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 Fresno
(County File No. 011-ACP-FRE-10/11)

Docket. No. 186

DECISION

T&C Vineyards
10500 E. Conejo Avenue
Kingsburg, California 93631
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 Fresno CAC found that the appellant, T&C Vineyards, violated the state's pesticide laws and regulations; FAC section 12973, and seven sections of 3 CCR. The commissioner imposed a total penalty of $15,500.00 for the violations.

T&C Vineyards 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.

Appellant's Assertions

The Appellant, through its attorney, contends that the penalties were excessive and unjustified under the facts of the case. Appellant contends that the facts of the case are based on a single event; hence, the violations should be consolidated into one violation as opposed to an entire series of violations that result in multiple penalties.

Violation Classes and Fine Levels

FAC section 12999.5 authorizes the commissioner to levy fines up to $5,000 per violation of certain State pesticide laws and regulations. When levying these fines, however, the commissioner must follow the fine guidelines in 3 CCR section 6130. Under section 6130, a Class A violation is a violation of a law or regulation which created an actual or environmental hazard and has a fine range of $700-$5,000; a Class B violation is a violation which poses a reasonable possibility of creating a health or environmental effect, and has a fine range of $250-$1,000; a Class C violation is a violation not defined as either Class A or B, and has a fine range of $50-$400.[1]

In this appeal, the record shows eight violations; five Class B violations and three Class A violations. The death of a 10-year old horse, the sickening of a 4-year old horse, and a neighbor's temporary loss of the use of his pasture followed after the application in question. Some of the violations were the direct cause of the harm that occurred and some may have contributed to the violations that caused the harm. All were separate and distinct violations of the laws or regulations meant to mitigate environmental or health effects of pesticide applications and, contrary to the Appellant's contention, can be legitimately charged and fined separately. The reasoning and justification for each classification and fine level are discussed below.

Factual Background

On June 10, 2009, Mr. Javier Barranco, the sole employee of T&C Vineyards, applied Wilco "Gopher Getter" Restricted Use Bait (bait), registration number 36029-50005-AA, to T&C Vineyard's Site Number 401; the treated crop was grapes/raisins. The bait's active ingredient was strychnine alkaloid. The label bore the signal word "Danger." The purpose of the baiting was to control a gopher infestation.[2] Mr. Barranco used a hand probe to deposit the bait in gopher runways. Mr. Barranco scattered the bait on top of the berms of the vineyard, along a fence line, and in squirrel holes located in the road that ran between the vineyard and the pasture. Mr. Barranco also applied the bait to the adjacent pasture owned by Mr. John Clark, located at 14664 South Temperance, Selma, California, bordering the west side of the vineyard.

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1 Section 6130's definitions of the three violation classes where amended effective September 22, 2011. However, this notice of proposed action was dated June 1, 2011 and used fine guidelines operative at that time.

2 Testimony given by Appellant during the hearing alleged that the squirrels and gophers migrated from the adjacent pasture owned by Mr. Clark onto T&C Vineyard's property. The Appellant, through their attorney, alleged on the record that the first five to seven rows of their vineyard closest to the adjacent pasture were being decimated by the migrating squirrels and gophers.

On June 12, 2009, the Fresno CAC's office received a telephone call from Ms. Robin Rogers-Dale that her 10-year old horse had died and that her four-year old horse was in severe distress. The two horses were in the pasture on the property of Mr. Clark. Mr. Mario Reeves, Supervising Agricultural Specialist with the Fresno CAC office, traveled to the site and began an investigation at approximately 9:00 p.m. Mr. Reeves observed the 10-year old horse's carcass lying in the pasture. Mr. Reeves inspected the area and observed the bait scattered above ground around the young vines located just across the ten-foot road between Mr. Clark's pasture and the vineyard. Mr. Reeves observed the bait in squirrel holes located in the roadway separating the pasture and vineyard, as well as along the fence line between the two properties. Mr. Reeves observed the bait in a "substantial pile" in the northwest corner of the pasture next to a wood pile located in Mr. Clark's pasture. Ms. Rogers-Dale had earlier found a white paper bag in the pasture with handfuls of bait in the bag. Ms. Rogers-Dale gave the bag to Mr. Reeves.

