



*Office of*  
**INDIANA STATE CHEMIST AND SEED COMMISSIONER**

*Protecting Indiana's Agriculture and Environment - Feed, Fertilizer, Pesticide and  
Seed*

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### **Pesticide Enforcement Response Policy**

This policy has been developed as guidance to assist the Office of Indiana State Chemist (OISC) in responding to violations and incidents of non-compliance with consistent, predictable, and timely enforcement responses. This policy is based largely on the Indiana pesticide civil penalty assessment schedule found in 357 IAC 1-6 but also encompasses practical experience gained by OISC in administering the requirements under the state and federal pesticide laws and regulations. It is also intended to reflect experience OISC has gained by observing the deliberations and actions of the Indiana Pesticide Review Board (IPRB), as part of their rule making, case review, and enforcement appeal functions conducted under Indiana pesticide law. As stated, this policy is only guidance. More stringent enforcement responses allowed under the law may be applied for non-compliant acts and resulting violations that directly result in significant human or environmental harm. This policy shall be effective on the date of final approval through the date of approval of any subsequent version.

#### **I. Legal Citations:**

The scope of this policy shall be limited to the following legal citations representing Indiana pesticide law and the regulations thereunder.

- 1) IC 15-16-4...Indiana Pesticide Law
- 2) IC 15-16-5...Indiana Pesticide Use and Application Law
- 3) 355 IAC 4...Pesticide Use and Application Rules
- 4) 355 IAC 5...Storage and Secondary Containment of Pesticides Rules
- 5) 357 IAC 1...Use of Pesticides Rules

#### **II. Enforcement Remedies Available:**

The following enforcement actions may be utilized by OISC to assist in gaining compliance of regulated individuals and businesses. These enforcement options are not mutually exclusive. For example, citations and civil (administrative) penalties are frequently issued for a single violative act. Likewise, a civil penalty and a license suspension may also be assessed for a single violative act.

Other than compliance assistance actions and "Stop Action Orders" issued by OISC field staff at the point of non-compliance, these enforcement actions will normally be administered by the OISC Compliance Officer. The range of enforcement remedies include the following:

- 1) Compliance assistance;
- 2) Action Order;
- 3) Written warning;
- 4) Written citation;
- 5) Civil (administrative) penalty;
- 6) License, permit, registration, or certification:
  - a) denial;
  - b) modification;
  - c) suspension; or

- d) revocation.
- 7) Referral to Indiana county attorney for criminal prosecution; or
- 8) Referral to the U.S Environmental Protection Agency or other agency, if it is determined there is a federal violation only or that an adequate state remedy is not available.

### **III. Civil Penalty Administration:**

357 IAC 1-6 is the Indiana rule that identifies both the specific violations subject to and the process for the administration of civil penalties. The first column in the schedule in 357 IAC 1-6-2 lists the violations by legal citation. The second column of that schedule lists the violations by general text description. The third column of that schedule lists the maximum penalty amount for 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, and subsequent violations. The last column of that table lists the scheme to be followed in assessing penalties. The determination to assess a civil penalty is not required by law or rule. One of the numerous criteria to be considered when determining if penalty assessment is appropriate will be if the violation was committed in conjunction with a direct income generating activity. The rule in its entirety can be viewed at [http://www.oisc.purdue.edu/pesticide/pest-rule\\_toc.html](http://www.oisc.purdue.edu/pesticide/pest-rule_toc.html).

### **IV. Determining Gravity of Violation and Level of Enforcement:**

Unless otherwise indicated in this policy, unknowing violations by first time offenders shall most routinely be addressed with documented compliance assistance, stop sale orders, action orders, or written warning letters.

More significant enforcement actions may be initiated for any violation, in consideration of applicable aggravating issues such as: 1) if a restricted use pesticide was involved; 2) if documented damage or harm occurred; 3) if the violator has not paid the full amount of any previously assessed civil penalty; 4) if the violator achieved significant financial gain from noncompliance; or 5) if the violator has a history of noncompliance.

Enforcement actions may be mitigated in consideration of applicable issues such as: 1) if the violator cooperated with the state chemist during the investigation process; 2) if the violator has taken significant remedial actions to prevent the noncompliance from reoccurring; or 3) if the violator has taken actions to address any damage or harm that occurred as the result of the violation.

### **V. Distribution of Violative Pesticide Products Guidance:**

Violative pesticide products distributed from or into Indiana will most routinely be the legal responsibility of the product registrant or manufacturer listed on the product label. Any resulting enforcement and compliance actions will be applied to the responsible registrant or manufacturer.

