

**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. 8-ACP-SB-12/13)

Administrative Docket No. 191

**DIRECTOR'S  
DECISION**

**Soil Fume, Inc.  
209 Riverside Road  
Watsonville, California 95076**

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Appellant/

**Procedural Background**

Under section 12999.5 of the Food and Agricultural Code, county agricultural commissioners (CACs) may levy a civil penalty up to \$5,000 for certain violations of California's pesticide laws and regulations. When levying a penalty, CACs must follow the guidelines established in California Code of Regulations, Title 3, section 6130 (3 CCR § 6130). Section 6130 requires CACs designate each violation as Class A, Class B, or Class C. Each class has a corresponding fine range.

After giving proper notice of the proposed action and providing a hearing (held on January 9, 2013) in Santa Maria, California, the Santa Barbara CAC (Commissioner) found that on October 3, 2011, Appellant, Soil Fume, Incorporated ("Soil Fume"), violated California Code of Regulations, Title 3, section 6600, subdivision b (3 CCR § 6600(b)). The Commissioner classified Appellant's violation as Class A and levied a \$4,100 civil penalty.

Appellant appeals the Commissioner's decision to the Director of the California Department of Pesticide Regulation. The Director has jurisdiction over this appeal under section 12999.5 of the Food and Agricultural Code.

**Standard of Review**

The Director decides this appeal on the record before the Hearing Officer. In reviewing the Commissioner's decision, the Director determines whether there was substantial evidence, contradicted or uncontradicted, before the Hearing Officer to support the Hearing Officer's findings and the Commissioner's decision. 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 have also been reached. In applying the substantial evidence test, the Director draws all reasonable inferences from information in the record to support the Hearing Officer's 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 October 3, 2011, Appellant Soil Fume, a registered pest control business, made a chemigation application of *Tri-Chlor E.C.* (EPA Reg. No. 58266-5-11220) to 22 acres of D & S Farms. (Stipulated Fact 5.) *Tri-Chlor E.C.*'s active ingredient is chloropicrin. (County Exhibit 7.) Minimal exposure to chloropicrin gas can cause lachrymation (tearing), headaches, respiratory distress, and vomiting. (County Exhibit 7; Testimony of I. Sahagun.)

Appellant used *Tri-Chlor E.C.* with a pre-phase one label. (Stipulated Fact 6.) A pre-phase one label is the product label in existence prior to the U.S. Environmental Protection Agency's first of two phases of label restrictions that were designed to protect persons working or living near fumigated fields. Pre-phase one labels do not require a fumigation management plan. Nevertheless, Appellant was aware that chloropicrin products with new phase-one labels require applicators complete a fumigation management plan to better document wind speeds, temperature, soil temperature, and other parameters of the application. (Testimony by Soil Fume.<sup>1</sup>)

Appellant began its morning chloropicrin application at approximately 9:35 a.m. (Soil Fume Exhibit 2; Testimony of R. Gutierrez.) This application ended at approximately 12:45 p.m. (Soil Fume Exhibit 2; Testimony of I. Sahagun.) During the application, the Santa Maria Public Airport recorded a wind, between 4.6 mph and 15.0 mph, blowing from the northwest towards the southeast. (County Exhibit 5 at p. 15.) Between 10:51 a.m. and 11:51 a.m. the wind direction varied. The Santa Maria Public Airport is located less than two miles from D & S Farms. (County Exhibit 5 at p. 15.)

At 10:25 a.m., County Agricultural Inspector L. Martin completed a Field Fumigation Use Monitoring Inspection. (County Exhibit 9; Testimony of L. Martin.) Inspector Martin did not find any violations during this inspection. Inspector Martin also did not notice any chloropicrin odor at the time of her inspection.

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<sup>1</sup> This testimony is by a Soil Fume representative present at the January 9, 2013 hearing. Soil Fume representatives did not identify themselves prior to testifying, therefore the identity of the specific representative cannot be determined based on the CD provided as part of the hearing record.

