STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER

DEC Case No.
R4-2015-1117-132

- by -

LESTER GIBSON,

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation ("Department" or "DEC") that Lester Gibson ("respondent") violated:

(i) ECL 33-1301(1) by applying an unregistered pesticide at a rental unit located at 74-76 Linden Street, Schenectady, New York ("site") on September 17, 2015;
(ii) 6 NYCRR 325.25(a) by failing to keep true and accurate records of the application of pesticides on September 17, 2015;
(iii) ECL 33-0905(5)(a) by failing to provide product labels for the pesticides sprayed at the site on September 17, 2015; and
(iv) 6 NYCRR 325.23(a) by failing to register with the Department as a pesticide business prior to applying pesticides at the site.

See Complaint, attached as Attachment 1 to Affirmation of Dusty Renee Tinsley, Esq., dated February 4, 2016 ("Tinsley Aff."), ¶¶ 8-27. Respondent applied pesticides to "agitate and kill bedbugs" (see Complaint dated December 30, 2015, ¶ 11).

Administrative Law Judge ("ALJ") D. Scott Bassinson of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Bassinson prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's default summary report, Department staff served a notice of hearing and complaint on respondent by certified mail, and respondent failed to file an answer to the complaint within 20 days after completion of service of the notice of hearing and complaint (see Default Summary Report at 1-2; see also id. at 3 [Findings of Fact Nos. 11 and 12]). Staff filed and served a motion for default judgment with supporting papers on February 4, 2015 (see id. at 3.

As a consequence of respondent's failure to answer in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted in part (see Default Summary Report at 8). Upon review of staff's papers submitted in support of its motion for default judgment, the ALJ found that staff has provided proof of the facts sufficient to support three of staff's four causes of action asserted in the complaint, as required (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3). I agree with the ALJ's finding that Department staff has submitted sufficient proof to support a default judgment with respect to the first, second, and fourth causes of action in the complaint.

As for the third cause of action, Department staff alleges that respondent violated ECL 33-0905(5)(a) by failing, on September 17, 2015, to provide product labels for the pesticides sprayed at the site to the occupants of the property (see Complaint dated December 30, 2015, ¶ 22). ECL 33-0905(5)(a) requires a certified applicator, prior to the application of a pesticide "within or on the premises of a dwelling," supply the occupants "with a copy of the information, including any warnings, contained on the label of the pesticide to be applied." Such information is to be supplied in a written, digital or electronic format (see id.). The ALJ concludes that staff's language in the complaint was insufficient to support its claim because staff, in stating that respondent failed to provide product labels, failed to state that the required information was not furnished in any other authorized format (see Default Summary Report, at 5).

Although the ALJ's characterization here might be seen as too narrow in light of reasonable inferences, it is important that staff clearly describe causes of action to avoid ambiguity or insufficiency particularly where, as here, the matter is being addressed in a default proceeding. Accordingly, on this record and the ALJ's analysis, I shall not disturb the ALJ's determination. In future proceedings, where violations of ECL 33-0905(5)(a) are alleged, Department staff should track the language of the statute. For example, if Department staff's allegation explicitly stated that respondent, prior to applying a pesticide within or on the premises of the dwelling in question, failed to supply the occupants therein with a copy of the information, including any warnings, contained on the label of the pesticide to be applied in either a written, digital or electronic format (which format shall have been determined by the occupants of the dwelling), that would have been sufficient for a finding of liability in this default proceeding.

With respect to penalty, ECL 71-2907(1) provides that any person who violates article 33 of the ECL (Pesticides) or any regulations promulgated pursuant thereto shall be liable for a civil penalty not to exceed five thousand dollars ($5,000) for a first violation and not to exceed ten thousand dollars ($10,000) for a subsequent offense. Department staff seeks, and the ALJ recommends, that I impose on respondent, a civil penalty of seven thousand dollars ($7,000) (see Default Summary Report at 6-7). Although I am not finding that staff is entitled to a default judgment on the third cause of action, the requested civil penalty of seven thousand dollars ($7,000) is supported by the remaining violations (see Default Summary Report, at 6-7).

