

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FLORIDA DEPARTMENT OF AGRICULTURE )  
AND CONSUMER SERVICES, )  
 )  
Petitioner, )  
 )  
vs. ) CASE NO. 90-5248  
 )  
TRI-STATE PLANT FOOD, INC., )  
 )  
Respondent. )  
\_\_\_\_\_)

RECOMMENDED ORDER

Pursuant to written notice a formal hearing was held in this case before Larry J. Sartin, a duly designated Hearing Officer of the Division of Administrative Hearings, on October 23, 1990, in Tallahassee, Florida.

APPEARANCES

For Petitioner: Harold Lewis Michaels  
Senior Attorney  
Department of Agriculture and  
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For Respondent: James D. Farmer, Esquire  
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STATEMENT OF THE ISSUES

Whether the fertilizer registrations in Florida of the Respondent, Tri-State Plant Food, Inc., should be suspended for committing the acts set out in an Administrative Complaint issued by the Petitioner, the Florida Department of Agriculture and Consumer Affairs, on July 31, 1990?

PRELIMINARY STATEMENT

The Petitioner, the Department of Agriculture and Consumer Affairs (hereinafter referred to as the "Department"), issued an Administrative Complaint notifying the Respondent, Tri-State Plant Food, Inc. (hereinafter referred to as "Tri-State"), that its fertilizer registrations in the State of Florida would be suspended for a period of 90 days. In a letter dated August 20, 1990, the President of Tri-State confirmed Tri-State's intent to request a formal hearing to contest the allegations of the Administrative Complaint. By letter dated August 21, 1990, the Department referred the matter to the Division of Administrative Hearings.

At the formal hearing the Department presented the testimony of Dale W. Dubberly, the Chief of the Division of Inspection, Bureau of Feed, Seed and Fertilizer Inspection of the Department. The Department also offered 6 exhibits which were accepted into evidence.

Tri-State presented the testimony of James O. Culbreth, President of Tri-State, and Hugh M. Griffith, plant supervisor. Two exhibits were offered by Tri-State and accepted into evidence.

The parties have filed proposed recommended orders containing proposed findings of fact. A ruling on each proposed finding of fact has been made either directly or indirectly in this Recommended Order or the proposed finding of fact has been accepted or rejected in the Appendix which is attached hereto.

#### FINDINGS OF FACT

1. Tri-State is an Alabama corporation engaging in the manufacture and sale of commercial fertilizer.

2. Tri-State's commercial fertilizers are registered with the Department for sale in the State of Florida.

3. Tri-State has a fertilizer manufacturing plant located in Dothan, Alabama. Commercial fertilizer manufactured at the Dothan plant is sold by Tri-State in Florida, Georgia and Alabama.

4. The Department is charged with the responsibility of regulating the registration, labeling, inspection and analysis of commercial fertilizers distributed in Florida.

5. All commercial fertilizer distributed in Florida is required to contain a label. The label must contain the manufacturer's "guaranteed analysis" (the minimum percentage of plant nutrients the manufacturer claims the fertilizer contains) of the fertilizer. In carrying out its responsibility to regulate the distribution of commercial fertilizer in Florida, Department personnel take samples of commercial fertilizer that will be distributed in Florida to determine whether the actual content of the fertilizer conforms with the guaranteed analysis contained on the label.

6. During the period July 1, 1989, through September 30, 1989, the Department analyzed 10 samples of Tri-State's commercial fertilizer to be sold in Florida to determine whether Tri-State's guaranteed analysis was accurate. Of the 10 samples, 8 were determined to be deficient. The primary plant nutrient deficiency was 28.08%. The allowable primary plant nutrient deficiency level is 12.5%. Tri-State's fertilizer exceeded the tolerances for primary plant nutrients. Accordingly, Tri-State was notified that it would be on probation for the period January 1, 1990, through March 31, 1990.

