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 Joaquin
(County File No. 001-ACP-SJ-17/18)

Docket No. 213

DIRECTOR'S DECISION

Alpine Helicopter Service, Inc.
P.O. Box 1405
Woodbridge, CA 92528
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 October 30, 2017, the San Joaquin County Agricultural Commissioner ("Commissioner") found that on September 20, 2016, the Appellant, Alpine Helicopter Service, Inc. committed a violation of California Code of Regulations, Title 3, section 6614 subdivision (b)(3) when Appellant drifted the pesticide Ethephon 2, upon a non-target car that was traveling along Alpine Road, near the application site. The Commissioner determined that this was a Class B violation and fined Appellant $500.

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

Appellant submitted arguments on March 30, 2018 again requesting oral arguments. The Director in his discretion denies this request.

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 September 20, 2016, between 7:20-7:40 a.m., Stephen Brunskill a pilot for Alpine Helicopter Service, made an aerial application of Ethephon 2 to a walnut grove farmed by Aaron Devencenzi. A few hours later, at 11:42 a.m., Ms. Angela Mancuso reported to County Biologist Rod Saiki that she had been driving north on Alpine Road near Glenwood School earlier that morning with her windows down. She saw a red and white helicopter making a pesticide application to a walnut orchard. As the helicopter was making the application, she saw a mist hit her car windshield and felt a mist on the left side of her face and left arm. She reported that she didn't think anything about it until later when she was working out and rubbed her left shoulder near her left eye. Her eye began twitching and it felt tight. She remembered earlier that morning seeing the red and white helicopter next to her as she drove north on Alpine Road and feeling the mist falling from the helicopter on her arm and face. She immediately took a shower and changed clothes. But her eye was still twitching when she called in the complaint. She felt her eye was ok as she was calling in the complaint, and so she felt that she didn't need to see a doctor.

County Biologist Rod Saiki took Ms. Mancuso's complaint and investigated. His investigation revealed that Alpine Helicopter was the only aerial application in the area that day. He also took a swab sample of Ms. Mancuso's car where she had said the mist fell onto her car. The laboratory results came back positive for Ethaphon 2, the pesticide that Mr. Brunskill had sprayed on September 20, 2016, between 7:20 and 7:40 a.m. He also investigated the wind reports for the area. It showed that the wind direction was heading towards Alpine Road from the direction of the walnut orchard that Alpine Helicopter was treating.

Relevant Laws and Regulations

"[N]o pesticide application shall be made or continued when ...[t]here is a reasonable possibility of contamination of nontarget public or private property...." (Cal. Code Regs. tit. 3, §6614, subd. (b)(3).)

A civil penalty may be levied by a county agricultural commissioner. "At the hearing, the person shall be given an opportunity to review the county agricultural commissioner's evidence and to present evidence on his or her own behalf." (Food & Agr. Code, § 12999.5.)

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 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 fine range for a Class B violation is $250 to $1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

Appellant's Contentions

Appellant makes the following six arguments:

1. There was no violation of California Code of Regulations, Title 3, section 6614(b)(3).[1]
2. The County Agricultural Commissioner incorrectly interpreted section 6614(b)(3).
3. The drift was not substantial under Food and Agricultural Code, section 12972.
4. The Hearing Officer relied on inadmissible evidence at the hearing.
5. The County failed to disclose exculpatory evidence before the hearing.
6. The Hearing Officer abused his discretion by relying on inadmissible evidence over Appellant's objections.

The Hearing Officer's Decision

The Hearing Officer found that the County "met its burden of proof that the contamination found on Ms. Mancuso's vehicle more likely than not came from [Appellant's] application." He found that Mr. Brunskill's testimony that he did not drift was not persuasive.

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1 All references to "section" without further citation will be to the California Code of Regulations, Title 3.

His testimony was contradictory. On the one hand he testified that he anticipated traffic. On the other hand he made the application without a spotter near what he knew to be a well-travelled road at a time of day when traffic would be expected. His testimony that there was no traffic on Alpine Road near a school at or near school time for 20 minutes was not persuasive.

Further, the Hearing Officer determined that the laboratory report showing Ethephon 2 on Ms. Mancuso's windshield in combination with Mr. Saiki's testimony concerning the sample and Mr. Saiki's investigation including his interview with Ms. Mancuso, was persuasive to show that the source of the Ethephon 2 on Ms. Mancuso's windshield more likely than not came from Mr. Brunskill's application on September 20, 2016, between 7:20-7:40 a.m.

The Hearing Officer did not find persuasive Appellant's argument that the small amount of Ethephon 2 by its nature could not be a health hazard because that amount can be consumed when on walnuts. He also did not find Appellant's argument persuasive that the County was required to prove substantial drift under Food and Agricultural Code section 12972.

