STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law ("ECL") and Parts 320 through 326 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"),

- by -

ISLAND LANDSCAPE LCP, CORP.,

Respondent.

ORDER[1]

File No.
R1-20040413-81

Staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondent Island Landscape LCP, Corp., by service of a notice of hearing and complaint.

On July 12, 2006, 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 ("NYCRR") and Civil Practice Law and Rules 311(a)(1), Department staff personally served respondent by serving the notice of hearing and complaint upon the Department of State. On the same date, Department staff mailed a copy of the notice of hearing and complaint to respondent at its last known business address: 5 Hobart Court, Dix Hills, New York 11746.

The complaint alleged that respondent violated article 33 of the Environmental Conservation Law ("ECL") and 6 NYCRR parts 320 through 326 by: (1) applying pesticides without a pesticide applicator's certification in violation of ECL 33-0905(1), ECL 33-1301(8) and 6 NYCRR 325.7(a); (2) failing to annually register the pesticide business as required by ECL 33-0907(1), ECL 33-1301(8-a) and 6 NYCRR 325.23(a); (3) failing to display a set of numbered stickers on each vehicle used to transport commercial application equipment as required by

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[1] By memorandum dated January 25, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

6 NYCRR 325.26(a); (4) failing to enter into a written contract prior to engaging in commercial application of pesticides in violation of ECL 33-1001(1); (5) failing to maintain true and accurate records of pesticide use in violation of ECL 33-1205(1) and 6 NYCRR 325.25; (6) failing to file a pesticide reporting law annual report as required by ECL 33-1205(1); (7) failing to keep copies of lawn contracts as required by ECL 33-1001(3); and (8) failing to provide a written copy of information concerning the use of pesticides to the occupants or agent of dwellings that will be subject to the commercial application of pesticides in violation of ECL 33-0905(5)(a). The complaint alleged that respondent committed each of the above violations in each of the years 2001, 2002, and 2003, except violation (7), which respondent committed in 2001, only. In sum, twenty-two separate violations were alleged.

Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on August 1, 2006, and has not been extended by Department staff. In addition, respondent failed to appear at the pre-hearing conference that was noticed for August 29, 2006 in the notice of hearing.

Department staff filed a motion for default judgment dated October 11, 2006 with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger.

In a ruling dated October 24, 2006, ALJ Goldberger determined that Department staff's motion for a default judgment should be granted on the issue of respondent's liability for the cited violations. In its complaint, Department staff requested a penalty no greater than the maximum allowed by law and an injunction prohibiting respondent from continuing to apply pesticides commercially in New York State. ALJ Goldberger requested additional information with respect to a specific penalty amount as well as support for the injunctive relief requested.

In response, Department staff submitted a brief dated November 22, 2006. By summary report dated December 7, 2006 ALJ Goldberger determined that a penalty of $50,000 should be assessed based upon the information in the complaint and Department staff's brief. However, ALJ Goldberger held that the injunctive relief requested by Department staff was not necessary nor authorized by law.

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

Based upon respondent's default and the record before me, I concur with the ALJ's determination that respondent is liable for the violations alleged in the complaint.

The recommendation of a lower penalty in the ALJ's summary report appears to be based, in part, on Department staff's failure to substantiate the frequency and extent of respondent's violations with respect to the application of pesticides. The ALJ's concerns about the documentation regarding respondent's pesticide applications and the economic benefit gained by respondent's non-compliance are well-taken (see Summary Report, at 4-6). I would urge that the ALJ's comments be considered by Department staff in the preparation of papers in future enforcement proceedings (see also Matter of Hunt d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 8-9 [addressing proof to be provided in support of penalty and remedial relief on a motion for a default judgment]).

Notwithstanding the foregoing, based upon my review of the record, I conclude that sufficient support exists in the record to justify the $124,000 civil penalty requested by Department staff. As the ALJ notes, "staff's complaint is indicative of respondent's total lack of adherence to the pesticide regulatory scheme" (Summary Report, at 6). Many of the twenty-two allegations in the complaint, all deemed to be admitted by operation of respondent's default, relate to respondent's failure to (i) maintain requisite records, (ii) file annual reports with the Department, or (iii) register with the Department. The State's regulation of pesticides relies, in part, on the accuracy of self-reporting by regulated entities. The very ambiguity created by respondent's failure to maintain records and report its activities to the Department should not serve to mitigate the penalty.

Department staff, in support of its penalty calculation, submitted a brief and supporting documents including but not limited to a narrative prepared by Christopher Spies, a Pesticide Control Specialist with the Department ("Spies Narrative"). Mr. Spies states that he became aware of respondent's activities only after a private citizen contacted the Department to complain that respondent had applied pesticides to her property without providing the requisite notice and that the pesticides had caused the death of one of her dogs.

Although both Department staff and ALJ Goldberger properly note that the cause of the dog's death was not established for the purposes of this proceeding, it is clear respondent's unlawful activities were only brought to the

Department's attention because of this unfortunate event. Mr. Spies' narrative recounts a conversation with respondent's president wherein the president acknowledges that he had applied pesticides at the complainant's residence in the days just prior to the dog's death. The narrative further recounts that, after Mr. Spies advised him that the unlawful application of pesticides must cease, respondent's president "stated that the Department was putting him out of business, because pesticide work was a major part of his work" (Spies Narrative, at 7). Respondent's president also indicated that respondent operated as a pesticide business for "at least the last four years" (see id.).

