

**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 Monterey
(County File No. 1271803)

Administrative Docket No. 220

DIRECTOR'S DECISION

**David W. Frye, Pesticide Control Advisor
17657 River Run Road
Salinas, CA 93908**

Appellant/

Procedural Background

Under Food and Agricultural Code, 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 a penalty, commissioners must follow the fine guidelines established in California Code of Regulations, title 3, section 6130 (3 CCR, § 6130) and must designate each violation as Class A, Class B, or Class C. Each classification has a corresponding fine range.

The Monterey County Agricultural Commissioner (Commissioner) issued a Notice of Proposed Action (NOPA) to Mr. David Frye (Appellant) on March 22, 2018 notifying Mr. Frye that the Commissioner proposed to take an enforcement action against him under Food and Agricultural Code (FAC) section 12973 for using a pesticide in conflict with the additional limitations applicable to the applicant's restricted materials permit. (County Hearing Exhibit No. 1.)¹ Mr. Frye requested a hearing and a hearing was held on March 13, 2020. The hearing was presided over by Hearing Officer Jim Allan (Hearing Officer). The hearing was recorded. Following the hearing, on July 29, 2020, the Commissioner fully adopted the Hearing Officer's proposed decision and found that the Appellant had violated Food and Agricultural Code, section 12973. The Commissioner classified the violation as a Class B violation, which has a fine range of \$250 to \$1000. The Commissioner levied a \$1,000 fine.

Appellant appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (Department). The Director of the Department (Director) has jurisdiction to review the appeal under Food and Agricultural Code, section 12999.5.

¹ Initial references to the County's exhibits presented at the hearing are styled as "County Hearing Exhibit No. [number]." Subsequent references to hearing exhibits are styled as "Exhibit No. [number]." The Appellant submitted a single exhibit which is styled as "Appellant Exhibit A."

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 Director notes that witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

If the Director finds substantial evidence in the record to support the Commissioner's decision, the Director affirms the decision. The substantial evidence test requires only enough relevant information and inferences from that information to support a conclusion, even though other conclusions could also be 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.

Factual Background

At all relevant times, Mr. Frye was a licensed Pest Control Advisor (PCA), License No. 71075 and registered with the County of Monterey. (County Hearing Exhibit No. 8, [Agricultural Pest Control Advisor Registration, signed Feb. 24, 2017].) At the time of the incident, Mr. Frye was employed by Soil Fume, Inc. (Soil Fume), a licensed Pest Control Business (PCB).

On August 27, 2017, Mr. Frye submitted a "Pest Control Recommendation and Notice of Intent" (Recommendation) (County Hearing Exhibit No. 9), to have Soil Fume apply Tri-Chlor Fumigant to nine acres of the Nakagawa Farm under Permit No. 27-17-2700559, Site 010001, 2139 Elkhorn Ranch. The active ingredient in Tri-Chlor Fumigant is Chloropicrin.² The treated acres were designated as Blocks 1 and 4 on site maps submitted to the County. (County Hearing Exhibit Nos. 3, 10). Block 1 is within ¼ mile (1,320 feet) of the Elkhorn Elementary School. (*Id.*)

Chloropicrin is a restricted material in California. (3 CCR, § 6400, subd. (e) [listing Chloropicrin as a restricted material].) "Restricted materials are pesticides deemed to have a higher potential to cause harm to public health, farm workers, domestic animals, honeybees, the environment, wildlife, or other crops compared to other pesticides. With certain exceptions, restricted materials may be purchased and used only by or under the supervision of a certified

² Tri-Chlor Fumigant, CA Reg. No. 58266-2-AA-11220, EPA Reg. No. 58266-2-11220, registered by the Department of Pesticide Registration, October 1, 2012. County Exhibit No. 12 (Specimen Label, March 2012).

commercial or private applicator under a permit issued by the County Agricultural Commissioner (CAC).”³

Due to its potential to harm human health and the environment, applications of products with this active ingredient are subject to County-wide general permit conditions. (County Hearing Exhibit No. 2 [2017 General Permit Conditions].) As required by the 2017 General Permit Conditions, Nakagawa Farms was required to submit a soil fumigation plan (also termed a “worksite plan”), notification log, encroachment permit and aerial maps of the application area. (Hearing Exhibits No. 3 [final and approved soil fumigation plan, signed encroachment permit, notification log and maps].)

