

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

In the Matter of the Decision of the
Agricultural Commissioner of the County of
Fresno (County File No. FRE-20/21-023)

R & C Fume, Inc.
Reyes Castrellon
3350 W. Sussex Way #105
Fresno, CA 93722

Appellant

Docket No. S-038

DECISION

Procedural Background

Pursuant to California Business and Professions Code (BPC) section 8617, and California Food and Agricultural Code (FAC) section 15202, the County Agricultural Commissioner (CAC) may levy a civil 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 decision and providing a hearing, the Fresno CAC found that R & C Fume, Inc. (Appellant) violated section 6614(a) of Title 3 of the California Code of Regulations (3 CCR) by failing to evaluate and cover all of the open vents, and gaps in the deck which could have reasonably allowed an animal access under the house resulting in the death of two of the neighbor's cats. The CAC classified the violation as a "Class A" violation under 3 CCR section 6130 and levied a \$3,500 fine on Appellant.

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. Sophia Azar for the Structural Pest Control Board (SPCB), and Ms. Katherine Gaudinier 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 based on the record reviewed by the hearing officer. It applies independent judgment when interpreting laws and regulations. For all other issues, the Committee determines whether the hearing officer had substantial evidence – whether disputed or undisputed – to support their findings and the CAC's

decision. The Committee also notes that witnesses may offer conflicting testimony or information, but evaluating witness credibility is the role of the hearing officer.

The substantial evidence test only requires enough relevant information and reasonable inferences to support a conclusion, even if other conclusions could have been made. When applying this test, the Committee draws reasonable inferences from 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 supporting the CAC's decision, it will affirm that decision.

Background

On May 5, 2020, at or about 9:40 a.m., employees of R & C Fume, Inc. performed a fumigation at 3014 N. Thorne Ave., Fresno, California, using the pesticide Vikane. On May 7, 2020, at or about 4:03 p.m., Timothy Prewitt, who resides at 3024 N. Thorne Ave., Fresno, California, contacted the Fresno CAC and stated that three of his cats had been killed by a fumigation to the house located at 3014 N. Thorne Ave., Fresno, California. Mr. Prewitt's residence is next door to the north of the house that was fumigated on May 5, 2020.

R & C Fume, Inc. is registered as a Branch 1 – structural fumigation company with the Fresno CAC and the SPCB.

Employees of R & C Fume, Inc. who made the application of Vikane were licensed by the SPCB to make pesticide applications.

The CAC issued a Notice of Proposed Action (NOPA) on March 8, 2021 (10 months after the alleged violation), and proposed to fine the R & C Fume, Inc. the sum of \$3,500. The NOPA charged R & C Fume, Inc. with one violation of 3 section CCR 6614(a). R & C Fume, Inc. requested a hearing that was held on November 15, 2023 (2 years, 8.5 months after the request and 3 years 3.5 years after the fumigation). After hearing the evidence, the Hearing Officer recommended to uphold the NOPA of one count and fine R & C Fume, Inc. in the amount of \$3,500. The CAC adopted the Hearing Officer's proposed decision. R & C Fume, Inc. filed this appeal before the Committee.

Analysis

Two members of the Committee voted to withdraw the citation issued to R & C Fume, Inc. based on the following factors:

The hearing officer's findings suggest that R & C Fume, Inc. failed to cover all vents, potentially allowing the cats to enter the structure or subarea. However, substantial evidence challenges the necessity of covering all vents to prevent animals from entering. R & C Fume, Inc. The appeal asserts that the cats were already in the inaccessible areas

of the substructure when the fumigation began. Testimony confirms that R & C Fume, Inc. conducted thorough inspections to confirm that no visible animals were present in accessible areas, including the subarea. Evidence further indicates that the cats were found in parts of the substructure inaccessible to humans, supporting the Appellant's argument that they were not responsible for sealing those areas and that they took reasonable steps to ensure no animals were present.

The Appellant also demonstrated due diligence by notifying the homeowner and neighbors well in advance of the fumigation. Testimony confirms that R & C Fume, Inc. was on-site and conducted a final inspection of the crawlspace around the time Mr. Prewitt claims he last saw his cats alive. There is no regulatory requirement for R & C Fume, Inc. to seal broken vents or other openings to prevent animals from entering; the tarping process itself secures the structure against entry. Windows, for example, must remain open during fumigation, and while animals could theoretically enter unscreened windows, only if they managed to get under the tarp.

