

**BEFORE THE DIRECTOR OF THE  
DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Kern  
(County File No. 016-ACP-KER-20/21)

Docket No. 225

**D & J Farm Management  
P.O. Box 82395  
Bakersfield, CA 93380**

Appellant/

**Procedural Background**

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), title 3, section 6130, and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

After giving notice of the proposed action and providing a hearing on March 3, 2021, the Kern County Agricultural Commissioner (Commissioner) found appellant D & J Farm Management (DJFM) committed four (4) violations of FAC section 12973. The Commissioner classified the violations as Class A in accordance with 3 CCR section 6130. The Commissioner set the fine for each violation of FAC 12973 at \$3,000, which is a total fine of \$12,000. The Commissioner also found appellant committed one (1) violation of CCR, title 3, section 6724(f). The Commissioner classified the violation as Class B in accordance with 3 CCR section 6130. The Commissioner set the fine for violating CCR, title 3, section 6724(f) at \$1,000. Therefore, the total fine for four (4) violations of FAC section 12973 and one (1) violation of CCR, title 3, section 6724(f) is \$13,000.

DJFM appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Director). The Director has jurisdiction to review the appeal under FAC section 12999.5.

**Standard of Review**

The Director decides the appeal on the record before the Hearing Officer. In reviewing the Commissioner's decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. The Director notes that witnesses sometimes present

contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions might also have been reached. In making the substantial evidence determination, the Director draws all reasonable inferences from the information in the record to support the findings, and reviews the record in the light most favorable to the Commissioner's decision. If the Director finds substantial evidence in the record to support the Commissioner's decision, the Director affirms the decision.

### **Factual Background**

DJFM (Restricted Materials Permit 15-20-1504585) operates a site for the cultivation of grapes identified as site 37005G, located in section 12, township 29 S, range 25E (hereafter referred to as "grape site"), which is in Kern County. (County Exhibit (Ex.) E1.) An almond orchard, site SR4 in section 18, township 28N range 25W (hereafter referred to as "almond orchard") shares a border with the Appellant's grape site. (County Ex. E1, E22.)

On the morning of July 18, 2020, four (4) of appellant's employees were making a ground application of *Wilbur Ellis Dusting Sulfur* (reg. no. 2935-48-ZA) using dusters to the grape site. (County Exs. E1, E 8, E10, E12; *see* Stipulations; *see also* Hearing Recording.) The label for *Wilbur Ellis Dusting Sulfur* states "Do not apply in a way that will contact workers or other persons directly or through drift." (County Ex. E23.) The label also states, "Caution, causes moderate eye irritation," and that the product is a hazard to humans and is harmful if absorbed through the skin. (*Id.*) According to pesticide use reports, no other pesticide applications occurred within a one-mile radius at the same time as Appellant's sulfur application. (County Exs. E1, E13, E14.)

Around 5:00 a.m. on the same day, the complainants, five (5) employees of Heritage Equipment Company (Pest Control Business License Number 41028), were travelling to their worksite on the almond orchard on all-terrain vehicles (ATVs), heading east to west on Sullivan Road, driving toward Highway 43. (County Ex. E1.) Complainants were traveling in two groups: three (3) of the complainants travelled together in a forward-group, and two (2) complainants travelled in a rear-group. (*Id.*) At the intersection of Enos Lane and Sullivan Road, the complainants in the forward-group noticed the applicators on the grape site, but saw the application equipment was turned off when complainants passed on their ATVs. (County Exs. E1, E7, E22.) When the complainants in the rear-group reached the intersection of Enos Lane and Sullivan Road, they saw appellant's employees making the application to the outer row of grapes, and noticed the application equipment was turned on when they passed. (*Id.*) The complainants in the rear-group also saw a lot of a dust-like substance and smelled a sulfur odor. (Count Ex. E1.) Two (2) of the complainants in the forward-group saw their coworkers in the rear-group get sprayed with a white dust that was discharged from the applicators. (*Id.*)

