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 Fresno
(County File No. 023-ACP-FRE-02/03)

Trinkle Ag Flying Service
2394 Avenue 376
Kingsburg, California 93631
_____Appellant/

Administrative Docket No. 116

DECISION

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 may levy a civil penalty up to $1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Fresno County Agricultural Commissioner found that the appellant, Trinkle Ag Flying Service, violated FAC section 12972. The commissioner imposed a total penalty of $500 for the violation.

Trinkle Ag Flying Service appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. 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.

Appellant's Contention

The appellant, Trinkle Ag Flying Service, in its written "answer and rebuttal" document, denied any drift onto Mr. Minnite's onion field, denied any violation of FAC 12972, denied any creation of an actual environmental hazard, and denied any creation of actual damage to Mr. Minitte's onion field. In his written answer and rebuttal, the appellant suggested that Blair Air's pesticide holding tank was contaminated from a previous paraquat application. Blair Air made an earlier application of Pursuit W DG to the alfalfa field immediately north of Mr. Minnite's onion field. Appellant also contended that the wind direction at the time of his application described below was inconsistent with the drift pattern. Appellant, in his written answer and rebuttal, tendered mostly irrelevant facts, irrelevant points and authorities, and a conclusion.

FAC Section 12972

Section 12972 provides that the use of any pesticide by any person shall be in such a manner as to prevent substantial drift to nontarget areas. As provided for in 3 CCR section 6000, "substantial drift" means the quantity of pesticide outside of the area treated is greater than that which would have resulted had the applicator used due care.

The appellant, Trinkle Ag Flying Service, was charged by the Fresno County Agricultural Commissioner's office for violating FAC section 12972. The appellant stipulated at the hearing that on January 22, 2003, he applied Gramoxone Extra, registration number 10182-280-AA, to EBC Farms' property at section 16, township 19S, range 19E, site 19-1. The active ingredient in Gramoxene is paraquat. Gramoxene's label bears the signal word, "Danger." The field that the appellant made the application to is approximately one-half mile east of Mr. Minnite's onion field.

The record shows that Mr. Minnite's onion field and the field on which the appellant made the paraquat application are in Fresno County, but borders Kings County. A search by both the Kings County Agricultural Commissioner's staff and the Fresno County Agricultural Commissioner's staff showed that the only application of paraquat in the vicinity of Mr. Minnite's onion field was made by the appellant on January 22, 2003. Gradient samples of the damaged onion plants, and in areas where the onions were killed back and sparse samples were available, weeds were collected by the Fresno County Agricultural Commissioner's staff. The collected samples were sent to the California Department of Food and Agriculture's (CDFA), Center for Analytical Chemistry (laboratory) for analysis. The CDFA laboratory's reports showed that all samples taken from Mr. Minnite's onion field tested positive for paraquat. Paraquat levels were at 0.02 parts per million (ppm), .30 ppm, 0.08 ppm, 0.05 ppm, 0.15 ppm, and 0.22 ppm. There is information in the record that the sample sites and their respective concentrations of paraquat were consistent with pesticide drift. The identical samples from Mr. Minnite's onion field were also tested for Pursuit W DG, the pesticide applied by Blair Air to the field adjoining Mr. Minnite's onion field. No residues of Pursuit W DG were found.

The appellant contends that the wind direction, as shown in the Lemoore Naval Air Station's weather observation report and the Hanford National Weather Service's log, is contrary to the drift pattern. These two reports were in the record and were considered by the hearing officer.

The record contains information that Mr. Minnite submitted a report of loss to the Fresno County Agricultural Commissioner's office. The records shows that there was visible yellowing and spotting of the onion plants. Reasonable inferences from this information are that the appellant did, in fact, drift to a nontarget area, i.e., Mr. Minnite's onion field. Therefore, the applicant did not use due care in his application of Gramoxene.

Authority to Levy Fines

FAC section 12999.5 authorizes the commissioner to levy fines for violations of certain State pesticide laws and regulations. Section 12999.5 authorizes a fine up to $1,000 for each violation.

When levying these fines, however, the commissioner must follow the fine guidelines in the State's pesticide regulations, 3 CCR section 6130. Under section 6130, a minor violation is one that did not create an actual health or environmental effect or did not pose a reasonable possibility of creating a health or environmental effect, and the fine range is $50 to $150 per violation; a moderate violation is a repeat of a minor violation or one that posed a reasonable possibility of creating a health or environmental effect, and the fine range is $151 to $400 per violation; and a serious violation is a repeat of a moderate violation or one that created an actual health or environmental hazard, and the fine range is $401 to $1,000 per violation.

According to Merriam Webster's Collegiate Dictionary, Tenth Edition, a hazard is a "source of danger." The record contains information that shows the appellant applied Gramoxene that drifted from the intended application site, across an open field, and onto an onion field. There is information in the record that Mr. Minnite submitted a report of loss to the Fresno County Agricultural Commissioner's office. The records shows that there was visible yellowing and spotting of the onion plants. Therefore, the appellant created an actual environmental hazard by making an application of Gramoxene, a toxicity Category One pesticide labeled with the signal word "Danger," in such a manner as to cause it to drift onto an unintended site, Mr. Minnite's onion field, in violation of FAC section 12972.

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 commissioner shall notify the appellant how and when to pay the $500 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

By: Paul Helliker Dated: 12/24/03

Paul Helliker
Director