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 Monterey
(County File No. 1271213)

Administrative Docket. No. 194

DIRECTOR'S DECISION

SoilFume, Inc.
209 Riverside Road
Watsonville, California 95076
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 must follow 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 and providing a hearing on April 25, 2013, the Monterey County Agricultural Commissioner (Commissioner) found that Appellant SoilFume, Inc. (SoilFume) committed three separate violations of California Food and Agricultural Code section 12973 in connection with fumigations made on October 1 and 2, 2010. Specifically, SoilFume applied *Terr-O-Gas 57* (Reg. No. 5785-28-AA), a pesticide containing methyl bromide and chloropicrin for field-soil fumigations, in conflict with the permit conditions issued by the Commissioner, including compliance with methyl bromide regulations and Monterey County's Methyl Bromide Field Fumigation Conditions and Worksite Plan. The Commissioner classified each violation as a Class B violation and levied a fine in the amount of $2,550 (Count 1: $1,000; Count 2: $1,000; Count 3: $550).

SoilFume appeals the Commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction to review the appeal under Food and Agricultural Code 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 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 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 September 27, 2010, the Commissioner issued Mendoza Berry Farms a restricted material permit to use methyl bromide in several fumigations on 90 acres split into four Blocks: Block 26, Block 27, Block 28, and Block 29. (Stipulated Fact (Fact) 8; County Exhibits (Ex.) 6-7; Testimony of N. Desjarlais.) Incorporated into the permit conditions were specific county conditions contained in "Monterey County Methyl Bromide Field Fumigation Conditions and Worksite Plan" that requires, among other things, compliance with all regulations. (County Ex. 5; Testimony of N. Desjarlais.) The methyl bromide worksite plan submitted by Mendoza Berry Farms for the fumigations indicated that SoilFume, a registered pest control business, would do the applications. (Fact 4; County Ex. 6.)

Mendoza Berry Farms employed SoilFume to perform specific notification regarding the fumigations to neighboring property operators, including property operated by D'Arrigo Bros. (Facts 4 and 22; Testimony of D. Frye.) The inner buffer zone of the fumigations of Blocks 27 and 28 would extend onto the D'Arrigo Bros. property. (Facts 12-13; County Ex. 11; Testimony of N. Desjarlais .) Approximately one week before the fumigation, Mr. Aragon, a D'Arrigo Bros. employee, stated that he received a phone call informing him that SoilFume would be treating Blocks 26, 27, 28, and 29. (Count Ex. 3, p. 36.) However, after that phone call, Mr. Aragon never received specific notification of what blocks were going to be fumigated on what dates or the expected expiration of the inner buffer zone. (County Ex. 3, p. 36.) On September 29, 2010, D. Frye of SoilFume informed D'Arrigo Foreman Jesus Vasquez Sr., in person, about the fumigation. (Testimony of D. Frye; County Ex. 3, p. 37.) On September 29, 2010, at approximately 6:00 p.m., 12 hours before the first fumigation was to begin on Block 26 on September 30, D. Frye left a voicemail on D'Arrigo Assistant Superintendent Jesus "JR" Vasquez's cell phone to notify him of the fumigation. (Fact 24; Testimony of D. Frye.)

The Commissioner's office received six separate Notices of Intent from SoilFume to conduct applications on Ranch 15 of Mendoza Berry Farms, starting September 28, 2010, and

ending October 4, 2010. (County Exs. 8-13.) On Friday, October 1, 2010, SoilFume completed the third in a planned series of non-isolated, tarped field fumigations of *Terr-O-Gas 57* (Reg. Number 5785-28-AA), a pesticide containing methyl bromide and chloropicrin, to 20 acres on Block 27 of Mendoza Berry Farms. (Facts 6-7, 10; County Ex. 15; Testimony of N. Desjarlais.) On Saturday, October 2, 2010, SoilFume completed the fourth field fumigation to 19.5 acres on Block 28 of Mendoza Berry Farms. (Fact 11; County Ex. 15; Testimony of N. Desjarlais.) The combined fumigations to Block 27 and Block 28 resulted in a 100 foot inner buffer zone, which extended approximately 75 to 80 feet into Block 25, a rapini field operated by D'Arrigo Bros. of California. (Facts 12-13; County Ex. 11; Testimony of N. Desjarlais.)

At approximately 3:00 p.m. on Saturday, October 2, 2010, a tarp on Block 27 failed. (Fact 16; County Ex. 3; Testimony of N. Desjarlais.) At the time of the tarp failure, one of three D'Arrigo crews was harvesting rapini in the Block 25 field. (County Ex. 2; Testimony of N. Desjarlais.) Because of the tarp failure, 31 of the rapini harvesters experienced symptoms including burning eyes, nose irritation, shortness of breath, stomach pain, dizziness, sore throat, and headache. (County Ex. 3.) Ten of the rapini harvesters who experienced symptoms were taken to Pinnacle Urgent Care in Salinas, and three days later, the crew foreman went to Salinas Valley Memorial Hospital emergency room for symptoms of headache and fever. (County Ex. 3.)