Shortly after, all five (5) complainants pulled over on the side of the road. (*Id.*) Of the complainants in the rear-group, one experienced symptoms of headache, eye irritation, and vomiting. (County Ex. E1, E16.) The other complainant in the rear-group experienced irritated eyes, nausea, vomiting, and trouble breathing requiring use of an inhaler. (*Id.*) Of the complainants in the forward-group, all three (3) experienced eye irritation. (*Id.*)

The complainants called their supervisor to report the possible exposure, and the supervisor met the complainants to provide decontamination equipment to wash out their eyes. (County Ex. E1.) The complainants then traveled to the almond orchard and made an application of *Clinch* (reg. no. 100-894-ZB, active ingredient abemectin). (*Id.*) At 8:15 a.m., a Heritage Equipment Company employee called the Kern County Department of Agriculture to report the possible pesticide exposure. (County Ex. E1, E2.) A Heritage Equipment Company supervisor stopped the complainants from finishing the application of *Clinch* to the almond orchard so they could be interviewed by the County investigator and be transported to a medical facility. (*Id.*)

Around 8:50 a.m., Investigator Daniel Ramirez, Senior Agricultural Biologist for the Kern County Agricultural Commissioner's Office, arrived at the almond orchard to investigate the incident. (County Ex. E1; Testimony of Daniel Ramirez ("Ramirez Testimony").) One complainant stated to Investigator Ramirez, "I don't feel like any chemical landed on me but when we stopped...my eyes did begin to feel irritated." (County Ex. E1.) Another complainant said, "I did not get exposed directly to the chemical but I did notice a white dust like substance land on my coworkers.... I do remember smelling a sulfur odor at the time of the incident." (*Id.*) And another complainant stated, "I do not feel that I was directly exposed and I did not start experiencing symptoms until 30 minutes after, my eyes began to water and felt irritated." (*Id.*) Investigator Ramirez collected five (5) clothing items as samples from four (4) of the complainants. The complainants told Investigator Ramirez that the clothing items had been washed prior to use on July 18, 2020. (County Ex. E1.) One (1) complainant did not consent to provide a clothing sample. (*Id.*) Investigator Ramirez also collected a swab sample from two (2) of the complainants' ATVs. (County Exs. E1, E9.) The samples were submitted to the California Department of Food and Agriculture's ("CDFA") Center for Analytical Chemistry, Residue Lab in Sacramento, California, to be tested for pesticides. (County Exs. E1, E9, and E21.) The five (5) clothing items and two (2) swabs tested positive for sulfur. (County Exs. E1, E21.)

After being interviewed, the complainants were transported to Irene Sanchez, M.D. Occupational Medicine, in Bakersfield, California. (County Ex. E1, E16.) All five (5) complainants were examined by Dr. Irene Sanchez. (*Id.*) Four (4) complainants provided medical releases, and one (1) complainant did not provide a medical release. (*Id.*) Two (2) of the complainants were diagnosed with allergic contact dermatitis, and two (2) complainants were diagnosed with ocular pain. (*Id.*)

When notified that some workers were exposed to DJFM's sulfur application, Fredy Zavala, the ranch supervisor of DJFM, provided the following written statement: "... [T]he persons who were touched by this powder, their eyes watered and they felt like vomiting. The

ones with the eyes are fine but I don't understand why they wanted to vomit... I could not control the air or the powder dust because it goes to all side [sic]." (County Ex. E1, E11.)

Only July 24, 2020, Inspector Ramirez conducted a Pest Control Headquarters Inspection of DJFM. (County Exs. E1, E17, E18; Ramirez Testimony.) DJFM provided training records for the four (4) employees who made the sulfur application to the grape site on July 18, 2020. (*Id.*) The training for *Wilbur Ellis Dusting Sulfur* was provided by Fredy Zavala, Rudy Avila, and Juan Quintero. (*Id.*) DJFM could not provide documentation that Fredy Zavala had a current qualified trainer certificate. (*Id.*) Fredy Zavala trained two of the employees who made the application of *Wilbur Ellis Dusting Sulfur* on July 18, 2020. (*Id.*)

On August 11, 2020, Inspector Ramirez conducted a Pest Control Headquarters Inspection of Heritage Equipment Company. (County Exs. E1, E19, E20.) Heritage Equipment Company provided training records for the five (5) complainants, and the records were complete. (*Id.*)

