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 Solano
(County File No. ACP-SOL-08-07)

Administrative Docket. No. 173

DIRECTOR'S DECISION

George Green
Dixon Aviation
6711 Rio Dixon Highway
Dixon, California 95620
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 September 22, 2009, the Solano CAC found that on July 2, 2006, the appellant, Mr. George Green, committed one violation of 3 CCR section 6614(b)(3), and levied a total fine of $700.

The appellant 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 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 2, 2006, Appellant applied a pesticide, *Mustang 1.5 EW,* on sudan grass fields immediately south of the Winger property in Dixon. According to the CAC's investigation report, the pilot and owner of Dixon Aviation, Mr. George Green, was applying his seventh load of the pesticide when he noticed dust arising from the dirt road on the north end of the fields. When he saw a motor bike on the road, he shut off the spray system, but the spray hit the person on the bike. Swab samples taken from the motor bike, the rider's helmet, and the grape leaves on the Winger property north of the road tested positive for Zeta-cypermethrin, the active ingredient in *Mustang*. The father of the rider complained to the CAC.

Relevant Laws and Regulations

FAC section 13000(a) is the applicable statute of limitations in this action and allows the CAC to bring an action against a violator within two years of the occurrence of the violation.

3 CCR section 6614(b)(3) reads: "Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when: (3) [t]here 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. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered."

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

The Appellant asserts that the case is well past any "statue of time." He asserts also that the CAC testified falsely about the location of the grapes and that "[t]he commissioner used the parts per million results from the lab to prove their case and yet could not give a firm answer to the amount for which it represented."

The Hearing Officer's Decision

The Hearing Officer found that the written statement of the complainant, the testimony of the Appellant, and the results of the laboratory sample all establish that complainant's son was sprayed by the pesticide. The Hearing Officer acknowledged that there was some confusion about where the son was when sprayed. Senior Agricultural Biologist Ms. Laura Tripp testified regarding the results of her sampling of complainant's grapes on the property just north of the road. The Hearing Officer found that the grapes were not contaminated through the process of volatilization based upon the fact that the level of active ingredient found on the grapes was 20 percent of the level found on the treated field. The grapes and the road were nontarget property. The Hearing Officer reasoned that since the *Mustang* label language indicates a hazard to humans,[1] contamination of nontarget property would create a reasonable possibility of creating a health hazard which would prevent the use of contaminated property. This reasoning lead the Hearing Officer to conclude that the CAC had met its burden of proof that 3 CCR section 6614(b)(3) was violated by Appellant. The Hearing Officer found that classifying the violation as a Class A violation was proper because actual contamination occurred rather than a reasonable possibility of contamination required for a Class B violation. The fine levied was $700, the lowest in the Class A range that overlaps with the highest level of $1,000 for Class B violations.

The Director's Analysis

FAC section 13000(a) is the applicable statute of limitations in this action and allows the CAC to bring an action against a violator within two years of the occurrence of the violation. The violation occurred July 2, 2006 and the Notice of Proposed Action was issued May 2, 2008. Appellant received the Notice of Proposed Action and notice of the action on May 8, 2008. No explanation has been offered about why the hearing did not take place until more than a year later on September 22, 2009. However, there is no statute or regulation that sets a time within which the hearing must be held. The action was brought in a timely fashion.

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[1] The Hearing Officer used the language on the label under "Precautionary Statements, Hazards to humans" as illustrative of his reasoning quoting "Warning, may be fatal if swallowed. Harmful if inhaled or absorbed through the skin."

The Hearing Officer discussed the conflict in the evidence about the location of complainant's son when sprayed and discussed complainant's written statement that his property was sprayed 4 or 5 times and that the last time his property was sprayed resulted in spray getting in his eyes. However, the Hearing Officer appears to rely on the evidence of contamination of nontarget property—the grapes—as the basis for his conclusion that Appellant violated 3 CCR section 6614(b)(3).[2] The Hearing Officer did not explain in any detail how he arrived at this conclusion.[3]

It is reasonable to conclude that the levels of active ingredient found on the grapes being 20 percent of that found in the treated field supports the reasoning that the complainant's property was sprayed and was not contaminated through volatilization. Under 3 CCR section 6614(b)(3) it is the responsibility of the applicator to refrain from making or continuing a pesticide application where there is a reasonable possibility of contamination of nontarget property. The Hearing Officer uses the label language found in the precautionary statement that states that the pesticide is a hazard to humans to come to the conclusion that a reasonable possibility of creating a health hazard which would prevent use of contaminated property existed at the time of the application. That logic does not follow. This label language would always infer that a reasonable possibility of creating a health hazard exists whenever the label carries a warning that the pesticide is a hazard to humans. There needs to be some evidence that a reasonable possibility of contamination of nontarget property existed at the time of application or during the application, and that the pesticide application was *made or continued* in such an event to establish a violation of 3 CCR section 6614(b)(3). The violation cannot be established on the basis of this label language alone.

However, the County presented evidence that wind conditions were too high to safely make the application and that the application should not have occurred. Evidence of wind conditions charted by CIMIS was introduced at hearing. Although the Hearing Officer did not rely on wind evidence in making his determination, that evidence, in addition to the evidence that the pesticide significantly drifted onto nontarget property, and created a health hazard that prevented the normal use the property[4], supports the conclusion that the application should not have been made or continued. The drift onto nontarget private property where the owner works and lives, and on an adjoining road, prevented the normal use of the property. Of great concern is the testimony of Mr. George Green at hearing that he had been watching the motorbike cruising

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[2]Section 6614(b)(1) involving the contamination of the bodies or clothing of persons not involved in the application could also have been charged in this instance based upon the reasonable possibility that that individuals could be on the road or in the field and that the application should not have been attempted due to wind conditions.

[3] Appellant argues that the CAC testified falsely as to the location of the grapes tested. The record does not support this assertion. The grapes were located between the house and the treated field, and Appellant appeared to agree with this location at hearing.

[4]The homeowner hosed down his patio, lawnchairs, and breezeway with soap and water, and the grapes were rendered unusable which prevented the use of the contaminated property.

down the highway, and that the motorbike had been "dogging" him and trying to get in front of him. Mr. Green testified that at one point he flew over the motorbike and saw the rider crouched down hiding behind the grass. Mr. Green stated he "zapped" him good then. This testimony is evidence that the application was continued when a reasonable possibility of contaminating a person not involved in the application. With this kid "playing games" with him, Mr. Green should have stopped the application. This evidence further supports a violation.

Conclusion

Although the Hearing Officer's determination was based on an erroneous application of the law, there is substantial evidence in the record that supports the violation charged. Therefore, the Director affirms the CAC's decision.

Disposition

The Commissioner's decision is affirmed. The Commissioner shall notify the appellant how and when to pay the $700 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: APR - 5 2010

By: _____
Mary-Ann Warmerdam, Director