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**COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON**

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LENARD BEIERLE and AG AIR FLYING SERVICE, INC., a  
Washington Corporation,

Appellant,

v.

WASHINGTON STATE DEPARTMENT OF AGRICULTURE,

Respondent.

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**RESPONDENT WASHINGTON STATE DEPARTMENT OF  
AGRICULTURE'S RESPONSE BRIEF**

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## I. INTRODUCTION

Pesticides are a useful but dangerous tool in Washington agriculture, especially when applied from the air. To engage in the business of applying pesticides, one must comply with the comprehensive regulatory program the Legislature and the Department of Agriculture (Department) implemented to protect the public from the risks of pesticide use. Central to this case, an applicator must not apply pesticides contrary to or inconsistently with legally mandated labeling, RCW 15.58.150(2)(c), or in a manner that causes injury to or endangers humans, or endangers the environment. WAC 16-228-1200(1), WAC 16-228-1220(2).

In August 2014, Appellant Lenard Beierle, the owner of Ag Air Flying Service, Inc. (Beierle), failed to meet his legal obligations as a licensed commercial pesticide applicator when he sprayed by airplane a mix of hazardous restricted use pesticides over a potato field and the pesticides drifted away and enveloped more than 60 farmworkers tending apple trees in a nearby orchard, causing them to become ill. The Department conducted a thorough investigation, and notified Beierle of his violations. Following an administrative hearing presided over by an Administrative Law Judge (ALJ), the Director of the Department (Director) issued a Final Order imposing a \$550 civil penalty and a nine-day license suspension. Because substantial evidence gathered through a

comprehensive investigation supports the Director's findings of fact, and the Director properly concluded that Beierle's actions violated the law, the Department respectfully asks the Court to affirm the Director's Final Order.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Is the Final Order supported by substantial evidence, including the totality of the evidence presented to the ALJ and the Director?

2. Did the Director correctly apply the law to the facts, which were supported by substantial evidence, when he concluded that Beierle violated RCW 15.58.150(2)(c), WAC 16-228-1200(1), and WAC 16-228-1220(2)?

## **III. STATEMENT OF THE CASE**

Lenard Beierle holds a Commercial Pesticide Applicator license issued by the Department under the authority of the Washington Pesticide Application Act (RCW 17.21) and owns and operates Ag Air Flying Service, Inc. On the morning of August 27, 2014, Beierle applied pesticides from a fixed wing airplane to 114 acres of potatoes located near Mattawa, Washington (Clerks Papers (CP) 1696, 1698). Beierle applied a pesticide with the active ingredient of lambda-cyhalothrin, trade name "Mana Silencer," to the potato field (CP 1696-98). For the application,

Beierle mixed the lambda-cyhalothrin with a surfactant (wetting agent), with the active ingredient alcohol ethoxylate, trade name “ORO WETCIT” (CP 1698).

About 60 farmworkers employed by Ag Management Group, LLC, were working in an apple orchard on the morning of August 27, 2014 (CP 1015, 1698). The apple orchard is located approximately 0.6 miles west of the potato field (CP 1698). At about 8:00 a.m. on that morning, some of the farmworkers observed an airplane flying overhead (CP 715-16, 724, 779-83, 796-98, 818-19). Shortly after they saw the airplane, the same farmworkers smelled a strong odor and started to experience physical symptoms including itchy nose/throat/eyes, tingling or numbness on the face/lips, sneezing, runny nose, coughing, shortness of breath, headache, sore throat, upset stomach, nausea, vomiting, diarrhea, and dizziness. (CP 716, 719, 730, 737, 777, 797, 819). Beierle reported the incident to the Department after he was told he sprayed the farmworkers with pesticide, which initiated an investigation (CP 1698-99).

Department Investigator Matt West interviewed a number of the farmworkers, who told him about their observations of the plane and the symptoms they experienced following the attempted application of pesticides to the potato field, as described above (CP 1697-1703, 1705-09). To determine whether drift occurred, Investigator West took samples

from various locations in and around the apple orchard and potato field (CP 1016, 1698). Nearly all of the samples, including those from the apple orchard, tested positive for lambda-cyhalothrin, the pesticide Beierle attempted to spray on the potato field (CP 1710-13). In addition, Investigator West collected pesticide application records from nearby farms and sales records of lambda-cyhalothrin from local dealers. Investigator West found no evidence of any other applications of lambda-cyhalothrin within approximately one mile of the area in the month preceding the application by Beierle (CP 1029-35). Mr. West also collected weather data from nearby recording stations (CP 1702-03, 1051-56), and talked with Beierle extensively about his application and his equipment ( CP 1698-1702).

Based on the information gathered in the course of the investigation, the Department concluded that Beierle's application of lambda-cyhalothrin drifted beyond the potato field and into the apple orchard, contacting the farmworkers, and violating state pesticide laws and Department rules.

