

**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 Sutter  
(County File No. ACP-SUT-10/11-002)

Administrative Docket. No. 182

**DIRECTOR'S  
DECISION**

**Sukhcharan Singh**  
**8571 S. George Washington Boulevard**  
**Yuba City, California 95993**

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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 November 5, 2010, and after rejecting the Hearing Officer's proposed decision, the Sutter CAC found that on March 27, 2010, the appellant, Sukhcharan Singh, committed one violation of pesticide laws and regulations. The CAC levied a \$250 fine for one violation of 3 CCR section 6614(b)(3), a Class B violation.

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 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 27, 2010, an application of Glystar Plus and Shark EW was made by ground application on a Walnut Orchard (site 2-2) operated by Appellant Singh. The owner of the property adjacent to and immediately to the north of site 2-2 contacted the Sutter CAC's office and complained that his peach orchard (site 2-12) suffered extreme damage as a result of the spraying. The record contains testimony from the county indicating that it was believed the adjacent landowner complained about extreme damage to his field by phone call on March 27, 2010. However, the phone call was not entered into the log as was the usual practice. The county believed it responded the same day but could not testify clearly as to the date(s) of its initial visit(s) to the property. Photographs of the field were taken on March 31, 2010, and a written complaint was filed on April 6, 2010<sup>1</sup>.

### **Relevant Laws and Regulations**

Title 3 CCR section 6614 reads:

“(a) An applicator prior to and while applying a pesticide shall evaluate the 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.”

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130.

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<sup>1</sup> Much of the testimony in the hearing discussed whether damage would be seen within three days of the application. Testimony did not clearly establish the dates of investigation. The county advocate did testify that he had a hard time believing extreme damage to the orchard was present so quickly, especially considering the complete recovery of the orchard.

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 stipulated that the application of the two pesticides was made on site 2-2 on March 27, 2010, and that he was the operator of that site. However, he asserted at hearing that glyphosate damage was not proven to have occurred. Specifically, the appellant challenged the sampling methods used by the CAC as not following proper statistical sampling. The appellant asserted that the damage to the leaves of the peach trees was caused by asphyxiation of the trees due to the excessive moisture in the ground during a very wet spring. The appellant also asserted that wind conditions of between two-three miles per hour with gusts up to nine miles per hour, and the concentration of glyphosate applied would not result in glyphosate drifting to the peach orchard. Lastly, the appellant argued that a residue of glyphosate of .33 parts per million is too low to cause damage and that such a low level might be present because of the very heavy glyphosate usage in the area.

### **The Hearing Officer’s Decision**

The Hearing Officer found that Glystar Plus drifted on the peach trees according to the positive sample analyzed by the California Department of Food and Agriculture’s Center for Analytical Chemistry. However, the Hearing Officer concluded that even with these findings, no violation of 3 CCR section 6614 was proven by the county. The Hearing Officer found that there was no evidence or testimony to indicate that the applicator made the application without proper evaluation of equipment and weather conditions prior to the application, and no evidence or testimony to indicate that there was any reason to discontinue the application due to possible contamination or damages. To support this conclusion, the Hearing Officer pointed to the wind evidence introduced at trial that demonstrated the wind speed was one-three miles per hour from the east/southeast, with gusts recorded up to nine miles per hour; and testimony that asserted such a wind speed is considered safe for this type of pesticide application. The Hearing Officer also based his decision on testimonial and photographic evidence that established the presence of a 40-foot buffer between the two sites.

### **The CAC’s Decision**

The CAC rejected the Hearing Officer’s proposed decision and determined that the

Hearing Officer made an error in interpreting the law and findings of fact. In his Notice of Decision, Order, and Right to Appeal, the CAC did not state what the error was. The CAC also did not address the Hearing Officer's findings that no evidence was introduced to support a violation of 3 CCR section 6614. The CAC instead disagreed with factual matters found in the discussion section of the proposed decision. The CAC disagreed with assumptions that visual glyphosate evidence would not be evident three days after application, and found that the photographs do show that the young leaf growth in the peach grove was affected by either the Shark pesticide, glyphosate, or a combination. The CAC also found that asphyxiation was not evident from the photographs because there was no standing water and no deep ruts typical of saturated clay/clay-loam soils characteristic of Sutter County orchard ground. The CAC also objected to the Hearing Officer's declaration that the appellant gave credible expert testimony, and the CAC found that post-physiology was not relevant to the hearing. The CAC found that the appellant had violated 3 CCR section 6614 and levied a fine of \$250.00.

In response to the Director's Notice of Appeal and request for the record and further argument, the CAC stated that he objected to the Hearing Officer making a determination that the Appellant did consider weather and equipment prior to and during the application. The CAC argued that the Appellant did not testify or offer evidence that he made the proper evaluations, and that the County advocate testified that the peach trees were at a critical growth stage and that the wind was blowing from the application site towards the peach trees at 3-9 miles per hour. The CAC stated that there is evidence in the record that the Appellant did not evaluate the application as required. The CAC opined that given the predominant wind flow direction and speed, the proximity of the peach orchard there was a reasonable possibility that the peaches could be contaminated by the application.

### **The Director's Analysis**

It is uncontroverted that an application of Glystar Plus and Shark EW was made on March 27, 2010, on site 2-2, adjacent to and immediately south of site 2-12. The winds averaged one-three miles per hour that day, with gusts up to nine miles per hour from the south/southeast. There was a 40-foot buffer between the two sites. This is the only evidence presented at hearing regarding the application, the evaluation of conditions required by 3 CCR section 6614, and the prohibition found in the regulation that an application is not to be made or continued when there is a reasonable possibility of contamination of nontarget public or private property.

