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 Solano
(County File No. ACP-SOL-09-22)

Administrative Docket. No. 172

DIRECTOR'S DECISION

George Green
Dixon Aviation
6711 Rio Dixon Highway
Dixon, California 95620
Appellant./

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations, (3 CCR) section 6130, 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 on September 22, 2009, the Solano CAC found that on March 24, 2009 the appellant, Mr. George Green, committed one violation of FAC section 12973, and levied a total fine of $2000. The appellant did not attend the hearing.

The appellant 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

On March 24, 2009, Appellant applied the pesticide *Cobalt* by airplane to a field north of Sievers Road in Dixon. Two bicyclists riding on Sievers Road, but not riding together, were sprayed with the pesticide. Both bicyclists identified the airplane and one was able to provide a tail number which identified the airplane as belonging to Appellant. Pesticide Use records confirmed that Appellant made the application of *Cobalt* on March 24, 2009, at the times the bicyclists reported being sprayed. The Solano CAC's office investigated the incident and took helmet swabs from each bicyclist. The samples tested positive for chlorpyrifos which is the active ingredient in *Cobalt*.

Relevant Laws and Regulations

FAC section 12973 states that the use of any pesticide shall not conflict with labeling registered with DPR or with any additional limitations applicable to the conditions of any permit issued by the CAC.

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 repeat of a 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 repeat of a 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-$400.

Appellant's Allegations

The Appellant argued that this action constitutes double jeopardy, but he did not appear at the hearing and did not present any evidence in support of this allegation.

The Hearing Officer's Decision

The Hearing Officer noted that even though the Appellant appeared at two different hearings in the morning, he stated that he could not attend the hearing for this case held in the afternoon. The Hearing Officer further noted that there was no evidence or testimony from Appellant or any rebuttal of the CAC's evidence, but that the CAC still must present and prove its case.

The Hearing Officer discussed the evidence presented by the county. The evidence included the sworn statements by the two bicyclists that stated that they had been sprayed by a plane, evidence establishing that Dixon Aviation made the application at the time the bicyclists were sprayed, and evidence that the sample swabs taken from the bicyclists' helmets tested positive for the active ingredient of *Cobalt*. The Hearing Officer discussed the requirement on the *Cobalt* label that the pesticide not be applied in a manner that would contact workers or other persons, and that the applicator was to "not allow spray to drift from the application site and contact people . . ." The laboratory results and label were admitted as evidence.

The Hearing Officer noted that FAC section 12973 states, in part, that the use of any pesticide shall not conflict with its labeling. The Hearing Officer concluded that the CAC had met the burden of proof and rendered decision in the CAC's favor. The Hearing Officer also discussed the fine level noting that the *Cobalt* label carries the signal word "Danger," is a restricted use pesticide, is a hazard to humans as stated on the label and the material safety data sheet, and that the bicyclists suffered symptoms consistent with those noted on the material safety data sheet and the label—an actual health hazard. The fine of $2,000 was upheld.

The Director's Analysis

FAC section 12999.5 requires the CAC to provide a person charged with a violation with a written notice of the proposed action, and provide the person a right to request a hearing. Appellant requested a hearing but did not attend the hearing. If the person upon whom the CAC levied a civil penalty requested, and *appeared* at a hearing, the person may appeal the CAC's decision to the director. Because the Appellant failed to appear at the hearing, the Appellant cannot now appeal the CAC's levy of the fine. The appeal is denied.

FAC section 12999.5 also requires the appeal to be in writing and state the grounds for the appeal. Appellant's grounds for this appeal are "[t]he commission has work in conjunction with another government agency and has already been part of handing down fines, lost of license, and expenses in the amount of over 9,800.00 and now ask 2000.00 additional for the commission which we feel is double jeopardy." This issue was not addressed at hearing. No evidence exists in support of this allegation.

The record supports the Hearing Officer's decision and the CAC's levy of a penalty at $2,000. The appeal is denied in its entirety.

Conclusion

The Commissioner's decision that the appellant violated FAC section 12973 is supported by substantial evidence and is upheld. The Commissioner's levy of a fine of $2000 for the violation is also supported by substantial evidence, and is upheld.

Disposition

The Commissioner's decision is affirmed. The Commissioner shall notify the appellant how and when to pay the $2000 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: APR - 5 2010

By: _____
Mary-Ann Warmerdam, Director