

**BEFORE THE DISCIPLINARY REVIEW COMMITTEE
STATE OF CALIFORNIA**

In the Matter of the Decision of
the Agricultural Commissioner of
the County of Los Angeles
(County File No. 2431516)

Docket No. S-034

Mega Fume, Inc.
438 West Meats Avenue
Orange, California 92865

DECISION

Appellant/

Procedural Background

Under section 8617 of the Business and Professions Code (BPC) and section 15202 of the Food and Agricultural Code (FAC), a County Agricultural Commissioner may levy a penalty up to \$5,000 for a violation of California's structural pest control and pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Los Angeles County Agricultural Commissioner (CAC) found that Mega Fume, Inc. (Appellant) violated California Code of Regulations, Title 3, section 6780 subdivision (b) during the aeration portion of a fumigation by failing to follow one of the methods listed in that subsection whenever an employee may be exposed above an exposure standard to sulfuryl fluoride. The CAC then fined Appellant \$650.

Appellant appealed the CAC's decision to the Disciplinary Review Committee (Committee). The Committee has jurisdiction of this appeal under BPC section 8662. Members serving on the Committee were Mr. John Tengan for the structural pest control industry, Ms. Susan Saylor for the Structural Pest Control Board (SPCB), and Ms. Marta Barlow for the Department of Pesticide Regulation (DPR). No party requested oral argument and the Committee determined oral argument was not necessary.

Standard of Review

The Committee decides this appeal on the record before the hearing officer. The Committee decides matters of law using its independent judgment. Matters of law include the meaning and requirements of laws and regulations. For other matters, the Committee determines whether there was substantial evidence, contradicted or uncontradicted, before the hearing officer to support the hearing officer's findings and the CAC's decision. The Committee 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 only requires there be enough relevant information and inferences from that information to support a conclusion even though other conclusions might also have been reached. In applying the substantial evidence test, the Committee 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 CAC's decision. If the Committee finds substantial evidence in the record to support the CAC's decision, the Committee affirms the CAC's decision.

Factual Background

The California Aeration Plan (CAP) is an industry-created Fumigation Safety Program for employers and employees to follow that meet the requirements of Title 3 California Code of Regulations Section 6780. (Albert Rodriguez testimony.) Employers may use this Program in lieu of requiring air-supplied respirator equipment or continuous monitoring when aerating tarp-contained structural fumigations with sulfuryl fluoride. (3 CCR 6780(b).)

On February 7, 2017, Mega Fume, Inc. fumigated a structure using the pesticide Master Fume (EPA Reg. No. 19713-596) at 124 St. Joseph Avenue, Long Beach. (Stipulated Facts 2, 3.) Kaiser T. Asuega on behalf of Mega Fume was the licensee responsible for the aeration phase of the fumigation. (Stipulated Fact 4.) On February 8, 2017, Albert Rodriguez, an Agricultural/Weights and Measures Inspector II with the County of Los Angeles Department of Agricultural Commissioner/Weights and Measures, arrived at the location and conducted an inspection. (Exhibit D.) During his inspection, he determined that the licensee had failed to correctly follow the CAP. (Exhibit D.)

On May 30, 2017, the CAC mailed Appellant the Notice of Proposed Action charging Appellant with violating 3 CCR 6780(b) for failing to meet the general standards of care when performing pest control based on Appellant's failure to follow the CAP correctly. Hearing Officer Robert G. Atkins heard the matter on behalf of the CAC on December 21, 2017.

Relevant Authorities

3 CCR 6780 General Fumigation Safe-Use Requirements.

(a) When fumigant concentrations cannot be controlled and an employee's exposure exceeds the Permissible Exposure Limit (PEL) as specified in Title 8, California Code of Regulations, Section 5155, Airborne Contaminants, or more stringent requirements by product labeling, the employer shall provide and require the employee to wear approved respiratory protective equipment.

(b) Whenever an employee may be exposed above an exposure standard to methyl bromide, sulfuryl fluoride, or any other fumigant for which only air-supplied respirator equipment is approved, the employer shall either:

(1) Require the use of air-supplied respirator equipment,

- (2) Employ continuous monitoring to warn employees before the PEL is reached, or
- (3) Operate under the provisions of (c) below.

