Pesticide Use Enforcement Program Standards Compendium

Volume 8

Guidelines for Interpreting Pesticide Laws, Regulations, and Labeling

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State of California
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Pesticide Use Enforcement
Program Standards Compendium

General Overview

Regulating pesticides in California is a joint responsibility of the Director of the Department of Pesticide Regulation (DPR) and county agricultural commissioners (CACs). Food and Agricultural Code (FAC) section 2281 provides that DPR is responsible for overall statewide enforcement and for issuing instructions and making recommendations to the CACs. The CACs are responsible for local administration of the pesticide use enforcement program. Several other FAC sections (11501.5, 12977, 12982, 14004.5, and 15201) state that the CACs work under the direction and supervision of the Director.

The *Pesticide Use Enforcement Program Standards Compendium* is a series of eight manuals that contain pesticide use enforcement directives, interpretations, recommendations, and expectations. The *Compendium* represents the Pesticide Use Enforcement Program's "standard operating procedures."

The contents of the *Compendium* supersede any position or direction on these subjects contained in previous letters to CACs or earlier manuals. Omitted items not in conflict with directions or positions contained in the *Compendium* may, however, continue to be used for interim guidance. DPR reserves the right to re-examine omitted topics and may readopt them or develop a new position or direction when necessary.

It should be noted that the procedures described in this document are intended solely for the guidance of employees of DPR and CACs. They do not constitute rulemaking by DPR. DPR and CACs may deviate from these procedures provided the deviation does not adversely impact the effectiveness of the county pesticide enforcement program or hinder effectiveness of DPR in fulfilling its responsibilities for the overall statewide enforcement program oversight.

New and updated procedures, policies, and interpretations will be issued in the form of updates to the *Compendium*. Suggestions for changes, additions, or deletions to the *Compendium* should be made to DPR. The *Compendium* will be the reference against which county programs are evaluated. County performance can impact the mil assessment distribution money it receives.

The following describes each of the eight volumes of the *Compendium*.

Volume 1: **General Administration of the Pesticide Use Enforcement Program**
General authority; Pesticide Regulatory Activities Monthly report instructions; pesticide use reporting; memorandum of understanding information; county pest control registration; local administration of the Licensing program with interpretations of law or regulation sections relating primarily to the need for one of the various pest control licenses; and general procedures and expectations not specifically covered in other volumes.

General Overview, Continued

Volume 2: **Laws and Regulations**
Current text of pesticide-related laws and regulations, including excerpts from Food and Agricultural Code (FAC) laws and Title 3, California Code of Regulations (3 CCR); Business and Professions Code provisions and Title 16 (16 CCR) regulations; Health and Safety Code sections (illness reporting, vector control, etc.); and Labor Code sections (farm labor contractors).

Volume 3: **Restricted Materials and Permitting**
The California Environmental Quality Act (CEQA) and the permit program's Environmental Impact Report (EIR) functional equivalency; permit issuance process and procedures; DPR "recommended" permit conditions; and permit appeals.

Volume 4: **Inspection Procedures**
Field procedures for pesticide use enforcement inspections and designing a neutral scheme inspection program.

Volume 5: **Investigation Procedures**
Guidance on planning and conducting pesticide investigations and reporting the findings; preserving evidence; chain of custody; and report writing.

Volume 6: **Enforcement Toolbox**
Interpretations of law and regulation provisions relating to the enforcement response regulations; making decisions on violations found during an investigation and what action to take; citable sections; regulatory toolbox; decision trees; statute of limitations; and a glossary.

Volume 7: **Hearings Source Book**
Guidance on how to draft the Notice of Proposed Action (NOPA); conduct administrative civil penalty hearings; adopt final actions; and handling appeals to the director.

Volume 8: **Guidelines for Interpreting Pesticide Laws, Regulations, and Labeling**
DPR interpretations of various sections of the law and regulations. Guidance on interpreting pesticide labeling, including interpretations of some general and specific labeling statements. It is cross-indexed by subject and section of the law or regulation addressed.

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About this Manual

Abbreviations

Throughout this manual, we will refer to the codes using these abbreviations.

Code	Abbreviation
California Business and Professions Code	B&PC
California Food and Agricultural Code	FAC
Federal Insecticide, Fungicide, and Rodenticide Act	FIFRA
Title 3, California Code of Regulations	3 CCR
Title 16, California Code of Regulations	16 CCR
Title 40, Code of Federal Regulations	40 CFR
United States Code	U.S.C.

Throughout this manual, we will refer to agencies using these abbreviations.

Agency	Abbreviation
County Agricultural Commissioner	CAC
California Department of Industrial Relations	DIR
California Department of Pesticide Regulation	DPR
California Department of Public Health	CDPH
California Environmental Protection Agency	Cal/EPA
Division of Occupational Safety and Health	Cal/OSHA
Enforcement Branch Liaison	EBL
Material Safety Data Sheet	MSDS
Occupational Safety and Health Administration	OSHA
Pesticide Safety Information Series	PSIS
Structural Pest Control Board	SPCB
United States Environmental Protection Agency	U.S. EPA
United States Food and Drug Administration	FDA

Disclaimer

The mention of commercial products, their source, or their use in connection with material reported here is not to be construed as either actual or implied endorsement of such product.

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Chapter 1

General Interpretation Guidelines

In this chapter This chapter contains the following topics.

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Section 1.1

Agricultural and Non-Agricultural Pest Control Use

Interprets FAC sections 11403 and 11408; 3 CCR section 6000

How pest control activity is divided and why it is important

Food and Agricultural Code (FAC) section 11408 provides the criteria to divide pest control activities into agricultural use and non-agricultural use. Pest control use is divided into these two categories by listing what activities are not agricultural uses. This classification is important because it is used to determine the applicability and implementation of other pesticide sale and use requirements.

What is pest control?

Section 11408 describes the activity it is classifying as agricultural and non-agricultural by using the definition of "pest control" found in section 11403. The most complete understanding of what "pest control" includes requires taking into account the definition of "pest" (*FAC section 12754.5*) and "pesticide" (*FAC section 12753*). Combining these sections, "pest control" is the use of any pesticide, method, or device to:

- Control (including prevent, repel, or mitigate) any pest (insect, predatory animal, rodent, or weed)
- Control a plant disease (viruses, fungi, bacteria, or other microorganism)
- Regulate growth by the direct application of a plant growth regulator (defined by *FAC section 12756*)
- Defoliate plants

Continued on next page

What pest control does not include

Pest control does not include the following:

- Monitoring for pest presence (U.S. EPA interpretation)
- The use of a tool or implement (hoe, rake, disc, or harrow) to control weeds (DPR licensing policy)
- The use of a fertilizing material to maximize potential plant growth (as opposed to stimulate, regulate, or alter through physiological action)
- The use of a substance (drug) to control, diagnose, mitigate, treat, or prevent disease in man or other animals, or substances used to control certain external pests considered animal drugs regulated by FDA[1].
- The control of microorganisms living in or on humans or animals. (These are not pests as defined in FAC section 12754.5.)

Agricultural pest control use categories

All pest control use that does not fit into the listed non-agricultural use categories is agricultural use. This includes watersheds, rights-of-way, landscaped areas (golf courses, parks, recreation areas, cemeteries, etc.).

Production agriculture: A subcategory has been created for pest control conducted in the "production for sale of an agricultural commodity" or "agricultural plant commodity" for the purpose of triggering certain requirements related to notice/use reporting and worker safety[2]. Commodity is defined as any unprocessed product of farms, ranches, nurseries, or forests (except livestock, poultry, and fish). (*Title 3, California Code of Regulations [3 CCR] section 6000*)

Non-production agriculture: All other agricultural use in non-production agriculture.

Continued on next page

[1] A 1971 Memorandum of Understanding (MOU) between U.S. EPA and the Food and Drug Administration (FDA) (FDA-225-73-8010; available for review at http://www.fda.gov/oc/mous/domestic/225-73-8010.html) outlines the basic jurisdictions of each Agency with respect to products that have been classified as a "*New Human or Animal Drug.*" The MOU states that FDA is the Agency responsible for regulation of products that are *classified as Human or Animal Drugs*, even if a product could be considered a pesticide by the other Agency.

[2] See 3 CCR sections 6618, 6619, 6623, and 6626 relating to notice and use reporting; and sections 6724, 6730, 6731, 6732, and 6761.1 related to worker safety.

Non-agricultural pest control use categories

Non-agricultural pest control use includes:

- **Home:** Use within, or in the immediate environment of, a household. (*3 CCR section 6000*)

- **Industrial:** Use within the confines of, or on property necessary for, the operation of factories, processing plants, packinghouses, or similar facilities, or use for or in a manufacturing, mining, or chemical process. In California, industrial use does not include use on rights-of-way. Post-harvest commodity fumigations at facilities or on trucks, vans, or rail cars are normally industrial use. (*3 CCR section 6000*)

- **Institutional:** Use within the confines of, or on property necessary for the operation of, buildings such as schools (playgrounds are necessary for the operation of a school), hospitals, office buildings, libraries, or auditoriums. When a licensed Structural Pest Control Operator treats these buildings, it is structural use. Landscaping of walkways, parking lots, and other areas immediately adjacent to these buildings is institutional. Landscaping of larger, more independent areas is not considered institutional. (*3 CCR section 6000*)

- **Structural:** Use by a licensed Structural Pest Control Operator within the scope of their license. (*3 CCR section 6000*)

- **Vector control:** Use by certain vector control (mosquito abatement) districts. (*FAC section 11408(e)*)

- **Veterinarian:** Use by or pursuant to the written prescription of a licensed veterinarian within the scope of their practice. There is no requirement for veterinarians to write prescriptions to themselves, so although not specifically mentioned in the law, by policy, veterinarians are covered by this use pattern. (*3 CCR section 6000*)

Continued on next page

Classifying use -- examples

Both the site or situation of use and the user must be considered to determine how a particular use is classified. A particular use in one context may be classified differently in another.

For example:

- A tree can be residential landscape (home), institutional landscape (institutional), or watershed (non-production agriculture) depending upon where it is growing. However, if that same tree is growing in an orchard, it would be production agriculture.
- Milk-handling equipment located on a dairy would be agricultural, while similar equipment located at a milk processing plant would be industrial.
- An agricultural commodity fumigated in storage on a farm could be production agriculture while that same commodity fumigated in storage at a processing plant would be industrial.
- A swimming pool that is part of a residential property would be home use. A city, school, or other public pool would generally be institutional.

Difficult cases

Classification is important because different regulatory requirements apply to each class. The difference between production agriculture and non-agriculture use often requires more analysis. Generally, treatments done by and on an agricultural production establishment tend to be production agriculture if the physical form of the commodity has not been changed (simply drying a commodity is not normally considered a change in its form). This rule may not apply if the agricultural production establishment also does treatments as a service or handles commodity from other producers. In that case, they are considered to have established an industrial facility adjacent to their agriculture production enterprise.

This general rule also applies to packing facilities. Packing produce in the field as part of the harvesting operation is normally considered production agriculture. However, if the agricultural production establishment has a separate packing facility, it would usually be considered an industrial facility and use in that situation would be considered industrial.

Difficult cases (continued)

A unique situation is created by items such as drip lines and other irrigation systems, farm roads, egg-handling equipment, milk-handling equipment, and other similar items. While at first glance they would seem to be production agriculture, at least on a farm, their relationship to production is indirect, rather than direct. Treating weeds in ditches, algae in drip lines, and sanitizing egg or milk-handling equipment are considered non-production agricultural uses.

Federal labeling definition is not the same

The California definition of agricultural use and non-agricultural use was created to determine the applicability of requirements related to licensing, restricted material permits, worker protection, and pesticide use reporting[3]. The definition of agricultural use on federal pesticide labels is different and is determined by federal law. The federal definition is more closely related to what DPR would call production agriculture. Therefore, when interpreting pesticide labeling statements such as, "for use in agricultural areas" or "for use in non-agricultural areas" the key factor is whether or not the pesticide is being used to produce an agricultural commodity.

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[3] See FAC sections 11407, 11407.5, and 11410 related to licensing; 3 CCR sections 6618, 6619, 6623, and 6626 related to notice and use reporting; sections 6724, 6728, 6730, 6731, 6732, and 6761.1 related to worker safety; and sections 6420 and 6430 related to restricted material permits.

Agricultural and Non-Agricultural Pest Control Use, Continued

Production Agricultural Use*:

- Apiaries
- Aquaculture
- Christmas tree production
- Crop production (orchards, groves, fields)
- Crops grown for seed
- Drying product in the field
- Egg production
- Feed and forage
- Field packing
- Fish production
- Flowers (cut and sold)
- Forests/timber production
- Greenhouse/nursery/mushroom production
- Livestock production (meat)
- Milk production
- Post-harvest commodity treatment on the farm
- Poultry production (meat/eggs)
- Preplant soil treatments
- Rangeland and pasture
- Research (production)
- Tree hole fumigation
- Turf (grown for sod)
- Washing produce in the field

Non-Production Agricultural Use*:

- Cemeteries
- Ditches and ditch banks
- Drip lines
- Egg handling equipment (on farms)
- Farm roads
- Field borders and headlands
- Golf courses
- Greenbelts
- Greenhouse/nursery/mushroom operations (outside general weeds and pests, as well as pest control within alley ways and other interior areas)
- Ground water recharge ponds
- Highway medians
- Irrigation canals
- Irrigation systems (drip lines)
- Lakes, rivers, and streams
- Milk-handling equipment (on farms)
- Mushroom (post-harvest kill)
- Parks
- Railroad shoulders
- Recreation areas
- Research (commodity destroyed)
- Reservoirs
- Roadsides
- Rights-of-way
- Uncultivated (fallow) agricultural ground

Continued on next page

Non-Agricultural Use*:

- Airports-*Industrial*
- Amusement parks-*Institutional*
- Apartments/townhouses-*Home*
- Auditoriums-*Institutional*
- Clubhouse landscape-*Institutional*
- Condominiums-*Home*
- Construction sites-*Industrial*
- Food manufacturing plants-*Industrial*
- Grain elevators (production agriculture if on farm)-*Industrial*
- Home gardens (no distribution)-*Home*
- Homeowner Association (HOA) Property (except golf courses)
- Homes and residences-*Home*
- Hospitals-*Institutional*
- Libraries-*Institutional*
- Lumber yards-*Industrial*
- Mobile home parks-*Home*
- Mosquito abatement districts-*Vector control*
- Nurseries (retail non-production)-*Industrial*
- Office complex (around outside)-*Institutional*
- Office parking lots-*Institutional*
- Oil wells-*Industrial*
- Packing houses-*Industrial*
- Paper mills-*Industrial*
- Pet animals-*Home*
- Ports-*Industrial*
- Post harvest commodity treatments-*Industrial*
- Prescription from veterinarian-*Veterinarian*
- Ranchette pasture (no distribution)-*Home*
- Restaurants-*Industrial*
- Schools (buildings and grounds)-*Institutional*
- Seed treatment-*Industrial*
- Sewage treatment plants-*Industrial*
- Sewer lines-*Industrial*
- Shipyards-*Industrial*
- Shopping malls (inside or outside)-*Institutional*
- Swimming pools-*Various*
- Uncultivated non-agricultural ground-*Various*
- Water treatment plants-*Industrial*
- Wood treatment plants-*Industrial*
- Zoos-*Institutional*

*The most common designation is indicated in italics. However, as previously discussed in this document, some of these use designations may change depending upon the setting or the status of the user.

Section 1.2

Commodity Seizure or Harvest Prohibition

Interprets FAC sections 12501, 12504, 12601, 12648, 12672, and 12673

Introduction

FAC sections 12501 and 12504 define produce as any food (for man or animals) in its raw or natural state. Attorney General's opinion no. 60/89 finds that pea vines and shelled peas, shelled nuts (walnuts), honey, milk and cream, pelleted alfalfa hay, ground almond hulls, chopped corn plants, and meat are all "raw agricultural products" subject to the law. Butter is not a raw agricultural product.

While the enforcement of pesticide residue tolerances is primarily a DPR responsibility, CACs have a role particularly in cases where commodity is unharvested or there is misuse or a preharvest interval violation. This section is included to give a better understanding of how CACs may fit into the overall program. Priority investigation crop loss criteria should be considered in these cases.

FAC section 12601 allows DPR to seize any produce (including unharvested produce, if it is within one week of being in a harvestable condition) suspected of carrying an illegal residue. If not sampled previously, samples confirming the illegal residue must be taken and analyzed within 24 hours (*FAC section 12604*). The traditional routine procedure for responding to a finding of illegal residue is found in FAC sections 12601-12606. These sections outline a comprehensive due process procedure that allows DPR to seize and hold the produce and includes provisions for commodity reconditioning or byproduct use. This section **does not authorize** DPR to order the disposal or destruction of the commodity.

General due process requirements

The statutes clearly outline due process procedures only for FAC section 12648 actions. This does not mean that there are not due process requirements for other actions outlined. For other than section 12648 actions, due process requirements are based on case law established by the courts, based on the Constitution. The closer we adhere to the procedures outlined in section 12648, the stronger is our position that we have given adequate due process in these other actions. See Compendium Volume 3, Restricted Materials and Permitting, for a general discussion of due process requirements.

Continued on next page

NTE residues resulting from unintentional use

DPR will generally handle "no tolerance established" (NTE) residue events that may have resulted from drift or other unintentional contamination, including reasonable labeling misinterpretation, pursuant to FAC section 12601. This section can be used even when there is some evidence of an illegal use. This would allow for reconditioning of the commodity, in these cases.

FAC section 12642

FAC section 12642 declares that any produce with an illegal residue is a public nuisance. The following sections (FAC sections 12643-12646) outline the procedure for DPR to take legal action to force disposal or destruction of the commodity. Due to the perishable nature of most produce, this provision is seldom used.

FAC section 12672 allows DPR or the CAC to prohibit harvest if a preharvest interval has not been complied with, but only until the interval has expired. In these cases, no laboratory analysis confirming residue is necessary. However, even though laboratory analysis demonstrates that the crop does not contain pesticide residues in excess of established tolerances, harvest prior to the expiration of a preharvest interval is a violation of FAC section 12973 and action should be taken on that violation consistent with the Enforcement Response Regulations (3 CCR sections 6128 and 6130). DPR will not be a participant in any agreement to facilitate a violation of the law. In any willful violation of this section our further responsibility is to protect the public from the possibility of any illegal residues through appropriate measures.

FAC section 12673 allows DPR or the CAC to prohibit the harvest of any produce that carries pesticide residue in excess of permissible tolerance. Even though field samples show an illegal residue, the plant, crop, or commodity, as marketed, may be legal due to residue degradation, growth dilution, trimming, or washing. This section should be used in cases of drift or reasonable label misinterpretation.

When illegal residues are suspected and no confirming analysis has been performed, DPR or county staff should collect samples and submit them to CDFA's Center for Analytical Chemistry for analysis. Sampling should be done in accordance with official sampling procedures of DPR.

Continued on next page

FAC section 12642 (continued)

If further follow-up sampling and analyses are necessary, the farm operator, packinghouse, etc., should use the services of an accredited commercial laboratory. When accredited commercial laboratory results of a properly collected sample show residues to be legal, a confirming DPR sample would not normally be required, however, a sample may be submitted to the Center for Analytical Chemistry whenever thought to be necessary.

FAC section 12648

FAC section 12648 allows DPR to seize or prohibit harvest of any plant, crop, or commodity that has been "intentionally" treated with a pesticide that was not registered for that commodity. This section does not use the word "intentionally" but does appear to contemplate residue from "intentional" use rather than accidental contamination by use of the word "treated."

The term "pesticide" as used in this section means active ingredient (substance) as defined in *FAC section 12753* rather than pesticide product. This is consistent with the stated purpose of preventing the gaining of an "unfair business advantage" through use of an unregistered pesticide substance. Also consider *FAC section 12995*. CACs *may* be asked to investigate cases where use of an unregistered pesticide is suspected. These cases are sometimes uncovered through use report review.

Produce treated with a pesticide not registered for that commodity is defined to be a public nuisance by *FAC section 12648(a)*. This section gives DPR the authority to seize and hold the produce, requires DPR to provide a hearing to allow the owner or person in control of the produce to challenge the seizure, and provides DPR with significant additional powers regarding disposition of the produce.

In addition, *FAC section 12648(b)* establishes two rebuttable presumptions (an assumption that is made that will stand as a fact unless someone comes forward to contest it and prove otherwise) that if the produce is treated with a pesticide not registered for that use:

1. The contaminated produce presents a hazard.
2. The pesticide was used to gain an unfair business advantage.

Continued on next page

FAC section 12648 (continued)

After due process procedures outlined in *FAC section 12648(c)*, DPR can:

1. Order destruction of the produce
2. Prohibit harvest or sale of produce grown on the site
3. Prohibit use of the site for any specified plant back period
4. Take any other appropriate measure

NTE residues resulting from "intentional" treatment

DPR will generally use the disposal and other provisions authorized by *FAC section 12648* whenever there is sufficient evidence that the produce was treated with an unregistered pesticide.

FAC section 12648 sets forth that a commodity is to be declared a public nuisance and may be seized by DPR when treated with a pesticide not registered for use on that plant, crop, or commodity. Where DPR can prove that the commodity was treated with a pesticide that is not registered or is not registered for that use, DPR will use the authority vested by *FAC section 12648* pursuant to the guidelines outlined in this policy. To establish this fact, DPR inspectors will rely on residue evidence (laboratory analysis), testimony, pesticide use records, and such other evidence as can be discovered as in any other investigation.

Due process

Where the evidence shows that it is more likely than not (preponderance of the evidence) that the pesticide residue is the result of an unlawful "treatment" under *FAC section 12648*, DPR will adhere to the following "due process" procedures outlined in the law:

- Notice and Seizure
- Hearing
- Appeal

Notice and seizure

Notice, as required by statute to the owner or person in control of the commodity, shall be made prior to seizure, unless DPR has reason to believe that prior notice will result in loss of control of the commodity. The notice will allege that the commodity was treated with a pesticide not registered for use on that commodity, describe the evidence upon which the allegation is based, and inform the owner or person in control of the commodity of their right to a hearing. DPR will then seize the commodity. The respondent must request a hearing within 15 days of receipt of the notice.

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Hearing waived

If the respondent does not request a hearing, DPR may take any of the actions described in the statute, including destruction of the commodity as described in **Crop / commodity disposition** that follows.

Hearing and determination

If the owner requests and appears at a hearing:

- DPR need only show that the commodity was treated with a pesticide and that pesticide was not registered for use on that commodity.
- DPR shall render a written decision.
- If the pesticide use is found unlawful under *FAC section 12648*, DPR may take any of the actions listed in the statute, including destruction of the commodity or other appropriate measure. Rebuttal of the two presumptions (hazard to human health and unfair business advantage) at hearing may be used to determine the appropriate action.

***Note*:** If DPR determines the illegal residue did not result from the intentional use of a pesticide not registered for use on the commodity and the commodity is no longer marketable due to storage or inability to harvest on time, DPR could be subject to an action for compensation under the Governmental Tort Claims Act for damage to the commodity before its release.

Appeal

Appeal may be made to the appropriate court for a review of DPR's decision. If the court determines there was not substantial evidence presented at the hearing to support the allegation of illegal treatment with a pesticide not registered for use on that commodity, DPR could be subject to an action for compensation under the Governmental Tort Claims Act for damage to the commodity before its release.

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Crop / commodity disposition

After a final determination of illegal treatment under FAC section 12648 and the appropriate action is "destruction of the commodity," disposition of the crop should be based on the guidelines outlined below, with exceptions approved by DPR's Enforcement Branch Chief where the situation warrants.

Single-Harvest Commodities

- Destruction of all commodities (harvested or un-harvested).

Multi-Harvest Commodities

- Destruction of currently marketable commodity (harvested and un-harvested).
- Strip all immature commodity from the plant. Continue stripping immature commodity until grower's test (using an acceptable laboratory) shows there is no longer any residue.
- Consider destruction of the plants if the potential for unfair business advantage warrants it.

Long-term/Permanent Tree or Vine Commodities

- Destruction of currently marketable commodity (harvested and un-harvested).
- Tree or vine destruction is not normally a reasonable option. Strip all immature commodity from the plant. Continue stripping immature commodity until grower's test (using an acceptable laboratory) shows there is no longer any residue. This may mean grower's testing of the crop produced following year.

Either DPR or CAC staff may issue an order to stop or prevent harvest. Except when urgent action is required, DPR or county staff should confer and decide the appropriate agency to issue the order. The agency that issues the order will provide a copy of the order to the other agency and provide information on any changes.

The order to stop or prevent harvest must be in writing and should be hand-delivered to the farm operator along with a copy to the harvest labor contractor when applicable. Releases of stop or prevent harvest orders should also be in writing.

Section 1.3

Complaint Handling by DPR and the CAC

Interprets FAC sections 2281 and 11501.5

In this section This section contains the following topics:

Topic	See Page
General Policy	1-15
Complaint Handling Overview	1-16
General DPR Responsibilities	1-17
Complaint Referrals	1-18
Complaints Involving Priority Episodes	1-20
Complaint Closing	1-22
Complaint Handling Procedures flow chart	1-23

General Policy

Introduction

DPR's policy is to respond to all complaints, notifications, or reports of episodes that come to the attention of DPR or the CAC alleging misuse of pesticides, pesticide exposure (including odor), or pesticide damage or injury to crops, property, humans, animals, or the environment. There is a further responsibility under the Enforcement Response Regulations to take appropriate action when a violation is documented. Enforcement response must be undertaken without regard to outside events, such as insurance settlements or private legal action taken by persons alleging pesticide injury or damage. Taking established, consistent enforcement response maintains the integrity of the pesticide regulatory program and provides an even playing field for the regulated community.

The CAC's office is the lead agency for use-related complaints, in consultation with DPR. The amount of resources that the CAC commits to the investigation of any particular complaint is dependent upon available resources and other workload. Complaints involving pesticide product compliance or pesticide residue on commodities in the channels of trade should be referred to DPR.

For a complaint that is outside DPR/CAC jurisdiction, you should connect the complainant with the agency responsible for the investigation of the activity whenever possible.

Continued on next page

Complaint Handling Overview

FAC section 2281

FAC section 2281 states in pertinent part, ". . . the commissioner shall be responsible for local administration of the enforcement program. The director shall be responsible for overall statewide enforcement and shall issue instructions and make recommendations to the commissioner."

FAC section 2281 further states, ". . . The director shall furnish assistance in planning and otherwise developing an adequate county enforcement program, including uniformity, coordination, training, special services, special equipment, and forms, statewide publicity, statewide planning, and emergency assistance."

Terminology

The term "complaint" as used here is a "notice" or "report" that someone believes a violation of pesticide law or regulation or a human/environmental effect, including exposure (episode), has occurred or is threatened.

It may also include a report of alleged CAC performance deficiency. A complaint does not include requests for information or labeling interpretation.

Exception

DPR staff will review and follow the guidelines outlined when handling (receiving or referring) complaints for investigation. They are provided as guidelines for CAC staff to consider.

Guidelines for the investigation of complaints are found in Compendium Volume 5, *Investigation Procedures*.

Situations that dictate different handling may arise and supervisors have discretion to appropriately address those situations.

Routine illness reports handled for DPR's Worker Health and Safety (WH&S) Branch are not impacted by this process. Consult Pesticide Use Enforcement Program Standards Compendium Volume 5, *Investigation Procedures*, for guidance in handling illness reports.

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Follow-up reports

DPR does not normally ask the investigating agency for a follow-up report on routine complaints. Exceptions would be if the complaint referral came from U.S. EPA and DPR has a need to do a follow-up report or there is a specific DPR executive assignment.

