

USDA APHIS PLANT PROTECTION AND QUARANTINE

OVERVIEW AND GUIDANCE FOR ENFORCEMENT DECISION MAKING

Revised April 19, 2013

Purpose

This memorandum provides guidance to the Animal and Plant Health Inspection Service's (APHIS) Plant Protection and Quarantine (PPQ) field offices for determining whether to complete a PPQ Form 518 (Report of Violation) for potential referral to Investigative and Enforcement Services (IES) and for prioritizing violations to determine how they will be handled throughout the investigative and enforcement process.

PPQ and IES field offices will work together to ensure that the highest priority, most significant cases are selected and referred to IES and within the capacity limits for all investigations regionally and nationally. The current target for open PPQ violation investigations, at any given time, is between 100 and 130 nationwide. The current target for all investigations referred by Customs and Border Protection at any given time is between 240 and 320 nationwide.

The procedures outlined in this guidance document are **effective April 22, 2013**.

STEP 1 – PPQ Determines Priority of the Alleged Violation

Once an alleged violation has been identified, PPQ must determine the priority level of the alleged violation. To make this determination, PPQ will need to weigh the merits of each violation, with all supporting evidence available at that time. **Appendix 1 “PPQ Prioritization of Alleged Violations”** provides examples of types of violations for three different levels of prioritization or seriousness. This Appendix is provided as a general guide; it does not provide all possible violations types that PPQ may encounter. In general, “Serious” alleged violations are those that would likely be referred directly to the Office of General Counsel (OGC) upon receipt of an investigative report at IES headquarters. “Serious” violations are the highest priority for PPQ. “Minor” alleged violations would be the least serious types of violations and would be addressed by PPQ through the use of compliance tools such as the Letter of Information (LOI) and targeted outreach. “Moderate” alleged violations are more serious than “Minor” violations and may, or may not, warrant the issuance of a civil penalty. They include repeat violations that do not qualify as “Serious” violations.

Appendix 2, *Should a PPQ Form 518 be Issued?*, is included in this document as additional guidance to help PPQ determine if an alleged violation is “Serious” or “Moderate”, and therefore warrants the issuance of a PPQ Form 518. If the facts of the violation event and the prioritization of the violation do not support the preparation of a PPQ Form 518, other alternatives, such as a Letter of Information (LOI), a recommendation to the permit staff to suspend a permit, or another course of action may be sufficient to bring the regulated entity into compliance with PPQ's regulations.

If the alleged violation is determined to be either “Serious” or “Moderate”, it should be referred to IES for investigation. PPQ must prepare and submit the PPQ Form 518, along with supporting documentation, to the IES Area Manager with the approval of the local State Plant Health Director (SPHD) or designee, **within 21 calendar days of discovery of the alleged violation**. At the time of referral, the SPHD or designee will also convey the prioritization level for all alleged violations referred, (except animal health violations) as either Serious or Moderate based upon guidance in Appendix 1. Veterinary Regulatory Support (VRS) is the PPQ Policy Management point of contact for animal health issues. As part of PPQ-Quarantine Policy, Analysis and Support (QPAS), the QPAS Director or designee

will determine the prioritization level for all animal health-related violations, excluding regulated garbage, throughout the process.

STEP 2—IES Concurrence Process Regarding PPQ’s Prioritization

The IES Area Manager will assess referrals for investigation using PPQ’s prioritization criteria (Appendix 1), the Area Manager’s existing investigative workload, and overall nationwide capacity. The IES Area Manager will discuss with the SPHD or designee any concerns s/he may have regarding the referral. The IES Area Manager will then determine whether to: (1) decline the request for investigation; (2) tentatively accept the request for investigation as a fact-finding to assess whether it warrants a full investigation (this initial fact-finding stage should last no longer than 30 days); (3) accept the request for investigation; or (4) recommend that the program initiate other action such as an LOI to the alleged violator to encourage compliance.

The IES Area Managers will provide explanations for any declinations to initiate an investigation that are consistent with the program-endorsed criteria and work-load conditions. If at any point during the investigation the Area Manager has reason to believe that the investigation should not move forward because the investigation’s scope and content is no longer consistent with the program-endorsed criteria (e.g., evidence shows that the alleged violation(s) did/does not present the threat, risk, or seriousness originally thought to have existed), the Area Manager will confer with the SPHD or designee and discuss whether the investigation should be closed or resolved in some other manner.

