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 Diego
(County File No. 265-ACP-SD-11/12)

Docket. No. 192

DIRECTOR'S DECISION

Pacific Rotors, Inc.
400 N. Pacific Street
Oceanside, CA 92054
Appellant/

Procedural Background

Under Food and Agricultural Code section 12999.5, county agricultural commissioners may levy a civil penalty up to $5,000 for certain violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow the fine guidelines established in California Code of Regulations, Title 3, section 6130, and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

After giving notice of the proposed action and providing a hearing on November 14, 2012, the San Diego Commissioner found that on September 21, 2011, the Appellant, Pacific Rotors, Inc., committed a violation of Food and Agricultural Code section 12973 when they made an aerial application of *Imidan 70-W* to a tejocote orchard in conflict with its registered labeling. The Commissioner determined that this was a Class A violation and fined Appellant $700.

Appellant appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction to review the appeal under Food and Agricultural Code section 12999.5.

Standard of Review

The Director decides matters of law using his 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.

Relevant Laws and Regulations

Food and Agricultural Code section 12973 states that a pesticide cannot be used in conflict with its label or permit conditions.

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, Title 3, section 6130. Violations shall be designated as Class A when the violation caused a health, property, or environmental hazard. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(A).) The fine range for a Class A violation is $700 to $5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).)

Factual Background

The hearing officer's decision provides the following summary of the undisputed facts in this case:

> On September 21, 2011 Pacific Rotors, Inc. conducted an aerial application of *Imidan 70-W* to four sites with tejocote trees operated by CF Farming. *Imidan 70-W* (EPA Reg. No. 10163-169-ZA) is a California registered pesticide with a Warning label, with the active ingredient phosmet. The commodity apple is listed on the label, tejocote is not.
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> On December 13, 2011 the California Department of Pesticide Regulation (CDPR) detected residue of the pesticide phosmet during a routine market sampling inspection in Los Angeles, CA. CDPR determined that the fruit, tejocotes, was grown by CF Farming in San Diego County. CDPR notified the San Diego County Agricultural Commissioner and directed that an investigation be conducted. Inspectors Veronica Anzaldo-Heredia and Nestor Silva interviewed Jaime Serrato, owner of CF Farming. Mr. Serrato verified that CF Farming had grown the tejocotes tested by

CDPR at multiple locations in San Diego County. Inspectors visited the orchards and storage areas and CF Farming's office where they conducted a records inspection. The inspectors reviewed pesticide recommendations written by Jose Barcinas of Entomological Services, Inc. for pesticides to be used on CF Farming's tejocotes and pesticide use reports for the aerial pesticide applications conducted by Pacific Rotors, Inc. on September 11, 2011, using the materials specified in the recommendations. One of the materials specified and used was Imidan 70-W.

Inspector Silva reviewed the label for Imidan 70-Wand determined that the commodity tejocote is not on the label. It was also determined that per federal regulations, there is no residue tolerance for phosmet on tejocotes. Supervising Inspector Stasi Redding issued a Hold Order/Stop Harvest to CF Farming for all tejocotes not yet harvested and fruit still in storage, thus preventing further sale of the commodity. CF Farming subsequently destroyed the remaining fruit and made a claim with the insurance carrier for Entomological Services, Inc. for $313,000.

Pacific Rotors, Inc. is a properly registered and licensed pest control business in San Diego County. The company has been conducting aerial pesticide applications for CF Farming for over ten years. CF Farming holds a valid Restricted Materials Permit, listing all orchard locations, describing the acreage and commodity grown for each site. The permit lists Pacific Rotors, Inc. as an authorized pest control business.

Appellant's Allegations

Appellant does not challenge the classification of the violation. Appellant's main contentions on appeal are:

- Appellant contends that Tejecotes are deciduous trees, and *Imidan 70-W* is permitted on deciduous trees; therefore, the application on this fruit was not illegal unless and until the crop was picked by the owner. Had the fruit stayed on the trees, it would have been a perfectly legal application.

- Appellant further contends they were "reasonable" when they applied the pesticide to the fruit and were under no obligation to ensure that the fruit was indeed on the label. Under a "reasonable person" test, they acted appropriately and should not be fined.

- Appellant further contends that they should not be held responsible for not following the *Imidan 70-W* label direction because the County classified the tejocotes as "apples."

The Hearing Officer's Decision

At the hearing, the hearing officer received both oral and documentary evidence, and the County and Appellant had the opportunity to present and question witnesses. The hearing officer determined that Appellant should not be fined for using the pesticide *Imidan 70-W* in conflict with the label directions because they "performed all reasonable due diligence in assuring the application was legal and proper by verifying the sites on the property operator's permit to make sure the crop is listed and confirming that the material specified by the pest control adviser is registered for the listed crop."