The Department issued a "Notice of Intent to Assess a Civil Penalty and to Suspend License and Notice of Rights and Opportunity for Hearing" to Beierle and Ag Air Flying Service, Inc. on April 28, 2015. This Notice of Intent assessed a \$7,500 civil penalty and a license

suspension of 90 days (CP 5-14). Beierle timely requested a hearing, and the Administrative Law Judge (ALJ) held a hearing in Yakima, Washington, December 8-10, 2015, and telephonically on January 4, 2016 (CP 463). The ALJ issued an Initial Order finding Beierle violated RCW 15.58.150(2), WAC 16-228-1200(1), and WAC 16-228-1220(2), and imposing a \$590 civil penalty and a nine-day license suspension (CP 555-574).

Following administrative appeals by both the Department and Beierle, on October 31, 2016, the Director issued the Final Order, which upheld the Initial Order of the ALJ as to both the penalty and findings related to a violation (CP 639-59). On November 29, 2016, Beierle timely filed his Petition for Judicial Review appealing the Director's Final Order in Grant County Superior Court.<sup>1</sup> On May 24, 2018, the Superior Court held a hearing on Beierle's Petition for Judicial Review, and on June 11, 2018, issued an order affirming the Director's Final Order. Beierle timely appealed the Superior Court's order on June 25, 2018.

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<sup>1</sup> On December 2, 2016, Modesta Arista Gomez, Irma Gomez Aguilar, Rocio Gomez, Maria Gonzalez, Alfredo Calderon Sanchez, Lourdes Camacho, and Florencia Aguilar, filed a Petition for Review (Gomez Petition) in Thurston County Superior Court, Thurston County Cause No. 16-2-04823-34, appealing the same Final Order as Petitioner in the Grant County action. These individuals were among the 66 farm workers affected by Petitioner's application and appeared as witnesses in the administrative hearing. The Gomez Petition named the Department, the Director, Lenard Beierle, and Ag Air Flying Services, Inc. as Respondents. Hearing on this Petition for Judicial Review is presently set for hearing in front of the Honorable John Skinder on November 2, 2018.

#### IV. STANDARD OF REVIEW

The Washington Administrative Procedure Act (APA), RCW 34.05, governs judicial review of government agency decisions. RCW 34.05.570; *Ryan v. Dep't of Social & Health Servs.*, 171 Wn. App. 454, 465, 287 P.3d 629 (2012), (citing *Postema v. Pollution Control Hearings Bd.*, 142 Wn.2d 68, 11 P.3d 726 (2000)). The Appellant has the burden of demonstrating the invalidity of the agency action. RCW 34.05.570(1).

The Court of Appeals “sits in the same position as the superior court and applies the APA standards directly to the record before the agency,” *King Cty. Pub. Hosp. Dist. No. 2 v. Wash. State Dep't of Health*, 178 Wn.2d 363, 372, 309 P.3d 416 (2013), (citing *Tapper v. Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494 (1993)), and reviews questions of fact under the "substantial evidence" standard. RCW 34.05.570(3)(e). Under the substantial evidence standard, the Court of Appeals may only grant relief where the "person seeking judicial relief has been substantially prejudiced by the action" of the agency. RCW 34.05.570(1)(d); *see also Densley v. Dep't of Ret. Sys.*, 162 Wn.2d 210, 217, 173 P.3d 885, 888 (2007). “A superior court's findings are not relevant in appellate review of an agency action” unless the superior court received additional evidence

under the APA. *Seattle Bldg. & Constr. Trades Council v. Apprenticeship & Training Council*, 129 Wn.2d 787, 799, 920 P.2d 581, 586 (1996).

The reviewing court may only grant relief when the agency's decision “is not supported by evidence that is substantial when viewed in light of the whole record before the court.” RCW 34.05.570(3)(e). *See also Beatty v. Wash. Fish & Wildlife Comm'n*, 185 Wn. App. 426, 449, 341 P.3d 291, 304 (2015). The substantial evidence standard is satisfied if the record contains evidence in sufficient amount to persuade a fair-minded person of the truth of the finding. *Heinmiller v. Dep't of Health*, 127 Wn.2d 595, 607, 903 P.2d 433 (1995), amended at 909 P.2d 1294 (1996), *cert. denied* 518 U.S. 1006, 116 S. Ct. 2526, 135 L. Ed. 2d 1051 (1996); *In re Elec. Lightwave, Inc.*, 123 Wn.2d 530, 542-43, 869 P.2d 1045, 24 (1994). The court does not need to be “persuaded of the truth or correctness of an order,” only that “any fair-minded person could have ruled as” the agency did “after considering all of the evidence.” *Callecod v. Wash. State Patrol*, 84 Wn. App. 663, 676 n.9, 929 P.2d 510 (1997).