DG Berry, Incorporated (DG Berry) is located east of D & S Farms. (County Exhibit 5 at p. 15; County Exhibit 6.) DG Berry and D & S Farms are separated by Black Road. At the time of the application, DG Berry fieldworkers were between 100 and 300 feet east of the D & S Farms' field being fumigated. (County Exhibit 5 at p. 15; County Exhibit 6.)

At the hearing, County Agricultural Inspector A. Cangelosi testified that around 11:00 a.m., DG Berry fieldworkers began smelling an odor and feeling burning eyes, headaches, nausea, and sore throats. (County Exhibit 5 at pp. 9-10; Testimony of A. Cangelosi.) Sixteen DG Berry fieldworkers reported negative health symptoms. (County Exhibit 5 at p. 1.) None of the fieldworkers were treated at a medical facility. (County Exhibit 5 at p. 11; Testimony of D. Frye.) The fieldworkers were treated by S. Gonzales, a former nurse and current DG Berry employee. (County Exhibit 5 at p. 8.)

Appellant walked the perimeter of the fumigated field prior to beginning its chloropicrin application. (Testimony of Soil Fume.) Nevertheless, Appellant did not see and was not aware of DG Berry fieldworkers.

Appellant testified that its employees stood at the point of injection during the entire application. Appellant's point of injection was upwind and on the western edge of the D & S Farms' field being fumigated. Appellant additionally testified that Appellant was unable to see the entire fumigated field from the point of injection and that Appellant did not have binoculars at the time of application.

On October 3, 2011, the only other pesticide application within a quarter mile of DG Berry was a ground application of *Kaligreen* (EPA Reg. No. 11581-2) and *Entrust* (EPA Reg. No. 84059-3). (County Exhibit 5 at p. 15.) It is highly unlikely that this application caused DG Berry fieldworkers' symptoms because this application concluded at 5:45 a.m. and *Kaligreen* and *Entrust* are applied by ground and do not cause odors. (County Exhibit 5 at p. 15.)

At approximately 2:00 p.m., in response to complaints by G. France and C. Gianini of DG Berry, County Agricultural Inspectors, K. Masuda and A. Cangelosi, arrived at D & S Farms. (Testimony of K. Masuda; Testimony of A. Cangelosi.) Neither inspector noticed a chloropicrin odor. (Testimony of K. Masuda.) Inspector Masuda testified that D & S Farms' sprinklers were running at the time the inspectors arrived.

Inspector Cangelosi interviewed J. Vasquez, R. Alvarez, and R. Sanchez, D & S Farms' employees. (Testimony of A. Cangelosi.) Mr. Vasquez informed Inspector Cangelosi that he did not know who was responsible for odor monitoring during Appellant's fumigation and that he was not present at the fumigated field during the fumigation. Mr. Alvarez stated that he was responsible for covering the ends of the fumigated field with plastic and that he also was not present at the fumigated field during the fumigation. Mr. Sanchez informed Inspector Cangelosi

that he was responsible for driving around the fumigated field every hour and looking for leaks. Mr. Sanchez stated that he was not responsible for odor monitoring and that he did not know who was responsible for such monitoring. Appellant testified that Appellant and D & S Farms never discussed who was responsible for odor monitoring. (Testimony of Soil Fume.)

The Santa Barbara CAC found that Appellant failed to perform pest control in a careful and effective manner, which is a violation of 3 CCR § 6600(b). (County Notice of Decision and Order.) The Merriam Webster Online Dictionary defines “careful” as “exercising or taking care,” “marked by wary caution or prudence,” and “marked by painstaking effort to avoid errors or omissions.” (County Exhibit 4.)

### **Relevant Laws and Regulations**

Each person performing pest control shall “perform all pest control in a careful and effective manner.” (Cal. Code Regs., tit. 3, § 6600, subd. (b).)