(c) Upon written application by an employer, the Director¹ will review, and may accept, a Fumigation Safety Program that describes methods, work practices, devices, or processes which the Director determines will ensure that employees will not be exposed to concentrations of fumigants in excess of the PEL.

(d) The employer shall have an accident response plan at the worksite. The plan shall provide instructions to protect employees during situations such as spills, fire, and leaks. Employees shall be trained in accident management procedures based on the plan.

CAP, approved by the Director pursuant to 3 CCR 6780(c) (Exhibit 3) states:

INLET DEVICES

The objective of inlet devices is to draw in fresh air to create negative air pressure and promote cross-ventilation of the structure....

Inlet devices must: (1) maintain the integrity of the required opening, (2) have an opening of at least 240 square inches up to a maximum opening of 381 square inches, (3) have the opening covered with material allowing ventilation, such as wire, plastic netting or mesh, (4) be located where the opening is not blocked and will draw in fresh air to create negative air pressure and promote cross-ventilation of the structure, (5) have the entire inlet opening be at least 4 feet above exterior grade and (6) be sealed in a way that allows external opening during aeration....

All of the following steps, 1-6 must be completed in sequence. (Tasks in steps may be accomplished in either order.) A licensed Operator or Field representative must be present for, and assure completion of, Steps 1 through 6.

Step 1:

To initiate aeration, remove the seal or duct cover from each previously installed aeration duct and activate the aeration fan(s). If the duct cover cannot be opened remotely due to malfunction, a Self-Contained Breathing Apparatus (SCBA) must be used when opening the duct cover.

Step 2:

After all aeration fans are activated, remove the inlet cover from each previously installed inlet device.

¹ All references to "director" are to the Director of the California Department of Pesticide Regulation.

TABLE 1

Determining the Number of Ducted Aeration Fans and Inlet Devices

Fumigated Structure Size (cubic feet)	Number of Ducted Aeration Fans	Number of Inlet Devices	Total Inlet Size Range: (minimum of 240 sq. inches, maximum of 381 sq. inches each Inlet Device)
60,000 or less	1	2-3	480 sq. inches to 762 sq. inches
60,001 to 120,000	2	3-4	720 sq. inches to 1,143 sq. inches
120,001 to 180,000	3	4-5	960 sq. inches to 1,524 sq. inches
180,001 to 240,000	4	5-6	1,200 sq. inches to 1,905 sq.
for each additional 60,000 over 240,000	1 additional ducted aeration fan unit AND	1-2 additional inlet device(s)*	adding a minimum of 240 sq. inches up to a maximum of 381 sq. inches per additional inlet device

California Code of Regulations, title 16, section 1922(a)(1)(B) (16 CCR 1922(a)(1)(C)) classifies a “moderate” violation as repeat violations that did not create an actual health or environmental effect or violations that pose reasonable possibility of creating a health or environmental effect. The fine range for moderate violations is \$250-\$1,000.

Appellant’s Contentions

Appellant argues the following:

- (1) We opened two vents to assure that the California Aeration plan was adhered to during structural pest control fumigation aeration in Long Beach and performed all pest control in a careful and effective manner. Nonetheless, the order shouldn’t apply to us.
- (2) [CCR 6780 (b)] authorizes the Director of DPR to review and accept a Fumigation Safety Program if the employer makes a written application and if the Fumigation Safety Program will ensure the employees will not be exposed to excessive concentrations of fumigants. It does not set forth any requirement that employers follow all the steps of a Fumigation Safety program nor does it provide any guidance on how to interpret such a plan. Therefore, it does not require compliance with or place any obligation upon the employer.

The CAC Decision

The hearing officer found by a preponderance of the evidence that Appellant violated 3 CCR 6870(b) on February 8, 2017, when Appellant failed to follow the CAP by not having at least two inlet devices with a minimum of 480 square inches of opening. Appellant had only one

inlet device with only 272 square inches open. During the hearing, Appellant did not deny that one of the inlet devices was closed. Instead, Appellant argued that any one of the three methods outlined in 3 CCR 6870(b) must be employed and that the County did not have any proof that one of the other methods was not used.

