge of psychology by study and observation.

Instrumentation - Instrumentation includes the application of instruments, including various types of scientific equipment and methods used in the physical sciences to detect a violation. Instrumentation is most effective in cases where physical evidence is abundant. Instrumentation includes photographing the violation site, sending samples of physical evidence (e.g., swab samples, produce samples, pesticide samples, etc.) to the laboratory to identify what pesticides are involved and connect them to the suspected violator, establish the degree of contamination, etc.

The most common use of instrumentation involves analyzing the physical evidence in the case. Investigators must be thoroughly trained in the various types of equipment used to aid him/her with the investigation. Many technical aids are available, but unless the investigator understands how these aids can be used effectively, their full potential will not be adequately realized.

Conclusion

Evidence gathered by investigators must establish the essential elements of the violations alleged. The investigation is not concluded until every attempt has been made to establish each essential element of the violation and connect them to the suspected violator.

The completed investigation is the end product of teamwork, from the time the violation has been discovered, authorities contacted, evidence collected, and witnesses interviewed, until the hearing takes place.

Continued on next page

What are the Main Points to Address in an Investigation?,
Continued

DPR training for investigators

For detailed information on pesticide use-related investigations, you should attend DPR's training course, *Investigative Techniques*. In this course, you will obtain the *Investigative Techniques Manual*, a manual intended for use by county agricultural commissioner staff. The manual will help investigators "think through" the investigation process, plan for any possible enforcement action, and use and assemble resources effectively.

Section 2.2

How To Determine the Elements of the Violation

Questions posted at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What is an element of a violation?
- How do we figure out the elements of the violation?
- Is there a simple method for figuring out the elements of the violation?

Terms for the elements analysis

- **Elements** are the pieces (or components) which must be addressed to prove parts of the violation. The number of rows on a Worksheet does not necessarily equal the number of "elements" of a violation.

- **Evidence** is a fact of consequence that furnishes proof of the violation.

- **Facts** are statements that can be proven. For example, facts can be proven by credible documentation, testimony, photographs, etc.

- **Inference** is a conclusion, based upon reasoning. By engaging in reasoning, a fact or conclusion becomes more or less likely to have occurred. Make inferences only when you have sufficient facts. Inferences should always be noted or labeled as such.

Not all elements have inferences or require strategies!

How to analyze a violation – in a nutshell

- Select a law, regulation, or rule;
- Break it into its relevant elements (components);
- Provide a piece of evidence to prove each element;
- Determine whether or not a violation occurred.

Element variations are possible

Analyzing the elements of a violation is not an exact science. In some cases, there may be more than one perspective on how to analyze a specific requirement, resulting in a slight variation on the number of elements.

Continued on next page

How To Determine the Elements of the Violation, Continued

Elements analysis helps prove the violation and the case

This elementary analysis of the requirement (or violation) and its specific elements will help you to determine what evidence may be necessary for a Hearing Officer to make necessary findings of fact.

The Hearing Officer needs at least one piece of evidence for each element to make a finding of fact that the Respondent "violated" or failed to comply with the legal requirement.

The elements analysis exercise also helps Advocates to plan or outline their presentation to the Hearing Officer, because it helps to focus on the relevant matters and evidence necessary to prove a violation by a preponderance of the evidence.

Having trouble?

If you are having trouble determining the elements, it may be because you have encountered an "unwritten element," clarifying statement, or a list within an element. Answering the following who, what, when, where, why and how questions may help you to determine the elements:

- **Who** is required to perform or complete the requirement?
  - This may be an "unwritten" element.
- **Who** is the requirement designed to protect?
  - This may be an "unwritten" element.
- **What** is the general requirement?
  - Occasionally, this is not stated and it may be unclear; try looking at the title of the law or regulation for guidance.
- **What** has to be done to fulfill the requirement?
  - Is there a specific method to be followed?
- **What**, if any, are the exceptions to the requirement?
- **When** or **where** is the requirement to occur?
- **Why** is this requirement important?
  - A specific "why" is sometimes not stated or apparent. Usually, the answer is something to the effect, "for the purpose of protecting the public health, safety, and the environment."
- **How** is the requirement to be completed?

Continued on next page

Example of a clarifying statement

Clarifying statements are not necessarily "elements" that would tend to prove or disprove a fact. They are usually just introductions or clarifying language to assist the reader to understand the Legislature or Director's intent for creating the particular requirement.

Example: *"Notwithstanding that substantial drift would be prevented . . . ."*

This statement could be restated to say, "In spite of what we mentioned a moment ago about the likelihood that harm or damage might occur, in order to prevent "substantial drift," you also have to . . . ."

Example of a broad element

Occasionally, elements are so broad they may seem subjective or may use subjective language. This is usually intentional on the part of the Legislature or Director because it isn't always possible to anticipate every problem that could arise in the future. The language is intended to make the requirement robust enough so that it can apply to a variety of unanticipated situations.

For example: *"The applicator shall evaluate . . . ."*

Occasionally there will be a list following "evaluate" or other subjective words. Look for clues within the list (e.g., "and", "or"). Occasionally, the list has no clues, but the list might not stand on its own – that is when it might be considered part of another element. Sometimes, there isn't a list accompanying a broad element – in those cases, consider utilizing the testimony of an expert witness to offer an opinion, based upon their knowledge and experience.

Elemental wisdom

- Make sure you consider all of the elements of the violation. If a table has three legs and it needs four to stand up, then you need to attach four legs to the table.
- Consider how an objective "trier of fact" might view the elements. You need to consider the elements during the investigation if you want your case to be successful when it is considered by an objective third party.
- Is your "evidence" relevant to the elements of the violation? Seven matching binders of a perfectly-tabbed, thick investigation report probably won't convince a "trier of fact" to make findings and a decision in your favor, if you miss addressing all elements of the violation(s).
- Use your best judgment.

Continued on next page

How To Determine the Elements of the Violation, Continued

Purpose of the worksheets

The Elements of the Violation Worksheet is intended to:

1. Provide an elementary analysis of a legal requirement; and
2. Outline the elements necessary to prove the violation by a preponderance of the evidence.

These are guides to assist you in proving a violation.

Caveat

The worksheet is not intended to override common sense or specific legal advice. They may not provide examples of every type of evidence that may be available and they may not ask every question that might be relevant to prove a violation.

Worksheet

The worksheet is available in the following section.

Section 2.3

Elements of the Violation Worksheet

Code:
Section:
Text:

Elements What must be proved to establish each element? What are the simplest parts of the requirement?	**Evidence** A fact of consequence that furnishes proof of the violation. A fact is a statement that can be proven (e.g., documentation, testimony, photos).	**Inference** A conclusion based upon reasoning. The reasoning can make it more or less probable.

If you have difficulty, . . . Ask the following questions if you are having difficulty breaking the section into their elements:

- What is the general requirement? What has to be done?
- Who is required to perform or complete the requirement? Who is the requirement designed to protect?
- How is the requirement to be completed? Is there a specific method?
- Are there other parts of the requirement that are very specific or detailed? (e.g., type of equipment, specifications, named documents, records, licenses, etc.
- Where and/or when is the requirement to occur?
- What, if any, are the exceptions to the requirement?

Inferences should be clearly labeled and only made when you have sufficient facts – they may not be necessary to prove the elements of the violation.

Section 2.4

General and Specific Code Sections

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Should the Food and Agricultural Code (FAC) or Title 3, California Code of Regulations (3CCR) be cited?
- What are the factors to consider?

Specific versus general

Under a long line of cases going back to the 1800s, the Supreme Court of California has held that:

- A general provision is controlled by specific provisions.
- Specific provisions relating to a particular subject are controlling over a general provision and govern in respect to that subject.

DPR's regulations outline the specifics of pesticide worker safety

The Department of Pesticide Regulation's (DPR's) regulations ***specifically*** outline the responsibilities of employers and employees in the area of pesticide worker safety. FAC section 12973 is a "general provision" related to the use of pesticides, and therefore, makes no mention of specific pesticide worker safety or employer-employee responsibilities in relation to pesticide worker safety.

Worker safety requirements versus FAC §12973

When initiating a civil penalty action against an employer for matters involving pesticide worker safety, county agricultural commissioners (CACs) are encouraged to charge violations of DPR's specific pesticide worker safety or other applicable regulations, rather than FAC section 12973.

For example, when an employer does not provide safety equipment such as goggles, which may be part of the federal worker protection standard in Title 40, Code of Federal Regulations (40 CFR), Part 170, and be on the label, it is more appropriate to cite 3CCR section 6738 rather than FAC section 12973. 3CCR section 6701 provides that it is intended that California's pesticide worker safety regulations, rather than those found in 40 CFR, Part 170, be enforced by DPR and CACs within California.

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Folklore about laws, regulations, and previous decisions

On occasion, we hear generalizations comparing laws and regulations that may or may not be true in any given situation. These generalizations should not be factors relied upon to determine which code section or regulation to use when preparing a civil penalty action. Consider these examples:

Generalization	Think About It
"The laws have more authority than the regulations so you should cite them instead, whenever possible."	Laws come from the Legislature. Regulations come from an administrative agency. The Legislature passes laws granting the administrative agency authority to promulgate the regulations. If the law or regulation is valid, the authority for each ultimately comes from the same source and both carry the weight of the law.

Generalization	Think About It
"Its easier to use a law than a regulation because laws are easier to prove."	This statement may be true in some cases. However, the agency initiating the action has a responsibility to analyze the situation and choose the most appropriate code or regulation section. In most cases, the best code or regulation section to choose is the one whose specific elements most closely match the specific facts of the case.

Generalization	Think About It
"We cited that section before without any problem."	The law may stay the same, but the facts of each case are unique. The evidence offered to prove those facts will differ. How the Hearing Officer weighs the credibility of the evidence and witnesses will vary. All these will affect how the advocate presents the case and what decision the Hearing Officer makes.

Continued on next page

General and Specific Code Sections, Continued

Tips

- Do not rely solely upon sections noted on inspection forms to determine the section you should cite in your administrative civil penalty action. Those sections may be cited, but you should cite the section most appropriate to your specific administrative civil penalty action.
- Check similar or corresponding laws and regulations for the subject area of your violation to determine if other sections might be more applicable to the situation.
- Determine the elements of the violation of any section you think you may be able to cite in the administrative civil penalty action.
- Determine which code or regulation violation has specific elements that can be most clearly and easily established by your evidence.
- Try to accept that decisions based upon the law may differ from the outcome you would like to see.

References

- 3CCR section 6701, Interpretation Consistent with Federal Standards
- 3CCR section 6702, Employer-Employee Responsibilities
- 3CCR section 6738, Personal Protective Equipment
- Enforcement Letter 2000-032 (Docket No. 088)
- Enforcement Letter 2001-055, Civil Penalty Actions Against Employers or Employees for Matters Involving Pesticide Worker Safety
- Enforcement Letter 2002-025 (Docket No. 109)
- FAC section 12973
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 2.5

Citing the Section or Specific Subsection

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- When citing a violation, should you cite the section or specific subsection?

The most specific citation possible should be used in the NOPA

Due process requires us to tell the Respondent the exact code or regulation section he/she is being charged with violating so that the Respondent has enough information to be able to defend himself/herself and prepare for the hearing. Due process will improve if the specific code or regulation section has been cited in the Notice of Proposed Action (NOPA).

Why the citation should be as specific as possible

Some regulations are simple and have few subsections, such as Title 3, California Code of Regulations (3CCR) section 6680, pertaining to prohibited containers for pesticides or 3CCR section 6682(a), pertaining to transportation of pesticides.

Other sections may be lengthy, broken into numerous subsections and to several levels of specificity, having exemptions, clarifications, or limitations built into them. A good example of this is 3CCR section 6738 pertaining to personal protective equipment requirements. 3CCR section 6738 contains nine subsections, many of which are broken down into more subsections, and has over two thousand words. In the case of such a lengthy regulation or code section, a citation which stops at a level before the actual omission or action constituting the violation is described could fail to met due process or make the preparation or presentation of the case, or the hearing or hearing record, unfocused, confused, or unclear.

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Citing the Section or Specific Subsection, Continued

Examples of how a lengthy section should be cited: 3CCR §6738

The more specific you are about code citations, the easier it is for the investigator, Advocate, Respondent, and Hearing Officer to focus on the elements of the alleged violation elements or requirements.

Example 1: 3CCR section 6738(d) requires an employer to assure that: "(1) When chemical resistant footwear is specified by the pesticide product labeling, one of the following types of footwear is worn: (A) Chemical resistant shoes; (B) Chemical resistant boots; or (C) Chemical resistant coverings worn over boots or shoes. (2) For aircraft operation, chemical resistant footwear need not be worn."

Assuming the facts of the case are: (i) The employer did not assure the employee was wearing the required footwear; and (ii) the inspection or investigation report or testimony shows the employee was wearing leather shoes (instead of chemical resistant footwear). There could be up to three citation styles for the NOPA. Any one of the following citations are possible:

1. 3CCR section 6738
2. 3CCR section 6738(d)
3. 3CCR section 6738 (d)(1)

Due process would clearly be met by (3) above. This citation with the greater detail might help the Respondent better understand the allegation, assist the Advocate in making a clearer case, or help the Hearing Officer write concise findings of fact.

Continued on next page

Examples of how a lengthy section should be cited: 3CCR §6738, continued

Example 2: 3CCR section 6738(b) requires an employer to assure: (1) that the employees wear protective eyewear when they are engaged in certain activities, i.e., activities in either paragraphs (A), (B), (C), (D) or (E).

Assuming the facts of the case are: (i) the employer did not assure that an employee was wearing protective eyewear; and (ii) when the employee was engaged in repairing lines containing pesticides. Any one of the following citations are possible:

1. 3CRR section 6738
2. 3CCR section 6738(b)
3. 3CRR section 6738(b)(1)
4. 3CRR section 6738(b)(1)(B)

It is only when citation (4) above is given that the activity (repairing a pesticide line) of the employee who was not wearing the protective eyewear is actually described. This citation describes the violation best, would provide better notice to the Respondent, and could help focus the entire hearing proceeding.

Warning: The ENFACT Database has a different citation style

The level of detail for code citations shown in the Enforcement and Compliance Action Tracking Database (ENFACT) *may* be different from the level of detail the county agricultural commissioner (CAC) uses for code citations in a NOPA or other document.

ENFACT is limited to accepting only the first level of detail after the section number. For example, no matter how many letters or symbols are entered, "3CCR section 6738(h)(1)(i)" will always be reported as "3CCR section 6738(h)" by the database. The database is not intended to have the same level of detail of a CAC's NOPA. There is sufficient information in the shorter citation style to meet the purpose of the database, which is to generally inform about violations, rather than providing due process to persons receiving a CAC's NOPA.

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Citing the Section or Specific Subsection, Continued

References

- 3CCR section 6680, Prohibited Containers for Pesticides
- 3CCR section 6682, Transportation
- 3CCR section 6738, Personal Protective Equipment
- Enforcement Guidelines, Technical Revision, December 2002, Citable Sections -- http://www.cdpr.ca.gov/docs/enfcmpli/admnacts/citsec.pdf
- FAC section 12999.5

Section 2.6

Multiple Violations Arising From a Single Episode

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What factors are considered when determining single/multiple violations arising from a single episode? The following questions are examples of section-specific questions provided by county staff at the Hearing Officer Roundtable discussions:

    1. Are one or two violations appropriate when a pesticide applicator is not wearing gloves or goggles?
    2. Are one or two violations appropriate when a pesticide drifts onto two adjacent properties?
    3. Are one or two violations appropriate when a pesticide application results in loss to two beekeepers?

- How do I determine the fine to levy against the violator?

Are one or two violations appropriate when a pesticide applicator is not wearing gloves or goggles?

It depends on the facts of the case <u>and</u> on which sections you determine best fit those facts, <u>and</u> on the strength of the evidence you have to prove the elements of each violation.

Let's assume in our scenario that an applicator failed to wear either gloves or goggles during a mixing and loading activity. There was no requirement that an applicator wear gloves stated on the label, but the label does require the applicator to "wear protective eyewear." We also know that Title 3, California Code of Regulations (3CCR) section 6738 specifically requires that the employer assure the employee wears gloves and protective eyewear (listing goggles as an option) when performing mixing or loading activities.

County agricultural commissioners (CACs) are encouraged to cite only the most specific section for which there is proof of each element of the violation. In this instance, that would probably be 3CCR sections 6738(b)(1)(A) and 6738(c)(1)(A) which specifically requires that the employer assure that their employees wear gloves and goggles when engaged in mixing and loading. Since 3CCR sections 6738 (b)(1)(A) and 6738 (c)(1)(A) impose separate requirements on the employer, the employer could be charged with a separate violation of each (i.e., charged with two violations).

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Multiple Violations Arising From a Single Episode, Continued

Are one or two violations appropriate when a pesticide drifts onto two adjacent properties?

Many “drift” incidents are a result of one contiguous application. It wouldn’t be appropriate to charge two counts of 3CCR section 6614(b)(1) for the same act or incident simply because the pesticide “drifted” onto two properties.

However, if the “drift” or application to a “nontarget crop” was the result of two discrete acts (e.g., the plane set down to reload with pesticides before continuing the application or the plane made a northern directional pass then a western directional pass), you might be able to make a successful argument for two violations of the same section. The facts of the case, the elements of the violation, and the strength of the evidence proving those elements should be your guides.

Are one or two violations appropriate when a pesticide application results in loss to two beekeepers?

In the question posed at the Roundtable, the scenario given was that the Respondent had killed some bees and damaged beehives. The Respondent was charged with violating 3CCR sections 6652 and 6654. These two specific sections relate to notification of beekeepers prior to applying pesticides, but they are NOT "citable" sections for a CAC's administrative civil penalty action. CACs have authority to levy civil administrative fines under Food and Agricultural Code (FAC) section 12999.5 only for violations of regulations issued pursuant to Divisions 6 and 7 of the FAC. Authority to issue regulations relating to the protection of bees comes from Division 13 of the FAC.

Therefore, the CAC cannot levy an administrative civil penalty against any Respondent for any violation of 3CCR sections 6652 and 6654. A Respondent probably can be charged with violating another statute or regulation for which the CAC does have the enforcement authority in this situation.

If the loss of bees was the result of “drift,” FAC section 12972 or 3CCR section 6614 may have been appropriate to charge, and the determining factor in deciding whether or not to charge more than one violation is, as described above, whether or not the damage can be seen as the result of one or two distinguishable acts.

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How do I determine the fine to levy against the violator?

Once the CAC has selected the most specific and appropriate code or regulation section to cite, he/she should determine the appropriate fine category as set forth in 3CCR section 6130. When determining a penalty amount from within the appropriate fine category, the CAC should use his/her own judgment based on the nature of the facts of the case (i.e., number of people actually affected, whether it was a minor and inadvertent mistake, an egregious lack of care, etc.). The CAC should not charge multiple sections solely for the purpose of building up the total penalty amount, but work within the parameters of the fine guidelines.

Application of FAC §12973 and 3CCR §6614

- FAC section 12973 states in pertinent part, "The use of any pesticide shall not conflict with labeling . . . ." In many cases, the pesticide label's "directions for use" state something to the effect of "avoid contamination of nontarget crops," "do not apply when conditions may favor drift," or "avoid drift."
- 3CCR section 6614(a) requires pesticide applicators, prior to and during an application, to evaluate the equipment to be used, meteorological conditions, the property to be treated, and surrounding properties to determine the likelihood of harm or damage; 3CCR section 6614(b)(1) prohibits making or continuing a pesticide application when there is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process.

Both FAC section 12973 and 3CCR section 6614 establish a standard of conduct to be followed by pesticide applicators. By invoking the requirements of the label, FAC section 12973 may only generally prohibit the result (contamination or drift), while 3CCR section 6614 specifically requires the applicator to assess the risks inherent in the specific situation and to specifically consider certain factors when making that assessment. In the case of a pesticide drift incident, in order to find the Respondent responsible for both offenses, the county must present evidence showing that the Respondent failed to do something specifically required by the label (FAC section 12973) *and* failed to adequately assess the risk of drift occurring by failure to consider one of the factors listed in 3CCR section 6614 or made or continued the application when one of the reasonable possibilities specified in subsection (b) existed.

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Application of FAC §12973 and 3CCR §6614 (continued)

The CAC is encouraged to charge only those sections where the evidence proves the Respondent failed to do something specifically required by the section relied upon as the basis of the charged violation.

Application of 3CCR §6614(b)(3) and 3CCR §6600(e)

- 3CCR section 6614(b)(3) prohibits the application of a pesticide when "there is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing the normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered."
- 3CCR section 6600(e) requires a pesticide applicator to "exercise reasonable precautions to avoid contamination of the environment."

3CCR section 6600(e) is what is termed a broad "catch-all" provision that requires the exercise of reasonable care to avoid contamination of the environment. 3CCR section 6614(b)(3) specifically spells out what in the environment the section is designed to protect, including the normal use of property. If the Respondent's actions have actually affected any category specifically spelled out in 3CCR section 6614, that section should be cited. It is hard to imagine a situation not covered by 3CCR section 6614 requiring the separate citation of 3CCR section 6600. Unless the facts of a specific incident analyzed fall under only the "catch-all" requirements of 3CCR section 6600, the CAC is encouraged to charge a violation of only the more specific 3CCR section 6614.

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Application of 3CCR §6600(c) and 3CCR §6600(e)

- 3CCR section 6600(c) requires a pesticide applicator to "use only methods and equipment suitable to insure proper application of pesticides."
- 3CCR section 6600(e) requires a pesticide applicator to "exercise reasonable precautions to avoid contamination of the environment."

As stated above, 3CCR section 6600 (e) is the broad "catch-all" provision. 3CCR section 6600 (c) requires care specifically with regard to methods and equipment. If the failure of the Respondent relates to the use of improper methods or equipment, the more specific section should be cited. If the Respondent's failure is to exercise reasonable care in the use of such equipment or in the execution of the method, perhaps the general section should be cited instead of the specific section. The correct call can only be made knowing the specifics of the particular incident.

Multiple counts for each person affected: FAC §12985

FAC section 12985 states, "Any person who orders an employee to enter an area posted with a warning sign in violation of any worker safety reentry requirements promulgated pursuant to this article by the Director is guilty of a misdemeanor." FAC section 12985 also states, "A violation of this article affecting any worker or workers constitutes a separate offense for each affected worker."

This code section expressly allows the CAC to charge one violation (count) for each employee ordered as specified in the section. For example, if an employer (the Respondent) directs 32 employees to enter a recently treated field before the expiration of the restricted entry interval, the CAC can charge the employer with 32 counts of violating FAC section 12985, one count for each employee directed to enter the field.

Continued on next page

Multiple Violations Arising From a Single Episode, Continued

Court decision

Violations of other sections that deal with situations where other persons are affected may also provide the possibility to charge one violation for each person affected or contaminated. A court decision has upheld a CAC's action charging multiple violations of FAC section 12973 for each worker who was "allowed to enter a treated field" in conflict with the label. The workers were not ordered to enter an area posted with a warning sign, however, the employer not only failed to notify workers pursuant to 3CCR section 6618(b) and failed to post under section 3CCR section 6676, but had been at the site, personally talked to the farm labor contractor, and failed to tell him not to let the workers enter the treated field. With these specific facts, the court upheld separate FAC section 12973 counts for each worker that entered the field.

General advice on charging multiple violations for a single act

Do not "pile on" violation counts in a Notice of Proposed Action in an attempt to arrive at a preconceived penalty amount. Let the facts of the case, the careful selection of the most specific violation(s) that best fits the evidence, and the fine guidelines (3CCR section 6130) determine the penalties.

References

- 3CCR section 6600, General Standards of Care
- 3CCR section 6614, Protection of Persons, Animals, and Property
- 3CCR section 6618, Notice of Applications
- 3CCR section 6652, Availability for Notification
- 3CCR section 6654, Notification to Beekeepers
- 3CCR section 6676, Container Requirements
- 3CCR section 6738, Personal Protective Equipment
- FAC sections 12972, 12973, and 12985

Section 2.7

Citation Strategies for Worker Safety Violations

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Is a County Agricultural Commissioner (CAC) required to cite an employee for personal protective equipment (PPE) violations if the employer can successfully assert the independent employee action defense (IEAD)?
- What factors can the CAC rely on to identify the responsible party for PPE violations?
- Should the CAC cite the employer, employee, or both?
- How should the county advocate respond if, during a hearing, the respondent claims the employee acted independently with regard to PPE violations?

Background

Before taking any enforcement action against an employer or an employee for a PPE violation, CACs must understand the laws, regulations, and policies applicable to this issue.

This document addresses questions posed at the Hearing Officer's Roundtable through discussions of:

- General sections of law versus specific provisions of law/regulations;
- Employer and employee responsibilities;
- Employer's IEAD;
- CAC's discretion concerning citing employees;
- Specific elements required when citing employees;
- Citing Food and Agricultural Code (FAC) section 12973 (**not recommended** in "PPE cases");
- Citing both parties (**not recommended** in "PPE cases"); and
- Defending the CAC's decision to cite an employer.

Continued on next page

Citing general versus specific provisions

Based on case law dating back to the 1800's, the California Supreme Court holds that:

- A general provision is controlled by specific provisions, and
- Specific provisions relating to a particular subject are **controlling** over a general provision and **govern** in respect to that subject.

The California Legislature has authorized the Department of Pesticide Regulation (DPR) to adopt "specific" regulations to effectively implement the Legislature's intent as reflected in certain general provisions of FAC Divisions 6, 7, and 13, *including pesticide worker safety*.

FAC section 12973 is a "general provision" requiring that pesticides not be used in conflict with their registered label, but makes no mention of specific worker safety requirements or employer-employee responsibilities in relation to worker safety. As required by FAC section 12781, DPR has adopted pesticide worker safety regulations (3CCR section 6700, et seq.) that set forth specific worker safety requirements and specify the responsibilities of employers and employees in meeting those requirements. These regulations more than fully implement in California law the protections the Federal Insecticide, Fungicide, and Rodenticide Act's worker protection standards indirectly incorporated by FAC section 12973.

Specific legal advice

Therefore, when initiating an administrative civil penalty action against an employer for matters involving worker (employee) safety, DPR strongly encourages CACs to cite a specific worker safety regulation rather than the FAC section 12973 general provision. For the purposes of this discussion, 3CCR sections 6700, et seq. **govern** and **control** FAC section 12973.

Continued on next page

***Employer* responsibilities**

California law places the preponderance of responsibility for employee safety *on the employer*.

Specifically, 3CCR section 6702 (a) and (b) require **employers** to:

- Comply with regulations applicable to employer conduct;
- Know about applicable safe use requirements in pesticide labeling and regulation;
- Provide employees with comprehensive pesticide-related safety information;
- Supervise employees to assure compliance with applicable requirements and safe handling practices;
- Provide a safe work place and require employees to follow safe work practices; and
- Take all reasonable measures to assure employee compliance with applicable laws, regulations, and pesticide label requirements.

***Employee* responsibilities**

California law recognizes that employees also bear some responsibility for their own safety in the pesticide work place.

3CCR section 6702(c) requires employees to:

- Use the PPE and safety equipment required by regulation or label, *which has been provided by the employer at the work site in a condition that will provide the intended safety or protection*.

Continued on next page

Elements of the IEAD

The Independent Employee Action Defense is a defense that may be raised by an employer when the employer is being blamed for the deed or misdeed of its employee in regard to employee safety. If the employer does not raise the defense, it need not be considered. The CAC is not required to consider it unless it is raised and its requirements established.

The IEAD recognizes that employees sometimes act independently of, and contrary to, their employer's instructions and against their employer's best safety efforts. DPR has allowed employers to use, and CACs to consider, the IEAD because the California Occupational Safety and Health Appeals Board (OSHAB) recognizes it. To successfully assert the IEAD, an employer must prove unequivocal compliance with the requirements described below:

Element	Description
Comprehensive written training program	The employer has a written training program, which includes training employees in matters of pesticide safety with respect to their particular job assignments.
Compliance with training requirements	The employer complied with all applicable training requirements in DPR's pesticide worker safety regulations, with respect to the employee.
Written disciplinary action policy and enforcement of policy against employee	The employer has a written workplace disciplinary action policy that it enforces against employees who violate the employer's safety requirements, and the employer *enforced* the policy against the employee for the incident.
Demonstrate prior employee knowledge	At the time of the incident, the employee, through his/her pesticide safety training or knowledge of the employer's work place disciplinary action policy, knew the employer required its employees to utilize label- or regulation-specified PPE.

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CAC discretion to cite only employers

There is no requirement in law or policy that requires CACs to cite **employees** alone or in addition to employers for specific PPE violations.

In fact, most situations where an **employee can** be cited for not wearing PPE will also be a situation where the employer can successfully raise the IEAD. To say it another way, if the CAC can successfully maintain an action against the employer, in most cases, the CAC cannot charge the employee. CACs cannot cite an employee for a PPE violation under 3CCR section 6702(c) unless the employee is licensed or certified (under either Chapter 14, Division 3, of the Business and Professions Code or Chapters 5, 8, Division 6, of the FAC) **and** all the same requirements that would allow the employer to assert the IEAD have been established (see section 6130(b) of 3CCR).

There may be a situation where the CAC can cite an **employer** for a violation of specific PPE regulations even when the employer's safety program meets the requirements of the IEAD. Close scrutiny of the employer's actions (or lack of) will often reveal one or more violations of the applicable elements in 3CCR section 6702(b) that contributed to an employee not wearing the required PPE. When preparing a case against an employer under these circumstances, the CAC's Advocate at the hearing should be prepared to explain how the employer did not meet its legal responsibilities under 3CCR section 6702(a) or (b) resulting in the employee's failure to meet the PPE requirements.

Citing the most appropriate Respondent and regulation

CACs who wish to bring civil penalty actions against **employees** as a tool in their enforcement program may do so under the very limited circumstances that are set forth in 3CCR section 6130. *The appropriate regulation to cite for the employee's failure to wear the required PPE is 3CCR section 6702(c).*

Continued on next page

Citing the most appropriate Respondent and regulation (continued)

The table below identifies the key information that the CAC must obtain before reaching the decision to bring an administrative civil penalty action against an employee for violations of the PPE requirements found in 3CCR section 6702(c).

Proceeding step by step through the chart below should lead to the correct decision as to who should be charged with the PPE violation in a given situation and greatly reduce the risk of reversal of the CAC's decision if it is appealed to the Director or the Disciplinary Review Committee (DRC).

Step	Action
1	Was the PPE available to the *employee* at the worksite? • If YES, go to Step 2. • If NO, cite the employer under the appropriate section of 3CCR section 6738.
2	Was the PPE in good condition? • If YES, go to Step 3. • If NO, cite the employer under the appropriate section of 3CCR section 6738.
3	Did the *employee* possess a current pesticide applicator's license or certificate issued by DPR, or a license/certificate issued by the Structural Pest Control Board? • If YES, go to Step 4. • If NO, cite the employer under the appropriate section of 3CCR section 6738.
4	Do the employer's safety programs and disciplinary program and actions meet the IEAD criteria unequivocally? • If YES, the CAC may cite the *employee* under 3CCR section 6702(c). • If NO, cite the employer under the appropriate section of 3CCR section 6738 or 6702(a) or (b).

More specific legal advice

The bottom line is that you should not use FAC section 12973 for personal protective equipment violations, unless you cannot find a more specific regulation to charge.

Continued on next page

Citing both parties can rarely be justified

DPR believes that citing both the employer and the employee for an employee's failure to wear the required PPE can rarely be justified as an appropriate exercise of discretion because it does not advance the goal of compliance or deterrence of the State or local Pesticide Use Enforcement program. Policy (IEAD as discussed in ENF 2001-55 and this document) and regulation (3CCR section 6702) provide CACs with ample and effective tools to determine the single, most responsible party when an employee is not wearing the required PPE. The party ultimately responsible should be held accountable if future compliance is the goal.

If a CAC is considering citing both parties, the CAC should question his/her reasons and the consequences of his/her actions –

- Is this being done to increase the amount of penalties collected?
- Is this being done to hedge against a dismissal of one of the cases by a Hearing Officer?
- Is this being done to make a statement? Does it make a good statement about the CAC's fairness?
- Does it solve the compliance problem?

Employer's assertion that it is not responsible for acts of its employees

The Respondent has the right to enter anything into the hearing record that it feels is germane to its case. The Hearing Officer can weigh and consider any information presented by either side. CACs and Advocates should expect an employer to claim it met its worker safety responsibilities and be prepared with their response.

If the CAC cited an employer for a specific 3CCR section 6738 violation, then, upon proof, the employer can be held responsible. The Advocate should be prepared, if he/she can, to explain how the employer failed to fulfill one or more of their responsibilities listed in 3CCR section 6702 (a) or (b) and how this failure allowed the violation of 3CCR section 6738 to occur.

If the CAC cited an employer under FAC section 12973 and the employer proved during the hearing that they met IEAD criteria, provided the employee with PPE in good condition at the worksite, and that the employee was licensed, then the Hearing Officer must dismiss the case. By citing FAC section 12973, and not a specific worker safety regulation, the CAC cannot argue his/her case based on the employer-employee responsibilities in 3CCR section 6702.

Continued on next page

References

- 3CCR section 6700, et seq.
- 3CCR sections 6702 and 6738
- Enforcement Letter 2001-55
- FAC section 12973

"Et seq." is an abbreviation of the Latin "et sequentes." It means "and those (pages or sections) that follow." In our case, "3CCR section 6700, et seq." would mean "3CCR section 6700 through 6795," or "all of the sections pertaining to worker safety that follow 3CCR section 6700."

Section 2.8

Chain of Custody

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- How admissible is a document containing chain of custody if not all the signatories are present?
- What is the proper chain of custody procedure?

Definition

Chain of custody - is technically defined as the movement and location of real evidence from the time it is obtained to the time it is presented in court. In practical terms, a chain of custody is the documentation and testimony that proves that the evidence has not been altered or tampered with in any way since it was obtained. This is necessary both to assure its admissibility in a judicial proceeding and its probative value in any preceding investigation.

"Chain of custody" and "chain of evidence" are often used interchangeably by Department of Pesticide Regulation (DPR) and county agricultural commissioner (CAC) staff; either name is acceptable.

Documenting the chain of custody

The most likely tool CACs will use to document chain of custody is on the reverse side of the Sample Analysis Report, form PR-ENF-030, in a section titled "Custody Record."

DPR staff credentialed to perform federal inspection activities relating to the Federal Insecticide, Fungicide and Rodenticide Act will use the inspection and/or sampling forms approved in the Cooperative Agreement between the U.S. Environmental Protection Agency and DPR.

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Chain of Custody, Continued

Handling the evidence

The necessity to maintain a chain of custody requires documentation of where the evidence was kept, who had access to it, and who actually had possession of the evidence at each point in time. Maintenance of such records as the DPR Chain of Evidence form and the similar DPR laboratory sampling form serve this purpose. Every time a piece of evidence is handled increases the risk that the chain of custody might be "broken," that is, accurate records may not be maintained, accidental contamination may occur, etc. For this reason, the number of persons handling the evidence from the time it comes into the possession of the CAC or DPR until the ultimate disposition of the case should be kept to a minimum.

