

**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 Merced
(County File No. 002-ACP-MER-07/08)

Docket. No. 152

DECISION

**Michael Wickstrom
Wickstrom Jersey Farms, Inc.
5638 Columbus Avenue
Hilmar, California 92324**

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 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 Merced County Agricultural Commissioner found that the appellant, Michael Wickstrom, owner/operator of Wickstrom Jersey Farms, Inc. (Wickstrom), violated FAC section 12973. The commissioner imposed a total penalty of \$700 for the violation.

Wickstrom 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.

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.

Michael Wickstrom
Wickstrom Jersey Farms, Inc.
Docket No. 152
Page Two

Factual Background

On August 3, 2005, Mr. Louis Sikma, a walnut farmer, contacted Mr. Dan Cismowski, the Deputy Assistant Agricultural Commissioner with Merced County at that time. Mr. Sikma was concerned about “apparent herbicide damage” to a row of walnut trees at his orchard. Mr. Sikma’s orchard was located in Merced County at Sikma Site 002, on the east side of Verde Avenue, and 1/8 mile north of Turner Avenue, near Hilmar, California. (Exhibits D and J, and testimony of Mr. Sikma, Mr. Dan Cismowski, and Ms. Eleanor Carlos.) Sikma Site 002 is adjacent to Respondent Wickstrom’s alfalfa field, identified in the record as “Winter.” (Exhibit D and testimony of Mr. Sikma, Mr. Cismowski, and Ms. Carlos.)

There is evidence in the record that Mr. Sikma sought advice from the University of California Cooperative Extension (UCCE) Stanislaus’ Farm Advisor, Ms. Kathy Kelly Anderson, regarding the damage to his walnut trees. Ms. Anderson advised Mr. Sikma that the damage to his walnut trees was consistent with bromacil contamination. (Exhibit D, and testimony of Mr. Sikma, Mr. Dan Cismowski, and Ms. Eleanor Carlos.)

Bromacil is an herbicide used mostly for noncrop areas; bromacil’s only agricultural use listed on the label is for use in citrus orchards for weed control. Bromacil is not labeled for use in walnut orchards. (Exhibits D, I, and J and testimony of Mr. Cismowski, Ms. Carlos, and Mr. Wickstrom.)

Mr. Cismowski reviewed noncrop Pesticide Use Report (PUR) information in Merced County submitted by Mr. Wickstrom and found that he had reported applications of Krovar IDF, registration number 352-505, and Hyvar X, registration number 352-287, in December 2002, February 2003, and May and December 2004. There is information in the record that Hyvar X contains 80 percent bromacil, and that Krovar IDF contains 40 percent bromacil. (Exhibits D, I and J, and testimony of Mr. Cismowski and Ms. Carlos.)

After reviewing Wickstrom’s PURs, Mr. Sikma asked Merced County to conduct an official investigation. In September of 2005, Mr. Cismowski assigned Ms. Eleanor Carlos, Merced County Agricultural Biologist (now retired) to conduct the investigation. (Exhibit D.)

Ms. Carlos’ investigation found that the owner of Sikma Site 002, Mrs. Yecny¹, had complained in 2001 of die-back in the identical area that Mr. Sikma identified. Mr. Sikma told Ms. Carlos that he had noticed the same symptoms back in 2003, but did not report it to the county. (Exhibit D, and testimony of Mr. Sikma, Mr. Cismowski, and Ms. Carlos.)

Ms. Carlos contacted Ms. Anderson with UCCE-Stanislaus and Ms. Anderson reiterated that Mr. Sikma’s walnut trees appeared to have sustained herbicide damage and that Krovar or Hyvar’s active ingredient, bromacil, could have caused the damage. Ms. Anderson had visited Mr. Sikma’s orchard some months before. (Exhibit D and testimony of Mr. Cismowski and Ms. Carlos.)

¹ Mr. Sikma leases the walnut orchard from Mrs. Yecny.

Michael Wickstrom
Wickstrom Jersey Farms, Inc.
Docket No. 152
Page Three

In October 2005, Ms. Carlos took photographs of the damage to the walnut trees. (Exhibit L.) At that time, Ms. Carlos also took six soil samples; three along the property line between Sikma Site 002 and Winter, and three on a north-south line every five feet at the eleventh tree from the north-east corner of Sikma Site 002. (Exhibit N.) Two of the six samples were sent the California Department of Food and Agriculture's Chemical Analytical Laboratory for chemical analysis for bromacil. The samples analyzed were identified as samples 102105-EC-1 and 102105-EC-4. Sample 1 was taken from the base of the eleventh tree in from the NE corner of the walnut orchard approximately 15 feet from the irrigation berm between the Winter site and Sikma Site 002. Sample 4 was taken along the irrigation berm between Sikma Site 002 and Winter. (Exhibit N and testimony of Ms. Carlos.) Both samples tested positive for bromacil at the concentration of 12 parts per million. (Exhibit O and testimony of Ms. Carlos.)

Mr. Carlos talked with Wickstrom on October 4, 2005. Wickstrom told Ms. Carlos that while he had used bromacil products in the past near Sikma's walnut orchard, he stopped using them back in the fall of 2001 after he became aware of problems with the walnuts. (Exhibit D and testimony of Mr. Wickstrom and Ms. Carlos.) There is evidence in the record that Wickstrom and Ms. Carlos met back in 2001 and had discussed the bromacil issue. Ms. Carlos and Wickstrom agreed that Wickstrom would stop applying bromacil to the area. (Testimony of Ms. Carlos and Mr. Wickstrom.) In addition, there is some hearsay evidence in the record that bromacil applied in 2001 would not result in positive residue samples in 2005. (Exhibit D.)

