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. 003-ACP-FRE-14/15)

Administrative Docket No. 203

DIRECTOR'S DECISION

Gerawan Farming
16749 E. Ventura
Sanger, California 93657
Appellant/

Procedural Background

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to $5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), 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 June 16, 2015, the Fresno County Agricultural Commissioner (Commissioner) found that appellant Gerawan Farming (appellant or Gerawan) violated 3 CCR § 6618(a)(3) by failing to give notice of its scheduled application to a nectarine orchard in Fresno County, California, to employees working in the same orchard. Several Gerawan employees who were harvesting nectarines in a section of the orchard adjacent to the application site reported that they received no notice of the application, smelled a pesticide odor, and experienced illnesses associated with pesticide exposure. The Commissioner found that appellant caused a health hazard by failing to give required notice of the application to the employees. The Commissioner designated this violation as a Class A violation and levied a $5,000 fine.

Gerawan 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 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.

Factual Background

Ranch 513A is an orchard located in Fresno County near Reedley, California. Gerawan operates Ranch 513A for the commercial production of nectarines. Gerawan splits Ranch 513A into two blocks: the "west block," covering rows 1-35; and the "east block," covering rows 36-73. (County Exhibit 6b.)

On August 1, 2013, Gerawan applied 415 Loveland Spray Oil (reg. no. 34704-727), Propicon 3.6EC (reg.no. 87290-7), and Success (62719-292-AA) to the west block using a tractor-driven spray rig. P. Braun, equipment manager for Gerawan, recorded the application in Pesticide Use Report number GER-M13-APL-PB-12596-1 (the "PUR") and reported the data to Fresno County. Mr. Braun reported that the application occurred on the morning of August 1, 2013 between 1:15 am and 6:30 am. (County Exhibit 6i.)

At approximately 6:00 am, Gerawan work crew 239 (Crew 239) began harvesting nectarines in the east block, approximately 900 feet from where the application was ongoing and outside of the restricted-entry-interval area. (County Exhibit 6b.) Crew 239 included 43 field workers and the crew foreman, E. Lopez (Mr. Lopez.) At the time of the harvest, Mr. Lopez and the members of Crew 239 were all Gerawan employees. (County Exhibit 6, pp. 8-9.)

Mr. Lopez was aware of the application to the west block because on July 31, 2013, Gerawan emailed Mr. Lopez to inform him that the west block would be closed on the morning of August 1 due to the application. As Crew 239 began picking nectarines, Mr. Lopez smelled

an odor that he thought was associated with the pesticide application to the west block. Mr. Lopez additionally overheard members of Crew 239 commenting about the smell of pesticide. At approximately 6:15 am, in response to the odor, Mr. Lopez decided to move the crew to the northeast corner of the east block. He did not remove the crew from Ranch 513A. No members of Crew 239 complained to Mr. Lopez about feeling pesticide mist or symptoms of pesticide exposure, or sought medical attention. (County Exhibit 6, pp. 8-9.)

On August 2, 2013, a representative of the United Farm Workers contacted the Commissioner's office on behalf of several anonymous Crew 239 members. The representative reported that on the prior morning, several Crew 239 members became ill while picking nectarines. The representative indicated that the workers reported smelling a "pesticide-like odor" and that pesticide had been applied to Ranch 513A.

Consistent with criteria outlined in the cooperative agreement between the U.S. Environmental Protection Agency, Region IX and DPR, the episode was designated as a "priority investigation." On August 5 and 7, 2013, G. Urquizu, Supervising Agricultural Standards Specialist (Inspector Urquizu), and I. Ramirez and L. Rosa, Agricultural Standards Specialists for the Fresno County Department of Agriculture conducted a field worker safety inspection, separately and individually interviewed witnesses, and recorded their findings in the County Pesticide Episode Investigation Report (PEIR).

The County interviewed each of the 43 members of Crew 239, Mr. Lopez, the pesticide applicators, and Gerawan managers. Of the 43 crewmembers, 33 stated that they did not receive any notice of the application to the west block. In addition, 31 reported smelling pesticide during the shift, 9 reported hearing or seeing the application to the west block, and 13 reported experiencing illnesses consistent with pesticide exposure including headaches, dizziness, stomach aches, nausea, eye and nasal irritation, and itchiness. (County Exhibit 6, pp. 12-21.)

