

**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 Sutter  
(County File No. ACP SUT 17/18 003)

Docket No. 214

**DIRECTOR'S DECISION**

**Farm Air Flying Service, LLC  
Justin Staas  
4425 West Riego Road  
Sacramento, CA 95836**

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 November 21, 2017, the Sutter County Agricultural Commissioner (“Commissioner”) found that appellant Farm Air Flying Service, LLC (“appellant” or “Farm Air”) made an aerial pesticide application over non-target property while workers were present. In doing so, Farm Air made a pesticide application when there was a reasonable possibility of contamination of persons not involved in the application in violation of 3 CCR 6614(b)(1). The Commissioner designated the violation as Class A and levied a \$2,500 fine.

Farm Air appeals the Commissioner’s civil penalty decision to the Director of the Department of Pesticide Regulation (“DPR”). 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**

On May 4, 2017, Farm Air made an aerial application of two (2) registered pesticide products—Manzate Prostick (reg. no. 70506-234-AA) and Nu-Crop 50 (reg. no. 45002-4-ZC)—to a walnut orchard located at the corner of Oswald Road and Railroad Avenue in Sutter County, California (“application site”). (Stipulation 3.) The application site directly abuts the western boundary of an adjacent apple tree nursery (“nursery site”) operated by Sierra Gold Nurseries (“Sierra Gold”). (County Exhibit 2.) On the morning of the application, at least seven (7) Sierra Gold employees were tying and staking trees at the nursery site under the supervision of G. Singh. (Testimony of G. Singh, hearing part 1 at 1:14:51; County Exhibit 10.)

Appellant observed the Sierra Gold employees prior to making the application. In order to alert them to his presence, he made multiple dry runs near the property line dividing the fields. (Respondent Exhibit 5.) At that time, the Sierra Gold work crew was working approximately 50 to 75 feet from the property line. (County Exhibit 2.) After Farm Air began the application, Sierra Gold employees reported smelling “spray” and G. Singh moved the work crew away from the application site to a location along the southern boundary of the nursery site, approximately 150 to 200 feet from the property line. (Testimony of G. Singh, hearing part 1 at 1:15:39.) Appellant applied pesticide to the application site over multiple north-south passes, and finished with a “clean-up” pass along the southern headland. During the clean-up pass, appellant flew over the nursery site and the Sierra Gold employees. (County Exhibit 2; Respondent Exhibit 2.) According to appellant, there was “product coming out” during the clean-up pass. (Testimony of J. Staas, hearing part 2 at 1:03:30.)

After Farm Air's clean-up pass, at least seven (7) Sierra Gold employees reported experiencing symptoms of pesticide exposure including headaches, difficulty breathing, and a "bad" taste. (County Exhibit 10.) At least seven (7) Sierra Gold employees were then taken to Rideout Memorial Hospital in Marysville, California for treatment. In each case, medical records state that the symptoms were diagnosed as being caused by "exposure to chemical pollution." (County Exhibit 13.)

The Commissioner's office conducted an investigation of the incident, interviewed witnesses, and recorded findings in the Pesticide Episode Investigation Report. On September 5, 2017, the Commissioner issued a Notice of Proposed Action ("NOPA") charging Farm Air with violating 3 CCR 6614(b)(1). The Commissioner proposed a fine of \$2,500. Farm Air requested a hearing. On November 21, 2017, the hearing was held in Yuba City, California before Donald O. Cripe, a hearing officer designated by the Commissioner.

### **The Hearing Officer's 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. The Hearing Officer found "in favor" of the County. The Commissioner adopted the Hearing Officer's decision in its entirety.

### **Appellant's Allegations**

On appeal, Farm Air does not challenge the violation of 3 CCR 6614(b)(1), the fine classification, or the fine amount. Instead, Farm Air argues that the Commissioner's decision discussed a separate pesticide regulation—3 CCR 6614(a)—that Farm Air did not violate. In the NOPA, the County alleged that Farm Air violated 3 CCR 6614(b)(1), which states that:

"Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when... there is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application..."

However, in attempting to cite that regulation, the County quoted language from 3 CCR 6614(a), which states that:

"An applicator prior to and while applying a pesticide shall evaluate the equipment to be used, meteorological conditions, the property to be treated and surrounding properties to determine the likelihood of harm or damage."

In the decision, the Hearing Officer framed the issue as whether Farm Air failed to evaluate “the property to be treated ... and surrounding properties” and found that Farm Air “failed to properly determine the likelihood of harm or damage prior to ... [the] application.” The Commissioner adopted the Hearing Officer’s decision in its entirety.

