

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
Agricultural Commissioner of  
the County of San Joaquin  
(County File No. 001-ACP-SJ-05/06)

Administrative Docket No. 129

**DECISION**

**Trinkle Ag. Flying Inc.**  
**2181 N. Tracy Blvd. #212**  
**Tracy, CA 95376**

Appellant/  
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**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and California Code of Regulations (CCR), title 3, section 6130, county agricultural commissioners 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 San Joaquin County Agricultural Commissioner found that the appellant twice violated CCR, title 3, section 6600(e), pertaining to its duty to exercise reasonable precautions to avoid contamination of the environment. The commissioner imposed a total penalty of \$2,000 for the two violations.

Trinkle Ag Flying 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

**Factual Background**

On February 17, 2005, the appellant applied a pesticide, Vanguard WG (U.S. Environmental Protection Agency registration number 100-828), at two separate sites. During each application, the pesticide drifted off-site and onto motorists on public roads. The first incident occurred at approximately 11:00 a.m., and involved Ms. Nancy Gray. The second incident occurred at approximately 2:00 p.m., and involved Senior Agricultural Biologist Robert Pelletier. These facts are not disputed.

**Appellant's Contentions**

Appellant argues on appeal that the drift did not "contaminate" the environment because Vanguard is "less toxic than table salt." Appellant also argues on appeal that, considering the toxicity of the pesticide ("practically non-toxic"), it exercised reasonable precautions because the timing of the application was imperative (thus it could not delay the application), and it uses drift retardant nozzles. Hence, "a trace amount of off target product should be allowed."

Appellant argues on appeal that the fine levied was excessive. Appellant argues that the Hearing Officer's reference to the use instructions on the label to support his finding that the violations created a reasonable possibility of harm was improper because the off-site area was not directly sprayed, only small amounts were found, and complainant Ms. Nancy Gray closed her car's vents and got no material on her.

### **Standard of Review**

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 in the record, contradicted or uncontradicted, to support 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 requires only enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. If the Director finds substantial evidence in the record to support the commissioner's decision, the Director affirms the commissioner's decision.

If a commissioner's decision presents a matter of an interpretation of a law or regulation, the Director decides that matter using her independent judgment.

### **Analysis**

The appellant must exercise reasonable precautions to avoid contamination of the environment when applying pesticides. (Cal. Code Regs., tit. 3, § 6600(e).)

- The evidence supports the conclusion that appellant "contaminated the environment" with Vanguard WG.

To contaminate means, "to soil, stain, corrupt, or infect by contact or association," it implies "intrusion of or contact with dirt or foulness from an outside source" (Webster's 11th Collegiate Dictionary [2003] p. 269). What makes a pesticide a "contaminant" within the meaning of CCR, title 3, section 6600(e) is not necessarily its level of toxicity, but more generally that it is where it does not belong and its presence is objectionable or "foul."

The Pesticide Episode Investigation Report (Hearing Exhibit A), Mr. Pelletier's testimony, and the laboratory results (Hearing Exhibits E and F) provide substantial evidence that the drift was considerable and where it did not belong--on cars using public roads. In one of the incidents, Mr. Pelletier watched the drift travel 65 to 75 feet off-site. He observed cars driving through the drift and the drift left a white residue on his own vehicle. A later test showed 54.8 milligrams (mg) of cyprodinil (the active ingredient in Vanguard) on a square foot of his windshield.<sup>1</sup> In the other incident Ms. Gray also observed the drift and the resulting residue on

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<sup>1</sup> The size of the sample area was established by testimony at the hearing.

her vehicle. A test of her windshield in Columbia, California (approximately 50-60 miles from the incident) showed 10.6 mg. of cyprodinil on her vehicle in a 25 by 20 centimeter area.

The Vanguard label and Ms. Gray's reactions, not to mention common sense, provide substantial evidence that its presence was objectionable. The label instructs users, "do not apply when conditions favor drift beyond the target area." (Hearing Exhibit L.) Ms. Gray's face became irritated, she turned beet red, and she suffered a headache (Hearing Exhibit A.) It is "foul" and objectionable to dust our citizens using public roads with pesticides, regardless of Mr. Trinkle's opinion of the health risks involved or the expense of avoiding drift.

