

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

In the Matter of the Decision of  
the Agricultural Commissioner of  
the County of Santa Clara  
(County File No. 2431516)

Docket. No. S-026

**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 Santa Clara County Agricultural Commissioner (CAC) found that Mega Fume, Inc. (Appellant) violated California Code of Regulations, title 3, section 6780(c) (3 CCR 6780(c)). The CAC specifically found that Appellant failed to keep the aeration duct cover from restricting or blocking the aeration duct opening during the aeration process on December 31, 2014 at 47 South 16th Street, San Jose, California and on April 14, 2015 at 733 Linda Flora Street, San Jose California, which does not meet the current California Aeration Plan (CAP) procedures. The CAC classified the violation as "moderate" and levied a \$250 fine.

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. Drew Saruwatari 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**

Appellant fumigated the structure located at 47 South 16th Street, San Jose, California using Vikane. (Stipulated Fact 12.) Vikane is registered with the U.S. EPA and the DPR under registration number 62719-4. (Stipulated Fact 12; Exhibit 4.) Vikane's active ingredient is sulfuryl fluoride. (Exhibit 4.) Appellant introduced Vikane into the structure on December 29, 2014 at 2:35 p.m. (Stipulated Fact 12.) Aeration commenced on December 30, 2014 at 2:55 p.m. (Stipulated Fact 12.) Under the California Aeration Plan (CAP), the minimum aeration time for this structure was twelve hours; therefore the required minimum aeration time was over at 2:55 a.m. on December 31, 2014. (Testimony of Mr. Walker & Mr. Wadleigh.) Appellant did not certify the structure as safe for reentry until December 31, 2014 at 10:50 a.m. (Stipulated Fact 12.)

On December 31, 2014 at 9:25 a.m. Mr. Mike Walker, Agricultural Biologist for the County of Santa Clara, conducted a tarp inspection at 47 South 16th Street. (Testimony of Mr. Walker; Exhibit 5.) When Mr. Walker arrived at the property he observed the aeration duct cover partially covering the aeration duct, the aeration fans running, and the inlet covers removed. (Testimony of Mr. Walker; Exhibit 5.) Mr. Walker noted this as a violation of the CAP on his Fumigation Use Monitoring Inspection Report. (Exhibit 5.)

Appellant fumigated the structure located at 733 Linda Flora Street, San Jose, California using Vikane. (Stipulated Fact 13.) Appellant introduced Vikane into the structure on April 13, 2015 at 11:30 a.m. (Stipulated Fact 13.) On April 14, 2015 at 12:40 p.m. Mr. Enrique Villa, Field Representative for Appellant, arrived at 733 Linda Flora Street to begin aeration. (Testimony of Mr. Cesena; Exhibit 5; Exhibit B.) However, Mr. Villa was unable to get the aeration duct cover to stay completely off the aeration duct. (Testimony of Mr. Cesena; Exhibit 5.) Mr. Villa contacted Mr. Francisco Cesena, Northern California General Manager for Appellant, via telephone to report that he was unable to completely remove the aeration duct cover from the aeration duct and to secure the cover so it would not block the aeration duct without using a ladder and that he was alone at the site. (Testimony of Mr. Cesena.) Since Mr. Villa was alone at the site, Mr. Cesena instructed Mr. Villa to leave the aeration duct cover as is

and that he and his crew would fully remove and secure the aeration duct cover later in the day. (Testimony of Mr. Cesena.)

At 4:25 p.m. on April 14, 2015, before Mr. Cesena and his crew were able to fully remove the aeration duct cover from the aeration duct, Mr. Walker arrived at 733 Linda Flora Street to inspect the tarp. (Testimony of Mr. Walker; Exhibit 5.) Mr. Walker observed the aeration duct cover partially covering the aeration duct, the aeration fans running, and the inlet covers removed. (Testimony of Mr. Walker; Exhibit 5.) Mr. Walker noted this as a violation of the CAP on his Fumigation Use Monitoring Inspection Report. (Exhibit 5.)

At 6:35 p.m. on April 14, 2015, Mr. Cesena and his crew arrived at 733 Linda Flora Street to fully remove the aeration duct cover from the aeration duct. (Testimony of Mr. Cesena; Exhibit B.) Mr. Cesena did not know that Mr. Walker had just conducted an inspection at this fumigation site. (See Exhibit 5.) Mr. Cesena and his crew fully removed the aeration duct cover from the aeration duct and secured the cover so it would not block the aeration duct. (Testimony of Mr. Cesena.) Appellant certified the structure at 733 Linda Flora Street as safe for reentry at 7:45 a.m. on April 15, 2016. (Testimony of Mr. Cesena; Exhibit B.) Even though the aeration cap was not fully removed until 6:35 p.m., the aeration duct cover remained fully removed from the aeration duct for the minimum aeration period required by the CAP. (Testimony of Mr. Cesena.)

