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# Guidance For Civil Penalty Actions Against Employers or Employees For Matters Involving Pesticide Worker Safety

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## Civil Penalty Actions Against Employers or Employees for Matters Involving Pesticide Worker Safety

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The Director of the Department of Pesticide Regulation (DPR) will rely upon the following guidance when considering a pesticide worker safety appeal pertaining to employers or employees:

- Specific Regulations Versus General Provisions.
- Circumstances For Citing An Employer When An Employee Was Not Wearing Personal Protective Equipment (PPE).
- Independent Employee Action Defense.
- Employer's And Employee's Responsibilities.
- Levying Civil Penalties Against Employees.
- Proposed Civil Penalty Actions Against An Employee Must Be Consistent With Title 3, California Code of Regulations (3CCR) Section 6130.

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This document provides two examples of Notices of Proposed Action (NOPA) and one example letter to an employer.

- **NOPA** – An example of a NOPA to be used for “Citing An Employer For A Violation Of Food and Agricultural Code (FAC) Section 12973 When an Employee Was Not Wearing PPE.”
- **NOPA** – An example of a NOPA to be used for “Citing An Employee Who Was Not Wearing Label-Specified PPE,” when the PPE was available at the use site in a condition that would provide the intended protection.
- **Letter To Employer** – An example of a letter from the Commissioner's Office to the employer when the Commissioner is considering taking civil penalty action against a licensed or certified employee of the employer.

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## Specific Regulations Versus General Provisions

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DPR's pesticide worker safety regulations are "specific" as to the responsibilities of employers and employees in relation to pesticide worker safety. FAC section 12973 is a "general provision" related to the use of pesticides, and, therefore, makes no mention of specific pesticide worker safety or employer-employee responsibilities in relation to pesticide worker safety.

Under a long line of cases going back to the 1800s, the Supreme Court of California has held that:

- A general provision is controlled by specific provisions.
- Specific provisions relating to a particular subject are controlling over a general provision and govern in respect to that subject.

Therefore, when initiating a civil penalty action against an employer for matters involving pesticide worker safety, commissioners are encouraged to charge violations of DPR's specific pesticide worker safety or other applicable regulations, rather than FAC section 12973.

- For example, when an employer does not provide safety equipment such as goggles, which may also be regulated by both the label and 3CCR section 6438, it is more appropriate to cite the regulation.

## Circumstances for Citing An Employer When An Employee Was Not Wearing Personal Protective Equipment (PPE)

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Specific cases may lend themselves to using FAC section 12973 rather than the specific regulation. DPR will uphold commissioners' actions that impose a civil penalty against an employer for a violation of FAC section 12973, rather than for violation of the specific applicable regulations, under the following circumstances:

- When an employee was found not wearing label-specified PPE that was available at the use site in a condition that would provide the intended protection; **and**
- Provided the commissioner uses a NOPA that fully informs the employer of the employer's independent employee action defense and fully informs the employer of information the employer should bring to hearing to show the defense.
- There is substantial evidence in the record to support the commissioner's decision.

In other words, if label-specified PPE is not available at the use site in a condition that would provide the intended protection, then the employer did not fulfill his responsibility. In addition, if the employer claims the employee acted independently, the employer must provide evidence that the employer met the independent employee action defense. If the two above-listed circumstances did not occur, it is advisable to cite the employer for failing to fulfill a specific worker safety requirement instead of FAC section 12973.

**NOPA Example** - This is an example of a NOPA to be used when "Citing An Employer For A Violation Of FAC Section 12973 When an Employee Was Not Wearing PPE."

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## Independent Employee Action Defense

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The commissioner must have evidence showing the employee was not wearing particular label-specified PPE, and if the employer shows all the elements of the independent employee action defense, the proposed action should be dismissed and no penalty would be imposed against the employer.

The independent employee action defense recognizes employees sometimes act independently of, and contrary to, their employer's instructions, and against their employer's best safety efforts.

An employer's independent employee action defense has long been recognized by the California Occupational Safety and Health Appeals Board (OSHAB), and we will allow such a defense to be recognized for employers in the pesticide work place, if the county is able to show the employee is licensed or certified as specified in 3CCR section 6130.

*(Mercury Service, Inc., OSHAB 77-1133; Decision After Reconsideration, Oct. 16, 1980)*

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## Employer's and Employee's Responsibilities

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Under DPR's pesticide worker safety regulations, employers have certain requirements for the safety of their employees in the pesticide work place.