Transferring the evidence to another person

A record must be kept documenting the transfer of evidence from one person to another. It is the responsibility of each person in the chain of custody to ensure that a complete and accurate record is maintained, including:

- The name of the person from whom he/she obtained the evidence;
- Date and time he/she came into possession of the evidence;
- What steps were taken to protect the evidence; and, if transferred again,
- The name of the person to whom it was transferred and the date and time of that transfer.

Protecting physical evidence

Protecting the physical evidence is important for two reasons:

1. Certain types of evidence are fragile and any failure to exercise due care in its handling could destroy its value as a clue in furtherance of the investigation.
2. If the evidence is not in the same condition as when it was first obtained near the time of a suspected violation, the evidence may still be used, however, its value as credible evidence to prove the violation can be diminished, e.g., plant foliage that was collected, documented, and preserved, but dessicates and dries out before the hearing.

Reference

- California Peace Officers Legal Sourcebook

Section 2.9

Digital Photography

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What is necessary to assure the credibility of digital photographs?

Introduction

Digital images, such as digital photographs, are pictures recorded by a digital camera. The images recorded by a digital camera are stored on a memory card. The images on this card can be loaded and stored on a computer to be printed-out for later use.

Use of photographs in a case

Photographs can document the severity and extent of damage that is caused by the negligent activity of a person or company to the personal or real property of another. Photographs are useful in cases where the property will be disposed of, repaired, evolve, or otherwise change, so that the extent and severity of the damage can no longer be subjected to the personal observation of the Hearing Officer.

The following are minimal requirements for using photographs:

- The subject, scene, or object photographed should pertain to your case;
- The manner in which the photograph is taken should be as objective as possible, guarding against depicting the evidence in an unduly prejudicial or sympathetic light;
- The photograph should not in any way distort the subject, scene, or object it depicts, but should represent a clear and accurate image of the facts.

Is a digital photograph acceptable as evidence?

A photograph taken by a digital camera is an "original" photograph as defined by Federal Rules of Evidence. California courts have not yet addressed this issue, but in all likelihood would follow the federal rule if such a photograph were ever challenged. The basic elements used by a digital camera to create a photograph are no different than a film-based camera; both use light sensitivity controlled by an aperture and shutter speed to capture the image. The digital photograph is kept on the flash memory card on which it was recorded and the traditional photograph is kept on the negative on which it was recorded. In each case, the original imprint remains unaltered. With respect to authenticity and evidentiary value, there is no practical difference between digital and film-based photographs.

Continued on next page

Digital Photography, Continued

Authentication of the photograph

The photograph can be authenticated when the witness (or photographer):

- Is familiar with the object or scene;
- Explains the basis for his/her familiarity with the object or scene;
- Recognizes the object or scene in the photograph as the one he/she saw; and
- Testifies that the photograph is a fair, accurate, true, or correct depiction of the object or scene at the relevant time.

Conclusion

The lack of federal or state appellate court cases dealing with the admissibility of digital photographs in civil or criminal trials seems to indicate that most courts have not had any problems accepting a digital photograph as real or demonstrative evidence.

Reference

- Practical Uses of Digital Photography in Litigation, U.S. Environmental Protection Agency Attorney's Information Exchange Group, July 2000.

Section 2.10

Comparing the Agricultural Civil Penalty and Structural Civil Penalty Programs

About this section	This section compares the differences and similarities between the Agricultural Civil Penalty Program and Structural Civil Penalty Program.
Comparison chart	The comparison chart follows.

Continued on next page

Agricultural Civil Penalties

Penalty Authority
This process may be applied to any person; Food and Agricultural Code (FAC) §12999.5.

Fines
Penalties up to $1,000 per violation for most violations; or up to $5,000 per violation in certain situations; Title 3, California Code of Regulations (3CCR) §6130.

Statute of Limitations
County Agricultural Commissioner (CAC) has two years from date of violation; except - one year from submission when the investigation is completed and submitted to the Director of Department of Pesticide Regulation (DPR); FAC §13000(a).

Respondent Has Right to Review Evidence
Evidence must be available for review at CAC's office during regular business hours - beginning on the day the Notice of Proposed Action (NOPA) is sent to the Respondent.

Hearing Must Be Requested
Within 20 days – **of *receipt* of** - NOPA.

Appeal Rights
An appeal is available only if Respondent timely requests and appears at the hearing. Respondent has **30** days after the CAC's Notice of Decision and Order (to appeal the decision); FAC §12999.5.

Time to Appeal Decision
Director has **45** days after receipt of written appeal or **15** days after oral arguments or "as soon as practical" to issue appeal decision.

Send Appeal To
Director
c/o Chief Counsel - Office of Legal Affairs
Department of Pesticide Regulation
P.O. Box 4015
Sacramento, CA 95812-4015

Appeal Decided By
Director of DPR

Failure to Pay Fine
CAC can refuse to issue permit or register pest control operator business; FAC §14008 and §11735.

Check Payable To
CAC or County (per county policy)

Key Process Documents
- NOPA must cite agricultural penalty authority; describe violations, discuss fine amount(s), provide hearing request procedures and notify of right to review evidence before hearing.
- Stipulation and Waiver to Order;
- CAC's Notice of Decision and Order must include findings of fact, fine amount, order and appeal rights.
- Hearing Officer's Proposed Decision must include findings of fact and proposed fine amount; the CAC must add an order adopting the decision, order the fine to be paid, and appeal rights.
- Appeal rights; FAC §12999.5.

Structural Civil Penalties

Penalty Authority
This process may only be applied to Structural Pest Control Board (SPCB) licensees and registered companies; Business and Professions Code (B&P Code) §8617.

Fines
Penalties up to $1,000 per violation; or up to three-day suspension; Title 16, California Code of Regulations (16CCR) §1922.

Statute of Limitations
County Agricultural Commissioner (CAC) has one-year from date of violation; Code of Civil Procedure §340.

Respondent Has Right to Review Evidence
Evidence must be available for review at CAC's office during regular business hours - beginning on the day the Notice of Proposed Action (NOPA) is sent to the Respondent.

Hearing Must Be Requested
Within 20 days – **of *issuance* of** - NOPA.

Appeal Rights
An appeal is available only if Respondent timely requests and appears at the hearing. Respondent has **10** days within receipt of the CAC's Notice of Decision and Order (to appeal the decision); B&P Code §8662.

Time to Appeal Decision
Disciplinary Review Committee (DRC) has **45** days after receipt of written appeal or **15** days after oral arguments to issue appeal decision.

Send Appeal To
Disciplinary Review Committee
c/o Chief Counsel - Office of Legal Affairs
Department of Pesticide Regulation
P.O. Box 4015
Sacramento, CA 95812-4015

Appeal Decided By
DRC of the SPCB

Failure to Pay Fine
SPCB shall increase the licensee's renewal fee by the fine amount, or refuse to sell stamps or renew license; B&P Code §8617(f).

Check Payable To
Structural Pest Control Education and Enforcement Fund

Key Process Documents
- NOPA must cite structural penalty authority; describe violations, discuss fine amount(s), provide hearing request procedures and notify of right to review evidence before hearing.
- Stipulation and Waiver to Order;
- CAC's Notice of Decision and Order must include findings of fact, fine amount, order and appeal rights.
- Hearing Officer's Proposed Decision must include findings of fact and proposed fine amount; the CAC must add an order adopting the decision, order the fine to be paid, and appeal rights.
- Appeal rights; B&P Code §8662.

Section 2.11

Certification of Registered Labeling

Introduction

Food and Agricultural Code (FAC) section 12973 states in pertinent part, "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any . . . ." One of the necessary "elements" to prove a violation of FAC section 12973 is evidence showing the label was registered at the time of the use/misuse of the pesticide.

Procedure for obtaining verification

1. Call the Department of Pesticide Regulation's (DPR's) Pesticide Registration Branch Label Resource Center at (916) 324-0419.
2. Provide the responding staff member with your name, affiliation, and mailing address.
3. Tell them you are preparing a case for an enforcement action and that you need them to mail you a copy of the "stamped registered label" AND a "Certification Statement" for that label showing that the pesticide was registered on the specific date of use.
4. Give them the U.S. EPA Registration Number.

These are critical details – don't skip them. If the pesticide was not registered on the day of use, you will not be able to use FAC section 12973; and, if the label was amended after that day of use, you need to request the label as it was registered on that day of use.

Other considerations:

- Faxed copies may be unacceptable for the hearing if the faxed copy is not considered "best evidence;" make sure it is understood that you need these documents to be mailed to you.
- It usually takes one to two weeks to process your request and mail it to you.
- Don't wait until the last minute to obtain the label and certification statement because you might not get them in time for the hearing. In addition, the label might undergo one or more amendments between the date of the violation and your hearing.

Continued on next page

This is a facsimilie of a certification of records

On Department of Pesticide Regulation Letterhead:
July 4, 2004

CERTIFICATION OF RECORDS

I, Tommy Tutone, do hereby certify that I am the duly appointed Chief of the Pesticide Registration Branch of the Department of Pesticide Regulation. I do hereby further certify that I am the legal custodian of the attached record filed with the Pesticide Registration Branch of the Department of Pesticide Regulation in Sacramento, California.

I do hereby further certify that the U.S. Environmental Protection Agency Registration Number 867-5309, manufactured by Major Corporation, is registered in California containing the following ingredients:

Active Ingredients:
Quadric Trichlor……99.%
Inert Ingredients……. 1.%

I declare under penalty of perjury that the foregoing is true and correct.

Tommy Tutone

Tommy Tutone, Chief
Pesticide Registration Branch
Department of Pesticide Regulation

JUL 04 2004
Date

Section 3.1

Fine Guidelines Seem to Overlap

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- When identifying the class of violation, the definitions seem to overlap.
- What are the determining factors between Class B (formerly *moderate*) and Class A (formerly *serious*)?

Flexible fines

The fine structures for administrative civil penalty actions, found in Title 3, California Code of Regulations (3CCR) section 6130 and 16CCR section 1922, were implemented as a "sliding scale" to afford the county agricultural commissioner (CAC) flexibility in determining the importance or seriousness of the violation. The guidelines cannot be any more specific without limiting CAC discretion and flexibility in dealing with violators.

Class B (moderate) versus Class A (serious)

The basic differences between Class B (moderate) and Class A (serious) fine category (other than Repeat Violation) are:

Class B (Moderate)	Class A (Serious)
Violation posed a reasonable possibility of creating a health or environmental effect.	Violation created an actual health or environmental hazard, and, violating a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897.

Note: No actual damage has to occur for either fine Class. See the Glossary for definitions of *Reasonable Possibility*, *Effect*, and *Hazard*.

Continued on next page

Fine Guidelines Seem to Overlap, Continued

The fine in the NOPA is presumed correct

In setting the fine in the Notice of Proposed Action (NOPA), it can be presumed that the CAC:

1. Determined the fine category after first consulting 3CCR section 6130 or 16CCR section 1922.
2. Considered the overlapping of fine categories and any mitigating factors when making his or her determination about the proposed fine category and/or fine level within a fine Class.
3. Is properly exercising his or her discretion.

A finding of CAC error must be made to adjust the fine

Therefore, if a Hearing Officer wishes to reduce the amount of the fine, he or she must show that the CAC incorrectly applied 3CCR section 6130 or 16CCR section 1922 and give the facts supporting that determination in the proposed decision. It is not appropriate for the Hearing Officer to reduce a fine based solely upon his or her discretion or personal opinion.

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- 16CCR section 1922, Civil Penalty Actions by Commissioners
- Enforcement Guidelines, Technical Revision, December 2002
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 3.2

Factors to Consider When Setting a Fine Amount

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What factors should the county agricultural commissioner (CAC) consider when choosing a fine amount?

Fine range set by regulation

Title 3, California Code of Regulations (3CCR) section 6130 establishes the criteria and fine range for each violation class designated in the regulation. The Department of Pesticide Regulation (DPR) provides guidance on selecting the type of compliance or enforcement action in the Enforcement Guidelines. After reviewing the evidence and selecting the most appropriate violation class, the CAC must then select a fine amount that falls within the fine range established for that violation class.

Fine amount according to CAC discretion

3CCR section 6130 does not provide specific fines for specific violations, but only a fine range for each class of violation as defined by the regulation. This is a sensible approach since there is no way DPR could foresee the circumstances of each violation. For that reason, within the range established for each class of violation, the actual fine is left solely to the discretion of the CAC who will be familiar with the circumstance of each case.

Fine amount supported by evidence

In selecting an appropriate fine amount, the CAC must exercise care to assure that the fine amount is commensurate with the documented circumstances of the violation. While developing the Notice of Proposed Action (NOPA), the CAC should document how they used the available evidence to establish a logical and appropriate fine amount. By incorporating this information into the NOPA, the CAC assures the Respondent that discretion was used fairly and within the bounds of the CAC's authority. This action will also prepare the CAC for an administrative hearing or an appeal to the Director, should the Respondent request them.

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- Enforcement Guidelines, Technical Revision, December 2002

Section 3.3

What Constitutes Repeatability?

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Why can't a county agricultural commissioner (CAC) consider a previous violation as a "repeat" violation unless the CAC levied a civil penalty for the previous violation?
- Does it have to be the same type of violation, the same section or subsection?

Original policy was "temporary" to assist in establishing the program

CACs were first given authority to levy agricultural civil penalties in 1986. At that time, the California Department of Food and Agriculture allowed CACs to consider a Violation Notice (Notice of Violation) as adequate to establish a "past violation" because CACs had not previously had authority to levy civil penalties.

A policy change was necessary after the program became established

There is no longer any need to look only to the Violation Notice to establish a "past violation."

In fact, there are important reasons for requiring that the Violation Notice resulted in a fine levied by the CAC before it can be considered a "past violation." These considerations relate to concepts of fundamental fairness sometimes referred to as "due process." When only a Violation Notice has been issued, the alleged violation has not been proven (via a hearing) and the Respondent has not been given an opportunity to respond to or defend against the charged violation. Using only the Violation Notice to show a "past violation" would be similar to using the arrest warrant of a person as proof of guilt without considering the trial, which may have determined that the person was not guilty.

Continued on next page

What Constitutes Repeatability?, Continued

Violation classes

The California Code of Regulations (CCR) is specific on this matter. The violation classes are defined as Class C (formerly *minor*), Class B (formerly *moderate*), or Class A (formerly *serious*). So, if you are attempting to establish that a violation is a repeat violation, you need to refer to the Respondent's record to see which violation classes were invoked to impose fines during the past two years. If the Respondent has a previous penalty for a violation that was classified as Class C (minor), then you could charge the Respondent with a Class B (moderate) fine, if appropriate. In any case, introducing the Respondent's enforcement history into the record will probably be sufficient to withstand any challenge to the fine level based upon repeatability.

In other words, when a Notice of Proposed Action (NOPA) proposes a penalty for a repeat violation, the NOPA shall identify the prior violation which supports the repeat violation, and, the record of the proceedings shall include a copy of the decision of that prior violation. At the same time, a copy of the notice shall be sent to the Department of Pesticide Regulation (DPR).

What is a repeat violation?

There have been a number of policies or theories that have been previously stated by DPR or county staff. The following provides a clarification of existing civil penalty regulation:

- The repeat violation section <u>does not have to be the exact section</u> number or exact subsection as the section previously cited.
- The repeat violation section <u>does not have to be in the same general area or requirement category</u>, e.g., worker safety, permitting, groundwater, etc. (The contrary was a written policy at one time; however, the previous policy is not consistent with the current regulation pertaining to fines, i.e., 3CCR section 6130.)

How the repeat violation concept works

The current alleged violation shall be considered a repeat violation if both of the following criteria are met:

1. The person against whom the civil penalty action is proposed had a prior violation that was, or would have been, in the same *violation class* as the current alleged violation; <u>AND</u>
2. A civil penalty was levied for the prior violation *within two years* of the date of the NOPA by the same county proposing the current action.

Continued on next page

Related Terms

See the *Glossary* for ***Repeat Violations*** and ***Subsequent Incident***.

References

- 3CCR section 6130, Civil Penalty Action by Commissioners
- 4CCR section 4802, Penalty Guidelines
- 16CCR section 1922, Civil Penalty Actions by Commissioners
- Enforcement Guidelines, Technical Revision, December 2002
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 3.4

Hearing Officer and CAC Discretion in Relation to Fines

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What discretion does the Hearing Officer have in reducing the fine amount and/or fine classification after considering mitigating circumstances?
- Does the violation (count) have to be dismissed if the Hearing Officer finds that the fine class was not correct?

Presumptions

It can be presumed that a county agricultural commissioner (CAC) intends to propose a correct fine amount after first consulting
Title 3, California Code of Regulations (3CCR) section 6130 (Civil Penalty Actions By Commissioners) and then considering the circumstances of the violation.

It can also be presumed that the CAC wishes to be fair to the Respondent and would prefer to have the Hearing Officer or Director make adjustments to the fine amount(s) if the fine amount cannot be supported by the evidence in the record.

Amending the Notice of Proposed Action (NOPA)

The CAC has the option to change a proposed fine before the hearing is held in two situations:

- When the CAC realizes he/she has proposed a fine in excess of authority (e.g., states in the Notice of Proposed Action [NOPA] that the violation was a Class B [formerly *moderate*] violation and the NOPA proposed a fine greater than allowed) and the hearing has not yet been held, the CAC can send a letter withdrawing the initial NOPA. The CAC could then issue a new NOPA with an appropriate proposed fine.
- When the CAC realizes he/she has misclassified a violation (e.g., the violation was noticed as Class B [moderate] with a proposed a fine of $1,500, but should have been classified as Class A [formerly *serious*] with a higher fine), the CAC could send a letter withdrawing the action and issue a new NOPA reclassifying the violation as serious and proposing a new fine within the appropriate fine range.

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Hearing Officer and CAC Discretion in Relation to Fines,
Continued

Amending the NOPA during the hearing

The CAC has an option if he/she needs to change a proposed fine and the hearing is imminent or in progress:

- If either of the above-noted scenarios exist, the CAC could direct the Advocate to point out the county's error at the hearing and request that, if the Hearing Officer finds the particular violation occurred and that it fits within a particular classification, the Hearing Officer order a fine within the proper range for that classification of violation.

Hearing Officer adjustments to the fine amount

In the absence of a finding that the CAC's application of the fine guidelines was in error, a Hearing Officer's decision to lower a fine is discouraged. There are limits to the Hearing Officer's authority to adjust fine amounts. For example:

- Once a Hearing Officer determines the appropriate class for the violation, he/she may not order a fine lower than that allowed by the fine guidelines for that class.
- The fine ordered by the Hearing Officer cannot ever be higher than the fine(s) proposed in the NOPA. The Hearing Officer cannot raise a fine under any circumstances.
- There are no circumstances where the CAC or Hearing Officer can lower the fine below the minimum amount of a Minor (Class C) fine.
- The CAC or Hearing Officer cannot consider violations that occurred outside of the County initiating the action in determining the proposed penalty.

Does the Hearing Officer have to dismiss the violation if the fine is incorrect?

No. The Hearing Officer does not need to dismiss the entire violation (count) or the case if the CAC's proposed fine amount is incorrect. If the proposed fine amount is incorrect, but the evidence supports a Finding that each element of the violation has occurred, the CAC can remedy the problem of an incorrect fine by making a Finding of the proper classification of the violation or the proper fine range, and applying those in determining the new fine amount.

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Hearing Officer and CAC Discretion in Relation to Fines,
Continued

Mitigating factors

There is no requirement in law that the Hearing Officer must consider "mitigating factors" in determining the fine amount. In other words, the Hearing Officer could find that there were "mitigating factors" but decide not to consider them in determining the fine amount.

If the Hearing Officer decides to take into account "mitigating factors" when deciding the amount of the fine, he/she can consider anything he/she finds the violator did to alleviate the violation(s) or prevent repeating the violation(s).

It is not possible to provide a list of "mitigating factors" as they will be unique to the circumstances of each case. Despite the presence of mitigating factors, the Hearing Officer cannot lower the fine below the range established for that classification of violation.

The CAC or Hearing Officer cannot consider "economic loss to the Respondent" in deciding the fine amount for the same respondent. Economic loss to the respondent caused by his or her own violation of a pesticide law or regulation is not a "mitigating factor."

Hearing Officer deviates from the fine guidelines

When the CAC or Hearing Officer deviates from the fine guidelines, they have acted outside the scope of his/her authority and the fine amount will be modified if there is an appeal to the Director.

Can the CAC change the Hearing Officer's fine?

No. If the CAC did not act as the Hearing Officer, the CAC must adopt the Hearing Officer's decision, including the fine amount.

References

The following references were used to answer the questions shown above:

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- FAC section 12999.5
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 4.1

What Constitutes a Complete NOPA?

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What constitutes a complete Notice of Proposed Action (NOPA)?

Background

Before a civil penalty is levied, the person charged with the violation(s) must be given a written notice of the proposed action that will ensure that due process requirements are met. At the most basic level, this means that the person must be notified of the violation he/she is being charged with, the amount of the fine and how it was determined, and be provided with the means to review and answer to the evidence against him/her.

The complete NOPA package

The complete NOPA package sent by certified mail to the Respondent must contain the following:

1. **Notice of Proposed Action, Grounds Therefore and Opportunity to be Heard** (the NOPA)**.** To meet due process requirements, this must include the following information:
   - A statement of the code or regulation section(s) alleged to have been violated.
   - A brief description of the specific acts which constitute the violation (usually giving the time, date, place, persons involved, and particular actions or inactions constituting the violation).
   - The amount of the proposed penalty and classification of the violation (giving notice of the fine range and how the fine amount was determined).
   - An offer to allow the Respondent to review the county agricultural commissioner's (CAC's) evidence establishing the violation.
2. **Request for Hearing** form for Respondent to sign and submit to request a hearing.
3. **Order** of the CAC directing payment of the fine (effective **only** in conjunction with the **Stipulation and Waiver to Order**, described below **or** when the Respondent "waives" his or her right to a hearing).

Continued on next page

The complete NOPA package (continued)

4. **Stipulation and Waiver to Order** for the Respondent to sign and submit as an alternative to the Request for Hearing, waiving the right to a hearing and to any appeal from the Order directing the payment of the proposed fine amount.
5. **Optional:** Copies of the text of the regulation setting forth the penalty guidelines applicable in the specific case (Title 3, California Code of Regulations [3CCR] section 6130 or Title 16, California Code of Regulations [16CCR] section 1922) and the text of the code or regulation section(s) alleged to have been violated.

Cite the authority for the levy of an administrative civil penalty

The NOPA should contain a citation to the authority of the CAC to levy an administrative civil penalty. Set forth the authority for the NOPA as the introductory sentence of the NOPA. Two examples are provided below:

Example: "Pursuant to Food and Agricultural Code (FAC) section 12999.5, in lieu of civil prosecution by the Director of the Department of Pesticide Regulation, the County Agricultural Commissioner may levy a civil penalty against a person for violating certain provisions of Division 6 and Division 7 of the FAC, or regulations adopted pursuant to those provisions. You are hereby notified that the Commissioner proposes to fine you $_____for violations of . . . ."

Example: "Pursuant to Business and Professions Code (B&P Code) section 8617, the County Agricultural Commissioner may levy a civil penalty against companies registered by or licensees of the Structural Pest Control Board for violations of certain provisions of the B&P Code or certain provisions of Division 7 of the Food and Agricultural Code and regulations adopted pursuant to those provisions. You are hereby notified that the Commissioner proposes to fine you $_____ for violations of . . . ."

Details to check

Each NOPA sent to a Respondent must contain the following and mailed certified, return receipt requested:

1. Name and address of the respondent.
2. File number assigned to the case (county abbreviation, fiscal year, and the case number).
3. The date and signature of the CAC.

Continued on next page

Hearing request

The Department of Pesticide Regulation is of the opinion that the Respondent must request a hearing. If the CAC mails the NOPA by way of certified mail and the Respondent does not request a hearing in a timely manner, the CAC may determine the Respondent wishes to waive their right to a hearing on the matter and write an **Order** of the Commissioner, directing payment of the fine, and mailing it certified, return receipt requested, to the Respondent.

"Boilerplate" statements

The table below provides standard boilerplate statements that must appear in each NOPA or some part of the NOPA package:

Part	Standard Boilerplate Statement
Review evidence statement	"You are entitled to review the evidence supporting these charges during regular business hours at the County Agricultural Commissioner's office, located at (address)."
Failure to request hearing or appear statement	"Failure to request a hearing within the allotted time is a waiver of the right to a hearing, and the County Agricultural Commissioner may take the action proposed in this notice without a hearing. Failure to request or appear at a hearing is also a waiver of the right to appeal the Order taking the action proposed by this notice."
Stipulation offer	"If you do not wish to request a hearing to contest the charges and proposed action, you may stipulate to the enclosed order by dating, signing, and returning the Stipulation and Waiver Order within 10 days of this notice."

Continued on next page

What Constitutes a Complete NOPA?, Continued

Helping the Respondent prepare for the hearing

The NOPA should include information that the Respondent can use to properly prepare for the hearing, such as providing:

- The Hearing Process Outline brochure
- A list of what to bring to the hearing, e.g., exhibits and witnesses

Exhibits that are or contain chemicals or compounds that could be dangerous because they have the potential to contaminate the hearing site, should not be allowed at the hearing. If a Respondent indicates they wish to bring this type of item, or any other item that may have been contaminated with chemicals or pesticides, ask them to bring a good quality photograph of the container or item that makes the point the Respondent wishes to convey in the hearing. The Hearing Officer can make a determination about the credibility of the photograph.

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- 16CCR section 1922, Civil Penalty Actions by Commissioners
- B&P Code sections 8616.4, 8616.7
- FAC section 12999.5
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 4.2

Developing a Model Hearing Process Brochure

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Is there a moral or ethical obligation to provide the Respondent with a hearing process outline?
- Should the Respondent be notified that anything placed into evidence will not be returned until the matter is closed?

Purpose of outlines, brochures, etc.

Hearing process outlines, brochures or other handouts have been developed by several counties. The purpose of these documents is to inform Respondents about due process hearings and to assist them in preparing for the hearing if they wish to have an opportunity to be heard. There is no requirement to provide a hearing process assistance document to Respondents, however, it is a practice that can promote good will, fairness, and ensure an orderly proceeding. It may also ensure a clear and complete record in support of the ruling.

Preparing for Your Administrative Hearing – model brochure developed

Several administrative process outlines or brochures were provided to the facilitator of the Administrative Hearing Issues Roundtable discussions. The Department of Pesticide Regulation (DPR) evaluated each of the submitted documents and developed a model brochure, entitled, Preparing for Your Administrative Hearing. The brochure will meet the needs of most counties; however there are a few blank spaces on it to accommodate a county logo or seal, contact information or minor modifications.

Preparing for Your Administrative Hearing has been assigned form number PR-ENF-086. The brochure has been assigned a form number to make copies available to counties through the routine forms requisition process.

Electronic version of DPR's brochure

If desired, counties preferring to develop their own brochure may make a written for a copy of the electronic version of Preparing for Your Administrative Hearing through their Regional Office. The Regional Office will forward the request to the Chief of the Enforcement Branch. The electronic version can then be modified by the county and published at the county's expense. This brochure is available in Microsoft Word software.

Closing Statements

A closing statement summarizes the evidence you presented to support your case. Your closing statement should be brief, direct, and to-the-point. At the close, the Hearing Officer should be told exactly what you are requesting. As before, the Agency's statement is heard first, followed by the Respondent's statement. A closing statement is optional.

The Hearing is Closed

The Notice of Decision

The Hearing Officer will submit a Notice of Proposed Decision in writing to the County Agricultural Commissioner. The County Agricultural Commissioner will review and adopt or not adopt the Proposed Decision. You will receive a copy of the Commissioner's Notice of Decision and Order within approximately 45 days.

Appeals

The Commissioner's Notice of Decision and Order will include appeal procedures.

OTHER HEARING DETAILS….

- The hearing will be tape-recorded. The county does not provide transcripts. If you wish, you may make your own arrangements to have transcripts made at your expense. You must also coordinate this activity with the County Agricultural Commissioner at least five days before the hearing.
- The Hearing Officer will administer an oath to all witnesses.
- The Hearing Officer will keep any items submitted as evidence until the case is closed and the Commissioner's Notice of Decision is issued.
- The hearing process may vary at the Hearing Officer's discretion.
- Hearing document titles may slightly vary by county.

YOU CAN REVIEW THE EVIDENCE

If you wish to review the Agency's evidence before the hearing, please call the office of the County Agricultural Commissioner to make an appointment to see the evidence soon after you receive a Notice of Proposed Action.

HEARING DATES AND CHANGES

If you have any questions about your hearing date or time, please call the office of the County Agricultural Commissioner.

Any changes to your hearing date must be requested in writing and received by the agency five days before your hearing date, except in cases of emergency.

ACCESSIBILITY OF THE HEARING LOCATION

Hearing locations must be accessible to persons with disabilities. If you have special needs that require reasonable accommodation, check with the office of the County Agricultural Commissioner in advance to assure accessibility.

This brochure has been prepared by the California Department of Pesticide Regulation for use by County Agricultural Commissioners when initiating administrative hearings relating to Pesticide Use Enforcement Activities. Additional copies of this brochure are available to County Agricultural Commissioners via the forms requisition process.

Preparing for Your Administrative Hearing
PR-ENF-086 (Est. 03/04)

Preparing for Your Administrative Hearing

You have requested an opportunity to be heard at an administrative hearing regarding alleged violations pertaining to pesticide use or pest control operations. At the hearing, you will have an opportunity to present evidence and testimony to refute the violation(s) presented in the Notice of Proposed Action.

Your hearing will be held before a Hearing Officer who will make a decision based upon evidence and testimony presented at the hearing. The role of the Hearing Officer is to determine if the violation(s) occurred and whether the penalty was placed at the correct level.

Please come and present all evidence and testimony at the time of the hearing. You can review all evidence before the hearing. Evidence submitted will be evaluated by the Hearing Officer for its credibility and relevance. Additional evidence and testimony may not be introduced after the hearing has concluded. All hearings are tape-recorded.

If you request a hearing and do not appear, the hearing will proceed as scheduled and the Hearing Officer will base the decision on the Agency's evidence only; you will forfeit your rights to an appeal.

Who's Who

The Agency is the county government agency administered by the County Agricultural Commissioner. Counties can have different names for this agency. The agency can be called the County Department of Agriculture; County Department of Agriculture, Weights and Measures; County Department of Agriculture and the Environment; or some other similar name.

The Advocate is the person who presents the case for the Agency.

The Hearing Officer is the person who will be making a decision in this matter. The Hearing Officer may be the County Agricultural Commissioner, a county or State employee, or any other person chosen by the County Agricultural Commissioner to hear the case fairly, impartially, and without bias.

The Respondent is the person or business charged with the violation(s).

The Respondent:

- May be represented by an attorney
- Is entitled to review the evidence
- Is entitled to question witnesses on relevant matters
- Is entitled to produce evidence in his/her behalf
- Is entitled to full and fair consideration of relevant evidence by an impartial hearing officer
- Is entitled to an appeal if he/she participates in the hearing
- Is entitled to hear the reasons for the fine amount or penalty, **AND**
- Any penalty or fine action taken against the RESPONDENT must be based upon sufficient and competent evidence contained in the hearing record.

The Pre-Hearing Conference

Immediately before the hearing, you will have an opportunity to meet with the Agency and the Hearing Officer. At this time, you may be able to agree on specific facts concerning all or part of your case. The pre-hearing conference generally will proceed as follows:

- Introductions and filling out the "Sign-in" or "Appearance" sheet.
- The Hearing Officer will explain the procedural rules. If you have any questions about specific hearing procedures, you should bring them up at this time.
- You and the Agency discuss the violations in the Notice of Proposed Action. Violations you acknowledge occurred can be agreed to (stipulated) and included as part of the hearing record.
- Bring any evidence you have to support your case. Evidence is testimony, writings, material objects, or other things that are offered to prove the existence or nonexistence of a fact. Examples of evidence include documents such as pesticide labels, licenses or records, and equipment. Please bring three copies of any document.
- To simplify the hearing process, evidence items accepted as relevant and truthful by both the Respondent and the Agency can also be agreed to or stipulated to.

The Hearing Process

During the hearing, violations not agreed to in the pre-hearing conference will be discussed. Clearly state your objectives (for example, you may want the charges dismissed or the fines reduced) and present evidence to support your request. Fines set at the minimum level cannot be reduced if the Hearing Officer determines that the violations occurred.

The Hearing Begins

- The Hearing Officer will turn on the tape recorder and state the date and time.
- All persons present will identify themselves and spell their names for the record.
- The Hearing Officer states, "Prior to the hearing, a pre-hearing conference was held and the parties stipulated to the following…. Is that correct?"

Opening Statements

An opening statement is a summary of what you intend to show or prove. An opening statement is optional. The Agency will make their opening statement first, followed by the Respondent.

Presentation of Testimony and Evidence

Since the Agency has the burden of proving its case, the Agency presents its case first. Testimony customarily begins with the inspector involved stating his or her observations. When finished, you are allowed to ask the inspector questions (this is called cross-examination). The Agency's presentation of testimony and evidence followed by your cross-examination continues until all desired evidence has been brought forth. You will then present your case in the same manner. Throughout this process, the Hearing Officer may ask questions of either party to clarify points.

Section 4.4

Consolidated Hearings

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- If a decision is made to propose an action against the employer and an employee, are there any ethical problems with concurrent (or consolidated) hearings?

Consolidated hearings

Occasionally, multiple parties may be responsible for violations pertaining to the same incident or pesticide episode (though, the violations do not need to be the same). The most likely scenario for this type of situation is one in which a grower and a certified or licensed applicator, labor contractor, or supervisor (who is also a certificate or license holder) were involved in an incident. A consolidated hearing may be convenient and expeditious for all parties.

Separate NOPAs and Decisions

Notices of Proposed Action (NOPA) cannot be consolidated. To ensure proper "notice," there must be a separate NOPA for each separate Respondent. There also must be a separate Decision and Order for each Respondent.

Hearing Officer decides, but… communication with the commissioner is encouraged

It is important for the county agricultural commissioner (CAC) and the Hearing Officer to communicate about the possibility of scheduling consolidated hearings (for one incident or episode) before the NOPAs are mailed to Respondents. Even if the CAC wants to schedule consolidated hearings, the Hearing Officer may prefer to hold separate hearings. The Hearing Officer has the final say in the decision of whether to hold a consolidated hearing.

Continued on next page

Avoiding consolidated hearings

Some Hearing Officers may not wish to hold consolidated hearings because of:

- Perceived or real complexity of issues. However, despite the complexity of issues, having everyone present may help sort out complex issues and give everyone an opportunity to be heard.
- Concerns that employee testimony may be tainted by concerns about retaliation.
- Concerns that employees may feel unnecessarily intimidated.
- Scheduling difficulties arising from the need for a large block of time for one consolidated hearing versus two or three shorter hearings.

