

Chapter 8

The Administrative Civil Penalty Hearing

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Section 8.1 Chapter Overview

**Purpose of
chapter**

This chapter provides a broad overview of the Commissioner’s pesticide administrative civil penalty hearing process. As standard practice, the Commissioner is not the Hearing Officer for administrative pesticide penalty hearings that occur in their county. CACs usually use the services of a Hearing Officer to conduct the hearing on behalf of the Commissioner. This chapter, and following chapters, are written with that in mind.

More details are contained in both the chapters for the Hearing Officer (Chapter 9) and County Advocate (Chapter 10). This chapter also includes issues which may come up before or during the hearing which are not covered elsewhere.

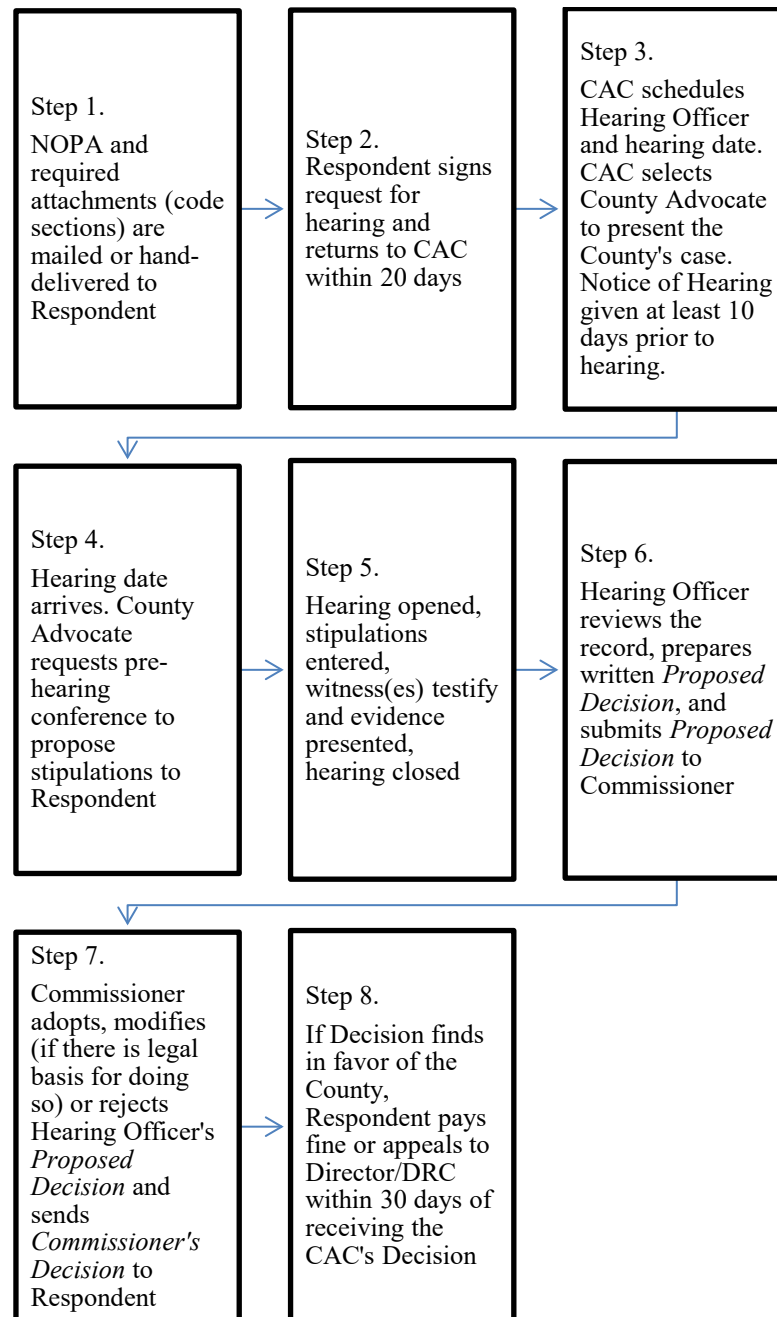
Please consult Appendix A *History of Administrative Adjudication* and Appendix B *Right to Due Process* for additional information.