Wickstrom's agricultural commodity PUR spreadsheets compiled and produced by the county for March 2002; January, March, and December 2003; and March and December 2004, show no applications of either Hyvar or Krovar at his Winter site, identified as "Winter 34-6S-10E M E/Verde & ¼ N/Turner." (Exhibit Q.)

Mr. Sikma's Site 002 PURs for 2003, 2004, and 2005 did not show any pesticides applied that contained bromacil. However, as indicated earlier, the PURs submitted by Wickstrom for noncrop use for December 2002, February 2003, and May and December 2004 all show applications of pesticides containing bromacil in the county. Wickstrom notes on the four PURs in column "F" "Roads/Ditch." (Exhibit Q.)

Appellant's Contentions

Wickstrom contends that the Hearing Officer, Donald O. Cripe, issued a decision that left open the question as to what caused the damage to the affected walnut trees. Wickstrom also contends that his PURs showed that he had not applied pesticides with the active ingredient bromacil at his Winter site adjacent to Sikma's walnut orchard since 2001.

FAC Section 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." In this case, the

Michael Wickstrom
Wickstrom Jersey Farms, Inc.
Docket No. 152
Page Four

elements of proving a violation of FAC section 12973 are: (1) a pesticide was applied; and (2) the pesticide was applied in a manner that conflicted with the instruction on the label of the pesticide applied.

Analysis of Violation of FAC Section 12973

In the Hearing Officer's decision adopted by the Commissioner, Wickstrom was found to have violated FAC section 12973 in May and December 2004² by applying Hyvar X and Krovar IDF on or near Mr. Sikma's walnut trees. The Hearing Officer made a finding that bromacil, an active ingredient found in Hyvar X and/or Krovar IDF, was found on or near the damaged the walnut trees and that Wickstrom was the only possible source in proximity to Sikma Site 002. The hearing officer stated that no other sources of bromacil were entered into evidence. The hearing officer specifically found the cause of the damage to the walnut trees observed at Sikma's Site 002 was uncertain.

The burden is on the county advocate to provide substantial evidence that: (1) Wickstrom applied pesticides with bromacil in 2004 on or near Sikma Site 002; and (2) that the application was in conflict with the Hyvar X and Krovar IDF's label directions because it was applied in a location where it could come into contact with the roots of the walnut trees. The directions on the labels states in relevant part, "Do not apply to sites which have roots of desirable plants growing into the treatment zone as plant injury or death may occur;" and, "Do not apply (except as recommended for crop use), or drain or flush equipment on or near desirable trees or other plants, or on areas where their roots may extend, or in locations where the chemical may be washed or moved into contact with their roots."

Of the two soil samples taken, one sample was taken on the border between the Winter site and Sikma's Site 002, and the second sample was taken approximately 15 feet in from the border line. The decision did not consider that the samples taken may have been contaminated by soil movement caused by Mr. Sikma's grading of Sikma Site 002. Mr. Sikma testified that in 2005, he did not use any herbicides on Sikma Site 002 because he had "table-topped leveled" the area. Moving the earth around in Sikma's walnut orchard supposes that the soil was moved from one area to another; hence, any sampling taken in October of 2005 was compromised by Mr. Sikma's grading. The samples do not constitute substantial evidence that the bromocil found was the result of any pesticide application on Wickstrom's property.

Furthermore, the county failed to provide any evidence to contradict Wickstrom's testimony regarding the locations where he did apply the Hyvar X and Krovar IFD in 2004 as reported on his noncrop PUR. (Exhibit Q.) Mr. Wickstrom testified that the bromocil products recorded on this form was not applied at or near the walnut trees, but that he had only applied them to his lagoon and his dairy area.

² Mr. Cismowski, in his opening remarks, remarked that the Notice of Proposed Action was unclear as to the dates of the alleged violation of FAC section 12973. Mr. Cismowski stated that the county was alleging that the application of the pesticides containing bromacil occurred in May and December 2004; hence, the alleged violation of FAC section 12973 occurred in 2004.

Michael Wickstrom
Wickstrom Jersey Farms, Inc.
Docket No. 152
Page Five

Mr. Wickstrom testified that he had not applied any pesticides with bromacil on Winter site or on or near Sikma Site 002 since the fall of 2001. Ms. Carlos' investigation summary corroborates Mr. Wickstrom's testimony as does Wickstrom's PURs for "Winter 34-6S-10E M E/Verde & ¼ N/Turner." (Exhibits D and Q.) This evidence is uncontradicted by any of the county's witnesses or evidence.

Therefore, the county did not provide substantial evidence that Mr. Wickstrom violated FAC section 12973 by applying Hyvar X and Krovar IDF in 2004 near Sikma Site 002 and the walnut trees in conflict with the product labels.

Conclusion

There is not substantial evidence in the record to support a decision that Wickstrom violated FAC section 12973.

Disposition

The commissioner's decision is reversed in its entirety.

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

By: 
MaryAnn Warmerdam, Director
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Dated: JAN 14 2008