STATE OF MICHIGAN
MICHIGAN ADMINISTRATIVE HEARING SYSTEM

IN THE MATTER OF:	Docket No.: 23-018664
Hilltop Fruit Trees, LLC	Agency No.: 21-PH-03509-0005580
	Part(s): Pesticide & Plant Pest Management
	Agency: Department of Agriculture and Rural Development
	Case Type: MDARD Pesticide Licensing

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FINAL DECISION AND ORDER

This matter was the subject of a contested case hearing resulting in the issuance of a Proposal for Decision (PFD) dated January 8th, 2024. (01/08/2024 PFD, pp 1–26.) Exceptions to the January 8th, 2024 PFD were filed by Respondent Hilltop Fruit Trees, LLC. (01/29/2024 Exceptions.) A response to the exceptions was filed by Petitioner, the Michigan Department of Agriculture and Rural Development (MDARD), on February 9, 2024. (02/09/2024 Response to Exceptions.) This matter is now before the Director of MDARD for a final agency decision pursuant to MCL 24.285 and Mich Admin Code, R 792.10122.

LEGAL STANDARD GOVERNING REVIEW OF A PFD

Michigan's Administrative Procedures Act sets forth the requirements for a final decision and order at MCL 24.285, which provides:

> A final decision or order of an agency in a contested case shall be made, within a reasonable period, in writing or stated in the record and shall include findings of fact and conclusions of law separated into sections

> captioned or entitled "findings of fact" and "conclusions of law", respectively. Findings of fact shall be based exclusively on the evidence and on matters officially noticed. Findings of fact, if set forth in statutory language, shall be accompanied by a concise and explicit statement of the underlying facts supporting them. If a party submits proposed findings of fact that would control the decision or order, the decision or order shall include a ruling upon each proposed finding. Each conclusion of law shall be supported by authority or reasoned opinion. A decision or order shall not be made except upon consideration of the record as a whole or a portion of the record as may be cited by any party to the proceeding and as supported by and in accordance with the competent, material, and substantial evidence. A copy of the decision or order shall be delivered or mailed immediately to each party and to his or her attorney of record.

Michigan law further provides that the final decision maker in a contested case may remand, reverse, modify, or set aside a PFD. Mich Admin Code, R 324.74(3). The final decision maker shall consider whether the proposal for decision is deficient on the grounds that it does any of the following:

(a) Misapplies a rule, statute, or constitutional provision governing the issues involved.

(b) Adopts an incorrect interpretation of a rule or statute or an incorrect conclusion of law.

(c) Incorporates typographical, mathematical, or other obvious errors that affect the substantial rights of one or all of the parties to the action.

(d) Fails to address a relevant issue.

(e) Makes factual findings inconsistent with the evidentiary record.

(f) Improperly excludes or includes evidence that substantially affects the outcome of the case. [Mich Admin Code, R 324.74(3).]

RESPONDENT'S EXCEPTIONS TO THE PFD

Exception regarding the applicability of Regulation 619

In this exception, Respondent argues that the requirements of Regulation 619, Mich Admin Code, R 285.619 should have applied to the inspection at issue. Respondent also suggests that MDARD was required to promulgate additional rules applicable to annual nursery stock inspections conducted for the purposes of issuing a certificate of inspection. Respondent's Exceptions, pp 4–8.

However, the ALJ properly concluded that a plain reading of both Regulation 619 and the Insect Pest and Plant Disease Act (IPPDA) make it clear that Regulation 619 applies to the Michigan Virus-Testing Certification Program (MVTC Program), and not the annual inspection. Mich Admin Code, R 285.619; IPPDA, MCL 286.201 *et seq.;* 01/08/2024 PFD, pp 16–20.

Specifically, the ALJ found that Regulation 619 did not govern the inspection at issue because Regulation 619 is a separate inspection program (the MVTC program) from the inspection required under the IPPDA. 01/08/2024 PFD, pp 17–18. The inspections performed pursuant to the MVTC program and Regulation 619 "permit a nursery to sell scionwood under a certification that it is 'Michigan Certified Virus-Free Scionwood,' Mich Admin Code, R 285.619.2(2)." (01/08/2024 PFD, p 18.) However, the inspections performed pursuant to the IPPDA "result only in a certificate allowing for the sale of nursery stock within Michigan." (01/08/2024 PFD, p 18.) Put simply, the inspections governed by

Rule 619 provided an optional certification. (*Id.*) The plain reading of the statute is also consistent with MDARD's application of Rule 619. (01/08/2024 PFD, p 17.)