7. During the period October 1, 1989, through December 31, 1989, the Department analyzed 28 samples of Tri-State's commercial fertilizer to be sold in Florida to determine whether Tri-State's guaranteed analysis was accurate. Of the 28 samples, 14 were determined to be deficient. The primary plant nutrient deficiency was 23.7%. Tri-State's fertilizer exceeded the tolerances for primary plant nutrients. Accordingly, Tri-State was notified that it would be on probation for the period April 1, 1990, through June 30, 1990.

8. During the period January 1, 1990, through March 31, 1990, the Department analyzed 51 samples of Tri-State's commercial fertilizer to be sold in Florida to determine whether Tri-State's guaranteed analysis was accurate. Of the 51 samples, 20 were determined to be deficient. The primary plant nutrient deficiency was 16.28%. Tri-State's fertilizer exceeded the tolerances for primary plant nutrients. Accordingly, Tri-State was notified that it would be on probation for the period July 1, 1990, through September 30, 1990.

9. During the period April 1, 1990, through June 30, 1990, the Department analyzed 39 samples of Tri-State's commercial fertilizer to be sold in Florida to determine whether Tri-State's guaranteed analysis was accurate. Of the 39 samples, 18 were determined to be deficient. The primary plant nutrient deficiency was 13.45%. Tri-State's fertilizer exceeded the tolerances for primary plant nutrients. Accordingly, Tri-State was notified that it would be on probation for the period October 1, 1990, through December 31, 1990.

10. On July 31, 1990, the Department issued an Administrative Complaint against Tri-State proposing to suspend Tri-State's fertilizer registrations in Florida for 90 days based upon the deficiencies described in findings of fact 6 through 9.

11. Of the 39 official samples analyzed by the Department during the period April 1, 1990, through June 30, 1990, 24 or 61.5% were taken during the preceding calendar quarter, January 1, 1990, through March 31, 1990.

12. All 39 official samples analyzed by the Department during the period April 1, 1990, through June 30, 1990, were "reported" during the period April 1, 1990, through June 30, 1990. The date "reported" of each sample is the date the sample was analyzed. All of the 39 samples were "reported" within approximately 30 days after the samples were taken.

13. Official samples are taken by personnel of the Department's Division of Inspection. The official samples are then delivered to the Department's Division of Chemistry/Fertilizer Laboratory where they are analyzed or "reported." It is the Department's policy to analyze official samples in the order they are received. The weight of the evidence failed to prove that the Department has a policy of expediting the analysis of official samples upon request of a manufacturer on probation. Official samples are generally reported within approximately 30 days after they are taken.

14. It is the policy of the Department to encourage persons on probation to report that a bulk shipment of commercial fertilizer is to be made into Florida so that the Department can attempt to take samples of the bulk fertilizer shipment. Because samples are weighted based upon the tonnage of a sample in determining efficiency, each bulk shipment of fertilizer for distribution in Florida can have a significant affect on whether a person on probation is determined to still be deficient.

15. The Department makes every reasonable effort to sample a bulk shipment if given reasonable notice and if an inspector is reasonably available. The weight of the evidence failed to prove, however, that the Department's policy includes the analysis of official samples on an expedited basis at the request of a manufacturer.

16. On June 8, 1990, an official sample was taken by Department personnel at the request of Tri-State. Tri-State presented evidence concerning efforts if made to get the Department to analyze the official sample taken on June 8, 1990, during the period April 1, 1990, through June 30, 1990. The Department did not honor this request. The June 8, 1990, official sample was analyzed after June 30, 1990. The weight of the evidence failed to prove that the Department's failure to report the June 8, 1990, sample during the period April 1, 1990, through June 30, 1990, was contrary to the Department's policy concerning the analysis of official samples in the order received by the Division of Chemistry/Fertilizer Laboratory, which means that normally a sample will be analyzed within approximately 30 days after it was taken.

17. Tri-State began distributing fertilizer in Florida in 1985. Tri-State has had a consistent history of violations since that time. Since the end of 1987, Tri-State has paid penalties imposed by the Department of \$24,519.17 and has been on probation at least 2 quarters of every calendar year.

