

**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 Imperial
(County File No. EA-13-2022-019)

Administrative Docket No. 228

DIRECTOR'S DECISION

Seth A. Hallock
5495 E 38th Street
Yuma, AZ 85365

Appellant/

Procedural Background

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

After giving a Notice of the Proposed Action (NOPA) and providing a hearing on April 19, 2023, the Imperial County Agricultural Commissioner (Commissioner) found appellant Seth Hallock (Appellant or Hallock) committed one violation of 3 CCR section 6614(b)(3) for making or continuing a pesticide application when there was a reasonable possibility of the contamination of nontarget private property, including the creation of a health hazard, preventing the normal use of that property. The Commissioner classified the violation as Class A in accordance with 3 CCR section 6130 and issued a \$1,500 fine.

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

Standard of Review

The Director decides matters of law using their 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.

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 could also be 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.

Relevant Laws and Regulations

California Code of Regulations, title 3, section 6614, state:

6614. Protection of Persons, Animals, and Property

(a) An applicator prior to and while applying a pesticide shall evaluate the equipment to be used, meteorological conditions, the property to be treated and surrounding properties to determine the likelihood of harm or damage.

(b) Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when:

(1) There is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process;

(2) There is a reasonable possibility of damage to nontarget crops, animals or other public or private property; or

(3) There 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.

Cal. Code Regs., tit. 3, § 6614

When levying fines, the Commissioner must follow the fine guidelines set forth in California Code of Regulations, title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C using the following definitions:

(1) A Class A violation is one of the following:

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

(B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A.

1. The respondent has a history of violations;

2. The respondent failed to cooperate in the investigation of the incident or allow a lawful inspection; or,

3. The respondent demonstrated a disregard for specific hazards of the pesticide used;

(C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, 11897, or 13102 of the Food and Agricultural Code.

(2) 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.

(3) A Class C violation is a violation of a law or regulation that does not mitigate the risk of an adverse health, property, or environmental effect, including, but not limited to, Title 3, California Code of Regulations, sections 6624 through 6628, and Food and Agricultural Code sections 11732, 11733, and 11761.

Cal. Code Regs., tit. 3, § 6130(b)

The fine range for a Class A violation is \$700-\$5,000 whereas a Class B violation is \$250 to \$1,000. (*Id.* at subd. (c).) The Commissioner shall use relevant facts, including the severity of actual or potential effects of the violation and the respondent /appellant's compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (*Id.* at subd. (d).)

Factual Background

On January 23, 2022, Imperial County Deputy Agricultural Commissioner Julian Lopez received a phone call from a complainant reporting that a helicopter drifted pesticides onto his pickup truck while he was driving south on Dogwood Road in El Centro, CA. The investigation was assigned to Agricultural Biologist, Hiram Rocha. (Rocha) (Ex. C4 p.1). On January 25, 2022, Rocha interviewed the complainant who stated that on January 23, 2022, at approximately 12:57 PM, the complainant and his wife were driving southbound on Dogwood Road in El Centro, CA. As they passed by the wheat field Dogwood 54A ("DOG54A"), they saw a white and blue helicopter treating DOG54A flying in an east to west pattern. (*Id.*) The complainant stated that as the helicopter flew over their vehicle, it sprayed the windshield and the driver's side of the vehicle. The complainant reports that his wife immediately turned on the windshield wipers to clear their field of view. At the same time, a strong odor of pesticides came through the vents, and his wife rolled down the window to air out vehicle. In doing so, the wiped away droplets entered the vehicle through the open window and came in to contact with the complainant's wife. She reported feeling some light droplets on her skin. (*Id.*) Neither the complainant nor his wife reported experiencing any pesticide exposure symptoms or discomfort after the incident. (*Id.*)

The same day, Rocha collected samples in accordance with the *Investigative Procedures, Volume 5 of the Pesticide Use Enforcement Program Standards Compendium*, and the specific instructions given by the local DPR enforcement Branch liaison. (*Id.*) Swab samples were collected from the driver's side door, window, hood of the truck, and from a utility pole 65 feet west of the treatment area. (*Id.* at P. 9.) Additionally, soil samples were collected in a gradient pattern from where the incident allegedly occurred. The farthest west sample, (approximately 2,800 feet from the field) was taken two days later on January 27, 2022. (*Id.* at P. 2.)

