

**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 Sonoma
(County File No. 1-17-49-4)

Docket No. 209

**Agrichem Services, Inc.
Paul Washburn
36053 County Road 31
Davis, CA 95616**

**DIRECTOR'S
DECISION**

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 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 January 16, 2017, the Sonoma County Agricultural Commissioner ("Commissioner") found that on March 24, 2015, the Appellant, Agrichem Services, Inc. committed a violation of California Food and Agricultural Code, section 12973 when Appellant's tank mix of several herbicides that included Roundup Custom and Clopyralid 3 drifted upon a non-target vineyard. The Commissioner determined that this was a Class A violation and fined Appellant \$4,000.

Appellant appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation ("Director"). 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 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.

Relevant Laws and Regulations

Food and Agricultural Code section 12973 states that a pesticide cannot be used in conflict with its label or with permit conditions established by the Commissioner.

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, title 3, section 6130. The Commissioner will designate a violation as Class A when the violation caused a health, property, or environmental hazard. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(A).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c) (1).)

Factual Background

On March 24, 2015 Appellant sprayed an herbicide tank mix along the Northern Pacific Railroad track on a corridor from the Highway 101 overpass, north to Bailhache Avenue in Healdsburg using a rail spray rig with a boom sprayer ("northern application"). The tank mix used in the northern application included Clopyralid 3 and Roundup Custom, as well as two other pesticides and two adjuvants.

The Clopyralid 3 label states:

This product can affect susceptible broadleaf plants directly through foliar contact and indirectly by root uptake from treated soil. Therefore, do not apply Clopyralid 3 directly to, or allow spray drift to come in contact with vegetable, flowers, tomatoes, potatoes, beans, lentils, peas, alfalfa, sunflowers, soybeans, safflower, or other desirable broadleaf crops or ornamental plants.

The Roundup Custom label states:

Avoid drift. Extreme care must be used when applying this product to prevent injury to desirable plants and crops. Do not allow the herbicide solution to

mist, drip, drift or splash onto desirable vegetation since minute quantities of this product can cause severe damage or destruction to the crop, plants or other areas on which treatment was not intended.

On June 11, 2015, the operator of a vineyard located at 200 Bailhache Avenue in Healdsburg ("Dempel vineyard") reported to the County that their vineyard sustained suspected herbicide damage. On June 17, 2015, County employees went to the Dempel vineyard and took samples at various locations at and near the Dempel vineyard. The foliage samples from the vineyard tested positive for Clopyralid (the active ingredient in Clopyralid 3, EPA Reg. number 81927-14-AA) and Glyphosate (the active ingredient in Roundup Custom, EPA Reg. number 524-343-ZG).

The County investigated possible sources of the herbicide residues including herbicide spraying by Barbieri Trucking Company (Barbieri), with a property that has been sprayed with herbicides just on the other side of the railroad tracks from the Dempel vineyard and herbicide spraying by the Dempel vineyard itself. After its investigation, the County determined that Appellant's March 24, 2015, herbicide application was the cause of the damage to the Dempel vineyard. The March 24, 2015 application by Appellant was the only application in the area that included the active ingredient Clopyralid.

On October 19, 2015, the County issued Appellant a Notice of Proposed Action alleging a violation of Food and Agricultural Code section 12973, for using a pesticide in conflict with its labeling. The County alleged that contrary to both the Clopyralid 3 label and the Roundup Custom label, Appellant allowed a pesticide to drift onto the Dempel vineyard, causing property damage.

Appellant's Allegations

On appeal, Appellant provided no arguments. During a hearing on January 16, 2017, Appellant alleged that the County presented insufficient evidence to establish that it was Appellant's March 24, 2015 application that caused the damage to the Dempel vineyard. Appellant presented other theories on what could have caused the Clopyralid residue and the resulting damage on the vineyard. Appellant argued that the Clopyralid could have come from the grasses he treated with the herbicide that were then mowed, and the resulting dust or straw from the mowed grass moved onto the vineyard and transferred the Clopyralid onto the vines. As a second theory he argued that the Clopyralid could have come from the Barbieri lot herbicide spraying. Appellant argued that the County never tested a residue sample of that property, and therefore, he argued, the County could not rule out Barbieri as a source of the Clopyralid residue. Appellant argued that Barbieri could have just lied to the County about what they had applied and the County never checked to make sure. Appellant's two theories stem from his belief that

the damage on the grape vines was too far removed in time to be a result of his spraying. He sprayed on March 24, 2015, but the owner of the vines did not report any damage to the vines until June 11, 2015.

