

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

In the Matter of the Decision of
the Agricultural Commissioner of
Contra Costa County
(County File No. 1071601)

Administrative Docket No. 210

**DIRECTOR'S
DECISION**

**City of Antioch Parks and Recreation
4701 Lone Tree Way
Antioch, CA 94531**

Appellant/

Procedural Background

Under section 12999.5 of the Food and Agricultural Code, county agricultural commissioners ("CACs") may levy a civil penalty up to \$5,000 for certain violations of California pesticide laws and regulations. When levying a penalty, CACs must follow the guidelines established in California Code of Regulations, title 3, section 6130 (3 CCR § 6130). 3 CCR § 6130 requires CACs to designate each violation as Class A, Class B, or Class C. Each class has a corresponding fine range.

After giving proper notice of the proposed action and providing a hearing on January 31, 2017 in Concord, California, the Contra Costa County Agricultural Commissioner ("Commissioner") found that on June 18, 2015, the City of Antioch Parks and Recreation, Appellant, violated section 12973 of the Food and Agricultural Code by using the pesticide *Liquichlor 12.5% Solution* (CA Reg. No. 550-198-AA.) in conflict with its registered labeling. The Commissioner classified this violation as Class A and levied a \$5,000 penalty.

Appellant appeals the Commissioner's decision to the California Department of Pesticide Regulation (DPR) Director (Director). The Director has jurisdiction over this appeal under section 12999.5 of the Food and Agricultural Code.

Standard of Review

The Director decides this appeal on the record before the Hearing Officer. 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, including matters of fact, the Director determines whether there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. Witnesses sometimes present contradictory testimony and information; however, issues of witness credibility are the province of the Hearing Officer.

The substantial evidence test only requires there be enough relevant information and inferences from that information to support a conclusion, even if other conclusions might have also been reached. In applying the substantial evidence test, the Director draws all reasonable inferences from the information in the record to support the Hearing Officer's 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

At approximately 2:20 p.m. on June 18, 2015, thirty-four individuals were exposed to high levels of chlorine while swimming in the sports pool at Appellant's Prewitt Family Water Park. (Respondent Exhibit Tab 1; County Exhibit A Tab 3.) Staff at the Prewitt Family Water Park promptly cleared the sports pool and contacted the Contra Costa Fire Department. (Testimony of Nancy Kaiser.) Upon arrival, Contra Costa first responders reported that many of the individuals who were swimming in the sports pool at the time of the incident were experiencing respiratory irritation, shortness of breath, and skin rashes. Seventeen individuals were transported via ambulance to urgent care. Twenty-two total individuals sought medical treatment related to this incident. (Respondent Exhibit Tab 1; County Exhibit A Tab 3.)

At approximately 4:30 p.m., the Contra Costa Environmental Health Department tested the chlorine levels of the sports pool and determined chlorine levels to be between 10.5 and 13.5 parts per million (ppm). (Respondent Exhibit Tab 1; County Exhibit A Tab 3.) After a thorough investigation, the Environmental Health Department concluded that two events led to the incident: (1) the recirculation pump at the sports pool stopped working at 10:40 p.m. on June 17, 2015 and (2) the chemical controller continued dispensing chemicals into the recirculation pump while the recirculation pump was not working, which caused a large amount of chlorine to be pumped into the sports pool when the recirculation pump started working at approximately 2:20 p.m. on June 18, 2015. The Environmental Health Department could not conclusively determine if the incident resulted from a mechanical malfunction, human error, or a combination of both. (Respondent Exhibit Tab 1; County Exhibit A Tab 3.)

Liquichlor 12.5% Solution, the chlorine product used at the Prewitt Family Water Park on June 18, 2015, is a pesticide registered with DPR (CA Reg. No. 550-198-AA). (County Exhibit A Tabs 1 & 2; Testimony of Larry Yost.) The registered label states "Re-entry into treated swimming pools is prohibited above levels of 4 ppm of chlorine due to risk of bodily harm." (County Exhibit A Tab 1.)

Relevant Laws and Regulations

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. (Food & Agr. Code, § 12973.)

The Commissioner may "levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of these provisions." (Food & Agr. Code, § 12999.5, subd. (a).)

When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR § 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class A violation is one of the following:

- (A) A violation that caused a health, property, or environmental hazard.
- (B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A.
 - 1. The respondent has a history of violations;
 - 2. The respondent failed to cooperate in the investigation of the incident or to allow a lawful inspection; or
 - 3. The respondent demonstrated a disregard of specific hazards of the pesticide used.
- (C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, 11897, or 13102 of the Food and Agricultural Code. (Cal. Code Regs., tit. 3, § 6130, subd. (b)(1)(A).)

The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

Appellant's Assertions

Appellant asserts the following:

- (1) The Hearing Officer failed to consider the exclusive jurisdiction of the California Department of Health and the Local Environmental Health Department in regulating safety standards for public swimming pools.
- (2) The Hearing Officer failed to consider the conflict of law between the Health and Safety Code Regulations and the California Code of Regulations governing public swimming pools and the Food and Agricultural Code regulations governing pesticides.