Routine complaint referrals need not be issued a tracking number at the state level. CACs should consult Compendium Volume 5, Investigation Procedures, Chapter I, Part C, *Pesticide Episode/Complaint Tracking Log*, for guidance on tracking complaint investigations.

Complaint tracking

DPR individually tracks only U.S. EPA priority investigations pursuant to the Cooperative Agreement Between the State of California Department of Pesticide Regulation, the California Agricultural Commissioners and Sealers Association, and the United States Environmental Protection Agency, Region 9. Staff receiving a complaint should attempt to determine the classification of the complaint as either priority or routine pursuant to criteria in the U.S. EPA/DPR/CACASA cooperative agreement.

Illness reports referred by WH&S are also issued a tracking number by them. In addition, when a complaint is filed using the Cal/EPA on-line system, a number is generated and assigned by the computer.

General DPR Responsibilities

Commodity residue

"Commodity residue" (lots of produce in the channels of trade) does not include follow-up investigation of possible misuse or drift incidents. These drift or misuse issues fall into the scope of CAC responsibility. Information about the source grower of the illegal produce will be forwarded to the CAC for investigation of possible misuse. Commodity residue issues involving commodities in the channels of trade should be referred to DPR's Enforcement Branch Food Safety Coordinator.

Product compliance

"Product compliance" (pesticide registration, labeling, sales, and assessment) complaints should be referred to DPR's Product Compliance Branch Chief. CAC staff should refer these issues to the Enforcement Branch Liaison (EBL) assigned to their county for forwarding.

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Complaints of county performance deficiency

If the complainant has previously reported an alleged violation of pesticide law or regulation or has reported an actual or threatened human/environmental effect to the CAC and is calling DPR due to dissatisfaction with the CAC handling of the complaint, DPR has a responsibility to investigate the CAC's response and evaluate county performance.

These issues should be referred to the Enforcement Branch Environmental Program Manager responsible for field operations for forwarding to the appropriate Enforcement Branch Regional Office (RO). The investigating RO should provide the CAC with its findings and recommendation.

If the DPR investigation finds the CAC investigation has met expected standards, the RO will notify the complainant of the findings with a copy to the CAC.

If the DPR investigation finds the CAC investigation lacking, the CAC should be provided the opportunity to reopen the investigation, implement the corrective action, and correspond with the complainant prior to the RO responding to the complainant about the findings and any additional action recommended to the county.

A copy of the recommendations should be sent to DPR's Agricultural Commissioner Liaison.

Complaint Referrals

Pesticide misuse and unlicensed activity

DPR generally refers complaints of pesticide misuse and unlicensed activity to the CAC through the Enforcement Branch for response.

The CAC is the field arm of the pesticide regulatory program. DPR does not generally take the lead investigator role or routinely assist CACs in investigating these situations. DPR will monitor CAC handling of investigations as part of the effectiveness evaluation process, but not routinely participate in this CAC activity.

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Complaints not the responsibility of DPR or CAC

Refer complaints that are not the responsibility of DPR/CAC to the appropriate agency.

These complaints would include such things as pesticide disposal (refer to the Department of Toxic Substances Control [DTSC]), retaliation against employees (refer to the Department of Industrial Relations [DIR]), fraud by structural operators (refer to the Structural Pest Control Board [SPCB]), and non-pesticide related issues.

Give the complainant appropriate contact information if available. If the complaint was received in writing, a response giving appropriate contact information should be sent.

Non-priority episodes

There are three options for complaint referral of non-priority and non-pesticide related episodes:

1. Inform the complainant of the on-line Cal/EPA complaint filing system. If their complaint is filed using this system, they will receive an acknowledgement and a record is created. This is the best way for the public to file an environmental complaint.
2. Inform the complainant of the appropriate CAC or other agency and give him/her the contact information if available. This is preferred over option #3, if acceptable to the complainant, because it may result in more complete and appropriate information provided to the ultimate investigating agency.
3. Take the complaint information on the *Complaint Referral* form (PR-ENF-211) and forward it to the appropriate CAC or other agency. This would include referrals from U.S. EPA, the directorate, or the division. **If this option is used, be sure to get the complainant's address and ensure that a letter is sent to the complainant confirming the referral and informing him/her that any request for follow-up information should be made to the investigating agency**. Copies of the letter go to the investigating agency and to the appropriate RO, if applicable. Do not indicate a particular EBL as an investigator on referral forms. DPR staff should generally not be physically involved in the investigation (except oversight). However, DPR can give advice, counsel, and direction, as necessary.

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Complaints Involving Priority Episodes

Receiving the complaint

DPR Enforcement Branch headquarters or RO receiving the complaint is responsible for numbering and notification of other parties according to established procedures for priority investigations.

Priority episode handling procedures

The following priority episode handling procedures will be observed by DPR. CACs should immediately report suspected priority episodes to their EBL or RO.

Step	Action
1	**Immediately** upon learning of an incident that **appears** to meet one or more of the human effects criteria for priority investigation and is **alleged** to be pesticide related, notify WH&S of the incident by e-mail. The numbering of the incident and processing of the Pesticide Episode Notification Record (PENR) should be done as soon as possible with as much information as you have at that point. In no case should the delay exceed eight work hours. **NOTE**: An episode can meet both of the priority parameters and yet have the lead responsibility fall to another agency such as DIR or DTSC. For this reason, the chart on page 1-23 shows classification as the first step.
2	Once a number has been obtained and distributed, that episode must be followed through to closing. **Priority numbers are not cancelled, recycled, or rescinded**.
3	After the hard copy of the PENR is reviewed by the RO supervisor, it will be electronically sent or faxed by the RO to all appropriate outside agency parties and routed to appropriate DPR headquarters personnel.
4	RO is responsible for progress reports (15-day reports). Progress reports are handled similarly to the initial notification. Everyone who received a copy of the PENR should also get a copy of the 15-day report.

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Priority episode handling procedures (continued)

Step	Action
5	RO supervisor is responsible for *Pesticide Episode Closing Report* (PR-ENF-055) review, approval, and distribution to all parties. Each section of the *Pesticide Episode Closing Report* should be completed before the form is signed and distributed to other parties. A. The investigation's **Summary of Findings** section of PR-ENF-055 must be a brief summary of relevant points (who, what, when, where, why) from the county investigation report. B. The **Violations Found** section is where the specific sections violated are listed; they do not need to be duplicated in the summary. Paraphrase the violation to give some specific indication of what it was. If there were violations uncovered, they must be listed even if no enforcement action was taken. C. The **Investigation Considerations/Impacts/Effects** section is used to indicate the environmental or health impacts of the episode. It is based upon the EBL's assessment of the CAC investigation report and any other information available. Remember, pesticide product impacts may not be available to the CAC. D. The **Enforcement Action** section is where the action taken is listed. <u>It does not have to be repeated in the summary</u>. Indicate the type of action and include the administrative civil penalty case number if there is one. If there is no action taken, check "none." If there was a violation and no action was taken, include the CAC's decision report for that decision if required. If the CAC has indicated an intention to take action but has not, check "pending."

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Priority episode handling procedures (continued)

Step	Action
6	RO supervisor is responsible for sending a copy of the *Pesticide Episode Closing Report* together with a copy of the CAC investigation report and final decision for any action taken to the field operations Environmental Program Manager for review and filing. If it is a human effects episode, a second copy of the entire county investigation report must be sent to the WH&S Branch Pesticide Illness Surveillance Program. All other agencies get a copy of the *Pesticide Episode Closing Report* only. Everyone who got a copy of the PENR should receive a copy of the closing report.
7	RO supervisor is responsible for following up on enforcement and compliance actions pending on priority investigations and ensuring that a copy of the final decision is forwarded to the Environmental Program Manager for review and filing with the investigation report.

Complaint Closing

Senior Special Investigator responsibility

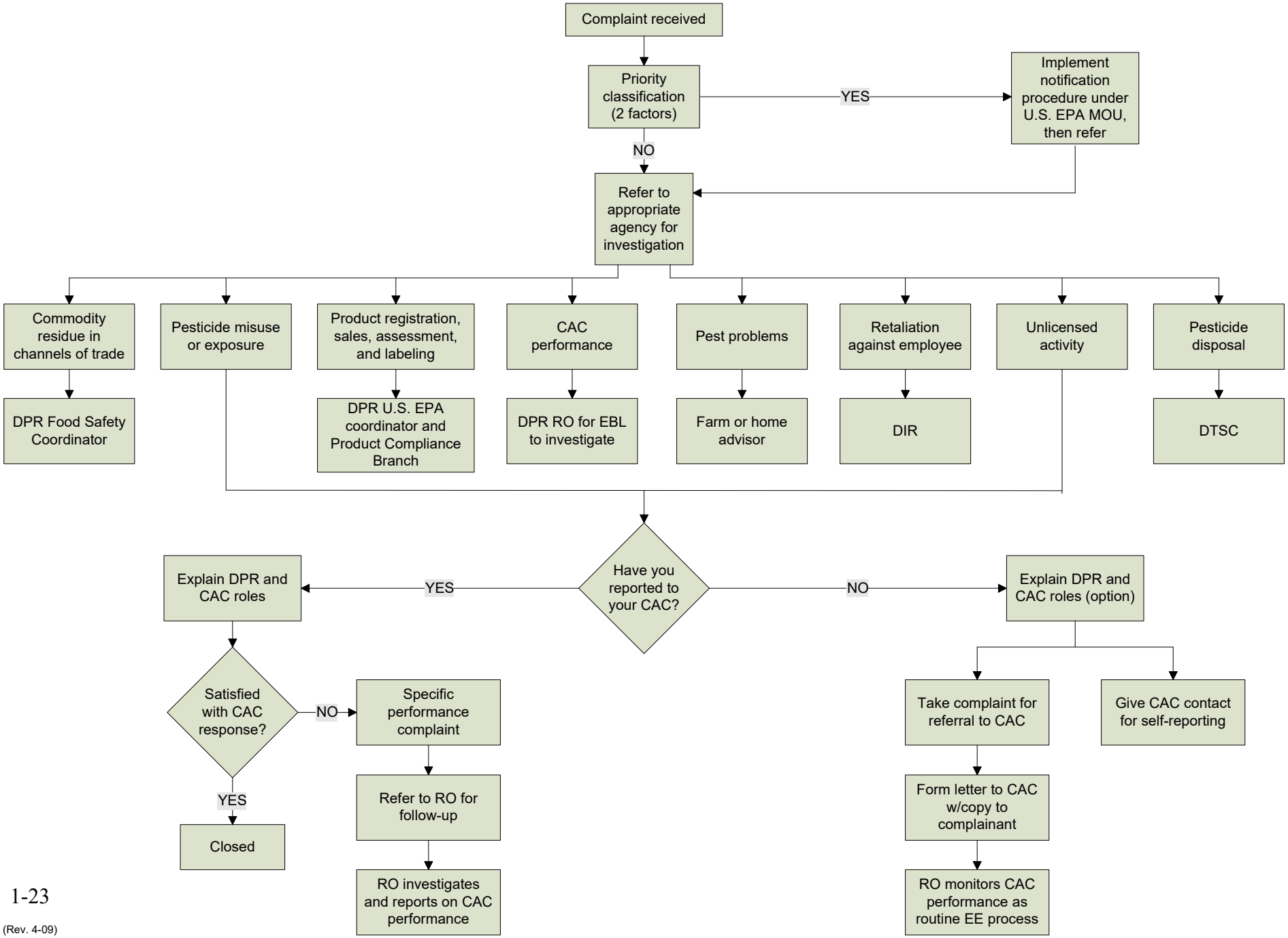
The DPR Enforcement Branch Headquarters Senior Special Investigator is responsible for:

1. Reviewing and refining case files on all state actions referred by the ROs and forwarding to the Office of Legal Affairs for legal action.
2. Data management for closed investigations and cases:
   - Identifying repeat offender patterns;
   - Trend analysis; and
   - Developing summary reports
3. Training Branch staff on complaint handling procedures.
4. Bringing any concerns about closed investigations to the attention of the field operations Environmental Program Manager.

DPR/CAC Complaint Handling Procedures chart

The DPR/CAC Complaint Handling Procedures chart follows on the next page.

DPR/CAC Complaint Handling Procedures



Section 1.4

Drift

Interprets FAC section 12972; 3 CCR sections 6000, 6600, and 6614

Definition

DPR considers pesticide drift to be an off-target deposition of pesticide residues at the time of an application, not from volatilization or other off site movement. Some off-target deposition at a measurable level is expected and may occur from ground and air applications. In some instances during or after a pesticide has been applied, some people may smell an odor. The presence of an odor does not necessarily mean that the applicator has violated requirements or that substantial drift has occurred and public health is at risk. See Compendium Volume 5, Investigation Procedures, for a discussion of odor episode response.

Pesticides are intended to be applied to a particular target such as a field, orchard, structure, or even an individual plant or particular place within a structure. The applicator is responsible for this placement. When the pesticide is released and does not reach the application target, contributing factors may include climatic conditions, equipment malfunction, application error, or ineffective application.

Pesticides may move off of the application target, after application, due to volatilization of the pesticide, wind-blown dust, irrigation run-off, or by other means. The responsibility for off site movement of pesticides is less clear. Volatilization is a characteristic of the pesticide itself, which cannot be controlled by the applicator. It may be a characteristic that creates a "hazard that is known to exist." The appropriateness of selecting or recommending a pesticide with this characteristic in the particular situation should be evaluated. When pesticide movement results from other factors, the roles of both the operator of the property and the applicator must be evaluated to determine which may have been able to prevent it and may have violated a pesticide law or regulation.

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Regulatory standards

Pesticide labeling often directs applicators to avoid drift, implying that any drift would be a violation. Given the reality of pesticide applications, this is not a reasonable standard. More appropriately, labeling may direct the applicator not to apply products when environmental conditions favor drift. Also, as discussed below, laws and regulations direct applicators to operate in a manner to prevent "substantial drift" (see definition) and not to apply pesticides when there is a reasonable possibility of contamination of persons or damage to nontarget property.

FAC section 12972 requires applicators to use pesticides in a manner that will prevent substantial drift to nontarget areas. The regulations define the term "substantial drift" as meaning that the quantity of pesticide outside the area treated is greater than that which would have resulted had the applicator used due care.

Also, *3 CCR section 6614* requires applicators to continuously evaluate conditions and surrounding environment and not make or continue an application when:

- There is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process,
- There is a reasonable possibility of damage to nontarget crops, animals or other public or private property; or,
- There is a reasonable possibility of contamination of nontarget public or private property preventing normal use of such property.

Subsection 6614(a) requires applicators to evaluate meteorological conditions, the application equipment they intend to use, and the target and surrounding properties to determine the likelihood of exposure, contamination or damage from the application. This information aids the applicator in deciding whether to begin or continue an application and how to conduct the application. Pesticide applicators have a duty to stop or reschedule an application when conditions exist which could reasonably be expected to cause exposure, contamination or damage.

Other regulations prescribe application standards for specific pesticides to minimize drift. These include: *3 CCR section 6460* (Drift Control); *3 CCR section 6462* (Propanil); *3 CCR section 6464* (Phenoxy and Certain Other Herbicides); *3 CCR section 6466* (Paraquat); and *3 CCR section 6470* (Cotton Harvest Aids).

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Enforcement

While there may be rare exceptions, in most cases the existence of damage or contamination (e.g., fish kills, phytotoxicity, damaged crops, or human exposure) establishes the fact that the damage or contamination could have reasonably been expected to occur. In those cases, the applicator should not have made (or continued) the application, and the pest control business or the applicator should be cited for violating *3 CCR section 6614(b)*.

If the applicator applied the pesticide under conditions the labeling directed against, the pest control business or the applicator can be cited for violating *FAC section 12973* (using the pesticide in conflict with its registered labeling). Citing for a violation of *FAC section 12972* requires the establishment of, with some particularity, the aspect of due care that the applicator failed to exercise.

When an investigator determines there is sufficient evidence showing that a law or regulation was violated in an episode or complaint involving pesticide drift, the *Enforcement Response Regulations (3 CCR sections 6128 and 6130)* should be used to determine the appropriate action. In most instances, the first violation warrants an Agricultural Civil Penalty or State action.

Section 1.5

Recommendations (Faulty) Followed by Applicators

Interprets FAC sections 12971 and 12973

Interpretation Both the person making the recommendation (adviser) and the applicator are clearly in violation when an applicator applies a pesticide in accordance with a recommendation that is in conflict with approved labeling. Disciplinary action should be taken against both parties for use and recommendation in conflict with approved pesticide labeling, but can be adjusted to reflect relative responsibility in the specific situation. The adviser is responsible for certain judgment factors in a recommendation just as the applicator is responsible for the condition of his/her equipment and monitoring weather conditions during the application. Each is responsible for complying with the label.

Section 1.6

Labeling Requirements--Interplanted Crops

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Each pesticide application to a crop grown in an interplant cropping system, such as beans grown between the rows of a non-bearing almond orchard, will have to be reviewed separately to determine if the application can be made without contacting the crop for which the pesticide is not registered. It is "use in conflict" with the labeling and a violation of FAC section 12973 to use a pesticide on a commodity or site for which it is not registered. Crops with residues of unregistered pesticides or over-tolerance residues at the time of harvest are illegal and may be required to be destroyed (see Section 1.2). Certain formulations (such as granular), or certain application methods (such as a ground rig or drip irrigation systems), may provide the necessary separation. Aerial applications, fumigants, and soil-applied systemic materials would, in most cases, be prohibited.

Section 1.7

Product Labeling at Use Site

Interprets FAC sections 12852, 12882 and 12973; 3 CCR section 6602

Background

3 CCR section 6602 clarifies and makes specific what is meant in FAC section 12973 by "delivered" and exactly what must be present. This section requires that a "copy" of the registered labeling covering the actual use be available at the use site. Typically, there is a registrant's container onsite with a label attached -- this is accepted as a copy of the registered labeling.

However, there are occasions where the registrant's container may not be at the use site, a service container may be in use, or the use is covered only by supplemental labeling or a Section 24(c) Special Local Need registration. In these situations, the user must arrange for alternate means of ensuring the appropriate labeling is on site.

Note: Section 18 Emergency Exemption use instructions are not considered labeling but exemptions *from* labeling. If the required Section 18 use instructions are not present at the use site, there is a violation of FAC section 12973 if the use is in conflict with the registered labeling.

Requirement

To be in compliance with 3 CCR section 6602, the labeling at the use site must completely cover both the general requirements and directions specific to the use. The text of the label must be the same as registered labeling, which has been approved by DPR's Registration Branch. Differences in the directions, restrictions, or precautions are unacceptable. Differences in format or layout are acceptable, unless they create a false or misleading impression.

Limitation

This interpretation should not be construed as permitting registrants to distribute new "FIFRA section 3" labels as supplemental labeling to change the use pattern of existing labeled product. This practice would be a violation of FAC section 12852.

Guidance

Any document that is an accurate depiction of the directions, restrictions, and precautions on the registered labeling is acceptable for complying with 3 CCR section 6602. Acceptable labeling can be formatted in various media including physical formats (i.e. paper copies, photographs, or facsimiles) as

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Guidance

well as digital formats (i.e. web distributed labeling, digital images, specimen labels downloaded from a registrant website or similar service, or other electronic formats).

During a pesticide use inspection, the pesticide user demonstrates compliance with section 6602 by physically producing a copy (paper or digital) of the labeling for CAC staff to review. The user can demonstrate compliance by producing either a paper copy or a digital copy of the labeling.

The same standard applies to paper or digital labels: the user must make viewable the contents of the labeling. The mere presence of a mobile device or computer at the use site does not demonstrate that a digital copy of the labeling is at the use site no more than an unidentifiable stack of papers at the use site demonstrates the physical presence of the registered labeling. For either medium, the user must provide a copy of the relevant labeling, either by displaying the labeling in the case of an electronic device, or presenting the physical copy of the labeling relevant to the use.

Enforcement

Regardless of the medium (paper or digital), it is the responsibility of the user to ensure that the labeling at the site accurately reflects currently registered labeling. If the electronic device fails, the user would be in violation of section 6602 if that was the only means of reviewing the labeling relevant to the use.

If it is discovered the labeling on site is not a true and accurate copy of the registered labeling, action can be taken for a violation of 3 CCR section 6602. Any use of a pesticide in conflict with **registered** labeling that was **delivered** with the pesticide is a violation of FAC section 12973.

It is not expected that CAC staff routinely conduct detailed comparisons of the labeling on site to registered labeling on file with DPR during field inspections. When the labeling attached to the container or electronically distributed is not the same as the labeling registered with DPR, it could be considered misbranded and a potential violation of FAC section 12882(d). However, situations which raise concerns about misbranding should be investigated and referred to the EBL assigned to your county for possible DPR product compliance action.

Section 1.8

Pesticide Bag Disposal

Interprets 3 CCR section 6670

Interpretation

The California Environmental Protection Agency (Cal/EPA) has adopted a policy for the disposal of emptied pesticide bags in a letter to Interested Parties entitled *California Environmental Protection Agency Policy on Disposal of Properly Emptied Pesticide Bag*s, dated December 14, 1995, and signed by Mr. Jack Pandol, Undersecretary. DPR recognizes this policy; however, some of Cal/EPA's Boards, Departments, and Offices (BDOs) and/or their local partners may interpret some parts of this policy slightly differently than DPR understands it. It is not DPR's role to directly enforce its interpretation of Agency policies against other BDOs or their local partners.

The Department of Toxic Substances Control adopted regulations stating that pesticide bags properly emptied will not be regulated as hazardous waste. These regulations are found in *22 CCR sections 66260.10, 66261.7, and 66262.70.*

Proper disposal

The options outlined in the Cal/EPA policy for disposal of properly emptied pesticide bags are:

Part	Function
Emptying pesticide bags	• Pesticide bags should be opened and emptied in a manner that results in no pesticide material remaining in the bag that can be poured, drained, or otherwise feasibly removed. • Empty the bag completely and hold the bag upside down for five seconds after continuous flow ceases. • Straighten out the seams so that bag is in its original "flat" position. • Hold the flattened bag upside down for another five seconds. Shake the bag twice and hold for an additional five seconds. If there is any continuous flow during this step, it must be repeated.

Continued on next page

Proper disposal (continued)

Part	Function
Land disposal	• Handlers of empty bags should wear all protective clothing and use safety equipment required for handling of the chemical in the bag. • Empty bags stored before transit to a landfill need to be in an area of controlled access. Bags can be stored for no longer than 90 days (to avoid need for a waste generator's permit). • Sulfur bags may be disposed of in any Class III landfill. Empty sulfur bags should be flattened and bundled separately from other bags. • Dispose of other properly emptied pesticide bags at lined Class III landfills or on a site-specific basis at unlined Class III landfills subject to approval by the Regional Water Quality Control Board. Bags should be flattened and baled or bundled.
Burning at use site	• Obtain an agricultural burn permit issued by the local air pollution control district to the grower. • Burn at the application site under the conditions of the agricultural burn permit. Only one day's accumulation of empty bags can be burned in any one day. Only paper bags, inner bags, and outer containers may be burned. The ash does not need to be tested. • A commercial applicator, either ground or aerial, can burn properly emptied pesticide bags where the bags are opened and emptied at the application site and under the agricultural burn permit issued to the grower by the local air pollution control district. • The person burning the bags and anyone working in close proximity must wear eye protection and respiratory protective equipment rated for protection against the particular type of pesticide material being burned, as well as airborne particulates.

Continued on next page

Proper disposal
(continued)

Part	Function
Burning bags	• Bags may be burned only at locations specified on the agricultural burn permit. These locations should be selected to minimize the amount of smoke blowing over areas where people or domestic animals are present. Selection should also consider distances to sensitive sites such as, homes, schools, parks and business. • Evaluate potential wind speed and direction and also inversions during the time needed to burn the bags. • Place a rock, brick or similar non-combustible weight on top of the stack of bags to be burned. • Light the bottom-most bag. • Stand upwind of the burn site to avoid breathing the smoke. • Control the site until burning is completed and the fire is extinguished.

Section 1.9

Pre-harvest Interval Enforcement

Interprets FAC section 12972; 3 CCR section 6000

Interpretation

Pre-harvest intervals are intended to provide a period between the application of a pesticide and harvest so the crop will meet the established pesticide residue tolerance and protect the public from possible exposure to excessive residues. Harvest prior to the expiration of a pre-harvest interval is a violation of FAC section 12973 and action should be taken on that violation consistent with the Enforcement Response Regulations *(3 CCR sections 6128 and 6130)*. DPR will not be a participant in any agreement to facilitate a violation of this or any other section of the law. In any willful violation of this section, our further responsibility is to use our authority to protect the public from any illegal residues through appropriate measures.

Section 1.10

Recognition of Federal Tolerances

Interprets FAC sections 12561 and 12565; 3 CCR section 6490

Interpretation

U.S. EPA and FDA have adopted tolerances and other recognized levels of pesticide residue. Tolerances are the most formal by virtue of being addressed in statute and adopted in the Code of Federal Regulations. "Action levels" have been established to allow for the presence of low levels of inadvertent residue from no longer used pesticides that remain in the environment. To avoid expending limited resources on actions related to insignificant residues, other levels, such as "levels of quantification," have been established and are routinely used by FDA in its food safety program. Note that these are not "permissible" levels; they are simply levels below which the risk is insignificant and further attention is not considered a prudent use of resources. This does not mean that the reason for the residue will not be investigated when the produce was grown in California.

DPR generally recognizes all federal established levels, in addition to tolerances, unless the specifics of a given situation indicate that it would be inappropriate to do so. The Enforcement Branch Chief will determine when it is inappropriate to apply any established federal residue level.

This interpretation is not a bar to any action under FAC sections 12648 or 12973 against either the commodity or a person responsible for pesticide misuse.

California-specific tolerances for pesticide residues

Pesticide residue tolerances within California are identical to U.S. EPA tolerances.

FAC section 12561 states that DPR has regulatory authority to set California-specific tolerances for pesticide residues in produce.

Continued on next page

California-specific tolerances for pesticide residues (continued)

In reality, however, state authority is severely limited by the Federal Food, Drug, and Cosmetic Act (FFDCA), chapter IV, section 408(n)(4), which states in part:

> "(4) STATE AUTHORITY - Except as provided in paragraphs (5), (6), and (8) no State or political subdivision may establish or enforce any regulatory limit on a qualifying pesticide chemical residue in or on any food if a qualifying Federal determination applies to the presence of such pesticide chemical residue in or on such food, unless such State regulatory limit is identical to such qualifying Federal determination. . . . . "

Both FFDCA section 408(n)(4) and FAC section 12565 authorize DPR to establish "state-specific" tolerances that are identical to the corresponding federal tolerances. DPR exercises this very limited power via 3 CCR section 6490(b). The formal incorporation of federal tolerances into California regulations via 3 CCR section 6490(b) is useful, in that it clarifies the authority of DPR and CAC staff to enforce tolerances. But, at present, pesticide tolerances within California are identical to U.S. EPA tolerances.

Section 1.11

Rinsate and Washwater Disposal

Interprets 3 CCR sections 6670, 6684, and 6686

Interpretation

Note: “rinsate” refers to the water used to remove remaining pesticide from a container (triple rinse) and “washwater” refers to the water used to clean contaminated equipment. This distinction is necessary because they are addressed differently in the regulations.

Except for the home use exemptions provided in *3 CCR section 6686*, each empty pesticide container which has held less than 28 gallons of a liquid pesticide must be rinsed at the time of use. Holding empty pesticide containers for rinsing later is not in compliance with this section.

In general, any pesticide rinsate, concentrate, diluted tank mix solution, or unrinsed container may be considered a "hazardous waste." Handling and disposal of materials designated as hazardous wastes are regulated by DTSC.

