

**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-10-05)

Administrative Docket. No. 178

**DIRECTOR'S
DECISION**

Ray Joe Madden
Madden Construction, Inc.
502 Regency Circle
Vacaville, California 95687

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 August 6, 2010, the Solano CAC found that on July 13, 14, and 15, 2009, the appellant, Ray Joe Madden, committed three violations of the pesticide laws and regulations. The CAC levied fines for one violation of FAC section 12973 (\$700), one violation of 3 CCR section 6614(a)(b) (\$625), and one violation of 3 CCR section 6702(a)(b) (\$350), for a total fine of \$1,675.

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

Madden Construction was hired to do remedial construction work recommended as a result of a structural pest control inspection of a private residence. Part of the repair work Madden was hired to do was to replace approximately 30 wooden pier posts under the residence. Madden employee Willie Carrillo applied Copper-Green Wood Preservative (EPA # 66591-1) to the posts after the posts were installed under the house. The work was done over three days in July 2009 (13, 14, and 15). Mr. Carrillo did not receive any pesticide handling training prior to the application. He wore his own long-sleeved shirt and long pants. He was provided two respirators, goggles, and green rubber gloves by Madden Construction and a white coverall. Mr. Carrillo did not wear the overalls provided, and wore the same respirator every day without changing filters.

The occupant of the house was present at the time of application, and although requested to leave the premises, refused to do so. The CAC received a consumer complaint on September 15, 2009 that expressed the occupant's concerns about health effects and odors from the application.

The label of Copper-Green Wood Preservative bears language that the product is for exterior use only. Wood to be protected against subterranean termites should be treated before use in construction. The product is to be applied to dry and seasoned wood prior to use in construction, and allowed to dry thoroughly prior to installation.

Relevant Laws and Regulations

FAC section 12973 reads: "The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

3 CCR section 6614 reads:

“(a) An applicator prior to and while applying a pesticide shall evaluate and equipment to be used, meteorological conditions, the property to be treated, and surrounding properties to determine the likelihood of harm or damage.

(b) Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when:

- (1) There is a reasonable possibility of contamination of the bodies or clothing of persons not involved in the application process;
- (2) There is a reasonable possibility of damages to nontarget crops, animals, or other public or private property; or
- (3) There is a reasonable possibility of contamination of nontarget public or private property, including the creation of a health hazard, preventing normal use of such property. In determining a health hazard, the amount and toxicity of the pesticide, the type and uses of the property and related factors shall be considered.”

3 CCR section 6702 reads:

“(a) The employer shall comply with each regulation in this subchapter which is applicable to the employer’s action or conduct.

(b) The employer:

- (1) Is responsible for knowing about applicable safe use requirements specified in regulations and on the pesticide product labeling;
- (2) Shall inform the employee, in a language the employee understands, of the specific pesticide being used, pesticide safety hazards, the personal protective equipment and other equipment to be used, work procedures to be followed, and pesticide safety regulations applicable to all activities they may perform;
- (3) Shall supervise employees to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements are complied with;
- (4) Has the duty to provide a safe work place for employees and require employees to follow safe work practices; and
- (5) Shall take all reasonable measures to assure that employees handle and use pesticides in accordance with the requirements of law, regulations, and pesticide product labeling requirements . . .”

3 CCR section 6724 requires that the employer train employees who handle pesticides and sets forth other specific requirements of that training. 3 CCR section 6739 sets out the requirements to be followed when a respirator is to be used, including training for the employee, fit testing, and proper procedures as well the choice of the proper respirator.

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 asserts that he did not apply Copper Green to newly installed posts under the residence, but applied the product to the existing posts and, therefore, the hearing officer's analysis is invalid. The appellant asserts that he did apply the product according to the label. The appellant further asserts that he was told by a DPR employee that he could use the product under the house, that a basement or crawlspace is considered the exterior of the house.

The appellant argues that he asked the occupant of the house to leave but she refused and that the hearing officer's finding that the application disrupted the normal use of the home was incorrect because a dirt/mold/mildew odor preexisted his application and the occupant was already ill.

The appellant asserts that the hearing officer should not have made findings that he failed to properly train his employee in the use of a pesticide. Appellant argued that he was not certified in the use of a store bought mask so could not train someone in the use of it.

The appellant emphasized at hearing that he did not know Copper Green was a pesticide and that the entire construction industry, including county building inspectors, believe that the basement and crawlspace are exterior areas and that Copper Green can be used in those areas.

The Hearing Officer's Decision

The hearing officer determined that Appellant violated FAC section 12973 by using the pesticide in conflict with the label. The hearing officer discussed evidence that showed that Copper Green was applied to pier posts installed under the house at the residence, and that the label says that the product is "For Exterior Use Only," and that wood should be treated before use in construction. The hearing officer also discussed the label stated under "Directions for Use" that the product is to be applied prior to construction and that the treated wood is not to be

installed until thoroughly dry. The hearing officer also found that DPR and the CAC have the authority to enforce pesticide laws and regulations and that the advice obtain by Appellant from other agencies “do not avail.”¹

The hearing officer found that the Appellant admitted that he knew that a strong unpleasant odor would result from the application and that the Appellant tried to get the resident to leave. The hearing officer noted that the pest control operator cannot absolve himself of label and regulatory violations by making the case that the property owner insisted he do the application. Based on these observations, the hearing officer found the Appellant had violated 3 CCR section 6614.

The hearing officer found that by Appellant’s failure to train his employee prior to the pesticide application, and failing to provide respirator training and fit testing, the Appellant violated 3 CCR sections 6724 and 6739 which constitute a violation of 3 CCR section 6702.