If the IES Area Manager and the SPHD or designee disagree on whether to pursue an investigation, the IES Area Manager will refer the matter to the IES Regional Director’s Office, who, in turn, will confer with the appropriate Associate Executive Director (AED) at the Field Operations hub to determine whether IES should or should not proceed with the investigation. The Area Manager will submit to his/her regional office a copy of the request for investigation, a written description of the Area Manager’s recommendation to the program official, the program official’s stated position, and a written description of what transpired between the Area Manager and program official when they conferred on the matter. The IES Regional Managers will then confer with the Field Operations AED to reach consensus on how to proceed with the request for investigation.

If IES Regional Managers and the Field Operations AED are unable to resolve the impasse, the IES Regional Managers will confer with the relevant IES Enforcement Branch Chief to obtain guidance on the viability of the alleged violation(s) and whether IES’s recommendation is consistent with previous decisions, from a national perspective. As appropriate, the IES Enforcement Branch Chief will raise the issues surrounding the request for investigation to the national PPQ Compliance and Enforcement Work Group for discussion and resolution of the issue.

During Step 2 of the process, the PPQ SPHD should communicate with State Officials on the initiation of investigations, and any program remedial action (e.g., permit revocation), as needed.

STEP 3—IES Conducts the Investigation

The IES Investigator conducts the investigation, and then provides the SPHD or designee with a copy of the Report of Investigation (ROI). The original ROI is sent to the appropriate IES Enforcement Branch in Riverdale. The Investigator may recommend investigation closure at any time during the investigation based on evidence discovered during the investigation, and will communicate with the SPHD or

designee. In this instance, the investigation may be closed in the field at any time with a finding of no violation or insufficient evidence.

The SPHD or designee will notify the National Operations Manager for Compliance and Enforcement of all “Serious” alleged violation referrals. If the Serious alleged violation is particularly egregious and/or may generate media coverage, the National Operations Manager for Compliance and Enforcement will notify his/her counterpart in Policy Management. Notification will also be provided to the Office of the Deputy Administrator through proper channels.

During Step 3 of the process, the SPHD or designee will communicate with State Officials on investigation initiation or declination, and program remedial action, as needed. Information about the investigation may be obtained by Field Operations officials with access to the IES ITEMS database.

STEP 4—PPQ Review of the Report of Investigation

The SPHD or designee reviews the ROI and provides any updates regarding the case to IES Enforcement via email **within 21 calendar days of receipt of the ROI**. Information provided by the referring official may include:

- changes to the regulatory status of the regulated article;
- ongoing issues with the subject not included in the scope of the investigation;
- recommendations and an explanation regarding changes to the priority level of the violation;
- updates regarding program remedial actions (PPQ, CBP or State) or mitigations that may have occurred not included the ROI.

STEP 5—Determination of Enforcement Action

IES Enforcement reviews the ROI and drafts a recommendation for enforcement action to the SPHD or designee. IES Enforcement will request concurrence from the SPHD or designee regarding the recommended enforcement action, or no action, via email correspondence. The SPHD or designee must **respond to the request for concurrence within the timeframe designated in the email correspondence**. IES Enforcement will refer to the National Operations Manager for Compliance and Enforcement any concurrence request not responded to, or in which there are irreconcilable differences of opinion. The National Operations Manager for Compliance and Enforcement will notify his/her Policy Management counterpart if, after his/her involvement, IES Enforcement and the SPHD or designee are unable to reach an agreement on the action needed to address the violation(s) and settle the case.

If the ROI indicates there is sufficient evidence to pursue an enforcement action, IES Enforcement will recommend an official warning or civil penalty based on APHIS Civil Penalty Guidelines. If the evidence and other factors cannot support an enforcement action, IES may close the case with a finding of no violation, insufficient evidence, or PPQ/VS declination to pursue (denied/declined). The program may choose to take program remedial action, such as permit revocation, but must do so in consultation with IES Enforcement.