18. The Department has held a number of informal conferences with Tri-State in an effort to work with Tri-State to correct the problems it has been experiencing with the commercial fertilizer it has distributed in Florida. The weight of the evidence failed to prove that the problems have been resolved.

19. Since January 1, 1990, Tri-State has endeavored to make corrections in its manufacturing methods to eliminate its primary plant nutrients deficiencies. Those efforts are described in Tri-State's proposed findings of fact 20 and 21 and are hereby accepted.

#### CONCLUSIONS OF LAW

20. The Division of Administrative Hearings has jurisdiction of the parties to and the subject matter of this proceeding. Section 120.57(1), Florida Statutes (1989). Section 576.031(1), Florida Statutes (1989), requires that commercial fertilizer distributed in Florida in containers must:

. . . have placed on or affixed to the immediate and outside container, if there be one, a label setting forth in clearly legible and conspicuous form the information required in s. 576.021(1)(b)-(f), and the net weight.

21. In pertinent part, Section 576.021(1), Florida Statutes (1989), requires that a "guaranteed analysis" be included on the label required to be affixed to commercial fertilizer containers. Section 576.021(1)(c), Florida Statutes (1989). The terms "guaranteed analysis" are defined, in pertinent part, as follows:

(a) "Primary plant nutrients." The term "guaranteed analysis" means the minimum percentage of plant nutrients claimed in the following order and form:

1. Total Nitrogen.....percent
2. Nitrate Nitrogen.....percent
3. Ammoniacal Nitrogen.....percent
4. Water-Soluble Organic Nitrogen  
(and/or Urea Nitrogen).....percent
5. Water-Insoluble Nitrogen...percent

6. Available Phosphoric Acid  
(P2O5).....percent
7. Soluble Potash (K2O).....percent

Section 576.011(13), Florida Statutes (1989).

22. Section 576.051(2), Florida Statutes (1989), authorizes the Department to "sample, test, inspect, and make analyses of commercial fertilizer sold or offered for sale within this state . . . to determine whether such commercial fertilizers are in compliance with . . . " Chapter 576, Florida Statutes (1989). Section 576.051(3), Florida Statutes (1989), requires that an "official sample" be used by the Department in carrying out its responsibility under Section 576.051(2), Florida Statutes (1989). An "official sample" is defined in Section 576.011(19), Florida Statutes (1989), as "any sample of commercial fertilizer taken by the department or its representative, in accordance with the provisions of law or rules adopted hereunder, and designated as 'official' by the department." The manner in which official samples are to be taken is governed by Rule 5E-1.009, Florida Administrative Code.

23. Pursuant to Section 576.151(6), Florida Statutes (1989), "misbranding" of commercial fertilizer is a prohibited act. "Misbranded" is defined by Section 576.011(17), Florida Statutes (1989), in pertinent part, as follows:

- (f) If its contents fail to meet the guaranteed analysis as expressed on the labeling under which it is sold, in excess of authorized tolerances.

24. The authorized tolerances by which commercial fertilizer may exceed the guaranteed analysis is governed by Section 576.061(1), Florida Statutes (1989), and Rule 5E-1.011, Florida Administrative Code. Section 576.061(2), Florida Statutes (1989), provides for the imposition of a penalty if authorized tolerances are exceeded. Additionally, Section 576.061(5), Florida Statutes (1989), authorizes the imposition of penalties for misbranding of commercial fertilizers as follows:

- (5) The department may enter an order imposing one or more of the following penalties against any person who violates any of the provisions of this chapter or the rules promulgated hereunder . . . "
  - (a) Issuance of a warning letter.
  - (b) Imposition of an administrative fine of not more than \$1,000 per occurrence after the issuance of a warning letter.
  - (c) Revocation or suspension of any registration issued by the department.

