

**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 San Diego
County File No. 427-ACP-SD-13/14

Administrative Docket. No. 202A

DIRECTOR'S DECISION

**Davey Tree Surgery Company
1914 Mission Road, Suite N
Escondido, California 92029**

Appellant/

Procedural Background

Under Food and Agricultural Code section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations. When levying fines, the commissioner follows the fine guidelines established in California Code of Regulations, 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; providing a hearing on March 25 and 26, 2015; and reviewing the Hearing Officer's proposed decision; the San Diego County Agricultural Commissioner (Commissioner) found that Appellant Davey Tree Surgery Company (Davey Tree) violated multiple sections of Title 3 of the California Code of Regulations and Food and Agricultural Code section 12973. The Commissioner classified the violations in accordance with section 6130 of Title 3 of the California Code of Regulations, and levied a total fine in the amount of \$7,900. (*See* Notice of Decision, Order and Right of Appeal for File No. 427-ACP-SD-13/14, dated June 15, 2015 (Commissioner's Decision).)

Davey Tree appeals the Commissioner's civil penalty decision only as to Charges A, G, and H.¹ The violations appealed by Davey Tree are as follows: two violations of California Code of Regulations, Title 3, section 6600(e) for failing to exercise reasonable precaution to avoid a pesticide spill and contamination of the environment, totaling \$5,000 (Charge A); one violation of California Code of Regulations, Title 3, section 6738(a)(2) for failing to assure that all personal protective equipment was kept in a pesticide free, specifically-designated place in the amount of \$400 (Charge G); and one violation of Food and Agricultural Code section 12973 for using a pesticide in conflict with its labeling in the amount of \$600 (Charge H). The Director has jurisdiction to review the appeal under Food and Agricultural Code section 12999.5. (*See* Appellant Davey Tree's Written Argument in Support of Appeal, by letter dated July 20, 2015 (Appeal) at pp. 1-14.)

1. As Appellant Davey Tree is only appealing Charges A, G, and H of the Commissioner's decision, the Director's Decision will only address the facts and law relevant to those charges.

Standard of Review

The Director decides matters of law using his independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, 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

A. July 31, 2013 Pesticide Use Monitoring Inspection

On July 31, 2013, San Diego County Agricultural Commissioner Inspector A. Amador (Inspector Amador) and Department of Pesticide Regulation (Department) Senior Environmental Scientist D. Weerasekera conducted an unscheduled Pesticide Use Monitoring Inspection of Davey Tree's fumigation treatment of utility poles located at the intersection of J Street and Second Avenue in Chula Vista in San Diego County. (*See* County Exhibits (Exs.) 1 and 3; Testimony of Inspector Amador (Amador Testimony); Testimony of D. Weerasekera (Weerasekera Testimony).) At the time of the inspection, Davey Tree's foreman and employee, R. Olivares, was present. (Exs. 1 and 3; Amador Testimony.)

During the inspection, Inspector Amador observed Davey Tree employee R. Talamantes apply the pesticide *L Fume 33* (Reg. Number 1448-437-AA-88201) to a utility pole to control internal decay. (Exs. 1 and 3; Amador Testimony.) In order to fumigate a utility pole, the applicator drills a hole into the utility pole with an eighteen inch drill bit and then pours *L Fume 33* into the hole to 16 inches to allow for a two inch safety plug. (Testimony of R. Gross (Gross Testimony); Testimony of B. Bohnet (Bohnet Testimony).) Inspector Amador observed Mr. Talamantes use yellow plastic plugs to seal each hole in the utility pole after he poured the *L Fume 33* pesticide into the drilled openings. (Exs. 1 and 3; Amador Testimony.) The *L Fume 33* label on file with the Department at that time was dated March 5, 2012. (Ex. 10.) The

Directions for Use on the *L Fume 33* label stated, "Plug holes with treated wood plugs." (Exs 1, 3; and 10; Amador Testimony.)