On November 10, 2020, the Commissioner issued a Notice of Proposed Action (NOPA) charging Appellant with five (5) counts of violating FAC section 12973, and one (1) count of violating CCR, title 3, section 6724(f). (*See* Notice of Proposed Action.) The Commissioner proposed a fine of \$3,000 for each of the five (5) counts of violating FAC section 12973, and a fine of \$1,000 for violating CCR, title 3, section 6724(f), which is a total proposed fine of \$16,000. (*Id.*) Appellant requested a hearing. (County Ex. B.) On March 3, 2021, the hearing was held in Bakersfield, California before Donald O. Cripe (Hearing Officer). (*Id.*)

### **Relevant California Regulations**

Food and Agricultural Code section 12973 states:

#### **Use to not conflict with label**

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.

Food and Agricultural Code section 12996.5(b) provides, "The exposure of each person to a pesticide resulting from the violation of Section...12973...that causes acute illnesses or injury, shall constitute a separate violation of the statute or regulation."

Food and Agricultural Code section 12996.5(a)(6) states, "'Acute' means a medical condition that involves a sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention and that has a limited duration."

California Code of Regulations, title 3, section 6724 states:

The employer shall assure that employees who handle pesticides have been trained pursuant to the requirements of this section and that all other provisions of this section

have been complied with for employees who handle pesticides.

....

(f) The person conducting the training for employees who will be handling pesticides for the commercial or research production of an agricultural plant commodity shall be qualified as one of the following:

- (1) A California certified commercial applicator;
- (2) A California certified private applicator;
- (3) A person holding a valid County Biologist License in Pesticide Regulation or Investigation and Environmental Monitoring issued by the Department of Food and Agriculture;
- (4) A University of California Extension Advisor;
- (5) A person who has completed an “instructor training” program presented by one of the following:
  - (A) the University of California, Integrated Pest Management Program; or
  - (B) other instructor training program approved by the Director;
- (6) A California licensed Agricultural Pest Control Adviser;
- (7) A California Registered Professional Forester; or
- (8) Other trainer qualification approved by the Director.

When levying fines, the Commissioner must follow the fine guidelines set forth in California Code of Regulations, title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class A violation is “a violation that caused a health, property, or environmental hazard.” (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).) A Class B violation is “a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effect...” (*Id.* at (b)(2).) The fine range for a Class B violation is \$250 to \$1,000. (*Id.* at (c)(2).) The Commissioner shall use relevant facts, including severity of actual or potential effects and the respondent’s compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (Cal. Code of Regs., tit. 3, § 6130, subd. (d).)

### **The Hearing Officer’s Proposed Decision**

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant had the opportunity to present evidence and question witnesses. Based on the evidence presented at the hearing, the Hearing Officer found the County presented sufficient evidence showing that on July 18, 2020, Appellant violated FAC section 12973 when it applied *Wilbur Ellis Dusting Sulfur* in conflict with the label. (Hearing Officer’s Proposed Decision, p. 5.) The Hearing Officer noted the *Wilbur Ellis Dusting Sulfur* label states, “Do not apply in a way that will contact workers or other [persons] directly or through drift,” and “Caution, causes moderate eye irritation,” and “Caution, causes moderate eye irritation.” (Hearing Officer’s Proposed Decision, p. 3.) The Hearing Officer was persuaded by the County’s evidence that Appellant’s sulfur application was the only one in the area at the time of the incident. (Hearing Officer’s Proposed Decision, p. 5.) The Hearing Officer also found the County’s evidence that the complainants’ clothing samples tested positive for sulfur was

