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 Yolo
(County File No. 011-ACP-YOL-08/09)

Administrative Docket. No. 169

DIRECTOR'S DECISION

Tom Jacobs
30690 The Horseshoe
Winters, California 95694
Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and Title 3, California Code of Regulations 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 June 23, 2009, the Yolo CAC found that on September 22, 2008, the appellant, Mr. Tom Jacobs, committed two violations of 3 CCR sections 6623 and 6776, and levied a total fine of $950.

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 September 22, 2008, Respondent hired a licensed applicator, Pacific Valley Aviation (PVA), to apply a restricted material, Ethephon2, to site A2 of his ranch. The restricted materials permit obtained by Respondent for 2008 included a site map for site A2 that was inaccurate and which included 10 acres of walnuts, the yard, and residence belonging to Ms. Jennifer Ott and Mr. Alexander Cameron. On September 22, 2008, PVA applied the pesticide to the Ott/Cameron walnut orchards without their permission following the inaccurate site map. In addition, the Ethephon2 label contained a requirement that the property to be treated must be posted with warning signs prior to the beginning of the application and that the signs were to remain in place for 72 hours. The property was not posted.

Relevant Regulations

3 CCR section 6623:

(a) Prior to the use of pesticide(s) for the production of an agricultural commodity, the operator of the property *shall obtain site identification number(s) from the commissioner* for each site where pest control will be performed. The site identification number(s) shall be valid for the same, concurrent, period of time as the operator identification number.

(b) The site identification number(s) shall be recorded by the commissioner on a restricted materials permit, if the operator of the property has such a permit, or on a form approved by the director. The information on the permit or form shall include:
   (1) The name and address of the operator of the property;
   (2) The operator identification number;
   (3) The location, description, or map of the site(s) where the pest control will be performed;
   (4) A site identification number for each site where the pest control will be performed; and
   (5) The date of issuance of the site identification number(s).

(c) *The operator of the property shall retain a copy of each restricted materials permit or form for two years* and make them promptly available to the director or commissioner upon request. (emphasis added).

3 CCR section 6776, in relevant part:

(a) The operator of the property shall assure that signs are posted around treated fields in the following circumstances:
    (1) Whenever required by pesticide product labeling, unless access to the treated field is controlled in a manner that assures no employee (other than the handlers making the application) will enter, work in, remain in, or walk within ¼ mile during the application and the restricted entry interval;. . .

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 alleges that the CAC created the inaccurate site map when it switched over from hand-drawn maps to using digitized aerial photos (GIS imagery) from Google Earth to attach to restricted materials permits. The Appellant wants the decision changed to include the fact that it was the Commissioner's staff that inaccurately drew the maps and not him. The Appellant asserts that he was not required to post the property since he had instructed his one employee to stay out of the treated sites for 72 hours. Appellant also alleges that he did post the field after the spraying.

The Hearing Officer's Decision

The Hearing Officer found that Respondent obtained a restricted materials permit for application of Ethephon2 on site A2 and that the site map submitted for site A2 included 10 acres belonging to Ott/Cameron. The Hearing Officer noted that this mistake had been carried on Respondent's restricted materials permits since 2003. The Hearing Officer discussed the evidence showing that the CAC sends letters to restricted materials permittees annually requesting that permittees review their permits, including the maps and report any changes or updates to the CAC. The Hearing Officer found that Respondent failed to correct the initial and subsequent inaccuracies in the A2 site map. Based on these findings, the Hearing Officer concluded that the Respondent improperly obtained the inaccurately described walnut site identification number in the restricted materials permit and was therefore in violation of

3 CCR section 6623. The Hearing Officer also found that the contamination to the Ott/Cameron property resulted in an actual health hazard because the residents would not have used the eye or skin protections required on the label while making normal use of their home. The fine for this Class A violation was proposed at the lowest end by the CAC and was found to be appropriate by the Hearing Officer.

In his discussion of the violation of 3 CCR section 6776, the Hearing Officer found that the Ethephon2 label specifies a worker restricted entry interval (REI) of 72 hours and requires that the property treated be posted with signs warning of the REI. The Hearing Officer found that when the CAC responded to Ott/Cameron's complaint that their orchard was being sprayed, no warning signs were seen and thus the property was not posted. The Hearing Officer found that Respondent thus violated 3 CCR section 6776, and because Respondent's employees would reasonably be expected to enter the orchard during the 72-hour REI without such posting or without otherwise adequately controlling access to the orchard, the employees had a reasonable possibility of exposure, making this a Class B fine. Again, the CAC's proposed fine was at the lowest end of Class B and found to be appropriate.

