

**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 San Bernardino
(County File No. 36-09/10-37)

Administrative Docket. No. 175

**DIRECTOR'S
DECISION**

**Larry Sweeden
Year Round Landscape Maintenance, Inc.
15189 Sierra Bonita Lane
Chino, California 91710**

Appellant.

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations, Title 3, (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 May 20, 2010, the San Bernardino CAC found that on February 17, 2010, the appellant, Mr. Larry Sweeden, committed six violations--FAC section 11701, FAC section 11732, 3 CCR sections 6726(b), 6738(b)(1)(C), and 6738(c)(1)(C)--and levied a total fine of \$3,300.

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.

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If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the decision. 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.

Factual Background

On February 17, 2010, Agricultural Standards Officer Brad Sanford of the San Bernardino CAC performed a pesticide use monitoring inspection at a commercial site in Loma Linda. He observed Mr. Evaristo Rea, an employee of Mr. Larry Sweeden and Year Round Landscape applying Roundup Pro from an unlabeled handheld sprayer. The employee was wearing cloth/leather gloves, no eyewear, and did not have emergency medical information at the site or in his work vehicle. Neither Mr. Sweeden nor Year Round Landscape is licensed with DPR as a pest control business. Neither is registered with the county. Mr. Rea could not tell Mr. Sanford what pesticide he was using.

Within the past two years, Mr. Sweeden and Year Round Landscape were found to be in violation for the same type of acts. On March 4, 2008, Los Angeles CAC Inspector Christine Belden observed the pesticide application of Roundup Pro by an employee of Year Round Landscape using a backpack sprayer. The employee was wearing a short-sleeved shirt and was not wearing gloves or protective eyewear. After contacting her office, the inspector also discovered that the business did not have a valid pest control business license. The resulting civil penalty action resulted in a fine of \$1,050.

Relevant Statute and Regulations

FAC section 11701 makes it unlawful for a person to advertise, solicit, or operate as a pest control business unless the person has a valid pest control business license issued by the director.

FAC section 11732 makes it unlawful for a person to advertise, solicit, or operate as a pest control business in any county unless the person has registered with the commissioner for the current year.

3 CCR section 6726(b) requires that employees be informed of the name and location of a facility where emergency medical care is available and that information shall be posted in a prominent place at the work site or work vehicle . . . if a facility is not reasonably accessible from that work location, procedures are to be followed to obtain emergency medical care.

3 CCR section 6738(b) requires the employer to assure that employees wear protective eyewear when required by pesticide product labeling or when employees are engaged in application by hand or using hand held equipment (with certain exceptions not relevant to this matter).

3 CCR section 6738(c) requires the employer to assure that gloves are worn when required by the pesticide product labeling when employees are engaged in application by hand or using hand-held equipment (again with certain irrelevant exceptions).

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 alleged that his company is not a pest control company and that they do not spray Roundup or any other chemicals in large areas nor do they apply Roundup for hire. The appellant alleged that his employee took it upon himself to spray a small amount of Roundup in the sidewalk cracks as a courtesy to his landscape maintenance customer.¹

In March of 2008, the appellant also argued that his company was not a pest control company and did not need to be licensed. He further argued that the employee took it on himself to spray a small amount of Roundup in the sidewalk cracks, had been supplied with all the

¹ On the Hearing Request form entered into evidence at hearing, the appellant alleged that his employee bought the Roundup at a Home Depot store and sprayed the pesticide without his knowledge to shortcut weed removal. Mr. Rea and Mr. Sweeney testified at hearing that Mr. Rea bought the Roundup.

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equipment needed, elected not to use the equipment, and, therefore, should have been fined instead of the business.

The Hearing Officer's Decision

The Hearing Officer found that Mr. Sweeney agreed to the factual basis for each of the violations. Year Round Landscape did not possess a valid pest control business license and was not registered with the County of San Bernardino. The Year Round employee was applying Roundup Pro without using the personal protective equipment (PPE) required by regulation and the label (protective eyewear and gloves). No emergency medical information was present at the site or in the work vehicle.

