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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.

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) Stop 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 1st, 2nd, 3rd, 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.

IV. Determining Gravity of Violation and Level of Enforcement:

Unless otherwise indicated in this policy, violations by first time offenders shall most routinely be addressed with documented compliance assistance, stop action orders, or written warning letters. However, more significant enforcement actions may be initiated for any violation, in consideration of the following factors. These factors may be evaluated as either mitigating or aggravating considerations, depending on the degree to which they may be applicable to the violation(s) at hand. Mitigating factors for civil penalty calculations are typically only applied to cases for which there are multiple days or counts of violation or that exceed \$1,000.00. Single counts or days of violation are most often assessed as maximum allowable civil penalties.

- 1) Documented or potential harm/damage associated with the violation.
- 2) Good faith efforts of the violator to comply.
- 3) Cooperation by the violator with the state chemist during the investigation process.
- 4) Violator's history of compliance, both within and prior to the last five years.
- 5) Whether the violation involved a restricted use pesticide.
- 6) Remedial or corrective action taken by the violator to address associated harm/damage or prevent subsequent non-compliance.
- 7) Failure by the violator to pay the full amount of any previously mitigated civil penalty by the date prescribed by the state chemist.

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 offer to distribute a state unregistered pesticide product to a customer in Indiana. This will most frequently include the issuance of an Action 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 following matrix will serve as guidance for responding to documented off-target movement violations that are based on non-compliance with pesticide label language or the state pesticide drift rule (357 IAC 1-12). The reference to first, second, third, and subsequent violations refers to violations that occurred within the last five years of the violation under consideration. The below provisions for license or certification suspension or revocation will most frequently not be initiated for drift violations related to applications that occur before the date of the issuance of a written warning or citation from OISC for the first drift violation. In addition, 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.

Violation	1st	2nd	3rd	Subsequent
General Use Pesticide	Warning	Civil Penalty	Civil Penalty	Civil Penalty + 6 Month License Suspension
Restricted Use Pesticide	Civil Penalty	Civil Penalty	Civil Penalty + 6 Month License Suspension	Civil Penalty + 5 Year Certification Revocation
Documented Human Exposure	Civil Penalty	Civil Penalty + 6 Month License Suspension	Civil Penalty + 1 Year Certification Revocation	Civil Penalty + 5 Year Certification 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.

- a) No repack agreement
- b) No residue removal procedure
- c) No description of acceptable containers
- d) No refilling records
- e) Refilling records present but missing some required elements
- f) *Portable refillable container (PRC) missing serial # (less than 10%)*
- g) PRC missing one-way valve
- h) PRC not cleaned over containment area
- i) PRC not in containment
- j) No documentation of pressure test for PRC
- k) Stationary bulk tank (tank) lacks vent
- l) Tank has external site gauge

- m) Tank lacks lockable shut-off valve
- n) *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:

All potential FIFRA product violations discovered as the result of OISC's marketplace inspections or state product registration activities will be referred to U.S. EPA Region 5 for consideration of federal enforcement action. These inspections and the associated 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 case summary/summary report to the EPA Region 5 OISC Technical Contact within five (5) business days of the completion of the draft. The draft shall summarize and include reference to the inspection procedures followed, the 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. EPA Region 5 will evaluate the suspected violation(s) outlined in the draft case summary/summary report and determine whether to request all supporting case file materials with the intent of pursuing federal enforcement.
- c. Within ten (10) business days of receipt of the e-mail from OISC, the EPA Region 5 Technical Contact or his/her designee will e-mail a reply to the OISC Compliance Officer indicating either:
 - i. the Region is interested in pursuing the suspected violation and is requesting the supporting case file; or
 - ii. the Region is remanding the case to OISC for consideration of state enforcement.
- d. If the Region expresses interest in the case the OISC Compliance Officer will provide supporting case file materials to the Region 5 Technical Contact within ten (10) business days of e-mail notification.
- e. 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.