The Commissioner may “levy a civil penalty against a person violating Division 6 (commencing with Section 11401), Article 10 (commencing with Section 12971), or Article 10.5 (commencing with Section 12980) of this chapter . . . or a regulation adopted pursuant to any of these provisions.” (Food & Agr. Code, § 12999.5, subd. (a).)

When levying a penalty, the Commissioner must follow the guidelines provided in 3 CCR § 6130. Under section 6130, violations shall be designated as Class A, Class B, or Class C. A Class A violation is one of the following:

- (A) A violation that caused a health, property, or environmental hazard.
- (B) A violation of a law or regulation that mitigates the risk of adverse health, property, or environmental effects, and the commissioner determines that one of the following aggravating circumstances support elevation to Class A.
  - 1. The respondent has a history of violations;
  - 2. The respondent failed to cooperate in the investigation of the incident or to allow a lawful inspection; or
  - 3. The respondent demonstrated a disregard fo specific hazards of the pesticide used.
- (C) A violation of a lawful order of the commissioner issued pursuant to sections 11737, 11737.5, 11896, 11897, or 13102 of the Food and Agricultural Code.

(Cal. Code Regs., tit. 3, § 6130, subd. (b)(1).)

The fine range for a Class A violation is \$700 to \$5,000. (Cal. Code Regs., tit. 3, § 6130, subd. (c).)

### **Appellant's Assertions**

On appeal, Appellant contends that (1) the Commissioner did not have sufficient proof to find that Appellant violated 3 CCR § 6600(b), and (2) any violation by Appellant should not be a Class A violation.

### **The Hearing Officer's Decision**

The Hearing Officer found by a preponderance of the evidence that Appellant's October 3, 2011 pest control application was not completed in a "careful" manner, and accordingly violated 3 CCR § 6600(b). Appellant's application was not careful because Appellant failed to thoroughly monitor and check the areas surrounding the application site for fieldworkers or other potential hazards. Further, Appellant did not discuss odor monitoring responsibilities with the owner of the fumigated field and no individual present at the application site was responsible for odor monitoring.

The Hearing Officer found by a preponderance of the evidence that Appellant's chloropicrin application caused DG Berry fieldworkers' symptoms. DG Berry fieldworkers' failure to seek treatment at a medical facility is not credible evidence that the fieldworkers did not actually suffer their reported symptoms. Additionally, Appellant did not introduce any credible evidence demonstrating that some other activity caused DG Berry fieldworkers' symptoms. Accordingly, the Hearing Officer found that Appellant's chloropicrin application caused DG Berry fieldworkers' symptoms.

The Hearing Officer classified Appellant's violation as Class A and levied a \$4,100 penalty. Appellant's violation is Class A because Appellant's chloropicrin application caused a health hazard to DG Berry fieldworkers. Further, the penalty amount is within the Class A fine range provided in 3 CCR § 6130. The Santa Barbara CAC adopted the Hearing Officer's proposed decision in its entirety.

### **The Director's Analysis**

- A. Substantial evidence supports the Commissioner's decision that Appellant violated 3 CCR § 6600(b) by failing to apply *Tri-Chlor E.C.* in a careful manner.

The Director finds there is substantial evidence to support the Commissioner's decision that Appellant violated 3 CCR § 6600(b). Section 6600(b) requires all pest control applications be made in a careful and effective manner. "Careful" requires applicators take "painstaking effort to avoid errors or omissions" and apply pesticides with "wary caution or prudence." (County Exhibit 4.)

1. Evidence that Appellant failed to thoroughly monitor and check the areas surrounding the fumigated field supports the Commissioner's decision that Appellant did not apply chloropicrin carefully.