On May 7, 2015, the Commissioner issued a Notice of Proposed Action (NOPA), charging Gerawan with violating 3 CCR § 6618(a)(3) for failing to provide the required notice to all field workers in Crew 239 prior to the application of the west block. Gerawan requested a hearing. On June 16, 2015, the hearing was held in Fresno, California before Donald O. Cripe, a hearing officer designated by the Commissioner.

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 evidence and question witnesses. The Hearing Officer upheld the violation, fine classification, and fine amount charged in the NOPA.

Appellant's Allegations

Appellant does not challenge the Commissioner's decision that Gerawan violated 3 CCR § 6618(a)(3). Appellant argues that the Commissioner did not have substantial evidence to support designating the violation as a Class A violation and that the penalty is excessive. Specifically, appellant asserts that the failure to notice did not cause a health hazard.[1]

The Director's Analysis

A. The Commissioner's decision that appellant violated 3 CCR § 6618(a)(3) is not challenged by the appellant and is supported by substantial evidence in the record.

The Commissioner found that appellant violated 3 CCR § 6618(a)(3) by failing to give the required notice to its employees prior to the pesticide application to the west block. Under California law, the operator of a property must assure that notice of a scheduled application made for the commercial production of a plant commodity is given to employees who are within a quarter mile of the site unless the field is posted. (Cal. Code Regs., tit. 3, § 6618(a)(3).) The Commissioner determined based on witness statements in the PEIR and Inspector Urquizu's testimony that at least 33 of the 43 crew members were not given notice of the application at all, and that any notice would have been improperly given at the beginning of the shift—hours after the start of the application. (Decision, pp. 5-6.)

Appellant does not challenge the determination that the violation occurred and concedes that the crew was within one quarter mile of the application and the field was not posted. Appellant states in the appeal that "Gerawan acknowledges that notice was not provided..." and "Gerawan did not provide prior notice before spraying..." (Appeal, pp. 2, 3.) Instead, appellant challenges the Commissioner's decision to designate the violation as a Class A violation and the amount of the civil penalty.

B. The Commissioner's decision to designate the violation as a Class A violation is supported by substantial evidence.

In enforcement actions taken pursuant to FAC § 12999.5, violations are designated as Class "A," "B," or "C." A Class A violation is one of the following:

> (A) A violation that caused a health, property, or environmental hazard.

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[1] Appellant cites the Merriam-Webster Dictionary definition of "hazard" as "a source of danger." (Appeal, pg. 12.) Throughout this decision, "hazard" and "source of danger" are used interchangeably.

> (B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determined that one of the following aggravating circumstances support elevation to Class A.
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> 1. The respondent has a history of violations;
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> 2. The respondent failed to cooperate in the investigation of the incident or allow a lawful inspection; or,
>
> 3. The respondent demonstrated a disregard of the specific hazards of the pesticide used;

A Class B violation is:

> [A] violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A."

(Cal. Code Regs., tit. 3, § 6130.) The Commissioner determined that the failure to give notice caused a health hazard and the violation was a Class A violation.

i. The Commissioner correctly designated the violation as a Class A violation.

Appellant argues that the violation is a Class B violation because 3 CCR § 6618(a)(3) is a regulation that mitigates the risk of adverse health effects. The regulation is intended to give prior notice to employees who are within a specified distance of a pesticide application. There is no question that the regulation mitigates the risk of adverse health effects and, at a minimum, qualifies as a Class B violation. However, in this case, the record supports elevation of this violation to Class A based on appellant's demonstrated disregard of the specific hazards of the pesticides used.[2]

The facts that support this elevation are not in dispute. The precautionary statements on the labels of the three pesticides (Propicon 3.6EC, Success, and 415 Loveland Spray Oil) being applied when the workers became ill warn against the danger that exists if they are inhaled or absorbed through the skin. (County Exhibits, 6c-e.). The appellant's crew foreman, Mr. Lopez, knew in advance that the application was going to take place and knew it was ongoing when his crew went into the orchard. Yet, even when the pesticide odor became apparent to him and others, and indicated a source of danger, he kept the workers in the field. The facts surrounding this B violation exhibit a disregard for the hazards presented by the pesticides that warrant its elevation to Class A.

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[2] Appellant acknowledges in the written appellate argument that Gerawan has been cited for 3 additional violations of the FAC. As such, the fine could also have been elevated due to a history of violations.