Section 8.2 The Hearing Process

Introduction

The following diagram shows the process flow from the NOPA through the Commissioner's Decision and Order.

Order of process – a visual overview



Section 8.2.1

Roles of People Involved in Pesticide Penalty Hearings

Introduction There are many persons who may be involved in the hearing. Here is a description of their roles and some rules that may apply to these persons while in their roles.

Hearing Officer In most cases the Hearing Officer is not the Commissioner but can be under certain circumstances. The Hearing Officer presides over the hearing as the person authorized by the Commissioner to “hear” the case on the Commissioner’s behalf and provides a written *Proposed Decision* to the Commissioner. The Hearing Officer’s role is to hear the case fairly, impartially, and without bias.

The Hearing Officer may be an employee of the county where the matter is being heard, an employee of a nearby county, a retired commissioner or retired county employee, or a CACASA contractor employed specifically for the purpose of acting as a Hearing Officer. The Hearing Officer should have no prior knowledge of the particular incident and alleged violation(s) at issue.

Commissioner The Commissioner is responsible for enforcing the laws and regulations pertaining to pesticide use within the County. The Commissioner:

- Sets the fine amount in the NOPA within the fine guidelines,
- Assigns a County Advocate to present the case,
- Assigns a Hearing Officer to hear the case and write a *Proposed Decision* for the Commissioner, and
- Issues the Decision and/or Order.

County Advocate The County Advocate is generally the CAC employee assigned to present the County’s case against person(s) alleged to have committed pesticide use violation(s).

Expert witness An expert witness is a person who has special knowledge and skills recognized by the Hearing Officer as relevant to the determination of guilt or innocence. Expert witnesses may express opinions or draw conclusions based on facts presented in testimony, unlike lay witnesses (non-expert witnesses).

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Roles of People Involved in Pesticide Penalty Hearings, Continued

- Lay witness** A lay witness is an eyewitness, character witness, or any other person called upon to testify, who is not considered an expert. Lay witnesses must testify to facts alone and may not draw any conclusions or express opinions. Other terms for “lay witness” may include:
- an “eyewitness” who saw the violation being committed or who came upon the violation scene shortly after the violation occurred, or
 - a “percipient witness” who perceived the things about which they testify (e.g., an eyewitness perceives with their eyes and sees, an ear witness perceives with their ears and hears).
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- Respondent** For the purposes of the administrative civil penalty process, a Respondent is the person (e.g., individual, group, or business) charged with the violation(s). The Respondent is entitled to:
- Know the alleged violation(s) and proposed fine (NOPA), and understand the administrative civil hearing process (“Preparing for Your Administrative Pesticide Penalty Hearing” brochure)
 - Review and hear evidence that is the basis for the proposed fine or penalty action
 - A full and fair consideration of relevant evidence by an impartial Hearing Officer
 - Question witnesses on relevant matters
 - Present evidence on their behalf
 - Represent themselves, be represented by an attorney, or by a designated representative at the hearing
 - Appeal if they participate in the hearing and request the appeal within 20 days of Commissioner’s Decision
-

- Respondent’s representative** The Respondent’s representative may be an attorney, a family member, or an officer or employee of the Respondent.
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- Observers** Administrative civil penalty hearings are not closed to the public; however, the hearings are not a venue for unsolicited public comment. Observers or audience members must not disturb or otherwise delay the hearing or act discourteously toward others in the hearing. The Hearing Officer may remove any persons who disrupt or delay the hearing or treat others in the hearing in a discourteous manner from the hearing room.
-

Section 8.2.2 Hearing Outline

Introduction This section outlines, in broad strokes, the process of conducting a hearing. More details are contained in the Chapters for The Hearing Officer (Chapter 9) and The County Advocate (Chapter 10).

