

## Traversing the Maze of Pesticide Enforcement

*Juli Jensen*

*Sacramento County Department of Agriculture*

The maze of pesticide enforcement may at times baffle or confuse those responsible for pesticide use programs but I assure you that enforcement decisions are not arbitrary and do follow a predictable pattern. This is thanks, in part, to the Enforcement Response and Civil Penalty Action Regulations found in Title 3 California Code of Regulations (CCR) Sections 6128 and 6130.

Section 6130, related to Civil Penalty Actions, was enacted in November 1986 and has been amended several times over the years. Section 6128 entitled Enforcement Response, was just enacted in November 2006 and came about as a response to the industry's and activists' complaints that pesticide enforcement varied widely from county to county in California. The California Department of Pesticide Regulation responded with a regulation that defined what enforcement or compliance action would be taken in response to the severity of the violation and compliance history of the violator.

California Agricultural Commissioners throughout the state follow the Enforcement Response Regulation and thus give some consistency to what response violators can expect.

### **Classification**

The first step in determining the enforcement response is to determine the classification of the violation. Section 6130 defines the classes of violations. There are three classes of agricultural pesticide use violations ranging from Class A for the most serious violations, to Class C for minor infractions.

**Class A** violations are the most serious because they create "an actual" health or environmental hazard or they are violations of a lawful order of the commissioner. Violations are also classified as Class A if they are a repeat of a Class B. Any incident that causes an illness would be a Class A violation.

**Class B** violations have a reasonable possibility of creating a health or environmental effect. Violations may also be classified as Class B if they are a repeat of a Class C violation. An example of a Class B violation would be failure to wear required personal protective equipment.

**Class C** violations are minor infractions that don't fall into either Class A or Class B. They are most often less serious paperwork or procedural violations.

To complete the classification of the violation, the Commissioner must look at the compliance history of the company or agency. Section 6130 states: "A violation shall be classified as a repeat violation, if it occurs within two years of a violation for which a civil penalty was levied against that person/company in the same county and of the same class." This does not mean that any violations over two years old will not be considered

at all. It means that they will not be considered when determining the class of violation. They may however, be considered when deciding where in the fine range a specific fine should be set if a fine is the correct action or they may be considered when deciding between a compliance action or an enforcement action when either is an option.

## **Enforcement Response**

Once the violation classification has been determined using Section 6130, the next step is to determine the correct enforcement response using Section 6128. Before going any further, we must define the various terminologies:

- **Compliance actions** document that certain behavior or an act is in violation of the law or regulations. They do not directly impose a monetary penalty. Compliance actions include notices of violation, warning letters, documented compliance interviews, and non-compliances noted on the inspection forms. Compliance actions also include public protection actions such as cease & desist orders; seize or hold product or produce orders; and prohibit harvest orders.
- **Enforcement actions** have the potential to impose a monetary penalty or loss of a right or privilege and are initiated by a Notice of Proposed Action. Enforcement actions include administrative civil penalties known as ACP's (Agricultural Civil Penalties) and SCP's (Structural Civil Penalties); refusal, revocation, or suspension of a license, certificate, or permit; civil court action; or criminal court action.
- **Decision reports** are written explanations and records of commissioners' decisions not to take enforcement actions.

**Class A** or serious violations require a serious enforcement response. Section 6128 allows for the following responses to a Class A violation:

- A formal referral to the District Attorney, City Attorney, or Circuit Prosecutor, or;
- A formal referral to the Director or Structural Pest Control Board Registrar for a statewide licensing action or Attorney General action, or;
- An enforcement action (if this is an ACP or SCP, the fine level is \$700 - \$5000 per violation)

**Class B** or moderate violations allow for a little more discretion in the enforcement response. Section 6128 allows for the following responses to a Class B violation:

- A formal referral to the District Attorney, City Attorney, or Circuit Prosecutor, or;
- A formal referral to the Director or Structural Pest Control Board Registrar for a statewide licensing action or Attorney General action, or;
- An enforcement action (if this is an ACP or SCP, the fine level is \$250 - \$1000 per violation), or;
- A compliance action with a decision report, provided there has not been a compliance action for a violation in the same class within two years of the current alleged violation.

**Class C** or minor violations allow for the most discretion in the enforcement response. Section 6128 allows for the following responses to a Class C violation:

- An enforcement action (if this is an ACP or SCP, the fine level is \$50 – 400 per violation), or;
- A compliance action with a decision report when there has been a compliance action for a violation in the same class within two years of the current alleged violation, or;
- A compliance action without a decision report, provided there has not been a compliance action for a violation in the same class within two years of the current alleged violation.

It should be noted that Section 6128 further requires that in the case of a priority investigation as defined in the 2005 Cooperative Agreement, between the California Department of Pesticide Regulation, the California Agricultural Commissioners and Sealers Association, and the U.S. Environmental Protection Agency, Region IX, the commissioner shall provide an opportunity to the District Attorney, City Attorney, or Circuit Prosecutor to participate in the investigation and/or pursue a civil or criminal action when a violation may have occurred.

### **Employer/Employee Responsibility**

The issue is often brought up by employers: “I do everything I can to make my employees compliant. Can’t you just fine them instead of the company when they are responsible for the violations?” In certain situations, the agricultural commissioner may bring an action against an employee. Those conditions are spelled out in CCR Title 3. Section 6130.

The agricultural commissioner may fine an employee if:

- The violation is for failing to use personal protective equipment or other safety equipment, and;
- The employee is licensed such as a QAL (Qualified Applicator License), QAC (Qualified Applicator Certificate), OPR (Structural Operator), FR (Structural Field Rep), or RA (Structural Applicator).

### AND

All of the following conditions are met:

- The employer provided the required safety equipment and it was at the use site in a useable condition, and;
- The employer has a written workplace disciplinary program that requires the use of the equipment, and follows that disciplinary procedure, and;
- The employer has complied with all of the training requirements, and;
- The employer supervised the licensee to assure that the equipment was properly used by the employee, and;
- At the time that the employee failed to use the safety equipment, he or she had knowledge of what discipline could be imposed under the written workplace disciplinary program.

## **What can I do?**

Here are a few suggestions for help you avoid the Pesticide Enforcement Maze or get you out more quickly and easily if you do stumble in:

- Train your employees emphasizing the use of safety equipment
- Have a written workplace disciplinary program and review it in your training.
- Make sure that someone goes over a checklist with each of your employees as they leave to see that they have their safety equipment with them when they leave the shop each morning and that it is in good condition.
- Periodically, make unannounced visits to the application sites to make sure that employees are following the laws and regulations.
- Some companies offer incentive programs for employees that get good inspections from the agricultural commissioner's office.
- Be a good role model for your employees and don't badmouth the agricultural inspectors in front of your employees – it's not professional and does not encourage compliance on their part.
- If by some chance, one of your employees gets inspected and there is a non-compliance, contact the agricultural commissioner's office immediately and let them know what steps you have taken to get back in compliance.
- This is also a great time to talk to the deputy or agricultural commissioner about what action is planned and who will be held responsible.
- If your company should receive a notice of proposed action for a fine, contact the Deputy Agricultural Commissioner and ask for an informal meeting. Most counties are happy to meet with you and discuss the issues. You can then make a better decision as to whether or not to request a hearing.

Hopefully this has given you a better understanding of the pesticide use enforcement response actions and how to avoid them. If you have further questions on this subject, please contact me at the Sacramento County Agricultural Commissioner's Office at (916)875-6603 or [Jensenj@saccounty.net](mailto:Jensenj@saccounty.net).