

County Letterhead

Date:

FILE NO. (*County abbreviation, fiscal year, case number*)

NOTICE OF PROPOSED ACTION, NATURE OF VIOLATION, AND RIGHT TO REQUEST HEARING

TO: Respondent Name (*business or individual – one entity per notice*)
License Number (*if applicable*)
Attn: (*individual's name if first line is a business*)
Address
City, State, Zip Code

You are hereby notified that the Agricultural Commissioner for the County of [x] proposes to fine you, [respondent], a [total number] civil penalty of [amount] [for x violations] for violating [California Food and Agricultural Code or California Code of Regulations (CCR) Title 3 section] by [state the facts that constitute the elements of the violation charged in one or two sentences for each violation]. The authority for this action is granted to the County Agricultural Commissioner pursuant to the provisions of section 12999.5 of the Food and Agricultural Code (FAC). *If appropriate immediately after recitation of violation with multiple counts:* Under the authority of FAC section 12996.5(b), the Commissioner proposes to charge you with [x] counts of violating [the FAC section that caused the acute illness or injury] at [fine amount] per violation.

FACTUAL CIRCUMSTANCES

In this section, discuss only the relevant facts necessary to prove all elements of the alleged violation(s). The Notice of Proposed Action (NOPA) is not a summary of the investigation, it is the formal charging document giving the respondent sufficient notice of the charges in order to prepare a defense. The NOPA should only include facts from the investigation report that are necessary to prove the violation and to provide this notice. Many facts that are necessary to develop and conduct a complete investigation, as reflected in the report, are not necessary to include in the NOPA and may only confuse the reader or raise irrelevant issues. Avoid using unnecessary and equivocal statements such as "the investigation report indicates." Simply state the facts revealed by the investigation in a linear and well-organized manner. The reader should be able to clearly follow the sequence of events that prove the violation.

On the other hand, be sure to provide all the specifics relevant to the case. For example, in a drift or off-site movement case: the date and time of the application, who made it, what was applied, the active ingredient, relevant circumstances of the application (may include size, weather conditions before and/or during application, arrival of workers/bystanders, application method, proximity to people, etc.), what happened, when and to whom, and relative evidence (gradient sampled, clothing analyses, PUR for surrounding area at time, etc.).

EXAMPLE

On September 1, 2015, between 5 a.m. and 10 a.m., Respondent applied Miticide (Reg. No. 1234-56), a Department of Pesticide Regulation (DPR)-registered pesticide, to treat a nut tree orchard (site X) using a tractor-driven spray rig. The active ingredient of Miticide is mitophos. Site X is located approximately 50 feet south of the County Road 1 and directly across from County High School. County High School was in session during the application. At 9 a.m., the wind changed direction and began blowing north towards the high school at 20 mph.

Shortly after 9 a.m., five (5) students at the County High School baseball field, directly across County Road 1 from site X, began to experience symptoms of acute illness including irritated eyes and throat, nausea, dizziness, headaches, and vomiting. A high school administrator called county medical staff to the school to provide medical treatment to the students. The county medical staff concluded that the students' symptoms were caused by exposure to pesticide. Surface swab samples taken from the high school baseball field and student clothing tested positive for mitophos. During the prior month, there were no other applications of any product containing mitophos within a mile of County High School.

VIOLATION

This section should be organized as follows: first, a statement of the law or regulation violated; second, a discussion of how the facts establish each element of the violation as described by the law or regulation; and finally, the conclusion that the violation occurred. The following are two examples of how to organize this section using facts from the Factual Circumstances section:

EXAMPLE 1: FAC section 12973

California Food and Agricultural Code section 12973 states:

“The use of any pesticide shall not conflict with the labeling registered pursuant to this chapter...”

The Miticide label states:

“Do not apply this product in a way that will contact persons, either directly or through drift.”

Respondent applied Miticide in close proximity to County High School while school was in session, continued the application after the wind increased speed and changed direction towards the school, and caused the pesticide to drift off target to the school grounds. Surface swab samples taken from the school grounds and student clothing, and Pesticide Use Report (PUR) data show that respondent caused the pesticide to drift to the school site and contact persons. Thus, respondent applied Miticide in a way that contacted persons through drift in violation of the label and California law.

EXAMPLE 2: 3 CCR section 6614

California Code of Regulations Title 3, section 6614(b)(1) states:

“Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when... (1) There is a reasonable possibility of contamination of the bodies or clothing or persons not involved in the application process...”

Respondent applied Miticide in close proximity to County High School while school was in session and continued the application after the wind increased speed and changed direction towards the school. Respondent therefore applied pesticide in a way that created a reasonable possibility of off-site movement in the direction of a school in session, and contaminated the clothing or bodies of students. The fact that the Miticide label directs users against applying the product “in a way that will contact persons...through drift” further shows that respondent acted unreasonably.

