

**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 Luis Obispo  
(County File No. 009-ACP-SLO-12/13)

Administrative Docket. No. 189

**DIRECTOR'S  
DECISION**

**Tri-Cal, Inc.**  
**P.O. Box 1327**  
**Hollister, California 95024**  

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Appellant.

**Procedural Background**

Under Food and Agricultural Code section 12999.5, county agricultural commissioners (CACs) 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 November 29, 2012, the San Luis Obispo CAC found that Appellant, Tri-Cal, Inc., committed two separate violations of Food and Agricultural Code section 12973. The first violation consists of the Appellant using the pesticide Tri-Con 50/50 in conflict with the registered label by failing to communicate to all handlers "the information necessary to comply with the label," when performing handling activities, including failing to maintain a complete and accurate fumigation management plan (FMP) record. The CAC determined that this was a Class A violation and fined Appellant \$2,000. The second violation involves the failure of the Appellant to post inner buffer zone signs in accordance with permit conditions. The CAC determined that this was a Class B violation and fined Appellant \$500, for a combined total fine of \$2,500.

Appellant appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR). The Director has jurisdiction to review the appeal under Food and Agricultural Code 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 CAC'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 CAC'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 CAC's decision. If the Director finds substantial evidence in the record to support the CAC's decision, the Director affirms the decision.

#### **Relevant Laws and Regulations**

Food and Agricultural Code section 12973 states that a pesticide cannot be used in conflict with its label or permit conditions.

California Code of Regulations, Title 3, section 6784, requires that before any employee may enter a field fumigated with methyl bromide to repair a tarp, a certified applicator wearing a self-contained breathing apparatus (SCBA) must test the ambient air to determine if the tarp can be repaired by a handler who is not wearing a SCBA. (Cal. Code Regs., tit. 3, § 6784, subd. (b)(5)(C).)

When levying fines, the Commissioner must follow the fine guidelines in California Code of Regulations, Title 3, section 6130. Violations shall be designated as Class A when the violation caused a health hazard. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(A).) The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c) (1).)

#### **Relevant Label Requirements**

Tri-Con 50/50 is a pre-plant fumigant consisting of the active ingredients methyl bromide and chloropicrin. (See stipulations of parties (Stipulations), 4, 5.) This is a restricted material pesticide, registered for use in California. (Stipulations 4-5.) The label requires that the user comply with all local regulations. (County Ex. 32, Tri-Con 50/50 label, p. 5.)

Before applying the pesticide, a site-specific FMP must be created for each day's fumigation activities. (County Ex. 32, Tri-Con 50/50 label, p. 14.) The certified applicator performing the fumigation is responsible for each FMP. (Ibid.)

After Tri-Con 50/50 is applied to the soil and the ground is covered with a tarp, for a specified period of time after the application, no one may enter the area where the ground has been fumigated and tarped unless they are handlers performing handling tasks, have been appropriately trained, and are equipped with the appropriate personal protective equipment (PPE). (County Ex. 32, Tri-Con 50/50 label, pp. 5-6.) On the label, this is called the "entry restricted period." Depending on the type of tarp and how it may be perforated, the length of time designated by the label as the entry restricted period may be different.

A handler is anyone applying the fumigant, supervising the application of the fumigant, taking air samples or monitoring the air concentrations, or making any repairs to the tarp during the entry restricted period. (County Ex. 32, Tri-Con 50/50 label, p. 6.)

At least two trained handlers must be present when performing any handling activity. (County Ex. 32, Tri-Con 50/50 label, p. 7.) For those handlers that are designated to wear respirators including SCBAs, the FMP must include the date of medical qualification, date of training, and date of fit-testing for those respirators. (County Ex. 32, Tri-Con 50/50 label, pp. 7, 14-15.) It also requires that a SCBA be on-site for all handling activities in case of an emergency. This information must be documented by the employer of any handler in the FMP. (County Ex. 32, Tri-Con 50/50 label, p. 7.) Most pertinent here, all the necessary information required to comply with the label must be communicated to the handlers:

For handling activities that take place after the fumigant has been delivered/dispensed into the soil until the entry restricted period expires, the certified applicator does not have to be on-site, but must have communicated in a manner that can be understood to the site owner/operator *and handlers* responsible for carrying out those activities the information necessary to comply with the label and procedures described in the FMP.

