

**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 Imperial
(County File No. 03-11/12)

Docket. No. 187

DECISION

**D.S. Dusters
1684 Anderholt Road
Holtville, California 92250**

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), 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, the Imperial CAC found that the appellant, D.S. Dusters, violated 3 CCR section 6614(b)(3). The commissioner imposed a total penalty of \$700 for the violation.

D.S. Dusters appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation¹. 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. 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.

1. Lewis Baker, the Appellant's pilot, was also issued a notice of proposed action by the Imperial CAC arising from the same facts that underlie this appeal. The Imperial CAC's file number for the Baker matter was 04-11/12. Although the Appellant references case number 04-11/12 in this appeal, the case was resolved without a hearing and is not relevant to this appeal.

Appellant's Assertions

The Appellant asserts that the amount of pesticide residue found could not be harmful to any person or animals. Appellant asserts that his pilot did not do anything that would violate the law for which he was cited. Appellant asserts that the application conditions were perfect and that, as the supervisor of the application at issue, he could not have done anything differently. Appellant contends that they followed the law and took into consideration all precautions with the application.

Factual Background

On November 6, 2010, D.S. Dusters made an aerial application of two pesticides to a sugar beet field located at the Dahlia canal, gate 71A. The tank mix consisted of Asana LX, registration number 352-515-AA, active ingredient esfenvalerate, and Warhawk, registration number 34704-857-AA, active ingredient chlorpyrifos. Both labels bear the signal word "Warning," and both are restricted use pesticides. The application ended at 6:45 a.m. A local resident contacted the Imperial CAC's office to make a complaint about the very strong pesticide odor inside her house. The complainant alleged that she and her husband had symptoms of headache, nausea, dizziness, and tingling of the tongue beginning at approximately 7:00 a.m. The Imperial CAC's office conducted an investigation. The inspector interviewed the complainant and took samples of the resident's glass table located in the back yard of the house². The sample from the glass table came back positive for both of the active ingredients of the tank mix; 1.79 ppm of esfenvalerate, and 3.34 ppm of chlorpyrifos. The only documented application of pesticides with the active ingredients was made by the Appellant on November 6, 2010. After conducting a hearing, the Imperial CAC issued a decision finding that the Appellant had violated 3 CCR section 6614(b)(3) and fined the Appellant \$700, the lowest fine level for a Class A violation³.

3 CCR section 6614(b)(3)

3 CCR section 6614(b)(3) provides in relevant part: "Protection of Persons, Animals, and Property. (b) Notwithstanding that substantial drift would be prevented, no pesticide application shall be made or continued when: . . . (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."

2. Four days later, a second resident made a similar complaint in connection with the November 6, 2010, application. The resident complained of smelling a strong pesticide odor, feeling itchy, and having a burning throat and eyes. There is no explanation for why the resident waited four days before making the complaint.

3. A Class A violation is a violation that caused a health, property, or environmental hazard.

Analysis

3 CCR section 6614(b)(3) states in part, "Notwithstanding that substantial drift would be prevented, . . . no pesticide application shall be made or continued when there is a reasonable possibility of contamination of nontarget private . . . property." In this case, the regulation means that despite the fact that substantial drift would have been prevented, pesticides cannot be applied if there is a reasonable possibility of contaminating nontarget private property.

In this case, within 15 minutes of the completion of the application, the local resident whose residence was just over ¼ mile from the application site complained of symptoms consistent with exposure to the two pesticides. The Asana LX label in the record states, "Do not get in eyes, on skin, or on clothing. Avoid breathing vapor or mist." The Warhawk label states, "Mixers and loaders using a mechanical transfer loading system and applicators using aerial application equipment [and all other mixers, loaders, applicators, and handlers] must wear: . . . A NIOSH-approved dust mist filtering respirator with MSHA/NIOSH approval number prefix TC-21C or NIOSH-approved respirator with any R, P or HE filter." Thus, it is clear from the label that dermal and inhalation exposure to people of these pesticides should be avoided.

The Appellant argued during the hearing that the material applied was made with all due care. The Appellant stated that there was no wind during the application and that the material was applied by air on a north/south manner to minimize any drift to the property to the east. The Appellant stated that the spray nozzles used were of such a size as to minimize drift and the application pressure used during the application was around 35 pounds to minimize drift. The Appellant alleged that the positive sample taken over ¼ mile away from the application site was "an act of God," and not caused by anything done by the Appellant or his pilot during the application. The Appellant claims that the application was performed in such a manner that it would be impossible to drift over ¼ mile away from the site.

There was also discussion that the one of the two samples taken came back "None Detected" was from the glass table; however, testimony by the CAC's staff who took the sample explained the discrepancy. The Appellant testified that the label does not require the mixer/loader to use a respirator, as the odor was "non-toxic." The Appellant was incorrect in that the Warhawk label calls for a NIOSH-approved dust mist filtering respirator for all mixers, loaders, handlers, and applicators. See above.

The Appellant's pilot testified that he never flew over the residences to the east. In the Inspection Report the pilot told the inspector that he never flew over the residences. However, the local resident who called in the complaint told the inspector that the airplane flew very low near her home at approximately 6:00 a.m. The assertion by the resident is corroborated by the sample from the glass table that came back positive for both of the active ingredients in the two pesticides applied to the nearby sugar beet field

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by the Appellant. The Appellant's application was the only application of these pesticides near the complainant's property.

Violations of pesticide regulatory statutes are considered "public welfare offenses' requir[ing] neither guilty knowledge nor intent." (*Aantex Pest Control Co. v. Structural Pest Control Bd.* (1980) 108 Cal.App.3d 696, 702.) Therefore, based on the resident's statements made to the Imperial CAC's inspector, the sampling results, and the fact that the Appellant made the only application that could have caused the contamination of the complainant's property and the resulting health effects suffered, it can reasonably be concluded that the Appellant made or continued to make a pesticide application that contaminated the nontarget private property and caused a health hazard.

Conclusion

The record shows the commissioner's decision is supported by substantial evidence and there is no cause to reverse or modify the decision.

Disposition

The commissioner's decision is affirmed. The Appellant has paid its \$700.00 fine to the Commissioner prior to this appeal.

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: JUN 25 2012

By: Brian R Leahy
Brian R. Leahy, Director