The Director's Analysis

The evidence at hearing established that the site map included with Respondent's restricted materials permit was inaccurate. At hearing, the CAC admitted that when it switched to using digitalized aerial maps from hand drawn maps, CAC staff drew the boundaries for site A2 inaccurately and included the Ott/Cameron property. The error carried on for many years without consequence because the PVA pilots knew where the physical boundaries were, as did Respondent, so that despite the inaccurate map, no applications of pesticides were made on the Ott/Cameron property. Only when a new PVA pilot unfamiliar with the ground boundaries followed the inaccurate site map was the error discovered. However, as admitted by Mr. Jacobs, he failed to find and correct the error despite being requested to review the restricted materials permit annually.

Although this error resulted in the spraying of the Ott/Cameron property, it is not a violation of 3 CCR section 6623. Section 6623(a) requires the operator of property to obtain a site identification number from the CAC. Section 6623(b) requires the CAC to record certain information on the permit, and section 6623(c) requires the operator to keep copies of the permit. This section is limited to the paperwork requirements of obtaining a site identification number. The section does not create a violation for the applying a pesticide to the wrong field because of an inaccurate site map. A violation for section 6623 can only be written if the operator fails to obtain a site identification number or fails to keep copies of the restricted materials permit.

In order for the CAC to fine Respondent for this erroneous application of a pesticide resulting from the negligent failure to correct the permit site map, the CAC should have charged Respondent with violating a pesticide use regulation. In the absence of a specific law or regulation addressing the responsibility of the Respondent for the accuracy of the map, this is a case where citing the use of the general requirement to perform pest control in a careful manner found in 3 CCR section 6600(b) would have been justified. Another section that could have been cited is 3 CCR section 6616 prohibiting the direct discharge of a pesticide on a property without the permission of the owner.

Mr. Tom Jacobs testified at hearing that he did not realize that he must post the field prior to the application. He further testified that once this fact was pointed out to him, he read the Ethephon2 label, and discovered the fact. Mr. Jacobs' written appeal states that he has one employee who was verbally warned to stay out of the field for 72 hours so that Mr. Jacobs was not required to post the site. However, Mr. Jacobs did not testify at hearing that he had one employee who was warned. As pointed out by the Hearing Officer, there was no testimony under oath at the hearing or evidence presented *at hearing* demonstrating that Respondent's employee(s)' access to the site was being controlled to assure he/they would not enter the site during the REI. Ms. Jennie King, Yolo County Agricultural Standards Inspector III, testified only that Mr. Jacobs had employees, and that his permit mentioned employees. Without testimony regarding controlling the employees, the Hearing Officer correctly determined that the Ethephon2 label and 3 CCR section 6776 required that the site be posted. This requirement would have included the requirement to post the Ott/Cameron property included in site A2. The testimony *at hearing* was uncontradicted that the treatment site was not posted. The Director finds that the Hearing Officer's conclusion that Respondent violated 3 CCR section 6776 was supported by substantial evidence.

The Ethephon2 label cautions that the material causes irreversible eye damage and skin burns and is harmful if swallowed or absorbed through the skin. The Hearing Officer reasoned that Respondents' employees could reasonably enter the orchard as part of their job duties and without the proper posting would not be protected and thus faced a reasonable possibility of health effects. The evidence supports this reasoning, and the fine at the lower end of Class B is well within the CAC's discretion.

Conclusion

The Commissioner's decision that the appellant violated 3 CCR section 6623 is overturned. The Commissioner's decision to levy a fine of $700 for a violation of 3 CCR section 6623 is overturned. The Commissioner's decision that the appellant violated 3 CCR section 6776 is supported by substantial evidence and is upheld. The Commissioner's levy of a fine of $250 for the violation of is supported by substantial evidence, and is upheld.

Disposition

The Commissioner's decision is overturned in part and affirmed in part. The Commissioner shall notify the appellant how and when to pay the $250 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: FEB 25 2010

By: _____
Mary-Ann Warmerdam, Director