

**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 Madera  
(County File No. 10-ACP-MAD-05/06)

Administrative Docket No. 128

**DECISION**

James Peter Wulf  
6612 N. Seedlescombe Drive  
Fresno, California 93711-1170  

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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 Madera CAC found that the appellant, Mr. James Peter Wulf, committed one violation of the State's pesticide laws and regulations, pertaining to FAC section 12973. The commissioner imposed a total penalty of \$1,000 for the violation.

Mr. James Peter Wulf appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). 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**

Mr. James Peter Wulf was the owner and operator of the orchard involved in this action located at 33253 Avenue 9 in Madera, California. Mr. Wulf is also a licensed Pest Control Adviser (PCA). On July 28, 2005, he purchased "PCQ pelleted rodent bait" for use to eliminate ground squirrels in his orchard. Mr. Wulf applied the bait along his property line, which ran down the center of a dirt road at the northeast end of his orchard. A residence and fallow field occupied and owned by Mr. Martin Nonini adjoins Mr. Wulf's property at the center of the dirt road. Mr. Wulf explained that Mr. Nonini had removed his orchard and did not address the resulting squirrel migration to Mr. Wulf's orchard. Mr. Wulf placed the bait to prevent the squirrels from entering his property.

On August 2, 2005, Mr. Nonini took his very sick dog to the veterinarian. The dog was diagnosed as suffering from severe anemia and coagulopathy. On August 31, 2005, Mr. Nonini contacted the Madera CAC to complain that his dog had become sick from eating rodent bait put on the road earlier in August by his neighbor, Mr. Wulf, and to report that Mr. Wulf had again applied the rodent bait in piles along the dirt road, and Mr. Nonini didn't want his dog to get sick again.

On August 31, 2005, the Madera CAC began an investigation into Mr. Nonini's complaint. The investigator determined that Mr. Wulf had not applied the pellet bait in the manner set forth on the product's label and had violated FAC section 12973. On September 30, 2005, the Madera CAC issued a Notice of Proposed Action (NOPA) for a violation of FAC section 12973 and proposed to fine Mr. Wulf the sum of \$1,000, designating the violation as a Class A violation pursuant to 3 CCR section 6130. A hearing was held on January 6, 2006, and the Hearing Officer issued a Notice of Proposed Decision, Order, and Right to Appeal on January 23, 2006.

### **Relevant Statutes and Regulation**

California Food and Agricultural Code Section 12973 reads as follows:

"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."

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 he used the PCQ bait in good faith, unaware that there was any domestic animal or wild life problem. He further asserts that the PCQ bait label contains conflicting directions that allow the applicator to scatter the bait on the ground unless there is a “‘known’ environmental problem with domestic animals or wild life” and he had no knowledge of the existence of Mr. Nonini’s dog.

The CAC levied a \$1,000 fine for the violation (Class A) based on the Hearing Officer’s determination that “the violation resulted in an actual health or environmental hazard in that the neighbor’s dog was sickened as well as posing an environmental risk to wildlife that may inhabit the area.” The CAC adopted the Hearing Officer’s decision in its entirety. The Appellant asserts that the CAC’s evaluation of the case is not proper and the case presented is not consistent with the magnitude of the fine.

### **The Hearing Officer’s Decision**

Under the section entitled “Determination of Issues,” the Hearing Officer found that Mr. James Peter Wulf made multiple applications of PCQ in violation of the label instructions. Although the Hearing Officer had previously made eight “findings of fact,” there is no discussion as to which findings of fact she relied upon to make her determination. The Hearing Officer also made a determination that the fine was properly categorized as a Class A fine because the violation resulted in an actual health or environmental hazard in that the neighbor’s dog was sickened as well as posing an environmental risk to wildlife that may inhabit the area. There was

no discussion of the findings of fact relied upon to support the determination. The Director must therefore look to the entire record to determine if the evidence supports the determinations.

