

**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. 025-ACP-SB-12/13)

Administrative Docket No.198

DIRECTOR'S DECISION

Tri Cal, Inc.
PO Box 1327
Hollister, CA 95024

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 October 3, 2013, the Santa Barbara County Agricultural Commissioner (Commissioner) found that appellant Tri Cal (appellant or Tri Cal) committed two violations of FAC 12973 in connection with an application of Pic-Clor 60 (reg. no. 8536-8-AA) made on November 21, 2012. Specifically, the Commissioner found that appellant used Pic-Clor 60 in conflict with the label by failing to accurately record the date that the tarp was perforated and describe the size of a tear in the tarp in the Post Application Summary (PAS). The Commissioner classified each violation as a Class B violation and levied a \$700 fine for each violation. For the two violations, the Commissioner levied a \$1,400 fine.

Appellant Tri Cal 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

In November 2012, C&JJ Farms employed Tri Cal, a registered pest control business, to fumigate a 19.3 acre parcel of land in Santa Barbara County with Pic-Clor 60. Pic-Clor 60 (reg. no. 8536-8-AA) is a registered pesticide containing chloropicrin and 1,3-dichloropropene. (Stipulation 4; County Ex. F.) Prior to the fumigation, Tri Cal completed a Fumigant Management Plan (FMP), and recorded a target-fumigation date of November 21, 2012, a target-tarp-perforation date of November 28, and a target-tarp-removal date of November 29. (County Ex. E.) On November 21, 2012 at 11 a.m., Tri Cal performed a tarped-field fumigation of the parcel by applying Pic-Clor 60 through soil injection. (Stipulation 5; County Ex. E.)

On November 22, 2012, a Santa Barbara County resident left a voicemail with the Commissioner's office complaining that she and her husband were experiencing symptoms of an illness that she believed were caused by the pesticide application at C&JJ Farms. The Commissioner's office conducted an investigation into the incident. Santa Barbara County Agricultural Inspector/Biologist P. Murguia (Inspector Murguia) investigated the incident, interviewed witnesses, inspected the application site, and documented his findings in a County Pesticide Episode Investigation Report (PEIR.)

On November 26, 2012, Inspector Murguia interviewed the complaining resident and subsequently inspected the application site at C&JJ Farms. During the inspection of the application site, Inspector Murguia discovered a tear in the tarp on the northwest edge of the

field. The tear was documented photographically and measured approximately 2 to 3 feet long by 1 to 2 inches wide. (County Ex. D; Testimony of P. Murguia.) Inspector Murguia then called Tri Cal employee C. Giannini (Mr. Giannini) to inform him about the tear. The tear was repaired by a Tri Cal employee later that day. (County Ex. E.)

On November 27, 2012, Inspector Murguia met with Mr. Giannini at the application site. When Inspector Murguia arrived, the tarps were being removed by 10-15 field workers. The tarps had already been cut from east to west and a tractor was on site cross-cutting the tarps from north to south. The field workers were not wearing personal protective equipment (PPE.) Mr. Giannini stated that he was “not aware” that the tarps would be removed that morning and “wasn’t sure” if the workers were in compliance with the label’s PPE requirements. (County Ex. D.)

On November 30, 2012 Tri Cal completed a PAS as required by the Pic-Clor 60 label. Tri Cal recorded the tarp-perforation date as November 26, 2012, and the tarp-removal date as November 27, 2012. Additionally, Tri Cal reported that a Tri Cal employee repaired tarp damage on November 26 at 12:18 p.m. The tarp damage is described as a tear measuring “2 IN WIDE” located at “WEST EDGE OF FIELD.” (County Ex. E.)

After reviewing the FMP and the PAS with Santa Barbara County Supervising Biologist L. Martin (Supervisor Martin), Inspector Murguia discovered that the tarp had been removed two days prior to the FMP-target date. On January 11, 2013, Inspector Murguia and Supervisor Martin interviewed C&JJ Farms’ representative Keith Kawahara (Mr. Kawahara) about the early tarp removal. Mr. Kawahara stated that the tarp was removed prior to the FMP-target date to prevent wash out from a predicted rain storm. Mr. Kawahara additionally stated that “[w]e cut the tarps the same day allowing 3-4 hours of aeration prior to removal.” (County Ex. D.)