persuasive, even though only two (2) of the claimants said they felt the pesticide land on their bodies. (*Id.*) The Hearing Officer was not persuaded by Appellant's argument that there was a distance between the application site and complainants so the sulfur could not have drifted onto complainants. (*Id.*) The Hearing Officer was also unpersuaded by Appellant's argument that the complainants approached the sulfur application from behind and should have avoided the sulfur drift; it is the applicator's responsibility to prevent pesticide drift onto other persons and that responsibility cannot be transferred. (*Id.*) However, the Hearing Officer dismissed one (1) count of violating of FAC section 12973. The Hearing Officer found that the County's "evidence is lacking in the case of [one (1) complainant]. He stated he was not exposed. His clothing was not sampled. He testified that his symptoms cleared up quickly so he didn't inform anyone about them." (*Id.*) The Hearing Officer found that the complainant's "temporary symptoms do not meet the standard in FAC 12996.5(a)(6) of requiring prompt medical attention. Indeed, there is no medical record for him." (*Id.*) Therefore, the Hearing Officer found that Appellant violated FAC section 12973 on four (4) counts because it applied *Wilbur Ellis Dusting Sulfur* in conflict with the label.<sup>1</sup> (*Id.*)

As for the second violation, the Hearing Officer found the County presented sufficient evidence showing that Appellant violated CCR, title 3, section 6724(f). (Hearing Officer's Proposed Decision, p. 6.) During the Pest Control Headquarters Inspection, Appellant failed to provide the required training records for its employee Fredy Zavala. (*Id.*) At the hearing, Appellant did not submit evidence that Fredy Zavala is a qualified trainer. (*Id.*)

The Hearing Officer found the Commissioner properly classified each of the four (4) counts of violating FAC 12973 as a Class A category, and the proposed fine of \$3,000 for each count as appropriate. (*Id.*) The Hearing Officer found the Commissioner properly classified the one (1) count of violating CCR, title 3, section 6724 as a Class B category, and the proposed fine of \$1,000 as appropriate. Therefore, the Hearing Officer's total proposed fine was \$13,000. On April 22, 2021, the Commissioner adopted the Hearing Officer's proposed decision in its entirety. (*See* Notice of Decision, Order and Right of Appeal.)

### **Appellant's Contentions on Appeal**

On appeal, Appellant appears to argue the Commissioner's decision that it violated FAC section 12973 was incorrect for a number of reasons. (*See* Notice of Appeal, dated April 29, 2021 (Notice of Appeal).) First, Appellant appears to argue that the complainants were not actually exposed to sulfur. (*Id.*) Second, Appellant appears to argue that the complainants' symptoms were due to exposure of their own application of *Clinch*. (*Id.*) Third, Appellant claims that a complainant refused to be seen by a medical provider or have his clothing tested for sulfur. (*Id.*) Fourth, Appellant notes that the complainants were wearing the necessary personal protective equipment. (*Id.*) Fifth, Appellant argues that the complainants should have driven around the sulfur to avoid exposure. (*Id.*) Finally, Appellant points out that the complainants' medical forms stated that they were exposed to sulfur on July 17, 2020, which is

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<sup>1</sup> While not an issue on appeal, the Director notes that in reaching his finding that there was no acute illness or injury caused by exposure, the Hearing Officer did not appear to consider that the complainant experienced illness symptoms of exposure including an onset of irritated eyes within 30 minutes of exposure and that the complainant received prompt medical attention. (County Ex. E1.)

the day before Appellant made the sulfur application. (*Id.*) As a result, Appellant asserts the Commissioner's decision that it violated FAC section 12973 should be appealed. Appellant does not appear to appeal the Commissioner's decision that it violated CCR, title 3, section 6724. (*Id.*)

### **The Director's Analysis**

**I. There is substantial evidence in the record to support the Commissioner's finding that Appellant violated FAC section 12973 on four (4) counts, to classify the violations as Class A violations, and set the fine at \$3,000 per violation.**

The Director finds there is substantial evidence in the record to support the Commissioner's decision that Appellant violated FAC section 12973 when it made an application of *Wilbur Ellis Dusting Sulfur* in conflict with the label. The Director also finds that there is substantial evidence in the record to support the Commissioner's decision that Appellant violated FAC 12973 on four (4) counts, to classify the violations as Class A violations, and to set the fine at \$3,000 for each violation.