(Emphasis added.) (County Ex. 32, Tri-Con 50/50 label, p. 6.)

### **Factual Background**

Mar Vista Berry, LLC (Mar Vista), is a grower that hired Appellant, a licensed pest control business, to perform fumigation of its strawberry fields with Tri-Con 50/50. (Stipulations 3-5, 7.) At some point in time, Appellant provided the owner of Mar Vista an English version of the Tri-Con 50/50 label. (County Ex. 48.)

Leading up to the fumigation, Appellant met with Mar Vista employee Christopher Giannini, a licensed Pest Control Adviser. Giannini was the primary contact between Appellant and Mar Vista. Appellant assisted Giannini to prepare the necessary documents on behalf of Mar

Vista to obtain a restricted materials permit for the fumigation of Tri-Con 50/50 from the County, including the FMP. Giannini was not a handler and was not involved in applying the fumigant. (Giannini testimony.)

Before Appellant began any work on the Mar Vista site, they provided Giannini with a document entitled "Safety Information for Handlers of Pesticide Soil Fumigants," in both English and Spanish that Giannini was to provide to the handlers employed by Mar Vista. (Giannini testimony, Respondent Ex. B.) That document would be the basis for the safety training for all Mar Vista handlers. (Fichtner testimony; Giannini testimony; County Ex. 29, p. 16 of 24.) It includes information such as "THE LABEL IS THE LAW" and advises handlers to read the safety information on the label. (Respondent Ex. B.)

The safety training itself was performed by Mar Vista employees Jesus Carranza and Luis Cordova. (County Ex. 29, p. 16 of 24; Giannini testimony.) That training was conducted in Spanish. (Giannini testimony.) During the training, Carranza gave the Spanish version of the document "Safety Information for Handlers of Pesticide Soil Fumigants," to the Mar Vista handlers. (Giannini testimony.)

The complete plan for fumigating Mar Vista included a sequence of 12 scheduled tarped applications of Tri-Con 50/50. Each of the 12 application blocks were designated by day--Day 1 fumigation block, Day 2 fumigation block, and so on. (County Ex. 40.)

The FMP for the Day 2 fumigation block was not complete and did not contain all the necessary information required by the Tri-Con 50/50 label. (Hearing Officer's Decision, pp. 4-8; County Exs. 32-48). It did contain information indicating that Appellant's employees were to apply the fumigant for the Day 2 fumigation block and were responsible for tarp repair during the fumigation injection. For the remainder of the entry restricted period following the fumigation injection, all handlers, including those who were responsible for repairing the tarp, were Mar Vista employees. (County Ex. 41.)

On August 13, 2011, Appellant applied Tri-Con 50/50 to the Day 2 fumigation block. (County Exs. 29, 44; Schmitz testimony.)

Five days later, on August 18, 2011, the Day 2 fumigation block was still entry restricted. (Stipulation 8.) That afternoon, Mar Vista employee Ricardo Navarro attempted to repair the tarp in the Day 2 fumigation block by himself. (Stipulation 8.) No fumigant level testing of the air around the block had been performed before Navarro's entry. (County Exs. 29, 44; Schmitz testimony.) During this attempt, Navarro was exposed to methyl bromide and chloropicrin. (Stipulation 8; County Ex. 30.) He suffered symptoms including burning eyes, vomiting, loss of consciousness, memory loss, and seizures. (County Ex. 29, p. 15 of 24.) He was taken to a medical clinic and then transferred to a hospital.

John Schmitz, an investigator and biologist employed by the County, conducted an investigation into the events that led to Navarro's exposure and reported his findings in a Pesticide Investigation Report. (County Exs. 29, 30, 32, 33 and 50; Schmitz testimony.)

