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. 022-ACP-MER-07/08)

Administrative Docket. No. 161

T-Craft, Inc.
Attn: Hugh Taylor
14027 S. Red Top Road
El Nido, California 95217
Appellant./

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations (3 CCR) section 6130, 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 on July 7, 2008, the Merced CAC found that on July 1, 2006, the appellant violated 3 CCR section 6614(b)(3) by contaminating nontarget property during an aerial application of a pesticide. The CAC levied a fine of $250.[1]

Mr. Hugh Taylor appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). 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 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

[1] The original Notice of Proposed Action charged Respondent with two violations and a fine of $500. At hearing, the CAC withdrew the proposed violation of FAC section 12973.

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 July 1, 2006, licensed aerial applicator Mr. Hugh Taylor of Respondent T-Craft, Inc., made an aerial application of three pesticides--Oberon 2 SC Insecticide/Miticide, Syl-Tac (surfactant) and Tri-Fol (buffer)--to 70 acres of fodder corn immediately north of an occupied residence. Mr. Ben Garcia was standing in the yard of his mother's residence, saw the aircraft and saw the drift of the pesticide into the yard, onto his car, and felt the mist on his skin. He spoke to the foreman of the ranch to determine the pesticide used, and the identity of the applicator. On July 3, 2006, Mr. Garcia called and filed a complaint with the Madera CAC. An inspector from the Madera CAC's office visited the property on July 3, 2006, and took three swab samples of the northward-facing side of a residence window, and a pick-up truck and semi-trailer parked in the yard. The samples were determined to be positive for the presence of spriomesifen, which is the active ingredient in Oberon. The investigation was thereafter handled by the Merced CAC because the application occurred in Merced and drifted across into Madera County.

Relevant Statute and Regulations

Appellant was charged with violating 3 CCR section 6614(b)(3)--Protection of Persons, Animals, and Property. Section (b)(3) reads in relevant part: "Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when: . . . (3) There is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such property."

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a repeat of a Class B violation. The fine range for Class A violations is $700-$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a repeat of a Class C violation. The fine range for Class B violations is $250-$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is $50-$400.

Appellant's Allegations

Appellant contended that key witnesses for the county lied. Appellant contended that complainant, Mr. Garcia, told a very different story at hearing than during a confrontation prior to the hearing in which Mr. Garcia was looking for a fight and was allegedly incoherent. Appellant contends that he was not afforded the opportunity to collect samples which was a violation of his rights and that the State laboratory fabricated the positive results of the testing in order to collect money to combat the State's financial crisis. Appellant contended that the county inspector Soehnen misquoted him with regard to wind direction. Appellant contended that the County of Merced has a long history of "bogus" violations. Appellant contended that some other source contaminated the residence, probably the county inspector or Mr. Garcia.

The Hearing Officer's Decision

The Hearing Officer noted the testimony of the inspector who took the three swab samples found to be positive for the active ingredient of the pesticide sprayed by Appellant. He noted that complainant, Mr. Garcia, testified that he saw the aircraft spraying the pesticide, saw the drift, and felt the spray contact him. The Hearing Officer noted that the county witnesses testified, and the pesticide use documents supported the fact that, there was only one application of Oberon at the time, the application was done by appellant, and it was the only known source of contamination.

The Hearing Officer discussed the conflicting testimony presented at the hearing and that the determination of the violation would turn on the credibility of the State laboratory results and evidence to support an alternate source of contamination. He noted that appellant failed to present any evidence to support his claim that the State laboratory would deliberately give false positives and to support the claim of another plane or hand sprayers caused the contamination found.

The Hearing Officer upheld the violation. He also upheld the fine of $250, a Class B fine, because the Oberon label states that the product is harmful if swallowed or absorbed through skin.

The Director's Analysis

The evidence shows that on the northward side of three different locations on the nontarget property the active ingredient of the pesticide applied by Appellant was found. There is

no evidence that the State laboratory falsified the results[2]. Appellant contended that he was denied discovery rights because he was not allowed to take samples and submit them to an independent laboratory. The evidence shows that Mr. Hugh Taylor knew about the allegation that his application had drifted on to the Garcia property on the date of occurrence. There is no evidence that Mr. Taylor attempted to obtain his own samples despite this knowledge.

