

**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. 385-ACP-SD-12/13)

Administrative Docket. No. 199

DIRECTOR'S DECISION

Critter Control of San Diego County
Dean Lucier, Owner
7929 Silverton Avenue, Suite 606
San Diego, California 92126

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 13, 2013, the San Diego County Agricultural Commissioner (Commissioner) found that Appellant Critter Control of San Diego County (Critter Control) violated California Food and Agricultural Code section 11701 by advertising, soliciting, or operating as a pest control business in San Diego County without a Pest Control Business License. Specifically, on or before April 3, 2013, Critter Control engaged in performing lethal gopher control within the County of San Diego without possessing a valid pest control business license issued by the California Department of Pesticide Regulation (Department). The Commissioner classified the violation as a Class C violation and levied a fine in the amount of \$250.

Critter Control appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. 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.

Factual Background

On February 27, 2013, the San Diego County Agricultural Commissioner's Office received a complaint that Critter Control was operating as a pest control business without a valid license. (County Exhibit, "Ex." 8.) San Diego County Agricultural Standards Inspector Daniel Desserich (Inspector Desserich) was assigned to investigate the complaint. (Testimony of D. Desserich, "Desserich Testimony"; County Ex. 7.) On or around June 14, 2013, Inspector Desserich completed his inspection of Critter Control. (Desserich Testimony; County Exs. 7 and 8.) During his investigation, Inspector Desserich spoke with the owner of Critter Control, Dean Lucier, on March 14, 2013, and April 3, 2013. (Desserich Testimony; County Ex. 8.) Mr. Lucier stated that he did not use pesticides, did not have a license from the Department, and admitted to using kill traps for gophers in yards and landscapes. (Desserich Testimony; County Ex. 8, pp. 2-3.) Mr. Lucier also stated that he possessed a trapping license issued by the California Department of Fish and Wildlife. (Testimony of D. Lucier, "Lucier Testimony"; County Ex. 8, p. 2.)

The County's investigation determined that at the time Critter Control advertised and engaged in pest control for hire, including the lethal control of gophers, it did not have a duly issued pest control business license from the Department. (Desserich Testimony; County Ex. 8, p. 3.) As a result, the County concluded that Appellant Critter Control violated Food and Agricultural section 11701 by advertising, soliciting, or operating as a pest control business in San Diego County without a pest control business license. (Desserich Testimony; County Exs. 1, 8.)

On August 14, 2013, the Commissioner issued a Notice of Proposed Action charging Appellant Critter Control with violating Food and Agricultural Code section 11701. (County Ex. 1.) Critter Control requested a hearing on August 26, 2013. (County Ex. 1.) The Commissioner granted Critter Control's request and on November 13, 2013, Hearing Officer

Louis L. Amadeo, Jr. held a hearing on the matter at 9325 Hazard Way, Suite 100 San Diego, California. (See Notice of Decision, Order and Right of Appeal for Critter Control; refer to Audio Recording of Hearing.)

Relevant Laws and Regulations

California Food and Agricultural Code section 11701 states:

It is 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.

California Food and Agricultural Code section 11403 states in relevant part:

‘Pest control’ means the use or application of any pesticide. It also means the use of any substance, method, or device to do any of the following:

- (a) Control pests.
- (b) Prevent, destroy, repel, mitigate, or correct any pest infestation or disorder of plants.

California Food and Agricultural Code section 12754.5 states in relevant part:

‘Pest’ means any of the following that is, or is liable to become, dangerous or detrimental to the agricultural or nonagricultural environment of the state:

- (a) Any insect, predatory animal, rodent, nematode, or weed.

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class C violation is “a violation of 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, subd. (b)(3).) The fine range for a Class C violation is \$50 to \$400. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(3).)

The Commissioner shall use relevant facts, including severity of actual or potential effects and the respondent’s compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (Cal. Code of Regs., tit. 3, § 6130, subd. (d).)

Appellant's Contention on Appeal

Appellant Critter Control's main contention on appeal is that Critter Control is not a "pest control business" as contemplated by the Food and Agricultural Code and therefore does not fall within the regulatory authority of the Department because it does not use pesticides in the capture and killing of gophers. (See Appellant's Notice of Appeal, "Notice of Appeal" at 1-2; see also Written Argument in Support of Appeal, "Appeal" at 2.)

