Chapter 11
After the Hearing: The Proposed Decision and Commissioner's Decision

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Section 11.1
Chapter Overview

Introduction

While the Commissioner can act as a Hearing Officer if certain conditions are met, most often the Hearing Officer is not the Commissioner. This chapter is written with that in mind.

Making the Proposed Decision

For the Hearing Officer, the term "Decision" encompasses both the *process* of weighing evidence entered into the hearing record, and the resulting *product* of deliberation, a document (the Proposed Decision).

It is the Hearing Officer's responsibility to prepare and submit a *Proposed Decision* to the Commissioner. Making the Proposed Decision is the responsibility ***solely*** of the Hearing Officer. Based **only** on the evidence entered into the record at the hearing, the Hearing Officer prepares the *Proposed Decision* by determining the issues, weighing the evidence entered into the hearing record, making findings of fact, and performing an analysis on whether the evidence supports the violation and fine amount. Section 11.2 goes into this in more detail. The Proposed Decision may find in favor of the County, may find in favor of the Respondent, or may modify the proposed action based on the evidence entered into the record.

The CAC's Decision

Once the Hearing Officer submits the *Proposed Decision* to the Commissioner, the Commissioner adopts, amends (if there is a legal basis to do so), or rejects it to make the *Commissioner's Decision*. Section 11.3 covers procedures for the Commissioner to notify the Respondent of the Commissioner's Decision.

Appellate Review

When the Respondent receives the Commissioner's Notice of Decision and Order, the Respondent will either pay the fine (which closes the case) or appeal the Commissioner's Decision. At this point the Respondent becomes the "Appellant" and the Director (agricultural civil penalties) or the DRC (structural civil penalties) becomes the "Respondent."

On appeal, the Commissioner's Decision can be affirmed, modified, or partially or completely reversed. The Appellant may further appeal the *Director's Decision* or *DRC's Decision* through the court systems. Section 11.4 discusses Appellate review of the record and concludes with links to DPR's official summaries of Director, DRC, and Court Decisions on Appeals.

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Chapter Overview, Continued

Terminology

Terms such as Proposed Decision, Decision, Notice of Decision, Commissioner's Decision, etc., can be a source of confusion. They are all labels to signify that a decision has been made in progressing stages of the administrative process, which may or may not be the "final" decision.

- **Proposed Decision** is the document the Hearing Officer submits to the Commissioner.
- **Decision**, or **Notice of Decision**, is generally the Commissioner's Decision, adopting, modifying, or rejecting the Hearing Officer's Proposed Decision. The term Decision (or Director's/DRC's Decision) may also apply to the formal action of the Director of DPR or the Disciplinary Review Committee responding to the Respondent's appeal of the Commissioner's Decision.
- **Commissioner's Decision** is the decision issued by the Commissioner. This also includes situations where the Commissioner is the Hearing Officer.
- **Decision Adopted by the Commissioner** refers to the action of the Commissioner adopting the Proposed Decision of a Hearing Officer in a matter.
- **Director's Decision** is the decision made by the Director of DPR on an appeal by the Respondent of the Commissioner's Decision; the Director may adopt, modify, or reject the Commissioner's Decision (such as in an appeal of a Commissioner's Decision pursuant to FAC section 12999.5).
- **DRC's Decision** is the decision made by the DRC (Disciplinary Review Committee) of the Structural Pest Control Board on an appeal by the Respondent of the Commissioner's Decision; the DRC may adopt, modify, or reject the Commissioner's Decision (such as in an appeal of a Commissioner's Decision pursuant to B&PC section 8617).
- **Docket No.** or **Administrative Docket No.** refers to the number assigned by DPR's Office of Legal Affairs to track administrative civil penalty decisions of the Director or the DRC.
- **Final Decision** refers to a Decision by the Commissioner, Director, or DRC once there is no potential to modify the Decision by another body. This means either no appeal is made to the appropriate body within the time period allowed by statute, or all possible appeals have been taken and decisions rendered on those appeals.

Section 11.2
Making the Proposed Decision

Introduction

As described in Chapter 9, one of the first and important tasks of the Hearing Officer is to focus the issues of the hearing. This begins when the County Advocate reads the stipulations (if any) into the record at the start of the hearing. Once the issues are defined (i.e., what the County seeks to prove and what the Respondent disputes) the hearing proceeds efficiently.

After the hearing, efficient decision making starts with the Hearing Officer reviewing the defined issues and asking, "What am I here to decide?" With the issues in focus, it is much easier to organize the evidence presented around those issues. The two main issues are:

1. Did the Respondent violate the code section cited by the Commissioner, and
2. Did the Commissioner classify the violation and set the fine amount appropriately.

To decide whether there has been a violation, the Hearing Officer determines what facts are required to prove the violation. Using the elements of the violation analysis described in Chapter 3 helps determine what facts are required. Then the Hearing Officer must decide if the hearing record contains a preponderance of evidence to sustain the violation(s) and the fine amount(s) enumerated in the NOPA received by the Respondent.

Proposed Decision overview

Making the Proposed Decision is the sole responsibility of the Hearing Officer and is based only upon evidence entered into the hearing record. The Hearing Officer must avoid using personal knowledge or conducting independent research to fill gaps in the record. Official notices of statutes, regulations, or official publications should be very specific and carefully scrutinized. In most cases, all excerpts of documents should be submitted into evidence. The Proposed Decision should be clear, understandable, and provide all the information for third party review. In essence, the Proposed Decision is a stand-alone document which generally includes Issues, Findings of Fact, Analysis (or Discussion), a Determination of Issues, and Decision. Each of these elements will be covered in more detail in Section 11.2.2.

The Issues section focuses on the violation(s) and fine amount(s) cited in the NOPA unless the Respondent stipulated to specific violations or fine levels. Once again, provide enough information for third party review.

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Making the Proposed Decision, Continued

Proposed Decision overview, (continued)

The Findings of Fact section contains only facts that are supported by evidence (including facts that have been stipulated to by the parties). Each element of the violation must be satisfied with at least one piece of evidence admissible in a court of law.

The Analysis and Determination sections connect the Findings of Fact to the violation(s) at issue to determine if the County proved, or did not prove, its case by the preponderance of evidence standard. These sections also address the issues and contentions of the Respondent requesting the hearing.

Order of legal authorities

1. Constitution
2. Statute
3. Court case
4. Regulation
5. Published written policy (e.g., Compendium, Enforcement Letters, Department website, etc.)
6. Unpublished written policy (e.g., email from DPR, etc.)
7. Verbal policy (e.g., meetings, discussions, training sessions)

Any resulting inconsistencies should defer to the higher authority in this hierarchy.

The Hearing Officer should be able to cite whatever authority they are relying on in the Proposed Decision.

Weighing evidence/ testimony

When reviewing the evidence submitted at a hearing and drafting the Proposed Decision, you may consider the following factors to determine the weight (the persuasiveness) of each piece of evidence:

- Was it direct or circumstantial? (See Section 3.3 for a discussion about direct vs. circumstantial evidence)
- Was it by an eyewitness or hearsay? (See Sections 3.3 and 9.9 for discussions about hearsay evidence)
- Was it competent?
- Was it corroborated?
- Was it answering a leading or neutral question?
- Was it fact or opinion?

Continued on next page

Making the Proposed Decision, Continued

Weighing evidence/ testimony, (continued)

- What was the demeanor of the witness? Do not assume it would be obvious if someone is lying. Assess the credibility of the witness: truth or falsehood determinations need to be based on facts in the case.

These questions help assess credibility. Factual evidence from a credible witness supports the determination.

Determining "facts" from relevant evidence

Reviewing the hearing record can be time consuming and confusing. By having the issues clearly in mind at the beginning of the review and after asking the question – "What am I here to decide?" – the process can be made less burdensome. Irrelevant evidence should be easily identified and disregarded. With that done, all relevant evidence can be evaluated.

It must be emphasized that evidence can be admissible and relevant but not determined to be "fact" in the Hearing Officer's final analysis. For example, an Inspector's testimony that she saw Respondent's employee pouring a pesticide without wearing the required goggles is relevant evidence. The employee's testimony that he was, in fact, wearing the goggles at the time in question and that the Inspector was lying is also relevant evidence. The Hearing Officer must weigh both pieces of evidence and make a "finding of fact" – either the person was or was not wearing the goggles.

If the Hearing Officer understands exactly what facts must be found to establish the violation, then it is a relatively easy task to list all the evidence relevant to those facts, disregard all that is not credible, and see if there is enough left to support a finding of fact.

The example below, while relatively straightforward, is an illustration which demonstrates an approach to the weighing of evidence that can be applied systematically to the most complex cases.

