

**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 Santa Barbara
(County File No. 15-ACP-SB-05/06)

Docket. No. 147

DECISION

L & M Agricultural, LLC
2223 South Oakley
Santa Maria, California 93455

Appellant/

Procedural Background

Under Food and Agricultural Code (FAC) section 12999.5 and section 6130 of Title 3, California Code of Regulations (3 CCR), county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations.

After giving notice of the proposed action and providing a hearing, the Santa Barbara CAC found that the Appellant, L & M Agricultural, LLC, committed one violation of the State's pesticide laws. The commissioner imposed a total penalty of \$350 for the violation.

Appellant appealed from the commissioner's civil penalty decision to the Director of the Department of Pesticide Regulation. The Director has jurisdiction in the appeal under FAC section 12999.5.

Standard of Review

The Director decides matters of law using her 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

The Santa Barbara CAC issued a Notice of Proposed Action on November 11, 2006, to the Appellant for a violation of FAC section 12973.

The violation found that the Appellant had failed to comply with the conditions of its methyl bromide permit by failing to insure that there were no occupied structures in the outer buffer zone during an application of methyl bromide. On October 2, 2006, Ms. Debra Trupe, Santa Barbara County Supervising Agricultural Biologist, conducted a fumigation use monitoring inspection at site 01 listed on the Restricted Materials Permit issue to the Appellant. During the course of her inspection Ms. Trupe found that, during the methyl bromide application, Mr. Bognuda was inside his residence that was located in the outside buffer zone, a violation of the permit condition. Since the Appellant failed to adhere to the permit condition, the Santa Barbara CAC found that the Appellant had violated FAC section 12973, which states in part, that the use of any pesticide shall not conflict with any additional limitations applicable to the conditions of any permit issued by the commissioner. The Santa Barbara CAC found the violation to be a Class B fine since the failure to insure that the residence in the outer buffer zone was vacated prior to the fumigation posed a reasonable possibility of creating a health effect. The Santa Barbara CAC's proposed fine of \$350 is at the lower end of the Class B fine range of \$250 to \$1,000.

Appellant's Arguments

Appellant argues in his written appeal, dated March 15, 2007, that he had shown good faith in removing Mr. Bognuda from his residence. Appellant argues that he kept in communication with Mr. Bognuda, that he had no authority to enter into Mr. Bognuda's residence to insure he was not home, that he knocked on the door of Mr. Bognuda's residence on the morning of October 2, 2006, just prior to fumigating and confirmed that no one was in the home, that he confirmed that Mr. Bognuda was staying at the hotel room provided by the Appellant, and that the Appellant possessed a letter from Mr. Bognuda wherein Mr. Bognuda agreed not to inhabit his home during the fumigation.

Analysis

There is evidence in the record that the Santa Barbara CAC issued the Appellant an amended Restricted Material Permit, Permit Number 42-06-4202057, on September 19, 2006. The purpose of the restricted materials permit amendment was to add methyl bromide and

chloropicrin for site 01, located southeast of Soloman and Highway 1. Appellant's owner, Mr. Manual Zepeda, Jr., signed the permit on September 19, 2006. On September 29, 2006, the Appellant initialed the "2006 Permit Conditions For Methyl Bromide Soil Fumigation," including paragraph "D. Buffer Zones." Paragraph D states in part, ". . . The fumigation applicator has the responsibility to keep all person, other than those involved in the application or those transiting, out of the inner buffer zone during injection. This responsibility transfers to the property operator after injection. The property operator shall insure that there are no occupied structures in the outer buffer zone."

The Methyl Bromide Work Site Plan For Soil Fumigation submitted by George Chavez, with SoilTech Services, on September 8, 2006, listed the property operator as "L & M Farming" and lists the onsite contact as Manuel Zepeda, Jr., the owner of L & M Agricultural, LLC, doing business as L & M Farming. Therefore, the record indicated that it was the Appellant who was the property operator; hence, it was the Appellant who bore the responsibility to insure that there were no occupied structures in the outer buffer zone.

There is information in the record that the application of the methyl bromide commenced on October 2, 2006. Ms. Trupe was inspecting the application when she noticed a dog running around Mr. Bognuda's residence that was located in the outer buffer zone. She knocked on the door and Mr. Bognuda answered. Ms. Trupe asked Mr. Bognuda why he was in the house, Mr. Bognuda said he had some paperwork to do. Ms. Trupe asked Mr. Bognuda if he had agreed to vacate the house. Mr. Bognuda said that he did, but he had some paperwork to do. Ms. Trupe arranged to have Mr. Bognuda work somewhere else outside of the outer buffer zone.

It is noted that the Appellant paid Mr. Bognuda and his family \$3,500 to stay at the Santa Maria Inn, and that Mr. Bognuda had executed an agreement to vacate the house.¹ Mr. Bognuda failed to comply with his agreement with L & M Agricultural, LLC.

Insure is defined as "to make certain especially by taking necessary measures and precautions."² While it is clear that Mr. Bognuda agreed to vacate the house and accepted the \$3,500 to cover his family's expenses for staying offsite, nonetheless, it is the Appellant who had the responsibility to "insure" that no one was at home the morning of the application. Upon direct examination, Mr. Zepeda testified that he checked the Bognuda residence the night before and *not* the morning of the methyl bromide application. The Appellant's assumptions that Mr. Bognuda would abide by his agreement and that the house would be empty the morning of the application because it was empty the night before are understandable. However, relying on assumptions does not rise to the level of insuring no one would be present when the application took place.³

1 Mr. Bognuda knowingly violate his agreement with L & M Agriculture; hence, L & M Agriculture has legal recourse in this matter outside the scope of this review.

2 Merriam-Webster's Collegiate Dictionary, Eleventh Edition

3 The fact that the Appellant assumptions are understandable seem to have been taken into account when the fine was set at the lower end of the Range B fine range. If Mr. Bognuda's presence not been discovered during the inspection, the violation and fine level would be, as a matter of law, Range A.

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There is information in the record that the Appellant neither visited the application site the morning of the methyl bromide application, nor did he remain onsite to monitor the permit conditions of the application. Therefore, the Appellant did not take the necessary measures and precautions to insure that there was no one in the structures in the outer buffer zone.

Conclusion

For the violation of FAC section 12973, the commissioner's decision is supported by substantial evidence.

Disposition

The commissioner's decision is affirmed in its entirety. The commissioner shall notify Appellant how and when to pay the \$350 fine.

Judicial Review

Under FAC section 12999.5, 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: JUL 20 2007

By: Mary-Ann Warmerdam
Mary-Ann Warmerdam, Director