### **Appellant's Allegations**

Appellant challenges only the \$2,000 Class A violation for using a pesticide in conflict with its label, arguing that they "absolutely communicated information in comprehensible form sufficient to allow Mar Vista and its personnel to comply with the label." Appellant also argues that the fact that the FMP was incomplete is "irrelevant" in establishing a failure to communicate between Appellant and the Mar Vista handlers.

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

The hearing officer determined that Appellant violated Food and Agricultural Code section 12973 by using the pesticide Tri-Con 50/50 in conflict with the label. The hearing officer discussed evidence that established that the Tri-Con 50/50 label required a complete FMP for each day's fumigation. The supervising certified applicator for the Day 2 fumigation block was an employee of Appellant. The label requires that the supervising applicator verify that a site-specific FMP existed for each day's activities. Here, the Day 2 fumigation block FMP lacked required information, including:

1. Information regarding whether any handler was properly fit-tested, trained, and medically examined. The statement on the FMP stating "Handler respiratory information and qualifications available on file," in the FMP was insufficient to document this information in the FMP without verification that those documents actually existed.
2. Information concerning whether TriCal or Mar Vista had a SCBA for emergencies.
3. Incomplete emergency procedures that did not specify that two trained handlers needed to be present during repair of tarp failures.

(Hearing Officer's Decision, pp. 4-8 of 10.)

In addition, the Tri-Con 50/50 label requires that for the 14 days after the initial application, the certified applicator that applied the pesticide does not need to be present, but must have communicated to the handlers that will be working in the entry restricted areas, in a manner that they understand, what the label requires when working in those areas. (County Exhibit 32, Tri-Con 50/50 label, p. 6.) The purpose of this label instruction is to maintain the safety of those handlers.

In his decision, the hearing officer reasoned "that the FMP must be accurate and complete in order to provide necessary information quickly to applicators, property operators, and all

handlers to assure worker safety during application and entry restricted periods and effective and safe emergency response. Any inaccurate or incomplete information in the FMP would demonstrate use in conflict with labeling by the certified applicator." (Hearing Officer's Decision, p. 6 of 10.) According to the label directions, Appellant and his certified applicator employee had the responsibility for ensuring that the FMP was complete in order for the necessary information be available to applicators, property operators, and all handlers. "[S]ince not all the required information was included in the written FMP, that information was not described in the FMP in a manner that could be understood." (Hearing Officer's Decision, p. 8 of 10.) Failing to maintain an accurate FMP, and failing to verify that the information in the FMP was accurate, led to a miscommunication. (Hearing Officer's Decision, p. 6 of 10.) Had the certified applicator verified that the FMP was complete and accurate, the incident may not have occurred. (Hearing Officer's Decision, p. 7 of 10.)

The hearing officer found that failing to follow the label directions that mandate a complete and accurate FMP was a clear indication that a failure to communicate between the certified applicator and the Mar Vista handlers occurred. Accordingly Appellant violated Food and Agricultural Code section 12973 by using the pesticide in conflict with the label. (Hearing Officer's Decision, p. 8 of 10.)

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

There is substantial evidence in the record to find that Appellant violated Food and Agricultural Code section 12973 by using Tri-Con 50/50, a restricted material pesticide, in conflict with the label.

Appellant argued during the hearing and in this appeal that Appellant was "deeply involved in advising Mar Vista about the upcoming fumigant application and in preparing the FMP and other necessary documentation, including the Worksite Plan and Tarp Repair Plan." Appellant does not challenge that the FMP was incomplete. Rather, they assert that the FMP was not the only communication by Appellant and Mar Vista owners and handlers and argue that the fact that the FMP was incomplete is "irrelevant."