- Under those regulations, the employer has primary responsibility for safety in the pesticide work place.

DPR's regulations recognize that employees also bear some responsibility for their safety in the pesticide work place. The regulations require employees to utilize personal protective and safety equipment specified by pesticide product labeling or required by the regulations:

- If the equipment has been provided by the employer at the work site, **and**
- The equipment is in a condition that will provide the intended protection or safety.

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## Levying Civil Penalties Against Employees

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There are have been instances when commissioners have levied civil penalties against nonlicensed or noncertified employees found not wearing label-specified PPE for violating FAC section 12973.

Under 3CCR section 6130, commissioners can levy civil penalties against employees for violating 3CCR section 6702(c), for not wearing label-specified or regulation-specified PPE, if the employee is licensed or certified as specified in section 6130, the employer provided the PPE at the work site in a condition that would provide the intended protection, and if the other conditions specified in section 6130 are met.

These circumstances represent the most supportable criteria for commissioners to levy civil penalties against employees.

**NOPA Example** - This is an example of a NOPA to be used when “Citing An Employee Who Was Not Wearing Label-Specified PPE” (that was available at the use site in a condition that would provide the intended protection).

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## Proposed Civil Penalty Actions Against An Employee Must Be Consistent with 3CCR Section 6130

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There have been other circumstances that some commissioners have used in levying penalties against employees. For appeals brought to DPR involving other criteria, the ability of the Director to uphold the commissioners' action may be in jeopardy.

To assist commissioners in obtaining information, they will need to find the other conditions specified in 3CCR section 6130. Following is a sample letter the commissioner's office can send to the employer before drafting a NOPA to the employee. The commissioner's office would decide to take action against the employer, or against **the licensed or certified employee**, after reviewing the information, if any, obtained from the employer as a result of sending the letter requesting various information.

**Letter To Employer Example** - An example of a letter from the commissioner's office to the employer when the commissioner is considering taking civil penalty action against **a licensed or certified employee** of the employer.

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**NOPA Example To Be Used For “Citing An Employer For A Violation of FAC Section 12973 When An Employee Was Not Wearing PPE”**

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**COUNTY LETTERHEAD**

**DATE**

**NOTICE OF PROPOSED ACTION,**

**File No. xxxxxxxxxxxx**

**GROUNDS THEREFORE, AND**

**OPPORTUNITY TO BE HEARD**

**In the Matter of xxx’s (Employee’s Name)  
Failure to Wear or Utilize Personal Protective  
Equipment Specified on Pesticide Labeling**

**xxxxx**

**Address**

**Address**

**Employer/Respondent /**

**Notice of Proposed Civil Penalty Action**

The xxxx County Agricultural Commissioner is charging the Respondent with a violation of **section 12973** of the Food and Agricultural Code (FAC). The Commissioner is taking this action pursuant to *FAC section 12999.5 or section 8617 of the Business and Professions Code*. The Commissioner proposes to fine the Respondent \$xxx for this violation.

**Grounds Upon Which This Action is Based**

In relevant part, FAC section 12973 requires that the use of a pesticide not conflict with the labeling registered by the California Department of Pesticide Regulation (DPR) that is delivered with the pesticide.

The Respondent is the employer of xxxxx (employee’s name). On xxx (date), that employee was xxx (e.g., applying, mixing/loading, handling) the pesticide xxx (name of pesticide product). That product’s registered label, which was available at the use site, specifies that personal protective equipment of xxx be utilized when that activity is performed. The equipment was

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## **NOPA Example To Be Used For “Citing An Employer For A Violation of FAC Section 12973 When An Employee Was Not Wearing PPE,”**

Continued

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available at the use site in a condition that would provide the intended protection, but the employee was not wearing or utilizing that equipment. Not wearing the label-specified personal protective equipment conflicts with the pesticide’s registered labeling. A violation notice, number xxx, was issued to the Respondent for this violation on xxx (date), and a copy of the violation notice is attached to this notice.

Under the civil penalty action regulations that commissioners follow for these types of actions,

- A **minor violation** is one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect, and the fine range is \$50 to \$150 per violation.
- A **moderate violation** is a repeat of a minor violation or one that posed a reasonable possibility of creating a health or environmental effect, and the fine range is \$151 to \$400 per violation.
- A **serious violation** is a repeat of a moderate violation or one that created an actual health or environmental hazard, and the fine range is \$401 to \$1,000 per violation.

This violation of FAC section 12973 is considered a xxxx (minor, moderate, or serious) violation because xxxxxxxx.

