

**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 Santa Barbara
(County File No. 16-ACP-SB-19/20)

Administrative Docket No. 219

DIRECTOR'S DECISION

**Chalky Ridge Vineyard Management
P.O. Box 190
Arroyo Grande, CA 93421**

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 a penalty, commissioners must follow the fine guidelines established in California Code of Regulations, title 3, section 6130 (3 CCR section 6130), and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

The Santa Barbara County Agricultural Commissioner (Commissioner) issued a Notice of Proposed Action on December 6, 2019 and provided a hearing on March 4, 2020. Following the hearing, the Commissioner fully adopted the Hearing Officer's proposed decision that Chalky Ridge Vineyard Management (Appellant) violated California Code of Regulations, title 3, section 6614, subdivision (a) (3 CCR section 6614(a)) by failing to adequately assess the neighboring property to determine the likelihood of harm or damage. The Commissioner classified the violation as a Class A violation and levied a \$700 fine.

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.

If the Director finds substantial evidence in the record to support the Commissioner's decision, the Director affirms the decision. The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions could also be 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.

Factual Background

Appellant is a licensed pest control company that oversees all aspects of pest management including all pesticide applications, at Fiddlesticks, LLC, dba Fiddlestix Vineyard (Fiddlestix). (Testimony of G. Gamache.) Beginning on May 23, 2019 and ending May 28, 2019, Appellant applied *Rally 40 WSP*, EPA Registration Number 62719-410, to wine grapes at Fiddlestix. (Stipulation 6; County Exhibit 4.) The active ingredient in *Rally 40 WSP* is myclobutanil. (Stipulation 4.) Beginning on June 12, 2019 and ending on June 15, 2019, Appellant applied *Flint Extra*, EPA Registration Number 264-826, to Fiddlestix. (Stipulation 6; County Exhibit 4.) The active ingredient in *Flint Extra* is trifloxystrobin. (Stipulation 4.) Appellant applied *Rally 40 WSP* and *Flint Extra* to the vineyard using a CIMA airblast sprayer towed by a tractor. (Stipulation 7; Testimony of C. Burd and G. Gamache.)

Applicators employed by Appellant attend outside training on handling pesticides. (Stipulation 8.) Applicators also receive internal training on how to calibrate sprayers, proper personal protective equipment, and how to record application specific information. (Testimony of G. Gamache.) Appellant performs routine maintenance on all application equipment, including inspecting and replacing spray nozzles to ensure they are appropriate for the particular chemical to be applied. (Testimony of G. Gamache.) Appellant also requires applicators complete a pre-application checklist that includes inspecting the spray nozzles prior to each application. (Testimony G. Gamache.)

Dr. Garrett Gamache, the vineyard manager, monitors meteorological conditions prior to and during all pesticide applications using a weather station located at Fiddlestix. (Testimony of G. Gamache.) When wind speeds exceed seven miles per hour, the weather station alerts Dr. Gamache and in turn, Dr. Gamache notifies applicators by either radio or physically going to the application site. (Testimony of G. Gamache.) Applicators do not have real time access to the weather station information. (Stipulation 8.) Applicators monitor the wind speed and direction during pesticide applications using ribbons/tape attached to their tractors and using the wind/fog on face technique. (Stipulation 8.) Applicators have authority to stop a pesticide application if the weather conditions are unfavorable. (Stipulation 8.) Applicators do not have access to a windsock or an anemometer during the pesticide application. (Stipulation 8; Testimony of G. Gamache.) The applicators did not notice that it was windy during the June 12,

2019 application. (Stipulation 8.)

Fiddlestix is located approximately 150 feet south of Central Coast Agriculture. (Testimony of D. Trupe.) There is no fence, hedge, or other physical barrier between Fiddlestix and Central Coast Agriculture. (Testimony of H. Heath and M. Marrero.) Central Coast Agriculture grows cannabis in hoop houses. (Testimony of C. Burd.) The hoop houses are made of plastic and have windscreens at the ends to protect the cannabis from pesticide contamination. (Testimony of C. Burd.) Central Coast Agriculture began growing cannabis at this location in March 2019. (Testimony of C. Burd.) It is illegal to distribute inhalable processed cannabis in California containing myclobutanil or trifloxystrobin residue above 0.1 µg/g. (Cal. Code Regs., tit 16, § 5719; Testimony of C. Burd.) Appellant and Central Coast Agriculture did not converse prior to the June 12, 2019 pesticide application. (Testimony of C. Burd and G. Gamache.) Appellant was unaware that cannabis is subject to mandatory testing and that it cannot be distributed if it tests positive for myclobutanil or trifloxystrobin. (Testimony of G. Gamache.)