Appellant did not apply chloropicrin carefully because Appellant failed to monitor and check the areas surrounding the fumigated field for fieldworkers or other potential hazards. At the hearing, Appellant testified that it was aware of chloropicrin's hazardous nature and knew that minimal exposure to chloropicrin gas could cause significant harm to those exposed. (Testimony of I. Sahagun.) Appellant further testified that Appellant did not notice the nearby DG Berry fieldworkers, despite walking the perimeter of the fumigated field prior to beginning the chloropicrin application. (Testimony of Soil Fume.) Appellant's testimony supports the Commissioner's decision that Appellant failed to monitor and check the areas surrounding the fumigated field with wary caution as required by 3 CCR § 6600(b). Had Appellant painstakingly surveyed the areas surrounding the fumigated field, Appellant would have noticed DG Berry fieldworkers and could have taken additional precautions to prevent DG Berry fieldworkers from being exposed to the hazardous chloropicrin gas. Given Appellant's knowledge of chloropicrin's hazardous nature, in this instance, a careful application required Appellant painstakingly survey and monitor the areas surrounding the fumigated field to ensure no nearby fieldworkers or any other individuals could be harmed. Appellant's failure to thoroughly survey and monitor the areas surrounding the fumigation supports the Commissioner's decision that Appellant did not apply chloropicrin carefully and accordingly violated 3 CCR § 6600(b).

On appeal, Appellant argues that Appellant was in fact aware of DG Berry fieldworkers' presence during the application. (Soil Fume Appeal at p. 3.) Appellant's statements on appeal directly contradict Appellant's testimony at the hearing. Issues of witness credibility are the province of the Hearing Officer. As Appellant failed to introduce this evidence at the hearing, this contradictory testimony was not before the Hearing Officer. Accordingly, under the substantial evidence standard of review, this evidence cannot be considered on appeal.

Additionally, on appeal, Appellant contests the distance of DG Berry fieldworkers from the fumigated field. At the hearing, the Advocate for the Santa Barbara CAC, D. Trupe, stated that DG Berry fieldworkers were 100 feet from the fumigated field. Further, the Hearing Officer repeatedly characterized the distance between the fumigated field and DG Berry fieldworkers as 100 feet. Appellant did not contest this distance at the hearing. Nevertheless, on appeal, Appellant argues that DG Berry fieldworkers were actually between 300 and 340 feet from the fumigated field at the time of the fumigation. Similar to above, Appellant failed to raise this issue or introduce evidence on this point at the hearing; therefore this testimony was not before the Hearing Officer at the time of the Hearing Officer's decision. Accordingly, the Director cannot consider this evidence on appeal.

Moreover, the Commissioner did not rely on the distance between DG Berry fieldworkers and the fumigated field in finding that Appellant failed to apply chloropicrin carefully. The Commissioner found that Appellant did not apply chloropicrin carefully because Appellant did not thoroughly monitor and survey the areas surrounding the fumigated field for fieldworkers or other hazards. Accordingly, the Director affirms the Commissioner's decision that Appellant failed to make its pesticide application carefully.

2. Evidence that Appellant failed to monitor for chloropicrin odors and failed to discuss odor monitoring responsibilities with D & S Farms' employees supports the Commissioner's decision that Appellant did not apply chloropicrin carefully.

Appellant did not apply chloropicrin carefully because Appellant failed to monitor for chloropicrin odors. Chloropicrin odors indicate that chloropicrin may be escaping the fumigated field and moving off site. Appellant testified at the hearing that all of Appellant's employees stood at the point of injection for the duration of the chloropicrin application. (Testimony of Soil Fume.) The point of injection was on the western edge of the fumigated field, which was upwind of the field being fumigated. (County Exhibit 6.) This evidence supports the Commissioner's decision that Appellant failed to apply chloropicrin carefully as required by 3 CCR § 6600(b). In this instance, a careful application required that Appellant or a designated D & S Farms' employee stand downwind of the fumigated field. Standing downwind of the fumigation enables Appellant to immediately recognize any unusual chloropicrin odors, which indicate that chloropicrin is escaping the fumigated field. This precaution would have prevented DG Berry fieldworkers' exposure. As all of Appellant's employees stood upwind of the fumigated field, Appellant was unable to immediately recognize chloropicrin gas moving off the field and to take steps to prevent exposure to nearby fieldworkers. Given the hazardous nature of chloropicrin and the fact that minimal exposure to chloropicrin gas can cause significant negative health symptoms, a careful application requires the applicator use wary caution and stand in a location where the applicator will immediately notice any unusual chloropicrin odors. As Appellant failed to monitor the fumigated field for chloropicrin odors, Appellant did not make its pesticide application carefully.