Pre-hearing conference The purpose of the pre-hearing conference is to see if any voluntary agreements (“stipulations”) concerning some relevant points can be reached between the parties. Stipulations are discussed in more detail in Chapter 10.

Pre-hearing conference: attendees Only the County Advocate and one assistant, Respondent, and/or Respondent’s representative, are allowed in the pre-hearing conference:

The following people are NOT allowed in the pre-hearing conference:

- The Hearing Officer,
 - Witnesses and persons who are not parties to the action,
 - Assistants who will be percipient witnesses at the hearing,
 - Court reporters, and
 - The Commissioner.
-

Pre-hearing conference: cannot “settle” the case The pre-hearing conference is not a settlement conference. CACs do not have authority to negotiate settlements for administrative civil penalty actions concerning pesticide use laws and regulations. In practical terms, the pre-hearing conference is only about reaching stipulations about the facts of the case. The Respondent could stipulate to the facts of the case and agree to pay the fine. In that instance, encourage the Respondent to sign the Stipulation and Waiver to Order, effectively ending the need for the hearing.

Otherwise, every violation charged in the NOPA mailed to the Respondent must go forward to the Hearing Officer at the hearing. The NOPA cannot change during the pre-hearing conference. The parties cannot agree to go into the hearing with fewer violations, fewer counts, or adjustments to the fine amounts which were proposed in the NOPA.

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Hearing Outline, Continued

Introductory remarks

The Hearing Officer is responsible for the smooth and efficient running of the hearing. The Hearing Officer:

- Introduces the hearing participants and asks the persons present why they are at the hearing, primarily to determine who may have to be excluded from the hearing room to protect potential testimony from being compromised.
 - Instructs persons who have not signed in to do so.
 - Reviews rules of the hearing and asks if there are questions about procedures.
 - Administers an oath to all potential witnesses, County Advocate and Respondent. If the Respondent's representative is a member of the California Bar, they do not have to participate in the oath.
 - Tests recording equipment or has an assistant test the recording equipment.
 - May inquire about the State Bar status or qualifications of the Respondent's representative. The purpose of this inquiry is to prevent the unauthorized and/or unqualified practice of law. DPR generally allows a family member, employee, or an officer of the Respondent's business to represent the Respondent; however, consultants who are not licensed attorneys cannot represent a Respondent.
-

The hearing begins

The Hearing Officer starts the hearing:

- Opens the hearing to the public
 - Verifies recording equipment is functioning correctly
 - Administers oath
 - Clears the room of any potential lay witnesses
 - Reads any pre-hearing stipulations into the record and makes a written record of stipulations
 - Does a "voice check" or oral identification for each witness before they testify, and identifies each speaker before they begin speaking, in case the matter goes to appeal so the reviewer can more easily identify the participants
-

During the hearing

The Hearing Officer:

- Tests recording after each break for the remainder of the hearing
 - Marks County and Respondent exhibits
-

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Hearing Outline, Continued

Hearing outline checklist County's Case and Witness(es):

County Advocate		Respondent	
	1. County's Opening Statement (optional)		1a. Respondent's Opening Statement (optional: now or later, but not both)
	2. Direct examination of first County witness		3. Cross examination of first County witness (optional)
	4. Re-direct examination of first County witness (optional)		5. Re-cross examination of first County witness (optional)
	6. Direct examination of second County witness		7. Cross examination of second County witness (optional)
	8. Re-direct examination of second County witness (optional)		9. Re-cross examination of second County witness (optional)

... and so on if there are succeeding witnesses.

Respondent's Statement and Witness(es)

County Advocate		Respondent	
			1a. Respondent's Opening Statement (optional, if not done earlier)
	3. Cross examination of first Respondent witness (optional)		2. Direct examination of first Respondent witness
	5. Re-cross examination of first Respondent witness (optional)		4. Re-direct examination of first Respondent witness (optional)
	7. Cross examination of second Respondent witness (optional)		6. Direct examination of second Respondent witness
	9. Re-cross examination of second Respondent witness (optional)		8. Re-direct examination of second Respondent witness (optional)

... and so on if there are succeeding witnesses.