According to the PUR and witness statements in the PEIR, Crew 239 began harvesting the east block at 6:00 am, while the application to the west block continued until at least 6:30 am. Mr. Lopez stated to Inspector Urquizu that he became aware of the application to the west block prior to the shift. Yet, after personally smelling pesticide and overhearing crew member comments about the odor, Mr. Lopez allowed Crew 239 to remain in Ranch 513A as the application continued. (County Exhibit 6, pg. 9.) This version of the events is not challenged by the appellant. In fact, the appellant explicitly states that "[the] following is not in dispute... The workers arrived at around 6:00 a.m., as the application in the far west rows was nearing completion... When the crew boss noticed an odor he associated with the application, he moved the crew[] even further away from the west side of the orchard." (Appeal, pp. 1-2.)

The odor reported by Mr. Lopez and the workers indicates that on August 1, 2013, Crew 239 was exposed to a source of danger—a hazard. Mr. Lopez states that at 6:15 am, he moved the crew away from the application site to the northeast corner of the east block and continued picking nectarines. In other words, even after the odor was detected, Crew 239 was allowed to remain in Ranch 513A while a known pesticide application to an adjacent section of the same field continued for at least 30 minutes. Crew 239 should have been removed from Ranch 513A after the pesticide odor was detected and not allowed to reenter until there was confirmation that the pesticides were being properly applied to the correct area of the orchard and not dangerous to the workers. Actual illness or injury is unnecessary to show disregard of a pesticide hazard. However, in this case 13 workers did become ill.

ii. The designation of the violation as a "Class A" violation is supported by substantial evidence.

The PUR and witness statements in the PEIR show that the foreman directed Crew 239 to enter the east block during the pesticide application and, despite smelling pesticide and overhearing crew member comments about the odor, failed to appropriately respond to the hazard by removing the crew from Ranch 513A. Appellant argues that the PEIR witness statements are inadmissible hearsay that cannot serve as the basis of the decision.

Administrative civil penalty actions taken under FAC § 12999.5 are not subject to the Administrative Procedure Act ("APA.") However, the APA's general rule governing hearsay has been applied to these proceedings. Under the APA, hearsay:

> "[May] be used for the purpose of supplementing or explaining other evidence but over timely objection shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

(Gov. Code § 11513.) The California Evidence Code provides exceptions to the hearsay rule in civil actions, including for official records and declarations against interest. (Evid. Code, §§ 1230, 1280.)

a. The decision is not based solely on the witness statements in the PEIR.

Appellant argues that the Commissioner's decision relies solely on inadmissible hearsay evidence and that as a result, the decision is not supported by substantial evidence. Even assuming appellant's contention that the statements in the PEIR are inadmissible hearsay, the Commissioner relied on other admissible evidence in the record. Specifically, the Commissioner relied on the PUR to show that Gerawan applied pesticide to Ranch 513A while Crew 239 was present. (Decision, pg. 2.)

Under California law, the operator of a property is required to report the application of a pesticide for an agricultural use to the agricultural commissioner of the county in which the work is performed. (Food & Agr. Code, § 14011.5; Cal. Code Regs., tit. 3, § 6626.) Pursuant to this requirement and in the regular course of business, Mr. Braun, a Gerawan employee, completed and submitted the PUR to Fresno County on September 13, 2013, reporting that the application to the west block was completed on August 1, 2013 at 6:30 am. The PUR is admissible evidence that was not challenged by appellant. The Commissioner did not rely solely on statements in the PEIR and the decision is supported by substantial evidence in the record.

b. The witness statements in the PEIR are admissible under the official records exception to the hearsay rule.

While the Commissioner did not solely rely on witness statements in the PEIR, those statements are admissible under the official records and declaration against interest exceptions to the hearsay rule and thus, could serve as the sole basis of the decision. Appellant argues that the statements made by the Crew 239 members and the foreman to Inspector Urquizu and recorded in the PEIR are hearsay and do not qualify for the official records exception because they are not trustworthy. Under Evidence Code section 1280:

> "[evidence] of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered in any civil or criminal proceeding to prove the act, condition, or event if all of the following applies: (a) The writing was made by and within the scope of duty of a public employee. (b) The writing was made at or near the time of the act, condition, or event. (c) The sources of information and method of time of preparation were such as to indicate its trustworthiness."

