

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. 011-SCP-GLE-07/08)

Docket. No. 163

**DECISION**

A.D. Poldervaart  
Poldervaart Farms  
7313 Road 30  
Orland, California 95963

Appellant/

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), 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 Glenn County Agricultural Commissioner (Commissioner) found that Mr. Poldervaart, owner/operator of Poldervaart Farms, violated 3 CCR section 6140(a) and levied a penalty of \$1,000. The Hearing Officer had tendered a proposed decision that Mr. Poldervaart had not violated 3 CCR section 6140(a), but the Commissioner did not adopt the Hearing Officer's proposed decision.

Mr. Poldervaart 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 the appeal on the record before the Hearing Officer. The Hearing Officer is the finder of fact. The Director decides matters of law using her independent judgment. With respect to the findings of fact, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the findings. If the Commissioner rejects the Hearing Officer's findings of fact, the Director will uphold that decision if there was not substantial evidence to support the Hearing Officer's findings. The Director notes that witnesses sometimes present contradictory testimony and information on key facts; however, factual determinations based on witness credibility are the province of the Hearing Officer and deference is given to those determinations.<sup>1</sup>

The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though conclusions other than those made 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 finder of fact. If the Director finds substantial evidence

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<sup>1</sup> See DPR's Enforcement Letter 06-28.

in the record to support the findings, the Director makes an independent determination of the law as applied to those facts in making her decision.

### **Appellant's Contentions**

Mr. Poldervaart contends that he demanded that the Glenn County inspectors stay back from his nurse rig when he was loading the spray rig due to safety concerns. After moving his nurse rig forward to stage the next filling of the spray rig, Mr. Poldervaart contends that the inspectors had unrestricted access to his nurse rig to perform an inspection.

### **Factual Background**

On December 12, 2007, Mr. Poldervaart made an application of Velpar L, registration number 352-392 bearing the signal word "Danger" at site 14, an alfalfa field farmed by Mr. Poldervaart, located north of County Road 33 and west of County Road S. There is evidence in the record that upon arrival at the application site, Mr. Poldervaart ordered the Commissioner's inspectors, Mr. Greg Hinton, Inspector IV, and Ms. Jordana Ellis, Inspector I, to stay back from the nurse rig three times. There is testimony in the record that Mr. Poldervaart said, "You're not going to slow me down today," "I don't have time for this today," and "Stop, do not come any closer [to the nurse rig]." Mr. Poldervaart's actions and words made it clear to the inspectors that they were not to approach the nurse rig while Mr. Poldervaart was filling the spray rig.

After filling the spray rig and repositioning the nurse rig for the next filling of the spray rig, Mr. Hinton conducted his inspection, although he felt "rushed" and that it was not a "normal" inspection. Mr. Hinton also testified that it was not unusual for an application of the restricted material, Gramoxone, to be applied to alfalfa with Velpar L. Mr. Hinton testified that there were some "unmarked" boxes on the nurse rig; the inference made was that Mr. Poldervaart may have been making an application of Gramoxone. Nothing beyond Mr. Hinton's initial testimony was ever discussed again or entered into evidence by the county with regard to Gramoxone. There is conflicting testimony as to whether the appellant kept the inspectors from inspecting his nurse rig after he had loaded the spray rig with the pre-mixed Velpar L solution and had pulled the nurse rig to the next loading location.

There is evidence in the record that Mr. Hinton found a personal protective equipment violation during his inspection for the failure of Mr. Poldervaart's employee to wear coveralls during his application of pesticide with the signal word "Danger," as required by 3 CCR section 6702(b)(3); however, Mr. Poldervaart stipulated to this violation prior to the hearing. Mr. Hinton asked Mr. Poldervaart to sign the inspection form, which he did. There is conflicting testimony as to what was said between Mr. Poldervaart and Mr. Hinton with regard to the appellant's signature, but only the personal protective equipment violation was noted on the inspection form. Mr. Poldervaart testified that he asked Mr. Hinton if "he had everything he needed," when he signed the form. Mr. Hinton does not recall this statement by Mr. Poldervaart, but Mr. Hinton testified, "I can't deny that it's a possibility." Mr. Poldervaart also testified that he would have not signed the inspection report unless Mr. Hinton had fully completed his inspection. After signing the inspection form, Mr. Poldervaart told the inspectors to leave.

Mr. Poldervaart was mailed a Notice of Proposed Action informing him of the alleged “failure to allow an inspection” on March 26, 2008. The hearing occurred on July 29, 2008. The Hearing Officer issued her proposed decision that concluded that while Mr. Poldervaart testified that he denied the inspectors access to his nurse rig at the mix load site because he had concern for their safety, she held that the record did not reflect that the inspectors were specifically denied access to any other area or equipment after the nurse rig finished loading the spray rig and was moved down to prepare for the next spray rig loading. Additionally, the proposed decision held that the record did not reflect any other concerns by Mr. Hinton about the application method or any equipment related to the Velpar L application. Finally, the proposed decision held that Mr. Hinton was able to conduct his inspection, albeit not as thoroughly as he would have liked. The inference is that even though Mr. Poldervaart’s actions and words “flustered” him, Mr. Hinton was able to conduct his inspection. As Mr. Hinton testified, “I had an inspection to do and I did it.”