The County Agricultural Commissioner's Decision

The Commissioner disagreed with the hearing officer's conclusion of law and instead found that the Appellant violated Food and Agricultural Code section 12973 when Appellant made an aerial application of *Imidan 70-W* to an orchard of tejocote fruit. The Commissioner noted that Appellant had a long history of compliance with pesticide laws and was confident that the Appellant truly did not know that the crop was not apples. Nonetheless, the Commissioner found the hearing officer's legal analysis was wrong. Appellant indeed applied a pesticide in conflict with its label, even if unknowingly. The Commissioner reasoned that the law "does not require that pesticides be used according to the label to the extent possible, nor does it [allow] 'reasonable' deviation from its requirements."

The Commissioner ordered Appellant to pay $700 for a Class A violation.

The Director's Analysis

There is substantial evidence in the record to support the Commissioner's decision.

I. Appellant may not apply a pesticide to fruit-bearing trees unless that fruit is specifically listed on the label.

Appellant's first argument is that the *Imidan 70-W* label allows for application to deciduous trees, and since Tejecote trees are deciduous, the label permits application to those trees. Appellant argues that it is a legal application and only becomes illegal when the fruit is taken from the trees. Appellant appears to believe that *Imidan 70-W* may be applied to any deciduous fruit tree as long as the fruit is not picked.

Appellant argued at the hearing that tejocote trees are deciduous, but failed to present any admissible evidence in support. Appellant admitted during the hearing that he is not a botanist. Appellant is therefore not qualified to testify as to the classification of tejocote trees as deciduous

or evergreen.[1] Accordingly, there is no evidence in the record supporting Appellant's contention that tejocote trees are deciduous trees.

Even if tejocote trees were deciduous, Appellant may not apply a pesticide to a deciduous fruit-bearing tree that is not specifically listed on the label even if the label permits its application to "deciduous trees." *Imidan 70-W* may not be applied to fig trees, for example, even though fig trees are deciduous. A fig orchard may not be sprayed with *Imidan 70-W* at any growth stage of the tree whether or not the fruit is ever picked because figs are not specifically listed on the label. Permitted fruit and nut crops are listed on the label for the purpose of limiting the use of the pesticide to those specific fruit and nut crops.

Moreover, there is no federal tolerance for phosmet, the active ingredient here, on tejocote. Thus, *Imidan 70-W*, is not permitted on tejocote trees at all. (County Ex. 7.)

II. Label directions must be followed exactly.

As to Appellant's argument that Appellant was "reasonable" in failing to follow the *Imidan 70-W* label directions, here too, Appellant's argument fails. The stated purpose of Division 7 of the Food and Agricultural Code, where section 12973 lies, is to protect public health and safety, the environment, people working with pesticides, and to "permit agricultural pest control by competent and responsible licensees and permittees under strict control of the director and commissioners." (Food & Agr. Code, § 11501.) It is, therefore, a public safety and welfare statute "purely regulatory in nature and involving [potentially] widespread injury to the public." (*People v. Martin* (1989) 211 Cal.App.3d 699, 713.) The label does not provide an exception for good intentions or reasonable mistakes. As such, it is a strict liability statute and to show a violation, the County only needed to prove that a violation took place without having to prove that Appellant acted with any kind of intent or unreasonableness. (*People v. Coria* (1999) 21 Cal.4th 868, 876-77.)

Here, the undisputed facts are that Appellant applied *Imidan 70-W* to a tejocote orchard and that tejocotes are not on the *Imidan 70-W* label. Those facts alone are sufficient to justify a finding that Appellant violated Food and Agricultural Code section 12973 by using a pesticide in conflict with its labeling. Label directions must be followed exactly. A "reasonable" deviation is not permitted.

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[1] In fact, both the U.S. Department of Agriculture and the Mexican government describe tejocote as evergreen trees. ("Importation of Fresh Fruit of Tejocote from Mexico into the Continental United States [Pest Risk Assessment], <http://www.regulations.gov/#!documentDetail;D=APHIS-2011-0077-0003; http://www.conabio.gob.mx/conocimiento/info_especies/arboles/doctos/59-rosac1m.pdf>.)

III. There is no evidence in the record to support Appellant's contention that the County classified tejocotes as apples.

Finally, there is no evidence in the record supporting Appellant's contention that the County has "been part and parcel of spreading the misidentity of this crop." According to County testimony, when a grower comes in and tells the County that their orchard is an apple orchard, the County does not go out and check to verify that the crop is in fact apples. The grower's identification of their own commodity is what will appear on County documents unless and until the County learns otherwise. (Stasi Redding testimony.) The grower's misidentification of this crop does not relieve Appellant of their independent responsibility to ensure that the orchard they sprayed was indeed one that was permitted by the label. The evidence is clear that Appellant applied *Imidan 70-W* to tejocote, which is not permitted by the *Imidan 70-W* label. Accordingly, Appellant used a pesticide in conflict with label directions.

Disposition

The Commissioner's decision and levy of fine is affirmed. The commissioner shall notify the Appellant how and when to pay the $700 fine.

Judicial Review

The Appellant may seek court review of the Director's decision within 30 days of the date of the decision. (Food & Agr. Code, § 12999.5.) 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: 5/16/2013

By: Brian Leahy
Brian Leahy, Director