

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

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

ORDER

- by -

**RICHARD GRAHAM
d/b/a R. GRAHAM PEST CONTROL,**

DEC Case No.
R4-2009-0409-63

Respondent.

Respondent Richard Graham, doing business as ("d/b/a") R. Graham Pest Control, is in the business of applying pesticides. This administrative enforcement proceeding addresses allegations that respondent violated certain requirements governing records that are to be maintained by commercial pesticide applicators.

Staff of the New York State Department of Environmental Conservation ("Department" or "DEC") mailed by certified mail, return receipt requested, a notice of hearing and complaint dated February 2, 2010 to respondent. Respondent received the papers on February 3, 2010, thereby completing service (see 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"]).

The complaint alleged two causes of action: (1) that respondent violated Environmental Conservation Law ("ECL") 33-1205(1) by failing to record certain information about an application of pesticides on February 13, 2009, in the City of Albany ("February 13, 2009 application"); and (2) that respondent violated 6 NYCRR 325.10 by failing to maintain training documentation for his pesticide apprentice.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on February 23, 2010. Department staff filed a motion for default judgment dated April 26, 2010 with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Susan J. DuBois who prepared the attached default

summary report. I adopt the ALJ's default summary report as my decision in this matter, subject to the following comments.

Department staff, in the first cause of action in its complaint, alleges that respondent violated ECL 33-1205(1) because his documentation of the February 13, 2009 pesticide application lacked required information. Specifically, the complaint alleges that the documentation failed to include the pesticide EPA registration number, the location of the application, the dosage rate, and the method of application. I concur with the ALJ that the complaint states claims upon which relief may be granted with respect to omission of the EPA registration number, dosage rate, and method of application.

The ALJ, however, concludes that the complaint does not state a claim upon which relief may be granted with respect to the alleged omission of the location at which pesticides were applied. In its papers, Department staff refers to the street address where the pesticides were applied (585 Washington Avenue, Albany, New York), but does not indicate what specific information was lacking in respondent's documentation. For example, ECL 33-1205(1) requires that the location information also include the five-digit zip code (see ECL 33-1205[1][e]). Department staff, however, does not cite this as the deficiency. Furthermore, as the ALJ discusses in her default summary report, if more specificity was required regarding where pesticides were applied on the property, this was not adequately pleaded. Accordingly, I decline to find that the complaint states a claim with respect to the absence of information on the location of the pesticide application.

I concur with the ALJ that respondent violated 6 NYCRR 325.10 for failure to maintain training documentation for respondent's pesticide apprentice, Bill Kennedy.

Department staff requested that a civil penalty of \$2,250 be assessed. I have determined that, on this record, no violation has been demonstrated with respect to maintaining record information on the pesticide application location as alleged in the first cause of action. However, the other

violations listed in that cause of action are sufficient to support the requested penalty. Accordingly, I am not decreasing the penalty that Department staff requested.¹

Department staff also requested that respondent be ordered to submit to the Department copies of his pesticide application records for six months following the effective date of this order, in addition to documentation information on his pesticide apprentices. No justification was provided for requesting the future pesticide application records or the additional pesticide apprentice training information. However, in view of the violations that respondent committed, I am directing respondent, within thirty (30) days of the service of this order, to provide Department staff with a copy of its apprentice training documentation for Mr. Kennedy and a revised and completed record of the February 13, 2009 application.

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 Richard Graham d/b/a R. Graham Pest Control is adjudged to be in default and to have waived the right to a hearing in this proceeding. Accordingly, the allegations against respondent, as set forth in Department staff's complaint, are deemed to have been admitted by respondent.

III. Respondent Richard Graham d/b/a R. Graham Pest Control is adjudged to have violated 6 NYCRR 325.10, by failing to maintain training documentation on pesticide apprentice Bill Kennedy, and ECL 33-1205(1) for failing to include information on the pesticide EPA registration number, dosage rate and the method of

¹ The ALJ concludes that the three required entries that are missing from the record constitute "minor" violations pursuant to Commissioner Policy DEE-12 (see Appendix to Commissioner Policy DEE-12, footnote 2). Based on my review of Department staff's papers, it is unclear whether respondent's entry omissions constitute "minor" violations (see Appendix, footnote 2[d]) or more significant violations (see Appendix, footnote 2[b] & Affirmation of Jill Phillips dated April 26, 2010, ¶9.A [referring to respondent's omission of four categories of required information]). Either factor in footnote 2 of the Appendix would, however, support the penalty requested.

application with respect to the pesticide application at 585 Washington Avenue, Albany, New York on February 13, 2009.

