

**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 San Diego
(County File No. 263-ACP-SD-11/12)

Administrative Docket. No. 190

**DIRECTOR'S
DECISION**

Jose M. Barcinas (PCA 70667)
c/o Entomological Services, Inc.
P.O. Box 3043
Visalia, CA 93278-3043

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) 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 California Code of Regulations, Title 3, 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 November 14, 2012, the San Diego County Agricultural Commissioner (Commissioner) found that on September 21, 2011, the Appellant, Pest Control Adviser Jose M. Barcinas of Entomological Services, Inc. (ESI), violated FAC section 12971 by recommending use of the pesticide *Imidan 70-W* on a tejocote crop in conflict with its registered labeling. The Commissioner classified the violation as a Class A violation and levied a fine in the amount of \$1,400.

Appellant Jose M. Barcinas (Appellant Barcinas) appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction to review the appeal under FAC 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

In February 2011, Appellant Jose M. Barcinas, a registered pest control adviser in San Diego County, began managing CF Farming's¹ tejocote groves and providing pest control adviser services for them. When Appellant Barcinas took over management of the tejocote groves, being unfamiliar with the crop tejocotes, he reviewed CF Farming's Operator Identification Number and Restricted Materials Permit information. Both documents indicated that the tejocote sites were designated as "apples" on the current and historical documentation. Appellant Barcinas physically inspected the trees, noted that the tree shape and leaf structure of the tejocote trees were similar to apple trees, and concluded that they were a type of crabapple.

On September 16, 2011, Appellant Barcinas made a pest recommendation to treat the tejocote groves with *Imidan 70-W* (EPA Reg. No. 10163-169), a Warning level, California registered pesticide containing the active ingredient phosmet. The recommendation listed the crop to be treated as "apples." On September 21, 2011, *Imidan 70-W* was applied on CF Farming's tejocote groves.

On December 13, 2011, during a routine market sampling inspection in Los Angeles, California, DPR detected illegal residue of phosmet on tejocotes sold under the brand name "Serrato Farms." DPR notified the Commissioner and directed her office to conduct an investigation. San Diego County Agricultural Inspector N. Silva conducted an investigation and documented his observations and findings in Pesticide Episode Investigation Report, Incident number 18-SD-12.

¹ Also known as Serrato Grove Management, Serrato Farms, Jaime Serrato, and Al Serrato.

The investigation confirmed that CF Farming grew tejocotes in multiple locations in San Diego County, and that Appellant Barcinas recommended the use of *Imidan 70-W* on their tejocote crops. The investigation further confirmed that tejocote was not a crop listed on the *Imidan 70-W* label and that, per federal regulations, there was no established residue tolerance for phosmet on tejocotes. As a result of the findings, Supervising Inspector S. Redding issued a Hold Order/Stop Harvest to CF Farming for all remaining tejocotes, thereby preventing future sales. CF Farming subsequently destroyed the remaining fruit, amounting to a loss of \$313,000.

At the time of the pesticide application, tejocote was not a crop listed on the *Imidan 70-W* label and was not listed on the federal "Crop Group Tables." In August 2012, tejocote was listed under Group 11 – Pome Fruits Group. Neither "tejocote" nor "pome fruit" are currently listed on the *Imidan 70-W* label.

On January 20, 2012, San Diego County issued a notice of violation to Appellant Barcinas for violating FAC sections 12971 and 12973. On September 13, 2012, Commissioner Lisa M. Leondis issued a Notice of Proposed Action, charging Appellant Barcinas with one violation of FAC section 12971.

Appellant Barcinas requested a hearing and on November 14, 2012, Marsha Philippe, a Hearing Officer designated by the Commissioner, held a hearing at 9325 Hazard Way, Suite 100, San Diego, California. During the hearing, Appellant Barcinas specifically did not dispute the violation, the Hearing Officer selected to hear the case, or the qualifications of the Commissioner's staff. Appellant Barcinas's sole argument at the hearing was that the \$1,400 Class A violation was excessive. On appeal, Appellant disputes all of the above.

Relevant Laws and Regulations

FAC section 12971 states, "No recommendation shall be in conflict with the registered labeling for the product being recommended."

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, Title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class A violation is one of the following:

- (A) A violation that cause a health, property, or environmental hazard.
- (B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that

one of the following aggravating circumstances support elevation to Class A.

1. The respondent has a history of violations;
 2. The respondent failed to cooperate in the investigation of the incident or allow a lawful inspection; or
 3. The respondent demonstrated a disregard for specific hazards of the pesticide used.
- (C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11897, or 13102 of the Food and Agricultural Code.

(Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(1).)

The Commissioner shall use relevant facts, including severity of actual or potential effects and the respondent's compliance history when determining the fine amount within the fine range, and include those relevant facts in the notice of proposed action. (Cal. Code of Regs., tit. 3, § 6130, subd. (d).)