The Glenn County Agricultural Commissioner did not adopt the proposed decision in this matter. In his decision, the Commissioner wrote: “The [Glenn County Agricultural Commissioner] contends that there is not substantial evidence to support the [Hearing Officer] in determining that Section 6140(a) was not violated and the proposed penalty of \$1000 was not appropriate.” The Commissioner’s decision stated that he had reviewed the hearing record and based on the hearing record he overrode the Hearing Officer’s interpretation of the law. In his decision, the Commissioner held that the Hearing Officer incorrectly found that 3 CCR section 6140(a) had two elements which must be shown to have been denied in order to find a violation: (a) the commissioner may enter and inspect, and (b) in order to determine compliance. The Commissioner held in his decision that the second element, “in order to determine compliance,” had been denied when the commissioner’s inspectors were “denied the ability to enter and inspect all equipment, which is the basic and primary function of the code section in question.” The Commissioner’s decision concluded that the appellant did violate 3 CCR section 6140(a) and upheld the proposed penalty of \$1,000.

### **3 CCR Section 6140(a)**

3 CCR section 6140(a) provides:

The director or commissioner may, during business hours, or if necessary to ensure immediate compliance, at any other reasonable time enter and inspect, and/or sample any of the following or related items in order to determine compliance with the provisions of this chapter and Divisions 6 and 7 of the Food and Agricultural Code, which pertain to pesticides and pest control operations.

- (1) Fields, areas, structures, and greenhouses where pesticides are handled, stored or applied;
- (2) Growing crops and harvested commodities;
- (3) Equipment (including protective clothing and equipment) used to store, transport or handle pesticides;

- (4) Change areas and other facilities used by employees; and
- (5) Pesticides and tank mixtures thereof.

The language of this section sets forth the authority of the director or commissioner to enter and inspect to determine compliance with the Department's regulatory scheme, but does not set forth a violation.<sup>2</sup> However, even if this was a section that could be violated, the Commissioner's decision is not supported by substantial evidence.

**Can the Commissioner Reject the Hearing Officer's Finding of Fact?**

In this case, the Hearing Officer found that the county inspectors were not specifically denied access to any area or equipment, other than the nurse rig when it was filling the spray rig, and that they were allowed to inspect. There was discussion in the record about whether Mr. Poldervaart's forceful and aggressive attitude toward the inspectors made them feel intimidated or believed that the nurse rig was off limits to them. However, the inspector testified that "he had an inspection to do and he did it." There was also Mr. Poldervaart's description of events, including those comments made when he signed the inspection notice. It is a well settled principle that the judgment of the Hearing Officer as the person who was present to hear the testimony firsthand and assess the manner and demeanor of the witnesses, is given deference relative to the weight and credibility of conflicting evidence. Whether or not Mr. Poldervaart refused to allow an inspection rests completely on assessment of the testimony of the witnesses at hearing.

Although the Commissioner couched his decision as an interpretation of the law, he was, in fact, reinterpreting the testimony to arrive at a different factual conclusion. The Director finds that there was substantial evidence in the record to support the Hearing Officer's finding that Mr. Poldervaart did not refuse to allow the inspection.

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<sup>2</sup> 3 CCR section 6140(a) does not require any person to allow the director or commissioner to exercise their inspection authority. If a grower or operator of the property refuses to allow entry on the property to allow a legitimate inspection, the remedy is to enforce the inspection right through the courts, deny any permit conditioned on consent to such inspections, or take a licensing action. 3 CCR section 6140(a) is not a section that is cited by the CACs.

However, 3 CCR section 6140(b) does set forth a violation that can be cited if a person refuses to allow an inspection of their records including records concerning work hours, training, and medical monitoring of employees, pest control recommendations, and pesticide use and operations records; and pesticide transaction, sales, and delivery records. Absent a repeat violation, the violation would be a Class C violation with a fine range of \$50 to \$400.

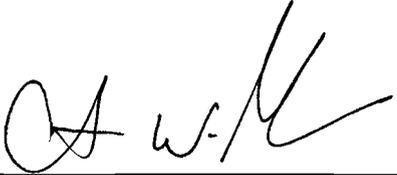
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**Conclusion**

For the foregoing reasons the Director reverses the Commissioner's decision.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**

Dated:           MAR 24 2009          

By:                       
Mary-Ann Warmerdam, Director