

**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 Glenn
(County File No. ACP-GLE-13/14-001)

Administrative Docket No. 195

**DIRECTOR'S
DECISION**

**Andy & Seth Fiack
Fiack & Fiack
3147 County Rd. XX
Glenn, California 95943-9669**

Appellant/

Procedural Background

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

After giving proper notice of the proposed action and providing a hearing, held on September 18, 2013 in Willows, California, the Glenn CAC (Commissioner) found that Appellants, Andy & Seth Fiack, violated section 12973 of the Food and Agricultural Code. The Commissioner classified Appellants' violation as Class B and levied a \$1,000 penalty.

Appellants appeal the Commissioner's decision to the Director of the California Department of Pesticide Regulation (Director). The Director has jurisdiction over this appeal under section 12999.5 of the Food and Agricultural Code.

Standard of Review

The Director decides this appeal on the record before the Hearing Officer. 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 determines whether there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test only requires there be enough relevant information and inferences from that information to support a conclusion, even if other conclusions might have also been reached. In applying the substantial evidence test, the Director draws all reasonable inferences from the information in the record to support the Hearing Officer's 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 January 7, 2013, Appellant Andy Fiack received a restricted materials permit (Permit No. 11-13-11-00732) for use of bolero on Appellants' rice crop. (Stipulated Fact 4.) Appellant's restricted materials permit mandates a 30 day hold period for water treated with bolero on properties that do not employ tailwater recovery systems or ponding water. (Stipulated Fact 11; County Exhibit 7.) Holding treated water means "[a]ll boards must be in place in each tailbox and maintained in such a manner to prevent spillage." (County Exhibit 7.)

On May 11, 2013, PM Dusters, a licensed Pest Control Business (License No. 032161), applied *Bolero UltraMax* Herbicide (EPA Reg. No. 59639-112) to Appellants' rice crop on Site 3. (Stipulated Fact 13; County Exhibit 9.) The label for *Bolero UltraMax* Herbicide provides the following directions for use:

Do not drain *Bolero UltraMax* Herbicide treated fields for a minimum of 30 days after application, except where state regulation may allow shorter water holding periods for hydrologically isolated fields or for fields associated with systems designed to isolate discharged water from natural bodies of water. (County Exhibit 6.)

On May 30, 2013, at approximately 1:30 p.m., Mr. Brian Taylor, a Glenn County environmental biologist, conducted a water hold inspection on Site 3. (Stipulated Fact 14; County Exhibit 11.) During this inspection, Mr. Taylor observed water treated with *Bolero UltraMax* Herbicide moving from Site 3 to Site 5 and then from Site 5 to an adjacent drainage ditch. (Stipulated Fact 15; County Exhibits 11, 14, 15.) The water leaving Site 5 and into an adjacent drainage ditch was not reused or recovered. (Stipulated Facts 16 & 17; County Exhibits 12 & 13.)

On August 15, 2013, Appellants received the Commissioner's Notice of Proposed Action for their violation of section 12973 of the Food and Agricultural Code. (Stipulated Fact 1.) Prior to the September 18, 2013 hearing, Appellants stipulated that they did not object to Mr. Paul Bock as their Hearing Officer. (Stipulated Fact 20.)

The Hearing Officer found that Appellants released water treated with *Bolero UltraMax* Herbicide before the conclusion of the 30 day water hold period mandated by Appellant's restricted materials permit and *Bolero UltraMax* Herbicide's product label. (County Notice of Decision and Order.) Accordingly, the Commissioner found that Appellants violated section 12973 of the Food and Agricultural Code. (County Notice of Decision and Order.) Violations of water hold requirements are considered serious violations because they jeopardize the entire Rice Pesticides Program. (County Exhibit 18; Testimony of A. Fiack.)

Relevant Laws and Regulations

"The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner." (Food & Agr. Code, § 12973.)

The Commissioner may "levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with Section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of these provisions." (Food & Agr. Code, § 12999.5, subd. (a).)

When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR § 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class B violation is any "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, subd. (b)(2).)

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

The Hearing Officer's Decision

The Hearing Officer found that Appellants violated section 12973 of the Food and Agricultural Code because Appellants used *Bolero UltraMax* Herbicide in conflict with the product's label and Appellant's restricted materials permit. The product label prohibits draining "*Bolero UltraMax* Herbicide treated fields for a minimum of 30 days after application." Appellant's restricted materials permit mandates that water treated with bolero be held for a minimum of 30 days. *Bolero UltraMax* Herbicide was applied to Site 3 on May 11, 2013. Water treated with bolero was released from Site 3 to Site 5 and then off Site 5 and into an adjacent drainage ditch on May 30, 2013. This release of water treated with bolero occurred within the required 30 day water hold period and was in violation of section 12973.

The Hearing Officer classified Appellants' violation as Class B and levied a \$1,000 penalty. Appellants' violation is Class B because Appellants violated a law that mitigates the

risk of harm to California's water quality and aquatic wildlife. The penalty amount is appropriate because it is within the Class B fine range provided in 3 CCR § 6130 and violations of water hold requirements are serious violations jeopardizing the entire Rice Pesticides Program. The Commissioner adopted the Hearing Officer's proposed decision in its entirety.

Appellants' Assertions

On appeal, Appellants contend that (1) the Commissioner did not provide relevant documents until the hearing commenced, (2) the Hearing Officer was biased and unfair, and (3) the amount of the fine is too high given Appellants' compliance history and that this violation was minor.