DPR's advice

According to California law, the consolidation of hearings falls within the discretion of the agency and the Hearing Officer. Although the Hearing Officer has the final say in the matter, the Department of Pesticide Regulation (DPR) strongly recommends granting a Respondent's request for a separate hearing. If you consolidate hearings, it might be a good idea to let the Respondent know they can request a separate hearing. Denial of a Respondent's request for a separate hearing is likely to result in an appeal to the director.

Because of the difficulty in managing multiple cases at one time, DPR suggests that consolidated hearings be left to experienced Hearing Officers and Advocates. In all cases, it is the CAC's responsibility to ensure that all Respondents in administrative civil penalty actions have proper notice, an opportunity to be heard, and are treated fairly.

Employer's responsibilities may militate against citing employees

This guidance is not an "approval" to issue NOPAs against employees when other circumstances militate against it, that is, when an action against the employer alone is more appropriate/recommended /required. For example, the employer cannot fulfill the requirements of the independent employee action defense or the employer is responsible for the violation because of the employer's failure to meet his/her responsibilities described in Title 3, California Code of Regulations (3CCR) section 6702 or other conditions described in 3CCR section 6130.

Continued on next page

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- 3CCR section 6702, Employer-Employee Responsibilities
- California Administrative Hearing Practice, Second Edition, April 2002 update
- Enforcement Letter 2001-055, Civil Penalty Actions Against Employers or Employees for Matters Involving Pesticide Worker Safety
- Government Code sections 11507.3(a), 11507.3(b), and 11512(b)

Section 4.5

Hearing Scheduling Difficulties

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What recourse does the county have if the Respondent requests a hearing, but does not return the county's calls to schedule a hearing?
- If a hearing has been scheduled, when and how many times are appropriate for the county agricultural commissioner (CAC) to reschedule a hearing at the request of the Respondent?
- What happens when the Respondent fails to appear for the scheduled hearing?

Introduction

When the Respondent has been charged with a violation, he/she has the right to be heard (due process). If the Respondent timely requested a hearing, the CAC will notify the Respondent of a hearing date and the case will be heard in front of a Hearing Officer.

All cases

According to Food and Agricultural Code (FAC) section 12999.5(b), the person charged with the violation shall be given a written notice of the proposed action and has the right to request a hearing within 20 days after receiving the Notice of Proposed Action (NOPA). The NOPA shall be sent by certified mail to the last known address of the person charged and shall be considered received, even if delivery is refused or the notice is not accepted at that address. If a hearing is requested, notice of the time and place of the hearing shall be given *at least* 10 days before the date set for the hearing.

At the hearing, the person shall be given an opportunity to review the CAC's evidence and to present evidence on his/her behalf. If a hearing is not timely requested, the CAC *may* take the action proposed without a hearing.

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Hearing Scheduling Difficulties, Continued

Respondent requests a hearing, but cannot be contacted to set a hearing date

If the Respondent requests a hearing, but does not respond to calls from the CAC to set a convenient time or cannot be reached by telephone, a hearing notification letter should be sent to the Respondent's address by certified mail. In the letter, indicate the date, time, and location of the hearing. Be sure to indicate in the letter that any changes to the hearing date must be requested *in writing* and received by the CAC's office not less than five days before the scheduled hearing date, except in cases of emergency.

Hearing is scheduled; Respondent requests to reschedule hearing date

A hearing date has been scheduled, but the Respondent asks that it be rescheduled. How many times would it be appropriate for the CAC's Office to reschedule the hearing?

This is at the CAC's discretion. It may be reasonable to assure the due process rights of the Respondent for the CAC to allow the Respondent to reschedule at least once. To grant second and any subsequent requests to reschedule would be in the discretion of the CAC. Factors to be considered include the length of the NOPA given to the county, the reason for the request, etc. Care should be taken to avoid the considerable costs of repeatedly rescheduling the hearing unless warranted by the facts of the situation. If a request to reschedule is denied, you should make it clear to the Respondent that he/she will only be provided with the statutorily required "opportunity to be heard" at the time scheduled and that the hearing will proceed whether or not he/she is in attendance.

Respondent is late for the hearing

What if the Respondent appears, but is late for the hearing?

The Hearing Officer needs to be flexible in these situations. In most cases, the hearing should move forward.

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Hearing Scheduling Difficulties, Continued

Hearing Officer is late for the hearing

What if the Hearing Officer is late and the Respondent, who appeared on time, leaves before the Hearing Officer arrives?

While this is unfortunate, it does *not* require the CAC to withdraw the action. The Hearing Officer should, of course, apologize and the CAC should reschedule the hearing.

Hearing is scheduled; Respondent fails to appear

If the Respondent fails to appear at the scheduled hearing, but calls on the day of the hearing to ask for a continuance, the Hearing Officer should consider whether there is good cause for continuance. Unless continuing the hearing would work a significant hardship on the county, brief continuances (i.e., one week to 10 days at most) should be granted. All factors should be considered including the reason for the failure to appear, the opportunity or lack of opportunity the Respondent had to attempt to reschedule, etc.

If it is decided that a continuance is unwarranted, then the hearing should proceed as scheduled. Even if the Respondent had previously made a written request that the hearing be rescheduled which was denied, it should be assumed that the Respondent will appear. If the Respondent was notified that his request to reschedule was denied, and still fails to appear, the hearing should proceed as scheduled.

It is unlikely that a final decision would be overturned if the CAC simply issued a final decision without taking testimony at the scheduled hearing. However, the most prudent course of action would be to proceed with the presentation of the county's case. Since all of the county's witnesses will be present and ready to proceed, the time and effort that would be expended making a record of the County's facts in support of the violation would be minimal. When the Hearing Officer goes on the record, it should be noted that the Respondent was given the opportunity to be heard, but has not appeared and has forfeited his/her rights to be heard and to an appeal. At the close of the hearing, the Hearing Officer should reiterate that the Respondent did not appear and has forfeited his/her rights to be heard and to an appeal.

References

- FAC section 12999.5
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 4.6

Stipulation and Waiver to Order

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What constitutes a Stipulation and Waiver to Order?
- What latitude do we have with the wording? Simplifying or changing the wording on this form might help with getting the Respondent's signature.

Definitions

The following table includes terms and definitions pertinent to this topic:

Term	Definition and Guidance and Discussion
Stipulation	A stipulation is a voluntary agreement between opposing parties concerning some relevant point. Stipulations with respect to matters of fact, law, or penalty amount make the hearing more convenient and expedient for both the county and the Respondent. Matters that are the subject of a stipulation are no longer in dispute or contested and need not be addressed at the hearing.
Waiver	A waiver is the voluntary relinquishment of a legal right or advantage. The party alleged to have "waived" a right must have had both knowledge of the existing right (in this instance, the right to a fair and impartial hearing) and the intention to give up that right.
Order	An order is a command, direction, or instruction of a judge, court, adjudicating officer, or agency. In this case, the "Order" is written and is delivered by the county agricultural commissioner (CAC) in the context of a civil penalty action. Food and Agricultural Code section 12999.5 and Business and Professions Code section 8617 authorize the CAC to levy a fine and "Order" the fine be paid.

What does the "Stipulation and Waiver to Order" have to say?

When an "offer" to enter into a "Stipulation and Waiver to Order" is attached to a Notice of Proposed Action (NOPA) and mailed to the Respondent, it must consist of three items:

- An **Order** of a CAC stating the amount of the fine.
- A **Stipulation** to be signed by the Respondent agreeing the NOPA states grounds for a civil penalty action and agreeing to the Order setting the fine.
- A **Waiver to Order** to be signed by the Respondent waiving his/her right to a hearing before the fine is imposed and all appeals afterwards.

Continued on next page

"What latitude do CACs have with the wording?"

There is not much "latitude" for the wording. The wording set forth in the example below is quite simple. Its purpose is to ensure the Respondent knows he/she has and intends to waive their rights to a hearing and to any appeals from the order that will issue, and the order is based on a valid legal claim supported by the uncontested facts.

The Department of Pesticide Regulation (DPR) strongly discourages any changes to the wording of its examples of "Stipulation and Waiver to Order" unless the proposed changes have been reviewed and approved by your County Counsel. The following example is a modification of the form currently used. It is not a substantive change, but a clarification of the prior form. DPR added the phrase "without admitting to the violations alleged in the Notice of the Proposed Action" in the last paragraph of the "Stipulation and Waiver to Order." The modified form may be used by CACs, if they prefer.

Continued on next page

Suggested Stipulation form

DPR prefers the following "form" which combines the "Order and Stipulation" and the "Stipulation and Waiver to Order." This ensures the Respondent is simply and fully advised of his or her rights.

COUNTY OF _____
AGRICULTURAL COMMISSIONER'S OFFICE

ORDER AND STIPULATION
FILE NO. (county abbreviation, fiscal year, case number)

TO: (respondent's name)
(address)

ORDER: It is hereby ordered that (name) is fined (amount). The fine is due now and payable.

STIPULATION AND WAIVER TO ORDER

I hereby stipulate that the Agricultural Commissioner's Notice of Proposed Action in the above-entitled matter states grounds for civil penalty action based on the evidence now before the Commissioner.

Without admitting to the violations alleged in the Notice of Proposed Action, I stipulate to the Commissioner's Order, as set forth above, and I waive all rights to a hearing and appeal or any other review in this matter.

DATED: (date)_____ (respondent's signature)____.
Respondent

Continued on next page

Is a signed Waiver to Order necessary to close a case prior to expiration of the 20 days the Respondent has to request a hearing?

Yes. However, if the Respondent mails in a check prior to the expiration of the 20-day period in which he/she has to request a hearing without signing and returning the Stipulation and Waiver to Order as written, the check should be held until the expiration of the 20-day time period. At that time, the check may be cashed and the case closed. A letter should then be sent to the Respondent:

1. Restating the language of the NOPA that failure to request a hearing within 20 days is a waiver of the right to a hearing and the right to appeal the CAC's decision;
2. Stating that the CAC has received and accepts the Respondent's check in discharge of the fine set forth in the order and stipulation previously mailed to the Respondent; and
3. Stating that the CAC has made a final decision and that the case is closed. See the example letter that follows after the "What if?" discussion.

"What if?"

The currently used "Stipulation and Waiver to Order" does not require an admission of guilt. It is the civil equivalent of the criminal nolo plea and merely admits that the facts before the CAC (in the NOPA) constitute a violation. They are not admitting to the facts, only that if the facts are true, it is a violation. If they sign it, they cannot say, "even if I did that, it is not a violation."

The NOPA itself states that if the Respondent does not request a hearing within 20 days, the CAC can take the action proposed without a hearing and the Respondent has waived his/her right to a hearing and to appeal the CAC's decision. This is, in practical terms, exactly the same as signing the form. So, if the Respondent does not request a hearing, waits until the 20 days has elapsed, and then sends in a check, no matter what is said in a letter or written on the stipulation, it is over. If they send it in under protest or without signing the form prior to that time, the above procedure should be followed.

Continued on next page

Stipulation and Waiver to Order, Continued

Sample letter to close a case after 20 days when fine is paid without signing the "Stipulation and Waiver to Order"

To: File No.

You are hereby notified that the County Agricultural Commissioner finds you have violated section(s) _____ of the Food and Agricultural Code and/or section(s) _____of Title 3 of the California Code of Regulations. You have failed to request a hearing within 20 days of the receipt of the Notice of Proposed Action in this case and, therefore, have waived your right to a hearing to contest the charges stated in the Notice of Proposed Action and all rights to appeal this ruling.

As set forth in the Stipulation and Waiver to Order which accompanied the Notice of Proposed Action, the Commissioner has determined the fine for the above mentioned violation(s) is $_____ and now orders the fine due and payable.

The Commissioner has received and now accepts your check in the amount of $_____ in discharge of this obligation. This matter is now closed.

Dated:_____ _____

Agricultural Commissioner

References

- Black's Law Dictionary, Seventh Edition
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 5.1

Hearing Contact Record

Introduction

The Hearing Contact Record is an *optional* record-keeping tool to assist the county agricultural commissioner (CAC), Advocate, and Biologist keep a record of contacts that occur before and after the Hearing. The record begins at the time the Notice of Proposed Action (NOPA) is mailed to the Respondent and before any prehearing discussions are held. This optional tool may be developed by counties to suit their own needs. This optional tool is not intended to replace or supersede the Enforcement and Compliance Data Entry Form or any other similar required form.

Sections of the Hearing Contact Record

The Hearing Contact Record contains:

- Case information
- Respondent(s) information
- Section(s) violated
- Mail contacts
- Telephone contacts
- Personal contacts
- Hearing information
- Decision

Case information

Case information includes:

- Name of the case
- Case number
- Penalty information
- Date Record is opened

Respondent information

Respondent* information includes:

- Name
- Address
- Telephone number, including home and work telephone numbers

*If more than one respondent, use separate form

Continued on next page

Hearing Contact Record, Continued

Section(s) violated	Include the Food and Agricultural Code section (FAC), Business and Professions Code section (B&P Code), California Code of Regulations section (CCR), or other appropriate code and section number violated and the date(s), time(s), and location(s) the alleged violation(s) occurred.
Mail contacts	This includes: • Who you mailed the information to • What was mailed • When the letter was mailed • Certified Mail receipt number. Certified Mail provides proof of mailing and delivery of mail. The sender receives a mailing receipt at the time of mailing; the United States Postal Service maintains a record of delivery. For an additional fee, a return receipt can also be purchased to provide the sender with proof of delivery. • Return receipt. You can use a return receipt, the traditional "green post card," and it will be mailed back to you once your letter is delivered.
Telephone contacts	Include the name of the person(s) you spoke with. Be sure to include the date, time, telephone number, and details of the topic discussed.
Personal contacts (after the NOPA has been mailed)	Include the name of the person(s) you spoke with. Include the occupation of the person you contacted. Be sure to include the date, time, location, and details of the topic discussed. If you need to contact the person in the future, ask for their telephone number.
Important dates to include	Include the following dates: • Pre-hearing date • Hearing date/Hearing reschedule date • Date the Decision is received from the Hearing Officer • Date the Decision and Order is mailed to the Respondent • Decision and Order information
Optional information	Include information you may wish to add that is pertinent to the case and your organization.

Section 5.2

Hearing Officer Checklist

Introduction

The Hearing Officer Checklist (for administrative penalty hearings) is an optional tool intended to compliment, not replace, the Hearing Sourcebook. The checklist includes basic concepts a Hearing Officer should consider. Since there are no specific rules with conducting the hearing process, other than those provisions ensuring due process, these concepts are solely recommendations.

Hearing Officer checklist

The Hearing Officer Checklist contains:

1. Request to Perform a Hearing
2. Notice of Proposed Action (NOPA) Review
3. Pre-hearing Conference
4. Hearing
5. Written Decision

Each part is described below.

1. Request to perform a hearing

1. Obtain a written request from the county agricultural commissioner (CAC) to perform a hearing (or review the request).

2. Make an inquiry about a hearing room. The room should be private and large enough to accommodate the anticipated number of participants. The table should be large enough to provide for proper seating configuration. There should be adequate number of electrical power sources in the room.

3. Make an inquiry about a tape recorder. Are tape recorders and blank audio tapes available? Obtain an adequate number of blank audio tapes, using only unrecorded audio tapes. Test both the tape recorder and audio tape together to make sure the tape recorder and tapes function properly.

   Make sure you have enough batteries or power sources, and if needed, an extension cord. Class C (formerly *minor*) violations usually last ½ to 2 hours; Class B (formerly *moderate*) violations usually last 1 to 2-1/2 hours. Class A (formerly *serious*) violations usually last 2 to 4 hours. Multiple violations may double usual times.

Continued on next page

Hearing Officer Checklist, Continued

1. Request to perform a hearing (continued)

4. Request a copy of the Notice of Proposed Action (NOPA).

5. Request that a copy of all evidence to be introduced be available to the Hearing Officer and to the Respondent at the hearing or pre-hearing conference, if stipulations are sought.

2. Notice of Proposed Action (NOPA) review

Upon receipt of the NOPA:

1. Review the NOPA for completeness. The NOPA should include the standard "boilerplate" language, in addition to information that is individual to each NOPA, which includes the section(s) violated, the circumstances of each violation, the fine amount for each violation and the reason for assessing that amount, and the fine guidelines. The review of the NOPA provides the Hearing Officer with the identical information given to the Respondent. This information will allow the Hearing Officer to be better prepared during the hearing and/or pre-hearing conference.

2. Compare the wording of the section(s) allegedly violated with the actual Food and Agricultural Code (FAC), Business and Professions Code (B&P Code), and/or California Code of Regulations (CCR) sections. Make note of any discrepancies or paraphrasing.

3. Identify the elements of each violation and make a checklist to assist you in keeping track of the evidence to make a finding for each element. The list of elements of each violation will assist you in keeping the hearing on track and when writing-up your findings. This checklist can be a simple, three-column, multiple-row table with one column for element, one for evidence to support element, and one column for inference(s).

Continued on next page

3. Pre-hearing conference

The pre-hearing conference should include the county's representatives (Advocate and interpreter if necessary) and the Respondent and/or the Respondent's representatives (and interpreter if necessary). Other individuals, such as the CAC, CAC staff, DPR staff, and/or someone requested by the Respondent may also be considered. In no case should witnesses, or any other parties, be present at the pre-hearing conference.

The pre-hearing conference affords the Hearing Officer the opportunity to:

1. Explain the process of the hearing.

2. Assist in clarifying violation types and fine guidelines. Even when the NOPA contained a description of violation types and fine guidelines, additional explanations are often necessary.

3. Assist in reaching stipulations. Stipulations are agreements or concessions between the two parties. In some instances, most or all potential exhibits are stipulated. To a lesser degree, the alleged violation is stipulated.

4. Ask the Respondent what the issues are. In most cases, the Respondent will indicate that he/she would like the Hearing Officer to decide on the matter of the violation and fine amount. In some cases, the Respondent will stipulate to the violation and is solely concerned with the issue of the fine amount.

Continued on next page

4. Hearing

The Hearing Officer should provide the Respondent with a meaningful opportunity to be heard, focus solely on the issue(s) at hand, and clearly have in mind what evidence must be presented to sustain the action.

The Hearing Officer should:

1. Make sure the tape recorder is functioning.

2. Identify the hearing, date and time.

3. Enter (read) any stipulations agreed to during the pre-hearing conference, into the record.

4. Ask the Respondent if he/she stipulated to each of the stipulations.

5. Ask all participants providing evidence to take an oath.

6. Ask that all participants identify themselves.

7. Ask that both parties acknowledge any stipulations for the record.

8. Allow each party the opportunity to call and examine witnesses, cross-examine witnesses, introduce exhibits, and to rebut the evidence.

9. Exercise control of the hearing process. Although there are no specific rules conducting the hearing process, a typical hearing includes: opening statements by the Advocate and Respondent, Advocate case presentation, Respondent cross-examination, Respondent presentation, Advocate cross-examination, and closing comments by Advocate and Respondent.

   Multiple alleged violations may be presented one at a time following the above scenario, or may be merged if specific evidence supports more than one violation. The Hearing Officer can better focus on the issue when each alleged violation is independently presented.

10. Exercise control over the participants in respect to demeanor. Participants may become emotional. Respondents and Advocates alike may become defensive, intimidated, and/or frustrated. Maintain the hearing on a professional, not personal level. It is easier in a civil, rather than hostile, environment to stay focused on the issue.

Continued on next page

4. Hearing (continued)

11. Dissect each violation into elements and have the element checklist in front of you. Each element must be satisfied with at least one piece of evidence admissible in a court of law. Admissible evidence may include direct evidence (witness testimony), circumstantial evidence (presentation of one or more facts connected), personal knowledge (expert witness), and exceptions to the hearsay rule (certain public employee or business reports). As evidence is presented, indicate its appropriateness to the element checklist (sometimes, this is called "making an inference").

    Although it is not the Hearing Officer's responsibility to present the case for the county, nor present the Respondent's case, it may be necessary to ask clarifying questions to reach a just and fair decision.

Continued on next page

Hearing Officer Checklist, Continued

5. Written decision

Making the decision is the sole responsibility of the Hearing Officer. The decision must be based upon only evidence in the record. Official notices of statutes, regulations, or official publications should be very specific and carefully scrutinized. In most cases, all excerpts of documents should be submitted into evidence as to avoid using personal knowledge to fill in the gaps. The decision should be clearly understandable and provide all the information for third party review. In essence, the written decision should be a "stand alone" document. All decisions generally include three separate sections: Issues, Findings of Fact, and Decision or Determination of Issues.

The Issues section usually parrots the language found in the NOPA unless the Respondent stipulated to specific violations or fine levels. Once again, provide enough information for third party review.

The Findings of Fact section should contain only facts that are supported by evidence. **Each element must be satisfied with at least one piece of evidence admissible in a court of law.** The decision section should draw conclusions that are stated in the Findings of Fact.

In writing the decision, the Hearing Officer should:

1. Separate each violation. Decisions are easier to understand when each violation is separated.

2. Use a checklist of elements. During the hearing process, many statements and exhibits are offered, but are not essential or relevant. Only those facts necessary to satisfy each element are essential. If each element is not satisfied with at least one piece of evidence admissible in a court of law, the issue must be decided for the Respondent. It is the county's obligation to admit evidence to establish each element.

3. Review the completed decision. Is each fact supported by evidence? Is each decision supported within the Findings of Fact? If so, the decision is probably fair and just.

Section 5.3

Stipulations

How should the Hearing Officer introduce and address stipulations made during a prehearing conference?

Following a prehearing conference, the Hearing Officer should open the hearing by informing the participants of the hearing rules and procedures, making introductions, and summarizing the substance and result of any prehearing conference.

To assure a complete Hearing Record, the Hearing Officer's prehearing conference summary should include:

- The names of the parties and the location, time, and date of the hearing;
- A statement that a prehearing meeting was held between the parties and that stipulations were made;
- A recitation for the record of each stipulation agreed to by the Respondent; for each stipulation, a reaffirmation by the Respondent that he/she understood and agreed to the stipulation.

Definition

Stipulation - A voluntary agreement between opposing parties concerning some relevant point. Matters that are the subject of a stipulation are no longer in dispute or contested and need not be addressed at the hearing.

Can the Respondent withdraw a stipulation made during a prehearing conference?

Yes. The Respondent may withdraw a stipulation made during a prehearing conference. If he/she requests to withdraw a stipulation, the Hearing Officer should attempt to ascertain why the Respondent is withdrawing a stipulation, although the Respondent has no obligation to provide a reason.

There are a few reasons why the Respondent may withdraw a stipulation:

- The Respondent did not understand the nature of the stipulation and wants to contest the facts set forth in the Notice of Proposed Action (NOPA) to which the Respondent has stipulated;
- The Respondent did not understand that the Hearing Officer's Findings or Conclusions *may* be based upon the stipulation without taking further evidence.

Continued on next page

Stipulations, Continued

"What if?"	**Question**: If the Respondent withdraws the stipulation, can he/she do so at any time? Or would it be restricted to after the hearing record has been opened? **Answer**: The Respondent can withdraw the stipulation at anytime, up to the conclusion of the hearing. They could even try to withdraw it after that, if they wanted to take the time and spend their resources to try to convince a court they didn't understand.
Advocate tip	The Advocate should adjust his/her presentation accordingly if a stipulation is withdrawn or rescinded.
Hearing Officer tip: Don't forget the hearing record!	Any discussions about stipulations after the hearing has begun should be reflected in the hearing record.
References	• Black's Law Dictionary, Second Edition • Hearing Officer Sourcebook, Second Edition, May 1995 • Various "Type A" personalities contributed to the "What if?" discussions

Section 5.4

The Expert Witness

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What is an expert witness?
- What is the role of the Advocate or Hearing Officer when an individual is introduced or portrayed as an expert witness?

Definition

Expert witness - A person recognized as having special knowledge, training, experience, skill, or education on the subject he/she testifies on. The expert witness is permitted to state his/her opinion concerning those technical subjects even though he/she was not present at the time the activity or incident in question took place.

- A witness is offered either by the Advocate or Respondent and accepted as an "expert" by the Hearing Officer because the witness is believed to possess special knowledge "not common to your fellow man."

Each side must qualify its witness as an "expert"

The party offering the testimony or opinion of an expert witness at a hearing must first elicit information demonstrating that the witness, because of his or her special knowledge, experience, training, skill, and education, is better qualified to render an opinion than a person without that background.

Qualify the witness as an "expert" by asking questions about the witness':

- Present occupation
- Academic background
- Occupational history
- Licenses and license history
- Special honors
- Association membership(s)
- Publications
- Teaching experience
- Other special familiarity or experience with the subject matter, including special studies, and
- Previous instances when they have been qualified as an Expert Witness.

Continued on next page

The Expert Witness, Continued

The "expert" may be examined	The "expert" offered by the Advocate (or Respondent) may be examined (questioned) by the opposing side.
Hearing Officer makes the determination	The Hearing Officer will determine whether the witness is qualified to be an "expert witness" who can offer an opinion regarding technical subjects in the case even though the person was not present at the time of the incident or activity. The Hearing Officer may allow several witnesses to be qualified as expert witnesses.

Section 5.5

Taking Official Notice

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable discussions:

- As a Hearing Officer, is it appropriate to "take official notice?"
- Does the Director consider the fairness of the "official notice?"

Definition

Official notice - the acceptance of the existence of a relevant fact or law without requiring formal proof because the fact or law cannot reasonably be disputed. Official notice can be taken of facts that are universally known to be true or can easily be verified by resorting to sources whose accuracy cannot reasonably be questioned. Official notice can be taken of all constitutional, decisional, and statutory law.

Examples:

- June 4, 2003, fell on a Wednesday.
- The sun is high in the sky at 12:00 p.m.
- Blythe is located in Riverside County.
- FAC section 11701 requires that a pest control business be licensed.

Official notice cannot be used to establish facts which can reasonably be disputed

Hearing Officers cannot "officially notice" facts which are not common knowledge, not easily verified by resorting to reliable sources, or which can reasonably be disputed. If the situation warrants, the Hearing Officer may want to ensure fairness and provide notice to the Respondent that he/she intends to officially notice a particular fact or law.

Director's review on appeal of Hearing Officer's official notice

During an appeal, if the Hearing Officer took official notice of a specific fact or law, the Director may consider whether it was proper for the Hearing Officer to do so, that is, whether existence of the fact or law cannot be reasonably disputed. The Director may also consider the relevance of the law or fact to the case and whether the inferences drawn from it by the Hearing Officer were reasonable. If the fact or law "officially noticed" was critical to the reasoning of the decision, the Director could reverse or modify the county agricultural commissioner's decision based on those determinations.

Continued on next page

References

- California Evidence Code Sections 450 and 451
- Federal Rules of Evidence, Section 201
- Jefferson's California Evidence Benchbook, Section 47

Section 5.6

Violations Discovered at Hearing

New violations discovered

What can an Advocate do in a hearing where the Respondent introduces evidence, *as a defense*, that supports or indicates additional violations by the Respondent that were not known and not included in the present Notice of Proposed Action (NOPA) allegations?

Background

On rare occasions, the Respondent might present evidence at a hearing which, if found to be true, tends to clear the Respondent of the violation charged, or, supports a different or new violation.

Response

At the hearing, the Advocate may request that the Hearing Officer drop a charge, in the interest of fairness, based upon new information. In the alternative, the Hearing Officer may make a finding that the county did not prove its case regarding a particular charge.

After the hearing, if the county agricultural commissioner (CAC) wishes to bring charges of new or additional violations against the Respondent, the CAC must prepare a new NOPA and start the process over from the beginning (mailing or providing the new complete NOPA package to the Respondent and awaiting his/her response).

In addition, if the Respondent is "cleared" by the Hearing Officer of the charge on the original NOPA, the CAC may issue a Violation Notice based on the evidence of the new violation that the Respondent presented at the Hearing.

Section 5.7

Closing Remarks

Questions posed at HO Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What should closing remarks include?
- Should comments be made to counter the Respondent's remarks?
- Should you request a recess to prepare your closing remarks?

Closing remarks

Closing remarks should be brief, but capture the theory of your case and highlight the relevant evidence in support of the county agricultural commissioner's (CAC's) action.

Highlight the violation(s), the evidence, and the proposed penalty

Briefly describe the issues for the Hearing Officer:

- Summarize the violation(s) and main evidence supporting it (them), i.e., review the facts and explain how they prove the Respondent committed the alleged violations, citing specific documents, testimony or other evidence.
- Explain why the violation(s) warrant(s) imposition of a civil penalty in the Class C (formerly *minor*), Class B (formerly *moderate*), or Class A (formerly *serious*) range proposed by the CAC, i.e., refer to the fine guidelines (Title 3, California Code of Regulations [3CCR] section 6130 or Title 16, California Code of Regulations [16 CCR] section 1922) and briefly explain how and why the CAC arrived at the proposed penalty for each violation.

Continued on next page

Closing Remarks, Continued

Countering the Respondent's evidence or remarks

- If you think it is necessary, respectfully remind the Hearing Officer that the standard of proof for levying an administrative civil penalty is "the preponderance of the evidence," i.e., "it is more likely than not" that the Respondent committed the alleged violation(s).
- If it seems appropriate or desirable, respectfully and politely point out any inconsistencies in the Respondent's case or contradictions to the Respondent's evidence provided by the CAC's evidence.
- If you think it is necessary given the facts of your case, you could remind the Hearing Officer that the Respondent received the Notice of Proposed Action (NOPA) and had an opportunity to review the evidence before the hearing; and/or
- Note that the Respondent had sufficient opportunity to gather his/her evidence and to present it at the hearing to refute the allegations in the NOPA.

Recess to prepare closing remarks?

The Hearing Officer is in charge of running the hearing. If you feel it is necessary, ask the Hearing Officer to grant a short recess so you could prepare your closing remarks. However, you should, and probably can, develop most of your closing remarks before the hearing and make minor adjustments to them, if necessary, as the evidence is presented during the course of the hearing.

Conclude your remarks

After discussing the violation(s), the evidence, and the penalty, and countering the Respondent's evidence or remarks, you may want to conclude by asking the Hearing Officer to make the findings of fact based upon the evidence that support the CAC's action.

Section 6.1

The Decision

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What are the differences in the "Notice of Decision" and "Final Decision"?
- Who writes and mails the "Notice of Decision" and the "Final Decision"?
- Whose letterhead should be used (Hearing Officer's or the county agricultural commissioner's [CAC's])?
- When is each of these required?

Decision terminology

Terms such as Decision, Notice of Decision, Commissioner's Decision, etc., seem to be a source of confusion. They are all "labels" intended to signify that a decision has been made at some point in the administrative process, which may or may not be a "final" decision.

- Decision, or Notice of Decision, is the CAC's decision. An underlying, proposed decision may have been written by the Hearing Officer who may or may not be a CAC. Decision may also refer to a decision of the Director of DPR.
- Commissioner's Decision is the decision issued by the CAC.
- Decision Adopted by the Commissioner is the CAC's decision where an underlying proposed decision of a Hearing Officer was adopted by the CAC as his/her decision in the matter.
- Director's Decision is the decision made by the Director (such as in an appeal of a CAC's decision pursuant to FAC section 12999.5).
- Docket No. or Administrative Docket No. refers to the number assigned by the Department of Pesticide Regulation's Office of Legal Affairs to track certain civil penalty decisions of the Director.

Final decision

A decision can become "final" at various points after the issuance of the CAC's decision at the county level. A decision becomes "final" only if:

1. No appeal is made to the appropriate body within the time period allowed by statute or
2. All possible appeals have been taken and decisions rendered on those appeals.

Continued on next page

The Decision, Continued

Director's Decision and Final Order

When a Commissioner's Decision is appealed to the Director, the Director's Decision may also be referred to as the "Director's Appeal Decision" or "Final Order." The Director's Decision can only be considered a "Final Order" if it is not appealed to the Superior Court within the time period permitted by statute.

When should the decision be forwarded to parties?

The Hearing Officer's proposed decision should be mailed or delivered to the CAC in a timely manner. There is no "time limit" per se, but in fairness to all parties, the written decision should be forwarded to the CAC within 20 days of the hearing. The CAC should process the proposed decision, (adopting the decision, issuing the order, and mailing along with the statement of appeal rights to the Respondent) in a timely manner. Again, there is no "time limit" but 10 to 15 days should be sufficient.

Who writes and mails what?

The Hearing Officer writes his or her proposed decision on his/her county's letterhead, signs and dates it, then mails or delivers the proposed decision to the CAC.

The CAC "adopts" the proposed decision on his/her letterhead, "orders" the fine to be paid, and provides the Respondent with written appeal instructions. Then, the CAC mails or delivers the decision, order, appeal rights, and any other pertinent instructions related to closing the matter, i.e., how to pay, who the check should be made payable to, etc. The CAC should attach the Hearing Officer's proposed decision to the Commissioner's Decision, order, and appeal rights.

Summary

Some of the terms mentioned above have similar meanings but are qualified in each case to clarify who exactly issued the decision and where exactly it fits in the whole scheme of the administrative and appeal process. The correct usage depends on the situation.

References

- Code of Civil Procedure
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 6.2

Commissioner's Discretion to Change a Decision

Guidance change June 2006

This document replaces and supersedes guidance found in the Hearing Officer Roundtable Project, Section 6.2, previously titled, "County Recourse for Hearing Officer's Decision," published in May 2004. This guidance applies to administrative hearings held under the authority of FAC section 12999.5, and in some respects, to Business and Professions Code sections 8617 and 8662. This document provides guidance on a question posed at the Hearing Officer Roundtable.

Question posed and updated response

- Does the county agricultural commissioner (CAC) have any recourse if he/she disagrees with the Hearing Officer's proposed decision?

Hearing process provides due process

If requested by the Respondent, the CAC must provide a hearing before levying a penalty. The hearing establishes the facts of the case and provides due process to the Respondent (an opportunity to review and respond to the county's evidence).

CAC should agree with the decision it adopts

The CAC, not the Hearing Officer, has the authority and responsibility to levy penalties.

The CAC is not required in all cases to adopt the Hearing Officer's decision in its entirety, *but the CAC should agree with the decision he or she adopts.*

The CAC may decline to adopt an error in the Hearing Officer's proposed decision and issue its own decision and order <u>based on the hearing record</u>.

This is a legitimate exercise of the CAC's authority that may avoid reversal on appeal and may be the only opportunity to correct a Hearing Officer's error. The <u>Respondent</u> may appeal the CAC's decision and order to the Director of the Department of Pesticide Regulation (Director) or the Disciplinary Review Committee (DRC), as appropriate.

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Due process limits CACs discretion in finding of facts

The Respondent's right to due process of law limits the CAC's discretion to reject a finding of fact in the Hearing Officer's proposed decision.

The CAC may overrule a Hearing Officer's findings of fact only if there is no substantial evidence to support it. The hearing creates the administrative record and provides the Respondent with an opportunity to review and respond to the county's evidence before an impartial arbiter as required by principles of due process. The record of the hearing is the sole source of facts in the case. The CAC can only rely on evidence admitted at the hearing as the basis of its decision to levy a penalty. Furthermore, deference is given to the Hearing Officer as the finder of fact. The CAC must accept the Hearing Officer's judgments about the relative weight and credibility of conflicting evidence.