On June 12, 2019, the Commissioner received a complaint from Central Coast Agriculture regarding a pesticide application at Fiddlestix. (County Exhibit 4.) On June 13, 2019, the Commissioner took foliage samples at Fiddlestix and Central Coast Agriculture. (County Exhibit 4; Testimony of H. Heath and M. Marrero.) All of the foliage samples tested positive for myclobutanil and trifloxystrobin. (County Exhibit 8.) The Commissioner took swab samples from the side of Central Coast Agriculture's hoop house 9 and 10, which faced Fiddlestix. (County Exhibit 8; Testimony of H. Heath.) Both of the swab samples were negative for myclobutanil and trifloxystrobin. (County Exhibit 8.)

Central Coast Agriculture tested one sample of cannabis oil for pesticide residue at CannaSafe Laboratory on June 20, 2019. (Testimony of C. Burd.) The cannabis oil was extracted from cannabis grown in hoop house seven. (Testimony of C. Burd.) Cannasafe Laboratory is a private laboratory certified by the Bureau of Cannabis Control. (Testimony of D. Trupe.) The sample had 0.46 µg/g of trifloxystrobin residue. (Testimony of C. Burd; County Exhibit 7.) On July 30, 2019, Central Coast Agriculture tested five more samples of cannabis oil at CannaSafe Laboratory. (Testimony of C. Burd; County Exhibit 7.) The samples had 0.24, 0.09, 0.26, 0.23, and 0.10 µg/g of trifloxystrobin, respectively. (County Exhibit 7.) No other applications of myclobutanil or trifloxystrobin were reported to the Commissioner's Office within a quarter mile of Central Coast Agriculture in June 2019. (Testimony of H. Heath.)

Relevant Laws and Regulations

California Code of Regulations, title 3, section 6614, subdivision (a) states:

An applicator prior to and while applying a pesticide shall evaluate the equipment to be used, meteorological conditions, the property to be treated and surrounding properties to determine the

likelihood of harm or damage.

California Code of Regulations, title 3, section 6130 states:

(a) When taking civil penalty action on incidents or violations related to agricultural or structural use of pesticides and all uses of fumigants pursuant to section 12999.5 of the Food and Agricultural Code, county agricultural commissioners shall use the provisions of this section to determine the violation class and the fine amount. This section may also be used to determine the violation class and fine amount for violations involving other uses of pesticides.

(b) County agricultural commissioners shall designate violations as “Class A,” “Class B,” or “Class C” using the following definitions:

(1) 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 allow a lawful inspection; or,

3. The respondent demonstrated a disregard for 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.

...

(c) The fine range for each class of violation is:

(1) Class A: \$700 to \$5,000.

(2) Class B: \$250 to \$1,000.

(3) Class C: \$50 to \$400.

Appellant’s Contentions on Appeal

Appellant argues the following on appeal:

1. The Hearing Officer misapplied the law by evaluating whether Appellant contaminated a cannabis crop.
2. Prior inspections demonstrate that Appellant complied with 3 CCR section 6614(a).
3. Appellant did not receive a fair and equitable hearing due to a conflict of interest.

The Hearing Officer's Proposed Decision

The Hearing Officer determined based on a preponderance of the evidence that Appellant violated 3 CCR section 6614(a) by failing to adequately assess the neighboring property to determine the likelihood of harm or damage. There was no physical barrier between Central Coast Agriculture and Fiddlestix to minimize the likelihood of harm. Moreover, Appellant had not had any discussions with Central Coast Agriculture since Central Coast Agriculture began growing cannabis adjacent to Fiddlestix, and Dr. Gamache did not know cannabis is subject to mandatory testing for certain chemicals prior to distribution. The Hearing Officer specifically noted Central Coast Agriculture's recent arrival to the area should have highlighted Appellant's need to adequately assess the neighboring property.

The Hearing Officer determined the penalty was properly classified as a Class A violation because Appellant's failure to evaluate the surrounding property resulted in actual damage to the crops on the neighboring property. The Hearing Officer found the Commissioner's proposed fine of \$700 was properly within the fine range for a Class A violation.

The Director's Analysis

- A. Substantial evidence supports the Commissioner's decision that Appellant did not evaluate the surrounding property to determine the likelihood of harm or damage, as required by 3 CCR section 6614(a).

Appellant does not raise this issue on appeal. However, there is substantial evidence in the record to support the Commissioner's decision. California Code of Regulations, title, 3, section 6614(a) requires applicators to evaluate the application equipment, meteorological conditions, the property to be treated and surrounding properties prior to and during an application to determine the likelihood of harm or damage. Appellant's evaluation of Fiddlestix, the property to be treated, was not at issue in this matter.