Fumigation applications involve treating the soil, which is then covered in tarpaulins (tarps). The 2017 General Permit Conditions provide that “[t]arps must not be cut before 9 days (216 hours) have passed after the application is complete, and must not be removed sooner than 1 day (24 hours) after the tarps are cut.” (Exhibit No. 2, p. 9.)

Due to the proximity to the Elkhorn Elementary School, the application was also subject to the “Monterey County Restricted Materials Supplemental Permit Chloropicrin and Chloropicrin with 1, 3-D Permit Conditions, Nakagawa Farms Permit No. 27-16-2700559, Site 010001, 2139 Elkhorn Ranch” (County Hearing Exhibit No. 5 [Supplemental Permit Conditions].)

Under the bold-print heading “Tarp Cutting and Removal” the Supplemental Permit Conditions provide additional instructions concerning tarp cutting and removal:

Tarp cutting on Block 1 shall commence *on the Saturday following the 9 days* (216 hours) after the completion of the application. Tarps shall not be removed sooner than 1 day (24 hours) after the tarps are cut.

(Exhibit No. 5, p. 2, emphasis added.) The application occurred on Saturday, September 2, 2017. Therefore, the soonest that the tarps could be cut was Saturday, September 16, 2017 and the soonest that the tarps could be removed was Sunday, September 17, 2017. (See Appellant Hearing Exhibit A [September 2017 calendar].)

The Supplemental Permit Conditions were signed by Mr. Nakagawa on August 29, 2017. (Exhibit No. 5.) On that same day, the parties held a 15-minute meeting at the school to discuss the pesticide application. In attendance were Mr. Frye, Mr. Nakagawa, Monterey County Deputy Agricultural Commissioner Mr. Ken Allen, Monterey County Deputy Agricultural Commissioner Heather Healy, Monterey County Agricultural Inspector Yvette Hilber, and two school

³ California Dept. of Pesticide Regulation, Restricted Materials Use Requirements, <https://www.cdpr.ca.gov/docs/enforce/permitting>, (last viewed, Feb. 8, 2021.)

representatives, Supervisor of Facilities, Maintenance and Facilities, Mr. Mark Harris and school Principal Ms. Sandra Cuevas. (County Hearing Exhibit No. 7.)

The Supplemental Permit Conditions were also sent by email by Ms. Hilber to Mr. Frye. (County Hearing Exhibit No. 6.) The email address used by Ms. Hilber was davef@soilfume.com. (*Id.*) This email address is the same email address provided by Mr. Frye on his Monterey County Agricultural Pest Control Advisor Registration. (Exhibit No. 8, p. 3.)

The Supplemental Permit Conditions were also referenced in the “Application – Restricted Materials Permit – Supplement,” a 31-line spreadsheet that was both initialized and signed by Mr. Nakagawa on August 29, 2017. (County Exhibit No. 4.) Lines 18 to 20 state: “Site-specific conditions for Block 1. School within ¼ miles of application.” (*Id.*)

On Friday, September 15, 2017, Ms. Hilber visited the application site. During this site visit, she discovered that Salinas Tarp Pullers had cut the tarps on Thursday, September 14, 2017 and were in the process of removing them. Ms. Hilber contacted Mr. Ken Allen. Mr. Allen drove past the site on September 15, 2017 and observed that the tarps had been removed. (Exhibit 1, p. 1; see also Allen Testimony, Hearing Audio File, at 1:02 – 1:04.) In a subsequent meeting, representatives from Salinas Tarp Pullers stated to County investigators that they had been instructed to cut and remove the tarps during the week. (Allen Testimony, Hearing Audio File, at 1:02 – 1:08.) As stated above, under the terms of the Supplemental Permit Conditions, the earliest that the tarps should have been cut was Saturday, September 16, 2017 and the earliest that the tarps should have been removed was Sunday, September 17, 2017.

Relevant Laws and Regulations

Food and Agricultural Code section 12973 provides:

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.

California Code of Regulations, title 3, section 6432 provides that a local agricultural commissioner must consider local conditions when evaluating a restricted materials use permit or notice of intent, and allows a commissioner to impose additional restrictions on such permits due to such local conditions, in order to lessen or avoid adverse impacts to human health and the environment.