Example: Weighing evidence

The County proposes to fine Mr. John Doe for failing to properly post his pesticide storage area. At the hearing, the County Inspector Smith testified that he was at Mr. Doe's farm on a routine inspection and asked Mr. Doe where he kept his pesticides. Mr. Doe reportedly pointed to a shed about ten feet away. Inspector Smith saw no signs posted on the pesticide storage shed. On the inspection report, Inspector Smith noted a violation of 3CCR section 6674. Mr. Doe stated in his testimony that he

Continued on next page

Making the Proposed Decision, Continued

Example: Weighing evidence, (continued)

just nodded and signed the report. After reviewing Mr. Doe's history, and classifying the violation, the Commissioner issued a NOPA to Mr. Doe. The NOPA included the exact language of 3CCR section 6674 which provides, in pertinent part:

> "Signs visible from any direction of probable approach shall be posted around all storage areas where containers that hold, or have held, pesticides required to be labeled with the signal words "warning" or "danger" are stored. …"

There is no evidence presented as to what types of pesticides were stored in the shed, and therefore, no evidence regarding what signal words were on the containers therein. Mr. Doe requested and appeared at a hearing to request a fine reduction.

The issue the Hearing Officer must decide is whether or not there is enough evidence to support a violation of 3CCR section 6674. The requirements of the section are quoted in the NOPA. To find the regulation was violated, the Hearing Officer must search the record to see if there is credible evidence to support a conclusion that, among other things, there were pesticides in the shed that carried either the signal word "Warning" or "Danger." Since there is nothing in the record about the contents of the storage shed, the Hearing Officer cannot make a finding in support of the violation. Therefore, one of the necessary elements of the violation has not been established and the Hearing Officer cannot rule in favor of the County on this issue.

Basic principles

A few other basic principles that can be applied to the storage shed example:

1. If the final conclusion is that there is not enough credible evidence *in the record* to prove the violation, then the issue must be decided in favor of the Respondent, i.e., the violation did not occur.

2. The Hearing Officer can rely on *any* evidence entered into the record, not just evidence presented by the County. For example, in the scenario above if Mr. Doe had testified that there were pesticide containers in the shed with a "Danger" signal word on them, he would have established that required element in the record.

3. Use only evidence **in the record**. Statutes and regulations are not

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Making the Proposed Decision, Continued

Basic principles, (continued)

evidence; they are not something to weigh or determine if they are true.

Be very careful not to "fill in" the record with personal knowledge or independent research. For example, in the previous scenario if Mr. Doe had testified that he kept pesticides with a skull and cross bone on them in the shed with no reference to the signal word, it would be inappropriate for the Hearing Officer to find there was a violation because the Hearing Officer knows registered pesticides with the signal word "Danger" have a skull and crossbones on them.

One way to confirm evidence is in the record is to make a simple list:

> **Proposed Finding of Fact:** The Gramoxone container carries the signal word "Danger."
>
> **Evidence to support Finding of Fact:** nothing in record, Hearing Officer's personal knowledge.

Gaps in evidence can be quickly spotted using this exercise.

4. In very complex cases, continue to literally "screen out" all irrelevant evidence. Put it aside. Gather only relevant evidence by separating documents, if possible, and making separate lists.

5. Conflicting testimony may be presented at the hearing. Trust "instincts" when making witness credibility determinations. Case law supports the assertion that it is the Hearing Officer's province to weigh the credibility of witnesses in an administrative hearing.

6. Do the best possible job with the information available. Be fair and conscientious.

Section 11.2.1
Writing the Proposed Decision

Introduction

After the hearing, the Hearing Officer has two primary goals:

1. Make the correct decision based on the evidence in the hearing record.
2. Explain clearly how the decision was determined.

To "explain clearly" means to leave no doubt as to:

- What evidence supported the Findings of Fact, and
- How the facts related to and resolved the issues.

A persuasive decision is carefully reasoned, logically organized (easy to follow), and concise. Consider your audience; the writing must be precise and simple.

Basic writing principles

Apply basic writing principles to the analysis.

1. Focus
   - Get to the core of the case/issue/point. Focus on the issue, violation, elements, and relevant finding; focus on the central purpose of a paragraph or passage.
2. Purpose
   - Every statement should have a purpose. Keeping that in mind helps avoid irrelevant information. Always ask "Why is this included?"
3. Organization
   - The organization and structure of the writing reflects an orderly thought process. Understanding the logical patterns underlying an analysis helps organize the factors under consideration.
4. Proportion
   - Emphasize what is important and de-emphasize what is less important. The amount of detail signals the level of importance being placed on that portion.
   - Use sufficient detail to explain the findings.

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Writing the Proposed Decision, Continued

Review the evidence and testimony

Listen to the recording of the hearing, as extensive note taking during the hearing may be difficult while listening to and guiding the hearing. Recount the County Advocate's case and Respondent's response relevant to elements of the violation.

During the analysis, address pertinent questions: What happened? How complicated is the incident? Are there any disputed facts? What were the Respondent's contentions/arguments? Are those contentions supported? How? By what evidence? Are those contentions contradicted by the evidence? What evidence?

Good questions to ask

When preparing to write the Proposed Decision, engage in two types of analysis for the case: determining the Findings of Fact, and deciding how best to present the Findings of Fact. To that end, here are some important questions to ask:

- What is the specific contention by the County?
- What is the rule? (law or regulation)
- What are the Elements of the Violation?
- What is the Respondent's contention(s)?
- What is the strongest evidence?
- What are the facts (including stipulations)?
- Is there any conflicting evidence (including testimony)?
- How can this be organized? or What will the strategy be?

Organization

Before writing, organize the details of the case.

- Write out names and titles of each witness who testified.
- Write out what each witness said under oath.
- Write titles and dates of documents witnesses either relied upon or prepared.
- Outline the elements of the violation(s), fill in the blanks.
- Use a highlighter to emphasize evidence that proves or disproves the elements of the violation.
- Review the hearing recording, taking notes.
- The County Advocate most likely provided the elements of the violation for each law or regulation listed. If not, it is the Hearing Officer's duty to list the elements for each code section cited.

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Writing the Proposed Decision, Continued

Capitalization rules	The titles for the Director (of DPR), the Commissioner, Hearing Officer, County Advocate, and Respondent are capitalized. "Section" is expressed in lower case (as in "3 CCR section…") unless it is the first word in a sentence. "County" is capitalized when using the term to substitute for the complete name of the county initiating the action, or when referring to the County's Advocate.
Notes	Do not refer to the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), Title 40, Code of Federal Regulations (40 CFR), or Title 8, California Code of Regulations (8 CCR) as CACs do not have authority to enforce these codes. Avoid using "et seq." or other Latin terms as they are frequently misused and not generally understood.
Do not include appeal rights	Do not include the right to appeal in the Proposed Decision, when the Commissioner issues their Notice of Decision to the Respondent, appeal information is included. Do not to use the pronoun "we" in referring to the Commissioner.
Review the Proposed Decision	Review the Proposed Decision. Is each fact supported by evidence? Is each determination supported within the Findings of Fact? If so, the Proposed Decision is probably fair and just. Remember: This is the Hearing Officer's Proposed Decision; the Hearing Officer is solely responsible for the content. Carefully check the document for content and typographical errors before submitting the Proposed Decision to the Commissioner.
Transmittal letter	When the Proposed Decision is ready for transmittal to the Commissioner, prepare a stand-alone transmittal letter *to the Commissioner*, stating that this is the Hearing Officer's Proposed Decision and ask the Commissioner to adopt it. A sample template for the Hearing Officer Transmittal Letter can be found later in this Chapter.

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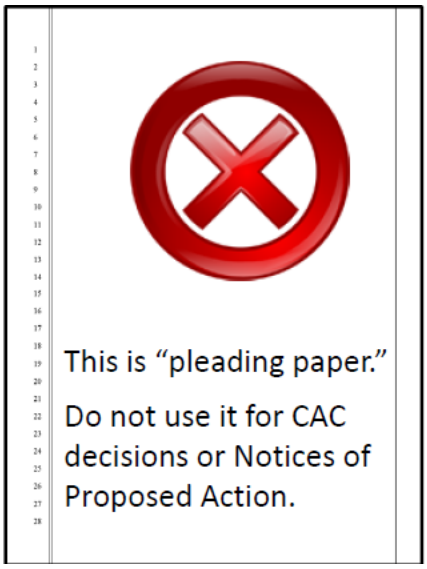
Writing the Proposed Decision, Continued

Paper

Use plain white paper for your Proposed Decision, not pleading paper (numbered lines on left).



Returning the Record

The Hearing Officer submits the Proposed Decision along with the entire written record (NOPA and all exhibits, including posters, CDs, etc.) and the audio record of the hearing to the Commissioner. This includes both County and Respondent materials. Any marks, notes, or writings made on these materials are also part of the Official Record.

Section 11.2.2
Format of the Proposed Decision

Outline of the Proposed Decision

The seven elements below form the outline for a Proposed Decision:

1. Heading
2. Opening Section
3. Findings of Fact
4. Analysis (sometimes called Discussion)
5. Determination of Issues (sometimes called Findings)
6. Decision
7. Closing

This section discusses each element, with examples provided.

