Hearing Officer Roundtable Project –

What Constitutes Repeatability?

Questions posed at Hearing Officer Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable:

- Why can't a Commissioner consider a previous violation as a repeat violation unless the Commissioner levied a civil penalty for the previous violation?
- Does it have to be the same type of violation, the same section or subsection?

Original policy was "temporary" to assist in establishing the program

Commissioners were first given authority to levy agricultural civil penalties in 1986. At that time, the California Department of Food and Agriculture (CDFA) allowed Commissioners to consider a Violation Notice (Notice of Violation) as adequate to establish a "past violation" because Commissioners had not previously had authority to levy civil penalties.

A policy change was necessary after the program became established

The Commissioners have since had the opportunity (authority) for over 15 years to levy civil penalties; there is no longer any need to look only to the Violation Notice to establish a "past violation."

In fact, there are important reasons for requiring that the Violation Notice resulted in a fine levied by the Commissioner before it can be considered a "past violation." These considerations relate to concepts of fundamental fairness sometimes referred to as "Due Process." When only a Violation Notice has been issued, the alleged violation has not been proven (via a hearing) and the Respondent has not been given an opportunity to respond to or defend against the charged violation. To use only the Violation Notice to show a "past violation" would be similar to using the arrest warrant of a person as proof of guilt without considering the trial which may have determined that the person was not guilty.

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What Constitutes Repeatability?, Continued

How the Repeat Violation concept works

The current alleged violation shall be considered a Repeat Violation if the following criteria are met:

1. The person against whom the civil penalty action is proposed had a prior violation that was, or would have been, in the same *violation class* as the current alleged violation; AND

2. A civil penalty was levied for the prior violation *within two years* of the date of the Notice of Proposed Action (NOPA) by the same county proposing the current action.

Violation class

Title 3, California Code of Regulations (3 CCR) is specific on this matter. The violation classes are currently defined as Minor, Moderate, or Serious. So, if you are attempting to establish that a violation is a Repeat Violation, you need to refer to the Respondent's record to see which violation classes were invoked to impose fines during the past two years. If the Respondent has a previous penalty for a violation that was classified as Minor, then you could charge the Respondent with a Moderate fine, if appropriate. In any case, introducing the Respondent's enforcement history into the record will probably be sufficient to withstand any challenge to the fine level based upon repeatability.

In other words, when a NOPA proposes a penalty for a Repeat Violation, the NOPA shall identify the prior violation that supports the Repeat Violation, and the record of the proceedings shall include a copy of the decision of that prior violation. At the same time, a copy of the Notice shall be sent to the Department of Pesticide Regulation (DPR).

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What Constitutes Repeatability?, Continued

What is a "repeat" violation?

There have been a number of policies or theories that have been previously stated by DPR or county staff. The following provides a clarification of existing civil penalty regulation:

- The "Repeat Violation" section does not have to be the exact section number or exact subsection as the section previously cited.

- The "Repeat Violation" section does not have to be in the same general area or requirement category, e.g., worker safety, permitting, groundwater, etc. (The contrary was a written policy at one time; however, the previous policy is not consistent with the current regulation pertaining to fines, i.e., 3 CCR section 6130.)

The current "repeat" concept, found in 3 CCR section 6130, has been in effect since 1990. In addition, the current "repeat" concept, found in Title 16, California Code of Regulations section 1922, has been in effect since 1998; and the same "repeat" concept can be found in Title 4, California Code of Regulations section 4802 (pertaining to CDFA's Division of Measurement Standards, Weights and Measures Penalty Guidelines), which has been in effect since 1996. The "repeat" concept has been stated in the **Enforcement Guidelines** since 1994.

Related terms

See the Glossary for Repeat Violations and Subsequent Incident.
Editorial note: This document is an excerpt of the Hearing Officer Roundtable Project and the Glossary is not attached. You may reference these terms in the current ***Enforcement Guidelines*** for now.

References

- Hearing Officer Sourcebook
- **Enforcement Guidelines** (2002 technical revision and 1994 version)
- Title 3, California Code of Regulations section 6130
- Title 16, California Code of Regulations section 1922
- Title 4, California Code of Regulations section 4802

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Style note Some words in this document may seem to be capitalized for no apparent reason. This is an excerpt from another document and the capitalization (upper case) are triggers for us to tag words that will be linked to the Glossary of Terms in the future Hearing Officer Sourcebook.

HO Sourcebook Section 7.13 (1992)
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