IV. Respondent Richard Graham d/b/a R. Graham Pest Control is hereby assessed a civil penalty in the amount of two thousand two hundred fifty dollars (\$2,250.00). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty shall be by cashier's check, certified check, or money order payable to the order of the "New York State Department of Environmental Conservation" and mailed or hand-delivered to:

Jill T. Phillips, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 4
1130 North Westcott Road
Schenectady, New York 12306.

V. Respondent Richard Graham d/b/a R. Graham Pest Control shall, within thirty (30) days of the service of this order upon respondent, submit the following information to the Department at the address referenced in paragraph IV of this order:

- A. a completed record of respondent's pesticide application on February 13, 2009, at 585 Washington Avenue, Albany, New York, including information on the pesticide EPA registration number, dosage rate, and the method of application; and
- B. a copy of respondent's pesticide apprentice training documentation for apprentice Bill Kennedy.

VI. All communications from respondent Richard Graham d/b/a R. Graham Pest Control to the Department concerning this order shall be directed to:

Jill T. Phillips, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 4
1130 North Westcott Road
Schenectady, New York 12306.

VII. The provisions, terms, and conditions of this order shall bind respondent Richard Graham d/b/a R. Graham Pest Control and his agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By:

Alexander B. Grannis
Commissioner

Dated: Albany, New York
May 25, 2010

In the Matter of Alleged Violations
of Article 33 of the Environmental
Conservation Law and Part 325 of Title 6
of the Official Compilation of Codes,
Rules and Regulations of the State of
New York by

DEFAULT SUMMARY
REPORT

DEC File No.
R4-2009-0409-63

Richard Graham d/b/a
R. Graham Pest Control,

May 20, 2010

Respondent.

On February 3, 2010, Staff of the New York State Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon Richard Graham ("Respondent"), 3406 State Street, Schenectady, New York 12304. Richard Graham does business as R. Graham Pest Control and is in the business of applying pesticides. The complaint alleged two causes of action: (1) that the Respondent violated Environmental Conservation Law ("ECL") section 33-1205(1) by failing to record certain information about a pesticide application; and (2) that the Respondent violated section 325.10 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR 325.10") by failing to have training documentation for an apprentice.

The notice of hearing and complaint were served upon the Respondent by certified mail, return receipt requested. The Respondent failed to file a timely answer. On April 26, 2010, DEC Staff moved for a default judgment and order pursuant to 6 NYCRR 622.15. On that date, DEC Staff mailed a copy of the default motion and supporting papers to the Respondent via certified mail, return receipt requested, and to the DEC Office of Hearings and Mediation Services ("OHMS") by first class mail. As of the date of this default summary report, the DEC OHMS has not received any response from or on behalf of the Respondent.

DEC Staff is represented in this matter by Jill T. Phillips, Esq., Assistant Regional Attorney, DEC Region 4, 1130 North Westcott Road, Schenectady, New York 12306. Nothing in the record of the motion indicates that the Respondent is represented by an attorney in this matter.

Subdivision 622.15(a) of 6 NYCRR (Default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them."

DEC Staff's motion papers consist of the following documents:

Notice of motion for default judgment and order, dated April 26, 2010;

Motion for default judgment and order, dated April 26, 2010; and

Affirmation of Jill Phillips, Esq., dated April 26, 2010, with three attached exhibits:

Exhibit A, April 26, 2010 affidavit of Kathleen Fabrey concerning service of the notice of hearing and complaint, and copies of the signed return card, the certified mail receipt and the February 2, 2010 transmittal letter to the Respondent;

Exhibit B, a copy of the February 2, 2010 notice of hearing and complaint; and

Exhibit C, a proposed order in this matter.