### **Director's Analysis and Conclusion**

The PCQ label provides the following use instructions for ground squirrels: "Scatter by hand approximately 2 oz. of bait (a handful) evenly over 40 to 50 square feet near active burrows or runways. Retreat every other day for 3 to 4 applications. An uninterrupted supply of bait should be available for 6 to 8 days. Don't pile bait. The scattering of baits takes advantage of the squirrels' natural foraging habits, and limits domestic livestock and wildlife from picking it up."

The label also contains the following language under "Caution": "Treated baits should be placed in locations not accessible to nontarget wildlife and domestic animals, or in tamper-resistant bait boxes." Under "Environmental Hazards," the label states that the product is toxic to wildlife and fish and that treated bait exposed on soil surface is hazardous to birds and other wildlife.

Mr. Wulf testified that he scattered the bait by dribbling handfuls on the road while driving a "Honda." He also testified that he used bait boxes provided by the CAC and that he filled them to overflowing to entice the squirrels. He further testified that he applied the bait three times, as stated on the label, but not over three days. Testimony was not elicited as to the dates of application, only that the total application was reported as August 25, 2005, on Mr. Wulf's pesticide use report (PUR). Mr. Wulf provided photographs of a demonstration on concrete of what three successive applications over a measured area of 6'3" X 6'3" (40 square feet) and a measured area of 20'X2' (40 square feet) would look like. He argued that he applied the bait properly and that his photographs look like the area from which the investigator took photographs.

Ms. Melissa Cregan, Agricultural Standards Inspector, Madera County Department of Agriculture, investigated Mr. Nonini's complaint. She testified at hearing that she visited the scene and took photographs of the scattered bait on the dirt road and the bait boxes placed in the orchard on August 31, 2005. Ms. Cregan testified that in her opinion, the bait was not scattered over a 40 to 50 square foot area as required by the label but was left in piles of about a handful of bait every 10 to 12 feet along the road. She could see older bait also scattered in the road. Ms. Cregan testified that because of the close proximity of the residence to the orchard and the presence of children's items in the front yard of the residence that the label required the bait to be

placed in tamper-resistant boxes and not scattered on the ground. She also testified that the bait boxes should not be overflowing because the bait was then accessible to wildlife and children. It was Ms. Cregan's testimony that the method of application, including the overflowing bait boxes, created an environmental hazard to domestic animals, wildlife, and children. Ms. Cregan's photographs corroborate her testimony regarding the scattered bait and bait boxes, as well as Mr. Wulf's testimony that the bait boxes were overflowing.

Based on the evidence presented at hearing—copies of the PCQ label, Ms. Cregan's photographs, Ms. Cregan's testimony, and the testimony of Mr. Wulf that he applied the bait in handfuls from a Honda—the Director finds that substantial evidence exists in the record to support the Hearing Officer's determination that Mr. Wulf made multiple applications of the bait in violation of the label's instructions.

With regard to the fine level, Mr. Wulf testified that he did not know Mr. Nonini still had "that" dog and had no knowledge of a wildlife population. He also testified that if the dog ate the bait on his property, the dog was trespassing.

Ms. Cregan admitted that she was unable to establish that Mr. Wulf had made an application of PCQ prior to August 2, 2005, that would have been the likely cause of the illness of Mr. Nonini's dog. However, notwithstanding any lack of proof of actual harm to the dog, Ms. Cregan did provide credible evidence via her photographs and testimony that the application of August 31, 2005, was in violation of the label directions and constituted an actual environmental hazard. The Director finds that the Hearing Officer's determination that the violation created an actual environmental hazard is supported by sufficient evidence in the record and justifies the Class A fine level.

### **Disposition**

The commissioner's decision that Mr. James Peter Wulf violated FAC section 12973 is affirmed. The commissioner's levy of a \$1,000 fine for the violation is also confirmed. The commissioner shall notify the appellant how and when to pay the \$1,000 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**

James Peter Wulf  
Docket No. 128

**DEPARTMENT OF PESTICIDE REGULATION**

By:   
Mary-Ann Warmerdam  
Director

Dated: \_\_\_\_\_