

**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. 017-ACP-KER-15/16)

Administrative Docket No. 206

**DIRECTOR'S
DECISION**

**Mr. Max Hanner
508 Partridge Avenue
Bakersfield, CA 93309**

Appellant/

Procedural Background

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

After giving proper notice of the proposed action and providing a hearing on July 28, 2016 in Bakersfield, California, the Kern CAC (Commissioner) found that on July 11, 2015, Mr. Max Hanner, Appellant, violated 3 CCR § 6600(b). The Commissioner classified this violation as Class A and levied a \$1,000 penalty.

Appellant appeals the Commissioner's decision to the Director of the California Department of Pesticide Regulation (Director). The Director has jurisdiction over this appeal under section 12999.5 of the Food and Agricultural Code.

Standard of Review

The Director decides this appeal on the record before the Hearing Officer. 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, including matters of fact, the Director determines whether there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test only requires there be enough relevant information and inferences from that information to support a conclusion, even if other conclusions might have also been reached. In applying the substantial evidence test, the Director draws all reasonable inferences from the information in the record to support the Hearing Officer's 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 July 11, 2015 at 1:03 p.m., Mr. Joe Turney called 911 to report that a crop duster just sprayed him with chemical while he was washing his truck on the driveway of his residence at 32180 7th Standard Road, Shafter, California. (County Exhibits E1 & E2; Testimony of Ms. Cerise Montanio.) Mr. Turney complained that his eyes burned and the 911 operator instructed him to rinse his eyes with water. (County Exhibits E2 & E6.) Upon the Kern County Fire Department's arrival, Mr. Turney had no signs or symptoms and refused transport to the local hospital. (County Exhibit E2; Testimony of Ms. Montanio.)

Ms. Cheryl Reed, Mr. Turney's neighbor at 32176 7th Standard Road, Shafter, California, also observed an airplane flying low, approximately twenty feet above her house, on July 11, 2015. She observed the airplane crossing 7th Standard Road in a southern direction and leaking chemical. (County Exhibit E1.)

On July 11, 2015, Appellant made an aerial application of the pesticide *Intrepid Edge* (CA Reg. No. 92719-666-AA) to Gardiner Farms site RR1. (Stipulated Facts 2, 3, & 4; County Exhibits E1 & E8.) Site RR1 is across the street from Mr. Turney's residence. (County Exhibit E7.) Mr. Luis Oropeza, a spotter for Appellant's aerial pesticide application, did not observe any chemical leaking from Appellant's aircraft from where he stood at the southern corner of site RR1 near Santa Fe Way. (Testimony of Mr. Oropeza.) Mr. Oropeza also could not see activity on Mr. Turney's property, including the fire truck and ambulance arriving, from where he stood as a spotter. (Testimony of Mr. Oropeza.)

No other growers within one mile of Mr. Turney's residence made an aerial pesticide application on July 11, 2015. (County Exhibit E1; Testimony of Ms. Montanio.) Appellant's application of *Intrepid Edge* was also the only application of *Intrepid Edge*, or any other pesticide containing the active ingredient methoxyfenozide, in the area during the time period of June 11, 2015 to July 21, 2015. (County Exhibit E1; Testimony of Ms. Montanio.)

Intrepid Edge is a pesticide comprised of 28.30 percent methoxyfenozide and 5.66 percent spinetoram. (Stipulated Fact 1; County Exhibit E10.) *Intrepid Edge*'s registered label states that it causes moderate eye irritation and instructs against using "this product in a way that will contact workers or other persons, either directly or through drift." (County Exhibit E10.)

Mr. David Neville, an agricultural biologist for the Kern CAC, collected foliage and swab samples on July 17, 2015 and July 21, 2015. (County Exhibit E14; Testimony of Ms. Motanio.) These samples were analyzed in a laboratory for methoxyfenozide, the active ingredient with the highest percentage in *Intrepid Edge*. These samples were not analyzed for spinetoram, the other active ingredient in *Intrepid Edge*. The laboratory analysis determined that the sample of trumpet vine growing along the west side of Mr. Turney's driveway, where Mr. Turney was washing his truck, contained 0.042 parts-per-million (ppm) of methoxyfenozide. The laboratory analysis determined that swab samples from a metal shed at the north end of Mr. Turney's driveway and a mailbox at the south end of Mr. Turney's drive contained 0.024 micrograms/second (ug/s) of methoxyfenozide and 0.027 ug/s of methoxyfenozide, respectively. Swab samples from the north and south guardrails along 7th Standard Road, the road in-between Mr. Turney's residence and site RR1, the target field, contained no methoxyfenozide. (*Ibid.*) However, a foliage sample from RR1 contained 0.73 ppm of methoxyfenozide. (*Ibid.*)

Relevant Laws and Regulations

Each person performing pest control shall "perform all pest control in a careful and effective manner." (Cal. Code Regs., tit. 3, § 6600, subd. (b) [adopted pursuant to Food & Agr. Code, §§ 11456, 12976, 12981].)