**A. There is substantial evidence in the record to support the Commissioner's decision that Appellant's application of *Wilbur Ellis Dusting Sulfur* on July 18, 2020 was in conflict with the product label in violation of FAC section 12973.**

There is substantial evidence in the record to support the Commissioner's decision that Appellant violated FAC 12973 because its *Wilbur Ellis Dusting Sulfur* application was in conflict with the product label. FAC section 12973 states, "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." The *Wilbur Ellis Dusting Sulfur* registered label states, "Do not apply in a way that will contact workers or other persons directly or through drift," and "Caution, causes moderate eye irritation." (County Ex. E23.)

Appellant does not deny that it made an application of *Wilbur Ellis Dusting Sulfur* to the grape site on July 18, 2020. (*See* Stipulations; *see also* Hearing Recording.) At the time of Appellant's application, the complainants were heading east to west on Sullivan Road, headed toward Highway 43. (County Ex. E1.) After the complainants who were travelling in the forward-group passed the applicator at the intersection of Enos Lane and Sullivan Road, the complainants in the rear-group noticed Appellant making an application to the outer row of grapes and that the applicator was turned on as complainants passed. (*Id.*) The complainants in the rear-group also saw a lot of a dust-like substance and smelled a sulfur odor. (*Id.*) Complainants in the forward-group saw their coworkers in the rear-group get sprayed by pesticides discharged from the applicators. (*Id.*) Shortly after, all five (5) complainants experienced eye irritation, one (1) experienced headache, two (2) vomited, one (1) had nausea, and one (1) had trouble breathing and required use of an inhaler. (County Exs. E1, E16.) All five (5) complainants were examined at Irene Sanchez, M.D. Occupational Medicine, in

Bakersfield, California. (*Id.*) Two (2) of the complainants were diagnosed with allergic contact dermatitis, and two (2) complainants were diagnosed with ocular pain. (*Id.*) The five (5) clothing item samples and the two (2) ATV swabs submitted to CDFA's Residue Lab tested positive for sulfur. (County Exs. E1, E9, and E21.) Appellant's application of *Wilbur Ellis Dusting Sulfur* was made in a way that it came into contact with other persons directly or through drift. Therefore, there is substantial evidence in the record to support the Commissioner's decision that Appellant's application of *Wilbur Ellis Dusting Sulfur* was in conflict with the label in violation of FAC section 12973.

**B. There is substantial evidence in the record to support the Commoner's decision that Appellant violated FAC section 12973 on four (4) counts, to classify the counts as Class A violations, and to set the fine at \$3,000 per count.**

On appeal, Appellant does not challenge the number of counts, classification, or fine amount set by the Commissioner; however, the Director finds there is substantial evidence to support the Commissioner's decision that Appellant violated FAC section 12973 on four (4) counts, that each violation was a Class A violation, and the fine of \$3,000 per each count is appropriate. FAC section 12996.5(b) provides, "The exposure of each person to a pesticide resulting from the violation of Section...12973...that causes acute illnesses or injury, shall constitute a separate violation of the statute or regulation." FAC section 12996.5(a)(6) states, "'Acute' means a medical condition that involves a sudden onset of symptoms due to an illness, injury, or other medical problem that requires prompt medical attention and that has a limited duration." Here, five (5) complainants experienced a sudden onset of irritable eyes, one (1) experienced headache, two (2) vomited, one (1) had nausea, and one (1) had trouble breathing and required use of an inhaler. (County Exs. E1, E16.) All five (5) complainants were examined at Irene Sanchez, M.D. Occupational Medicine, in Bakersfield, California. (*Id.*) Two (2) of the complainants were diagnosed with allergic contact dermatitis, and two (2) complainants were diagnosed with ocular pain. (*Id.*) Therefore, five (5) complainants were exposed to a pesticide resulting from the violation of FAC section 12973 that caused acute illnesses or injury. Therefore, there is substantial evidence in the record to support the Commissioner's decision that Appellant violated FAC section 12973 on four (4) counts.