1. Heading

Standard elements

The Heading announces the completion date of the Proposed Decision and includes identifying information for the parties, the case number, and a reference to the total proposed fine.

Note: The Heading is the title of the document and does not contain salutations to, or communications with, the Commissioner. Those are contained in the *Hearing Officer Transmittal Letter* (See Section 11.2.4 below). The Proposed Decision is a stand-alone document intended to address the Respondent's appeal of the matter. The Proposed Decision in its original format is sent to the Respondent with the Commissioner's Notice of Decision.

Example Heading information section

NOTICE OF PROPOSED DECISION

DATE:

Agricultural Commissioner
County of *[County Name]*
vs
[Respondent Name]
[Respondent Address]

FILE NO.:
Total Proposed Fine:

Continued on next page

Format of the Proposed Decision, Continued

2. Opening Section

Standard elements

The Opening Section consists of several standard elements:

A. **Procedural Background**. The first several paragraphs are "standard text" which identify the Hearing Officer, Respondent, and violations; identify when and where the hearing took place; describe the hearing and authorities of the Hearing Officer; emphasize the standards of evidence for deciding on the matter; and state the Proposed Decision reflects the official record of the hearing.
B. **List of Attendees**, with title and role in the hearing (as applicable).
C. Identification of whether a Pre-Hearing Conference was conducted and, if so, a **List of Stipulations** entered into the hearing record.
D. **List of Exhibits** entered into the hearing record.
E. Identification of any **Procedural Matters** (if necessary).
F. Finally, the **Issues** concludes the Opening Section with exactly what the Hearing Officer is deciding upon, and quotes the code section.

Example Opening section – A. Procedural Background

An administrative civil penalty hearing on the above-entitled matter was held by [*Name of Hearing Officer*], a hearing officer designated by the Agricultural Commissioner of [*Name*] County. The hearing was held on [*month, day year*], at [*time*] a.m. in [*City*] in [*Name*] County to determine whether [*Respondent Name*] violated [*Business and Professions Code (B&PC), Food and Agricultural Code* (*FAC)* or *Title 3/16 California Code of Regulations (3/16 CCR)*] section ___. The total proposed fine was $_____.

During the hearing, County and Respondent were given the opportunity to make opening and closing statements, submit and rebut evidence, and question/cross-examine witnesses. The record was then closed, and the matter was submitted to the Hearing Officer for a Proposed Decision.

In reaching the Proposed Decision, the entire record of the hearing was considered, including facts, evidence, and stipulations, as well as Respondent and County arguments. Only evidence and exhibits in the record deemed credible or supported by fact were considered. The burden of proof the County was required to meet in this action is the "preponderance of the evidence" standard, in other words, "more likely than not to have happened."

The Hearing Officer's record of the hearing is the official record of the hearing. This Proposed Decision reflects the official record. Issues of witness

Continued on next page

Format of the Proposed Decision, Continued

Example Opening section – A. Procedural Background, (continued)

credibility are the province of the Hearing Officer. The Hearing Officer is only required to have enough information and inferences from the official record to support a reasonable conclusion, though other reasonable conclusions are possible.

Example Opening section – B. List of attendees

Present at the Hearing were: [*examples only*]

[*Name*], County Advocate
[*Name*], [*Title, e.g. Agricultural Biologist III, Deputy Ag. Commissioner, homeowner, etc.*], County Witness
[*Name*], [*Owner of Business Name, Manager, or Licensee*], Respondent
[*Name],* [*Role of Individual, e.g., Respondent Attorney, Employee, Representative, etc.*]
[*Name],* [*Title, e.g. Supervisor, applicator, etc.*], Respondent Witness
[*Name*], Observer

C. Pre-hearing conference and stipulations

Information about the pre-hearing conference (if one was held) and a list of stipulations generally follows. Stipulations are agreements which both parties agree to and need no further discussion. List all stipulations agreed to in your Proposed Decision. If the Advocate can get agreement to some or all of the stipulations, the stipulations will usually provide several of the elements of the violations, such as:

- Who was the subject of the incident
- Where the alleged violation occurred
- When the events occurred

Factual stipulations can be entered as facts in evidence because they were not disputed.

If the list of stipulations is long and related to more than one issue, a good approach is to make a general statement regarding stipulations in your introduction and attach the list of stipulations to your decision, but state specific stipulations where they are relevant.

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Format of the Proposed Decision, Continued

C. Pre-hearing conference and stipulations, (continued)

Including the stipulations as part of the standard text in the opening section serves two purposes:

1. The stipulations are equivalent to findings of fact and are used to make the final decision in the same way as findings. Therefore, it is important to have them physically in the record, verbally read into the record by the Hearing Officer at the beginning of the hearing, and clearly listed in the Opening Section of the Proposed Decision. A decision may hinge on a stipulation and may not make logical sense if the stipulation is not clearly referenced.
2. Listing the stipulations brings focus to the outstanding issues of the case. A fact is not "at issue" if it has been stipulated to and the Hearing Officer need not spend any time discussing evidence that only relates to a stipulation. For example, if the Respondent stipulates that a certain person is their employee, it is unnecessary to discuss evidence that would go to prove that the person was their employee, even if there is such evidence on the record.

Example Opening Section – Pre-hearing conference and stipulations

PRE-HEARING CONFERENCE AND STIPULATIONS

A pre-hearing conference was held immediately before the hearing, with only the County Advocate, Respondent, and Respondent's representative present.

When the record was opened at the hearing, the parties affirmed the following stipulations made during the prehearing conference: [*Note: the following are examples only and depend greatly on the facts of the case.*]

1. The [*County Name*] County Agricultural Commissioner has the authority under [*FAC section 12999.5 to levy an agricultural civil penalty* or *B&PC section 8617 to levy a structural civil penalty*].
2. Notice of Proposed Action (NOPA) for [*File Number*] was received by [*Respondent*] on [*Date*].
3. [*Respondent*] received a copy of the case file from the [*County Name*] County Agricultural Commissioner's Office on [*Date*]. The entire case file is entered into evidence.
4. [*Product Name*] (EPA Registration No. *XXXX-XXX*) is a pesticide registered by the Department of Pesticide Regulation.

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Format of the Proposed Decision, Continued

Example Opening Section – Pre-hearing conference and stipulations

5. [Pilot name] has a Pest Control Pilot Aircraft Certificate from the Department of Pesticide Regulation [*JP/AP XXXXX*].
6. [*Respondent*] applied [*Product Name*][(EPA Registration No. [*XXXX-XXX*]) to [*Crop*] on [*Site*] on [*Date*], starting at [*Time*] and ending at [*Time*].
7. *Or other stipulations.*

D. List(s) of exhibits

Information about exhibits entered as evidence at the hearing generally follow the list of stipulations. Including the list helps the Respondent and other readers cross reference the Exhibits with the Findings of Fact and Analysis sections of the Proposed Decision.

Long lists of exhibits may interfere with the flow of the Proposed Decision but may be necessary (remember proportion). One option is to tell the reader that exhibits were admitted into evidence and then attach the list to the Proposed Decision.

Example Opening Section – Exhibits

EXHIBITS

Exhibits agreed upon by County and Respondent and entered into the hearing record:

COUNTY EXHIBITS: (*The following are examples only)*

A. Notice of Proposed Action File No.
B. [*Product Name*] (EPA Registration No. *XXXX-XXX-ZZ*) registered label
C. [*Respondent*] Restricted Material Permit [*Number*] with conditions
D. Pesticide Use Report [number or grower, *site, and date*]
E. Pesticide Episode Investigation Report…
F. Investigative Sample Analysis Reports
G. Map of locations of pesticide residue samples with results
H. Written statement of…

RESPONDENT EXHIBITS: (*The following are examples only)*

1. Map of…
2. Photograph of…
3. Screenshot of Weather Forecast from "Weather" mobile phone application, 5:00 AM, April 1, 20XX
4. Correspondence with…
5. Other business reports or records…

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Format of the Proposed Decision, Continued

E. Procedural Matters (if necessary)

The procedural aspects of the hearing will typically not factor into the decision itself. If there are no procedural issues during the hearing, this section does not need to be included. If the Respondent raises issues regarding procedural matters, address the contentions in a separate section entitled "**Procedural Matter(s)**" following the list of exhibits.

Example Opening Section – Procedural Matters (if necessary)

PROCEDURAL MATTER

During the hearing, Respondent's counsel, Mr. Lawyer, made a motion alleging the Respondent had not received adequate notice because it did not receive notice of the County's intention to rely on specific label statements on the Drifty 4 label to find a violation. Respondent's counsel stated they had several meetings with County representatives and that the specific statement had never been brought up; therefore, they had been unable to prepare their defense.