The substantial evidence standard is highly deferential to the agency factfinder, *Arco Prods. Co. v. Utils. & Transp. Comm'n*, 125 Wn.2d 805, 812, 888 P.2d 728 (1995), and requires a reviewing court to view evidence in the light most favorable to the prevailing party in the highest administrative fact finding forum below. *Spokane Cty. v. E. Wash.*

*Growth Mgmt. Hearings Bd.*, 176 Wn. App. 555, 565, 309 P.3d 673, 678 (2013), (citing *City of Univ. Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001)). A reviewing court gives deference to the factfinder regarding witness credibility or conflicting testimony, *Affordable Cabs, Inc. v. Dep't of Emp't Sec.*, 124 Wn. App. 361, 367, 101 P.3d 440, 443 (2004), and gives the same deference to the agency's factual findings as an appellate court would afford to a superior court's factual findings. *Motley-Motley, Inc. v. State*, 127 Wn. App. 62, 72, 110 P.3d 812, 818 (2005), (citing *King Cty. v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 553, 14 P.3d 133 (2000), and *Snohomish Cty. v. Hinds*, 61 Wn. App. 371, 378-79, 810 P.2d 84 (1991)). A reviewing court does not weigh the evidence or substitute its judgment. *Phoenix Dev., Inc. v. City of Woodinville*, 171 Wn.2d 820, 831-32, 256 P.3d 1150 (2011). The court must confine its review to the agency record unless RCW 34.05.562(1) allows it to go beyond the record below. *US West Commc'ns, Inc. v. Utils. & Transp. Comm'n*, 134 Wn.2d 48, 72, 949 P.2d 1321 (1997). Unchallenged findings are verities on appeal. *Hilltop Terrace Homeowner's Ass'n. v. Island Cty.*, 126 Wn.2d 22, 30, 891 P.2d 29 (1995).

Mixed questions of law and fact require the application of legal precepts to factual circumstances. *Tapper v. State Emp't Sec. Dep't*, 122 Wn.2d 397, 402, 858 P.2d 494, 497 (1993). “Factual findings made by the

agency are entitled to the same level of deference which would be accorded under any other circumstance . . . [t]he process of applying the law to the facts, however, is a question of law and is subject to de novo review.” *Id.*

Alleged errors of law are reviewed de novo. *Ames v. Wash. State Health Dep’t Med. Quality Health Assurance Comm’n*, 166 Wn.2d 255, 260, 208 P.3d 549 (2009). Although the court may substitute its judgment for that of an administrative agency, the court accords substantial weight to the agency’s interpretation of the law it administers—especially when the issue falls within the agency’s expertise. *Id.* at 260-61. The Courts also give substantial weight to an agency’s interpretation of its own regulations when the interpretation falls within the agency’s expertise. *Hospice of Spokane v. Wash. State Dep’t of Health*, 178 Wn. App. 442, 448, 315 P.3d 556 (2013), (citing *Children’s Hosp. & Med. Ctr. v. Dep’t of Health*, 95 Wn. App. 858, 864, 975 P.2d 567 (1999)), (quoting *Purse Seine Vessel Owners Ass’n v. Dep’t of Fish & Wildlife*, 92 Wn. App. 381, 389, 966 P.2d 928 (1998)).

## V. ARGUMENT

State statute and Department rule makes it a violation of the law to apply pesticides in a manner inconsistent with their labeling and in a manner that endangers or injures humans or the environment.

RCW 15.58.150(2)(c), WAC 16-228-1200(1), and WAC 16-228-1220(2). Beierle attempted to apply pesticides to a potato field, but those pesticides drifted onto farmworkers in an apple orchard, in violation of those laws. The evidence gathered through an extensive investigation led to this conclusion. The Department attempted to find a plausible alternative explanation for the presence of the pesticide in the apple orchard and on the clothing of the farmworkers, but could find none. Substantial evidence supports the Director's findings, and the Director's conclusions are free from error. This court should affirm.

**A. The Findings of Fact that the Appellant does not Contest are Verities on Appeal and Support a Violation**

Beierle accepts and does not challenge five key Findings of Fact that were central to the Director's Order. First, he does not challenge the finding that he applied a tank mix of pesticides, including Silencer (active ingredient - lambda-cyhalothrin), to a potato field 2.1 miles east of Mattawa, Washington between approximately 7:55 and 8:37 a.m. on August 27, 2014 (Finding of Fact (FOF) 2, 5, and 11, CP 1791). Second, he does not challenge that the labels for the pesticides in his tank mix that morning indicate that the pesticides, including lambda-cyhalothrin, are hazardous to humans and domestic animals (FOF 12, 13). Third, Beierle does not challenge the Director's finding that there were no other pesticide

applications of lambda-cyhalothrin in the one-mile radius of the apple orchard during August 2014, before Beierle's pesticide application on August 27, 2014 (FOF 20). Fourth, he does not challenge the Finding that the only purchase of a product containing lambda-cyhalothrin in August 2014, within a one-mile radius of the apple orchard was the sale to Beierle for the August 27, 2014 application to the potato field (FOF 21). Finally, Beierle does not contest the Director's findings that the samples from the apple orchard taken by Beierle and the Department tested positive for lambda-cyhalothrin (FOF 32 and 39<sup>2</sup>). These findings, and any other findings not specifically challenged, are verities on appeal. *Hilltop Terrace*, 126 Wn.2d at 30. These five uncontested facts strongly support the conclusions of law that Beierle violated the pesticide application laws.