L Fume 33 is a fumigant with the signal word, "Danger," indicating that it is highly toxic and dangerous to humans and animals. (Amador Testimony; Weerasekera Testimony; Ex. 10.) The *L Fume 33* label also states to "Inject equal amount of fumigant into all holes using a total of 1 pint per pole on the average." (Ex. 10.) During the application, Inspector Amador and Mr. Weerasekera observed an undetermined amount of liquid spill out of the drilled holes onto nontarget areas. (Amador Testimony; Weerasekera Testimony; Ex. 3.) When interviewed, a Davey Tree employee informed Inspector Amador that he applied four pints of the liquid per pole. (Amador Testimony.) Mr. Weerasekera separately observed a Davey Tree employee hammering plastic plugs into drilled holes containing *L Fume 33* and saw the pesticide splash out of the hole onto the sidewalk. (Weerasekera Testimony; Ex. 3 at p. 12.) The Davey Tree employee hammering the plugs into the pole warned Mr. Weerasekera to stand back because it was going to splash out. (Weerasekera Testimony.)

B. August 14, 2013 Headquarters and Employee Safety Inspection and Licensed Pest Control Business Records and Storage Inspection

On August 14, 2013, Inspector Amador conducted a Headquarters and Employee Safety Inspection and Licensed Pest Control Business Records and Storage Inspection of Davey Tree. (Exs. 1 and 4; Amador Testimony.) The inspection was conducted at Extra Space Storage located at 8038 Arjons Avenue, Unit G-165 in San Diego. (Exs. 1 and 4.) Mr. B. Bohnet, a supervisor for Davey Tree, was present at the time of the inspection. (Exs. 1 and 4; Amador Testimony.) Inspector Amador observed that Davey Tree stored the pesticides *L Fume 33* (Reg. Number 1448-437-AA-88201) and *QNAP8* (Reg. Number 64405-16-AA) in the same storage unit as personal protective equipment. (Ex 4 at pp. 6-7.)

C. January 24, 2014 Follow-Up Pesticide Use Monitoring Inspection

On January 24, 2014, Inspector Amador and Mr. Weerasekera conducted an unscheduled follow-up Pesticide Use Monitoring Inspection of Davey Tree's fumigation application at 1917 Terry Lane, National City, in San Diego County. (Exs. 1 and 6; Amador Testimony; Weerasekera Testimony.) Davey Tree's supervisor, B. Bohnet, was present at the time of the inspection. (Exs. 1 and 6; Amador Testimony.) Similar to the previous inspection, Inspector Amador observed a Davey Tree employee applying the pesticide *L Fume 33* to a utility pole to prevent internal decay. (*Id.*) Inspector Amador and Mr. Weerasekera observed the *L Fume 33* pesticide escape from the sealed hole after the applicator hammered the plastic plugs into the hole, allowing the pesticide to spill to a nontarget area. (Amador Testimony; Weerasekera Testimony.) Inspector Amador also observed a Davey Tree employee use yellow plastic plugs to seal each hole in the utility pole after he poured the *L Fume 33* pesticide into the drilled

openings. (Exs. 1 and 6; Amador Testimony.) The *L Fume 33* label dated March 5, 2012, stated under its Directions for Use, "Plug holes with treated wood plugs." (Exs 1, 6; and 10; Amador Testimony.)

D. Notice of Proposed Action

On October 19, 2014, the Commissioner issued a Notice of Proposed Action charging Davey Tree with a number of violations and proposed a penalty of \$8,300. (Ex. 1.) On November 10, 2014, Davey Tree requested a hearing. The Commissioner granted Davey Tree's request and on March 25 and 26, 2015, Hearing Officer Thomas L. Marshall held a hearing on the matter. (*See Commissioner's Decision; also refer to Audio Recordings of Hearing.*)

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Davey Tree had the opportunity to present evidence and question witnesses. The Hearing Officer noted that Davey Tree withdrew its challenge to Charge B (2 violations), C, and D, totaling \$1,200. The Hearing Officer also found that Davey Tree violated Charge F, but did not violate Charge E dismissed that charge's associated \$400 fine. (*See Proposed Decision of Hearing Officer in File No. 427-ACP-SD-13/14, dated April 13, 2015 (Hearing Officer Decision) at pp. 8-10.*)

