

## **Appendix D**

### **Off-site Movement Incidents**

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**Overview**                    This Appendix provides background and guidance to CACs on off-site movement incidents and what may be required at a hearing. This Appendix expands on information contained in Compendium Volume 4 and Compendium Volume 5 Chapter 2.

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## Appendix D.1 Off-site Movement

Interprets FAC sections 12972 and 12973; 3 CCR sections 6000, 6600 and 6614

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### Definitions

- **Drift** - the off-target deposition of pesticide residues at the time of application. This can be in the form of mist, particles, or vapor (gas). Drift does not include the movement of pesticide and associated degradation compounds off the target area after the pesticide application, 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.
  - **Negligence** - the failure to behave with the level of care that a reasonable person would have exercised under the same circumstances. Either a person's actions or omissions of actions can be found negligent.
  - **Sensitive site** - a location determined by the CAC or Director, based upon an evaluation, to contain elements 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, pollinators, wildlife sanctuaries, groundwater, 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. (3 CCR section 6000)
  - **Target area or target site** - when applying pesticides, the applicator intends to apply the pesticide to a particular target. The target can include things like a field, orchard, water body, flower bed, lawn, an individual plant or animal, and a structure or a particular place within a structure such as a kitchen countertop or baseboards.
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### Background

When people apply pesticides, they have a particular target on which they want to deposit the pesticide (see target area/site above). The applicator is responsible for this placement. Legal requirements concerning drift and off-site movement of pesticides are typically intended to protect certain sites or areas, which are often referred to as sensitive sites.

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## Off-site Movement, Continued

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**Types of off-site movement** Off-site movement of pesticides can be broadly grouped into two categories:

1. **Primary:** the pesticide that moves through the air and is not deposited on the target area at the time of application (i.e., drift). When the pesticide is released and does not reach the target area, contributing factors may include climatic conditions, equipment malfunction, application error, or ineffective application.
2. **Secondary:** the movement of the pesticide or degradation compounds via translocation (groundwater or surface water), volatilization, evaporation, or movement of pesticide dusts or pesticide residues on soil particles that are windblown after the application, etc.

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**Application of FAC section 12972** Some pesticide drift is expected from aerial and other above-ground pesticide applications. Recognizing this, the California Legislature required only that pesticides be applied in a manner that prevents *substantial drift* to nontarget areas (FAC section 12972). As discussed in E.2, only when the drift exceeds what is reasonable (i.e., the applicator did not display due care) does it become illegal.

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**Negligence** When adopting the 3 CCR section 6000 definition of “substantial drift” and 3 CCR section 6614 (Protection of Persons, Animals, and Property), the Department recognized the FAC and court cases decided thereunder mandated a negligence standard: individuals applying pesticides are required to conduct themselves in a careful and reasonable manner. Adopting a strict liability standard with defined tolerances and/or measurable effect levels was not appropriate.

3 CCR section 6614 outlines the standards of care necessary to protect nontarget areas when applying pesticides and, with the expectation that all applicators will take steps to prevent substantial drift, prohibits applications when adverse effects may be anticipated. Under these requirements, it is negligent to apply a pesticide when there is a reasonable possibility of contamination or damage. Even though there may be no contamination or damage as a result of the application, the application under hazardous circumstances is in itself a violation.

Inability of an applicator to control all off-site movement of the pesticide does not exonerate the applicator.

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## Off-site Movement, Continued

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**Negligence,**  
(continued)

It is also not acceptable to “wave off” people on or near the target area and then make the application if they refuse to leave on the basis that they have accepted the risk or result.

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**Secondary off-site movement and section 6614**

Section 6614 is not limited to drift from an application, but also includes secondary off-site movement from use of a pesticide. As noted earlier, secondary off-site movement is when pesticides move off the target after application, such as translocation and volatilization. For example, while DPR was not a party in the case, in *Jacobs Farm/Del Cabo Inc. v. Western Farm Service Inc.* (App. 6 Dist. 2010), both the trial and appellate courts found that 3 CCR section 6614 was intended to prevent harm caused by post-application movement, such as volatilization which may damage nontarget crops. The appellate court also noted the regulation imposes no time limit upon when possible damage might occur.