### **Employer’s Independent Employee Action Defense to the Charges**

Under DPR’s pesticide worker safety regulations, employers have certain requirements for the safety of their employees in the pesticide work place. Under those regulations, the employer has primary responsibility for safety in the pesticide work place. The regulations also require employees to utilize personal protective and safety equipment specified by pesticide product labeling or required by the regulations, if the equipment has been provided by the employer at the work site in a condition that will provide the intended protection or safety. Thus, DPR’s regulations recognize that employees also bear some responsibility for their safety in the pesticide work place.

Employees have a responsibility to comply with their employer’s safety requirements; however, employees sometimes act independently of, and contrary to, their employer’s instructions, and against their employer’s best safety efforts.

## **NOPA Example To Be Used For “Citing An Employer For A Violation of FAC Section 12973 When An Employee Was Not Wearing PPE,”**

Continued

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Therefore, the charges against the Respondent will be dismissed and no penalty will be imposed against the Respondent if the Respondent shows all the following elements of the employer’s independent employee action defense:

1. The employer has a written training program, which includes training employees in matters of pesticide safety with respect to their particular job assignments.
2. The employer complied with all applicable employee training requirements in DPR’s pesticide worker safety regulations in Title 3, California Code of Regulations (3CCR), beginning with section 6700, with respect to this employee.
3. The employer has a written work place disciplinary action policy, which it enforces against employees who violate the employer’s safety requirements, and the employer enforced the policy against the employee for this incident.
4. At the time of the incident, the employee, through his or her pesticide safety training or knowledge of the employer’s work place disciplinary action policy, knew the employer required its employees to utilize label-specified personal protective equipment.

### **Hearing**

The Respondent has the right to be heard before the Commissioner takes the civil penalty action that is proposed.

The Respondent has the right to request a hearing within 20 days after receiving this notice of proposed action. If the Respondent or its attorney requests a hearing in a timely manner, the Commissioner’s office will schedule a hearing, and provide the Respondent with notice of the date, time, and place of the hearing at least ten days before the date set for the hearing. If there are specific dates that the Respondent or its attorney, if any, cannot appear at a hearing, the Respondent is requested to provide those dates when requesting the hearing, or as soon thereafter as practical.

Prior to the hearing, the Respondent may review the Commissioner’s evidence at the Commissioner’s office during regular business hours. Please contact xxxxx, at xxxx (telephone number), to make an appointment to review the evidence.

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## **NOPA Example To Be Used For “Citing An Employer For A Violation of FAC Section 12973 When An Employee Was Not Wearing PPE,”**

Continued

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At the hearing, the Respondent will be given an opportunity to review the Commissioner’s evidence and to present evidence, oral or written, on its own behalf. Representation by an attorney at the hearing is not required, but an attorney may accompany and represent the Respondent at the hearing.

**To show the elements of the independent employee action defense, the Respondent should bring the following information to the hearing:**

- A copy of its written training program.
- A copy of its disciplinary action policy.
- Information showing the employer complied with applicable training requirements in DPR’s pesticide worker safety regulations in 3CCR, beginning with section 6700, such as a copy of the employee’s pesticide safety training records.
- Information showing how the disciplinary action policy was enforced against the employee for this incident of not wearing personal protective equipment.

The Respondent is also encouraged to bring the employee to the hearing, if he or she is still employed by the Respondent. The Respondent may also bring other persons to the hearing, including those who may testify in regard to the employee’s training and disciplinary action taken against the employee.

The Commissioner may take the action proposed in this notice without a hearing, if the Respondent does not request a hearing within 20 days after receiving this notice. Failure to request a hearing is a waiver of the right to a hearing.

If the Respondent does not wish to request a hearing to defend against the charges and proposed action, the Respondent may stipulate to the enclosed order by dating and signing the Stipulation and Waiver to Order within 20 days of receipt, and returning it to the Commissioner’s office.

Dated: \_\_\_\_\_

\_\_\_\_\_

XXXXX

Agricultural Commissioner

Enclosure

# **NOPA Example To Be Used For “Citing An Employee Who Was Not Wearing Label-Specified PPE”**

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## **COUNTY LETTERHEAD**

**DATE**

**NOTICE OF PROPOSED ACTION,**

**File No. xxxxxxxxxxxx**

**GROUND THEREFORE, AND**

**OPPORTUNITY TO BE HEARD**

**In the Matter of xxx’s (Employee’s Name)  
Failure to Wear or Utilize Personal Protective  
Equipment Specified on Pesticide Labeling**

**xxxxx**

**Address**

**Address**

**Employee/Respondent /**

### **Notice of Proposed Civil Penalty Action**

The xxxxx County Agricultural Commissioner is charging you, the Respondent, with a violation of **section 6702(c)** of Title 3 of the California Code of Regulations (3CCR). The Commissioner is taking this action pursuant to *section 12999.5 of the Food and Agricultural Code (FAC)* or *section 8617 of the Business and Professions Code*.