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order on respondent, as requested by Department staff and recommended by the ALJ.

Department staff has requested that my order in this matter state that "[r]espondent shall not offer . . . the service of commercial pesticides application unless it has complied with all applicable pesticide regulations and laws" (Complaint, Tinsley Aff. Attachment 1, Wherefore clause ¶ II; see also Proposed Order, Tinsley Aff. Attachment 7, Ordering clause ¶ II; Motion for Default Judgment ¶ b and Wherefore clause ¶ IV). Respondent is required to comply with all applicable pesticide regulations and laws prior to offering the service of commercial pesticide application, and further language to that effect in this order is not needed.

I note that respondent, in addition to the violations established in this proceeding, has a prior history of violations in applying pesticides without a business registration and for failing to provide "notification/product labels" (Pendell Affidavit, ¶ 4 [referencing respondent's signing of an order of consent effective May 21, 2012 involving those violations]). In the event that respondent commits any additional violations in the future, respondent's history of non-compliance should be a factor in the calculation of any civil penalty.

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

I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear in this proceeding, respondent Lester Gibson waived his right to be heard at a hearing.

II. Moreover, based upon proof of the facts submitted, respondent Lester Gibson is adjudged to have violated:

A. ECL 33-1301(1)(a), by using a pesticide that is not registered in accordance with applicable law;

B. 6 NYCRR 325.25(a), by failing to keep true and accurate records of his application of pesticides; and

C. 6 NYCRR 325.23(a), by failing to register with the Department as a pesticide business.

III. Within thirty (30) days of the service of this order upon respondent Lester Gibson, respondent shall pay a civil penalty in the amount of seven thousand dollars ($7,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:

Office of General Counsel, Region 4
NYS Department of Environmental Conservation
1130 North Westcott Road
Schenectady, New York 12306-2014
Attn: Dusty Renee Tinsley, Esq.

IV. Any questions or other correspondence regarding this order shall also be addressed to Dusty Renee Tinsley, Esq. at the address referenced in paragraph III of this order.

V. The provisions, terms and conditions of this order shall bind respondent Lester Gibson, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: Albany, New York
July 5, 2016

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 33 of the New York State Environmental Conservation Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

DEFAULT SUMMARY REPORT

DEC Case No. R4-2015-1117-132

- by -

LESTER GIBSON,

Respondent.

I. Procedural History

Staff of the New York State Department of Environmental Conservation ("Department") served respondent Lester Gibson ("respondent") with a notice of hearing and complaint, dated December 30, 2015, asserting four causes of action alleging violations of New York State Environmental Conservation Law ("ECL") § 33-1301(1), ECL § 33-0905(5)(a), and sections 325.25(a) and 325.23(a) of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"). Department staff requests in its complaint that the Commissioner issue an order: (i) imposing a civil penalty of seven thousand dollars ($7,000); (ii) stating that respondent shall not offer the service of commercial pesticide application unless he has complied with all applicable pesticide regulations and laws; and (iii) directing all other and further relief deemed necessary and appropriate.

Staff sent its notice of hearing and complaint to respondent by certified mail, return receipt requested, on December 30, 2015. See Affirmation of Dusty Renee Tinsley, Esq., dated February 4, 2016 ("Tinsley Aff."), at ¶ 2; see also Tinsley Aff. Attachment 4 (Affidavit of Service by Jill Viscusi, sworn to February 2, 2016 ("Viscusi Aff."). Staff has submitted copies of: (i) the U.S. Postal Service tracking sheet, reflecting that the notice of hearing and complaint were delivered on January 2, 2016; and (ii) the certified mail receipt, signed by or on behalf of respondent, dated January 2, 2016. Thus, service on respondent of the notice of hearing and complaint was complete on January 2, 2016. See 6 NYCRR § 622.3(a)(3).