When levying fines, a commissioner must follow the fine guidelines set forth in California Code of Regulations, title 3, section 6130. Under California Code of Regulations, title 3, section 6130, violations shall be designated as a Class A, Class B, or Class C. 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." (3 CCR, § 6130, subd. (b)(2).) The fine range for a Class B violation is \$250 to \$1000. (3 CCR, § 6130, subd. (c)(2).)

The Commissioner shall use relevant facts, including the severity of actual or potential effects and respondent's compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (3 CCR, § 6130, subd. (d).)

Appellant's Contentions on Appeal

The Appellant raises a single issue on appeal. Appellant contends that when a PCA is employed by a PCB, the PCB is solely culpable for any violations that occur in the course of the PCA's employment. Thus, Mr. Frye contends, this action should be "directed back" to Soil Fume. (Appellant's Appeal Letter, p. 1.) Although this precise issue was not directly addressed in the Commissioner's Final Decision, this issue was raised by the Appellant during the hearing, and so is preserved on appeal. (FAC, § 12999.5, subd. (d)(5) [Director decides the appeal based on the record of the proceedings below].)

The Hearing Officer's Proposed Decision

Hearing Officer Jim Allan issued a proposed decision (Proposed Decision) which was fully adopted by Monterey County Agricultural Commissioner Henry Gonzalez on July 29, 2020 (Commissioner's Final Decision).

In reaching his decision, the Hearing Officer considered the entire record of the proceeding, including witness testimony, submitted exhibits, and stipulations made by the County and the Appellant. The Hearing Officer relied only upon such evidence and exhibits deemed credible or supported by the facts and evidence. The burden of proof that the County was required to meet in the action was a "preponderance of the evidence" or in other words, a determination that the events were "more likely than not to have happened." (Proposed Decision, p. 1.) The Hearing Officer's record of the hearing is the official record in this matter. Issues of witness credibility were the province of Hearing Officer Jim Allan. The Hearing Officer was only required to have enough information and inferences from that information to support a reasonable conclusion, even though other reasonable conclusions might also have been reached. (Proposed Decision, p. 1.) The purpose of the hearing was two-fold: 1) to determine if the County had sufficient evidence to prove, by a preponderance of the evidence, that Mr. Frye had violated Food and Agricultural Code, section 12973 as stated in the NOPA; and 2) if the County had placed the fine in the correct category, as described in California Code of Regulations, title 3, section 6130.

The Hearing Officer found that the County had sufficient evidence to establish that Mr. Frye had violated Food and Agricultural Code, section 12973 and that the Class B classification was the correct category.

First, the Hearing Officer found that Mr. Frye had “sufficient notice” of the “Saturday requirement” in the Supplemental Permit Conditions. (Proposed Decision, p. 3.) Mr. Frye was given sufficient notice of these conditions as the “written conditions were provided to the grower, emailed to [the] respondent [Appellant Mr. Frye]” and “reviewed at a meeting with the school,” which Mr. Frye attended. (Proposed Decision, p. 3.) The Hearing Officer further stated that permit conditions “have been discussed at county sponsored continuing education sessions widely attended by the regulated community.” (*Id.*) Mr. Frye was bound by the conditions, even if he did not presently recall discussing these issues at the meeting with school officials, a meeting that Mr. Frye stipulated that he had attended. (*Id.*; see also *id.* at p. 2, Prehearing Conference Stipulations, Stipulation No. 9.)

Second, the Hearing Officer found that the County properly categorized the penalty as a Class B violation. (Proposed Decision, p. 3.) The conditions placed on cutting and removing tarps within ¼ mile of a school are intended to mitigate anticipated harm. (*Id.*) The Proposed Decision also noted that the determination of the fine amount within the range is at the sole discretion of the County and is not subject to review by Hearing Officer. (*Id.*)

The Director’s Analysis

A. There is Substantial Evidence in the Record to Support the Commissioner’s Finding that the Appellant violated Food and Agricultural Code, Section 12973.

Food and Agricultural Code, section 12973 prohibits the use of any pesticide in conflict with its label “or with any additional limitations applicable to the conditions of any permit issued by the director or commissioner.”

