

**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-06/07-013

Administrative Docket No. 150

**DECISION**

**Wayne Sue  
Sutter Butte Dusters, Inc.  
P.O. Box 213  
Live Oak, California 95953**

Appellant /

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Sutter CAC found that the appellant, Sutter Butte Dusters, Inc. (SBD), committed three violations each of two regulations--3 CCR sections 6434 and 6626(b). The CAC imposed a penalty of \$2,199 for the violations.

SBD appealed from the CAC'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.

**Standard of Review**

The Director decides matters of law using her 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 CAC'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 CAC'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 CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

### **Factual Background**

On June 26, 2006, at 9:30 a.m., Mr. Kevin Putman (Mr. Putman), Sutter County Agricultural Biologist, investigated the application of an unknown material made by SBD using an airboat on a rice field operated by North Side Farms and Mr. Mark Evans. In Mr. Putman's experience, the airboat had been used only to apply restricted materials and the CAC had not received a Notice of Intent (NOI) to apply restricted materials that day in Mr. Putman's area.<sup>1</sup> Mr. Putman was able to determine that the airboat made an application in site 1-75 of North Side Farms by observing the airboat leave the field, and by noticing marks on the muddy berms (checks) surrounding the field and disturbed vegetation at the edge of the field, indicating that the airboat had been in the field. Similar marks were found in the adjacent rice field, site 1-46. CAC staff contacted SBD who was unable to provide staff with the name of the material being applied. The next day, June 27, 2006, SBD provided Mr. Putman an invoice for the sale of 15 gallons of Biomin Zinc Organic fertilizer purchased by North Side Farms from Helena Chemical, and represented that the invoice was proof of purchase of the material applied on June 26, 2006. Contact with Helena Chemical revealed that the zinc had not been ordered until 4:46 p.m. on June 26, 2006. Mr. Putman contacted local suppliers of rice chemicals and determined that Mr. Mark Evans had recently purchased the rice herbicides Regiment, Clincher, and Londax.<sup>2</sup> Mr. Putman also discovered that the three fields had been registered as organic fields.

In 2005, the Sutter CAC had declared Regiment a restricted material that requires an NOI be filed with the CAC 24 hours prior to application.

Late in the day on June 26, 2006, Mr. Putman took samples of vegetation from the field site identified as 1-75, and returned to the field the next day (June 27, 2006) to gather an additional sample. The samples were submitted to the California Department of Food and Agriculture's (CDFA's) laboratory to determine if the samples contained Regiment or Londax.

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<sup>1</sup> At the hearing, Mr. Wayne Sue, President of SBD, testified that the airboat was used a "half-dozen to a dozen" times to apply materials that were not restricted materials, but it was used "lots" to apply restricted materials.

<sup>2</sup> The sales analysis for the same time frame did not indicate a purchase of zinc until the purchase on June 26, 2006. Mr. Putman's investigation further revealed some 116 ounces of Regiment purchased over the past three years could not be accounted for in pesticide use reports.

The first sample was positive for the presence of Regiment. The second sample was negative for Londax. SBD admitted treating the three fields identified as 1-75, 1-46, and 1-28 on the morning of June 26, 2006, using the airboat, but asserted that they applied zinc. No NOIs were filed and no pesticide use reports were filed. Mr. Putman and his supervisor, Deputy Agricultural Commissioner Stephen Scheer (Mr. Scheer), took photographs at various locations in the three fields on June 27, 2006, and again nine days later on July 5, 2006. Mr. Putman and Mr. Scheer testified at hearing that the fields showed evidence of an herbicide effect consistent with the use of Regiment. The photographs corroborated that testimony.

SBD asserts that it was contacted by Mr. Mark Evans who asked SBD to apply zinc to the fields and who provided the material in three five-gallon containers that were delivered to the field. SBD asserts that it believed the material to be zinc, not Regiment.

The Sutter CAC filed a Notice of Proposed Action against SBD on December 28, 2006, citing SBD with 7 violations. The first three violations were for failing to file NOIs for the application of Regiment in fields 1-75, 1-46, and 1-28 in violation of 3 CCR section 6434; violation four was for filing a false report with the CAC in violation of FAC section 11792(a); and the last three violations were for failing to file pesticide use reports in violation of 3 CCR section 6626 on each of the three fields. On May 25, 2007, a hearing was held. The Hearing Officer found that the CAC failed to prove SBD *intended* to apply Regiment to the fields and thus found no violations for violations 1-3. The Hearing Officer did not find that SBD filed a false report, but found that SBD failed to file pesticide use reports for applying Regiment on the three fields and upheld those three violations. The CAC rejected the Hearing Officer's finding of no violation on the first three counts because the CAC determined that intent was not an element of 3 CCR section 6434. The CAC determined that SBD was in violation and fined SBD on counts 1-3 and counts 5-7. SBD filed this appeal.