Within this exception, Respondent further argues that MDARD was required to promulgate additional rules applicable to annual nursery stock inspections conducted for the purposes of issuing a certificate of inspection. However, the ALJ properly concluded that "the plain language of the IPPDA clearly gives MDARD the authority to conduct inspections and to withhold certification." (01/08/2024 PFD, p 18.) The ALJ notes that the act itself does not *require* the promulgation of rules. (*Id.*) It is well-settled that when the statutory language is sufficient, administrative agencies need not always promulgate rules prior to enforcing a statute. *Dep't of State Compliance and Rules Div v Michigan Educ Ass'n-NEA,* 251 Mich App 110, 121 (2020); see also *Total Petroleum, Inc v Dep't of Treasury*, 170 Mich App 417, 421–22 (1988). After careful review, the ALJ found the statutory language of the IPPDA sufficiently established the agency's authority. (01/08/2024 PFD, p 19.) Respondent's exception is therefore denied.

Exception Regarding MDARD's Historical Stance on Apple Chlorotic Leaf Spot Virus (ACLSV)

Respondent next alleged that the ALJ improperly determined that MDARD has not changed its position on whether ACLSV is injurious. Respondent's primary basis for its argument is that, because of inspections conducted pursuant to the MVTC, MDARD was aware of ACLSV within Respondent's stock and continued to

issue the annual certificate of inspection under the IPPDA. (Respondent's Exceptions pp 10–11.) However, as the ALJ succinctly explains:

> Hilltop's inference is contradicted by the fact that, under the MVTC program, Hilltop was supposed to have removed the infected trees from the mother block so that they could not be used for future scionwood. When MDARD discovered that trees identified as infected with ACLSV had not been removed from the mother block as required, MDARD notified Hilltop that it would no longer be eligible to participate in the MVTC program. These facts demonstrate that MDARD considered ACLSV to be a "plant disease" in 2018 and 2019. [01/08/2024 PFD, pp 20–21.]

Further, Petitioner highlights that the field utilized for the mother block is not the same field that is utilized for a given year's nursery stock. Therefore, it is not problematic that MDARD could find ACLSV within the *mother block* and simultaneously find that Hilltop's *nursery stock* was "apparently free" from insect pests and plant disease. (Petitioner's Response to Exceptions pp 7–9.) Respondent's exception is therefore denied.

Exception Regarding Finding that ACLSV is "Injurious"

Here, Respondent argues that ACLSV should not be considered a "plant disease" under the IPPDA because it is not injurious[1]. Respondent relies on the assertion that ACLSV does not often cause significant economic loss and can be managed with best practices. The ALJ properly rejected this argument. First, the IPPDA simply does not include an economic analysis. MCL 286.202(k);

[1] In briefing, the parties agreed that the word "injurious" should be interpreted according to its dictionary definition to mean "harmful, hurtful, or detrimental, as in effect." (01/08/2024 PFD, p 21.)

(01/08/2024 PFD, p 21). Further, even if Hilltop uses practices aimed at managing the effects of ACLSV, Hilltop's customers may not. (01/08/2024 PFD, pp 21–22.)

Contrary to Respondent's argument, the ALJ noted that the record convincingly demonstrates that ACLSV is injurious.

> Up to 30% reduction in yield has been reported for ACLSV in combination with other latent viruses. ACLSV can also cause "top-working disease," and sometimes will "make the graft union susceptible to other pathogens." MDARD also established that Canada restricts the importation of apple trees with ACLSV. [01/08/2024 PFD, pp 21–22]

Petitioner's Response to Exceptions further identifies numerous record citations as well as hearing testimony supporting the ALJ's conclusion that ACLSV is injurious. (Petitioner's Response to Exceptions pp 9–10.) Respondent's exception is therefore denied.