The Commissioner's Office conducted an investigation into the incident. (Fact 18; County Ex. 3.) Monterey County Agricultural Inspector/Biologist N. Desjarlais investigated the incident, interviewed witnesses, and documented his findings in Pesticide Episode Investigation Report for Priority Investigation 55-MON-10. (Fact 18; County Ex. 3.) The investigation concluded that Appellant SoilFume made several violations of Food and Agricultural Code section 12973 by failing to comply with several methyl bromide regulations and the conditions of the Monterey County Methyl Bromide Field Fumigation Conditions and Worksite Plan. (County Ex. 3.)

On March 15, 2012, the Commissioner issued a Notice of Proposed Action (NOPA), charging SoilFume with three counts of violating California Food and Agricultural Code section 12973. (County Ex. 20.) SoilFume requested a hearing on March 22, 2012, and subsequently requested to postpone the hearing due to work constraints on September 19, 2012. (Fact 3; County Ex. 20.) The Commissioner granted SoilFume's request and, due to the unavailability of a primary witness for the Commissioner's office, the hearing was rescheduled for April 25, 2013. (Fact 3; County Ex. 20.) On April 25, 2013, R. O'Connell, a Hearing Officer designated by the Commissioner, held a hearing at 1428 Abbott Street, Salinas, California.

Relevant Laws and Regulations

Food and Agricultural Code section 12973 states, "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 states in relevant part, "'Assure' or 'Ensure' means to take all reasonable measures so that the behavior, activity, or event in question occurs..."

California Code of Regulations, title 3, section 6447.2, entitled Methyl Bromide Field Fumigation Buffer Zone Requirements, states in relevant part:

...

(e) Inner Buffer Zone Restrictions

...

(2) The operator of the property to be treated shall assure that no persons are allowed within the inner buffer zone except to transit and perform fumigation handling activities.

...

(h) The operator of the property to be treated shall assure that specific notification of the date and time of the state of the fumigation and anticipated expiration of buffer zones is provided to the other property operator, if the operator of the other property is required to notify his/her employees as specified in (g). This specific fumigation notification shall be provided to the other property operator at least 48 hours prior to starting the fumigation. ...

When levying fines, the Commissioner must follow the fine guidelines 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." (Cal. Code Regs., tit. 3, § 6130, subd. (b)(2).) The fine range for a Class B violation is $250 to $1,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c)(2).)

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, subd. (d).)

Appellant's Allegations

In their initial appeal, SoilFume vaguely argued that they disagreed that the burden of proof was on SoilFume, when people were in fact notified. SoilFume did not submit additional written argument in this matter.

The Hearing Officer's Decision

At the hearing, the Hearing Officer received both oral and documentary evidence, and the County and SoilFume had the opportunity to present and question witnesses. The Hearing Officer determined that there was sufficient evidence to show that SoilFume committed three separate violations of California Food and Agricultural Code section 12973 by failing to comply with specific county conditions contained in "Monterey County Methyl Bromide Field Fumigation Conditions and Worksite Plan" in connection with fumigations on Mendoza Berry Farms on October 1 and 2, 2010. Specifically, the Hearing Officer found that SoilFume (1) failed to take all reasonable measures to ensure that specific notification occurred, as required by California Code of Regulations, title 3, section 6447(h); (2) failed to take reasonable measures to prevent a person not in transit or involved in the fumigation-handling activities from being in the inner buffer zone; and (3) failed to provide complete and accurate maps with its Notices of Intent. The Hearing Officer upheld the three violations and held that the respective fines of $1,000, $1,000, and $550 were appropriately classified within the Class B category because they were violations of law or regulations aimed at mitigating the risk of adverse health, property, or environmental effects. On June 12, 2013, the Monterey County Agricultural Commissioner adopted the Hearing Officer's proposed decision in its entirety.

The Director's Analysis

A. Failure to comply with any condition of the permit issued by the Commissioner is a violation of Food and Agricultural section 12973.