In the “Violations” section of the PEIR, Inspector Murguia reported multiple violations of FAC section 12973 by Tri Cal for failing to accurately record the perforation date and describe the size of the tarp tear in the PAS. On July 10, 2013, the Commissioner issued a Notice of Proposed Action (NOPA), charging Tri Cal with two counts of violating FAC section 12973. Tri Cal requested a hearing. The hearing was held before Susan L. Johnson, a hearing officer designated by the Commissioner, on October 3, 2013 at 354 Second Street, Fillmore, California.

The Hearing Officer’s Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Tri Cal had the opportunity to present evidence and question witnesses. The Hearing Officer determined that there was sufficient evidence to show that Tri Cal committed two

separate violations of FAC section 12973 by failing to comply with the PAS requirements of the Pic-Clor 60 label. Specifically, the Hearing Officer found that:

- A. Tri Cal used Pic-Clor 60 in conflict with the label by inaccurately recording the tarp perforation date in the PAS as “November 26, 2012” because the tarp was perforated on November 27, 2012;
- B. Tri Cal used Pic-Clor 60 in conflict with the label by inaccurately describing tarp damage in the PAS as a “2 IN WIDE” tear because the tear measured 2 to 3 feet long by 1 to 2 inches wide; and,
- C. The violations were Class B violations because they violated a law that mitigates the risk of adverse health effects. The Hearing Officer upheld the proposed fines of \$700 per violation.

On October 30, 2013, the Santa Barbara County Agricultural Commissioner adopted the Hearing Officer’s proposed decision in its entirety.

Appellant’s Allegations

Tri Cal appealed, arguing that Tri Cal was advised by Mr. Kawahara that the tarp had been cut on November 26, 2012 and that “Tri Cal was acting in good faith based upon its understanding of the true facts,” in recording the perforation date in the PAS. Tri Cal submitted a written argument on appeal that included new evidence supporting this position. Additionally, appellant argued that Tri Cal “acted in good faith” in describing the size of the tarp tear in the PAS.

Relevant Laws and Regulations

FAC section 12973 states that, “[t]he use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.”

When levying fines, the Commissioner must follow the guidelines provided in 3 CCR § 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class B violation is “a violation of law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A.” (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(2).) The fine range for a Class B violation is \$250 to \$1,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c)(2).)

The Commissioner shall use relevant facts, including the severity of actual or potential effects and the respondent's compliance history when determining the fine amount within the fine range. (Cal. Code of Regs., tit. 3, § 6130, subd. (d).)

The Director's Analysis

A. The Commissioner's decision that Tri Cal used Pic-Clor 60 in conflict with the label by inaccurately recording the tarp perforation date in the PAS is supported by substantial evidence.

The Commissioner adopted the Hearing Officer's decision that appellant violated FAC section 12973 by failing to accurately record the tarp perforation date in the PAS as required by the Pic-Clor 60 label. Specifically, the Commissioner found that Tri Cal recorded the perforation date as November 26, 2012, while the tarp was actually perforated on November 27, 2012.

FAC section 12973 states:

"The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

The Pic-Clor 60 label states:

"The Post-Application Summary must contain the following elements:

- ❖ Tarp perforation/removal details (if applicable)
 - Description of tarp removal (if different than in the FMP)
 - Date tarps were perforated..."

Thus, failure to record the date that tarps were perforated in the PAS is a conflict with the label in violation of FAC section 12973. Failure to accurately record the perforation date is tantamount to not recording the date at all, and as such is a violation of FAC section 12973. Appellant appeals the Commissioner's decision, arguing that Tri Cal was advised by Mr. Kawahara that the tarp had been cut on November 26 and that "Tri Cal was acting in good faith based upon its understanding of the true facts." Tri Cal has attempted to introduce new evidence with the appeal supporting this position.

