

**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 Monterey  
File No. 1271711

Docket No. 215

**Mendoza Berry Farms  
Attn: Jose Mendoza  
1829 Declaration Street  
Salinas, California 93906**

Appellant/

**Procedural Background**

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), 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 March 22, 2018, the Monterey County Agricultural Commissioner (Commissioner) found that appellant Mendoza Berry Farms (Appellant or Mendoza Berry Farms) violated 3 CCR 6614(b)(1) and FAC section 12973. The Commissioner classified the violations as Class A in accordance with 3 CCR section 6130. The Commissioner levied a \$5,000 fine for each violation, which is a total fine of \$10,000.

Mendoza Berry Farms 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 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**

Mendoza Berry Farms owns and operates Brazil Ranch for the commercial production of strawberries. (County Exhibit (Ex.) 2.) Mendoza Berry Farms splits Brazil Ranch into Block 8, Block 9, and Block 10. (Stipulation 9.) Block 9 and Block 10 share a border. (County Ex. 9.) Block 9 is to the west of Block 10. (Stipulation 13.) On August 20, 2015, at approximately 6:30 am, two crews totaling seventy-one (71) crewmembers from Fresh Harvest, Inc. (Fresh Harvest) began to harvest strawberries in Block 10. (Stipulation 15.)

At approximately 2:30 pm on the same day, Mr. Gerardo Martinez, an employee of Mendoza Berry Farms, used a tractor to make an application of one (1) registered pesticide product—IAP Dusting Sulfur (reg. no. 2935-48-AA-71058)—to the strawberry field located in Block 9 (the application). (Stipulation 5; County Ex. 5.) Mr. Martinez did not have a pesticide-handling license. (County Ex. 1) Mr. Martinez was aware of the harvesting crew in Block 10, and he believed the crew was 400 feet away from the application. (Stipulation 18.) The use label of IAP Dusting Sulfur instructs that in California IAP Dusting Sulfur shall not be applied during wind velocities that exceed 10 miles per hour (mph). (County Ex. 5.) During the application, Mr. Martinez did not have tools to measure the wind speed, and he could not feel the speed or direction of the wind on his body due to the personal protective equipment (PPE) he was wearing. (County Ex. 1.)

Several crewmembers reported seeing a tractor that was depositing something on the strawberry crops in Block 9. (County Ex. 10.) Six (6) crewmembers observed “dust clouds” blowing from Block 9, towards where they were working in Block 10. (Testimony of Francisco Paredes (Paredes Testimony).) Thirty (30) crewmembers also reported that they smelled an unpleasant odor. (Paredes Testimony.) Sixty-four (64) crewmembers developed symptoms of eye, nose, and throat irritation around the time of the application. (County Ex. 10.) Around 3:00 pm, one of the Fresh Harvest foremen called the Mendoza Berry Farms ranch supervisor, Mr. Eliseo Mendoza, and expressed concern regarding the application. (County Ex. 1.) The ranch supervisor told the foreman that the material was not harmful, but still called Mr. Martinez to instruct him to discontinue the application. (Id.) The harvesting crews working in Block 10 stopped harvesting at 3:30 pm. (Id.)

On August 21, 2015, the day after the application, the Fresh Harvest crews returned to Brazil Ranch to continue harvesting the strawberries. (Id.) That same morning, several crewmembers complained to the foremen of eye, nose, and throat irritation. (Id.) As a result, all seventy-one (71) crewmembers were taken to medical clinics to receive treatment for symptoms

of eye, nose, and throat irritation. (Id.) Sulfur dust may cause eye, nose, throat, and skin irritation. (County Exs. 6 and 11.)

The Monterey County Office of the Agricultural Commissioner conducted an investigation of the incident, interviewed witnesses, and recorded findings in the Pesticide Episode Investigation Report. The County's investigation included an examination of the wind velocity at the time of the application, which began around 2:30 pm. On the day of the application, California Irrigation Management System (CIMIS) weather station #116 recorded speeds out of the west of 9.9 mph to 10.9 mph between 2:00 pm and 3:00 pm. (Stipulation 10; County Ex. 7.) CIMIS station #116 is located approximately 5 miles northwest of the application site. (Paredes Testimony.) The Salinas Municipal Airport recorded winds speeds of 13.8 mph out of the west between 1:53 pm and 2:53 pm on the same day of the application. (Stipulation 11; County Ex. 8.) The Salinas Municipal Airport is located approximately 4 miles southwest from the application site. (Paredes Testimony.)

On October 17, 2017, the Commissioner issued a Notice of Proposed Action (NOPA) charging Mendoza Berry Farms with violating 3 CCR 6614(b)(1) and FAC section 12973. The Commissioner proposed a fine of \$5,000 for each violation, totaling \$10,000 in fines. Mendoza Berry Farms requested a hearing. On March 22, 2018, the hearing was held in Salinas, California before David Wallis (Hearing Officer), a hearing officer designated by the Commissioner.