Appellant does not dispute that the PEIR satisfies the first two elements of this exception. The PEIR was prepared at or near the time of the incident by employees of Fresno County. Instead, appellant argues that "[writings] made in an official capacity that represent the statements of non-government third-parties... do ***not*** fall within this exception." (Appeal, pg. 7 [emphasis added by appellant].) Appellant cites several cases providing that "[a] public employee's writing, which is based upon information obtained from persons who are not public employees, is generally excluded because the 'sources of information' are not such as to indicate its trustworthiness." (Jefferson, California Benchbook (1972) at § 5.1, p. 96; *Behr v. County of Santa Cruz* (1959) 172 Cal.App.2d 697.)

Contrary to appellant's suggestion, there is no blanket exclusion from the official records exception for information obtained from persons who are not public employees. In this case, Inspector Urquizu conducted an investigation and separately and individually interviewed the 43 Crew 239 members and the foreman, Mr. Lopez. During these interviews, 31 crewmembers reported smelling pesticide, 9 reported hearing or seeing the application, and 13 reported feeling illnesses from pesticide exposure. These reports are consistent with the foreman's statements that he smelled an odor "associated with the spray in the west block," and overheard several workers "commenting about a smell." (County Exhibit 6, pg. 9.) These statements are supported by the fact that Gerawan was applying pesticide to Ranch 513A while the crew was present in the east block. Appellant does not challenge the fact that the crew started the shift at 6:00 am, and the PUR shows the application was not completed until 6:30 am. Based on the large number of corroborating statements and the undisputed factual circumstances of this case, the sources of information indicate trustworthiness and the statements are admissible as official records.

c. The foreman's statements in the PEIR are admissible under the declaration against interest exception to the hearsay rule.

In addition, the foreman's statements were made against his interests and qualify for the declaration against interest exception to the hearsay rule. Under Evidence Code section 1230:

> "[evidence] of a statement by a declarant having sufficient knowledge of the subject matter is not made inadmissible by the hearsay rule if... the statement, when made, was so far contrary to the declarant's pecuniary...interest, or so far subjected him to the risk of civil or criminal liability... that a reasonable man in his position would not have made the statement unless he believed it to be true."

The foreman's statements to Inspector Urquizu show that he allowed Crew 239 to remain in Ranch 513A and exposed them to danger despite having knowledge of the nearby pesticide application. These statements indicate that his actions fell below reasonable standards, caused

harm to those under his supervision, and subjected him to the risk of legal liability. As a result, the foreman additionally could have faced recourse from his employer and harm to his pecuniary interests.

As discussed above, substantial evidence in the record supports the decision. Appellant's argument that the county provided no evidence of drift, medical reports, or testimony as to the nature of the pesticides being applied[3] fails because such evidence is not necessary to support the violation. As an extension of these arguments, appellant argues it was deprived of due process based on the unavailability of witnesses. Because the decision met the applicable burden of proof, the fact that certain witnesses were not available for examination did not deprive appellant of its due process.

C. The penalty against Gerawan is not excessive and within the Commissioner's discretion.

Appellant argues that the Commissioner abused its discretion by levying the penalty at the top of the fine range because the penalty is disproportionate to the violation and inconsistent with penalties in similar cases, and the commissioner failed to consider mitigating factors. The Commissioner has broad discretion with respect to the imposition of civil penalties. The Commissioner determined that because 13 workers reported illnesses from pesticide exposure, the fine should be placed at the top of the range. The Commissioner distinguished the cases presented by appellant on the bases of "crew size, symptoms, pesticides... and timing of application." (Decision, pg. 6.) The Commissioner's decision to place the fine at the top of the permissible fine range is reasonable and well within its discretion.[4] As such, the Commissioner's exercise of discretion in this case satisfied any applicable due process requirements.

Appellant cites a policy under the labor code that allows agricultural employers relief from liability by repudiating the unlawful conduct. Any such policy is not applicable in this case.

Conclusion

The Commissioner's decision that appellant Gerawan violated 3 CCR § 6618(a)(3) is affirmed. The fine of $5,000 is upheld.

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[3] In fact, the County did present evidence of the nature of the pesticides being applied. *See* County Exhibits 6c-e; Testimony of G. Urquizu at 16:50.

[4] The Commissioner's decision seems particularly evenhanded when considering that under certain circumstances, California law mandates separate charges for each person exposed to pesticides. Here, the Commissioner charged only one violation despite the reported exposures and illnesses of 13 persons. *See* FAC § 12996.5(b).

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify appellant Gerawan of how and when to pay the $5,000 in total fines.

Judicial Review

Under FAC section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. 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: 10/12/2015

By: Brian Leahy
Brian Leahy, Director