

**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 Fresno
(County File No. 003-ACP-FRE-16/17)

Administrative Docket No. 211

DIRECTOR'S DECISION

TriCal, Inc.
8100 Arroyo Circle
Gilroy, California 95020

Appellant/

Procedural Background

Under California Food and Agricultural Code (FAC) section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for violations of California's pesticide laws and regulations. When levying fines, the Commissioner must follow fine guidelines established in California Code of Regulations (CCR), 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 June 21, 2017, the Fresno County Agricultural Commissioner (Commissioner) found that appellant TriCal, Inc. (appellant or TriCal) failed to use the equipment required by the product label to seal the soil surface of a broadcast untarped chloropicrin fumigation. The Commissioner found that TriCal violated five (5) provisions of California law related to the fumigation and caused the illnesses of nine (9) individuals. The Commissioner levied a \$53,000 fine.

TriCal appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation (DPR) by arguing that it should not be responsible for first responder emergency officials who became ill as a result of TriCal's admitted pesticide use violation. The Director has jurisdiction to review the appeal under FAC section 12999.5.

Standard of Review

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 October 4, 2014 between 8:00 am and 1:30 pm, TriCal performed a broadcast untarped fumigation of an almond orchard located at 2675 N. Jameson Avenue in Fresno, California using the pesticide product Tri-Clor (reg. no. 58266-2-AA-11220) (the application). (County Exhibit E14.) Tri-Clor contains the active ingredient chloropicrin. (County Exhibit E1.)

The Department has designated chloropicrin as a restricted material under California law. (Cal. Code Regs., tit. 3, § 6400.) Applications of chloropicrin must therefore be supervised by a certified applicator. (Cal. Code Regs., tit. 3, § 6406.) P. Domecq was TriCal's certified applicator and supervisor on site at the application. At the time of the application, P. Domecq was a licensed qualified applicator (QAL no. 97243) and pest control advisor (PCA license no. 70870). (County Exhibits E3, E5.)

On September 28, 2014, prior to the application, P. Domecq signed and certified the notice of intent to apply chloropicrin ("NOI"). The NOI stated that TriCal would apply Tri-Clor to the almond orchard on October 4, 2014 using the "non-tarp deep strip" application method, and would seal the soil with a "disc [and] ring roller." (County Exhibit E5.)

On October 3, 2014, Inspector J. Fulbright, Supervising Ag/Standards Specialist for Fresno County conducted a pre-site evaluation of the application. During the evaluation, she observed the sealing tractor that would be used for the application. The tractor was equipped with a rig carrying a disc and attached metal pipe. She did not observe a cultipacker, ring roller, or roller. (PEIR at pg. 9.)

On October 4, 2014 at 8:50 pm, the Fresno County Sheriff's Department received a call from local resident R. Covarrubia complaining that a suspected pesticide drift was causing an odor and eye irritation. An emergency team consisting of four (4) county sheriff's officers and

one (1) county health officer responded to the call. (County Exhibit E20.) R. Covarrubia's residence is located directly across N. Jameson Avenue from the TriCal application site, and the emergency team investigated the application as a possible cause of the complaint. (County Exhibit E10.)

When the emergency team arrived at the application site, they obtained the applicator's contact information from warning signs that TriCal had posted along the site perimeter. (County Exhibits E24-26.) The site specific information on the signs—including the applicator's contact information—was either completely missing or faintly written on the signs. (County Exhibits E12; E24-26.) The emergency team then contacted P. Domecq, who met the team near the application site. P. Domecq stated that the pesticide used in the application was "not" toxic, and would "not require any special equipment when applying." P. Domecq stated that he "would have no problem walking into the field" and in fact agreed to accompany the emergency team in their investigation. (County Exhibit E26.) All five (5) emergency team members and P. Domecq reported experiencing illnesses.

On October 6-8, 2014, Inspector Fulbright and the Fresno County Department of Agriculture conducted an investigation of the incident by interviewing witnesses and inspecting the application site, and recorded the findings in the County Pesticide Episode Investigation Report ("PEIR"). During the investigation, the County documented that the sealing tractor at the application site matched the equipment observed during the pre-site evaluation. Namely, the tractor rig was not equipped with a cultipacker, ring roller, or roller. (County Exhibit E 23.) P. Domecq stated in his interview with the County that:

"The sealing rig was a vineyard tractor with a disc and pipe behind the disc. There was not a compacting roller-ring used at this application because the grower's tractor wasn't large enough to pull both a disc and a roller-ring."

