

**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 San Diego  
(County File No. 432-ACP-SD-14/15)

Docket No. 204

**DIRECTOR'S  
DECISION**

**Tri Cal, Inc.**  
**1029 Railroad Street**  
**Corona, California 92882**

Appellant/

**Procedural Background**

Food and Agricultural Code (FAC) section 12999.5, permits county agricultural commissioners (CACs) to levy civil penalties for certain violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow the fine guidelines established in California Code of Regulations, 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 July 15, 2015, the San Diego CAC found that Appellant Tri-Cal, Inc. violated FAC section 12973. The CAC classified the violation as Class B and fined Tri-Cal, Inc. \$250, the lowest level possible for a Class B violation.

Tri-Cal, Inc. admits the violation, the facts are undisputed, and all exhibits were entered with no objections. Therefore, this appeal to the Director of the Department of Pesticide Regulation (DPR) addresses only a matter of law and the interpretation of California Code of Regulations, title 3, section 6130 concerning the classification of violations in civil penalty actions brought by CACs.

The Director has jurisdiction to review the appeal under FAC 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.

## Relevant Laws and Regulations

Restricted materials are pesticides deemed to have a higher potential to cause harm compared to other pesticides. Accordingly, except in limited circumstances, restricted material pesticides may only be used under a written permit issued by a CAC. (Food & Agr. Code, § 14006.5.)

FAC section 12973 states that a pesticide cannot be used in conflict with its label and if the pesticide requires a permit before use, the applicator must follow all permit conditions.

When levying fines, the CAC must classify a violation as A, B, or C and must follow the fine guidelines outlined in California Code of Regulations, title 3, section 6130.

A violation of a law or regulation that was not designed to mitigate the risk of an adverse health, property, or environmental effect will be classified as Class C. Specific examples of statutes or regulations that were not designed to mitigate the risk of adverse health, property, or environmental effect include California Code of Regulations sections 6624 through 6628, the regulations relating to reporting annual pesticide use; FAC sections 11732, 11733, and 11761, the sections relating to registering as a pest control business, maintaining appropriate records of pesticide sales, and reporting a loss due to pesticide use. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(3).) Violations of these statutes and regulations will be classified as Class C. The fine range for Class C violations is \$50 to \$400. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(3).)

“A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A.” (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).) The fine range for Class B violations is \$250 to \$1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(2).)

A Class A violation is defined as:

- (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....

(Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).)

### **Factual Background**

Pic-Clor 60, a restricted material pesticide, is a pre-plant fumigant consisting of the active ingredients 1, 3-dichloropropene and chloropicrin. (Cal. Code Regs., tit. 3, § 6400; County Ex. 10, Pic-Clor 60 label.) The Pic-Clor 60 label requires at a minimum, a 25 foot buffer zone. (County Ex. 10, Pic-Clor 60 label, p. 18-19.) If the buffer zone “extends onto areas not under the control of the owner,” the certified applicator must have a written agreement permitting encroachment of the buffer zone onto an adjacent property. (County Ex. 10, Pic-Clor 60 label, p. 18.) The encroachment agreement must be part of the fumigant management plan (FMP) for the fumigation. The complete FMP, including the written encroachment agreement, must be reviewed and certified – signed and dated – by the certified applicator before the fumigation begins. (County Ex. 10, Pic-Clor 60 label, pp.33-34.)

A Pic-Clor 60 application also requires a written permit issued by the CAC before an application can begin. (Food & Agr. Code, § 14006.5; Cal. Code Regs., tit. 3, § 6400.) Here, the CAC office issued a permit for use of the active ingredients in Pic-Clor 60, on June 11, 2014, to Mellano and Company, located at 734 Wilshire Road, Oceanside, California. (County Ex. 7.) The permit conditions included that the applicator must submit “Documentation of agreement allowing the buffer zone to extend onto the adjoining agricultural property, if applicable,” 48 hours before the start of the application.

On October 14, 2014, at approximately 7:30 a.m., Tri-Cal, Inc. conducted a fumigation operation using Pic-Clor 60 at the Mellano property. (County Ex. 4, Amended Inspection Notes; County Ex. 6, Notice of Intent; County Ex. 7, Restricted Material Permit.) Mr. Lauman was not present at the Mellano property at the start of the fumigation. (Hearing Transcript, 17:58-18:19.) When he arrived, he realized the buffer zone extended beyond the Mellano property. (Hearing Transcript, 17:58-18:19; County Ex. 4, Amended Inspection Notes.) The same day at 10:26 a.m., Tri-Cal, Inc. submitted an “Encroachment Agreement for Fumigant Buffer Zones,” signed on October 14, 2014, by the adjacent property owner permitting the buffer zone to extend onto his property. (County Ex. 4, Amended Inspection Notes; County Ex. 8, E-mail Correspondence; County Ex. 9, Encroachment Agreement.)