Appellant also argued, as he does here, the CAP is not a requirement that the employer must follow. The Hearing Officer rejected this argument and explained, "when the Director of the California Department of Pesticide Regulation accepted the Structural Pesticide Industry's CAP procedures, such adoption included the requirements that are contained therein."

Appellant also argued that his employees were not exposed to danger and that the County was not present during the entire aeration phase. Therefore, the County does not know whether one of the other methods outlined in 3 CCR 6780(b) was employed, other than the CAP. The Hearing Officer rejected this argument as well: "Mega Fume performed this fumigation with the CAP equipment in place and in use. The Respondent only raises these other options because of the failure of the crew to perform the CAP procedures correctly."

The hearing officer then recommended that the proposed action in the Notice of Proposed Action be adopted by the Commissioner, and the Appellant be ordered to pay a fine of \$650. The CAC adopted the hearing officer's proposed decision in its entirety.

Analysis

The CAC determined that Appellant violated 3 CCR 6780(b) by failing to perform a fumigation aeration by either requiring the use of an air-supplied respirator, employing continuous monitoring, or by following the CAP. In his appeal letter to the Director, Appellant admits that Appellant tried to follow the CAP: "We opened two vent (sic) to assure that the California Aeration plan was adhered to during structural pest control fumigation aeration in Long Beach." However, Appellant argues that Appellant performed the aeration in a "careful and effective manner," and is not required to follow the CAP exactly.

Appellant must understand 3 CCR 6780(b) is a requirement that all employers performing fumigations with methyl bromide or sulfuryl fluoride must follow. There is no general safety requirement or any arguments that employees were not in danger, therefore the employer does not have to follow 3 CCR 6780(b) exactly. There are only three (3) enumerated ways an employer may comply with 3 CCR 6780(b) during the aeration phase of a structural fumigation: employ continuous monitoring, have all employees wear air-supplied respirator equipment, or follow exactly a Fumigation Safety Program (such as the CAP).

There is no evidence in the record to show Appellant's employees used air-supplied respirators or continuously monitoring the property during the aeration phase of the fumigation. Indeed, in Appellant's letter of appeal to the Director, Appellant admitted that of the three methods, Appellant chose to follow the CAP, a Fumigation Safety Program approved by the Director. At the hearing, the Hearing Officer made a finding of fact that Appellant did not have at least two (2) inlet devices with a minimum of 480 square inches of opening. Appellant had

only one (1) inlet device with only 272 square inches open. The evidence in the record supporting this finding included the testimony of the County inspector, the County Inspector's Inspection Report (Exhibit D), the County Inspector's written statement (Exhibit E), the photographs of the open and closed inlet devices (Exhibit F), and the video recording of the open and closed inlet devices (Exhibit M). Accordingly, Appellant did not follow the CAP correctly. Therefore, Appellant violated 3 CCR 6780(b).

Appellant apparently believes that he does not have to follow the CAP exactly and directly quotes (without a proper citation) two (2) previous Director's decisions finding that a commissioner may not charge for violations of 3 CCR 6780(c) because that subdivision (c, not b as Appellant is charged with here) permits the Director to approve a Fumigation Safety Program, but does not create any obligation on the part of an employer to follow the CAP. Unlike subsection c, subsection b in 3 CCR 6780 creates an obligation on the part of an employer. It requires the employer to choose one of three methods in which to comply with 3 CCR 6780(b): have employees use an air-supplied respirator, employ continuous monitoring, or follow a Fumigation Safety Program such as the CAP. An employer may not be charged with violating 3 CCR 6780(c), because that subsection gives the Director authority to approve a Fumigation Safety Program. But an employer must comply with 3 CCR 6780(b).

The CAC was within his discretion to charge this violation of \$650 as a "moderate" violation. Evidence at the hearing established that Appellant had a previous violation. The \$650 fine is within the \$250-\$1,000-fine range for a moderate violation.

Conclusion

The CAC's decision that Appellant violated 3 CCR 6780 (b) is affirmed.

Disposition

The CAC's decision and levy of fine is affirmed. The CAC shall notify the Appellant of how and when to pay the \$650 fine.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: APR 04 2018

By: Marta Barlow
Marta Barlow, Member
For the members of the Disciplinary
Review Committee