### **Relevant Statutes and Regulations**

3 CCR section 6434 (Notice of Intent) requires that, where an NOI is required by the CAC, it shall include specified information, and requires that the CAC shall be notified at least 24 hours prior to commencing the use of a pesticide requiring a permit.

3 CCR section 6626(b) requires that an agricultural pest control business shall report the use of pesticides applied by it for the production of an agricultural commodity to the commissioner of the county in which the pest control was performed within seven days of completion of the application.

3 CCR section 6130, Civil Penalty Actions by Commissioners, states in relevant part:  
“(a) When taking civil penalty action pursuant to section 12999.5 of the Food and Agricultural

Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount.

(1) For purposes of this section, violations shall be designated as "Class A," "Class B," and "Class C."

(A) Class A: Violations which created an actual health or environmental hazard, violations of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, or 11897 of the Food and Agricultural Code, or violations that are repeat Class B violations. The fine range for Class A violations is \$700-\$5,000.

(B) Class B: Violations which posed a reasonable possibility of creating a health or environmental effect or violations that are repeat Class C violations. The fine range for Class B violations is \$250-\$1,000.

(C) Class C: Violations that are not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$400."

### **Appellant's Contentions**

SBD challenges the CAC's decision on nine grounds. SBD asserts that the CAC's decision is vague and inadequate because it fails to identify the findings of the Hearing Officer being rejected and fails to make a determination that SBD violated section 6434. The appellant argues that the CAC's rejection of the Hearing Officer's finding that intent is needed to establish a violation of section 6434 is an abuse of discretion, legal error, and not based on admissible evidence. SBD asserts that the County's exhibits A-28 and A-29 are inadmissible evidence so that the Hearing Officer's findings 11 and 12 (Regiment was a restricted material requiring an NOI be filed) are an abuse of discretion, legal error, and not based on admissible evidence. SBD challenges the Hearing Officer's finding that Mr. Scheer was an expert witness qualified to testify regarding the herbicidal effects of Regiment. The appellant asserts that the findings that Regiment was applied to sites 1-46 and 1-28 were not established by a preponderance of admissible evidence. SBD asserted that the determination that it failed to file pesticide use reports and thus violated section 6626(b) was legal error and not based on a preponderance of admissible evidence. Last, SBD argues that the imposition of a fine was an abuse of discretion, legal error, and not based on the preponderance of admissible evidence.

### **The Hearing Officer's Decision**

The Hearing Officer made 14 factual findings that included his findings that Mr. Scheer has sufficient professional experience and knowledge to be considered an expert witness in the herbicidal effect of Regiment; that SBD was hired by Mr. Mark Evans to apply zinc and was provided the zinc by Mr. Mark Evans, but that clear and convincing evidence established that SBD applied Regiment to site 1-75; and that the preponderance of the evidence established that SBD applied Regiment to sites 1-46 and 1-28. The Hearing Officer also found that Regiment was

a restricted material in Sutter County that required an NOI at least 24 hours prior to application and the filing of pesticide use reports. The Hearing Officer found that the agricultural civil penalty action asserted by the CAC as a prior violation, which qualified the instant violations as repeat violations, occurred later in time and could not be used to raise the violation class from Class B to Class A.

The Hearing Officer then made seven determinations. In the first three such determinations, the Hearing Officer interpreted section 6434 as requiring an intent to apply a restricted material before the requirement of filing an NOI is triggered. He reasoned that SBD was told they were applying zinc, were provided the material, and believed they applied zinc using the airboat. Therefore, SBD had no intention or knowledge that they were applying Regiment to the rice fields and could not be found guilty of failing to file NOIs for the three fields.<sup>3</sup> The Hearing Officer determined (determinations 5-7) that SBD did violate section 6626(b) by failing to file pesticide use reports for the three fields because SBD knew at the relevant time that the CAC had evidence that Regiment had been applied to the fields. Therefore, the Hearing Officer reasoned, SBD should have filed pesticide use reports. The Hearing Officer assessed a fine of \$1,200 for failing to file pesticide use reports on the three fields (\$400 per violation).