Further, while Beierle challenges Finding of Fact 16, which relates to the farmworkers seeing the airplane, smelling the odor, and experiencing symptoms, he fails to provide any substantive argument in support of his assignment of error. "A party abandons assignments of error to findings of fact if it fails to argue them in its brief." *Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 630, 733 P.2d 182, 188 (1987);

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<sup>2</sup> While Beierle's Brief incorrectly labels Finding of Fact 36 as "Finding of Fact 39" in his argument, the substantive argument in this section relates to Finding of Fact 36. Nowhere in his briefing does Beierle discuss or challenge Finding of Fact 39.

RAP 10.3(a)(5)-(6). The finding is therefore functionally uncontested. Additionally, Beierle challenges Conclusion of Law 15, but fails to challenge several of the findings of fact supporting the conclusion of law, including that the samples tested by the Department and Anatek labs tested positive for lambda-cyhalothrin and that the only purchase of a product containing lambda-cyhalothrin in August 2014 within a one-mile radius of the apple orchard was the sale to Beierle (FOFs 32, 36, 20), and fails to argue Finding of Fact 16. That leaves most of the findings underlying Conclusion of Law 15 unchallenged, with the exception of challenged Finding of Fact 25.

**B. Substantial Evidence Supports the Director's Final Order**

Substantial evidence supports the Director's Final Order. The Department provided extensive documentary evidence and sworn testimony detailing its thorough investigation of the incident. Samples from the ground in the area where the pesticide contacted the farmworkers in the orchard, as well as samples from the workers' clothing, indicated the presence of lambda-cyhalothrin (CP 1763-90). Numerous farmworkers experienced symptoms, which coincided in time and place with the presence of Beierle's airplane. At least five witnesses testified that they went to the health clinic following their exposure on August 27, 2014, and received some treatment for their symptoms (CP 717, 777-78, 799-800,

823, 835). The Washington State Department of Health conducted an independent investigation and found that 66 workers had confirmed pesticide-related illness (CP 1046-48, 1704-05).

The Department eliminated any other potential source of exposure, including use in the workers' homes (CP 1043-46). Beierle does not dispute that he was spraying lambda-cyhalothrin the same morning that the farmworkers experienced their symptoms (FOF 2, CP 1791). The overwhelming evidence in the record shows that the farmworkers experienced symptoms consistent with the human health warnings on the pesticide labels for the product containing lambda-cyhalothrin sprayed by Beierle (CP 1721-1753).

Substantial evidence supports the challenged findings of fact as well as the challenged findings of fact contained in the conclusions of law in the Director's Final Order. The APA directs a reviewing court to consider all of the evidence in the record when making a decision under the substantial evidence standard. A reviewing court can only grant relief when the agency's decision "is not supported by evidence that is substantial when viewed *in light of the whole record before the court.*" RCW 34.05.570(3)(e) (Emphasis added). The whole record, including both circumstantial and direct evidence, supports the Director's findings of fact. In considering evidence, "circumstantial evidence is as good as direct

evidence.” *Rogers Potato Serv., L.L.C. v. Countrywide Potato, L.L.C.*, 152 Wn.2d 387, 391, 97 P.3d 745, 747 (2004), (citing *State v. Gosby*, 85 Wn.2d 758, 766-67, 539 P.2d 680 (1975)). A review of the entire agency record before this Court on appeal from the Director clearly supports a finding in favor of the Director under the substantial evidence standard.

**1. Substantial Evidence Supports the Director’s Findings of Fact 15, 29, 39, 46, and 48, and the Findings of Fact Contained in Conclusions of Law 15 Concerning the Collection, Testing, and Splitting of Samples**

When considered in light of the whole record, substantial evidence supports the findings made by the Director with respect to the collection, testing, and splitting of samples. During the course of the investigation, Mr. West took foliage samples, samples of the clothes worn by some of the farmworkers, and samples from a truck driven on a road adjacent to both the potato field and apple orchard during Beierle’s application, which the Department tested to determine the presence or absence of pesticides (CP 1016-1020, 1710-13). According to Investigator West’s sworn testimony and the admitted exhibits, all of the samples collected by Investigator West, except one, tested positive for lambda-cyhalothrin (CP 1016-20, 1763-90). The samples produced positive tests for lambda-cyhalothrin on the clothing of three different farmworkers present in the apple orchard on the morning of the incident (CP 1712-13, 1785-90).

Beierle does not contest the portion of the Director's finding that none of the samples were tampered with, improperly handled, or contaminated after the Department collected them (FOF 46).

Investigator West collected samples from where the workers were working when Beierle drifted pesticides on them. Investigator West testified as to the location of the collection of the samples of grass taken from the orchard (CP 1024-26, 1147). Investigator West's testimony at hearing was consistent with both his investigation report and the maps he created as part of the investigation (CP 1700, 1710-13, 1754-57).

Multiple witnesses testified as to the state of the workers' clothes the day of the incident, and that the clothes in question had been freshly laundered or were clean. At least one witness, Guadalupe Gonzales Mendez, testified that the clothes she gave to the Department to test for residue had been freshly laundered at some point before the incident on August 27, 2014 (CP 784). Ms. Gonzales-Mendez's clothes returned positive lab test results for lambda-cyhalothrin (CP 1712-13, 1785-86, 1789-90).