Staff's notice of hearing stated that respondent was required to "file a written answer to the charges of the violations alleged within twenty (20) days of receipt of the Complaint," and that failure to serve a timely written answer "will result in a default and a waiver of your right to a hearing; and, pursuant to 6 NYCRR 622.15, an Order may be issued against you granting the relief requested in the attached Complaint." Tinsley Aff. Attachment 1.

Respondent failed to serve an answer to the complaint. See Tinsley Aff. ¶ 6. Staff now moves for a default judgment pursuant to 6 NYCRR § 622.15. As discussed below, I recommend that the Commissioner grant staff's motion in part, and deny it in part.

II. Findings of Fact

1. On September 29, 2015, Brayton Pendell, a Pesticide Control Specialist 1 in the Division of Materials Management at the Department's Region 4 office in Schenectady, New York, conducted an inspection of a residential rental unit located at 74-76 Linden Street, Schenectady, New York ("site"). See Affidavit of Brayton Pendell, sworn to February 4, 2016 ("Pendell Aff."), at ¶ 9.

2. On November 4, 2015, Brayton Pendell conducted another inspection of the site, accompanied by respondent Lester Gibson. Id.

3. During his November 4, 2015 inspection of the site, Brayton Pendell determined that respondent had used, on September 17, 2015, a 91% alcohol solution "to agitate and kill bedbugs" at the site. A 91% alcohol solution is not a registered pesticide. See id. ¶¶ 11, 12, 23.

4. After the November 4, 2015 inspection of the site, Mr. Pendell determined that respondent had applied Tempo Dust, Temp SC and a 91% alcohol solution at the site on September 17, 2015. See id. ¶ 15.

5. During and after the November 4, 2015 inspection of the site, Mr. Pendell determined that respondent failed to keep true and accurate records of the September 17, 2015 application of Tempo Dust, Temp SC and the 91% alcohol solution at the site. See id. ¶ 16.

6. During the November 4, 2015 inspection of the site, Mr. Pendell determined that respondent failed to provide to occupants of the site the product labels for the pesticides applied at the site on September 17, 2015. See id. ¶ 20.

7. During the November 4, 2015 inspection of the site, Mr. Pendell determined that respondent had applied pesticides at the site without first registering with the Department. See id. ¶ 23.

8. Mr. Pendell reviewed Department records and determined that respondent had not registered with the Department to offer, advertise or provide the services of commercial application of pesticides prior to his application of pesticides at the site on September 17, 2015. See id. ¶ 24.

9. Respondent Lester Gibson is a certified commercial pesticide applicator, Pesticide Applicator ID # C4677073. See http://www.dec.ny.gov/nyspad/find?1 (search "Lester Gibson"); see also 6 NYCRR § 622.11(a)(5) (official notice).

10. Lester Gibson signed Order on Consent No. R4-2011-1130-151 effective May 21, 2012 relating to violations based upon applying pesticides without business registration and failing to provide notification/product labels. See Pendell Aff. ¶ 4; see also http://www.dec.ny.gov/regulations/88206.html .

11. On December 30, 2015, staff sent a notice of hearing and complaint to respondent by certified mail, return receipt requested. See Viscusi Aff. Staff received a return receipt, signed by or on behalf of respondent, reflecting delivery of the notice of hearing and complaint on January 2, 2016. See Tinsley Aff., Attachment 2; see also Tinsley Aff., Attachment 3 (USPS tracking sheet reflecting delivery of notice of hearing and complaint on January 2, 2016).

12. Respondent failed to file an answer to the complaint within 20 days after completion of service of the notice of hearing and complaint. See Tinsley Aff. ¶ 6.

III. Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR § 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR § 622.15(a). Upon a respondent's failure to answer a complaint, Department staff may make a motion to an administrative law judge ("ALJ") for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR § 622.15(b)(1)-(3).

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; and (ii) respondent has failed to file an answer to the complaint. In addition, Department staff has submitted a proposed order. See Tinsley Aff. Attachment 7. Staff also served respondent with copies of the motion for default judgment and supporting papers. See February 4, 2015 letter from Dusty Renee Tinsley, Esq. to Chief ALJ James McClymonds, enclosing motion papers and copying respondent.