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

#### **Regiment is a restricted material in Sutter County.**

An NOI is required to be filed with the CAC when a restricted material is to be applied. The county provided evidence, in the form of Exhibits A-28 and A-29, and by testimony of Mr. Scheer that the pesticide Regiment is a restricted material in Sutter County requiring that an NOI be filed with the CAC 24 hours prior to application. Although Regiment is not a state or federal restricted material, the CAC can require a permit be obtained when the material presents an undue hazard when used under local conditions under FAC section 14006.6. Although unsigned, the letter submitted by the county was authenticated by Mr. Scheer's testimony, as was the document setting out Regiment permit conditions. These documents, in addition to Mr. Scheer's testimony that Regiment is restricted in Sutter County, provide sufficient evidence that the use of Regiment in Sutter County requires a permit and an NOI. The Appellant objects in this appeal to the admission of the Exhibits A-28 and A-29 and objects to any findings based on the exhibits. The Appellant was asked at hearing if there was objection to the admission of the two exhibits and clearly stated "no objection" on the record. In addition, these agricultural civil penalty actions are informal actions that do not follow the formal rules of evidence. The Hearing Officer satisfied himself that the documents were authentic and made findings based on those

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<sup>3</sup> The Hearing Officer did not find SBD guilty of providing false documents to the CAC. This finding was not rejected by the CAC and is not at issue in this appeal.

documents and Mr. Scheer's testimony. There is sufficient evidence in the record to support the Hearing Officer's acceptance of the exhibits A-28 and A-29 and to support his factual findings 11 and 12 that the use of Regiment in Sutter County required a permit and an NOI.

**Regiment was applied to sites 1-75, 1-46, and 1-28.**

The Appellant argues that the CAC provided scant and equivocal evidence that Regiment was applied to the three rice fields. The Appellant supports this argument with a suggestion that since the material to be applied was provided in buckets and not water-soluble pouches, the material had to be zinc. The only evidence presented at hearing that the material applied was zinc was an invoice for a material ordered after the application had taken place. The vice president of SBD, Mr. Mike Sue, testified that Mr. Mark Evans asked him to apply zinc to the fields. Mr. Sue testified that Mr. Evans provided three buckets of material and told Mr. Sue to apply those three buckets. Mr. Sue testified that he did not look at the labels nor did he know if the buckets were sealed. SBD did not offer any labels at hearing or testimony by the crew who did the actual application. Mr. Mark Evans also did not testify.

The vegetation sample taken from site 1-75 tested positive for Regiment. Mr. Putman testified as how he took the sample following Department of Pesticide Regulation protocol, and the testimony was corroborated by Mr. Scheer's testimony. Mr. Putman gathered a pound of vegetation in a fifty-yard radius within site 1-75, consolidated the vegetation into one sample, and submitted the sample to the CDFA laboratory and requested testing for the presence of Regiment. The Appellant asserts that many samples of the vegetation must be taken throughout the entire field and the separate samples must be submitted to the laboratory to establish Regiment was applied. The Director rejects this assertion. The one sample submitted clearly established Regiment was present in the field. It is not necessary to sample the entire field to establish the presence of Regiment in the field.<sup>4</sup>

Mr. Putman and Mr. Scheer took before-and-after photographs of sites 1-75, 1-46, and 1-28 on June 27, 2006, and nine days later on July 5, 2006. The Regiment label states that susceptible weeds turn yellow and stop growing 3 to 7 days after treatment and that browning of sensitive weeds is evident in 7 to 14 days after treatment. Mr. Putman and Mr. Scheer testified, unequivocally, that they witnessed yellowing and other herbicide effects in the fields 9 days after

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<sup>4</sup> Appellant argued that the CAC should have tested the field for the presence of zinc. Mr. Scheer and Mr. Putman testified in detail about the expense of testing and the decision to test for certain pesticides. By looking at recent purchase records, the CAC made a decision to test the two samples taken for the rice herbicides Regiment and Londax. They did not test for Stam (also a rice herbicide) because Stam causes an effect within a couple of days and the fields were still green when the decision was made 3 or 4 days after treatment. The CAC did not test for zinc because a positive zinc sample would not rule out a positive Regiment sample. SBD did not have the field sampled for rebuttal evidence.