The Hearing Officer further found that the County provided sufficient evidence to show that it was more likely than not that Appellant continued his application when there was a reasonable possibility of contamination of property because of the time of day, the traffic, and the nearby school. The presence of Ethephon on Ms. Mancuso's vehicle is ample proof that such reasonable possibility existed.

The Code does not require that a health effect be demonstrated in order for a health hazard to be present. Further, the Code only requires that a reasonable possibility of a health hazard be created for a violation to exist.

The Hearing Officer also did not find any violation of due process because the County was able to show that the difference in the two lab reports was a clerical mistake. In addition, the Hearing Officer found that "a health hazard was created" by the drift onto Ms. Mancuso's vehicle, as evidenced by the Ethaphon 2 present in the swab sample taken of Ms. Mancuso's car.

As for the fine designation under section 6130, the Hearing Officer found that the County established that section 6614 is a regulation designed to mitigate adverse health, property, or environmental effects and therefore was properly categorized as a Class B violation and that the charged $500 fine was appropriate.

The County Agricultural Commissioner adopted the Hearing Officer's decision in its entirety and ordered Appellant to pay the $500 fine.

The Director's Analysis

Substantial evidence supports that Alpine Helicopter caused Ethaphon 2 to drift onto Angela Mancuso's car on September 20, 2016, at approximately 7:45 a.m., on Alpine Road and Highway 88, in violation of Title 3, section 6614, subdivision (b)(3). Alpine Helicopter continued an application when there was a reasonable possibility of contamination to Angela Mancuso's car as she drove along Alpine Road.

The substantial evidence supporting the drift incident includes the testimony of Stephen Brunskill, stating that on September 20, 2016, he applied Ethaphon 2, to walnuts between 7:20 a.m. and 7:40 a.m., along the same road that Ms. Mancuso drove her car. Further evidence included the testimony of Rod Saiki, Agricultural Biologist for San Joaquin County. He testified that he interviewed Ms. Mancuso and documented his interview with her in his report, that he wrote at or near the time he interviewed Ms. Mancuso. He also testified that he took a swab sample of her windshield where she told him the drift fell onto her car. Mr. Saiki also testified that he investigated all possible applications in the area, and that only Appellant made an aerial application that day. He also investigated the wind conditions for the day. The Ethaphon 2 label states that this product may not be used in a way that will contact people, either directly or via drift. All of this evidence (Mr. Brunskill's testimony, Mr. Saiki's testimony, Mr. Saiki's report, the lab report, the wind condition report, the Ethaphon 2 label) supports that Alpine Helicopter drifted onto Ms. Mancuso's car. This was a health hazard because Ethaphon 2 may not be sprayed on cars (with people in them, possibly with their windows down) as those cars travel along the road. Considering its potential for "irreversible eye damage and skin burns" (Exhibit C, p. 3) it was extremely dangerous to continue an application with cars driving along the road at a time when school was nearly in session.

Mr. Brunskill testified that at the time of day that he made his application, he would expect cars along that road. Yet earlier in his testimony he stated that he saw no cars, and if he had seen cars, he would have stopped the application. He also testified that he would travel over and beyond the road about 200 feet in order to turn around. About 40 feet before he reached the road, he would turn off his sprayer. He testified that in his experience turning off the sprayer 40 feet before the road will prevent drift. However, Mr. Brunskill had no way to tell whether the drift reached the road. He was not on the ground to see or feel the drift. Moreover, the Hearing Officer made the following credibility determination:

> Brunskill's testimony that he did not drift was not persuasive. His testimony was contradictory. On the one hand he testified that he anticipated traffic. On the other hand he made the application without a spotter near what he knew to be a well-travelled road at a time of day when traffic would be expected. His testimony that

there was no traffic on Alpine Road near a school at or near school time for 20 minutes was not persuasive.

Mr. Brunskill's testimony, Mr. Saiki's testimony, the laboratory report, the wind condition report, the copy of the Ethaphon 2 label, and Mr. Saiki's report constitute substantial evidence supporting the County Agricultural Commissioner's finding that it was more likely than not that Mr. Brunskill drifted onto Ms. Mancuso's car on September 20, 2016.

A. Appellant's arguments are not compelling.

Appellant makes several arguments that "there was a failure of proof by the San Joaquin County Agricultural Commissioner," and requests that the Director reverse the Commissioner's decision based on several grounds. As discussed below, none of Appellant's arguments persuade the Director to reverse the Commissioner's decision because those arguments are based on an incorrect interpretation of administrative and pesticide laws.

