

**BEFORE THE DIRECTOR OF THE DEPARTMENT OF PESTICIDE REGULATION  
STATE OF CALIFORNIA**

In the Matter of the Decision of  
Agricultural Commissioner of  
the County of San Luis Obispo  
(County File No. 052-ACP-SLO-07/08)

Administrative Docket No. 166

**DECISION**

**Tri-Cal, Incorporated**  
**Post Office Box 1327**  
**Hollister, California 95024**

Appellant/

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5, and Title 3, California Code of Regulations (3 CCR) section 6130, county agricultural commissioners may levy a civil penalty up to \$5,000 against a person who violates certain California pesticide laws. FAC section 12973 prohibits use of a pesticide in conflict with the registered label.

The San Luis Obispo County Agricultural Commissioner proposed to fine Tri-Cal, Incorporated (Tri-Cal) \$400 for using Inline, a field fumigant, in conflict with its label by not having two self-contained breathing apparatuses (SCBAs) available at the application site. Tri-Cal requested and appeared at a hearing to contest the proposed action. The Hearing Officer found that Tri-Cal had not violated section 12973 because the Inline label did not require that two SCBAs be available. The Commissioner disagreed, found that Tri-Cal had violated section 12973, and levied the \$400 fine.

Tri-Cal appealed the Commissioner's action to the Director of the Department of Pesticide Regulation. The Director has jurisdiction over the appeal under FAC section 12999.5.

**Factual Background**

The facts are not in dispute. Tri-Cal used Inline on March 31, 2008. During that use, Tri-Cal's employees had two SCBAs in the cab of their truck. One of the tanks had air in it; the other was empty.

**Appellant's Contentions**

On appeal, Tri-Cal contends that the label does not require that two SCBAs be available. Tri-Cal also contends that compliance with 3 CCR section 6739(j) regarding inspection and repair of respirators is equivalent to compliance with the label instructions that respirators be available during fumigation.

### **Standard of Review**

The Director decides the appeal on the record before the Hearing Officer. The Director affirms the commissioner's decision if it is supported by substantial evidence. The substantial evidence test requires sufficient relevant evidence and inferences from that evidence to support a conclusion by a reasonable fact-finder, even though a reasonable person might also have made different findings. Where a commissioner's decision presents a question of the law, the Director decides that issue using her independent judgment.

### **Findings and Analysis**

Parties dispute whether the Inline label requires that two SCBAs be available onsite during use. This is a question of law. As an initial matter, the Inline label does not clearly address the issue of how many SCBAs, if any, must be onsite. The relevant label instructions are:

- Never fumigate alone: It is imperative to always have an assistant and proper protective equipment in case of accidents.
- Handlers exposed to high airborne concentrations of this product, such as cleanup following large spills, must wear . . . Supplied-air respirator . . . or self-contained breathing apparatus.

According to the label, handlers are not required to wear SCBAs when performing virtually any other tasks involved in Inline use, including cleaning up "small spills," cleaning or repairing equipment, transferring the fumigant in an open delivery system, and entering the treated field within five days to assess the application and adjust the tarp (collectively "routine tasks"). Inline is one-third chloropicrin, a strong, tear-producing eye irritant and an upper respiratory tract irritant. The label only instructs handlers to wear SCBAs in case of exposure to high concentrations of the Inline, such as those present during cleanup of a large spill or in a similar emergency response situation. The label requires SCBAs be worn when the air concentration of chloropicrin exceeds four parts per million, but there is no requirement to measure chloropicrin concentrations, or wear an SCBA, during routine tasks.

Thus SCBAs are "proper protective equipment" in cases of exposure to high air concentrations such as a large spill. In the course of using Inline there can be accidents, such as large spills, that require the responder, whoever that may be, to don an SCBA. Thus, it can be argued that the label instruction to *always* have proper protective equipment *in case of* accidents requires that two SCBAs be available onsite at every Inline fumigation--one for a handler who may be required to enter the area of high air concentration, and one for the person who remains outside ready to enter and assist if the need arises.