In enforcement actions taken pursuant to FAC section 12999.5, violations are designated as Class A, Class B, or Class C. A Class A violation is one that caused a health, property, or environmental hazard. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).) The Commissioner must also determine that an aggravating circumstance supports an elevation to Class A. (*Id.* at subd. (b)(1)(B).) One of the "aggravating circumstances includes when "[t]he respondent demonstrated a disregard for specific hazards of the pesticide used." (*Id.* at subd. (b)(1)(B)(3).) The fine range for a Class A violation is \$700 to \$5,000. (*Id.* at subd. (c).) The Commissioner has broad discretion with respect to the imposition of civil penalties within the corresponding fine range. Here, Appellant caused a hazard to complainants' health by applying *Wilbur Ellis Dusting Sulfur* in conflict with the registered label that states, "Do not apply this product in a way that will contact workers or other persons, either directly or through drift." (County Ex. E23.) Appellant applied the pesticide in a manner that resulted in it contacting complainants



and required them to seek medical attention for a sudden onset of symptoms, such as irritated eyes, nausea, vomiting, and headaches. The Commissioner set the fine for each count at \$3,000, within the fine range of \$700 to \$5,000 for a Class A violation. As a result, the Director finds the evidence in the record supports the Commissioner's decision to fine Appellant \$3,000 for four (4) counts of violating FAC section 12973, with a total fine of \$12,000.

**C. Appellant's arguments on appeal are unconvincing.**

On appeal, Appellant appears to make a number of arguments. First, Appellant appears to argue that complainants were not exposed to its application of *Wilbur Ellis Dusting Sulfur* on July 18, 2020. (See Notice of Appeal.) Appellant states three (3) of the five (5) complainants said that they were not exposed to sulfur. (*Id.*) Appellant's assertion is a mischaracterization of the complainants' statements. One complainant stated, "I don't feel like any chemical landed on me but when we stopped...my eyes did begin to feel irritated." (County Ex. E1.) Another complainant said, "I did not get exposed directly to the chemical but I did notice a white dust like substance land on my coworkers.... I do remember smelling a sulfur odor at the time of the incident." (*Id.*) And another complainant stated, "I do not feel that I was directly exposed and I did not start experiencing symptoms until 30 minutes after, my eyes began to water and felt irritated." (*Id.*) The complainants did not state that they were definitively not exposed to the pesticide, as Appellant asserts. In fact, the complainants' statements support the Commissioner's finding that the complainants were exposed because they experienced eye irritation and smelled a sulfur odor. There is sufficient evidence in the record to support that the complainants were exposed to Appellant's application of *Wilbur Ellis Dusting Sulfur*, including the positive clothing and swab samples, the complainants' symptoms, pesticide use reports, and the complainants' statements that they saw a dust-like substance drift. (County Exs. E1, E21.)

Second, Appellant also appears to argue the complainants were exposed to their own application of *Clinch* on the same day as the incident. (See Notice of Appeal.) In its Appeal, Appellant states the County did not conduct a Pest Control Headquarter Inspection of the complainants' employer, Heritage Equipment Company; the County did not have documentation that the complainants were trained in the use of *Clinch*; and that the County did not test the complainants' clothing for *Clinch*. (*Id.*) The complainants experienced symptoms of pesticide exposure, including eye irritation, nausea, vomiting, and trouble breathing shortly after they observed Appellant's application of *Wilbur Ellis Dusting Sulfur* on the morning of July 18, 2020. (County Ex. E1.) Around 5:00 a.m. on July 18, 2020, complainants observed Appellant's sulfur application. (*Id.*) Shortly after the complainants observed Appellant's application, they called their supervisor to report the possible exposure, and the supervisor met the complainants to provide decontamination equipment to wash out their eyes. (*Id.*) Then, the complainants proceeded to their work site to make an application of *Clinch*. (*Id.*) Contrary to what Appellant asserts, the County conducted a Pest Control Headquarter Inspection of Heritage Equipment Company on August 11, 2020. (County Exs. E1, E19, E20.) Heritage Equipment Company provided training records for all of the complainants, and the records were complete. (*Id.*) Therefore, the Director is unconvinced by Appellant's argument that the complainants were exposed to their own application of *Clinch*, instead of Appellant's sulfur application.