During the pre-hearing conference, the Respondent stipulated to having been properly notified, stipulated to having requested a hearing, and stipulated that Drifty 4 is a pesticide. In addition, the Notice of Proposed Action, File No. _____, dated April 23, 2023, and mailed shortly thereafter (Exhibit A), indicates the Respondent had approximately two months to prepare for the hearing. The Notice specifically quotes the Drifty 4 label (Exhibit C), and it also informed the Respondent that they were entitled to review the evidence supporting the County's charges. The Respondent collected a copy of the case file six weeks prior to the hearing.

The Hearing Officer denied the motion as being without merit and proceeded with the hearing.

F. Issues before the Hearing Officer

The "Issues" in the case are the matters to be decided by the Hearing Officer.

Generally, the two core issues are:

Issue 1. Did the Respondent violate [*the section cited*] by [*action*]?
Issue 2. Did the Commissioner classify and set the fine for the violation in accordance with [*3 CCR section 6130* or *16 CCR section 1922*]?

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Format of the Proposed Decision, Continued

F. Issues before the Hearing Officer, (continued)

In cases with multiple violations, the two core issues are addressed for each violation individually. For example:

VIOLATION 1
Issue 1. Did the Respondent violate [*the section cited*] by [*action*]?
Issue 2. Did the Commissioner classify and set the fine …?

VIOLATION 2
Issue 1. Did the Respondent violate [*the section cited*] by [*action*]?
Issue 2. Did the Commissioner classify and set the fine …?

Issue 1: Did the violation occur?

Issue 1 can be stated broadly or narrowly, depending on the circumstances of the case. If the Respondent flatly denies that a violation occurred, the issue could be stated broadly. For example:

> **Issue 1.** Did the Respondent violate 3 CCR section 6616?

If the Respondent stipulates to certain aspects of the violation and is focusing their defense on one aspect of the violation, the issue can be stated narrowly, focusing on the area of disagreement. In an example scenario, the Respondent is charged with violating 3 CCR section 6616, "No person shall directly discharge a pesticide onto a property without the consent of the owner or operator of the property." The Respondent stipulated that he did directly discharge a pesticide on his neighbor's property. However, the Respondent contends that he had the neighbor's consent. The best way to state the issue, when there are stipulations such as those described above, is to state the broad issue and then refine it. For example:

> **Issue 1.** Did a violation of 3 CCR section 6616 occur, specifically, did the Respondent have the consent of his neighbor when he discharged the pesticide on his neighbor's property?

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Format of the Proposed Decision, Continued

Issue 2: The fine class and amount

The second core issue is an assessment of whether the Commissioner classified the violation correctly and set the fine within the range for the class, as required by 3 CCR section 6130 or 16 CCR section 1922. A Respondent may have stipulated that the violation did occur, but contests it was not a Class A/Serious violation and/or that the fine was set too high. In either case, Issue 2 is typically stated as such:

> **Issue 2.** Did the Commissioner classify and set the fine for the violation in accordance with 3 CCR section 6130?

Or,

> **Issue 2.** Did the Commissioner appropriately classify the alleged violation of *[code section]* as Class [*A/B/C*] with a fine of *[$ amount]* in accordance with 3 CCR section 6130?

Text of the law or regulation

Conclude each Violation by including the full title and text of the law or regulation cited in the NOPA.

Example Opening Section – Issues and text of cited law or regulation

ISSUES

VIOLATION 1 [*if there are multiple violations*]

Issue 1:
Did the Respondent, Flier Ag Aircraft, violate FAC section 12973 on April 12, 2022, by applying the pesticide Kilzmor in conflict with its labeling which states "Do not apply this product in a way that will contact persons and/or property either directly or through drift"?

Issue 2:
Did the Commissioner appropriately classify the alleged violation of FAC section 12973 as a Class A violation with a fine of $XXXX as required by 3 CCR section 6130?

FAC 12973.
The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.

Continued on next page

Format of the Proposed Decision, Continued

3. Findings of Fact

Introduction

The Findings of Fact is the **most important part of the Proposed Decision**. A finding of fact must be made for each Element of the Violation. A finding of fact is *not* a restatement of witness testimony and cross-examination in the hearing. Only those facts necessary to satisfy each element are essential.

The two key areas are:

A. Expressing the "facts" as facts supported by the evidence; and
B. Including all the facts necessary to establish the violation(s).

The most straightforward method of presenting the Findings of Fact is a numbered list. An example of a numbered list and narrative style for the same scenario follows the instructions on how to write a Finding of Fact.

How to write a Finding of Fact

In this portion, avoid the tendency to simply summarize the testimony given, without referencing the evidence, to make a "finding of fact." There may be much in the record that may be true but is not relevant to the issue to be decided. The Hearing Officer need not make findings of fact regarding those irrelevant matters.

The findings of fact can be expressed in short, numbered sentences or paragraphs. It is imperative that the record contain sufficient evidence to support each finding of fact. The Hearing Officer is not required to list the evidence relied upon with each finding, but it is a good practice. The Hearing Officer may expand on the basic format if the essential findings are made to establish each violation. The Hearing Officer knows what the essential findings are by knowing the Elements of the Violation.

Section 11.2 above discussed weighing evidence and testimony, determining facts, some basic principles, and provided an example. The example below is included to demonstrate how to transform information in the record into a finding of fact.

A Hearing Officer might initially write:

1. Inspector Jones testified that when she observed the pesticide application, the applicators were not wearing eye protection.

This is a reiteration of evidence, not a finding of fact.

Continued on next page

Format of the Proposed Decision, Continued

How to write a Finding of Fact, (continued)

It is particularly important to clearly state a finding of fact when there is conflicting evidence. For example, a Hearing Officer may initially write:

1. Inspector Jones testified that when she observed the applicators they *were not* wearing eye protection. The applicators testified they *were* wearing eye protection.

Reiterating testimony is not a finding of fact. In this case, convey to the reader the inspector's testimony was credible, *and* it is believed to be "a fact." The two examples above do not indicate what the Hearing Officer believed to be a fact, only what witnesses said in their testimony. To transform it into a finding of fact, the Hearing Officer must choose between the conflicting testimony and/or pieces of evidence.

This potential finding of fact becomes either:

The applicators *were* wearing eye protection.

OR

The applicators *were not* wearing eye protection.

With credible evidence cited, the Finding of Fact is established:

1. The applicators were not wearing eye protection (testimony of County witness Jones and County Exhibit D, photographs of application).

The Findings of Fact can also include issues that were stipulated to, for example:

1. As stipulated, Respondent did not have, and thus was unable to provide to the County, training records as required by 3 CCR 6724(e).

Relevant facts to include

A clear understanding of the Elements of the Violation will guide the Hearing Officer on what to include, i.e., a finding of fact that establishes each element.

For example, 3CCR section 6738.3(a) requires an employer to know what type of chemical-resistant glove the pesticide product labeling requires and provide that type of glove to employees handling pesticides. The labeling statement indicating what type of gloves are required is a critical element of the violation and must be included as a statement of fact. The County Advocate must submit the evidence (for example, a copy of the product labeling) or the Respondent must stipulate to the labeling requirement, and the Hearing Officer must make a finding of fact on what type of glove the labeling required. A Proposed Decision in favor of the County without this fact may cause the decision to be overturned on appeal to the Director or DRC.

Continued on next page

Format of the Proposed Decision, Continued

Example Findings of Fact – numbered list

FINDINGS OF FACT

1. Bob Smith is a licensed journeyman pilot. (Exhibit E)
2. On September 29, 2022, Bob Smith applied the pesticides Folex 6EC (EPA Reg # 1234-567-ZZ) and Cottonquick (EPA Reg # 7654-321-ZZ) onto a Culton Ranch cotton field, Site 333. (Stipulation #1, Exhibit B, PUR)
3. Folex 6EC and Cottonquick both contain the cautionary statement "Do not apply this product in a way that will contact workers or other persons, either directly or through drift." (Exhibit C Folex 6EC labeling, Exhibit D Cottonquick labeling)
4. At the time of the application, Richard Jones was driving an open tractor, pulling a water trailer, west of site 333. (Jones Testimony)
5. Richard Jones felt spray mist from the application contact with his skin. (Jones Testimony)
6. Richard Jones's lips became numb, his eyes became irritated, he became dizzy, he had trouble breathing and he vomited. (Jones Testimony)
7. Richard Jones's symptoms are consistent with exposure as described on the Folex 6EC and Cottonquick Safety Data Sheets. (Exhibit F).
8. Richard Jones sought medical attention because of his symptoms. (Exhibit A, PIR)
9. The attending physician diagnosed Richard Jones's condition as "chemical burns to the eyelids" from Mr. Jones's exposure to Folex. (Exhibit H Medical Record Jones)
10. Richard Jones's hat and coveralls tested positive for tribufos (the active ingredient in Folex). (Exhibit J Sample Results)

Example Findings of Fact: narrative style

FINDINGS OF FACT

On September 29, 2022, licensed (Exhibit E) journeyman pilot Bob Smith applied the pesticides Folex 6EC (EPA Reg # 1234-567-ZZ) and Cottonquick (EPA Reg # 7654-321-ZZ) onto a Culton Ranch cotton field, Site 333 (Stipulation #1, Exhibit B, PUR). Both pesticides contain the cautionary statement "Do not apply this product in a way that will contact workers or other persons, either directly or through drift" (Exhibit C Folex 6EC labeling, Exhibit D Cottonquick labeling).