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim." Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

As discussed below, Department staff's submissions in support of the motion for a default judgment in this matter provide proof of the facts sufficient to support three of the four causes of action asserted in the complaint. I find, however, that staff has not submitted proof sufficient to support the third cause of action asserted in the complaint.

A. Conclusions of Law - Liability

In its first cause of action, staff asserts that respondent violated ECL § 33-1301(1) by using a 91% alcohol solution at the site on September 17, 2015. See Complaint, Tinsley Aff. Attachment 1, at ¶¶ 8-12. ECL § 33-1301(1)(a) provides in relevant part as follows: "It shall be unlawful … [f]or any person to … use within this state … [a]ny pesticide which has not been registered pursuant to the provisions of this article."

According to the sworn affidavit of staff witness Brayton Pendell, who is a Pesticide Control Specialist 1 with the Department, a 91% alcohol solution is not a registered pesticide, and respondent used this solution at the site on September 17, 2015 "to agitate and kill bedbugs." See Findings of Fact No. 3. I find Mr. Pendell's sworn affidavit to be sufficient to support staff's claim for purposes of staff's motion for a default judgment.

In its second cause of action, staff asserts that respondent violated 6 NYCRR § 325.25(a) by failing to keep true and accurate records of the application of Tempo Dust, Tempo SC, and the 91% alcohol solution at the site on September 17, 2015. See Complaint, Tinsley Aff. Attachment 1, at ¶¶ 13-17. Section 325.25(a) provides in relevant part that businesses required to register pursuant to 6 NYCRR § 325.23(a)[1] shall keep true and accurate records including the kind and quantity of each pesticide used, the dosage rates, methods of application, target organisms, the use, and the date and place of application. Such records must be retained for at least three years and made available for inspection upon request by the Department. See 6 NYCRR § 325.25(a).

According to Mr. Pendell's sworn affidavit, respondent applied Tempo Dust, Temp SC and a 91% alcohol solution at the site on September 17, 2015, and failed to document the EPA registration number, quantity used, date applied, address, dosage rate, method of application and target organism. See Findings of Fact Nos. 4 and 5; see also Pendell Aff. ¶ 16. I find Mr. Pendell's sworn affidavit to be sufficient to support staff's claim for purposes of staff's motion for a default judgment.[2]

In its third cause of action, staff asserts that respondent violated ECL § 33-0905(5)(a) by failing to provide product labels for the pesticides sprayed at the site on September 17, 2015.

[1] As discussed below with respect to staff's fourth cause of action, respondent falls within the scope of the requirement to register pursuant to 6 NYCRR § 325.23(a).

[2] Records of the Department, of which I take official notice, see 6 NYCRR § 622.11(a)(5), state that currently registered pesticides in New York can be found in the Pesticide Product, Ingredient, and Manufacturer System ("PIMS"). See http://www.dec.ny.gov/chemical/8528.html. The Department website provides a link to PIMS. See id. The pesticide product information in PIMS is supplied by the Department's pesticide product registration section. See http://pims.psur.cornell.edu/). A search of PIMS reveals several "Tempo" pesticides. Although staff has not specified the particular "Tempo" or "Tempo SC" pesticides at issue here, Mr. Pendell's sworn affidavit is sufficient proof, for purposes of staff's motion for a default judgment, to establish that "Tempo" pesticides were applied at the site. See also Matter of Alvin Hunt, d/b/a Our Cleaners, (defaulting respondent deemed to have admitted factual allegations of complaint and all reasonable inferences that flow from them).

See Complaint, Tinsley Aff. Attachment 1, at ¶¶ 18-22. ECL § 33-0905(5)(a) requires each certified applicator, prior to applying a pesticide at a "dwelling,"[3] to

> supply the occupants therein with a copy of the *information*, including any warnings, *contained on the label* of the pesticide to be applied. Such information shall be supplied in either a written, digital or electronic format which shall be determined by the occupants of such dwelling, provided however that the certified applicator must also have a written copy of such information in his/her possession.