Where a CAC's decision overrules a Hearing Officer's finding of fact that is supported by substantial evidence in the record, the Director of DPR or the DRC will overturn that decision.

CAC's independent judgment limited to application of law

The CAC can use its independent judgment when overriding a Hearing Officer's interpretation of the law.

The CAC need not defer to the Hearing Officer's interpretation of the law. If the CAC believes that the Hearing Officer incorrectly interpreted the law, then it should correct that error in its final decision and order levying a penalty. If the Respondent appeals the CAC's decision on that basis, then the Director or DRC would exercise *their* independent judgment in resolving that purely legal question.

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Commissioner's Discretion to Change a Decision, Continued

CACs must review record and articulate reasoning

Consider these points when reviewing the Hearing Officer's decision:

- The "substantial evidence" standard is not a high standard. The standard is whether any reasonable person could come to that conclusion of fact based on the evidence in the record. The CAC should review the entire record before making this determination.

- Whenever the CAC overrules a Hearing Officer's legal interpretation or finding of fact, it should carefully explain its reasoning in its final decision. Letting the Respondent know the basis of the CAC 's action respects its procedural rights and can avoid unnecessary expense for everyone involved. An explicitly reasoned order helps the Respondent make an informed decision about whether to appeal and, if the Respondent decides to appeal, facilitates that process.

Reference

Food and Agricultural Code sections 12999.5 and 12999.5(c)(7)

Business and Professions Code sections 8617 and 8662

ENF 2006-09 - Structural Pest Control Disciplinary Review Committee's Decision on Appeal of a County Agricultural Commissioner's Decision (Docket Number S-010)

ENF 2006 - 012 - Director's Decision on Appeal of a County Agricultural Commissioner's Decision (Docket Number 126)

Section 6.3

Notice of Decision and Order Under FAC §12999.5

Subject

This is an example of the letter the county agricultural commissioner (CAC) sends to a Respondent when the CAC decides to "adopt" a Hearing Officer's Proposed Decision under Food and Agricultural Code (FAC) section 12999.5.

Continued on next page

Notice of Decision and Order Under FAC §12999.5, Continued

Example letter

FILE NO._____

TO: Respondent
Address

The attached Proposed Decision of the Hearing Officer is hereby adopted by the Commissioner as his/her decision in this matter. This decision shall become effective 30 days after the Respondent receives the decision, unless an appeal is timely filed with the Director of the California Department of Pesticide Regulation.

ORDER: You are hereby ordered to pay a fine of $_____.

APPEAL RIGHTS: As provided in Food and Agricultural Code section 12999.5, this decision may be appealed by the Respondent within 30 days of the date of its receipt by mailing a written request to the Director of the California Department of Pesticide Regulation addressed to:

Department of Pesticide Regulation
Office of Legal Affairs
1001 I Street
P.O. Box 4015
Sacramento, CA 95812-4015

The appeal request must be signed by the Respondent or the Respondent's authorized agent, must state the grounds for the appeal (i.e., the reasons why the Commissioner's decision is in error), and must include a copy of the Commissioner's decision.

The Respondent must mail a copy of the appeal request to the Commissioner at the same time it is mailed to the California Department of Pesticide Regulation.

_(name)_____ DATE:_____
Agricultural Commissioner

Make Check Payable To: (name of county) - Agricultural Commissioner

Section 7.1

Enforcement Actions and Fines for Violating FAC §§11791 and 11792

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What is the most appropriate enforcement action for violations of Food and Agricultural Code (FAC) sections 11791 and 11792, especially for false, misleading, or fraudulent activities?
- When levying administrative civil penalties for violations of FAC section 11792, what is the most appropriate fine classification?

Improved compliance is the primary goal of the pesticide enforcement program

The primary goal of the pesticide enforcement program is industry compliance with state and local pesticide use requirements. This goal is achieved through the use of a wide variety of regulatory enforcement tools. Depending on the specific circumstances or consequences of the violation, our enforcement response can be designed to:

- Change violators' behavior though a program of progressive discipline.
  Examples: repeat inspections, office interviews, administrative civil penalties, and license, certificate, registration, or permit suspensions.

- Prevent or mitigate harm by stopping current and/or future actions.
  Examples: cease and desist orders, abatement orders, seize / hold actions, prohibit harvest orders, license, permit, or certificate suspensions / revocations.

- Punish egregious behavior or consequences by depriving the violator of freedom or property.
  Examples: criminal prosecution resulting in fines and/or imprisonment, civil prosecutions of up to $10,000 per violation, or permanent revocation of a state or county issued license, certificate, registration, or permit.

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Enforcement Actions and Fines for Violating FAC §§11791 and 11792, Continued

Which enforcement response is most appropriate?

The most appropriate enforcement response to a violation of FAC section 11791 or 11792 is the action that best fits the circumstances of the violation and will likely result in the desired outcome.

The best response to an "unlawful act" depends on many factors, including:

- The specific circumstances of the violation
- The actual or potential effect(s) of the violation on people, the environment, or property
- The violator's history
- The violator's status (licensee, permittee, or certificate holder)
- The quality of evidence collected by or available to the investigator **AND**
- The desired outcome:
  - ✓ Long term behavior change
  - ✓ Preventing real or potential harm **or**
  - ✓ Punishment.

Note: When mitigating harm through a Cease and Desist Order, the county agricultural commissioner (CAC) must be prepared to choose and implement their enforcement responses very quickly.

Isn't fraud really bad?

Yes. Really bad. However, the FAC doesn't distinguish fraud from any other violation with respect to the actions that can, or should, be taken to change or punish the violator's behavior or quickly mitigate harm to people, the environment, or property.

As with any other violation, the CAC must evaluate the circumstances and consequences of the fraudulent action before determining the most appropriate enforcement response.

Continued on next page

Enforcement Actions and Fines for Violating FAC §§11791 and 11792, Continued

Choose an enforcement response that allows you to control the outcome

The Department of Pesticide Regulation (DPR) suggests that CACs use, whenever possible, the regulatory enforcement tools in the FAC that allow them full control over implementation and outcome.

Depending on the specific circumstances of the violation and the violator's history, the CAC may be able to effect behavior change through a program of progressive discipline where the CAC's response increases in severity over time. If the violation or violator poses a significant threat to people, the environment, or property, the CAC is authorized to stop or prohibit the action without first consulting DPR and can determine when it is appropriate for the action to resume.

If the violation is so egregious that the CAC feels they cannot adequately protect health, environment, or property using the regulatory tools they control, then the CAC should refer the issue to an external enforcement agency. Once this occurs, the CACs gives up a certain amount of control over the outcome.

Desired outcome	Enforcement Tools Under CAC Control
Behavior change	• Frequent follow-up inspections • In-person compliance interviews[1] • Levying an administrative civil penalty at the lowest fine level possible, or • Suspending the violator's permit or county registration until the violator comes into compliance with the law or a lawful order of the CAC.
Mitigate or prevent harm	• Issuing a Cease and Desist Order • Issuing a Prohibit Harvest Order, or • Refusing, suspending, or revoking a permit or county registration until the violator comes into compliance with the law or a lawful order of the CAC.
Punishment	• Refer case to external agency

Continued on next page

[1] The information presented here does not supersede the Enforcement Guidelines. CACs should consult and follow these guidelines when evaluating their enforcement options.

Enforcement Actions and Fines for Violating FAC §§11791 and 11792, Continued

Second choice - refer the case to DPR for more severe action

Under certain circumstances, the CAC should consider referring the case to DPR when the available county-level enforcement responses are not effective in changing violator behaviors, mitigating or preventing harm, in cases of high priority incidents, or when dealing with violations committed in multiple jurisdictions.

The FAC allows the Director to engage in civil prosecutions, levy civil penalties, and take licensing actions against licensees. The Director may also refer the case to the Attorney General.

Although the CAC does not have total control of cases referred to DPR, there is the opportunity for a moderate to high degree of cooperation in case development and the action taken. CACs are encouraged to discuss their concerns regarding the effectiveness of a county level action and the opportunities for case referral with DPR's Enforcement Branch at the earliest possible opportunity.

Third choice - actions controlled by external enforcement agencies or the courts

DPR and the CACs, when faced with egregious and/or criminal acts, can refer cases to enforcement agencies that are better equipped with respect to legal and penalty authority and personnel training and experience.

When referring a case to the Attorney General, district attorney, city prosecutor, or city attorney, both DPR and the CACs give up control of the investigation, prosecution, and penalty. When considering a referral, CACs should discuss the case and their concerns with DPR or their County Counsel to be certain that there are no other "in-house" options that could achieve the desired result (i.e., perhaps the County Counsel has experience in revoking a city business license and this is his or her preferred method of dealing with recalcitrant businesses).

Best fine classification

If the CAC chooses to levy a civil penalty for a violation of FAC section 11791 or FAC section 11792, then the CAC may apply the fine guidelines in 3CCR section 6130 to the circumstances of the violation, including consideration of the actual or possible consequences.

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Enforcement Actions and Fines for Violating FAC §§11791 and 11792, Continued

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- 3CCR section 6140, Inspection Authority
- 3CCR section 6141, Employee Interviews
- 16CCR section 1922, Civil Penalty Actions by Commissioners
- B&P Code section 8617
- Enforcement and Compliance Options Chart, a.k.a., form PR-ENF-072
- FAC sections 2281, 11452, 11453, 11456, 11501.5, 11737, 11791, 11792, 11893, 11896, 11897, 11981, 12582, 12601, 12642, 12643, 12648, 12672, 12673, 12961, 12977, 12982, 12996, 12998, 12999.5, 13000, 13101, 13102, 14004, and 15202

Section 7.2

Drift and Negligence

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable, in addition to other negligence-related issues:

- What evidence is necessary to support the element "notwithstanding substantial drift would be prevented" as found in Title 3, California Code of Regulations (3CCR) section 6614?
- Is 3CCR section 6614 the appropriate section to cite when damage (or potential damage) is due to offsite movement? If not, which is the appropriate section?

Note: Refer to Enforcement Letter 2000-034, Pesticide Drift Incident Response Policy.

Definitions

- **Drift** - the pesticide that moves through the air and is *not* deposited on the target area at the time of application. Drift *does not* include the movement of pesticide and associated degradation compounds off the target area, such as by translocation, volatilization, evaporation, or the movement of pesticide dusts or pesticide residues on soil particles that are windblown after the application.
- **Due care** - the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under the same or similar circumstances. When a person does not exercise due care, they are considered negligent.
- **Sensitive site** - a location determined by the county agricultural commissioner (CAC) or Director based upon his/her evaluation, to contain things that could suffer harm or injury from the pesticide in question, such as sites containing people, crops where minor amounts of residue can cause harm, honey bees, wildlife sanctuaries, etc.
- **Substantial drift** - the quantity of pesticide outside the treated target area is greater than that which would have resulted had the applicator used due care (3CCR section 6000).
- **Target area** - when applying pesticides, the applicator has a particular target to apply the pesticide. The target is known as the target area and can be a field, orchard, water body, structure, kitchen counter top, pet, flower bed, lawn, etc.

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Drift investigation policy

When the CAC becomes aware of a pesticide "drift" incident, the incident must be promptly investigated, including complaints that are anonymous and/or not in writing. Each investigation must be completed, even if the complaint is withdrawn or the complainant receives compensation for any alleged damages.

Pesticide drift

Some pesticide drift is expected from aerial and other above-ground pesticide applications. Recognizing this, the California Legislature required only that pesticides be used in a manner that prevents substantial drift to nontarget areas (Food and Agricultural Code [FAC] section 12972).

Which code section to use?

When conducting an investigation involving pesticide drift, the CAC should determine whether the applicator violated FAC section 12972 or 3CCR section 6614 or other applicable regulations.

Legal requirements

Legal requirements concerning drift are typically intended to protect certain sites or areas, which are often referred to as sensitive sites.

FAC section 12972 requires persons to use pesticides in a manner to prevent substantial drift to nontarget areas.

In addition to legal requirements intended to minimize drift, 3CCR section 6614 prohibits making or continuing a pesticide application when specified situations exist.

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Section 7.2.1

Reasonable Possibility of Harm or Damage - 3CCR §6614

Background

3CCR section 6614 places responsibility on the applicator *prior* to making a pesticide application to evaluate the surrounding properties and other conditions (e.g., application equipment, meteorological conditions, property to be treated, etc.) and determine the likelihood of harm or damage in order to decide whether the application should be made.

3CCR section 6614 also requires the applicator, *during* the application to continually monitor these conditions to determine if the likelihood of harm or damage has arisen during the application in order to further decide if the application must be discontinued.

3CCR section 6614 prohibits making or continuing a pesticide application when there is a reasonable possibility of:

1. Contamination to bodies or clothing of persons not involved in the application process,
2. Damage to nontarget crops, animals, or other public or private property, or
3. Contamination to nontarget public or private property, including the creation of a health hazard, preventing the normal use of the property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property, and related factors must be considered.

Applicator's obligations

To fulfill the applicator's obligations under 3CCR section 6614, the applicator must evaluate surrounding nontarget properties, be aware of the types and uses of the surrounding nontarget properties, and to be aware of nearby crops or animals. The applicator must also have knowledge of the effects of the pesticide in order to decide whether contamination of nontarget property with the pesticide that will be applied could create a health hazard that would prevent a normal use of the property.

Continued on next page

Reasonable Possibility of Harm or Damage - 3CCR §6614,
Continued

Applicator's obligations (continued)

Also, the applicator must constantly look for the presence of persons not involved in the application process. The applicator must not make or must discontinue an application when the reasonable possibilities specified in the Background section (see above) exists.

Examples: Applicator's responsibilities

Basically, 3CCR section 6614 states that even though the applicator will use the same care that reasonable applicators would use under the same or similar circumstances to minimize drift to nontarget areas, there are still certain situations where the application cannot be made, or, once started, cannot be continued. These situations involve possibilities that are *reasonable* ones under the circumstances of the particular application, i.e., possibilities of which the applicator *reasonably* should have known.

For example, the applicator should evaluate whether a sensitive site is near the target area. If the target area is near residential property, a road on which vehicles and people travel, or another sensitive site, the applicator should consider:

- Distances from the target area to the sensitive site
- The layout of the target area (e.g., the presence of power poles or trees on the target area, the shape of the target area, the application pattern that will be used, etc.)
- The use of buffer zones
- Making the application when the wind is blowing away from the sensitive site or
- Using a different application method than that originally planned or hoped to be used.

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Reasonable Possibility of Harm or Damage - 3CCR §6614,
Continued

CAC's role and responsibilities

If a person's pesticide application contaminates the bodies or clothing of persons not involved in the application process, does damage to nontarget crops or other property, or contaminates property creating a health hazard that prevents normal use of the property, then, in most cases, the CAC will be able to show that the person applied the pesticide when there was a reasonable possibility that the consequence would happen and the person violated 3CCR section 6614.

However, occasionally there could be a case where an application caused the damage (or other consequence) described in 3CCR section 6614, but the evidence shows that the possibility that the damage (or other consequence) would result was **not** a reasonable possibility.

Where a consequence mentioned in 3CCR section 6614 (e.g., property damage) occurs as a result of an application, before initiating an administrative civil penalty action alleging a violation of 3CCR section 6614, the CAC should carefully consider all the circumstances surrounding the application, including pesticide label directions aimed at preventing the consequence, to decide if the possibility the consequence would occur was a reasonable one. Even if the CAC believes there was a reasonable possibility the consequence would occur and proposes a civil penalty action, the Respondent, at the hearing, still has an opportunity to show that the possibility was not reasonable under the particular circumstances of the application.

References

- Enforcement Letter 2000-034, Pesticide Drift Incident Response Policy
- Investigative Sampling Manual
- Investigative Techniques Manual

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Section 7.2.2

Due Care - FAC §12972

Background

FAC section 12972 requires persons to use pesticides in a manner to prevent substantial drift to nontarget areas.

Even though the 3CCR section 6000 definition of substantial drift includes the phrase "quantity of pesticide," a determination that drift was substantial *is not* dependent on the amount of pesticide that was deposited outside the target area, but rather, by a determination that the applicator did not use due care.

Pesticide drift is substantial if the applicator *did not use* due care.

Establishing due care

To prove that an applicator failed to use due care in making a pesticide application, the CAC must present sufficient evidence, in effect, that the applicator failed to do what a reasonable applicator would or would not have done under the same or similar circumstances. This can be difficult.

To determine whether an applicator used the care that was due, it is essential to determine what the weather and other conditions were at the time of the application, what the conditions were at and near the target area, and what decisions were made and what actions were taken by the applicator. The applicator's actions, or lack of actions, will be the deciding factors in determining whether the applicator used due care under the circumstances that existed at the time of application, and, thus, whether the pesticide was or was not used in a manner to prevent substantial drift to nontarget areas.

This determination may involve referencing published good established practices or having other applicators specify the actions they would or would not have taken under the conditions that existed at the time of application, and comparing them to the actions the applicator took.

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Examples of supporting evidence

To prove a violation of FAC section 12972, the CAC must collect and present at the hearing evidence to show each of the following:

1. The person/company charged with the violation applied a pesticide to a particular target area.

   Supporting evidence (examples) may include:
   - Records of application
   - Statements made by the applicator
   - Testimony of persons who witnessed the application
   - Positive sample analyses

2. The application resulted in the pesticide being deposited outside the target area.

   Supporting evidence (examples) may include:
   - Positive sample analyses of crop foliage, clothing, or other items located outside the target area
   - Testimony of persons who observed the application

3. The applicator failed to use the care that was due under the circumstances that existed at the time of the application.

   Supporting evidence (examples) may include:
   - Evidence of the circumstances/conditions that existed at the time of the application
   - Evidence of actions taken by the applicator to show what care the applicator used under those conditions
   - Standards of care published by the pest control industry for such circumstances (if any)
   - Testimony at the hearing from one or more pest control applicators (other than the applicator in question) or other persons to compare the judgment and actions of the applicator to those of a reasonable applicator under the same or similar circumstances

Continued on next page

Due Care - FAC §12972, Continued

Examples of supporting evidence (continued)

OPTIONS: The CAC could establish that the applicator failed to use due care by showing at the hearing, the applicator failed to follow:

- Drift control standards (if any) required by the pesticide label
- Certain general standards of care specified in 3CCR section 6600
- Drift minimization requirements specified in permit conditions or
- Regulations intended to minimize drift.

However, in these instances, the CAC could charge a violation of one or more of these applicable laws or regulations rather than a violation of FAC section 12972.

DPR recommends CACs reserve administrative civil penalty actions for alleged violations of FAC section 12972 for those cases where the CAC's evidence clearly establishes that an applicator failed to use due care at the time of the application. These cases most likely will "stand out" because the applicator would have used poor judgment.

Reference

- Enforcement Guidelines, Technical Revision, December 2002
- Enforcement Letter 2000-034, Pesticide Drift Incident Response Policy
- Investigative Sampling Manual
- Investigative Techniques Manual
- Pesticide Episode Investigation Procedures Manual

Section 7.3

Appropriate Violation Class for Violation of 3CCR §6680

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- If a container has been significantly altered to measure and load a pesticide into the application rig, is it a violation of Title 3, California Code of Regulations (3CCR) section 6680 (prohibiting the use of pesticides in containers commonly used for food, drink, or household products)?
- What is the most appropriate violation class for a violation of 3CCR section 6680?

What constitutes a violation of 3CCR §6680?

Placing any pesticide in any container commonly used for food, drink, or household products is expressly prohibited by 3CCR section 6680.

Per Administrative Docket No. 096, which involved 3CCR section 6680, there is no exemption for altered food, drink, or household product containers and the prohibition of this regulation still applies. A pesticide handler who places a pesticide in a container commonly used to hold a food, drink, or household product, whether altered or not, is in violation of 3CCR section 6680.

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Appropriate Violation Class for Violation of 3CCR §6680,
Continued

Choosing the appropriate violation class in 3CCR §6130

The appropriate violation class depends on whether harm occurred or was likely as a result of a person's actions and the person's violation history in that county. The following table shows the criteria associated with each violation class:

For violation class . . .	You must prove that the violation . . .
Class A (formerly *serious*)	• Created an actual health or environmental hazard or • Violated a lawful order of the county agricultural commissioner pursuant to Food and Agricultural Code sections 11737, 11737.5, 11896, or 11897 or • Repeated a prior violation in Class B (moderate class)
Class B (formerly *moderate*)	• Posed a reasonable possibility of creating a health or environmental effect or • Repeated of a prior violation in Class C (minor class)
Class C (formerly *minor*)	• Did not create or pose a reasonable possibility of creating a health or environmental effect

Are all violations of 3CCR §6680 considered "serious" or "moderate?"

No. Mitigating circumstances and/or the lack of tangible health or environmental consequences can eliminate or reduce the actual or potential harm that may result from a violation of 3CCR section 6680. If the investigator cannot prove the existence of an actual hazard or infer a reasonable possibility of harm based on the circumstances of the violation, then the most appropriate violation class is "minor."

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Appropriate Violation Class for Violation of 3CCR §6680,
Continued

Definitions

- **Hazard** - as used in 3CCR section 6130, means "a source of danger" or a "risk[1]."
- **Possible** - as used in 3CCR section 6130, means that the event "may or may not occur" or "may occur given the proper conditions[2]." However, the degree of likelihood is not implied by this term. "Possible" implies <u>any</u> condition between a "moderate degree of probability" to "the barest change within the limits of the circumstances."
- **Reasonable** - as used in 3CCR section 6130, means "being in accordance with reason; not extreme or excessive; moderate; fair[3]." For the purposes of this discussion, a person with an average capacity for rational thought, inference, and logical thinking is considered to possess "common sense."

Establishing a reasonable possibility of harm

Determining whether a violation of 3CCR section 6680 poses a reasonable possibility of harm requires the investigator to evaluate <u>all</u> of the circumstances associated with the violation and the relationships between these facts. If the evidence allows an average person to infer that a probable consequence of an unmitigated violation was harm to a person or the environment, then the investigator has established that a reasonable possibility of harm existed.

While there are no strict guidelines for building adequate proof, the investigators should establish, at a minimum, the:

- Amount of control the handler had over the container
- Proximity of non-handlers to the container
- Types of non-handlers present
- Location of the container relative to other food, drink or household product containers
- Appearance of the container
- Toxicity of the pesticide concentrate
- Concentration and amount of pesticide present and
- Appearance of the contents.

Continued on next page

[1] Definition excerpted from Merriam-Webster's Collegiate® Dictionary, Tenth Edition, p. 533.
[2] Ibid., p. 907.
[3] Ibid., p. 971.

Appropriate Violation Class for Violation of 3CCR §6680,
Continued

Example of establishing a reasonable possibility of harm

The following example describes a set of circumstances that, when taken together, would allow an average person to infer that harm to non-handlers was both possible and reasonable.

General	Supporting Observation
Container control	• The applicator was over 200 yards from the container and facing away.
Proximity and types of non-handlers	• Several young children were observed near the container without the knowledge of the applicator.
Container location	• The contaminated beverage container was on a picnic table about 100 feet away from the equipment and pesticide sheds where the employees routinely ate lunch.
Container appearance	• The beverage container was not altered or marked to indicate its current use or contents and looked exactly like the product available at the local grocery store.
Pesticide toxicity	• The precautionary statement on the pesticide label required immediate medical attention following accidental ingestion of the concentrate.
Pesticide concentration and quantity	• The beverage container held approximately 12 ounces of pesticide concentrate.
Contents - appearance	• The pesticide concentrate appeared substantially similar to the normal contents of the beverage container.

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- 3CCR section 6680, Prohibited Containers for Pesticides
- Enforcement Letter 2001-010 (Docket No. 096)

Section 7.4

Employer's Failure to "Assure" Compliance - 3CCR §6738

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What evidence is necessary to prove that an employer failed to "Assure" employee compliance with the requirements of Title 3, California Code of Regulations (3CCR) section 6738 concerning personal protective equipment (PPE)?

Definition

Assure - 3CCR section 6000 defines Assure[1] as taking "all reasonable measures so that the behavior, activity, or event in question occurs."

Measures for "assuring" employee compliance

In addition to defining assure, 3CCR section 6000 also describes some reasonable measures that an employer could take to "assure" employee compliance with the worker safety regulatory requirements. These measures include:

- Making sure that the employee has the knowledge to comply;
- Providing the means to comply;
- Supervising the work activity; and
- Having and enforcing a written workplace disciplinary action policy covering the employer's requirements.

In addition to this list, employers must comply with all other measures specified in a specific pesticide law or regulation.

Employers responsible for worker safety violations

3CCR section 6702 requires employers to train, supervise, and intervene to the level required, to assure employee compliance and safety while handling pesticides. In general, 3CCR section 6738 requires employers to assure:

1. Employees have everything available in the proper condition to provide the intended protection, and
2. The employees use the proper equipment required in each specified situation.

Continued on next page

[1] Merriam-Webster's Collegiate® Dictionary, Tenth Edition, provides a more succinct definition: "To make sure or certain."

Employer's Failure to "Assure" Compliance - 3CCR §6738,
Continued

Proving employer "failure to assure" compliance

Employee violations of worker safety regulations imply an employer's "failure to assure" compliance because the employer assumed the responsibility and the authority to prevent unsafe work practices from occurring or continuing.

In spite of this regulatory advantage, the investigator must evaluate and document all of the circumstances associated with the violation and the relationships between these facts. If the accumulated evidence allows an average person to infer that the employer did not take all reasonable measures to assure employee compliance, then the employer is in violation of 3CCR section 6738. While there are no strict guidelines for building adequate proof, the following table may help an investigator establish whether the employer took all reasonable measures available to them to assure employee compliance with the worker safety requirements.

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Employer's Failure to "Assure" Compliance - 3CCR §6738,
Continued

Did the employer Assure…	By taking reasonable measures[2], such as….
Knowledgeable employees?	• Implement a written training program that complies with 3CCR section 6724; • Conduct training in the language understood by the employee • Provide qualified trainers; • Conduct surprise inspections to test employee knowledge; • Stage formal and "tailgate" training sessions that match employee needs and knowledge.
The means to comply?	• Train employees on proper PPE use, fit, and maintenance; • Provide all required PPE; • Make all required PPE available at the work site; • Require the use of PPE (as documented through the training and disciplinary programs); • Require the employee to inspect PPE before use and reject inadequate equipment; • Require the proper cleaning after use; • Repair or replace worn, damaged, or heavily contaminated PPE; • Assure the proper storage of PPE at all times; • Conduct surprise inspections to assure employees use: provided supplies, equipment in good condition, and heat stress prevention.
Adequate supervision?	• Match the supervision method to the activity's hazard and complexity and the employee's competency and history; • Provide a means to contact the supervisor in case the employee has questions; • Conduct surprise and routine "in person" inspections to check PPE use and condition; • Correct unsafe work practices when they are observed and document the correction; • Provide a safe workplace by enforcing employer and regulatory requirements.
An effective workplace disciplinary action program?	• Implement a written workplace disciplinary action policy; • Train employees about the policy; • Enforce the policy by citing employees, in writing, who violate employer and regulatory requirements

Continued on next page

[2] Assumes that the employer can provide documentation where appropriate.

Employer's Failure to "Assure" Compliance - 3CCR §6738,
Continued

References

- 3CCR section 6000, Definitions
- 3CCR section 6702, Employer-Employee Responsibilities
- 3CCR section 6738, Personal Protective Equipment
- Merriam-Webster's Collegiate® Dictionary, Tenth Edition

Section 7.5

Registration and Permit Refusals, Revocations, Suspensions, and "Denials"

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable discussions:

- Does due process require that a county first register a pest control operator or business, then suspend registration or simply deny registration?

The relevant question

Due process requirements must be met regardless of when the refusal or denial occurs. The more relevant question is: In what circumstances does a County Agricultural Commissioner's (CAC) refusal to register or grant a permit trigger the due process requirements of notice and hearing?

"Deny" is the same as "refuse"

Merriam-Webster's Collegiate® Dictionary, 10th Edition, defines "deny" as, "to refuse to grant." To "deny" registration is the same as to "refuse" registration.

FAC §11512.5

Food and Agricultural Code (FAC) section 11512.5 allows the CAC to refuse, suspend or revoke a county registration or permit pursuant to section 11735, 11924, 12035, or 14008; <u>and it also requires</u> the CAC to provide due process when refusing, suspending, or revoking a county registration or permit pursuant to FAC sections 11735, 11924, 12035 and 14008.

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Registration and Permit Refusals, Revocations, Suspensions, and "Denials", Continued

Due process required

If	Then,
The applicant for the registration or permit meets the requirements for registration or a permit, but the CAC decides to refuse, revoke, or suspend the registration or permit…	The CAC must: 1) provide due process in the form of notice and an opportunity to be heard, **and** 2) make findings to support the decision, to refuse, suspend, or revoke the registration or permit consistent with the requirements of FAC sections 11735, 11924, 12035, or 14008.

In other words, the CAC must provide a "notice and an opportunity to be heard" or "due process" when refusing, suspending, or revoking a county registration or permit -- unless the applicant does not meet an objectively determined minimum requirement as described below.

Exception

If the CAC can objectively determine from the person's application or other public record that the person does not meet a requirement necessary to qualify for the registration or permit (e.g., failed to submit proof of passing a required examination, possessing a valid pilot's license, or failed to pay an outstanding civil penalty) or if the person simply does not have "a complete" application, the registration or application for permit may be "denied" or refused without the necessity of a hearing. However, the applicant should be given notice of the application defect and provided with the opportunity to cure it.

Applicable sections

- FAC section 11735 - Registration of a pest control operator.
- FAC section 11924 - Registration of a pest control aircraft.
- FAC section 12035 - Registration of a pest control adviser.
- FAC section 14008 - Permit applications.

References

FAC sections 11512, 11512.5, 11735, 11737, 11910, 11924, 12023, 12035, 14008, and 14009.

Section 7.6

Unlicensed Pest Control by Maintenance Gardeners

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What evidence is necessary to prove that pest control by a maintenance gardener (MG) is more than "incidental," the limitation set forth in Food and Agricultural Code (FAC) section 11704?
- What evidence is necessary to prove that a MG is performing pest control work for hire?

Scope of the MG PCB License

Enforcement Letter 2000-43, *Maintenance Gardener Category of the Pest Control Business License*, established Department of Pesticide Regulation (DPR) policy that the MG Pest Control Business (PCB) License applies to all landscaped areas without regard to location provided that the use of a pesticide for pest control is a minor, or complementary, aspect of the physical landscape maintenance work.

Definition

Incidental - Enforcement Letter 2000-43 defines "incidental," as used in FAC section 11704, as pest control that ensues from, or is a minor consequence of, a business' overall landscape maintenance activities. This definition does not limit a MG PCB to a certain type of pesticide or number of applications. However, it requires that <u>each</u> pest control activity is obviously subordinate to, generated by, <u>and</u> done in conjunction with, the business' main purpose of landscape maintenance.

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Difference between the MG and "full" PCB License

DPR requires applicants with the "full" PCB License to have at least one person in a supervisory position who holds a Qualified Applicator License (QAL) in the proper pest control category(ies) (FAC section 11703). By contrast, MGs can qualify for a MG PCB License by having a Qualified Applicator Certificate (QAC) in the proper pest control category(ies) (FAC section 11704). The tests for the QAL are more rigorous than the tests for the QAC.

This two-tiered licensing system matches regulatory requirements to the potential (or expected) level of threat posed to the public and the environment by specific types of pest control operations. DPR believes the lower qualification standard allowed to obtain the MG PCB License adequately protects the public and the environment because "incidental" pest control, as used in FAC section 11704 and described in Enforcement Letter 2000-43, does not pose the same potential for harm as larger scale pest control operations.

MG without PCB: Cite FAC §11701 for unlicensed pest control activities

FAC section 11701 makes it unlawful for any person to advertise, solicit, or operate as a pest control business, unless the person has a valid PCB License issued by DPR, regardless of the type of pest control conducted.

It is a violation of FAC section 11701 for MGs to apply pesticides as part of his/her "for hire" business activities without obtaining a MG PCB License from DPR and registering with the CAC in any county in which he/she does business. To prove that FAC section 11701 has been violated, the CAC only needs to prove the observed pest control was being done for hire and the person or business did not possess a valid PCB License issued by DPR. If the MG has no PCB License, a violation of FAC section 11701 is established without even reaching the issue of whether the pest control activity was incidental to the MG's landscape maintenance activities.

Other options

In addition to an enforcement or compliance action, CAC staff who observe violations of FAC section 11701 could issue a cease and desist order pursuant to FAC section 11737(b) until the person or business is properly licensed by DPR. A fine can be levied against persons or businesses that refuse or neglect to comply with a CAC's lawful order for a violation(s) of FAC section 11792.

Continued on next page

When MG PCB activity is "not incidental": cite FAC §11701, not FAC §11704

FAC section 11704 establishes who is required to have a MG PCB License and describes the procedures and fee necessary to obtain one. If a MG PCB License holder provides pest control beyond what is "incidental" to landscape maintenance (the limitation of the MG PCB License set by FAC section 11704), he/she is providing services beyond the scope of the license. Therefore, in that case, the MG PCB is violating FAC section 11701 because the business is performing pest control without a **valid** pest control business license.

In other words, FAC section 11704 sets up the MG scheme, but if you go beyond it, it's as if you don't have the proper license --- hence FAC section 11701 is violated.

FAC section 11704 should not be cited as a "violation" in an administrative civil penalty action for unlicensed pest control activities by a MG.

Continued on next page

Citing licensed MG PCBs who work outside the scope of their license

The applicator certification and licensing process for MG PCBs only qualifies them to engage in pest control that is "incidental" to their physical landscape maintenance activities. If they conduct pest control activities that do not fit within the narrow definition of "incidental," then they must qualify for the "full" PCB License which requires at least a QAL.

If CAC staff observes a licensed MG PCB conducting pest control that is more than "incidental," in addition to citing him/her for a violation of FAC section 11701, the CAC may issue a cease and desist order pursuant to FAC section 11737(a) for operation of a pest control business by an unqualified person and request DPR to pursue a licensing action against the licensee. The CAC may also suspend the licensee's county registration for the same reason, pursuant to FAC section 11735(b). Because either action could result in a state licensing action, the CAC should discuss his or her intentions with DPR's Enforcement and Licensing Branches before acting against a licensed MG PCB for this type of violation.

The CAC must be prepared to prove in a hearing that the MG PCB licensee engaged in pest control that was outside the scope of its license, in the event a failure to comply with the order results in a state licensing action.

Continued on next page

Proving that pest control is more than "incidental"

Proving that a MG PCB Licensee engaged in pest control that was "more than incidental" can be difficult since there are no objective criteria upon which to make that determination. The "more than incidental" conclusion must be based on the unique facts of each situation and logical inferences from those facts. The documented evidence, as presented and explained by the CAC, must allow an average person to make a reasonable inference that the MG was acting outside the scope of the MG PCB License.

