

**STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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In the Matter of the Alleged Violations  
of Article 33 of the Environmental  
Conservation Law ("ECL") and Part 326 of  
Title 6 of the Official Compilation of  
Codes, Rules and Regulations of the  
State of New York ("6 NYCRR"),

**ORDER**

DEC Case No.  
R1-20040422-95

- by -

**CEDARCIDE INDUSTRIES, INC.,**

Respondent.

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On March 27, 2007, staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent CedarCide Industries, Inc. ("CedarCide") with service of a notice of hearing and complaint. Staff's notice of hearing and complaint are each dated March 27, 2007.

In its complaint, Department staff alleges that respondent CedarCide is a corporation duly authorized and registered to do business in Texas, and that its offices are located at 2123 Old Ox Road in Spring, Texas 77386. According to the complaint, on February 15, 2003 staff conducted an inspection of the Hicks Nursery, which is located at 100 Jericho Turnpike in Westbury (Town of North Hempstead, Nassau County), and identified various violations relating to CedarCide products.

Staff alleges that respondent CedarCide violated Environmental Conservation Law ("ECL") § 33-0701, ECL 33-1301(1)(a), and 6 NYCRR 326.14(a) when respondent caused or allowed the sale of 1,350 containers of CedarCide pesticides that were not registered with the Department. Staff further alleges that Respondent violated ECL 33-1301(1)(e) when respondent CedarCide caused or allowed the sale of 1,350 containers of CedarCide pesticides that were misbranded.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), respondent was served by certified mail, return receipt requested. The complaint was received by respondent on March 29, 2007, thereby completing service.

Respondent CedarCide failed to file an answer to the March 27, 2007 complaint. With a cover letter dated June 1, 2007, Department staff filed a motion for default judgment, of the same date, with the Department's Office of Hearings and Mediation Services, and the matter was assigned to Administrative Law Judge ("ALJ") Daniel P. O'Connell. After reviewing Department staff's motion papers, the ALJ prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

I conclude that the complaint alleges sufficient facts upon which to impose liability on respondent CedarCide.

Although Department staff requested a civil penalty of sixty-seven thousand five hundred dollars (\$67,500), it provided only limited information on how the penalty was calculated. Department staff should have provided more detailed information in its papers on how it calculated the amount of the proposed penalty.

I note, however, that the penalty requested is below the statutory maximum, and it appears that the penalty was derived, following consideration of applicable enforcement guidances, by multiplying the number of containers (1,350) times a penalty of fifty dollars per container, although that is not explicitly stated in Department staff's papers. In light of the gravity of the violations here (that is, the substantial number of pesticide products that were both misbranded and unregistered), the proposed penalty is appropriate.

The record also supports staff's request for an order that directs respondent to stop selling non-compliant pesticide products in New York State and to submit annual pesticide reports in electronic form as required by title 12 of ECL article 33.

**NOW, THEREFORE,** having considered this matter and being duly advised, it is **ORDERED** that:

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondent CedarCide Industries, Inc. is adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the March 27, 2007 complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated ECL 33-0701, ECL 33-1301(1)(a), and 6 NYCRR 326.14(a) on February 25, 2003 when Respondent caused or allowed the sale of 1,350 containers of pesticides that were not registered with the Department.

IV. Respondent is adjudged to have violated ECL 33-1301(1)(e) on February 25, 2003 when Respondent caused or allowed the sale of the same set of 1,350 pesticide containers that were misbranded.

V. Respondent is hereby assessed a total civil penalty in the amount of sixty-seven thousand five hundred dollars (\$67,500). The total civil penalty shall be due and payable within thirty (30) days after service of this order upon respondent. Payment shall be made in the form of a cashier's check, certified check or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed to the Department's Central Office at the following address: 625 Broadway, 14<sup>th</sup> Floor, Albany, New York 12233-5500, ATTN: Alyce Gilbert, Esq.

VI. Respondent CedarCide Industries, Inc. shall immediately stop all sales of non-compliant products in New York State.

VII. Respondent CedarCide Industries, Inc. shall submit all pesticide annual reports required by title 12 of ECL article 33 in electronic form using one of the options for electronic reporting described on the Department's web page at [www.nysprl.com](http://www.nysprl.com), or any successor Department web page.