ECL § 33-0905(5)(a) (italics added).

Given the language in the statute, I find that staff has not provided proof sufficient to support its claim for purposes of its motion for a default judgment. As the italicized portion of the quoted statute above reflects, the statute does not require that a certified applicator provide the actual product labels to dwelling occupants prior to application of the pesticides. Rather, the statute requires that the applicator provide the *information* that is contained in the label, and authorizes the applicator to provide such information in any of several ways. Staff alleges (and staff's witness states in his affidavit) only that respondent failed to provide product labels to occupants of the dwelling at the site. See Complaint, Tinsley Aff. Attachment 1, at ¶¶ 21-22; Pendell Aff. ¶¶ 20-21. Such allegation, without more (i.e., an allegation, and assertion by a fact witness, that respondent failed to provide the required information in any of the other formats authorized by the statute) is insufficient to support the claim.

In its fourth cause of action, staff asserts that respondent violated 6 NYCRR § 325.23(a) by failing to register with the Department as a pesticide business prior to applying pesticides at the site on September 17, 2015. See Complaint, Tinsley Aff. Attachment 1, at ¶¶ 26-27. Section 325.23(a) provides, in relevant part, that "each business offering, advertising or providing the services of commercial application of pesticides … must register annually with the department." A "pesticide business" is defined in the statue as "any person providing commercial application of pesticides for hire." ECL § 33-0101(36).

According to Mr. Pendell's sworn affidavit, he determined during his November 4, 2015 inspection that respondent had applied pesticides at the site on September 17, 2015. See Pendell Aff. ¶¶ 11, 15 and 23. Mr. Pendell states further that he reviewed Department records, and thereafter determined that respondent had not registered with the Department to offer, advertise or provide the services of commercial application of pesticides prior to applying pesticides at the site. See id. ¶ 24. I find Mr. Pendell's sworn affidavit to be sufficient to support staff's claim for purposes of staff's motion for a default judgment.

Based upon the foregoing, the Department is entitled to a default judgment in this matter with respect to its first, second and fourth causes of action, pursuant to the provisions of 6

[3] "Dwelling" is defined as "any building or structure or portion thereof which is occupied in whole or in part as the home, residence or sleeping place for one or two families." ECL § 33-0905(d)(i). Staff misstates the citation as ECL § 33-0905(5)(b). See Complaint, Tinsley Aff. Attachment 1, at ¶ 20.

NYCRR § 622.15, and based upon the proof of facts submitted as part of staff's motion for a default judgment.

B. Civil Penalty

Department staff seeks an order imposing a civil penalty upon respondent pursuant to ECL § 71-2907(1) in the amount of seven thousand dollars ($7,000), and requesting that such payment be made within 30 days of service of the order upon respondent. See Complaint, Tinsley Aff. Attachment 1, Wherefore clause ¶ I; see also Tinsley Aff. ¶ 13(c).[4] Staff's civil penalty request is based upon an analysis of the penalty statute, ECL § 71-2907(1), the Department's Pesticide Enforcement Policy (DEE-12, rev. March 26, 1993), and the Department's Civil Penalty Policy (DEE-1, June 20, 1990). See Tinsley Aff. ¶¶ 11-12, and Attachments 5 and 6; see also Pendell Aff. ¶¶ 26-29, and Attachments 1 and 2. As discussed below, I recommend that the Commissioner grant staff's request to impose a civil penalty in the amount of seven thousand dollars ($7,000), but reach that conclusion based on an analysis that differs from that proffered by staff.