In addition, OISC will also apply enforcement action to any person found to be responsible for actual distribution, or offering for distribution, a pesticide product that does not hold a state registration, to a customer in Indiana. This will most frequently include the issuance of stop sale order and a written warning to the end-of-the-distribution chain distributor, for the first documented violation. All subsequent

documented distribution violations after the date of the first violation written warning will most frequently be addressed with civil penalties. This will apply to distribution from both local brick and mortar locations and virtual marketplace locations. This strategy will be applied on an individual per distribution location basis, unless OISC has previously addressed the violation and compliance issues on a corporation-wide basis.

## **VI. Off-Target Movement (Primarily Drift) Guidance:**

The matrix in this section will serve as guidance for responding to documented off-target movement violations based on non-compliance with pesticide label language or the state pesticide drift rule (357 IAC 1-12).

For purposes of civil penalty assessment, the reference to first, second, third, and subsequent violations refers to investigations for violation concluded within the last **five (5) years** of the violation investigation under consideration.

For purposes of license or certification suspension or revocation, the reference to first, second, third, and subsequent violations refers to investigations for violation concluded within the last **two (2) years** of the violation investigation under consideration. License or certification suspension or revocation will most frequently not be initiated for drift violations related to applications that occur before the date of issuance of a written citation from OISC for the first drift violation. In addition, a minor drift management violation resulting in only a warning, shall not be counted toward the cumulative total of violations resulting in a license or certification action. The six-month license suspension must be served during the months of April through September but may commence in one calendar year and transition into the next.

Warnings, rather than citations and civil penalties, may be issued for minor drift management violations. Minor drift management violations include, but are not limited to:

- 1) Failure to visit a registrant website prior to application.
- 2) Off-target exposure coupled with wind blowing toward sensitive crops, plants, or residential areas greater than ½ mile from the last downwind edge of the target field/site.
- 3) Failure to consult a sensitive crop registry prior to application.
- 4) Failure to keep a complete application record.
- 5) Failure to document familiarity with local wind patterns and how they affect drift.
- 6) Failure to consult on recommendations to prevent spray mixture pH levels less than 5.0.
- 7) Failure to check with the drift reduction agent manufacturer prior to application.
- 8) Failure to maintain a copy of the Endangered Species Protection Bulletin as part of the application record.

| <b>Violation</b>                 | <b>1<sup>st</sup></b> | <b>2<sup>nd</sup></b>                            | <b>3<sup>rd</sup></b>                                    | <b>Subsequent</b>                                     |
|----------------------------------|-----------------------|--|--|---|
| <b>General Use Pesticide</b>     | Warning               | Civil Penalty                                    | Civil Penalty  | Civil Penalty +<br>6 Month License<br>Suspension      |
| <b>Restricted Use Pesticide</b>  | Civil Penalty         | Civil Penalty                                    | Civil Penalty +<br>6 Month License<br>Suspension         | Civil Penalty +<br>5 Year Certification<br>Revocation |
| <b>Documented Human Exposure</b> | Civil Penalty         | Civil Penalty +<br>6 Month License<br>Suspension | Civil Penalty +<br>1 Year<br>Certification<br>Revocation | Civil Penalty +<br>5 Year Certification<br>Revocation |

## **VII. Worker Protection Standard (WPS) Guidance:**

The WPS rule is detailed, relatively extensive, and contains a great many regulatory requirements that may be characterized as technical violations. Therefore, some minor violations may be addressed by OISC with compliance assistance. OISC will generally not utilize compliance assistance to address the following violations, which OISC considers more significant and more central to the ultimate goals of the WPS regulation:

- 1) No central posting location
- 2) No poster displayed
- 3) No application records available at location
- 4) No Safety Data Sheet (SDS) available at location
- 5) Incomplete application records (REI, app. date, product name, EPA Reg. #)
- 6) Application records not accessible by workers & handlers
- 7) Application records not kept by employer for at least two years
- 8) No emergency medical information
- 9) No safety training provided at all
- 10) No safety training provided before work or annually
- 11) No records of worker or handler training kept for at least two years
- 12) Training not provided by a qualified trainer
- 13) Training materials do not cover all rule requirements
- 14) No decontamination supplies provided to workers & handlers
- 15) No eyewash water provided for workers & handlers
- 16) Decontamination supplies missing water, soap, or change of clothes
- 17) Workers or handlers not notified of applications
- 18) Warning signs not posted
- 19) REIs not implemented
- 20) PPE not provided to workers & handlers
- 21) PPE not maintained
- 22) No medical evaluation for respirator wearing workers & handlers
- 23) No fit testing for respirator wearing workers & handlers
- 24) No resp. training, medical evaluation, or fit testing records kept for two years
- 25) Fumigation precautions not implemented
- 26) Danger/poison precautions not implemented

- 27) Emergency assistance not provided to workers & handlers
- 28) Employer retaliates against workers & handler
- 29) Commercial handler employer fails to provide application info. to grower

#### **VIII. Portable Refillable Container (Minibulk) & Containment Guidance:**

OISC shall issue a Stop Action Order and initiate an enforcement action in response to documented violations listed below at agricultural repackaging/refilling facilities, most of which are also custom agricultural pesticide application services. However, compliance assistance may be utilized to address the violations listed below in italics.