The Hearing Officer's Decision

The Hearing Officer found that pursuant to section 12999.5 of the Food and Agricultural Code, the Commissioner has jurisdiction to charge Appellant with a violation of section 12973 of the Food and Agricultural Code. The Commissioner's action is enforcing a pesticide's registered labeling, which is not a local health and safety standard under section 116064.1 of the Health and Safety Code.

The Hearing Officer further found by a preponderance of the evidence that Appellant violated section 12973 of the Food and Agricultural Code. Appellant used *Liquichlor 12.5% Solution* in the sports pool at the water park it operates. The *Liquichlor 12.5% Solution's* registered label states "Re-entry into treated swimming pools is prohibited above levels of 4 ppm of chlorine due to risk of bodily harm." On June 18, 2015, the level of free chlorine in the sports pool ranged from 10.5 ppm to 13.5 ppm while individuals were swimming in the sports pool. Consequently, Appellant used *Liquichlor 12.5% Solution* in conflict with its registered labeling.

The Hearing Officer classified Appellant's violation as Class A and levied a \$5,000 penalty. Appellant's allowance of individuals to be inside the sports pool when the level of free chlorine ranged between 10.5 ppm to 13.5 ppm caused a health hazard to twenty-two individuals. The penalty amount is within the Class A fine range provided in 3 CCR § 6130 and is appropriate given the number of individuals injured.

The Director's Analysis

- A. The Contra Costa County Agricultural Commissioner is authorized to investigate and enforce section 12973 of the Food and Agricultural Code against public swimming pools.

Appellant asserts that the California Department of Public Health and the local Environmental Health Department have exclusive jurisdiction regarding safety standards at public swimming pools. While the Director agrees that the Department of Public Health and local Environmental Health Departments are authorized to enforce the Health and Safety Code and its corresponding regulations regarding public swimming pools, the Director disagrees that these laws are the only laws, to the exclusion of all others, that regulate the use of pesticides in public swimming pools.

Appellant highlights several sections of the Health and Safety Code, including sections 116035, 116053, and 116055, pertaining to the Department of Public Health and the local Environmental Health Department's authority to ensure the sanitation and safety of public swimming pools. However, nowhere in the Health and Safety Code does it state the Legislature's intent for the Department of Public Health and the local Environmental Health Department to have exclusive jurisdiction regarding safety standards applicable to the operation

of public swimming pools. In fact, in 2012 the Legislature repealed section 116064.1 of the Health and Safety Code, which stated that the Health and Safety Code and its corresponding regulations were the exclusive health and safety standards relating to public swimming pools. Had the Legislature intended for the Health and Safety Code provisions and implementing regulations to be the exclusive laws regulating all aspects of public swimming pools and for the Department of Public Health and the local Environmental Health Department to be the exclusive agencies authorized to enforce regulations related to the safety standards for pesticide use in public swimming pools, the Legislature would not have repealed section 116064.1.

The Legislature mandated that county agricultural commissioners, under the direction and supervision of the Director, enforce provisions of the Food and Agricultural Code, including section 12973, which prohibits the use of a registered pesticide in conflict with its registered label. (Food & Agr. Code, § 12977.) It is undisputed that Appellant used a registered pesticide, *Liquichlor 12.5% Solution*, in its sports pool on June 18, 2015. (County Exhibit A Tabs 1 & 2; Testimony of Larry Yost.) Since there is nothing in the Health and Safety Code sections cited by the Appellant that preempt county agricultural commissioners from exercising this authority, the Contra Costa County Agricultural Commissioner was authorized to enforce section 12973 of the Food and Agricultural Code against Appellant in this instance.

B. Section 12973 of the Food and Agricultural Code does not conflict with section 65529 of title 22 of California Code of Regulations.

Appellant asserts that it is impossible to comply with both section 12973 of the Food and Agricultural Code and section 65529 of title 22 of California Code of Regulations (22 CCR § 65529). Section 12973 prohibits a person from using a pesticide in a manner that is inconsistent with the directions on its registered label. It is also a violation of federal law to use a pesticide in conflict with its registered label. (7 U.S.C.A. § 136j.) *Liquichlor 12.5% Solution's* registered label states that persons are prohibited from entering a treated pool if the chlorine level is above 4 ppm. (County Exhibit A Tabs 1 & 2.) 22 CCR § 65529 states that chlorine levels in public swimming pools must generally be between 1 ppm and 10 ppm regardless of whether persons are present in the swimming pool. Per 22 CCR § 65529's title, this section is meant to assure public pool disinfection, not to protect the swimmers from the potential adverse effect of exposure to a pesticide, which is the purpose of *Liquichlor 12.5% Solution's* label requirement at issue in this case. Therefore, contrary to Appellant's assertion, Appellant could have complied with both the requirements and purposes of Food and Agricultural Code section 12973 and 22 CCR § 65529 if it maintained a chlorine level between 1 ppm and 4 ppm in the sports pool when individuals were in the pool or if it prohibited persons from entering the pool when the chlorine level was between 4 ppm and 10 ppm.