Simply having an incomplete FMP is sufficient to show that Appellant did not follow the label directions. The Tri-Con 50/50 label required a complete and accurate FMP. Although the hearing officer concluded that the label was unclear as to who's certified applicator (Appellant's employee or Mar Vista's employee) was responsible for having a complete FMP (Hearing Officer's Decision, p. 5 of 10), it is the certified applicator performing the fumigation that has that responsibility. (See County Ex. 32, Tri-Con 50/50 label, pp. 6, 14.) Appellant's employee was the certified applicator performing the fumigation. (County Exs. 29, 35, 43.) The certified applicator performing the fumigation is charged with knowing and following all label directions. The evidence is clear that the FMP for the Day 2 fumigation block was not complete.

Accordingly, Appellant failed to follow the label directions.

- I. Appellant failed to communicate to the Mar Vista handlers in a manner that they understood that they may not repair the tarp alone and they may not repair the tarp unless someone tests the air first.

The label required that for handling activities performed by the Mar Vista handlers during the entry restricted period, Appellant's certified applicator did not need to be present as long as he communicated to the handlers in a manner that they could understand, the label requirements for safely working in the entry restricted areas. (County Ex. 32, Tri-Con 50/50 label, p. 6.) Appellant argues that the required communication occurred because Appellant was involved in "preparing the FMP and other necessary documentation, including the Worksite Plan and Tarp Repair Plan." In addition, Appellant argues that they "provided training information and materials to Mar Vista for use with its handlers, along with a host of other materials including, among others, the Tri-Con 50/50 label and Material Safety Data Sheet, the permit and permit conditions, a site map marked with emergency exit routes, and lists of both [Appellant's] and Mar Vista's trained employees." However, none of these documents show that Appellant communicated to the Mar Vista handlers that they may not repair the tarp alone and may not repair the tarp unless the air was tested first.

Appellant provided the basis for the fumigant safety training to the Mar Vista employees in a two-page Spanish hand-out, entitled "Safety Information for Handlers of Pesticide Soil Fumigants." (Giannini testimony; Fichtner testimony; County Ex. 29 p. 16 of 24; Respondent Ex. B.) The testimony gleaned at the hearing suggests that all the handlers were primarily Spanish-speaking. (Giannini testimony.) Safety training was performed by primarily Spanish-speaking Mar Vista employees to Spanish-speaking Mar Vista handlers. (Giannini testimony; County Ex. 29.) This two-page document is not specific to Tri-Con 50/50 and lacked the safety information that led to this injury – that the tarp may not be repaired by someone working alone, and may not be repaired unless the air is tested first. (Respondent Ex. B.)

Carranza, the Mar Vista safety trainer, did not know that a written tarp repair response plan existed. (Schmidt testimony; County Ex. 29, p. 16 of 24.) He also did not know that a SCBA was required to be on site for all handling activities in case of an emergency. (County Ex. 29, p. 16 of 24.) The Mar Vista safety trainer did not himself know critical safety information for using the product in a manner that was consistent with the label. (Giannini testimony; Schmidt testimony; County Ex. 29, p. 16 of 24.) If the trainer did not know, he certainly could not have passed the information on to the other handlers.

The hand-out provided by Appellant stated that the label is the law and that all label directions must be followed. (Respondent Ex. B.) However, no evidence was submitted

establishing that any handler, or anyone else for that matter, was provided a Spanish version of the Tri-Con 50/50 label. Telling someone that the label is the law, and then making available a label in a language the handler cannot understand is insufficient to show that appropriate and effective communication of all label requirements took place. Moreover, it is unclear whether any of the handlers had access to the label, even if they could understand it.

If the certified applicator performing the fumigation is not on site after the initial application, he **must** document in the FMP that he communicated with the handlers the information necessary to safely work in those areas after his departure. (County Ex. 32, Tri-Con 50/50 label, p. 6.) It is not enough to tell those handlers to go read the label especially where, as here, they probably couldn't understand the language used on the label.