The timeline of events further supports R & C Fume, Inc.'s actions. Mr. Prewitt claims to have last seen his cats alive at 8:00 a.m., with fumigation beginning at 9:40 a.m. Testimony suggests that the cats were hidden in inaccessible substructure areas before fumigation, casting doubt on Mr. Prewitt's recollection. There is no evidence that the cats entered after the tarps were up or that any openings would have allowed entry after the structure was secured.

Finally, it is the responsibility of the CAC to provide substantial evidence demonstrating that R & C Fume, Inc. failed to evaluate the property properly and assess potential risks. After review, two of the three Committee members determined that the CAC did not meet this evidentiary standard, warranting withdrawal of the citation.

Conclusion and Disposition

The Fresno CAC's decision is overturned. No penalty will issue.

STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE

Azar,

Dated: 1/31/2025

By: Sophia@DCA

Sophia Azar, Member
For the members of the
Disciplinary Review Committee

Digitally signed by Azar,
Sophia@DCA
Date: 2025.01.31 10:36:58 -08'00'

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In the Matter of the Decision of the
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Docket No. S-038

DISSENT

R & C Fume, Inc.
Reyes Castrellon
3350 W. Sussex Way #105
Fresno, CA 93722

Appellant

The Disciplinary Review Committee (Committee) majority decision takes the position that Appellant, R & C, Fume, Inc. ("R & C Fume"), conducted an adequate evaluation of the property in compliance with section 6614(a) of Title 3 of the California Code of Regulations (3 CCR) and that the Fresno County Agricultural Commissioner (CAC) decision improperly interprets 3 CCR section 6614(a) as requiring structural fumigators to take affirmative action to cover all vents or other entry points to a substructure. However, the appellant did not actually argue that the evaluation was adequate and compliant with 3 CCR section 6614(a).

On appeal to the Committee, Appellant states, in relevant part:

Incorrect on Report: I said, I started working in the fumigation business since 1992, three days after getting out of the Marine Corps. That is 31 years ago, I worked as a Licensee for 29 of those years in Fresno. Following the rules and regulations, and the Agriculture Department inspector's orders; in front of Martin who was in charge in the 1990's. As the years when on in front of Gilbert, Karen, Kua, Dana, Mike and so on. *None of them, ever, told me they wanted air vents to the subarea fixed and all-around decks blocked before the fumigation was to be done.*

(Emphasis added.)

Based on Appellant's written appeal, Appellant does not actually argue that R & C Fume complied with 3 CCR 6614(a) or that the Fresno CAC decision is unsupported by substantial evidence. DPR believes the Committee's review of the case is most properly confined to the scope of the appeal and the arguments directly raised by the Appellant for the Committee's review. DPR is concerned about the potential for an overly broad scope of review in future appeals that could go beyond the Committee's authority pursuant to California Business and Professions Code (BPC) section 8662(b)(5).

In addition to the procedural issue, DPR is concerned about the impacts of this and a previous decision by the Committee on the ability of CACs to bring enforcement in structural fumigation cases that result in the death of domestic animals and pets.

In 2011, Santa Barbara CAC issued a penalty under California Food and Agricultural Code (FAC) section 12973, for a case involving a deceased cat found after a fumigation of a commercial residential structure with apartment units. FAC section 12973 prohibits the use of a pesticide in conflict with the registered label (Mission City Fumigation, Docket No. S-021). Specifically, the *Vikane* label states that applicators must “remove from the structure to be fumigated all persons, domestic animals, pets, and desirable growing plants.” The apartment where the cat was found seemed to be unprepared for the fumigation, and the tenant’s cat remained hiding in the apartment. The Committee majority reversed the CAC decision on the ground that the label requires applicators to take a “common sense” approach based on the circumstances of the fumigation. DPR did not join the majority, arguing that the requirement to remove all persons, domestic animals, pets and desirable growing plants is unequivocal and voted to uphold the violation. DPR is aware of numerous incidents of cat deaths resulting from structural fumigations and is concerned that these DRC decisions will constrain the ability of CACs to bring enforcement in such cases. DPR enforcement continues to hold the position that a violation of FAC section 12973, relative to the *Vikane* label language, is appropriate for structural fumigations which result in the death of domestic animals and pets.

**STATE OF CALIFORNIA
DISCIPLINARY REVIEW COMMITTEE**

Dated: January 31, 2025

By: 
Katherine Gaudinier, Member
For the Department of Pesticide Regulation