Ms. Rogers-Dale told Mr. Reeves that her four-year old horse was displaying stress and sweating profusely. The four-year old horse was treated earlier that afternoon by Dr. Stephanie Murphy, DVM, for strychnine poisoning and was removed from the property since the strychnine bait was still on the ground in Mr. Clark's pasture. The horse carcass was later taken to the California Animal Health and Food Safety Laboratory to determine the cause of death.

Mr. Reeves came back to the scene on June 15, 2009, to finish his inspection and take additional photographs during daylight hours. At that time, Mr. Reeves noted an orange plastic Halloween pumpkin traditionally used for "trick or treat" hanging on a grape stake on T&C Vineyard's property and found residue of the bait inside the pumpkin.

Samples of the bait were collected from the vineyard, the pile next to the wood pile, and the pasture. The samples came back positive for the active ingredient strychnine. The necropsy conducted on Ms. Rogers-Dale 10-year old horse found strychnine in the horse's stomach. The four-year old horse responded well to treatment for strychnine poisoning.

Mr. Clark expressed concern that the remaining bait on his pasture would not allow him to use his property. T&C Vineyard and Mr. Clark agreed that the pasture would be disked by T&C Vineyards to turn under any remaining bait as to not cause additional harm to other animals.

Fresno CAC issued a notice of violation listing violations of 3 CCR section 6412(a), applying a restricted pesticide without a valid Restricted Material Permit; 3 CCR section 6434(b), failure to submit a Notice of Intent (NOI) to apply a restricted material; 3 CCR section 6723(a), failure to display a complete copy of the Pesticide Safety Information Series Leaflet A-8 in a central location; 3 CCR section 6723.1(a), failure to display at a central location Application Specific Pesticide Information; 3 CCR section 6724, failure to assure the Mr. Barranco was trained to handle pesticides; 3 CCR section 6680, using a food/drink container to store pesticides; 3 CCR section 6616, failure to obtain the adjacent property owner's permission to apply a pesticide; and FAC section 12973, applying the bait above ground in violation of the label's directions. The notice of violation proposed a total fine of $15,500 for all violations.

A hearing was held on Monday, December 19, 2011, in Fresno, California. Mr. Donald O. Cripe was the hearing officer. After considering the evidence presented during the hearing, Mr. Cripe issued his decision on February 11, 2012, upholding all of the eight proposed violations and assessed a penalty of $15,500.00. The decision was adopted by Ms. Carol N. Hafner, Fresno CAC, on February 24, 2012, and received by the Respondents on March 2, 2012. Respondents timely filed this appeal to the Director of the Department of Pesticide Regulation pursuant to FAC section 12999.5.

Section 6412(a)

3 CCR section 6412 provides:

Restricted Material Permit Requirements.

(a) Except as provided in this Section and Sections 6400, 6414 and 6416 [not applicable here], restricted materials shall be possessed or used only under permit of the commissioner or under his direct supervision, or under permit of the director in any county in which there is no commissioner.

All strychnine-containing pesticides labeled for agricultural use are restricted materials and can only be applied under a restricted material permit.[3] In this case, the record shows that T&C Vineyards did not have a restricted material permit for strychnine on file with the Fresno CAC. Appellant purchased two 50-pound containers of Wilco "Gopher Getter" Restricted Use Bait, bearing the signal word "Danger" that was labeled for agricultural use. There is information in the record that between April and June of 2009, Appellant applied approximately 20 pounds of the bait; hence, the Appellant possessed and applied a restricted material without first obtaining a restricted material permit.