VIII. All communications from respondent to the Department concerning this order shall be made to Alyce Gilbert, Esq., New York State Department of Environmental Conservation, 625 Broadway, 14<sup>th</sup> Floor, Albany, New York 12233-5500.

IX. The provisions, terms and conditions of this order shall bind respondent CedarCide Industries, Inc., and its agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

/s/

By:

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Alexander B. Grannis  
Commissioner

Dated: October 4, 2007  
Albany, New York

TO: CedarCide Industries, Inc. (via certified mail)  
2123 Old Ox Road  
Spring, Texas 77386

Alyce Gilbert, Esq.  
New York State Department of  
Environmental Conservation  
625 Broadway, 14<sup>th</sup> Floor  
Albany, New York 12233-5500

NEW YORK STATE: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations  
of the Environmental Conservation Law of  
the State of New York (ECL) article 33,  
and Title 6 of the Official Compilation  
of Codes, Rules and Regulations of the  
State of New York (6 NYCRR) part 326 by

Default  
Summary Report

DEC Case No.  
R1-20040422-95

CEDARCIDE INDUSTRIES, INC.,  
Respondent.

September 27, 2007

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**Proceedings**

With a cover letter dated March 27, 2007, Staff from the New York State Department of Environmental Conservation (Department staff or Staff) commenced the referenced enforcement action by serving a notice of hearing, and a complaint by certified mail, return receipt requested upon CedarCide Industries, Inc. (Respondent). Staff sent the notice of hearing, and the complaint to CedarCide Industries, Inc. at 2123 Old Ox Road, Spring, Texas 77386. Staff's notice of hearing, and the complaint are each dated March 27, 2007.

With a cover letter dated June 1, 2007, Department staff filed a motion for default judgment pursuant to 6 NYCRR 622.15 when Respondent did not answer Staff's March 27, 2007 complaint. Department staff's motion papers consist of: (1) a notice of motion for default judgment and order; (2) a motion for default judgment and order, and (3) an affirmation in support of the motion by Alyce M. Gilbert, Esq. Each of these documents is dated June 1, 2007.

Staff also included various exhibits with the June 1, 2007 motion. Exhibit A is a copy of a signed domestic return receipt, which relates to service of the March 27, 2007 notice of hearing and complaint. Exhibit B consists of copies of the March 27, 2007 notice of hearing and complaint. With the March 27, 2007 complaint, Staff included a copy of a stop use order, which is dated April 12, 2004, by Vincent A. Palmer, Pesticide Control Specialist III, from the Department's Region 1 Office. Exhibit C is a copy of a proposed order.

Staff's motion was assigned to me. In a letter dated September 10, 2007, I requested an affidavit of service from Department staff. I sent a copy of my September 10, 2007 letter to Respondent. With a cover letter dated September 13, 2007, Department staff provided me with a certificate of service dated

September 13, 2007 by Alyce Gilbert, and a copy of the shipping request form for the certified mailing related to the March 27, 2007 notice of hearing and complaint.

Department staff provided Respondent with notice of the June 1, 2007 motion for default judgment by sending a copy of its motion papers to Respondent by regular, first class mail, and by certified mail, return receipt requested. In addition, Department staff sent a copy of Ms. Gilbert's September 13, 2007 cover letter and the certificate of service to Respondent. As of the date of this Summary Report, the Office of Hearings and Mediation Services has not received any response from Respondent to Staff's June 1, 2007 motion.

This Summary Report is prepared pursuant to 6 NYCRR 622.15(c). Upon review of Staff's motion and for the reasons discussed below, I recommend that the Commissioner grant Staff's motion for a default judgment.

### Allegations

In two causes of action, the March 27, 2007 complaint alleges that Respondent violated various provisions of Environmental Conservation Law (ECL) article 33 (Pesticides), and implementing regulations at Title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (6 NYCRR) part 326 (Registration and Classification of Pesticides). ECL article 33 regulates the registration, commercial use, purchase and application of pesticides in New York State. In the complaint, Staff asserts that Respondent is a corporation duly authorized and registered to do business in Texas, and that its offices are located at 2123 Old Ox Road in Spring, Texas 77386.

