

**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 Diego
County File No. 452-ACP-SD-13/14

Administrative Docket. No. 202C

DIRECTOR'S DECISION

**Davey Tree Surgery Company
1914 Mission Road, Suite N
Escondido, California 92029**

Appellant/

Procedural Background

Under Food and Agricultural Code section 12999.5, county agricultural commissioners may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations. When levying fines, the commissioner follows 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, providing a hearing on March 25 and 26, 2015, and reviewing the Hearing Officer's proposed decision, the San Diego County Agricultural Commissioner (Commissioner) found that Appellant Davey Tree Surgery Company (Davey Tree) violated California Code of Regulations, title 3, section 6738(b) by failing to assure that its employees wear the required protective eyewear (Charge A), and Food and Agricultural Code section 12973 by using a pesticide in conflict with its labeling (Charge B). The Commissioner classified both violations as Class B violations, and levied a total fine in the amount of \$2,000. (See Notice of Decision, Order and Right of Appeal for File No. 452-ACP-SD-13/14, dated June 15, 2015 (Commissioner's Decision).)

Davey Tree appeals the Commissioner's civil penalty decision only as to Charge B, involving a violation of Food and Agricultural Code section 12973¹ (See Appellant Davey Tree's Written Argument in Support of Appeal, by letter dated July 20, 2015 (Appeal) at 19.) The Director has jurisdiction to review the appeal under Food and Agricultural Code section 12999.5.

1. As Appellant Davey Tree is only appealing Charge B of the Commissioner's decision, the Director's Decision will only address the facts and law relevant to that violation.

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 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 February 5, 2014, San Diego County Agricultural Commissioner Inspector A. Amador (Inspector Amador) conducted a random, unscheduled Pesticide Use Monitoring Inspection of Davey Tree's fumigation activities at 658 1st Street in Coronado, located in San Diego County. (County Exhibits (Exs.) 3 and 12.) At the time of the inspection, Davey Tree's employee and foreman, D. Vazquez, was present. (Ex. 3.)

During the inspection, Inspector Amador observed Davey Tree employee J. Gordon apply the pesticide *L Fume 33* (Reg. Number 1448-437-AA-88201) to a utility pole to control internal decay. (Ex. 3; Testimony of Inspector Amador (Amador Testimony).) In order to fumigate a utility pole, the applicator drills a hole into the utility pole with an eighteen inch drill bit and then pours *L Fume 33* into the hole to 16 inches to allow for a two inch safety plug. (Testimony of R. Gross (Gross Testimony).) Inspector Amador observed Mr. Gordon pour the *L Fume 33* pesticide into the drilled openings in the utility pole, and subsequently seal each hole with a yellow plastic plug. (Ex. 3; Amador Testimony.) The *L Fume 33* label on file with the Department at that time was dated March 5, 2012. (Ex. 5.) The Directions for Use on the *L Fume 33* pesticide label stated, "Plug holes with treated wood plugs." (Exs. 3 and 5; Amador Testimony.) During two previous pesticide use monitoring inspections of a utility pole application by Davey Tree on July 31, 2013 and January 24, 2014, Inspector Amador observed the same behavior and each time informed Davey Tree that its use of yellow plastic plugs to seal the drilled holes in the utility pole conflicted with the label requirements for *L Fume 33*.

(Amador Testimony; *see also*, Exs. 3 and 6 in Case No. 427-ACP-SD-13/14) Davey Tree failed to correct its behavior to comply with the pesticide label and as a result, Inspector Amador issued Davey Tree a citation for violating California pesticide laws.

On October 19, 2014, the Commissioner issued a Notice of Proposed Action charging Davey Tree with violating California Code of Regulations, title 3, section 6738(b) and Food and Agricultural Code section 12973. (Ex. 1.) Davey Tree requested a hearing on November 10, 2014. The Commissioner granted Davey Tree's request and on March 25 and 26, 2015, Hearing Officer Thomas L. Marshall held a hearing on the matter. (*See* Commissioner's Decision; *also refer to* Audio Recordings of Hearing.)

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and Davey Tree had the opportunity to present evidence and question witnesses. The Hearing Officer determined that there was sufficient evidence to show that Davey Tree violated California Code of Regulations, title 3, section 6738(b), by failing to assure that its employee use required personal protective equipment while applying a pesticide (Charge A), and that Davey Tree violated Food and Agricultural section 12973, by using *L Fume 33* in conflict with its labeling (Charge B). However, as to Charge B, the Hearing Officer found that using plastic plugs was "strictly a technical violation" because the industry standard had shifted to tight fitting plastic plugs, and that the manufacturer had changed the directions for use for the *L Fume 33* label. As a result, the Hearing Officer reduced the Class B fine for Charge B from \$1,000 to \$250. The Hearing Officer proposed a total fine of \$1,250 for both violations. (*See* Proposed Decision of Hearing Officer in File No. 452-ACP-SD-13/14, dated April 14, 2015 (Hearing Officer Decision) at pp. 4-5.)