1. Residue levels set for produce are irrelevant to the determination of whether Appellant violated California Code of Regulations, Title 3, section 6614(b)(3).

First, Appellant alleges that there was no violation of section 6614(b)(3) because the amount of residue found on Ms. Mancuso's car was less than what is allowed on walnuts under the Code of Federal Regulations, Title 40, section 180.300.[2] Appellant misinterprets the law and ignores the allegations. A residue level for produce does not address the allegations here. The County charged and found that Appellant continued an application when there was a reasonable possibility of contamination to Ms. Mancuso's car as she drove along Alpine Road. The County used the swab sample that tested positive for Ethaphon 2 to show that it was more likely than not that the drift incident occurred. The residue that fell onto Ms. Mancuso's car did not have to be at a certain level to establish that the drift incident occurred. The two things are inapposite.

This incident created a health hazard because Appellant sprayed Ms. Mancuso and her car as she drove along the road and also because someone could touch the residue left on the car, then touch their skin or eyes. And according to the label this pesticide causes irreversible eye damage and skin irritation. Nowhere on the label does it say that Ethaphon 2 can be sprayed directly onto non-target locations like people or cars as they drive along roads, as long as what is found on a small piece (such as in the swab sample) of the non-target property contains a low percentage of the active ingredient. Indeed, the label states: "Do not apply this product in a way that will contact workers or other persons, either directly or through drift. Only protected handlers may be in the area during application." (Exhibit C, p. 3.) Simply arguing that this residue level is what is permitted on walnuts does not show that this is a safe level to have all

2 Appellant did not include the correct citation of the law, and referenced only "USEPA allowed tolerance." All tolerances are contained within the Code of Federal Regulations.

over a car because the two are not analogous.

This incident created a health hazard because Appellant sprayed the car as Ms. Mancuso drove along the road and also because someone could touch the residue left on the car, then touch their skin or eyes. It doesn't matter that the percentage of residue on the swab sample was low because the purpose of the swab was to test for the presence of residue, not to show that a particular level was safe. Accordingly, this argument fails.

2. The Commissioner correctly interpreted California Code of Regulations, Title 3, section 6614(b)(3).

Next, Appellant argues that the County Agricultural Commissioner incorrectly interpreted section 6614(b)(3) because contamination of a windshield does not rise to the level of the definition of contamination necessary to prevent normal use of the property. Again, Appellant misinterprets this regulation. The County did not need to prove that the drift caused a health hazard preventing normal use of the property – only that Appellant contaminated the property.

The complete section reads:

> (b) Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when:
>
> ...
>
> (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, subd. (b)(3).) "[T]he words 'include' and 'including' are ordinarily words of enlargement, and not of limitation." (*People v. Wesson* (2006) 138 Cal.App.4th 959, 968, citing *People v. Horner* (1970) 9 Cal.App.3d 23, 27.) Accordingly, a County may try to prove a health hazard preventing use of the property to show the seriousness of the offense. But, the "including" language in section 6614(b)(3) does not limit that section to only drift onto public or private property that causes a health hazard preventing normal use of the property. The section is meant to prevent all contamination of non-target public or private property.

Even so, the County demonstrated a health hazard in this situation. The contamination causing a health hazard occurred while Ms. Mancuso drove along the road. It is a health hazard to drift onto a car while a driver is driving in it along that road. Normal use of a car allows

someone to drive along the road without the car (or the person driving it) being sprayed with a pesticide that causes "irreversible eye damage and skin burns." (Exhibit C, p. 3.) Arguably, the drift caused even the future normal use of the car because Ms. Mancuso's normal use of the car included her cat sitting on the car and Ms. Mancuso possibly touching the car or cat and having the residue transfer to her person. The residue amount that was swabbed along the windshield simply tended to prove that Ms. Mancuso's statements were accurate, and that her car and her person were indeed sprayed with a pesticide as she drove along the road. This was the health hazard, and not only the residue that was left on the car after the drift incident.

Appellant also seems to argue that contamination only occurs when there is enough pesticide on the vehicle to create a health hazard. Contamination is not defined in Division 6 or 7 of the Food and Agricultural Code, or in the Title 3 of the California Code of Regulations. Therefore, its ordinary dictionary definition controls. (*Hammond v. Agran* (1999) 76 Cal.App.4th 1181, 1189 ["in the absence of specifically defined meaning, a court looks to the plain meaning of a word as understood by the ordinary person, which would typically be a dictionary definition."].) Contaminate means "to soil, stain, corrupt, or infect by contact or association."[3] Under the normal dictionary definition, something can be contaminated by a pesticide simply by having any amount of residue on it.

