

INITIAL STATEMENT OF REASONS AND PUBLIC REPORT
DEPARTMENT OF PESTICIDE REGULATION

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

This is the Initial Statement of Reasons required by Government Code section 11346.2 and the public report specified in section 6110 of Title 3, California Code of Regulations (3 CCR). Section 6110 meets the requirement of Title 14 CCR section 15252 and Public Resources Code section 21080.5 pertaining to state regulatory programs certified under the California Environmental Quality Act.

SUMMARY OF PROPOSED ACTION/PESTICIDE REGULATORY PROGRAM
ACTIVITIES AFFECTED

The Department of Pesticide Regulation (DPR) proposes to amend 3 CCR sections 6128 and 6130, and amend and renumber section 6130(b) to section 6131. The pesticide regulatory program activities that will be affected by this proposal are those pertaining to pesticide enforcement. In summary, the proposed regulatory action would revise appropriate enforcement responses to be taken by the county agricultural commissioner (CAC) each time a violation(s) occurs to improve effectiveness and clarity of the regulations.

SPECIFIC PURPOSE AND FACTUAL BASIS

DPR protects human health and the environment by regulating pesticide sales and use and by fostering reduced-risk pest management. DPR's strict oversight begins with product evaluation and registration; and continues through statewide licensing of commercial and private applicators, pest control businesses, and consultants; environmental monitoring; and residue testing of fresh produce. This statutory scheme is set forth primarily in Divisions 6 and 7 of the Food and Agricultural Code (FAC). CACs have joint authority with DPR in enforcing pesticide laws and regulations. Field enforcement on a local level is carried out by the CACs, under the supervision of DPR. The goal of the enforcement programs is to protect public health, property, pesticide handlers and fieldworkers, and environment of the State of California.

Consistent statewide enforcement of California's environmental laws is paramount for the protection of California's people, property, and the environment. In 2006, DPR adopted enforcement response regulations (ERR) to strengthen environmental enforcement and improve statewide consistency of enforcement responses used by CACs when acting upon pesticide violations. By creating a violation classification system and enforcement response procedure, CACs throughout California are able to follow the same guidelines.

The primary goal of ERR is to ensure that California's robust pesticide laws and regulations are enforced in a uniform manner by the 55 CACs. Although the CAC is necessarily sensitive and responsive to the environmental, pest control, and business needs of their county, they enforce pesticide regulations within the legal and policy framework of the statewide DPR program. DPR works to ensure uniform implementation through its coordination of activities.

It must be a goal of any enforcement program to foster a sense of fairness in all participants. CACs conduct 15,000 to 18,000 pesticide inspections annually, leading to most enforcement actions. A smaller portion of enforcement actions are based on investigation of pesticide exposure-related illness episodes and investigations of other complaints. Belief in the fairness of the enforcement program is critical to the accuracy of the inspection and acceptance of the outcome. Under this principle, everyone involved in the regulatory process, including administrators and inspectors, as well as the regulated public, need to accept the fundamental fairness of the rules being enforced and the outcome for violators.

The proposed revisions will improve effectiveness and clarity of the regulations, and also help CACs prioritize their efforts toward the violations most likely to cause harm to people and the environment. They, like most public agencies, are increasingly required to accomplish more with reduced staff time and funding available. Enforcement actions require careful assembly of case evidence and preparation for hearings and appeals, making them a relatively resource-consuming part of the CACs' pesticide program.

- Amend 6128 - Enforcement Response

DPR proposes to revise the section title to "Enforcement Response to Violations" for clarity.

The current scope of regulations includes violations of all uses of pesticides, including agricultural, structural, industrial, institutional, and home. Given the greater toxicity, quantity, and frequency-of-use of pesticides in agricultural and structural pest control, and fumigations (which may be agricultural, structural, or industrial use), those work places are subject to a greater degree of enforcement scrutiny. DPR believes that those businesses and work places should be held to high standards of understanding and obeying laws and regulations governing pesticide use. The prescriptive ERR requirements were designed to be applied to those situations. Other uses of pesticides (where the enforcement profile is lower) are usually incidental to other activities. The proposed revisions narrow the prescriptive requirements to pesticide use situations of higher enforcement priority (agricultural and structural use and all uses of fumigants), although CACs would retain authority to levy fines for all pesticide use violations as appropriate for the situation. All requirements would continue to apply to violation incidents in agricultural (including non-production agriculture) and structural use situations plus all uses of fumigants.

DPR proposes to amend section 6128(a) to allow the CAC to comply with provisions of this section as a related group of violations. All documents relating to a single incident can be aggregated to support a stronger enforcement action.