The Commissioner's Decision

On June 15, 2015, the Commissioner adopted the Hearing Officer's proposed decision that Davey Tree violated California Code of Regulations, title 3, section 6738(b) (Charge A) and Food and Agricultural Code section 12973 (Charge B). However, with respect to Charge B, the Commissioner disagreed with the Hearing Officer's finding that using plastic plugs was a technical violation and reduction of the fine from \$1,000 to \$250. The Commissioner found that the County presented sufficient evidence to support the fine classification and amount. Specifically, the Commissioner found that the County presented evidence that Davey Tree was previously informed that the *L Fume 33* label required treated wood plugs and that Davey Tree failed to change its behavior to comply with the label. The Commissioner also found that the higher fine was appropriate because it was Davey Tree's second violation on the same issue. As a result, the Commissioner reinstated the fine for Charge B and ordered Davey Tree to pay a total fine of \$2,000. (*See* Commissioner's Decision.)

Appellant's Contention on Appeal

Appellant Davey Tree appeals the Commissioner's decision as to Charge B, involving a violation of California Food and Agricultural Code section 12973. Davey Tree's main contentions on appeal are:

- Using plastic plugs instead of treated wooden plugs did not conflict with label and therefore did not violate the law.
- Using treated wooden plugs was not required by the *L Fume 33* label, but was merely an example or recommendation of a way to plug the drilled hole in the utility pole.
- Using of plastic plugs is the industry norm and a superior method to using treated wooden plugs for sealing holes on utility poles.

(Appeal at pp. 7-14, 19)

Relevant Laws and Regulations

California Food and Agricultural Code section 12973 states:

Use not to conflict with label

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.

California Code of Regulations, title 3, section 6000 defines "**Conflict with labeling**", in relevant part, as:

Any deviation from instructions, requirements or prohibitions of pesticide product labeling concerning storage, handling or use except:

....

- (e) Employing a method of application not expressly prohibited, provided other directions are followed;

....

When levying fines, the Commissioner must follow the fine guidelines set forth in California Code of Regulations, title 3, section 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class B violation is a violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects that is not designated as Class A. The fine range for a Class B violation is \$250 to \$1,000. The

Commissioner shall use relevant facts, including severity of actual or potential effects and the respondent's compliance history when determining the fine amount within the fine range, and include those relevant facts in the Notice of Proposed Action. (Cal. Code of Regs., tit. 3, § 6130.)

The Director's Analysis

- A. Substantial evidence supports the Commissioner's Decision that Davey Tree violated California Food and Agricultural Code section 12973 by deviating from *L Fume 33*'s mandatory label instruction to use treated wood plugs. (Charge B)

In this case, the parties do not dispute that *L Fume 33*'s label states "Plug holes with treated wood plugs" under directions for use. (Ex. 5; Audio Recording of Hearings) The parties further do not dispute that at the time of the pesticide application and inspection by Inspector Amador on February 5, 2014, that Davey Tree used yellow plastic plugs instead of the treated wood plugs listed on the pesticide label. The sole issue in this appeal is two-fold: (1) whether *L Fume 33*'s instruction to "plug holes with treated wood plugs" was mandatory or merely a recommendation, and (2) whether Davey Tree's use of plastic plugs instead of treated wood plugs amounted to a different method of application which did not violate Food and Agricultural Code section 12973.²

1. *L Fume 33*'s direction to use treated wood plugs was mandatory.

Davey Tree argues that the direction to use treated wood plugs was not a mandatory label instruction that must be followed, but was merely a recommendation on a way to plug the holes in the utility pole. (Appeal at pp. 7-11.) By law, the labeling of pesticides is exclusively the province of the federal government. (7 U.S.C. § 136v [Federal Insecticide, Fungicide, and Rodenticide Act].) In other words, while a state can regulate the sale and use of any federally registered pesticide, it cannot dictate what is on a pesticide product label. (*Id.*) Even after initial registration, most label amendments must first be submitted and approved by the United States Environmental Protection Agency (U.S. EPA) before it can be submitted to the Department for acceptance. The U.S. EPA, Office of Pesticide Programs has issued specific guidance on the issue of mandatory versus advisory statements on pesticide labels that is accepted by the Department. The U.S. EPA explains that for purposes of label interpretation, mandatory statements are generally written in imperative or directive sentences such as "Wear chemical resistant gloves" and "Apply immediately after mixing." Advisory statements, on the other hand, are generally written in descriptive or nondirective terms, and include terms such as "should,"

² At the hearing, both parties stipulated to the testimony, exhibits, objections and arguments in case number 427-ACP-SD-13/14, relating to Davey Tree's use of plastic plugs while using *L Fume 33* during a previous inspection on January 24, 2014. (Stipulation No. 5.)

