

Section 7.2

Drift and Negligence

Questions posed at the Roundtable

This document provides guidance on the following questions posed at the Hearing Officer Roundtable, in addition to other negligence-related issues:

- What evidence is necessary to support the element “notwithstanding substantial drift would be prevented” as found in Title 3, California Code of Regulations (3CCR) section 6614?
- Is 3CCR section 6614 the appropriate section to cite when damage (or potential damage) is due to offsite movement? If not, which is the appropriate section?

Note: Refer to Enforcement Letter 2000-034, Pesticide Drift Incident Response Policy.

Definitions

- **Drift** - the pesticide that moves through the air and is *not* deposited on the target area at the time of application. Drift *does not* include the movement of pesticide and associated degradation compounds off the target area, such as by translocation, volatilization, evaporation, or the movement of pesticide dusts or pesticide residues on soil particles that are windblown after the application.
 - **Due care** - the degree of care that a prudent and competent person engaged in the same line of business or endeavor would exercise under the same or similar circumstances. When a person does not exercise due care, they are considered negligent.
 - **Sensitive site** - a location determined by the county agricultural commissioner (CAC) or Director based upon his/her evaluation, to contain things that could suffer harm or injury from the pesticide in question, such as sites containing people, crops where minor amounts of residue can cause harm, honey bees, wildlife sanctuaries, etc.
 - **Substantial drift** - the quantity of pesticide outside the treated target area is greater than that which would have resulted had the applicator used due care (3CCR section 6000).
 - **Target area** - when applying pesticides, the applicator has a particular target to apply the pesticide. The target is known as the target area and can be a field, orchard, water body, structure, kitchen counter top, pet, flower bed, lawn, etc.
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Drift and Negligence, Continued

Drift investigation policy

When the CAC becomes aware of a pesticide “drift” incident, the incident must be promptly investigated, including complaints that are anonymous and/or not in writing. Each investigation must be completed, even if the complaint is withdrawn or the complainant receives compensation for any alleged damages.

Pesticide drift

Some pesticide drift is expected from aerial and other above-ground pesticide applications. Recognizing this, the California Legislature required only that pesticides be used in a manner that prevents substantial drift to nontarget areas (Food and Agricultural Code [FAC] section 12972).

Which code section to use?

When conducting an investigation involving pesticide drift, the CAC should determine whether the applicator violated FAC section 12972 or 3CCR section 6614 or other applicable regulations.

Legal requirements

Legal requirements concerning drift are typically intended to protect certain sites or areas, which are often referred to as sensitive sites.

FAC section 12972 requires persons to use pesticides in a manner to prevent substantial drift to nontarget areas.

In addition to legal requirements intended to minimize drift, 3CCR section 6614 prohibits making or continuing a pesticide application when specified situations exist.

Continued on next page

Section 7.2.1

Reasonable Possibility of Harm or Damage - 3CCR §6614

Background

3CCR section 6614 places responsibility on the applicator *prior* to making a pesticide application to evaluate the surrounding properties and other conditions (e.g., application equipment, meteorological conditions, property to be treated, etc.) and determine the likelihood of harm or damage in order to decide whether the application should be made.

3CCR section 6614 also requires the applicator, *during* the application to continually monitor these conditions to determine if the likelihood of harm or damage has arisen during the application in order to further decide if the application must be discontinued.

3CCR section 6614 prohibits making or continuing a pesticide application when there is a reasonable possibility of:

1. Contamination to bodies or clothing of persons not involved in the application process,
2. Damage to nontarget crops, animals, or other public or private property, or
3. Contamination to nontarget public or private property, including the creation of a health hazard, preventing the normal use of the property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property, and related factors must be considered.

Applicator's obligations

To fulfill the applicator's obligations under 3CCR section 6614, the applicator must evaluate surrounding nontarget properties, be aware of the types and uses of the surrounding nontarget properties, and to be aware of nearby crops or animals. The applicator must also have knowledge of the effects of the pesticide in order to decide whether contamination of nontarget property with the pesticide that will be applied could create a health hazard that would prevent a normal use of the property.

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Reasonable Possibility of Harm or Damage - 3CCR §6614, Continued

Applicator's obligations (continued)

Also, the applicator must constantly look for the presence of persons not involved in the application process. The applicator must not make or must discontinue an application when the reasonable possibilities specified in the Background section (see above) exists.

Examples: Applicator's responsibilities

Basically, 3CCR section 6614 states that even though the applicator will use the same care that reasonable applicators would use under the same or similar circumstances to minimize drift to nontarget areas, there are still certain situations where the application cannot be made, or, once started, cannot be continued. These situations involve possibilities that are *reasonable* ones under the circumstances of the particular application, i.e., possibilities of which the applicator *reasonably* should have known.

