

## Section 2.6

### Multiple Violations Arising From a Single Episode

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**Questions posed at the Roundtable**

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

- What factors are considered when determining single/multiple violations arising from a single episode? The following questions are examples of section-specific questions provided by county staff at the Hearing Officer Roundtable discussions:
    1. Are one or two violations appropriate when a pesticide applicator is not wearing gloves or goggles?
    2. Are one or two violations appropriate when a pesticide drifts onto two adjacent properties?
    3. Are one or two violations appropriate when a pesticide application results in loss to two beekeepers?
  - How do I determine the fine to levy against the violator?
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**Are one or two violations appropriate when a pesticide applicator is not wearing gloves or goggles?**

It depends on the facts of the case and on which sections you determine best fit those facts, and on the strength of the evidence you have to prove the elements of each violation.

Let's assume in our scenario that an applicator failed to wear either gloves or goggles during a mixing and loading activity. There was no requirement that an applicator wear gloves stated on the label, but the label does require the applicator to "wear protective eyewear." We also know that Title 3, California Code of Regulations (3CCR) section 6738 specifically requires that the employer assure the employee wears gloves and protective eyewear (listing goggles as an option) when performing mixing or loading activities.

County agricultural commissioners (CACs) are encouraged to cite only the most specific section for which there is proof of each element of the violation. In this instance, that would probably be 3CCR sections 6738(b)(1)(A) and 6738(c)(1)(A) which specifically requires that the employer assure that their employees wear gloves and goggles when engaged in mixing and loading. Since 3CCR sections 6738 (b)(1)(A) and 6738 (c)(1)(A) impose separate requirements on the employer, the employer could be charged with a separate violation of each (i.e., charged with two violations).

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# Multiple Violations Arising From a Single Episode, Continued

**Are one or two violations appropriate when a pesticide drifts onto two adjacent properties?**

Many “drift” incidents are a result of one contiguous application. It wouldn’t be appropriate to charge two counts of 3CCR section 6614(b)(1) for the same act or incident simply because the pesticide “drifted” onto two properties.

However, if the “drift” or application to a “nontarget crop” was the result of two discrete acts (e.g., the plane set down to reload with pesticides before continuing the application or the plane made a northern directional pass then a western directional pass), you might be able to make a successful argument for two violations of the same section. The facts of the case, the elements of the violation, and the strength of the evidence proving those elements should be your guides.

**Are one or two violations appropriate when a pesticide application results in loss to two beekeepers?**

In the question posed at the Roundtable, the scenario given was that the Respondent had killed some bees and damaged beehives. The Respondent was charged with violating 3CCR sections 6652 and 6654. These two specific sections relate to notification of beekeepers prior to applying pesticides, but they are NOT “citable” sections for a CAC’s administrative civil penalty action. CACs have authority to levy civil administrative fines under Food and Agricultural Code (FAC) section 12999.5 only for violations of regulations issued pursuant to Divisions 6 and 7 of the FAC. Authority to issue regulations relating to the protection of bees comes from Division 13 of the FAC.

Therefore, the CAC cannot levy an administrative civil penalty against any Respondent for any violation of 3CCR sections 6652 and 6654. A Respondent probably can be charged with violating another statute or regulation for which the CAC does have the enforcement authority in this situation.

If the loss of bees was the result of “drift,” FAC section 12972 or 3CCR section 6614 may have been appropriate to charge, and the determining factor in deciding whether or not to charge more than one violation is, as described above, whether or not the damage can be seen as the result of one or two distinguishable acts.

## Multiple Violations Arising From a Single Episode, Continued

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### How do I determine the fine to levy against the violator?

Once the CAC has selected the most specific and appropriate code or regulation section to cite, he/she should determine the appropriate fine category as set forth in 3CCR section 6130. When determining a penalty amount from within the appropriate fine category, the CAC should use his/her own judgment based on the nature of the facts of the case (i.e., number of people actually affected, whether it was a minor and inadvertent mistake, an egregious lack of care, etc.). The CAC should not charge multiple sections solely for the purpose of building up the total penalty amount, but work within the parameters of the fine guidelines.

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### Application of FAC §12973 and 3CCR §6614

- FAC section 12973 states in pertinent part, “The use of any pesticide shall not conflict with labeling . . . .” In many cases, the pesticide label’s “directions for use” state something to the effect of “avoid contamination of nontarget crops,” “do not apply when conditions may favor drift,” or “avoid drift.”
- 3CCR section 6614(a) requires pesticide applicators, prior to and during an application, to evaluate the equipment to be used, meteorological conditions, the property to be treated, and surrounding properties to determine the likelihood of harm or damage; 3CCR section 6614(b)(1) prohibits making or continuing a pesticide application when there is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process.