The Commissioner may "levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of these provisions." (Food & Agr. Code, § 12999.5, subd. (a).)

When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR § 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 caused 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 to

- allow a lawful inspection; or
3. The respondent demonstrated a disregard of specific hazards of the pesticide used.
- (C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, 11897, or 13102 of the Food and Agricultural Code.

(Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).)

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

Appellant's Assertions

On appeal, Appellant contends the following:

- (1) the swab and foliage samples retrieved for this investigation were not tested for *Intrepid Edge*, the pesticide Appellant applied, because the laboratory did not test the samples for both of the active ingredients in *Intrepid Edge*,
- (2) the Hearing Officer improperly interpreted and relied on Ms. Reed's statement, which was not credible,
- (3) Kern CAC inspectors did not thoroughly investigate whether another aerial application of a pesticide containing methoxyfenozide could have contaminated Mr. Turney's residence, and
- (4) the Hearing Officer did not properly consider the fact that the small amount of pesticide residue on the samples from Mr. Turney's property, in contrast with the larger amount of pesticide residue on the sample taken from site RR1, are not dangerous and could indicate the pesticide residue on Mr. Turney's residence was from a prior pesticide application that is in the middle of its half-life.

The Hearing Officer's Decision

The Hearing Officer determined that Appellant did not purposely spray Mr. Turney on July 11, 2015. However, the Hearing Officer found by a preponderance of the evidence that Appellant failed to perform his aerial application of *Intrepid Edge* in a careful manner in violation of 3 CCR § 6600(b). Appellant's aerial pesticide application resulted in a small amount of pesticide on Mr. Turney's residence. Appellant's assertion that the pesticide contamination could have resulted from a prior pesticide application was unpersuasive. There were no other applications of *Intrepid Edge* or any other pesticide containing methoxyfenozide, the active ingredient in *Intrepid Edge*, during the time period of June 11, 2015 to July 21, 2015 and Appellant did not present any credible evidence to support his argument that, due to

methoxyfenozide's half-life, the methoxyfenozide on Mr. Turney's property could have resulted from other pesticide applications occurring over the prior year.

The Hearing Officer classified Appellant's violation as Class A and levied a \$1,000 penalty. *Intrepid Edge* poses a hazard to a person's eyes and allowing *Intrepid Edge* to contaminate an occupied residence caused a health hazard. The penalty amount is within the Class A fine range provided in 3 CCR § 6130 and is appropriate.

The Director's Analysis

- A. Substantial evidence supports the Commissioner's decision that Appellant violated 3 CCR § 6600(b) by failing to perform his July 11, 2015 aerial pesticide application in a careful manner.

3 CCR § 6600(b) requires all pest control applications to be made in a careful and effective manner. On July 11, 2015 Appellant made an aerial application of the pesticide *Intrepid Edge* to Gardiner Farms site RR1. (Stipulated Fact 4 & 5.) Site RR1 is across the street from Mr. Turney's residential property. (County Exhibit E7.) Given the close proximity of site RR1 to Mr. Turney's residence, in this case, 3 CCR § 6600(b) required Appellant to make sure his aerial pesticide application did not inadvertently land on Mr. Turney's non-target residential property.

Nonetheless, at 1:03 p.m. on July 11, 2015, Mr. Turney contacted 911 and complained that his eyes were burning because he was sprayed with chemical from a crop duster airplane. (County Exhibit E2.) Appellant's aerial pesticide application of *Intrepid Edge* was the only aerial application within one mile of Mr. Turney's property on this date. (County Exhibit E1; Testimony of Ms. Montanio.) *Intrepid Edge*'s registered label states that it can cause moderate eye irritation. (County Exhibit E10.) Therefore, Mr. Turney's reported symptoms are consistent with those caused by exposure to *Intrepid Edge*.