The Hearing Officer determined that there was sufficient evidence to show that Davey Tree violated California Code of Regulations, title 3, section 6600(e), by failing to exercise reasonable precaution to prevent a pesticide spill and avoid contamination of the environment on two occasions (Charge A); violated California Code of Regulations, title 3, section 6738(a)(2) by failing to assure that personal protective equipment was kept in a pesticide free, specifically designated place (Charge G); and violated Food and Agricultural section 12973, by using *L Fume 33* in conflict with its labeling (Charge H). However, as to Charge H, the Hearing Officer found that using plastic plugs was "strictly a technical violation" because they appeared to be a superior method of sealing the fumigant and protecting the environment. As a result, the Hearing Officer reduced the Class B fine for Charge H from \$600 to \$250. The Hearing Officer proposed a total fine of \$7,550 for all violations. (*See Hearing Officer Decision at pp. 9-10.*)

The Commissioner's Decision

On June 15, 2015, the Commissioner adopted the Hearing Officer's Decision regarding Charges A, G and H, specifically that Davey Tree violated California Code of Regulations, title 3, sections 6600(e), 6738(b), and Food and Agricultural Code section 12973. However, with respect to Charge H, the Commissioner disagreed with the Hearing Officer's finding that using tight fitting plastic plugs was a technical violation and reduction of the fine from \$600 to \$250.

The Commissioner found that the County presented sufficient evidence to support the fine classification and amount. Specifically, the Commissioner found that the County presented evidence that Davey Tree was previously informed that the *L Fume 33* label required treated wood plugs and that Davey Tree failed to change its behavior to comply. The Commissioner further found that the fine amount was appropriate within the Class B range. As a result, the Commissioner reinstated the \$600 fine for Charge H and ordered Davey Tree to pay a total fine of \$7,900 (\$5,000 for Charge A; \$1,200 for Charges B, C, D; \$0 for Charge E; \$700 for Charge F; \$400 for Charge G; and \$600 for Charge H). (See Commissioner's Decision, pp. 1-2.)

Appellant's Contention on Appeal

Appellant Davey Tree appeals Charges A, G, and H of the Commissioner's Decision in Case Number 427-ACP-SD-13/14. Davey Tree's main contentions on appeal are:

Charge A – Violation of Title 3, California Code of Regulations, section 6600(e)

- The pesticide only made contact with a small area outside the drilled hole on the utility pole, which was reasonable and part of the target site, and as a result, there was no environmental contamination or violation of section 6600(e).
- The County failed to prove that the chemical was splashed or sprayed.
- The County failed to present any evidence that the pesticide contaminated the environment.

Charge G – Violation of Title 3, California Code of Regulations, section 6738(a)(2)

- Davey Tree complied with the regulation by storing its personal protective equipment in a specifically designated place away from pesticides in the same storage unit.
- Inspector Amador's testimony was inconsistent with the evidence and unreliable.

Charge H – Violation of Food and Agricultural Code section 12973

- Using plastic plugs instead of treated wooden plugs did not conflict with the label and therefore did not violate the law.
- Using treated wooden plugs was not required by the *L Fume 33* label, but was merely an example or recommendation of a way to plug the drilled hole in the utility pole.
- Using plastic plugs is the industry norm and a superior method to using treated wooden plugs for sealing holes on utility poles.

Relevant Laws and Regulations

California Code of Regulations, title 3, section 6600(e), states in relevant part:

General Standards of Care

Each person performing pest control shall:

.....

- (e) Exercise reasonable precaution to avoid contamination of the environment.

California Code of Regulations, title 3, section 6738(a)(2), states in relevant part:

Personal Protective Equipment

(a) The employer shall:

.....

- (2) Assure that all clean personal protective equipment, when not in use, is kept separate from personal clothing and in a pesticide free, specifically designated place; ...

California Food and Agricultural Code section 12973, states:

Use not to 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.

California Code of Regulations, title 3, section 6000 defines “**Conflict with labeling**”, in relevant part, as:

Any deviation from instructions, requirements or prohibitions of pesticide product labeling concerning storage, handling or use except:

.....

- (e) Employing a method of application not expressly prohibited, provided other directions are followed;

.....

When levying fines, the Commissioner must follow the fine guidelines 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, among other things, a violation that caused a health, property, or environmental hazard, or a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects and there are aggravating circumstances

that support the elevation to a Class A. The fine range for a Class A violation is \$700 to \$5,000. A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A. The fine range for a Class B violation is \$250 to \$1,000. 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 Regs., tit. 3, § 6130.)