One way to show that pest control is "more than incidental" may be a "stand-alone" pesticide application. If an inspector observes a MG PCB conducting pest control, but can find no evidence of other landscape maintenance work being done on site, then a reasonable and logical inference is that the pest control activity was not "incidental" to landscape maintenance activities at the site when the pest control activity was observed. However, the MG may provide a contradictory verification from the property owner, such as showing that the property owner requested the MG to perform the incidental pest control on a day other than the day when the gardening activities were being performed.

Also, the proof may get a bit more subjective and more dependent on the ability of the investigator to collect good evidence and to provide a cogent interpretation of information which supports the "more than incidental" allegation. Such evidence may include direct observations, documented inspections, photographs, property owner statements, and written contracts.

Again, because this type of investigation can result in a state licensing action, CACs should work with appropriate DPR staff to fully develop a well-documented and convincing case.

References

- Enforcement Letter 2000-43, Maintenance Gardener Category of the Pest Control Business License
- FAC sections 11501.5, 11701, 11704, 11708, 11732, 11735 (b), 11737 (a), 11791, and 11792

Section 7.6

Unlicensed Pest Control by Maintenance Gardeners

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- What evidence is necessary to prove that pest control by a maintenance gardener (MG) is more than "incidental," the limitation set forth in Food and Agricultural Code (FAC) section 11704?
- What evidence is necessary to prove that a MG is performing pest control work for hire?

Scope of the MG PCB License

Enforcement Letter 2000-43, *Maintenance Gardener Category of the Pest Control Business License*, established Department of Pesticide Regulation (DPR) policy that the MG Pest Control Business (PCB) License applies to all landscaped areas without regard to location provided that the use of a pesticide for pest control is a minor, or complementary, aspect of the physical landscape maintenance work.

Definition

Incidental - Enforcement Letter 2000-43 defines "incidental," as used in FAC section 11704, as pest control that ensues from, or is a minor consequence of, a business' overall landscape maintenance activities. This definition does not limit a MG PCB to a certain type of pesticide or number of applications. However, it requires that <u>each</u> pest control activity is obviously subordinate to, generated by, <u>and</u> done in conjunction with, the business' main purpose of landscape maintenance.

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Difference between the MG and "full" PCB License

DPR requires applicants with the "full" PCB License to have at least one person in a supervisory position who holds a Qualified Applicator License (QAL) in the proper pest control category(ies) (FAC section 11703). By contrast, MGs can qualify for a MG PCB License by having a Qualified Applicator Certificate (QAC) in the proper pest control category(ies) (FAC section 11704). The tests for the QAL are more rigorous than the tests for the QAC.

This two-tiered licensing system matches regulatory requirements to the potential (or expected) level of threat posed to the public and the environment by specific types of pest control operations. DPR believes the lower qualification standard allowed to obtain the MG PCB License adequately protects the public and the environment because "incidental" pest control, as used in FAC section 11704 and described in Enforcement Letter 2000-43, does not pose the same potential for harm as larger scale pest control operations.

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Other options

In addition to an enforcement or compliance action, CAC staff who observe violations of FAC section 11701 could issue a cease and desist order pursuant to FAC section 11737(b) until the person or business is properly licensed by DPR. A fine can be levied against persons or businesses that refuse or neglect to comply with a CAC's lawful order for a violation(s) of FAC section 11792.

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In other words, FAC section 11704 sets up the MG scheme, but if you go beyond it, it's as if you don't have the proper license --- hence FAC section 11701 is violated.

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The CAC must be prepared to prove in a hearing that the MG PCB licensee engaged in pest control that was outside the scope of its license, in the event a failure to comply with the order results in a state licensing action.

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Proving that pest control is more than "incidental"

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Also, the proof may get a bit more subjective and more dependent on the ability of the investigator to collect good evidence and to provide a cogent interpretation of information which supports the "more than incidental" allegation. Such evidence may include direct observations, documented inspections, photographs, property owner statements, and written contracts.

Again, because this type of investigation can result in a state licensing action, CACs should work with appropriate DPR staff to fully develop a well-documented and convincing case.

References

- Enforcement Letter 2000-43, Maintenance Gardener Category of the Pest Control Business License
- FAC sections 11501.5, 11701, 11704, 11708, 11732, 11735 (b), 11737 (a), 11791, and 11792

Section 7.7

Registered Label Delivered With the Pesticide - FAC §12973

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What evidence is necessary to prove that the registered label was delivered with the pesticide, an element of a Food and Agricultural Code (FAC) section 12973 violation?

FAC §12973

FAC section 12973 states, "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

Elements of FAC §12973

The elements of FAC section 12973 are use of:

- A registered pesticide
- That pesticide in conflict with the registered label delivered with the pesticide or
- That pesticide in conflict with any permit condition(s) issued by the Director or county agricultural commissioner (CAC).

Note: There can be variations in analysis "style" when determining the "elements" of the violation. Occasionally, the number of elements varies.

Supplemental labeling and supplemental labels

"Supplemental labeling" is a term used to describe partial labeling which includes uses, use directions, or other instructions which differ from those on the registered label. Supplemental labels are changed by the registrant and approved by the Department of Pesticide Regulation (DPR) as part of the accepted (registered) labeling and must be delivered with the pesticide by the registrant or supplemental distributor. Therefore, "use shall not conflict with labeling" includes supplemental labeling.

Product bulletins or technical information bulletins (TIB) are not "supplemental labeling" unless they have been accepted by DPR as part of the registered label.

Continued on next page

Registered Label Delivered With the Pesticide - FAC §12973,
Continued

How and where do we get proof that a label/ supplemental label is registered?

To check on the registration status of a pesticide, log onto the DPR Web site: <www.cdpr.ca.gov>.

From the home page select *"Look up pesticide products."* This page allows a label search using any of the following variables:

- Product name;
- California registration number (this number may be the EPA registration number – without the alpha code);
- Site code; or
- Chemical code.

If you do not have access to the Internet, call the DPR Label Resource Center at (916) 324-0399. You may contact the Center for copies of any registered labeling (including supplemental labeling).

For a CAC to obtain proof that a pesticide product label is DPR-registered, DPR will issue a "Certification of Records." This document will be signed by the DPR Registration Branch Chief, certifying that the pesticide label is duly registered and on file with the Department.

Preparing a case for an enforcment action

When you prepare a case for an enforcement action specific to the pesticide product label at issue, you may contact the DPR Label Resource Center for this document. Do not request a copy of the "Certification of Records" unless you are preparing a case for an enforcement action and anticipate having to introduce the document as a piece of evidence.

Continued on next page

Registered Label Delivered With the Pesticide - FAC §12973,
Continued

What kind of evidence would prove "delivered with the pesticide"?

The forms of evidence to prove "delivered with pesticide" may include any of the following:

1. A statement from the user, dealer, operator, or employer regarding the labeling accompanying the pesticide.
2. A photograph of the actual pesticide container at the use site showing the label, storage site, etc.
3. The actual label from the container that was at the use site, storage site, etc.
4. A photograph of the labeled container at the site of the violation showing something attributable to the site, i.e. the company signs or building, or testimony from the person who took the photograph specifying where the photograph was taken. Or,
5. A photograph of the container, including an employee or user/handler or county staff taken at the time of the violation.

References

- Example "Certification of Records" – sample document
- FAC section 12973
- Hearing Officer Sourcebook, Second Edition, May 1995

Section 7.8

Unlicensed and Unregistered Activity - Citation Strategies

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- Many individuals perform pest control for hire and are not licensed to perform pest control activities. Should we take action against that person as being both "unlicensed and unregistered (Food and Agricultural Code [FAC] sections 11701 and 11732 respectively)?"

The applicant attempts to register

In order to become registered to perform pest control for hire in a particular county, an applicant must register at the county agricultural commissioner's (CAC's) office. The county requires proof of a license or certificate issued by the Department of Pesticide Regulation (DPR) before it will register the applicant to perform pest control for hire in the county. If the applicant is unable to produce any documentation of a DPR-issued license or certificate, the county should advise the applicant that he/she first needs to obtain a DPR-issued license or certificate prior to conducting business anywhere in the State and that the county will not register the person until a DPR-issued license or certificate is provided.

Unless the county has independent evidence that the person has already performed pest control for hire in the county, it should not take action against the person as being both "unlicensed and unregistered."

The applicator performs pest control for hire without registration and/or licensing

In a different scenario, the inspector observes an applicator performing non-structural pest control and determines that the application is "for hire," but the applicator cannot produce a DPR-issued license or certificate. In this case, it is appropriate to charge the applicator with being "unlicensed" and with being "unregistered" if it was confirmed by checking with DPR and the CAC's office that the applicator is, indeed, neither licensed or registered, e.g., the elements of both FAC sections 11701 and 11732 can be proven.

One or both?

In the above scenario, if the person is licensed by DPR, but not registered by the county, obviously only FAC section 11732 can be charged.

Continued on next page

Unlicensed and Unregistered Activity - Citation Strategies,
Continued

References

- FAC section 11701
- FAC section 11732

Section 7.9

Home Use of Pesticides Not Registered in California

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Title 3, California Code of Regulations (3CCR) section 6301 (Unregistered Products) states, "(Food and Agricultural Code [FAC]) Section 12995 shall not apply to an individual who personally uses a substance for the purpose of controlling their residence or garden pests, provided no food or feed commodities treated with the substance are sold, distributed, or fed to animals that are sold or distributed for human consumption." What does this mean?
- What about "home-brew" pesticides used by home gardeners?

What is "home use?"

3CCR section 6000 defines "home use" as "use in a household or its immediate environment."

Aren't these substances and methods still "pesticidal?"

Occasionally, home gardeners (home users) may make traps or repellents from food products, so-called "natural substances" or other substances typically found in a home. The use of many of these mixtures or techniques are technically "pesticidal" since the intention is to kill, repel, or reduce pests.

3CCR section 6301 provides an exemption from FAC section 12995, regarding use of unregistered 3CCR section 6301 pesticides, that allows home gardeners to employ relatively safe pest reduction or elimination strategies when they use relatively nontoxic substances or methods to control pests on food or commodities they intend to consume. The resulting fruits, vegetables, and plants are not intended to be distributed or sold to the public, but rather, enjoyed by the home gardener and his or her family.

Potentially dangerous "home-brew" substances

There are some potentially dangerous mixtures of "home-brew" pesticides or pesticide/fertilizers: for example, cola, soap, and fertilizer mixtures; or tea of nicotine mixtures. Nicotine is a registered pesticide and its potentially toxic properties should not be ignored.

Continued on next page

Pesticide products exempt from registration – 3CCR §6147

There are some substances (or pesticides) exempt from registration because they are of a nature not likely to cause significant danger, even though they fall under the definition of pesticide and may have once been registered as a pesticide.

The federal government has determined that certain substances (mostly food products) do not pose an unreasonable risk to the public health or the environment and has therefore exempted them from registration requirements. 3CCR section 6147, entitled *Exempted Pesticide Products*, lists these substances. This section applies equally to homeowners, growers, and pest control professionals.

Registration requirements; Unregistered products – FAC §12995

California's pesticide product registration requirements (Article 4 of Chapter 2 of Division 7 of the FAC) apply to persons who intend to sell the products to other persons. A certificate of registration is required before any manufacturer of, distributor of, and dealers in "a pesticide product" offer the product for sale. (FAC section 12811).

Just as it has been determined that some substances do not pose an unreasonable risk to the public health and the environment, it has also been determined that a person using an unregistered pesticide (of any type) for home use, does not pose an unreasonable risk to the public health or the environment and is exempt from registration. <u>This exemption only applies to an individual who personally uses a substance for the purpose of controlling pests in and around his/her residence or garden, provided that</u>:

- No food or feed commodities treated with the substance are sold or distributed to another person or fed to animals that are sold or distributed for human consumption.

Continued on next page

Pesticides "not registered in California"

"Not registered in California" can have three meanings:

1. The pesticide is a federally registered pesticide, but is not registered for use in California.
2. The substance being used as a pesticide is a "natural" substance and is considered benign, thus, exempted from the requirements of registration. 3CCR section 6147 lists pesticide products which are not required to be registered by DPR.
3. The pesticide being used is not federally registered or California registered and is not exempt from Department of Pesticide Regulation (DPR) registration by 3CCR section 6147.

Home use of an unregistered pesticide under any of these definitions may be exempt under 3CCR section 6301.

Home-use pesticide is drifting onto someone else's property

Despite the fact that a pesticide is exempt from registration, if there is a violation, i.e., if the home user is not exercising due care, the county agricultural commissioner (CAC) may administer a variety of compliance or enforcement options. Before taking any action, the CAC should consider whether the home user's actions have caused "a hazard or effect."

Generally, DPR does not advise using the Administrative Civil Penalty process against home users unless it was the only realistic option to change the violator's behavior or it is the only realistic option available to the CAC. It is likely that a compliance action, such as a Violation Notice, is all that is necessary to ensure that a repeat of the incident does not occur.

If the home user's pesticide use is of real concern, DPR advises contacting the City or District Attorney before conducting any enforcement action.

Continued on next page

IPM techniques and mixtures

Many of the "home brew" substances or methods employed by home gardeners are called Integrated Pest Management (IPM) techniques. Some common examples that illustrate the use of IPM techniques include: dishwashing soap and water sprayed on garden plants to reduce aphid populations; petroleum jelly spread on bright yellow antifreeze containers to control aphids; cornmeal sprinkled on a lawn to prevent fleas; peanut butter or chocolate sauce as bait to make rodent traps; cedar blocks or shavings in a drawer intended to repel moths; "smelly" deodorant soaps or concoctions intended to repel deer; and saucers of beer to kill snails.

For more information on Integrated Pest Management, see the University of California, Davis Web site at: <http://www.ipm.ucdavis.edu/>.

References

- 3CCR section 6147, Registration Exempted Pesticide Products
- 3CCR section 6301(a), Unregistered Products
- Enforcement Guidelines, Technical Revision, December 2002
- FAC section 12995 - Possession or use of unregistered pesticides

Section 7.10

Actions Against Home Gardeners

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Are administrative civil penalty actions appropriate for "homeowner" violations?
- If not, what can be done if the homeowner's violation caused illness to a family member, guest, or neighbor?

Original intent of ACP actions and/or fines

Typically, when the Legislature passes a law, it is attempting to solve a problem. In 1984, the Legislature passed Food and Agricultural Code (FAC) section 12999.5, authorizing county agricultural commissioners (CACs) to levy fines as a method of encouraging the regulated industry to immediately correct misbehaviors before they escalate to the point where a licensing action or court action is necessary.

FAC section 12999.5 is a means for the CACs to get the attention of individuals and the regulated industry as a whole, before licenses or businesses are jeopardized or the CAC's resources drained, by potentially expensive licensing or court actions.

Definition

Industry - refers collectively to persons or businesses engaged in a distinct branch of trade or manufacture. Generally speaking, persons who are part of the pesticide-regulated industry includes, but is not limited to: persons licensed or certificated by the Department of Pesticide Regulation (DPR); growers, producers and sellers of agricultural commodities; manufacturers and sellers of pesticides; and farm labor contractors.

Home gardener actions were not targeted by the Legislature

The Legislature intended to authorize ACP actions against the pesticide-regulated industry. However, there is no provision in the law exempting the application of FAC section 12999.5 to other persons; CACs may levy a civil penalty against *any person* violating specified pesticide laws and regulations.

Continued on next page

Actions Against Home Gardeners, Continued

Home gardens

Home gardens (and ranchettes) are places where pesticides are sometimes used by persons typically producing commodities for their own personal consumption only. The home garden use of a pesticide, when applied to commodities intended for personal consumption only, including pasture uses for production of livestock for personal consumption only, are not "agricultural uses" of a pesticide. Persons who apply pesticides in a home garden situation in these circumstances typically are not considered part of the regulated "industry" targeted by the Code sections DPR and the CACs enforce that require the application of pesticides in a professional, safe, and effective manner.

Home gardens, which produce commodities for sale, fall under the definition of agricultural use and are subject to the state's pesticide regulatory requirements, regardless of the size of the production area.

DPR's thoughts on the matter

DPR does not generally advise the use of ACP actions against home gardeners producing commodities for their personal use only, as this was not the original intent of the Legislature. However, this is a conservative interpretation and individual CACs may have valid reasons to go forward with an ACP action against a home gardener who is producing commodities for personal use only.

What if the home gardener's action is egregious?

There may be other options available to CACs when a home gardener who is producing for personal consumption commits a violation that is so egregious that it is perceived as deserving some sort of "action." For example, the City Attorney or District Attorney may want to file other civil or criminal charges.

However…

For a variety of reasons, a City Attorney or District Attorney may be unable or unwilling to file against a home gardener for a home-use violation of a pesticide law or regulation. There may be times when the CAC may believe an ACP action is the only feasible and meaningful method to redress or correct action by a home gardener.

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Illness occurs

The Enforcement Guidelines outline the criteria in cases when an illness occurs. It is likely the violation would result in a Class A (formerly *serious*) fine action in accordance with 3CCR section 6130 (Civil Penalty Actions by Commissioners).

It's the CAC's decision

Before initiating an administrative civil penalty action against a home gardener producing commodities only for personal consumption, the CAC must weigh the need to take action to stop or redress the offending behavior.

References

- 3CCR section 6130, Civil Penalty Actions by Commissioners
- 3CCR section 6301, Unregistered Products (Products used by home gardener producing only for personal consumption exempt from registration requirements)
- Enforcement Guidelines, Technical Revision, December 2002
- FAC section 12999.5

Glossary

Introduction

This glossary is applicable to the Enforcement Branch Agricultural Civil Penalty and Structural Civil Penalty Programs and California's Pesticide Regulatory Program.

General information

- Latin phrases are included because they sometimes appear in training materials and literature regarding administrative hearings.
- As a general rule, Latin phrases should not be used in your documents without clarification because their meanings may not be commonly understood.

Terms

3CCR: Title 3, California Code of Regulations pertaining to Food and Agriculture (see also *California Code of Regulations*).

4CCR: Title 4, California Code of Regulations pertaining to Business Regulations (see also *California Code of Regulations*).

8CCR: Title 8, California Code of Regulations pertaining to Industrial Relations (see also *California Code of Regulations*).

16CCR: Title 16, California Code of Regulations pertaining to Professional and Vocational Regulations (see also *California Code of Regulations*).

§: Section of legal code

§§: Sections of legal code

Terms, Continued

-A-

Abuse of Discretion: A standard applied by appellate courts when reviewing the exercise of discretion by trial courts and administrative agencies.

ACP: Agricultural Civil Penalty or Administrative Civil Penalty.

Action: An enforcement activity. The adjective used in front of the word defines the type, e.g., a civil action, a criminal action, etc.

Adjourn: To postpone, disperse or put off until a later time.

Adjudicate: To consider and pass judgment on a controversy based upon evidence.

Admissible evidence: Information that can be received into court or at a hearing to aid in deciding a case.

Advocate: A person who assists, defends, or pleads a cause or case for another person or entity.

APA: Administrative Procedure Act.

Agricultural Civil Penalty: A penalty levied for certain violations of the Food and Agricultural Code or Title 3 of the California Code of Regulations. This penalty activity is authorized by Food and Agricultural Code section 12999.5. Also known as "ACP".

ALJ: Administrative Law Judge. Administrative Law Judges are not required for administrative civil penalty hearings initiated pursuant to FAC section 12999.5 or B&P Code section 8617.

Allegation: Assertion of fact not yet proven.

Appeal: A request made after the administrative hearing by a party that has lost on one or more issues. To make a request for review is "to appeal." The higher authority, in our case, the Director of DPR (Director) or the Structural Pest Control Board's Disciplinary Review Committee (DRC), reviews the administrative hearing decision to determine if it was correct. In our case, the Director or the DRC will rely upon the Hearing Officer to be the "trier of fact." Although they may review whether or not there was substantial evidence for the Hearing Officer to have made a finding, the trier of fact may make a determination about legal issues. When the respondent appeals the Hearing Officer's decision, or the Director or DRC's decision, he or she is then referred to as the appellant.

Appellant: The party who appeals to the Director or a reviewing court.

Arbitrary: Not according to a fixed standard, but resulting from one's opinion or will.

Terms, Continued

-A- (Continued)

Assure: 3CCR section 6000 defines "assure" as taking all reasonable measures so that the behavior, activity, or event in question occurs. Merriam-Webster's Collegiate® Dictionary provides a more succinct definition: "assure" means "to make sure or certain."

Attest: To declare and affirm as true.

Terms, Continued

-B-

B&P Code: Business and Professions Code.

Best Evidence Rule: A rule of law which requires that when a written document is introduced into evidence, the original document shall be provided. If the original document is not available, its absence must be reasonably explained. An original case file is "best evidence;" a photocopy of the case file is "secondary evidence."

Bias: A preconceived opinion.

Burden of proof: The duty to demonstrate the required degree of truth of one's claim. In an administrative civil penalty hearing the burden of proof is on the agency. For administrative civil penalty hearings initiated pursuant to FAC section 12999.5 or B&P Code section 8617, the burden of proof is "by a preponderance of the evidence".

Terms, Continued

-C-

CAC: County Agricultural Commissioner

California Code of Regulations (CCR): A series of regulations (or rules) that have been formally adopted by state agencies, reviewed and approved by the Office of Administrative Law, and filed with the Secretary of State.

Case: Commonly used to describe a suit or action of law.

Causation: The force that prompts something to happen.

CC: Civil Code

CCP: Code of Civil Procedure

CCR: California Code of Regulations

Cease and desist: To stop or discontinue ongoing or periodic activity. There are various cease and desist authorities in the Food and Agricultural Code.

CFR: Code of Federal Regulations

Chain of custody: The act of persons handling the evidence between the commission of the alleged offense and the ultimate disposition of the case. Each transfer of this evidence should be receipted (signature, time, and date of transfer). The chain of custody is sometimes referred to as the "chain of evidence". These terms can be used interchangeably. You will find a chain of custody or chain of evidence form on the reverse side of most DPR-issued sample collection forms.

Circumstantial evidence: Evidence of facts or circumstances from which the existence or non-existence of a fact in issue may be inferred. Circumstantial evidence is not a less valuable form of evidence than other forms of evidence. However, the reliance on circumstantial evidence requires the Advocate be prepared to show that the sum of the circumstances are reliable and credible enough so that an ordinary person can make a determination that the existence or non-existence of a fact can be inferred.

Claim: A demand; an assertion of a right.

Code: A compilation of laws.

Competent: Qualified or capable of doing a certain act; in a hearing context, legally able to understand and testify capably.

Terms, Continued

-C- (Continued)

Complaint: The first pleading, filed by the plaintiff, in a civil action.

Compliance Action: An activity to document and notify a person of a non-compliance with applicable laws or regulations. Compliance Actions give "notice" to the violators about their violative behavior, but do not automatically result in a punitive action. On a statewide basis, Compliance Actions are weighted equally. Examples of Compliance Actions are: Warning Letters (WL); Violation Notices (VN); Notices of Violation (NOV); inspection forms with one or more non-compliances noted; and Documented Compliance Interviews. Imposition of "Public Protection Options" by the Director or CACs are considered Compliance Actions.

Compliance interview: An interview ("talk") with the county agricultural commissioner (or agent). The compliance interview is informal and undocumented. A compliance interview, while beneficial, is an educational tool and is not considered a Compliance Action or an Enforcement action.

Compromise: Mutual concessions by both parties in order to settle a dispute.

Contempt: A willful disregard or disobedience of a public authority. In a court context, disobedience of a judge's order.

Continuance: Postponement of an action.

Controversy: A dispute involving an allegation on one side and a denial on the other.

Counsel: An attorney who represents a client.

County Agricultural Commissioner (CAC): A county department head appointed by the county board of supervisors and licensed by the State of California to carry out various county and state agricultural, environmental, and pesticide worker safety and consumer protection programs, including local responsibility for pesticide use enforcement.

Credible: Worthy of belief.

Cross examination: Interrogation of a witness by the opposing counsel after questioning by the side who introduced the witness.

Culpable: Deserving of blame; at fault.

Terms, Continued

-D-

Date of delivery (delivery of notice): Date actually delivered by the post office, as documented on the return receipt.

Date of notice: Date noted on the Notice (e.g., Notice of Proposed Action, Notice of Decision).

De facto: (Latin: "In fact, actually, in reality.") De facto segregation, for example, simply occurs.

De minimis: (Latin: "Insignificant; minute.") Frivolous; i.e., not of sufficient importance to be dealt with by law.

Decision: A judgment or decree pronounced in settlement of a controversy; and/or, an authoritative answer to the questions raised before it. Also known as the "Notice of Decision" or "Final Decision."

Decision Report: Describes the factors of a decision. The Decision Report may be prepared in a variety of formats, including a narrative report, a letter, or an inter-office memorandum. A sample decision report form is provided in the Enforcement Guidelines. The sample form may be utilized, adopted, or revised by each county as they wish.

Default judgment: A ruling against a party because of his failure to respond adequately to procedural requirements such as an order to appear in court.

Demonstrative Evidence: Visual aids used to help clarify oral testimony. Examples of demonstrative evidence include: maps, diagrams, photos, charts, data graphs and video taped recordings.

DHS: Department of Health Services

Direct examination: The first questioning of a witness by the party that called the witness. (see *Cross Examination*.)

Director: Director of the Department of Pesticide Regulation.

Disciplinary Review Committee: The legislatively mandated Committee which hears structural licensee appeals of administrative civil penalty actions. The Disciplinary Review Committee is comprised of three members -- a representative from the Department of Consumer Affairs' Structural Pest Control Board; a representative from the Department of Pesticide Regulation; and a representative from the structural pest control industry.

Discovery: Consists of pre-trial procedures in which both parties obtain information about the claims and defenses asserted by their opponent.

Terms, Continued

-D- (Continued)

Discretion: Power or privilege to act unhampered by a legal rule. When applied to public functionaries, it means wise conduct and management.

Dismissal: Termination or cancellation.

Disposition: A final settlement. Satisfaction of a debt.

Division 6: Division 6 of the Food and Agricultural Code (specifically Food and Agricultural Code sections 11401 through 12499) pertaining to Pest Control Operations.

Division 7: Division 7 of the Food and Agricultural Code (specifically Food and Agricultural Code sections 12500 through 16000) pertaining to Agricultural Chemicals, Livestock Remedies, and Commercial Feeds .

Documentary evidence: Evidence supplied by writings and documents of every kind, e.g., photographs, diagrams, maps, and forms.

Documented compliance interview: An interview which documents a discussion between a person and the county agricultural commissioner (CAC) (or agent) about a specific noncompliance committed by the regulated person. A documented compliance interview typically is held at the CAC's office. A documented compliance interview must note the date, time, location, parties present, activity which precipitated the interview, noncompliance or violation, and proposed corrective action(s). A summary of the documented compliance interview is typically mailed to the parties that were present. An interview that does not result in some sort of document summarizing the interview, to be attached to the file or inspection report, would not be considered a documented compliance interview.

Double jeopardy: Being tried twice for the same crime. Double jeopardy is prohibited by the Fifth Amendment to the U.S. Constitution.

DPR: Department of Pesticide Regulation

Drift: The pesticide that moves through the air and is *not* deposited on the target area at the time of application. Drift *does not* include the movement of pesticide and associated degradation compounds off the target area, such as by translocation, volatilization, evaporation, or the movement of pesticide dusts or pesticide residues on soil particles that are windblown after the application.

Due care: The degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under the same or similar circumstances. When a person does not exercise due care, they are considered *negligent*.

Terms, Continued

-D- (Continued)

Due process of law: A concept first introduced in the Fifth Amendment to the U.S. Constitution that has come to be equated with current attitudes of fairness in the legal process. 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 or her conduct. In essence, "due process" is fundamental fairness within our quasi-judicial hearing process.

Duty: Conduct owed by obligation to another. Legally, a sanctioned obligation which, if breached, makes the offending party liable, regardless of the existence of a contract.

Terms, Continued

-E-

EC: Evidence Code

Educational and monitoring tools: An activity or document used to determine or encourage compliance. Educational and monitoring tools benefit the public. Informal compliance interviews or formal presentations by regulators to the regulated public and increased inspection activities are examples of educational or monitoring tools. Educational and monitoring tools are not compliance actions.

Effect: The result or consequence of an action. Application of "effect" in applying Fine Guidelines: An actual or environmental effect may support a finding that a violation could have created an actual health or environmental effect; however, it is not required that an actual health or environmental effect occur in order for a violation to be classified as Class B (formerly *moderate*) or Class A (formerly *serious*). (see *Fine Guidelines.*)

Elements of the violation: The summary of actual requirements that must occur in order to prove a violation occurred.

Enforcement Action: An action to document, notify, and penalize the violator for an activity not in compliance with applicable laws or regulations. An Enforcement Action must provide the respondent/violator with notice and an opportunity to be heard before a sanction or penalty is enforced. Examples of frequently used Enforcement Actions are: Administrative Civil Penalties, in the form of Agricultural Civil Penalties (ACP) or Structural Civil Penalties (SCP); revocation or suspension of county registration; and refusal, revocation or suspension of a restricted materials permit. Examples of more aggressive Enforcement Actions are: A formal request to the Department of Pesticide Regulation or Structural Pest Control Board to initiate a licensing action; formal referral to a District or City Attorney for civil or criminal adjudication; or a formal request by the Department of Pesticide Regulation to the Office of the Attorney General.

A Cease and Desist Order or a Crop Destruct Order is not an Enforcement Action. A Cease and Desist Order is a mitigation measure to protect the public from known or unknown hazards. Cease and Desist Order/Crop Destruction Order are actions authorized by the Legislature for the purpose of immediately protecting the public health or environment. In terms of the *Enforcement Guidelines*, the above-mentioned orders can be referred to as Public Protection Options.

Terms, Continued

-E- (Continued)

Enforcement Guidelines: The Enforcement Guidelines concept is a method of describing and categorizing a violation for the purpose of encouraging uniform enforcement responses. Examples of Enforcement Guideline categories are: General, Substantive Possible and Substantive Actual. Some requirements can be characterized by more than one category; the category could change, depending on the circumstances of the violation. The Enforcement Guidelines were approved by the Department of Pesticide Regulation and the California Agricultural Commissioners and Sealers Association in December 1994; a Technical Revision was approved in December 2002.

Environmental effects: Refers to any damage, either permanent or temporary, to public or private property; or, to the creation of deleterious effects to air or water quality. Examples of environmental effects include: crop damage, loss of use of public or private property, bee kills, livestock poisoning, residues that affect the marketability of a crop, fish or wildlife kills, and contamination of land, water or air. (see *Effect*.)

Erroneous: Mistaken; or, deviating from requirements of law, as opposed to illegal; or, lacking legal authority.

Errors: (see *Harmless Error*.)

Et seq.: (Latin: "and those that follow.") Abbreviation for "et sequentes." For example, "3CCR section 6700 et seq." would mean "3CCR section 6700 through 6795," or "all of the sections pertaining to worker safety that follow 3CCR section 6700."

Ethics: The standards of conduct, honesty, and morality expected of those practicing a particular profession.

Evidence: The entire means used at trial or in an investigation in order to prove or disprove any alleged fact.

Ex parte: (Latin: "In part.") A proceeding that involves consideration of one side's approach only, without notification of the adverse party. An example of ex parte communication would be when a county agricultural commissioner attempts to influence a Hearing Officer's decision after the Respondent has left the hearing site. Essentially, the Respondent is not given the opportunity to respond to the additional information.

Terms, Continued

-E- (Continued)

Expert witness: An expert witness is one who is recognized as having special knowledge, training, experience, skill, or education on the subject he/she testifies on. The expert witness may be called upon to state their opinions on a matter where the "trier of fact" himself/herself cannot form an opinion because he/she does not possess the specialized qualifications required to do so. The expert witness is permitted to state his/her opinion concerning those technical subjects even though he/she was not present at the time the activity or incident in question took place.

Terms, Continued

-F-

FAC: Food and Agricultural Code.

Fact: An event deemed proven; anything that has been done or that has existed.

Fair: Equitable; reasonable.

Familiar: Known or no longer novel. (see *Unfamiliar*.)

Fault: The responsibility for negligence or a mistake.

FIFRA: Federal Insecticide, Fungicide, and Rodenticide Act

Final Decision: (see *Decision*.)

Findings of fact: The findings of a trier of fact (hearing officer, judge or jury) on issues of fact submitted to it for decision. The findings of fact are used in formulating a determination or judgment.

Findings of law: The findings of a judge (or in our case the Director or DRC) on how the law applies to the facts of the case.

Fine: To impose a monetary penalty as a punishment for a violation; a monetary penalty.

Fine guidelines: The California Legislature authorized the levy of administrative civil penalties in the mid 1980's (Agricultural - FAC section 12999.5; Structural - B&P Code section 8617). The Legislature's authorization was contingent upon the development of fine guidelines to encourage consistent application of this enforcement tool. Today, county agricultural commissioners are required to follow the fine guidelines when levying a civil penalty pursuant to FAC section 12999.5 or B&P Code section 8617. Fine guidelines are located by regulation in 3CCR section 6130 (Agricultural Civil Penalties) and 16CCR section 1922 (Structural Civil Penalties).

Form: A model document containing the legally accepted words that make the paper procedurally correct.

Formal referral: A letter to another agency requesting assistance. A formal referral should contain factual information, an analysis of the problem, a summary of actions taken by the initiating agency to date, and a request for assistance.

Terms, Continued

-G-

GC: General Code

General Violation: A General Violation does not pose a direct threat to health, property, or the environment. General Violations are true paperwork oversight violations. General Violations usually fall into the Class C (formerly *minor*) or Class B (formerly *moderate*) fine categories.

Good cause: Legally sufficient reason for taking some action.

Good faith: Absence of any intent to defraud or take unfair advantage of another; a sincere, honest effort to fulfill an obligation.

Terms, Continued

-H-

Harm: Hurt, damage or injure. **Application of "harm" when applying fines:** Actual health or environmental harm may support a finding that a violation could have created or did create actual health or environmental harm; however, it is not required that actual health or environmental harm occur to prove that a hazard existed, and it is not required that an actual health or environmental harm occur in order for a violation to be classified as Class B (formerly *moderate*) or Class A (formerly *serious*). (see *Fine guidelines.*)

Harmless error: A minor mistake in a judicial proceeding which does not justify an appellate body modifying or overturning the decision.

Hazard: A source of danger. **Application of "hazard) when applying fines:** An actual health or environmental effect may support a finding that a violation could have created or did create an actual health or environmental hazard; however, it is not required that an actual health or environmental effect occur to prove that a hazard existed, and it is not required that an actual health or environmental effect occur in order for a violation to be classified as moderate or serious. (see *Fine guidelines*.) Hazard, as used in 3CCR section 6130, means "a source of danger" or a "risk."

Hearing: A proceeding in which both parties have an opportunity to be heard; and, in which an issue of fact is decided. This term is frequently used in a broader sense in that it also can be used to describe proceedings that take place before a public functionary who has been granted judicial powers. Some statutes require that boards and departments follow Administrative Procedure Act (APA) guidelines and procedures for hearings; however, FAC sections 12999.4, 12999.5, and 12999.6 or B&P Code section 8617 do not mandate the use of APA guidelines and procedures.