In addition, Mr. Turney's neighbor, Ms. Reed, told the Kern CAC investigators that she also observed an airplane flying low over her house on July 11, 2015 and that the airplane was leaking chemical. (County Exhibit E1.) A laboratory analysis determined that a small amount of methoxyfenozide, the highest percentage active ingredient in *Intrepid Edge*, was on the trumpet vine, the shed, and the mailbox located on Mr. Turney's property. (County Exhibit E14.) Appellant's July 11, 2015 application was the only application of *Intrepid Edge*, or any other pesticide containing methoxyfenozide, in the area during the time period of June 11, 2015 to July 21, 2015, thirty days prior to Appellant's application through the date the swab samples were collected. (County Exhibit E1; Testimony of Ms. Montanio.) Accordingly, there is substantial evidence in the record to support the Hearing Officer's determination that a small amount of

pesticide from Appellant's aerial pesticide application landed on Mr. Turney's nearby non-target residential property, and consequently Appellant failed to perform his July 11, 2015 aerial pesticide application in a careful manner.

On appeal, Appellant argues that the swab and foliage samples collected during the investigation should have been tested for both of *Intrepid Edge*'s active ingredients, not just methoxyfenozide. However, the lack of a laboratory analysis for spinetoram, the active ingredient with the lowest percentage in *Intrepid Edge*, does not refute the laboratory analysis demonstrating that methoxyfenozide, the highest percentage active ingredient in *Intrepid Edge*, was present on Mr. Turney's property. Moreover, the lack of a laboratory analysis does not tend to demonstrate that Appellant performed his July 11, 2015 pesticide application carefully. Accordingly, the Director finds this argument unpersuasive.

Appellant also argues on appeal that the Kern CAC should have investigated whether a prior aerial pesticide application could have caused the pesticide residue on Mr. Turney's residence and that the small amount of methoxyfenozide found on Mr. Turney's residence was not dangerous and is consistent with the amount of pesticide that would exist from a prior pesticide application. Similar to above, the absence of evidence of other pesticide applications in the area and the fact that the amount of methoxyfenozide residue on Mr. Turney's property was not dangerous do not affirmatively demonstrate that Appellant performed his July 11, 2015 pesticide application in a careful manner. Moreover, they do not demonstrate that a small amount of pesticide from Appellant's July 11, 2015 application did not land on Mr. Turney's property. Appellant raised these arguments during the hearing and the Hearing Officer found them to be unpersuasive because Appellant failed to present any evidence to support these theories. On appeal, Appellant submitted documents to the Director to support these arguments, but even these do not provide evidence that identifies another source of the pesticide contamination. Further, the Director decides this appeal by reviewing the record before the Hearing Officer, and accordingly, this evidence cannot be considered.

Finally, Appellant asserts that the Hearing Officer improperly relied on a statement made by Mr. Turney's neighbor, Ms. Reed, which was not credible. However, witness credibility is the province of the Hearing Officer and Appellant failed to question or present evidence to attack the credibility of Ms. Reed's statement during the hearing. Accordingly, after reviewing the record as a whole, the Director finds there is substantial evidence that Appellant failed to perform his aerial pesticide application in a careful manner by allowing a small amount of pesticide to hit a non-target residential area where bystanders were present and affirms the Commissioner's decision.

B. The Commissioner's decision to classify Appellant's violation of 3 CCR § 6600(b) as Class A and to levy a \$1,000 penalty is supported by substantial evidence.

A Class A violation is any “violation that caused a health, property, or environmental hazard.” (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(1)(A).) Intrepid Edge’s registered label states that that the product causes moderate eye irritation and instructs users to avoid applying “this product in a way that will contact workers or other persons, either directly or through drift.” (County Exhibit E10.) Mr. Turney called 911 complaining that his eyes burned after being sprayed with a chemical. Mr. Turney’s health symptoms are consistent with the symptoms caused by Intrepid Edge exposure. Appellant did not present any evidence to the contrary in the hearing and does not argue the violation classification on appeal. Accordingly, the Director affirms the Commissioner’s decision to classify Appellant’s violation as a Class A.

The Commissioner’s decision to levy a \$1,000 fine for Appellant’s Class A violation of 3 CCR § 6600(b) is appropriate. The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c).) Therefore, the Director finds that the \$1,000 fine is a reasonable exercise of the Commissioner’s discretion

Conclusion

The Commissioner’s decision that Appellant violated 3 CCR § 6600(b) and that the violation is a Class A violation is affirmed. The civil penalty assessed is within the Commissioner’s discretion and accordingly the Director upholds the \$1,000 civil penalty.

Disposition

The Commissioner’s decision and levy of fine is affirmed. The Commissioner shall notify Appellant how and when to pay the \$1,000 penalty.

Judicial Review

Under section 12999.5 of the Food and Agricultural Code, 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.

Mr. Max Hanner
Administrative Docket No. 206
Page 8

**STATE OF CALIFORNIA
DEPARTMENT OF PESTICIDE REGULATION**

Dated: DEC 15 2016

By: Brian Leahy
Brian Leahy, Director