Farm Air appeals the Commissioner’s decision by arguing that the applicator took reasonable steps in evaluating the equipment to be used, meteorological conditions, the property to be treated, and surrounding properties prior to the application. In other words, Farm Air argues that it did not violate 3 CCR 6614(a).

### **The Director’s Analysis**

The County provided Farm Air with notice of the alleged violation of 3 CCR 6614(b)(1) and an opportunity to respond to that allegation. Further, the Commissioner’s decision that Farm Air violated 3 CCR 6614(b)(1) is supported by substantial evidence in the record. Any discussion of 3 CCR 6614(a) in the Commissioner’s decision is not relevant to the alleged violation.

Under the “VIOLATION” section of the NOPA, the County cited 3 CCR 6614(b)(1) and the County attached the full text of the regulation to the NOPA. The legal analysis in the NOPA makes unmistakably clear that the County alleged a violation of 3 CCR 6614(b)(1). The NOPA states that:

“The Farm Air Flying Service application did not take into account the reasonable possibility that contamination of persons not involved in the application process would occur given the close proximity of the workers to the application site.”

The NOPA then states that:

“While the Commissioner is only required to show a ‘reasonable possibility’ of contamination, in this case ... Farm Air Flying Service ... did in fact cause bodily contamination.”

This analysis closely tracks the language of 3 CCR 6614(b)(1) and discusses the legal elements of the violation. The NOPA specifically alleged that Farm Air made a pesticide application when there was a “reasonable possibility” of “contamination” of “persons not involved in the application ...” Although the County quoted language from 3 CCR 6614(a) in addition to citing 3 CCR 6614(b)(1), the legal analysis provided Farm Air with adequate notice of the alleged violation.

Farm Air's defense at the hearing demonstrates that Farm Air had actual notice of the alleged violation of 3 CCR 6614(b)(1). At the hearing, Farm Air made arguments challenging the validity of the County's pesticide sample analyses, the consistency of the reported symptoms with symptoms that would be caused by exposure to the pesticides that were applied, and the accuracy of witness statements concerning the applicator's flight path. (Respondent Exhibit 5; Testimony of J. Staas, hearing part 2 at 00:30:02.) All of these arguments are intended to rebut the allegation of pesticide drift in violation of 3 CCR 6614(b)(1). None of these arguments would reasonably respond to an allegation that Farm Air violated 3 CCR 6614(a) by failing to evaluate surrounding properties.

The Hearing Officer found "in favor" of the County, which alleged a violation of 3 CCR 6614(b)(1). While Farm Air does not appeal the Commissioner's decision by challenging the violation of 3 CCR 6614(b)(1), that violation is supported by substantial evidence in the record. The Hearing Officer found that evidence in the record "places the employees directly under [Farm Air's] southern headland pass." (Decision at pg. 7.) The Hearing Officer based this finding on testimony that Farm Air flew over the nursery site while performing the clean-up pass along the southern headland and during this pass, there was "product coming out." (Testimony of J. Staas, hearing part 2 at 1:03:30.) Farm Air's tracking program confirms this testimony. According to Farm Air, the release of pesticide during the application is marked by its tracking program with the orange line that passes over the nursery site. (Testimony of J. Staas, hearing part 2 at 1:04:03; Respondent Exhibits 2, 4.) Statements made to County investigators by Sierra Gold employees Ranjit Kaur and Harbhajan Jit Kaur that Farm Air passed over the nursery site during the clean-up pass further support the Hearing Officer's finding. (County Exhibit 10.)

Farm Air does not challenge this finding on appeal, and the finding is based on substantial evidence in the record. The aerial application of pesticides over non-target property while workers are present creates the reasonable possibility of contamination of persons not involved in the application. There is substantial evidence in the record to show that Farm Air violated 3 CCR 6614(b)(1).

It is unclear why the NOPA and Hearing Officer decision discussed 3 CCR 6614(a) at all, or why the Commissioner adopted this portion of the decision. Since the NOPA never alleged a violation of 3 CCR 6614(a), any discussion of 3 CCR 6614(a) in the decision is irrelevant. Even so, it is worth noting that the Hearing Officer's finding that Farm Air failed to "determine the likelihood of harm or damage prior to beginning or continuing this application" is not supported by the record. In fact, evidence in the record shows the opposite: that Farm Air *did* evaluate the nursery site, determined that there were workers present, and then made the application anyway.

### **Conclusion**

The Director affirms the Commissioner's decision that Farm Air violated 3 CCR 6614(b)(1). The total fine is upheld.

### **Disposition**

The Director affirms the Commissioner's decision and levy of fine. The Commissioner shall notify appellant Farm Air of how and when to pay the \$2,500 in total fines.

### **Judicial Review**

Under FAC 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: APR 26 2010

By: Brian Leahy  
Brian Leahy, Director