Application of the Tri-Chlor Fumigant in this instance required compliance with three sets of restrictions under Food and Agricultural Code, section 12973. First, the application was required to comply with any and all directions and precautionary statements provided on the product label. The product label was entered into the record as County Exhibit 12. Second, the application was subject to the General Permit Conditions for Monterey County in effect in 2017. The 2017 General Permit Conditions were entered into the record as County Exhibit 2. In relevant part, the 2017 General Permit Conditions provided that after a fumigation, tarps must not be cut before nine (9) days have passed after the application is complete, and must not be removed for another 24 hours. (Exhibit No. 2, p. 9.)

Finally, the application was subject to the more restrictive Supplemental Permit

Conditions, which were entered into the record as County Exhibit 5. A “supplement” is defined as “something that completes or makes an addition” to a thing. (Merriam-Webster Dictionary Online, <https://www.merriam-webster.com/dictionary/supplement>, last viewed Feb. 11, 2021.) Therefore, by definition, supplemental permit conditions are in addition to general permit conditions. Indeed, under the California Code of Regulations, title 3, section 6432, a local commissioner *must* impose such additional, specific and more restrictive conditions when local conditions warrant it in order to ensure the safe and effective application of restricted use materials. (See generally 3 CCR, § 6432.)

Here, the local condition at issue was the proximity of Elkhorn Elementary School to Block 1 of the application site. (Exhibits 3, 10 [maps of application site, demonstrating school boundary within ¼ mile of Block 1].) Due to this local condition, the Commissioner imposed several restrictions on the application to protect the health and safety of the children and staff at the school. These restrictions included the requirement that tarps be cut and removed when school was not in session. Specifically, tarp cutting could only occur on the *Saturday* following the nine days after the completion of the application, with removal occurring not sooner than 24 hours later, on a *Sunday*. (Exhibit No. 5, pages 2.) 4

Therefore, by directing Salinas Tarp Pullers to cut and remove the tarps during the school week and before the deadlines specified in the Supplemental Permit Conditions, the Appellant violated Food and Agricultural Code, section 12973.

B. There is Substantial Evidence in the Record to Support the Commissioner’s Decision that the Appellant had Sufficient Notice of the Supplemental Permit Conditions, Including the Saturday Requirement.

Additionally, the Director finds that there is substantial evidence in the record to support the Commissioner’s decision that the Appellant had sufficient notice of the Supplemental Permit Conditions. In addition, the Director finds that the Supplemental Permit Conditions were in effect and fully-enforceable at the time of the incident.

Specifically, the record reflects that the Supplemental Permit Conditions were signed by the grower, Mr. Nakagawa, and the County in August 2017. (Exhibit No. 5.) The record reflects that these conditions were referenced on paperwork accompanying the permit itself. (Exhibit No. 4, lines 18-20.) The record reflects that the Supplemental Permit Conditions were emailed to the Appellant at the address provided by him in his PCA registration with the County. (Exhibit Nos.

4 The Commissioner imposed several other restrictions on this application, including, but not limited to: restricting the initial application to a weekend, and if during Labor Day weekend, only if no events were occurring at the school; requiring the school facilities manager receive prior notification before the application; and site monitoring.

6, 8.) The record further reflects these issues were discussed at a meeting with school officials, which Mr. Frye attended. A record of this meeting was put into the record as County Exhibit 7. Mr. Allen testified that County Exhibit 7 is a spreadsheet created and maintained by him in order to track and memorialize such conversations with local schools. (Allen Testimony, Hearing Audio File, at 43 – 44 minutes.) The Appellant stipulated that he attended the meeting. (Proposed Decision, p. 2, Prehearing Conference Stipulations, Stipulation No. 9.)

Therefore, the Director finds that there is substantial evidence in the record to support the Commissioner's finding that the Appellant had sufficient notice of the permit conditions, including the Saturday requirement. These conditions were in effect and fully-enforceable at the time of the incident.

C. There is Substantial Evidence in the Record to Support a Finding that an Individual PCA is Liable for Failure to Understand and Comply with all Permit Conditions, Including Supplemental Permit Conditions.

The Director finds that there is substantial evidence in the record to support a finding that an individual PCA must understand and comply with restricted materials permit conditions, including supplemental permit conditions. Therefore, the Appellant's contention that only a PCB is liable for such violations when the application occurs in the course of the PCA's employment is without merit.