The Commissioner proposes to fine you \$xxx for this violation.

### **Grounds Upon Which This Action is Based**

Under the California Department of Pesticide Regulation’s (DPR’s) pesticide worker safety regulations, employers have certain requirements for the safety of their employees in the pesticide work place. Under those regulations, the employer has primary responsibility for

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## **NOPA Example To Be Used For “Citing An Employee Who Was Not Wearing Label-Specified PPE,” Continued**

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safety in the pesticide work place. However, DPR’s regulations recognize that employees also bear some responsibility for their safety in the pesticide work place.

Under 3CCR section 6702(c), employees are required to use the personal protective equipment and other safety equipment required by pesticide product labeling or specified in DPR’s pesticide worker safety regulations in 3CCR, if the equipment has been provided by the employer at the work site in a condition that will provide the safety or protection intended by the equipment.

You are the employee of xxxxx (employer’s name). On xxx (date), you were xxxxxx (e.g., applying, mixing/loading, handling) the pesticide xxx (name of pesticide product). That product’s label specifies that personal protective equipment of xxxxx be utilized when that activity is performed. The specified personal protective equipment was at the work site in a condition that would provide the intended protection, but you were not utilizing the equipment and, therefore, you violated 3CCR section 6702(c). A violation notice, number xxx, was issued to you for this violation on xxx (date), and a copy of the violation notice is attached to this notice.

Under 3CCR section 6130, Civil Penalty Actions by Commissioners, the Commissioner may bring an action against an employee who violated 3CCR section 6702(c), when the following conditions are met:

1. The employee is licensed or certified pursuant to Chapter 14, Division 3, of the Business and Professions Code; Chapters 5 or 8, Division 6, of the FAC; or Chapters 3.4 or 3.6, Division 7, of the FAC.
2. The employer provided the equipment to the employee, and the equipment was available at the work site in a condition that would have provided the safety or protection intended by the equipment.
3. The employer, through its written work place disciplinary action policy, required the employee to utilize the equipment.
4. The employer complied with all applicable employee training requirements in DPR’s pesticide worker safety regulations in 3CCR, beginning with section 6700, before the employee failed to utilize the equipment

## NOPA Example To Be Used For “Citing An Employee Who Was Not Wearing Label-Specified PPE,” Continued

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5. The employer supervised the employee to assure the equipment was properly used by the employee.
6. At the time of the employee’s failure to utilize the equipment, the employee had knowledge of the discipline that could be imposed under the employer’s written work place disciplinary action policy for failure to utilize the equipment.

The Commissioner has contacted the *DPR Pest Management and Licensing Branch, the Structural Pest Control Board, and/or county files* to verify the status of your license and/or certificate. These records indicate you have a (xxx) license/certificate, No. (xxx if applicable), which is valid until xxx (date).

The Commissioner has determined that you are licensed or certified as specified above, and that the required safety equipment was available at the work site in a condition that would have provided the safety or protection intended by the equipment.

Your employer has provided the Commissioner with information regarding items three to six above:

- Your employer’s written work place disciplinary action policy required employees to utilize pesticide safety equipment.
- With respect to you, your employer complied with applicable employee training requirements in DPR’s pesticide worker safety regulations.
- Your employer supervised you, or your duties included supervising persons who handle pesticides or work in pesticide-treated areas.
- At the time you failed to utilize the equipment, you knew of the discipline that could be imposed against you by your employer.

Under the civil penalty action regulations that commissioners follow for these types of actions,

- A **minor violation** is one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect, and the fine range is \$50 to \$150 per violation.

## NOPA Example To Be Used For “Citing An Employee Who Was Not Wearing Label-Specified PPE,” Continued

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- A **moderate violation** is a repeat of a minor violation or one that posed a reasonable possibility of creating a health or environmental effect, and the fine range is \$151 to \$400 per violation.
- A **serious violation** is a repeat of a moderate violation or one that created an actual health or environmental hazard, and the fine range is \$401 to \$1,000 per violation.