### **The Hearing Officer's Decision**

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Appellant had the opportunity to present evidence and question witnesses. The Hearing Officer found that the County had "not met its burden in demonstrating" that Appellant violated FAC Section 12973. (*See* Hearing Officer's Proposed Decision.) As a result, the Hearing Officer recommended that Appellant "should not be fined" for violating FAC Section 12973. As for the CCR 6614(b)(1) violation, the Hearing Officer found that the County's case "relies heavily on" the violation of FAC Section 12973 and Appellant's overall actions were not "demonstrated as irresponsible enough to warrant a maximum fine." (Id.) As a result, the Hearing Officer recommended that the fine imposed on Appellant for violating CCR 6614(b)(1) be reduced to \$3,500.

The Commissioner, Henry S. Gonzales, did not accept the Hearing Officer's recommendations to not fine Appellant for violating FAC Section 12973. (*See* Notice of Decision, Order and Right of Appeal.) The Commissioner found that the Hearing Officer acted inconsistent with California Government Code section 11425.10(a)(6), because the Hearing Officer considered testimony received from sources outside of and after the hearing closed. As for the CCR 6614(b)(1) violation, the Commissioner did not accept the Hearing Officer's recommendations to lower Appellant's fine. (Id.) The Commissioner found that the Hearing Officer's statement that the County was dependent on FAC Section 12973 to find that Appellant violated CCR 6614(b)(1) was improper because the two codes are separate and have different elements. Under CCR 6614(b)(1), an application should not be made when there is a

reasonable possibility of contamination of persons, even at wind speeds less than required for a FAC Section 12973 violation.

### **Appellant's Allegations**

On appeal, Appellant argues that the Commissioner's decision to fine it \$5,000 for violating CCR 6614(b)(1) was incorrect. (Notice of Appeal, dated September 6, 2018 (Notice of Appeal).) Appellant asserts the NOPA was based on vague, inaccurate information. Appellant also argues that the County's response was delayed. Due to the delayed response, the County failed to take plant residue and clothing samples. Therefore, Appellant argues that while it violated CCR 6614(b)(1), the fine should be reduced to \$700, the lowest amount within the Class A fine range.

Appellant also argues that the Commissioner's decision to fine it \$5,000 for violating FAC Section 12973 is incorrect. (Notice of Appeal.) Appellant asserts the Commissioner's decision incorrectly states that the County used two wind data reports from CIMIS. Instead, the Appellant argues, the County used wind data from CIMIS station #116 and the Salinas Municipal Airport. Additionally, Appellant argues that the County should have considered wind data from CIMIS station #214, which recorded wind speeds below the limit designated by the pesticide label. Therefore, Appellant argues that it did not violate FAC Section 12973.

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

**A. The Commissioner's decision to fine Appellant \$5,000 for violating the California Code of Regulations, title 3, section 6614(b)(1) is supported by substantial evidence in the record.**

There is substantial evidence in the record to support the Commissioner's finding that Appellant should be fined \$5,000, the maximum amount for a Class A violation, for violating CCR section 6614(b)(1). In its appeal to the Director, Appellant does not seem to dispute that it violated Section 6614(b)(1). Instead, Appellant requests that the civil fine be reduced to \$700, the lowest amount within the Class A fine range. However, there is substantial evidence in the record to support the Commissioner's decision to fine Appellant \$5,000.

**1. There is substantial evidence in the record to support a finding that there was a reasonable possibility of contaminating the harvesting crewmembers when Appellant's employee applied IAP Dusting Sulfur to an adjacent field.**

Appellant does not seem to dispute that it violated Section 6614(b)(1). Instead, Appellant asserts that the fine should be diminished to \$700. Even so, the issue of whether Appellant violated Section 6614(b)(1) will be addressed. Then, the issue of whether the amount of the fine imposed by the Commissioner will be addressed.

Section 6614(b)(1) provides: "Notwithstanding that substantial drift will be prevented, no pesticide application shall be made or continued when...[t]here is a *reasonable possibility* of contamination of the bodies or clothing of persons not involved in the application process." (Cal.

Code Regs. tit. 3, § 6614, subd. (b)(1) (emphasis added).) According to 3 CCR section 6130, a Class A violation “caused a health, property, or environmental hazard.” (Cal. Code Regs. tit. 3, § 6130.) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).) The Commissioner has broad discretion to impose civil penalties within the corresponding fine range.