Appellant's Allegations

Appellant Barcinas's main contentions on appeal are:

- Appellant Barcinas contends that the \$1,400 fine is excessive because his recommendation relied on incorrect information provided by both the grower and historical documentation from the Commissioner's office listing the tejocote crop sites as "apples."
- Appellant Barcinas contends that the \$1,400 fine is excessive because at the time of the incident, tejocote was not listed in the Code of Federal Regulation "Crop Group Tables" and therefore, he had no way of determining or verifying the correct commodity classification for tejocote.
- Appellant Barcinas generally objects to the violation, the Hearing Officer selected, and the qualifications of the Commissioner's staff.

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant Barcinas had the opportunity to present and question witnesses. The Hearing Officer determined that there was sufficient evidence to show that on September 16, 2011, Pest Control Adviser Barcinas wrote a recommendation to apply the pesticide *Imidan 70-W* to crops he knew to be tejocote, but identified on his recommendation as "apples." On September 21, 2011, *Imidan 70-W* was applied to CF Farming's tejocote groves. At the time of the application, *Imidan 70-W* was not registered for use on tejocotes. As a result, Appellant Barcinas's recommendation violated FAC section 12971, which prohibits a recommendation in conflict with the registered labeling of a pesticide.

The Hearing Officer upheld the \$1,400 fine in the Class A category because the violation caused an actual property hazard, the destruction of the remaining tejocote crops. The San Diego County Agricultural Commissioner adopted the Hearing Officer's proposed decision in its entirety.

The Director's Analysis

- A. Appellant Barcinas waived his right to object to the Hearing Officer selected and the qualifications of the Commissioner's staff because he specifically stipulated to these facts, and failed to raise or address these issues at the administrative hearing.

In accordance with the FAC, "the director shall decide the appeal on the record of the hearing..." (Food & Agr. Code § 12999.5, subd. (d)(5).) At the hearing, Appellant Barcinas specifically stipulated to a number of facts, including facts associated with the violation; that he had no objection to the Hearing Officer; and that he had no issues with the qualifications of the Commissioner's staff. (*See* Hearing Officer's Proposed Decision, Stipulated Facts 1-8.) On appeal, Appellant Barcinas now disputes all of the above. (*See* Barcinas Notice of Appeal.) Appellant Barcinas, however, has waived his right to object to these issues because he stipulated to having no objection to the Hearing Officer or the Commissioner's staff and moreover, failed to raise, address, or present any evidence relating to his current objections at the administrative hearing. Accordingly, the Director cannot consider Appellant Barcinas's newly raised general objections for the first time on appeal.

- B. Substantial evidence supports the Commissioner's decision that Appellant Barcinas violated FAC section 12971 by making a recommendation to apply *Imidan 70-W* on tejocote crops, in conflict with the registered label.

At the November 14, 2012-hearing, Appellant Barcinas stipulated to the following facts:

1. The situation in the Notice of Proposed Action, dated September 13, 2012, occurred in San Diego County.
2. The Respondent has no objection to the Hearing Officer.
3. The Respondent has no issues with the qualifications of the inspectors giving testimony for San Diego County.
4. The Respondent is a licensed pest control adviser.
5. The application was made to tejocotes, not apples.
6. The material used, *Imidan 70-W*, was not registered for tejocotes at the time of the application.
7. *Imidan 70-W* was applied to CF Farming's tejocotes on September 21, 2011.
8. Phosmet residue, the active ingredient in *Imidan 70-W*, was found on tejocotes on December 13, 2011, by DPR during random sampling conducted at the Los Angeles product market. (See Hearing Officer's Proposed Decision.)

The Director finds that there is substantial evidence to support the Commissioner's decision that Appellant Barcinas violated FAC section 12971, which states that no recommendation shall be in conflict with the registered labeling of a pesticide. The FAC specifically requires agricultural pest control advisers to identify the commodity or crop to be treated in their recommendation (Food & Agr. Code §§ 12003, subd. (d)), and further mandates that no recommendation shall be in conflict with the registered labeling for the product being recommended (*Id.* at § 12971). At the hearing, Appellant Barcinas stipulated to the fact that he is a licensed pest control adviser. (Stipulated Fact 4.) The evidence shows that on September 16, 2011, Appellant Barcinas wrote a recommendation to apply the pesticide *Imidan 70-W*, containing the active ingredient phosmet, on a crop of tejocotes. (County Exhibit 7.) Appellant Barcinas's recommendation identified the crop as "apples." (*Id.*) Testimony by Appellant Barcinas and his witness, R. Walthers, confirmed that ESI had knowledge that the crop to be treated was tejocotes, not apples. On September 21, 2011, *Imidan 70-W* was applied to CF Farming's tejocotes. (Stipulated Fact 7.) At the time of the application, *Imidan 70-W* was not registered for use on tejocotes (Stipulated Fact 6; County Exhibit 10) and the label for *Imidan 70-W* specifically stated, "Apply this product only as specified on this label." (County Exhibit 10). In sum, the evidence establishes that Appellant Barcinas knew that the crop to be treated was

tejocotes, not apples, yet made a recommendation to apply a pesticide to a commodity not listed on the registered label. Accordingly, there is substantial evidence to support the Commissioner's decision that Appellant Barcinas violated FAC section 12971.