The Director's Analysis

- A. Substantial evidence supports the Commissioner's Decision that Davey Tree failed to exercise reasonable precaution to avoid contamination of the environment when it allowed *L Fume 33* to spill outside of the target hole. (Charge A)

In their appeal, Davey Tree argues that based on the totality of the evidence presented at the hearing, and finding by the hearing officer that "the agency failed to prove by a preponderance of the evidence that the chemical was splashed or sprayed," the County failed to establish a violation of Title 3, California Code of Regulations, section 6600(e). (See Appeal at pp 1-3; Hearing Officer Decision at p. 9.) Davey Tree's arguments are unpersuasive.

Section 6600(e) states as a general standard of care that, "Each person performing pest control shall: ... (e) Exercise reasonable precaution to avoid contamination of the environment." The general definition of "contaminate" means "to make something dangerous, dirty or impure by adding something harmful or undesirable to it." (Merriam-Webster Online Dictionary. Retrieved October 12, 2015, from [http://www.merriam-webster.com/dictionary/contaminate.](http://www.merriam-webster.com/dictionary/contaminate))

Here, the County presented evidence that during two separate inspections, Davey Tree employees allowed *L Fume 33* to escape from the plugged hole to a nontarget area², resulting in contamination to the environment. First, according to the pesticide label and the County's testimony, the target area for *L Fume 33* was *inside* the pre-drilled holes of the pole.³ The label directions for wood treatment specifically stated that *L Fume 33* "is a liquid used to control *internal* decay," and to "inject equal amounts of fumigant *into all holes...*" (Ex. 10 (emphasis added).) The label instructions further stated, "[d]o not apply this product in a way that will contact workers or other persons, either directly or through drift." Next, it is undisputed that *L Fume 33* is a highly toxic and dangerous pesticide, bearing the signal word "Danger." (Ex. 10; Amador Testimony; Gross Testimony.) The signal word "Danger" is the highest toxicity

² A nontarget area is an area that is not the intended object of action by a particular agent (i.e. pesticide). In contrast, a target area is the area where you intend to use the pesticide.

³ Through his line of questioning of Inspector Amador, Davey Tree's counsel even acknowledges that the target area for *L Fume 33* is inside the pole. "Do you understand why *L Fume* is put *inside* the pole?" (emphasis added). (Audio Recording of Hearing.)

category for pesticides and means that the product is highly toxic and may even be fatal, by at least one route of exposure. (*See* 40 C.F.R. § 156.64(a)(1).) In fact, because of its potential toxicity, the *L Fume 33* label bears the following warning:

HAZARDS TO HUMANS AND DOMESTIC ANIMALS Corrosive: Causes skin damage. May be fatal if absorbed through the skin. Causes eye irritation. Harmful if inhaled or swallowed. Irritating to nose and throat. Avoid breathing vapor or spray mist. Do not get into eyes, on skin or clothing. (Ex. 10.)

Finally, the County presented evidence that *L Fume 33* spilled onto the outside of the pole and the nearby sidewalk during the application, both of which were nontarget areas. (Amador Testimony; Weerasekera Testimony.) Specifically, Inspector Amador testified that on July 31, 2013 and January 24, 2014, he observed an undetermined amount of liquid spill out of the drilled hole during the application. He further testified that on July 31, 2013, a Davey Tree applicator informed him that he applied four pints of *L Fume 33* per pole, even though the label limited use to “1 pint per pole on the average.” (Amador Testimony; Ex. 10.) Mr. Weerasekera also testified that on July 31, 2013, he observed a Davey Tree employee hammering plastic plugs into the drilled holes containing the *L Fume 33* fumigant; that the area of the fumigation was a busy intersection in a residential neighborhood; that the employee warned him to stand back because it was going to splash; and that the pesticide splashed out of the hole onto the sidewalk. (Weerasekera Testimony; Ex. 3 at p. 12.) Mr. Bohnet of Davey Tree explained that the more experienced an applicator becomes with applying the pesticide and plugging the holes, one will see less trickling of the pesticide outside of the hole; however, he also testified that the applicator who stated that he applied four pints per pole was a new employee. A reasonable inference from the combined testimony is that Davey Tree’s applicator overfilled each hole and as a result, pesticide spilled out of the hole to a nontarget area (i.e. outside the pole and on the sidewalk). It is thus apparent that allowing a highly toxic pesticide to escape to a nontarget area, such as outside of the pole or onto the sidewalk, amounts to contamination because it is both undesirable and potentially harmful.

