

**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. 020-ACP-KER-16/17)

Administrative Docket No. 208

DIRECTOR'S DECISION

Vince Dusters
P.O. Box 597
Buttonwillow, CA 93206

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 January 11, 2017, the Kern County Agricultural Commissioner (Commissioner) found that appellant Vince Dusters (appellant or Vince Dusters) violated 3 CCR § 6600(b) in connection with an aerial pesticide application to a tomato field. Specifically, the Commissioner found that Vince Dusters failed to perform pest control in a careful and effective manner by allowing pesticide to drift off-target to a residential property. The Commissioner found that in doing so, Vince Dusters caused a health hazard, and accordingly designated the violation as a Class A violation. The Commissioner levied a \$2,000 fine based on Vince Dusters' history of pesticide use violations.

Vince Dusters 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

On May 9 and 10, 2016, Vince Dusters applied three (3) pesticides—Gavel 75DF (reg. no. 10163-6414), Kocide 3000 (reg. no. 352-662), and Microthiol Disperss (reg. no. 70506-187)—by aerial application to a tomato field owned and operated by Cauzza Brothers, LLC (Site 10 application). (County Exhibit 15.) The tomato field is located on Buttonwillow Drive in Kern County, California near Buttonwillow, California (Site 10). The active ingredient in Gavel 75DF is Mancozeb, a fungicide. (County Exhibit 18.)

On May 11, 2016, D. Holder, a resident of Kern County, contacted the Commissioner's office to complain about a potential pesticide drift. At that time, D. Holder and his family resided at a property located directly west across Buttonwillow Drive from Site 10 (Holder Property). The Commissioner's office investigated the complaint. M. Haskell, Agricultural Biologist III, and B. Owen, Agricultural Biologist with the Kern County Department of Agriculture, interviewed witnesses, collected field samples, and recorded their findings in the Pesticide Episode Investigation Report (PEIR).

M. Haskell and B. Owen interviewed D. Holder and his family members. D. Holder stated that on May 9, 2016, he witnessed a helicopter apply a yellow material over Site 10. (County Exhibit 5 at pg. 2.) D. Holder and T. Holder stated that at the time of the application, the wind was blowing towards the Holder Property. (*Id.* at pg. 3.) D. Holder and family members stated that after witnessing the application, they noticed a "weird" smell that was accompanied by a "chemical" taste that they attributed to the Site 10 application. D. Holder and family members also reported various physical symptoms including nausea, headaches, and vomiting that they attributed to the Site 10 application. (*Id.* at pg.'s 2-4.) D. Holder sought medical treatment for his physical symptoms. (*Id.* at pg. 5.) These physical symptoms were later determined to be unrelated to the Site 10 application. (Commissioner Decision at pg. 6.) The Holders did not report feeling any drift on their persons. (County Exhibit 5 at pg. 5.)

M. Haskell and B. Owen interviewed M. Slikker of Vince Dusters. M. Slikker stated that during the Site 10 application, Vince Dusters used a spotter who determined that there were no bystanders in the vicinity of the application. M. Slikker stated that the Vince Dusters pilot who performed the Site 10 application reported that the wind was blowing away from the Holder Property at the time of the application: "out of the northwest at 3 miles per hour." (County Exhibit 5 at pg. 4.)

M. Haskell and B. Owen collected two (2) samples from the Holder Property and analyzed them for pesticide residue. The sample taken from an ornamental tree located inside the fence surrounding the Holder residence facing Buttonwillow Drive tested positive for Mancozeb, the active ingredient in Gavel 75DF. (County Exhibit 10.) M. Haskell and B. Owen reviewed local pesticide use reports. Aside from Vince Dusters' Site 10 application, M. Haskell and B. Owen found only one (1) other application of any product containing Mancozeb within a one (1) mile radius of the Holder Property in the prior month. On April 16, 2016, Jerry Slough Farming Co. applied a product containing Mancozeb to a property 0.7 miles from the Holder Property. (County Exhibit 8.)

On November 18, 2016, the Commissioner issued a Notice of Proposed Action (NOPA), charging Vince Dusters with violating 3 CCR § 6600(b) for failing to perform pest control in a careful and effective manner by allowing pesticide to drift off-target to a residential property. Vince Dusters requested a hearing. On January 11, 2017, the hearing was held in Bakersfield, California before Donald O. Cripe, 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 upheld the violation, fine classification, and fine amount charged in the NOPA.

Appellant's Allegations

Appellant argues that the Commissioner relied on evidence that is not in the record, and failed to properly consider evidence presented at the hearing. Appellant does not challenge the Commissioner's decision to classify the violation as a Class A violation or the penalty amount.