The Director's Analysis

1. The Commissioner properly complied with all procedural requirements.

Appellants contend that the Commissioner did not properly provide copies of the Commissioner's relevant documents until the hearing commenced. The Director reviews this claim using his independent judgment.

Under the Food and Agricultural Code, "[a]t the hearing, the person shall be given an opportunity to review the commissioner's evidence." (Food & Agr. Code, § 12999.5, subd. (c) (emphasis added).) Therefore, California law only requires the Commissioner provide Appellants with an opportunity to review the Commissioner's evidence *at the hearing*. California law does not require that Appellants receive copies of the Commissioner's evidence *prior to the hearing*. As Appellants had an opportunity to review and respond to the Commissioner's evidence at the hearing, the Director finds that the Commissioner properly complied with the procedural requirements set forth in section 12999.5.

Moreover, the Commissioner exceeded section 12999.5's procedural requirements by offering Appellants an opportunity to review and/or make copies of the Commissioner's evidence prior to the hearing. The Commissioner's Notice of Proposed Action informed Appellants that they "are entitled to review the Commissioner's evidence supporting this charge during regular business hours at the office of the Glenn County Agricultural Commissioner." Thus, Appellants could have obtained copies of the Commissioner's evidence in advance of the hearing. There is no evidence in the record that Glenn County refused to allow Appellants to review the Commissioner's evidence. In fact, there is no evidence in the record that Appellants even attempted to review the Commissioner's evidence prior to the hearing. Accordingly, the Director finds that Appellants had an opportunity to review the Commissioner's evidence in advance of the hearing and that the Commissioner properly complied with all procedural requirements.

2. Mr. Paul Bock was a proper Hearing Officer.

The Director also uses his independent judgment to review Appellants' claim that the Hearing Officer, Mr. Paul Bock, was biased and unfair.

As an initial matter, prior to the hearing, Appellants stipulated that they did not object to Mr. Bock as their Hearing Officer. (Stipulated Fact 20.) Stipulations are binding and preclude a party from later objecting to stipulated matters. (*Palmer v. City of Oakland* (1978) 86 Cal.App.3d 39, 44.) Accordingly, Appellants are precluded from objecting to Mr. Bock as their Hearing Officer on this appeal.

Even so, it is well-established under California law that Appellants are entitled to a reasonably impartial and non-involved hearing officer at administrative hearings. A hearing officer is presumed to be unbiased and impartial. (*McIntyre v. Santa Barbara Employee's Retirement System* (2001) 91 Cal.App.4th 730, 735.) Therefore, Appellants must present concrete facts and evidence that Mr. Bock has a conflict of interest or some other actual bias to rebut this presumption. The mere possibility or the unsubstantiated insinuation of bias will not overcome this presumption.

On appeal, Appellants' generally claim that Mr. Bock was biased because he is a retired CAC from a different county. However, this broad allegation does not demonstrate that Mr. Bock was actually biased or unfair. Further, Appellants fail to present any concrete evidence that Mr. Bock was prejudicial to Appellants. Without any concrete evidence of Mr. Bock's alleged bias, the presumption that Mr. Bock is reasonably impartial and unbiased stands. Accordingly, the Director finds that Mr. Bock was a proper Hearing Officer.

3. The Commissioner's decision to classify Appellants' violation of section 12973 as Class B and to levy a \$1,000 penalty is supported by substantial evidence.

The Director affirms the Commissioner's classification of Appellants' violation as Class B and the Commissioner's decision to levy a \$1,000 fine.

The Commissioner's decision to classify Appellants' violation as Class B is supported by substantial evidence. A Class B violation is any "violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects." (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(2).) The water hold requirements provided on *Bolero UltraMax* Herbicide's label and Appellant's restricted materials permit are intended to protect California's water quality and aquatic wildlife from pesticide contamination. (Stipulated Fact 18; County Exhibits 6 & 18.) Therefore, Appellants' violation of section 12973, which requires use of *Bolero UltraMax* Herbicide in accordance with the product's label and permit conditions, is a violation of a law that mitigates the risk of adverse environmental impact.

The Commissioner's decision to levy a \$1,000 fine for Appellants' Class B violation is appropriate. Appellants contend the fine amount is too high as Appellants only released a small amount of treated water and Appellants do not have a history of noncompliance. However, the Commissioner's decision to levy a specific fine amount is a matter of discretion and will only be disturbed if there is a clear abuse of discretion. An abuse of discretion is found when the Commissioner's fine is not one which could have been made by a reasonable person. (*Holt v. Department of Food & Agriculture* (1985) 218 Cal.App.3d 427, 437.) The fine range for a Class B violation is \$250 to \$1,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c).) The Commissioner's decision to levy a \$1,000 fine is reasonable because it is within the Class B fine range and violations of the Rice Pesticides Program are considered serious violations jeopardizing the entire program.

Conclusion

The Commissioner's decision that Appellants violated section 12973 of the Food and Agricultural Code is affirmed. The Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision. The Commissioner's decision that Appellants' violation is Class B is affirmed. The civil penalty assessed is within the Commissioner's discretion and accordingly the Director upholds the \$1,000 civil penalty.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellants how and when to pay the \$1,000 penalty.

Judicial Review

Under section 12999.5 of the Food and Agricultural Code, 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: JAN 15 2014

By: Brian Leahy
Brian Leahy, Director