In defense, Mr. B. Bohnet testified on behalf of Davey Tree that it would be impossible to use four pints of *L Fume 33* on one pole and that a typical spill during the application process is usually a small amount of liquid oozing or trickling out of the hole. (Bohnet Testimony.) However, Mr. Bohnet was not present during either inspection and Davey Tree presented no competing eyewitness testimony regarding the events on July 31, 2013 and January 24, 2014. Thus, despite the Hearing Officer’s determination that the county failed to prove that the chemical was “splashed or sprayed,” the Hearing Officer did find that on July 31, 2013 and January 24, 2014, Davey Tree’s applicator allowed *L Fume 33* to leak from the filled holes to a nontarget area in an undetermined amount resulting in contamination to the environment. (*See* Hearing Officer Decision at p. 9.) As a result, the Director finds that there is substantial evidence to affirm the Commissioner’s Decision as to Charge A.

B. Substantial evidence supports the Commissioner's Decision that Davey Tree failed to assure that all personal protective equipment was kept in a pesticide free, specifically designated place. (Charge G)

In its appeal, Davey Tree argues that it did not violate Title 3, California Code of Regulations, section 6738(a)(2), when it stored its personal protective equipment in a specifically designated area, separated from pesticides in the same storage unit. Davey Tree further argues as an aside that Inspector Amador's testimony was inconsistent and unreliable.⁴ (Appeal at pp. 3-7.) However, the parties do not dispute the basic, underlying facts related to this charge. The issue therefore centers on the meaning and interpretation of the phrase "pesticide free, specifically designated place," as stated in section 6738(a)(2).

Section 6738(a)(2) of Title 3 of the California Code of Regulations, states in relevant part, "[t]he employer shall: ... (2) Assure that all clean personal protective equipment, when not in use, is kept separate from personal clothing and in a pesticide free, specifically designated place." The terms "pesticide free" or "specifically designated place" are not separately defined in statute or regulation. However, when not explicitly defined, courts generally "extend considerable deference to an administrative agency's interpretation of its own regulations or the regulatory scheme which the agency implements or enforces." (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089 at 1107.)

In its appeal, Davey Tree focuses on the words, "specifically designated place," but fails to recognize the importance of the requirement that the specifically designated place be "pesticide free." (See Appeal at pp. 4-6.) Consistent with the County's testimony on this issue, the Department has interpreted "pesticide free" to be an area in which there is no risk for cross-contamination from the pesticide to personal protective equipment. (Amador Testimony.) For example, a publicly available Department study guide for laws and regulations states, "Do not store pesticides near food, feed, or personal protective equipment because of the possibility of contamination."⁵ The Department's Enforcement Program Standards Compendium, which serves as a reference and resource for enforcement personnel and is also publicly available states, "Examples of proper storage [of personal protective equipment] are lockers or assigned tote bags. ... In addition, a pesticide storage area is not a proper place for storage of safety equipment."⁶

4 Issues of witness credibility are the province of the hearing officer.

5 Laws and Regulations Study Guide (Study Guide) at p. 61, Second Edition 2011, available at http://www.cdpr.ca.gov/docs/license/pubs/laws_regs_study_guide.pdf.

6 Pesticide Use Enforcement Program Standards Compendium (Compendium), Vol. 4, Inspection Procedures at p. 176, available at http://www.cdpr.ca.gov/docs/enforce/compend/vol_4/chap9.pdf (emphasis added).

Moreover, an examination of the regulatory history behind Section 6738(a)(2) demonstrates that the purpose behind this particular worker protection regulation was to prevent the possibility of pesticides cross-contaminating personal protective equipment. The following excerpt from the rulemaking file is instructive:

12.19 Storage of PPE “apart” and “away”

Q: The rule requires that all clean PPE be stored “apart” from the pesticide contaminated area. It also states that workers have clean places “away” from pesticide storage and use areas to store their clothing not in use, etc. From an enforcement standpoint, what is meant by the terms “apart” and “away”?

A: The objective for this provision is to assure that clean PPE and personal clothing will not come in contact with pesticide residues. As long as the employer can assure that...storage of PPE occurs in an area separate from pesticide storage and use areas...so that these activities will not result in...PPE coming into contact with pesticide residues, then the employer has met the criteria for “apart” and “away.”