Both the complaint and the proposed order seek a civil penalty of \$2,250 and a requirement that the Respondent submit to the Department copies of his pesticide application records and apprentice training documentation for six months following the effective date of the order.

FINDINGS OF FACT

1. Richard Graham ("Respondent") does business as R. Graham Pest Control and is in the business of applying pesticides. The Respondent is a certified commercial pesticide applicator. His Pesticide Certification identification number is C4051682.
2. DEC Staff mailed a notice of hearing and complaint in this matter to the Respondent at 3406 State Street, Schenectady, New York 12304 by certified mail, return receipt requested. The signed card was returned to DEC Staff showing the signature of Mr. Graham and February 3, 2010 as the date of delivery.
3. The notice of hearing stated that a written answer must be served upon DEC Staff within twenty days of receipt of the complaint. The notice of hearing also stated that failure to serve a timely written answer will result in a default and a waiver of the Respondent's right to a hearing. The twenty day time period expired on February 23, 2010 and the Respondent failed to answer within the twenty day period.
4. On March 30, 2009, DEC Staff conducted an inspection of the Respondent's pesticide application records. During the inspection, DEC Staff found that the application record for a pesticide application on February 13, 2009 at 585 Washington Avenue, Albany, New York was missing certain information required by ECL 33-1205(1) including the EPA registration number, the dosage rate and the method of application.
5. The February 13, 2009 pesticide application at 585 Washington Avenue, Albany, New York was made by Bill Kennedy, an apprentice working under the Respondent. As of DEC Staff's March 30, 2009 records inspection, the Respondent did not have any training documentation in his files or records for Mr. Kennedy.

DISCUSSION

The notice of hearing and complaint were served upon the Respondent as required by 6 NYCRR 622.3(a)(3). The Respondent failed to submit an answer within the required time. Thus, the Respondent is in default. The Respondent did not contest any of the allegations in the complaint, and also did not contest the penalty or remedial actions sought in the complaint.

As outlined in the Commissioner's order in Matter of Alvin Hunt d/b/a Our Cleaners (at 4-5), once it is concluded that DEC Staff has demonstrated the required service and that a respondent has failed to answer in a timely manner, "the ALJ then considers whether the complaint states a claim upon which relief may be granted, and examines whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported."

In the present case, DEC staff stated a cause of action with respect to all but one of the allegations. The first cause of action relates to omission of four items of information from the record of a pesticide application. The information allegedly missing was "(a) the EPA registration number [of the pesticide applied]; (b) the location of the application; (c) the dosage rate; and (d) the method of application." DEC Staff charged that these omissions violated ECL 33-1205(1). DEC Staff also alleged, however, that the pesticide application took place at 585 Washington Avenue, Albany, New York.

ECL 33-1205(1) requires that commercial applicators shall maintain pesticide use records for each pesticide application, and that section identifies the items of information that must be contained in the records. These include the EPA registration number, the "location of application by address (including five-digit zip code)," the dosage rates, the methods of application, and other information not relevant here.

Based on the allegations in paragraphs 9 through 11 of the complaint, and the manner in which the term "location" is used in ECL 33-1205(1) and the related DEC Program Policy OGC-3, "Pesticide Recordkeeping and Reporting of Commercial Applicators" (July 10, 1998), it is not clear how the record of this pesticide application could both be missing the "location of the application" and be identifiable as the record for a pesticide application at 585 Washington Avenue, Albany, New York. "Location," as used in ECL 33-1205(1)(e), is the address at which the pesticide was applied. The complaint does not identify any source of information about the address at which this pesticide application occurred other than the Respondent's records reviewed by DEC Staff on March 30, 2009.

The recordkeeping requirements in 6 NYCRR 325.25(a) require that businesses providing commercial application of pesticides must keep records that include the "place" of application of pesticides. The term "place," in the context of commercial pesticide applicators' records, is used to mean a more specific

place such as a kitchen of an identified building or an individual apartment in a building (DEC Program Policy OGC-3, at 3).