Continued on next page

Format of the Proposed Decision, Continued

Example Findings of Fact: narrative style, (continued)

Richard Jones, driving a tractor west of Site 333 (Jones Testimony), observed an aerial application and felt spray mist from the application contact his skin (Jones Testimony). Soon thereafter, Mr. Jones's lips became numb, he became dizzy, his eyes became irritated, he had trouble breathing, and he vomited (Jones Testimony). Mr. Jones's symptoms are consistent with exposure as described on the pesticide's Safety Data Sheets (Exhibit F). Mr. Jones subsequently sought medical attention because of his symptoms (Exhibit A, PIR); the attending physician diagnosed his condition as chemical burns to the eyelids as a result of exposure to Folex (Exhibit H Medical Record Jones). The hat and coveralls Mr. Jones was wearing at the time of exposure tested positive for tribufos (the active ingredient in Folex) (Exhibit J Sample Results).

4. Analysis

Standard elements

Next is the Analysis section (sometimes entitled "Discussion"). This section distills the relevant details in the case in the context of the Findings of Fact. Specifically, regarding the testimony and evidence that the County contends supports, and the Respondent contends does not support, the violation and/or fine amount. A key point of the Analysis is an acknowledgment of the Respondent's points of appeal and determinations of their merit.

In the Analysis, the Hearing Officer summarizes the incident, highlights the facts in the case, applies the facts to the "preponderance of evidence" burden of proof, weighs the strength of the evidence, assesses witness credibility, and ultimately determines if the Hearing Officer is convinced the County has demonstrated that the violation more likely than not occurred. The counter arguments of the Respondent are also deliberated in the Analysis. Building on the "Finding of Facts," a well-framed "Analysis" sets up and supports the Hearing Officer's later "Determination of Issues": the resolutions of Issue 1 (was there a violation) and/or Issue 2 (is the violation classified correctly with the appropriate fine amount).

Continued on next page

Format of the Proposed Decision, Continued

Example Analysis

ANALYSIS

Factual Circumstances
On Thursday, June 16, 20XX, at 6:45 a.m., John Applicator, an employee of BUO Pest Control, applied Kilzmor (EPA Reg. No. 000-11) with a generator-powered sprayer to three oak trees at an apartment complex at 13 Carmichael Way, owned by Michael Landlord. John and Jill Neighbor own and occupy a home adjacent to the apartment complex and share a common driveway. Limbs of the oak trees extend above an eight-foot privacy fence between the apartments and home and over the Neighbor's property.

At the time of the application, Jill Neighbor was in her backyard hanging clothes on the clothesline. Mr. Applicator testified he did not realize that Ms. Neighbor was in the yard. Ms. Neighbor testified that when she heard the generator and felt drops on her face, she went to the driveway and asked Mr. Applicator to stop spraying. Mr. Applicator told her to go in and wash with soap and water and that he would be finished in a minute. John Neighbor testified he then came out and insisted that Mr. Rawlings quit spraying. Mr. Neighbor was given the same advice and was told the pesticide was "benign."

Mr. Applicator finished spraying, collected his equipment, and left. Late in the afternoon that same day Ms. Neighbor felt ill and went to the emergency room at the hospital. She was noted to be suffering from dizziness and nausea. She was held eight hours for observation and was released without further symptoms. The County investigated the Neighbors' complaint and issued a notice of violation to BUO Pest Control for a violation of 3 CCR sections 6600(e) and 6614(b)(1).

Violation 1 Analysis
At the hearing, the Respondent contended the company took due care when making the application. The evidence shows the application started early in the morning, the applicator wore protective gear, that he had covered an automobile under the tree with plastic, and that he was spraying with his back to the fence. While these are expected due diligence actions, the argument that due care was taken because it was too early for someone to be out in the yard is without merit. The spraying was done on a weekday at 6:45 a.m., at a time when people are likely to be up and could reasonably be outside. Mr. Applicator acknowledged that he did not look over the fence and that BUO Pest Control did not give notice to the occupants of the house or the tenants in the apartment complex. While the evidence establishes that he took due care to cover himself and the immediate surroundings, Mr. Applicator did not take

Continued on next page

Format of the Proposed Decision, Continued

Example Analysis, (continued)

due care in the application of the pesticide to perform pest control in a careful and effective manner.

Violation 1 Classification Analysis
The Notice of Proposed Action submitted into evidence stated the violation of 3 CCR sections 6600(e) was designated as a Class A violation because it caused a health hazard. The Respondent stated that even if his application went off -target that no real harm resulted this should be no more than a Class B violation with a greatly reduced fine. Evidence in the record of Ms. Neighbor's symptoms, their consistency with the symptoms listed on the product label and Safety Data Sheet, photographs, and positive sample results support refuting the Respondent's position. Therefore, it meets the definition of 3 CCR section 6130(b)(1)(A): "A violation that caused a health, property, or environmental hazard."

Violation 2 Analysis
Respondent's allegation that no spray drifted over the fence is not supported by the evidence. Mr. Applicator testified he used a high-pressure delivery system, with a pinpoint tip, set a medium pressure, to shoot the pesticide 100 feet up into the tree. The pressure was sufficient to blow the plastic covering off the car and he had to hold the covering on as he sprayed. By Mr. Applicator's own testimony, the tree was drenched. Photographs introduced into evidence show wetness on the ground under the tree, up to the privacy fence, and on the Neighbor's garage. The method of application, photographs, and positive sample results establish that the spray did go over the fence. These facts, as well as the credible testimony of Mr. and Ms. Neighbor and the sample results from Ms. Neighbor's shirt and patio table (positive for the active ingredient in Kilzmor), support the conclusion that an actual contamination of a person did occur.

Violation 2 Classification Analysis
The Notice of Proposed Action submitted into evidence stated the violation of 3 CCR sections 6614(b)(1) was designated as a Class A violation because it caused a health hazard. The Respondent stated that even if his application went off -target that there was no contamination of bodies or clothing and this should be no more than a Class B violation with a greatly reduced fine. Evidence in the record of Ms. Neighbor's symptoms, their consistency with the symptoms listed on the product label and Safety Data Sheet, photographs, and positive sample results, including on Ms. Neighbor's shirt refute the

Continued on next page

Format of the Proposed Decision, Continued

Example Analysis, (continued)

Respondent's position. Therefore, it meets the definition of 3 CCR section 6130(b)(1)(A): "A violation that caused a health, property, or environmental hazard."

Review

What is the purpose of each paragraph? How is each paragraph organized to show the writer's reasoning?

Fine classification and fine amount

One of the common hearing issues is whether the proposed fine classification and amount is appropriate, in accordance with 3 CCR section 6130 or 16 CCR section 1922. The Respondent may say they feel the violation is "not a Class A violation" or "the fine is too high." This issue must be addressed in the Proposed Decision if it is raised by the Respondent. For example, if Issue 2 was stated as:

> **Issue 2:** Did the Commissioner classify and set the fine for a violation of [*code section*] for a Class [*A/B/C*] violation at [*fine amount*] as required by 3 CCR section 6130?

Part of the analysis of this issue might include:

> When levying fines, the Commissioner must follow the guidelines in 3 CCR section 6130. Under this section, a Class A violation is a violation that caused a health, property, or environmental hazard, a Class B violation that was elevated to a Class A, or a violation of a lawful order of the Commissioner. The fine range for the Class A violation is $XXX to $XXXX.

It is the Hearing Officer's responsibility to confirm the violation is correctly classified and the County presented evidence of relevant facts, including severity of actual or potential effects and the respondent's compliance history, when demonstrating the fine was appropriately within the range of the classification.

Continued on next page

Format of the Proposed Decision, Continued

5. Determination of Issues

Standard elements

If all Elements of the Violation have been proven by evidence entered into the record (e.g., testimony, documents, or other evidence) the Hearing Officer must determine that a violation occurred. If the County fails to prove all Elements of the Violation, the Hearing Officer must determine that a violation did not occur.

Example Determination of Issues

DETERMINATION OF ISSUES

VIOLATION 1 [*if there are multiple violations*]

Issue 1
The Hearing Officer finds in favor of the [*County/Respondent*].

[*Summary of Respondent's and County's assertions and summary of findings of fact or evidence in the record which supports this determination*]

The violation is [*upheld/overturned*].