Ideally, this requirement may be met by providing a separate room for storage of PPE...; but there are a number of other ways of achieving compliance provided that pesticide residues do not come into contact with the PPE...such as storing PPE in sealed containers.

(OAL File No. 295-1226-01, Agency No. WHS 96-1127-05, Vol. 3, *EPA Interpretative Guidance Workgroup Questions and Answers about the WPS* (Rulemaking), March 15, 1995, at § 12.19.) Therefore, it is clear that the intent of the Department’s regulation for storing personal protective equipment in a specifically designated area free from pesticides was to reduce the risk of contamination of personal protective equipment from stored pesticides or pesticide residues.

The Director finds that there is substantial evidence to support the Commissioner’s Decision that Davey Tree violated Title 3, California Code of Regulations, Section 6738(a)(2) by failing to store personal protective equipment in a pesticide free area. At the hearing, Inspector Amador testified that on August 14, 2013, he conducted a headquarters inspection of a Davey Tree rental storage unit and observed pesticides being stored in the same enclosed storage unit as personal protective equipment. (Amador Testimony; Ex. 4.) Inspector Amador estimated that the pesticides were stored approximately three to five feet away from the personal protective equipment within the enclosed storage unit. Although there was some dispute as to the exact dimensions of the storage unit, which Davey Tree stated was ten feet wide by twenty-five feet deep, neither party disputes that pesticides and personal protective equipment were stored in the same enclosed storage unit together. (Amador Testimony; Bohnet Testimony.) The Director

finds that based on the potential for pesticides to volatilize in an enclosed area and the intent behind the regulation to prevent cross-contamination and protection of workers, storing pesticides and personal protective equipment in the same enclosed air space, such as an enclosed storage unit, is not "pesticide free" as required by Section 6738(a)(2). (See Study Guide; Compendium; and Rulemaking, *supra*.) Accordingly, the Director affirms the Commissioner's Decision as to Charge G.

C. Substantial evidence supports the Commissioner's Decision that Davey Tree violated California Food and Agricultural Code section 12973 by deviating from *L Fume 33*'s mandatory label instruction to use treated wood plugs. (Charge H)

In this case, the parties do not dispute that *L Fume 33*'s label states "Plug holes with treated wood plugs" under directions for use. (Ex. 10; Audio Recording of Hearings) The parties further do not dispute that at the time of the pesticide application and inspections by Inspector Amador on July 31, 2013, and January 24, 2014, Davey Tree used yellow plastic plugs instead of the treated wood plugs listed on the pesticide label. (See Appeal and Audio Recording of Hearing.) The issue regarding this violation is two-fold: (1) whether *L Fume 33*'s instruction to "plug holes with treated wood plugs" was mandatory or merely a recommendation, and (2) whether Davey Tree's use of plastic plugs instead of treated wood plugs amounted to a different method of application which did not violate Food and Agricultural Code section 12973.

1. *L Fume 33*'s direction to use treated wood plugs was mandatory.

Davey Tree argues that the direction to use treated wood plugs was not a mandatory label instruction that must be followed, but was merely a recommendation of a way to plug the drilled out holes in the utility pole. (Appeal at pp. 7-11.) By law, the labeling of pesticides is exclusively the province of the federal government. (7 U.S.C. § 136v [Federal Insecticide, Fungicide, and Rodenticide Act].) In other words, while a state can regulate the sale and use of any federally registered pesticide, it cannot dictate what is on a pesticide product label. (*Id.*) Even after initial registration, most label amendments must first be submitted and approved by the United States Environmental Protection Agency (U.S. EPA) before it can be submitted to the Department for acceptance. The U.S. EPA, Office of Pesticide Programs has issued specific guidance on the issue of mandatory versus advisory statements on pesticide labels that is accepted by the Department. The U.S. EPA explains that for purposes of label interpretation, mandatory statements are generally written in imperative or directive sentences such as "Wear chemical resistant gloves" and "Apply immediately after mixing." Advisory statements, on the other hand, are generally written in descriptive or nondirective terms, and include terms such as "should," "may," or "recommend." (See U.S. EPA, Pesticide Registration Notice (PRN) 2000-5, *Guidance for Mandatory and Advisory Labeling Statements* at p.2, available at

<http://www2.epa.gov/pesticide-registration/prn-2000-5-guidance-mandatory-and-advisory-labeling-statements>; *see also*, Department Enforcement Letter 01-35 dated July 23, 2001, accepting U.S. EPA PRN 2000-5, available at <http://www.cdpr.ca.gov/docs/county/cacltrs/penfltrs/penf2001/2001035.pdf>.)