- 1) No repack agreement
- 2) No residue removal procedure
- 3) No description of acceptable containers
- 4) No refilling records
- 5) Refilling records present but missing some required elements
- 6) *Portable refillable container (PRC) missing serial # (less than 10%)*
- 7) PRC missing one-way valve
- 8) PRC not cleaned over containment area
- 9) PRC not in containment
- 10) No documentation of pressure test for PRC
- 11) Stationary bulk tank (tank) lacks vent
- 12) Tank has external site gauge
- 13) Tank lacks lockable shut-off valve
- 14) *Tank missing serial # (less than 10%)*

#### **IX. Termiticide Preconstruction Application Guidance:**

If it is determined that a category 7b licensed applicator or business applies fifty (50) percent or less of the termiticide required for a full by-the-label preconstruction termite prevention treatment, a civil penalty will be assessed and the category 7b applicator and/or business licenses for the responsible parties will be modified to prohibit preconstruction treatments. Civil penalties for this type of violation will typically not be subject to mitigation. In addition, the details of the violation (s) may be forwarded to the local jurisdiction prosecuting attorney for consideration of criminal review.

#### **X. Penalty vs. Late Fee Guidance:**

If it is documented that an individual or business was or has been conducting pesticide application operations without the required certification or license or was or has been offering a pesticide product for sale or distribution without the required registration, those violative acts will be addressed through the enforcement procedures outlined in this policy.

However, instead of an enforcement response, OISC will assess a 100% late filing fee in addition to the annual credentialing/registration fee for any individual, business, or product that meets the following criteria:

- 1) The individual, business, or product was credentialed or registered at the close of the previous credentialing/registration year;

- 2) The individual, business, or product was otherwise in compliance with all other pesticide regulatory requirements; and
- 3) The individual, business, or product credentialing or registration deficiency was promptly, upon notice, rectified by filing of all necessary forms, fees, and late filing fees.

#### **XI. Enforcement Discretion & Proposed Rule Revisions:**

The IPRB has determined that two rule revisions should be pursued in 2018/2019. The first is a revision to the civil penalty assessment rule, 357 IAC 1-6, specifically with respect to the ability of OISC to mitigate penalties for certain violations. The IPRB wants to permit mitigation of those specified violations, with the approval of the Board. This will require a rule revision, but while this rule change is being promulgated OISC will negotiate proposed mitigations, as deemed necessary, through consent orders authorized by the IPRB.

The second rule revision will be to the bulk pesticide storage and containment rule, as it applies to storage and containment of disinfectants by end users. The IPRB wants to revise the storage and containment regulation to make it more consistent with the federal EPA rule for disinfectants. While this rule change is being promulgated, OISC will address any pertinent violations with warnings Action Orders rather than civil penalties, as needed.

#### **XII. Federal Product Violation Referrals to EPA Region 5:**

Only cases involving ten or more counts of distribution of a noncompliant product will be routinely referred to Region 5 for consideration of federal enforcement. OISC will pursue enforcement of most other documented distribution violations under FIFRA through IC 15-16-4-57(9). Inspections and investigations resulting in federal violations will be conducted and documented in accordance with OISC's standard operating procedures, which have been determined to be equivalent to the guidance provided in the EPA FIFRA Inspection Manual. OISC and EPA will follow the below listed outline when processing a referral.

- a. The OISC Compliance Officer or his/her designee will e-mail a draft state enforcement letter or charging document and a copy of the entire case file to the EPA Region 5 Enforcement Contact within five (5) business days of the completion of the investigation. The draft **state** enforcement letter shall summarize and include reference the pertinent evidence collected, the suspected violations found, and the proposed state enforcement actions to be pursued if it is a case or violation that EPA Region 5 chooses not to pursue.
- b. Within ten (10) business days of receipt of the e-mail from OISC, the EPA Region 5 Enforcement Contact or his/her designee will e-mail a reply to the OISC Compliance Officer indicating either EPA is:
  - i. interested in pursuing the suspected violation ; or
  - ii. remanding the case to OISC for consideration of state enforcement.
- c. EPA Region 5 and OISC will track the progress and disposition of any referrals through the quarterly enforcement conference calls and the mid-year and end-of-year cooperative agreement review processes.

