

**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 Stanislaus
(County File No. 50-ACP-0607-021)

Administrative Docket. No. 153

DECISION

**Cavanagh Flying Service
601 S. Indiana Avenue
Modesto, California 95357**

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 Stanislaus CAC found that the appellant, Cavanagh Flying Service (CFS), committed one violation of the FAC section 12973. The CAC imposed a penalty of \$1,000 for the violation.

CFS 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 July 24, 2006, starting at approximately 7:00 a.m., CFS applied Lorsban 4E, a restricted material pesticide, by helicopter on a 40 acre almond orchard adjacent to the Pedretti Sports Complex in Turlock, California. The application was completed at approximately 7:40 a.m. The Boy's Baseball Western World Series Tournament was scheduled to continue play with four games to begin at 8:00 a.m. at the sports complex. Players, parents, coaches, and other visitors were present at the complex during most of the application. One parent became concerned that the helicopter failed to completely shut off its application equipment while making turns over the complex and called the CAC. Witnesses reported seeing the helicopter making the application and smelling a pesticide odor but could not say they saw the pesticide drift over the complex. A maintenance worker reported feeling mist on his skin after pulling out of a complex parking lot while driving his tractor down Tegner Road that runs between the orchard and the complex. Samples taken three days later on July 27, 2006, from the tractor and from the driver's sweatshirt were negative for the presence of the pesticide. A sample taken from a transformer adjacent to Tegner Road on complex property was positive for the presence of pesticide. The transformer was enclosed in a fenced and locked area.

The Lorsban 4E label contains the following language under the heading "Spray Drift Management": "[d]o not allow spray to drift from the application site and contact people, structures people occupy at any time and the associated property, parks and recreation areas, non-target crops, aquatic and wetland sites, woodlands, pastures, rangelands, or animals."

CFS stipulated prior to hearing that during the application of July 24, 2006, Bill Cavanagh drifted Lorsban 4E onto the transformer located on the north end of Pedretti Park.

Relevant Statutes and Regulations

FAC section 12973 states:

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.

3CCR 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

The appellant contends that there was no evidence that pesticide residue was found off site and within the prohibited areas of the Lorsban 4E label, and therefore the Hearing Officer’s finding of violation is unsupported by any evidence and is arbitrary and capricious and must be overturned. The appellant contends that the transformer is not a structure occupied by people so that the label restrictions were not violated.

The Hearing Officer’s Decision

The Hearing Officer rejected the appellant’s contentions. The Hearing Officer found that it was unreasonable to contend or conclude that drift fell only on the top of the transformer and not on the adjacent sidewalk, grass, roadway, etc. The Hearing Officer accepted the county’s explanation of why a sample was taken from the fenced transformer only. The county explained that drift residue would have been washed away or diluted by park lawn watering so they sampled the transformer and not the adjacent sidewalk or grass. The Hearing Officer then determined that the appellant argued an overly narrow reading of the prohibition on drift and found that the transformer was clearly part of an “associated property” and “park” or “recreation area” within the meaning of the label. Based on these conclusions, the Hearing Officer found that appellant violated FAC section 12973 by applying Lorsban 4E in conflict with the label.

The Hearing Officer then determined that the proposed fine of \$5,000 was not appropriate because the county had not established that pesticide mist had actually fallen upon persons present in the complex, and therefore did not establish that an actual health hazard had

been created. Additionally the county failed to establish that the residue level found on the transformer of .07 micrograms was high enough to constitute an actual health hazard. However, the Hearing Officer did find that the violation of section 12973 by CFS posed a reasonable possibility of creating a health or environmental effect that warranted a Class B violation and because of the number of persons present and their ages, the maximum fine of \$1,000 was appropriate.

The Director's Analysis

The Director agrees with the Hearing Officer that the appellant's argument that the transformer is not protected by the Lorsban 4E label is overly narrow. The transformer, even though located in a locked fenced area, is still "associated property" or a "parks and recreation area" outside of the targeted treatment area upon which drift is prohibited by the Lorsban label. It is also reasonable to infer that the adjacent sidewalks and grass were drifted upon, but, that due to overnight watering, it would have been unreasonable to sample those areas. The positive sample taken from the transformer, coupled with appellant's stipulation that Bill Cavanagh drifted Lorsban 4E onto the transformer, is sufficient evidence to support the Hearing Officer's finding of drift in violation of the label.

The Director also agrees with the Hearing Officer's analysis that the CAC failed to present evidence that an actual health hazard was created by the violation sufficient to support a Class A fine. The witnesses and witness statements were consistent in denying contact by pesticide mist and in denying illness. Even the tractor driver, who did not testify at hearing, did not claim illness nor were the samples taken of the tractor and his sweatshirt positive for the presence of pesticide. There was no evidence presented that pesticide drifted onto any parts of the park other than the transformer. In addition, the CAC did not present evidence that the presence of .07 micrograms of pesticide on the transformer constituted a hazardous level to health or the environment. While it is not necessary to establish actual illness to establish that an actual health hazard was created, sufficient evidence must be presented to support a finding that would justify a Class A fine. The Hearing Officer's inference that Lorsban 4E probably drifted onto adjacent grass and sidewalks surrounding the transformer is reasonable, and his finding that this created a reasonable possibility of creating a health or environmental effect (a Class B violation) was supported by the evidence. The CAC adopted the Hearing Officer's finding that the maximum fine in the Class B range was appropriate. The assessment of the maximum fine of \$1,000 is 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 \$1,000 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: FEB 22 2008

By: Mary-Ann Warmerdam
Mary-Ann Warmerdam, Director