At the hearing, the County presented evidence that *L Fumes 33*'s label had specific directions to drill four to five holes into the utility pole, inject equal amounts of the fumigant into each hole, and to "Plug holes with treated wood plugs." (Ex. 10.) The County further presented evidence that Davey Tree deviated from the specific instructions to plug the pre-drilled holes with treated wood plugs, by using yellow plastic plugs. (Exs. 3 and 6; Amador Testimony.) Both Inspector Amador and Mr. Weerasekera testified that although they had limited experience with utility pole fumigations and the use of *L Fume 33*, they did have extensive experience conducting pesticide use inspections, and reviewing and interpreting pesticide labels. They further explained that a pesticide label can contain both mandatory and advisory statements, and that the language to "Plug holes with treated wood plugs" was unquestionably phrased to be mandatory language that must be followed.

In contrast, Davey Tree argued and presented the testimony of R. Gross, from Poles, Inc., the manufacturer of *L Fume 33*, that the instruction to "Plug holes with treated wood plugs" was merely a recommendation or example of a way to plug the drilled holes filled with the fumigant. (Gross Testimony.) Mr. Gross testified that plastic plugs are the current industry standard; are superior to treated wood plugs because they do not deteriorate and are removable; and that the manufacturer was in the process of amending the *L Fume 33* pesticide label to allow the use of either wood or plastic plugs.⁷ (Gross Testimony; *see also* Ex. 14.) Davey Tree also presented evidence that at the time of the violation, there were other registered pesticides with the identical chemical makeup of *L Fume 33* that allowed the use of either a plastic or treated wood plugs. (Gross Testimony; Davey Tree Exs. A and B.)

The Department's well-trained and well-qualified inspectors cannot be experts in the specific nuances and movements in industry standards for each of the thousands of pesticides registered by the Department. Department inspectors and staff must therefore rely on the accuracy and specificity of the registered pesticide label, which is developed by the manufacturer and vetted by both U.S. EPA and the Department before being approved for use. If Davey Tree wanted to use a plastic plug instead of the treated wooden plug required by the *L Fume 33* label, it should have either used a different pesticide, or encouraged the manufacturer of *L Fume 33* to amend its label to reflect this change. The Director finds that although the *L Fume 33* pesticide label contained the terms "should," "guide," and "example" in sentences immediately preceding the final instruction, the final directive sentence to "plug holes with treated wood plugs,"

⁷ On August 21, 2015, the Department approved an amended label for *L Fume 33* with the amended language: "Plug the pre-drilled holes immediately after applications."

contained no such advisory terms. As a result, Davey Tree's use of plastic plugs deviated from the specific, mandatory directions for using *L Fume 33* and violated Food and Agricultural Code section 12973.

2. Using plastic plugs conflicted with the *L Fume 33* pesticide label.

Although not explicitly cited or extensively argued at the hearing, Davey Tree argues that using plastic plugs does not conflict with the label under Department regulations because it is a different method of application, not expressly prohibited by the pesticide label. (See Ex. 14, Gross Testimony.) California Food and Agricultural Code section 12973 states, "[t]he use of any pesticide shall not conflict with labeling registered pursuant to this chapter..." The Department's regulations define "conflict with the labeling" to mean, "[a]ny deviation from instructions, requirements or prohibitions of pesticide product labeling concerning storage, handling or use except...Employing a method of application not expressly prohibited, provided other directions are followed ..." (Cal. Code of Regs., tit. 3, § 6000 "Conflict with labeling", subd. (e).)