Concluding remarks

County Advocate		Respondent	
	1. Closing Argument (optional)		2. Closing Argument (optional)

Hearing closes The Hearing Officer:

- Admonishes employers about retaliation for testimony provided if appropriate.
- Instructs all parties and representatives that future contact with the Hearing Officer regarding this case is prohibited.
- Closes the record and restates that no additional evidence will be considered.
- States that a Proposed Decision will be submitted to the Commissioner in approximately 30 days.

Section 8.3 Consolidated Hearings

Background Occasionally, multiple parties may be responsible for violations pertaining to the same incident or pesticide episode (though, the violations do not need to be the same). The most likely scenario for this type of situation is one in which a grower and a certified or licensed applicator, labor contractor, or supervisor (who is also a certificate or license holder) were involved in an incident. A consolidated hearing may be convenient and expeditious for all parties.

Separate NOPAs and Decisions NOPAs cannot be consolidated. To ensure proper “notice” there must be a separate NOPA for each Respondent. There also must be a separate Decision and Order for each Respondent.

Communications for consolidated hearings It is important for the Commissioner and the Hearing Officer to communicate about the possibility of scheduling consolidated hearings (for one incident or episode) before the NOPAs are mailed to Respondents. Even if the Commissioner wants to schedule consolidated hearings, the Hearing Officer may prefer to hold separate hearings. The Hearing Officer should have the final say in the decision of whether to hold a consolidated hearing.

Considerations for consolidated hearings The Hearing Officer may not wish to hold consolidated hearings because of:

- Perceived or real complexity of issues. However, despite the complexity of issues, having everyone present may help sort out complex issues and give everyone an opportunity to be heard.
- Concerns that employee testimony may be compromised by fears of retaliation.
- Concerns that employees may feel intimidated.
- Scheduling difficulties arising from the need for a large block of time for one consolidated hearing versus two or three shorter hearings.

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Consolidated Hearings, Continued

**DPR
recommendations**

The consolidation of hearings falls within the discretion of the CAC and the Hearing Officer. Although the Hearing Officer should have the final say in the matter, DPR strongly recommends granting a Respondent's request for a separate hearing if one is submitted. If the Hearing Officer consolidates hearings, it is advisable to let the Respondents know they can request a separate hearing. Denial of a Respondent's request for a separate hearing is likely to result in an appeal to the Director.

Because of the challenges in managing multiple cases simultaneously, DPR suggests that consolidated hearings be conducted by experienced Hearing Officers and County Advocates. In all cases, it is the CAC's responsibility to ensure that all Respondents in administrative civil penalty actions have proper notice, have an opportunity to be heard, and are treated fairly.

Section 8.4 Hearing Scheduling Difficulties

Background When the Respondent has been charged with a violation, they have the right to be heard (due process).

Due Process For administrative civil penalties, FAC section 12999.5 and B&PC section 8617 require the person charged with the violation (the Respondent) be given a written NOPA. The Respondent has the right to request a hearing within 20 days after receiving the NOPA. A NOPA sent by certified mail to the last known address of the Respondent is considered received, even if delivery is refused or the notice is not accepted at that address. The CAC may take steps beyond delivery by certified mail, such as also emailing or faxing the NOPA to the Respondent, if the CAC believes it may help ensure the Respondent receives the NOPA.

If a hearing is requested, notice of the time and place of the hearing shall be given at least 10 days before the date set for the hearing.

At the Hearing, the Respondent shall be given an opportunity to review the CAC's evidence and to present evidence on their behalf. If a hearing is not requested by the Respondent within 20 days of receiving the NOPA, the CAC may take the action proposed without a hearing.

Respondent requests a hearing, but cannot be contacted to set a hearing date

If the Respondent requests a hearing but does not respond to calls from the CAC to schedule the hearing, or cannot be reached by telephone, a hearing notification letter should be sent to the Respondent's address by certified mail. The letter should indicate the date, time, and location of the hearing. The letter should also notify the Respondent that any proposed changes to the hearing date must be requested in writing and received by the CAC's office not less than **five** days before the scheduled hearing date, except in cases of emergency.