(PEIR at pg. 16.) P. Domecq stated that "off-gassing" from the application might have been prevented by "using a ring-roller after the disc." (PEIR at pg. 17.) M. Gillis (QAL no. 103035), a TriCal employee who assisted P. Domecq in the application, stated to the County that he "didn't understand why [the sealing tractor] was such small vineyard equipment without a compaction ringer." (PEIR at pg. 26.)

In total, the County found that the TriCal application caused twelve (12) illnesses: R. Covarrubia, P. Domecq, the five (5) emergency team members, and five (5) additional bystanders who lived nearby the application site. On September 30, 2016, the Commissioner issued a Notice of Proposed Action (NOPA), charging TriCal with the following violations:

1. Twelve (12) counts of violating FAC section 12973. The Commissioner alleged that TriCal used Tri-Clor in conflict with the label by failing to use the equipment required by the product label to seal the soil surface of the broadcast untarped field fumigation. The Commissioner charged twelve (12) counts because the violation allegedly exposed R. Covarrubia, P. Domecq, the five (5) emergency team members, and the five (5) additional bystanders to a pesticide that caused each to experience acute illnesses.
2. Violation of FAC section 12973 for failing to perform fumigant monitoring in conflict with the Tri-Clor label.
3. Violation of FAC section 12973 for failing to properly post warning signs around the treated field in conflict with the Tri-Clor label.
4. Violation of FAC section 12973 for failing to include required information in the fumigation management plan in conflict with the Tri-Clor label.
5. Violation of 3 CCR section 6724(b) for failing to include required elements in the employee handler training program.
6. Violation of 3 CCR section 6724(e) for failing to retain or provide a signed record of employee annual training.

The Commissioner proposed a total fine of \$73,000 for the violations. TriCal requested a hearing. On June 21, 2017, the hearing was held in Fresno, California before Donald O. Cripe, a hearing officer designated by the Commissioner.

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and appellant had the opportunity to present evidence and question witnesses. The Hearing Officer upheld violations 2 and 4-6, but dismissed violation 3 and three (3) of the twelve (12) counts of violation 1. As is relevant to this appeal, the Hearing Officer upheld all five (5) counts of violation 1 corresponding to the five (5) emergency team members. The Hearing Officer reduced the total fine to \$53,000. The Commissioner adopted the Hearing Officer's decision in its entirety.

Appellant's Allegations

TriCal appeals the Commissioner's decision only with respect to the five (5) counts of violation 1 corresponding to the five (5) emergency team members. Appellant argues that the Commissioner's decision for those counts should be reversed because: (A) TriCal was not authorized or responsible for excluding law enforcement officials from the application site; and (B) the Commissioner had no jurisdiction to investigate the illnesses experienced by the emergency team members. Appellant does not challenge the Commissioner's decision that TriCal violated section 12973, the fine classification, or the fine amount with respect to these counts.

Appellant does not challenge the Commissioner's decision at all for the remaining four (4) counts of violation 1, violation 2, or violations 4-6.

The Director's Analysis

Appellant does not challenge the Commissioner's decision that TriCal violated FAC section 12973 by failing to use the equipment required by the label to seal the soil surface at the application site, and the Commissioner's decision is supported by substantial evidence in the record. Under FAC section 12973, the use of any pesticide shall not conflict with the registered labeling. Tri-Chlor is a registered pesticide product. The "Soil Sealing" section of the use directions on the product label states that for broadcast untarped applications:

"Following elimination of the chisel trace, the soil surface must be compacted with a cultipacker, ring roller, and roller in combination with tillage equipment."

(County Exhibit E1.) The Tri-Chlor label requires the use of sealing equipment for broadcast untarped fumigations, and failing to use this equipment is a violation of California law. This requirement is intended to reduce the possibility of off-site movement of the fumigant gas. TriCal should have known that it was required to use the soil sealing equipment specified on the Tri-Chlor label. After all, TriCal registered the Tri-Chlor label itself. And indeed, TriCal does seem to have been aware of this requirement. TriCal's certified applicator listed "ring roller" in the NOI as equipment that would be used to seal the soil at the application. Yet, TriCal ultimately failed to do so.

The County inspected the application equipment both before and after the application. In neither instance did TriCal have a cultipacker, ring roller, or roller on site. Instead, the County observed a tractor equipped only with a rig carrying a disc and attached metal pipe. (PEIR at pg. 9; County Exhibit E23.) During the County investigation, both P. Domecq, the certified applicator in charge of supervising the application, and M. Gillis, a TriCal employee who

assisted in the application, acknowledged that they did not use the required sealing equipment. P. Domecq explained that the tractor used at the application “wasn’t large enough” to pull a roller-ring, while M. Gillis recalled wondering why TriCal was using “such small vineyard equipment without a compaction ringer.” (PEIR at pg.’s 16; 26.)