25. Additionally, Section 576.101, Florida Statutes (1989), authorizes the following actions by the Department:

- (1) The department may deny or revoke any registration issued by the department for any violation of the provisions of this chapter or the rules promulgated thereunder.
- (2) The department may place any fertilizer plant on a probationary status when the deficiency levels of samples taken from that plant do not meet minimum performance levels as established by rule.

26. To implement the penalty provisions of Section 576.061 and 576.101, Florida Statutes (1989), the Department has promulgated Rule 5E-1.018, Florida Administrative Code. Rule 5E-1.018(2), Florida Administrative Code, provides, in pertinent part:

(2) A registrant of commercial fertilizer may be designated to be on probation if any one or more of the following levels of deficiencies . . . occur for official samples analyzed during the preceding reporting quarter.

(a) Primary plant nutrient elements (total nitrogen, available phosphoric acid and soluble potash) - 12.5 percent or more of nutrients guaranteed are found to be deficient by an amount greater than the established tolerance, or, 5 percent or more of nutrients guaranteed are found to be deficient by an amount greater than 3 times the established tolerance. [Emphasis added].

Pursuant to this provision, Tri-State has been placed on probation for each quarter of 1990.

27. At issue in this proceeding is Rule 5E-1.018(5), Florida Administrative Code, which provides:

(5) If, based on all official samples reported of the registrant's product during the probation period, the condition in (2) above for which the registrant was placed on probation is above the acceptable level, the department may revoke and deny all registrations of the registrant. If fewer than 8 samples of a registrant's product are reported during any designated probationary period, the probation shall be extended for additional reporting quarters until a cumulative total of eight or more samples have been reported. The department shall not revoke and deny registrations if there are fewer than 3 deficient nutrients in the registrant's product during the probations period. If the registrant's performance record is satisfactory the registrant shall be removed from probations. [Emphasis added].

Based upon official samples taken in part during the period January 1, 1990, through March 31, 1990, and in part during the period April 1, 1990, through June 30, 1990, the Department has proposed to suspend Tri-State's registrations for a period of 90 days.

28. The official samples relied upon by the Department for its proposed action, although taken during the first and second quarters of 1990, were analyzed or "reported" by the Department during the period April 1, 1990, through June 30, 1990.

29. In challenging the proposed suspension of its registrations, Tri-State has argued first that the Department's proposed action is contrary to the requirements of Rule 5E-1.018, Florida Administrative Code, because the official samples relied upon by the Department were not "taken" during the quarter it was on probation, April 1, 1990, through June 30, 1990. Tri-State has argued that

the last sentence of Rule 5E-1.018(5), Florida Administrative Code, requires that it be removed from probation if its "performance record is satisfactory . . ." based upon samples taken only during the probationary period. Rule 5E-1.018, Florida Administrative Code, however, does not expressly require that the Department base a decision to suspend or revoke fertilizer registrations on official samples taken only during the probationary period. To the contrary, Rule 5E-1.018(5), Florida Administrative Code, provides that the official samples the Department may base a decision to revoke or suspend fertilizer registrations on are those samples which are "reported" during the probationary period. Official samples are "reported" when they are analyzed.

30. The weight of the evidence in this matter proved, and Tri-State has not disputed, that all of the official samples relied upon in the Department's decision to suspend Tri-State's registrations were "reported" during the probationary period April 1, 1990, through June 30, 1990. The Department's proposed action is, therefore, consistent with the clear and unambiguous language of Rule 5E-1.018(5), Florida Administrative Code.

31. Whether the requirement of Rule 5E-1.018(5), Florida Administrative Code, that official samples "reported", as opposed to those "taken", during a probationary period will control whether the Department may revoke or suspend a manufacturer's fertilizer registrations is arbitrary and capricious is not at issue in this proceeding. This is a formal administrative hearing pursuant to Section 120.57(1), Florida Statutes (1989), and not a rule challenge pursuant to Section 120.56, Florida Statutes (1989). The validity of Rule 5E-1.018, Florida Administrative Code, has not been challenged in this proceeding. Nor has it previously been declared invalid. Therefore, the Rule is assumed to be valid and must be followed.