“may,” or “recommend.” (See U.S. EPA, Pesticide Registration Notice (PRN) 2000-5, *Guidance for Mandatory and Advisory Labeling Statements* at p.2, available at <http://www2.epa.gov/pesticide-registration/prn-2000-5-guidance-mandatory-and-advisory-labeling-statements>; see also, Department Enforcement Letter 01-35 dated July 23, 2001, adopting PRN 2000-5, available at <http://www.cdpr.ca.gov/docs/countr/cacfltrs/penfltrs/penf2001/2001035.pdf>.)

At the hearing, the County presented evidence that *L Fumes 33*'s label had specific directions to drill four to five holes into the utility pole, inject equal amounts of the fumigant into each hole, and to “Plug holes with treated wood plugs.” (Ex. 5.) The County further presented evidence that Davey Tree deviated from the specific instructions to plug the pre-drilled holes with treated wood plugs, by using yellow plastic plugs. (Ex. 3; Amador Testimony.) Both Inspector Amador and Senior Environmental Scientist with the Department, D. Weerasekera, testified that although they had limited experience with utility pole fumigations and the use of *L Fume 33*, they did have extensive experience conducting pesticide use inspections, and reviewing and interpreting pesticide labels. (Amador Testimony; Testimony of D. Weerasekera (Weerasekera Testimony); Stipulation No. 3.) They further explained that a pesticide label can contain both mandatory and advisory statements, and that the language to “Plug holes with treated wood plugs” was unquestionably phrased to be mandatory language that must be followed.

In contrast, Davey Tree argued and presented the testimony of R. Gross, from Poles, Inc., the manufacturer of *L Fume 33*, that the instruction to “Plug holes with treated wood plugs” was merely a recommendation or example of a way to plug the drilled holes filled with the fumigant. (Gross Testimony.) Mr. Gross testified that plastic plugs are the current industry standard; are superior to treated wood plugs because they do not deteriorate and are removable; and that the manufacturer was in the process of amending the *L Fume 33* pesticide label to allow the use of either wood or plastic plugs. (Gross Testimony; Ex. 8; Stipulation No. 5; see Davey Tree Ex. A in Case No. 427-ACP-SD-13/14.) Davey Tree also presented evidence that at the time of the violation, there were other registered pesticides with the identical chemical makeup of *L Fume 33* that allowed the use of either a plastic or treated wood plugs. (Gross Testimony; Davey Tree Exs. A and B in Case No. 427-ACP-SD-13/14.)

The Department's well-trained and well-qualified inspectors cannot be experts in the specific nuances and movements in industry standards for each of the thousands of pesticides registered by the Department. Department inspectors and staff must therefore rely on the accuracy and specificity of the pesticide label, which is developed by the manufacturer and vetted by both U.S. EPA and the Department before being approved for use. If Davey Tree wanted to use a plastic plug instead of the treated wooden plug required by the *L Fume 33* label, they should have either used a different pesticide, or encouraged the manufacturer of *L Fume 33* to

amend its label to reflect this change.³ The Director finds that although the *L Fume 33* pesticide label contained the terms “should,” “guide,” and “example” in sentences immediately preceding the final instruction, the final directive sentence to “plug holes with treated wood plugs,” contained no such advisory terms. As a result, Davey Tree’s use of plastic plugs deviated from the specific, mandatory directions for using *L Fume 33* and violated Food and Agricultural Code section 12973.

2. Using plastic plugs conflicted with the *L Fume 33* pesticide label.

Although not explicitly cited or extensively argued at the hearing, Davey Tree argues that using plastic plugs does not conflict with the label under Department regulations because it was a different method of application, not expressly prohibited by the pesticide label. (*See Ex. 8; Gross Testimony.*) California Food and Agricultural Code section 12973 states, “[t]he use of any pesticide shall not conflict with labeling registered pursuant to this chapter...” The Department’s regulations further define “conflict with the labeling” to mean, “[a]ny deviation from instructions, requirements or prohibitions of pesticide product labeling concerning storage, handling or use except...Employing a method of application not expressly prohibited, provided other directions are followed ...” (Cal. Code of Regs., tit. 3, § 6000 “Conflict with labeling”, subd. (e).)