The Hearing Officer's Decision

On January 26, 2017, the County presented its case against Appellant in front of Hearing Officer Thesken. During the nearly five-hour hearing, the County presented the testimony of Alexander Scott McVicker, designated as an expert, and who performed the investigation on behalf of the County. The County also submitted 29 exhibits. Further, Appellant testified and submitted Exhibits A through W. Both the County and Appellant had the opportunity to present and question witnesses. The hearing officer's decision stated the following:

Stipulations agreed upon by the Respondent and the County prior to this hearing narrowed the scope of this proceeding to address one issue: Was the Respondent responsible for drifting herbicide onto a vineyard adjacent to the railroad track corridor that he was spraying on March 24, 2015.

The County, having the burden of proof to show that the Respondent violated California Food and Agricultural Code Section 12973, did a thorough examination and presentation of the elements of this code section and anticipated rebuttals by the Respondent. An exhaustive description of photos by Mr. McVicker during testimony, showed damaged grape leaves.

Results of gradient sampling of grape plants at various points from the treated railroad track to a point relatively far from the tracks (Exhibits C-5 and C-12), showed that the chemicals used in the March 24th application were present within and adjacent to the treatment area. The County also investigated the possibility that the pesticide residue could have been attributed to a source other than the Respondent's application. This search for another source showed that there were other applications made by Mr. Dempel and in a truck yard southwest of the railroad tracks, but the timing and products used in these applications did not match the residue 'signature' of the residue detected from the damaged grape plants in the Dempel vineyard.

The Respondent suggested that the residue products found on the grape plants could have come from the other two sources mentioned above (from Mr. Dempel or from the Barbieri truck yard), from some other unknown application, or from dust drifting onto the grape plants from trackside mowing of the area that the Respondent had treated. Residue on

the grape plants caused by Mr. Dempel or by the Barbieri truck yard are not credible scenarios based upon the mismatch of products used compared to products detected in the grapes. Any other application that could have been made in this area was investigated by the County using their monthly use reports, but no evidence was presented at this hearing that any other source existed. The possibility that contaminated weeds could be mowed and that the dust of this mowing could drift onto adjacent grape plants to cause the observed damage was never substantiated and was not considered by this Hearing Officer to be a valid argument.

It became evident with testimony and evidence presented at the hearing, that Agrichem Services, Inc. has a good compliance record considering the years that they have been in business, the number of applications conducted, the variety of locations and site types treated, and the condition of their equipment. Even with the good compliance record earned by the Respondent, unanticipated meteorological conditions and extraordinarily high sensitivity to grape plants by the application products appeared to be primary factors leading to this episode of chemical drift.

This Hearing Officer found that, based on testimony and evidence presented during the January 26, 2017 hearing, that the Respondent, Agrichem Services, Inc. did violate California Food and Agricultural Code Section 12973 and that the proposed violation class (Class A) and fine level (\$4,000.00) are appropriate. It is recommended that the Sonoma County Agricultural Commissioner accept and adopt this decision.

The County Agricultural Commissioner's Decision

The Commissioner adopted the hearing officer's proposed decision and ordered Appellant to pay \$4,000 for a Class A violation.

The Director's Analysis

The evidence supports the factual conclusion that Agrichem Services Inc. drifted onto the Dempel Vineyard.

The Director's review of the Commissioner's factual findings is limited to deciding whether the record below contains substantial evidence to support those findings. If "substantial evidence" is present, no matter how slight it may appear in comparison with the contradictory evidence, the [Commissioner's decision] will be affirmed...[The Director]... looks only at the evidence supporting the successful party, and disregards the contrary showing." (*Chodos v.*

Insurance Co. of North America (1981) 126 Cal.App.3d 86, 97.)

The County presented 29 exhibits and the testimony of County employee, Alex McVickers, Agricultural Biologist. Some of the most compelling evidence included County Exhibit 2, the County Pesticide Episode Investigation Report, and County Exhibit 12, the residue sample findings from the Dempel Vineyard. Also compelling was Mr. McVicker's testimony that no one else in the area had used the particular mix of herbicides used by Appellant that included Clopyralid. Without looking at Appellant's testimony and evidence, the evidence presented by the County was substantial and supports the Commissioner's factual finding that Appellant's March 24, 2015 herbicide application drifted onto Dempel Vineyards.

But even if the Director were permitted to analyze the weight of the evidence from the County in comparison to Appellant's evidence, the Director would still uphold the Commissioner's decision. Appellant testified that he did not drift and argued that the County was incorrect in several assertions that they made. But the County was able to refute Appellant's arguments.