Appellant argued that they had a restricted material permit for aluminum phosphide to kill squirrels and it was much more poisonous than the bait. Appellant argued that their pesticide distributor, Britz Simplot, was at fault and should be responsible. Appellant argued that their minor son was allowed to participate in the purchase of a small container (one pound) of the identical bait at a local hardware store; hence, the bait wasn't controlled. Appellant argues that there were no prior violations issued to them and that there was no malicious intent.

The regulation is made mandatory by the use of the word, "shall." It is mandatory for anyone who possesses or uses a restricted material to have a permit issued by the commissioner. Pesticides are designated as restricted materials based upon the significant hazard they pose to, among other things, domestic animals and wildlife. See FAC section 14004.5. This designation is made in order to require a permit before use with the additional regulatory oversight that entails. Appellant did not obtain a permit before the application made on June 10, 2009, as shown by the record. Violations of pesticide regulatory statutes are considered "'public welfare' offenses . . . . requir[ing] neither guilty knowledge nor intent." (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696, 702.); hence, neither malice nor intent is required. Nor

3 Only public agency vector control districts are exempt from this requirement.

are the Appellant's arguments that he had a permit for other material or that his son purchased a smaller container of the bait relevant to this violation.[4]

The record provides substantial evidence that the Appellant violated 3 CCR section 6412(a) by applying a strychnine product designated as a restricted material without obtaining the restricted material permit required before such use.

Appellant contends that the proposed fine of $500 is excessive. This violation was charged as a Class B violation under 3 CCR section 6130 with a fine range of $250 to $1,000. The fine of $500 falls in the lower portion of this range. The fact that this violation involved ignoring a requirement that was intended to mitigate the very harm that resulted supports the fine imposed. The fine was not excessive and was well within the appropriate exercise of the Commissioner's discretion.

Section 6434(b)

3 CCR section 6434 provides:

Notice of Intent.

(a) If the information required by (g), (h), and (i) of Section 6428 is not provided on the permit, it shall be included in the notice of intent.

(b) When a notice of intent is required by the commissioner, it shall provide the following information concerning the proposed application. If the information required by this paragraph has been provided on the permit, it may be referenced on the notice of intent.

(1) Permit number;
(2) Name and address of permittee and applicator;
(3) Location of areas to be treated and name of farm operator;
(4) Crop or commodity, or if there is no crop or commodity the site to be treated;
(5) Approximate acres or other units;
(6) Method of application;
(7) Pesticide(s);
(8) Dilution, volume per acre or other units, and dosage;
(9) Pest(s) to be controlled;
(10) Date intended application is to commence; and
(11) Location and identity of areas specified in Section 6428 which have changed since the permit was issued and which may be adversely impacted. A map or aerial photograph may be used for designating such locations.

The commissioner shall be notified at least 24 hours prior to commencing the use of a pesticide requiring a permit. The notice of intent to apply a pesticide may be submitted to the commissioner by the operator of the property to be treated, by such operator's authorized representative, or by the licensed pest control operator who is to apply the pesticide. The commissioner may allow less than 24 hours-

4 Although not clear from the record, it is likely that the small quantity purchased by the son was labeled for structural or residential use, which based on the size of the package, is not designated as a restricted material.

> notice if he determines that because of the nature of the commodity or pest problem effective pest control cannot be attained or when 24 hours are not necessary to adequately evaluate the intended application.

(Emphasis added.)

In this case, the Appellant did not file a NOI to apply the restricted pesticide bait. The application took place and the Fresno CAC's office was not given the opportunity to review or inspect any facet of the pesticide application. The application resulted in the death of one horse, the sickening of a second horse, and the loss of use of the pasture by Mr. Clark.

There is substantial evidence in the record that the Appellant did not file a NOI in violation of 3 CCR section 6434(b) that requires that the commissioner shall be notified at least 24 hours prior to commencing the use of a pesticide requiring a permit.

The Appellant argues that the fine of $500 is excessive. This violation was charged as a Class B violation under 3 CCR section 6130 with a fine range of $250 to $1,000. The fine of $500 falls in the lower portion of this range. The fact that this violation involved ignoring a requirement that was intended to mitigate the very harm that resulted supports the fine imposed. The fine is not excessive and was well within the appropriate exercise of the Commissioner's discretion.