Rocha obtained the pesticide use recommendation and the pesticide application completion record from Farm Aviation for the application performed on DOG54A on January 23, 2022. (*Id.*) The completion record confirmed that the aerial application began at 12:17pm and ended at 2:59pm, which is consistent with the time and location described by the complainant. (*Id.* at p.12) According to the completion record the pesticides applied to DOG54A were Osprey Herbicide, signal word "Caution" (EPA reg. no. 264-802), *Brox 2EC*, a signal word "Warning" minimal exposure pesticide ("MEP") (EPA reg, no. 42750-48), and Pacific Premium CDC, a signal word "Warning" pesticide (CA reg, no. 37686,50003). (Ex. C6) MEPS are pesticides which, by regulation, are subject to heightened safety use requirements. (3 CCR section 6790-6793)

Consistent with the recommendations of the DPR Enforcement Branch, *Bromoxynil*, the active ingredient in *Brox 2EC* was the target chemical. (Investigative sample analysis reports C4 pgs. 40-60) Soil samples were taken 70 feet inside the treatment area (2.3ppm detected), at the west edge of the treatment area (1.0ppm detected), 70 feet west of the treatment area (0.14ppm detected) 130 feet west of the treatment area (0.21ppm detected) and 2,800 feet west of the treatment area (None detected). The control sample as well as the sample taken 2,800 feet west of the intended treatment area tested "none detected". (*Id.*) All the other samples tested positive for *Bromoxynil*, except for the wipe sample from a utility pole that is 65 feet from the edge of the target field. Rocha testified that he had concerns about the effectiveness of the pole sample due to the weathered surface and dust on the pole. (*Id.*)

The County searched for any other application of *Bromoxynil* made between December 23, 2021, and January 27, 2022, within one mile of the incident location and found two other applications of *Bromoxynil*. (Ex. C4 p. 4.) Both of which were applied by ground on January 8, 2022, 15 days prior to the subject application and were approximately 0.8 miles from the nearest positive soil sample. (*Id.*) Sample #22-06-HR was taken south of these fields and tested negative *Bromoxynil* residues. (C4 pgs. 40-60) The wind on the date of these applications was slight (2.8-5.9mph), but generally in a direction toward the incident location. (*Id.* at p.64.)

On August 2, 2022, the Commissioner issued a NOPA to Hallock, File No. EA-13-2022-019. (Ex. C2.) The Commissioner proposed to fine Hallock \$1,500 for a single Class A violation of 3 CCR section 6614(b)(3) for making or continuing a pesticide application when there was a reasonable possibility of contamination of nontarget private property, including the creation of a health hazard, preventing normal use of that property, in violation of 3 CCR section 6614(b)(3). (*Id.*) On August 20, 2022, appellant signed and returned an Acknowledgement of Receipt of Notice of Proposed Action and Request for a Hearing. (Ex. C3) On February 3, 2023, Imperial County Agricultural Commissioner Carlos Ortiz issued a Notice of Hearing. (*Id.* at p.2.)

A hearing was duly held on April 19, 2023, before Hearing Officer Robert G. Atkins. Hearing Officer Atkins issued his proposed decision to the Commissioner on April 28, 2023. Hearing Officer Atkins found that the County proved by a preponderance of the evidence that Hallock violated 3 CCR section 6614(b)(3) and proposed that the \$1,500 fine be upheld. The Commissioner fully adopted the Hearing Officer's Proposed Decision and ordered Hallock to pay \$1,500 for a Class A violation. The Commissioner's Notice of Decision and Order to Pay was received by the Appellant on May 19, 2023. Appellant filed his appeal on June 20, 2023.

The Hearing Officer's Proposed Decision

A hearing was held before Hearing Officer Robert G. Atkins on April 19, 2023. At the hearing, the County and appellant both had the opportunity to present oral and documentary evidence. At issue was (1) whether the incident constituted a violation as alleged, and (2) whether the fine was correctly categorized as proposed.