Hearing Officer: The presiding officer of an administrative hearing. Some statutes require that boards and departments use an Administrative Law Judge (ALJ) for administrative hearings; however, FAC sections 12999.4, 12999.5 and 12999.6 or B&P Code section 8617 do not mandate the use of an ALJ.

Hearsay evidence: A rule stating that any testimony from a secondhand witness is unreliable and cannot be used in a court of law or legal proceeding. A secondhand witness is someone who did not actually see the event, but heard about it later from a person who was there (an eyewitness). Administrative hearings allow several exceptions to the Hearsay Rule.

Terms, Continued

-I-

Immaterial: Without relevance or pertinence to the matter under consideration.

Implied: Not explicitly expressed in writings or words, but determined by deduction from known facts or evidence.

Incident: An occurrence when one or more noncompliances are found during an activity such as an inspection, investigation, follow-up, etc. The activity may be limited to a single routine inspection or audit, or it may include several inspections and the collection of evidence, as in the case of a complicated episode investigation. Noncompliances found during the incident are divided into the categories of General, Substantive Possible, and Substantive Actual.

Independent Employee Action Defense (IEAD): A defense that may be raised by an employer when the employer is being blamed for the deed or misdeed of its employee in regard to employee safety. If the employer does not raise the defense, it need not be considered. The CAC is not required to consider it unless it is raised and its requirements established.

Interrogation: Questioning a person suspected of having committed an offense or questioning a person who is reluctant to disclose information pertinent to the investigation.

Interview: A conversation in which facts or statements are elicited from another.

Terms, Continued

-J-

Judgment: The final decision of a court on a matter brought before it.

Jurisdiction: A court or agency's legal authority to hear and determine a case, either by virtue of power over the subject matter of the controversy or over the parties.

Terms, Continued

-K-

Key Elements of California's Pesticide Regulatory Program: Requirements for the following programs are enforced to protect the health and safety of Californians and their environment: Restricted Materials Permit Program; Licensing and Certification Program; and the Worker Health and Safety Program. Failure to adhere to these requirements often results in health or environmental hazards or effects.

Terms, Continued

-L-

Law: The body of government-enacted rules of conduct that govern individuals in a society.

LC: Labor Code.

Legal: Of, or relating to, the law.

Levy: A tax or a fine; to assess.

License: A right or permit granted someone that enables him/her to do something he/she could not legally do without permission.

Terms, Continued

-M-

Matter of record: Something provable by checking existing papers or documents.

Material: Important or necessary.

Material fact: Information necessary to decide a case or to enter into a contract.

Material witness: A person who can provide key information in a hearing or trial.

Mitigating circumstances: Conditions that do not completely exonerate a defendant, or justify or excuse certain actions of the offense in questions, but which reduce the punishment or fine.

Mitigation: Reduction or lessening the amount of a penalty or punishment.

Motive: Cause or reason behind some act; an inducement to commit an act.

Terms, Continued

-N-

Nature of the violation: The circumstances of the violation which identify the "who, what, when, where, why, and how."

Negligence: Failure to act with an acceptable or reasonable amount of care in a given situation.

Negotiation: The act of settling or arranging the terms and conditions of a transaction; a discussion or conference on the terms of a proposed agreement.

Non-compliance: Failure to comply with any law or regulation. A noncompliance may be documented in forms, hearings, interviews or letters. (see *Violation.*)

NOPA: Notice of Proposed Action

Notice: Information, or knowledge of existence of a fact.

Notice of Proposed Action (NOPA): A document which is used to inform the Respondent of the action that the county agricultural commissioner intends to take, offering the Respondent an opportunity to be heard.

Notice of Violation (NOV): (see *Violation Notice*.)

Terms, Continued

-O-

Oath: A promise made by a witness to tell the truth. A person making an oath does not have to "swear" to tell the truth, but only to "promise" to tell the truth.

Official Notice: When the Hearing Officer, upon request, makes a statute, regulation, or official publication part of the hearing record. When this is done, it is not necessary to introduce the text as an exhibit.

Oral warning: Oral instructions or warnings that are not documented or filed. An oral warning, while possibly beneficial, is not considered a Compliance Action or Enforcement Action.

Order: An "order" is a command, direction, or instruction of a judge, court, adjudicating officer, or agency. In this case, the "order" is written and is delivered by the county agricultural commissioner in the context of a civil penalty action. FAC section 12999.5 and B&P Code section 8617 authorize the county agricultural commissioner to levy a fine and "order" the fine be paid.

Terms, Continued

-P-

Party: A person or organization that takes part or holds an interest in any legal matter or proceeding.

Pending: Not yet decided.

Per se: (Latin: "By itself.")

Plaintiff: The person who initiates a suit; the party bringing a court or agency action.

Possible: "Possible," as used in 3CCR section 6130, means that the event is "capable of happening without contradicting proven facts, laws, or circumstances." However, the degree of likelihood is not implied by this term. "Possible" implies any condition between a "moderate degree of probability" to "the barest change within the limits of the circumstances."

Postponement: Delay or adjournment.

Pre-hearing discussion: A discussion or conference, with all parties present, before a hearing to attempt to agree or stipulate to certain facts. A pre-hearing discussion is not a settlement negotiation. Witnesses, who are not parties to the matter, should not be allowed in the pre-hearing discussion

Preponderance: Superiority in weight, importance or influence.

Preponderance of the evidence: The standard of proof in general civil and administrative cases; the version of facts more likely to be true than not. Preponderance of the evidence also can be described as "the greater weight of the evidence," or "superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue than the other." In a civil trial, the jury is instructed to find for the party that, on the whole, has the stronger evidence, however slight the edge may be. *(see Proof.)*

Proof: Technically, proof is the establishment of a fact by evidence. In the broader sense, it is the logically sufficient reason to convince the mind of the truth or falsehood of a fact. There are many "standards of proof." The standard of proof which applies to administrative and civil actions is "a preponderance of the evidence." This should not be confused with "beyond a reasonable doubt" (also known as "entirely convincing") which is the standard of proof for criminal actions.

Proposed Decision: A decision issued by a Hearing Officer who is not the CAC or Director.

Proximate cause: That which produces an event without which the injury would not have occurred.

Terms, Continued

-P-

Public Protection Option: An action initiated for the purpose of immediately protecting public health or safety. Public Protection Options are not penalties in and of themselves, although they may temporarily have the effect of a punishment. They usually require an additional action to become a permanent punishment. Examples of Public Protection Options are: Cease and Desist Orders; Seize/Hold Produce Orders; Crop Abatement Orders; Crop Seizure; Prohibit Harvest Orders; and Pesticide Seizure.

Terms, Continued

-R-

Reasonable: "Reasonable," as used in 3CCR section 6130, means "within the bounds of common sense; not excessive or extreme; fair; and moderate." For the purposes of this discussion, a person with an average capacity for rational thought, inference, and logical thinking is considered to possess "common sense."

Rebuttal evidence: Anything that tends to disprove, overcome, or dispel previously offered evidence or legal presumptions.

Relevant: To the point, describing matters dealing with the pertinent points of a case.

Reliance: Trust, confidence, dependence upon what is considered sufficient trust or authority. Detrimental reliance prompts an individual to take steps that worsen his position.

Repeat violations: The currently alleged violation shall be considered a repeat violation if the following criteria are met: 1) The person against whom the violation is proposed had a prior violation that was in the same class (Class A [formerly *serious*], Class B [formerly *moderate*], or Class C [formerly *minor*]) as the currently alleged violation; AND, 2) A civil penalty was levied for the prior violation within two years of the date of the Notice of Proposed Action by the county proposing the current action.

> Repeat violation ? See *3CCR section 6130, Civil Penalty Actions by Commissioners* (formerly known as the *Fine Guidelines*).

Respondent: A term used to describe the person who is the subject of an action to fine or punitive licensing action and must respond to the charges against him/her. The word may also refer to someone who, after having won a case which is then appealed, must respond to that appeal. For example, when a case upheld by the Director or the DRC is appealed to the Superior Court, DPR or the DRC becomes "the respondent."

Reversible error: An erroneous judgment or ruling by a Hearing Officer or court that substantially affects the appellant's legal rights and would lead, if uncorrected, to a miscarriage of justice.

Terms, Continued

-S-

SCP: Structural Civil Penalty

Sensitive site: A location determined by the county agricultural commissioner or Director based upon his/her evaluation, to contain things that could suffer harm or injury from the pesticide in question, such as sites containing people, crops where minor amounts of residue can cause harm, honey bees, wildlife sanctuaries, etc.

Settlement: The resolution or disposition of a matter by agreement or compromise before a trial.

Should and shall be considered: Refers to an evaluation of all available evidence, including, but not limited to, violation history, intent, willfulness, and seriousness of the violation, in determining the appropriate level of action.

Statement: An allegation. The term is popularly used to describe narratives.

Statute: A law enacted by a legislature.

Statute of limitations: Time period after an incident occurs during which a lawsuit may be filed regarding the incident.

Statutory: That which is governed by statute (act of legislature) as opposed to the common law or equity.

Stipulation: A stipulation is a voluntary agreement between opposing parties concerning some relevant point. Stipulations with respect to matters of fact, law, or penalty amount make the hearing more convenient and expedient for both the county and the Respondent. Matters that are the subject of a stipulation are no longer in dispute or contested and need not be addressed at the hearing.

Structural Civil Penalty: A penalty levied for certain violations of the Business and Professions Code or Title 16 of the California Code of Regulations. Also known as “SCP”.

Structural Pest Control Board (SPCB): The Structural Pest Control Board is under the jurisdiction of the California Department of Consumer Affairs.

Subpoena: (Latin: "put or call in place.") A written order of the court which compels a witness to appear or produce documents. Hearing Officers (unless they are ALJs) do not have the authority to issue subpoenas.

Subject: In the investigation sense, the person (witness or suspect) who is being interviewed or interrogated and not necessarily the subject of the case under investigation. Where the two terms will differ, the distinction will be apparent from the phrasing and the context.

Terms, Continued

-S- (Continued)

Subsequent incident: An incident that takes place later and is separate from another incident. Noncompliances found during the later incident do not have to be violations of the same law or regulation in order for the later incident to be considered "subsequent"; however, a subsequent incident would not occur more than two years after the date of the first incident because of the statute of limitations. *Note the timing difference between subsequent incident and the requirement for Repeat Violation found in 3CCR section 6130, Civil Penalty Actions by Commissioners (formerly known as the Fine Guidelines).*

Subsequent incident is an Enforcement Guidelines concept that should be used to determine what type of action to initiate when a violation occurs. Subsequent incident should not be confused with Repeat Violation, a concept to be considered in determining a fine category

Subsequent incident ? See *Enforcement Guidelines*

Substantial drift: The quantity of pesticide outside the treated target area is greater than that which would have resulted had the applicator used due care (3CCR section 6000).

Substantial evidence: Substantial evidence is evidence upon which a reasonable person would rely in a serious matter. All that is required is enough evidence to establish the violation cited in the County's Notice of Proposed Action.

Substantial Evidence Test: The Substantial Evidence Test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In other words, the decision rendered by the Hearing Officer need not be the only possible interpretation of the evidence submitted. The decision must simply be a reasonable interpretation of the evidence presented. The Director and the Disciplinary Review Committee rely upon the Substantial Evidence Test to make a determination about the findings and decision of a Hearing Officer if the matter is forwarded to them for review or appeal.

Substantive Violation: A violation which poses a threat to health, property or the environment. Substantive violations, by their nature, create unnecessary risks. Substantive Violations usually fall into the Class B (formerly *moderate*) or Class A (formerly *serious*) violation classes.

Suspect: A person whose guilt is considered on reasonable grounds to be a practical possibility.

Terms, Continued

-T-

Target area: When applying pesticides, the applicator has a particular target to apply the pesticide. The target is known as the *target area* and can be a field, orchard, water body, structure, kitchen counter top, pet, flower bed, lawn, etc.

Testify: To provide testimony.

Testimony: Evidence given by a witness at a hearing or other legal proceeding.

Title 3: Food and Agriculture, California Code of Regulations

Title 4: Business Regulations, California Code of Regulations

Title 8: Industrial Relations, California Code of Regulations

Title 16: Professional and Vocational Regulations, California Code of Regulations.

Trial: A proceeding before a competent tribunal to determine the facts and/or law in a dispute.

True hearing: (see *Hearing*.)

Terms, Continued

-U-

Unfamiliar: There is category of people who may not be Familiar with pesticide regulatory requirements because they are in a situation or business which does not traditionally require them to be familiar with pesticide regulatory requirements. Pesticide Use Enforcement staff must draw upon their own experience and knowledge of pesticide regulatory requirements to determine whether it is reasonable for a violator to be Unfamiliar with pesticide regulatory requirements. Examples of persons who are Familiar and persons who are Unfamiliar, are presented below:

- Familiar: A grower with a pesticide user identification number, a restricted materials permit holder, a certificate holder or a licensee is expected to know about pesticide use requirements; also, a person or business which has previously been the subject of a compliance or enforcement action is expected to know about pesticide regulatory requirements pertaining to their activities.

- Unfamiliar: Businesses such as restaurants, hospitals, schools, janitorial services, or employees of these groups (who have not been the subject of a compliance or enforcement action or otherwise exposed to pesticide regulatory requirements) may be considered Unfamiliar.

U.S. EPA: United States Environmental Protection Agency.

U.S. EPA Region 9: United States Environmental Protection Agency Region 9. California is included in Region 9. Region 9 covers the southwestern United States -- Arizona, California, Hawaii, Nevada, the Pacific islands subject to U.S. law, and approximately 140 tribal nations. U.S. EPA works with state, local, and tribal governments in the region to carry out the nation's environmental laws.

Terms, Continued

-V-

Variance: Special permission granted by a local zoning authority to allow a specific use of property which does not conform to current zoning laws. County Agricultural Commissioners do not have authority to issue a “variance” in relation to following laws, regulations, or permit conditions.

Violation: Failure to comply with any law or regulation. A violation may be documented by forms, hearings, interviews, or letters. (see *Non-compliance*.)

Violation class: Class A, Class B, or Class C, as defined by Title 3, California Code of Regulations section 6130. Formerly, violations were defined as serious, moderate, and minor.

Violation Notice: A Violation Notice (VN), also known as a "Notice of Violation" (NOV), is a written document which identifies the violator, inspector/biologist, location and date of occurrence, and applicable laws or regulations. A Violation Notice is typically a form, but may be presented in letter format. A Violation Notice is a Compliance Action.

Violation type: Formerly defined as serious, moderate, or minor. (see *Violation class.*)

VN: Violation Notice

Terms, Continued

-W-

Waiver: The voluntary relinquishment of a legal right or advantage. The party alleged to have "waived" a right must have had both knowledge of the existing right (in this instance, the right to a fair and impartial hearing) and the intention to give up that right.

Warning Notice: A Warning Notice (WN), also known as a "Notice of Warning" or "Warning Letter" is a written document which identifies the violator, inspector/biologist, location and date of occurrence, and applicable laws or regulations. A Warning Notice is typically in letter format, but may be noted on a form. A Warning Notice is a Compliance Action.

Warrant: A written order of the court authorizing a certain act, e.g., a search warrant. A written order directing the arrest of an individual (also known as a bench warrant). Our Hearing Officers do not have the authority to issue warrants.

Weight of evidence: The relative value of all evidence of one side of a dispute compared with all that on the other.

Withdraw: To remove.

Witness: One who gives evidence in a case before a hearing Officer or court.

Work for hire: Work done under contract to an employer, in which the employer is considered the creator of the work. A "paper contract" does not have to exist for a "contract" to exist. A contract may be verbal or implied.

Appendix A

The Bill of Rights

Introduction	The first 10 Constitutional Amendments were ratified December 15, 1791. They form what is known as the "Bill of Rights."
Amendment I	Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.
Amendment II	A well regulated militia, being necessary to the security of a free state, the right of the people to keep and bear arms, shall not be infringed.
Amendment III	No soldier shall, in time of peace be quartered in any house, without the consent of the owner, nor in time of war, but in a manner to be prescribed by law.
Amendment IV	The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.
Amendment V	No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Continued on next page

The Bill of Rights, Continued

Amendment VI	In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.
Amendment VII	In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.
Amendment VIII	Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.
Amendment IX	The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.
Amendment X	The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people.

Appendix B

Unfairness Allegations

Question posed at the Roundtable

This document provides guidance on the following question posed at the Hearing Officer Roundtable:

- What is the most appropriate response to the Respondent's argument that the "county is picking on them?"

The Department of Pesticide Regulation will also address another "unfair" allegation, i.e., "the Hearing Officer is biased" in this document. This document will not go into significant detail because these are "common sense" issues.

Uniform enforcement is a goal of enforcement agencies

Members of the regulated public are entitled to expect and receive equal treatment by those enforcing the laws and regulations. Uniformity of enforcement is a universally accepted goal of enforcement agencies and is a key concept that influences all administrative civil penalty programs.

The Hearing Officer

Hearing Officers at all levels of government are commonly employed by the agency that is bringing the penalty action against the person or business. A Hearing Officer who, in a particular case, believes that he or she cannot be fair and impartial should not serve as the Hearing Officer in that case; however, the mere fact that a Hearing Officer is employed by the agency bringing the action does not mean that the Hearing Officer cannot be fair and impartial in making his or her findings and decisions.

Respondent's burden to produce facts when making an allegation of Hearing Officer bias

Under California law, it is a well-settled principle that due process in the case of an administrative hearing requires only a reasonably impartial, noninvolved reviewer, McIntyre v. Santa Barbara County Employee's Retirement System, 91 Cal.App. 4th 730 (2001); Linney v. Turpin, 42 Cal.App. 4th 763 (1996). Also, the mere fact that the decision maker or his/her staff is a more active participant in the fact-finding process will not render the administrative procedure unconstitutional, Howitt v. Superior Court, County of Imperial, 3 Cal.App. 4th 1575 (1992).

Continued on next page

Respondent's burden to produce facts when making an allegation of Hearing Officer bias (continued)	If the Respondent were to take legal action to overturn a decision, he/she would assume the burden to produce facts to show that the Hearing Officer was biased against the Respondent and that he/she was not treated the same as others in similar situations.
References	• Enforcement Guidelines, Technical Revision, December 2002 • Enforcement Letter 2002-18 (Docket No. 106) and Enforcement Letter 2002-02 (Docket No. 104) • Hearing Officer Sourcebook, Second Edition, May 1995

Enforcement Guidelines

A uniform approach to pesticide use enforcement activities.

A joint project developed by the
Department of Pesticide Regulation
and
California Agricultural Commissioners and Sealers Association
Co-Agency Committee – December 1994.

Technical Revision
December 2002

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The Citable Sections lists is updated periodically. A current version can be downloaded from DPR's Web site at
www.cdpr.ca.gov

EXECUTIVE SUMMARY

BACKGROUND

The Enforcement Guidelines are a cooperative project developed by the California Department of Pesticide Regulation (DPR) and the California Agricultural Commissioners and Sealers Association. The intent of the Enforcement Guidelines is to provide uniform, predictable and fair enforcement responses that are understandable to the regulated community and the public.

DPR is responsible for administration, development and oversight of California's unique pesticide regulatory program. The pesticide use enforcement activity is primarily performed and administered by agricultural commissioners and staff of California's 58 counties. Local program administration naturally results in variable enforcement decisions and responses. The Enforcement Guidelines take into consideration diverse geographical and agricultural regions, and local resources, while attempting to provide some uniformity in the responses.

The December 2002 revision is a technical revision of the Enforcement Guidelines. It corrects items that require modification because of law or regulation changes; adds, expands or clarifies definitions; adds a sample Decision Report; updates contact information and reformats pages. The 1994 Summary page has been electronically scanned and left intact for two reasons: 1) There have been no conceptual changes to the Enforcement Guidelines, and 2) To continue recognition of the leaders who succeeded in bringing this guidance into fruition.

Questions about the Enforcement Guidelines may be directed to DPR's Enforcement Branch at (916) 324-4100 or your local County Agricultural Commissioner.

_____

Scott T. Paulsen, Chief
Enforcement Branch
Department of Pesticide Regulation

1994 SUMMARY

The purpose of the Enforcement Guidelines is to promote uniformity in State and county enforcement responses to violations of pesticide regulatory requirements. The intent of the Enforcement Guidelines is to provide uniform, predictable and fair enforcement responses which are understandable to the regulated community and the general public. The Enforcement Guidelines are a cooperative project developed by the California Department of Pesticide Regulation and the California Agricultural Commissioners and Sealers Association.

California has a unique pesticide regulatory program. The Department of Pesticide Regulation administers a comprehensive pesticide regulatory program at the state level and provides support for administration of many pesticide use enforcement activities at the local level. The local administrator is the County Agricultural Commissioner. The Enforcement Guidelines take into consideration diverse geographical and agricultural regions, and local resources.

Questions about the Enforcement Guidelines may be directed to DPR's Enforcement Branch at (916) , or your local County Agricultural Commissioner.

James W. Wells, Director
Department of Pesticide Regulation
Committee Co-Chair

Jearl Howard, Past President
California Agricultural Commissioners and Sealers Association
Committee Co-Chair

Charles M. Andrews, Chief
Pesticide Enforcement Branch

Gerald A. Benincasa, President
California Agricultural Commissioners and Sealers Association

12-06-94

ENFORCEMENT GUIDELINES

The Enforcement Guidelines package is divided into several sections. A description of each section follows:

Decision Trees
Decision trees are graphic representations of decision-making processes. The decision trees describe appropriate enforcement responses. When an incident occurs, the violation(s) is categorized into a General or Substantive Violation. After the violation is categorized, it is dropped through the corresponding decision tree category to determine an appropriate response or option. The decision trees also take the violator's compliance history into account. The severity of actions should elevate for second or subsequent violations, e.g., the greater the number of previous violations, the more severe the enforcement response.

To achieve statewide consistency, counties must use these guidelines for each incident, and before determining which type of enforcement response to initiate. If a county's response differs from the guidelines, they must prepare a written decision or "Decision Report" which describes the factors that influenced the outcome of the alternate decision. The Decision Report may be prepared in a variety of formats.

Glossary of Terms
This section describes terms used in the Enforcement Guidelines. The terms are specific to California's pesticide regulatory program.

Citable Sections
Referencing the "Citable Sections" is the first step in the Enforcement Guidelines decision-making process. The Citable Sections are paraphrased for your convenience; however, you should always consult the Food and Agricultural Code, California Code of Regulations, Business and Professions Code, and Labor Code to verify their elements before initiating a fine or licensing action.

Administrative Civil Penalty Fine Guidelines
Agricultural Civil Penalty Fine Guidelines are found in Title 3, California Code of Regulations, Section 6130 (3CCR §6130). Structural Civil Penalty Fine Guidelines are found in Title 16, California Code of Regulations, Section 1922 (16CCR §1922).

The Administrative Civil Penalty Fine Guidelines chart describes the general application of fine guidelines to the Enforcement Guidelines, once it has been determined that an administrative civil penalty action is the most appropriate action. You should always check the violation against 3CCR §6130 or 16CCR §1922, to evaluate the violation and correctly apply the fine, before proposing an administrative civil penalty.

Enforcement Guidelines Overview

Violations are divided into two major groups, “General” and “Substantive.”

Some laws and regulations may be considered “General” or “Substantive,” depending on the circumstances of the violation.

General Violations (G)

“General” violations do not directly threaten health, property or the environment.

“General” violations can be described as true "paperwork oversights."

Substantive Violations (S)

“Substantive” violations may threaten health, property or the environment, or violations of key elements of California's pesticide regulatory program.

“Substantive” violations are further divided into "Possible" and "Actual.”

Substantive Possible (P)

“Substantive Possible” violations pose a reasonable possibility of creating a health or environmental hazard or effect.

Substantive Actual (A)

“Substantive Actual” violations create an actual health or environmental hazard or effect.

General Violations

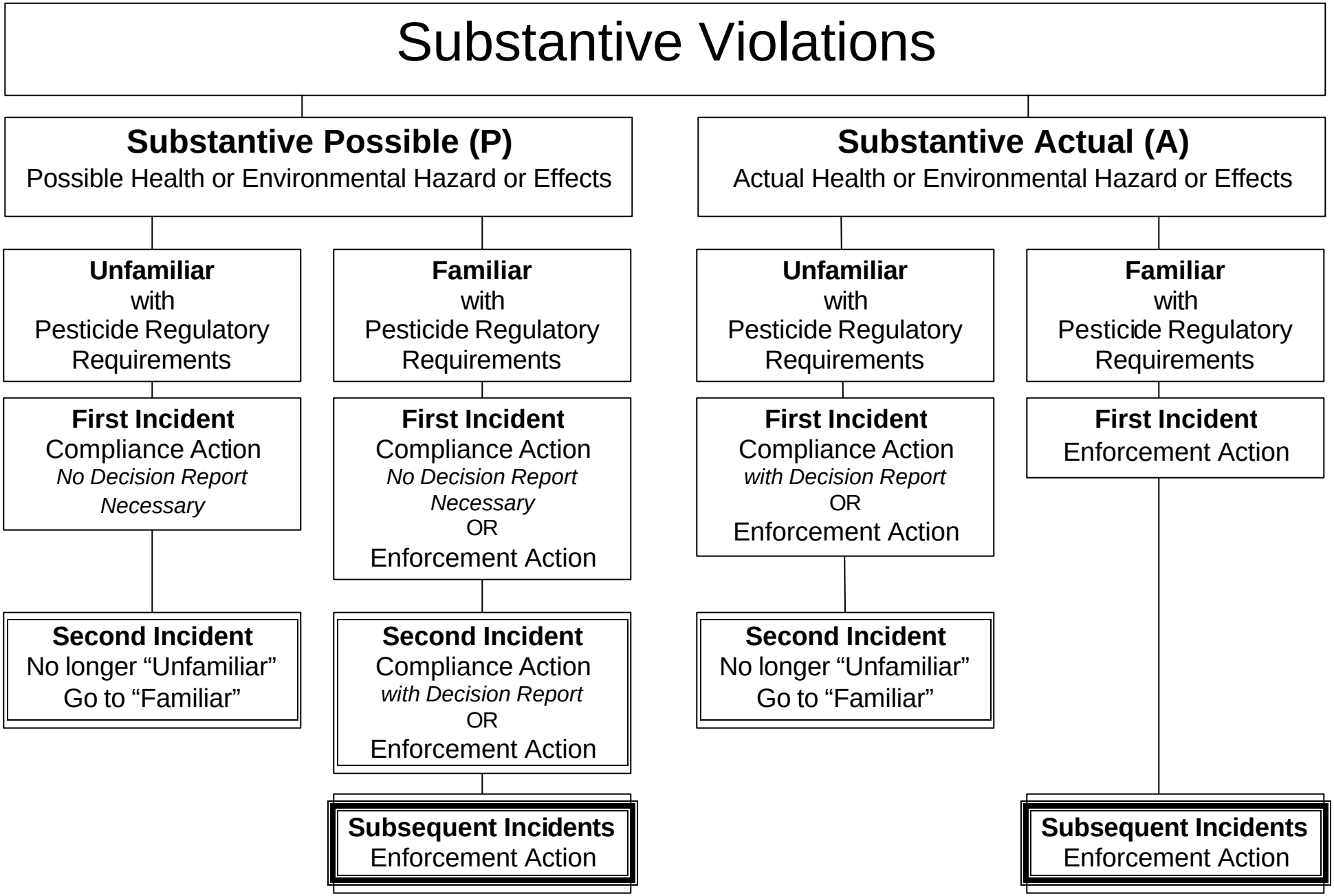
General (G)

"General" violations do not directly threaten health, property or the environment.

First Incident
Compliance Action
No Decision Report Necessary

Second Incident
Compliance Action
No Decision Report Necessary
OR
Enforcement Action

Any Subsequent Incidents
Compliance Action
With Decision Report
OR
Enforcement Action


Substantive Violations
Substantive Possible (P)
Possible Health or Environmental Hazard or Effects
Substantive Actual (A)
Actual Health or Environmental Hazard or Effects
Unfamiliar with Pesticide Regulatory Requirements
Familiar with Pesticide Regulatory Requirements
Unfamiliar with Pesticide Regulatory Requirements
Familiar with Pesticide Regulatory Requirements
First Incident Compliance Action No Decision Report Necessary
First Incident Compliance Action No Decision Report Necessary OR Enforcement Action
First Incident Compliance Action with Decision Report OR Enforcement Action
First Incident Enforcement Action
Second Incident No longer "Unfamiliar" Go to "Familiar"
Second Incident Compliance Action with Decision Report OR Enforcement Action
Second Incident No longer "Unfamiliar" Go to "Familiar"
Subsequent Incidents Enforcement Action
Subsequent Incidents Enforcement Action

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GLOSSARY OF TERMS

Compliance Action An activity to document and notify a person of a noncompliance with applicable laws or regulations. On a statewide basis, compliance actions are weighted equally. Examples of Compliance Actions are: Warning Letters (WL); Violation Notices (VN); inspection forms with one or more non-compliances noted; and Documented Compliance Interviews. “Public Protection Options” are considered Compliance Actions.

Compliance Interview An interview ("talk") with the County Agricultural Commissioner (or agent). The Compliance Interview is informal and undocumented. A Compliance Interview, while beneficial, is an Educational Tool and is not considered a Compliance Action or an Enforcement Action.

Decision Report The Decision Report describes the factors of a decision. The Decision Report may be prepared in a variety of formats, including a narrative report, a letter, or an inter-office memorandum. A sample Decision Report form is provided in the Enforcement Guidelines for convenience. The sample form may be utilized, adopted or revised by each county as they wish.

Documented Compliance Interview An interview to document a discussion interview took place between a person and the County Agricultural Commissioner (or agent) about a specific noncompliance committed by the regulated person. A Documented Compliance Interview typically is held at the Commissioner's office. A Documented Compliance Interview must note the date, time, location, parties present, activity which precipitated the interview, noncompliance or violation, and proposed corrective action(s). A summary of the Documented Compliance Interview is typically mailed to the parties that were present. An interview that does not result in some sort of document summarizing the interview, to be attached to the file or inspection report, would not be considered a Documented Compliance Interview.

GLOSSARY OF TERMS

Educational and Monitoring Tools

An activity or document used to determine or encourage compliance. Educational and Monitoring Tools benefit the public. Informal compliance interviews or formal presentations by regulators to the regulated public and increased inspection activities are examples of Educational or Monitoring Tools. Educational and Monitoring Tools are not compliance actions.

Effect

The result or consequence of an action.
Application of "Effect" in applying Fine Guidelines: An actual or environmental effect may support a finding that a violation could have created an actual health or environmental effect; however, it is not required that an actual health or environmental effect occur in order for a violation to be classified as moderate or serious. *See Fine Guidelines*

Enforcement Action

An action to document, notify and penalize violator for an activity not in compliance with applicable laws or regulations. An enforcement action must provide the respondent / violator with notice and an opportunity to be heard before a sanction or penalty is enforced. Examples of frequently used Enforcement Actions are: Administrative Civil Penalties, in the form of Agricultural Civil Penalties (ACP) or Structural Civil Penalties (SCP); revocation or suspension of county registration; and refusal, revocation or suspension of a restricted materials permit. Examples of more aggressive enforcement actions are: a formal request to the Department of Pesticide Regulation or Structural Pest Control Board to initiate a licensing action; formal referral to a District or City Attorney for civil or criminal adjudication; or a formal request by the Department of Pesticide Regulation to the Office of the Attorney General.

A Cease and Desist Order or a Crop Destruct Order is not an enforcement action. A Cease and Desist Order is a mitigation measure to protect the public from known or unknown hazards. Cease and Desist Order/Crop Destruction Orders are actions authorized by the Legislature for the purpose of immediately protecting the public health or environment. They can be referred to as Public Protection Options.

GLOSSARY OF TERMS

Enforcement Guidelines The Enforcement Guidelines concept is a method of describing and categorizing a violation for the purpose of uniform enforcement. Examples of enforcement guideline categories are: General, Substantive Possible and Substantive Actual. Some requirements can be characterized by more than one category; the category could change, depending on the circumstances of the violation.

Environmental Effect Refers to any damage, either permanent or temporary, to public or private property; or, to the creation of deleterious effects to air or water quality. Examples of environmental effects include: crop damage, loss of use of public or private property, bee kills, livestock poisoning, residues that affect the marketability of a crop, fish or wildlife kills, and contamination of land, water or air. *See Effect*

Familiar Known or no longer novel. *See Unfamiliar*

Formal Referral A Formal Referral is a letter to another agency requesting assistance. A Formal Referral should contain factual information, an analysis of the problem, a summary of actions taken by the initiating agency to date, and a request for assistance.

General Violation A General Violation does not pose a direct threat to health, property or the environment. General Violations are true paperwork oversight violations. General Violations usually fall into the minor or moderate fine guideline categories.

Harm Hurt, damage or injure. **Application of Harm in applying Fine Guidelines:** Actual health or environmental harm may support a finding that a violation could have created or did create actual health or environmental harm; however, it is not required that actual health or environmental harm occur to prove that a hazard existed, and it is not required that an actual health or environmental harm occur in order for a violation to be classified as moderate or serious. *See Fine Guidelines*

GLOSSARY OF TERMS

Hazard	A source of danger. **Application of Hazard in applying Fine Guidelines:** An actual health or environmental effect may support a finding that a violation could have created or did create an actual health or environmental hazard; however, it is not required that an actual health or environmental effect occur to prove that a hazard existed, and it is not required that an actual health or environmental effect occur in order for a violation to be classified as moderate or serious. *See Fine Guidelines*
Incident	An incident is an occurrence when one or more noncompliances are found during an activity such as an inspection, investigation, follow-up, etc. The activity may be limited to a single routine inspection or audit, or it may include several inspections and the collection of evidence, as in the case of a complicated episode investigation. Noncompliances found during the incident are divided into the categories of General, Substantive Possible and Substantive Actual.
Key Elements of California's Pesticide Regulatory Program	Requirements for the following programs are enforced to protect the health and safety of Californians and their environment: Restricted Materials Permit Program; Licensing and Certification Program; and the Worker Health and Safety Program. Failure to adhere to these requirements often results in health or environmental hazards or effects.
Noncompliance	Failure to comply with any law or regulation. A noncompliance may be documented in forms, hearings, interviews or letters. *See Violation*
Oral Warning	Oral instructions or warnings that are not documented or filed. An oral warning, while possibly beneficial, is not considered a Compliance Action or Enforcement Action.

GLOSSARY OF TERMS

Public Protection Option A Public Protection Option is an action initiated for the purpose of immediately protecting public health or safety. Public Protection Options are not penalties in and of themselves, although they may temporarily have the effect of a punishment. They **usually** require an additional action to become a permanent punishment. Examples of Public Protection Options are: Cease and Desist Orders, Seize/Hold Produce Orders, Crop Abatement Orders, Crop Seizure; Prohibit Harvest Orders, and Pesticide Seizure.