Both FAC section 12973 and 3CCR section 6614 establish a standard of conduct to be followed by pesticide applicators. By invoking the requirements of the label, FAC section 12973 may only generally prohibit the result (contamination or drift), while 3CCR section 6614 specifically requires the applicator to assess the risks inherent in the specific situation and to specifically consider certain factors when making that assessment. In the case of a pesticide drift incident, in order to find the Respondent responsible for both offenses, the county must present evidence showing that the Respondent failed to do something specifically required by the label (FAC section 12973) *and* failed to adequately assess the risk of drift occurring by failure to consider one of the factors listed in 3CCR section 6614 or made or continued the application when one of the reasonable possibilities specified in subsection (b) existed.

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## Multiple Violations Arising From a Single Episode, Continued

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**Application of  
FAC §12973  
and  
3CCR §6614  
(continued)**

The CAC is encouraged to charge only those sections where the evidence proves the Respondent failed to do something specifically required by the section relied upon as the basis of the charged violation.

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**Application of  
3CCR  
§6614(b)(3) and  
3CCR §6600(e)**

- 3CCR section 6614(b)(3) prohibits the application of a pesticide when “there is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing the normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered.”
- 3CCR section 6600(e) requires a pesticide applicator to “exercise reasonable precautions to avoid contamination of the environment.”

3CCR section 6600(e) is what is termed a broad “catch-all” provision that requires the exercise of reasonable care to avoid contamination of the environment. 3CCR section 6614(b)(3) specifically spells out what in the environment the section is designed to protect, including the normal use of property. If the Respondent’s actions have actually affected any category specifically spelled out in 3CCR section 6614, that section should be cited. It is hard to imagine a situation not covered by 3CCR section 6614 requiring the separate citation of 3CCR section 6600. Unless the facts of a specific incident analyzed fall under only the “catch-all” requirements of 3CCR section 6600, the CAC is encouraged to charge a violation of only the more specific 3CCR section 6614.

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# Multiple Violations Arising From a Single Episode, Continued

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**Application of  
3CCR §6600(c)  
and  
3CCR §6600(e)**

- 3CCR section 6600(c) requires a pesticide applicator to “use only methods and equipment suitable to insure proper application of pesticides.”
- 3CCR section 6600(e) requires a pesticide applicator to “exercise reasonable precautions to avoid contamination of the environment.”

As stated above, 3CCR section 6600 (e) is the broad “catch-all” provision. 3CCR section 6600 (c) requires care specifically with regard to methods and equipment. If the failure of the Respondent relates to the use of improper methods or equipment, the more specific section should be cited. If the Respondent’s failure is to exercise reasonable care in the use of such equipment or in the execution of the method, perhaps the general section should be cited instead of the specific section. The correct call can only be made knowing the specifics of the particular incident.

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**Multiple counts  
for each person  
affected:  
FAC §12985**

FAC section 12985 states, “Any person who orders an employee to enter an area posted with a warning sign in violation of any worker safety reentry requirements promulgated pursuant to this article by the Director is guilty of a misdemeanor.” FAC section 12985 also states, “A violation of this article affecting any worker or workers constitutes a separate offense for each affected worker.”

This code section expressly allows the CAC to charge one violation (count) for each employee ordered as specified in the section. For example, if an employer (the Respondent) directs 32 employees to enter a recently treated field before the expiration of the restricted entry interval, the CAC can charge the employer with 32 counts of violating FAC section 12985, one count for each employee directed to enter the field.

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## Multiple Violations Arising From a Single Episode, Continued

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**Court decision** Violations of other sections that deal with situations where other persons are affected may also provide the possibility to charge one violation for each person affected or contaminated. A court decision has upheld a CAC’s action charging multiple violations of FAC section 12973 for each worker who was “allowed to enter a treated field” in conflict with the label. The workers were not ordered to enter an area posted with a warning sign, however, the employer not only failed to notify workers pursuant to 3CCR section 6618(b) and failed to post under section 3CCR section 6676, but had been at the site, personally talked to the farm labor contractor, and failed to tell him not to let the workers enter the treated field. With these specific facts, the court upheld separate FAC section 12973 counts for each worker that entered the field.

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**General advice on charging multiple violations for a single act** Do not “pile on” violation counts in a Notice of Proposed Action in an attempt to arrive at a preconceived penalty amount. Let the facts of the case, the careful selection of the most specific violation(s) that best fits the evidence, and the fine guidelines (3CCR section 6130) determine the penalties.

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**References**

- 3CCR section 6600, General Standards of Care
- 3CCR section 6614, Protection of Persons, Animals, and Property
- 3CCR section 6618, Notice of Applications
- 3CCR section 6652, Availability for Notification
- 3CCR section 6654, Notification to Beekeepers
- 3CCR section 6676, Container Requirements
- 3CCR section 6738, Personal Protective Equipment
- FAC sections 12972, 12973, and 12985

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