A person who violates any provision of ECL article 33 or any regulation thereunder shall be liable for a civil penalty of up to five thousand dollars ($5,000) for a first violation and up to ten thousand dollars ($10,000) for each subsequent offense. See ECL § 71-2907(1). The first step in a civil penalty analysis is to calculate the maximum possible penalty under the statute (see DEE-1, at 4). In this matter, staff witness Pendell states that respondent signed an order on consent in 2012 for violating the pesticide business registration requirement and failing to provide proper notification prior to applying pesticides. See Pendell Aff. ¶ 4. This allegation is confirmed by records of the Department, of which I take official notice. See http://www.dec.ny.gov/regulations/88206.html; 6 NYCRR § 622.11(a)(5). Thus, each violation in this matter is a "subsequent" violation for which the maximum statutory penalty would be $10,000 per violation. The maximum statutory penalty for the three violations that I have found in this matter would therefore be $30,000.

Although staff's papers do not provide a statutory maximum penalty for the violations alleged in this matter, they discuss the Department's civil penalty policy (DEE-1) and pesticide enforcement policy (DEE-12) and apply them to the circumstances presented here. Staff counsel and staff's witness discuss the importance of enforcement of pesticide laws to protect the public health and the environment, and to prevent injury to public health, property, and wildlife from the improper use of pesticides. See Tinsley Aff. ¶ 12; Pendell Aff. ¶ 28. They also describe the "priority level" for each of the violations alleged here and, in accordance with DEE-12, provide a doubling of the penalty for repeat violations. See e.g. Pendell Aff. ¶ 29 (chart reflecting doubling of $1,000 penalty for second failure to register, and doubling of $1,000 penalty for second "failure to provide product label notification"). Staff also alleges that respondent

[4] Ms. Tinsley's affirmation states that staff seeks an order "requiring Respondent to pay a civil penalty in the amount of TWO THOUSAND DOLLARS ($7,000)." Tinsley Aff. ¶ 13(c) (underline added); see also Tinsley Aff. Attachment 7, Proposed Order ¶ 10(c) (same). Given that the numerical amount in the parentheses in Ms. Tinsley's affirmation – $7,000 – matches the amount requested in the complaint, and that other documents submitted on the motion request seven thousand dollars in both text and numbers, see e.g. Motion for Default Judgment at pages 1 and 2, the word "TWO" in the affirmation and proposed order must be a typographical error.

committed "21 record keeping incidents," each of which would result in a $250 penalty, for a total of $5,250, but for which staff seeks only a total of $2,000. See id.[5]

Although I find that staff is not entitled to a default judgment with respect to its third cause of action, the requested penalty of $7,000 is supported by the remaining violations.

As set forth above, the statutory maximum penalty for three violations where, as here, the respondent has committed violations in the past, is $30,000. The record reflects that this respondent entered into a consent order in 2012 to resolve violations including a failure to register as a pesticide business. The business registration requirement is critical to the Department's overall regulatory scheme with respect to the use of pesticides. Failure to register deprives the Department of its ability to review and control the regulated activities, and thereby protect the public and the environment from the harm that unregulated use of pesticides can cause. Given respondent's repeated failure to comply with his obligation to register as a pesticide business, the maximum statutory penalty of $10,000 for this one violation alone would be defensible.

Similarly, respondent's other violations warrant a significant penalty. For purposes of staff's motion for a default judgment, the record establishes that respondent also applied an unregistered pesticide and failed to keep proper records regarding his application of pesticides. Application of an unregistered pesticide may pose significant and unknown risks to people and the environment, and failure to keep accurate records subverts the Department's ability to monitor the use of pesticides in this State.

In light of the foregoing, staff's request for an order imposing a civil penalty of seven thousand dollars ($7,000), which is less than one-fourth of the maximum statutory penalty for three violations by a repeat offender, is authorized and appropriate.

C. Other Requested Relief

In its complaint, Department staff has requested that the Commissioner's order state that "[r]espondent shall not offer for [sic] the service of commercial pesticides application unless it has complied with all applicable pesticide regulations and laws." Tinsley Aff. Attachment 1, Wherefore clause ¶ II; see also Tinsley Aff. ¶ 13(d) (same); Tinsley Aff. Attachment 7, Proposed Order, at ¶ 10(d) and Ordering clause ¶ II; Motion for Default Judgment, Wherefore clause ¶ IV (similar). Respondent is already required to comply with the ECL and relevant regulations; any future actions in derogation thereof will subject respondent to further enforcement action. Staff's request in this regard is unnecessary. I note, however, that this respondent has a history of non-compliance.