Proposed subsection (b) clarifies that the terms defined also apply to sections 6130 and 6131, and amends the term "decision report" for clarity purposes. DPR proposes to add the definition of "incident." The addition of the concept of an "incident," allows CACs the flexibility to combine related compliance actions, such as inspection reports, follow-up inspections, illness investigations, and complaint investigations into a single case file. The intent is to contribute to stronger case files for enforcement actions and improve flexibility in CAC resource allocation.

Existing subsection (c) sets up an enforcement response structure designed to be used based on the type of violation "class" specified in section 6130. Section 6130 identifies three types of class violations--A, B, and C. These classes are based upon the seriousness and potential harm to public health, worker safety, and the environment. CACs would respond to each violation with an enforcement response appropriate to that violation class.

DPR proposes to amend subsection (c) to require the CAC to respond with an enforcement response for each incident instead of each violation. As previously mentioned, this allows CACs the flexibility to combine related compliance actions, such as inspection reports, follow-up inspections, illness investigations, and complaint investigations into a single case file, and improve flexibility in CAC resource allocation.

In subsections (c)(1)(A) and (c)(2)(A), DPR proposes to delete formal referral to the Attorney General for Class A and B violations. It is inappropriate for CACs to refer directly to the Attorney General. For cases requiring criminal prosecution it is appropriate for CACs to refer to the county's District Attorney. If a case is not accepted by the District Attorney for investigation, it remains appropriate for civil penalty action. When investigation for statewide licensing action is appropriate, CACs refer to DPR or the Structural Pest Control Board Registrar.

Current enforcement response for a Class B violation includes a compliance action with a decision report, provided there has not been a compliance action for a violation in the same class within two years of the current alleged violation. DPR proposes to amend subsection (c)(2)(C) to allow a compliance action with a decision report, provided there has not been a violation in Class A or B within two years of the current violation. The purpose of this requirement is to ensure that a civil penalty action is taken on persons committing repeat violations within two years. The proposed change clarifies that a repeat violation includes a history of either a Class A or B violation.

It is believed that in some situations where a Class B or Class C violation has occurred, compliance can be met without the necessity of taking an enforcement action. Enforcement responses for these classes allow a CAC to determine, in specified situations, if a compliance action is more appropriate. However, in some cases when a compliance action is determined to be the appropriate response, the CAC must submit a decision report to the Director for concurrence. The decision report allows DPR to monitor and ensure that like violations are being treated the same in each county, and consistent statewide enforcement is taking place.

Staff time is spent completing decision reports for violations not deemed significant enough for an enforcement action. While this process contributes to the goal of statewide uniformity for violations of moderate severity, it is seen as an unnecessary draw on resources for minor

violations. Since the proposed types of violations eligible for Class C designation will be severely reduced by the new definition, DPR proposes to eliminate in subsection (c)(3)(B) the need for decision reports for Class C violations. For similar reasons, CACs would not be required to take an enforcement action on the most minor, or Class C, violations under the proposed revisions. Enforcement actions are very time consuming for CACs working with diminishing resources. One of the goals of the proposed revisions is to allow direction of those resources to incidents where future harm might be prevented or violations are more egregious. By limiting Class C violations to only the most minor infractions, DPR proposes to allow CACs full latitude in determining the need to take an enforcement action.

Subsection (d) specifies the information required to be submitted to the Director when a decision report is required. Currently, the decision report must be submitted within 30 days of the date of the compliance action for concurrence. DPR proposes to extend the time in which the report is to be submitted to the Director to within 60 days. Completing a decision report includes the determination not to seek an enforcement action, which may itself require follow-up inspections. Providing additional time for submission of a decision report for those cases not requiring civil penalty action will not adversely affect the enforcement process. Additional proposed changes as to what must be contained in the reports are for clarity purposes.

Existing subsection (e) requires CACs to provide the opportunity to the District Attorney, City Attorney, or Circuit Prosecutor to participate in a priority investigation (as defined in the 2005 Cooperative Agreement or subsequent modifications to that agreement between DPR, the California Agricultural Commissioners and Sealers Association, and the U.S. Environmental Protection Agency, Region IX) and/or pursue a civil or criminal action if other than a compliance action is being contemplated. DPR proposes to exclude "cases of intentional ingestion" from this requirement since these rarely merit further investigation. In the unusual circumstance that warrants criminal investigation, CACs are still able to refer the case.

- Amend section 6130 - Civil Penalty Actions by Commissioners

When taking civil penalty action pursuant to FAC section 12999.5, CACs use the provisions of this section to determine the violation class and the fine amount. DPR proposes to amend subsection (a) to specify that these actions pertain to incidents or violations related to agricultural or structural use of pesticides and all uses of fumigants, and that this section may also be used to determine the violation class and fine amount for violations involving other uses of pesticides. For reasons described in amendments to section 6128 above, the priorities of CAC educational and enforcement activities are focused on the agricultural and structural use of pesticides. Except for fumigants, other uses (industrial, domestic, and institutional) are much lower profile.