The Hearing Officer found Appellant evaluated its equipment prior to and during its June 2019 applications of *Flint Extra*. Dr. Gamache testified during the hearing that he regularly evaluates the application equipment to ensure it is in good working order and calibrated for the

specific chemical to be applied. Dr. Gamache also testified that applicators' pre-application checklist requires them to evaluate the application equipment and a maintenance crew regularly inspects tractors and application equipment. The Commissioner presented evidence questioning the appropriateness of the application equipment and resulting spray droplet size. However, Appellant's application equipment is the industry standard. (Testimony of G. Gamache.) Moreover, 3 CCR section 6614(a) only requires Appellant evaluate its application equipment; it does not mandate that Appellant utilize a particular type of application equipment. Accordingly, substantial evidence in the record supports the Hearing Officer's determination that Appellant properly evaluated its equipment prior to and during its June 2019 pesticide applications.

The Hearing Officer also found Appellant evaluated the meteorological conditions prior to or during the applications at issue. Appellant's tractor had tape/ribbons, which allow applicators to monitor the wind during an application. (Stipulation 8.) Additionally, one of Appellant's applicators stated he monitors the wind during applications using the wind/fog to face technique. (Stipulation 8.) Appellant's applicators received training and were authorized to stop any application that had unfavorable meteorological conditions. (Stipulation 8.) Appellant also continuously monitors meteorological conditions via a weather station located at Fiddlestix. (Testimony of G. Gamache.) The weather station alerts Dr. Gamache if the wind speed exceeded seven miles per hour and Dr. Gamache in turn notifies the applicators. (Testimony of G. Gamache.) Therefore, substantial evidence in the record demonstrates Appellant evaluated the meteorological conditions prior to and during the applications at issue.

Finally, the Hearing Officer found Appellant did not evaluate the surrounding properties prior to and during the applications at issue. Appellant and Central Coast Agriculture never discussed Appellant's applications of pesticides with the active ingredients myclobutanil or trifloxystrobin prior to June 12, 2019. (Testimony of C. Burd and G. Gamache.) Moreover, Dr. Gamache testified he did not know cannabis is subject to testing for myclobutanil and trifloxystrobin prior to distribution and sale in California. Understanding cannabis is subject to mandatory testing for myclobutanil and trifloxystrobin is critical to evaluating the likelihood of harm or damage that Appellant's applications pose to Central Coast Agriculture, especially since there was no physical barrier between the properties. During the hearing Dr. Gamache stated he did evaluate the surrounding property prior to and during the pesticide applications at issue. However, he did not elaborate on his evaluation or provide any evidence to support this assertion. He also did not provide any evidence to support his assertion that Central Coast Agriculture's security guards rebuffed his attempts to contact Central Coast Agriculture prior to the June 2019 pesticide applications. Accordingly, there is substantial evidence to support the Hearing Officer's determination that Appellant did not evaluate the surrounding property prior to or during the application to determine the likelihood of harm or damage.

- B. The Hearing Officer correctly analyzed Appellant's compliance with 3 CCR section 6614(a) despite adding references to cannabis to a statement of the issues.

Appellant asserts the Hearing Officer misstated the law by adding a requirement to

3 CCR section 6614(a) that Appellant's failure to evaluate caused contamination to surrounding property and a cannabis crop loss to occur. The Director agrees any contamination to the surrounding property and cannabis crop loss is irrelevant to determining whether Appellant violated 3 CCR section 6614(a). However, the Director finds the addition of these references to the issue statement on page 3 of the Proposed Decision was immaterial to the Hearing Officer's overall decision.

The Hearing Officer referenced causing contamination and a cannabis crop loss one time in the Proposed Decision when outlining the two issues to be addressed. The Hearing Officer did not mention requiring contamination to or loss of cannabis in any other reference to 3 CCR section 6614(a). On page 2 of the Proposed Decision, the Hearing Officer accurately stated in part, the purpose of the hearing was to determine if there was sufficient evidence to prove Appellant committed the violation alleged in the Notice of Proposed Action and the Notice of Proposed Action explicitly alleged Appellant violated 3 CCR section 6614(a). (Proposed Decision, page 1; County Exhibit 2.) The Hearing Officer also correctly analyzed Appellant's compliance with 3 CCR section 6614(a) in the "Discussion" section of the Proposed Decision. (Proposed Decision, pages 5-8.) The only other mention of a cannabis loss in the Proposed Decision was in the "Discussion" section, where the Hearing Officer stated the reported amount of cannabis loss was irrelevant. (Proposed Decision, page 6.) Finally, even though the Hearing Officer imprecisely described the first issue to be addressed in the Proposed Decision, the Hearing Officer made the following determination for this issue:

I find that there was a violation of California Code of Regulations Section 6614(a) based upon the fact that Chalky Ridge Vineyard Management failed to adequately assess the neighboring property to determine the likelihood of harm or damage.
(Proposed Decision, Page 8.)