Volatilization is a characteristic of the pesticide formulation. It may be a characteristic that creates a "hazard that is known to exist." For example, labeling may direct users “Do not apply directly to, or otherwise permit contact with” crops, flowers or other ornamentals susceptible to the pesticide. These statements are intended to prevent damage to sensitive crops occurring from the use of the product, and volatility is included in “otherwise permit contact with”. The appropriateness and responsibilities of those selecting or recommending a pesticide in the particular situation should also be evaluated.

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## Off-site Movement, Continued

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### Odor

In some instances, during or after a pesticide has been applied, some people may smell an odor. All odors represent exposure to a chemical. The odor may not be the pesticide active ingredient itself but one or more of the inert ingredients, a breakdown product, a warning agent, or a chemical added to the formula to mask a bad odor.

Finding the source of a pesticide odor or why it occurred can be difficult. Two pesticide applications may be almost identical, yet one results in an odor and the other does not.

The presence of an odor does not necessarily mean that the applicator has violated requirements or that substantial drift has occurred. However, the CAC must still conduct an investigation to verify that no pesticide laws or regulations were violated.

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### Other regulatory standards

Pesticide labeling often directs applicators to avoid drift, implying that any drift would be a violation. Given the reality of pesticide applications, this is not a reasonable standard. More appropriately, labeling may direct the applicator not to apply products when environmental conditions favor drift.

Regulations that prescribe application standards for specific pesticides to minimize drift include 3 CCR sections 6460 (Drift Control), 6462 (Propanil), 6464 (Phenoxy and Certain Other Herbicides), 6466 (Paraquat), and 6470 (Cotton Harvest Aids).

County permit conditions may also contain drift mitigation requirements. For example, Compendium Volume 3 Appendix C contains DPR's recommended permit conditions for *General Drift Minimization*.

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### Elemental wisdom

Proving intent is not a required element. The unique facts of each situation must be analyzed to determine if there has been a violation (i.e., "Did the applicator apply or continue the application when there was a reasonable possibility of damage to non-target crops?"). As with any other potential violation, consider the elements of a requirement, apply the relevant facts to the situation, and analyze whether there is sufficient evidence to initiate a penalty action before doing so.

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## Off-site Movement, Continued

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**Enforcement  
response to  
violations**

While there may be rare exceptions, in most cases the existence of damage or contamination (e.g., fish kills, phytotoxicity, damaged crops, or human exposure) establishes the fact that the damage or contamination could have reasonably been expected to occur. In those cases, a violation of 3 CCR section 6614(b) has likely occurred.

If the applicator applied the pesticide under conditions the labeling directed against, the applicator can be cited for violating FAC section 12973 (use in conflict with the label). Citing an applicator for a violation of FAC section 12972 requires a detailed establishment of the aspect of due care that the applicator failed to exercise.

When there is sufficient evidence showing that a law or regulation was violated involving off-site movement of pesticides, the Enforcement Response Regulations must be used to determine the appropriate action.

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## Appendix D.2

### Reasonable Possibility of Harm, Damage, or Contamination

Interprets 3 CCR section 6614

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#### Background

FAC section 11501 outlines the Legislature's intent of FAC Division 6 and parts of Division 7. Subsections (a) and (b) specifically state:

- (a) To provide for the proper, safe and efficient use of pesticides essential for production of food and fiber and for protection of the public health and safety.
- (b) To protect the environment from environmentally harmful pesticides by prohibiting, regulating, or ensuring proper stewardship of these pesticides.

The Department's intent in adopting 3 CCR section 6614 was not just limited to regulating "substantial drift," but also other facets of negligent operation which conflict with the Department's Legislative mandate.

Subsection (a) 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.

Subsection (a) also requires the applicator *during* application to continuously evaluate the surrounding properties and these conditions and determine if the likelihood of harm or damage has arisen in order to decide if the application must be discontinued.

While it is expected that all applicators take steps to prevent substantial drift under FAC section 12972, subsection (b) prohibits making or continuing a pesticide application when there is a reasonable possibility of:

- (1) Contamination of bodies or clothing of persons not involved in the application,
- (2) Damage to nontarget crops, animals, or other public or private property, or
- (3) Contamination to nontarget public or private property preventing the normal use of the property.