Substantial evidence in the record supports the conclusion that the appellant contaminated the environment.

- The evidence supports the conclusion that the appellant failed to exercise reasonable precautions to avoid the contamination of the environment.

The only evidence Mr. Trinkle offered at the hearing of precautions appellant took to avoid the drift was a statement that he had used smoke.<sup>2</sup> Mr. Trinkle did not specifically testify as to what the smoke showed. Faced with the fact of drift, and being in the best position to know what precautions it used, it is incumbent on the appellant to offer evidence to support its claim that it took reasonable precautions. Rather than focusing on precautions taken, the appellant testified at the hearing that it was impossible to avoid the drift and argued that given the low toxicity of Vanguard, a trace amount of drift should be allowed.<sup>3</sup>

As an initial matter, there is substantial evidence in the record to support a finding that Vanguard is not benign and exposure to it is not inconsequential. The Vanguard label requires that workers not enter treated areas before 12 hours have elapsed, or have contact with anything that has been treated, without wearing protective clothing. In addition, the U.S. Environmental Protection Agency and DPR have required the maker of Vanguard to prominently display the word "caution" on its label. Finally, the label states that Vanguard is "harmful if absorbed through the skin" and advises users to "avoid contact with skin, eyes or clothing." Appellant offered as contrary evidence a hearsay statement it attributed to the manufacturer that the material was "less toxic than table salt," and statements from the Material Safety Data Sheet (MSDS) that Vanguard is "practically non-toxic." As discussed above, the label provides substantial evidence even if other evidence contradicts it. However, it should be noted that the MSDS is a document written by the manufacturer for first responders and not approved by any regulatory authority.

Mr. Pelletier testified that he did not observe any ground crew. A ground crew could have either directed traffic or warned the pilot of oncoming cars when he was spraying near the road. There is no evidence that Mr. Trinkle made any attempt to break off to avoid drifting onto the cars. Finally, while Mr. Trinkle testified that he had used smoke, he did not specifically testify as

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<sup>2</sup> Mr. Trinkle cannot raise for the first time on appeal the contention that appellant uses drift retardant nozzles. Evidence must be presented at the hearing to provide the opportunity for it to be considered, challenged or disputed.

<sup>3</sup> As discussed above, substantial and undisputed evidence supports the conclusion that the drift was considerable, not "trace" or "miniscule".

to what the smoke showed. He did, however, testify that he would not have applied a more toxic pesticide under the same conditions. Thus, substantial evidence supports the inference that the smoke showed that conditions favored drift.

There is substantial evidence in the record to support the conclusion that appellant did not exercise reasonable precautions to avoid contamination of the environment.

- The fine levied is appropriate.

When levying a fine pursuant to FAC section 12999.5, county agricultural commissioners must levy a fine between \$250 and \$1,000 for violations that posed a reasonable possibility of creating a health or environmental effect. (Cal. Code Regs., tit. 3, § 6130.) The commissioner need not determine the potential severity of that effect. The commissioner need not find that there was an actual effect, only that the violation created a reasonable possibility of one.

As discussed above, there is substantial evidence in the record to support a finding that the violation involved contamination of the environment by a substance that can have health effects. There is substantial evidence of an actual health effect in the case of Ms. Gray. Thus, there is substantial evidence to support the conclusion that both violations created a reasonable possibility of a health or environmental effect.

#### Conclusion

The record shows the Commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

#### Disposition

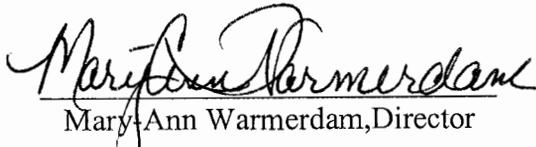
The commissioner's decision is affirmed. The commissioner shall notify the appellant how and when to pay the \$2,000 fine.

#### 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 DEPARTMENT OF PESTICIDE REGULATION

Dated:                     MAY 23 2006                    

By:   
Mary Ann Warmerdam, Director