For example, the applicator should evaluate whether a sensitive site is near the target area. If the target area is near residential property, a road on which vehicles and people travel, or another sensitive site, the applicator should consider:

- Distances from the target area to the sensitive site
- The layout of the target area (e.g., the presence of power poles or trees on the target area, the shape of the target area, the application pattern that will be used, etc.)
- The use of buffer zones
- Making the application when the wind is blowing away from the sensitive site or
- Using a different application method than that originally planned or hoped to be used.

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Reasonable Possibility of Harm or Damage - 3CCR §6614, Continued

CAC's role and responsibilities

If a person's pesticide application contaminates the bodies or clothing of persons not involved in the application process, does damage to nontarget crops or other property, or contaminates property creating a health hazard that prevents normal use of the property, then, in most cases, the CAC will be able to show that the person applied the pesticide when there was a reasonable possibility that the consequence would happen and the person violated 3CCR section 6614.

However, occasionally there could be a case where an application caused the damage (or other consequence) described in 3CCR section 6614, but the evidence shows that the possibility that the damage (or other consequence) would result was **not** a reasonable possibility.

Where a consequence mentioned in 3CCR section 6614 (e.g., property damage) occurs as a result of an application, before initiating an administrative civil penalty action alleging a violation of 3CCR section 6614, the CAC should carefully consider all the circumstances surrounding the application, including pesticide label directions aimed at preventing the consequence, to decide if the possibility the consequence would occur was a reasonable one. Even if the CAC believes there was a reasonable possibility the consequence would occur and proposes a civil penalty action, the Respondent, at the hearing, still has an opportunity to show that the possibility was not reasonable under the particular circumstances of the application.

References

- Enforcement Letter 2000-034, Pesticide Drift Incident Response Policy
- Investigative Sampling Manual
- Investigative Techniques Manual

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Section 7.2.2

Due Care - FAC §12972

Background

FAC section 12972 requires persons to use pesticides in a manner to prevent substantial drift to nontarget areas.

Even though the 3CCR section 6000 definition of substantial drift includes the phrase “quantity of pesticide,” a determination that drift was substantial *is not* dependent on the amount of pesticide that was deposited outside the target area, but rather, by a determination that the applicator did not use due care.

Pesticide drift is substantial if the applicator *did not use* due care.

Establishing due care

To prove that an applicator failed to use due care in making a pesticide application, the CAC must present sufficient evidence, in effect, that the applicator failed to do what a reasonable applicator would or would not have done under the same or similar circumstances. This can be difficult.

To determine whether an applicator used the care that was due, it is essential to determine what the weather and other conditions were at the time of the application, what the conditions were at and near the target area, and what decisions were made and what actions were taken by the applicator. The applicator’s actions, or lack of actions, will be the deciding factors in determining whether the applicator used due care under the circumstances that existed at the time of application, and, thus, whether the pesticide was or was not used in a manner to prevent substantial drift to nontarget areas.

This determination may involve referencing published good established practices or having other applicators specify the actions they would or would not have taken under the conditions that existed at the time of application, and comparing them to the actions the applicator took.

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Due Care - FAC §12972, Continued

Examples of supporting evidence

To prove a violation of FAC section 12972, the CAC must collect and present at the hearing evidence to show each of the following:

1. The person/company charged with the violation applied a pesticide to a particular target area.

Supporting evidence (examples) may include:

- Records of application
- Statements made by the applicator
- Testimony of persons who witnessed the application
- Positive sample analyses

2. The application resulted in the pesticide being deposited outside the target area.

Supporting evidence (examples) may include:

- Positive sample analyses of crop foliage, clothing, or other items located outside the target area
- Testimony of persons who observed the application

3. The applicator failed to use the care that was due under the circumstances that existed at the time of the application.

Supporting evidence (examples) may include:

- Evidence of the circumstances/conditions that existed at the time of the application
- Evidence of actions taken by the applicator to show what care the applicator used under those conditions
- Standards of care published by the pest control industry for such circumstances (if any)
- Testimony at the hearing from one or more pest control applicators (other than the applicator in question) or other persons to compare the judgment and actions of the applicator to those of a reasonable applicator under the same or similar circumstances

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Due Care - FAC §12972, Continued

Examples of supporting evidence (continued)

OPTIONS: The CAC could establish that the applicator failed to use due care by showing at the hearing, the applicator failed to follow:

- Drift control standards (if any) required by the pesticide label
- Certain general standards of care specified in 3CCR section 6600
- Drift minimization requirements specified in permit conditions or
- Regulations intended to minimize drift.

However, in these instances, the CAC could charge a violation of one or more of these applicable laws or regulations rather than a violation of FAC section 12972.

DPR recommends CACs reserve administrative civil penalty actions for alleged violations of FAC section 12972 for those cases where the CAC's evidence clearly establishes that an applicator failed to use due care at the time of the application. These cases most likely will "stand out" because the applicator would have used poor judgment.

Reference

- Enforcement Guidelines, Technical Revision, December 2002
 - Enforcement Letter 2000-034, Pesticide Drift Incident Response Policy
 - Investigative Sampling Manual
 - Investigative Techniques Manual
 - Pesticide Episode Investigation Procedures Manual
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