Your violation of 3CCR section 6702(c) is considered a xxxx (minor, moderate, or serious) violation because xxxxxxx.

### Hearing

You have the right to be heard before the Commissioner takes the civil penalty action that is proposed against you.

You have the right to request a hearing within 20 days after receiving this notice of proposed action. If you request a hearing in a timely manner, the Commissioner’s office will schedule a hearing and provide you with notice of the date, time, and place of the hearing at least ten days before the date set for the hearing. If there are specific dates that you or your attorney, if any, cannot appear at a hearing, you are requested to provide those dates when requesting the hearing, or as soon thereafter as practical.

Prior to the hearing, you may review the Commissioner’s evidence at the Commissioner’s office during regular business hours. Please contact xxxxx, at xxxx (telephone number), to make an appointment to review the evidence.

At the hearing, you will be given an opportunity to review the Commissioner’s evidence and to present evidence, oral or written, on your own behalf. You may bring other persons to the hearing, including those who may testify on your behalf. Representation by an attorney at the hearing is not required, but an attorney may accompany and represent you at the hearing.

**The commissioner may take the action proposed in this notice without a hearing, if a hearing is not requested within 20 days after you received this notice of proposed action. Failure to request a hearing is a waiver of the right to a hearing.**

**NOPA Example To Be Used For “Citing An Employee Who Was Not Wearing Label-Specified PPE,” Continued**

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**If you do not wish to request a hearing to defend against the charges and proposed action, you may stipulate to the enclosed order by dating and signing the Stipulation and Waiver to Order within 20 days of receipt, and returning it to the Commissioner’s office.**

**Dated:** \_\_\_\_\_

\_\_\_\_\_  
XXXXX  
Agricultural Commissioner

Enclosure

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# Letter To Employer Example - To Be Used When The Commissioner Considers Taking Civil Penalty Action Against A Licensed Or Certified Employee Of The Employer

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## COUNTY LETTERHEAD

### DATE

Employer's Name  
Employer's Address

Dear xxxx:

Xxx (company name or grower's name) is the employer of xxxx (employee's name). On xxxxx (date), that employee was xxxxx (e.g., applying, mixing/loading, or otherwise handling) the pesticide xxxxx (name of pesticide product). That product's label specifies that personal protective equipment of xxxxx be utilized when that activity is performed. The label-specified equipment was at the work site in a condition that would provide the intended protection, but the employee was not utilizing the equipment.

This employee is licensed or certified pursuant to *section xxxx of the Food and Agricultural Code or section xxxx of the Business and Professions Code*. **Since the employee is licensed or certified, and the equipment was at the work site in a condition that would provide the intended protection, the Commissioner is authorized to, and is considering taking civil penalty action against the employee instead of the employer if certain conditions have been met.** Therefore, we request that you provide the following information to the Commissioner's office within the next 30 days.

- A copy of the employer's written work place disciplinary action policy that requires the employee to utilize pesticide safety equipment.
- Information showing the employer supervised the employee, or showing that the employee's job duties included supervising persons who handle pesticides or work in pesticide-treated areas.
- If, on the date specified above, the employee held a valid pest control aircraft pilot certificate as an apprentice, information showing the employer complied with applicable training requirements of Division 6 of Title 3, California Code of Regulations, prior to the time the employee failed to utilize the equipment.

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## Letter To Employer Example - To Be Used When The Commissioner Considers Taking Civil Penalty Action Against A Licensed Or Certified Employee Of The Employer , Continued

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For example, provide (1) a copy of the employer's written training program, which includes training employees in matters of pesticide safety with respect to their particular job assignments; and (2) a copy of the employee's pesticide training records.

- Information showing that, at the time of the employee's failure to utilize the equipment, the employee had knowledge of the discipline that could be imposed by the employer for an employee's failure to utilize pesticide safety equipment.

Examples of information showing that employee's knowledge may include:

- A statement signed by the employee **prior to** the employee's failure to utilize the equipment showing the employee had read the employer's written work place disciplinary action policy.
- A document addressed to the employee showing disciplinary action had been taken against the employee in the past, **prior to** this incident, for failure to utilize personal protective equipment.
- A written statement signed by the employee's supervisor under penalty of perjury stating that the employee has been disciplined in the past, **prior to** this incident, for failure to utilize personal protective equipment, and describing that prior discipline.

Thank you for your anticipated cooperation in this matter. If you have any questions, or need additional information, please contact me at xxx (telephone number).

Sincerely,

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XXXXXXXXX  
Title

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