Any unused pesticide material remaining in a container or spray tank, and the water used to rinse the container or wash equipment after an application of a pesticide is completed, can be applied directly onto the originally treated crop or site for which the pesticide material is registered. This practice would basically be considered part of the original application process rather than as a disposal or discharge of a hazardous waste. The regulations require the container rinsate to be added to the mix and applied to the crop. This is an option for equipment washwater. However, if amounts are more than minimal, this practice could result in an overdose and potentially, a violation of *FAC section 12973* (using the pesticide in conflict with its registered labeling). If the pesticide rinsate or washwater is applied to non-registered areas, the application would be considered as a "use in conflict."

Section 1.12

Requirement for a Visible Inversion Indicator

Interprets 3 CCR section 6464

Interpretation

Restricted material regulations in *3 CCR section 6464(b)* require that a visible column of smoke (or other device) be employed at the time and place of air applications of restricted herbicides in the Central Valley below 1,000 feet elevation during the period beginning March 16 and continuing through October 15 of each calendar year.

A visible column of smoke can indicate inversion conditions, while the use of flags and gauges can only indicate wind direction and speed. Smoke generated by equipment attached to the aircraft making the application would not be adequate. The smoke would not be a column and in most cases would not be continuous. In any instance not already specifically covered by regulation, a visible inversion indicator may be expressly required as a condition of a restricted material use permit. Other options, such as multi-level thermometers, should be considered whenever possible.

You should contact State and local air pollution control districts regarding any additional restrictions and in obtaining any required permits.

Section 1.13

Service Containers

About this section

This section contains two parts: Service Container--Application Equipment and Service Container--Selection.

A. Service Container--Application Equipment
Interprets FAC section 12757.5; 3 CCR section 6678

Application of the definition

Measuring vessels and application equipment are not considered to be service containers while they are in use. However, they are, and must be labeled as a service container, if they are used to store or hold pesticides for a prolonged period or to transport pesticide down a public road to another site. This interpretation applies to all application equipment from backpack sprayers to tractor mounted or towed equipment.

B. Service Container--Selection
Interprets FAC sections 12757.5; 3 CCR section 6680

Application of section 6680

We must recognize that both the consumer products listed in 3 CCR section 6680 and pesticides are distributed in a wide variety of containers and some overlap of types is inevitable.

Prohibits use of empty containers

Anything that is not the original registrant's container but holds the pesticide is a service container. 3 CCR section 6680 prohibits end users from using empty containers that are readily identifiable or recognizable as food or beverage containers as pesticide service containers.

Generic containers

This section does not prohibit end users from using generic plastic or glass bottles, plastic bags, or similar containers (that have no identifiable food or beverage use labeling, either printed or embossed, or are not uniquely shaped to be identifiable as a branded food container) as service containers. Each service container must be properly labeled as a pesticide service container, pursuant to 3 CCR section 6678.

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Exception for farmers

The exception from service container labeling requirements for farmers using service containers on their own property does not apply to home, structural, or other uses nor does it apply to the restrictions on the kind of containers acceptable for use as pesticide service containers. 3 CCR section 6680 also applies to farmers.

Does not apply to registrants

3 CCR section 6680 applies to pesticide users only. This section does not apply to pesticide registrants and their choice of packaging for their products. Pesticide packaging is preempted by U.S. EPA pursuant to FIFRA.

Section 1.14

Pesticide Storage

Interprets 3 CCR sections 6670 and 6672

Interpretation

"Attended" means a responsible person present in the vicinity at all times to maintain control over the pesticide to prevent contact by unauthorized persons. Adjacent to roadways or populated areas, a person must have pesticides in sight. NOTE: Certain materials are exempt from storage requirements according to *3 CCR section 6686(b)*. However, this exemption may be waived if the CAC determines that a hazard to public health or the environment exists.

"Enclosure" means a truck or trailer with side racks, the top of which is a minimum height of six feet above the ground, a lockable storage compartment, or a locked, fenced (6 feet high chain link or other mesh) area.

Certain large storage containers of liquid pesticides are allowed to have a locked closure on the container [section 6672(b)(2)] rather than be contained within an enclosure. This provision applies only to the true "liquid" formulations only. It does not include gaseous pesticides that are "liquids under pressure" as stored (chlorine, for example).

Storage posting is required when toxicity category 1 or 2 pesticides are stored. The signs must warn from any direction of probable approach. This section is intended to apply to pesticide use situations. Warehouses, dealerships, and other similar commercial facilities should instead, comply with the universal hazardous material "diamond" sign posting requirements. One or the other posting signs must be in use.

See also *Vehicles-Storage Area Posting*.

Section 1.15

Vector Control Exemption

Interprets 3 CCR sections 6614 and 6620

Background

Vector control districts conduct area wide pest control projects to protect public health from vector borne diseases. These treatments are at a low dose and may be made as low volume or ultra low volume applications. To be efficient, these applications commonly utilize swath dispersion to obtain more uniform coverage within the target area.

As with many uses of pesticides, public concern sometimes arises about contamination of people and property. This interpretation provides guidance to CACs on issues related to the deposition of pesticides within the overall treatment zone of the project.

Interpretation

3 CCR section 6620 specifically exempts any public agency or its contractor conducting vector control under a cooperative agreement with the Department of Public Health from certain regulatory requirements. Specifically, the consent and notice requirements of 3 CCR sections 6616 and 6618 do not apply to these vector control pesticide applications. Section 6620 also specifically exempts these activities from the restriction of 3 CCR section 6614(b)(1) that prohibits applications that could create the reasonable possibility of exposing people (clothing or bodies) to pesticides, provided that the pesticide is registered for use in residential areas for vector control.

3 CCR section 6614(b)(2) and (3) that prohibits contamination or damage to nontarget crops, animals, and property still apply to vector control, but should have only very limited impact on such activities or their consequences. If the product is registered for use in residential areas for vector control, there would be no violation of these subsections resulting from pesticide falling anywhere within the boundaries of the area targeted for a vector control application. The vector control district or its contractor conducting the application may agree to take steps to minimize deposition on certain areas within the targeted treatment zone to address general public or specific property owner's concern or to minimize potential liability for damage caused by the vector control district's activities, but such deposition that may occur despite these efforts, would not constitute a violation of 3 CCR section 6614.

Section 1.16

Vehicles

About this section

This section contains two parts: Vehicles--Storage Area Posting and Vehicles--Pesticides in Passenger Compartment.

A. Vehicles-Storage Area Posting
Interprets 3 CCR section 6674

Interpretation

Posting of pest control service vehicles as a storage area is generally not required provided:

- The primary use and purpose of these vehicles is to transport and apply rather than store, pesticides.
- The vehicle is not routinely used as a fixed pesticide storage site.
- Pest control vehicles are identified, as required, with descriptive language that denotes pesticide activity and uses as specified in *3 CCR section 6630.*
- Service containers and pesticides are attended or enclosed at all times, as specified in *3 CCR sections 6670 and 6672*.

If the pest control operator has no fixed storage area other than the service vehicle and more than “use amounts” of pesticides labeled with the signal word “Danger” or “Warning” are being stored, then vehicle posting is required. When determining "use amounts," consider the total of the situation. Amounts of pesticide that would reasonably be expected to be used between restocking trips to the headquarters would generally be considered as "use amounts" and not require posting.

Note: Storage area posting should not be confused with the equipment identification requirements of 3 CCR section 6630.

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B. Vehicles--Pesticides in Passenger Compartment
Interprets 3 CCR section 6682

Interpretation

This regulation section was not intended to apply to persons who fall under the jurisdiction of commercial transportation regulations, although they may be transporting pesticides, food, and feed in the same "compartment" (cargo box). This regulation was intended to apply only to persons engaged in pest control businesses (structural or agricultural), growers, and other users who may transport opened or sealed containers to and from an application site.

Section 6682 was enacted to provide a reasonable level of protection from physical (dermal) contamination of people and certain commodities which, at times, are transported to or from a use site together with pesticide containers in the same vehicle. It was never intended to address inhalation exposure.

When a van or SUV-type vehicle is being used, creating separation through utilization of a mounted panel or baffle that substantially separates passengers and cargo areas meets the intent of this regulation. An air-tight or even leak proof separation is not required to meet this standard. A separate compartment may also be created through the use of a container, such as a cargo box or cabinet, secured to the vehicle.

Section 1.17

Preemergent Herbicides--Wellhead Protection

Interprets 3 CCR section 6609

Interpretation

For the purposes of 3 CCR section 6609 only, "preemergent herbicides" are limited to only those listed in 3 CCR section 6800(a) or (b).

Section 6609 is intended to protect wellheads from pesticide contamination. It prohibits, among other provisions, the application of a "preemergent herbicide" within 100 feet of an unprotected well. That prohibition was adopted because "preemergent herbicides" are the primary pesticides that have been found in ground water due to agricultural use.

Preemergent herbicides that have been found in ground water are both mobile and persistent, which are characteristics of pesticides listed in section 6800 (The Ground Water Protection List). However, there are preemergent herbicides that are not listed in section 6800 because they are either not mobile or not persistent. These preemergent herbicides are considered to have a low potential to move offsite to ground water.

Chapter 2

Pesticide Product Labeling Interpretations

In this chapter This chapter contains the following topics.

Section	Topic	See Page
2.1	Conflict with Labeling Exemptions (2ee)	2-2
2.2	Pesticide Use Practices that Create Conflict with Labeling	2-7
2.3	Label and Labeling Definitions	2-10
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2.5	Labeling Statements A. Mandatory vs. Advisory B. Site Listing--Inclusive vs. Exclusive	2-12 2-12 2-13
2.6	Pesticide Products, Using for Non-pesticide Uses	2-14

Section 2.1

Conflict with Labeling Exemptions (2ee)

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Conflict with labeling means any deviation from instructions, requirements, or prohibitions of registered labeling concerning storage, handling, or use except those outlined below. The definition of "conflict" is consistent with the definition of "inconsistent" as used in FIFRA section 2(ee). The following exceptions do not apply to section 18 emergency exemptions (see Section 5.2 for discussion).

Decrease in dosage rate per unit treated

The amount of pesticide (active ingredient) applied per acre or other unit treated may be decreased as long as the label does not prohibit a decreased rate.

The labeling of many public health pesticides (antimicrobials) prohibit decreasing the dosage to ensure efficiency and manage resistance.

16 CCR section 1991(b) prohibits decreasing the dosage below product labeling rates for preconstruction pest control treatments.

Decrease in concentration of the mixture applied

The dilution rate and total volume of diluent applied per acre may be increased (concentration decreased) as long as the total amount of pesticide applied per acre or unit does not exceed the labeling dosage rate. However, the total volume diluent per acre or unit cannot be decreased below that allowed in labeling even if the label dosage rate is not increased.

Application at a frequency less than specified

A pesticide may be applied less often than indicated in labeling.

Target pest not listed

Use to control a **target pest not listed** in labeling, provided the application is to a commodity or site listed in labeling and the use of the product against an unnamed pest is not expressly prohibited.

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Method of application not prohibited

Employing a **method of application** not prohibited, provided other labeling directions are followed:

Usually when a pesticide label specifies a volume in excess of 20 gallons per acre, the primary method of application is interpreted to be by ground. If the volume per acre specification is 20 gallons or less, it may be assumed the pesticide can effectively be applied by aircraft.

Applicators may use a method of application not indicated on a pesticide label; however, the method employed must be consistent with dosage rate, volume of diluent and concentration directions as well as with precautionary statements. This exemption is often restricted by soil incorporation and chemigation requirements.

Pesticides can be applied through irrigation systems (chemigation) only when labeling gives specific directions for chemigation application. **No pesticide may be applied by sprinkler or other irrigation systems unless "sprinkler" or "sprinkler irrigation system" or a similar statement, is specified in the pesticide labeling.** Most irrigation systems are not properly engineered for pesticide application and would require modification in order to provide proper coverage and prevent contamination of nontarget areas. Most pesticides are formulated for application by methods other than irrigation and may require levels of agitation which are difficult or impossible to maintain during application by irrigation systems. Excess irrigation water treated with pesticides must not be allowed to contaminate any water supply, and runoff to adjacent properties must be prevented.

Generally, when a pesticide is applied through a thermal fogger, it is used without dilution. This means that pesticide products with labeling directions requiring dilution are not compatible with this method of application. Thermal fogging is a "space spray" type of treatment and issues of registration and tolerances on any crop or commodity present must be considered.

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Method of application not prohibited (continued)

The rate of application for a pesticide may be adjusted for use with a thermal fogger under the following conditions:

- The labeling does not prohibit this method of application.
- All labeling directions and precautions are complied with, including dilution rates.
- The pesticide has the site or crop listed on the label.
- There is an adequate method to determine the rate adjustment does not result in an increase.

Additionally, a method which is inherently hazardous would constitute a violation of *3 CCR section 6600* (e.g., "...Perform all pest control work in a careful and effective manner...").

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Mixing with another pesticide or with a fertilizer

This exemption (commonly referred to as "tank mixing") allows the addition of other pesticides or fertilizers to a pesticide mixture. It does not allow the addition of unregistered substances, such as sugar or vegetable oil, which are added to enhance the efficacy of the mixture. Any substance which is added to a pesticide to enhance the efficacy of a pesticide is defined in *FAC section 12758* as a spray adjuvant and must be registered in California as a pesticide, although the U.S. EPA does not consider spray adjuvants to be pesticides.

Pesticide products may be combined for application when:

- None of the products' labels prohibit such combination;
- The commodity or site is included on each label;
- The dosage rate for each product is not exceeded; and
- The dilution rate on each label is not decreased.

Pesticide product combinations may affect efficacy, human or environmental hazards, phytotoxicity, residue remaining at harvest, and the choice of application methods. The person recommending the use of pesticide product combinations must accept responsibility for any problems that develop. The pesticide registrants may not accept responsibility since they did not include the combination in the labeling of their products.

As a general rule, where the labeling of pesticides to be applied simultaneously have differing (inconsistent) requirements, the handling is to be done following the most restrictive (or most protective) requirement. This rule is found throughout FIFRA (see 40 CFR part 170.112(a)(3) with respect to entry restrictions) and is reflected in pesticide labeling as well.

Mixing with other substances

Some substances other than pesticides or fertilizers are generally allowed in tank mixes. They include deodorizers (such as Oil of Wintergreen), marking dyes, drift control materials, and warning agents (such as low levels of chloropicrin). Since these products are not added to affect the performance of the pesticide itself but to assist the application they are not considered spray adjuvants.

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Conflict with Labeling Exemptions (2ee), Continued

Increase in the concentration of the mixture

An **increase in the concentration** of the mixture applied may occur, provided it corresponds with the current published guidelines of the University of California.

The dilution ratio and volume of diluent applied per acre may be decreased (concentration increased), only when the application recommendation is included in an authorized, current, printed guideline of the University of California Cooperative Extension for the particular formulation to be used. This does not include newsletters or guidelines issued by individual local farm advisers. The crop to be treated must be included, and the per-acre dosage shall not exceed that shown in pesticide labeling.

PPE exceptions and substitutions allowed by section 6738

3 CCR section 6738 provides for exceptions and substitutions from labeling-required PPE and for the use of engineering controls, rather than labeling PPE. All of the provisions of section 6738 apply to both labeling and regulation requirements. This provision is specifically mentioned in the definition of "conflict with labeling" (as exceptions) found in section 6000.

Section 2.2

Pesticide Use Practices that Create Conflict with Labeling

Simultaneous use of two products with conflicting labeling statements

Occasionally, a situation arises where an applicator wants to simultaneously use two products with conflicting (as opposed to inconsistent) labeling statements.

In these cases the instructions cannot be reconciled to allow the applicator to follow the most protective requirement. For example, if one product labeling states: "**Do not wear** (emphasis added) jewelry, gloves, goggles, tight clothing, rubber protective clothing, or rubber boots when handling" and the other product labeling states: "Handlers performing direct-contact tasks **must wear** (emphasis added) … chemical-resistant gloves, chemical-resistant footwear, face-sealing goggles…" a situation is created where a user cannot comply with both labeling requirements when mixing and using the two pesticides. This situation creates an express prohibition and simultaneous use of these two products puts applicators at risk for violating FAC section 12973.

If registrants seek to market products to be used simultaneously, they must address this issue and submit labeling amendments with current data supporting the requested change(s) for use of appropriate personal protective equipment.

Illegal mixing of two pesticides with the same AI to increase dosage

The practice of increasing the dosage rate ("doubling the dose") of an application by "tank mixing" two separate pesticide products containing the same active ingredient (AI) is a use in conflict with that labeling and a violation FAC section 12973. For example, an analysis of the tank mix would indicate there is a higher rate of AI than allowed by the registered labeling delivered with either product (an overdose). That overdose would constitute a use in conflict with the registered labeling and, therefore, is a violation of FAC section 12973. Similarly, the sequential application of multiple products containing the same AI to exceed the amount allowed in a time interval (see definition of *growing season* in Chapter 4) by the registered labeling would constitute a use in conflict.

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Illegal mixing of two pesticides with the same AI to increase dosage (continued)

3 CCR section 6000 defines "conflict with labeling" as any deviation from instructions, requirements, or prohibitions of the pesticide product labeling concerning storage, handling, or use with certain exceptions. Generally, tank mixing is allowed under the definition of conflict with labeling when neither product label prohibits such practice. However, the definition of conflict with labeling has never been interpreted as allowing nor is it intended to allow an increase in the maximum dose shown in pesticide labeling. DPR has no intention of accepting such an interpretation.

DPR is concerned that potential serious problems may result from this type of practice. For example, there would be an increased likelihood of pesticide residue in excess of the established tolerance for the treated crop; there would be the increased likelihood of pesticide residue or pesticide residues in excess of the established tolerance for adjacent crops (caused by pesticide drift); and there is an increased likelihood of illness to field workers exposed to excessive levels of pesticide residue on the treated crop(s).

Licensed Agricultural Pest Control Advisers should be made aware that repeated recommendation of a tank mix of two products to exceed the maximum dose is unprofessional conduct as defined by FAC section 12023.5(a) and a violation of FAC section 12023(f). Violations of the above-listed sections could result in a sanction against their license. DPR is advising CACs to take additional action against the county registration (suspension or revocation) of any adviser found to be performing this unprofessional practice pursuant to FAC section 12035.

Arguably, this practice also violates the intention of 3 CCR sections 6600(b) and 6600(e) respectively. When the result of this “tank mixing” practice exceeds the maximum allowable rate of active ingredient, pest control is not being performed in a careful and effective manner, and the adviser is not exercising reasonable precautions to avoid contamination of the environment. This practice is also inconsistent with FAC sections 11501(a) and 11501(b), which outline the purposes of the requirements and states in pertinent part, “To provide for the proper, safe and efficient use of pesticides essential for production of food and fiber and for protection of the public health and safety; and, to protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of these pesticides.”

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Vegetable oils used in pesticide mix

Adjuvants
Applicators may use vegetable oils with a pesticide in an attempt to increase the efficiency of their operations as spray adjuvants and as diluents in the following situations:

There are vegetable oil products registered for use as spray adjuvants. These products may be used according to their labeling directions with pesticides that do not, by their own labeling, prohibit their use. This use is, in effect, a tank mix of two or more registered products. Vegetable oil products which are not registered may not be used as spray adjuvants. Their use would be a violation of *FAC section 12995.*

Diluents
Oil may be used as a diluent if the pesticide product labeling has directions for dilution with oil. When the labeling specifies a substance as the product's diluent, the use of any other substance as a diluent is considered a use in conflict with the labeling. In instances where no diluent is specified, water is considered the default material and must be used. If the labeling requires use of the product undiluted, then no diluent may be added.

Section 2.3

Label and Labeling Definitions

Interprets United States Code (U.S.C.) section 136(p)

Interpretation

The terms "label" and "labeling" may not be used interchangeably, they have different scopes and meanings. Pesticide labeling includes the actual label attached to the pesticide container, any supplemental information accompanying the pesticide container, any manuals referenced on the label, any appropriate Section 24(c) Special Local Need labeling, and any appropriate Section 18 Emergency Exemption documentation. The pesticide label is limited to the document (including printed or embossed) that is actually attached to the container.

FIFRA definitions

FIFRA definitions:

(p) Label and Labeling

(1) Label -- The term label means the written, printed or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers.

(2) Labeling -- The term labeling means all labels and all other written, printed, or graphic matter:

(a) accompanying the pesticide or device at any time; or
(b) to which reference is made on the label or in literature accompanying the pesticide or device, except current official publications (of specified federal or State institutions or agencies).

Material Safety Data Sheet status as labeling

A reference to the Material Safety Data Sheet (MSDS) is often found on the pesticide label. However, U.S. EPA, in PR Notice 92-4, has issued a determination that it does not intend to review MSDSs and will not treat them as labeling as long as nothing in the MSDS conflicts with what is in other labeling for the product or labeling requirements in 40 CFR part 156, Labeling Requirements.

Section 2.4

Labeling Interpretations (DPR Procedures)

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

CAC staff is encouraged to make an effort to interpret pesticide labeling using the guidelines contained in this manual.

Please submit unresolved questions in writing to your Enforcement Branch Liaison. Questions should be submitted with all relevant information and documentation including the labeling, and reference to laws, regulations, or this manual. Include your proposed response and discuss any problems created by the interpretation.

The Enforcement Branch Liaison and the Regional Office Supervisor will review this information to determine if the question has already been addressed by existing interpretations. The Regional Office will provide the CAC with a written response to a written question covered by existing interpretations.

A question not covered by an existing interpretation will be forwarded with supporting information to Enforcement Branch headquarters staff who will prepare a response to address the issue.

Section 2.5

Labeling Statements

About this section

This section contains two parts: Labeling Statements--Mandatory vs. Advisory and Labeling Statements, Site Listing--Inclusive vs. Exclusive.

A. Labeling Statements--Mandatory vs. Advisory
Interprets FAC section 12973; 3 CCR section 6000

Introduction

Labeling statements can be divided into two general groups based upon their semantic structure--those that are mandatory and those that are advisory.

Mandatory statements

Mandatory statements address how the product must be used or handled. Examples are: "wear a respirator;" "mix one quart per ten gallons;" "keep away from heat or open flame;" "do not contaminate water;" or "do not make more than two applications per season."

Mandatory statements are conditions of use and generally must be followed or a violation of *FAC section 12973* (conflict with labeling) occurs. The definition of conflict with labeling can be found in *3 CCR section 6000.*

Advisory statements

Provide facts or information about the product such as: "contents - five gallons;" "flammable mixture;" "this product is toxic to fish;" or "frequent applications may cause the appearance of visible spray residues on foliage." Labeling statements preceded by terms such as, "it is recommended," "users should" or "for best results" are also considered advisory statements.

Information about health or environmental hazards included in the labeling can be used as evidence that the user (or adviser) knew or should have known about the hazard. If necessary precautions were not taken, this can be used to support enforcement action based on negligent operation. However, advisory labeling statements do not create a specific enforceable obligation upon the user.

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B. Labeling Statements, Site Listing--Inclusive vs. Exclusive
Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Generally, it is unlawful to use a pesticide on a site not listed under *Directions for Use* on the labeling. If the labeling statement is structured to indicate that the list is exclusive (i.e., "deciduous orchards," apples and pears," or "product may be used on Citrus [oranges, grapefruit, lemons]"), use of the pesticide is restricted to these sites, and only those commodities or sites can be legally treated.

DPR acknowledges there are occasions when the labeling cannot be considered exclusive. When the list is preceded by wording that suggests that what follows are examples only, by using "such as", "etc." or "including", the product can legally be used on other species covered by the general term. For example, if the labeling states "deciduous fruit such as apples, peaches, and pears," the use of the product in deciduous fruit orchards other than apples, peaches and pears cannot be considered use in conflict with the labeling.

Some labeling, particularly rodenticides, may not indicate a specific site and any interpretation of application sites could be quite broad. DPR's interpretation is supported by the U.S. EPA Label Review Manual (LRM) used to evaluate labeling submitted by registrants prior to approval of product registration. The LRM *Chapter 11: Directions for Use states (in part) under Site Groupings:*

- "If the use site is indicated by a broad crop grouping, such as "ornamentals," the registrant should be instructed to specifically identify sites on which the product may be applied in the directions for use: "Ornamentals: Christmas tree plantings, conifer seed orchards, and rhododendrons." In this example, the product user is restricted to using the product only on those three use sites. However, if a use site were indicated as "Non-cropland industrial sites, such as, airports, fence rows, roadsides, and associated rights-of-ways," then the user could use the product on any place that would fall under the category as non-cropland industrial sites."

The U.S. EPA Label Review Manual is available at: <www.epa.gov/oppfod01/labeling/lrm/>.

Section 2.6

Pesticide Products, Using for Non-pesticide Uses

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Many materials have both pesticide and non-pesticide uses. When products with a specific active ingredient have been registered, those products cannot be used for any non-pesticide use that is not listed on the labeling. This issue has come up with sodium hypochlorite use as a bleach, chloropicrin use as a warning agent, sulfur and phosphorous as fertilizing materials, dibrom use in insect monitoring traps by CDFA and others, and sulfur dioxide ($S0_2$) use as a fermenting agent in the wine industry.

Once a product is registered as a pesticide you must follow the label. Any non-pesticide uses must also be listed to allow legal use. The alternative is to find a product that is not registered as a pesticide.

This issue has been discussed with U.S. EPA and they have concurred with this interpretation.

Chapter 3

Specific Labeling Statement Interpretations

In this chapter This chapter contains the following topics.

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Section 3.1

Avoidance Statements--General

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The general labeling statement, "Avoid breathing spray mists or dusts," does not necessarily mean that a respirator is required. This labeling statement allows for other methods or equipment, such as engineering controls. When these controls cannot mitigate the exposure, respiratory equipment is required.

The employer is required to provide the employee with approved respiratory protective equipment when specifically required by pesticide labeling, established regulation, or when respiratory protection is needed to maintain employee exposure below an applicable recognized exposure standard. When labeling simply directs the handler to avoid breathing mist or dust, respiratory equipment is not specifically required by pesticide labeling. There is, however, a recognized exposure standard for nuisance dust that has been established in *8 CCR section 5155.* This standard may apply to some dusts, for example, sulfur.

Open air application of pesticides may not result in air concentrations that approach or exceed the exposure standard. If the handler can avoid breathing the spray or dust in amounts that exceed the standard without respiratory protective equipment, the use is in compliance with a general labeling statement. If the applicator cannot avoid breathing the mist or dust, the use of approved respiratory protective equipment is required and the employer must comply with *3 CCR section 6738(h).*

Section 3.2

Bait Boxes

Interprets FAC section 12973; 3 CCR section 6000

Introduction

Rodenticide labeling often contains the statement, "Treated baits must be placed in locations not accessible to children, pets, wildlife and domestic animals, or in tamper-resistant bait boxes." This statement requires enforcement personnel to address two questions when faced with rodenticide baiting situations: (1) Is the treated bait in a location accessible to children, pets, wildlife or domestic animals? (2) If the treated bait is in an accessible location, is a tamper-resistant bait box being used?

Placement

Different application sites require different methods. Each application site requires individual evaluation and mitigation of known hazards prior to choosing the application method.

When estimating hazards, consideration is given to the feeding behavior of wild or domestic animals. Some rodenticide labels require removal of bait prior to livestock grazing. In areas where bait applications may be hazardous to endangered species, special precautions may be required to mitigate those hazards.

There is a perceived discrepancy between standardized label statements such as, “Baits should be placed in areas inaccessible to children, pets, wildlife and domestic animals or in tamper-resistant bait boxes” and other instructions on the label that describe hand-broadcast applications.