Third, Appellant states that a complainant refused to be seen by a medical provider or to have his clothing tested. (*See* Notice of Appeal.) Appellant's argument in making this statement is unclear. The Hearing Officer dismissed one (1) count of violating FAC section 12973 since the complainant did not release his medical records. (*See* Hearing Officer's Proposed Decision, p. 5.) Moreover, Appellant's assertion is a partial mischaracterization of the facts. A complainant did not provide a medical record release to the County, but the complainant was examined by Irene Sanchez, M.D. (County Ex. E1; Ramirez Testimony.) It is accurate that a complainant refused to provide a clothing sample to Investigator Ramirez. (County Ex. E1; Ramirez Testimony.) However, the clothing samples provided by the four (4) other complainants and the two (2) swab samples of the ATVs all tested positive for sulfur. (County Ex. E21.) Therefore, there is sufficient evidence in the record to support the Commissioner's finding that Appellant violated FAC 12973 on four (4) counts.

Fourth, Appellant notes the complainants were wearing the necessary personal protective equipment (PPE), including eye protection, masks, gloves, long sleeve shirts, long pants, shoes and socks. (*See* Notice of Appeal.) Appellant's argument in making this statement is unclear. The fact that complainants were wearing PPE does not outweigh the evidence in the record that supports the Commissioner's finding that Appellant violated FAC section 12973, such as the positive clothing and swab samples, the complainants' symptoms, pesticide use reports, and complainants' statements that they saw a dust-like substance drift and smelled a sulfur odor. (County Exs. E1, E21.)

Fifth, Appellant argues that if the complainants saw a sulfur cloud, then they should have driven around the sulfur to avoid exposure. (*See* Notice of Appeal.) The *Wilbur Ellis Dusting Sulfur* label states, "Do not apply in a way that will contact workers or other persons directly or through drift." (County Ex. E23.) The label places the burden on the applicator to apply the product in a way that it does not contact other persons. Appellant cannot shift this burden to the complainants.

Finally, Appellant points out that the complainants' medical forms stated they were exposed to sulfur on July 17, 2020, which is the day before Appellant made the sulfur application. (*See* Notice of Appeal.) Appellant pointed out this fact at the hearing, and Inspector Ramirez responded that the incorrect date on the forms must be a mistake. (*See* Hearing Recording.) There is sufficient evidence in the record to support that Appellant's application contacted complainants on July 18, 2020, such as Inspector Ramirez's investigation report, the Pesticide Notification Record, pesticide use reports, and the medical records, which all state the incident occurred on July 18, 2020. (County Exs. E1, E2, E13, E14, E16.) Therefore, there is sufficient evidence in the record to support the Commissioner's finding that appellant violated FAC section 12973 on four (4) counts, that the violations be classified as Class A violations, and to set the fine at \$3,000 per count.

**II. There is substantial evidence in the record to support the Commissioner's finding that Appellant violated CCR, title 3, section 6724(f), to classify the violation as a Class B violation, and set the fine at \$1,000.**

On appeal, Appellant does not appear to challenge the Commissioner's decision that Appellant violated CCR, title 3, section 6724(f), to classify the violation as a Class B violation, or to set the fine at \$1,000. However, the Director finds there is substantial evidence in the record to support the Commissioner's finding that Appellant violated CCR, title 3, section 6724(f), because Appellant could not provide documentation that Fredy Zavala was a qualified trainer, and Fredy Zavala trained employees who handle pesticides. The Director also finds there is substantial evidence in the record to support the Commissioner's decision to classify the violation as a Class B violation and to set the fine at \$1,000.

**A. There is substantial evidence in the record to support the Commissioner's finding that Appellant violated CCR, title 3, section 6724(f).**

The Director finds there is substantial evidence in the record to support the Commissioner's decision that Appellant violated CCR, title 3, section 6724(f). CCR, title 3, section 6724 states:

The employer shall assure that employees who handle pesticides have been trained pursuant to the requirements of this section and that all other provisions of this section have been complied with for employees who handle pesticides.

....