This determination does not reference cannabis contamination or cannabis loss. Accordingly, the Hearing Officer's imprecise characterization of 3 CCR section 6614(a) when summarizing the first issue to be addressed is immaterial.

C. Evidence of past compliance with 3 CCR section 6614(a) does not demonstrate compliance with 3 CCR section 6614(a) on June 12, 2019.

On May 24, 2019, Inspector Heath conducted a random inspection of an application by Appellant at Fiddlestix. (Testimony of H. Heath.) Inspector Heath found no violations during this inspection. (Testimony of H. Heath.) However, Appellant's compliance with 3 CCR section 6614(a) on May 24, 2019 does not demonstrate Appellant's compliance with 3 CCR section 6614(a) on June 12, 2019.

While the application equipment, property to be treated, and surrounding property may

have been the same on both May 24, 2019 and June 12, 2019, the likelihood of harm and damage to the surrounding property was not necessarily the same on these two dates. The likelihood of harm or damage depends on many application-specific factors, including but not limited to, the chemical being applied, the weather conditions, the proximity of the application to the surrounding property, and the crops being grown on surrounding properties. Therefore, evidence that Appellant complied with 3 CCR section 6614(a) on one day does not demonstrate compliance with 3 CCR section 6614(a) on a different day when the application-specific factors could result in a greater likelihood of harm or damage to the surrounding property.

Moreover, 3 CCR section 6614(a) requires Appellant to monitor the conditions prior to and during the pesticide application since conditions can change in a short amount of time. Accordingly, Appellant's evaluation of neighboring property on May 24, 2019 does not fulfill Appellant's requirement to regularly evaluate the surrounding property to assess the likelihood of harm or damage prior to and during all subsequent applications.

D. Appellant received a fair and equitable hearing.

Central Coast Agriculture's Managing Member, John De Friel is a member of the Santa Barbara County Agricultural Advisory Committee. The Commissioner and the Commissioner's advocate provide administrative support to the Santa Barbara County Agricultural Advisory Committee. Appellant asserts it did not receive a fair and equitable hearing due to the existence of this working relationship,

Government Code section 11425.10 outlines the governing procedures for an administrative hearing. Section 11425.10 specifically requires the presiding officer of an administrative hearing be unbiased, not prejudicial and not have a conflict of interest. (Gov. Code, § 11425.10, subd. (a)(4).) It also requires the adjudicative functions be separated from the investigative, prosecutorial, and advocacy functions. (*Id.*, § 11425.10, subd. (a)(5).) Government Code section 11425.10 does not require the presiding officer or a person involved in the investigative, prosecutorial, and advocacy functions have no relationship whatsoever to an interested party.

The presiding officer in this matter was the Hearing Officer. Appellant did not assert at the hearing and does not assert now on appeal that the Hearing Officer was biased, prejudiced or had a conflict of interest. Appellant also did not assert at the hearing and does not assert now on appeal that the Commissioner's Office failed to properly separate the adjudicative functions from the investigative and prosecutorial functions on this matter.

Appellant acknowledges the Commissioner was not the presiding officer in this matter, but highlights the Commissioner signed and issued the Notice of Proposed Action. While the Commissioner may have signed and issued the Notice of Proposed Action, Appellant did not present any evidence or authority regarding why this violated Appellant's due process and

prevented Appellant from receiving a fair and equitable hearing before the unbiased Hearing Officer.

Appellant also asserts the Commissioner's Advocate regularly reported to the Santa Barbara County Agricultural Advisory Committee on matters related to her role on the Cannabis/Ag Working Group. However, again, besides generally stating the Commissioner's Advocate supports and works with the Cannabis/Ag Working Group and the Santa Barbara County Agricultural Advisory Committee, Appellant does not present any evidence demonstrating why this working relationship prevented Appellant from receiving a fair and equitable hearing before the unbiased Hearing Officer on this particular matter. As Appellant failed to present any evidence demonstrating a potential violation of Appellant's due process rights, the Director finds the general existence of a working relationship between the Commissioner, the Commissioner's Advocate, and an interested party did not prevent Appellant from receiving a fair and equitable hearing in this matter.

E. The Commissioner's decision to classify the violation as a Class A violation and fine Appellant \$700 was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in 3 CCR section 6130. A Class A violation is a violation of law or regulation that causes a health, property, or environmental hazard. (Cal. Code of 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)(1).) Appellant does not contest the fine classification or amount on appeal. Accordingly, the Director upholds the Class A violation classification and the \$700 fine amount.

Conclusion

The Commissioner's decision that Appellant violated 3 CCR section 6614(a) and the violation qualified as a Class A violation is affirmed. The fine of \$700 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant of how and when to pay the \$700 fine.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant Sharma 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: _____ By: Val Dolcini
Val Dolcini, Director