The class of violation--A, B, or C--is based on definitions provided in current subsections 6130(a)(1)(A)-(C). The intention was for Class A to be the most serious, Class B less serious, and Class C the least serious violation. The current definitions do not sufficiently distinguish between more and less serious incidents. DPR proposes to renumber subsection (a)(1) to subsection (b); revise and provide a clear criteria for violations that are in Class A, B, or C; and clarify that CACs are responsible for designating the violation class.

Proposed subsection (b)(1)(A) provides a clear criteria for which Class A might be appropriate, given the circumstances of the incident. These aggravating circumstances significantly broaden the criteria for Class A determination and include all violations that caused a hazard. CACs have a general understanding of the toxic, chemical, and physical properties of the pesticides being regulated and are able to distinguish hazardous from nonhazardous situations. In addition to violations causing a hazard, the CAC could make a determination in subsection (b)(1)(B) that Class B violations having one or more aggravating circumstance could be elevated to Class A. Those aggravating circumstances are necessary to provide deterrent to respondents having an egregious history of violations, those who refuse to cooperate in an incident investigation, or demonstrate a disregard for a pesticide's specific hazards.

Proposed subsection (b)(2) provides clear definition for violations that are Class B. These are violations of regulations that mitigate the risk of adverse health, property, and environmental effects. Note that these could be elevated to Class A by the aggravating circumstances discussed above. The phrase "violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects" is intended to simplify the CAC's decisionmaking. DPR believes the determination of whether a regulation mitigates adverse effects is less subjective than determining whether a violation "posed a reasonable possibility of creating a health or environmental effect." By simplifying this determination, the proposed wording will also have the effect of defining some violations as Class B that would currently be treated as Class C.

Proposed subsection (b)(3) provides a clearer definition of a Class C violation. These are violations of regulations that do not mitigate the risk of adverse health, property, and environmental effects, including 3 CCR sections 6624 through 6628, and FAC sections 11732, 11733, and 11761. While these sections indirectly enhance the effectiveness of DPR's pesticide regulatory program, they do not directly contribute to public health or protection of property or the environment.

Some examples of how the proposed changes would clearly distinguish between more and less serious violations.

- A violation for not wearing required gloves when applying a low-toxicity pesticide. Currently, this could be treated as a Class B or C violation due to ambiguous wording of class definitions. With the proposed amendments, this violation must be treated as Class B or higher.
- A violation for not wearing required gloves or eyewear when applying a high-toxicity pesticide. Currently, this is defined as a Class B violation and rarely as a Class A. As proposed, if the CAC determines that the respondent "demonstrated a disregard for specific hazards of the pesticide used," it would be a Class A violation.
- A violation for inadvertently spraying children with a low-toxicity pesticide while they are waiting for a school bus on public road. Currently, this may be defined as Class A or B violation. As proposed, this must be treated as Class A for meeting the criterion of "caused, or could have caused a health, . . . hazard."

After determining the class of violation, current regulations specify the possible outcomes of the case. Fine ranges were previously included with each Class definition. DPR proposes to consolidate civil penalty fines under subsection (c). The fine ranges of \$50 to \$400 for Class C, \$250 to \$1,000 for Class B, and \$700 to \$5,000 for Class A violations remain unchanged.

Current subsections (a)(1)(A) and (B) attempt to increase fines by escalating "repeat" Class B violations to the Class A fine range. This has proven cumbersome and counterproductive. The "repeat" clause applies only to fully-adjudicated cases as described in existing subsection (a)(2). Only a violation occurring within a two-year look-back period is treated as a potential repeat violation. Prosecution of a second violation that occurs during the time it takes the initial case to be fully adjudicated (which is often a year or more) is not defined as a repeat. Also, if no civil penalty is taken at the first violation, the second is not defined as a repeat offense.

The consequence of a repeat violation is escalation to the next highest fine range. Since there is no higher fine range than Class A, repeats of Class A violations are not affected. When the second Class B violation does occur within two years of a fully adjudicated first violation, current regulations require the fine to be issued from the Class A fine range. (It remains a Class B violation.) In this unusual circumstance, there is often a sense that the violator is being unfairly treated. In this case the fine escalation does not result from the seriousness of the violation, but an unlucky sequencing of events that are mostly unrelated to the violation being considered.

The proposed amendments change the approach to fine escalation for repeat violators by keeping fines within the prescribed fine ranges for each class of violation, but requiring use of the respondent's entire compliance history. Previous violations must have been documented by a compliance or enforcement action, but need not have been fully adjudicated. Therefore, fine-setting must also account for the severity of actual or potential adverse effects caused by the violation as proposed in subsection 6130(d).