Additionally, Appellant never discussed odor monitoring with D & S Farms and no employee of D & S Farms was clearly responsible for odor monitoring. At the hearing, Inspector Cangelosi testified that no D & S Farms' employee was responsible for odor monitoring. (Testimony of A. Cangelosi.) Further, Appellant testified that it never discussed odor monitoring with D & S Farms. Appellant's failure to discuss odor monitoring with D & S Farms and failure to make a specific individual responsible for odor monitoring is evidence that Appellant did not apply chloropicrin carefully. Had Appellant taken extra precautions to discuss odor monitoring with D & S Farms and clearly designate an employee of D & S Farms as responsible for odor monitoring, DG Berry fieldworkers would not have suffered harm from chloropicrin exposure.

Appellant argues on appeal that D & S Farms' employees made untruthful statements to Inspector Cangelosi regarding their lack of odor monitoring responsibilities. As discussed above, witness credibility is the province of the Hearing Officer. On appeal, the Director is limited to reviewing the record before the Commissioner to determine if there is substantial evidence to support the Commissioner's decision. The record contains evidence that no employee of Appellant or D & S Farms monitored for chloropicrin odors and that Appellant failed to discuss odor monitoring with D & S Farms. As a careful application in this instance, requires Appellant monitor for unusual chloropicrin odors, the Commissioner's decision that Appellant did not apply chloropicrin carefully is supported by substantial evidence.

3. The Commissioner did not rely on D. Frye's testimony about discrepancies in the amount of chloropicrin used during the application, Appellant's testimony that Draeger readings were not taken during the application, or evidence that Appellant did not have binoculars present at the application site in finding that Appellant violated 3 CCR § 6600(b).

On appeal, Appellant contests statements made in the "Discussion" section of Commissioner's Notice of Decision. Appellant specifically contests Commissioner's statements that D. Frye "pointed out discrepancies in the amount of [c]hloropicrin used in the application," that "no [D]raeger reading was taken during the application," and that Appellant "did not have binoculars."

Appellant argues that California's laws and regulations do not require Appellant have binoculars at the application field or take Draeger readings during the chloropicrin application. While Appellant is correct, 3 CCR § 6600(b) requires Appellant make its application carefully. "Careful" requires Appellant use "wary caution" and take "painstaking" effort to avoid mistakes. Accordingly, in some instances, a careful application requires the applicator go beyond the minimum requirements set forth in California's laws and regulations and requires the applicator use its individual expertise and judgment on how to apply pesticides safely. In this instance, given the hazardous nature of chloropicrin, 3 CCR § 6600(b) required Appellant take extra steps to ensure the application was made safely.

Further, the statements Appellant contests are not relevant to this appeal because the Commissioner did not rely on these statements in making its decision. These statements were made in the "Discussion" section of the Commissioner's Notice of Decision and are not discussed subsequently in the "Decision" section of the Notice of Decision. The "Discussion" section generally describes the testimony presented at the January 9, 2013 hearing. As the Commissioner did not rely on any of these statements in making its decision, these statements are not relevant to determining whether the Commissioner's decision is supported with substantial evidence.

The Director finds the Commissioner's decision supported by substantial evidence. Evidence in the record indicates that Appellant failed to thoroughly monitor and check the areas surrounding the fumigated field prior to beginning the application. Further, the record contains evidence that Appellant did not discuss odor monitoring with D & S Farms and that no employee of D & S Farms or employee of Appellant was responsible for odor monitoring. Lastly, evidence in the record indicates that Appellant stood at the point of injection for the entire application which prevented Appellant from being able to see the entire field being fumigated and observe fieldworkers or other individuals who may be in the area. Accordingly, the Director affirms the Commissioner's decision that Appellant failed to make its application carefully.