Section 6723(a)

> 3 CCR section 6723 provides:
> Hazard Communication for Pesticide Handlers.
> (a) Before employees are allowed to handle pesticides, the employer shall display a copy of a completed written Hazard Communication Information for Employees Handling Pesticides in Agricultural Settings (Pesticide Safety Information Series leaflet A-8) or Hazard Communication Information for Employees Handling Pesticides in Noncrop Settings (Pesticide Safety Information Series leaflet N-8), as applicable, at a central location in the workplace. Upon request, the employer shall read to the requesting employee, in a language understandable to that employee, Pesticide Information Series leaflet A-8/N-8. Pesticide Information Series leaflet A-8/N-8 shall be written by the Department of Pesticide Regulation in English and Spanish. Pesticide Information Series leaflets are available from the department.

There is substantial evidence in the record that the Appellant did not display the Form A-8 in violation of 3 CCR 6723.

Appellant argues that the fine $500 is excessive. This violation was charged as a Class B violation under 3 CCR section 6130 because the information that was not displayed did pose a reasonable possibility of creating an environment or health hazard. Class B violations have a fine

range of $250 to $1,000 and the fine of $500 falls in the lower portion of this range. Had the employee read the label as the Form A-8 instructs, he may become aware of how to safely apply the bait. The fine level is not excessive and is within the appropriate exercise to the Commissioner's discretion.

Section 66723.1(a)

3 CCR section 6723.1 provides:

Application-Specific Information For Handlers.

(a) The operator of property used for the commercial or research production of an agricultural plant commodity shall display, at a central location, the following application-specific information while employees are employed to handle pesticides:

(1) Identification of the treated area;

(2) Time and date of the application;

(3) Restricted entry interval; and

4) Product name, EPA registration number, and active ingredients.

There is substantial evidence in the record that the Appellant did not display the requisite information regarding the bait in violation of 3 CCR section 6723.1.

Appellant argues that the fine of $500 is excessive. Had the information been displayed and read, the handlers would have been informed that the active ingredient was strychnine, and more care may have been taken to apply the product correctly. Had the employee read the label, the application would have most likely been all below-ground as directed. Instead, the bait was incorrectly applied and resulted in the death of one horse, the sickening of the second horse, and Mr. Clark's loss of use of his pasture. The fine level was not excessive and was an appropriate exercise of the Commissioners discretion.

Section 6724

3 CCR section 6724, in pertinent part, provides:

Handler Training.

The employer shall assure that employees who handle pesticides have been trained pursuant to the requirements of this Section and that all other provisions of this Section have been complied with for employees who handle pesticides.

(a) The employer shall have a written training program. The training program shall describe the materials (e.g., study guides, pamphlets, pesticide product labeling, Pesticide Safety Information Series leaflets, Material Safety Data Sheets, slides, video tapes) and information that will be provided and used to train his or her employees and identify the person or firm that will provide the training.

> The training program shall address each of the subjects specified in subsection (b) that is applicable to the specific pesticide handling situation. The employer shall maintain a copy of the training program while in use and for two years after use, at a central location at the workplace.
>
> (b) The training shall cover, for each pesticide or chemically similar group of pesticides, to be used:
>
> (1) Format and meaning of information, such as precautionary statements about human health hazards, contained in pesticide product labeling;
>
> (2) Hazards of pesticides, including acute and chronic effects, delayed effects, and sensitization, as identified in pesticide product labeling, Material Safety Data Sheets, or Pesticide Safety Information Series leaflets;
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> * * *
>
> (11) Environmental concerns such as drift, runoff, and wildlife hazards;
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> * * *
>
> (15) The location of the written Hazard Communication Information For Employees Handling Pesticides (Pesticide Safety Information Series leaflet A-8), other Pesticide Safety Information Series leaflets, and Material Safety Data Sheets;
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> * * *
>
> (d) Training shall be completed before the employee is allowed to handle pesticides, continually updated to cover any new pesticides that will be handled, and repeated at least annually thereafter. Initial training may be waived if the employee submits a record showing that training meeting the requirements of this Section and covering the pesticides and use situations applicable to the new employment situation was received within the last year. A certified applicator is considered trained for the purposes of this Section.
>
> (e) The date and extent of initial and annually required training given to the employee and the job to be assigned shall be recorded. This record shall be verified by the employee's signature and retained by the employer for two years at a central location at the workplace accessible to employees.