Following concurrence decisions, IES Enforcement will send a copy of the enforcement document (official warning, stipulation, or referral letter to OGC) via email to the SPHD or designee and others as

designated in the ROI. IES Enforcement will send copies of the enforcement document to the National Operations Manager for Compliance and Enforcement for concurrence requests involving multi-state concurrence. IES Enforcement will also send copies of the enforcement document to the National Operations Manager for Compliance and Enforcement and the Policy Management counterpart for all concurrence requests involving large proposed civil penalties (over \$20,000), and all OGC referral concurrence decisions. IES Enforcement will subsequently obtain approval from the MRPBS Deputy Administrator and APHIS Office of the Administrator for all OGC referrals.

During Step 5 of the process, the PPQ SPHD will communicate with State Officials on enforcement outcomes, and program remedial actions, as needed. Additional information about the investigation may be obtained by Field Operations officials with access to the IES ITEMS database.

APPENDIX 1 - PPQ Prioritization of Alleged Violations

Serious Alleged Violation

- Criminal, deceitful and fraudulent activities under PPQ- or VS-administered statutes and regulations. For example: counterfeit import/export documents or federal forms; assaulting or threatening a Federal officer; evidence of smuggling¹ of prohibited or restricted articles with the intent to resell, propagate or distribute; deceitful movement of a plant pest, animal or plant products, or biological materials that are considered to be or found to be diseased (including select agent violations).
- Failing to abide by permit conditions, compliance agreement conditions (if specifically supported by a regulation), and EAN or hold orders that result in pest/disease dissemination, or unknown but high probability of pest/disease dissemination, where there was no obvious attempt by the subject to mitigate the risk in a timely manner (e.g., failure to return infected/infested plant material to quarantine area or port of arrival, failure to apply required treatment before interstate movement; failure to safeguard high-risk plant or animal material as prescribed in permit or compliance agreement, etc.).
- Import or interstate movement of restricted or prohibited regulated material (plant or animal) without the required permit or certificate after being denied a request for such movement by State or Federal Officials (through the certification or permitting process).
- Breaking of a Federal seal without authorization in order to remove, add, or alter/manipulate an interstate or international movement of high-risk plant or animal products in order to evade inspection or other APHIS regulatory requirement.
- The subject has a prior criminal adjudication for PPQ- or VS-administered statutes and the alleged violation is moderate.
- The subject has a prior civil adjudication for VS- or PPQ-administered statutes², and continues to fail to comply with the same regulations.
- The subject caused unprocessed regulated garbage to be introduced into a non-regulated garbage stream (i.e. dumping unprocessed regulated garbage into a domestic dumpster).
- T&E or IE shipments of restricted or prohibited products are found to be transiting the United States through prohibited corridors and there was evidence of pest/disease dissemination, or a high probability of pest/disease dissemination, due lack of sufficient pest-proof packaging and/or a broken or missing seal.

Moderate Alleged Violations

- Interstate movement of a commercial quantity of prohibited plants, plant products, or pests, including cargo from Hawaii to the mainland.
- Failure to possess a permit for the interstate movement of a commercial quantity of high-risk and/or restricted material.
- Failing to abide by permit conditions or Emergency Action Notification (EAN) orders related to a commercial quantity of restricted material where there has been no obvious attempt to mitigate the pest risk (i.e., abandonment; failure to return plant material to quarantine area, failure to destroy, etc.), but there is no known release or dissemination of pests/diseases.

¹Mismanifesting and concealing physical structures or cargo placement, intentional mislabeling, or documentation that shows intent to deceive and evade inspection.

²Time frame considered for prior adjudications based on the APHIS-administered statutes is 5 years, which represents the Statute of Limitations.