32. Tri-State has also argued that the Department has abused its discretion or acted in bad faith, arbitrarily or capriciously in failing to analyze during the period April 1, 1990, through June 30, 1990, an official sample taken on June 8, 1990, from a bulk fertilizer shipment Tri-State made into Florida. Tri-State had requested on June 22, 1990, that the official sample be analyzed before the end of June, 1990. The weight of the evidence failed to prove that the Department's failure to analyze the June 8, 1990, official sample before the end of June, 1990, was improper. The Department's policy is to take official samples when requested, if reasonably possible. The weight of the evidence proved that the Department followed this policy by taking an official sample on June 8, 1990, at Tri-State's request. Once an official sample is taken it is the Department's policy to analyze the sample within approximately 30 days after the sample was taken. The weight of the evidence failed to prove that the Department failed to follow this policy by refusing to analyze the sample earlier as requested by Tri-State.

33. Finally, Tri-State has argued that the Department's proposed action will not promote the legitimate public interests and purposes underlying the Florida commercial fertilizer law. In suggesting that the Department's proposed action is not in the public interest, Tri-State has cited its payment of fines and penalties to the Department, the improvements Tri-State has made in its manufacturing process during the four quarters involved in the Administrative Complaint and the corrective measures Tri-State has recently taken. The weight of the evidence failed to prove, however, that these actions are sufficient to protect the public interest or that suspension of Tri-State's registrations would be contrary to the public interest.

34. The penalties paid by Tri-State were to compensate for past deficiencies. The corrective actions Tri-State has taken come too late. Tri-State has experienced deficiencies since it began operating in Florida. Since 1987, Tri-State has been deficient in at least two quarters each calendar year. Prior to the proposed revocation at issue in this proceeding, Tri-State was deficient in four consecutive quarters. In light of Tri-State's past history of performance in Florida, the public interest will be better served if Tri-State's registrations are suspended.

35. If Tri-State believes the public interest will be served by allowing Tri-State to distribute fertilizer in Florida because it has corrected its problems, Tri-State may request reinstatement of its registrations pursuant to Rule 5E-1.018(7), Florida Administrative Code.

#### RECOMMENDATION

Based upon the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a Final Order be issued suspending Tri-State's fertilizer registrations in the State of Florida for a period of ninety (90) days and dismissing the Petition in this matter with prejudice.

DONE and ENTERED this \_\_28th\_\_ day of November, 1990, in Tallahassee, Florida.

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LARRY J. SARTIN  
Hearing Officer  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-1550  
(904) 488-9675

Filed with the Clerk of the  
Division of Administrative Hearings  
this \_\_28th\_\_ day of November, 1990.



APPENDIX

The parties have submitted proposed findings of fact. It has been noted below which proposed findings of fact have been generally accepted and the paragraph number(s) in the Recommended Order where they have been accepted, if any. Those proposed findings of fact which have been rejected and the reason for their rejection have also been noted.

The Department's Proposed Findings of Fact

Proposed Finding of Fact	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
Paragraph 1	1 and 3-4.
Paragraph 2	6.
Paragraph 3	7.
Paragraph 4	8.
Paragraph 5	9.
Paragraph 6	17.

Tri-State's Proposed Findings of Fact

Proposed Finding of Fact Number	Paragraph Number in Recommended Order of Acceptance or Reason for Rejection
1	1-2.
2	4, 6 and hereby accepted.
3	6-10.
4	17.
5	11.
6	Hereby accepted.
7	This proposed finding of fact contains speculation. It is not relevant to this proceeding.
8-9	Not relevant to this proceeding.
10	Not supported by the weight of the evidence. See 13.
11-14	Not relevant to this proceeding.
15	2 and 14.
16	16.
17-18	See 16.
19	See 19.
20-21	19.
22-23	Not relevant to this proceeding.

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions to this Recommended Order. All agencies allow each party at least 10 days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the final order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.