**XIII. Appeals of Enforcement Actions:**

An appeal of any enforcement action by OISC will be administered according to IC 15-16-4-64.5 and IC 15-16-5-67 as follows:

(a) A person who is:

- (1) regulated under this chapter; and
- (2) aggrieved by any decision of the state chemist;

may obtain a review by the board if the person files a written petition with the board not later than thirty (30) days after the state chemist's decision.

(b) The board shall provide a copy of a petition filed under subsection (a) to the state chemist not later than seven (7) days after receiving the petition.

(c) Not more than fifteen (15) days after receiving a petition under subsection (b), the state chemist shall certify and file with the board a transcript of any record related to the petition, including a transcript of any evidence received.

(d) Whenever a hearing is held under this section, the board may designate one (1) or more persons as the board's agent or representative to conduct the hearing. The agent or representative shall conduct the hearing in the manner provided by IC 4-21.5-3.

(e) After hearing the appeal, the board shall affirm, set aside, or modify the action of the state chemist. However, the state chemist's finding of facts that are supported by the substantial evidence is considered conclusive.

(f) A person aggrieved by any action of the board may obtain judicial review under IC 4-21.5-5.

**Revision History**


| Date    | Change   | Justification  |
|---------|--|--|
| 1-15-16 | Initiated the process of communicating ERP content with entire pesticide staff annually.   | Need make policy more transparent to entire OISC staff.  |
| 2-15-17 | 1. Expanded the introduction. 2. Added reference to process for civil penalty assessment. 3. Converted drift response table to text. 4. Added worker protection standard (WPS) guidance. 5. Added portable refillable container and containment guidance. 6. Added termiticide preconstruction application guidance. 7. Added guidance for assessing civil penalty versus late filing fee for annual credentials or registrations. | 1. Need to incorporated recognition of OISC practical experience in working with IPRB. 2. Need to highlight the philosophies outlined in the civil penalty rule. 3. Need to relate drift response to civil penalty rule for clarity. 4. Need to identify WPS violations addressed with compliance assistance versus other enforcement options. 5. Need to identify container/containment violations addressed with compliance assistance versus other enforcement options. 6. Need to incorporate a previously separate industry-specific ERP into overall comprehensive ERP. 7. Need to identify and make |

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|         |  | consistent for various sections within OISC pesticide section when civil penalties versus late filing fees would be appropriate.  |
| 3-13-17 | Added guidance for federal product violation referrals to EPA Region 5.  | Needed to insure consistency regarding how and when documented product violations under FIFRA would be referred to EPA for federal enforcement consideration.   |
| 9-1-17  | Expanded the drift response guidance to reflect how dicamba drift violations would be assessed differently than  | Needed to elevate the level of enforcement response for dicamba-specific drift violations in consideration of IPRB recommendations to OISC intended to insure safe use and preservation of the new much needed resistant weed control technology.   |
| 7-27-18 | 1.Revised WPS guidance to modify the list of violations that would be addressed with compliance assistance. 2. Added enforcement discretion to mitigate size of civil penalty for some violations of a daily repeating nature. | 1. Needed to respond to EPA Region 5 request to shift from compliance assistance to enforcement for year old amendments to the WPS reg. 2. Needed to respond to IPRB recommendation to allow for mitigation of excessive civil penalties until formal rulemaking could be undertaken to implement the option. |
| 6-23-19 | Revised the drift response guidance to distinguish between violations involving RUPs versus GUPs and clarified when applicator credential suspension would be initiated.   | Needed to incorporate the concept of greater potential environmental harm for violations involving RUPs, as it relates to more significant response options such as license suspension.   |
| 3-10-20 | Revised the drift response guidance to reduce the evaluation period for purposes of license suspension or revocation for violations from five years to two years.  | Needed to incorporate provisions arrived upon through negotiated discussions with agricultural applicator industries subject to violations for drift. Consideration was given to provisions introduced in Senate Enrolled Act #438.   |
| 4-14-20 | 1.Modified language to specify the coverage period of the ERP. 2.Modified language to specify aggravating and  | 1.Some stakeholders expressed confusion about the dates determining the federal fiscal year period addressed in this ERP. 2.The   |



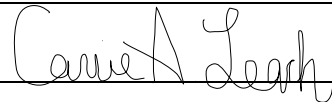


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|  | mitigating considerations. 3. Modified language regarding criteria and procedures for referring federal product violations to EPA R5. | specificity of aggravating and mitigating considerations has become more important to stakeholders in recent months. 3.Reduction in available federal enforcement resources has resulted in the need to modify enforcement referrals. |
|--|---|---|

**Document Owner**

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**Reviewed and Approved**

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