While the Commissioner is only required to show a “reasonable possibility” of contamination, in this case the surface swab samples taken from the school grounds and student clothing, and PUR data show that respondent did in fact cause contamination of the clothing or bodies of the students.

PENALTY

This section should be organized as follows: first, set forth the regulation that provides the penalty classification and fine range for the classification of the violation charged. Second, state the classification of the violation (s) and fine selected in the appropriate range. Finally, give the facts that support the classification and fine selected. If appropriate, cite FAC section 12996.5 that allows multiple counts for each person affected.

EXAMPLE

Under California Code of Regulations Title 3, section 6130, a “Class A” violation is a violation that causes a health hazard. Respondent’s violations of FAC section 12973 (example 1) or 3 CCR 6614 (b)(1) (example 2) caused a health hazard that resulted in the illnesses of 5 students. The fine range for a “Class A” violation is set by regulation as between \$700 to \$5,000.

Because the incident did actually cause acute illnesses, the CAC proposes a civil penalty at the top of the permissible fine range for each violation—\$5,000 per violation.

Under FAC section 12996.5:

“The exposure of each person to a pesticide resulting from the violation of... Section 12973... that causes acute illness or injury shall constitute a separate violation of the statute.”

Respondent’s violations of FAC section 12973/3 CCR section 6614(b)(1) resulted in pesticide exposure and caused five (5) students to become acutely ill. The CAC is therefore charging five (5) separate violations of FAC section 12973, for a total civil penalty of \$25,000.

ENCLOSURE(S)

List the enclosures of code text:

A copy of the text of 3 CCR, section 6130, and/or FAC section _____ and/or 3 CCR section(s) _____ is enclosed for your convenience, (*again, enclose only those which apply to this case*).

The most likely code sections you will need to provide are the specific violation codes, 3 CCR section 6130, FAC section 12999.5. If you charge multiple counts, you should also reference FAC sections 12996.5 and/or 12997.5.

You May Review the Evidence Against You

You are entitled to review the Commissioner’s evidence supporting these charges during regular business hours at the office of the _____ County Agricultural Commissioner, located at _____ in _____, California. We will provide one copy of the case file free of charge. We may charge you reasonable costs for additional copies.

Although not required by the statute, it is a good idea to have a separate copy of the case file available for respondents to review before the hearing so they have a chance to prepare. This practice is both fair and helpful to ensure due process. In any case, if respondents request to see the evidence before the hearing, you must allow them to do so at a reasonable time during regular business hours.

A few words to Commissioners about how the Public Records Act may apply to the NOPA or the case file. . . .

You do not have to provide a free copy of the case file to the respondent. However, if you do charge for the file, the “per page” copying fee should not exceed those that you would normally charge any other person seeking copies of other public records. For example, DPR charges 25

cents per page for copies of documents released pursuant to Public Records Act requests because that is the Department's cost to copy documents on their photocopiers. Pursuant to the statute, staff time to review, retrieve, or prepare the document(s) cannot be charged for Public Records Act requests.

It is DPR's opinion that a NOPA is not a pre-decisional document or protected document under the Public Records Act. The Commissioner acts as an official representative of the people of her or his county. When a Commissioner issues a NOPA, it has the same effect as filing a complaint against the respondent at the county courthouse.

Consult your county counsel if you need advice specific to your county on this matter. For further information about the Public Records Act, you may consult Government Code, section 6250, et seq.

You May Request a Hearing and Present Evidence at the Hearing You may request a hearing to review the Commissioner's evidence, and to present any evidence, oral or written, on your behalf as to why the Commissioner should not take the proposed action. You are not required to be represented by legal counsel at the hearing. Your attorney may accompany you and represent you if you wish. You will be provided a written decision of the Commissioner's finding. Although not required by the authorizing statute, a tape-recording will be made of the hearing proceedings. If you require a translator at the hearing, you must inform the Commissioner within [x] days before the scheduled hearing date.

How to Request a Hearing - Failure to Request – FAC section 12999.5

A hearing in this matter will be scheduled and held at the office of the County Agricultural Commissioner, located at the above noted address, if you request a hearing by signing, dating, and returning the enclosed Hearing Request (*or a hearing request letter*) within 20 days of receipt of this Notice of Proposed Action. Failure to timely request a hearing is a waiver of the right to a hearing. The Commissioner may take the action proposed in this notice without a hearing. Further, failure to request a hearing is a waiver of your right to appeal the Commissioner's decision (see *Appeal Rights After Hearing*).

