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 Parts 320 through 326 of Title 6, of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

- by -

NYSDEC File No
CO7-20060824-1

GREEN THUMB LAWN CARE, INC.,

Respondent.

In this administrative enforcement proceeding, staff of the New York State Department of Environmental Conservation ("Department") alleged that respondent Green Thumb Lawn Care, Inc. ("respondent") violated provisions of the New York Environmental Conservation Law ("ECL") and accompanying regulations relating to the commercial application of pesticides, as well as provisions of an April 2, 2002 order on consent ("2002 consent order") (DEC File No. R4-2001-0709-82).

On November 10, 2010, then-Acting Commissioner Peter M. Iwanowicz issued a Decision and Order that, among other things: (i) granted staff's motion for order without hearing against respondent; (ii) held that respondent violated the ECL, the regulations and the 2002 consent order; and (iii) assessed against respondent a civil penalty in the amount of nineteen thousand dollars ($19,000) (see Matter of Green Thumb Lawn Care, Inc., Decision and Order of the Acting Commissioner, November 10, 2010 ("2010 D&O"), at 12).

Respondent thereafter commenced a combined proceeding and action in New York Supreme Court, Onondaga County seeking, among other things, to vacate the 2010 D&O. As part of that proceeding, the Department requested that the court modify the 2010 D&O to dismiss all charges associated with the 2002 consent order, and to remit the matter to the Department for a reassessment of an appropriate penalty. On October 13, 2011, the court, among other things, granted the Department's request, dismissing "all charges related to any and all alleged violations of the 2002 Consent Order," and remitting to the Department "for reassessment of an appropriate penalty in light of this dismissal" (Matter of Green Thumb Lawn Care, Inc., Index No. 11/0062, Article 78 Decision, Order and Judgment [Sup Ct, Onondaga County, October 13, 2011], at 12). The court confirmed "[a]ll other determinations and associated penalties of the [Acting] Commissioner" (id.).

On appeal, the Appellate Division, Fourth Department, affirmed the Supreme Court and the Acting Commissioner with respect to respondent's liability, and acknowledged that the Supreme Court had, with the consent of the Department, dismissed all charges related to the alleged violations of the 2002 consent order (see Matter of Green Thumb Lawn Care, Inc. v Iwanowicz, 107 AD3d 1402, 1404-05 [4th Dept 2013]). The New York Court of Appeals thereafter denied respondent's motion for leave to appeal the Appellate Division's Memorandum and Order (see Matter of Green Thumb Lawn Care, Inc. v Iwanowicz, 22 NY3d 866 [2014]).

By letter to the parties dated April 15, 2014, Assistant Commissioner for Hearings and Mediation Services Louis A. Alexander directed Department staff to submit any recalculation of the civil penalty in light of the Supreme Court's remand of the case, and provided respondent an opportunity to submit a response to any staff penalty recalculation. Department staff submitted a revised civil penalty calculation by letter dated April 30, 2014, and respondent submitted a response by letter dated May 14, 2014. After having requested and been granted leave, staff submitted a reply dated May 27, 2014. I discuss below the parties' positions with respect to an appropriate civil penalty.

In its initial Motion for Order Without Hearing, staff's calculation of a total civil penalty of $19,000 included a $5,000 component representing the amount of the suspended penalty under the 2002 consent order. Staff also included $2,000 in its consent order discussion, characterizing this amount as a "punitive penalty … to persuade the violator to take precautions against falling into non-compliance again" (Attorney's Brief in Support of Motion for Order without Hearing, dated April 6, 2007, at 6). In its April 30, 2014 recalculation of the requested civil penalty, staff sought a civil penalty of $12,000, calculated "by subtracting the amount of the civil penalty that is attributable to the violation of the 2002 Order on Consent," which staff stated was $7,000 (Letter from M. Naughton, Esq. dated April 30, 2014, at 1).