The term “method of application” is not specifically defined in statute or regulations. When not explicitly defined, courts generally “extend considerable deference to an administrative agency’s interpretation of its own regulations or the regulatory scheme which the agency implements or enforces.” (*Communities for a Better Environment v. State Water Resources Control Bd.* (2003) 109 Cal.App.4th 1089 at 1107.) Here, a review of the Department’s reference documents and forms clearly indicate that the “method of application” refers to how a pesticide is physically applied or distributed (i.e. chemigation, spray blast, ground, aircraft) to its target area.⁴ Consistent with this interpretation, the Pesticide Use Monitoring Inspection Report form (PR-ENF-104) used in this case specifically has a “Method of Application” box to be checked with the following options: Aerial, Chemigation, Hand Held, Ground Rig, Other. (*See Ex. 3.*) Thus, the method of application in this case was inserting a three inch plastic tube by hand into the utility pole to distribute *L Fume 33* into the pre-drilled hole, not the act of sealing

³ On August 21, 2015, the Department approved an amended label for *L Fume 33* with the amended language: “Plug the pre-drilled holes immediately after applications.”

⁴ *See* DPR Pesticide Use Enforcement Program Standards Compendium, Vol. 8, *Guidelines for Interpreting Pesticide Laws, Regulations, and Labeling* (2009), Chapter 2, Pesticide Product Labeling Interpretations, § 2.1 “Conflict with Labeling Exemptions (2ee)”, available at http://www.cdpr.ca.gov/docs/enforce/compend/vol_8/chapter2.pdf.

the hole after the pesticide is dispersed, a step required by that application method.⁵ (Case No. 427-ACP-SD-13/14, Ex. 3 at p. 12 [description of first picture showing use of yellow plugs].)

After reviewing the evidence, testimony, and arguments presented at the hearing in this case and Case Number 427-ACP-SD-13/14, the Director finds that there is substantial evidence to support the Commissioner's Decision that Davey Tree violated California Food and Agricultural Code section 12973 by deviating from mandatory directions for use on the *L Fume 33* pesticide label. Accordingly, the Director affirms the Commissioner's Decision as to Charge B.

B. Substantial evidence supports the Commissioner's decision to classify this violation as a Class B violation and that the fine was appropriate.

When levying fines, the Commissioner must follow the fine guidelines contained in California Code of Regulations, title 3, section 6130, set forth above. Here, there is substantial evidence to support the Commissioner's decision that this was a Class B violation and that the fine was appropriate. At the hearing, Mr. Holbrook testified that failing to follow the pesticide label instructions for use was a violation of a law intended to mitigate the risk of adverse health, property or environmental effects. (Holbrook Testimony.) The fine range for a Class B violation is \$250-\$1,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c)(2).) Mr. Holbrook further testified that the upper end of the fine range was appropriate because *L Fume 33* is a highly toxic fumigant and that Davey Tree failed to change its behavior to comply with the pesticide label, despite being informed on numerous occasions by the County that the pesticide label required the use of treated wood plugs. Accordingly, the classification and fine was appropriate.

In sum, after reviewing the *L Fume 33* product label, the evidence and testimony presented at the hearings, written arguments, and applicable laws and regulations on this issue, the Director finds that Davey Tree violated Food and Agricultural Code section 12973 by failing to follow the label instructions to plug holes with treated wood plugs. Therefore, the Director finds that the Commissioner's Decision as to Charge B of this case must be AFFIRMED.

⁵ In fact, Davey Tree's own example of using a marshmallow to plug the holes in the utility pole demonstrates exactly why the Department does not interpret each and every step in the application process to be incorporated into the term "method of application." (Gross Testimony.)

Conclusion and Disposition

Davey Tree did not appeal Charge A of the Commissioner's Decision that it violated California Code of Regulations, title 3, section 6738(b). The Commissioner's Decision as to Charge A, and associated **\$1,000** fine, is therefore **AFFIRMED**.

The Commissioner's Decision that Davey Tree violated California Food and Agricultural Code section 12973, and associated **\$1,000** fine, is **AFFIRMED**.

The Commissioner shall notify Davey Tree of how and when to pay the **\$2,000 fine**.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant Davey Tree Surgery Company 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: DEC 01 2015

By: Brian Leahy
Brian Leahy, Director