B. The Commissioner's decision to classify Appellant's violation of 3 CCR § 6600(b) as Class A and to levy a \$4,100 penalty is supported by substantial evidence.

The Director affirms the Commissioner's classification of Appellant's violation as Class A and the Commissioner's decision to levy a \$4,100 fine.

The Commissioner's decision to classify Appellant's violation as Class A is supported by substantial evidence. A Class A violation is any "violation that caused a health, property, or environmental hazard." (Cal. Code of Regs., tit. 3, § 6130, subd. (b)(1)(A).) At the hearing, Inspector Cangelosi testified that 16 DG Berry fieldworkers experienced health symptoms, including burning eyes, headaches, nausea, and sore throats. (County Exhibit 5 at pp. 9-10; Testimony of A. Cangelosi.) DG Berry fieldworkers' symptoms are consistent with the symptoms caused by chloropicrin gas, and Appellant's chloropicrin application was the only pesticide application on October 3, 2011 that could have caused DG Berry fieldworkers' symptoms. Accordingly, the Commissioner found that Appellant's violation of 3 CCR § 6600(b) caused DG Berry fieldworkers' health symptoms. Since DG Berry fieldworkers suffered negative health effects, Appellant's violation caused a health hazard and Commissioner's classification of Appellant's violation as Class A is proper.

On appeal, Appellant argues that DG Berry fieldworkers were not harmed because DG Berry fieldworkers never went to a medical facility. At the hearing, Inspector Cangelosi testified to each fieldworker's symptoms. (Testimony of A. Cangelosi.) Additionally, Inspector Masuda testified that S. Gonzalez, a former nurse, treated the fieldworkers for health symptoms. (Testimony of K. Masuda.) Appellant presented his lay opinion that the DG Berry fieldworkers did not actually experience negative health symptoms because they did not go to a medical facility. As discussed above, under the substantial evidence standard of review, issues of witness credibility are the province of the hearing officer. Accordingly, the Commissioner's finding that Appellant's failure to apply chloropicrin carefully caused a health hazard is supported by substantial evidence because evidence in the record indicates that DG Berry fieldworkers suffered negative health effects.

Additionally on appeal, Appellant argues that the Commissioner's supposition that DG Berry fieldworkers did not go to the hospital because they work on a piecemeal rate demonstrates that DG Berry fieldworkers were not in the presence of a health hazard. The Commissioner's theory as to why DG Berry fieldworkers did not go to a medical facility is not probative as to whether DG Berry fieldworkers were exposed to a health hazard. Further, Inspector Cangelosi testified to each DG Berry fieldworker symptom. Accordingly, the Director finds there is substantial evidence to support the Commissioner's decision that Appellant's failure to apply chloropicrin carefully caused a health hazard.

The Commissioner's decision to levy a \$4,100 fine for Appellant's Class A violation is appropriate. The fine range for a Class A violation is \$700 to \$5,000 and a fine can be levied for each individual exposed. (Cal. Code of Regs., tit. 3, § 6130, subd. (c); Food & Agr. Code, § 12996.5, subd. (b).) The Director finds that the \$4,100 fine is at the lower end of the potential fine range for this Class A violation that exposed and caused symptoms in sixteen workers and is a reasonable exercise of the Commissioner's discretion.

#### **Conclusion**

The Commissioner's decision that Appellant violated 3 CCR § 6600(b) and that the violation qualifies as a Class A violation is affirmed. The civil penalty assessed is well within the Commissioner's discretion and accordingly the Director upholds the \$4,100.00 civil penalty.

#### **Disposition**

The Commissioner's decision and levy of fine is affirmed. The Commissioner shall notify the appellant how and when to pay the \$4,100.00 penalty.

#### **Judicial Review**

Under section 12999.5 of the Food and Agricultural Code, 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: 5/29/13

By: Brian Leahy  
Brian Leahy, Director