Repeat Violations The currently alleged violation shall be considered a Repeat Violation if the following criteria are met: 1) The person against whom the violation is proposed had a prior violation that was in the same class (minor, moderate, or serious) as the currently alleged violation; AND, 2) A civil penalty was levied for the prior violation within two years of the date of the Notice of Proposed Action by the county proposing the current action.

Repeat Violation ? See Fine Guidelines

Subsequent Incident An incident, that takes place later, and is separate from another incident.

Noncompliances found during the later incident do not have to be violations of the same law or regulation in order for the later incident to be considered "subsequent"; however, a Subsequent Incident would not occur more than two years after the date of the first incident because of the statute of limitations. *Note the timing difference between Subsequent Incident and the requirement for Repeat Violation found in the Fine Guidelines.*

Subsequent Incident is an Enforcement Guidelines concept that should be used to determine what type of action to initiate when a violation occurs. Subsequent Incident should not be confused with Repeat Violation, a concept to be considered in determining a fine category

Subsequent Incident ? See Enforcement Guidelines

Substantive Violation A violation which poses a threat to health, property or the environment. Substantive Violations, by their nature, create unnecessary risks. Substantive Violations usually fall into the moderate or serious Fine Guideline categories.

GLOSSARY OF TERMS

Unfamiliar

There is category of people who may not be Familiar with pesticide regulatory requirements because they are in a situation or business which does not traditionally require them to be familiar with pesticide regulatory requirements. Pesticide Use Enforcement staff must draw upon their own experience and knowledge of pesticide regulatory requirements to determine whether it is reasonable for a violator to be Unfamiliar with pesticide regulatory requirements. Examples of persons who are and persons who are Unfamiliar, are presented below:

- Familiar: A grower with a pesticide user identification number, a restricted materials permit holder, a certificate holder or a licensee is expected to know about pesticide use requirements; also, a person or business which has previously been the subject of a compliance or enforcement action is expected to know about pesticide regulatory requirements pertaining to their activities.

- Unfamiliar : Businesses such as restaurants, hospitals, schools, janitorial services, or employees of these groups (who have not been the subject of a compliance or enforcement action or otherwise exposed to pesticide regulatory requirements) may be considered Unfamiliar.

Violation

Failure to comply with any law or regulation. A violation may be documented by forms, hearings, interviews or letters. *See Noncompliance*

Violation Notice

A Violation Notice (VN), also known as a "Notice of Violation" is a written document which identifies the violator, inspector/biologist, location and date of occurrence, and applicable laws or regulations. A Violation Notice is typically a form, but may be presented in letter format. A Violation Notice is a Compliance Action.

Warning Notice

A Warning Notice (WN), also known as a "Notice of Warning" or "Warning Letter" is a written document which identifies the violator, inspector/biologist, location and date of occurrence, and applicable laws or regulations. A Warning Notice is typically in letter format, but may be noted on a form. A Warning Notice is a Compliance Action.

FINE GUIDELINES

Excerpted from Title 3, California Code of Regulations

Fine Guidelines
Subchapter 3. Agricultural Cmmissioner Penalties
Article 1. Guidelines
§6130. Civil Penalty Actions by Commissioners.

(a) When taking civil penalty action pursuant to Section 12999.5 of the Food and Agricultural Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount.

(1) For purposes of this Section, violation classes shall be designated as "serious," "moderate," and "minor."

(A) Serious: Violations that are repeat violations of those in subparagraph (B) or violations which created an actual health or environmental hazard. The fine range for serious violations is $401-$1,000.

(B) Moderate: Violations that are repeat violations of those in subparagraph (C) or violations which posed a reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is $151-$400.

(C) Minor: Violations that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect. The fine range for minor violations is $50-$150.

(2) The currently alleged violation shall be considered a repeat violation if the following criteria are met:

(A) The person against whom the civil penalty action is proposed had a prior violation that was, or would have been, in the same class as the currently alleged violation; and

(B) A civil penalty was levied for the prior violation within two years of the date of the Notice of Proposed Action by the county proposing the current action.

(3) The person charged with a violation(s) shall be notified of the proposed fine action, including the amount of the proposed fine(s). When a penalty is proposed resulting in a repeat violation, the Notice of Proposed Action shall identify the prior violation and the record of the proceedings shall include a copy of the decision regarding that prior violation. The commissioner shall send a copy of the notice to the department at the same time the notice is provided to the person charged with a violation(s).

(4) If the person against whom the commissioner levied a fine requested and appeared at the hearing offered by the commissioner, the commissioner's decision shall include information concerning the person's right to appeal the commissioner's decision to the Director.

5) The Department, on at least an annual basis, shall inform commissioners of violations for which fines have been levied.

CONTINUED ON NEXT PAGE

FINE GUIDELINES

§6130. Civil Penalty Actions by Commissioners, continued from previous page

(b) When acting pursuant to Food and Agricultural Code Section 12999.5 or Business and Professions Code Section 8617, an agricultural commissioner may bring an action against an employed person who failed to utilize personal protective equipment or other safety equipment as required by section 6702(c) provided the commissioner determines that all of the following conditions are met:

(1) The employed person is licensed or certified pursuant to Chapter 14, Division 3, of the Business and Professions Code; Chapters 5 or 8, Division 6, of the Food and Agricultural Code; or Chapters 3.4 or 3.6, Division 7, of the Food and Agricultural Code;

(2) The employer provided the equipment to the licensee or certificate holder and the equipment was available at the work site in a condition that would have provided the safety or protection intended by the equipment;

(3) The employer, through its written workplace disciplinary action policy, required the licensee or certificate holder to utilize the equipment;

(4) The employer has complied with applicable training requirements of this Division prior to the time the licensee or certificate holder failed to utilize the equipment;

(5) The employer supervised the licensee or certificate holder to assure that the equipment was properly used by the licensee; and

(6) At the time of the licensee's or certificate holder's failure to utilize the equipment, the licensee or certificate holder has knowledge of the discipline that could be imposed under the employer's written workplace disciplinary action policy for failure to utilize the equipment.

NOTE: Authority cited: Sections 12781, 12976, 12981 and 15203, Food and Agricultural Code. Reference: Sections 11892, 12973, 12997, 12999.5 and 15202, Food and Agricultural Code.
Go to: <www.oal.ca.gov> for most recent version and history.

3CCR Section 6130 History

Title 3, California Code of Regulations (3CCR) section 6130, provides fine guidelines for the Agricultural Civil Penalty process. Title 3 , California Code of Regulations, Section 6130, was amended in 1996 and 2001. Summary of amendments follows:

a) Amendment of section heading, section and NOTE (describing the authority cited) filed 12-31-96; operative 1-1-97 pursuant to Government Code Section 11343.4(d) (Register 97, No.1).

b) Change without regulatory effect amending of subsection (b), adopting new subsection (b) (1), relettering subsections and amending NOTE filed 6-20-2001 pursuant to section 100, title 1, California Code of Regulations (Register 2001, No. 25).

FINE GUIDELINES

Application of Fine Guidelines for Agricultural and Structural Civil Penalties

Title 3, California Code of Regulations, Section 6130
Title 16, California Code of Regulations, Section 1922

Minor

For purposes of the fine guidelines, Minor violations are violations that are procedural and did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect.

The fine level range for Minor violations is $50 - $150.

"General" (G) incidents usually fall into the Minor fine level range upon the first incident.

"Substantive Possible" (P) incidents occasionally fall into the Minor fine level range.

Moderate

For purposes of the fine guidelines, Moderate violations are repeat violations of Minor violations or violations that posed a reasonable possibility of creating a health or environmental effect.

The fine level range for Moderate violations is $151 - $400.

"General" (G) incidents normally do not fall into the Moderate fine level range upon the first incident; but may upon the second incident.

"Substantive Possible" (P) incidents usually fall into the Moderate fine level range upon the first incident.

"Substantive Actual" (A) incidents occasionally fall into the Moderate fine level range upon the first incident.

Serious

For purposes of the fine guidelines, Serious violations are repeat violations of Moderate violations that created an actual health or environmental hazard.

The fine level range for Serious violations is $401 - $1000.

"General" (G) incidents rarely fall into the Serious fine level range.

"Substantive Possible" (P) incidents may fall into the serious fine level range upon the first incident; and usually upon subsequent incidents.

"Substantive Actual" (A) incidents usually fall into the Serious fine level range upon the first incident.

(Variable Agency Designation)

DECISION REPORT FORM

PR-ENF-XXX (Temp. 01/03)

COMPANY/PERSON	VIOLATION/EPISODE NUMBER
COUNTY	LICENSE NUMBER

SECTION (VIOLATION)	VIOLATION TYPE	INCIDENTS
1.		☐ 1st ☐ 2nd ☐ Subsequent
2.		☐ 1st ☐ 2nd ☐ Subsequent
3.		☐ 1st ☐ 2nd ☐ Subsequent
4.		☐ 1st ☐ 2nd ☐ Subsequent
5.		☐ 1st ☐ 2nd ☐ Subsequent
6.		☐ 1st ☐ 2nd ☐ Subsequent
7.		☐ 1st ☐ 2nd ☐ Subsequent
8.		☐ 1st ☐ 2nd ☐ Subsequent

DECISION FACTOR(S)

☐ Insufficient evidence to prove all elements of violation. Explain below:

_____

_____

_____

☐ Investigation inconclusive due to complainant(s) lack of cooperation.

☐ Company/person "Unfamiliar" with pesticide regulatory requirements as described in Enforcement Guidelines. Note type of business or use: _____

☐ Unable to pursue enforcement action for "General Violations" due to insufficient resources.

☐ Other - Explain below:

_____

_____

_____

_____

_____

_____

_____

_____

_____

REPORT PREPARED BY	DATE SIGNED
REPORT REVIEWED BY	DATE SIGNED

Distribution: Original, Permit , Company or Program File **Copies:** Individual / Regional Office/Other Appropriate Files

CITEABLE SECTIONS

Most Citeable Sections contained in the following list may be cited by CACs and DPR to initiate an administrative civil penalty action. However, there are a few Citeable Sections that cannot be used by CACs when initiating an administrative civil penalty action. The Citeable Sections list is a tool that should be referenced whenever an administrative fine, licensing, civil or criminal penalty action is considered.

Each listing in the Citeable Sections is followed by a brief description of the requirement or violation. The descriptions are paraphrased for your convenience. You should always consult the Food and Agricultural Code, California Code of Regulations, Labor Code or Business and Professions Code to verify the elements of the violation before initiating an enforcement action to levy a fine or action against a licensee.

Some listed sections also have a "Possible Exception or Advisory". A "Yes" in this column indicates that it would be useful to consult various codes to determine whether there is an exception to the requirement or whether there is some other caution to citing the particular section.

The full text of sections with a notation in the "Exception Reference or Advisory" column should be closely reviewed before initiating an enforcement action to levy a fine or action against a licensee. The design of this particular database did not allow notation of a specific code, e.g., FAC, 3CCR, 16CCR, etc., next to the number in this column.

For purposes of this document, code sections with a minimum of five digits, and which begin with 1 are from the Food and Agricultural Code; code sections which begin with a 6 are from Title 3, California Code of Regulations; code sections which begin with 19 are from Title 16, California Code of Regulations; code sections that begin with an 8 are from the Business and Professions Code; and there is only one Labor Code section, section 1695.

All sections note available "Enforcement Options." "ACP" indicates that a CAC may initiate an Agricultural Civil Penalty action; "SCP" indicates that a CAC can initiate a Structural Civil Penalty action. "State" indicates that the CAC lacks authority to initiate an administrative civil penalty action such as an ACP or SCP; however, most "State" enforcement options that may be initiated as civil or criminal actions by a District or City Attorney, a Circuit Prosecutor, or the Office of the Attorney General. There are a few other Enforcement Options noted at the legend at the bottom of the Citeable Section pages.

http://www.cdpr.ca.gov/docs/enfcmpli/admnacts/citsec.pdf

California Environmental Protection Agency
Department of Pesticide Regulation

Citeable Sections

Code	Section	Description	Possible Exception or Advisory	Exception Reference or Advisory	Enforcement Option(s)
FAC	11701	Unlawful to advertise, solicit or operate pest control business.	Yes	11701; use instead of 11710.	ACP
FAC	11701.5	Persons in supervisory positions in principal and branch offices - QAL.	No		ACP
FAC	11704	Maintenance gardener requirements.	Yes	CAC - Cite 11701 instead.	State Only
FAC	11704(a)	Maintenance gardener license required - qualifications examination.	Yes	CAC - Cite 11701 instead.	State Only
FAC	11704(b)	Maintenance gardener - limits and contract or verification.	Yes	CAC - Cite 11701 instead.	State Only
FAC	11709	Person not regularly engaged in pest control for hire - special requirements.	Yes	11709;11732	ACP
FAC	11732	Pest control business must be registered in county.	No		ACP
FAC	11733	Pest control business must record/report properties treated to county.	Yes	11733	ACP
FAC	11737	Grounds for Cease & Desist Order.	Yes	11737.5	Cease & Desist
FAC	11737.5	Violate order issued pursuant to 11737 (cease and desist).	No		ACP
FAC	11761	File report of loss, nonperformance or damage resuting from application.	No		ACP
FAC	11791	Unlawful acts.	Yes	11791(a-d)	ACP
FAC	11791(a)	Unlawful act - make any false or faudulent claim.	No		ACP
FAC	11791(b)	Unlawful act - operate in a faulty , careless or negligent manner.	No		ACP
FAC	11791(c)	Unlawful act - refuse/neglect to comply with this division/regulation.	Yes	11791	ACP
FAC	11791(d)	Unlawful act - refuse/neglect to kept/maintain records required.	Yes	11791	ACP
FAC	11792	Unlawful acts.	Yes	11792(a-e)	ACP
FAC	11792(a)	Unlawful act - make any false/fraudulent record/report.	No		ACP
FAC	11792(b)	Unlawful act - operate in county w/o first registering w/commissioner.	No		ACP

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FAC	11792(c)	Unlawful act - operate equipment w/incompetent/unqualified persons.	No		ACP
FAC	11792(d)	Unlawful act - use any fraud/misrepresentation - license application.	No		ACP
FAC	11792(e)	Unlawful act - fail to comply with provisions of Div. 7, Chapter 3.	Yes	FAC Div. 7, Ch. 3	ACP
FAC	11896	Director's order - use/handling/delivery/sale of pesticide.	Yes	11896;Director	Cease & Desist;State Only
FAC	11897	Commissioner's order - use/handling/delivery/sale violation - appeal right.	Yes	11897;CAC	Cease & Desist; CAC only.
FAC	11901	Pest control pilot's certificate - commercial pilot/medical certificates.	No		ACP
FAC	11909	Apprentice cerfiticate holder not under journeyman's direct supervision.	No		ACP
FAC	11920	Pest control aircraft pilot must register in county.	No		ACP
FAC	11924	Aircraft pilot - refusal, revocation or suspension of registration.	Yes	11910	State Only
FAC	12001	Agricultural pest control adviser license required.	Yes	12001;12051	ACP
FAC	12002	Agricultural pest control adviser must register in county.	Yes	12052	ACP
FAC	12003	See subsections.	No	12003(a-h)	ACP
FAC	12003	Recommendations in writing.	Yes	12003(a-h)	ACP
FAC	12003(a)	Recommendations - req'd information - name/dose/method.	No		ACP
FAC	12003(b)	Recommendations - req'd information - identity of pest.	No		ACP
FAC	12003(c)	Recommendations - req'd information - owner/operator and location/acerage.	No		ACP
FAC	12003(d)	Recommendations - req'd information - commodity/crop/site.	No		ACP
FAC	12003(e)	Recommendations - req'd information - time/conditions/method.	No		ACP
FAC	12003(f)	Recommendations - req'd information - warning of possible damage.	No		ACP

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FAC	12003(g)	Recommendations - req'd information - signature/address/business.	No		ACP
FAC	12003(h)	Recommendations - necessary information, including Director's requirements.	No		ACP
FAC	12004	Advisers/pest control businesses must retain recommendations for one year.	No		ACP
FAC	12031	Agricultural pest control advisers must register.	Yes	12031	ACP
FAC	12051	Unlicensed agricultural pest control adviser.	Yes	12001	ACP
FAC	12052	Unregistered agricultural pest control adviser.	Yes	12002	ACP
FAC	12053	Unlawful for agricultural pest contol adviser to violate rules.	Yes	12053	ACP
FAC	12054	Pest control adviser cannot make recommendations in uncertified category.	No		ACP
FAC	12101	Pest control dealers must be licensed.	Yes	12102	ACP
FAC	12101.5	Pest control dealer designated agent to actively supervise operations.	No		ACP
FAC	12108	Pest control dealer must notify director of address/location change.	No		ACP
FAC	12115	Purchase agricultural-use pesticides from licensed dealer or registrant.	Yes	12101	State Only
FAC	12116	Dealers only purchase agricultural-use pesticides from registrants/brokers.	Yes	12107;12402	State Only
FAC	12121	Offenses.	Yes	12121(b-e)	ACP
FAC	12121(a)	Fail to obtain pest control dealer license.	No		ACP
FAC	12121(b)	Dealer fails to notify Director of transfer or address change.	No		State Only
FAC	12121(c)	Dealer fails to comply with Div. 7 laws/pursuant regulations.	No		ACP
FAC	12121(d)	Dealer makes false or fraudulent statement, etc., on application/renewal.	No		ACP
FAC	12121(e)	Dealer makes false or misleading statements or promises, etc.	No		ACP

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FAC	12201.1	Pest control business supervisor must be a qualified applicator licensee.	Yes	11705	ACP
FAC	12251	Pest control dealer designated agent must be licensed.	No		ACP
FAC	12255	Designated agent must notify Director of address change.	No		State Only
FAC	12258	Offenses.	Yes	12258(a-e)	ACP
FAC	12258(a)	Designated agent must notifiy Director of address change.	Yes	May duplicate 12255.	ACP
FAC	12258(b)	Designated agent must comply w/Div. 6 & 7 laws and pursuant regulations.	No		ACP
FAC	12258(c)	Designated agent makes false/fraudulent statements on application/renewal.	No		State Only
FAC	12258(d)	Designated agent makes false/misleading statements in employer's records.	No		ACP
FAC	12258(e)	Designated agent fails to responsibly supervise employees.	No		ACP
FAC	12400	Broker license required for sale of agricultural-use pesticides.	Yes	12400	State Only
FAC	12405	Broker must inform Director of address/branch/business location change.	No		State Only
FAC	12406(a)	Brokers must maintain records of purchases/sales/distributions in state.	No		State Only
FAC	12406(b)	Brokers must report quarterly - see 12406(b), 12841 and 12841.1.	Yes	12400; 12841, et seq.	State Only
FAC	12407	Unlawful acts for brokers.	Yes	12407;12847	State Only
FAC	12601	Director may seize produce which may carry pesticide residues.	Yes	12601	State Only
FAC	12648(a)	Treatment with unregistered pesticide - plant/crop/commodity.	No		State Only
FAC	12671	Unlawful to pack/ship/sell produce w/residue in excess of tolerance.	Yes	12999.4	State Only
FAC	12841	Mill assessment payment required.	Yes	12841;12841.1	State Only
FAC	12971	No recommendation shall be in conflict with the registered labeling.	No		ACP;SCP

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FAC	12972	Drift prevention.	No		ACP;SCP
FAC	12973	Pesticide use shall follow REGISTERED label/labeling and/or permit conditions.	No		ACP;SCP
FAC	12978	Pesticide applications on specified public property. See subsections.	Yes	12978(a-f)	ACP
FAC	12978(a)	Pesticide applications on public property - REI.	Yes	12978(e-f)	ACP
FAC	12978(b)	Pesticide applications on public property - posting.	Yes	12978(e-f)	ACP
FAC	12978(c)	Pesticide applications on public property - sign location.	Yes	12978(e-f)	ACP
FAC	12978(d)	Pesticide applications on public property - agency req's.	Yes	12978(e-f)	ACP
FAC	12985	Worker safety reentry requirements - can be separate offenses for each worker.	Yes	Div.7,Art.10.5 &3CCR	ACP;Civil;Criminal.
FAC	12991	Use in conflict with the registered label or permit conditions.	Yes	Many label req's!!	Civil;Criminal.
FAC	12991(a)	Pesticides - make material or substantial misrepresentation.	Yes	12991(f)	Civil;Criminal.
FAC	12991(b)	Pesticides - false promises, deception.	No		Civil;Criminal.
FAC	12991(c)	Pesticides - illegitimate/dishonest business dealing.	No		Civil;Criminal.
FAC	12991(d)	Pesticides - false or misleading literature or advertisement.	No		Civil;Criminal.
FAC	12991(e)	Use/store/transport/dispose of pesticide/container.	Yes	Specific to regs.	Civil;Criminal.
FAC	12991(f)	Purchase ag pesticide except from licensed dealer - and record reqs.	Yes	12107	Civil;Criminal;State Only.
FAC	12992	Sale of adulterated or unregistered pesticide.	Yes	12992-defense	Civil;Criminal;State Only
FAC	12993	Unlicensed manufacture or sale.	Yes	12993-export	Civil;Criminal;State Only.
FAC	12995	Possession or use of unregistered/suspended pesticide.	Yes	12995	ACP
FAC	12999.5(a)	Refuse or neglect to pay civil penalty levied pursuant to FAC section 12999.5.	Yes	FAC 12999.5(a); 14008	ACP

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FAC	13101	Immediate hazard - use, handling, delivery or sale of pesticides.	No		State Only
FAC	13102	Immediate hazard; irreparable damage - order and appeal to Director.	No		Cease & Desist;CAC
FAC	14006.5	Permit - use/possession of restricted material (ag use).	Yes	14006.6;12825	ACP
FAC	14007(a)	Permits conditioned on compliance/w code/regulations and other conditions.	No		ACP
FAC	14007(c)	Permittee has duty to update permit information to commissioner.	No		ACP
FAC	14010	Sales - necessity of user's permit.	No		ACP
FAC	14011	Application of restricted materials - application of regulations.	No		ACP
FAC	14011.5	Pesticide use reports for restricted materials to commissioner w/i 7 days.	No		ACP
FAC	14012(a)	Maintainance/availability of restricted materials sales records.	Yes	12811, et seq.	ACP
FAC	14012(b)	Pesticide use reports must be submitted to commissioners.	Yes	14011.5	ACP
FAC	15204	Notice before operation of structural pest control business.	Yes	15204(a,c,d)	SCP
FAC	15204(a)	Notice to commissioner before operation of structural pest control business.	No		SCP
FAC	15204(c)	Structural pest control licensees/fumigators make personal notification to commissioner.	No		SCP
FAC	15204(d)	Structural pest control licensees make personal notification to commissioner.	No		SCP
FAC	15205	Licensees records available; onsite inspections, etc.	Yes	15205(a); B&P 8505.5	SCP
FAC	15205(a)	Registered structural pest control companies must make records available.	No	B&P8505.5	SCP
FAC	15301(a)	Manufacture/deliver/sell/advertise unregistered wood destroying pest device.	No		SCP
LAB	1695	Farm labor contractors - county registration.	No		ACP
16CCR	1970	Standards and record requirements.	No		SCP

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16CCR	1970(a)	Standards/record requirements - fumigation log.	No		SCP
16CCR	1970(b)	Standards/requirements - pesticide use log.	No		SCP
16CCR	1970.3	Securing against entry.	No		SCP
16CCR	1970.4	Pesticide disclosure requirement.	No		SCP
16CCR	1970.5	Commencing aeration.	No		SCP
16CCR	1971	Fumigation safety kit requirements.	Yes	B&P1971(a-b)	SCP
16CCR	1971(a)	Fumigation safety kit in possession of crew.	No		SCP
16CCR	1971(b)	Fumigation safety kit - use instructions.	No		SCP
16CCR	1973	Reentry requirements.	No		SCP
16CCR	1974	Fumigation warning signs.	No		SCP
16CCR	1983	Handling, use and storage of pesticides.	No		SCP
3CCR	6140	Inspection authority.	Yes	6140(a-b)	ACP;SCP
3CCR	6140(a)	Inspection authorrity - enter and inspect.	No		ACP;SCP
3CCR	6140(b)	Inspection authority - records available.	No		ACP;SCP
3CCR	6141	Confidential employee interview regarding illnesses during work hours.	No		ACP;SCP
3CCR	6260	Research authorization requirements.	Yes	6260(a-c,e)	ACP
3CCR	6260(a)	Research authorization required before experimental or unregistered use.	No		ACP
3CCR	6260(b)	Research authorization - general conditions.	No		ACP
3CCR	6260(c)	Research authorization - human exposure protocol.	No		ACP

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3CCR	6260(e)	Research authorization - conditions.	No		ACP
3CCR	6264	Notifications for research authorizations.	Yes	6264(a-b)	ACP
3CCR	6264(a)	Notification and use of research authorization - 24 hour notice.	No		ACP
3CCR	6264(b)	Notification and use of research authorization - report required.	No		ACP
3CCR	6266	Research authorization reports.	Yes	6266(a-b)	ACP
3CCR	6266(a)	Research authorization use report - final application report.	No		ACP
3CCR	6266(b)	Reports of research authorization use - final experimental PUR.	No		ACP
3CCR	6270	Research authorization - costs and fees prohibited.	No		ACP
3CCR	6272	Research authorization - possession of authorization.	No		ACP
3CCR	6301(a)	This is the "homeowner exemption." CAREFUL - intention to sell/distribute/apply elsewhere?	Yes	6301(a),12995	ACP
3CCR	6301(b)	Unregistered products - possess or sell.	Yes	6301(a)	State Only
3CCR	6301(c)	Unregistered products - possess or use cancelled or suspended.	Yes	6301(a)	State Only
3CCR	6361(d)	Butyl mercaptan limitations.	Yes		State Only
3CCR	6406	Supervision standards - certified applicators.	No		ACP
3CCR	6412	Restricted materials permit requirements.	Yes	6412(a-b)	ACP
3CCR	6412(a)	Restricted material permit requirement - possession/use.	Yes	6400;6414;6416	ACP
3CCR	6412(b)	Restricted material permit requirement - storage after permit expires.	Yes	6670;6670	ACP
3CCR	6416	Groundwater use restrictions.	Yes	6416(a)	ACP
3CCR	6416(a)	Groundwater use restrictions - permit required for possession/use.	No		ACP

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3CCR	6420	Permit requirements.	Yes	6420(c)	ACP
3CCR	6420(c)	Permittee responsible for compliance with all permit conditions.	No		ACP;SCP
3CCR	6426	Alternatives and mitigation measures.	Yes	6426(a-b)	ACP
3CCR	6426(a)	Alternatives and mitigaiton measures - lessen adverse impacts.	No		ACP
3CCR	6426(b)	Alternatives and mitigation measures - recommendation available.	No		ACP
3CCR	6428	Agricultural permit applications.	Yes	6428(a-i)	ACP
3CCR	6428(a)	Agricultural permit applications - name and business address.	No		ACP
3CCR	6428(b)	Agricultural permit applications - various requirements in subsections.	Yes	6428(b)	ACP
3CCR	6428(c)	Agricultural permit requirements - identification of certain areas.	Yes	6434(a)	ACP
3CCR	6428(d)	Agricultural permit applications - commodity/crop to be treated.	No		ACP
3CCR	6428(e)	Agricultural permit applications - pest problem to be controlled.	No		ACP
3CCR	6428(f)	Agricultural permit applications - permit for each pest on crop/commodity.	No		ACP
3CCR	6428(g)	Agricultural permit applications - date/crop stage for application.	No		ACP
3CCR	6428(h)	Agricultural permit applications - expected method of application.	No		ACP
3CCR	6428(i)	Agricultural permit applications - business/supervisor/applicator name.	No		ACP
3CCR	6434	Notice of intent requirements.	Yes	6434(a-b)	ACP
3CCR	6434(a)	Notice of intent - additional information may be required.	Yes	6428;6464(a)	ACP
3CCR	6434(b)	Notice of intent - 24 hour notice; and specific information required.	Yes	6428	ACP
3CCR	6443	Permits for use of phenoxy herbicides.	Yes	6443(b,c)	ACP

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3CCR	6443(b)	Permits for use of phenoxy herbicides on timberland - permittee posting.	Yes	Apply to permittee.	ACP
3CCR	6443(c)	Permits for use on phenyoxy herbicides on timberland - prespray notice.	No		ACP
3CCR	6450	Chloropicrin and methyl bromide field fumigation requirements.	Yes	6450(a,c,d,e,f,g)	ACP
3CCR	6450(a)	Chloropicrin and methyl bromide field fumigation - plan required.	No		ACP
3CCR	6450(d)	Chloropicrin and methyl bromide field fumigation - application block size.	Yes	6450	ACP
3CCR	6450(e)	Chloropicrin and methyl bromide field fumigation - tarpaulin.	Yes	6450	ACP
3CCR	6450(f)	Chloropicrin and methyl bromide field fumigation - tarps buried.	Yes	6450	ACP
3CCR	6450(g)	Chloropicrin and methyl bromide field fumigation - drip elimination.	Yes	6450	ACP
3CCR	6450.1(a)	Methyl bromide field fumigation notification - notify commissioner.	Yes	6450.1	ACP
3CCR	6450.1(b)	Methyl bromide field fumigation notification - property operator.	Yes	6450.1	ACP
3CCR	6450.2	Methyl bromide field fumigation buffer zone requirements.	Yes	6450.2(b,c,e,f,g,h,I)	ACP
3CCR	6450.2(b)	Methyl bromide field fumigation buffer zone req's - distance measurement.	No		ACP
3CCR	6450.2(c)	Methyl bromide field fumigation buffer zone req's - 36 hours.	No		ACP
3CCR	6450.2(e)	Methyl bromide field fumigation buffer zone req's - inner buffer zone.	Yes	6450.2(e)	ACP
3CCR	6450.2(f)	Methyl bromide field fumigation buffer zone req's - outer buffer zone.	Yes	6450.2(f)	ACP
3CCR	6450.2(g)	Methyl bromide field fumigation buffer zone req's - notifications.	Yes	6450.2(g)	ACP
3CCR	6450.2(h)	Methyl bromide field fumigation buffer zone req's - specific notification.	Yes	6450.2(g)	ACP
3CCR	6450.2(i)	Methyl bromide field fumigation buffer zone req's - schools.	Yes	6450.2(I)	ACP
3CCR	6450.3	Methyl bromide field fumigation methods.	Yes	6450.3(a)	ACP

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3CCR	6450.3(a)	Methyl bromide field fumigation methods - restrictions.	Yes	6450.3;6260	ACP
3CCR	6452(a)	Chloropicrin and methyl bromide-nursery/commodity fumigation - gas loss.	No		ACP
3CCR	6452(b)	Chloropicrin and methyl bromide-nursey/commodity fumigation - post/attend.	No		ACP
3CCR	6454	Chloropicrin and methyl bromide - structural fumigation requirements.	Yes	6454(a-n)	SCP
3CCR	6454(a)	Chloropicrin and methyl bromide - structural fumigation - warning agent.	No		ACP;SCP
3CCR	6454(b)	Chloropicrin and methyl bromide - structural fumigation -tarps..	No		ACP;SCP
3CCR	6454(c)	Chloropicrin and methyl bromide-structural fumigation - tarp damage.	No		ACP;SCP
3CCR	6454(d)	Chloropicrin and methyl fromide-structural fumigation - method.	No		ACP;SCP
3CCR	6454(e)	Chloropicrin and methyl bromide-structural fumigation -tarp drape.	No		ACP;SCP
3CCR	6454(f)	Chloropicrin and methyl bromide-structural fumigation - warning agent.	Yes	6454(f)	ACP;SCP
3CCR	6454(g)	Chloropicrin and methyl bromide -structural fumigation - fan.	No		ACP;SCP
3CCR	6454(h)	Chloropicrin and methyl bromide-structural fumigation - aeration.	No		ACP;SCP
3CCR	6454(i)	Chloropicrin and methyl bromide-structural fumigation - tubes/ducts.	Yes	6454(j)	ACP;SCP
3CCR	6454(j)	Chloropicrin and methyl bromide-structural fumigation - nearby structure.	No		ACP;SCP
3CCR	6454(k)	Chloropicrin and methyl bromide-structural fumigation - aeration monitor.	No		ACP;SCP
3CCR	6454(l)	Chloropicrin and methyl bromide-structural fumigation - fan installation.	No		ACP;SCP
3CCR	6454(m)	Chloropicrin and methyl bromide-structural fumigation - SCBA.	No		ACP;SCP
3CCR	6454(n)	Chloropicrin and methyl bromide-structural fumigation - concentration.	No		ACP;SCP
3CCR	6458	Aldicarb.	Yes	6458(a-b)	ACP

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3CCR	6458(a)	Aldicarb - application limit.	Yes	6458(a-b)	ACP
3CCR	6458(b)	Aldicarb - application prohibition - September to March.	Yes	6458(a)	ACP
3CCR	6460	Drift control.	Yes	6460(a-d)	ACP
3CCR	6460(a)	Drift control - certain herbicides - discharge shutoff.	No		ACP
3CCR	6460(b)	Drift control - certain herbicides - 10 mph+ prohibition.	No		ACP
3CCR	6460(c)	Drift control - certain herbicides - aircraft requirements.	Yes	6460	ACP
3CCR	6460(d)	Drift control - ground equipment requirements.	Yes	6460	ACP
3CCR	6462	Propanil.	Yes	6462(a-c)	ACP
3CCR	6462(a)	Propanil - restricted use in some counties.	Yes	6462(b)	ACP
3CCR	6462(b)	Propanil - use or study areas.	Yes	6462(a-b)	ACP
3CCR	6464	Phenoxy and certain other herbicides.	Yes	6464(a-c)	ACP
3CCR	6464(a)	Phenoxy and other herbicides - time period and boundries.	Yes	6464(a)	ACP
3CCR	6464(b)	Phenoxy and certain other herbicides - time period and boundries.	Yes	6464(b)	ACP
3CCR	6464(c)	Phenoxy and certain other herbicides - time period and boundries.	Yes	6464(c)	ACP
3CCR	6466	Paraquat.	Yes	6466(a-d)	ACP
3CCR	6466(a)	Paraquat for preplant/preemergency - nozzles.	No		ACP
3CCR	6466(b)	Paraquat for preplant/preemergence - nozzles.	No		ACP
3CCR	6466(c)	Paraquat for preplant/preemergence - discharge.	No		ACP
3CCR	6466(d)	Paraquat - wind velocity.	No		ACP

