

# Annotated Structural Civil Penalty Written Notice of Proposed Action Guide

[*County Letterhead*]

DATE:

FILE NO. [*County abbreviation, fiscal year, case number*]

## NOTICE OF PROPOSED ACTION (NOPA), NATURE OF VIOLATION, AND RIGHT TO REQUEST HEARING

**TO:** Respondent Name [*business or individual – one entity per notice*]  
Company Registration or Individual License Number [*if applicable*]  
Attn: [*individual's name if Respondent's Name is a business*]  
Address  
City, State Zip Code

You are hereby notified that the Agricultural Commissioner for the County of [*County name*] proposes to fine you, [*Respondent*], a civil penalty of \$[*amount*] for violating [*Business and Professions Code (B&PC), California Food and Agricultural Code (FAC), and/or Title 3/16 of the California Code of Regulations (CCR)*] section(s)\_\_\_ 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 8617 of the Business and Professions Code (B&PC).

## FACTUAL CIRCUMSTANCES

*[In this section, discuss only the relevant facts necessary to prove all elements of the alleged violation(s). The NOPA is the formal charging document giving the Respondent sufficient notice of the charges in order to prepare a defense; it is not a summary of the inspection or investigation. The NOPA should only include facts from the inspection or investigation report that are necessary to prove the violation and to provide this notice. For example, many facts that are necessary to conduct an investigation and complete 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," etc. Simply state the facts revealed by the inspection or 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: the location, date and time of the application, who made it, what was applied, relevant circumstances of the application, what happened, when and to whom, whatever evidence that was obtained (pictures, witness statements, etc.).]*

## EXAMPLE

On September 1, 20XX, at about 11:00 a.m., Ms. Betty Inspector, a Sunny County Agricultural Inspector/Biologist, arrived at 900 N. Elsewhere Drive in Somewhere, CA to conduct an

## **Annotated Structural Civil Penalty Written Notice of Proposed Action Guide**

inspection of a structure fumigated by FumeCo Inc. (PR #99999). The fumigation crew was not present and the tarps were still on the structure. The warning signs on the tarps indicated the structure had been fumigated using Fumex (EPA Registration No. 1234-56-ZZ), a pesticide registered with the California Department of Pesticide Regulation. During the perimeter inspection, Ms. Inspector observed on the east side of the structure there was no seal between the tarp and the ground, measuring approximately 37 inches in length.

The Standard Structural Fumigation Log stated the licensee responsible for preparing the structure for fumigation and for introducing the fumigant into the structure was Field Representative [*Respondent's name*] (FR #88888).

### **VIOLATION(S)**

*This section should be organized as follows:*

1. *A statement of the law or regulation violated, including any relevant label or California Aeration Plan language as applicable;*
2. *A discussion of how the facts establish each element of the violation as described by the law or regulation; and*
3. *The conclusion that the violation occurred.*

*The following example demonstrates a method to organize this section using facts from the Factual Circumstances section:*

#### *EXAMPLE: FAC section 12973*

Food and Agricultural Code section 12973 states in part:

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

A copy of the full text of this code section is included with this NOPA.

The Fumex labeling directs applicators to “Seal the bottom edges of the tarp to the ground using materials such as soil, sand, or weighted ‘snakes’.” By failing to seal the bottom edge of the tarp to the ground as required by the Fumex labeling, [*Respondent's name*] used Fumex in conflict with the registered labeling and violated FAC section 12973.

### **PENALTY**

*This section should be organized as follows:*

1. *Set forth the regulation that provides the penalty classification and fine range for the classification of the violation charged.*
2. *State the classification of the violation(s) and fine selected in the appropriate range.*
3. *State the facts that support the classification and fine amount.*

## **Annotated Structural Civil Penalty Written Notice of Proposed Action Guide**

*In classifying the violation and setting the fine level consistent with 16 CCR section 1922, it is important to include adequate factual support in the NOPA explaining how the Commissioner determined the fine classification and amount within the range. Having this information detailed in the NOPA assures the Respondent the fine was not set in an arbitrary manner. In addition, having the information in the NOPA helps the Respondent and County Advocate prepare for a hearing by outlining the evidence the Commissioner relied on in setting the classification and fine level.*

*The following example uses facts from the Factual Circumstances and the Violation sections above:*

### *EXAMPLE*

Title 16, California Code of Regulations (16 CCR) section 1922 sets forth the penalty classifications and fine ranges for county agricultural commissioner administrative civil penalty actions pursuant to B&PC section 8617. A copy of 16 CCR section 1922 is attached to this NOPA.

The violation you are charged with, FAC section 12973, is classified as a “Moderate violation” under 16 CCR section 1922(a)(1)(B). Moderate violations are violations “which pose a reasonable possibility of creating a health or environmental effect.” The Fumex label requires applicators to seal tarps to the ground while performing a tarped structural fumigation in order to protect bystanders from the potential offsite movement of the fumigant. As a result, [Respondent’s] violation posed a reasonable possibility of creating a health effect caused by exposure to the fumigant.

Under 16 CCR section 1922(a)(1)(B) the fine range for a Moderate violation is between \$XXX to \$X,XXX. In this case, the fine is set at \$XXX because according to the Fumex label exposure to the pesticide can be fatal. While exposure to Fumex may have potentially severe health effects, the opening in the tarpaulins was located along a side of the structure that was not easily accessible to bystanders. Ms. Inspector documented on the inspection form that the licensee and crew returned to the site promptly to correct the noncompliance, after the licensee was contacted.

### **ENCLOSURES**

*[List the enclosures of law or regulation code text:]*

A copy of the text B&PC section 8617, 16 CCR, section 1922, *[and the code section violated, such as FAC / B&PC section(s) \_\_\_\_\_ and/or 3/16 CCR section(s) \_\_\_\_\_]* is enclosed for your reference.

*[Again, enclose only those which apply to this case. The most likely code sections you will need to provide are the specific violation code(s), 16 CCR section 1922, and B&PC section 8617.]*

### **You May Review the Evidence Against You**

## **Annotated Structural Civil Penalty Written Notice of Proposed Action Guide**

You are entitled to review the Commissioner’s evidence supporting these charges during regular business hours at the office of the [county name] County Agricultural Commissioner, located at [address] in [city], California. We will provide one copy of the case file.

*[Although not required by the statute, it is a good idea to have a separate copy of the case file available for the Respondent 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 the Respondent requests 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...***

*DPR recommends as a best practice that you 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 35 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 DPR photocopiers. Pursuant to the statute, staff time to review, retrieve, or prepare the document(s) cannot be charged for Public Records Act requests. In any event, the Respondent must be given adequate time to review the documents to be presented at hearing before it begins.*

*Once issued, a NOPA is not a pre-decisional document or a 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. **Please read the enclosure “Preparing for Your Pesticide Administrative Civil Penalty Hearing” for further information.** 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 – B&PC section 8617**

## **Annotated Structural Civil Penalty Written Notice of Proposed Action Guide**

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 and 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 After Hearing*).

### **Stipulation and Waiver to Order – B&PC section 8617**

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 of Proposed Action.

### **Appeal Rights After Hearing – B&PC sections 8617 and 8662**

Should you disagree with the Commissioner's Decision, you may request an appeal to the Disciplinary Review Committee 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 Disciplinary Review Committee, 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 Disciplinary Review Committee.

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

The Disciplinary Review Committee will render a written decision within approximately 45 days after receipt of your appeal, or as soon thereafter as practical.

*Commissioner Signature*  
*Commissioner's Name*  
*Commissioner's Official Title*

*Date*