At the outset, I will address the new evidence. The Director decides the appeal on the record before the Hearing Officer. The new evidence provided by Tri Cal is not part of the record and was not considered by the Hearing Officer. Appellant had abundant opportunity to properly introduce this evidence at the hearing, but failed to do so. The Director cannot consider this evidence in reaching a decision on appeal because it is beyond the scope of review.

The PAS shows that Tri Cal recorded November 26, 2012 as the perforation date. (County Ex. E.) In finding that the tarp was actually perforated on November 27, 2012, the Commissioner relied on the PEIR, testimony presented at the hearing, and inferences drawn from the record. Specifically, the Commissioner relied on an interview with Mr. Kawahara conducted by Inspector Murguia and Supervisor Martin that was documented in the PEIR. Mr. Kawahara stated during the interview that:

“We decided to pull the tarps prior to the seven days to prevent wash out from a predicted rain storm... We cut and pulled the tarps the same day allowing 3-4 hours of aeration prior to removal.”

There is no dispute that the tarp was removed on November 27, 2012 and both Inspector Murguia and Mr. Giannini were present and witnessed the tarp being removed on that date. (County Ex. D.) Thus, Mr. Kawahara’s statement that the tarp was “cut and pulled...the same day,” indicates that the tarp was perforated on November 27, 2012. In addition, both Inspector Murguia and Supervisor Martin—who were present at the interview—testified at the hearing that Mr. Kawahara stated that the tarp had been cut and removed on the same date: November 27, 2012. (Testimony of P. Murguia and L. Martin.)

At the hearing, appellant challenged the County’s interpretation of Mr. Kawahara’s statement. Appellant argued that Mr. Kawahara’s statement is consistent with Tri Cal’s position that the tarp was perforated on November 26 because the statement could be interpreted to mean that Mr. Kawahara *cross-cut* the tarp on November 27, but that he *initially* cut the tarp on November 26. The County convincingly argued that this version of the facts is unlikely.

At the time of the interview, Mr. Kawahara and his employer were under investigation by the County for, among other charges, failure to provide proper PPE and respiratory equipment to field workers during the tarp removal. Mr. Kawahara stated that on November 27, after cutting the tarp, they allowed “3-4 hours of aeration prior to removal.” (County Ex. D.) The aeration period was allowed in order to limit worker exposure to the pesticide. If, as appellant argues, Mr. Kawahara had initially cut the tarp on November 26, he surely would have said so, as the earlier cut-date would have allowed additional time for aeration and given the appearance of greater concern for worker safety during the incident for which Mr. Kawahara was under investigation. Appellant’s contention that Mr. Kawahara stated during the County interview that

the tarp was cross-cut on November 27, but failed to mention that the tarp was initially cut on November 26 would have been against Mr. Kawahara's own interest.

The only information in the record supporting appellant's position is a conversation with Mr. Kawahara related at the hearing by Mr. Giannini in which Mr. Kawahara stated that the tarp was initially cut on November 26, 2012 and advised Mr. Giannini to record that date in the PAS. (Testimony of C. Giannini.) The County expressed doubt concerning this conversation because when Mr. Giannini was originally interviewed by the County on February 1, 2013, he apparently failed to mention that this conversation had occurred.

Further, Mr. Giannini's testimony contradicts testimony provided by Inspector Murguia and Supervisor Martin. Where witnesses present contradictory testimony and information, issues of witness credibility are the province of the Hearing Officer. There is nothing in the record to suggest that the Hearing Officer improperly accepted the County version of the facts by finding that the tarp was cut on November 27, and the Commissioner's decision is amply supported by substantial evidence in the record from the PEIR, testimony presented at the hearing, and reasonable inferences from the record.

B. The Commissioner's decision that Tri Cal used Pic-Clor 60 in conflict with the label by inaccurately describing the tarp tear in the PAS is supported by substantial evidence.