In addition, on August 27, 2014, Mr. West took a swab sample of the windshield of a truck driven by Mr. Alberto Aguilar. Mr. Aguilar reported to Mr. West that Beierle drifted pesticides on his truck while he drove down Road 24 SW. Beierle attempted to discredit the sampling done

on this truck by claiming the sample came from a different truck (CP 1123-24, 1462-63). Beierle supported this assertion at hearing with his own testimony relating to his flight pattern and how droplets fall on a windshield (CP 1477-79). The make of the truck is not a part of either of the Findings of Fact relating to the sampling associated with the truck. Beierle provided no additional evidence that the wrong truck was sampled, other than his own otherwise unsupported assertions during his testimony.

Further, Beierle received split samples of all but three of the Department's samples, which he had tested by Anatek Labs, Inc. Of the samples received by Anatek Labs, all tested positive for lambda-cyhalothrin except one clothing sample (CP 1985-2002). Beierle also collected his own samples for testing at Anatek Labs (CP 1463-68). The results of those tests show positive results for lambda-cyhalothrin in the apple orchard where the workers were located (samples three and eight) and no lambda-cyhalothrin elsewhere (CP 1467, 2003-2014).

Beierle also complains that the Department failed to provide him a split sample of Sample 14. Washington State Department of Agriculture (WSDA) Chemical and Hops Lab Manager Mike Firman admitted during testimony that he did not know what happened to that sample after WSDA tested it (CP 1182-83). However, Beierle failed to assert at hearing, and again fails to assert in his challenge to the Director's Order, that his own

testing of his samples at Anatek Labs would likely have produced a different result. Indeed, Anatek's testing of the split samples provided by the Department produced results generally consistent with those returned by the WSDA Chemical and Hops Lab (CP 1985-2002). Substantial evidence supports the Director's findings.

**2. Substantial Evidence Supports the Director's Findings of Fact 16<sup>3</sup>, 25, and 43, and the Findings of Fact Contained in Conclusions of Law 15 and 17 Concerning the Farmworkers' Testimony, the Health Effects of Beierle's Application, and the Odor of the Pesticides**

The evidence in the administrative record supports the Director's findings concerning the farmworkers' testimony, the health effects experienced by the farmworkers following their exposure to Beierle's pesticide spray, and the odor of the products Beierle sprayed. Witnesses testified consistently during the hearing that the products Beierle sprayed have an odor; however, the testimony was inconsistent as to the specific nature of the odor of the products. For instance, all of the farmworkers testified that they smelled a strong or bad odor, but most had difficulty describing the odor (CP 716, 726, 744, 747, 773-74, 797, 819, 833-34). Dr. Robert Wolf, the Department's expert witness testified that lambda-cyhalothrin products have a recognizable odor and that "it smells," but he

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<sup>3</sup> Beierle assigns this finding error, but fails to brief or argue it. As stated, *supra*, "A party abandons assignments of error to findings of fact if it fails to argue them in its brief." *Valley View Indus. Park*, 107 Wn.2d at 630.

could not describe the odor (CP 1524-25). Investigator West also testified that lambda-cyhalothrin has a distinct smell but could not describe it (CP 1094-95).

Further, the material safety data sheets (MSDS) for the products applied by Beierle describe the odors of the products as “aromatic of solvent” (CP 1883), “light citrus” (CP 1888), and “musty earthy” (CP 1872). Only one witness, Gail Amos, testified that these products have no odor – inconsistent with all of the other witnesses and the MSDS sheets (CP 1001-02). As testimony and exhibits show, these products are substantially odorous, and whether that odor is specifically identifiable is immaterial to the Director’s ultimate determination.

Further, the testimony in the record clearly supports that the farmworkers experienced symptoms in response to Beierle spraying them with pesticides. The farmworkers testified consistently in reporting the onset of symptoms after seeing the plane and smelling the odor, which included a sore or itchy throat (CP 730, 797), nausea (CP 736-37, 819), cough (CP 719), sneezing and coughing (CP 716), numbness of the face and mouth (CP 736-37), and bloodshot eyes (CP 777-78). At least five witnesses testified that they went to the health clinic following their exposure on August 27, 2014, and received some treatment for their symptoms (CP 717, 777-78, 799-801, 823, 835). The Department ruled

out alternative sources of exposure that could have resulted in all the workers simultaneously experiencing these symptoms.

Further, the Department received a report from the Washington State Department of Health (DOH) (CP 1704-05). The DOH report indicated 66 cases of pesticide-related illnesses following Beierle's application, one 'confirmed' case and 65 'probable' cases of exposure (CP 1046-48, 1704). Samples from the ground in the area where the workers were present, as well as samples from the workers' clothing, indicated the presence of lambda-cyhalothrin where the workers worked in the orchard (CP 1763-90). The workers' symptoms were consistent with those outlined on the pesticide labels (CP 1721-53). While an actual copy of the DOH report was not presented at hearing as an exhibit, as complained of by Beierle in his brief, the results of the DOH investigation were testified to at hearing and included in the Department's investigative report, which was included as an exhibit presented at hearing (CP 1046-48, 1704-05).

