

**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 Kern
(County File No. 009-ACP-KER-12/13)

Administrative Docket. No. 188

**DIRECTOR'S
DECISION**

Alpha & Omega Gardening, Inc.
104 Coremark Court
Bakersfield, California 93307

Appellant/

Procedural Background

Under Food and Agricultural Code section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow the fine guidelines established in Title 3, California Code of Regulations (3 CCR) section 6130, and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

After giving notice of the proposed action and providing a hearing on October 17, 2012, the Kern County Agricultural Commissioner found that on June 22, 2012, the Appellant, Alpha & Omega Gardening, Inc., committed three violations of pesticide laws and regulations. The Commissioner levied fines for one violation of 3 CCR section 6702(b)(3) (\$350), one violation of 3 CCR section 6676 (\$250), and one violation of 3 CCR section 6678 (\$250), for a total fine of \$850. The Commissioner classified each of the three violations as Class B.

Appellant appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). Appellant seeks to have the fines reduced by changing the classification of the violations from Class B to Class C. The Director has jurisdiction to review the appeal under Food and Agricultural Code section 12999.5.

Standard of Review

The Director decides matters of law using his 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 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 June 22, 2012, county agricultural biologist Ms. Jackie Bressler observed Appellant's employee, Mr. Mario Galvan, using a backpack sprayer and hand-held wand to apply a use-dilution of Roundup Pro Max in the median strip of Merle Haggard Drive in Oildale, Kern County. She documented her observations in pesticide use monitoring inspection report number 104-801363.

According to Ms. Bressler's report, during the application, Mr. Galvan did not wear unlined chemical-resistant gloves and instead wore lined chemical-resistant gloves. Mr. Galvan was not wearing eye protection. In addition, protective eyewear and unlined chemical-resistant gloves were not available to Mr. Galvan at his work site.

The container used by Mr. Galvan to carry and transport Roundup Pro Max in its undiluted form was not labeled. The backpack sprayer containing the use-dilution of Roundup Pro Max used by Mr. Galvan to apply the product also did not have a label or any other indication that it contained Roundup Pro Max.

On September 14, 2012, Kern County Agricultural Commissioner, Mr. Ruben J. Arroyo, issued a Notice of Proposed Action (NOPA), charging Appellant with one violation of 3 CCR section 6702(b)(3), one violation of 3 CCR section 6676, and one violation of 3 CCR section 6678, based on Ms. Bressler's report.

Mr. Daniel Cismowski, a hearing officer designated by the Kern County Agricultural Commissioner, held a hearing on October 17, 2012, at 1001 South Mount Vernon Avenue, Bakersfield, California. During the hearing, Mr. Gerald Koop, owner of Alpha & Omega Gardening, Inc., the Appellant, stipulated to the violations as described in Ms. Bressler's report and charged in the NOPA.

Relevant Laws and Regulations

A pest control employer "shall supervise employees to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements are complied with." (Cal. Code Regs., tit. 3, § 6702, subd. (b)(3).)

Pest control employers must assure that employees wear chemical-resistant gloves when employees are applying pesticides with hand-held equipment. (Cal. Code Regs., tit. 3, § 6738, subd. (c).) Glove liners "shall not be worn unless expressly permitted by the pesticide product labeling." (Cal. Code Regs., tit. 3, § 6738, subd. (c)(2).)

Pest control employers must also assure that employees wear protective eyewear when employees are applying pesticides with hand-held equipment. (Cal. Code Regs., tit. 3, § 6738, subd. (b).)

All containers, except service containers, used to carry, transport, or store pesticides must have the pesticide label on them. (Cal. Code Regs., tit. 3, § 6676.)

A "service container" is "any container, other than the original labeled container of a registered pesticide provided by the registrant, that is utilized to hold, store, or transport the pesticide or the use-dilution of the pesticide." (Food & Agr. Code, § 12757.5.) A service container must have the name and address of its owner, something on the container identifying its contents, and must also have the word, "Danger," "Warning," or "Caution," conforming to the word used on the original pesticide label. (Cal. Code Regs., tit. 3, § 6678.)

When levying fines, the Commissioner must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. Those categories are defined as follows:

A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A.