The majority of labels allow hand-broadcast applications, but not the scattering of baits in areas accessible to children, pets, nontarget wildlife, or domestic animals. Areas accessible to the designated groups require tamper-resistant bait boxes.

Accessibility to young children represents the most important factor in evaluating application sites. Tamper-resistant bait boxes are the only acceptable treatment method when young children are present in public or private parks or recreation areas. Using natural or man-made barriers at the application site to exclude young children provides sufficient mitigation.

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Tamper-resistant bait boxes

Since neither U.S. EPA nor DPR "approves" bait boxes prior to use, Pesticide Enforcement personnel must judge the adequacy of bait boxes in actual use situations. Criteria have been adopted from U.S. EPA (Pesticide Registration [PR] Notice 94-7) for enforcement decisions regarding bait boxes containing treated bait. Under these criteria, bait boxes are to be:

- Resistant to weather. (A critical factor of evaluation is placement, i.e., a bait box placed outside will need to be more resistant to varying weather conditions than one placed indoors or under shelter.)
- Strong enough to prohibit entry by large nontarget species. (Placement is again a factor, i.e., is the bait box likely to be broken or affected adversely by nontarget animals?)
- Equipped with an access panel that can be securely attached (meaning a locking lid or secured rebaiting hatches).
- Equipped with entrances which readily allow target animals access to baits while denying access to larger, nontarget species (suggested means for achieving this include use of baffles, mazes, or small entrances).
- Capable of being anchored securely to resist effort to move the container or to displace its contents.
- Equipped with an internal structure for containing baits (most boxes contain baffles to contain bait).
- Made in such a way as not to be an "attractive" nuisance.
- Capable of displaying "proper" precautionary statements in a prominent location.
- Bait station labeling in non-licensed situations is regulated by the label *(FAC section 12973)* and the U.S. EPA criteria for tamper-resistant bait stations.
- Bait stations are intended to present (apply) the pesticide to the target pest. Bait stations are considered application equipment and subject to the labeling requirements of *3 CCR section 6630* when placed by a licensed pest control company.

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Tamper-resistant bait boxes (continued)

16 CCR section 1983(i) more specifically states, "When a covered or uncovered bait station is used for any pesticide, the bait station shall be adequately marked with the signal word or symbols required on the original pesticide label, the generic name of the pesticide, and the name, address, and telephone number of the structural pest control company. A building which is vacated, posted, locked and in the care, custody, and control of the registered company shall be considered the bait station." Any device that is designed to dispense pesticidal baits while unattended is a bait station. Since this requirement is contained in the Structural Pest Control Act, it applies only to persons operating within their Structural Pest Control Business license. It is the responsibility of the Structural Pest Control Operator to ensure that the bait stations are labeled.

The size of the letters to be used is not addressed in the regulations; however, they should be large enough to "adequately mark" the device. The purpose of the regulation is to provide a warning to persons who may come in contact with the station and therefore the information should be of a size, and located such that they can see the pesticide name and signal word without picking up the device. The name, address, and telephone number of the operator could be displayed on the bottom of the station if the device is too small to display the information on the top. If desired, the required labeling can be displayed on a card attached to the device.

If, in your judgment, a bait box in use does not meet these eight criteria, it is not "tamper-resistant" and, therefore, is in violation of *FAC section 12973*, "Use in Conflict with the Label" or *16 CCR section 1983(i).*

Section 3.3

Bee Protection Statements

Interprets FAC sections 12973, 29102, and 29103; 3 CCR sections 6000 and 6614

Approved State program

FAC section 29102 states: "The director shall adopt regulations necessary to minimize the hazard to bees, while still providing for the reasonable and necessary application of pesticides toxic to bees to blossoming plants." "The regulations may also include provisions for timely notification of apiary owners of proposed pesticide applications, and limitations on the time and method of application of the pesticides and the pesticide used."

Additionally, FAC section 29103 states: "Failure of a beekeeper to remove hives from a specific location …after notification …shall not prevent the application of pesticides to blossoming plants if consistent with the pesticide's labeling and regulations. When the pesticide applicator has complied with the notification …the applicator shall not be liable for injury to bees that enter the area treated during or after the application."

Interpretation of basic statements

U.S. EPA recommends specific bee caution statements on pesticide labeling. DPR has analyzed these statements and offers the following interpretative guidance.

U.S. EPA allows for some flexibility in bee protection labeling statements, so some pesticides may have bee protection labeling statements that differ from the U.S. EPA recommended statements found in their Label Review Manual (LRM). Some of those differences can have a significant impact on the requirements that apply, as discussed below. Some labeling refers to a State program that provides for the protection of bees. California's statutory and regulatory bee protection requirements meet that labeling provision.

Drift effects

Relative to the term "drift" used in mandatory bee caution statements, "drift" implies deposition outside of the treatment area rather than within the target site. Drift is a separate concept that should not be confused with on-site issues. Drift impacts on bees should be handled similar to drift impacts on any other sensitive site.

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Drift effects (continued)

It is acknowledged that some drift is a common occurrence. Substantial drift is always prohibited by FAC section 12972. A violation of this labeling phrase occurs when an applicator fails to exercise due care and bees on neighboring property are damaged by drift, under the stated conditions on the labeling.

The applicator must always use discretion when making an application. It is the responsibility of the applicator to comply with the pesticide's labeling and regulations and to consider the potential impacts of the application. Any application resulting in damage to bees off-site could be a violation of *FAC section 12973* (use in conflict with labeling) or *3 CCR section 6614*.

Residual toxicity

Pesticides toxic to bee are those that include the words "toxic to bees" on labeling, regardless of modifying words such as "highly" or "moderately." Residual toxicity (RT), as specified on the labeling, is the period of time after completing a pesticide application until there is minimal toxic effect to bees. *3 CCR section 6650 contains standards relating to bee activity.*

When data submitted by the registrant shows that RT is prolonged, the U.S. EPA LRM-recommended bee protection statements for both bee toxicity group I (highly toxic) and bee toxicity group II (toxic) labeling contains the directional statement, "Do not apply this product if bees are visiting the treatment area." For pesticides that are highly toxic to bees, there is an additional statement relating to drift onto blooming crops or weeds.

The intent of this labeling statement is to prohibit applications when the RT period specified on the labeling will extend into the subsequent bee activity periods.

Note: Most products do not show RT times on labeling.

When data submitted by the registrant shows that residual toxicity is NOT prolonged, the U.S. EPA LRM-recommended bee protection statements for both bee toxicity group I (highly toxic) and bee toxicity group II (toxic) labeling contains the directional statement, "Do not apply this product while bees are actively visiting the treatment area." For pesticides that are highly toxic to bees, there is an additional statement relating to drift onto blooming crops or weeds. Some interpretation of the meaning of the word "actively" and how it affects the requirement is required.

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Residual toxicity (continued)

The intent of this labeling statement is to have applications made when bees are not active and the hazard to bees is minimal by the next active period when the bees may visit /enter the area treated. Bees are "actively visiting" when they are physically present.

Bee hazard information

More information on evaluating bee hazards is available in: *How to Reduce Bee Poisoning from Pesticides* at http://extension.oregonstate.edu/catalog/pdf/pnw/pnw591.pdf. This document provides useful information but is not an enforceable standard unless specifically included, in whole or part, in permit conditions.

Agreed upon standards

One of the primary purposes of the statutory bee protection program provisions is to bring the operator of the property to be treated and the owner of the bees into a site-specific discussion of the potential risks and impacts. Often, these discussions result in an "agreed standard" for interpreting the impact on bees with the potential to visit the site versus impacts of applying available mitigations. This approach recognizes the impracticality of basing an interpretation of "visiting" strictly on a number. In effect, the parties, whether individuals or industry groups, most directly impacted and closest to the scene, interpret the labeling provisions in a manner agreeable to both. DPR recommends that, as a general rule, these site-specific, interpretative agreements be honored and accepted for labeling enforcement purposes.

To be acceptable, any agreed standard must meet the following criteria:

1. Be mutually agreed upon by relevant parties without coercion.
2. Create a documented standard for acceptable "bee visitation" through such mitigation practices as timing, dosage, method of application, amount of bloom, or other factors to minimize the number of bees exposed.
3. Contain terms that are measurable/enforceable, so that it can be clearly determined whether the agreement was honored by all parties involved.
4. Convey the terms to the CAC in advance of any application.

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Example of labeling statements: Variation statement 1

When the pesticide product labeling states: "This product is highly toxic to bees exposed to direct treatment or residues on blooming crops or weeds. **Do not apply** this product, [or allow it to drift to blooming crops or weeds,] if bees are **visiting** (or actively visiting) the treatment area."

Interpretation:
The first sentence is advisory. It provides facts or information about the product. Advisory labeling statements do not create a specific enforceable obligation upon the user. The second sentence is a mandatory statement. Mandatory statements address how the product must be used or handled and generally, must be followed to avoid a violation. However, before this mandatory statement can be interpreted, the term "visiting" must be defined. Merriam-Webster's Collegiate Dictionary, 11th edition, on page 1398, defines "visiting" as "to go to see or stay at (a place) for a particular purpose." 3 CCR section 6650 defines "inactive" as from one hour after sunset to two hours before sunrise (night time and twilight hours) or when the temperature is below 55 degrees Fahrenheit (°F). Use the above criteria to establish that bees are "active" and can potentially be "visiting" (or foraging) during daylight and twilight hours between two hours before sunrise to one hour after sunset when the temperature is above 55°F. During this time, it is still necessary to determine if bees are visiting in sufficient numbers to be significantly impacted by the application.

Based on the above definition of the term "visiting," the mandatory bee caution statement above is interpreted as follows.

Products with this labeling statement can be applied to a crop:

1. That is not "blooming" under an established or agreed upon standard.
2. That is blooming when bees are inactive.
3. That is blooming when bees are active, provided the threshold is below the criteria in an established or agreed upon standard for "visiting."

Continued on next page

Example of labeling statements: Variation statement 2

"This product is toxic to bees exposed to treatment for 3 hours following treatment. **Do not apply** this pesticide to **blooming**, pollen-shedding or nectar-producing parts of plants if bees may **forage** on the plants during this time period. The 3-hour limitation does not apply if the applicator operates in a state with a formal, state-approved bee protection program, and the applicator follows all applicable requirements of the state-approved program designed to ensure that managed bees are not present in the treatment area during this time period."

Interpretation:
The first and third sentences are advisory. The first sentence provides information that the product is toxic to bees exposed to treatment for 3 hours following treatment. The third sentence informs the user that the 3-hour limitation does not apply if the applicator operates in a state with a formal, state-approved bee protection program (such as California), and the applicator follows all applicable requirements of the state-approved program designed to ensure that managed bees are not present in the treatment area during this time period. These advisory labeling statements do not create a specific enforceable obligation upon the user.

The second sentence is a mandatory statement. This mandatory statement addresses how the product must be used or handled to avoid a violation.

However, this statement prohibits application to blooming plants only if bees may forage during a specific 3-hour time period. Furthermore, this mandatory statement (limitation) does not apply in a state (such as California) with a bee protection program. In effect, the mandatory limitation is cancelled by the third advisory sentence. As written, no part of this statement is enforceable in California. Not withstanding the above statement, the applicator must use discretion when making the application to a crop during a bloom period when bees are considered active or (actively foraging). It is the responsibility of the applicator to be aware of the pesticide's labeling and regulations, and to evaluate the potential impacts of the application. Any application resulting in a bee loss could be a violation of *3 CCR section 6614*.

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Example of labeling statements: Variation statement 3

"This product is toxic to bees exposed to treatment for 3 hours following treatment. **Do not apply** this pesticide to **blooming**, pollen-shedding or nectar-producing parts of plants if bees may **forage** on the plants during this time period."

Interpretation:
The first sentence is advisory. The first sentence provides information that the product is toxic to bees exposed to treatment for 3 hours following treatment. The second sentence is a mandatory statement. This mandatory statement addresses how the product must be used or handled or a violation. This statement prohibits use of this product during the blooming period if bees are likely to forage on plants within 3 hours. However, before this mandatory statement can be interpreted, the term "forage" must be defined. Merriam-Webster's Collegiate Dictionary, 11th edition, on page 488, defines "forage" as "to wander in search of …collect …food."

Based on the above definition of the term "forage," this mandatory bee caution statement is interpreted as follows.

Pesticide products with this labeling statement can be applied to a crop:

1. That is <u>not</u> "blooming," under an established or agreed upon standard.
2. That <u>is</u> blooming when bees are <u>inactive</u>.
3. That <u>is</u> blooming when bees are <u>active</u> provided the threshold is below the criteria in an established or agreed upon standard for "foraging."

Section 3.4

Feeding Restrictions

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Labeling that states, for example, “Do not use tops for food or feed” prohibits the grower from marketing the root crop (such as carrots) with the tops attached. Root crops and their tops are considered “food” regardless of whether people commonly eat the tops or not. When produce is offered for sale in the grocery store, we have to assume that someone may eat any portion of what they bring home.

A labeling statement might read, for example, "do not use treated foliage for feed or forage," "treated fields are not to be grazed," and "crop residues and cuttings are not to be fed to livestock or baled for such use." These statements prohibit the use of crop residues (straw, trash, screenings, stalks and pumice) for livestock feed. Grazing restrictions apply only to domestic animals such as for meat or dairy use. They do not apply to wild game animals and no hunting restrictions are incurred.

Many growers are unaware of these restrictions because they utilize the services of a commercial pest control business to apply the pesticide and do not have an opportunity to read the labeling restriction. Therefore, a pest control adviser's written recommendation must include any applicable label restrictions on use or disposition of crop or crop by-products and a copy must be provided to the grower *(FAC section 12003(f) and 3 CCR section 6556(c))*.

The agricultural pest control adviser has fulfilled his or her responsibility when he or she includes the restrictive label statements in the written recommendation and provides the grower with a copy. The grower is then responsible for assuring that the restrictive labeling statements are followed. If the grower does not observe the restrictive label statements in the pesticide labeling, he or she is in violation of *FAC section 12973.*

Growers intending to feed crop residues or by-products to livestock should consult their pest control adviser or pesticide dealer to select pesticides that do not have restrictive labeling statements.

Section 3.5

Food Products

Interprets FAC section 12973; 3 CCR section 6000

Interpretation Pesticide labeling commonly includes directions to remove, bag or cover food products prior to treating the area. The term "food products" is interpreted as including other things that are put into the mouth such as, toothpaste, mouthwash, denture adhesives and medicines, even though they may not be swallowed.

Section 3.6

Harvest Date

Interprets FAC section 12973; 3 CCR section 6000

Interpretation Harvest date means the day a crop is removed from its site of growth, such as picked from a tree, bush or vine, or cut as in the case of hay. "Removed from the site of growth" does not mean when the crop is removed from the field or when the crop is threshed or baled after field drying.

Section 3.7

Management of Greenhouse and Nursery Stock After Treatment

Interprets FAC section 12973; 3 CCR sections 6618 and 6770

Purpose

This interpretation addresses labeling statements regarding restricted entry intervals (REI) and specific product labeling requirements for personal protective equipment (PPE) concerning greenhouse and nursery stock treatments. See also Section 4.8 for a discussion of greenhouse use relating to site and labeling.

Issues

There are several related issues involved in this situation:

- Can plants be sold and moved off property during the REI?
- Does the reference to "other personnel" found on some labeling refer to harvesters and outdoor nursery workers?
- What are the specific labeling requirements after the REI has expired and to whom do they apply?
- What notification requirements apply?

REI requirements

Worker protection standards found in 3 CCR section 6770 allow workers to be in the treated area during the REI only to perform specified exempted activities. There is no exemption to harvest or move the plants out of the treatment area.

Treatment area

U.S. EPA Interpretive Policy[1] *5.16: Moving containers during REI,* specifically states that in cases where both the pots and the plants have been treated, both are considered the "treated area" and are subject to REI requirements.

If the pesticide is applied to the potted plants without any spray contacting the pots, the plants could then be moved, as the pots would not part of the "treated area." We believe this would be a rare, unique circumstance.

Continued on next page

[1] U.S. EPA Agricultural Worker Protection Standard 40 CFR parts 156 & 170 Interpretive Policy Questions and Answers. See http://www.epa.gov/pesticides/safety/workers/amendmnt.htm.

Management of Greenhouse and Nursery Stock After Treatment, Continued

Movement and sale after the REI expires

Treated plants may be sold and moved off-site only after the REI has expired.

Specific requirements for PPE after REI expires

Occasionally, pesticide product labeling registered for greenhouse and nursery use may require PPE after the REI expires. When labeling requires PPE after the REI expires, all production greenhouse and nursery employees moving treated stock must abide by the labeling requiring specific requirements for use of PPE.

Specific labeling requirements for use of PPE after the REI expires do not apply to destination workers (home and garden retail employees) handling previously treated plants. However, in the event of prolonged contact with treated foliage, it is recommended that retail employees wear PPE.

If the pesticide is applied at a retail center, the California-specific labeling requirements do apply to the workers at the retail establishment.

Notification requirements

Production greenhouse/nursery:

- Posting and notification are required under 3 CCR sections 6761 and 6776.

Retail centers:

- Notification requirements under the worker protection standards only apply to the originating production/greenhouse nursery. Notification to destination workers at retail centers is not required. However, notification to and use of PPE by workers unloading and moving treated stock at a retail nursery or garden center is recommended in the event of prolonged contact with the treated plants.

Customers:

- There is no requirement to notify persons purchasing the potted plants of the continuing PPE requirement, as it does not apply to customers.

Section 3.8

Physically Present (Certified Applicator)

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The "physically present" language on pesticide labeling requires a certified applicator to provide both "direct supervision" and to be "physically present" when non-certified persons are involved in applying, mixing, and loading these pesticides and when repairing and cleaning the application equipment.

The certified applicator must be located on the premises or contiguous parcel and be in a position to:

- Ensure that non-certified persons are following the labeling directions,
- Provide guidance if the labeling is unclear, and
- Affect changes in procedures if they are not being adhered to or unusual situations occur.

Where California statutes, regulations, or labeling require physical presence and there is **one non-certified handler** at the handling site, the certified applicator must maintain direct supervision and the physically present "in-line of sight" visual standard. Voice contact alone to one non-certified handler does not meet this standard.

In those situations when pesticide handling activities are occurring and there are **two or more non-certified handlers** at separate sites on the same pesticide handling location, the "physically present" statement means the certified applicator must be physically on the premises and must maintain the ability for either visual or two-way voice contact between himself or herself and the non-certified handlers. The ability for immediate communication using their own human voices (not text messaging, computer-generated voice paging, voicemail, etc.), such as by two-way radio or cellular telephone, is required.

Section 3.9

Plant Back Restrictions

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The basis for plant back restrictions is either or both phytotoxicity problems and/or residues in crops for which no tolerance exists. Pesticide labeling plant back restrictions can be classified as either directional (mandatory) or informational (advisory). A mandatory plant back statement is one that addresses how a pesticide must be used. If a grower ignores a mandatory plant back statement, that application is in conflict with labeling and in violation of *FAC section 12973.* An advisory plant back statement is one that provides facts or information about the possible impact. A grower may be responsible for damage or loss that results from a decision to ignore an advisory plant back statement, but is not in violation of *FAC section 12973*. See Chapter 2, *Labeling Statements, Mandatory vs. Advisory*, for a more general discussion of this issue.

Plant back statements are an important consideration in areas where crops are rotated and the same parcel of land may be leased and treated by a succession of growers. If a grower does not observe a mandatory plant back statement and the result is adverse effects to other people, the CAC should consider enforcement action. Adverse effects would include illegal residues on commodities produced and sold by that grower, and illegal residues in or damage to crops produced by subsequent growers who were unaware of the earlier applications.

Enforcement of plant back statements presents unique challenges. DPR recommends appropriate enforcement with respect to any illegal residues on commodities reaching the marketplace to protect the food supply. While "use," as defined in 3 CCR section 6000, specifically mentions plant back restrictions [(c)(2)], tying the application to the subsequent planting that created the "conflict" requires careful presentation when two different people are involved. 3 CCR section 6600 could also be used if the evidence supports it.

Section 3.10

Site Control Statements

Interprets FAC section 12973; 3 CCR section 6000

Interpretation A labeling statement such as, "Keep children and domestic animals out of treated areas until this material has been washed into the soil" does not prohibit the use of the product along roadways and similar areas even though access by the public is not controlled. This statement is intended to apply to products for use on home lawns, parks, and in similar areas where children or pets are likely to play. Its purpose is to avoid repeated or prolonged exposure under those circumstances.

Section 3.11

Professional Applicator Statements

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Statements such as "For use only by professional applicators" or "For use by licensed applicators only" currently have no legal definition, and do not require the user to be a certified applicator nor do they limit the use of the product to licensed agricultural or structural pest control businesses. However, this is an indication that these products are not intended to be consumer products for homeowner use.

U.S. EPA's Label Review Manual, Chapter 11 - *Directions For Use*, Roman numeral VI. - *Guidance for Wording Application Information*, states: "The phrases, "For use only by [certain type of user]"; "For Commercial Use Only" or "For Professional Use Only" should not appear on a product label. Such statements are often used by registrants for marketing purposes. However, neither FIFRA nor the applicable regulations provide for labeling statements such as for "professional use", "industrial use" or other such terms. The registration process does not involve a determination that a product should be used, for example, only by "service persons." Such statements are vague and can mislead customers into believing that a product with such statement is somehow more efficacious than another product. Such statements are also not likely to be enforceable under FIFRA."

Section 3.12

Spray Adjuvant/Surfactant Statements

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

There are various labeling statements pertaining to the use of surfactants and other adjuvants with pesticides. Directions for use on pesticide labeling may specify a particular (commonly a proprietary brand name) surfactant at a specified rate. Other labeling statements may include a prohibitive statement, i.e., "Do not use with surfactant other than…." In these cases, the pesticide must be applied with that particular surfactant. All surfactants must be registered as pesticides (spray adjuvants) in California.

Labeling statements may instruct, "Add spreader (non-ionic) at specified rate." This statement would require the use of a spreader meeting the specifications outlined but would allow the user to choose the brand.

Other labeling may state, "A spreader is recommended, but a similar and suitable non-ionic surfactant may be substituted." This labeling may be interpreted to mean that no spreader, or other spreaders may be used, however, only at the indicated rate.

Chapter 4

DPR Specific Use Site Interpretations

In this chapter This chapter contains the following topics.

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Section 4.1

Crack and Crevice

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site "crack and crevice" is the application of small amounts of insecticide directly into cracks and crevices in which insects hide or through which they may enter the building. Examples are openings occurring at expansion joints, between different elements of construction, and between equipment and floors.

If emulsifiable or oil-base sprays (including nonpressurized, ready-to-use products) are used, equipment must be capable of delivering a pin stream of insecticide. If a pressurized spray is used, an injection or insertion tube must be used. If a dust is used, a bulbous duster or other suitable equipment capable of applying insecticide directly into cracks and crevices must be used. Only minimal amounts of pesticide should remain on the surface.

Section 4.2

Crawl Space

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Application of any pesticide within a crawl space is considered an “indoor” or “interior” use. Therefore, any application of a pesticide labeled for “For Exterior Use Only” within a crawl space would be in conflict with labeling and a violation of Food and Agricultural Code section 12973, despite the presence of vents or air ducts.

“For Exterior Use Only” means to treat or apply only to the exterior wood surfaces of windows, window frames, doors, steps, porches and foundation sills. Although these structures have both interior and exterior surfaces, the products can only be applied to the exterior surfaces.

Application during construction, to any surfaces that will be "interior" when construction is completed, is also prohibited.

Section 4.3

Cropland/Field Crops

Interprets FAC section 12973; 3 CCR section 6000

Interpretation The site "cropland" or "field crops" without any limiting language means the product may be used on any crop grown for commercial or research production purposes. However, it should be noted that there may not be established tolerances for some crops. The grower is responsible for any illegal residues contained in food or feed commodities at the time of harvest.

Section 4.4

Food Areas

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site "food areas" includes receiving, serving, storage (dry, cold, frozen, raw), packaging (canning, bottling, wrapping, boxing), preparing (cleaning, slicing, cooking, grinding), edible waste storage, and enclosed processing systems (mills, dairies, edible oils, syrups). When pesticides are registered for use in these areas, labels will specify dilution rates, appropriate equipment, type of application, and specific precautions to be taken.

In some cases, materials can be used in serving areas, such as dining rooms, but not in areas where the food is processed, or vice versa. Also, the type of treatment may be limited to only crack and crevice or spot treatment within these specific areas.

Section 4.5

Food Handling Establishment

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site “food handling establishment” is a place, other than a private residence, in which food is held, processed, prepared, or served.

Kitchen facilities in apartments, hotel rooms, and rooms associated with group living facilities are in "private residences" and do not fall within this definition. However, facilities in these types of situations where food is prepared for group dining would fall within the definition.

Section 4.6

Fallow Land

Interprets FAC section 12973; 3 CCR section 6000

Interpretation The use site "fallow land" is agricultural acreage that is temporarily out of production. Acreage that is out of production, but which is expected to be returned to production in the foreseeable future, should be considered fallow unless pesticide labeling has clearly specified otherwise.

See also Noncrop.

Section 4.7

Forestry

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site "forestry" includes site preparation for tree planting, conifer release brush control projects, and stump treatments in forestry management. However, brush control and stump treatment for clearing are not considered "forestry" if the purpose is to increase forage production (grazing), even though trees are on the site.

Section 4.8

General Treatment

Interprets FAC section 12973; 3 CCR section 6000

Interpretation The use site "general treatment" is a structural/institutional term indicating an application to broad expanses of surfaces such as walls, floors, and ceilings, or as an exterior treatment.

Section 4.9

Greenhouse Use

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site "greenhouse" is defined as a structure or space, of sufficient size to permit entry, that is enclosed with a nonporous covering and used in the commercial or research production of an agricultural plant commodity. A structure constructed of porous cloth or other porous material (such as lath) is not considered a greenhouse. If a greenhouse has sides or significant portions of the structure removed during the application and the restricted entry interval (REI), it is not considered a greenhouse. Simply opening doors or windows does not alter the structural status as a greenhouse. Whether a specific pesticide may be used in a greenhouse or other enclosed plant-growing area depends upon the application directions that appear in the labeling.

Grouping of pesticides

The nature of pesticide labeling instructions permits the grouping of pesticide products into two groups:

1. Products which may be used in greenhouses and enclosed plant-growing areas, and,
2. Products which may *not* be used in greenhouses.

Products which may be used in greenhouses and plant-growing areas

Products which may be used in greenhouses and enclosed plant-growing areas include:

- Labeling that is explicit and bears adequate application directions and other precautionary labeling stating "for greenhouse use." The use of electrostatic sprayers in greenhouses is allowed when the application complies with all label requirements, particularly minimum dilution statements.

Continued on next page

Products which may be used in greenhouses and plant-growing areas (continued)

- Labeling which bears directions for use on the commodity to be treated and has dilution and dosage rate instructions and other precautionary statements which are consistent with the use in a greenhouse. This means directions stated in terms of pots, planting beds, square feet, and similar instructions. Occasionally, greenhouse crops may be grown in large greenhouses (one-half acre or larger). Pesticide labels used in these types of situations could indicate application rates in "per acre" units. All other labeling requirements would have to be consistent with use in a greenhouse setting.

- Since degradation of pesticides in enclosed areas may vary widely, use on food crops grown in greenhouses requires specific label directions for that use. The label must indicate that the particular food crop grown in a greenhouse or enclosed area may be treated with the pesticide. Preharvest and reentry label statements must be followed.

- Transplant operations grow food crops that are eventually grown and harvested outdoors rather than grown to harvest in the greenhouse. Food crop transplants should not be considered as food crops; the vegetable transplants represent the "harvested crop" of the greenhouse operation.

