

FINAL STATEMENT OF REASONS AND PUBLIC REPORT  
DEPARTMENT OF PESTICIDE REGULATION

Title 3. California Code of Regulations  
Amend Sections 6128 and 6130  
Amend Section 6130(b) and Renumber to Section 6131  
Pertaining to the Enforcement Response

UPDATE OF THE INITIAL STATEMENT OF REASONS

The originally proposed regulatory action was noticed in the *California Regulatory Notice Register* on January 14, 2011.

During the 45-day public comment period, DPR received comments on the proposed text. The comments are discussed under the heading “Summary and Response to Comments Received” of this Final Statement of Reasons.

DPR made modifications sufficiently related to the original text of the proposed action for the reasons stated below.

- Revised subsections 6128(c)(1)(A) and (c)(2)(A) to make more clear the intent of the originally proposed change. If the county agricultural commissioner's initial enforcement response for a Class A or B violation was to formally refer to the District Attorney, City Attorney, or Circuit Prosecutor, or the Director or Structural Pest Control Board Registrar for a statewide licensing action and the referral was declined, the commissioner shall proceed with an enforcement action.
- Add to subsection 6128(d) the word “initial.” In the case of an incident in which multiple violations are discovered, this will clarify from which occurrence the 60-day time frame begins for the commissioner to submit a decision report to the Director.
- Amend the authority and reference citations in section 6130 to reflect the appropriate Business and Professions Code.

PUBLIC HEARING

A public hearing was not scheduled or held.

SUMMARY AND RESPONSE TO COMMENTS RECEIVED

During the 45-day public comment period, DPR received joint comments submitted by California Rural Legal Assistance Foundation, Californians for Pesticide Reform, Pesticide Watch Education Fund, and California Rural Legal Assistance, Inc.

***Comment No. 1:***

- Support requirements to consider the history of past pesticide use violations, failure to cooperate in an investigation, and any demonstrated disregard for specific pesticide hazards as grounds for levying a higher fine.
- Support to make it clearer that failure to provide safety equipment, observe a buffer zone, or prevent drift contact can be designated as Class A violations even if no immediate illness is documented.
- Support requiring a mandatory fine for Class B violation if the party charged with the violation has committed any Class A or B pesticide violation in the previous two years.

***Response:*** DPR agrees.

***Comment No. 2:*** The concept of “incident” may be inconsistent with the Food and Agricultural Code (FAC) section 12996.5(b) mandate that the exposure of each person to a pesticide that causes acute illness or injury shall constitute a separate violation. Commenter requests removal of “incident” from all locations where proposed or, as an alternative, addition of a clarifying statement that the enforcement response regulations (ERR) not be interpreted to supersede the intent of FAC section 12996.5(b).

***Response:*** The concept of “incident” was proposed to ensure that enforcement actions are supported by the strongest evidence. As proposed, revised regulations would compel a commissioner to act upon the combined evidence from an inspection, a follow-up inspection, and/or an illness investigation. Since all administrative civil procedures are subject to potential judicial review, and in the interests of an overall sense of fairness, bringing the strongest body of evidence possible remains the primary consideration. We do not believe the concept of incident as proposed will compromise the intent or implementation of FAC section 12996.5(b).

***Comment No. 3:*** Proposed 3 CCR section 6128(a) narrows mandatory enforcement requirements to agricultural and structural uses of pesticides and all fumigant uses. We strongly agree that these are high priority areas for pesticide enforcement and do not object to giving CACs some discretion in enforcement for homeowners and some small businesses which infrequently use pesticides. However, at a minimum, all commercial pest control application businesses should be subject to these enforcement requirements for nonfumigant as well as fumigant applications.

***Response:*** DPR proposes to narrow the scope of ERR to agricultural and structural uses of pesticides and all uses of fumigants. Agricultural use includes production agriculture (farming and ranching) and nonproduction agriculture (golf courses, rights-of-way, parks, ditch banks, etc.) Structural use includes all activities of a licensee of the Structural Pest Control Board. The reason for narrowing the scope of ERR is to avoid the unintended consequences of applying specific rules to all situations. CACs retain the ability to take enforcement actions and even to apply the enforcement constructs of ERR (violation classes, fine ranges, etc), as appropriate, to pesticide use situations that are outside the areas of their focused enforcement activities.

***Comment No. 4:*** Concerned about deleting the requirements in proposed 3 CCR section 6130(e)(5) for DPR to inform the CACs on at least an annual basis of violations for which fines have been levied. CACs need to know what fines have been levied in other counties

to fully assess the history of violations for businesses operating in multiple counties. These communications could be made through reference to an obligation to keep the pesticide enforcement database on the DPR Web site up-to-date and instruct the CACs in using it.

**Response:** Commissioners are already aware of fines they have levied themselves. A summary of completed enforcement actions--including date of action, respondent name, code section cited, and fine amount--is available online for general use by the public.