On December 18, 2015, the CAC issued a Notice of Proposed Action (NOPA) charging Appellant with violating 3 CCR 6780(c) for failing to meet the requirements of the CAP. On April 20, 2016, a hearing was held before Mr. Stan Toy, the hearing officer appointed by the CAC.

### **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 director 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.

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

The aeration ducting shall be designed and sealed in a manner that allows it to be opened remotely from ground level when aeration is initiated. If the aeration duct cover cannot be opened remotely due to malfunction, an SCBA must be used when removing the duct cover. The duct cover shall not restrict or block the aeration duct opening after the duct cover is removed.

...

**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, an 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.

**Step 3:**

Any time after the required hours of aeration are completed, as specified in Table 2, turn off the aeration fan(s).

**Step 4:**

Remove all tarpaulins and/or seals from the structure.

**Step 5:**

If the structure has a central air system, turn on only the fan (or blower) for each operational unit. As an alternative, a circulation fan may be placed in front of a furnace inlet to blow air into central heating and cooling ducts. Remove all chloropicrin evaporation containers from the fumigated space.

**Step 6:**

Measure the concentration of sulfuryl fluoride in breathing zones (where people typically stand, sit or lie down) using an approved detection device as per sulfuryl fluoride product labeling. If the concentration of sulfuryl fluoride is greater than 1 ppm or warning properties of chloropicrin are detected continue ventilation with doors and windows open until aeration is completed. Confirm sulfuryl fluoride concentrations are 1 ppm or less.

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) The County did not present any evidence that the aeration duct cover was blocking the aeration duct at 47 South 16th Street, San Jose, California during the twelve hours of required aeration time. At the time Mr. Walker observed the aeration cap blocking the duct, the aeration time required under the CAP had passed and aeration was complete.

(2) Mr. Villa was unable to fully remove the aeration duct cover at 733 Linda Flora Street, San Jose, California due to a malfunction in the equipment. Mr. Villa's decision to turn on the aeration fans and remove the inlet covers even though the aeration duct cover was partially blocking the aeration duct was more protective of bystanders than leaving the aeration duct cover partially removed and not turning on the aeration fans or removing the inlet covers.

**The CAC Decision**

The hearing officer found by a preponderance of the evidence that Appellant violated 3 CCR 6780(c) on December 31, 2014 by failing to keep the aeration duct cover from restricting or blocking the aeration duct opening during the aeration process at 47 South 16th Street, San Jose, California. The hearing officer determined that even if windy conditions caused the aeration duct cover to partially block the aeration duct at some unknown time during the aeration process, it is the responsibility of Appellant to ensure the aeration duct remains unblocked during the entire active aeration process.

The hearing officer also found by a preponderance of evidence that Appellant violated 3 CCR 6780(c) on April 14, 2015 at 733 Linda Flora Street, San Jose, California. The hearing officer specifically found that Mr. Villa did not completely remove the aeration duct cover from the aeration duct before continuing on to the next steps in the aeration process, activating the aeration fans and removing the inlet covers. The hearing officer stated that Appellant may have had good intentions; however, the CAP clearly states that the aeration duct cover must be removed before the inlet covers can be removed.

The hearing officer determined that classifying Appellant's violation as "moderate" and imposing a fine of \$250 is consistent with 16 CCR 1922(a)(1)(C). The CAC adopted the hearing officer's proposed decision in its entirety.

### **Analysis**

The CAC determined that Appellant violated 3 CCR 6780(c) at 47 South 16th Street, San Jose, California and 733 Linda Flora Street, San Jose, California because Appellant failed to keep the aeration duct cover from restricting or blocking the aeration duct during the aeration process, which is a requirement outlined in the CAP. However, 3 CCR 6780(c) does not require Appellant to keep the aeration duct cover from restricting or blocking the aeration duct during aeration nor does it require Appellant to follow the procedures outlined in the CAP.

Contrary to the CAC's determination that Appellant violated 3 CCR 7860(c), subsection (c) does not impose any requirements on Appellant. Rather, this subsection 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.<sup>1</sup>

### **Conclusion**

The CAC's decision that Appellant violated 3 CCR 6780(c) is reversed because that subsection authorizes the Director to approve a Fumigant Safety Plan to be used by the employer, but does not require compliance with or place any obligations upon the employer.

### **Disposition**

The CAC's decision and levy of a fine is reversed.

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<sup>1</sup> 3 CCR 6780(b) is the regulation requiring employers to operate under the provisions of an accepted Fumigation Safety Program when an employee may be exposed to fumigants. A violation of this subsection may have been found had it been charged. 3 CCR 6600(b) requiring pest control to be conducted in a careful and effective manner could also have been charged and potentially proven.

**STATE OF CALIFORNIA  
DISCIPLINARY REVIEW COMMITTEE**

Dated:     AUG 23 2016    

By:       
Drew Saruwatari, Member  
For the members of the Disciplinary  
Review Committee