The Director’s Analysis

The hearing officer states that both the CAC and the Appellant supported their respective positions on violation 1 (violation of FAC section 12973) by direct testimony and documentary evidence. Appellant claims that his company applied Copper Green to previously existing wooden pier posts under the house, not to new construction. Appellant argues that the crawlspace is an exterior area so that Copper Green can be used in the crawlspace. The label clearly states that Copper Green is for exterior use only, is to be used prior to construction, and that the treated lumber is not to be installed until thoroughly dry. DPR guidance documents define a crawlspace as an interior area. Appellant admits he used the pesticide in the crawlspace on existing piers, which is direct evidence of the violation. The label is clear that the product can only be used in exterior areas, or prior to construction and allowed to dry. Appellant’s testimony, corroborated by the documentary evidence presented by the CAC, supports the hearing officer’s finding of a violation.

As to violation 2, the Notice of Proposed Action issued by the CAC proposes to fine Appellant for a violation of 3 CCR 6614 because of his “[f]ailure to adequately evaluate the possible consequences of the application resulted in the creation of a ‘foul odor’ in the living area

¹ During the hearing and in written documents, Appellant asserts that Dr. Louise Mehler of DPR told him he could apply Copper Green under the house. Dr. Mehler denies making these statements. The Hearing Officer determined that the conflict between what the CAC asserts Dr. Mehler told Appellant, if anything, and what Appellant claims Dr. Mehler said is nullified. It is assumed that the Hearing Officer felt the conflict made relying on Dr. Mehler’s statements impossible. It is noted that any contact with Dr. Mehler was five months after the application and could not possibly have impacted Appellant’s decisions when making the application. Dr. Mehler’s e-mail, whether or not received by Applicant, is clearly limited to suggesting remediation, and cannot be read as advice relied upon to justify the initial application.

of the residence which lasted for at least two (2) weeks.” At hearing, the CAC argued that the continued application resulted in the reasonable possibility of the creation of a health hazard, preventing the normal use of such property. The hearing officer found that “[r]esponsibility is placed upon pesticide users to obey label instructions, laws and regulations. This responsibility cannot be transferred to another person. For example, a pest control operator cannot absolve himself of label and regulatory violations by making the case that the property owner insisted that he do it.”

Contrary to what the hearing officer implies, violation 2 does not hinge entirely on the label violation but on whether the application was made when there was a reasonable possibility that normal use of the property would be prevented. There is a lack of substantial evidence to support this violation. The hearing officer states that the CAC supported its case by direct testimony and documentary evidence, but cites only to the CAC’s use of County Exhibit 1, Tab 4, which is the pesticide episode investigation (PEI) report. The name of the complainant and the statements made by the complainant have been redacted from the report. The e-mails and statements referred to in the report and presumably attached to the original, and submitted by the complainant in support of her complaint were also removed from the report and not presented as evidence at hearing. The only evidence available to the hearing officer to support this violation was the summaries found in the PEI written by Ms. Jessen, and Ms. Hardy’s readings from the report that the resident of the property complained two months later about certain health problems she attributes to the application. Ms. Jessen and Ms. Hardy are employees of the Solano CAC office. There is no evidence in the record that the property owner was forced to leave the property at the time. In fact she insisted on remaining in the residence.² Further, there is no evidence in the record that the symptoms complained of two months later by the resident were the result of the application. In fact the record shows that the symptoms complained of by the resident are not symptoms listed on the material safety data sheet as those that could result from exposure to this pesticide. The signs and symptoms listed on the front of the PEI were “chills, pneumonia, and collapsed lung.” The material safety data sheet lists effects of overexposure to Copper Green as irritation to skin and eyes, and if the exposure was inhalation the signs are dizziness and nausea. In light of this inconsistency the reported statements of the complainant do not support a finding of the creation of a health hazard that prevents the normal use of the premises.

The Director finds that the record does not contain substantial evidence that supports the hearing officer’s finding of a violation of 3 CCR section 6614.

Violation 3 alleges that the Appellant violated 3 CCR section 6702 by failing to follow all regulations in the subchapter Pesticide Worker Safety, and specifically the failing to follow

² Appellant’s testimony disputes the facts that would support this violation by stating that the normal use of the property was not disrupted, and that he purchased and installed fans to prevent any odor from entering the living space.

section 6724 to provide pesticide handling training, and section 6739 to provide respiratory protection to include training, fitting, and all necessary procedures. Appellant testified that he did not provide training to his employee and was not certified to provide respirator training. This direct evidence establishes the violation. The CAC's documentary evidence also supports this violation. Substantial evidence exists in the record to support the hearing officer's decision.

The hearing officer found that the violations were properly designated as Class B because failure to follow those sections poses a reasonable possibility of creating a health effect without any analysis. In general, the Pesticide Worker Safety regulations are designed to protect workers and it is reasonable to determine that the failure to follow those regulations could create a reasonable possibility of creating a health hazard. Likewise, the use of a product in conflict with its label reasonably could lead to a health hazard.

Conclusion

The Commissioner's decision that the appellant violated FAC 12973 and 3 CCR section 6702 (a)(b) is affirmed. The Commissioner's decision that the Appellant violated 3 CCR section 6614(a)(b) is overturned. The Commissioner's decision that the two violations are properly Class B violations is well within his discretion as is the fine levels assessed. The fines of \$700 and \$350 are upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The commissioner shall notify the appellant how and when to pay the \$1,050 fine.

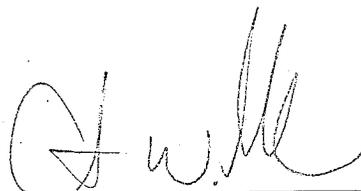
Judicial Review

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: March 4, 2011

By: _____



Mary-Ann Warmerdam, Director