the suspected treatment. They also testified that the effects were similar to known Regiment effects documented in another field. Mr. Scheer and Mr. Putman took photos of site 1-61 for which there was an NOI filed for the use of Regiment for an application on June 24, 2006. They testified that the effects were similar. The only equivocal testimony received at hearing about the herbicidal effects seen in the fields was that of Mr. Greg Anderson, the pest control adviser employed by Helena Chemical, who was called as a witness by Appellant. Mr. Anderson testified that he did not want to testify, and could not tell from photos if an herbicidal effect occurred. Mr. Anderson testified that he would have had to be present to see the effects and was not. Early in his testimony Mr. Anderson stated that he was not familiar with Regiment effects, it was a relatively new product to him, and he hadn't noticed what effects Regiment caused. He testified that he usually sprays it and walks away unless someone begins "crying" about the application.

SBD stipulated that it applied a material to all three fields on June 26, 2006, by airboat.

The positive sample, the stipulation, and the testimony of Mr. Putman and Mr. Scheer provide sufficient supporting evidence for the Hearing Officer's factual findings (5,6, and 7) that Regiment had been applied to the three fields by SBD.<sup>5</sup>

**Intent is not an element of the violations.**

Proving a violation of 3 CCR section 6434 does not require a showing that Respondent knew the substance he was applying was a restricted material. Appellant asserts that it cannot be found guilty of a violation of 3 CCR section 6434 without a finding that it knowingly applied a restricted material. Appellant asserts that the language "NOI" must be interpreted to require intent as an element of the violation. The Hearing Officer made this same interpretation in his determinations 1-3 and discussed the lack of evidence at hearing that failed to establish SBD intended to apply Regiment. The determination was an interpretation of law that the CAC rejected. The CAC has the authority to correct an erroneous interpretation of law before issuing his order based upon the Hearing Officer's findings of fact.

The Director finds, as a matter of law, that the CAC does not need to establish that an applicator knew he was applying a restricted material to be found in violation of the requirement to file an NOI. The use of the word "intent" in the regulation only clarifies when the required

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<sup>5</sup> Appellant challenges the Hearing Officer's finding that Mr. Scheer has sufficient experience to be able to testify as an expert witness on herbicidal effects on the basis that his expertise was not established by a preponderance of admissible evidence. Mr. Scheer testified as to his 14 years of experience and testified knowledgeably during the hearing. The hearing is an informal procedure not dependent on the formal rules of qualifying an expert witness. The Director has found sufficient evidence in the record to support the Hearing Officer's findings which relied on Mr. Scheer's testimony as a percipient witness, as well as other evidence as noted, and does not find it necessary to address the issue of expert witnesses in this decision.

notice must be given—prior to the application. It is not an element of the offense, but describes the requirement. Proving a violation of 3 CCR section 6434 does not require a showing that the Respondent intended to violate the regulation, but only that the violation was committed. The CAC must show only that there was an application of a restricted material and that no NOI was filed. The purpose of the regulation is clear—the CAC must have advance knowledge of the application of a restricted material in order to monitor the application and ensure compliance with the permit conditions. That purpose cannot be thwarted by the failure of an applicator to take any steps to confirm or verify what substance it is applying. Apparently, in this instance, buckets were provided to the applicator at the field and the applicator simply instructed his employees to apply it without even inspecting the containers or their contents. Mr. Mike Sue testified that he did not look at the label of the containers and could not testify if the containers were sealed. This lack of knowledge is of very great concern. To allow an applicator to avoid following the rules and regulations by simply applying a material at the request of the grower is to allow it to circumvent the permit system and raises a very reasonable possibility of causing harm to humans or the environment. It is clear that SBD applied Regiment on site 1-75. SBD, by failing to even check what it was applying, cannot hide behind his lack of “intent” to avoid liability for failing to comply with the law.

As Appellant has argued, interpretation of a regulation must be in accord with its plain meaning to avoid an absurd result. Adopting the Respondent’s interpretation would lead to the absurd result that the applicator can avoid the consequences of violating California law by blindly applying whatever the grower provides. Mr. Sue rather tellingly testified that he just keeps his mouth quiet when they [growers] contact him, “they [the growers] have some strange stuff out there.” Adopting the Hearing Officer’s and the Appellant’s interpretation would allow the Respondent to avoid the requirement of a permit or complying with its requirements, and, in this case, allow the grower to apply a restricted material to his organic rice crop, and then market that crop to unsuspecting buyers as organic.<sup>6</sup>

The Director finds that the CAC was correct in overruling the erroneous interpretation of the regulation and in reinstating the violations 1-3 for failing to file NOIs for the three fields.