Testifying for the County was Assistant Agricultural Commissioner/Sealer Rachel Garewal, and Agricultural Biologist Hiram Rocha. Seth A. Hallock and his wife Jeana Hallock testified on his behalf. The County presented Exhibits C1 to C9: C1: Pre-Hearing Conference Stipulations; C2: Notice of Proposed Action; C3: Hearing Request and Notice of Hearing; C4: Investigative Narrative Report; C5: Incident Map; C6: *Brox 2 EC* label and SDS; C7: CA Code of Regulations, CA Food and Agricultural Code, and CA Evidence Code; C8: PSIS A6 and C9: Investigator License. Hallock presented Exhibits R-1 to R-2: R-1: Appellant's written statement and R-2: photos of the area of the incident. (See Proposed Decision, p. 3 [Evidence Docket])

Does the incident as alleged constitute a violation?

Appellant made several arguments against the credibility of the complainant, specifically because the complainant was anonymous. He further argued that the Complainant should bear some, if not all, of the responsibility of being sprayed as they did not make any efforts to avoid being sprayed. The Hearing officer found these arguments to be unpersuasive as the county is obligated to investigate all complaints regardless of the source and to only take enforcement actions when the evidence, as it does in this case, supports the allegations. The Hearing Officer further found that there is no evidence that the Complainant was "not driving correctly when and where it could be expected and not where they could have anticipated entering the actual spray area." (Proposed Decision, p. 15.)

Appellant further argued that there was not sufficient evidence to support that his application was the source of the *Bromoxynil*. The Hearing Officer found that "while imperfect, the sampling did confirm the presence of the target pesticide from the treated field to the far side of the road where the complainant said the incident occurred." (*Id.*)

Appellant argued that he had acted reasonably under the circumstances as he chose to delay the application to a Sunday to reduce the likelihood of traffic, that he shuts off if he sees a vehicle, and that the guide wires which protruded into the field made trim passes on the western edge impractical. The Hearing Officer did not find this argument persuasive and found that if the Appellant does not feel that it was safe to apply trim passes, then he needed to discuss with the farmer on whether to apply the herbicide from the ground or not.

Classification of the fine

The Appellant argued that as the complainants did not complain of any symptoms, there was no basis for a Category A fine. Appellant then referred to several cases he found on the DPR website which he contends supports a Category B fine, he specifically identified *Alpine Helicopters Service, Docket No. 213*; and *Farm Air Flying Service LLC, Docket No. 214*. The Hearing Officer found that contrary to Appellant's position, there were not several other comparable violations of 3 CCR section 6614(b)(3), he was only able to find 3 such cases, none of which he found to be persuasive in changing the County's proposed fine.

For the reasons stated above, the Hearing Officer determined that Hallock violated 3 CCR section 6614(b)(3), for performing a pesticide application that resulted in the contamination of nontarget private property, including the creation of a health hazard, preventing the normal use of that property. The Hearing Officer further found the Commissioner's proposed \$1,500; Class A fine was appropriate. (Proposed Decision, p. 16.)

On May 8, 2023, the Commissioner adopted the Hearing Officer's Proposed Decision in its entirety. (Commissioner's Decision and Order.)

Appellant's Contentions on Appeal

In the Appellant's Notice of Appeal, he contends that the Hearing Officer's proposed decision contains errors of both law and fact. Appellant did not provide any information on what these errors may be. No further arguments were received by either party.

The Director's Analysis

- I. **There is substantial evidence in the record to support the Commissioner's Decision that Appellant violated 3 CCR section 6614(b)(3), for making or continuing a pesticide application when there was a reasonable possibility of contamination of nontarget private property, including the creation of a health hazard, preventing the normal use of that property.**

There is substantial evidence in the record to support that the Appellant made or continued a pesticide application when there was a reasonable possibility of contamination of nontarget private property, including the creation of a health hazard, preventing normal use of that property, in violation of 3 CCR section 6614(b)(3).