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Critter Control had the opportunity to present evidence and question witnesses. The Hearing Officer determined that there was sufficient evidence to show that Critter Control violated Food and Agricultural section 11701 by advertising, soliciting, or operating as a pest control business in San Diego County without a Pest Control Business License.

The County presented evidence at the hearing that Critter Control engaged in the lethal trapping of gophers while failing to possess a valid pest control business license from the Department. Based on the evidence presented, the Hearing Officer upheld the violation and held that the fine of \$250 was appropriate and properly classified within the Class C category. On December 2, 2013, the Commissioner adopted the Hearing Officer's decision in its entirety. (See Notice of Decision, Order and Right of Appeal.)

The Director's Analysis

- A. Substantial evidence supports the Commissioner's decision that Critter Control violated Food and Agricultural Code section 11701 by advertising, soliciting, or operating as a pest control business in San Diego County without a duly issued pest control business license from the Department, when it engaged in the lethal control of gophers.

On appeal, Critter Control argues that because it does not use pesticides, its activities, including the lethal trapping of gophers, do not require a license by the Department and in fact falls outside the regulatory purview of the Department. (Appeal at 1.) After reviewing the evidence and testimony presented at the hearing, the Director finds that there is substantial evidence to support the Commissioner's decision that Critter Control unlawfully operated as a pest control business when it engaged in the lethal trapping of gophers, and therefore violated Food and Agricultural Code section 11701.

Food and Agricultural Code section 11403 defines "pest control," as meaning the "use or application of any pesticide. It also means the use of any substance, method, or device to do any of the following: (a) Control pests. (b) Prevent, destroy, repel, mitigate, or correct any pest

infestation ...” (Food & Agr. Code § 11403, subd. (a) and (b) (emphasis added).) The Code goes on to define a “pest” as being, among other things, any insect, predatory animal, *rodent*, nematode, or weed that is liable to become detrimental to the agricultural or nonagricultural environment of the state. (Food & Agr. Code § 12754.5, subd. (a) (emphasis added).) Finally, the Code clearly states that it is 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 Department. (Food & Agr. Code § 11701.)

Here, it is undisputed that a gopher is a rodent.¹ At the hearing, the County presented evidence that on or before April 3, 2013, Critter Control engaged in the lethal trapping of gophers in San Diego County by way of lethal kill trap devices. (Desserich Testimony; Testimony of J. Arriaga, “Arriaga Testimony”; County Ex. 8.) Critter Control also admitted in their appeal that it “advertised once for the trapping of a gopher on its website, which is a rodent, and has since been removed from its service offerings.” (Appeal at 1.) The County presented evidence at the hearing that, although Critter Control possessed a valid trapping license from the Department of Fish and Wildlife,² at no time during Critter Control’s advertising for, or lethal trapping of gophers, did Critter Control possess a valid pest control business license from the Department. (Desserich Testimony; County Ex. 8.) As a result, Critter Control violated Food and Agricultural Code section 11701.

Critter Control’s main argument on appeal is that it was not the intent of the Legislature to regulate individuals or businesses that engage in pest control without the use of chemical pesticides. (See Notice of Appeal and Appeal.) Critter Control’s arguments, however, are without statutory support. In fact, the Legislature specifically and unambiguously granted the Department authority to regulate pest control activities by pesticides *and* any substances, methods, or *devices* that are used to control, destroy, prevent, or mitigate a pest as defined by statute, and further required that any individual or business engaging in “pest control” be licensed by the Department. (See Food & Agr. Code §§ 11403, 11701; 12754.5.) The County presented evidence that individuals or businesses engaging in pest control without a valid pest control business license are less likely to be aware of the applicable industry laws and regulations pertaining to the safe and effective practice of pest control. (See County Ex. 1.) At the hearing, San Diego County Supervising Agricultural Standards Inspector J. Arriaga (Supervising

¹ See Merriam Webster Dictionary definition of “gopher,” located at <http://www.merriam-webster.com/dictionary/gopher>.