### **The Hearing Officer’s Decision**

The hearing officer determined that Tri-Cal, Inc. violated FAC section 12973 by not obtaining an encroachment agreement before the application on October 14, 2014. The hearing officer further found that this was a Class B violation because a violation of FAC section 12973 “is a violation of a law that mitigates the risk of adverse health, property or environmental effects.” (Hearing Officer’s Decision, p. 4.)

The hearing officer found that obtaining written permission for the encroachment on the adjacent property has the “obvious purpose to protect the health of individuals on the adjoining properties....” (Hearing Officer’s Decision, p. 4.) Accordingly Tri-Cal, Inc.’s violation of FAC section 12973 was a Class B violation. The Hearing Officer

further found that the fine amount of \$250 was appropriate based on the facts, including that Mr. Mark Lauman, the field supervisor for Tri-Cal, Inc., conducted himself “honestly and ethically by bringing the error to the attention of the agency inspectors.” (Hearing Officer’s Decision, p. 4.)

### **The Director’s Analysis**

FAC section 12973, requires that an applicator follow label directions and permit conditions. Following label directions and permit conditions mitigates “the risk of adverse health, property, or environmental effects.” (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).) Moreover, the specific label and permit conditions here had the intended purpose of protecting people. The Pic-Clor 60 label requires that the owner or certified applicator create a site-specific fumigant management plan (FMP). As part of that plan, if the buffer zone encroaches onto an adjacent landowner’s property, the written agreement must be part of the FMP and the certified applicator must review it before the fumigation can begin. (County Ex. 10, Pic-Clor 60 label, pp. 33-35.)

In addition, the restricted material permit required that the encroachment agreement be filed with the Notice of Intent to apply the pesticide 48 hours before the application. (County Ex. 7, p. 7 of 8.) The purpose of these requirements is to ensure that the adjacent property owner has sufficient notice and will not allow anyone to enter the buffer zone. (See County Ex. 9, Encroachment Agreement Fumigant Buffer Zone.) The label directions and permit conditions were designed to prevent accidental exposure to this fumigant by unsuspecting people adjacent to the application.

Tri-Cal, Inc. argues:

This is a paperwork issue, and no one’s health was in danger as a result of the paperwork violation.

(Tri-Cal, Inc. letter, 9/8/2015.) They argue that the area was difficult to access and that their failure to obtain an encroachment agreement in accordance with the label and permit conditions did not harm anyone. Luckily for Tri-Cal, Inc. their failure to follow these permit conditions and label directions did not cause an actual hazard. If it had, this would have been a Class A violation. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A); *See also Patterson Flying Service v. California Dept. of Pesticide Regulation* (2008) 161 Cal.App.4th 411, 432.)

But whether someone’s health was in actual danger is not the standard the CAC must use when deciding if a violation should be classified as B or C. The standard is whether the *law or regulation violated* was designed to mitigate “the risk of adverse health, property, or environmental effects.” (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).) As discussed above, FAC section 12973 is a law that was designed to mitigate against risks to people, property, and the environment. Accordingly, the CAC appropriately found that this violation was at a minimum a Class B violation.

The CAC could have also found that this was a Class A violation. Tri-Cal, Inc. had a history of violations. (County Ex. 11.) Therefore, the CAC could have used his discretion and charged Tri-Cal, Inc. with a Class A violation because Tri-Cal, Inc. violated a law that was meant to protect against the risk of adverse health, property, or environmental effects and Tri-Cal, Inc. had a history of violations. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(B).) Instead, the CAC charged and found that Tri-Cal, Inc.'s violation was a Class B violation, and fined Tri-Cal, Inc. the lowest fine possible because Tri-Cal, Inc. brought the error to the County's attention. It was within his discretion to do so.

Accordingly, the Director affirms the CAC's finding that Tri-Cal, Inc.'s violation of FAC section 12973 was a Class B violation.

### **Disposition**

The Commissioner's decision and levy of fine is affirmed. The commissioner shall notify the appellant how and when to pay the \$250 fine.

### **Judicial Review**

The Appellant may seek court review of the Director's decision within 30 days of the date of the decision. (Food & Agr. Code, § 12999.5.) The 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: OCT 27 2015

By: Brian Leahy  
Brian Leahy, Director