In several documents submitted with staff's motion – but not the complaint – staff also requests that the Commissioner include a requirement that "Respondent shall return a Compliance Verification Affidavit, signed and notarized by Respondent, to Brayton Pendell … at the time this Order is returned to the Department." Motion for Default Judgment, first unnumbered page ¶ (c); see also id., second unnumbered page, Wherefore clause ¶ V; Tinsley

[5] Staff's papers do not list or otherwise identify the 21 record keeping incidents.

Aff. ¶ 13(e); Tinsley Aff. Attachment 7, Proposed Order, ¶ 10(e) and Wherefore clause ¶ III. The purpose of this request is unclear. A "Compliance Verification Affidavit" is neither defined in nor included with the papers submitted by staff. In addition, the phrase "at the time this Order is returned to the Department," has no meaning in the context of staff's motion for default judgment.

"Compliance verification affidavits" are used in Region 4 pesticide matters that settle pursuant to a consent order. See e.g. www.dec.ny.gov/docs/regions_pdf/redmaple.pdf; www.dec.ny.gov/docs/regions_pdf/midstatepestcontrolorder.pdf; www.dec.ny.gov/docs/legal_protection_pdf/scottslawn.pdf. This matter has not settled pursuant to a consent order. Moreover, this item of requested relief is not in the complaint and is not otherwise supported in staff's papers. I therefore recommend that the Commissioner not grant this item of requested relief.

IV. Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

A. Granting in part staff's motion for a default, holding respondent Lester Gibson in default pursuant to the provisions of 6 NYCRR § 622.15;

B. Holding, based upon the proof of facts submitted, that respondent Lester Gibson violated:

1. ECL § 33-1301(1)(a) by using a pesticide that is not registered in accordance with applicable law;

2. 6 NYCRR § 325.25(a) by failing to keep true and accurate records of his application of pesticides; and

3. 6 NYCRR § 325.23(a) by failing to register with the Department as a pesticide business.

C. Directing respondent Lester Gibson to pay a civil penalty in the amount of seven thousand dollars ($7,000) within thirty (30) days of service of the Commissioner's order on respondent;

D. Otherwise denying staff's motion for a default judgment; and

E. Directing such other and further relief as he may deem just and appropriate.

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: February 24, 2016
Albany, New York

APPENDIX A

Matter of Lester Gibson
DEC File No. R4-2015-1117-132
Motion for Default Judgment

1. Cover letter dated February 4, 2016, addressed to Chief Administrative Law Judge James McClymonds of the Department's Office of Hearings and Mediation Servicers, reflecting that respondent was also served with the motion papers.

2. Motion for Default Judgment, dated February 4, 2016

3. Affirmation of Dusty Renee Tinsley, dated February 4, 2016, with the following Attachments:

    (1) Notice of Hearing and Complaint, dated December 30, 2015

    (2) Certified mail return receipt No. 70150640000069002741, signed and dated January 2, 2016

    (3) U.S. Postal Service tracking sheet for tracking No. 70150640000069002741, reflecting delivery on January 2, 2016.

    (4) Affidavit of Service by Certified Mail Return Receipt, Jill Viscusi, sworn to February 2, 2016

    (5) DEC Civil Penalty Policy, DEE-1, issued June 20, 1990

    (6) DEC Pesticide Enforcement Policy, DEE-12, revised March 26, 1993

    (7) Proposed Order

4. Affidavit of Brayton Pendell, dated February 4, 2016, with the following Attachments:

    (1) DEC Civil Penalty Policy, DEE-1, issued June 20, 1990

    (2) DEC Pesticide Enforcement Policy, DEE-12, revised March 26, 1993