Tri-Cal's response to this interpretation of the label requirement and its application in this instance is well taken. Its emergency response protocol requires that its employees evacuate the

area and wait for professional emergency responders. Thus, Tri-Cal is not the “handler” who would cleanup large spills, the activity that requires two SCBAs. However, Tri-Cal is responsible to ensure that proper equipment is available in case of a large spill either to its own employees or the emergency responders, whichever entity they anticipate will respond to the incident. If a professional emergency responder who maintains its own equipment has been designated to respond to any accident at Tri-Cal Inline fumigations, requiring Tri-Cal to maintain the required protective equipment required for cleaning up large spills onsite would be duplicative and impose an unnecessary expense.

This analysis does not relieve Tri-Cal of the responsibility to have one SCBA onsite to meet the label requirement. Cleaning up a large spill is not the only reason an SCBA may be needed in case of accidents. The point of the label instruction to never fumigate alone in case of accidents is that the applicator may need help escaping or evacuating. The label notes that a high chloropicrin air concentration could leave an exposed person temporarily blind and panic-stricken. (Exhibit X) If an accident occurs, the second applicator required by the label in case of just such an event could be exposed to high concentrations. The label requires that second applicator to have access to proper protective equipment, including an SCBA.

Thus, the Inline label instructions require that the fumigator always have at least one SCBA available onsite, so that the assistant can do it to immediately rescue the applicator from a high concentration area resulting from an accident. However the label does not necessarily require the fumigator to have two SCBAs onsite. If the applicator has obtained written assurance from the responder identified in its emergency response plan that the responder is prepared with the two appropriate and functioning SCBAs, and any other equipment required by the label for cleaning up large spills, then the applicator need only have one SCBA available onsite.

The burden is on the respondent to show that it had such assurance from the emergency responder, and thus that adequate protective equipment was available to respond to any accidents at its Inline applications. However, the need to show this fact was not identified as a relevant issue at hearing by any party. Thus the record is not clear on this issue. The only evidence on point suggests that Tri-Cal did have an adequate emergency plan. The parties also agree that one working SCBA was available onsite. While Tri-Cal should have provided clear evidence that justified its reliance on the emergency responders to satisfy its responsibility under the label to assure adequate protective equipment in case of an accident, we do not find it fair to rely on that deficiency to support the violation in this instance. The label requirement is not spelled out with clarity and it was reasonable for Tri-Cal to provide one functioning SCBA onsite to meet the requirement backed up by its emergency response plan. However, further compliance and enforcement efforts should be guided by the reasoning of this decision.

While not necessary to resolve this appeal, we note that Tri-Cal’s contention that its compliance with 3 CCR section 6739(j) somehow means that an SCBA without any air in its tank is “available” is without merit. Section 6739(j) requires that Tri-Cal inspect its emergency

use respirators at least once a month according to certain standards. The Inline label requires that proper protective equipment, including at least one SCBA, be available during fumigation. These requirements are obviously related. Section 6739(j) requires Tri-Cal to take a specific action--inspect emergency respirators monthly--which decreases the risk that its respirators will not be available if needed. The label makes Tri-Cal, as the fumigator, responsible for the existence of a certain condition--that appropriate respirators are, in fact, available.

These are different requirements and it is entirely possible to violate either or both. For example, if the inspection tag on the lone available SCBA in this case showed that it had not been properly inspected in the past month, then Tri-Cal would have been in violation of section 6739, even if it did not violate the label. If the tag showed that the SCBA had been properly inspected, but its tank was also empty, then Tri-Cal would have violated the label instruction, but not the regulation. Compliance with the requirement to inspect a respirator does not excuse the failure to actually have the functioning respirator available.

**Conclusion**

For the foregoing reasons, the Commissioner's decision to levy a penalty of \$400 against Tri-Cal for violating FAC section 12973 is not supported by substantial evidence.

**Disposition**

The Commissioner's decision is reversed.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**

**October 20, 2009**  
Dated: \_\_\_\_\_

  
By: \_\_\_\_\_  
Mary-Ann Warmerdam, Director