

**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 Joaquin
(County File No. 002-ACP-SJ-00/01)

Administrative Docket No. 103

DECISION

J & M Boggiano
15219 E. Eight Mile Road
Linden, California 95236

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$1,000 for each violation of certain State pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Joaquin County Agricultural Commissioner (commissioner) found that J & M Boggiano violated FAC section 12973. Using Division 6 of Title 3, California Code of Regulations (3 CCR) section 6130, Civil Penalty Actions by Commissioners, the commissioner imposed a penalty of \$450.

J & M Boggiano appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Appellant's Contentions/Grounds for Appeal

J & M Boggiano contends it followed all required regulations, it did nothing wrong, and it feels a fine is not justified.

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.

FAC 12973

FAC section 12973 provides, "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."

There is evidence in the record that the appellant's employee, Jose Guerra, on behalf of and for the appellant, applied the pesticide Carbaryl 4L, U.S. EPA Registration Number 19713-49, to the appellant's apple orchard site 34-2 on April 22, 1999. Doug Mattes, Senior Agricultural Biologist with the San Joaquin Agricultural Commissioner's Office, observed the application at 1:35 p.m. During the application, Mr. Mattes observed honey bees foraging on blooming weeds and apple blossoms inside the treatment area.

The U.S. EPA approved label, provided with the Carbaryl 4L and accompanying the hearing record, contains a provision entitled, "BEE CAUTION." The provision provides, "BEE CAUTION: This product is highly toxic to bees exposed to direct treatment or residues on blooming crops or weeds. . . . For maximum honey bee hazard reduction, apply from late evening to early morning or when bees are not foraging. Do not apply this product or allow it to drift to blooming crops or weeds if bees are foraging in the treatment area. However, applications may be made during foraging periods if the bee keeper takes one of the following precautionary measures prior to bee flight activity on the day of treatment: (1) confine the honey bees to the hive by covering the colony or screening the entrance; (2) locate the hives beyond bee flight range from the treated area."

There is information in the record that the application was made in the late morning-early afternoon. The application was observed by San Joaquin County staff at 1:35 p.m. Also, even though the apple blossoms were toward the end of their blooming cycle, the application was made when there were apple blossoms and weed blossoms in the apple orchard. The appellant applied Carbaryl 4L when the honey bees were foraging on both the apple blossoms and the weed blossoms.

The appellant noted that FAC section 29103 states [in part] that "Failure of a beekeeper to remove bee hives from a specific location, . . . after notification, shall not prevent the application of pesticides to blooming (sic) [blossoming] plants if consistent with the pesticide's labeling and regulations." (Emphasis added.)

This provision of FAC section 29103 provides no defense to appellant's violation of FAC section 12973. The label prohibits applications of Carbaryl 4L "if bees are foraging in the treatment area." The appellant made the application when honeybees were foraging in the treatment area, i.e., foraging in the apple orchard to which the pesticide was applied.

However, if bees had not been foraging in the treatment area during the application, the appellant could have made an application "during foraging periods" consistent "with the pesticide's labeling and regulation," if the appellant complied with 3 CCR section 6654 (Notification to Beekeepers) and provided specified information to the beekeeper at least 48 hours before applying the pesticide during foraging periods, **and** if the beekeeper, before bee flight activity on the day of treatment, had either (1) confined his honey bees to the hive by covering the colony or screening the entrance, or (2) located the hives beyond bee flight range from the treated area. Even if the appellant had met the requirements of section 6654 and bees had not been foraging in the apple orchard during the appellant's Carbaryl 4L application, the record shows, and appellant admitted in its appeal request, that the beekeeper did neither of the two things above, which are specified on the label.

The appellant also noted that FAC section 29103 provides "When the pesticide applicator has complied with the notification [to apiary owners] . . . the applicator shall not be liable for injury to bees that enter the area treated during or after the application."

This provision of FAC section 29103 is not applicable in this matter. The commissioner did not bring an action against the appellant for damages for injury to the beekeeper's bees. Only the beekeeper can bring that type of action, and the beekeeper would do so by filing a complaint for damages in a court of law. If the beekeeper brings such a lawsuit against J & M Boggiano, then J & M Boggiano, as the defendant in that proceeding, could assert any defenses it may have, which might include FAC section 29103.

There is substantial evidence in the record to support a finding that the appellant applied Carbaryl 4L in conflict with the label and violated FAC section 12973.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$450 fine.

Judicial Review

As provided in FAC section 12999.5, the appellant may seek court review of the Director's decision within 30 days of the date of the decision. The appellant must bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

By: Paul Helliker
Paul E. Helliker
Director

Dated: OCT 10 2001