The Notice of Proposed Action (NOPA) issued by the CAC charged a violation of 3 CCR section 6614(b)(3) alleging pesticide drift from the application site onto the adjacent roadway.<sup>2</sup> The CAC stated that the purpose of the hearing was to determine if drift had occurred from the application. If the NOPA had charged the appellant with a violation of FAC section 12973 for failing to follow label language requiring the applicator to apply the product in

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<sup>2</sup> The NOPA did not charge the appellant with allowing the application to drift on the adjacent orchard.

such a manner as to prevent drift, the CAC's statement of the issue in the case may have been complete. However, the violation charged was making or continuing an application when there was a reasonable possibility of drift, in violation of section 6614. The label was never considered at hearing or introduced into evidence. In this instance, the Hearing Officer more fully identified the issues in the case--did the application drift, and additionally, was the drift the result of the appellant violating 3 CCR section 6614?

Much of the hearing testimony addressed the extent of the damage that occurred to the leaves of the trees in the peach orchard, the cause of the damage, and the recovery of the orchard. These contested factual matters are beside the point. It is uncontroverted that the single composite leaf sample taken of the trees along the south edge of site 2-12 tested positive for glyphosate. The appellant suggests that this level of glyphosate is always present because of its heavy use in the area, and also argued that the damage could be the result of asphyxiation. The county presented contradictory evidence that the positive sample was due to this application.<sup>3</sup> Rather than weighing whether the evidence supported the Hearing Officer's findings, the CAC used his own knowledge to reach his conclusion that asphyxiation was not evident, and that the damage was caused by drift of glyphosate from the application.<sup>4</sup> The CAC relied, in part, on the Glystar Plus label that indicates damage can be evident in three days time. The label was never introduced at hearing and cannot be used to support a decision. In addition to the label that was not introduced, the CAC used his own knowledge of the soils and his review of the photographs to rebut Mr. Singh's testimony that the damage was caused by asphyxiation. No evidence was entered at hearing about the soils, or whether or not standing water existed at the site; and these issues relied upon by the CAC, if raised at the hearing, may have led to additional testimony from first-hand observers or other knowledgeable individuals. The facts are determined by the evidence presented at the hearing which allows rebuttal testimony or evidence to be presented. Factual determinations cannot be determined unilaterally by the CAC based on information outside the hearing record.

With respect to the elements of the 3 CCR section 6614 violation, the CAC asserts that evidence in the record shows that the appellant did not evaluate the site, but points to no specific evidence for this conclusion. The appellant did testify that the wind speed was low and that it was thus safe to apply, indicating that he evaluated conditions. The county advocate testified as to wind speed, the growth stage of the leaves, and a 40-foot buffer zone between the sites. There was no testimony that the appellant was unaware of these facts prior to the application, nor was

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<sup>3</sup> The county testified that it sampled trees along the south end of site 2-12 near the site where the application was done, taking particular care to sample trees that looked damaged. The county presented some contradictory testimony that it took a sample that included one pound, and then later testified that it took several pounds of leaves, but consistently maintained that the leaves were submitted as one sample. No control sample was taken. The Hearing Officer did not address the appellant's concerns about the sampling method. The Director does not deem it necessary to address this issue.

<sup>4</sup> The Hearing Officer's role is to be a neutral, unbiased finder of fact. It is inappropriate for the CAC, or the Director for that matter, to substitute his own knowledge or rely on evidence not in the record to make different factual findings. The standard of review is to accept the findings if supported by substantial evidence.

there any evidence in the record that the 3-to-9-mile wind speed and the 40-foot buffer zone presented a reasonable possibility of drift. In fact, the only testimony in the record supports the conclusion that no drift should have occurred under the conditions of the application. The Hearing Officer correctly pointed out that the county must prove the elements of the violation, that the county failed to provide evidence of a failure to properly evaluate the site, and failed to provide evidence that the application should not have gone forward because the wind presented the reasonable possibility of harm to nontarget sites. The lack of evidence in the record showing a violation, coupled with uncontroverted wind speed evidence and evidence of a buffer between the properties, supports the Hearing Officer's proposed decision. There is not significant evidence in the record to support the CAC's determination.

Although the Hearing Officer did not formally follow the guidelines to declare a witness an "expert," it is within the Hearing Officer's province to declare a witness credible. The Hearing Officer found Mr. Singh's testimony credible. The CAC rejected this finding and substituted his own finding that asphyxiation did not occur.<sup>5</sup> The most significant aspect of the hearing is that there is no other evidence addressing a violation of 3 CCR section 6614. The existence of residue on nontarget property is just one fact to consider in determining if a violation occurred. According to the evidence presented, the application was conducted under appropriate conditions. There is no evidence suggesting otherwise. There is no evidence to show that the application on March 27, 2010, held a reasonable possibility of contamination of nontarget public or private property.

The evidence supports the Hearing Officer's conclusion and that conclusion should not have been overturned by the CAC. The Hearing Officer's finding that no violation occurred is upheld and the fine is dismissed.

### **Conclusion**

The Commissioner's decision that the appellant violated 3 CCR section 6614(a)(b) is overturned.

### **Disposition**

The Commissioner's decision and levy of fine are overruled.

### **Judicial Review**

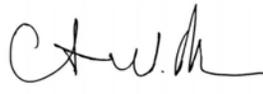
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<sup>5</sup> The CAC asserted that post-physiology was not relevant to this hearing. Post-physiology can be relevant to establish the presence of a drifted pesticide, but does not establish in this case whether a violation of 3 CCR section 6614(b)(3) occurred.

The Commissioner does not have the right of judicial review under these statutes.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**

Dated: 5/12/11

By:   
Chris Reardon, Chief Deputy Director