The Director's Analysis

- A. The Commissioner's decision that appellant violated 3 CCR § 6600(b) is supported by substantial evidence in the record.**

The Commissioner adopted the hearing officer's decision that appellant violated 3 CCR § 6600(b) by allowing pesticide to drift off-target to the Holder Property. In reaching this decision, the hearing officer relied primarily on the positive Mancozeb sample taken from the Holder Property. In the decision, the hearing officer states that:

"The COUNTY'S case is based on the positive sample... The case is based on COUNTY'S conclusion that the positive foliage sample is the result of offsite movement during RESPONDENT'S application of Mancozeb to Cauzza Brothers tomato site No. 10."

(Commissioner Decision at pg. 6.) The positive Mancozeb sample, together with several other facts, provides substantial evidence to support the conclusion that appellant violated 3 CCR § 6600(b). The county investigation found that in the month preceding the Site 10 application, the only other application of a product containing Mancozeb within a one (1) mile radius of the Holder Property was a ground application made more than three (3) weeks earlier and 0.7 miles away. (County Exhibit 8.) The hearing officer found that Vince Dusters' application was "the more likely cause" of the Mancozeb drift. (Commissioner Decision at pg. 3.) In addition, the Holders stated in the PEIR that the wind was blowing towards their residence at the time of the application. (County Exhibit 5 at pg. 3.)

While the hearing officer found that the physical symptoms reported by the Holders were not caused by the application, he found that the reported pesticide smell and taste were "consistent with" a pesticide drift. (Commissioner Decision at pg. 7.) Appellant argues that the hearing officer's finding with respect to the reported pesticide smell and taste impermissibly relies on evidence that is not in the record. Specifically, appellant argues that the County failed to include any evidence in the record about "what the taste of Mancozeb would be." In this case, the record supports the finding that the violation occurred independent of whether or not the Holders smelled or tasted pesticide. As such, the argument is irrelevant.

B. The Commissioner properly considered evidence presented by the appellant.

Appellant argues that the Commissioner failed to adequately consider certain evidence presented at the hearing. Appellant argues that the decision "ignored...evidence to explain the travel of material, well after the safe application." At the hearing, appellant presented a theory explaining the positive Mancozeb sample taken from the Holder Property. Appellant argued that the application to Site 10 was made carefully, and that the pesticide was carried off-target *post*-application either by a dust devil or passing vehicle.

The hearing officer did not "ignore" this argument. In fact, the hearing officer explicitly compared the likelihood that drift occurred during or post-application and found that "[it] is more likely than not that a small residue would result from a whole field application than from smaller

amounts over several days.” (Commissioner Decision at pg. 7.) This finding was adopted in the Commissioner’s decision and the appellant provided no grounds for reversal.

Appellant similarly argues that the Commissioner did not adequately consider the post-application drift argument by failing to collect a USB stick containing appellant’s PowerPoint presentation on post-application drift that was shown at the hearing. The hearing officer viewed the PowerPoint presentation during the hearing and properly considered appellant’s post-application drift argument. (Hearing Transcript at 51:33.)

Appellant argues that the Commissioner failed to explain “how only one sample out of two was positive.” As discussed above, the combination of facts cited in the Commissioner’s decision provides substantial evidence that the violation occurred. The county was only required to show that drift occurred on some part of the Holder Property. It is irrelevant that one of the samples taken from a different location on the property tested negative for Mancozeb.

Finally, appellant argues that the stipulations reached by the parties in the prehearing conference “are not attached to the Hearing Decision as stated.” The stipulations were entered into the record by the hearing officer at the hearing. (Hearing Transcript at 1:26.) As stated above, there is substantial evidence in the record to prove that the violation occurred.

C. Appellant does not challenge the Commissioner’s decision to designate the violation as a Class A violation or the fine amount.

In enforcement actions taken pursuant to FAC § 12999.5, violations are designated as Class “A,” “B,” or “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 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 with respect to the imposition of civil penalties within the corresponding fine range. Here, the Commissioner determined that appellant created a health hazard—a risk of harm to human health—by allowing pesticide to drift to an off-target residential property. The Commissioner imposed a civil penalty of \$2,000—an amount within the corresponding fine range—based on appellant’s history of pesticide use violations. (County Exhibit 23.) Appellant does not challenge either the fine classification or the amount.

Conclusion

The Commissioner’s decision that appellant Vince Dusters violated 3 CCR § 6600(b) is affirmed. The fine of \$2,000 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify appellant Vince Dusters of how and when to pay the \$2,000 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: APR 24 2017

By: 
Brian Leahy, Director