C. Appellant Barcinas's allegation that the \$1,400 fine is excessive is without evidentiary support.

Appellant Barcinas's attempt to minimize his responsibility for the violation by placing blame on the Commissioner's office is without support from the record. Specifically, Appellant Barcinas argues that the Commissioner bears some responsibility for the violation because she issued a number of permits throughout the years that designated CF Farming's tejocote groves as "apples." Appellant Barcinas further argues that the fine is excessive because tejocotes were not listed on a federal "Crop Group Table" until August 2012, and as a result, he had no way of verifying the correct classification for tejocotes before the incident. (Appellant Exhibit F.) Appellant Barcinas's allegations are without evidentiary support from the record and the Commissioner's decision is affirmed.

Contrary to Appellant Barcinas's arguments, the evidence establishes that Appellant, as the pest control adviser, was the party responsible for correctly identifying the crop to be treated and ensuring that the pesticide being recommended was allowed under the registered pesticide label. (See Food & Agr. Code §§ 12003, subd. (d); 12971.) Supervising Agricultural Standards Inspector S. Redding testified that it is the responsibility of the pest control adviser to thoroughly understand the requirements of the pesticide label for any application, including approved registered crops. Although Appellant Barcinas testified that upon taking over management of CF Farming's tejocote crops, he reviewed their Operator Identification Number, Restricted Materials Permit, prior recommendations by the previous pest control adviser, and the physical site of the tejocotes; he admitted to being unfamiliar with tejocotes and assumed they were some type of crabapple because the trees and flowers looked like apples. (County Exhibit 6 at p.9.) Appellant Barcinas further admitted that "it wasn't until this whole residue issue came up that I did research on the tejocote." (*Id.*)

Moreover, absent from the record is any evidence establishing that the Commissioner had actual knowledge that CF Farming's crop sites were tejocotes or gave approval to classify tejocotes as apples. To the contrary, Ms. Redding testified at the hearing that the Commissioner relies on information provided by the grower regarding what crops they are growing, unless the grower intends to apply a restricted material pesticide to a particular crop.² As a result, she

² Ms. Redding testified that *Imidan 70-W* is not a restricted material.

explained that if a grower informs the Commissioner that they are growing a particular crop with a non-restricted pesticide, the Commissioner relies on that information and does not physically inspect the property to verify if that information is correct. Although Mr. Walther testified that ESI made multiple attempts from various agencies to determine which commodity code should be used for the tejocote sites, there is no evidence in the record to establish that the grower, Appellant Barcinas, or any representative from ESI inquired with the Commissioner or DPR before the incident regarding the correct commodity listing for tejocote. The only evidence submitted by Mr. Walther to prove his communications with DPR or the county on this issue begins on September 24, 2012, almost a year after the incident. (*See* Appellant Exhibit D.) In fact, when Appellant Barcinas's was questioned at the hearing regarding whether he inquired with the county about the classification of tejocote before he wrote the recommendation, he admitted that he relied on the previous recommendation and there was nothing to compel him to obtain more details. Finally, the fact that at the time of the incident, tejocotes were not listed on a Crop Group Table is not justification for classifying it as another commodity and recommending a pesticide not approved for use on tejocotes.

Based on the evidence and record before the Director, the Director finds that there is substantial evidence to support the Commissioner's decision that Appellant Barcinas violated FAC section 12971, a section that places the ultimate responsibility on the pest control adviser as the licensed expert to assure his recommendations do not violate the law. In this context, the fine was not excessive.

D. Substantial evidence supports the Commissioner's decision to classify the violation as a Class A violation and that the fine was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in California Code of Regulations, Title 3, section 6130, set forth above.

Here, there is substantial evidence to support the Commissioner's decision that the violation was a Class A violation and that the fine was appropriate. At the hearing, Ms. Redding testified that Appellant Barcinas's violation was appropriately classified as a Class A violation because his recommendation for use of a pesticide in conflict with its label caused an actual hazard to property, as the remaining tejocote crop had to be destroyed, amounting to a loss of \$313,000 for the grower. (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(1); County Exhibit 6, at p. 13.) The fine range for Class A violations is \$700-\$5,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c).) Ms. Redding testified that based on the investigation and the evidence, the fine, which was on the lower end of the fine range, was fair. Based upon the facts of this case, the Director finds that violation was appropriately charged as a Class A violation and that the \$1,400 fine

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levied is not excessive, and is a reasonable exercise of the Commissioner's discretion.

Conclusion

The Commissioner's decision that Appellant Barcinas violated FAC section 12971 and that the violation qualifies as a Class A violation is affirmed. The fine of \$1,400.00 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant Barcinas of how and when to pay the \$1,400 fine.

Judicial Review

Under FAC 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: 4/29/2013

By: Brian Leahy
Brian Leahy, Director