

**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 Kern  
(County File No. 038-ACP-KER-16/17)

Docket No. 212

**DIRECTOR'S DECISION**

**Tri-Cal, Inc.  
P.O. Box 1327  
Hollister, CA 95204**

Appellant/  
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**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations. When levying 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 18, 2017, the Kern County Agricultural Commissioner found that on October 25, 2016, the Appellant, Tri-Cal, Inc., (hereinafter "Tri-Cal" or "Appellant") violated FAC section 12973 when Tri-Cal permitted a handler of the pesticide Tri-Clor to enter and perform handling activities on an application block without having first been appropriately trained, in conflict with this pesticide's label directions. The Commissioner classified the violation as Class B.

Appellant appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). Appellant contends on appeal that, although the certified applicator was a Tri-Cal employee, the person performing the handling activities was not a Tri-Cal employee, and therefore, Appellant should not be held responsible for failing to ensure that this handler received appropriate training.

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. For other matters, the Director decides the appeal on the record before the hearing officer. In reviewing the Commissioner's

decision, the Director looks to see if there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the Commissioner's decision.

The 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**

Tri-Clor, a pesticide, California registration number 58266-2-AA-11220, is a pre-plant soil fumigant containing 99% chloropicrin. Page 7 of the label states: "For all applications ... from the start of the application until the application is complete, a certified applicator must directly supervise all persons performing handling activities." Also on page 7, the label states that handling tasks are "prohibited from being performed by anyone other than persons who have been appropriately trained and equipped as handlers..." Page 11 states: "Entry into the application block (including early entry that would otherwise be permitted under the WPS) by any person – other than a correctly trained and PPE-equipped handler who is performing a handling task listed on this labeling is PROHIBITED – from the start of the application until: 5 days (120) after the application is complete for untarped application..."

On October 25, 2016, Kern County conducted a pesticide use monitoring inspection on Tri-Cal, Inc., while they were making a pre-plant application of Tri-Clor to almonds belonging to South Valley Farms. The driver of the tractor sealing the application with a disk, a handling task, was Timothy Epps, an employee of J.C. Sheets Farming. Mr. Epps did not receive chloropicrin or respirator training before performing this handling task.

### **Relevant Laws and Regulations**

A pesticide must be used according to label directions and permit conditions. (Food & Agr. Code, § 12973.)

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. Those categories are defined as follows:

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.) The fine range for a Class B violation is \$250 to \$1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

### **The Hearing Officer's Decision**

The hearing officer organized his opinions by breaking down the decision into two issues:

#### Issue 1

Did RESPONDENT violate FAC Section 12973 on October 25, 2016 by allowing Timothy Epps to enter an application block, treated with Tri-Clor Chloropicrin, to drive a soil sealing rig without being properly trained for Chloropicrin or respirator use, in conflict with the Tri-Clor Label?

Was RESPONDENT Mr. Epps' employer, thus responsible for his training as stated above?

#### Issue 2

Did the Commissioner set the fine for violation of FAC section 12973 at \$700.00 as a Class B violation consistent with the definition of a Class B violation as stated in 3 CCR Section 6130?

The Hearing Officer then found that Tri-Cal directly supervised Mr. Epps, and that Tri-Cal was indeed Mr. Epps' employer for that application. Tri-Cal did not ensure that Mr. Epps was appropriately trained to apply Tri-Clor, and by failing to do so, Tri-Cal used Tri-Clor in conflict with its label directions. The Hearing Officer further determined that FAC Section 12973 is a "law which mitigates adverse health effects. Class B is proper and middle of the range is appropriate...." The Kern County Agricultural Commissioner then adopted the hearing officer's proposed decision in its entirety.

### **The Director's Analysis**

There is substantial evidence in the record to find that Appellant violated FAC section 12973 by using Tri-Clor, a restricted material pesticide, in conflict with the label.

There are no disputed issues of fact. Appellant stipulated to the following:

1. Due process has been afforded in this case up until this point.
2. Tri-Clor (EPA Reg. No. 58266-2-11220) is a Danger category registered pesticide

with the active ingredient Chloropicrin used as a preplant fumigant.

3. Tri-Cal, Inc. made a preplant application of Tri-Chlor as a pest control business 30596 to almond site (SA 1710A) operated by South Valley Farms (Restricted Materials Permit 1501888) on October 25, 2016.
4. Clyde Tange (Qualified Applicator License 99952) is an employee of Tri-Cal and was a certified applicator present during the application of Tri-Chlor to almond site SA 1710A on October 25, 2016.
5. Timothy Epps was a pesticide handler in the application of Tri-Chlor made by Tri-Cal on October 25, 2016.