Further, the label "contains an irrefutable level of complexity." (Admission by Tri-Cal through its attorney during hearing.) It is 21 pages long. (County Ex. 32, Tri-Con 50/50 label.) The certified applicator performing the application has the responsibility to pass along the critical safety information that handlers will need when working in the entry restricted areas. (County Ex. 32, Tri-Con 50/50 label, p. 6.) The onus is placed on the certified applicator performing the application because it is he or she that must understand the label and pass that knowledge on to the handlers that will be working with the fumigant.

Navarro was not the only individual that did not understand that a tarp may not be repaired by just one person. The hearing officer found that the evidence in the record "suggests that the individual cutting the tarp on the Day 1 fumigation block on August 18, 2011 was working alone." (Hearing Officer's Decision, p. 7 of 10.) This is very concerning. So is the fact that no one at Mar Vista even knew that they were required to have a SCBA on site in case of emergencies. (Giannini testimony; County Ex. 29.) Yet, the FMP noted that all handling activities after the initial fumigation were to be handled by Mar Vista employees. (County Ex. 41.)

The certified applicator performing the fumigation did not check to make sure that Mar Vista had a SCBA on site for all of the handling activities that would take place during those critical days after the initial fumigation. Testimony gleaned from the hearing shows that the requirement for an emergency SCBA was in documents that Appellant provided to Mar Vista owners and managers. Yet no one at Mar Vista knew of this requirement. Ed Fichtner, Appellant's employee, was the contact person for the owner of Mar Vista and Giannini. (Fichtner testimony.) He testified that he did not tell anyone at Mar Vista about the need to have a SCBA on site. Clearly, whatever communication occurred between Appellant and Mar Vista in the documents that Appellant provided Mar Vista owners and managers, those documents were insufficient to communicate the Tri-Con 50/50 label requirements to the handlers.

II. Appellant failed to document in the FMP that a SCBA was on site in case of emergency.

Appellant had employee handlers. (County Exs. 29, 41; Giannini testimony; Fichtner testimony.) The label required that all employers of handlers document in the FMP that a SCBA was available in case of emergency. (County Ex. 32, Tri-Con 50/50 label p. 7.) Appellant failed to include in the FMP that a SCBA was available for handling activities performed by Appellant's employees. (County Exs. 35-43.) Here too, Appellant failed to follow the label directions.

III. Appellant failed to follow the controlling regulations.

Regulations applicable to methyl bromide applications require that a certified applicator wearing a SCBA must test the ambient air to determine if the tarp can be repaired by a handler who is not wearing a SCBA. (Cal. Code Regs., tit. 3, § 6784, subd. (b)(5)(C).) Mar Vista did not own a SCBA and didn't own any testing equipment. (Giannini testimony.) Yet only Mar Vista employees were designated for tarp repair after the initial fumigation day. (County Ex. 42.) The Appellant did not test the air before the tarp repair was performed because they failed to adequately communicate this requirement to the Mar Vista handlers they designated to conduct such repair. Thus, the Appellant is responsible for the failure to follow the regulation in conflict with the label.

IV. Conclusion.

This pesticide is a restricted material because the hazard it may pose to human health requires additional restrictions. When working with it, it is imperative that all label directions and regulations governing its use are followed to ensure that incidents like this do not happen. Here, the label directions and regulations were not followed, and this led to a serious exposure to a handler that the label and regulations were designed to protect.

This was a Class A violation because Appellant's failure to comply with Food and Agricultural Code section 12973 caused a dangerous health hazard that resulted in serious injury.

The Director affirms the Commissioner's finding that Appellant violated Food and Agricultural Code section 12973 by failing to communicate to handlers the necessary information for them to be able to comply with the Tri-Con 50/50 label. Accordingly, the Director finds that the Commissioner properly classified this violation as a Class A violation and was within his discretion to fine Appellant \$2,000.

Appellant did not challenge the second \$500 Class B violation for failure to comply with label instructions requiring inner buffer zone signs.

**Disposition**

The Commissioner's decision and levy of fine is affirmed. The commissioner shall notify the appellant how and when to pay the \$2,500 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: 9 May 2013

By: Brian Leahy  
Brian Leahy, Director