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<sup>6</sup> Appellant argues that the regulation cannot be meant to create strict liability, requiring that applicators would be liable for failure to file NOIs and pesticide use reports for applications that they did not intend to make and did not know they had made. This argument is frightening. How can a licensed pesticide applicator apply a material, possibly quite toxic, and not know what they are applying? Is that applicator without liability if a grower hands him a bucket of something like chlorpyrifos or DDT and asks that it be applied? How can the applicator follow the label without knowing the name of the material? This argument flies in the face of DPR’s regulatory scheme.

**Pesticide Use Reports are required to be filed after the application of a pesticide.**

For the same reasoning as above, SBD violated 3 CCR section 6626(b) by failing to file pesticide use reports. There is no element of intent in the regulation. A pesticide applicator is charged with knowing that he is applying a pesticide, and must report that application. Any other interpretation results in the absurd consequence of rewarding intentional or negligent ignorance. There is sufficient evidence in the record to support the CAC's finding of three violations of the section.<sup>7</sup>

**The CAC's rejection and reinstatement of the violations was sufficiently clear to advise SBD of the CAC's decision and level of fine levied.**

The Appellant argues that the CAC's decision is vague and inadequate in that the CAC failed to clearly identify the exact findings of the Hearing Officer he rejected, and that he failed to make an express determination that SBD violated section 6434. The CAC did not reject any of the Hearing Officer's *findings of fact* 1-14. The CAC rejected the Hearing Officer's interpretation of 3 CCR section 6434 in *determinations* 1-3 that inserted "knowingly" or "intent" as an element of the violation. The CAC rejected that interpretation of the law, and, therefore, the application of that interpretation to these facts. The CAC adopted the remaining findings and determinations, and by levying a fine of \$2,199, obviously reinstated the violations 1-3 with an additional fine of \$999. The CAC noted that the Class A violations were decreased to Class B violations by the Hearing Officer's finding number 13 that the instant violations could not be properly found to be repeat Class B violations that would support the Class A classification. Thus, the CAC levied a fine of \$333 for each of the violations 1-3 rather than the amount of \$1,000 found in the original Notice of Proposed Action. 3 CCR section 6130 states the Class B violation range to be \$250-\$1,000, so a fine of \$333 is well within the CAC's discretion.<sup>8</sup>

The Hearing Officer's findings of fact 4, 5, 6, 7, 10, 11, 12 and 13, and stipulations 3, 4, and 5 are sufficient to establish that SBD applied Regiment to the three fields without filing NOIs or pesticide use reports. As discussed above, the findings are supported by sufficient

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<sup>7</sup> At hearing, SBD's counsel argued that the CAC cannot charge a separate violation for the treatment of each of the three fields. Counsel argued it was one application. This argument was not brought up in the appeal and will not be addressed here.

<sup>8</sup> The notice of proposed action issued by the CAC against SBD originally proposed to levy fines of \$1,000 each for violations 1-3 as Class A violations (total fines of \$5,200). The notice of proposed action put SBD on notice of the fine level and the violations alleged so that the CAC's rejection of the Hearing Officer's erroneous interpretation of 3 CCR 6434 and reinstatement of the violations does not result in surprise or a denial of due process. Again, this hearing process is an informal commonsense hearing process that does not require the formal processes of civil trial and judgment. FAC section 12999.5 governs this process and does not require the CAC to make formal findings of fact or conclusions of law.

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evidence in the record. Thus, the CAC's finding that SBD is responsible for violations 1-3 and 4-7 is supported by substantial evidence. The fines are within the regulatory fine levels and well within the CAC's discretion.

**Conclusion**

The record shows the CAC's decision is supported by substantial evidence and there is no cause to reverse or modify the decision. The Director upholds the CAC's decision and fine in its entirety.

**Disposition**

The CAC's decision is affirmed. The CAC shall notify the appellant how and when to pay the \$2, 199 fine.

**Judicial Review**

Under 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 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: NOV 16 2007

By:   
Mary-Ann Warmerdam, Director