

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 each pest control activity is obviously subordinate to, generated by, and done in conjunction with, the business’ main purpose of landscape maintenance.

Continued on next page

Unlicensed Pest Control by Maintenance Gardeners, Continued

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

Unlicensed Pest Control by Maintenance Gardeners, Continued

**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

Unlicensed Pest Control by Maintenance Gardeners, Continued

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

Unlicensed Pest Control by Maintenance Gardeners, Continued

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
-