Products which may not be used in greenhouses

Products which may not be used in greenhouses:

- Labeling which has an explicit prohibition against use of the pesticide in greenhouses or enclosed structures (not including residential structures).

- Labeling which has directions for use on the commodity to be treated and bears dilution or dosage rate instructions and accompanying precautionary statements which are not consistent with greenhouse use. This means statements such as "apply by aircraft only" or other directions inconsistent with use in an enclosed structure.

Continued on next page

Safety of greenhouse employees

While we recognize that the use of pesticides in greenhouses may involve broad interpretations of some labeling, special attention should be given to the hazards of illegal or increased pesticide residues and hazards to the applicator, picker, transplanter, disbudder, and others who may work in, or come in contact with, the application site.

Users should give special attention to the amount or type of personal protective equipment worn by the applicator beyond that normally associated with open field applications of the same pesticide due to the potential for increased exposure in enclosed spaces.

See also Section 3.7 for a discussion of the management of greenhouse and nursery stock after treatment.

Section 4.10

Growing Season

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The term "growing season" means the time period from planting until harvest is completed for a particular annual or biannual crop (such as alfalfa, asparagus, strawberries, or sugar beets), but is usually not more than one year (365-day period) for perennial crops with multiple annual harvests, such as orchards. This interpretation is important because pesticide labeling often limits the number of applications or total amount applied during the growing season or crop year.

See also Preplant.

Section 4.11

Homeowner (Consumer) Use Products

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Directions for use on pesticide labeling given on a "per acre" basis are generally used to indicate an intention for commercial, rather than, homeowner (consumer) use. Homeowner-use pesticides have directions to use the product at a rate of so much material "per 1,000 square feet," or amount of material per gallon, pint, etc., and carry special precautions to protect children, pets, etc. The size of the container should also be considered. Occasionally, certain pesticide products that are intended for homeowner use may show greater units of area for dilution rates, for example, rural residential or "ranchette" uses. These products must indicate by site description or use directions that they are consistent with homeowner use.

By the same token, agricultural or commercial use of consumer products may be in conflict with labeling. Normally, this is not a serious problem due to cost issues, and generally, there is little or no hazard created. However, where a clear misuse occurs and a hazard is created, action may be taken.

Section 4.12

Non-bearing Crop Use

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Pesticide labeling may specify that the product can be applied only to "non-bearing" crops. This labeling may designate the conditions, restrictions and time intervals that provide for application of a pesticide to a non-bearing food or feed crop. In the absence of specific labeling directions, immature perennial crops are considered non-bearing only if a harvestable raw agricultural commodity is not expected to be produced for 12 months from the date of application. Once a perennial crop has produced a harvestable commodity, it is considered "bearing" from that point on. Non-bearing does **NOT** refer to the period of the annual growth cycle that has no crop on the tree or vine.

Dormant season applications to plantings that have produced a harvestable crop or are expected to produce a harvestable crop during the next growing season, are considered made to a bearing crop. Crops which have sustained freeze or drought damage and are not expected to produce a harvestable crop during the next growing season are still considered to be bearing. A bearing crop cannot be made non-bearing by stripping and destroying havestable fruit. Perennial nursery stock would normally be considered non-bearing. These guidelines are consistent with U.S. EPA's pesticide assessment guidelines for hazard evaluation and registration.

Section 4.13

Non-crop Land Areas

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site "non-crop land areas" refers to areas which will not in the foreseeable future be used to grow food, feed, or fiber crops, or to pasture animals. Examples of non-crop land include railroad beds, lumberyards, highway shoulders, driveways, roadsides, vacant lots, etc. This could include areas in a residential or farmstead setting.

See also Fallow land.

Section 4.14

Non-food Areas

Interprets FAC section 12973; 3 CCR section 6000

Interpretation The use site "non-food areas" in the structural/institutional setting includes garbage rooms, laboratories, floor drains (to sewers), entries and vestibules, offices, locker rooms, machine rooms, boiler rooms, garages, mop closets, and storage (after canning and bottling). When pesticides are registered for use in these areas, labeling will specify dilution directions and type of application, such as general treatment, spot treatment and crack and crevice.

Section 4.15

Ornamental

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site “ornamental” means plants that are grown for aesthetic purposes. The term includes outdoor landscape and indoor (interiorscape) plantings and nursery stock of non-food plants produced for landscape or ornamentation purposes. This term does not include common food plants, even if grown for ornamental or research purposes.

However, in certain circumstances, there are "ornamental" plants that have some limited food use such as, ornamental kale, olives, certain species of cacti, etc. Some discretion and consideration of the actual intended primary use should apply in these cases.

Section 4.16

Pasture

Interprets FAC section 12973; 3 CCR section 6000

Interpretation The use site "pasture" refers to land on which the foliage is grazed by animal stock, and on which agricultural practices are performed on an annual or more frequent basis. Any fence encompassing a pasture is included as part of the pasture. "Agricultural practices" include, cultivation, seeding, fertilization, irrigation, and pesticide application (see Rangeland).

Section 4.17

Pre-plant

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

Pre-plant applications are pesticide applications that are made to prepare the area for planting. These applications are directly related to the growth and development of the subsequent crop. Examples of pre-plant applications are soil fumigation prior to vegetable planting, and pre-plant herbicide or nematicide treatments. Any restrictions on what may be planted after the application must be followed.

See also Growing season.

Section 4.18

Rangeland

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site "rangeland" is land on which the foliage is grazed by animal stock, but on which agricultural practices are not performed on an annual or more frequent basis.

See Pasture.

Section 4.19

Sorghum (family grouping)

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

When labeling lists the crop "sorghum" it can also be used on sudangrass and hybrids.

40 CFR part 180.1(g) columns A and B, generally establish tolerances and exemptions for pesticide chemicals in or on family grouping and specific varieties of raw agricultural commodities. Raw agricultural commodity groups listed in column A are considered to include the corresponding specific raw agricultural commodities listed in column B.

However, a tolerance or exemption for a specific commodity in column B does not apply to the entire general category in column A. So, when labeling lists the crop "sudangrass" which is in column B, the use is restricted to sudangrass and its hybrids. If used on "sorghum" which is in column A, it would be a use in conflict with labeling and a violation of FAC section 12973.

40 CFR part 180.1(g) column A clearly differentiates between the grain/seed crops and the forage/fodder crops, as does 40 CFR part 180.40, Tolerances for Crop Groups, and 40 CFR part 180.41, Crop Group Tables.

40 CFR part 180.1(g) includes both "sorghum (grain)" and "sorghum (fodder, forage)" in column A. Both of these citations include "sudangrass and hybrids" in column B. It is important to maintain consistency, whenever possible, between labeling use site interpretations and the application of tolerances. The designation of sudangrass as a specific "variety" of sorghum serves to establish the intent to allow the use of a pesticide on sudangrass whenever sorghum is listed on the labeling.

When the labeling lists the crop "grain sorghum," use would be allowed on seed/grain crops of sorghum, sudangrass and their hybrids and labeling may have feeding restrictions concerning forage.

When the labeling lists "sorghum forage, fodder," use would be allowed on sorghum, sudangrass and hybrids where the foliage, rather than the grain or seed, is to be the harvested crop.

Section 4.20

Spot Treatment

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The use site “spot treatment” in the institutional setting means an application limited to areas on which insects are likely to occur, but which will not be in contact with food or utensils and will not ordinarily be contacted by workers. These areas may occur on floors, walks, and bases or undersides of equipment. For this purpose, a "spot" will not exceed two square feet.

In the outdoor setting, including agricultural, a spot treatment would be an application where small irregular areas are treated, usually specific areas of pest infestation within a more general area.

Section 4.21

Trees

Interprets FAC section 12973; 3 CCR section 6000

Interpretation The general site, "trees," without any limiting language, means the product may be used on any tree and cannot be limited to only non-crop trees. However, it should be noted that there *may* not be established tolerances for some tree crops. The grower is responsible for any illegal residues contained in food or feed commodities at the time of harvest.

Section 4.22

Waterfowl in Alfalfa

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

The application of certain pesticides, particularly in granular form, has been implicated in the poisonings of waterfowl feeding in the treatment area. *3 CCR section 6474 (carbofuran)* uses the phrase "where repeated feeding of waterfowl is known to occur." Coots normally do not frequent alfalfa fields where the height of the alfalfa is greater than six inches. Geese and widgeon, on the other hand, do frequent alfalfa fields regardless of the height of alfalfa.

California Department of Fish and Game (DFG) officials can be helpful in advising CAC staff concerning the presence of grazing waterfowl in the immediate locality and forecasting the movement of waterfowl from adjacent areas.

Section 4.23

Wood Intended for Cooking

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

U.S. EPA has indicated that the use of certain fumigants on wood intended for cooking and heating purposes is a non-food use. Phosphide and bromide residues are not expected in food cooked with treated wood. It is not a violation of the label to use methyl bromide and aluminum or magnesium phosphide fumigants on fuel wood if the products are labeled for use on wood and wood products. It is a violation of state law and the label to use other products on wood intended for cooking.

This interpretation is limited to fumigants, due to the reduced likelihood that residues would remain at time of use.

Chapter 5

Supplemental Labeling

In this chapter This chapter contains the following topics.

Section	Topic	See Page
5.1	FIFRA Section 24(c) Special Local Needs	5-2
5.2	FIFRA Section 18 Emergency Exemption	5-4
5.3	SLN Restrictions for Food/Feed Use--Alfalfa	5-8
5.4	SLN Always Controlling Document	5-10

Section 5.1

FIFRA Section 24(c) Special Local Needs

Interprets FAC section 12973; 3 CCR section 6000; and 40 CFR part 162.152

Background

To address a pest situation that a FIFRA section 3 (normally registered) product cannot mitigate, DPR, under the authority of FIFRA section 24(c) and 40 CFR part 162.152, may register a new end-use product or an additional use of a federally-registered pesticide product, provided there is a special local need within the state and the following conditions exist:

- The use is covered by the necessary tolerances or exemption from tolerance if the pesticide is used on a food or feed commodity.
- Registration for the same use has not been previously denied, disapproved, suspended, or cancelled by U.S. EPA, or voluntarily cancelled by the registrant.
- The pesticide does not contain a new active ingredient not registered by U.S. EPA.
- There is no other federally-registered pesticide for the specific use or no federally-registered product available to address the special local need.

A special local need may address a new pest, method or timing of application, different use rate, new crop/use site, and Integrated Pest Management in certain crops.

Two types of registrations under section 24(c)

There are two types of special local need (SLN) registrations:

1. A first-party SLN in which the applicant is the manufacturer of the pesticide (most commonly issued by the manufacturer as product bulletins).
2. A third-party SLN in which the applicant is someone other than the manufacturer, such as a grower, grower association, or UC extension (issued by DPR in an SLN format). Both are subject to the same limitations regarding residue tolerance, cancellation, etc.

SLN registrations are product-specific and must be in possession of the user at the time of application.

Continued on next page

Information regarding special local need registrations

The following items must be submitted by the applicant in order for the SLN application to be processed:

- The California *Request for a Special Local Need Registration (SLN)*, section 24(c) form
- Efficacy and phytotoxicity data to support the SLN use pattern
- For a first-party SLN, six copies of the proposed labeling that addresses the SLN use pattern. Third-party SLN labeling is developed from the State application form.
- A letter of authorization from the manufacturer of the pesticide supporting the use of their product as an SLN
- A U.S. EPA SLN form (Form 8570-25, rev. 1/94), *Application for/Notification of State Registration of a Pesticide to Meet a Special Local Need*, filled out and signed

Detailed letters or documentation from experts, such as UC Farm Advisors or UC Extension Specialists, demonstrating the SLN pesticide/use pattern has been shown to address an existing or imminent pest problem and no federally-registered pesticide product is sufficiently available.

Dealer responsibility for current SLN labeling

Pest control dealers act as quasi-agents of the registrant in the distribution of pesticide products. As such, they are expected to distribute current labeling. 3 CCR section 6301 provides a two-year "window" for the dealer to continue distribution of unregistered products. However, dealers are expected to distribute only current supplemental labeling regardless of when they placed the product into their inventory. When SLNs are amended, the dealer is responsible for obtaining and distributing the most current version of the labeling.

Continued use after inactivation of SLN

Material purchased by the end user under a valid SLN may continue to be applied pursuant to that use, after the SLN is inactivated or the product has been deleted from an active SLN, only until that specific amount of stock has been exhausted. Any material purchased after the inactivation date cannot be used pursuant to the SLN. If uses are not in compliance with the parameters of the SLN, then a use in conflict with the registered labeling has occurred. However, any state or U.S. EPA suspension action would supersede this approval.

Section 5.2

FIFRA Section 18 Emergency Exemption

Interprets FAC sections 12973 and 12833; 3 CCR sections 6000 and 6206; and 40 CFR part 166

Background

FIFRA section 18 grants U.S. EPA the authority to authorize any federal or State agency to allow the use of a pesticide without registration for a limited time, if U.S. EPA determines that emergency conditions exist. The regulations governing FIFRA section 18 (found at 40 CFR part 166) define *Emergency Condition* as an urgent, non-routine situation that requires the use of a pesticide(s). Such uses are often referred to as "emergency exemptions," "section 18s," or simply "exemptions."

The issuance of a section 18 is not the same as the issuance of a product license (registration). A section 18 exemption allows for the time-limited use of a pesticide product (registered or unregistered) to control an urgent, non-routine pest problem.

An applicant for a section 18 must be someone other than the product registrant. Examples include farm advisors, county agricultural commissioners, grower groups, etc. Once the application has been reviewed by DPR, the request is forwarded to U.S. EPA for final approval or denial.

It is DPR's position that all materials used under an emergency exemption program should be applied using the best available pest control methods and technology. These may include pest population monitoring, treatment thresholds, methods of application designed to reduce environmental contamination, and limitations to mitigate effects on nontarget organisms. When feasible methods and technologies are available, their use will be required for application under the exemption.

Any pesticide used under an emergency exemption is automatically a restricted material [*3 CCR section 6400(b)*] and requires a restricted material permit.

Product uses issued under section 18 cannot be advertised unless criteria outlined in 40 CFR part 168.22 are met.

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Deviations from labeling not allowed

U.S. EPA considers section 18s exemptions from labeling rather than supplemental labeling, and therefore, users are not allowed the deviations from labeling requirements granted in *3 CCR section 6000 (Conflict with Labeling).* Any deviation from a section 18 would be considered a violation of permit conditions under *FAC section 12973*. A pesticide must be used in compliance with all section 18 requirements, including rate, concentration, method, timing, and target pest.

U.S. EPA has given DPR permission to add the following standard language, allowing tank mixing of section 18 materials:

- Tank mixing with other compatible pesticides, spray adjuvants and fertilizers is allowed as long as all labeling and regulation requirements are met and tank mixing is not otherwise prohibited.

Tolerances - time limited

Emergency exemptions are often requested for food uses for which no tolerance or exemption from tolerance has already been established. Food uses with existing residue tolerances or exemption from the requirement of a tolerance would be processed under FIFRA section 24(c) as an SLN. If the emergency use involves the treatment of a food crop, U.S. EPA will establish a temporary tolerance (maximum allowable residue levels) to cover any pesticide residues that may result. These are usually granted for two to three years.

Tolerances - regional

U.S. EPA has informed us that from an enforcement standpoint, regional tolerances are no different from national tolerances and the FDA and DPR would not consider any commodity with residues below a regional tolerance in violation, no matter where the commodity was grown.[1]

The regional tolerance is a guide for government agencies to use for placing area use limitations on product labeling, including SLNs.

Continued on next page

[1] April 9, 1990 letter quoting Hoyt Jamerson, U.S. EPA, Office of Pesticide Programs.

FIFRA Section 18 Emergency Exemption, Continued

Section 18 - four types of emergency exemptions

The federal regulations adopted for section 18 provide for **four** types of emergency exemptions:

1. Specific exemption
2. Public health exemption
3. Quarantine exemption
4. Crisis exemption

1. Specific exemption

- Majority of requests are for specific exemptions
- Requested when an emergency condition exists, in order to avert a significant economic loss or a significant risk to endangered or threatened species, beneficial organisms, or the environment
- Growers or agricultural research scientists identify a pest situation which registered pesticides cannot control
- Growers request their State lead agency (DPR) to request an emergency exemption from U.S. EPA
- U.S. EPA evaluates request and decides whether or not to authorize use
- Specific exemptions may be authorized for up to one year

2. Public health exemption

- Requested to control a pest that will cause significant risk to human health
- "Emergency" based upon the potential for a pest to be a vector for disease that possess risk to human health
- Public health exemptions may be authorized for up to one year

3. Quarantine exemption

- Requested to prevent the introduction or spread of an invasive pest species not previously known to occur in the United States
- "Emergency" rests on the potential of an invasive species to cause a significant economic loss
- U.S. EPA may issue the quarantine exemption directly to a federal agency, such as U.S.D.A.
- Quarantine exemptions may be authorized for up to three years

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4. Crisis exemption

- Immediate need for a specific, quarantine, or public health exemption. Applicant may request the crisis exemption with an already-submitted specific, quarantine, or public health emergency exemption request. This procedure allows the use to begin while U.S. EPA makes a decision on the corresponding exemption request. **This is usually done simultaneously in California.**
- Applicant confers with U.S. EPA prior to use. U.S. EPA performs a cursory review to ensure there are no concerns, and whether the appropriate safety findings required by the Food Quality Protection Act of 1966 can be made.
- If U.S. EPA identifies concerns, they will confer with the applicant; if concerns are not resolved, U.S. EPA may disallow a crisis exemption to be issued. Following communication with, and clearance by, U.S. EPA (oral approval 36 hours before issuance), DPR or federal agency may issue a crisis exemption, allowing the unregistered use to proceed for up to 15 days.

Application requirements

The following items must be submitted by the applicant in order for the emergency exemption request to be processed:

- California *Application for Section 18* Emergency Exemption that includes:
  - A complete description of the emergency pest problem
  - The contact information for knowledgeable experts
  - The emergency use instructions needed to apply the product in order to control the pest problem
  - Information to support the argument that a significant economic loss (SEL) has occurred, or is about to occur, due to a pest problem
  - The economic history (typically three years worth of information) of the crop, including information on annual production, price of commodity, and cost of production before the pest problem occurred or became significant
- Data to support section 18
- A letter of authorization from the product registrant
- Draft product labeling and product formulation sheet if the product has not been federally registered, or a copy of the U.S. EPA stamped--accepted label and confidential statement of formula (CSF) if the product is not currently registered in California

Section 5.3

SLN Restrictions for Food/Feed Use -- Alfalfa

Interprets FAC sections 12972 and 12973

Background

Assembly Bill 697 (Chapter 287, Statutes of 1995) added section 12832 to the FAC. The bill was adopted to allow alfalfa and certain vegetable crops grown for seed to be considered non-food/non-feed sites under FIFRA section 24(c). This means that a section 24(c) registration could be issued for the use of a pesticide on these crops when grown for seed, in the absence of a tolerance or an exemption from tolerance, if used in accordance with the conditions of FAC section 12832.

Governing authorities

Authorities that regulate alfalfa seed crops treated under an SLN registration:

- The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)
- Food and Agricultural Code (FAC)
- SLN labeling

FAC restrictions

FAC section 12832 establishes that alfalfa, when grown for seed production, is classified as a non-food/non-feed site when the following conditions are met:

- All seed screenings shall be disposed of in such a way that they cannot be distributed or used for food/feed. The seed conditioner shall keep records of screenings disposal for three years from the date of disposal.
- No portion of the seed plant may be used or distributed for food/feed.
- All seed crops grown on a non-food/non-feed site or conditioned in California must bear a tag or container label that forbids the use of the seed for human consumption or animal feed.
- Seed grown on a non-food/non-feed site or conditioned in California may not be distributed for human consumption or animal feed.

This provision allows the use of section 24(c) labeling rather than a section 18 exemption to authorize use even in the absence of a tolerance.

Continued on next page

SLN Restrictions for Food/Feed Use -- Alfalfa, Continued

SLN labeling

Labeling requirements found on SLNs for alfalfa grown for seed incorporate by reference requirements found in FAC section 12832. In addition, the SLN labeling prohibits seed from treated plants to be used for growing sprouts for human or animal consumption.

The later establishment of a tolerance does not eliminate a violation of FAC section 12972 if the crop or by-products are used for food/feed in conflict with labeling statements.

No harvest from subsequent growing seasons

Alfalfa seed is a perennial crop and creates a unique situation regarding harvesting subsequent crop production.

FAC section 12832 restrictions and SLN labeling do not provide an exemption for perennial crops, therefore, requirements carry over from one growing season to the next until the plant is removed from the ground. Alfalfa seed crops treated under section 24(c) labeling cannot be harvested for food/feed, in conflict with labeling prohibitions, in subsequent growing seasons.

Pre-harvest interval requests

Interested parties may request to establish a tolerance and appropriate pre-harvest interval (PHI) through the following steps:

1. Provide required data to U.S. EPA
2. Submit a section 24(c) amendment request to the DPR

Section 5.4

SLN Always Controlling Document

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

When confronted with both the container label and supplemental labeling, supplemental labeling is always the controlling document in the field whether or not it is in conflict with an express prohibition on the container label. If supplemental labeling is sought and obtained either by the registrant, user or DPR, it is by definition approval of some aspect of use inconsistent with the container label, expressed or implied.

DPR will attempt to avoid, insofar as possible, using 24(c) labeling to add restrictions to current labeled uses due to the enforcement challenges presented. It is sometimes difficult to prove that the labeling was actually delivered with the pesticide and that the labeling is required at the use site.

This is not interpreted as allowing new amended FIFRA section 3 container labels to be distributed as supplemental labeling to allow new uses of old product. To upgrade the old product to allow new section 3 approved uses, the product must be relabeled with the new label in compliance with U.S. EPA registered establishment requirements or an SLN issued to add the new uses to the old label.

Chapter 6

Worker Safety

In this chapter This chapter contains the following sections.

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Section 6.1

History of Worker Safety Regulations

Interprets FAC sections 12980 through 12988

Background

In 1974, California adopted comprehensive worker safety regulations designed to protect agricultural pesticide handlers and field workers. That same year, the U.S. Environmental Protection Agency (U.S. EPA) adopted a worker protection standard that dealt only with the protection of field workers.

From 1986 through 1988, California revised its worker safety regulations and expanded the scope to include all pesticide handlers. The revisions clarified and increased requirements for handler training, medical supervision, personal protective equipment, field reentry, and worker reentry intervals.

California amended its worker safety regulations in January 1992 to include hazard communication requirements. Hazard communication regulations were developed to supplement existing worker safety regulations dealing with hazard communication for pesticide handlers and field workers. Incorporation of the regulations ensured that California's worker safety program was equivalent to the 1988 revisions of the Federal Hazard Communication Standard.

In August 1992, federal regulations were adopted, known as the Worker Protection Standard (WPS) (40 CFR part 170), designed to protect employees on farms, forests, nurseries, and greenhouses from occupational exposures to agricultural pesticides. At that time, California began to work with U.S. EPA to address interpretation issues and determine regulatory equivalency for several elements of California's existing worker safety regulations.

In May 1995, U.S. EPA gave interim approval of California's request for regulatory equivalency contingent upon incorporation of federal WPS requirements in California's worker safety regulations. Since 1995, California has continued to improve many of the requirements contained in its worker safety regulations.

Worker safety regulations apply only to employees; however, labeling requirements for pesticide safety and personal protective equipment apply to all users. Failure by any user, including growers and employers, to use the protective equipment specified by the label, is a violation of both State and federal law.

Section 6.2

Accessible

Interprets 3 CCR section 6723

Interpretation "Accessible" means that records required by regulations of the pesticide regulatory program can be easily obtained (i.e., within 48 hours) by employees who handle pesticides. This is not the same as "display" which is defined in 3 CCR section 6000.

Section 6.3

Closed System Criteria (Application of)

Interprets 3 CCR sections 6000, 6738, and 6746

Background

The definition of "closed system" in 3 CCR section 6000 includes a reference to the Director's Criteria for Closed Systems (Director's Criteria). DPR's Worker Health and Safety Branch developed the Director's Criteria. The current Director's Criteria were developed to implement the requirement of 3 CCR section 6746 and therefore address only liquid pesticides. The Director's Criteria is found in Compendium Volume 4, Inspection Procedures, Appendix 1.

Section 6738 allows any person handling pesticides through a closed system to reduce labeling-required PPE in specified situations. This provision applies to both liquid and dry pesticides and is not limited to mixing and loading. It extends to use of a closed application system as well. There is no further clarification in this section about what standards a closed system must meet.

A manufacturer's certification that their system meets the Worker Protection Standard is one way to show proof in the absence of the Director's Criteria.

Section 6746 requires a closed system to be used by employees who mix or load certain liquid pesticides. Both State and federal policy have long allowed for reduction of PPE when engineering controls are used. The provisions of section 6738 should be applied to section 6746.

Interpretation

When a liquid pesticide is being handled pursuant to either section 6738 or section 6746, the Director's Criteria should continue to be applied. The absence of the Director's Criteria for dry formulations of pesticides and for application does not preclude a person from taking advantage of the allowable exceptions and substitutions in section 6738. The definition in section 6000 should be used to evaluate closed systems for dry formulations, but disregarding the reference to the Director's Criteria, which is not applicable and should not be used in this case. DPR does not anticipate approving closed systems for dry formulations of pesticides.

Section 6.4

Decontamination

Interprets 3 CCR sections 6701, 6734, and 6768

Interpretation

How much water is enough? The term used in the California regulations is "sufficient." U.S. EPA guidelines recommend at least three gallons of water for each handler and one gallon for each field worker. The employer must determine how much water is sufficient. Section 6701 directs that we interpret our regulations consistent with federal regulations. Factors to consider include the number of handlers or field workers, the type of handling or field work activity, the amount of water needed for adequate decontamination after exposure, and the frequency of filling containers. A clear violation occurs when they run out of water. In other circumstances, the evidence available relating to the total situation must be evaluated.

Section 6.5

Employee Laundering Coveralls

Interprets 3 CCR sections 6736 and 6738

Interpretation

An employer may contract with an employee to launder coveralls only under the following conditions:

1. The coveralls remain the property of the employer and employees are not allowed or directed to take potentially contaminated coveralls into their home.
2. Contaminated or potentially contaminated coveralls must be kept separate from other clothing and laundry and stored in a sealed container until laundering.
3. All clean coveralls must be either dried thoroughly or put in a well-ventilated place to dry.

It is recommended that laundering be done in a dedicated washer and dryer separate from any residential unit or laundromat.

Definition

It is important to understand the difference between coveralls (PPE) and work clothing (*3 CCR section 6000*) to properly apply this interpretation. *Coverall differs from, and should not be confused with, work clothing that generally, is provided by the employee*. Although they may be physically similar, the difference is based on who provides it.

Employer instruction to person doing the laundering

To protect themselves, their employees, and those with whom they may contract to wash coveralls, employers shall:

- Make sure the person laundering understands that the coveralls may be contaminated with pesticides;
- Instruct them on methods to prevent personal exposure;
- Provide the employee or contractor with the requirements specified in 3 CCR sections 6736 and 6738; and
- Conduct supervision of laundering, if needed.

Washing "work clothes"

For information regarding the washing of pesticide work clothes, please reference the Pesticide Safety Information Series (PSIS) A-7 and N-7: *Washing Pesticide Work Clothing.* The PSIS can be downloaded from DPR's Web site at: http://www.cdpr.ca.gove/docs/whs/psisenglish.htm.