The Hearing Officer also found that the failure to be properly licensed is properly charged as a Class B violation because the violation threatens the integrity of the State licensing program which is in place to protect the public health and environment. The Hearing Officer found that the violation of FAC section 11701 and the violations of 3 CCR sections 6678, 6726(b), 6738(b and c), were all properly placed in Class B because the violations pose a reasonable possibility of creating a health or environmental effect. The violation of FAC section 11732 was found to be a procedural violation properly charged as a Class C violation. The Hearing Officer assessed the fine at the maximum for the violation of FAC section 11701 because Mr. Sweeden was previously fined for the same code section in another county and had received a warning letter from San Bernardino CAC advising him that the use of any amount of pesticide is pest control work requiring a license. The other fines were assessed by the Hearing Officer in the mid-range because Mr. Sweeden had been fined previously for similar violations.

The Director's Analysis

The applicant stipulated to the facts that supported each violation. In fact, at hearing Mr. Sweeden repeatedly said he was taking responsibility and did not dispute the violations. However, in his written appeal Mr. Sweeden argued that he did not operate a pest control business, did not spray Roundup or other chemicals in large areas, and that his employee sprayed the Roundup as a courtesy to their client.

At hearing Mr. Rea and Mr. Sweeden testified that Mr. Rea had purchased the Roundup at Home Depot and used it without Mr. Sweeden's knowledge. However, Mr. Sanford testified that when Mr. Rea could not identify the pesticide being used at the site, Mr. Rea placed a call to Ernie who he identified as his supervisor to inquire into the identity of the pesticide. Mr. Sanford testified that Ernie told him that the only pesticide on the trucks is Roundup Pro. Mr. Sanford also testified that Mr. Rea told him he had taken the Roundup from one of the trucks on another site. The CAC introduced evidence in the form of invoices showing that on at least four

occasions Year Round Landscape employees purchased pesticides from Country Farm Supply, including a purchase of Roundup Pro by Mr. Rea, using Year Round's account. Although Mr. Sweeden stipulated to the violations, this evidence contradicts Mr. Sweeden's assertions and further supports the fine analysis and conclusion of the Hearing Officer.

FAC section 11701 is quite clear that it is unlawful to operate as a pest control business unless properly licensed by DPR. The appellant's employee was applying a pesticide in the course of his duties. Year Round Landscape must have a pest control business license prior to applying a pesticide, *regardless of the size of the job*. Additionally, the employee making the application must comply with the regulations governing the wearing of PPE as well as the product label. The employer is obligated by regulation to ensure that the employee wear the PPE. Mr. Sweeden knows this and knows that his arguments provide no defense. He received a warning letter in 2006², and he was fined for virtually identical violations in 2008 after he offered the CAC the same excuses.

It is uncontroverted that the appellant's business was not properly licensed, not registered with the county, and that he failed to ensure that the employee use protective eyewear and proper gloves. It is uncontroverted that no emergency medical information was provided at the site or in the vehicle and that the containers were not labeled. The record supports the Hearing Officer's finding of violations.

The violations were properly placed in the Class B category as creating a reasonable possibility of producing a health or environmental effect, and the CAC's placement of the fine at the maximum for the violation of FAC section 11701 is well supported by the facts and law of this case. The CAC has the discretion to assess fines for the remaining violations at the midrange which is also well supported by the record. The CAC could well have charged Mr. Sweeden with higher fines. The Director finds that the fine categories and levels are well supported by the record and within the discretion of the CAC.

Conclusion

The commissioner's decision that the appellant violated FAC sections 11701 and 11732, and 3 CCR sections 6678, 6726 (b), 6738(b), and 6738 (c) is supported by substantial evidence.

² The letter entered into evidence and referred to as a warning letter was a letter mailed to all landscape contractors by the Los Angeles CAC dated August 22, 2006 advising the recipients that if they use any type of pesticide in the course of their business they must be licensed by DPR and registered with the CAC. The CAC also offered evidence that a similar letter was sent to appellant in 1993 by the San Bernardino CAC.

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The commissioner's decision to levy a fine of \$3,300 is also supported by substantial evidence, and is well within his discretion.

Disposition

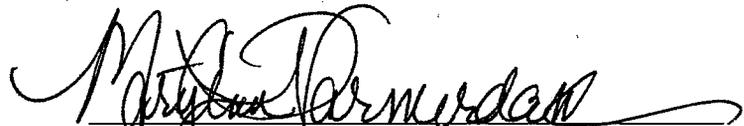
The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$3,300 fine.

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**

25 August 2010
Date


Mary-Ann Warmerdam, Director