California Food and Agricultural Code section 12973 states, "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*." (emphasis added) "Monterey County Methyl Bromide Field Fumigation Conditions and Worksite Plan" contains a number of specific conditions for field fumigations taking place within Monterey County. The permit explicitly stated that both the Permittee and Pest Control Business "share responsibility for compliance with all conditions of [the] permit" and sections 6447, 6447.1, and 6447.2 of title 3 of the California Code Regulations. (County Ex. 5, p. 1.) Specifically, the permit conditions placed joint responsibility on both Mendoza Berry Farms and SoilFume for ensuring that that (1) no persons were within the inner buffer zone except to transit and perform fumigation handling activities, and that (2) neighboring property operators were notified of the date and time and expected expiration of the buffer zones on their properties at least 48 hours prior to starting the application. (Cal. Code of Regs., tit. 3, § 6447.2, subd. (e)(2) and (h).) Section 6000 of the California Code of Regulations defines "ensure" as "tak[ing] all reasonable measures so that the behavior, activity, or event in question occurs."

B. Substantial evidence supports the Commissioner's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing to take all reasonable measures to ensure that specific notification occurred to neighboring property operators.

The Director finds that there is substantial evidence to support the Commissioner's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing to take all reasonable measures to ensure that specific notification occurred to neighboring property operators, as required by California Code of Regulations, title 3, section 6447(h).

At the hearing, the parties stipulated to the fact that Mendoza Berry Farms employed SoilFume to perform fumigation and specific notification to neighboring property operators. (Facts 4 and 22; Testimony of D. Frye.) Based on the County's post-incident interviews with D'Arrigo employees and D. Frye, it appears that SoilFume had three contacts with D'Arrigo employees before the fumigation. The evidence showed, however, that each contact amounted to deficient notification under California law. During the County's interview of Jesse Aragon, Production Superintendent for D'Arrigo Bros., he stated that he received a phone call about a week before the fumigation saying that SoilFume would be treating Blocks 26, 27, 28, and 29. (Count Ex. 3, p. 36.) Mr. Aragon stated that subsequent to that phone call, he never received specific notification of what blocks were going to be fumigated on what dates or the expected expiration of the inner buffer zone. (County Ex. 3, p. 36.) The next contact occurred on September 29, 2010, when D. Frye informed D'Arrigo Foreman Jesus Vasquez Sr., in person, about the fumigation. (Testimony of D. Frye; County Ex. 3, p. 37.) However, there was evidence that Jesus Vasquez Sr. was the incorrect person to notify. (County Ex. 3, p. 37.) There was also no evidence presented that D. Frye informed Mr. Vasquez of the specific date and time of the fumigation, or expiration of the inner buffer zone at that time. (County Ex. 3, pp. 37, 42.) The final contact occurred at approximately 6:00 p.m. on September 29, 2010, 12 hours before the fumigation was to begin on Block 26, when D. Frye left a voicemail on D'Arrigo Assistant Superintendent Jesus "JR" Vasquez's cell phone to notify him of the fumigation. (Fact 24; Testimony of D. Frye.) Again, there was no evidence presented demonstrating that D. Frye informed "JR" in his voice message of the specific dates and times of the fumigation, what blocks would be treated, or the expected expiration of the inner buffer zone.[1] There was also no evidence presented showing that D. Frye followed-up his voicemail with Jesus "JR" Vasquez to ensure that D'Arrigo Bros. received specific notification.

In sum, no evidence was submitted or presented at the hearing demonstrating that SoilFume, at any time, gave D'Arrigo Bros. timely, sufficient, and specific notification of the date, time, and location of the fumigation or expected expiration of the inner buffer zone. Even

1 In fact, Jesus "JR" Vasquez stated in his County interview that he never received a voicemail from D. Frye on September 29, 2010. (County Ex. 3, p. 39.)

presuming D. Frye gave specific notification in his voicemail to Jesus "JR" Vasquez, the notification was given less than the required 48 hours before the application, also making it a deficient notification. Accordingly, SoilFume failed to take all reasonable measures to ensure that specific notification to neighboring property operators occurred, and therefore violated Food and Agricultural Code section 12973.

C. Substantial evidence supports the Commissioner's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing to take reasonable measures to prevent persons not in transit or involved in the fumigation-handling activities from being in the inner buffer zone.

The Director finds that there is substantial evidence to support the Commissioner's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing to take all reasonable measures to prevent harvesting activities from occurring in the inner buffer zone on October 2, 2010. As stated above, under the permit conditions and applicable California regulations, Mendoza Berry Farms and SoilFume were jointly responsible for assuring that no persons be allowed within the inner buffer zone except to transit and perform fumigation handling activities. (Cal. Code of Regs., tit. 3, § 6447.2, subd. (e)(2); County Ex. 5, p.1.) The act of harvesting is not an enumerated "fumigation handling activity," and is therefore not a lawful activity to occur within the inner buffer zone under California law. (Cal. Code of Regs., tit. 3, §6445.)