The Commissioner adopted the Hearing Officer's decision that appellant violated FAC section 12973 by inaccurately describing the tarp tear in the PAS as required by the Pic-Clor 60 label. Specifically, the Commissioner found that Tri Cal described the tear as 2 inches wide, while the tear measured approximately 2 to 3 feet long by 1 to 2 inches wide.

FAC section 12973 states:

"The use of any pesticide shall not conflict with labeling registered pursuant to this chapter which is delivered with the pesticide or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner."

The Pic-Clor 60 label states:

"The Post-Application Summary must contain the following elements:

- ❖ Tarp damage and repair information (if applicable)
 - Location and size of tarp damage..."

Thus, failure to describe the size of tarp damage—including a tarp tear—in the PAS is a conflict with the label in violation of FAC section 12973. Failure to accurately describe the size of a tarp tear is tantamount to not describing the tear at all, and as such is a violation of FAC section 12973. Appellant appeals the Commissioner’s decision, arguing that Tri Cal “acted in good faith.”

The PAS shows that Tri Cal described the tear as “2 IN WIDE.” (County Ex. E.) In deciding that this description was inaccurate, the Commissioner relied on photographic evidence of the tear taken by Inspector Murguia on November 26, 2012. The photograph shows—and appellant does not dispute—that the dimensions of the tear were between 2 and 3 feet long by between 1 and 2 inches wide. (County Ex. D; Testimony of P. Murguia.)

Appellant’s argument that Tri Cal acted in good faith is unpersuasive. Tri Cal was required by the label to describe the size of the tarp tear, but failed to do so. Appellant argued at the hearing that Tri Cal complied with the label requirement by accurately describing the width of the tear. Adopting this reading of the requirement would lead to absurd results. The requirement is intended to provide an accurate description of tarp damage and the omission of the lengthwise dimension from the PAS in this case would totally undermine the accuracy of the description. The Commissioner’s decision is reasonable and supported by substantial evidence in the record.

In addition, although the County did not separately charge this violation, as the NOPA states: the PAS must document any deviations from the FMP including tarp damage and tarp perforation and removal details. (County Ex’s. A, F.) Failure to document deviations from the FMP in the PAS is a violation of FAC section 12973. The fumigation in this case deviated from the FMP’s target-tarp perforation and removal dates. Tri Cal not only failed to record the FMP deviations in the PAS, but affirmatively checked the box marked “NO” in response to the FMP deviation prompt. (County Ex. E.) Tri Cal should have documented the deviations from the FMP. Failure to do so was in conflict with the Pic-Clor 60 label.

C. The Commissioner properly categorized the violations as “Class B” violations.

Appellant does not appeal the decision that the violations are Class B violations. A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects. (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(2).) The fine range for a Class B violation is \$250 to \$1,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c)(2).) The County argued that Tri Cal violated a law that mitigates the risk of adverse health effects because:

- The Pic-Clor 60 label includes safety instructions and other information intended to mitigate health risks associated with use of the pesticide;
- The FMP and PAS are intended to guide applicators in carrying out complex fumigation procedures and reduce accidents and injuries to bystanders, workers, and handlers; and,
- The data recorded in the FMP and PAS is used by state and federal regulators to assess the adequacy of label language in mitigating health risks associated with use of the pesticide.

The Commissioner's decision that Tri Cal violated a law that mitigates the risk of adverse health effects is supported by substantial evidence and the Commissioner properly categorized each violation as a Class B violation. Further, the \$700 fines are squarely within the permissible fine range and are not excessive. The Commissioner properly considered Tri Cal's compliance history—Tri Cal had three violations related to field fumigations in the previous two years—in assigning the fines.

Conclusion

The Commissioner's decision that appellant Tri Cal committed two separate violations of FAC section 12973 and that the violations qualify as Class B violations is affirmed. The fine of \$1,400 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify appellant Tri Cal of how and when to pay the \$1,400 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: FEB 19 2016

By: Brian Leahy
Brian Leahy, Director