Program Policy OGC-3 discusses the overlap between the recordkeeping requirements in ECL article 33, title 12, which became law in 1996, and the similar requirements in 6 NYCRR 325.25. OGC-3 establishes a policy under which businesses can use a single recordkeeping method to comply with both the statute and the regulation. The policy document states that DEC would use the requirements in ECL article 33, title 12 in lieu of those in 6 NYCRR 325.25, with the exception that the "place" of use would also need to be recorded (Program Policy OGC-3, at 4). The "place" of use is not listed as part of the recordkeeping required by ECL 33-1205(1) but is part of the recordkeeping pursuant to 6 NYCRR 325.25.

In the context of these recordkeeping requirements, "location" would be the street address and "place" would be the specific place at which pesticides were applied at that address. The complaint in the present manner does not allege that the record lacked information about the "place" where pesticides were applied, nor that the Respondent violated 6 NYCRR 325.25.

Thus, the complaint states a cause of action with regard to failure to record the EPA registration number, the dosage rate, and the method of application, but does not state a cause of action with regard to failure to record the location of the application.

The complaint states a cause of action with regard to the Respondent's lack of records about apprentice training, and as noted above the Respondent did not contest this allegation.

ECL 71-2907(1), concerning administrative sanctions for violations of ECL article 33 or any regulation issued under ECL article 33, provides for a civil penalty not to exceed five thousand dollars for a first violation. DEC Staff is seeking a penalty of \$250 for each of four alleged violations of the pesticide use recordkeeping requirements of ECL 33-1205(1), for a total penalty of \$1,000 for the first cause of action. DEC Staff is seeking a penalty of \$1,250 for the Respondent's failure to keep records of apprentice training, based on \$250 for each of the five categories of information that 6 NYCRR 325.10 requires such records to include. Ms. Phillips's affirmation states that the proposed penalties are consistent

with the penalty matrix of the Department's Pesticide Enforcement Policy.

The Pesticide Enforcement Policy (Commissioner Policy DEE-12, issued on January 20, 1987 and revised on March 26, 1993) recommends a first offense minimum penalty of \$250 for recordkeeping violations, when a case is resolved by an order on consent. The policy states that penalties imposed after hearings should be higher than the minimum penalties listed in the penalty matrix, unless a respondent proves facts that mitigate the violation (Commissioner Policy DEE-12, Appendix 1). The policy also identifies four categories of record keeping violations, ranging from having no recordkeeping system at all to having an appropriate recordkeeping system in which entries for a few applications are incomplete (Commissioner Policy DEE-12, Appendix 1, footnote 2).

In the present case, the Respondent did not have any training documentation for an apprentice (a more serious violation) and had three required entries missing from a record concerning one pesticide application ("minor" violations, as listed in Commissioner Policy DEE-12, Appendix 1, footnote 2). The proposed penalty of \$1,000 for the alleged violation of ECL 33-1205(1) is based on the allegation that four items of information were missing from the record of a pesticide application, with a penalty of \$250 for each missing item, but the complaint only states a cause of action concerning three of these items of information. The \$250 per violation, however, is the minimum recommended penalty for use in orders on consent and a higher penalty could be imposed under both ECL 71-2907(1) and the Pesticide Enforcement Policy. Overall, either the proposed penalty of \$2,250 or a penalty of \$2,000 would be supported by the record of this case. The Respondent did not contest either the allegations or the proposed penalty. I recommend that the Commissioner impose the penalty requested by DEC Staff.

CONCLUSIONS

1. The Respondent was served with the notice of hearing and complaint. By failing to file a timely answer, the Respondent defaulted in this matter.
2. The Respondent violated ECL 33-1205(1) by failing to record the EPA registration number, the dosage rate and the method of application for a pesticide application made on February

13, 2009 at 585 Washington Avenue, Albany, New York.

3. The Respondent violated 6 NYCRR 325.10 by failing to have training documentation for his apprentice Bill Kennedy.
4. ECL 71-2907(1) authorizes a civil penalty not to exceed five thousand dollars for a first violation of any provision of ECL article 33 or of any regulation issued under ECL article 33.

RECOMMENDATION

I recommend that the Commissioner issue an order to the Respondent as requested by DEC Staff, with the exception that the order not find that the Respondent violated ECL 33-1205(1) by omitting the location of the pesticide application from the record that is the subject of the first cause of action.

/s/

Albany, New York
May 20, 2010

Susan J. DuBois
Administrative Law Judge