² Critter Control argues that because it possessed a valid trapping license from the Department of Fish and Wildlife, which allowed it to take nongame mammals such as gophers, it did not need a separate license from the Department. (Notice of Appeal at 1-2.) In fact, Mr. Lucier has it exactly backwards. Section 4005 was amended in 2006 to eliminate the dual licensing requirement with Fish and Wildlife and the Structural Pest Control Board (SPCB) and Department for the trapping of rats, mice, voles, moles or gophers. (Fish & G. Code § 4005, subd. (e)(2)-(3).) That is, if an individual or business possesses a license from the SPCB or Department for trapping rats, mice, voles, moles or gophers, it does not also need a Fish and Wildlife trapping license.

Inspector Arriaga) also testified that there are safety concerns regarding the ultrahazardous use of kill trap devices to trap gophers and that requiring pest control businesses to possess a license helps ensure they possess the proper knowledge about potential threats, safety, and physical hazards associated with using such devices. (Arriaga Testimony; County Ex. 11.) The County also presented evidence that the suggested study materials for an individual to obtain a qualified applicator's license, which is a requirement to obtain a valid pest control business license, includes information for businesses that use devices for integrated pest management purposes (County Ex. 16 at 9, 11; Arriaga Testimony), and that the knowledge expectations are not limited to applicators who only use chemical pesticides (County Ex. 17 at 1-2; Arriaga Testimony). Accordingly, the Director rejects Critter Control's arguments that the Legislature did not intend for the Department to regulate individuals or businesses engaged in the lethal trapping of gophers.

Further, the express statutory licensing exemptions set forth in Food and Agricultural Code section 11531 clearly do not apply to this case. It is well-settled under the rules of statutory construction and interpretation that courts look to the plain language of the statute and where, "exceptions to a general rule are specified by statute, other exceptions are not to be implied or presumed." (*Wildlife Alive v. Chickering, et al.* (1976) 18 Cal.3d 190, 195.) Here, the licensing exemption contained in section 11531 only applies to the *live* capture and removal or exclusion of certain vertebrate pests, bees, or wasps without the use of pesticides. (*See* Food & Agr. Code § 11531, subd. (e).) Mr. Lucier admitted that he engaged in the *lethal* trapping of gophers. (Desserich Testimony; *see also* County Ex. 8.) As a result, the licensing exemption does not apply and Critter Control needed a valid pest control business license to engage in the lethal control of gophers.

In sum, Critter Control engaged in pest control activities, including the lethal trapping of gophers, which required a license from the Department. At no time did Critter Control possess a pest control business license issued by the Department when it advertised or engaged in such lethal pest control activities. Accordingly, the Director finds that there was substantial evidence to support the Commissioner's decision that Critter Control violated California Food and Agricultural Code section 11701 by advertising, soliciting, or operating as a pest control business, specifically by the lethal trapping of gophers in residential yards, without a valid pest control business license issued by the Department.

B. Substantial evidence supports the Commissioner's decision to classify the violation as a Class C violation and that the fine was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in California Code of Regulations, title 3, section 6130, set forth above. Here, there is substantial evidence to support the Commissioner's decision that this violation was a Class C violation and that the fine was appropriate. A Class C violation is a violation of law or regulation that was not

intended to mitigate the risk of adverse health, property, or environmental effects. (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(3); Arriaga Testimony.)

At the hearing, Supervising Inspector Arriaga testified that the violation against Critter Control was appropriately classified as a Class C violation. (Arriaga Testimony.) Supervising Inspector Arriaga testified that licensing violations are normally Class B violations, but that the Commissioner took into consideration the fact that Critter Control did not use pesticides and possessed a valid Fish and Wildlife trapping license. (Arriaga Testimony.) Supervising Inspector Arriaga also provided testimony that the \$250 fine was appropriate for this type of violation as it was placed near the middle of the class range, between \$50.00 and \$400.00. (Cal. Code of Regs., tit. 3, § 6130, subd. (c)(3).)

Based upon the facts of this case, the Director finds that the violation was appropriately charged as a Class C violation and that the \$250 fine levied is not excessive, and is a reasonable exercise of the Commissioner's discretion.

Conclusion

The Commissioner's decision that Appellant Critter Control of San Diego County violated California Food and Agricultural Code section 11701 and that the violation qualified as Class C violation is affirmed. The fine of \$250 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant Critter Control of San Diego County of how and when to pay the \$250 fine.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant Critter Control of San Diego County 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: 3/21/2014

By: Brian Leahy
Brian Leahy, Director