

**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. 3-ACP-SB-10/11)

Administrative Docket. No. 183

**DIRECTOR'S
DECISION**

TriCal, Inc.
P.O. 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 (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing on February 24, 2011, the Santa Barbara CAC found that on August 30, 2010, the appellant, TriCal, Inc., committed one violation of California's pesticide laws. The CAC levied a \$700 fine for one violation of FAC section 12973, and because this was a repeat Class B violation, the CAC levied this fine as a Class A violation.

The appellant appealed from the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using 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.

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

On August 30, 2010, Appellant completed an application of MBC-33 (methyl bromide and chloropicrin) on a remote field located in Lompoc, California and operated by Rincon Pacific. The restricted materials permit issued by the CAC required that the inner buffer zone of the field be posted with warning signs every 100 feet, and that the applicator insure that the field is so posted during the application period. The permit required that the operator insure that the field stay posted after the applicator leaves the field until the reentry interval expires.

On August 31, 2010, the CAC received a complaint by a neighbor that the application had occurred too close to her house. The CAC responded and investigated that same day. The CAC inspectors noted a number of violations by both Rincon and Appellant. As relevant here, the CAC found that the Appellant had failed to insure that warning signs along the inner buffer zone of the south edge of the field were posted every 100 feet.

Relevant Laws and Regulations

FAC section 12973 states that 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.

When levying fines, the CAC must follow the fine guidelines in 3 CCR section 6130. Under section 6130, violations shall be designated as "Class A," "Class B," and "Class C." A "Class A" violation is one which created an actual health or environmental hazard; is a violation of a lawful order of the CAC issued pursuant to FAC sections 11737, 11737.5, 11896, or 11897; or is a repeat of a Class B violation. The fine range for Class A violations is \$700-\$5,000. A "Class B" violation is one that posed a reasonable possibility of creating a health or environmental effect, or is a repeat of a Class C violation. The fine range for Class B violations is \$250-\$1,000. A "Class C" violation is one that is not defined in either Class A or Class B. The fine range for Class C violations is \$50-\$400.

Appellant's Allegations

The Appellant asserts that his employee, Luis Velasquez, placed five signs along the inner buffer zone of the field in compliance with the permit conditions. Appellant asserts that the two of the signs must have blown down or were removed by someone. The Appellant also asserts that the CAC inspectors visited the property approximately twenty-four hours after his company had left the property and that after his company left the property the responsibility for insuring that the inner buffer zone was properly posted rested with the property operator alone.

The Appellant also asserts that the Hearing Officer's Proposed Decision and Order is not supported by the evidence.

The Hearing Officer's Decision

The Hearing Officer found that the preponderance of the evidence shows that Appellant did not place the signs at the edge of the inner buffer zone on August 30, 2010 as claimed. The length of the field edge to be posted was approximately 343 feet requiring five signs. The inspectors found only three signs, posted at the corners and one sign in between creating an interval of 180 feet and another interval of 150 feet. The Hearing Officer found that there was no evidence of anyone working nearby that would have removed signs and that the remote location, the interior field bordering a fence and a thick row of trees, and the restricted application made it extremely unlikely that a person would have walked through the outer buffer zone and removed two signs from the boundary of the inner buffer zone. It was also noted that the inspectors did not find the signs lying on the ground, and Mr. Velasquez did not actually provide testimony that he had properly placed five signs. Based on this evidence, the Hearing Officer concluded that the signs were found as initially placed by the applicator's employee so that the Appellant had failed to insure the posting required in the permit.

The Director's Analysis

The hearing tape provided to the Director as part of the record contained much testimony about the location of the signs as found and where the signs should have been. However, the testimony provides little guidance to the Director. The testimony consisted of witnesses pointing out locations on paper without identifying the exhibits and the record only reflects verbal statements such as "a sign was placed here, here, and here, "signs should have been posted here, here, and here". It is essential that the Hearing Officer require that the testimony be given in a manner that can be understood from a review of the hearing record. Despite this difficulty, the record is adequate to reach a decision in this case.

It is undisputed that the CAC's permit conditions required that the inner buffer zone be posted with signs at 100 foot intervals¹ before beginning the injection and throughout the time the injection continued. The inspector's report and her testimony establish that approximately 24 hours after the application only three signs were found marking the south side inner buffer zone, creating an interval of 180 feet and another at 150 feet.² The inspector also testified that when walking through the bean field along the south edge, she did not find any signs lying on

¹ Appellant argued that California regulations required the posting at 200 foot intervals and placed the responsibility for insuring the posting exclusively on the property operator. As recognized by the Appellant at hearing, the permit conditions control in this situation and the regulations are irrelevant to this action.

² As noted by the Hearing Officer, the fact that the NOPA stated the intervals as 200 feet and 150 feet is not relevant. Defendant/Appellant received ample notice that the charge was failure to properly post the inner buffer zone.