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## Reasonable Possibility of Harm, Damage, or Contamination, Continued

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**Employer  
responsibility  
regarding  
3 CCR section  
6614(b)**

An employer is ordinarily liable for their employee's actions during the employee's work duties. The language of subsection (b) indicates that it applies to all persons, including employers. Even though the employer may not be the applicator in the field, they can be held responsible for their employee's drift. This interpretation was confirmed by a court decision in *Raj Kumar Sharma v. State of California, Department of Pesticide Regulation* (Super. Ct. Sutter County, 2012, No. CVCS 11-1343).

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**3 CCR section  
6614(b)(3):  
Creation of a  
health hazard**

Subsection (b)(3) includes the phrase "including the creation of a health hazard, ..." The word "including" is ordinarily a word of enlargement. Accordingly, the County may try to show a health hazard was created that prevented use of the property to show the seriousness of the offense. However, the "including" language in section 6614(b)(3) does not limit that section to only drift onto public or private property that causes a health hazard preventing normal use of the property. The section is meant to prevent all contamination of non-target public or private property which would prevent the normal use of the property.

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**Example  
applicator's  
responsibilities  
under 3 CCR  
section 6614**

Even though the applicator will use the same care that reasonable applicators would use under the same or similar circumstances to minimize off-site movement, 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 the applicator *reasonably* should have known.

For example, the applicator must evaluate whether a sensitive site is near the target area. 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 setbacks or buffer zones,
  - Making the application when the wind is blowing away from the sensitive site, or
  - Using a different product, formulation, or application method than originally planned.
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## Reasonable Possibility of Harm, Damage, or Contamination, Continued

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**CAC's role and responsibilities**

If a pesticide application, either through drift or other off-site movement:

- Contaminates the bodies or clothing of persons not involved in the application process;
- Damages nontarget crops, animals (including bees), or other property; or
- Contaminates property that prevents normal use of the property;

then 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 3 CCR section 6614(b).

However, the Respondent, at the hearing, still has an opportunity to argue the possibility was not reasonable under the particular circumstances of the application. Where a consequence mentioned in 3 CCR section 6614(b) (e.g., property damage or contamination) occurs as a result of an application, before initiating an administrative civil penalty action, the CAC should carefully consider all the circumstances surrounding the application to decide if the possibility the consequence would occur was a reasonable one. .

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## Appendix D.3 Due Care

### Interprets FAC section 12972

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#### Background

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

“Substantial drift” is defined in 3 CCR section 6000 as “the quantity of pesticide outside of the area treated is greater than that which would have resulted had the applicator used due care.”

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#### Elemental wisdom

There are two primary elements to the definition of “substantial drift.” Pesticide drift is substantial if the CAC:

1. Provides evidence a “quantity of pesticide” was found outside of the treated area. Proving this element is commonly done via sample results, photos of damage, or other evidence. This element **is not** dependent on the amount of pesticide found outside the target area but rather by the presence of a quantifiable amount, or damage or harm caused.
  2. Establishes the applicator **did not use** due care (i.e., was negligent).
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#### Establishing failure to use 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. .

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.

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## Due Care, Continued

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### Establishing failure to use due care, (continued)

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.

For the hearing, the County Advocate may also consider seeking testimony from a witness who can be qualified as an “expert” in the field.

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### Examples of supporting evidence

As discussed in Chapter 2, enforcement personnel can use the Elements of the Violation analysis to break laws or regulations into its individual functional parts. One way of breaking FAC section 12972 into its elements is outlined below. The CAC must have evidence to show:

1. Use of a substance,
2. The substance is a pesticide (definition from FAC section 12753),
3. Use by a person (definition from FAC section 38, i.e., individual, group, or business),
4. Pesticide was applied to a particular target area,
5. Pesticide deposition through drift outside the target area, and
6. How the applicator failed to use the care that was due under the circumstances that existed at the time of the application.

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

- Drift control standards (if any) required by the pesticide label
- Certain general standards of care specified in 3 CCR 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.

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