Section 6130(a)(2) clarifies what determines a "repeat" violation. DPR proposes to delete this subsection for reasons mentioned above. A portion of current subsection (a)(3) is proposed to be deleted as it is no longer applicable with the proposed deletion of existing subsection 6130(a)(2). The remaining requirement of the CAC to send a copy of the notice of proposed action to the Director and the respondent has been moved to proposed subsection (e). Current subsection (a)(4) has been renumbered to proposed subsection (f). The changes made to proposed subsections (e) and (f) were for clarity purposes.

DPR proposes to delete subsection (a)(5) that requires DPR, at least annually, to inform commissioners of violations for which fines have been levied. This requirement serves no purpose since it requires DPR to inform CACs of their own fine-levying activity.

Proposed subsection (g) requires the CAC to send a copy of the final action to the Director no later than the time the notice is provided to the respondent. This requirement is needed as part of DPR's oversight role with CACs.

The authority and reference citations were revised to accurately reflect the correct sections.

- Amend Section 6130(b) and Renumber to Section 6131 - Actions Allowed Against Licensed or Certificated Employees

Existing subsection 6130(b) is proposed to be renumbered to create section 6131 - Action Allowed Against Licensed or Certificated Employees. Creating a new section is more appropriate as this section will further clarify the criteria that must be met before CACs can take an enforcement action against an employee.

Existing regulation specifies the conditions in which a CAC may bring an action against an employee who failed to use personal protective equipment or other safety equipment required by section 6702(c). DPR proposes to clarify in subsection (a) that this also includes failure to use personal protective equipment required on pesticide product labeling. Also, FAC section 12999.5 and Business and Professions Code section 8617 are proposed to be deleted as reference to these sections are unnecessary.

DPR proposes to move current condition (a)(6) and rewrite as (a)(4) to require that before licensed or certified employees are cited, they must have acknowledged by signature having read and understood the employer's written workplace disciplinary action policy for failure to properly use the personal protective equipment. The signature will provide the commissioner with a measurable way to determine the employee had knowledge.

DPR proposes to delete subsection (a)(5) that requires the CAC to evaluate and be prepared to prove that the employer's supervision was adequate before taking a civil penalty action against the employee. DPR has determined it is extremely difficult for CACs to objectively establish the adequacy of an employer's supervision and places CACs in the untenable position of assessing facts outside the purview of their knowledge and expertise.

Proposed subsection (b) requires a Notice of Proposed Action to fine an employee for failure to use personal protective equipment must include a copy of the text of subsection (a). Since civil penalty actions, when taken, are usually taken against the company/employer, employees are generally unaware of the conditions required for the CACs to charge an employee. Likewise, employees are generally unprepared to defend themselves in an administrative hearing. This requirement provides some of the facts that transferred culpability to them from the employer.

CONSULTATION WITH OTHER AGENCIES

DPR consulted the California Agricultural Commissioners and Sealers Association at its regional area groups meetings during the development of the proposed regulations.

ALTERNATIVES TO THE PROPOSED REGULATORY ACTION [GOVERNMENT CODE SECTION 11346.2(B)]

DPR has not identified any feasible alternatives to the proposed regulatory action that would lessen any possible adverse economic impacts, including any impacts on small businesses, and invites the submission of suggested alternatives.

ECONOMIC IMPACT ON BUSINESSES

The proposed regulations will not have a significant adverse economic impact upon businesses. The document relied upon to make this determination is listed in the "Documents Relied Upon" section of this initial statement of reasons and is available from DPR.

IDENTIFICATION OF ANY SIGNIFICANT ADVERSE ENVIRONMENTAL EFFECT THAT CAN REASONABLY BE EXPECTED TO OCCUR FROM IMPLEMENTING THE PROPOSAL

DPR's review of the proposed action showed that no significant adverse environmental effect to California's air, soil, water, plants, fish, or wildlife can reasonably be expected to occur from implementing the proposal. Therefore, no alternatives or mitigation measures are proposed to lessen any significant adverse effects on the environment.

EFFORTS TO AVOID UNNECESSARY DUPLICATION WITH FEDERAL REGULATIONS

The proposed regulatory action does not duplicate or conflict with the Code of Federal Regulations.

DOCUMENTS RELIED UPON

- Economic Analysis for Proposed Regulation Department of Pesticide Regulation No. 10-005. California Environmental Protection Agency, Economic Studies Section, Air Resources Board. Memorandum from Stephen Storelli to Linda Irokawa-Otani, Regulations Coordinator, DPR. October 28, 2010.