There is information in the record that the Appellant's sole employee applied sulfur from time-to-time. The employee made the application of the bait on June 10, 2009, that caused the death of one horse and the illness of the second horse. No documentation of a written disciplinary action policy or a written record of employee training was introduced by the Appellant.

Reasonable inference from this information is that the Appellant did not assure that his employee was trained in accordance with this section.

Appellant argues that the fine of $5,000 is excessive. The fact that the employee did not receive any training created an actual environment or health hazard when he improperly applied the restricted material pesticide. The fine level is not excessive and is within the appropriate exercise of the Commissioners discretion.

Section 6680

3 CCR section 6680 provides, "Prohibited Containers for Pesticides. In no case shall a pesticide be placed or kept in any container of a type commonly used for food, drink or household products."

In this case, a Halloween trick-or-treat pumpkin was used to store a pesticide bearing the signal word, "Danger." Storing a strychnine poison bait in a Halloween candy container is exactly what this section prohibits; a child seeing such a container would be sorely tempted to sample the contents. There is information in the record that the Appellant provided the pumpkin container to its employee. Mr. Reeves found the container out in the open. Should a young child happen upon this type of container, the results could have been deadly.

There is substantial evidence in the record that the Appellant violated 3 CCR section 6680.

Appellant argues that the fine of $1,000 is excessive. This violation was charged as a Class B violation under 3 CCR section 6130 because the action of placing this toxic material in a container used for candy did pose a reasonable possibility of an environment or health hazard. Class B violations have a fine range of $250 to $1,000. The Appellant is fortunate that no one was injured or died. This violation could have been charged as a Class A violation with a maximum fine of $5,000 violation as it clearly posed an actual health hazard. Setting the fine level at the top of the Class B range is well within the appropriate exercise of the Commissioner's discretion in this circumstance.

Section 6616

3 CCR section 6616 provides: "Consent to Apply. No person shall directly discharge a pesticide onto a property without the consent of the owner or operator of the property."

There is information in the record that Mr. Clark did not give T&C Vineyards permission to apply the bait to his property. There is substantial evidence that the Appellant violated 3 CCR section 6616.

Appellant argues that the fine of $2,500 is excessive. This violation was charged as a Class A violation with a fine range of $700 to $5,000 because this violation caused actual damage to property. The fine of $2,500 is only slightly above the middle of the fine range. The lack of T&C's consent caused the death of one horse, the injury of the second horse, and the prevented the use of the property as a pasture until the above-ground bait was eliminated by disking it into the soil. The fine level is not excessive and is well within the appropriate exercise of the Commissioner's discretion.

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.

There is information in the record that the application was made above-ground. The label instructions state that the application shall only be made below ground; hence, the Appellant's employee did not follow the label instructions.

There is substantial evidence in the record that the Appellant, through its employee, used the bait in conflict with the label instructions in violation of FAC section 12973.

Appellant argues that the fine of $5,000 is excessive. This violation was charged as a Class A violation as it directly resulted in the harm the label was intended to prevent, harm to property. The horses ate the bait that should not have been placed above ground within their reach. The failure to follow the label directions caused serious harm --- the death of one horse, the injury of the second horse, and prevention of the use of Mr. Clark's property until the bait was disked under. The fine level is not excessive and well within the appropriate exercise of the Commissioner's discretion.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the $15,500.00 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: ____5/23/12_____ By: _____
Brian R. Leahy, Director