3. Whether there was "substantial drift" is not dispositive in this case.

Appellant's next argument is that there was no substantial drift under Food and Agricultural Code, section 12972. Appellant was not charged with violating this Food and Agricultural Code section, and so the County did not need to prove substantial drift. If the County had proven substantial drift, this may have helped in also proving that Appellant had violated section 6614. But section 6614(b) specifically excludes consideration of "substantial drift" under Food and Agricultural Code, section 12972. Accordingly, Appellant's argument that the County did not prove substantial drift is not relevant.

4. The Hearing Officer properly admitted all evidence.

Appellant's fourth argument is that the Hearing Officer relied on inadmissible evidence at the hearing. In determining what is admissible at an informal hearing such as this one, we look to the Administrative Procedures Act (APA) as a guide. Under the APA, a hearing officer "may" limit the use of evidence. He is not, however, required to exclude any evidence:

> [T]he presiding officer shall regulate the course of the proceeding. The presiding officer shall permit the parties and may permit others to offer written or oral comments on the issues. The presiding

[3] https://www.merriam-webster.com/dictionary/contaminated

> officer may limit the use of witnesses, testimony, evidence, and argument, and may limit or eliminate the use of pleadings, intervention, discovery, prehearing conferences, and rebuttal.

(Govt. Code, §11445.40, subd. (b).) Indeed, even formal hearings under the APA allow hearsay evidence:

> Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.

(Gov. Code, § 11513, subd. (c).) All of the records in this case, including the lab reports and Mr. Saiki's report are records made by public employees, and are admissible even in civil court. (Evid. Code, § 1280.) Ms. Mancuso's statement within Mr. Saiki's report (a public employee record) was supporting evidence for the laboratory report (also a public employee record) showing Ethaphon 2 residue on the windshield. Accordingly, none of the evidence relied on by the Hearing Officer was inadmissible. Again, the substantial evidence in the record supporting that Appellant drifted on Ms. Mancuso's car as she was driving along Alpine Road included Mr. Brunskill's testimony that he applied Ethephon 2 in that area between 7:20 a.m. and 7:40 a.m.; Mr. Saiki's testimony that he investigated the incident and found that only Alpine Helicopter made an application in that area on that day; the laboratory report showing the residue from the windshield of Ms. Mancuso's car; the wind reports; the Ethephon 2 label, and the supporting statements within Mr. Saiki's report by Ms. Mancuso that she was driving along the road, saw the helicopter, felt the mist, and later when she was working-out, touched her hand to her eye and her eye began to twitch.

The Hearing Officer was within his discretion to allow all of the evidence into the record, including any hearsay.

5. Appellant received all the process that was due.

Appellant's fifth argument is that the County failed to disclose exculpatory evidence, and that this was a violation of Appellant's due process. "The governing procedure by which an agency conducts an adjudicative proceeding is determined by the statutes and regulations applicable to that proceeding." (Gov. Code, § 11415.10.) In this case, Food and Agricultural Code, section 12999.5 outline the governing procedures for the hearing. That section specifically states when a commissioner must provide all evidence to the person being charged: "At the hearing, the person shall be given an opportunity to review the commissioner's evidence and to present evidence on his or her own behalf." Contrary to Appellant's contention, the

Commissioner was not required under Food and Agricultural Code section 12999.5, to give him any evidence before the hearing.[4]

6. At an informal hearing, hearsay evidence is permitted.

Finally, Appellant argues that the Hearing Officer abused his discretion by allowing hearsay evidence over Appellant's objection. As described above, the Hearing Officer may allow "any relevant evidence ... if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." (Gov. Code, § 11445.40, subd. (b).) This includes hearsay. Also permitted are reports by public employees. (Evid. Code, § 1280.) Accordingly, the Hearing Officer did not abuse his discretion by allowing any of the evidence into the record.

B. California Code of Regulations, title 3, 6614, subdivision (b)(3) is a regulation designed to protect people, property, or the environment from harm.

Appellant did not challenge the fine amount, or the classification of section 6614 as a Class B violation under section 6130. This section specifically states, it was designed to protect nontarget property from harm, such as a car driving by during an aerial application. Accordingly, the Director finds that the Commissioner properly determined that Appellant's violation of California Code of Regulations, title 3, section 6614, subdivision (b)(3), was a Class B violation. The $500 fine is appropriate and within the violation range for Class B.

Conclusion

The Commissioner's decision that Appellant violated California Code of Regulations, title 3, sections 6614, subdivision (b)(3), is affirmed.

Disposition

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

Judicial Review

Under Food and Agricultural Code, 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

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4 Further, the error in the lab report concerning the level of residue from the windshield favored Appellant, but was still sufficient evidence to support the violation.

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: MAY 11 2018

By: Brian Leahy
Brian Leahy, Director