**Comment No. 5:** Concerned that the changes would completely eliminate the requirements for decision reports for Class C violations, so that repeat Class C violations would no longer be classified as Class B violations. Such a broad change will undermine the process of strengthening enforcement and making it more uniform.

**Response:** This is a matter of prioritization of effort. Class C violations by definition are the least egregious. The decision not to take an enforcement action on Class C violations is not an issue that DPR expects to review. This is especially true given that redefinition of the violation Classes (in this rulemaking) will move many violations to Class B that were formerly Class C.

**Comment No. 6:** Concerned that DPR is proposing to specifically classify school, agricultural, and other pesticide use reporting requirements as Class C violations that DPR considers to be "minor infractions," and proposes to allow CACs full latitude in determining the need to take an enforcement action (for any Class C violation).

**Response:** Pesticide use report violations are currently treated as Class C violations in most cases. The proposed ERR would continue that practice as it defines Class B violations as those violating requirements that mitigate health and environmental hazards. Commenter is correct that DPR and others rely on the pesticide use report database as an important tool in regulatory decisionmaking. Due to time lags in reporting, pesticide use report data is most valuable as an aggregated data set. DPR would expect CACs to take enforcement action on egregious violators of pesticide use report regulations.

**Comment No. 7:** The initial statement of reasons does not include any example of recordkeeping violations which should be subject to mandatory fines because they are important components of the regulatory structure.

**Response:** DPR agrees with the commenter that listed elements of the restricted materials program are critical components of the pesticide regulatory structure in California. They are not simple "paperwork" violations and would not be considered appropriate as Class C violations. Omission of this from the Initial Statement of Reasons does not reflect any change in DPR priorities.

**Comment No. 8:** Category C violations which do not require mandatory fines should be limited to truly minor infractions of regulations which do not mitigate risk of adverse effects or pesticide exposure. This could include an isolated instance of filing a late use report or minor obvious mistakes in filling out required use reports and pest control business registration forms or failure to file a report of loss.

**Response:** We agree that these items listed are appropriately Class C violations.

**Comment No. 9:** In 3 CCR sections 6130(e) and (g), text should be added to require that copies of the notices of proposed and final action be sent to any person whose complaint triggered the investigation resulting in the action.

**Response:** The suggestion to send copies of notices of proposed and final actions to complainants does not meet the rulemaking requirement of necessity. Complainants are not a party to, nor do they have special legal standing in, this administrative penalty action process; however, they may request to receive notices directly from the CAC.

**Comment No. 10:** Urge DPR to make further improvements to give both complainants and any employees impacted by alleged violations in a pesticide incident the right to appeal citations or participate in the appeal process, a right currently only afforded to the person or business cited.

**Response:** This recommendation is outside the scope of the proposed regulations.

**Comment No. 11:** The proposed requirement in 3 CCR section 6131 that the licensed or certificated employee must sign a statement indicating that they have read and understood the disciplinary policy should specify that the required statement and the written disciplinary program needs to be in the same language that the employee took the certification test in.

**Response:** In general, DPR supports communication between employers and employees in a language understood by both [see 3 CCR section 6724(c), Handler Training]. In this case the suggestion is not practical. In only one licensing category is an examination administered in a language other than English (maintenance/gardeners). Also, the investigating commissioner has no way to determine in what language the employee took a state licensing examination.

#### COMMENTS RECEIVED DURING THE 15-DAY COMMENT PERIOD

During the 15-day public comment period, DPR received comments from Gary Maxwell, Target Specialty Products. However, the comments were not relevant to the modifications..

#### MANDATE ON LOCAL AGENCIES OR SCHOOL DISTRICTS

DPR has determined that the proposed regulatory action does not impose a mandate on local agencies or school districts requiring reimbursement by the State pursuant to Part 7 (commencing with section 17500) of Division 4 of the Government Code because the regulatory action does not constitute a "new program or higher level of service of an existing program" within the meaning of section 6 of Article XIII B of the California Constitution. DPR has also determined that no nondiscretionary costs or savings to local agencies or school districts will result from this regulatory action.

#### ALTERNATIVES DETERMINATION

The Director has determined that no alternative considered by DPR would be more effective in carrying out the purpose for which this regulation is proposed, or would be as effective and less

burdensome to affected private persons or businesses than the proposed regulatory change.

#### POSTING REQUIREMENT

3 CCR, section 6110 states in part that, “The public report shall be posted on the official bulletin boards of the Department, and of each commissioner's office, and in each District office of the DPR [Division of Pest Management, Environmental Protection and Worker Safety] for 45 days.” DPR has posted its Initial Statement of Reasons and Public Report on its official bulletin board, which consists of the Department's Internet Home Page <<http://www.cdpr.ca.gov>>. In addition, copies were provided to the offices listed above for posting.