

**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 Riverside
(County File No. 349-ACP-RIV-05/06)

Administrative Docket No. 126

DECISION

Tree & Plant Rescue
Cardiff, California

Appellant /

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Riverside CAC found that the appellant, Tree and Plant Rescue (TPR), committed two violations of the State's pesticide laws and regulations, pertaining to FAC sections 11701 and 12995. The commissioner imposed a total penalty of \$300 for the violations.

TPR appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her 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

TPR developed a product from worm castings that is registered as a soil amendment with the California Department of Food and Agriculture (CDFA). TPR creates a “tea” from the product and offers a service that applies the product to plants. At the times relevant to this action, TPR advertised and solicited business on the basis that application of its “tea” to trees and plants makes them repellant to pests.

The Riverside CAC issued a Violation Notice on August 25, 2004, to TPR for two violations of California’s pesticide laws. Violation one found that TPR violated FAC 11701 by advertising, soliciting, and operating a pest control business without a license. Violation two found that TPR violated FAC 12995 by possessing and using an unregistered pesticide.

Relevant Statutes and Regulation

FAC section 11701 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 director. Pest control is defined as the use of any substance, method, or device to control pests, to prevent, destroy, repel, mitigate or correct any pest infestation or disorder of plants, or to inhibit, regulate, stimulate, or otherwise alter plant growth by direct application to plants. FAC 11403. A pesticide is defined as any substance that, as relevant here, is intended to be used for preventing, destroying, repelling, or mitigating any pest. FAC 12753.

FAC section 12995 makes it unlawful for any person to possess or use any pesticide that is not registered pursuant to the requirements of the Department of Pesticide Regulation.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as “Class A,” “Class B,” and “Class C.” A “Class A” violation is one which created an actual health or environmental hazard, is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897, or is a violation that is a repeat Class B violation. The fine range for Class A violations is \$700-\$5,000. A “Class B” violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a violation that is a repeat Class C violation. The fine range for Class B violations is \$250-\$1,000. A “Class C” violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$500.

Appellant's Allegations

The Appellant asserts that his product is a soil amendment, registered by CDFA, is nontoxic and organic, is not a pesticide, and, therefore, he was not operating a pest control business. He contends that he applied his product as directed by a number of governmental agencies and officials. However, the Appellant admits that he advertised the product as having pesticidal properties, solicited business to apply a product with pesticidal properties, and that he now understands such advertising is a violation of law.

The CAC levied a \$250 fine for violation one (Class B) and a \$250 fine for violation two (also Class B). The Hearing Officer reduced the amount of the fine for violation two to \$50 (Class C). The CAC adopted the Hearing Officer's decision in its entirety. The Appellant asserts that his product is non-toxic and does not create a reasonable possibility of a health or environmental effect such that the fine at a Class B level is not appropriate.

The Hearing Officer's Decision

Violation One-FAC Section 11701

Regarding violation one, the Hearing Officer found, and the record supports, that TPR advertised its product (Tree and Plant Rescue Solution or Worm Gold Solution) as a pesticide, solicited business, and applied the product to trees for the intended result of repelling bark beetles. The Hearing Officer cited to evidence in the record that, in advertising brochures, on flyers, and on TPR's internet Web site, TPR's product is advertised as "repels bark beetles," "will continue to be avoided by beetles," "fights diseases," and "prevents further growth of pathogens." The Hearing Officer also cited to evidence that TPR was not a licensed pest control business and concluded that TPR's actions violated FAC 11701.

Violation Two- FAC Section 12995

As to violation two, the factual evidence is undisputed that TPR's product qualified as an unregistered pesticide. While the Hearing Officer acknowledged TPR's efforts to obtain registration with the U.S. Environmental Protection Agency (U.S. EPA), she also noted the evidence established that the product was not exempted from registration, was not registered, and was advertised and applied as a pesticide with the specific intent of repelling bark beetles from trees. The Hearing Officer's conclusion is well supported in the record not only by the documentary evidence discussed above, but also by the testimony of George Hahn, the owner and operator of TPR who acknowledged that the product was being applied to trees to repel bark beetles.

The Fines

The Hearing Officer found that as to violation one, a fine in the Class B level was appropriate because the application of an unregistered pesticide by an unlicensed company creates a reasonable possibility of a health or environmental hazard. As testified to by Michele Tracy of the Riverside CAC, it is essential for the protection of the public and the environment, as well as the applicator, that the material being applied be evaluated for its efficacy, for the effectiveness and safety of its application methods, and for its toxicity. It is also essential that the material be applied by a trained and licensed pest control applicator.