Section 6.6

Employee or Independent Contractor (Sharecropper)

Interprets FAC section 11510; 3 CCR section 6702

Interpretation

Normally, if an interpretation of the specific employment relationship in question has been made by the U.S. Department of Labor, the State Employment Development Department, or a State or federal tax agency, DPR would use that determination for the application of pesticide laws and regulations designed to protect employees. In the absence of any formal determination relevant to the particular situation at hand, the following guidelines are presented. This interpretation is based on information from the U.S. Department of Labor, Field Operations Handbook, Parts 10b04-10b11 and California State Management Memo 92-20, jointly issued by the Department of Finance and the Employment Development Department.

A sharecropper is a person who rents a piece of property for a percentage of the harvested crop, rather than paying a monetary rental or lease fee. How the rent is paid is not at issue for our purposes. A sharecropper is considered an independent contractor or owner for purposes of pesticide laws and regulations.

An employee is one who is hired by another to work for wages or salary and whose work is largely directed by his or her employer. The principle test relied upon by the courts for determining whether an employment relationship exists has been whether the possible employer controls, or has the right to control, the work to be done by the possible employee to the extent of prescribing how the work shall be performed.

Continued on next page

Interpretation (continued)

The factors which the Supreme Court has considered significant (although no single one is considered controlling) are:

1. The extent to which the services in question are an integral part of the possible employer's business;
2. The amount of the alleged contractor's investment in facilities and equipment;
3. The alleged contractor's opportunities for profit or loss;
4. The amount of initiative, judgment or foresight in open market competition with others required for the success of the claimed independent enterprise.

There are two pertinent questions for our purposes. First, who actually is the operator of the property, mainly for restricted material permitting purposes? In true rental or lease situations, the renter or lessee normally gains control of the property through the rental or lease agreement and is clearly the operator of the property. However, in sharecropping situations, the relationship may be less clear. Often, these management agreements leave considerable control with the umbrella corporation. You may have to carefully review the actual agreement to gain enough information to make a decision about who has the most significant control for the purposes of applying the regulations. Second, is the sharecropper an independent contractor (owner of his or her farming business) or is the relationship with the umbrella corporation more of an employer/employee relationship for the purposes of applying the worker safety regulations? If the sharecropper is clearly the operator of the property, it is likely that they are also an owner, rather than in an employee relationship.

Carefully review the definitions of "operator of the property," "employee," and "employer" in 3 CCR section 6000 and apply them to the situation. It would be possible, at least in theory, to determine that the sharecropper has sufficient control over the aspects of the operation of the property important for permitting to be the operator of the property and yet be in an employee relationship with the umbrella corporation due to other limitations. There are several questions to ask when deciding whether a sharecropper is an owner or an employee for worker safety purposes, and if they can be considered an operator of the property for permitting purposes. You must use your judgment in applying the following factors to the situation. You should also consider whether this is a situation that may be common to other counties and therefore, in the interest of uniformity, should DPR be involved in the determination.

Independent Contractor/Employee Status
Common Law Determination Factors

Factors	Employment	Independent Contractor
1. Instructions	A worker who is required to comply with instructions about when, where, and how to work is ordinarily an employee. The instructions may be in the form of manuals or written procedures that show how the desired result is to be accomplished. Some employees may work without receiving instructions because they are highly proficient and conscientious workers. Even if no instructions are given, the control factor is present if the employer has the right to give instructions.	An independent contractor decides how to do the job, establishes his or her own procedures and is not supervised. The entity engaging his or her services is only interested in the end result.
2. Training	Training of a worker by an experienced employee working with him or her, by correspondence, by required attendance at meetings, and by other methods, is a factor of control indicating that the employer wants the services performed in a particular manner. This is especially true if the training is given periodically or at frequent intervals.	An independent contractor ordinarily uses his or her own methods and receives no training from the purchaser of services. He or she is not required to attend meetings.
3. Integration	If the individual's services are so integrated into an employer's operations that the success or continuation of the business depends on the performance of the services, it generally indicates employment.	If the individual's performance of service and those of the assistants establish or affect his or her own business reputation and not the business reputation of those who purchase his or her services, it is an indication of an independent contractor relationship.
4. Services rendered professionally	If the services must be rendered personally, it indicates the employer is interested in the methods, as well as the results.	An individual's right to substitute another's services without the employer's knowledge suggests the existence of an independent relationship.
5. Hiring assistants	An employee works for an employer who hires, supervises, and pays assistants. If an employee hires and supervises assistants at the direction of the employer, he or she is acting as an employee in the capacity of a foreman for or representative of the employer.	An independent contractor hires, supervises, and pays assistants under a contract that requires him or her to provide materials and labor.

Independent Contractor/Employee Status
Common Law Determination Factors

Factors	Employment	Independent Contractor
6. Continuing relationship	The existence of a continuing relationship between an individual and the person for whom he or she performs services indicates an employer-employee relationship. If the arrangement consists of continuing or recurring work, the relationship is considered permanent, even if the services are rendered on a part-time basis, are seasonal in nature, or if the person actually works for only a short time.	The relationship between an independent contractor and his or her client ends when the job is finished.
7. Set hours of work	The establishment of set hours of work by the employer is a factor of control. If the nature of the occupation makes fixed hours impractical, a requirement that the worker work at certain times is an element of control.	An independent contractor is the master of his or her own time.
8. Full-time work	Full-time work for the business is indicative of control by the employer since it restricts the worker from doing other gainful work. Full time does not necessarily mean an eight-hour day or five day week. Its meaning may vary with the intent of the parties, the nature of the occupation, and the customs in the locality. These conditions should be considered in defining full-time. Full-time services may be required even though not specified orally or in writing.	An independent contractor is free to work when he or she chooses, and to set his or her daily or weekly schedule. An independent contractor would normally perform service less than full time for one principal.
9. Work done on premises	Doing the work on the employer's premises, or on a route, or at a location designated by an employer implies employer control, especially where the work is of such a nature that it could be done elsewhere. The use of desk space and of telephone and stenographic services provided by an employer places the worker within the employer's direction and supervision unless the worker has the option as to whether he or she wants to use these facilities. However, the fact that the work is done off the premises does not indicate freedom from control since some occupations, e.g., employees of construction contractors, are necessarily performed away from the premises of the employer.	Doing work away from the employer's premises when it could be done on the employer's premises indicates a lack of control, especially when the work is free from supervision.

Independent Contractor/Employee Status
Common Law Determination Factors

Factors	Employment	Independent Contractor
10. Order or sequence set	If a person must perform services in the order or sequence set by the employer, it shows that the worker is not free to follow an independent pattern of work, but must follow the established routines and schedules of the employer. Often, because of the nature of the occupation, the employer either does not set the order of the services or sets them infrequently. Control is sufficiently shown, however, if the employer retains the right to do so.	If the person engaging the services is not interested in the order or sequence by which the individual completes the work, there is an indication that there is lack of control over the manner and means by which the work is performed.
11. Reports	The submission of regular oral or written reports indicates control since the worker must account for his or her actions.	An independent contractor is not required to file reports, which constitutes a review of his work. (However, reports related only to an end result are not an indication of employment or independence.)
12. Payments	Payment by the hour, week or month represents an employer-employee relationship. The guarantee of a minimum salary or the granting of a drawing account at stated intervals with no requirement for repayment of the excess over earnings tends to indicate the existence of an employer-employee relationship.	Payment on a commission or job basis is customary where the worker is an independent contractor. Payment by the job includes a lump sum computed by the number of hours required to do the job at a fixed rate per hour.
13. Expenses	Payment of the worker's business and travel expenses by the employer indicates control over the worker.	A person who is paid on a job basis and who has to take care of all incidental expenses is generally an independent contractor. Since the person is accountable to no other person for the expenses, the person is free to work according to his or her own methods and means.
14. Tools and materials	The furnishing of tools, materials, etc., by the employer indicates control over the worker. In some occupations and industries, it is customary for individuals to provide their own tools, which are usually small hand tools; in that case, workers may also be considered to be employees.	When a worker furnishes tools and materials, especially when a substantial sum is involved, there is an indication of independence.

Independent Contractor/Employee Status
Common Law Determination Factors

Factors	Employment	Independent Contractor
15. Investment	The furnishing of all necessary facilities by the employer tends to indicate an employment relationship. Facilities include, generally, equipment or premises necessary for the work, but not tools, instruments, clothing, etc., that are commonly provided by employees in their particular trade.	A significant investment by the worker in facilities used by him or her in performing services for another tends to show an independent status. In order to be significant, the investment must be real, essential, and adequate.
16. Profit or loss	When workers are insulated from loss or are restricted in the amount of profit they can gain, they usually are employees. The opportunity for higher earnings, such as from pay on a piecework basis or the possibility of gain or loss from a commission arrangement, is not considered profit or loss.	The possibility of a profit or loss for the worker as a result of his or her services generally shows independent contractor status. Profit or loss implies the use of capital by the individual in an independent business. Whether a profit is realized or loss suffered generally depends on management decisions: that is, the one responsible for a profit or loss can use his or her own ingenuity, initiative, and judgment in conducting the business or enterprise. Factors that affect whether or not there is a profit or loss are whether the worker hires, directs, and pays assistants; has his or her own office, equipment, materials, or other facilities for doing the work; he or she has continuing and recurring liabilities or obligations; his or her success or failure depends on the relation of his or her receipts to his or her expenditures; he or she agrees to perform specific jobs for prices agreed upon in advance; and he or she pays expenses incurred in connection with the work. Independent contractors typically can invest significant amounts of time or capital in their work without any guarantee of success.

Independent Contractor/Employee Status
Common Law Determination Factors

Factors	Employment	Independent Contractor
17. Works for more than one person or firm	It is possible that a person may work for a number of people or firms and still be an employee of one or all of them because he or she works under the control of each firm.	Work for a number of persons or firms at the same time usually indicates an independent contractor status because the worker is usually free, in such cases, from control by any of the firms.
18 Offers services to general public	If a worker performs service for only one person, does not advertise his or her services to the general public, does not hold licenses or hire assistants, and performs services on a continuing basis, it is an indication of an employment relationship.	The availability of services to the general public usually indicates independent contractor status. This may be evidenced by the worker having his or her own office and assistants, hanging out a "shingle" in front of his or her home or office, holding business licenses, maintaining business listings in telephone directories, or advertising in newspapers, trade journals, magazines, etc.
19. Right to fire	If an employer has the right to discharge an individual at will without liability, that worker is considered an employee. The employer exercises the control through the ever-present threat of dismissal, which causes the worker to obey instructions. A restriction on the employer's right to discharge in a labor union contract does not detract from the existence of an employment relationship.	An independent contractor cannot be discharged as long as he or she produces a result that measures up to his or her contract specifications. However, the relationship can be terminated with liability.
20. Right to quit	The right to quit at any time without incurring liability indicates an employer-employee relationship.	An independent contractor usually agrees to complete a specific job and he or she is responsible for its satisfactory completion or is legally obligated to make good for failure to complete the job. If the principal terminates an independent contractor on a contract job without cause, the principal is still liable to the independent contractor for the job price.

Additional Independent Contractor/Employee
Common Law Determination Factors
For State Employment Tax Purposes

Factors	Employment	Independent Contractor
21. Custom in industry and location	If the work is traditionally done by employees under the direction of a supervisor, it is an indication of employment.	If the work is usually done by independent contractors, it is an indication of independence.
22. Required level of skill	A low level of technical skill is strong evidence of employment, since as the skill level declines there is less room to exercise the discretion necessary for independence.	A high level of technical skill is important when combined with other factors such as owning a separate and distinct business.
23. Belief of parties	It is an indication of employment if: • Both the worker and the employer believe the relationship is employment. • If either party believes that the relationship is employment.	If all parties agree that the relationship is one of independence, it may be. However, consideration should be given to the fact that many individuals do not know how an employee determination is made, and believe they are an independent contractor because they were told they are.

Section 6.7

Employer Identification

Interprets FAC section 12980; 3 CCR section 6702

Discussion

Is it the grower (property operator) or Farm Labor Contractor (FLC) who is the employer that can be held liable for violations of the California pesticide laws and regulations concerning worker safety requirements?

General

There are two general areas where action can be taken against the employer for a violation of California pesticide laws and regulations. The first area is the pesticide worker safety regulations, which impose requirements for the safety of employees on employers. 3 CCR section 6000 defines "employer" as: "any person who exercises primary direction and control over the services, or activities of an employee".

The second area occurs when there is an employee's violation of a pesticide law or regulation. 3 CCR section 6000 defines "employee" as: "any person who, for any kind of compensation, performs work, services, or activities covered by Division 6 – Pesticides and Pest Control Operations".

In this case, the employer can be held responsible for the violation under the principle that the employer is responsible for the acts of its agents.

When a grower hires an employee through a FLC and a violation of California pesticide laws and regulations occur, the determination of the employer (grower or FLC) for enforcement action must be made.

Determining who's the employer -- grower or FLC

The employer can be determined by identifying who has direction and control of the contract employee's work activities.

When contract employees are hired by a grower through a FLC, the contract employees supplement the grower's permanent work force. Sometimes the contract employees work under the direction and supervision of the FLC (or the FLC's management personnel) and sometimes they work under the direction and supervision of the grower (or the grower's management personnel). 3 CCR section 6000 clearly states that the employer is the person who exercises primary direction and control over the employee's work activities.

Continued on next page

Determining who's the employer -- grower or FLC (continued)

When the contract employee's work activities are under the control, direction or supervision of the grower, there is both a general employment relationship between the FLC and the contract employee and a special employment relationship between the grower and the contract employee. The contract employee, in essence, has dual employers -- the FLC and grower.

The concept of duality of employers has long been recognized in workers' compensation law and work place health and safety law under the California Occupational Safety and Health Act (Cal/OSHA). Under this concept, the person who is receiving services from a contract employee is known as the **secondary** or special employer. The person who supplies the contract employee for a fee is known as the **primary** or general employer. The primary employer typically pays the wages of the contract employee; withholds taxes; and provides employee benefits that generally are associated with an employer/employee relationship, including workers' compensation coverage. The primary employer also may maintain time records of the contract employee, but does not control, direct, or supervise the work activities of the contract employees. The secondary employer provides the work place and controls how the work is to be done, directs what work is to be done, or supervises the work activities of the contract employee. The secondary employer cannot discharge the contract employee. The secondary employer can only request that the contract employee be replaced by another worker.

Under general provisions of the Labor Code (section 6400, et seq.) and California regulations, employers have primary responsibility for employee safety. This includes the primary employer as well as the secondary employer.

Thus, when the secondary employer (i.e., the grower who receives services from the contract employee) has the control, direction or supervision of the contract employee's work activities the grower acts as the employer and is responsible for any worker safety violation that may occur. Conversely, when the primary employer (i.e., the FLC) has control, direction or supervision over the contract employee's work activities the FLC is the employer and is responsible for compliance of the FAC regulatory requirements relative to worker safety and pest control licensing. (See attached flow chart at the end of this section.)

Continued on next page

Employer's worker safety requirements

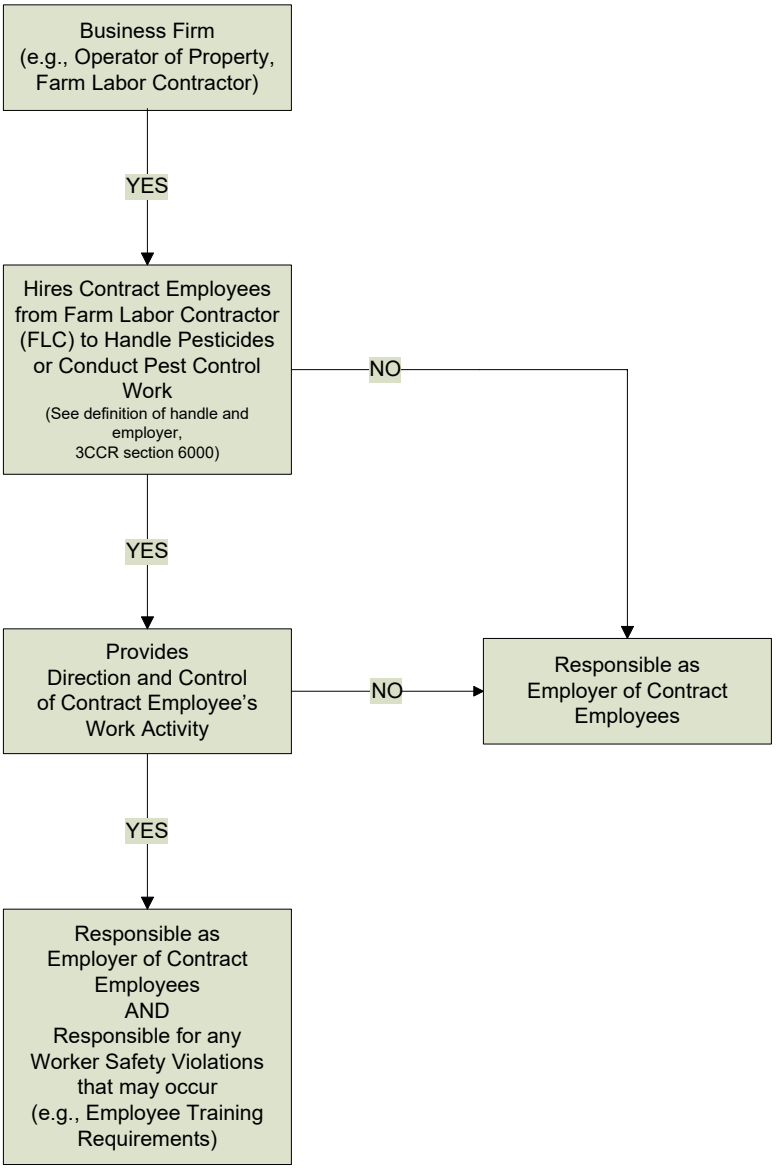
To meet these worker safety responsibilities, it is necessary for the FLC to determine the specific work activities that a contract employee will be called upon to perform for the grower and to determine whether the FLC or the grower will be responsible for directing and controlling or supervising those activities. Likewise, it is necessary for the grower to inform the FLC of the work activities that the contract employee will be performing and whether the grower or the FLC will be responsible for directing and controlling or supervising those activities. For example, it is necessary for the FLC to know if the contract employee will be mixing and loading pesticides to ensure that the FLC provides only a contract employee that has been properly trained, provides and ensures the contract employee wears any necessary safety equipment, and provides a supervisor to supervise and direct the work activities, if the grower specifies that supervision is a service that the grower wants and for which a fee will be paid to the FLC. (See also Pest Control Business licensing requirements in Volume 1.)

When determining the work activities that the contract employee will be performing for the grower, it is desirable for the grower to put in writing the work activities and who will be responsible for supervision of the contract employee (the FLC or the grower). This should be provided to the FLC before any work activities are performed by the contract employee. This will minimize the possibility of misunderstandings between the FLC and the grower as to who is responsible for the control and supervision of the contract employees' work activities.

Consistent with federal OSHA law

The 3 CCR section 6000 definition of "employer" is also consistent with federal Occupational Safety and Health Act (OSHA) law. The principal test relied upon by the courts for determining whether an employment relation exists has been whether the employer controls or has the right to control the work to be done by the employee.

Determining Employer/ Worker Safety Responsibilities



Section 6.8

Enclosed Cab and Cooled Chemical Suit

Interprets 3 CCR section 6738

Interpretation

When a chemical-resistant suit is required by pesticide labeling or regulation (section 6738(g)) and the temperature exceeds 80°F (degrees Fahrenheit) by day (85°F at night), a cooled chemical suit is normally required. However, a cooled chemical suit would not be required when all of the following conditions are met:

1. Is working in an enclosed cab (under the exemption in section 6738); and
2. Wears the chemical-resistant suit only while making minor equipment adjustments; and
3. The minor equipment adjustments take no more than five minutes in a 60-minute period.

Section 6.9

Equipment Cleaning and Decontamination

Interprets 3 CCR sections 6736, 6738, 6739, and 6771

Interpretation DPR does not approve products for cleaning and decontamination of application equipment or PPE. Thorough washing with detergent and water for PPE or a product such as Nutra-Sol for application equipment is usually adequate decontamination. The washwater from application equipment is considered hazardous waste unless it is applied onto the labeled application site.

Section 6.10

Fumigation -- Accident Response Plan

Interprets 3 CCR section 6780

Interpretation

The accident response plan requires the employer to anticipate what hazards might develop in an accident or spill and provide written instructions on how employees should respond. This plan must be at the worksite. This requirement was not meant to have growers or applicators develop a comprehensive plan attempting to mitigate all possible scenarios resulting from an accident. However, the plan must include the availability of information regarding the security of the area where the problem has occurred and whom to contact in the event of a problem. Emergency information should be documented and available, especially the emergency telephone number. This needs to be more specific than simply calling 9-1-1.

Through the Label Improvement Program and new registration standards, general information on spills and leaks is available on the label.

Section 6.11

Fumigation -- Tarp Pullers as Handlers

Interprets 3 CCR section 6000

Interpretation Tarp pullers (structural and field) are considered handlers because they are removing treatment site coverings. They can be considered non-handlers only if they handle uncontaminated tarp material before the introduction of any pesticide. When tarps are being installed in conjunction with the application (for example, soil fumigation), they are handlers. The regulations that apply to handlers, therefore, apply to these employees.

Section 6.12

Fumigation -- Respiratory Protection and SCBA Backup

Interprets FAC section 12973; 3 CCR sections 6000, 6739, and 6782

Interpretation

If self-contained breathing apparatus (SCBA) is required in an enclosed space by labeling or regulation, two NIOSH-approved units are required to be present; the routine use unit (must begin the workday with a minimum of 80% of the manufacturer's maximum recommended air tank capacity) and an emergency use unit (that must be charged to 100% of the manufacturer's recommended air tank capacity). If an employee must enter an enclosed space to begin aeration prior to clearing, he/she must wear SCBA and have a back-up person at the site. The back-up person must be similarly equipped (*3 CCR sections 6782 and 6739(j)*).

16 CCR section 1971(a)(1)(B) specifically requires two appropriate pieces of respiratory protection for structural applicators. These same standards would apply to the interpretation of that section.

Note: However, the 80% capacity tank need not be the one in the harness; if a third tank of less than 80% capacity is in the harness, it may be used until the low pressure warning device activates, at which time the air tank must be replaced. The interpretation (the "*three tank rule*") allows partial tanks to be used, yet still comply with section 6739(j).

Section 6.13

Fumigation -- Spot Injection

Interprets 3 CCR sections 6738 and 6739

Interpretation

If the labeling requires PPE to be used only "in case of a spill or leak," PPE need not be routinely worn during applications to outdoor, unconfined sites, including tree site fumigation. However, a self-contained breathing apparatus (SCBA) must be available to stabilize an emergency situation. Unless specifically required by labeling, a second SCBA is not necessary.

The emergency response plan should specify that only the SCBA-equipped person is responsible for correcting leaks and spills and the second worker evacuates the area and does not reenter until the SCBA-equipped person determines it is safe.

Note: If the "in case of a spill or leak" unit is considered an emergency unit, i.e., non-routine use, then it must be at 100% of the manufacturer's recommended pressure.

Section 6.14

Fumigation -- Two Trained People

Interprets 3 CCR section 6784

Interpretation If two trained people are required by labeling or regulation during a fumigation, the two persons may be two employers, two employees, or one of each. The second person is often required by fumigant labeling and, in the case of employees, by regulation (*3 CCR section 6784*). This requirement should not be confused with the need for a certified applicator when restricted materials are used. The certified applicator may be one of the two people only if physically present at the use site

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Section 6.15

Formaldehyde

Interprets FAC section 12973; 3 CCR section 6000; and 8 CCR sections 5203 and 5217

Interpretation

The formaldehyde Occupational Safety and Health Administration (OSHA) standard is found on the labeling of pesticides which have formaldehyde as an active ingredient. These products are registered for use in citrus packinghouses and poultry confinement buildings.

Formaldehyde is a regulated carcinogen under 8 CCR section 5217. Under the Memorandum of Understanding between DIR/DPR/CACs, Cal/OSHA is responsible for this pesticide. Pesticide illness reports and employee complaints involving these products should be referred to Cal/OSHA.

Exposure levels of personnel handling the product must be monitored according to specific instructions listed on the labeling and the requirements of 8 CCR section 5217. When performing inspection on the use of these products, you should determine if personnel are being monitored. If handlers are not being monitored, you should investigate the lack of monitoring as a possible labeling violation. You should request that the employer provide evidence that the operation has qualified for an exemption. If the employer has documentation from OSHA which indicates that the specific site being inspected has qualified for an exemption from monitoring, the operation can be considered in compliance with that portion of the labeling. If any other type of documentation is offered by the employer as qualifying for an exemption, the inspector should refer the case to their EBL. The EBL will consult OSHA on the validity of the documentation.

OSHA has indicated that this exemption is valid only if the employer has site-specific data which documents that personnel will not be exposed to levels of formaldehyde above the allowed levels. Approval of any exemption to the formaldehyde monitoring requirement of 8 CCR section 5217 is the responsibility of OSHA.

Section 6.16

Handle

Interprets 3 CCR sections 6000, 6700, and 6720

A. Generally

The next four parts are general information.

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1. Unopened containers

The term "handle" does not include movement or transportation of pesticides in the registrant's original unopened containers. Pesticide dealer employees such as salespersons, warehouse persons, and forklift drivers are covered under Cal/OSHA regulations. However, pesticide dealer employees who mix or load pesticides or calibrate equipment in the field are handlers and under FAC jurisdiction.

Note: Pest control business licensing may also be needed in this case.

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2. Field transplant workers

Several field agricultural crops are grown using transplants from nursery seedbeds. Most current agricultural practice involves the transplants being set into the soil concurrent with an at-plant pesticide application. Transplant operations are usually accomplished using one of the following two methods:

1. Manual transplanting with concurrent pesticide application where the employees plant the seedlings in advance of the spray-rig, with the spray-rig following behind applying the pesticide; or
2. Mechanical transplant/application where equipment is a combination planting apparatus and application rig (commonly called a "transplant rig") attached to and pulled by a tractor on which employee(s) sit and feed seedlings onto the planting arm or wheel (depending on the equipment) which mechanically sets plants into the soil while at the same time a pesticide is applied. Additionally, there may be an employee(s) following the transplant rig to assure that the rig is operating and setting the plants in the soil properly.

Note: there are several variations of these transplant type operations where planting occurs at the same time as the pesticide applications (dip solutions, etc.).

Continued on next page

3. "Field workers" not involved in the application

For field transplant operations such as described in number one (1) in *Field transplant workers* above, the employees are considered field workers since they are solely performing hand-labor tasks as transplanters and are **not involved** in the "pesticide application process" itself.

- If workers can keep in front of the treated area (that area to where the pesticide is being directed or has been directed) and the employer and handler assure that the workers do not come onto contact with the pesticide or pesticide-treated surfaces while transplanting (directly or through drift), then the operation would not constitute a violation of 3 CCR section 6762(b) Field Work During Pesticide Application.
- As field workers, the employer has the responsibility to comply with the following:
    1. Other 3 CCR field worker requirements, e.g., hazard communication, application-specific information, emergency medical care, decontamination facilities, field reentry after pesticide application, early entry field workers, and restricted entry intervals.
    2. Assure that the workers who are transplanting seedlings constantly remain in front or outside of the treated area.
    3. Assure workers do not enter or remain in the treated area during the application of a pesticide.
    4. Notify the workers of the pesticide application (3 CCR section 6618(b)).

4. "Handlers" involved in the application

When field transplant operations are ***combined*** with pesticide applications which may require additional employees to be within the area treated or to participate in the treatment (such as dipping), DPR considers the entire operation to be part of a "pesticide application process." Therefore, the employees are considered handlers and are not subject to restrictions associated with remaining outside of the treated area. As handlers, including those following the rig, the employer must provide the following:

1. All workers taking part in such a transplant operation must be trained as handlers as required by 3 CCR section 6724.
2. The employer must provide and assure all workers wear coveralls when required by 3 CCR section 6736.
3. The employer must provide and assure all workers wear personal protective equipment as required by 3 CCR section 6738 and labeling for the pesticide used.