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Hearing Scheduling Difficulties, Continued

Respondent requests to reschedule the hearing

A hearing date has been scheduled, and the Respondent asks that it be rescheduled. How many times would it be appropriate for the CAC's Office to reschedule the hearing?

It may be reasonable, to assure the due process rights of the Respondent, for the CAC to allow the Respondent to reschedule at least once. To grant second and any subsequent requests to reschedule is at the discretion of the CAC. Care should be taken to avoid the considerable costs of repeatedly rescheduling the hearing unless warranted by the facts of the situation. If the Respondent's request to reschedule is denied, the Respondent should be notified that the statutorily required "opportunity to be heard" takes place at the scheduled hearing, and that the hearing will proceed whether or not they attend the hearing.

Respondent is late for the hearing

What if the Respondent appears, but is late for the hearing?

The Hearing Officer needs to be flexible in these situations. In most cases, the hearing should proceed.

Hearing Officer is late for the hearing

What if the Hearing Officer is late and the Respondent, who appeared on time, leaves before the Hearing Officer arrives?

While this is unfortunate, it does *not* require the CAC to withdraw the action. The CAC should reschedule the hearing.

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Hearing Scheduling Difficulties, Continued

**Hearing is
scheduled;
Respondent
fails to appear**

If the Respondent fails to appear at the scheduled hearing but calls on the day of the hearing to ask for a continuance, the Hearing Officer should consider whether there is good cause for continuance (i.e., an emergency). Unless continuing the hearing would impose a significant hardship on the County, brief continuances (i.e., one week to 10 days) should be granted.

If it is decided that a continuance is unwarranted, then the hearing should proceed as scheduled. Even if the Respondent had made a written request (within 5 days of the hearing) which was denied, it should be assumed that the Respondent will appear. If the Respondent was notified the request to reschedule was denied, and still fails to appear as scheduled, the hearing should proceed.

It is important to note that when the Respondent sends in a written hearing request but does not attend the hearing, they are still entitled to a written decision from the Commissioner (however appeal rights are forfeited). The most prudent course of action is for the Hearing Officer and County Advocate to proceed with the presentation of the County's case as if the Respondent were present. The Hearing Officer might suggest to the County Advocate:

“Identify each violation in the NOPA, outline the elements of each violation, and present the evidence you have to prove those elements. Briefly explain why the Commissioner chose the fine category and fine amount within the fine range (for each violation). Summarize why I should find in the County’s favor.”

When the Hearing Officer goes on the record, it should be noted that the Respondent was given the opportunity to be heard but has not appeared and has forfeited their rights to be heard and cannot appeal the decision. The County Advocate presents the County’s evidence (addressing all the elements of the violation(s) and fine amount(s)) on the record to the Hearing Officer. At the close of the hearing, the Hearing Officer reiterates that the Respondent did not appear and has forfeited their rights to be heard and cannot appeal the decision. The Hearing Officer writes a Proposed Decision based on the evidence in the record and submits it to the Commissioner.

Section 8.5

Violations Discovered at Hearing

New violations discovered How does a County Advocate respond when the Respondent introduces evidence, as a defense, that clears the Respondent of the charges or supports or indicates additional violations that were previously unknown and therefore not included in the present NOPA?

Background On rare occasions, the Respondent may present evidence at the hearing which if found to be true, may either clear the Respondent of the violation charged, or support a different or new violation.

Response As discussed earlier, every violation charged in the NOPA received by the Respondent must go forward to the Hearing Officer at the hearing. At the hearing, for situations where, based upon new information, the County Advocate believes the Respondent did not commit the violation charged, DPR recommends the Advocate discuss it with County management first. In the interest of fairness and efficiency the Advocate may then inform the Hearing Officer to may make a finding in the Proposed Decision the County did not prove its case regarding a particular charge.