To support a violation of Section 6614(b)(1), the County only needs to show a “reasonable possibility” of contamination. Here, there was certainly a reasonable possibility of contaminating the crewmembers’ bodies. At the start of the application, Mr. Martinez believed the harvesting crews were approximately 400 feet away from the application. (County Ex. 1.) During the application, Mr. Martinez did not have tools to measure the wind speed. (Id.) Additionally, Mr. Martinez could not feel the wind speed or direction of the wind due to the PPE he was wearing. (Id.)

The crewmembers’ statements further support that there was a reasonable possibility of contamination. Several crewmembers reported seeing a tractor that was depositing something on the strawberry crops in Block 9, and that the tractor came as close as thirty (30) feet away from them. (County Ex. 1.) Six (6) crewmembers observed “dust clouds” blowing from Block 9, towards where they were working in Block 10. (Paredes Testimony; County Ex. 1.) Thirty (30) crewmembers also reported that they smelled an unpleasant odor. (County Ex. 1.)

Weather data at the time of the application also supports that there was a reasonable possibility of contamination. On the day of the application, CIMIS weather station #116 recorded speeds out of the west at 9.9 mph to 10.9 mph between 2:00 pm and 3:00 pm. (Stipulation 10; County Ex. 7.) The Salinas Municipal Airport recorded winds speeds of 13.8 mph out of the west between 1:53 pm and 2:53 pm on the same day of the application. (Stipulation 11; County Ex. 8.)

Additionally, the application did in fact cause bodily contamination to the crewmembers. Sixty-four (64) crewmembers developed symptoms of eye, nose, and throat irritation. (County Ex. 10.) On August 21, 2015, the day after the application, several crewmembers experienced eye, nose, and throat irritation, which are symptoms consistent with exposure to Sulfur. (County Exs. 1, 6, and 11.) All seventy-one (71) crewmembers were taken to medical clinics to receive treatment for symptoms of eye, nose, and throat irritation. (County Ex. 1.) Appellant did not present evidence of any other pesticide application in the area that could be responsible for the above circumstances. Thus, the record contains substantial evidence to support the Commissioner’s decision that there was a reasonable possibility of contaminating the harvesting crewmembers when Appellant’s employee applied IAP Dusting Sulfur in Block 9 while the crews were harvesting in Block 10.

**2. There is substantial evidence in the record to support the Commissioner’s decision to fine Appellant \$5,000, the top of the Class A range.**

In enforcement actions taken pursuant to FAC § 12999.5, violations are designated as Class A, Class B, or Class C. A Class A violation is one that caused a health, property, or environmental hazard. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).) The Commissioner

must also determine that an aggravating circumstance supports an elevation to Class A. (Id. at subd. (b)(1)(B).) One of the “aggravating circumstances includes when “[t]he respondent demonstrated a disregard for specific hazards of the pesticide used.” (Id. at subd. (b)(1)(B)(3).) The fine range for a Class A violation is \$700 to \$5,000. (Id. at subd. (c).) The Commissioner has broad discretion with respect to the imposition of civil penalties within the corresponding fine range.

Here, the Commissioner determined that Appellant created a health hazard by allowing pesticide to drift off-target and onto the bodies of the harvesting crewmembers in the adjacent field. The Commissioner imposed a civil penalty of \$5,000, based on appellant’s disregard for specific hazards of the pesticide used. Appellant knew that there were workers present before he began the application. Pesticides formulated as a dust, like IAP Dusting Sulfur, can easily drift to non-target sites. (County Ex. 6.) Appellant’s employee, Mr. Martinez, did not have equipment to monitor the wind velocity and direction during the application. (County Ex. 1.) However, Mr. Martinez disregarded these hazards and made the application anyway, which resulted in sixty-four (64) crewmembers exhibiting symptoms of pesticide exposure and seventy-one (71) crewmembers receiving medical treatment. (Id.) As a result, the Director finds the evidence in the record supports the Commissioner’s decision to fine Appellant \$5,000, the top of the Class A range, for violating Section 6614(b)(1).

**3. Appellant’s arguments on appeal are irrelevant and do not overcome the weight of the evidence in the record.**

Appellant’s assertions that the NOPA is based on vague, inaccurate information regarding the application method does not overcome the weight of the evidence in the record. Appellant asserts the map depicting the application area created by the County and presented at the hearing inaccurately depicts the direction of the rows in a portion of Block 9, as well as the direction that the tractor was driving when it applied the IAP Dusting Sulfur. Additionally, Appellant argues that the County’s investigation efforts were delayed. Due to the delayed response, Appellant argues, the County failed to take plant residue and clothing samples.

