

## Section 3.3

### What Constitutes Repeatability?

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**Questions posed at the Roundtable**

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

- Why can't a county agricultural commissioner (CAC) consider a previous violation as a "repeat" violation unless the CAC levied a civil penalty for the previous violation?
  - Does it have to be the same type of violation, the same section or subsection?
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**Original policy was "temporary" to assist in establishing the program**

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

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**A policy change was necessary after the program became established**

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 CAC 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. Using 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

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### Violation classes

The California Code of Regulations (CCR) is specific on this matter. The violation classes are defined as Class C (formerly *minor*), Class B (formerly *moderate*), or Class A (formerly *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 Class C (minor), then you could charge the Respondent with a Class B (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 Notice of Proposed Action (NOPA) proposes a penalty for a repeat violation, the NOPA shall identify the prior violation which 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 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., 3CCR section 6130.)
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### How the repeat violation concept works

The current alleged violation shall be considered a repeat violation if both of 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 NOPA by the same county proposing the current action.
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## What Constitutes Repeatability?, Continued

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**Related Terms** See the *Glossary* for *Repeat Violations* and *Subsequent Incident*.

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- References**
- 3CCR section 6130, Civil Penalty Action by Commissioners
  - 4CCR section 4802, Penalty Guidelines
  - 16CCR section 1922, Civil Penalty Actions by Commissioners
  - Enforcement Guidelines, Technical Revision, December 2002
  - Hearing Officer Sourcebook, Second Edition, May 1995
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