Stipulation and Waiver to Order – FAC section 12999.5

If you do not wish to request a hearing to contest the charges and proposed action, you may stipulate (agree) to the enclosed Order by dating, signing, and returning the enclosed Stipulation and Waiver to Order within 20 days of receipt of this notice.

Appeal Rights After Hearing – FAC section 12999.5

Should you disagree with the Commissioner's decision, you may request an appeal to the Director of DPR within 30 days of receiving the Commissioner's decision and order. However, you waive these appeal rights if you do not request and attend the hearing at the scheduled time and date, or if you fail to request an appeal within the 30-day time frame.

The request for appeal must be mailed to the Director of the Department of Pesticide Regulation (Director), 1001 I Street, P.O. Box 4015, Sacramento, California 95812-4015.

The request for appeal:

1. Must be signed by you or your authorized agent; and
2. Must state the grounds for the appeal; and
3. Must include a copy of the Commissioner's Decision and Order; and
4. Must be filed or mailed to the Commissioner at the same time you mail it to the Director.

Failure to follow any of the above requirements may affect your right to appeal.

If the Director grants an appeal, you will receive the Director's written decision approximately 45 days after receipt of your appeal, or as soon thereafter as practical.

The following three notices may or may not apply to the circumstances of the NOPA – use only those notice(s) that apply to the particular situation:

Pesticide Incident Reimbursement Notice - FAC section 12997.5

Any person found in violation of pesticide laws and regulations that resulted in illness or injury requiring emergency medical transport or emergency medical treatment of any individual, in a non- occupational setting, from a pesticide used in the production of an agricultural commodity shall be liable to the individual harmed or to the medical provider for the immediate costs of uncompensated medical care from acute injuries and illnesses of the exposed individual.

Timely Reimbursement - Penalty Offset and Proof Notice – FAC sections 12996.5 and 12997.5

If you offer to reimburse, or have already reimbursed, the immediate medical costs for acute medical illnesses and injury, the Commissioner may reduce the proposed administrative civil penalty by an amount up to fifty percent. You must request a hearing and provide proof at the hearing of immediate reimbursement in order for the Commissioner to consider reducing the penalty.

Schools Notice – FAC section 12999.5(b)

If you receive a civil penalty for pesticide drift in a school area subject to FAC section 11503.5 that results in a Class A violation as defined in 3 CCR section 6130, the Commissioner shall charge a fee, not to exceed fifty dollars (\$50), for processing and monitoring each subsequent pesticide application that may pose a risk of drift, until you have completed 24 months without another Class A violation (as defined by 3 CCR section 6130).

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ORDER

FILE NO. *(County abbreviation, fiscal year, case number)*

TO: *(Respondent Name) (Address)*

ORDER: It is hereby ordered *(name)* is fined *(total amount of fine for this action)*. The fine is due now and payable.

Commissioner Signature
Commissioner's Official Title
Address

Instructions to Respondent:

If you wish to pay the fine and not request (waive) a hearing, you may sign the Stipulation and Waiver to Order below. By doing so, you also waive your right to a hearing, appeal, or any other review in this matter. If you wish to sign the Stipulation and Waiver to Order, you must submit it to the Agricultural Commissioner within 20 days of receipt of this notice.

STIPULATION AND WAIVER TO ORDER

I hereby stipulate that the Agricultural Commissioner's Notice of Proposed Action in the above-entitled matter states grounds for civil penalty action based on the evidence now before the Commissioner.

Without admitting to the violations alleged in the Notice of Proposed Action, I stipulate to the Commissioner's Order, as set forth above, and I waive all rights to a hearing and appeal or any other review in this matter.

Respondent's Signature

Date: _____

Make the check payable to: _____ Mail the check and the signed **Stipulation and Waiver to Order** to:
Department Name or Commissioner's Office
Address

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HEARING REQUEST

**ACKNOWLEDGMENT OF RECEIPT OF NOTICE OF
PROPOSED ACTION AND REQUEST FOR HEARING**

FILE NO. *(County abbreviation, fiscal year, case number)*

Important: The Hearing Request must be submitted to the Agricultural Commissioner within 20 days of receipt of the Notice of Proposed Action.

TO: *(Respondent's Name)*
(Address)

I, the undersigned respondent in this proceeding, hereby acknowledge receipt of a copy of the Notice of Proposed Action.

I hereby request a hearing to permit me to have an opportunity to present my defense to the violations contained in the Notice of Proposed Action.

Respondent's Signature

Date

Respondent's Name (printed)
Telephone: (____)

Mail this form to:
Commissioner's Official Title
Department Name
Address

If you have any questions regarding this matter, please contact at () _____. *This person should not be the Hearing Officer.*

Commissioner's Signature
Commissioner's Official Title
Address
Telephone Number