As such, there is substantial evidence in the record to show that appellant used Tri-Clor in conflict with the registered label by failing to seal the soil surface of a broadcast untarped fumigation with the equipment required by the product label. Appellant does not challenge this decision, and instead makes the arguments below.

A. The Commissioner found that TriCal failed to use the equipment required by the Tri-Clor label to seal the soil surface. It is irrelevant whether or not TriCal violated a separate label requirement relating to the buffer zone.

Appellant argues that the five (5) counts of FAC section 12973 corresponding to the five (5) emergency team members should be reversed. In support, appellant cites language in the buffer zone requirements section of the Tri-Clor label stating that:

“Local, state, or federal officials performing inspection, sampling, or other similar official duties are not excluded from the application block or the buffer zone by this labeling. The certified applicator supervising the application [is] not authorized to, or responsible for, excluding those officials from the application block or the buffer zone.”

Based on this language, appellant argues that TriCal was not authorized or responsible for keeping the emergency team members out of the application site. Appellant further argues that the officials “were aware of the potential odor issue before responding to the scene” and “chose to enter anyway with no protective gear.”

As stated above, the Commissioner found that TriCal used Tri-Clor in conflict with the soil sealing requirements of the label. The Commissioner never alleged that TriCal failed to exclude the emergency team from the application site, or any other buffer-zone related violation. TriCal admittedly failed to use equipment required by the product label to seal the soil of the application site, leading to the chloropicrin incident that necessitated an official emergency response. But for TriCal’s failure to use the product consistent with its own label, the emergency team never would have investigated the application site. The fact that the label allows officials to enter application sites so that they can perform official duties—including, for example, emergency response—is irrelevant.

Appellant also argues that the emergency team chose to enter the application site despite being aware of the potential odor issue. As stated above, the emergency team never would have

investigated the application site but for TriCal's illegal pesticide use. Further, the emergency team only approached the application site based on assurances from TriCal's own certified applicator, and due to TriCal's failure to clearly mark the application warning signs. The emergency team first approached the application site because the contact information written on the warning signs was either missing or "difficult" to read. (County Exhibits E12; E24-26.) The emergency team then judiciously contacted TriCal's certified applicator who assured the emergency team that it would be safe to enter the site without protective gear, and personally accompanied them. (County Exhibit E26.)

B. The Commissioner had jurisdiction to investigate the pesticide-related illnesses of the emergency team members.

Appellant also argues that the Commissioner should not have investigated the illnesses in the first place. Appellant notes that because the officials were acting within the scope of their official duties, they fall under the California Division of Occupational Safety and Health (Cal/OSHA) requirements for permissible chloropicrin exposure limits. Consequently, appellant argues, where there is an illness investigation related to chloropicrin exposure, "it is [Cal/OSHA's] jurisdiction to investigate, not the County Ag Commissioner..."

Appellant's argument that the Cal/OSHA chloropicrin exposure limits preclude the Commissioner's jurisdiction to investigate the pesticide-related illnesses of emergency officials misses the mark. The Commissioner has authority to investigate any pesticide-related illness reported in the county, including those involving emergency officials. The Commissioner in no way encroached on Cal/OSHA's jurisdiction. The Commissioner's investigation looked at whether TriCal's violation of FAC section 12973 caused the emergency team members' illnesses—not whether the application exposed them to chloropicrin that exceeded Cal/OSHA's permissible limits.

Appellant further notes that the illnesses reported by the emergency team are consistent with "low levels of chloropicrin exposure" according to the Cal/OSHA limits and that one officer's reported symptoms could have been caused by asthma. At the hearing, appellant argued that these facts indicate that the officials did not in fact experience "illnesses." The emergency officials reported experiencing "coughing," "chest tightness," and "burning eyes" that lasted upwards of several minutes. (County Exhibits E24-26.) The Commissioner determined based on testimony, and records in the PEIR and Fresno County Sheriff Follow-Up Reports that the five (5) emergency team members experienced acute illnesses caused by TriCal's violation of FAC section 12973. (Decision at pg. 11.) The Commissioner's decision is supported by substantial evidence in the record. Appellant provides nothing to indicate that the Commissioner improperly relied on this evidence. The Commissioner does not enforce Cal/OSHA limits and those limits are irrelevant to this proceeding.

Conclusion

The Director affirms the Commissioner's decision that TriCal failed to use the equipment required by the product label to seal the soil surface of the application as required by the Tri-Clor label, and in doing so exposed the five (5) emergency team members to pesticide that caused their acute illnesses. The total fine is upheld.

Disposition

The Director affirms the Commissioner's decision and levy of fine. The Commissioner shall notify appellant TriCal of how and when to pay the \$53,000 in total fines.

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
Brian Leahy, Director