A Class C violation is a violation of a law or regulation that does not mitigate the risk of an adverse health, property, or environmental effect, including, but not limited to, Title 3, California Code of Regulations, sections 6624 through 6628, and Food and Agricultural Code sections 11732, 11733, and 11761.

(Cal. Code Regs., tit. 3, § 6130.) The fine range for a Class B violation is \$250 to \$1,000, while a Class C violation ranges from \$50 to \$400. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

The Hearing Officer's Decision

The hearing officer determined that on June 22, 2012, Mr. Galvan, Appellant's employee, was noncompliant with 3 CCR section 6738(b) and (c), in that he failed to wear unlined chemical-resistant gloves and eye protection while using a backpack sprayer and hand-held wand to apply a use-dilution of Roundup Pro Max in the median strip of Merle Haggard Drive, in Oildale, Kern County. Appellant failed to "supervise [Mr. Galvan] to assure that safe work practices, including all applicable regulations and pesticide product labeling requirements [were] complied with," in violation of 3 CCR section 6702(b)(3), in relation to this incident. The hearing officer fined Appellant \$350 for this Class B violation.

The hearing officer also determined that Mr. Galvan had a container of Roundup Pro Max that was not labeled in violation of 3 CCR section 6676 and that this it was a Class B violation. Therefore, he fined Appellant \$250. The hearing officer further determined that the backpack sprayer worn by Mr. Galvan during the application of the use-diluted Roundup Pro Max was a service container that did not have a label or anything else on it indicating its contents in violation of 3 CCR section 6678. This, too, he determined was a Class B violation warranting a \$250 fine.

The Kern County Agricultural Commissioner adopted the hearing officer's proposed decision in its entirety.

The Director's Analysis

There are no disputed issues of fact. Appellant stipulated to the following:

1. On June 22, 2012, his employee sprayed a use-dilution of Roundup Pro Max, from a backpack sprayer that did not have anything on the container indicating its contents.
2. During this application, his employee did not wear unlined chemical resistant gloves and did not wear eye protection.
3. Unlined chemical resistant gloves and eye protection were not available to the employee at the work site.
4. On June 22, 2012, Appellant's employee carried and transported between job sites a container holding undiluted Roundup Pro Max that did not have a label.

When a Commissioner finds that a person violated a pesticide law or regulation, he or she must classify the violation as Class A, Class B, or Class C. A violation of a law or regulation that is designed to protect people, property, or the environment will be classified as Class A or Class B. (Cal. Code Regs., tit. 3, § 6130.) Class A violations require an aggravating factor in addition to the violation of a regulation designed to protect people, property, or the environment. (Ibid.) A Class C violation is a violation that does not put people, property, or the environment at risk. For example, a violation by a pest control operator failing to keep pesticide use reports for two years may be classified as a Class C violation. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(3).)

Appellant seeks a reduction in the fine classification alleging that the fines should have been classified as Class C. To succeed, Appellant must establish that the stipulated violations were not designed to protect people, property, or the environment. (Cal. Code Regs., tit. 3, § 6130.)

1. 3 CCR section 6702(b)(3) is a regulation designed to protect people, property, or the environment from harm.

An employer must supervise his employees to assure that they follow worker health and safety rules established by California law. (Cal. Code Regs., tit. 3, § 6702, subd. (b)(3).) Safety requires that employees wear the correct gloves and protective eye wear and that the correct personal protective equipment is available to the employee at the work site. (Cal. Code Regs., tit. 3, § 6738, subd. (b), (c).) In a Pesticide Monitoring Inspection Report, dated June 22, 2012, County employee, Ms. Jackie Bressler, wrote the following: "Applicator does not have any safety glasses available. The gloves are lined with cotton and unlined gloves are not available." Appellant failed to supervise to assure that his employee had available at the work site and wore the appropriate personal protective equipment. (Cal. Code Regs., tit. 3, § 6702, subd. (b)(3).) During the hearing on October 17, 2012, Appellant stipulated to this violation. Thus, the only issue here is whether this regulation was designed to protect people, property, or the environment. If it was, Appellant's violation must be at least a Class B violation.