Although not an issue in this particular matter, Appellant further asserts that it is impossible for Appellant to comply with both section 12973 and 22 CCR § 65529 if it applied

Liquichlor 12.5% Solution to the spa at the Prewitt Family Water Park. However, *Liquichlor 12.5% Solution's* registered label provides specific directions for use of this pesticide in spas. Its label directions state "Re-entry into treated spa/hot tubs is prohibited above levels of 5 ppm due to risk of bodily harm." 22 CCR § 65529 states that chlorine levels should be between 3 ppm and 10 ppm in a public spa regardless of whether persons are present in the spa. Therefore, similar to above, Appellant can comply with both section 12973 and 22 CCR § 65529 if it maintains a chlorine level between 3 ppm and 5 ppm in its public spas when persons are in the spa. Accordingly, section 12973 and 22 CCR § 65529 are not in conflict and Appellant is required to comply with section 12973.

- C. Substantial evidence supports the Commissioner's decision that Appellant violated section 12973 of the Food and Agricultural Code by allowing persons to be in a swimming pool when the chlorine level was above 4 ppm.

Under section 12973, it is unlawful for any person to use a pesticide in conflict with its registered label. On June 18, 2015, Appellant used *Liquichlor 12.5% Solution*, a registered pesticide, in the sports pool at the Prewitt Family Water Park. (County Exhibit A Tabs 1 & 2.) *Liquichlor 12.5% Solution's* registered label states "Re-entry into treated swimming pools is prohibited above levels of 4 ppm of chlorine due to risk of bodily harm." (County Exhibit A Tab 1.) At approximately 2:20 p.m. on June 18, 2015, the recirculation pump restarted working and pumped a large amount of chlorine into the sports pool. There were thirty-four individuals swimming in the sports pool at this time. Many of these individuals experienced symptoms consistent with exposure to high levels of chlorine. (See Respondent Exhibit Tab 1; County Exhibit A Tabs 1 & 3.) At 4:30 p.m., after the pool was evacuated, free chlorine levels in the sports pool ranged from 10.5 ppm to 13.5 ppm. (Respondent Exhibit Tab 1; County Exhibit A Tab 3.) Accordingly, Appellant's use of *Liquichlor 12.5% Solution* conflicted with its registered label and violated section 12973.

- D. The Commissioner's decision to classify Appellant's violation of section 12973 of the Food and Agricultural Code as Class A and to levy a \$5,000 penalty is supported by substantial evidence.

The Director affirms the Commissioner's decision to classify Appellant's violation as a Class A. A Class A violation is any "violation that caused a health, property, or environmental hazard." (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(1)(A).) *Liquichlor 12.5% Solution's* registered label states "Re-entry into treated swimming pools is prohibited above levels of 4 ppm of chlorine due to risk of bodily harm." Twenty-two individuals experienced health effects and sought medical treatment due to their exposure to high levels of chlorine at the Prewitt Family Water Park. Appellant did not present any evidence to the contrary in the hearing and does not argue the violation classification on appeal.

The Commissioner's decision to levy a \$5,000 fine for Appellant's Class A violation of section 12973 of the Food and Agricultural Code is appropriate. The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c).) The Director finds that the \$5,000 fine is a reasonable exercise of the Commissioner's discretion given the significant number of individuals that experienced negative health effects from exposure to high levels of chlorine.¹

Conclusion

The Commissioner's decision that Appellant violated section 12973 of the Food and Agricultural Code and that the violation is a Class A violation is affirmed. The civil penalty assessed is within the Commissioner's discretion and accordingly the Director upholds the \$5,000 civil penalty.

Disposition

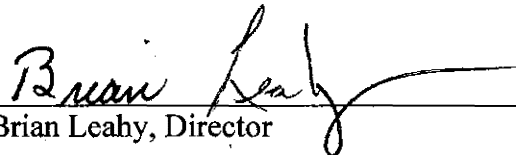
The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant how and when to pay the \$5,000 penalty.

Judicial Review

Under section 12999.5 of the Food and Agricultural Code, 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: AUG 09 2017

By: 
Brian Leahy, Director

¹ The Commissioner could have found a violation and levied a fine for each person who suffered a health effect. However, given the corrective measures taken --- the purchase and installation of a new operating system to minimize the likelihood of this type of incident occurring in the future and the adoption of updated policies and procedures to increase human oversight of the system and chlorine levels, including manually checking the chlorine levels every hour --- the Commissioner apparently exercised his discretion to charge only one violation at the top of the fine range. Due process precludes the Director from increasing the fine above the amount charged in the notice of proposed action.