According to the complaint, staff discovered the alleged violations during an inspection of the Hicks Nursery on February 25, 2003. The Hicks Nursery is located at 100 Jericho Turnpike in Westbury (Town of North Hempstead, Nassau County), New York. In the first cause of action, Staff alleges that Respondent violated ECL 33-0701, ECL 33-1301(1)(a), and 6 NYCRR 326.14(a) when Respondent caused or allowed the sale of 1,350 containers of pesticides that were not registered with the Department. In the second cause of action, Staff further alleges that Respondent violated ECL 33-1301(1)(e) when Respondent caused or allowed the sale of the previously identified pesticides in misbranded containers.

Department staff requests a civil penalty of not less than \$67,500, and an order from the Commissioner, which directs Respondent to: (1) stop selling all non-compliant products in New York State; (2) comply with the applicable provisions of ECL article 33 and implementing regulations within 30 days; and (3) submit annual pesticide reports, as required by ECL article 33, title 12 in electronic form.

### **Findings of Fact**

1. Department staff served a notice of hearing and a complaint, both dated March 27, 2007, upon CedarCide Industries, Inc. by certified mail, return receipt requested. Staff sent the March 27, 2007 notice of hearing and complaint to CedarCide Industries, Inc. at 2123 Old Ox Road, Spring, Texas 77386.
2. CedarCide Industries, Inc. received Staff's March 27, 2007 notice of hearing and complaint on March 29, 2007.
3. Referring to 6 NYCRR 622.4, the March 27, 2007 notice of hearing states that Respondent must serve an answer upon Department staff within twenty days of receiving the notice of hearing and complaint.
4. With respect to the March 27, 2007 complaint, the time for Respondent to serve its answer expired on April 18, 2007. As of the date of Department staff's motion for default judgment, Respondent had not filed an answer.
5. Department staff previously attempted to serve the notice of hearing and complaint upon Respondent by certified mail, return receipt requested on October 17, 2006 and December 15, 2006. On those two occasions, the certified mail was returned unclaimed. On the third attempt, Staff sent the March 27, 2007 notice of hearing and complaint by regular, first class mail, as well as by certified mail.

### **Discussion**

According to the Department's enforcement hearing regulations, a respondent's failure to file a timely answer constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, Department staff may move for a default judgment.

Consistent with 6 NYCRR 622.15(b), Staff's June 1, 2007 motion for default judgment includes:



- a. Proof of service upon the respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
- b. Proof of the respondent's failure to file a timely answer or to appear at a pre-hearing conference; and
- c. A proposed order.

1. Service of Staff's March 27, 2007 Notice of Hearing and Complaint

Alyce M. Gilbert, Esq., is the attorney representing Department staff. On behalf of Department staff, Attorney Gilbert filed an affirmation in support of Staff's motion for default judgment dated June 1, 2007. In addition, Ms. Gilbert filed a certificate of service dated September 13, 2007 to demonstrate service of Staff's March 27, 2007 notice of hearing and complaint upon Respondent.

Pursuant to 6 NYCRR 622.3(a)(3), Department staff may commence an administrative enforcement action with service of a notice of hearing and complaint by certified mail. Service is complete upon receipt of the notice of hearing and complaint.

In the September 13, 2007 certificate of service, Ms. Gilbert certifies that she caused a copy of Staff's March 27, 2007 notice of hearing and complaint to be delivered to Respondent by certified mail, return receipt requested. Exhibit A attached to Staff's motion for default judgment is a copy of the signed domestic return receipt. Based on Ms. Gilbert's certification and the signed domestic return receipt, Respondent received the notice of hearing and complaint on March 29, 2007.

Accordingly, Department staff served the March 27, 2007 notice of hearing and complaint in a manner consistent with the regulations. In addition, service was complete upon Respondent on March 29, 2007.

2. Liability

Pursuant to the notice of hearing, Respondent was required to file an answer within 20 days after receiving Staff's papers. Consequently, Respondent's answer was due by April 18, 2007. However, Ms. Gilbert's affirmation demonstrates that Respondent did not answer the complaint. Based on these circumstances, Respondent has defaulted and waived its right to a hearing, and

Department staff is entitled to a default judgment pursuant to 6 NYCRR 622.15(a).

3. Relief

When a respondent defaults, it waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, nevertheless, still has the obligation to prove damages. (See *Matter of Alvin Hunt d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 3-4.)

Pursuant to ECL 71-2907(1), any person who violates any provision of ECL article 33 or any rule, regulation or order issued thereunder, or commits any offense described in ECL 33-1301 shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for the first violation, and not to exceed ten thousand dollars (\$10,000) for a subsequent offense.