Here, the County responded to a complaint from the public regarding an alleged spray drift of pesticides onto their vehicle by a blue and white helicopter at approximately 12:57pm on Sunday January 23, 2022 as they were driving southbound on Dogwood Road. The Appellant performed an application of *Brox 2EC* (EPA Reg. No. 42750-48) to the wheatfield Dogwood 54A on Sunday January 23, 2022, from 12:00pm-2:59pm using a blue and white helicopter that matches the description provided by the complainant. The County's sampling of the complainant's vehicle, and soil from the incident location confirmed the presence of *Bromoxynil* residue, the active ingredient in *Brox 2EC*. The concentration of the residues in the soil generally decreased with

increasing distance from the treatment stream which is indicative of pesticide drift. While Sample #22-07-HR (0.21 PPM) tested for a greater concentration than Sample# 22-08-HR (0.14 ppm) even though Sample# 22-08-HR was closer to the treatment, this was satisfactorily explained to be a product of the air movement from helicopter application. The County performed an adequate search for other potential sources of the *Bromoxynil*, and only found one other possible source which was applied by ground on January 8, 2022, 15 days prior to the incident and 0.8 miles from the nearest positive sample. Considering appellant sprayed pesticide onto a high traffic public roadway, well outside the target area, there was a reasonable possibility of contamination, even without evidence that the contamination actually occurred. But in this case, this evidence demonstrates that appellant made an application that did contaminate nontarget private property (the complainant's truck). The fact that the people inside the vehicle were exposed to the drift of a MEP demonstrates the creation of a health hazard. For the above stated reasons, the Director finds that there was substantial evidence to determine that Appellant violated 3 CCR section 6614(b)(3).

II. There is substantial evidence in the record to support the Commissioner's Decision to categorize the violation as a Class A violation and set the penalty at \$1,500.

A Class A violation is "a violation that caused a health, property or environmental hazard". (3 CCR, § 6130, subd. (b)(1).) Appellant argued that as the complainants did not experience any symptoms as a result of their exposure and as a result, there was not an actual health hazard, and that there was no basis for a Category A fine. This is a misinterpretation of the law. 3 CCR section 6130 does not require actual health harm but the creation of a health hazard or risk of injury or illness from the exposure. While prior versions of 3 CCR section 6130 defined a Class A violation as "Violations which created an actual health or environmental hazard", it was amended in 2011 to "[a] violation that caused a health, property, or environmental hazard." Furthermore, since *Bromoxynil* is designated as a MEP pursuant to 3 CCR section 6790, meaning that health risks are heightened from any potential exposure. Given that the hazard in this case was created by the spray contacting a vehicle on a high traffic roadway, well outside the target area with a minimum exposure pesticide, Category A fine is supported.

Respondent went on to argue that that were several comparable Director's appeal cases that he was able to find on the DPR website that support only a Category B fine. However only one of the cited cases concerned a violation of 6614(b)(3), and none of the cited cases concerned a minimal exposure pesticide. These cases are not persuasive in changing the proposed fine.

The fine range for a Class A violation is \$700 to \$5,000. (3 CCR, § 6130, subd. (c)(1).) The Commissioner shall use relevant facts, including the severity of the actual or potential effects of the violation and the respondent / appellant's compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (*Id.* at subd. (d).) Here, the fine was set at the low end of the range, at \$1,500. The Director finds the commissioner's decision was supported by substantial evidence and well within his discretion.

Conclusion

The Director finds there is substantial evidence in the record to support a finding that Appellant violated 3 CCR section 6614, subdivision (b)(3). Substantial evidence in the record supports the Commissioner's finding that Appellant made or continued a pesticide application when there was a reasonable possibility of contamination of nontarget private property, including the creation of a health hazard, preventing normal use of that property. The Director further finds substantial evidence to support the Commissioner's classification of the violation as a Class A violation and \$1,500 fine amount.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify appellant of how and when to pay the \$1,500 fine.

Judicial Review

Under Food and Agricultural Code 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: 10-2-2023

By: 
Julie Henderson, Director