It is also undisputed that the Tri-Chlor label required that all handlers receive appropriate training.<sup>1</sup> Appellant challenges this decision on the grounds that Mr. Epps was not Appellant's employee and Tri-Cal should not be responsible for ensuring that Mr. Epps received appropriate training. But Tri-Cal fails to understand that regardless of the employment status of any handler, the label mandates that the certified applicator performing the fumigation has the ultimate responsibility to follow all label directions.

Mr. Epps was a handler. Mr. Clyde Tange, a Tri-Cal employee, was the certified applicator that directly supervised the fumigation, including Mr. Epps and all other handlers during the fumigation. Regardless of the employment status of Mr. Epps, the label directions state that the certified applicator performing the application "must directly supervise all persons performing handling activities." (Tri-Chlor label p. 7.) He must "make sure that all persons who are not trained and PPE-equipped and who are not performing one of the handling tasks ... are ... excluded." (Tri-Chlor label p. 8.) For purposes of the fumigation, Tri-Cal has the ultimate responsibility to ensure that all label directions are followed, including that only "correctly trained and PPE-equipped handler(s)" are permitted enter the fumigation block. (Tri-Chlor label p. 11.)

"[E]nforcement liability for the misuse of pesticides falls primarily upon the pesticide user or applicator...." (*U.S. v. Corbin Farm Service* (E.D. Cal. 1978) 444 F.Supp. 510, 522, *aff'd* (9th Cir. 1978) 578 F.2d 259.) As the Director has previously informed Tri-Cal, the certified applicator must ensure that all label directions are followed. (See Director's Decision, *Tri-Cal v. San Luis Obispo CAC*, Docket No. 189, May 9, 2013: "The certified applicator performing the fumigation is charged with knowing and following all label directions.") Tri-Cal failed to follow the Tri-Chlor label directions when Mr. Tange, the certified applicator directly supervising the application, failed to ensure that Mr. Epps received appropriate training (in accordance with Cal. Code Regs. tit. 3, § 6724) before Mr. Epps performed handling activities.

Tri-Cal argued during the hearing that Tri-Cal had no control over Mr. Epps; if Tri-Cal discovered that Mr. Epps had not been properly trained in the use of Tri-Chlor, the only thing the

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<sup>1</sup> California Code of Regulations, Title 3, section 6724 lists the requirements for appropriate handler training.

certified applicator could have done was “stop the job and call his actual employer.” (Hearing audio at 29:44.) That is precisely why the certified applicator bears the responsibility to ensure that all label directions are followed. The certified applicator controls the fumigation and has the authority to “stop the job” and refuse to continue until all label directions are followed.

Tri-Cal violated the label by failing to ensure that Mr. Epps was properly trained before performing handling activities and before entering the application block during the entry restricted period. Accordingly, the Director affirms the CAC’s finding that Tri-Cal violated FAC section 12973.

### **The CAC Properly Classified the Violation**

When a Commissioner finds that a person violated a pesticide law or regulation, they must classify the violation as Class A, Class B, or Class C. A violation of a law or regulation that is designed to protect people, property, or the environment will be classified as Class A or Class B. (Cal. Code Regs., tit. 3, § 6130.) Class A violations require an aggravating factor in addition to the violation of a regulation designed to protect people, property, or the environment such as actual harm, a history of previous violations, the violator failed to cooperate, or the violator “demonstrated a disregard for specific hazards of the pesticide used.” (Ibid.)

Here, the County classified the Tri-Cal violation as a “B” violation. FAC section 12973 requires that an applicator follow label directions. Following label directions mitigates “the risk of adverse health, property, or environmental effects.” (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).) Moreover, the specific label directions here had the intended purpose of protecting workers by ensuring that anyone who handles the pesticide must first receive appropriate training. Accordingly, the CAC appropriately found that this violation was at a minimum a Class B violation.<sup>2</sup>

The CAC charged and found that Tri-Cal’s violation was a Class B violation and fined Tri-Cal \$700. This is within the fine range for a Class B violation of \$250 to \$1,000. Accordingly the Director affirms the CAC’s imposition of the \$700 fine amount.

### **Disposition**

The Director affirms the Commissioner’s decision and fine. The commissioner shall notify the appellant how and when to pay the \$700 fine.

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<sup>2</sup> The CAC could have also found that this was a Class A violation. Tri-Cal, Inc. had a history of violations. (County Ex. 12.) Indeed, Tri-Cal’s previous violation was for the same failure as here – failing to ensure that handlers are appropriately trained before they enter an application block. 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 violation history. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(B).)

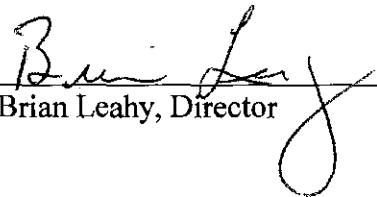
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**Judicial Review**

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: NOV 09 2017

By:   
Brian Leahy, Director