As to violation two, the Hearing Officer found that a Class B fine was not supported by the record. The Hearing Officer noted the only evidence in the record regarding the toxicity of the material was Mr. Hahn's testimony, which persuaded her that the product was nontoxic. The Hearing Officer concluded that the use of the product as an unregistered pesticide would not result in the reasonable possibility of a hazard to health or the environment.

Director's Analysis and Conclusion

The commissioner's decision that TPR violated FAC 11701 and 12995 is supported by substantial evidence and is affirmed by the Director. The commissioner's decision to levy a fine of \$250 (Class B) for violation one is supported by the evidence and is well within his discretion under 3 CCR 6130. The commissioner adopted the Hearing Officer's decision to decrease the amount of the fine for violation two from \$250 for a class B violation as levied in the Notice of Proposed Action (NOPA), to \$50 for a Class A violation, based on the Hearing Officer's conclusion that the Appellant's use and possession of the product did not pose a reasonable possibility of health or environmental effect.¹ The Director overturns the classification and fine for violation two and reinstates the original NOPA Class B determination and \$250 fine.

It is undisputed that the product applied by TPR was an unregistered, highly concentrated, organically-based product. Mr. Hahn testified that the product was nontoxic and could be safely ingested by animals and people. However, Mr. Hahn's testimony was conclusory, was not supported by documentary or scientific evidence, and was based on two anecdotal incidents of hearsay where he had been told that people had ingested his product. There was no testimony on the final effect on those people.

Mr. Hahn testified at length about the impact of his product on trees and plants. According to Mr. Hahn, the product had dramatic effect on the growth of leaves on decimated trees, and had dramatic repellency effects on "bugs." Thus, the evidence was undisputed that this product has an effect on the environment. Due to the product's undisputed ability to

1 The Hearing Officer found that the product was organic and benign and safe enough for human ingestion and that insufficient evidence existed in the record to support a health or environmental effect.

stimulate growth, it is reasonable to assume that this product would have an environmental effect on non-target plants, and by run-off or overspray on streams, rivers, and ponds and their plant, animal, and algae ecosystems. TPR's advertising claimed an effect on fungal pathogens present in the environment by effecting plant and fungal growth. Of considerable concern is Mr. Hahn's testimony that he has been unable to register the product with U.S. EPA as a pesticide because he is unable to provide an exact breakdown of the contents of the product. Mr. Hahn testified that U.S. EPA staff could not register his product because it contains "millions" of microorganisms. Mr. Hahn further testified that he is unable to identify all of the microorganisms.

3 CCR 6130 does not require an actual effect to support a Class B violation. The only evidence in the record that the product in question does not pose a reasonable possibility of creating a health or environmental effect is Mr. Hahn's conclusory anecdotal testimony. Although not necessary to reach a decision in this case, the Director has determined that the Hearing Officer's finding that TPR's product did not pose a reasonable possibility of health or environmental effect is not supported by substantial evidence. In fact, the record contains considerable evidence that the possession and use of TPR's product posed a reasonable possibility of health or *environmental effect*.

Further, the Hearing Officer's conclusion that the Appellant's use and/or possession of the product did not pose a reasonable possibility of health or environmental effect is in conflict with her legal conclusion with regard to violation one that "advertising pest control products and services by a company not licensed would lead a reasonable person to conclude that the possibility of health or environmental effect could exist." The same reasoning applies with equal force to the fine for violation two. The possession and use of an unregistered pesticide would lead a reasonable person to conclude that the possibility of health or environmental effect could exist.

It is important to recognize that DPR administers a comprehensive regulatory program that registers pesticides after thorough scientific review and evaluation. That review and evaluation includes determining if the product is effective as represented, can be used safely by those applying the product, and will not have a significant adverse environmental effect. This registration process is essential to carrying out the Department's mandate to protect human health and the environment, and the prohibition of the sale, possession, and use of unregistered pesticides is critical to its success.

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Use of any pesticide has an environmental effect. Use of an unregistered pesticide is a violation of law, and thus that violation always has an environmental effect. Therefore, the use of this unregistered pesticide posed a reasonable possibility of creating a health or environmental effect, as a matter of law.

Disposition

The commissioner's decision that TPR violated FAC section 11701 and 12995 is affirmed. The commissioner's levy of a \$250 fine for violation one is confirmed. The commissioner's levy of a \$50 fine for violation two is overturned. The Director finds that the fine for violation two will be \$250. The commissioner shall notify the appellant how and when to pay the \$500 fine.

Judicial Review

Under FAC 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**

By: _____
Mary-Ann Warmerdam
Director

Dated: _____