Issue 2
The Hearing Officer finds in favor of the [*County/Respondent*].

[*Respondent's contention and summary of findings of fact or evidence in the record which supports or refutes this contention*].

[*If classification is upheld:*] The Commissioner classified the violation as a [*Class A/B/C or Serious/ Moderate/Minor*] violation with a fine of $XXXX. A [*Class*] violation is [*quote Class description from 3 CCR section 6130 or 16 CCR section 1922*], and the fine range for a [*Class*] violation is $XXX-$XXXX. Based on evidence in the record, the violation [met/did not meet] the definition of a [*Class*] violation because it [*state evidence in the record*]. The fine amount [*is/is not*] within the range for a [*Class*] violation.

The violation classification and fine amount [*is/is not*] appropriate and is [*upheld/overturned*].

Continued on next page

Format of the Proposed Decision, Continued

Example Determination of Issues – multiple counts for Issue 1

VIOLATION 2 [*if there are multiple violations*]
Issue 1
The Hearing Officer finds in favor of the County for [*number*] Counts.

[*Summary of evidence which supports this determination.*] Therefore Respondent violated [*code section name and number*] by [*action*].

The Respondent's assertions [*summarize Respondents contentions*] are without merit since [*state findings of fact*]. Respondent's argument that there cannot be multiple counts for a single application was withdrawn after County Witness [*Witness name*] testified as to the requirements of FAC section 12996.5(b) and the definition of "acute" in 12996.5(a), both of which were also attached to the Notice of Proposed Action. The separate Counts in response to this incident are warranted per FAC section 12996.5(b).

Respondent's argument that the count for the [*Xth*] fieldworker should be dropped since there is no medical record or clothing sample for this individual is without merit. The testimony of [*Witness name*] indicated at the time of the application [*Xth*] worker was at work in the field and was immediately adjacent to the other workers. Per [*cite evidence or finding of fact*] this worker experienced symptoms of [*recount symptoms*] which is consistent with [*cite evidence or finding of fact*]. The application by the Respondent is found to have [*finding of fact*] [*number*] workers. The county presented evidence that, consistent with 3 CCR section 6766, the employer immediately took the fieldworker crew to seek medical care although only [*number*] accepted treatment, released their medical records to the County, and [*number*] submitted clothing samples to the County. The responsibility of the Respondent is not mitigated by [*state Respondent's contention*].

The application of [*pesticide name*] by the Respondent exposed [*number*] of persons and caused acute illness or injury to them. The violation is upheld for [*number*] counts.

6. Proposed Decision

Standard elements

This is resulting *product* of the Hearing Officer's deliberation. Re-state that the Proposed Decision was based only on the evidence presented during the hearing and then for each violation summarize the findings.

Continued on next page

Format of the Proposed Decision, Continued

Example Proposed Decision

SUMMARY OF PROPOSED DECISION

In reaching the Proposed Decision, only evidence and exhibits in the record deemed credible or supported by facts were considered.

VIOLATION 1 [*if there are multiple violations*]
The Hearing Officer finds that, based on a preponderance of the evidence presented during the *[month, day year]* hearing, the Respondent, [*Respondent Name*], [*did/did not*] violate [*Food and Agricultural Code / Business & Professionals Code / Title 3/16, California Code of Regulations*] section [*number*]. The Commissioner's classification of the violation as a [*Class A/B/C* or *Serious/Moderate/Minor*] [*meets/does not meet*] the guidelines as established in [*Title 3, California Code of Regulations, Section 6130* OR *Title 16, California Code of Regulations, Section 1922*] and proposed fine amount of $*XXXX.00* [*is* or *is not*] appropriate.

7. Closing

Standard elements

This section, like the Heading, is quite short. Respectfully ask the Commissioner to adopt the Proposed Decision, and then sign the Proposed Decision.

Example Closing

REQUEST ADOPTION OF THIS PROPOSED DECISION

As your appointed Hearing Officer in this matter, I respectfully request the [*County name*] County Agricultural Commissioner adopt my Proposed Decision in this matter as the Commissioner's Decision.

Sincerely,

[*Signature*]
[*Hearing Officer name*], Hearing Officer

Section 11.2.3
Hearing Officer Changes to CAC Fines

Introduction

The Commissioner initiates an action against the Respondent by issuing a NOPA which proposes a fine for an alleged violation. Occasionally, based on the evidence presented in the hearing the Hearing Officer may decide a change to the fine level proposed by the Commissioner in the NOPA is warranted.

Applicable codes

3 CCR section 6130 specifically identifies the Commissioner as the person responsible for setting fines in agricultural civil penalty actions initiated pursuant to the authorities of FAC sections 12999.5, 15204 and 15204.5.

In addition, 16 CCR section 1922 specifically identifies the Commissioner as the person responsible for setting fines in structural civil penalty actions initiated pursuant to the authority of B&PC section 8617.

Fines should not be changed unless there is an identifiable mistake

The Commissioner carefully considers facts and the evidence when determining fine classes and amounts before issuing a NOPA.

A Hearing Officer may propose a lower a fine amount than set by the Commissioner in the written Proposed Decision stating that:

- The fine **classification** is not supported by evidence in the record, or
- The fine **amount** is not supported by evidence in the record.

If the County fails to prove by a preponderance of the evidence the alleged violation occurred, the Hearing Officer has an obligation to dismiss the violation instead of reducing the fine (see below).

Additional requirements come into play when a fine is changed or a violation is dismissed.

- If the Hearing Officer believes it is necessary to lower the fine, the Proposed Decision must state the specific lack of factual allegations in the NOPA (pertaining to the fine), and also note any specific lack of evidence (supporting a violation) in the hearing record.
- The Hearing Officer's Proposed Decision to reduce the fine must conform to the applicable fine regulation (both to class and fine range); and, to the greatest extent possible, follow the Commissioner's stated logic for setting the fine amount within the chosen class.

Continued on next page

Hearing Officer Changes to CAC Fines, Continued

Additional guidance for the Hearing Officer relative to fine reduction

If a Hearing Officer decides it is necessary to reduce a fine:

- While the NOPA contains facts to support the fine class and amount, the County must still prove those facts, by a preponderance of the evidence, at the hearing. If, at the hearing, the County Advocate does not provide facts necessary to support a particular fine class or amount in the record (and the NOPA also did not state reasoning, and there is no stipulation about the facts), then the Hearing Officer has discretion to propose reducing the fine in the Proposed Decision.
- When the County does not prove, by a preponderance of the evidence, that a violation took place, the Hearing Officer has an obligation to dismiss that violation instead of reducing the fine. In effect, the Hearing Officer will reduce the fine to zero because there will be a finding in the Proposed Decision that there was not sufficient evidence to prove the Respondent committed the violation.
- The Hearing Officer's Proposed Decision must provide adequate reasoning so the Commissioner, and others, can understand why the proposed fine amount differs from the fine amount previously set by the Commissioner in the NOPA.

Actions not allowed by a Hearing Officer

- A Hearing Officer may never set a **higher** fine classification or fine amount than what is stated in the NOPA.
- A Hearing Officer must not adjust the fine amount to punish or reward either party for poor or good performance at the hearing.

Section 11.2.4
Hearing Officer's Transmittal Letter

Introduction

Use plain paper. Keep it succinct.

Example

DATE:

FILE NO.: [*Number on NOPA***]**

TO: [*Commissioner name*]
[*County name*] County Agricultural Commissioner
[*Address*]
[*City, State ZIP*]

Commissioner [*Surname*],

I have reached a decision in the matter of [*Case name*], File No. [*Number on NOPA*].

I have attached my Proposed Decision and the administrative record. I respectfully request you adopt my Proposed Decision as your Decision in this matter.

Sincerely,

[*Signature*]
[*Hearing Officer name*], Hearing Officer

[*Address*]
[*City, State ZIP*]
[*Contact phone number*]

Section 11.2.5
Proposed Decision Checklist

Hearing Officer's Transmittal Letter

Use plain paper:

- ✓ Date of letter
- ✓ Case identification information
- ✓ Signature block
- ✓ Attached Proposed Decision and other appropriate attachments

Proposed Decision

Use plain paper:

- ✓ Introduction
- ✓ Identification of violations and fines
- ✓ Statements concerning how the decision was made
- ✓ Statement about burden of proof
- ✓ Statement about official record
- ✓ Purpose of the hearing: (*usually two-fold: Did violations occur? Were fines set in correct class?*)
- ✓ List of persons present at the hearing, including:
  - Witnesses,
  - Other persons involved in the hearing (e.g., County Advocate, Respondent, translators, etc.), and
  - Observers (*persons in attendance but not involved in the hearing*)
- ✓ If there was a pre-hearing conference:
  - Persons attending pre-hearing conference
  - Detailed results of pre-hearing conference, including a list of stipulations (if any)
- ✓ Issues (or "Issues to be Determined) with basic description, including any issues that were not stipulated to.
- ✓ The entire text of the law or regulation violated
- ✓ Findings of Fact (*attempt to organize by "issue"*)
- ✓ Analysis (or "Discussion"). This includes the factual scenario, based upon testimony and evidence presented at hearing (*this should be the longest part of the Proposed Decision*)
- ✓ Determination of Issues (sometimes called "Findings") (*organize by issue*)
- ✓ Request to Commissioner to adopt the Proposed Decision
- ✓ Signature block

Return the case file with the documentary exhibits and copy of the hearing audio file to the CAC with the Proposed Decision.