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3CCR	6470	Cotton harvest aids.	Yes	6470(a-c)	ACP
3CCR	6470(a)	Cotton harvest aids - various requirements.	Yes	6470(a)	ACP
3CCR	6470(b)	Cotton harvest aids - aircraft requirements.	Yes	6470(b)	ACP
3CCR	6470(c)	Cotton harvest aids - air carrier ground equipment.	Yes	6470(c)	ACP
3CCR	6474	Carbofuran - alfalfa restriction.	No		ACP
3CCR	6476	Fenamiphos.	Yes	6476(a-d)	ACP
3CCR	6476(a)	Fenamiphos - turf use - restrictions.	No		ACP
3CCR	6476(b)	Fenamiphos - turf use - equipment restriction.	No		ACP
3CCR	6476(c)	Fenamiphos - turf use - run off.	No		ACP
3CCR	6476(d)	Fenamiphos - turf use - reentry.	No		ACP
3CCR	6486	Renumbered section - previously for minimal exposure pesticides.	Yes	6486.1-8	Do not cite.
3CCR	6486.1(a)	Atrazine - restriction for ag, outdoor institutional/industrial use.	Yes	6802(c)	ACP
3CCR	6486.2(a)	Simazine - noncrop ag, outdoor institutional/industrial use prohibited.	Yes	6802(d)	ACP
3CCR	6486.2(b)	Simazine -right-of-way ag, outdoor institutional/industrial use prohibited.	Yes	6802(d)	ACP
3CCR	6486.3(a)	Bromacil - noncrop ag, outdoor institutional/industrial use prohibited.	Yes	6802(b)	ACP
3CCR	6486.3(b)	Bromacil -right-of-way ag, outdoor institutional/industrial use prohibited.	Yes	6802(e)	ACP
3CCR	6486.4(a)	Diuron- noncrop ag, outdoor institutional/industrial use prohibited.	Yes	6802(f)	ACP
3CCR	6486.4(b)	Diuron -right-of-way ag, outdoor institutional/industrial use prohibited.	Yes	6802(f)	ACP
3CCR	6486.5	Prometon - ag, outdoor institutional/industrial use prohibited.	Yes	6802(g)	ACP

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3CCR	6486.6(a)	Bentazon - ag, outdoor institutional/industrial use prohibited - locations.	Yes	6486.6(a)	ACP
3CCR	6486.6(b)	Bentazon - ag, outdoor institutional/industrial use prohibited - lrice.	Yes	6486.6(b)	ACP
3CCR	6486.6(c)	Bentazon - ag, outdoor institutional/industrial use prohibited - timing.	Yes	6486.6(c)	ACP
3CCR	6486.6(d)	Bentazon - ag, outdoor institutional/industrial use prohibited - sprinkler.	Yes	6486(d)	ACP
3CCR	6486.7(a)	Azinphos-methyl - air blast/enclosed cab requirements.	Yes	6486.7(a)	ACP
3CCR	6486.8	Norflurazon - some ag, outdoor institutional/industrial uses prohibited.	Yes	6486.8;6802(h)	ACP
3CCR	6488	Antifouling paints or coatings containing tributyltin.	Yes	6488(a-c)	ACP
3CCR	6488(a)	Antifouling paints or coatings containing tributyltin - watercraft.	Yes	6488(a)	ACP
3CCR	6488(b)	Antifouling paints or coatings containing tributyltin - freshwater/marine.	Yes	6488(b)	ACP
3CCR	6488(c)	Antifouling paints or coatings containing tributyltin - dealer req's.	Yes	6488(c)	ACP
3CCR	6489	Tributyltin paint and/or coating additives.	No		ACP
3CCR	6508	Licensee must notify Director if change of name, address, business, etc.	No		State Only
3CCR	6513	Continuing education records requirements.	Yes	6513(a,b,e)	State Only
3CCR	6513(a)	Records of continuing education - instructor/sponsor - three years.	No		State Only
3CCR	6513(b)	Records of continuing education - licensee - three years.	No		State Only
3CCR	6513(e)	Records of continuing education -must submit to Director upon request.	No		State Only
3CCR	6524	Financial responsibilty - applicants for ag pest control business license.	Yes	6524(a,b,d,e,f)	State Only
3CCR	6534	Director's actions against qualified applicator certificate.	No	6534(a-c)	State Only
3CCR	6540	Apprentice pilot supervision.	No		State Only

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3CCR	6542	Aircraft pilot registration.	Yes	6542(a-b)	ACP
3CCR	6542(a)	Apprenctice pilot registration - identification of journeyman pilot.	No		ACP
3CCR	6542(b)	Apprenctice pilot registration - journeyman pilot change notification.	No		ACP
3CCR	6544	Pesticide handling by pilot - closed system req. and certain prohibitions.	No		ACP
3CCR	6556	Recommendations.	Yes	6556(a-e);12003	ACP
3CCR	6556	Recommendations - additional to FAC 12003.	Yes	6556(a-e);12003	ACP
3CCR	6556(a)	Recommendations - acerage/units to be treated.	Yes	12003	ACP
3CCR	6556(b)	Recommendations - concentration/volume per acre.	Yes	12003	ACP
3CCR	6556(c)	Recommendations - worker re-entry interval and disposition.	Yes	12003	ACP
3CCR	6556(d)	Recommendations - criteria for determining recommendation.	Yes	12003	ACP
3CCR	6556(e)	Recommendations - mitigation measures considered.	Yes	12003	ACP
3CCR	6557	Groundwater protection advisories.	Yes	6557(a-b)	ACP
3CCR	6557(a)	Groudwater protection advisory in writing - specifics.	Yes	6557(a);6800(a)	ACP
3CCR	6557(b)	Groundwater protection advisory - ag pest control adviser reporting req's.	Yes	6557(b)	ACP
3CCR	6560	Supervision - pest control dealer licenses.	Yes	6560(a-b)	ACP
3CCR	6560(a)	Supervision - pest control dealer designated agent at principal office.	No		ACP
3CCR	6560(b)	Supervision - designated agent license/competence requirements.	Yes	6560(b)	ACP
3CCR	6562	Dealer records and sales reporting.	Yes	6462;6564;6622	ACP
3CCR	6562(a)	Dealer records and sales reporting - requirements.	Yes	6562(a);6622	ACP

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3CCR	6562(b)	Dealer records and sales reporting - records retained and available.	Yes	6562(b)	ACP
3CCR	6564	Appropriate products - dealer responsibilities.	Yes	6564(a-b)	ACP
3CCR	6564(a)	Appropriate products - sale/delivery must correspond with recommendation.	Yes	6564(b)	ACP
3CCR	6564(b)	Appropriate products - knowing noncompliance sale/delivery.	Yes	6564(a)	ACP
3CCR	6566	Supplemental labeling - recommendation consistent w/registered supplement.	No		ACP
3CCR	6568	Dealer responsibilities.	Yes	6568(a-e)	ACP
3CCR	6568(a)	Dealer responsibilities - obtain copy of purchaser permit before sale, etc.	No		ACP
3CCR	6568(b)	Dealer responsibilities - must obtain purchaser cert./license before sale.	Yes	6400(a);6400(d)	ACP
3CCR	6568(c)	Dealer responsiblities - must obtain RMP and operator identification info.	Yes	6622	ACP
3CCR	6568(d)	Dealer responsibility - operator id. list to out-of-county commissioners.	No		ACP
3CCR	6568(e)	Dealer responsibility - retain copy of purchaser permits for two years.	Yes	6622	ACP
3CCR	6570	Groundwater protection material requirements.	Yes	6570(a-b);6800;6802	ACP
3CCR	6570(a)	Groundwater protection material - required statement.	Yes	6800(a);6802	ACP
3CCR	6570(b)	Groundwater protection material - provide to purchaser copy of report form.	Yes	6800;6802	ACP
3CCR	6574	Antifouling or tributyltin coatings - dealer requirements.	Yes	6574(b-d)	ACP
3CCR	6574(b)	Antifouling or tributyltin coating uses - dealer to obtain statement.	Yes	6574(a)	ACP
3CCR	6574(c)	Antifouling or tributyltin coating uses - dealer to maintain records.	Yes	6574(a-b)	ACP
3CCR	6574(d)	Antifouling or tributyltin coating uses - dealer to maintain/present logs.	Yes	6574(a-c)	ACP
3CCR	6600	General standards of care.	Yes	6600(a-e)	ACP;SCP

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3CCR	6600(a)	General standard of care - equipment in good repair/safe to operate.	No		ACP;SCP
3CCR	6600(b)	General standard of care - perform pest control in safe/effective manner.	No		ACP;SCP
3CCR	6600(c)	General standard of care - use methods/equipment for proper application.	No		ACP;SCP
3CCR	6600(d)	General standard of care - perform pest control in correct conditions.	No		ACP;SCP
3CCR	6600(e)	General standards of care - exercise reasonable precautions.	No		ACP;SCP
3CCR	6601	General application standards.	Yes	6601(a);6700	ACP;SCP
3CCR	6601(a)	General application standards.	Yes	6700	ACP;SCP
3CCR	6602	Label must be available at each use site.	No		ACP;SCP
3CCR	6604	Pesticides must be measured with accurate devices.	No		ACP;SCP
3CCR	6606	Pesticide mixtures must be uniform in application and service rigs.	No		ACP;SCP
3CCR	6608	Equipment must be clean to prevent illness, damage, residues, etc.	No		ACP;SCP
3CCR	6610	Backflow prevention device or double-check assembly.	No		ACP;SCP
3CCR	6612	Age requirement.	Yes	6612(a-c)	ACP;SCP
3CCR	6612(a)	Age requirement for products with certain labeling - air-supply related.	No		ACP;SCP
3CCR	6612(b)	Age requirement for products with certain labeling - closed-system related.	No		ACP;SCP
3CCR	6612(c)	Age requirement for products with certain labeling - resistant clothing.	No		ACP;SCP
3CCR	6614	Protection of persons, animals or property.	Yes	6614(a-c);6620	ACP;SCP
3CCR	6614(a)	Protect persons, animals, property - must evaluate before application.	Yes	6620	ACP;SCP
3CCR	6614(b)	Protect persons, animals, property - prevent substantial drift.	Yes	6614(a-b)	ACP;SCP

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3CCR	6616	Consent to apply necessary.	Yes	6620	ACP;SCP
3CCR	6618	Notice of application.	Yes	6618(a-c); 6670; 6676; Cite correct party.	ACP;SCP
3CCR	6618(a)	Notice of applications to property owner.	Yes	6618; Cite correct party.	ACP;SCP
3CCR	6618(b)	Notice of applications - commercial or research production.	Yes	6670; 6676; 6618; Cite correct party.	ACP
3CCR	6618(c)	Notice of applications - non agricultural or structural setting.	Yes	12978; B&P8538; 6618; Cite correct party.	ACP;SCP
3CCR	6619	Pesticide application completion notice.	Yes	6618;6619(a-e)	ACP
3CCR	6619(a)	Pesticide application completion notice - agricultural pest control business.	Yes	6618	ACP
3CCR	6619(b)	Pesticide application completion notice - property operator notification method.	No		ACP
3CCR	6619(c)	Pesticide application completion notice - property operator record keeping requirement.	No		ACP
3CCR	6619(d)	Pesticide application completion notice - operator/pest control business records.	No		ACP
3CCR	6619(e)	Pesticide application completion notice - 2 year retention requirement.	No		ACP
3CCR	6622	Operator identification numbers.	Yes	6622(a-d)	ACP
3CCR	6622(b)	Operator identification number required - production of agricultural commodity.	Yes	6622(a)	ACP
3CCR	6622(c)	Operator identification numbers - nonagricultural uses requirements and exemptions.	Yes	6622(a),(c)	ACP
3CCR	6622(d)	Operator identification numbers - specific to counties where work is performed.	Yes	6622(b-c)	ACP
3CCR	6623	Site identification numbers.	Yes	6623(a,c)	ACP
3CCR	6623(a)	Site identification numbers - property operator must obtain number from commissioner.	No		ACP
3CCR	6623(c)	Site identification numbers - property operator must retain RMP for two years.	No		ACP
3CCR	6624	Pesticide use records.	Yes	6624(a-e)	ACP;SCP in some cases.

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3CCR	6624(a)	Pesticide use records - persons who must maintain records.	Yes	6624	ACP;SCP in some cases.
3CCR	6624(b)	Pesticide use records - pest control operators must include certain information.	Yes	6624	ACP; SCP in some cases.
3CCR	6624(c)	Pesticide use records - property operators must include certain information.	Yes	6624	ACP
3CCR	6624(d)	Pesticide use records - ag property operators to retain pest control operator information.	Yes	6624	ACP
3CCR	6624(e)	Pesticide use records - must be retained and made promptly available for two years.	No	6624	ACP;SCP
3CCR	6625	Pesticide use report for school sites - requirements.	Yes	6627;6624;6625(a-b)	ACP;SCP
3CCR	6625(a)	Pesticide use report for school sites.	Yes	6624;6627	ACP;SCP
3CCR	6625(b)	Pesticide use report for school sites - information required to be on form.	Yes	6624;6627	ACP;SCP
3CCR	6626	Pesticide use reports for production agriculture.	Yes	6626(a-e)	ACP
3CCR	6626(a)	Pesticide use reports - production ag - general property operator reporting req's.	Yes	6626(a)	ACP
3CCR	6626(b)	Pesticide use reports - production ag - pest control business operator reporting req's.	Yes	6626(b)	ACP
3CCR	6626(c)	Pesticide use reports - production ag - must be on approved form.	No		ACP
3CCR	6626(d)	Pesticide use reports - production ag - postmark date.	No		ACP
3CCR	6626(e)	Pesticide use reports - production ag - alternate report to director.	No	6626(e)	ACP
3CCR	6627	Monthly summary pesticide use reports.	Yes	6624;6626;6627(a-c)	ACP;SCP
3CCR	6627(a)	Monthly summary pesticide use report - general reporting req's.	Yes	6624;6626	ACP;SCP
3CCR	6627(b)	Monthly summary pesticide use report - reporting items req'd.	No		ACP;SCP
3CCR	6627(c)	Monthly summary pesticide use reports - alternate report to director.	No		ACP;SCP
3CCR	6628	Negative pesticide use reports.	Yes	6628(a-c); 11732	ACP; SCP in some cases.

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3CCR	6628(a)	Negative pesticide use report - ag pest control business - report to commissioner.	Yes	11732	ACP
3CCR	6628(b)	Negative pesticide use report - structural pest control business - report to commissioner.	Yes	15204	SCP
3CCR	6628(c)	Negative pesticide use report - postmark date.	No		ACP;SCP
3CCR	6630	Pest control business - equipment identification.	No		ACP;SCP
3CCR	6632	Pest control business - recommendation and use permit for ag use.	No		ACP
3CCR	6634	Pest control business - accident reports.	No		ACP;SCP
3CCR	6670	Storage, stransportation, disposal - container control.	Yes	6402;6686	ACP;SCP
3CCR	6672	Delivery of pesticide containers.	Yes	6772(a-b);6686;6402	ACP;SCP
3CCR	6672(a)	Storage, transportation, disposal - delivery of pesticide/container.	Yes	6686	ACP;SCP
3CCR	6672(b)	Storage, transportation, disposal - delivery and control of pesticide/container.	Yes	6402;6686	ACP;SCP
3CCR	6674	Posting of pesticide storage areas - general requirements.	Yes	6686	ACP;SCP
3CCR	6676	Container requirements - general.	No	6684	ACP;SCP
3CCR	6678	Service container labeling requirements.	Yes	6678(a-c)	ACP;SCP
3CCR	6678(a)	Service container labeling - responsibility for container.	No		ACP;SCP
3CCR	6678(b)	Service container labeling - identify of pesticide.	No		ACP;SCP
3CCR	6678(c)	Service container labeling - signal word.	No		ACP;SCP
3CCR	6680	Prohibited containers for pesticides.	No		ACP;SCP
3CCR	6682	Transportation.	Yes	6682(a-b);6686	ACP;SCP
3CCR	6682(a)	Transportation - no transportation in compartment with persons, food, feed.	Yes	6686	ACP;SCP

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3CCR	6682(b)	Transportation - containers secured during transportation to avoid spillage/moisture.	Yes	6686	ACP;SCP
3CCR	6684	Rinse and drain procedures.	Yes	6684(a-d);6686	ACP;SCP
3CCR	6684(a)	Rinse/drain procedures - rinse/drain by user at time of use.	Yes	6686	ACP;SCP
3CCR	6684(b)	Rinse/drain procedures - water/spray carrier amounts.	Yes	6686	ACP;SCP
3CCR	6684(c)	Rinse/drain procedures - rinse inner surface.	Yes	6686	ACP;SCP
3CCR	6684(d)	Rinse/drain procedures - other method.	Yes	6686	ACP;SCP
3CCR	6702	Employer-employee responsibilities.	Yes	6702(a-c)	ACP;SCP
3CCR	6702(b)	General employer responsibilities.	Yes	6702	ACP;SCP
3CCR	6702(c)	General employer responsibilities - employee personal protective equipment requirement.	No		ACP;SCP
3CCR	6720	Safety of employed persons.	Yes	6720 (a-d)	ACP;SCP
3CCR	6720(a)	Safety of employed persons - general employer requirement for pesticide handling.	Yes	6720(a-b)	ACP;SCP
3CCR	6723(a)	Hazard communication for handlers - written/read information at workplace.	No		ACP;SCP
3CCR	6723(b)	Hazard communication for handlers - certain records in central location.	No		ACP;SCP
3CCR	6723(c)	Hazard communication for handlers - must inform about document location, annually.	No		ACP;SCP
3CCR	6723(d)	Hazard communication for handlers - certain records available to physicians, others.	No		ACP;SCP
3CCR	6723.1	Application-specific information for handlers.	Yes	6723.1(a-c)	ACP
3CCR	6723.1(a)	Application specific info for handlers - display at central location at time of activity.	No		ACP
3CCR	6723.1(b)	Application specific info for handlers - provide w/i 24 hours of application treatment.	No		ACP
3CCR	6723.1(c)	Application specific info for handlers - employers maintain certain documents.	No		ACP

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3CCR	6724	Handler training requirements.	Yes	6724(a-f)	ACP;SCP
3CCR	6724(a)	Handler training - employer written training program requirement.	No		ACP;SCP
3CCR	6724(b)	Handler training - employer training program components.	No		ACP;SCP
3CCR	6724(c)	Handler training - must be understandable to employee and require employe responses.	No		ACP;SCP
3CCR	6724(d)	Handler training - must be completed before employee handles pesticides.	No		ACP;SCP
3CCR	6724(e)	Handler training - annual training and record/verification of training.	No		ACP;SCP
3CCR	6724(f)	Handler training - trainer qualifications.	No		ACP;SCP
3CCR	6726	Emergency medical care requirements.	Yes	6726(a-c)	ACP;SCP
3CCR	6726(a)	Emergency medical care - advance plan and availability.	No		ACP;SCP
3CCR	6726(b)	Emergency medical care - posted name/location of medical/emergency facility.	No		ACP;SCP
3CCR	6726(c)	Emergency medical care - employer ensures employee is taken to physician - immediately.	No		ACP;SCP
3CCR	6728	Medical supervision requirements.	Yes	6728(a-f)	ACP
3CCR	6728(a)	Medical supervision - employer maintains records handler's use of certain pesticides.	No		ACP
3CCR	6728(b)	Medical supervision - regular handler monitoring - employer/physician agreement.	No		ACP
3CCR	6728(c)	Medical supervision - regular handler monitoring - cholinesterase baseline.	No		ACP
3CCR	6728(d)	Medical supervision - regular handler monitoring - cholinesterase levels.	No		ACP
3CCR	6728(e)	Medical supervision - regular handlers - cholinesterase - remove employee from exposure.	No		ACP
3CCR	6728(f)	Medical supervision - approved chlolinesterase testing labs/procedures.	No		ACP
3CCR	6730	Working alone requirements.	Yes	6730(a-b)	ACP

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3CCR	6730(a)	Working alone - two hour contact requirement.	No		ACP
3CCR	6730(b)	Working alone - one hour contact requirement.	No		ACP
3CCR	6732	Change area must be provided by employers of certain pesticide handlers.	No		ACP
3CCR	6734	Handler decontamination facilities requirements.	Yes	6734(a-d)	ACP;SCP in some cases
3CCR	6734(a)	Handler decontamination facilities - water, soap, towels, emergency wash, eye flush, etc.	No		ACP;SCP
3CCR	6734(b)	Handler decontamination facilities - distance from mix/load site - not restricted area.	No		ACP
3CCR	6734(c)	Handler decontamination - eye flush immediately available/carried in certain conditions.	No		ACP
3CCR	6734(d)	Handler decontaminatin facilities - w/l 100 feet of mix/load site in certain conditions.	No		ACP;SCP
3CCR	6736	Coveralls requirements.	Yes	6738;6736(a,b,d)	ACP;SCP
3CCR	6736(a)	Coveralls - employer shall provide handlers w/coveralls w/certain pesticides.	Yes	6738(l);6736(c)	ACP;SCP
3CCR	6736(b)	Coveralls - employer assures coveralls available at start of workday.	Yes	6736(c)	ACP;SCP
3CCR	6736(d)	Handler decontamination facilities - w/l 100 feet of mix/load site in certain conditions.	No		ACP;SCP
3CCR	6738(a)	Personal protective equipment - general employer requirements - inspected/clean.	Yes	6738	ACP;SCP
3CCR	6738(b)	Personal protective equipment - general employer requirements - eyewear.	Yes	6738	ACP;SCP
3CCR	6738(c)	Personal protective equipment - general employer requirements - gloves.	Yes	6738	ACP;SCP
3CCR	6738(d)	Personal protective equipment - general employer requirements - footwear.	Yes	6738	ACP;SCP
3CCR	6738(e)	Personal protective equipment - general employer requirements - headgear.	Yes	6738	ACP;SCP
3CCR	6738(f)	Personal protective equipment - general employer requirements - apron.	Yes	6738	ACP;SCP
3CCR	6738(h)	Personal protective equipment - general employer requirements - respiratory protection.	Yes	6738;8CCR5155	ACP;SCP

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3CCR	6740	Adequate light.	No		ACP;SCP
3CCR	6742	Safe equipment requirements.	Yes	6742(a-b)	ACP;SCP
3CCR	6742(a)	Safe equipment provided/inspected by employer before use.	No		ACP;SCP
3CCR	6742(b)	Safe equipment - openings, hoses, shut-off devices, etc.	No		ACP;SCP
3CCR	6744	Equipment maintenance - general requirements.	No		ACP;SCP
3CCR	6746	Equipment maintenance requirements.	Yes	6746(a-b)	ACP
3CCR	6746(a)	Closed systems - employers required to provide for certain pesticides.	Yes	6746(b)	ACP
3CCR	6760	Employer responsibilities and exceptions.	Yes	6760(a-e)	ACP
3CCR	6760(a)	Employer responsibilities - baits/traps/gov't. pest control/irrigation/direct injection.	No	6760(b-d)	ACP
3CCR	6761	Hazard communication to field workers.	Yes	6767((a-d);6761.1	ACP
3CCR	6761(a)	Hazard communication - must display hazard communication information at worksite.	Yes	6761.1(c)	ACP
3CCR	6761(b)	Hazard communication - property operator has records, MSDS, in employee accessible place.	Yes	6624;8CCR5194	ACP
3CCR	6761(c)	Hazard communication -property operator to inform laborers/employees of records location.	Yes	6761(a-b)	ACP
3CCR	6761(d)	Hazard communication - property operators make records availalble to certain persons.	Yes	6761 - Info. Note	ACP
3CCR	6761.1	Application-specific information for field workers.	Yes	6761.1(a-b)	ACP
3CCR	6761.1(a)	Application-specific info for fieldworkers - property operator displays/central location.	No		ACP
3CCR	6761.1(b)	Application-specific info for fieldworkers - property operator displays w/i 24 hours.	Yes	6761.1(c)	ACP
3CCR	6762	Field work during pesticide application - requirements.	Yes	6614;6762(b-c)	ACP
3CCR	6762(b)	Field work during application - employer shall not allow entry into treated farm/forest.	Yes	6614;6762(b)	ACP

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3CCR	6762(c)	Field work during application - employer shall not allow entry into nursery/greenhouse.	Yes	6614;6762(c)	ACP
3CCR	6762(c)	Field work during application - employer shall not allow entry into nursery/greenhouse.	Yes	6614;6762(c)	ACP
3CCR	6764	Field worker training requirements.	Yes	6764(a,b,d,e)	ACP
3CCR	6764(a)	Fieldworker training - employer assures employees in treated fields are trained.	Yes	6764(c)	ACP
3CCR	6764(b)	Fieldworker training - required training components.	Yes	6764(c)	ACP
3CCR	6764(d)	Fieldworker training - information presented in understandable/responsive manner.	No		ACP
3CCR	6764(e)	Field worker training - trainer qualifications.	No		ACP
3CCR	6766	Emergency medical care requirements.	Yes	6766(a-c)	ACP
3CCR	6766(a)	Emergency medical care - planned for in advance.	No		ACP
3CCR	6766(b)	Emergency medical care - employees or supervisors informed of name/location of physician.	No		ACP
3CCR	6766(c)	Emergency medical care - employer must take employee to physician when illness suspected.	No		ACP
3CCR	6768	Field worker decontamination facilities - requirements.	Yes	6768(a-b);8CCR3457	ACP
3CCR	6768(a)	Fieldworker decontamination facilities - sufficient water and supplies.	Yes	8CCR3457	ACP
3CCR	6768(b)	Fieldworker decontamination facilities - reentry interval/treatment area restrictions.	Yes	6768(b)	ACP
3CCR	6769	Greenhouse ventilation criteria.	Yes	6769(a)	ACP
3CCR	6769(a)	Greenhouse ventilation criteria - concentration.	No		ACP
3CCR	6769(b)	Greenhouse ventilation criteria - alternate conditions.	No		ACP
3CCR	6770	Field entry after pesticide application - requirements.	Yes	6770(a);6772	ACP
3CCR	6770(a)	Field entry after application - no employee in treatment area per REI noted on label.	Yes	6770(a);6772	ACP

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3CCR	6771	Requirements for early entry - field workers.	Yes	6771(a-l)	ACP
3CCR	6771(a)	Early reentry requirements for field workers - specific information to employees.	No		ACP
3CCR	6771(b)	Early reentry requirements for field workers - personal protective equipment provided.	Yes	6738	ACP
3CCR	6771(c)	Early reentry requirements for field workers - personal protective equipment used.	No		ACP
3CCR	6771(d)	Early reentry requirements for field workers - personal protective equipment clean.	No		ACP
3CCR	6771(e)	Early reentry requirements for field workers - employer's personal protective equipment.	No		ACP
3CCR	6771(f)	Early reentry requirements for field workers - eyeflush water immediately accessible.	No		ACP
3CCR	6771(g)	Early reentry requirements for field workers - place to remove protective equipment.	Yes	6770(d-e)	ACP
3CCR	6771(h)	Early reentry requirements for field workers - clean/pesticide-free area/personal clothes.	No		ACP
3CCR	6771(i)	Early reentry requirements for field workers - employer to prevent heat-realted illness.	No		ACP
3CCR	6772	Restricted entry interval - requirements.	Yes	6772(a-b);6774	ACP
3CCR	6772(a)	Restricted entry intervals - general.	Yes	6772(a);6774	ACP
3CCR	6772(b)	Restricted entry intervals - specific pesticide/crop combinations.	Yes	6772(b)	ACP
3CCR	6774	Restricted entry intervals adjustments - requirements.	Yes	6772;6774(b-e)	ACP
3CCR	6774(b)	Restricted entry interval adjustment - organophosphates.	Yes	6772;6772	ACP
3CCR	6774(c)	Restricted entry interval adjustment - no foliage adjustment but never less than label .	No		ACP
3CCR	6774(d)	Restricted entry interval adjustment - not less than label req'/commissioner verifies.	No		ACP
3CCR	6774(e)	Restricted entry interval adjustment - rainfall data/commissioner verify.	No		ACP
3CCR	6776	Field postings - requirements.	Yes	6776(a-e)	ACP

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3CCR	6776(a)	Field postings - peroperty operator ensures posting.	Yes	6776(a);6774	ACP
3CCR	6776(b)	Field posting - signage requirements.	No		ACP
3CCR	6776(c)	Field posting - sign timing, legibility, condition, etc.	No		ACP
3CCR	6776(d)	Field posting - visable at usual entry points.	No		ACP
3CCR	6776(e)	Field posting - additional "danger" or minimal exposure posting requirements.	Yes	6790	ACP
3CCR	6778(a)	Repealed.	Yes	Do not cite.	ACP
3CCR	6780	General fumigation - safe use requirements.	Yes	6780(a,b,d)	ACP;SCP
3CCR	6780(a)	General fumigation - safe use req's - uncontrolled concentrations - respiratory equipment.	Yes	6780(a)	ACP;SCP
3CCR	6780(b)	General fumigation - safe use req's - certain fumigants - respiratory equipment.	No		ACP;SCP
3CCR	6780(d)	General fumigation - safe use req's - accident response plan.	No		ACP;SCP
3CCR	6782	Fumigation in enclosed spaces -requirements.	Yes	6782(a-f)	ACP;SCP
3CCR	6782(a)	Fumigation in enclosed spaces - two employees present at all times.	No		ACP;SCP
3CCR	6782(b)	Fumigation in enclosed spaces - second employee has access to protective equipment.	No		ACP;SCP
3CCR	6782(c)	Fumigation in enclosed spaces - warning signs.	No		ACP;SCP
3CCR	6782(d)	Fumigation in enclosed spaces - employees cannot enter except in certain situations.	No	6780(a)	ACP;SCP
3CCR	6782(e)	Fumigation in enclosed spaces - no fumigant release in occupied work areas.	No		ACP;SCP
3CCR	6782(f)	Fumigation in enclosed spaces - fumigant concentration in area after fumigation.	Yes	6780(a)	ACP;SCP
3CCR	6784	Field fumigation requirements.	Yes	6784(a-b)	ACP
3CCR	6784(a)	Field fumigation - sign posting.	Yes	6776(f)	ACP

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3CCR	6784(b)	Field fumigation - methyl bromide, chloropicrin , etc., requirements.	Yes	6450.3;6784(b)	ACP
3CCR	6792	Conditions of use requirements.	Yes	6792(a-c)	ACP
3CCR	6792(a)	Minimal exposure conditions of use - oxydemeton-methyl - ornamental landscape.	No		ACP
3CCR	6792(b)	Minimal exposure conditions of use - oxydemeton-methyl - no greenhouse use.	No		ACP
3CCR	6792(c)	Minimal exposure conditions of use - propargite - no greenhouse use.	No		ACP
3CCR	6793	Minimal exposure pesticide safety - use requirements.	Yes	6732;6734;6736;6793(a-g)	ACP
3CCR	6793(a)	Minimal exposure pesticide - use req's - employer provides clothing change area.	Yes	6732	ACP
3CCR	6793(b)	Minimal exposure pesticide - use req's - employer provides washing facilities.	Yes	6734	ACP
3CCR	6793(c)	Minimal exposure pesticide - use req's - employer provides work clothing.	Yes	6736	ACP
3CCR	6793(d)	Minimal exposure pesticide - use req's - employer provides closed system.	Yes	6000.4	ACP
3CCR	6793(e)	Minimal exposure pesticide - use req's - employer provides full body protective clothing.	Yes	6738(d)	ACP
3CCR	6793(f)	Minimal exposure pesticide - use req's - employer provides respiratory protection.	Yes	6738(e)	ACP
3CCR	6793(g)	Minimal exposure pesticide - use req's - employer provides clean equipment, daily.	No		ACP
3CCR	6795	Thiophanate-methyl requirements.	Yes	6795(a-b)	ACP
3CCR	6795(a)	Minimal exposure pesticide - thiophanate-methyl - respiratory protection.	No		ACP
3CCR	6795(b)	Minimal exposure pesticide - thiophanate-methyl - indoor applications prohibited.	Yes	6795(a)	ACP
3CCR	6910	Prohibition of use and sale of products containing tributyltin - requirements.	Yes	6910(a-b)	ACP
3CCR	6910(a)	Tributyltin for cooling water systems - possession/use restriction in some counties.	No		ACP
3CCR	6910(b)	Tributyltin for cooling water systems - sales restriction in some counties.	Yes	6910(a)	ACP

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California Environmental Protection Agency
Department of Pesticide Regulation

Citeable Sections

Code	Section	Description	Possible Exception or Advisory	Exception Reference or Advisory	Enforcement Option(s)
3CCR	6920	Prohibition of use and sale of products containing copper - requirements.	Yes	6920(a-b)	ACP
3CCR	6920(a)	Copper possession/use prohibition in some counties for specific uses.	No		ACP
3CCR	6920(b)	Copper sales prohibition in some counties for specific uses.	Yes	6920(a)	ACP
B&P	8505.10	Fumigation - warning sign specifications.	No		SCP
B&P	8505.11	Fumigation - attics and underarea req's.	No		SCP
B&P	8505.12	Fumigation - warning agent required.	No		SCP
B&P	8505.13	Fumigation - job log submitted and records available to SPCB/commissioners.	No		SCP
B&P	8505.15	Fumigation - two masks available/used.	No		SCP
B&P	8505.16	Fumigation - fumigators able to perform CPR.	No		SCP
B&P	8505.17	Structural Pest Control Education and Enforcement Fund - disbursement - monthly PUR info.	Yes	8505.15(c)	SCP
B&P	8505.17(c)	Structural pest control companies perepare/submit monthly pesticide use report to county.	No		SCP
B&P	8505.2	Fumigation - under direct supervision of SPCB licensee.	No		SCP
B&P	8505.5	Fumigation - prior notice to fire department and commissioner.	No		SCP
B&P	8505.6	Fumigation - adjacent rooms and apartments must be vacated.	No		SCP
B&P	8505.7	Fumigation - space vacated/secured - safe before reoccupancy.	No		SCP
B&P	8505.8	Fumigation - structure sealed before fumigation.	No		SCP
B&P	8505.9	Fumigation - warning signs.	No		SCP
B&P	8538(a)	Clear notice presented to owner/tenant before treatment.	No		SCP
B&P	8538(b)	48 hours notice prior to application to owner/tenant.	No		SCP

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Citeable Sections

Code	Section	Description	Possible Exception or Advisory	Exception Reference or Advisory	Enforcement Option(s)
B&P	8550(a)	Unlawful to offer/engage in business/practice of structural pest control without license.	Yes	8505; 8555(a-g);Chapter 14	SCP
B&P	8550(b)	Companies must be registered before soliciting; solicitor does not perform activity.	Yes	8550(b);8555(a-g);Chapter 14	SCP
B&P	8550(c)	Unlawful for unlicensed solicitor to perform certain acts.	Yes	8550(b); 8550(c); 8555(a-g); Chapter 14	SCP
B&P	8550(d)	Unlawful for unlicensed individual to offer opinion, recommendations, etc.	Yes	8550(d);8555(a-g)	SCP
B&P	8550(e)	Unlawful for firm, parnership, corporation, etc. to engage or offer unless registered.	Yes	8550(e);8555(a-g)	SCP
B&P	8551	Unlawful for unlicensed person fo perform fumigation.	Yes	8555(a-g)	SCP
B&P	8551.5	Unlawful for unlicensed employee to apply pesticides, rodenticides, etc. for Branch 2 or 3	Yes	8551.5,8555(a-g)	SCP
B&P	8552	Unlawful to advertise/represent pest control done on a structure unless work was performed	Yes	8555(a-g)	SCP
B&P	8553	General violation of Chapter 14 or conspiracy to violate Chapter 14 is a misdemeanor.	Yes	Chapter 14,8555(a-g)	State or DA only

Total Sections: 560

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