As discussed above, substantial evidence in the record supports the Commissioner’s decision. Appellant’s argument that the decision is based on vague and inaccurate information due to errors in the County’s map and the lack of plant and clothing samples is irrelevant. Appellant’s employee applied IAP Dusting Sulfur to Block 9, even though he knew that the crewmembers were working in Block 10. (County Ex. 1.) Appellant did not provide evidence or argue that another pesticide application in the area was responsible for the crewmembers’ symptoms. The lack of residue samples does not overcome the weight of the evidence in the record.

The Commissioner has broad discretion with respect to the imposition of civil penalties. The evidence in the record supports the Commissioner’s decision to fine Appellant \$5,000 for violating Section 6614(b)(1). Due to Appellant’s application of IAP Dusting Sulfur with a reasonable probability of contaminating the crewmembers, sixty-four (64) crewmembers developed symptoms consistent with exposure to IAP Dusting Sulfur. (County Ex. 10.) Seventy-one (71) crewmembers were taken to medical clinics to receive treatment.

(County Ex. 1.) The Commissioner's decision to place the fine at the top of the permissible fine range is reasonable and well within the Commissioner's discretion.

Based on the evidence presented, the Director finds that there is substantial evidence to support the Commissioner's decision to fine Appellant \$5,000 for violating the California Code of Regulations, title 3, section 6614(b)(1). Accordingly, the Director affirms the Commissioner's Decision.

**B. The Commissioner's decision that Appellant violated Food and Agricultural Code, section 12973 is supported by substantial evidence in the record.**

After reviewing the evidence and testimony presented, the Director finds that there is substantial evidence in the record to support the Commissioner's decision that Appellant violated FAC Section 12973 by applying IAP Dusting Sulfur to the application site during wind speeds above 10 mph, in conflict with the registered label.

Section 12973 states that "[the] use of any pesticide shall not conflict with labeling." (Cal. Food & Agric. Code § 12973.) On August 20, 2015, Appellant applied IAP Dusting Sulfur to the application site. The registered label of IAP Dusting Sulfur mandates that the product shall not be applied when the wind velocity exceeds 10 miles per hour. (Stipulation 9.)

The Commissioner presented substantial evidence to support his decision that Appellant violated Section 12973. At the hearing, the County presented evidence of wind speeds above the 10 mph limit recorded at a CIMIS station and the Salinas Municipal Airport. CIMIS weather station #116 is approximately five (5) miles from the application site, and recorded speeds out of the west of 9.9 mph to 10.9 mph between 2:00 pm and 3:00 pm on the date of the application. (Stipulation 10; County Ex. 7; Paredes Testimony.) The Salinas Municipal Airport is located approximately four (4) miles from the application site, and recorded winds speeds of 13.8 mph out of the west between 1:53 pm and 2:53 pm on the same day of the application. (Stipulation 11; County Ex. 8; Paredes Testimony.) These wind velocity data points are above the 10 mph limit mandated by the IAP Dusting Sulfur label. As a result, the record presents substantial evidence to support the Commissioner's finding that the wind velocity was above the 10 mph limit mandated by the IAP Dusting Sulfur label during the application.

On appeal to the Director, Appellant argues that the County should have considered wind data from CIMIS station #214 because it is more topographically similar to the application site. At the hearing, Appellant submitted a topographic map of the area where Brazil Ranch is located. (Appellant Ex. A.) However, Appellant did not provide a topographic map of the areas where the CIMIS stations or the Salinas Municipal Airport are located. As a result, Appellant did not submit sufficient evidence to support his assertion that CIMIS station #214 is topographically more similar to the application site. Therefore, the Commissioner was reasonable when he considered the wind data from CIMIS station #116 and the Salinas Municipal Airport, which recorded speeds in excess of the 10 mph limit.

Additionally, Appellant asserts that the Commissioner was mistaken when he stated that the County used wind velocity data from two CIMIS stations in its investigation. Instead, the

County used data from CIMIS station #116 and the Salinas Municipal Airport. Appellant is correct that the County used data from a CIMIS station and the Municipal Airport. However, this error does not invalidate the Commissioner's conclusion. There is no rule that the Commissioner must only consider CIMIS station wind data. The County's presentation, or the Commissioner's consideration, of data from the Municipal Airport was not improper. As a result, Appellant's assertion is unsupported by the record.

Based on the evidence presented, the Director finds that there is substantial evidence to support the Commissioner's Decision that Appellant violated Section 12973. Accordingly, the Director affirms the Commissioner's Decision.

#### **Conclusion**

The Director affirms the Commissioner's decision that Appellant violated 3 CCR 6614(b)(1) and FAC section 12973. The total fine is upheld.

#### **Disposition**

The Director affirms the Commissioner's decision and levy of fines. The Commissioner shall notify Appellant of how and when to pay the \$10,000 in total fines.

#### **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: OCT 10 2019

By: Jessie Mankie for B. Leahy  
Brian Leahy, Director