Section 11.3
The Commissioner's Decision

Decision timelines

The Hearing Officer's Proposed Decision should be mailed or delivered to the CAC in a timely manner. There is no "time limit" per se, but in fairness to all parties it should be forwarded to the CAC within 30 days of the hearing.

The CAC should process the Proposed Decision and issue the Commissioner's Decision in a timely manner. Again, there is no "time limit" but 10 to 15 days should be sufficient in most cases.

Who writes and mails what?

The Hearing Officer writes the Proposed Decision on plain paper, signs, and dates it, then mails or delivers it to the CAC, along with the official record including all evidence submitted during the hearing.

If the Proposed Decision upholds the violations alleged in the NOPA, the CAC "adopts" it as the Commissioner's Decision on County letterhead, "orders" the fine to be paid, and provides the Respondent with written appeal instructions. Then, the CAC mails or delivers the Commissioner's Decision, adopted Proposed Decision, order, appeal rights, and any other pertinent instructions related to closing the matter (i.e., how to pay, who the check should be made payable to, etc.) to the Respondent.

Final decision

A Commissioner's Decision can become "final" at various points after the issuance of the CAC's decision at the county level. A decision becomes "final" only if:

1. No appeal is made to the appropriate body within the time period allowed by statute, or
2. All possible appeals have been taken and decisions rendered on those appeals, or
3. The Respondent pays the fine.

Director's/ DRC's Decision and Final Order

When a Commissioner's Decision is appealed to the Director or DRC, the Decision by the Director/DRC may also be referred to as the "Director's Decision on Appeal," or "Disciplinary Review Committee's Decision on Appeal." The Director's/DRC's Decision is considered a "Final Order" if the Respondent does not appeal the matter within the time period permitted by statute.

Section 11.3.1
Review of Certain Proposed Hearing Decisions by DPR

Background

Certain CAC draft Decisions must be sent to DPR for review prior to being sent to the Respondent.

Hearing decision review criteria

For hearing decisions that involve a human health Reportable Incident or other substantial adverse effect to human health, before issuing the Commissioner's Decision to the Respondent the CAC must first submit it to the appropriate DPR Regional Office (RO) for review, if:

- The Hearing Officer's Proposed Decision modifies or overturns the action that the CAC proposed in the NOPA, or
- The Hearing Officer's Proposed Decision upholds the action proposed in the NOPA, but the CAC plans to modify or reject the Proposed Decision.

What to submit

When sending a decision to the DPR RO for review, please include:

1) The Hearing Officer's Proposed Decision.
2) A draft of the Commissioner's Decision, indicating whether the CAC plans to adopt, modify, or reject the Hearing Officer's Proposed Decision.
3) A copy of the investigation report, inspection form, or other documentation of the violations identified in the NOPA.

DPR consultation

DPR will consult with the CAC regarding these types of decisions within 30 calendar days of DPR's receipt of the Hearing Officer's Proposed Decision.

If a CAC wants guidance on options regarding a Hearing Officer's Proposed Decision, the RO will contact DPR headquarters to make a DPR legal staff attorney available.

Section 11.3.2
CAC Changes to a Hearing Officer's Proposed Decision

Issue

How does the Commissioner respond if they disagree with the Hearing Officer's Proposed Decision?

Background

A Respondent's basic due process rights for administrative civil penalties are reasonable notice, a reasonable opportunity to be heard, and an impartial decision maker. If requested by the Respondent, the Commissioner must provide a hearing before levying a penalty. The hearing establishes the facts of the case and provides due process to the Respondent.

CAC should be able to agree with the adopted decision

The Commissioner, not the Hearing Officer, has the authority and responsibility to levy penalties. The Commissioner is not required in all cases to adopt the Hearing Officer's Proposed Decision in its entirety, but the Commissioner should basically agree with the decision they adopt. The Commissioner **may decline to adopt an error** in the Hearing Officer's Proposed Decision and issue a Commissioner's Decision and Order **based on the hearing record**, within certain limits.

This is a legitimate exercise of the Commissioner's authority that may avoid reversal on appeal and may be the only opportunity to correct a Hearing Officer's error. The Respondent may appeal the CAC's Decision and Order to the Director or the DRC, as appropriate.

Due process limits the CAC's discretion relating to findings of facts

The Respondent's right to due process limits the Commissioner's discretion to reject a finding of fact in the Hearing Officer's Proposed Decision.

The Commissioner may overrule a Hearing Officer's findings of fact **only if there is no substantial evidence, in the hearing record, to support it**. The hearing creates the administrative record and provides the Respondent with an opportunity to review and respond to the County's evidence before an impartial arbiter as required by principles of due process. The hearing record is the sole source of facts in the case. The Commissioner must only rely on evidence admitted at the hearing as the basis of the Decision to levy a penalty. Furthermore, deference is given to the Hearing Officer as the finder of fact. The Commissioner must accept the Hearing Officer's judgments about the relative weight and credibility of conflicting evidence.

Continued on next page

CAC Changes to a Hearing Officer's Proposed Decision,
Continued

Due process limits the CAC's discretion relating to findings of facts, (continued)

Where a Commissioner's Decision overrules a Hearing Officer's finding of fact that is supported by substantial evidence in the record, the Director of DPR or the DRC will overturn that Decision.

CAC's independent judgment limited to application of law

The Commissioner may use their independent judgment when overriding a Hearing Officer's interpretation of the law. The Commissioner need not defer to the Hearing Officer's interpretation of the law if it is incorrect. When the Commissioner believes the Hearing Officer incorrectly interpreted the law, then the Commissioner should correct that error in the Commissioner's Decision and Order to levy the penalty. If the Respondent appeals the Decision on that basis, then the Director or DRC would exercise their independent judgment in resolving potential misinterpretations of law.

CAC must review record and articulate reasoning

Consider these points when reviewing the Hearing Officer's Proposed Decision:

- The "substantial evidence" standard is not a high standard. The standard is whether any reasonable person could come to that conclusion of fact based on the evidence in the record. The Commissioner should review the entire record before making this determination.

- Whenever the Commissioner overrules a Hearing Officer's legal interpretation or finding of fact, the Commissioner should carefully explain their reasoning in the Commissioner's Decision. Letting the Respondent know the basis of the Commissioner's action respects the Respondent's procedural rights and can avoid unnecessary expense for everyone involved. A clearly written and well-reasoned Order helps the Respondent make an informed decision about whether to appeal and, if the Respondent decides to appeal, facilitates that process.

Continued on next page

CAC Changes to a Hearing Officer's Proposed Decision,
Continued

Review standards

1. The Commissioner must personally review the hearing record before changing a Hearing Officer's Proposed Decision. The record of the hearing is the sole source of facts in the case. The Commissioner must only rely on evidence admitted at the hearing and cannot rely upon another person's interpretation of what happened and what was said at the hearing or insert their own personal knowledge of the facts (that may or may not have been presented at the hearing).

2. As a matter of law, deference must be given to the Hearing Officer as the "finder of fact." The Commissioner must accept the Hearing Officer's judgments about the relative weight and credibility of conflicting evidence.

3. The Commissioner may overrule a Hearing Officer's "finding of fact" only when there is no substantial evidence (in the hearing record) to support the finding.

4. The Commissioner may decline to adopt a Hearing Officer's error or misinterpretation of law in the Hearing Officer's Proposed Decision and instead issue their own decision about the application of that rule or law, based on the hearing record. The Commissioner may only use their independent judgment to override a Hearing Officer's interpretation of the law, i.e., to resolve a legal question. However, it must be understood that if the Respondent appeals the Commissioner's Decision on that basis, then the Director or DRC would exercise the independent judgment in resolving that legal question.

5. When a CAC's decision overrules a Hearing Officer's finding of fact that is supported by substantial evidence in the hearing record, the Director of DPR or the DRC will overturn that decision.

Section 11.3.3
Notice of Decision and Order Templates

Introduction

This section contains templates for the letter the Commissioner sends to a Respondent when the Commissioner decides to adopt a Hearing Officer's Proposed Decision. There are separate Notice of Decision and Order templates for Agricultural Civil Penalties and Structural Civil Penalties. As appropriate, remove the *italicized* text and fill in the blanks.