Beierle suggests that there is no evidence to support the conclusion that the Silencer caused these symptoms in the farmworkers. Contrary to Beierle's assertions, the Department presented ample evidence at hearing connecting Silencer and lambda-cyhalothrin to the farmworkers' symptoms. Circumstantial evidence has the same probative value as direct evidence. *Rogers Potato Serv., L.L.C.*, 152 Wn.2d at 391. The

Department's sampling detected lambda-cyhalothrin in the area of the orchard where the farmworkers were working, and on the clothing of several workers (CP 1763-90). Numerous farmworkers experienced symptoms, which coincided with the presence of Beierle's airplane. At least five witnesses testified that they went to the health clinic following their exposure on August 27, 2014, and received some treatment for their symptoms (CP 717, 777-78, 799-800, 823, 835). DOH conducted an independent investigation, and found that 66 workers had confirmed pesticide-related illness (CP 1046-48, 1704-05). Investigator West requested application records from the general area of the incident within a month and found no other applications of lambda-cyhalothrin in the area (CP 1029-33). The Department eliminated any other potential source of exposure, including use in the workers' homes (CP 1043-46). Substantial evidence supports the Director's conclusion that the Silencer caused the symptoms in the farmworkers.

**3. Substantial Evidence Supports the Director's Findings of Fact 4, 9, 14, 22, 23, 24, 40, and 46 Concerning Wind Speed and Direction, the Relative Geography of the Potato Field and Apple Orchard, and the Position of Beierle's Airplane**

Substantial evidence in the record related to relative geography, the wind, and the position of Beierle's airplane supports the Director's findings. Investigator West collected weather readings from the day of the

incident, and the Director found that the readings could not conclusively indicate the direction of the wind during the incident. In fact, the parties presented numerous pieces of conflicting evidence at hearing about the direction of the wind. Characterizations of the wind on the morning of August 27, 2014, included that it was from the south, southeast, northwest, northeast, east, and 'variable,' and was blowing at varying speeds between one and five miles per hour (CP 1051-56, 1218, 1700-1704, 1791, 2086). Because of multiple different wind directions reported at the time of the application, the Director could reasonably characterize the wind as variable. Multiple different weather readings in the area existed, sufficient for the Director to conclude that the weather during the time of the incident could not be determined. Beierle also argues, with respect to the readings collected from the weather stations, that the Director's use of the term 'near' is an opinion or an improper legal conclusion, rather than a finding of fact. The Director's determination that both weather stations were 'near' the location of the incident is warranted based on the complete record on review.

Investigator West's investigation included interviews with witnesses to the event, as well as collection of documentary evidence. The testimony of the witnesses at hearing presented several consistent themes, particularly in relation to Beierle's airplane. First, the precise position of

the plane is far less important than the fact that multiple witnesses reported seeing an airplane somewhere overhead and promptly thereafter becoming ill (CP 715-16, 746, 759-60, 796-97, 835-36, FOF 16). The farmworkers testified consistently at hearing with contemporaneous statements made to Investigator West the day of the incident and the flight log provided by Beierle (CP 1705-07, 1890). Further, Beierle himself indicated that an individual's experience and depth perception could have an impact on his or her perception of the relative location of an airplane in the sky (CP 1469-72). Additionally, Investigator West, positioned in the northeast corner of the apple orchard, took a video recording of Beierle conducting a fly-over in the days following the incident to simulate Beierle's application on the morning of August 27, 2014 (CP 1142, 1144-47, 1701-02, 2085). What the video showed was consistent with the farmworkers' testimony about the position of the airplane.

**4. Substantial Evidence Supports the Director's Finding of Fact 44, and the Findings of Fact Contained in Conclusions of Law 7 and 16 Concerning the Completeness of the Department's Investigation and the Director's Characterization of the Labels**

Evidence obtained during the Department's investigation, presented at hearing through the testimony of the investigator and other witnesses, supports the Director's findings with respect to the investigation and labels. Investigator West performed a complete and

thorough investigation in this case. Investigator West collected a total of 15 samples for the purpose of this investigation, including foliage, water, and clothing samples (CP 1710-13). Investigator West collected statements from 13 witnesses (CP 1705-09), created nine maps, took 66 photographs (CP 1717), and completed a review of the labels in the case. Investigator West conducted an exhaustive and complete investigation, in general compliance with the pesticide manual, a guidance document (CP 853, 1696-1720, 2053).

Indeed, Beierle bases his assertions to the contrary primarily on the testimony of Department Investigator Gail Amos, whose only involvement in the investigation included taking the initial complaint from Beierle (CP 975). Mr. Amos opined on the fact finding techniques of Investigator West despite admitting during direct examination by Beierle that he had never actually read the investigator manual (CP 976).