- Breaking a Federal seal without authorization when moving permitted plants or plant material interstate, but it appears nothing was removed, added or manipulated.
- Repeat alleged violations regarding movement of quarantined material (i.e. firewood) into non-quarantined area(s).
- Repeated disregard for directions/safeguards listed in a pest permit for pests not requiring containment.
- Interstate or international arrival of any 526 permit material for which the package/ container is sufficiently torn, broken, or leaking to allow the escape of all or some of the regulated article(s).
- Three or more interceptions of prohibited material in outbound Hawaii mail by the same entity if evidence is available of previous receipt of an LOI or 7060.
- T&E or IE shipments of restricted or prohibited products found to be transiting the United States through prohibited corridors but the pest risk was safeguarded (e.g., the seal wasn't broken or, if broken by law enforcement, the articles in the shipment were not manipulated or removed from the conveyance).
- Unauthorized removal or handling of regulated garbage without a compliance agreement or direct PPQ or CBP supervision and the absence of evidence that a plant pest or animal disease was moved.

Minor Alleged Violations -- No Referral to IES for Investigation

- A first-time subject engaged in a moderate or minor alleged violation.
- An alleged violation that does not increase risks of pest dissemination or negatively affect plant health (for example, not completing forms correctly, failure to possess a permit to move articles that are low risk and not infested/diseased).
- An alleged violation that does not involve commercial quantities of regulated material. The exceptions would be the illegal movement of noncommercial quantities of high-risk material such as plant pests, select agents, or known infested plants.
- Evidence shows that the subject has made good faith efforts to comply with the EAN or permit conditions, even if minor delays occurred,
- Evidence indicates the subject failed to abide by administrative requirements such as recordkeeping that may have less serious implications regarding risk.
- Noncommercial quantity of prohibited material found in outbound Hawaii mail.
- Importation of articles identified by PPQ as "Low Risk" (i.e., VRS' List of Low Risk Material)

APPENDIX 2 – Should a PPQ Form 518 be Issued?

The following questions are intended to assist you in the thinking process when you are not sure whether you should issue a PPQ Form 518. The extent to which you answer “yes” will determine your course of action. A greater number of positive responses increases the likelihood that you should prepare a 518; fewer positive responses increases the likelihood that you should take alternative action such as preparing a Letter of Information or recommending revocation of a permit. Keep in mind that the 518 you prepare will be weighed against other alleged violations in your work unit and those of other work units in your region to determine whether it should be pursued based on PPQ’s enforcement and compliance priorities and compliance goals.

- **Compliance history**
 - Have you taken documented steps to work with the subject to obtain compliance?
 - Are you aware of any enforcement actions against this subject in the past?
- **Culpability**
 - Do you have evidence that the subject was provided with prior, accurate and complete notice of the regulations or requirements they must meet?
 - Do the facts indicate the alleged violation was intentional?
- **Degree of cooperation**
 - Did the violator fail to cooperate to mitigate the risk posed by the alleged violation?
 - Did the violator fail to provide information requested by PPQ?
- **Potential or known agricultural risk posed by the violation**
 - Did the article or shipment harbor a plant or animal pest or disease, or increase the likelihood of dissemination of a plant or animal pest or disease?
 - Is the animal material high risk for disease (i.e. not designated at “low risk” article)?
 - Can you demonstrate the alleged violation caused the spread of a pest or disease?
 - Was the article or shipment moved from a quarantine area to a non-quarantine area?
 - Was prohibited plant material commingled with non-prohibited material?
 - Was the intended use of the plant material for propagation?
 - Was there escape of a pest from a containment facility?
- **Scope**
 - Were a significant number of regulated articles shipped (e.g. 100 vs. 2)?
- **Extent**
 - Was the shipment sent to more than one State or to distributors?
 - Through how many states did the noncompliant shipment transit until reaching destination?
- **Number of violation events**
 - Were there multiple separate violation events?
 - Has the violation event continued over a period of time?
- **Availability of evidence**
 - Does sufficient documentation exist to support the allegation of violation (e.g. photographs, records, dates, statements, samples of the regulated articles)?
 - Is the violator a U.S. citizen or company or a foreign company with a U.S. agent representing it?

- ***Criminal allegations***
 - Are potential, documentable criminal actions involved (generally determined by a high degree of knowledge and intent and/or evidence of a pattern of noncompliance or a scheme devised to circumvent the regulations or statute)?
 - Were fraudulent documents discovered?
- ***Age of the violation***
 - Did the violation occur recently or over 6 months ago?

Overview of the Process for Referral of PPQ Alleged Violations

Process Initiated with Report of Violation, Form 518

STEPS