The first argument made by Appellant was that the residue and damage was not caused by him drifting during the application, but rather by someone mowing the grasses where he had applied. When the property was mowed, the grasses or microdust with the herbicides on them moved onto the vineyard. (Hearing Transcript ("HT") 3:45.) He argued that, according to the Clopyralid product label (read into the record at HT 4:00), this active ingredient is highly transferable, and can move from one plant to another. The straw or microdust from the treated area touched the vineyard and transferred the Clopyralid from the grasses and/or microdust to the vines, resulting in residue and damage. But County biologist Mr. McVicker testified that the mowing was an unlikely cause of the damage to the vines because the symptoms on the vines were severe, and if there was movement of the grass or microdust from the mowing, it would have been significantly diluted and insufficient to cause the damage. (HT 3:06 to 3:13.) Moreover, there was no difference in the symptoms of the vines where the weeds had been mowed near the vineyards, and those where they had not been mowed. Many of the vines along the railroad tracks had visual signs of herbicide damage, although only the Dempel Vineyard tested positive for herbicides.

Second, Appellant testified and argued that the March 24, 2015 application was too far removed in time from the discovery of the damage. The Dempel Vineyard owner only reported the damage on June 11, 2015 – two and a half months after the application. (HT 3:46.) Here, Appellant provided no evidence, other than the simple statement that it could not have been his application. On the other hand, the County presented evidence that Clopyralid is not photosensitive – meaning that it will not break down easily. (HT 2:38.) If it does not break down easily, it may well have remained on the leaves of the vineyard for two and one-half months.

Third, Appellant testified and argued that the County did not test the Barbieri Truck lot across the railroad tracks from Dempel Vineyard. Accordingly, he argued, the County could not rule out the herbicide application made by Barbieri as the source of the Clopyralid residue. (HT 3:50.) Refuting Appellant's third theory, the County explained how they determined that the Barbieri Trucking company was not the source of the Clopyralid. (Beginning at HT 2:33 to approximately 2:38.) Barbieri is not an agricultural producer. As such, they would not have access to an agricultural pesticide, such as Clopyralid. Moreover, Clopyralid doesn't affect grasses, and that is what Barbieri was trying to control, as evidenced by the pictures of the property. Accordingly, there was no reason for the County to disbelieve Barbieri when they were told that Barbieri only applied Glyphosate. Also, the County observed blackberry bushes along the fence-line of the Barbieri property that tended to show that there was no drift from the glyphosate application. The top of the bushes did not have symptoms of Glyphosate, and there were no other symptoms of drift from the property.

Appellants fourth argument was also refuted by the evidence submitted by the County and by Appellant's own testimony. Appellant stated that the wind was only blowing 2 miles per hour when he applied his herbicide mix. He argued that because of this, his application could not have been the cause of the Clopyralid residue. (HT 4:24.) But he also testified that he was traveling 12 miles per hour along the railway. (HT 3:14.) This could have caused sufficient air movement for the spray to travel to the Dempel farm.

Based on all of the evidence before him, the Hearing Officer made the factual finding that Appellant's Application on March 24, 2015, caused the residue on the Dempel Vineyard found on June 11, 2015. The Director may only overturn that factual finding if there is not substantial evidence in the record.

As discussed above, the County presented substantial evidence supporting that Appellant's March 24, 2015 application drifted onto the Dempel Vineyard.

The evidence supports the factual conclusion that the Appellant's application caused actual harm to the Dempel Vineyard.

Mr. McVicker testified that the Dempel Vineyard was not able to sell the grapes on the vines in which the vines tested positive for Clopyralid. (HT 3:23.) Dempel Vineyards received a letter from the County informing Dempel Vineyards that they could not sell their grapes because the grapes contained illegal pesticide residue. (County Exhibit 27.) Appellant's own submitted evidence (Appellant's Exhibit D) confirmed herbicide damage to the farm. (HT 4:29.) Accordingly, substantial evidence supports the Commissioner's findings that Appellant's March 24, 2015 application caused a property hazard.

The fine levied is appropriate.

When levying fines, the Commissioner must follow the fine guidelines in 3 CCR section 6130. There is substantial evidence in the record to support a finding that the violation involved drift that caused a property hazard making it a "Class A" violation. The fine range for a Class A violation is \$700 to \$5,000. The \$4,000 fine levied by the Commissioner is within this fine amount and is therefore appropriate.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify the appellant how and when to pay the \$4,000 fine.

Judicial Review

The Appellant may seek court review of the Director's decision within 30 days of the date of the decision. (Food & Agr. Code, § 12999.5.) 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**

Dated: MAY 11 2017

By: Brian Leahy
Brian Leahy, Director