Both the "Adoption of Proposed Decision and Order" and "Appeal Rights and Instructions" must be sent to the Respondent, as well as a copy of the Hearing Officer's Proposed Decision.

Note: These templates do not address actions under B&PC sections 8663 and 8664.

Continued on next page

Notice of Decision and Order, Continued

Notice of Decision and Order template - Agricultural Civil Penalty

[*County Letterhead***]**

COMMISSIONER'S NOTICE OF DECISION AND ORDER TO PAY FINE

DATE:

FILE NO.:

TO: *Respondent Name*
Address

Mr./Ms. _____

I have adopted the Hearing Officer's Proposed Decision, in its entirety, for file No. _____, also known as County of _____ v. _____. The Hearing Officer made a finding that you violated [*California Food and Agricultural Code* (*FAC)* or *Title ___ California Code of Regulations (_ CCR)*] section [___] and upheld the fine of $_____. [*Repeat sentence for each violation*].

The Decision and appeal information are enclosed with this letter.

This Order shall become effective **30** days after the Respondent receives the Decision, unless an appeal is timely filed with the Director of the California Department of Pesticide Regulation.

COMMISSIONER'S ORDER TO PAY FINE

The total fine of $____ is now due and payable

You may send the payment to: County of _____
Agricultural Commissioner's Office
Address

Make the check payable to: [*County name*] Agricultural Commissioner.
Please note on the check: FILE NO. [*NOPA number*].

Commissioner Signature
Commissioner's Official Title
Attachments: Hearing Officer's Proposed Decision for File No. ____
Appeal Rights and Appeal Instructions

Continued on next page

Notice of Decision and Order, Continued

Notice of Decision and Order template - Structural Civil Penalty

[*County Letterhead***]**

COMMISSIONER'S NOTICE OF DECISION AND ORDER TO PAY FINE

DATE:

FILE NO.:

TO: *Respondent Name*
Address

Mr./Ms. _____

I have adopted the Hearing Officer's Proposed Decision, in its entirety, for file No. _____, also known as County of _____ v. _____. The Hearing Officer made a finding that you violated [*Business and Professions Code (B&PC), California Food and Agricultural Code* (*FAC)* or *Title ___ California Code of Regulations (_ CCR)*] section [___] and upheld the fine of $_____. [*Repeat sentence for each violation*].

The Decision and appeal information are enclosed with this letter.

This Order shall become effective **30** days after the Respondent receives the Decision, unless an appeal is timely filed with the Disciplinary Review Committee of the Structural Pest Control Board.

COMMISSIONER'S ORDER TO PAY FINE

The total fine of $____ is now due and payable

Make the check payable to: Structural Pest Control Board Education and Enforcement Fund

Mail the check and this Order to:
Structural Pest Control Board, 2005 Evergreen Street Suite 1500, Sacramento CA 95815-3831. **Please note on the check: FILE NO. [*NOPA number*]**

Commissioner Signature
Commissioner's Official Title
Attachments: Hearing Officer's Proposed Decision for File No. ____
Appeal Rights and Appeal Instructions

Continued on next page

Notice of Decision and Order, Continued

Appeal Rights and Instructions template – Agricultural and Structural Civil Penalties

APPEAL RIGHTS AND APPEAL INSTRUCTIONS

FILE NO.:

Within **30 days** of the date of receiving this notification, you may appeal the Commissioner's Decision to the [*Director of the Department of Pesticide Regulation* or *Disciplinary Review Committee*]. The following instructions must be followed:

- Your appeal request must be in writing, be signed by you or your authorized agent, and must state grounds for the appeal (i.e., the reasons why you believe the Commissioner's Decision is in error);

AND

- Your appeal request must contain a copy of the Commissioner's Notice of Decision and Order to Pay Fine;

AND

- Your appeal request must be mailed, at the same time, to both the [*Director of the Department of Pesticide Regulation* or *Disciplinary Review Committee*] and the _____ County Agricultural Commissioner as specified below:

    - One copy of the appeal must be mailed to:
      [*Director* or *Disciplinary Review Committee*]
      c/o Chief Counsel – Office of Legal Affairs
      Department of Pesticide Regulation
      P.O. Box 4015
      Sacramento, CA 95812-4015

    - One copy of the appeal must be mailed to:
      [*Agricultural Commissioner's Name*]
      _____ *County Agricultural Commissioner*
      Mailing Address
      City, CA, Zip

Please make sure to include your telephone number, with area code, so that a representative of the [*Director* or *Disciplinary Review Committee]* may contact you if there is a problem with your appeal request.

Continued on next page

Notice of Decision and Order, Continued

Appeal Rights and Instructions template – Agricultural and Structural Civil Penalties, (continued)

On appeal pursuant to [*Food and Agricultural Code section 12999.5* or *Business and Professions Code sections 8617 and 8662*], the [*Director* or *Disciplinary Review Committee*] may affirm the Commissioner's Decision, reverse the Commissioner's Decision, or modify the Commissioner's Decision by reducing or increasing the amount of the penalty levied so that it is within the [*Director's* or *Structural Pest Control Board's*] guidelines for imposing civil penalties. Any civil penalty increased by the [*Director* or *Disciplinary Review Committee*] shall not be higher than that proposed by the Commissioner in the Notice of Proposed Action.

The [*Director* or *Disciplinary Review Committee*] decides the appeal on the record of the hearing and the written decision received. No new evidence may be admitted to the record on appeal. Request for oral arguments may be made, but they are granted on a case-by-case basis. If the [*Director* or *Disciplinary Review Committee*] finds substantial evidence in the record to support the Commissioner's Decision, the [*Director* or *Disciplinary Review Committee*] will affirm the decision.

The [*Director* or *Disciplinary Review Committee*] will render a written decision within 45 days of the date of appeal or as soon thereafter as practical. A copy of the [*Director's* or *Disciplinary Review Committee's*] decision shall be delivered or mailed to the appellant and the Commissioner.

Section 11.4
Appellate Review

Hearing record preservation

When the Hearing Officer submits the Proposed Decision to the Commissioner, the Hearing Officer also submits the entire record (NOPA and all exhibits introduced during the hearing including posters, CDs, and audio recording of the hearing) used in preparing the Proposed Decision. This includes both the County's and Respondent's materials. Any marks, notes or writings made on these materials are also part of the Official Record. These exhibits and materials must be safeguarded until the Respondent's appeal rights have been exhausted.

Substantial evidence standard

If the Commissioner's decision is appealed to the Director/DRC or to a court, the standard of review is "substantial evidence." Substantial evidence means enough relevant evidence and inferences from that evidence to support a conclusion, even though other conclusions might have been reached. It is a higher standard than the "preponderance of evidence" for the civil penalty hearings.

Although related, these standards have several key distinguishing features:

	Preponderance of the Evidence	Substantial Evidence
What?	The government must prove that the alleged violation was "more likely than not" to have occurred.	The CAC's Decision must be based on enough relevant evidence and inferences from that evidence to support a conclusion, even though other conclusions might also have been reached.
When?	The government must prove the alleged violation according to this standard at the hearing.	The CAC's Decision is reviewed by DPR/DRC and courts according to this standard.

Notification of appeal

If the Appellant (formerly the Respondent) appeals the Commissioner's Decision to the Director or DRC, the Appellant should also send the appeal letter to the Commissioner. CAC staff should prepare to send the Hearing Officer's original copies to DPR/DRC when requested.

Department of Pesticide Regulation - Office of Legal Affairs
1001 I Street, MS4D
P.O. Box 4015
Sacramento, CA 95812-4015

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Appellate Review, Continued

Grounds for appeal	The Appellant (formerly the Respondent) is required to state the grounds for the appeal. The review of the Director/DRC is not necessarily limited to the grounds stated. For example, the "grounds" stated may be that the violation did not occur. The Director/DRC could find there is substantial evidence to uphold the Commissioner's Decision that the violation did occur, and could also find there is not substantial evidence to support the Commissioner's Decision the violation was a Class A/Serious violation under 3 CCR section 6130/16 CCR section 1922. In this case, the amount of the fine will be modified even though the amount of the fine was not stated as grounds for appeal.
Arguments	The Director and DRC have no authority to deny written arguments. If a case is appealed to the Director or the DRC, the Respondent may submit written arguments. The Commissioner may also submit written arguments as to why the Commissioner's Decision is correct and why it should be upheld. The governing laws do not authorize a hearing but do allow the Director or DRC to grant "oral arguments." Decisions as to oral arguments are made on a case-by-case basis.
Witness credibility	Issues of witness credibility are the province of the Hearing Officer. If a Commissioner's Decision is appealed, the Director/DRC is required to affirm the decision if there was substantial evidence in the hearing record to support the decision, even though other decisions might also have been reached.
No new evidence	The Director/DRC decides an appeal based on the record before the Hearing Officer. The Director/DRC cannot consider new evidence in reaching a decision on appeal.