At all relevant times, the Appellant was licensed with the Department as a Pest Control Advisor (License No. 71075) and registered with the County of Monterey. Mr. Frye's Agricultural Pest Control Advisor Registration for Monterey County was entered into the record as Hearing Exhibit 8. In relevant part, Mr. Frye's Agricultural Pest Control Advisor Registration provides:

2. *PCA's should be aware of the grower's restricted materials permit when making recommendations.*

4. In addition, *certain permits may have more restrictive conditions based on local conditions. It is your [the PCA's] responsibility to read and understand these as well. If you have any questions, contact [the office of the Monterey County Agricultural Commissioner] before writing the [pesticide use] recommendation or the NOI [Notice of Intent].*

(Exhibit No. 8, p. 2, emphasis added.) In particular, the terms in condition four (4) plainly apprise a licensee that certain permits may contain more restrictive conditions based on local conditions, and it is the PCA's specific and personal responsibility to read and understand these additional conditions.

In addition to the Appellant's PCA registration, the Supplemental Permit Conditions also apprised the Appellant of his specific responsibility to comply with the additional permit conditions. The Supplemental Permit Conditions state:

*You, the Pest Control Business (PCB) and the Pest Control Advisor (PCA) are all equally responsible to comply with these supplemental permit conditions. Failure to comply may result in an administrative penalty consisting of a fine to you, the PCB and the PCA.*⁵

(Exhibit No. 5, p. 1, emphasis added.) The Director finds the statement "all equally responsible" to be a key phrase, along with references to the "PCA" (here, the Appellant.) This language was sufficient to fairly apprise the Appellant of his personal responsibility under the terms of his registration to comply with the Supplemental Permit Conditions imposed on Mr. Nakagawa's restricted materials permit.

In addition, as discussed above, Food and Agricultural Code, section 12973 does not limit liability based on the employment status of the PCA. Although the Appellant may disagree with the County's decision to hold him liable, there is substantial evidence in the record to support the Commissioner's finding that the County was within its discretion to do so.

Appellant's position that licensed PCAs should be shielded from liability by their employer is particularly troubling in light of statements made by the Appellant at the March 13, 2018 hearing. When asked by County representative Casey McSwiggen (Deputy Agricultural Commissioner, Monterey County) if the Appellant had received and understood the Supplemental Permit Conditions, the Appellant responded by stating "permit conditions usually don't have teeth. They are just SOP, standard operating procedures." (Frye Testimony, Hearing Audio File at 1:45.)

This is false. Far from simply reiterating "standard operating procedures" supplemental permit conditions *expand* the list of requirements for a pesticide application with additional, more restrictive conditions. Nor are supplemental permit conditions "without teeth" but rather, when approved by a county and signed by an applicant become a fully-enforceable set of requirements. As discussed above, Chloropicrin is a highly-regulated restricted material in California, due to its potential to harm human health. The purpose of the Supplemental Permit Conditions was to provide additional protection to children and school employees, due to school's proximity to the treated area. As the Hearing Officer stated, "[w]hile the label, laws,

⁵ As the document explains, "You" refers to the permit applicant. In this instance, Mike Nakagawa and Nakagawa Farms.

regulations and permit conditions for fumigation comprise a complex range of responsibilities, they do form the body of rules that must be adhered to.” (Proposed Decision, p. 3.) The Director concurs.

Conclusion

The Director finds that there is substantial evidence in the record to support a finding that the Appellant had sufficient notice of the Supplemental Permit Conditions and that an individual, licensed PCA is expected to know, understand and adhere to all of the laws, regulations and conditions related to a pesticide application for a restricted material where that PCA has written the Recommendation.

The Commissioner’s decision that Appellant violated Food and Agricultural Code, section 12973 and that the violation qualified as a Class B violation is affirmed. The fine of \$1,000 is upheld.

Disposition

The Commissioner’s decision and levy of fine is affirmed. The Commissioner shall notify Appellant of how and when to pay the \$1,000 fine.

Judicial Review

Under Food and Agricultural Code, section 12999.5, the Appellant may seek court review of the Director’s decision within 30 days of the date of the decision. 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: FEB 17 2021

By: 
Val Dolcini, Director