Exception Regarding Sufficiency of Cause to Withhold Certificate of Inspection

Respondent argues that the ALJ should not have concluded that MDARD had sufficient cause to withhold Hilltop's certificate of inspection. (Respondent's Exceptions, p 14.) Hilltop argues that a plain reading of the IPPDA should preclude MDARD's withholding. Specifically, Hilltop states "The plain language [of the IPPDA] therefore supports that MDARD may issue the certificate of inspection on visual observations alone, but does not support the inverse." (*Id*.) This line of argument is without merit for two reasons. First, a plain reading of the statute clearly supports withholding of the certificate if the premises are not "apparently free from insect pests and plant diseases." MCL 286.206(2). Secondly, MDARD did

confirm the presence of ACLSV with laboratory testing. In fact, MDARD's expert, Dr. Webster, indicated that laboratory testing is sought "if warranted." (Hr'g Tr, p 156:12.) For example, he said:

> If I'm unsure what is causing harm to the plant, it's something that's unfamiliar to me, I would do it if the grower is curious about something and I don't have any answers, and also if there is a large-scale restriction, meaning there's a lot of monetary—potentially monetary loss there, then I do that to reinforce the decision and to confirm what I was seeing. [Hr'g Tr, p 156:14–20.]

Dr. Webster further testified that the visual observations of ACLSV were so extensive ("at least 75 percent") that he began looking for trees that didn't have symptoms of ACLSV. (Hr'g Tr, p 161:12–15.)

Respondent also unconvincingly challenges the validity of MDARD's testing procedures. MDARD's witnesses testified extensively about the testing procedures and credibility of the results. Numerous exhibits and the testimony of multiple witnesses support the validity of the testing results. (See generally, Hr'g Tr, pp 67–140 (examination of Elizabeth Dorman, qualified as an expert in plant pathology and laboratory diagnostic techniques); Hr'g Tr, p 210:6–13 (testimony of Dr. Rhodes confirming the presence of ACLSV; Petitioner's Exhibits 6–9; Respondent's Exhibits E, G, H.[2])

Finally, within this exception, Respondent suggests that MDARD cannot withhold the certificate of inspection because it did not prove that *all* of the nursery stock was infected with ACLSV. (Respondent's Exceptions, pp 15–16 ("Here, even

[2] Non-exhaustive list of support for the credibility of the laboratory process and results.

assuming that ACLSV is injurious to apple tree nursery stock, MDARD's laboratory analysis does not conclusively prove that all of Hilltop's nursery stock are infected with an injurious plant disease").) Again, Respondent's argument is without merit. The IPPDA is clear that withholding of the certificate is appropriate if the premises are not "apparently free from insect pests and plant diseases." MCL 286.206(2). The evidence is overwhelming that the nursery stock was not "apparently free from" ACLSV, rather ACLSV was so prevalent, inspectors began trying to find trees that were not infected. (Hr'g Tr, p 161:12–15.) Despite Respondent's argument, nothing in MCL 286.207 required a different result, especially given the extent of the infestation.

> Here, based on MDARD's two visual inspections of Hilltop's nursery stock and premises in September and October of 2022, as confirmed by subsequent laboratory testing, ACLSV was prevalent in the nursery stock at Hilltop. Because ACLSV is "injurious" to apple trees, it is a "plant disease" under MCL 286.202(k). Therefore, MDARD had sufficient cause to withhold the certificate of inspection from Hilltop. [01/08/2024 PFD, p 24.]

Respondent's exception is therefore denied.

FINDINGS OF FACT

The findings of fact set forth in the PFD are adopted and incorporated into this Final Decision and Order by reference.

CONCLUSIONS OF LAW

The conclusions of law set forth in the PFD are adopted and incorporated into this Final Decision and Order by reference.

NOW, THEREFORE, IT IS ORDERED:

1. That the 2022 Certificate of Inspection for Respondent, Hilltop Fruit Trees, LLC, is withheld.

2. The November 2, 2022 Notice and May 3, 2023 Statement in Support of Withholding are affirmed.

3. MDARD does not retain jurisdiction in this matter.

Date: June 6, 2024

Revised 6/24/24 to correct name on page 7.

Dr. Tim Boring, Director
Michigan Department of Agriculture
and Rural Development