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4. "Handlers" involved in the application (continued)

4. Additionally, the employer has the responsibility to comply with other 3 CCR handler requirements, e.g., hazard communication, application specific information, emergency medical care, medical supervision, and decontamination facilities.

B. Government personnel

Government personnel handling insecticidal lures or baiting traps that have pesticides are handlers and required to comply with the applicable worker safety regulations even though trapping for monitoring purposes is not a pesticidal use. When insect monitoring traps or non-insecticidal lures are handled, the employer is exempt from the requirements of *3 CCR section 6730 (Working Alone), section 6732 (Change Area),* and *section 6736 (Coveralls)*.

Government personnel conducting inspections are not handlers or field workers. These employees are protected by Cal/OSHA regulations.

C. Regularly handle

There are two interpretations of the definition of "regularly handle" that can be reasonably drawn from the wording of the regulation.

In one interpretation (call it the "fixed period interpretation") there are fixed 30-day periods starting the first day a handler works with an organophosphate (OP) or carbamate (Carb). In a worst-case scenario, using this interpretation, a handler could be exposed up to 12 consecutive days in two consecutive 30-day periods without triggering medical supervision requirements. The "fixed period" interpretation circumvents the intent of medical supervision by allowing more than six days exposure without triggering medical supervision.

The second interpretation (sliding period) means the 30-day period changes every day. Thus, the prohibition against working seven days in a 30-day period must be reevaluated each day.

Because the "fixed period" interpretation does not meet the intent of the medical supervision program, DPR has adopted the "sliding period" interpretation. Thus, any time an employee handles category I or II OP or Carb pesticides for more than six days in **any** 30-day period (that is 30 consecutive days), that employee falls under the requirements of the medical supervision program.

Section 6.17

Hazard Communication

Display

Interprets 3 CCR sections 6000, 6723, 6723.1, and 6761

For grower's employees who handle pesticides, the completed written Hazard Communication Program (PSIS A-8, *Safety Rules for Pesticide Handlers on Farms*) must be displayed (see 3 CCR section 6000 for definition of "display") at a central location. For grower's employees who are working in a treated field, the PSIS A-9 (*Pesticide Safety Rules for Farmworkers*) must be displayed at the worksite. If workers gather at a central location prior to transport to the worksite, the PSIS A-9 may be displayed at that central location. Also, if requested, the employer must read the information contained in the document to the employee.

A. Grower responsibility

Interprets 3 CCR section 6761

The grower is responsible for providing specific information to employees of a labor contractor. The operator of the property must provide, upon request of his or her employee, or an employee of a labor contractor, access to use records, Material Safety Data Sheets (MSDS), and PSIS leaflets.

B. MSDS availability

Interprets 3 CCR section 6723

An MSDS may not exist for every pesticide manufactured. It is the responsibility of the pesticide dealer (*Labor Code section 6393*) to provide the purchaser with the appropriate MSDS, if it is available from the registrant. However, *3 CCR section 6723* requires the employer to make a written inquiry to the registrant of the pesticide as to the availability of an MSDS within seven days of receiving a request for an MSDS from an employee.

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B. MSDS availability (continued)

Outlets such as nurseries, lumber stores, and hardware stores that sell pesticides do not need to have MSDS available. These outlets do not need to provide MSDS to purchasers of pesticides that are intended for use by the consumer. Also, MSDSs do not need to be provided when a pesticide is incidentally sold to an employer that is in the same form, approximate amount, concentration, and manner as it is sold to consumers (*Labor Code section 6393*). For example, a retailer selling snail bait to maintenance gardeners does not have to distribute an MSDS. However, maintenance gardeners who have employees who handle this pesticide are still required to provide an MSDS, on request, if it is available from the registrant. The requirement for the registrant or dealer to provide MSDS is contained in the Labor Code and is the jurisdiction of Cal/OSHA.

Regulations are specific. If an employee requests an MSDS, the employer is required to make a written inquiry to the registrant of the pesticide as to the availability of the MSDS. Upon receiving a request for an MSDS, the employer must provide original information to a requester. A "summarized copy" of an MSDS may not be consistent with the registrant's printed MSDS for the pesticide.

C. Program

Interprets 3 CCR sections 6720 and 6723

All employers who assign employees to handle pesticides need to keep a written Hazard Communication Program. Employers of people in restaurants, industrial facilities, schools, hospitals, agricultural operations, etc., must post a completed Hazard Communication Program (PSIS A-8). It must be posted at a location where employees assigned to handle pesticides usually start the work day. If employees do not start their activities at one locale, the employer must maintain one copy of the program at a central location at the workplace and accessible to employees. When only antimicrobial agents are handled, and employers have, and are in compliance with, a current Hazard Communication Program and Injury and Illness Prevention Program as required by the Department of Industrial Relations Cal/OSHA regulations, the employer is exempt from specifically complying with *3 CCR section 6723.*

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D. Records

Interprets 3 CCR sections 6723 and 6761

Companies that farm in multiple counties may keep records at a centralized location (i.e., place where the business maintains other records such as purchase orders, training records, etc.) in just one county, but the employer must provide, upon request of an employee, employee representative, or employee's physician, access to any records or documents (within 48 hours) the employer is required to keep concerning hazard communication. Also, employee records and documents must be made available to the CAC in each county where the company operates.

Section 6.18

Immediate Family

Interprets 3 CCR sections 6700 and 6701

WPS definition of "immediate family"

The federal WPS defines “immediate family” as including only spouse, children, parents, and siblings. These relationships include either legal (in-law) or blood (genetic) status. DPR uses the federal definition to interpret 3 CCR worker safety regulations and pesticide labeling requirements.

Section 6.19

Medical Supervision

A. Medical supervision -- ethephon

Interprets 3 CCR sections 6000 and 6728

The regulations require medical supervision whenever an employee regularly handles a pesticide with the signal word "DANGER" or "WARNING" that contains an organophosphate or carbamate for the commercial or research production of an agricultural plant commodity. Both *organophosphate* and *carbamate* are defined in 3 CCR section 6000.

U.S. EPA reviewed ethephon and determined it to be an organophos**phonate**. Organophos**phonates** do not fall within the definition of organophosphate in 3 CCR section 6000 and therefore are not currently covered by the medical supervision requirements.

Based on a review of the toxicity, ethephon does inhibit cholinesterase. It is not a potent inhibitor, but does consistently inhibit cholinesterase in animal studies.

B. Medical supervision -- records location

Interprets 3 CCR section 6728

3 CCR section 6728(c)(3) lists the records the employer is required to keep:

- The agreement (with the medical supervisor).
- The use (exposure) records.
- Recommendations from the medical supervisor.
- The results of cholinesterase (ChE) tests performed.

These records must be maintained for three years and be made available for inspection by specified officials. DPR has historically interpreted this section to require that these records be retained at the employer's headquarters location. We have been asked if the medical supervisor could retain the records, on behalf of the employer. The need for confidentiality of personal medical information is cited as a reason for having the doctor hold the records.

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B. Medical supervision -- records location (continued)

When this section was originally adopted in 1973, confidentiality was not the issue that it is today. There have been several State and federal laws adopted in recent years protecting the confidentiality of personal information. The interpretation and application of 3 CCR section 6728 must be reevaluated in light of these more recent laws. It is reasonable for the employer to have the medical supervisor retain the confidential medical information (the test results).

With the exception of the ChE test results, there should be no confidentiality issues generated by retention of these records. It is DPR's interpretation that these records must be retained by the employer at a business location within the State, with the exception of ChE test results. The employer must maintain a record identifying the employee and the dates of tests when having the actual test results retained by the medical supervisor.

Enforcement of medical supervision requirements should focus first on it being in place when required and secondly on the employer implementing the recommendations of the medical supervisor. The other required records should allow you to effectively enforce this section without routinely reviewing the actual ChE test results. If you have concerns about the completeness of the employer's records, follow-up with the medical supervisor may be necessary. The identity of the medical supervisor can be obtained from available records (the contract).

If you or other officials have a need to review the actual test results, the records can be obtained from the medical supervisor through legally provided procedures. DPR's Worker Health and Safety Branch can provide guidance in this area.

Section 6.20

Notice of Application

A. Generally

Interprets FAC section 12978; 3 CCR section 6618

In some situations (such as, employees that gather at one location before going to the field), notification required by *3 CCR section 6618* may be fulfilled by posting the information at a central location. In order to fully satisfy the requirement, all workers, employees or contractors who may walk within ¼ mile of the treated field must start their work day at the central location where the notification is posted.

"Likely to enter," as it applies to property such as golf courses, parks, college campuses, rights-of-way, and school buildings, refers to persons who have access to the property and who commonly enter it, while a labeling reentry restriction (REIs generally apply only to fields) is in effect. For example, persons playing golf, students on campus, students using school hallways, the public who has access to a park are "likely to enter" and, therefore, notification is required. Also need to consider the likelihood of persons such as contractors, utility workers, and government employees conducting inspections, etc., who could enter the site. However, if an area, right-of-way, school hallway, is posted or blocked off, entry is unlikely.

FAC section 12978 uses the term "exposure (entry) is foreseeable" and is talking about public property. In practical terms, these two terms are considered to have similar objectives and are interpreted to mean the same thing. It is assumed that it is necessary to enter in order to have exposure.

B. Posting the area

Interprets 3 CCR section 6618

Field posting can be used to give notice to persons likely to enter pursuant to *3 CCR section 6618* even when a field is not required to be posted by label or regulation (unless both oral notification and posting are required by the labeling). The posting must be removed before workers are allowed to enter the field.

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B. Posting the area (continued)

The property operator should comply with notification requirements when persons are likely to enter a treated area in the following manner:

- The property operator is required to give notice to all persons known to be on or are likely to enter a treated area on the date a pesticide application was made, or while the REI is in effect; identity of the pesticide by brand name or common chemical name; and the precautions (e.g., reentry).

The regulations do not specify how persons are to be notified. If so desired, the property operator can give either oral or written (i.e., posting) notification. Posting or a barrier is required on public property if the reentry interval is 24 hours or greater (see *Notice of Application-Public Property*).

C. Public property

Interprets FAC section 12978

Posting is required on public property when both of the following conditions exist:

- There is a reentry interval of 24 hours or longer for the pesticide used (The REIs for agricultural fields would not normally apply to this type of property).
- There is foreseeable exposure to the public (a barrier eliminates foreseeable exposure, and is an alternative).

Please pay special attention to pesticide labels on products that may be used on public school grounds, parks, or other rights-of-way. This provision is not limited to applications made by public agencies, but covers public property. Pesticide applications by Caltrans (California Department of Transportation) on public highways are exempt from this notice requirement.

Section 6.21

Personal Protective Equipment

A. Underwear

Interprets FAC section 12973; 3 CCR section 6000

Some pesticide labeling requires "coverall worn over short-sleeved shirt and short pants." The phrase “short-sleeved shirt and shorts" does not refer to undergarments. There are no requirements addressing the presence or absence of undergarments in laws or regulations. For a list of acceptable PPE to wear when this and other statements are found on pesticide labeling, see Compendium Volume 4, Inspection Procedures, Appendix 1.

B. Coveralls and chemical-resistant suit

Interprets 3 CCR sections 6000, 6736, and 6738

The worker safety regulations contain two quite different standards for employer-provided body protection. The requirement for coveralls *(3 CCR section 6736)* requires body covering of tightly woven cloth, or equivalent, extending from the neck to wrists to ankles. Specialty fabrics, such as uncoated Tyvek, KleenGuard, and several others, are at least equivalent to cloth in their protective ability. Coveralls made of these materials are fully acceptable for meeting the coverall requirements of *3 CCR section 6736*.

The language referring to chemical-resistant suit, rain suit or waterproof pants and coat *(3 CCR section 6738(g)*) requires body covering that is, in practical effect, “chemical proof” for the period of use. This protective clothing must cover torso, head, arms and legs. Clothing made of rubber, neoprene, polyethylene or similar materials are required to meet this level of protection. The desire for disposable or limited use clothing that meets this more stringent chemical-resistant requirement caused DPR to evaluate specialty fabrics that might meet this requirement. So far, three acceptable materials have been found: 1) Tyvek (spun bonded olefin) laminated to either Saranex or polyethylene; 2) polypropylene laminated with polyethylene; and 3) Encase II. Several manufacturers of protective clothing who use these materials have begun identifying their products as being constructed of one of these materials or as meeting the standards of *3 CCR section 6738(g)*. DPR does not require a manufacturer to label these products, so garments without this labeling may possibly be acceptable for this use. If in doubt, the manufacturer of the coveralls should be able to identify the material used. Because of the greater complexity and hazards involved, requests for evaluation of other materials that might meet this requirement should be referred to the Worker Health and Safety Branch.

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C. Employees laundering coveralls

See page 6-7 in this chapter.

(D)1. Eyewear and antimicrobials

Interprets 3 CCR sections 6720 and 6738

Employee eye protection is required for all disinfectant pesticide applications even when, for example, the hand-held application equipment is a sponge or mop. Except for those activities described in *3 CCR section 6738(b)(1)(C)*, all employees are required to wear eye protection while applying any pesticide. Language in section 6720 refers to Title 8. The applicable section of 8 CCR section 3382 reads, "(a) Employees working in locations where there is a risk of receiving eye injuries such as punctures, abrasions, contusions, or burns as a result of contact with flying particles, **hazardous substances**, projections or injurious light rays which are inherent in the work or environment, **shall be safeguarded by means of face or eye protection.**" … "**The employer shall provide and ensure that employees use protection suitable for this exposure.**" General safety requirements *3 CCR section 6720(c)* exempt the employer from the requirements of *3 CCR section 6730 (Working Alone), section 6732 (Change Area),* and *section 6746 (Closed Systems)* when antimicrobial agents or pool and spa chemicals are handled. However, *3 CCR section 6738(b)(1) (Eye Protection)*, must be complied with when employees apply antimicrobial pesticides.

(D)2. Eyewear and closed systems

Interprets 3 CCR sections 6738 and 6793

Eye protection must be worn when preparing to use closed systems, such as loading pesticides from a rig to the application equipment (the aircraft), when opening containers and inserting probes. Protective eyewear is also required when using closed systems that operate under positive pressure. When using a closed system, protective eyewear must be available on site.

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(E)1. Disposable gloves

Interprets FAC section 12973; 3 CCR sections 6000 and 6738

Lightweight disposable gloves are generally not suitable for hand protection while handling pesticides. Even though it may be argued that they meet the regulatory requirement when new, they would have a limited applicability and short use life because of their fragile construction. A few minutes of light-duty use would probably breech the physical and chemical integrity of this type of glove and would not provide a level of protection required by regulation. Any legitimate use would be limited to short-term, single-use situations where little stress is placed on the gloves and does not result in any permeability by the pesticide.

(E)2. Glove liners

Interprets FAC section 12973; 3 CCR sections 6000 and 6738

Background:
On September 1, 2004, 40 CFR part 170 was revised to allow the use of glove liners by handlers and early entry field workers. An exemption for pilots wearing gloves when entering or leaving an aircraft used to apply pesticides was also added.

DPR recommendations:
Since these changes were made to increase compliance by making the use of PPE more comfortable, DPR is recommending that CACs allow the use of glove liners and the pilot exemption under the conditions listed in the federal regulations until 3 CCR section 6738 is revised to reflect the federal standard.

Conditions of use:
The use of glove liners is allowed only when the following conditions are met:

- Pesticide product labeling does not prohibit the use of glove liners.
- Glove liners must be separable from the chemical-resistant glove.
- Liners may not extend outside of the chemical-resistant gloves.
- Liners must be replaced immediately if directly contacted by a pesticide.
- Liners must be discarded at the end of each workday.
- Contaminated liners must be disposed of in accordance with federal, state or local regulations.

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(E)2. Glove liners (continued)

Pilots:
Wearing chemical-resistant gloves when entering or leaving an aircraft used to apply a pesticide is optional, unless such gloves are required on the pesticide product labeling. If gloves are brought into the cockpit of an aircraft that has been used to apply pesticides, the gloves must be kept in an enclosed container that prevents contamination of the inside of the cockpit.

Enforcement:
DPR recommends that CACs enforce 3 CCR section 6770 (Field Entry After Pesticide Application) and section 6738(c) (Personal Protective Equipment) in a manner that allows the proper use of separable glove liners. The allowed exemptions apply to both non-agricultural uses as well as agricultural uses. Only new glove liners that are separate from the chemical-resistant glove may be used. Previously laundered liners are not sufficiently protective because there is no certainty that laundering a glove liner would remove all contaminants. Any contaminants left behind would be in close, occluded contact with the worker's skin the next time the liners and glove are put on.

If persons are using glove liners improperly, CACs should cite for violation of 3 CCR section 6738(c)(2).

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(F)1. Respirator designation

Interprets FAC section 12973; 3 CCR section 6000

The National Institute for Occupational Safety and Health (NIOSH) has regulations in *42 CFR part 84* "… for certifying non-powered, air-purifying, particulate-filter respirators." Part 84 creates three levels of filter efficiency and three categories of resistance to filter efficiency degradation. The three levels of filter efficiency are 95%, 99% and 99.97%. The three categories of resistance to filter efficiency degradation are N, R and P:

1. **N** for **N**ot resistant to oil / NO OIL IN MIX; dispose of filter at end of the day
2. **R** for **R**esistant to oil / OIL IN MIX; dispose of filter after 8 hours per day
3. **P** for oil-**P**roof / OIL IN MIX; dispose of filter at end of the day

Organic vapor respirator -- dispose of the filter at the end of the day. If no oil particles are present in the work environment, use a filter of any series, N, R, or P. If oil particles are present, use an R- or P-series filter. If oil particles are present and the filter is to be used for more than eight hours, use only a P-series filter. All NIOSH-approved particulate respirators of the TC-84A series will have the NIOSH logo (the letters "NIOSH") and the type/efficiency rating (e.g., N95 or P99) somewhere on the body of the respiratory protective device. NOTE: N-series filters cannot be used if oil particles are present.

For more information, see http://www.cdc.gov/niosh.

(F)2. Employer responsible for respirators

Interprets FAC section 12973; 3 CCR section 6739

The employer shall assure that employees use approved respiratory protection equipment when pesticide product labeling or regulations require respiratory protection or when respiratory protection is needed to maintain employee exposure below an applicable exposure standard found in *8 CCR section 5155.*

The intent of this section is to regulate respiratory protection for employees required to wear it by labeling or regulation. Therefore, an employer is not required to comply with the cited regulations if the employee chooses to supply and wear a respirator when it is *not* required by labeling or regulation, i.e., voluntary use (*3 CCR section 6739(b)*).

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(F)2. Employer responsible for respirators (continued)

When respiratory protection equipment is provided by the employer for voluntary use, the employer is responsible for the maintenance, cleaning, and employee's medical clearance, except as exempted in *3 CCR section 6739(b)(3)* regarding filtering facepiece particulate masks.

(F)3. Respirator inspection

Interprets 3 CCR section 6739

The employer shall assure that respirators maintained for stand-by or emergency use are inspected monthly or before use, if occasions for possible use are more than one month apart. A record of the most recent inspection shall be maintained on the respirator or its storage container. The intent of *3 CCR section 6739(j)* is to inspect a respirator maintained for unanticipated use (stand-by or emergency) monthly.

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(F)4. Respirator maintenance

Interprets 3 CCR section 6739

Respirator air-purifying elements must be changed according to specific pesticide labeling directions or the respirator manufacturer's recommendation in relationship to a specific pesticide, whichever is more frequent. Generally, the pesticide label does not include such information as cartridge change-out schedules; neither do the respirator manufacturer's instructions usually include cartridge change-out schedules or pesticide-specific recommendations. These manufacturers are reluctant to include specific instructions because of their liability.

Therefore, DPR adopted regulations to specify that in the absence of any instructions on service life (i.e. change-out schedules), the air-purifying elements must be changed at the end of each day's work period. As an added precaution, DPR requires the cartridges to be changed prior to the end of the work day if the respirator user senses odor, chemical taste, or irritation. The recommendation to change air-purifying elements at the "first indication of odor, taste or irritation" is common to the instructions of probably all manufacturers of respiratory equipment. This precautionary wording is standard "boilerplate" language, but the use of warning properties is no longer considered by Cal/OSHA as an adequate means to determine cartridge-life (see *8 CCR section 5144(d)(3)(D)*). Additionally, few pesticides have adequate warning properties, so this recommendation is of limited value and cannot be used to determine routine change-out schedules for air-purifying elements of respirators used for protection against most pesticides. This recommendation must remain since it may have some applicability for certain pesticides and, as a backup precaution for others. These considerations were the basis for development of the regulation covering the changing of elements.

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(F)4. Respirator maintenance (continued)

The respirator manufacturer's instruction to change cartridges at the first indication of odor, taste or irritation should not be viewed as a recommendation regarding service life. Because of the lack of objective data (as required by Cal/OSHA), DPR assumes that a cartridge or filter will last one work period, as short (5 minutes) or as long (12 hours) as that period may be. Thus, the hierarchy of replacement, as defined in 3 CCR section 6739(o), must be followed unless pesticide-specific change-out information is available. In the majority of cases, this will not be available. However, for a limited number of chemicals that have use in other industries (e.g., phosphine), such information may be available from the respirator manufacturer. Also, respirator manufacturers may submit data to DPR/WH&S Branch in support of extended change-out schedules. This information will be posted to DPR's website.

G. Respiratory protection and dusting sulfur

Interprets FAC section 12973; 3 CCR sections 6000 and 6739

Sulfur dust product labeling often includes the precautionary wording "avoid breathing dust." These products are sometimes applied by motorized backpack dusters that preclude avoiding contact with the dust (see Chapter 3 for a more general discussion of the application of this wording).

A paper dust mask is adequate protection for handlers of these sulfur dust products if the mask is NIOSH/MSHA approved for protection from dusts and mists and the manufacturer's directions for selection, fit testing, and replacement are followed. Masks that are not NIOSH-approved do not provide adequate respiratory protection for sulfur dust. There is, however, a recognized exposure standard for particulates not otherwise regulated (i.e., 10 mg/meter^3 for sulfur dust) established in *8 CCR section 5155.*

In general, the agricultural application of sulfur dust rarely results in air concentrations that approach or exceed the exposure standard. If the applicator cannot avoid breathing the dust, the use of approved respiratory protective equipment is required and the employer must comply with *3 CCR section 6739.*

Section 6.22

Pesticide Illness -- Reasonable Grounds to Suspect

Interprets 3 CCR section 6726

Interpretation

The following should be used to help determine: (1) "reasonable grounds to suspect" that an employee has a pesticide illness, or (2) when an exposure to a pesticide has occurred that might "reasonably be expected to lead" to an employee's illness as those terms are used in *3 CCR section 6726(c).*

If any employee that is working with or around pesticides develops symptoms consistent with exposure to any of the pesticides he/she is working with or around, the regulation requires they be taken to a physician. Since typical pesticide exposure symptoms are often general in nature, this would mean most illness situations.

If an employee is visibly contaminated, such as being splashed or drenched in pesticide, the employee should be immediately decontaminated and taken to a physician. If an employee has had a significant respiratory exposure episode, that employee should also be taken to a physician.

Section 6.23

Posting

A. Along rights-of-way

Interprets 3 CCR section 6776

When a treated field is adjacent to an unfenced right-of-way or easement, additional signs shall be posted at each end of the treated field and at intervals not exceeding 600 feet along the treated field's border with the right-of-way. A public right-of-way is any road, path, trail, or area that is not privately owned and where the public is not considered to be trespassing when they are upon it. The posting requirements of *3 CCR section 6776(d)* are applicable to any pesticide application made adjacent to a right-of-way, regardless of the proximity to sensitive areas.

If there is a significant separation between the field and the right-of-way, such as a large steep-sided ditch or canal, the field is considered to be adjacent to the barrier rather than the right-of-way. If the CAC determines that the ditch, canal, or other impediment is sufficient to keep unauthorized people out of the treated field, the grower may be allowed to post only the entry points or corners as provided in *3 CCR section 6776(d).*

B. Restricted entry interval -- interplanted fields

Interprets 3 CCR sections 6772 and 6776

When an orchard interplanted with two crops, such as citrus and pears, has a pesticide applied, such as Guthion which has a restricted entry interval (REI) that is different for each crop, the more restrictive REI is applicable. Since the REI is not only related to the specific crop, but also to the field itself, posting based on the longer REI applies.

Section 6.24

Restricted Entry Interval

A. Beginning

Interprets 3 CCR sections 6769 and 6772

The restricted entry interval (REI) begins upon completion of the application. The REI and greenhouse ventilation criteria are independent of each other. No person, other than a properly trained and equipped handler, may enter a greenhouse until the ventilation criteria have been met.

B. Termination

Interprets 3 CCR sections 6772 and 6774

A restricted entry interval may be shortened to not less than the restricted entry interval specified on the pesticide product labeling upon verification by the CAC. However, authorization may only be granted if DPR has established a safe work level for the specific pesticide and crop combination. At this time DPR has established the following safe levels:

- Methomyl/grapes at 0.1 (micrograms per square centimeter of leaf surface)
- Propargite/grapes at 0.1 (micrograms per square centimeter of leaf surface)

Contact the Worker Health and Safety Branch to determine if any additional safe levels have been established.

The following procedures should be followed in the issuance of the authorization:

1. The authorization should be written on county letterhead.
2. Suggested language for the authorization is: "Pursuant to Title 3 California Code of Regulations, section 6774(c)(4) the person named is authorized to collect or supervise the collection of samples and arrange for analysis from the following described location(s). The sampling and analysis must be conducted by a procedure acceptable to the Department of Pesticide Regulation."
3. The locations to be sampled should be described on the authorization and include acreage, variety, field number, ranch name, and any other information necessary to identify the sample location. The location description should be consistent with any permit location description whenever possible.

Continued on next page

B. Termination (continued)

4. Include the following information in the authorization:
    a. The name and address of the operator of the property;
    b. The name, address and phone number of the laboratory that will be used;
    c. The sampling method to be used to collect the sample (Consult Chapter III, Evidence Collection from Volume 5, *Investigation Procedures*, of the Compendium. Contact the Worker Health and Safety Branch for additional guidance.);
    d. The signature of the CAC or designee; and
    e. The date of the authorization.

Monitoring the collection of the samples is at CAC discretion and depends upon resources and other priorities. However, since DPR does not expect many growers to request a reduction of a reentry interval, we encourage you to monitor a majority of these authorizations based on the origin of the request and size of the location to be sampled.

When the authorized person submits the final laboratory analysis results to your office, you should review them and determine whether the reentry interval can be terminated. The amount of analyte reported must be at or below the safe level established by DPR.

After determining that the amount of analyte is acceptable, you should sign a statement granting the termination of the reentry interval to the person who received the authorization. The granting document should include a statement acknowledging compliance with section 6774(c)(4) and the sampling protocol and be counter-signed by the person who received the authorization. The suggested wording is: "Pursuant to Title 3, California Code of Regulations section 6774(c)(4) and based on the final laboratory results of samples collected according to accepted protocols, authority is hereby granted to terminate the reentry interval for the above described location(s)."

Continued on next page

C. REI and notification -- forest

Interprets 3 CCR sections 6618 and 6776

All persons, including visitors such as hunters and field workers who are likely to enter a forest area that is being treated or under an REI, need to be given notification. If they are likely to enter an area under an REI, they must be notified of the location and description of the treated area, duration of the REI, and instructions not to enter until the REI is expired.