The Department Staff has provided a proposed order with its motion papers. The proposed order would assess a total civil penalty of \$67,500, and would require CedarCide Industries, Inc. to: (1) stop selling non-compliant products in New York State; (2) sell only compliant products; and (3) submit annual pesticide reports in electronic form, consistent with statutory requirements.

In the first cause of action (see ¶ 9 of the March 27, 2007 complaint), Department staff alleges that Respondent offered for sale 1,350 containers of pesticides that had not been properly registered in New York State in violation of ECL 33-0701, 33-1301(1)(a) and 6 NYCRR 326.14(a). Staff discovered this violation during an inspection of the Hicks Nursery on February 25, 2003.

In the second cause of action (see ¶ 10), Department staff alleges that Respondent offered for sale the previously identified pesticide containers that had been misbranded in violation of ECL 33-1301(1)(e). Staff also discovered this violation during the February 25, 2003 inspection at Hicks Nursery.

To calculate the requested civil penalty for these two violations, Ms. Gilbert states in her affirmation that Department staff relied upon the guidance outlined in the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990) and the Department's Pesticide Enforcement Guidance Memorandum (DEE-12, issued January

20, 1987, revised March 26, 1993). According to Ms. Gilbert, the requested civil penalty is substantially less than the total maximum civil penalty. In addition, the requested civil penalty would penalize Respondent for the violations alleged in the March 27, 2007 complaint, and encourage compliance with the applicable statutory and regulatory requirements in the future.

As an aggravating factor, Ms. Gilbert notes that Department staff attempted to serve the notice of hearing and complaint upon Respondent by certified mail, return receipt requested on October 17, 2006 and December 15, 2006. On those two occasions, the certified mail was returned unclaimed. When service was attempted a third time, Staff sent the March 27, 2007 notice of hearing and complaint by regular, first class mail, as well as by certified mail. Ms. Gilbert notes further that Respondent did not answer the complaint or otherwise attempt to resolve the captioned matter. Consequently, Department staff was required to expend additional resources to resolve these violations with its motion for default judgment.

DEE-12 characterizes violations associated with the registration of pesticides and the misbranding of pesticide containers as having a high enforcement priority due to their serious nature. In addition, ECL Article 33, the applicable regulations, and DEE-12 differentiate between restricted use pesticides and general use pesticides (see 6 NYCRR 326.1[w]). Restricted use pesticides are identified in the regulations at 6 NYCRR 326.2. DEE-12 recommends a minimum civil penalty of \$50 per container when restricted use pesticides are not registered or are misbranded. A minimum civil penalty of \$25 per container is recommended when general use pesticides are not registered or are misbranded. The civil penalties recommended in DEE-12 are minimums that would be applied when a respondent voluntarily enters into an order on consent. When, as here, an administrative enforcement proceeding is necessary to establish a respondent's liability, significantly higher penalties should be imposed (see DEE-12 ¶ 4).

Based on Department staff's civil penalty request, it can be reasonably inferred that the pesticides at issue in this proceeding are general use pesticides. This inference is further supported by Staff's stop order dated April 12, 2004, which identifies the active ingredients as essence of *Juniperus virginiana*, and refined cedar oil. These active ingredients are not identified as restricted use pesticides at 6 NYCRR 326.2. Staff attached a copy of the April 12, 2004 stop order to the March 27, 2007 complaint as Exhibit A. Therefore, Department

staff's civil penalty request appears to be a doubling of the recommended civil penalty of \$25 for unregistered or misbranded general use pesticides. This request is reasonable and consistent with the guidance outlined in DEE-12.

The Commissioner should assess a substantial civil penalty for these violations given the high regulatory priority associated with them, and the aggravating factors identified by Staff. Based on the foregoing discussion, I conclude that Department staff has provided a reasoned explanation for the requested civil penalty of \$67,500.

**Conclusions**

1. Respondent has defaulted and, therefore, has waived its right to a hearing concerning its liability for the violations alleged in the March 27, 2007 complaint.
2. Department staff has provided a justification for the requested civil penalty and other requested relief.

**Recommendation**

The Commissioner should issue the proposed order submitted by Department staff, which would assess a total civil penalty of \$67,500 and order Respondent to: (1) stop selling non-compliant products in New York State; (2) sell only compliant products; and (3) submit annual pesticide reports in electronic form.

/s/

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Daniel P. O'Connell  
Administrative Law Judge