The term "method of application" is not specifically defined in statute or regulations. As stated above, courts generally "extend considerable deference to an administrative agency's interpretation of its own regulations or the regulatory scheme which the agency implements or enforces." (*Communities for a Better Environment, supra*, 109 Cal.App.4th 1107.) Here, a review of the Department's reference documents and forms clearly indicate that the "method of application" refers to how a pesticide is physically applied or distributed (i.e. chemigation, hand held, spray blast, ground, aircraft) to its target area.⁸ Consistent with this interpretation, the Pesticide Use Monitoring Inspection Report form (PR-ENF-104) used in this case specifically has a "Method of Application" box to be checked with the following options: Aerial, Chemigation, Hand Held, Ground Rig, Other. (See Exs. 3 and 6.) Thus, the method of application in this case was inserting a three inch plastic tube by hand into the utility pole to distribute *L Fume 33* into the pre-drilled hole, not the act of sealing the hole after the pesticide is dispersed, a step required by that application process.⁹ (Ex. 3 at p. 12 [description of first picture showing use of yellow plugs].) As a result, the method of application exception does not apply to this situation.

⁸ See Compendium, Vol. 8, *Guidelines for Interpreting Pesticide Laws, Regulations, and Labeling* (2009), Chapter 2, Pesticide Product Labeling Interpretations, § 2.1 "Conflict with Labeling Exemptions (2ee)," available at http://www.cdpr.ca.gov/docs/enforce/compend/vol_8/chapter2.pdf.

⁹ In fact, Davey Tree's own example of using a marshmallow to plug the holes in the utility pole demonstrates exactly why the Department does not interpret each and every step in the application process to be incorporated into the term "method of application." (Gross Testimony.)

After reviewing the evidence, testimony, and arguments presented at the hearing in this case and Case Number 452-ACP-SD-13/14, the Director finds that there is substantial evidence to support the Commissioner's Decision that Davey Tree violated California Food and Agricultural Code section 12973 by deviating from mandatory directions on the *L Fume 33* pesticide label to use treated wood plugs. Accordingly, the Director affirms the Commissioner's Decision as to Charge H.

D. Substantial evidence supports the Commissioner's decision to classify the violations as a Class A and Class B violation and that the fines were appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in California Code of Regulations, title 3, section 6130, set forth above. Here, there is substantial evidence to support the Commissioner's decision that these violations were Class A and B violations and that the fines were appropriate. A Class A violation is, among other things, a violation that caused a health, property or environmental hazard. A Class B violation is a violation of a law or regulation that was intended to mitigate the risk of adverse health, property, or environmental effects. (Cal. Code of Regs., tit. 3, § 6130, subd. (b); Holbrook Testimony.)

At the hearing, Senior Supervising Inspector Holbrook testified that the violations against Davey Tree were appropriately classified as a Class A violation for Charge A and that the fine was appropriate because Davey Tree spilled a dangerous liquid fumigant to a nontarget area, causing an environmental hazard. (Holbrook Testimony.) Holbrook also testified that the balance of the violations were appropriately classified as Class B violations and that the fines were appropriate because Davey Tree violated a law or regulation intended to mitigate the risk of adverse health, property, or environmental effects. Specific to Charge H (using *L Fume 33* in conflict with label requirements), Holbrook testified that the increased fine was appropriate because Davey Tree was previously made aware of the label requirement to use treated wood plugs, could have easily complied with the label or used a different pesticide, yet failed to take corrective action. Based upon the facts of this case, the Director finds that the violations were appropriately charged and that the fine levied for each charge was not excessive, and was a reasonable exercise of the Commissioner's discretion.

Conclusion and Disposition

The Commissioner agreed with the Hearing Officer and dismissed Charge E. Davey Tree did not appeal Charges B, C, D, and F of the Commissioner's Decision. The Commissioner's Decision as to those charges, and associated \$1,900 fine, is therefore AFFIRMED.

The Commissioner's Decision that Davey Tree violated California Code of Regulations, title 3, section 6600(e) by failing to exercise reasonable precaution to avoid contamination of the environment (Charge A); California Code of Regulations, title 3, section 6738(a)(2) by improperly storing personal protective equipment (Charge G), and Food and Agricultural Code section 12973 by using a pesticide in conflict with its label (Charge H), and fines totaling \$6,000 is AFFIRMED.

The Commissioner shall notify Davey Tree of how and when to pay the **\$7,900 fine** for Charges A, B, C, D, F, G and H.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant Davey Tree Surgery Company 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: DEC 11 2015

By: Brian Leahy
Brian Leahy, Director