For purposes of providing notice under *3 CCR section 6618*, the notification can be either oral or written (posting) unless the pesticide label requires both. Since the labeling requirement for dual notification applies only to workers, other visitors need not be provided with dual notification. Also, the operator of the forest must make accessible to forest workers at the work site a completed copy of PSIS A-9, *Pesticide Safety Rules for Farmworkers*.

Posting signs is required in forests when either:

1. A pesticide application results in an REI greater than seven days; or
2. Posting is required by the label.

Section 6.25

Training

A. Field worker

Interprets 3 CCR section 6764

Either the farm labor contractor or the grower can be held responsible to assure that their employees receive pesticide safety training. The grower-employer who hires the services of a farm labor contractor's employees to perform work on the grower's property must assure that those employees have received the required training. Generally, the agricultural employer who directs and controls the employees is the responsible party.

B. Field worker from out-of-state

Interprets 3 CCR section 6764

California will accept field worker training from another state. The employer must be assured that the employee has received pesticide safety training within the past five years. If the employee posses a valid U.S. EPA Training Verification Card (Blue Card) issued in another state, then the requirement for pesticide safety training is met.

C. Handlers and delayed effects

Interprets 3 CCR section 6724

The employer must provide training so that each employee understands the hazards associated with exposure to pesticides with known or suspected chronic effects as identified in MSDS, pesticide labeling, and PSIS leaflets. If these sources do not list the delayed effects (i.e., tumors, cancer, birth defects), then the employer would not be required to seek further information provided the referenced materials were current. The employer could identify in the training records that there are no known long-term hazards identified in the MSDS, pesticide labeling, or PSIS that were available at training time.

D. Handlers from out-of-state

Interprets 3 CCR section 6724

Handler training from another state will not be recognized, due to the many unique aspects of California's requirements.

Continued on next page

E. Non-English speaking handlers

Interprets 3 CCR sections 6724 and 6764

If the non-English speaking employee has been properly trained and the label has been fully translated, the review of the label does not have to occur each time the pesticide is used. Frequency of review and translation of the label would depend on a number of factors, including type of application, label changes, competency of employee, etc.

F. Training Verification Program

Interprets 3 CCR section 6764

The U.S. EPA Training Verification Program enables trainers who meet certain qualifications to issue training verification cards to field workers who have been trained in WPS. Participation in the card program is voluntary. Qualified trainers must submit an application to DPR and contract for inventory control and record requirements.

Section 6.26

Treated Field

Interprets 3 CCR section 6000

Interpretation

When field workers are in the field pruning early in the season before the field meets the definition of a treated field, and immediately following (30 feet behind the pruners) are pesticide handlers applying pesticide by a paint brush to the cut surfaces, the entire field is not considered a “treated field,” but only that area actually being treated. In this circumstance, the treated field is only that area of the plants that was actually treated (see *Handle, Transplanters*).

When producing some commodities, growers will treat only part of a field the first day and another part the second day, and so on. The REI and "treated field" expires in the same rotation. Often, the grower wants to put workers into the "cleared" portions immediately. When growers use this procedure, they must have maps with dates and areas treated to show the CAC and must post reflecting the different areas.

A field is considered a "treated field" until 30 days have passed after the REI has expired, whether or not the crop that was treated has been harvested and removed from the field.

Section 6.27

Worker Protection Standard Labeling

Interprets FAC section 12973; 3 CCR section 6000

Interpretation

All pesticides labeled for use in agricultural production sites are required to comply with Worker Protection Standard (WPS) labeling requirements that include personal protective equipment (PPE), restricted entry intervals (REI), and other worker safety requirements. Generally, these requirements are located in a distinct section of the label (often referred to as "inside the box") and specify that they apply to agricultural production operations.

When a dual-use pesticide is being used in a non-agricultural production site, the WPS (inside the box) requirements do not apply. However, the rest of the labeling does apply to all uses and must be complied with.

Section 6.28

Worksite and Workplace

Interprets 3 CCR section 6700, et seq.

Interpretation "Worksite" is meant to describe the exact location of a work activity, e.g., mixing and loading site, field, etc. "Workplace" is meant to identify in more general terms the work area (e.g., the business operation or employer headquarters). They do not have the same meaning.

Chapter 7

Pesticide Product Registration

In this chapter This chapter contains the following sections.

Section	Topic	See Page
7.1	General Registration Requirements	7-2
7.2	Fertilizing Material/Livestock Drug vs. Pesticide	7-5
7.3	Specific Pesticide Use Determinations	7-6
7.4	Unregistered Pesticide Products--Use	7-12
7.5	Unregistered or Misbranded Products--Sales	7-13

Section 7.1

General Registration Requirements

Interprets FAC sections 12753 and 12811; 3 CCR sections 6147 and 6301

Introduction

This section provides county field staff with a general overview of pesticide registration requirements so they are equipped to make general determinations about the applicability of registration requirements to the products they encounter in the field.

Interpretation

County personnel who encounter suspected unregistered pesticide products during field activities are expected to document readily available relevant evidence and forward it to DPR via the EBL assigned to their county for evaluation and investigation by DPR's Product Compliance Branch.

Generally, it is illegal to manufacture, deliver, or sell (collectively referred to as "distribute") any substance that makes pesticidal claims or is represented to be an essential ingredient necessary to make a pesticide unless it is registered by U.S. EPA and DPR (*FAC section 12993*). It is also illegal to use an unregistered pesticide. *FAC section 12995* prohibits, with some exceptions found in *3 CCR sections 6147 and 6301*, the use of a pesticide that is not registered. The purpose of the registration process is to evaluate a pesticide for suitability and efficacy under California conditions. The law requires that a pesticide manufacturer or importer register a product before it is offered for sale in California. The law also specifies the registrant is in violation if it ships the product after the registration has expired.

Exceptions to the Registration Requirement:
(1) Attractants – Food products (which do not contain an active pesticide ingredient) used to attract pests are exempt [*3 CCR section 6147(a)(3)*]. Products intended to be used with a pesticide, such as syrup baits, adjuvants (*FAC section 12758*) or as pesticides themselves (i.e., pheromones), require registration.

Continued on next page

Interpretation (continued)

(2) Minimum risk products [FIFRA section 25(b)] – Both federal and State laws exempt certain pesticide products from the requirement to obtain registration, provided they meet certain criteria. These products have been granted exemption from registration because they do not pose an unreasonable risk to public health or the environment. These products are still pesticides and subject to most other provisions.

At a minimum, all products must meet the following requirements:

- List all the active ingredient(s) by name and percentage (by weight) on the label. To qualify for an exemption as a minimum risk pesticide, each active ingredient in the pesticide product must be listed in 40 CFR part 152.25(f)(1). The approved list of active ingredients can also be found in 3 CCR section 6147(a)(5).
- List all inert ingredients by name on the label. All inert ingredients must be on U.S. EPA's most current *Minimal Risk FIFRA Section 25(b) Inert Ingredients* list (formerly List 4A). **These two lists are <u>not</u> interchangeable.**
- The total percentage by weight must equal 100%.
- The label must not contain false or misleading statements defined in 40 CFR part 156.10(a)(5)(i) through (viii).
- Additionally, products must also meet a series of exemption conditions described in 40 CFR part 152.25 and 3CCR section 6147.

NOTE: Section 6147 exempts manufacturers, importers, and dealers (distributors) of certain [FIFRA section 25(b)] products from the registration and <u>registration-related</u> requirements of the regulations. Distributors of section 25(b) products are not required to obtain a certificate of registration before a pesticide is offered for sale. There is nothing in section 6147 that implies that such products are not pesticides. However, requirements based on the need for "registered" labeling cannot be enforced against them since there is no "registered" labeling. Although not specifically listed as an exemption in 3 CCR section 6301, DPR considers these products exempt from the provisions of FAC section 12995 by virtue of their inclusion in section 6147. FAC sections 12971 and 12973 and 3 CCR section 6602 would not apply since one element required for a violation of these sections relates to "registered" labeling.

Continued on next page

Interpretation (continued)

Other law and regulation sections do apply to those who recommend, sell or use these products:

- Those who recommend, sell or apply these products are subject to the licensing requirements of FAC Division 6.
- A CAC could require a permit for these pesticides pursuant to FAC section 14006.6.
- They are subject to tolerance requirements on food or feed commodities.
- Pesticide use records are necessary for other regulatory purposes and would apply to these products. However, pesticide use reports (3 CCR sections 6625-6627 will not be required at this time (See the *PUR* chapter in Volume 1 of the Compendium).
- Only regulations required PPE, **not** labeling requirements, can be enforced.

(3) Previously Registered Products – A dealer or broker who acquired a pesticide product in California while the product was properly registered may lawfully sell and deliver the product for two years after the last date of registration. If acquired by an end-user while legally registered or within two years after the last date of registration, these products may be possessed and used indefinitely. This exemption does not apply to the registrant. A registrant may not sell or distribute any pesticide that is not currently registered *(3 CCR section 6301).*

Recommendations may be made and restricted permits may be issued for the use of these products. However, a pesticide cannot lawfully be sold or used, or a permit issued contrary to any U.S. EPA or DPR cancellation or suspension order pertaining to use.

Contact your regional pesticide enforcement office or Enforcement Branch Liaison for any questions you may have regarding these policies.

Section 7.2

Fertilizing Material/Livestock Drug vs. Pesticide

Interprets FAC section 12811

Interpretation

The California Department of Food and Agriculture (CDFA) has regulatory authority over fertilizing materials and livestock drugs sold in California. In order to be legally sold as a fertilizer compound or livestock drug, the product must be registered as a fertilizing material or livestock drug with CDFA.

Manufacturers sometimes attempt to evade DPR pesticide registration and other regulatory requirements by registering the substance with CDFA as a fertilizing material or livestock drug. U.S. EPA and FDA have established an MOU (memorandum of understanding) to clarify overlap between livestock drugs and pesticides (see *Agricultural and Non-Agricultural Pesticide Use* in Chapter 1 for a discussion of this exemption). DPR follows this MOU.

An analysis of the FAC uncovered nothing that would preclude the registration of a substance by both DPR and CDFA. In other words, registration as a fertilizing material does not preclude requiring registration as a pesticide for specific identified uses where a pesticide effect can be documented. CDFA has acknowledged that DPR may regulate some uses of a fertilizing material as a pesticide.

Section 7.3

Specific Pesticide Use Determinations

Interprets FAC sections 12811 and 12995

About this section

This section discusses: nitrogen compounds (fertilizer or plant growth regulator), phosphorous (fertilizing material or fungicide), elemental sulfur (fertilizing material or fungicide), and sulfur dioxide.

Nitrogen compounds (fertilizer or plant growth regulator)

Purpose

This interprets and clarifies current DPR application of FAC sections 12811, 12995, and other provisions of the FAC to the use of certain nitrogen-based fertilizer compounds such as Calcium Ammonium Nitrate (CAN-17), Urea Ammonium Nitrogen (UAN), Calcium Nitrate, and other similar materials applied post-dormant to plants to influence bud break. DPR acknowledges the position taken by U.S. EPA and has little choice but to interpret state pesticide law in a manner consistent with U.S. EPA's position insofar as that is possible.

Background

"Aqueous hydrogen cyanamide solution derived from calcium cyanamide and water" was registered in the 1980's as a plant growth regulator (PGR) at both the State and federal levels for its desirable effect on bud break; it remains registered at the present time.

Subsequently, the agricultural industry found that other sources of nitrogen would provide similar beneficial effects when used in this manner on other crops, such as kiwis and cherries, in addition to grapes.

A registration package, including all of the required data, was submitted to U.S. EPA for registration. In response, U.S. EPA made the determination that this was a non-pesticide use in an August 21, 2003 letter. U.S. EPA further notified the applicants that making PGR claims for these nitrogen-based fertilizer products would be a violation of FIFRA.

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U.S. EPA conclusion

U. S. EPA's finding was that "When these nitrogen-based fertilizer compounds are applied directly to trees and vines during a post-dormant phase, or "quiescence," the result is a uniform bud break, a physicochemical process caused by increased turgor pressures in tissues, provided necessary environmental conditions are present. None of these fertilizer compounds would cause a plant to break dormancy, a physiological process that responds to environmental stimuli and hormonal changes within the plant or to related chemicals known as PGRs. These nitrogen-based fertilizer compounds used post-dormant on trees, shrubs, and vines to ensure uniform bud break are not pesticides."

U.S. EPA basis for conclusion

U.S. EPA presented six points to justify their decision to classify these uses as non-pesticides:

1. The major factors controlling breaking of dormancy are photoperiod and temperature.
2. Typical application rates of nitrogen-based fertilizer compounds are greater than any plant hormone concentrations needed to evoke a plant response.
3. The time lapse between application and bud-break is too great to be considered a PGR effect.
4. There is no data to demonstrate that these nitrogen-based fertilizer compounds act by a mode of action similar to PGRs in the breaking of dormancy.
5. Bud break is not the signal of breaking of dormancy.
6. Nitrogen-based fertilizer compounds are common fertilizing materials.

DPR position

As a result of these actions, California agriculture can use these nitrogen-based fertilizer compounds that are registered as fertilizing materials with CDFA during the post-dormant season to enhance uniform bud break, provided the labeling or advertising does not include express pesticide (PGR) claims.

Regulating fertilizing materials

Since CDFA has regulatory authority over fertilizing materials sold in California, in order to be legally sold as a nitrogen-based fertilizer compound, the product must be registered as a fertilizing material with CDFA. Labeling and advertising must not include any specific PGR claims.

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Phosphorous (fertilizing material or fungicide)

DPR position

DPR's position is that phosphorous acid materials applied directly into (injection) or to (foliar) plants or applied as a soil drench at rates that provide little or no nutritional benefit to the plant are being applied for their pesticide value regardless of the product's status as a registered fertilizing material with CDFA. Because of this intent, these products must be registered as a pesticide with DPR. It is not necessary that the manufacturer make specific pesticide claims for the product when these specific use patterns are on labeling. The pesticide benefits and intent of this use pattern are well known and understood by all involved.

CDFA: no credible data to support nutritional claims

CDFA has informed us that it has no credible data on file to support nutritional claims for application of phosphorous acid directly to or into the plant. Various phosphate compounds can be applied as foliar fertilizers. This would be a form of phosphorus available to the plant with little or no pesticide benefit.

Phosphorous acid, when applied to soil, slowly converts to phosphate, the only nutritionally active form of phosphorous. Soil application is the appropriate method for use of phosphorous acid as a nutrient. This would be an acceptable non-pesticide use. However, soil application rates that provide significant amounts of phosphate are far above the soil application rates commonly recommended for pesticide effect. Generally, soil application at these low rates per acre would be considered to be primarily for pesticide intent.

There are currently several phosphorous acid products registered as pesticides with the U.S. EPA and DPR. The labeling for these products has use directions that are consistent with the use patterns described above.

Over the years, DPR has been consistent in its interpretation of when phosphorous acid becomes a pesticide. Two specific cases have involved its use on avocados to control phytophthora and its use on oak trees to control sudden oak death.

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Labeling

When you encounter phosphorous acid products with labeling that includes direct application on or into the plant, or soil application rates significantly below fertilizer rates per acre, gather product labeling and any additional information you can obtain about how the product is marketed or presented to the grower. For example, reducing or substituting for applications of fungicides or other phosphorous acid products, other "indirect" pesticide benefits, timing of applications, technical bulletins, research results, other oral claims, etc. Product compliance (registration) issues should be forwarded to the EBL assigned to your county for follow-up action against the manufacturer and/or distributor. Enforcement action may be taken against users who persist in this use violation pursuant to *FAC section 12995*.

Elemental sulfur (fertilizing material or fungicide)

DPR interpretation of elemental sulfur materials

DPR's interpretation of the law is that the application of elemental sulfur materials directly to or "over the top" of plants in leaf are presumed to be a pesticide (fungicide) use. Elemental sulfur products, with labeling that suggests this use, must be registered as a pesticide, regardless of the product's status as a registered fertilizing material with CDFA. It is not necessary that the manufacturer make specific pesticide claims for the product; the pesticidal benefits and intent of this use are well known and understood.

DPR review of literature

DPR's scientific review of available literature indicates that plants take up and utilize sulfur in the sulfate form - SO_4. Elemental sulfur must be oxidized to sulfate to be made available to the plant. This process takes place in the soil and is accomplished by soil microbes. Available references, including the *Western Fertilizer Handbook*, make no mention of plants using elemental sulfur directly, nor the conversion of elemental sulfur to sulfate in or on the plant itself. Thus, the application of elemental sulfur to foliage is not going to provide any significant amount of nutritionally available sulfur to the plant. The sulfur must go through the soil first.

On the other hand, sulfur applied to leaves has several direct pesticidal benefits for disease and mite control. Registered sulfur pesticide product labeling has a vast array of crops listed. The conclusion is that the only benefit gained from the foliar application of elemental sulfur is a pesticidal benefit, not a nutritional one.

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Non-pesticide use of sulfur

Soil application is the appropriate method for use of elemental sulfur as a nutrient. This would be an acceptable non-pesticide use. Sulfur and sulfate also have soil amendment properties, e.g., lowering pH in alkaline soils and improving structure in sodic soils if applied with calcium, etc. Various mineral sulfate compounds can be applied as foliar fertilizers. This would be an available form of sulfur to the plant, with little to no pesticidal benefit.

Product labeling

When you encounter elemental sulfur products with labeling that includes foliar use, gather product labeling and any additional information you can obtain about how the product is marketed or presented to the grower. For example, reducing or substituting for applications of fungicides or other registered sulfur products, other "indirect" pesticidal benefits, timing of applications (e.g., starting applications early when canes are 6" - 8" long), technical bulletins, research results, other oral claims, etc. Product compliance (registration) issues should be referred to the EBL assigned to your county for follow-up action against the manufacturer and/or distributor. Enforcement action may be taken against growers who persist in this use violation pursuant to FAC section 12995.

Sulfur dioxide

Sulfur dioxide (wine fermentation or equipment disinfection)

Sulfur dioxide (SO_2) is a product that has multiple uses in the wine industry. According to the University of California, one of the primary uses is as an antioxidant to prevent off-odors and discoloration. This use is considered non-pesticidal. SO_2 is also used as a commodity fumigant to prevent bacterial or mold spoilage of grapes and as a container disinfectant. The primary issue is the use of SO_2 as a disinfectant. SO_2 has been registered as a pesticide active ingredient since 1961.

Wooden barrels and tanks have porous surfaces that allow mold, yeast, and bacteria to accumulate and can eventually spoil the wine when it contacts the contaminated barrels. To prevent this, SO_2 is introduced into the barrel or tank along with water, killing the mold, yeast, and bacteria. This meets the federal and state definition of a pesticide and therefore is a pesticidal use and a concern for DPR and CACs. Registered pesticide products must be used for this purpose.

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Sulfur dioxide (wine fermentation or equipment disinfection) (continued)

When you encounter SO_2 products with labeling that includes disinfectant use, gather product labeling and any additional information you can obtain about how the product is marketed or presented to the winery. Product compliance (registration) issues should be referred to the EBL assigned to your county for follow-up action against the manufacturer and/or distributor. Enforcement action may be taken against wineries who persist in this use violation pursuant to FAC section 12995.

Section 7.4

Unregistered Pesticide Products -- Use

Interprets FAC section 12995; 3 CCR sections 6147 and 6301

Interpretation

It is unlawful for persons to mix and apply, for pesticidal purposes, materials that were prepared from unregistered materials (e.g., an unregistered bordeaux mixture made from copper sulfate and hydrated lime that is subsequently used as a fungicide). It is a violation of *FAC section 12995* to possess and use unregistered materials intended for pest control purposes, except as specifically exempted in 3 CCR sections 6147 and 6301. Often, this occurs as an inadvertent violation by well-intentioned persons who may often be looking for a "greener" method of pest control or simply as a way to save money by using a cheaper source of pest control material. Where evidence shows this to be the case and no commercial food use or significant adverse impacts have occurred, a first time violation may be handled with a cease and desist order and a notice of violation. However, where it appears that it is a knowledgeable violation, an enforcement action may be warranted.

The role of the product manufacturer should also be evaluated. It is particularly important to collect any advertising, sales invoices, or other literature that can be used as evidence of their intent to have their product used as a pesticide. These cases should be routed through the EBL assigned to your county for forwarding to DPR's Product Compliance Branch.

Section 7.5

Unregistered or Misbranded Products -- Sales

Interprets FAC section 12811

Interpretation

Complaints of illegal sales tactics or misrepresentation of products by firms should be documented and submitted to DPR's Product Compliance Branch through your EBL so that appropriate enforcement steps by State or federal agencies can be taken.

Information needed in a statement from the purchaser documenting the reported complaint includes the following, if available:

- Name of complainant or other party;
- Salesperson's name and company represented, address;
- Name of product offered for sale or sold, date, etc.;
- Type of claims made by salesperson or advertising;
- Invoice or truck line or carrier by which product delivered;
- Other information (date of call, time of call, price per gallon, farmer's statement, etc.).

Chapter 8

Research Authorizations

In this chapter This chapter contains the following sections.

Section	Topic	See Page
8.1	General Requirements for Research Authorization	8-2
8.2	Harvest or Destruct	8-5

Section 8.1

General Requirements for Research Authorization

Interprets 3 CCR section 6260

Interpretation

A person is required to obtain a research authorization from DPR prior to using pesticides in conflict with labeling or any unregistered pesticides for experimental purposes.

This authorization is not required of pesticide registrants engaged in experimental work with pesticides on property under their control or of colleges and universities where the experimental use of pesticides is used according to the current established policy of the college or University.

All requests for research authorizations must be referred to DPR's Registration Branch. In this way, DPR can uniformly evaluate and regulate these uses.

For each research authorization, the hazards to persons, animals, and the environment are evaluated; certain restrictions are imposed on the work before the authorization is issued. Special, local conditions may dictate further restrictions at the county level. The intent of the regulation is to prevent produce bearing an illegal residue from entering the food chain and to prevent undue contamination of the environment.

Research authorizations are approved for statewide use. Research authorization holders are required to provide copies of the authorizations along with Notices of Intent (NOI) to CACs at least 24-hours prior to beginning work in each county. CACs should not accept an NOI without a copy of the research authorization. Following the final application, an *Experimental Trial Report* must also be submitted to the CAC (*3 CCR section 6266(a)*).

Unless otherwise specified in correspondence or on the authorization, monitoring of this program is at the discretion of the CAC.

Restricted material permits are not required for restricted materials used under a valid research authorization [*FAC section 14006.6(b)*]. Any registered pesticide uses of restricted materials made in conjunction with research authorization pesticides (control plots, standards, etc.) would require a permit.

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Interpretation (continued)

Research authorizations are conditioned to expire on completion dates or when the crop is harvested or destroyed. When experimental work is canceled in a county, the applicant should notify the CAC using the *Experimental Trial Report.* If the authorization holder has not contacted the county by the expiration date on the authorization, note this and return it to the Registration Branch.

Within two weeks following the expiration date of the research authorization, the researcher must submit an Experimental Pesticide Use Report to DPR (*3 CCR section 6266(b)*).

Permission to do research and development work with pesticides in California is predicated on compliance with all applicable regulations.

Special requirements printed on the permit address these specific concerns:

1. "Notify the commissioner of each trial location within his/her jurisdiction at least 24 hours before beginning application. The CAC reserves the right to review your plans as they pertain to requirements and conditions within the county. The work may be denied or you may be asked for specific changes if your plans are determined to be detrimental in any way."
2. "Notify the commissioner of the exact location in writing (or map) within seven days after application or before harvest, whichever is sooner. Exact location means that sufficient detail must be included to allow someone not familiar with the area to be able to locate and observe the trial using only the information and map. This map should contain reference to permanent fixtures, buildings, etc. where necessary, with an appropriate reference to an identifying spot and/or corner of the trial. The overall perimeter of the trial with appropriate dimensions must be shown."
3. "Notify the commissioner if you cancel this work in any of the listed counties. If you have listed a county as a candidate for your work and you find that, for any reason, you do not work in that county under terms of that particular authorization, it is considered that you have canceled that work and the CAC must be notified."
4. "Notify the commissioner of the time, place, and method of crop disposal at the earliest possible time before beginning harvest. The CAC should know of the proper disposal of all treated material."

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Interpretation (continued)

Special restrictions printed on the authorization address specific concerns with respect to proper county notification procedures and crop harvest or crop destruct restrictions.

Contact your regional pesticide enforcement office or Enforcement Branch Liaison for any questions you may have regarding these policies and procedures.

Section 8.2

Harvest or Destruct

Interprets 3 CCR section 6268

Interpretation

3 CCR section 6268(b) exempts personnel employed by colleges and universities engaged in pesticide research from research authorization (RA) requirements if they are operating according to a "current established policy" of the college or university that covers pesticide use and experimentation that has been approved by DPR. An example of an established policy is the University of California, Division of Agricultural and Natural Resources' Policy No. 281 entitled, "Pesticides and Related Chemicals." The approved "policy" is considered to be the functional equivalent of an RA and gives them the same privileges as would an RA issued by DPR.

Current established policies must include instructions for submitting a notice of application to the CAC for all research trials conducted off college and university property. When submitting the notice of application, researchers must indicate whether crop destruction is required. This provides notice to the CAC for scheduling inspections to confirm disposition for those trials requiring crop destruction, if necessary.

College and university researchers often test pesticide products that are exempt from the requirement of a tolerance, are permissible to use under a federal Experimental Use Permit, or are currently registered federally, but have not yet received registration in California. Use of such products is legal under federal statutes (listed below); commodities treated may enter the channels of trade. Crop destruction is only required in cases where tolerances, temporary tolerances or exemptions from tolerance are not established.

Please refer to 40 CFR part 180 (http://www.access.gpo.gov/nara/cfr/waisidx_99/40cfrv16_99.html) to determine if a tolerance for the specific crop/chemical has been established or if it is exempt from tolerance.

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Interpretation (continued)

Federal laws and regulations that allow research crops to enter the channels of trade are:

- 40 CFR part 172.3(ii) relative to experimental use permits states: "Any food or feed crops involved in, or affected by, such tests (including, but not limited to, crops subsequently grown on such land which may reasonably be expected to contain residues of the tested pesticides) shall be destroyed or consumed only by experimental animals unless an appropriate tolerance or exemption from a tolerance has been established under the Federal Food, Drug, and Cosmetic Act (FFDCA) for residues of the pesticide."
- 40 CFR part 172.24 relative to state issuance of authorizations, in part states: "…(d) Requirement of tolerance. If the experimental use pesticide is to be used in or on food or feed, the applicant must - (1) Submit evidence that:
    1. A tolerance or exemption from the requirement of a tolerance has been established for residues of the pesticide in or on such food or feed under FFDCA section 408 or a regulation established under FFDCA section 409, and
    2. The proposed program would not reasonably be expected to result in residues of the pesticide in or on such food or feed in excess of that authorized under FFDCA section 408 or a regulation established under FFDCA section 409."
- FFDCA section 408 [21 U.S.C. 346a] - "(a) Requirement for Tolerance or Exemption," in part states: "(4) Effect of Tolerance or Exemption - While a tolerance or exemption from the requirement for a tolerance is in effect under this section for a pesticide chemical residue with respect to any food, the food shall not by reason of bearing or containing any amount of such a residue be considered to be adulterated within the meaning of FFDCA section 402(a)(1)."

FFDCA section 402 [21 U.S.C. 342] - "A food shall be deemed to be adulterated" in part states: "(a)(1) If it bears or contains any poisonous or deleterious substance which may render it injurious to health; but in case the substance is not an added substance such food shall not be considered adulterated under this clause if the quantity of such substance in such food does not ordinarily render it injurious to health."