

**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. 06-ACP-SLO-01/02)

Administrative Docket No. 109

**DECISION**

**SAN YSIDRO FARMS**  
**P.O. Box 819**  
**Guadalupe, California 93434**

Appellant /

**Procedural Background**

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners may levy a civil penalty up to \$1,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the San Luis Obispo County Agricultural Commissioner found that the appellant, San Ysidro Farms, violated FAC section 12973 and 3 CCR section 6734(a). The commissioner imposed a penalty of \$200 for the violation of FAC section 12973 and \$151 for the violation of 3 CCR section 6734(a), for a total penalty of \$351 for the two violations.

San Ysidro Farms appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC 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 them on the record before the Hearing Officer. In reviewing the record, 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 in 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 findings and decision, the Director affirms the decision.

### **FAC Section 12973**

FAC section 12973 provides, in part, that the use of any pesticide shall not conflict with the registered labeling that is delivered with the pesticide.

The appellant was charged with violating FAC section 12973 based on its employee not wearing the personal protective equipment (PPE) of chemical-resistant footwear and waterproof gloves specified on the Kerb 50-W pesticide label when the employee was applying that pesticide.

In a previous decision (Marvin Nies, Docket No. 088), I reversed a commissioner's decision that charged an employer with violating FAC section 12973, based on an employee's failure to wear all the label-specified PPE, instead of charging the employer with a violation of the State's pesticide worker safety regulations that place requirements on employers.

As stated in the Nies decision, 3 CCR section 6702(b) requires that employers supervise employees to assure their employees comply with pesticide product labeling requirements. That section also requires employers to take all reasonable measures to assure their employees handle and use pesticide in accordance with the requirements of law, regulations, and pesticide product labeling requirements. Among other things, section 6738 requires that employers assure their employees wear protective eyewear when required by the pesticide product labeling or engaged in specified activities; assure that employees wear protective gloves when required by the product labeling, except as otherwise provided in that section; and assure that employees wear chemical-resistant footwear when required by the product labeling.

The Marvin Nies decision was issued on August 9, 2000, and made available to county agricultural commissioners by a letter dated August 24, 2000 (ENF 2000-032).

When the commissioner issued the Notice of Proposed Action on September 25, 2001, charging San Ysidro Farms with violating FAC section 12973, that notice was inconsistent with my decision in the Marvin Nies case. Therefore, I am reversing the commissioner's decision in this matter regarding section 12973.

On December 31, 2001, I issued a letter to county agricultural commissioners regarding civil penalty actions against employers or employees for matters involving pesticide worker safety (ENF 01-55). The letter further clarified that, when initiating a civil penalty action against an employer for matters involving pesticide worker safety, commissioners are encouraged to charge violations of the State's specific pesticide worker safety or other applicable regulations, rather than FAC section 12973. By that letter, I also adopted the independent employee action defense, and provided, for matters involving an employee not wearing label-specified PPE, that actions against an employer for violations of FAC section 12973 would be upheld in certain limited circumstances:

- The label-specified PPE that was not being worn by the employee was available at the use site in a condition that would provide the intended protection; and
- The commissioner's Notice of Proposed Action fully informs the employer of the employer's independent employee action defense, and fully informs the employer of information the employer should bring to the hearing to show the defense; and
- There is substantial evidence in the record to support the commissioner's decision.

In this case, it appears that the label-specified PPE the San Ysidro Farms' employee was not wearing also was not available at the use site, and, even under ENF 01-55, the employer should have been charged with a violation of an applicable pesticide worker safety regulation, rather than FAC section 12973.

### **3 CCR Section 6734**

Section 6734 provides, in part, that "The employer shall assure that sufficient water, soap and single use towels for routine washing of hands and face and for emergency eye flushing and washing of the entire body are available for employees as specified in this Section."

There is information in the record that a county agricultural inspector conducted a pesticide use monitoring inspection on April 12, 2001, at San Ysidro Farms, and observed a San Ysidro Farms' employee on a tractor applying Kerb 50-W. The inspector found no soap or single-use towels on the tractor.

After the field inspection, the inspector went to the mix/load area. The employee directed the inspector to a water source, but the inspector found no soap or single-use towels at the water source. On previous inspections of San Ysidro Farms by the inspector, soap and hand towels were located by the water source.

A reasonable inference from this information is that San Ysidro Farms did not assure that sufficient water, soap, and single-use towels for routine washing of hands and face, and for emergency eye flushing and washing of the entire body, were available for employees.

**Disposition**

The commissioner's decision is affirmed in part and reversed in part.

The commissioner's decision is affirmed in regard to the finding that appellant violated 3 CCR section 6734. The commissioner shall notify the appellant how and when to pay the \$151 penalty for its violation of 3 CCR section 6734.

The commissioner's decision is reversed in regard to FAC section 12973. It is in the discretion of the commissioner whether to bring an action against the appellant for violation of an applicable pesticide worker safety regulation within the two-year statute of limitations period.

**Judicial Review**

Under FAC 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 bring the action under Code of Civil Procedure section 1094.5.

**STATE OF CALIFORNIA  
DEPARTMENT OF PESTICIDE REGULATION**

By: Original signed by  
Paul E. Helliker  
Director

Dated: June 13, 2002