At the hearing, the evidence showed that there was a 100 foot inner buffer zone from the October 1, 2010-methyl bromide fumigation to Block 27 at Mendoza Berry Farms, which extended approximately 75 to 80 feet into Block 25, a rapini field operated by D'Arrigo Bros. (Testimony of N. Desjarlais; County Ex. 2.) The evidence also showed that on October 2, 2010, a rapini harvesting crew of about 35 individuals started harvesting rapini on Block 25 within the inner buffer zone. (Testimony of N. Desjarlais; County Ex. 2 and Ex. 3, p. 34.) Although there was evidence that the rapini harvesting machinery is very large and the rapini harvesting process is slow, there was no evidence that anyone from SoilFume attempted to stop the harvesting activity from occurring within the inner buffer zone. (Testimony of N. Desjarlais; County Ex. 3.) Accordingly, there is substantial evidence to support the Director's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing to take all reasonable measures to prevent harvesting from occurring within the inner buffer zone.

D. Substantial evidence supports the Commissioner's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing to provide complete and accurate maps with its Notices of Intent.

The Director finds that there is substantial evidence to support the Commissioner's decision that SoilFume violated California Food and Agricultural Code section 12973 by failing

to provide complete and accurate maps with its Notices of Intent, as required under the specific conditions contained in Monterey County's Methyl Bromide Field Fumigation Conditions and Worksite Plan. Monterey County's permit conditions require all Notices of Intent to include, "a complete and accurate map of the fumigation site using the map from the worksite plan and showing the area to be fumigated and the areas where the inner and outer buffer zone extend onto property not operated by the permittee." (County Ex. 5, p. 3.)

At the hearing, the evidence showed that each of the five Notices of Intent submitted by SoilFume to fumigate acreage on Mendoza Berry Farms D'Arrigo Ranch 15 were either incomplete or inaccurate. (Fact 31; County Exs. 9-13.) A review of each of the maps submitted with the Notices of Intent demonstrates that SoilFume failed to include an accurate map indicating where both the inner and outer buffer zones extended onto property not operated by Mendoza Berry Farms. (Testimony of N. Desjarlais; County Exs. 9-13.) In addition, the map submitted with Notice of Intent #298-580 for the fumigation of Block 28 indicated the treatment of a rectangular block when in fact the completed fumigation was L-shaped. (Facts 33-34; Testimony of N. Desjarlais.) Both the failure to indicate inner and outer buffer zones and the failure to submit an accurate map of the proposed treatment area are violations of the specific permit conditions set forth in Monterey County's Methyl Bromide Field Fumigation Conditions and Worksite Plan. Accordingly, there is substantial evidence to support the Director's decision that SoilFume violated California Food and Agricultural Code section 12973.

E. Substantial evidence supports the Commissioner's decision to classify each 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 each violation was a Class B violation and that the fine was appropriate.[2] At the hearing, Mr. Desjarlais testified that SoilFume's violations were appropriately classified as Class B violations because their violations (i.e. failure to give specific notification; failure to assure prohibited activities were not occurring within the inner buffer zone; and failure to submit complete and accurate maps with the notice of intent) were violations of law or regulation that mitigate the risk of adverse health, property, or environmental effects. (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(2).) The fine range for Class B violations is $250-$1,000. (Cal. Code of Regs., tit. 3, § 6130, subd. (c)(2).)

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2 In fact, under California Code of Regulations, title 3, section 6130, the first two violations could have even been classified as a Class A violation, with a range up to $5,000, because of SoilFume's violation history, or because the violation arguably caused harm (i.e. failure to give appropriate notice and stop/remove rapini harvesters caused harm to harvesters).

Mr. Desjarlais testified that based on the investigation and the evidence, the $1,000 fine for each of Count 1 and Count 2 was appropriate due to the level of toxicity of methyl bromide (County Ex. 16) and SoilFume's compliance history within the last one and half years (County Exs. 21-23). (Testimony of N. Desjarlais.) For Count 3, Mr. Desjarlais testified that the $550 fine was appropriate because while SoilFume previously had agricultural penalties assessed against them, failing to submit complete and accurate maps with the notice of intent was the least likely to directly harm health, property or the environment.

Based upon the facts of this case, the Director finds that each violation was appropriately charged as a Class B violation and that the $2,550 fine levied is not excessive, and is a reasonable exercise of the Commissioner's discretion.

Conclusion

The Commissioner's decision that Appellant SoilFume made three separate violations of California Food and Agricultural Code section 12973 and that each violation qualified as Class B violation is affirmed. The fine of $2,550 is upheld.

Disposition

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify Appellant SoilFume of how and when to pay the $2,550 fine.

Judicial Review

Under Food and Agricultural Code, section 12999.5, Appellant SoilFume 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: SEP 20 2013

By: Brian Leahy
Brian Leahy, Director