In its response to staff's initial proposed penalty recalculation, respondent (i) requested that the "penalty proceeding" be referred back to the ALJ to whom this matter was initially assigned,[1] and (ii) stated that staff's revised penalty request was "excessive" (Letter from A. Pierce, Esq. dated May 14, 2014, at 1). Respondent also provided a discussion of each element of staff's initial penalty calculation, which included economic benefit, gravity, Department costs, and an amount assessed for two violations (id. at 2-3), and included several attachments to its letter. In respondent's view, "at most the penalty here should be $2,500 or $3,000" (id. at 3).

In its reply, staff stated its willingness to remove "the $3,000 attributable to economic benefit and $2,000 for the gravity component," and further reduced its penalty request from $12,000 to a total of $7,000 (see Letter of M. Naughton, Esq. dated May 27, 2014, at 2-3). According to staff, the revised penalty request is comprised of two elements: (i) $4,000, comprised of a $1,000 penalty for each of the two ECL violations and, pursuant to the

[1] Respondent's request is denied. Given the circumstances of this case, it is more efficient for me to review the parties' submissions on the limited issue on remand than requiring multilevel review where the matter is referred to an ALJ to make recommendations that are then forwarded to me for review and ultimate decision.

Department's Pesticide Enforcement Policy, a doubling of that amount because the violations are "subsequent offenses" (see Pesticide Enforcement Policy, DEE-12, at Appendix I, § II); and (ii) $3,000 for "the Department's costs" (Letter of M. Naughton dated May 27, 2014, at 2-3). For the reasons set forth below, I deny staff's request to include $3,000 of Department costs as part of the civil penalty, and assess against respondent a total civil penalty of $4,000.

To support its request to include Department costs as part of the civil penalty, staff asserts that this amount "represents an amount that is far less than the time and expense that was expended in the prosecution of the administrative enforcement action and the defense of the Article 78 proceedings" (id., at 2). Staff consulted with a staff economist and suggested that $200 per hour "is a generally recognized billable hour rate for Department attorneys" (id.). Staff then stated that it "can construct a billable hour time sheet for this matter" but would do so only if the Office of Hearings and Mediation Services made a determination that it would be necessary (see id. at 2-3).

This portion of staff's penalty request is essentially a request for attorneys' fees, and is denied. Absent statutory or other legal authority, or a written agreement, that specifically authorizes the recovery of attorneys' fees – and staff has not cited any such legal authority or agreement – such fees are not recoverable. I note that ECL 71-2907, the statutory provision pursuant to which staff seeks a civil penalty in this matter, contains no such authorization for the recovery of attorneys' fees (see also Matter of ExxonMobil Corporation, Rulings of ALJ, September 27, 2002, at 13 [denying requests for costs, attorneys' fees or sanctions, stating that 6 NYCRR Part 622 does not authorize such awards]).

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

I. Based upon the violations by respondent Green Thumb Lawn Care, Inc. of Article 33 of the Environmental Conservation Law and its implementing regulations, as held in the November 10, 2010 Decision and Order of the Acting Commissioner, and as affirmed in Matter of Green Thumb Lawn Care, Inc. v Iwanowicz, 107 AD3d 1402 (4th Dept 2013), lv denied, 22 NY3d 866 (2014), I assess against respondent Green Thumb Lawn Care, Inc. a civil penalty in the amount of four thousand dollars ($4,000), which is due and payable within thirty (30) days of service of this order on respondent.

II. Respondent Green Thumb Lawn Care, Inc. shall submit payment of the four thousand dollar ($4,000) civil penalty assessed in paragraph I in the form of a cashier's check, certified check, or money order made payable to the order of the New York State Department of Environmental Conservation, and shall mail or hand-deliver such payment to:

New York State Department of Environmental Conservation
Office of General Counsel

625 Broadway – 14th Floor
Albany, New York 12233-1500
Attention: Michael P. Naughton, Esq.

III. Any questions or other correspondence regarding this order shall also be directed to the attention of Michael P. Naughton, Esq. at the address referenced in paragraph II of this order.

IV. The provisions, terms and conditions of this order shall bind respondent Green Thumb Lawn Care, Inc., its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: July 10, 2014
Albany, New York