

**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 Shasta
County File No. 014506003

Administrative Docket No. 142

DECISION

**Chuck Jones Flying Service, Inc.
P.O. Box 497
Biggs, California 95917**

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 Shasta CAC found that the appellant, Chuck Jones Flying Service (Jones), violated 3 CCR section 6614(b)(2). The CAC imposed a total penalty of \$2,000 for two violations.

Jones appealed from the CAC'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 the appeal on the record before the Hearing Officer. In reviewing the CAC'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 CAC'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 CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

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Factual Background

Appellant Jones was hired by the ranch manager (Robert Shadley) of River Butte and River Ranch to apply a mix of pesticides to two fields of grass hay. Mr. Shadley obtained a pest control applicator's (PCA's) recommendation from licensed PCA Clayton Jacobsen of McArthur Farm Supply that allowed a mixture of Malathion 8, Weedar 64 (2,4-D), Banvel, and Dyne-amic to be applied to the fields in one pass. Very soon after the application the adjoining alfalfa fields showed damage. The incident was reported to the Shasta CAC's office. The CAC investigators noted the damage and took foliage samples of the damaged alfalfa fields, which tested positive for the presence of Malathion and 2,4-D. The CAC determined that drift occurred from the application that resulted in actual damage to nontarget crops, in violation of 3 CCR section 6614(b)(2). The CAC determined that since two applications to two different fields resulted in damage to alfalfa fields adjacent to each application, that two violations of section 6614(b)(2) occurred. Because actual damage occurred, the fine was assessed at the Class A level.

The appellant contends that it applied a mix of pesticides recommended by a licensed PCA, that the recommendation was legal and within the label restrictions of each of the pesticides, that the application was made at the insistence of the ranch manager, and that the application was legal so that Jones did not violate the law.

Relevant Statutes and Regulations

3 CCR section 6614 (b)(2) states: "Notwithstanding that substantial drift would be prevented, no pesticide application shall be made or continued when: . . . (2) There is a reasonable possibility of damage to non-target crops, animals, or other public or private property"

3 CCR section 6130, Civil Penalty Actions by Commissioners states in relevant part: "(a) When taking civil penalty action pursuant to section 12999.5 of the Food and Agricultural Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount.

(1) For purposes of this section, violations shall be designated as 'Class A,' 'Class B,' and 'Class C.'

(A) Class A: Violations which created an actual health or environmental hazard, violations of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, or 11897 of the Food and Agricultural Code, or violations that are repeat Class B violations. The fine range for Class A violations is \$700-\$5,000.

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(B) Class B: Violations which posed a reasonable possibility of creating a health or environmental effect or violations that are repeat Class C violations. The fine range for Class B violations is \$250-\$1,000.

(C) Class C: Violations that are not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$400.”

The Hearing Officer’s Decision

The Hearing Officer found that Jones testified that it was ambivalent about applying the materials recommended for the job by the PCA, that some of these chemicals volatilize when mixed together and hang in the air, and that it was pressure from the grower that convinced Jones to go ahead with the application. The Hearing Officer determined that experienced PCAs, like Jones, could reasonably expect the pesticides ordered by Jacobson may cause damage to adjacent nontarget crops. The Hearing Officer also found that Jones was worried before the application began that off-target movement could occur and that damage to nontarget crops could result. Based on these findings and determinations, the Hearing Officer found that conditions did arise during the application that would lead an experienced license aerial applicator to expect the possibility of nontarget crop damage so that continuing the application under these conditions was a violation of 3 CCR 6614(b)(2).

As regard the fine level, since two separate PCA recommendations were issued--one for each field treated--the Hearing Officer determined that two separate violations occurred. Since actual damage occurred, he found the fine level to be appropriate at the Class A level.

The Director’s Analysis

The testimony of pest control operator Dale Jones and pilot Brad Criner established that appellant sought to apply the pesticides in two passes and preferred not to apply such a “hot” mix all together in one pass. Their testimony further established that appellant went forward with the application at the insistence of ranch manager Shadley. CAC Agricultural Standards Investigator Carl Yingst testified that he spoke with the PCA, Clayton Jacobson, who was also uneasy about applying all four pesticides together but wrote the recommendation anyway at the insistence of Shadley. The testimony of Yingst also established that the grower (River Ranch and River Butte) had experienced drift and damage to nontarget crops in the past using this same mix of pesticides. Mr. Yingst had interviewed two other experienced PCAs who told him they would not mix two herbicides with an oil based insecticide because the mix would form small drops that would move offsite. If Dyne-amic was added, as in this case, very fine drops could result that

would greatly increase the potential for drift. However, Mr. Yingst concluded his testimony by stating that his investigation showed that the mixture of pesticides was not contraindicated by the regulations or by the products' respective labels.

The testimony of Yingst and the laboratory results established that the mix of pesticides applied by Jones did drift onto nontarget adjacent alfalfa fields. The appellant stipulated that the drift caused the damage discovered in the adjacent alfalfa fields. Jones and Criner testified that, if they had known of the previous damage caused by this mix of pesticides, they would not have agreed to do the application as insisted upon by Shadley. It is uncontroverted that ranch manager Shadley had knowledge that this exact mix of pesticides had a likelihood of drift that would cause damage to adjacent alfalfa fields.¹ It is also uncontroverted that both the PCA and applicator had reservations about applying the mix but went forward at the insistence of Shadley. The weather evidence showed that the winds were light and were not a factor in causing the drift.

The regulation requires that no pesticide application shall be made or continued when there is a reasonable possibility of damage to nontarget crops. The regulation does not require that the CAC demonstrate the applicator have actual knowledge that damage will result to establish a violation of the regulation. As the CAC argued in this case, the use of such a mix of pesticides resulted in actual damage to nontarget crops, not just a reasonable possibility of such damage. The Hearing Officer's determination that an experienced pest control operator or applicator would have known that such a mix would result in a reasonable possibility of nontarget crop damage, and that a reasonable possibility of such damage did exist, is supported by substantial evidence. Even though Jones states it would not have applied the mix had they known of the past damage incident, the evidence shows that both Jones and the PCA had misgivings about using such a "hot" mix. In face of this reasonable possibility of damage, the applicator should not have made the application. The CAC's decision that a violation of 3 CCR section 6614(b)(2) occurred is supported by substantial evidence.

The Hearing Officer's determination that two violations occurred is reasonable. Two PCA recommendations were made for applications on two separate fields. Since actual damage to nontarget crops resulted, the assessment of a fine in the Class A level is appropriate. The fine levied by the commissioner of \$1,000, in the lower end of the range set by regulation for Class A violations, is well within the CAC's discretion.

¹ Mr. Yingst's investigation showed that some two years prior Shadley had applied the same mix of pesticides to grass hay fields that resulted in drift and damage to adjacent alfalfa fields. The event was not reported to the CAC and the parties settled the damage claims through their insurance companies.

Conclusion

The record shows the CAC's decision is supported by substantial evidence and there is no cause to reverse or modify the decision. The Director upholds the CAC's decision and fine in its entirety.

Disposition

The CAC's decision is affirmed. The CAC 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: January 24, 2007

By: 
Mary-Ann Warmerdam, Director