The regulation itself explains that it is a regulation designed to mitigate adverse health and environmental effects, as the employer is required to assure that employees follow "safe work practices." (Cal. Code Regs., tit. 3, § 6702, subd. (b)(3).) From a common sense standpoint, placing the responsibility on employers to make sure that their employees are safe, is on its face a regulation designed to protect workers from harm. Additionally, 3 CCR section 6702 was enacted under the authority of Food and Agricultural Code section 12980,

which explains the Legislature's intent that regulations adopted under its authority have the purpose of ensuring safe working conditions for pest control applicators. (Food & Agr. Code, § 12980.)

Appellant failed to provide any facts or argument establishing that 3 CCR section 6702(b)(3), was not a regulation designed to protect people, property, or the environment from harm.

Accordingly, the Director finds that the Commissioner properly determined that Appellant's violation of 3 CCR section 6702(b)(3), was a Class B violation. The \$350 fine is appropriate and within the violation range for Class B, \$250 to \$1,000.

2. 3 CCR section 6676 is a regulation designed to protect people, property, or the environment from harm.

Appellant admitted that his employee, Mr. Galvan, carried and transported Roundup Pro Max in a container that did not have a label, as required by 3 CCR section 6676. Appellant's arguments that there was minimal risk of exposure because his employees carry a maximum of eight ounces of Roundup Pro Max at a time and that Roundup Pro Max is a relatively safe material with minimal toxicity that will only cause slight eye irritation, is insufficient to establish that section 6676 was not promulgated to protect people, property, or the environment.

Further, Appellant failed to provide scientific evidence at the hearing to support his arguments that Roundup Pro Max is relatively safe. Indeed, the label for this product indicates it is a hazard to humans and domestic animals, causes moderate eye irritation, cautions the user to avoid breathing the vapor or spray mist, and is an environmental hazard that may not be applied directly to water. Even if Appellant had established that the product is relatively safe and eight ounces of the product risked only "minimal exposure," these arguments do not establish that the regulation mandating a label on any container carrying or transporting a pesticide is not a regulation intended to protect people and the environment.

Section 6676, was originally promulgated in 1973, as 3 CCR section 3140. (See History, Cal. Code Regs., tit. 3, § 6676.) Included in the rulemaking file for section 3140, is former 3 CCR section 3135: "The director finds that pesticide containers may cause injury to persons, animals, or the environment, unless they are stored, transported, and handled, or disposed of in a safe manner." (Former 3 CCR section 3135; Office of Administrative Law [OAL] file no. 73-0130-03.) A container that holds or has held a pesticide is a potential hazard to people and the environment, and the regulations promulgated to provide for their safe handling are regulations meant to protect both.

Accordingly, the Director finds that the Commissioner properly determined that Appellant's violation of 3 CCR section 6676 was a Class B violation. The \$250 fine is appropriate and within the violation range for Class B.

3. 3 CCR section 6678 is a regulation designed to protect people, property, or the environment from harm.

Appellant admits that his employee, Mr. Galvan, used a service container on June 22, 2012, that did not conform to 3 CCR section 6678, and did not identify the pesticide within the container.

Appellant argues that this violation should be classified as Class C because there is only a minimal risk of exposure due to the nature of Roundup Pro Max ("safe material, minimal toxicity will only cause slight eye irritation"). Appellant's arguments are unpersuasive. When used as directed by a person who knows the container's contents, the product may be relatively safe with minimal toxicity. However, the potential hazard created in not labeling the service container is to the people that do not know its contents. The Initial Statement of Reasons promulgating 3 CCR section 6678 explains that the regulation was written to protect the applicator, any people that may unwittingly come across the container, and emergency personnel in responding to any emergency or accident related to the container. (OAL file no. 90-0501-01.) It is indeed a regulation designed to protect people and the environment from the hazard a pesticide container with unknown contents poses to those who do not know what it holds.

Accordingly, the Director finds that the Commissioner properly determined that Appellant's violation of 3 CCR section 6678 was a Class B violation. The \$250 fine is appropriate and within the violation range for Class B.

Conclusion

The Commissioner's decision that Appellant violated 3 CCR sections 6702(b)(3), 6676, and 6678 and that the three violations are Class B violations is affirmed. The fines of \$350, \$250, and \$250 are upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant of how and when to pay the \$850 fine.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant may seek court review of the Director's decision within 30 days of the date of the decision. 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: 1/3/2013

By: Brian R Leahy
Brian R. Leahy, Director