The complainant testified that he saw the aircraft applying the pesticide, saw the drift, and felt the spray contact him. There is no contradictory evidence. Appellant makes reckless and unsubstantiated statements about Mr. Garcia and calls him a liar. Appellant states that proof that the complainant is a liar is shown by complainant noting in his statement that the two men had a long close working relationship. In apparent contradiction, appellant denies ever meeting Mr. Garcia. Appellant misstated what the complainant said in his statement. Complainant said he called the operator of the ranch with whom he had a long close working relationship. Complainant also testified that he worked one summer for Mr. Hugh Taylor and knew him and his son.[3]

Appellant asserts that any contamination had to be caused by a different source and infers that the CAC or the complainant may have used a hand sprayer to contaminate the site. The documentary evidence presented shows that the only Oberon application on July 1, 2006, in the four sections surrounding the nontarget property, was the single application by appellant. No evidence exists as to an alternative source. The allegation that the nontarget property was intentionally contaminated by a hand-sprayer operated by the CAC or by Mr. Garcia for monetary gain is completely unsubstantiated and without merit.

Appellant argued strongly against the wind evidence presented and again asserted that the witnesses were either lying or stupid for relying on wind evidence from the CIMIS weather stations ten miles away. Whether the day was calm, or the wind was moving at 1-3 miles per hour, does not override the fact that the pesticide was seen to drift, and that positive samples were found on nontarget property. Documentary evidence presented at hearing showed a distance of 80 feet between the edge of the target property and the residence property on which drift was found. The close proximity to the field creates a reasonable possibility of contamination of nontarget property. The appellant admitted seeing the Garcia residence, and asserted that dense vegetation there would protect the property and that he was not worried about the southeast

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[2] At hearing the CAC inspector tried to explain to Mr. Taylor that he was incorrect that the State laboratory would falsify the results to get money to ease the State's financial crisis by explaining that the State does not receive the penalty money and that many times they receive negative results from the State laboratory. Mr. Taylor shouted over the inspector and cut her off, refusing to listen to her explanation.

[3] Both appellant and Mr. Garcia testified to an incident in which an employee of Mr. Garcia's parked a truck on appellant's airstrip giving rise to a confrontation. The Hearing Officer rightly stopped these lines of testimony and admonished all witnesses to limit their testimony to the facts surrounding the case. The Hearing Officer further stated he would not allow name-calling and would not base his decision on histrionics.

property but was more worried with the northeast property where he saw the application drift. Appellant's reliance on the vegetation to protect the property also indicates a recognition that there was a reasonable possibility of contamination.

The Hearing Officer relied on the positive laboratory samples and the documentation that appellant made the only Oberon application in the area on the day of the incident to find that the appellant violated 3 CCR section 6615(b)(3). The evidence supports this finding.

The CAC presented evidence of the Oberon label that stated that the product was harmful if swallowed or absorbed through the skin. The application consisted of two additional pesticides--Syl-Tac (surfactant) and Tri-Fol (buffer). The labels of these two pesticides cautioned against contact with the eyes.[4] The Hearing Officer determined and the Director agrees that the cautions found on the label support a finding that a reasonable possibility of creating a health or environmental hazard existed when these pesticides drifted sufficient to support charged the violation as a Class B violation.

Conclusion

The commissioner's decision that Appellant violated 3 CCR section 6614(b)(3) is supported by substantial evidence. The commissioner's decision to levy a fine of $250 is also supported by substantial evidence and well within his discretion.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the $250 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.

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[4] It is of concern to the Director that a licensed aerial applicator would not only testify that the surfactant and the buffer were not pesticides, but would assert that mistaken fact strongly at hearing. Both are registered pesticides (spray adjuvants). The Director also points out that the $250 fine payable to the CAC does not begin to reimburse the two CACs for the time and effort in putting together the investigation and participating in a hearing, to say nothing about the abusive language directed at the CAC employees and the witnesses by Mr. Taylor.

DEPARTMENT OF PESTICIDE REGULATION

Dated: 16 Dec 2008

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