Investigator West collected pesticide application records from all neighboring fields within a one-mile radius of the worker's location (CP 1029-30, 1699-1700), and contacted pesticide dealers that serviced the area to see if they had made sales of products containing lambda-cyhalothrin (CP 1030). Investigator West was able to determine that no other applications or distributions of lambda-cyhalothrin had been made in the month prior to Beierle's application (CP 1030). Additionally,

Investigator West gathered information about applications of pesticides other than lambda-cyhalothrin, and found no information to suggest that the application of any other pesticide occurred in the same period or that a different application of lambda-cyhalothrin could be responsible for the workers' symptoms (CP 1030). Investigator West testified that during his investigation, he could not identify any possible source of lambda-cyhalothrin other than Beierle's application (CP 1062). Investigator West went to great lengths to find some other explanation for the presence of the lamda-cyhalothrin other than Beierle's drifting application, but he could find none. Nor could Beierle, who did not present evidence of any other possible source of lambda-cyhalothrin at hearing.

**5. Substantial Evidence Supports the Director's Findings of Fact 8 and 48, and the Findings of Fact Contained in Conclusions of Law 14, 15, and 16 Concerning Expert Witness Testimony**

Substantial evidence supports the Director's findings of fact related to the expert witness testimony presented at hearing. Two expert witnesses, one for the Department and one for Beierle, presented testimony at hearing. The experts presented conflicting testimony. The Department presented testimony from expert Dr. Robert Wolf, and Beierle presented testimony from Dr. Alan Felsot. The Department's expert, Dr. Wolf, testified about the many factors that an aerial applicator has to

keep in mind to minimize off site movement of pesticides including weather, wind speed, time of day, temperature, and geography (CP 1509-10).

Dr. Wolf testified that he had reviewed the case report, maps, and weather information, and that a drift event could account for the exposure of the workers (CP 1519-20). Droplet size, according to Dr. Wolf, plays a critical role because very small droplets do not drop to the target areas and the wind can carry them off target (CP 1513). Dr. Wolf testified that Beierle's application set up on his plane would produce about 10 percent of droplets in the fine category, below 228 microns, so pilots must always be concerned about drift (CP 1515). Dr. Felsot testified consistently that nozzles produce a range of droplet sizes (CP 1299-1300). Beierle nonetheless cites Dr. Wolf's testimony in his challenge to the sufficiency of FOF 9, which deals with the speed and direction of the wind on Beierle's application record, as well as the fact that Beierle recorded that no workers were present or adjacent at the time of his spray. The exchange Beierle cites, in particular Beierle's question, can best be described as confusing, and fails to support Beierle's claim with respect to the evidence presented (CP 1525-26).

Beierle presented expert testimony from Dr. Alan Felsot of Washington State University. Dr. Felsot's testimony and related exhibits

focus on a simulation that Dr. Felsot performed with the AgDrift model (CP 1253). Dr. Felsot based his report on assumed numbers for variables such as wind speed and temperature. When questioned, Dr. Felsot stated that he did not try to simulate the actual wind speed and direction on the date of the application (CP 1268, 1283, 1306-07). Importantly, Dr. Felsot testified that his model can only calculate estimated drift out to 2,650 feet from the model's start point (CP 1268). The most that can be gathered from Dr. Felsot's testimony is that drift is possible beyond 2,650 feet, less than the distance between the potato field and the farmworkers in the apple orchard, and that some portion of the droplets produced in Beierle's application were small enough to be susceptible to drift (CP 1297-1300).

Further, Dr. Felsot's model only considers the human health effects of long-term exposure to lambda-cyhalothrin through the skin (CP 1271). Dr. Felsot testified that his conclusion was that no harm was likely in this case. However, Dr. Felsot based this conclusion primarily on a one-year dietary study with dogs (CP 1307-10, 1335). Notably, Dr. Felsot's conclusion failed to take into account either injuries from inhalation of lambda-cyhalothrin or injuries to the eyes or gastrointestinal system (CP 1325-27).

The Department's statutes and rules are not written in terms of exposures of a certain level. Rather they prohibit applications that drift off

target or that harm or risk harm to humans or the environment. WAC 16-228-1220(2). As indicated earlier, DOH conducted an independent investigation, and concluded that 66 workers had confirmed pesticide-related illness (CP 1046-48, 1704-05). As part of its investigation, DOH interviewed the workers and collected medical records (CP 1047).

Further, Dr. Felsot's estimates of the dermal exposure of the workers are mathematically flawed. In his report, Dr. Felsot assumed that the Department's clothing samples were a single 2x2, 3x3, or 4x4 swatch. Dr. Felsot then used that assumption to calculate an exposure for the person who wore that clothing (CP 1314-22). As described by Lab Director Mike Firman, the Department's procedure uses multiple swatches from all the pieces of clothing collected from one individual (CP 1166). The Department's testing can determine the presence or absence of a pesticide. However, as Mr. Firman testified, the results do not have any toxicological significance (CP 1166-67). The Department does not consider dosage – rather it considers whether DOH confirmed the pesticide exposure.