Only the violations in the NOPA received by the Respondent can be addressed in the hearing. For a previously unknown violation, there is no action the Advocate can take during the hearing.

After the hearing, if the Commissioner wishes to bring charges of new or additional violations against the Respondent, the Commissioner must prepare a new NOPA and start the process over from the beginning (mailing or providing the new complete NOPA package to the Respondent) being mindful the statute of limitations (FAC section 13000(a) or B&PC section 8617(n)) is based on the occurrence of the violation, not when the evidence was discovered.

Section 8.6 Amending Fine Amounts

Background

In setting the fine amount in the NOPA, it should generally be presumed the Commissioner:

1. Determined the appropriate fine class after first consulting 3 CCR section 6130 or 16 CCR section 1922.
 2. Considered the overlapping fine ranges and any extenuating/mitigating factors.
 3. Is properly exercising the Commissioner's discretion.
-

Reasons must be stated in the NOPA

For actions under FAC section 12999.5, when determining the fine amount within the range 3 CCR section 6130(d) requires the Commissioner to include in the NOPA the relevant facts, including severity of actual or potential effects and the Respondent's compliance history.

A finding of an error must be made to adjust the fine

A Hearing Officer generally cannot reduce the amount of the fine. As outlined in Section 11.2.3 *Hearing Officer Changes to CAC fines*, the Hearing Officer must show the violation was misclassified; the Commissioner incorrectly applied 3 CCR section 6130 or 16 CCR section 1922; and give facts supporting that determination in the Proposed Decision. It is not appropriate for the Hearing Officer to reduce a fine based solely upon discretion or personal opinion.

"Amending" the NOPA

The CAC has the option to change a proposed fine after a NOPA is issued but *before* the hearing in the following two situations:

- When the Commissioner realizes the proposed fine is in excess of authority (e.g., the NOPA states the violation is a Class B violation and the proposed fine is greater than allowed for Class B). In this case, the Commissioner can withdraw the initial NOPA and then issue a new NOPA with an amended proposed fine.
 - When the Commissioner realizes the violation was misclassified (e.g., the violation was noticed as Class B or Moderate, but should have been classified as Class A or Serious). In this case, the CAC can withdraw the initial NOPA and issue a new NOPA reclassifying the violation as Class A or Serious and proposing a new fine within the appropriate fine range.
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Amending Fine Amounts, Continued

**Amending the
NOPA during
the hearing**

Adjusting proposed fines during a hearing is discouraged, should be extremely rare, and has the potential to deprive the Respondent of their due process rights.

In circumstances where the fine in the NOPA is in excess of the authority or the violation was misclassified in the NOPA, the County Advocate could point out the County's error at the hearing and request that, if the Hearing Officer finds the violation occurred and that it fits within a particular classification, the Hearing Officer order a fine within the proper range for that classification of violation. The fine cannot be more than originally proposed in the NOPA.

Section 8.7 Unlawful Practice of Law

Issue Can non-lawyers represent parties in CAC administrative civil penalty hearings?

Analysis B&PC section 6125 states “No person shall practice law in California unless the person is an active member of the State Bar.” B&PC section 6126 makes it a misdemeanor to advertise or hold oneself out as practicing law or otherwise practicing law, punishable by up to one year in county jail or a fine of up to \$1000, or both.

Representing parties that appear in an administrative hearing can be considered practicing law. The California Supreme Court discussed the practice of law in *Baron vs. City of Los Angeles* (1970) 2 Cal. 3d 535, citing that cases uniformly hold that the character of the act, and not the place where it is performed, as the decisive element. If the application of legal knowledge and technique is required, the activity constitutes the practice of law, even if conducted before an administrative board or commission.

The FAC and its implementing regulations do not address the issue of lay representation. However, DPR and CACs generally allow a Respondent to be represented by a family member or employee or officer of the Respondent. The Respondent should be prepared to demonstrate to the Hearing Officer their relationship to the representative.

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