(f) The person conducting the training for employees who will be handling pesticides for the commercial or research production of an agricultural plant commodity shall be qualified as one of the following:

- (1) A California certified commercial applicator;
- (2) A California certified private applicator;
- (3) A person holding a valid County Biologist License in Pesticide Regulation or Investigation and Environmental Monitoring issued by the Department of Food and Agriculture;
- (4) A University of California Extension Advisor;
- (5) A person who has completed an "instructor training" program presented by one of the following:
  - (A) the University of California, Integrated Pest Management Program; or
  - (B) other instructor training program approved by the Director;
- (6) A California licensed Agricultural Pest Control Adviser;
- (7) A California Registered Professional Forester; or
- (8) Other trainer qualification approved by the Director.

Here, during the Pest Control Headquarter Inspection on July 24, 2020, Appellant provided training records for the four (4) employees who made the sulfur application to the grape site on July 18, 2020. (County Exs. E1, E17, E18.) However, DJFM could not provide documentation that Fredy Zavala had a current qualified trainer certificate. (*Id.*) Fredy Zavala trained two of the employees who made the application of *Wilbur Ellis Dusting Sulfur* on July 18, 2020. (*Id.*) Fredy Zavala was not qualified to conduct pesticide handling training for employees who will be handling pesticides for commercial production of an agricultural plant.

Therefore, there is substantial evidence in the record to support the Commissioner's decision that Appellant violated CCR, title 3, section 6724(f).

**B. There is substantial evidence in the record to support the Commissioner's decision to classify the violation of CCR, title 3, section 6724(f) as a Class B violation and set the fine at \$1,000.**

In enforcement actions taken pursuant to FAC § 12999.5, violations are designated as Class A, Class B, or Class C. A "Class B" violation is a violation of law or regulation that mitigates the risk of an adverse health, property or environmental effect." (Cal. Code Regs., tit. 3, § 6130.) The fine range for a Class B violation is \$250 to \$1,000 per violation. (Cal. Code Regs., tit. 3, § 6130(c). "When determining the fine amount within the fine range, the commissioner shall use relevant facts, including the severity of actual or potential effects and the respondent's compliance history, and include those relevant facts in the notice of proposed action." (Cal. Code Regs., tit. 3, § 6130(d).)

Here, the Commissioner found Appellant violated CCR, title 3, section 6724(f), which requires trainers to be qualified to train in the use of pesticides. (*See* Notice of Proposed Action.) Requiring that trainers be qualified mitigates the risk of an adverse health effect when pesticides are being handled. Therefore, Appellant's violation of CCR, title 3, section 6724 is a violation of law or regulation that mitigates the risk of an adverse health effect and is a Class B violation. In setting the fine at \$1,000, the Commissioner considered the facts that Appellant's actions were severe because two of the applicators were trained by an unlicensed trainer, and applied the pesticide in a way that resulted in acute adverse health effects for the complainants. (*Id.*) The Commissioner also considered that when informed of the incident, Fredy Zavala, a DJFM employee, provided the following statement: "... [T]he persons who were touched by this powder, their eyes watered and they felt like vomiting. The ones with the eyes are fine but I don't understand why they wanted to vomit... I could not control the air or the powder dust because it goes to all side [sic]." (County Ex. E1, E11.) The Commissioner found Fredy Zavala's statement demonstrates a lack of understanding of the hazards of sulfur-based pesticides, and Fredy Zavala trained other DJFM employees to use *Wilbur Ellis Dusting Sulfur*. (*See* Notice of Proposed Action.) Therefore, there is sufficient evidence in the record to support the Commissioner's decision to set the fine at \$1,000, the top of the Class B range.

**Conclusion**

The Director affirms the Commissioner's decision to charge Appellant with four (4) counts of violating FAC section 12973, to classify the violations as Class A violations, and to set the fine for each count at \$3,000. The Director also affirms the Commissioner's decision to charge Appellant with one (1) count of violating CCR, title 3, section 6724(f), to set the violation as a Class B violation, and to set the fine at \$1,000. The total fine of \$13,000 upheld.

**Disposition**

The Director affirms the Commissioner's decision and levy of fines. The Commissioner shall notify Appellant of how and when to pay the \$13,000 in total fines.

**Judicial Review**

Under Food and Agricultural Code section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. Appellant must file a petition for writ of mandate with the court and bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**

Dated: JUN 29 2021

By:   
Val Dolcini, Director