**C. The Director Correctly Applied the Law to the Findings of Fact when he Concluded that Beierle Violated RCW 15.58 and WAC 16-228**

The Director determined, based on a preponderance of the evidence, that Beierle applied pesticides in a manner inconsistent with their labeling and that endangered and injured humans or the environment, in violation of RCW 15.58.150(2)(c), WAC 16-228-1200(1), and WAC 16-228-1220(2). The Director's conclusions of law are firmly supported by the findings discussed above, and the Court should uphold them. Although the court may substitute its judgment for that of an administrative agency when reviewing a question of law, the court nonetheless accords substantial weight to the agency's interpretation of the law it administers – especially when the issue falls within the agency's expertise, as it does with respect to pesticides here. *Ames*, 166 Wn.2d at 260-61.

The statutes and rules at issue here impose liability on all pesticide applicators in Washington State. They do not premise liability on carelessness or negligence, but rather impute liability for violating the statutes even when the applicator did not act carelessly. The Legislature developed this statutory scheme consistently with the Washington Supreme Court's holding in the tort context in *Langan v. Valicopters, Inc.*, 88 Wn.2d 855, 865, 567 P.2d 218 (1977). In that case, the Supreme Court

adopted the position taken by many states before and since, that aerial applications of pesticide create a high degree of risk that cannot be eliminated by exercise of reasonable care and “useful but dangerous activities must pay their own way.” *Langan*, 88 Wn.2d at 864, (citing RESTATEMENT (Second), Torts, § 520(f) (Tent Draft No. 10, 1964)). Any pesticide application that endangers humans or does not comply with label direction violates the statutes and rules charged in this case.

The Legislature enacted RCW 15.58 with a clear purpose. RCW 15.58.020 states that the Legislature enacted RCW 15.58 as an “exercise of the police powers of the state for the purpose of *protecting the immediate and future health and welfare of the people of the state.*” RCW 15.58.020 (emphasis added). The Legislature charged the Director with affirmatively protecting the people of the state from misuse of pesticides. The Director enforced the violations of the statute and rules committed by Beierle consistent with the purpose of RCW 15.58.

The Director correctly determined that Beierle violated RCW 15.58.150(2)(c) by applying pesticides in a manner contrary to their labels. The labels of the pesticides Beierle applied prohibit applications that result in drift (CP 1721-53, 1858-59). The Director found, based on substantial evidence that Beierle’s pesticide application drifted when it contacted the farmworkers. Accordingly, the Director correctly concluded

that Beierle failed to follow the pesticide label, and thus the law, by permitting his pesticide to drift off target.

The Director found that the labels of the products Beierle applied “can be summarized as requiring the applicator to use extreme care to avoid contact with humans and to avoid drift” (Conclusion of Law 7). Beierle argues that the Director’s summation of the labels by using the term ‘extreme care’ presents an unwarranted legal conclusion. Even a cursory review of both applicable pesticide labels indicates that the Director made a reasonable characterization of the labels (CP 1721-53, 1858-59). But whether the term ‘extreme care’ is an unwarranted legal conclusion ultimately has no bearing on the Director’s correct conclusion in the Final Order that Beierle violated RCW 15.58.150(2)(c). The pesticides’ labels prohibit applications resulting in drift. Beierle applied the pesticides in a manner resulting in drift. Beierle did not follow the pesticides’ labels and thus violated the law.

The Director also properly determined that Beierle violated WAC 16-228-1200(1) and WAC 16-228-1220(2). WAC 16-228-1200(1) prohibits the use of pesticides "in such a manner as to endanger humans and their environment," and WAC 16-228-1220(2) prohibits the application of pesticides in a manner that causes injury to humans. The Director found that Beierle’s application of lambda-cyhalothrin

endangered the farmworkers because they became ill when the pesticide drifted and contacted them. The farmworkers' testimony about their symptoms, the Department's sampling, the DOH report of the farmworkers' symptoms, and the elimination of other possible sources for the lambda-cyhalothrin found in the samples collected by the Department from the farmworkers' clothing and the apple orchard where they were working, among other things, constitute substantial evidence in support of the Director's findings. Beierle harmed humans with the pesticides he sprayed. The Director correctly determined that he violated WAC 16-228-1200(1) and WAC 16-228-1220(2), which prohibit such conduct.

Substantial evidence supports the factual basis for the Director's conclusions of law. The Director made the correct legal conclusion that Beierle applied the pesticide contrary to the label and in a way that endangered humans and caused injury to them when his aerial pesticide application drifted from the intended application area to an apple orchard where farmworkers were located. The Director based the conclusions in the Final Order on the evidence presented to him – evidence that is substantial when “viewed in light of the whole record before the court.” *Beatty*, 185 Wn. App. at 449. The Director's conclusions of law should therefore stand.

## VI. CONCLUSIONS

Based on the foregoing, the Department respectfully requests this Court find that Beierle has failed to meet his burden and uphold the Final Order entered by the Director of the Washington State Department of Agriculture in this matter.

RESPECTFULLY SUBMITTED this 29<sup>th</sup> day of October 2018.

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I certify under penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

DATED this 29<sup>th</sup> day of October 2018, at Olympia, Washington.

/s/ Krystle Berry  
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**WASHINGTON STATE ATTORNEY GENERAL'S OFFICE AGRICULTURE & HEALTH  
DIVISION**

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