Attached to Department staff's brief is a letter from respondent's president, dated March 6, 2004, stating that he has been in the landscaping business for 33 years and has "always taken great care in properly applying granular chemicals[.]" Respondent's president further stated that he is aware that landscapers must have "a license to apply chemicals" and acknowledged that he has twice taken the commercial applicator test, but has failed to pass it.

With regard to calculating the maximum penalty authorized by statute, respondent's failure to maintain records makes it impossible to ascertain the actual number of violations respondent committed. Nevertheless, Department staff's complaint alleges twenty-two violations and these violations are deemed admitted by operation of respondent's default. Although Department staff's papers did not set forth any calculations regarding the penalty, I note that the maximum statutorily authorized penalty for the twenty-two violations alleged in the complaint is substantially higher than the penalty requested by Department staff (see ECL 71-2907[1], which provides for a penalty "not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense").

Staff's proposed civil penalty of $124,000 for 22 violations is generally consistent with penalties imposed in cases involving similar circumstances (see, e.g., Matter of DeMuro, Order of the Commissioner, March 13, 2003 [$25,000 penalty for three violations of pesticide registration requirement]; Matter of Briga Landscaping, Order of the Commissioner, January 14, 2003; and Matter of JR Tree Spraying, Inc., Order of the Commissioner, November 15, 1999 [$115,000 penalty for sixteen pesticide-related violations]).

A review of the record demonstrates that the proof offered in support of the penalty is consistent with the

Department's Civil Penalty Policy (Commissioner Policy DEE-1, June 20, 1990). Application of the penalty calculation paradigm in the Department's Pesticides Enforcement Guidance Memorandum dated March 16, 1993 would support a lesser penalty than Department staff is requesting (see ALJ Summary Report, at 6-7). However, the Pesticides Enforcement Guidance Memorandum states that penalties in adjudicated cases should be significantly higher than penalty amounts in consent orders which are entered into voluntarily by respondents.

Given the serious nature of the violations, the failure of respondent to cooperate with the Department and the economic benefit derived by respondent by not adhering to the law and regulations governing commercial pesticide applicators, the penalty proposed by Department staff is justified.

Finally, I concur with ALJ Goldberger's determination that the injunctive relief requested by Department staff should be denied as unnecessary. Department staff's complaint requests an order "directing Respondent to immediately stop all pesticide applications within New York State[.]" By law, respondent is not authorized to undertake the commercial application of pesticides without Department approval. However, I do not adopt the ALJ's determination as to the scope of the Department's injunctive powers relative to violations of ECL article 33. Because, as noted, Department staff's request for injunctive relief is unnecessary, I do not have to reach the question of the extent of the Department's injunctive powers under the circumstances presented here.

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 Island Landscape LCP, Corp. is adjudged to be in default and to have waived its right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondent, as contained in the complaint, are deemed to have been admitted by respondent.

III. Respondent is adjudged to have violated ECL 33-0905(1), 33-0907(1), 33-1301(8), 33-1301(8-a), 33-1001(1), 33-1205(1), 33-1001(3), and 33-0905(5)(a), and 6 NYCRR 325.7(a), 325.23(a), 325.26(a), and 325.25 during the years alleged in the complaint,

for a total of twenty-two (22) separate violations.

IV. Respondent Island Landscape LCP, Corp. is hereby assessed a civil penalty in the amount of one hundred twenty-four thousand dollars ($124,000). The civil penalty shall be due and payable within thirty 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 at the following address: New York State Department of Environmental Conservation, Division of Environmental Enforcement, 625 Broadway, 14th Floor, Albany, NY 12233-5500, ATTN: Alyce M. Gilbert, Esq.

V. All communications from respondent to the Department concerning this order shall be made to Alyce M. Gilbert, Esq., New York State Department of Environmental Conservation, Division of Environmental Enforcement, 625 Broadway, 14th Floor, Albany, NY 12233-5500.

VI. The provisions, terms and conditions of this order shall bind respondent Island Landscape LCP, Corp., its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Louis A. Alexander
Assistant Commissioner

Dated: February 8, 2007
Albany, New York

TO: Island Landscape LCP, Corp. (via Certified Mail)
5 Hobart Court
Dix Hills, New York 11746

Nunzio DeCrescenzo (via Certified Mail)
5 Hobart Court
Dix Hills, New York 11746

Alyce M. Gilbert, Esq. (via Regular Mail)
NYSDEC - DEE
625 Broadway, 14th Floor
Albany, NY 12233-5500

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

Summary Report

Island Landscape LCP, Corp.,
Respondent.

File No. R1-20040413-81

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Proceedings

On October 12, 2006, pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), staff of the Division of Environmental Enforcement (DEE) of the New York State Department of Environmental Conservation (DEC or Department) filed a notice of motion for default judgment with the Department's Office of Hearings and Mediation Services (OHMS). In a ruling dated October 24, 2006, I concluded that staff's motion for a default judgment met the requirements of 6 NYCRR § 622.15(b) as staff demonstrated that the respondent failed to answer the complaint and the time to answer has passed. In addition, DEC Division of Environmental Enforcement attorney Alyce M. Gilbert submitted proof of service of the notice of hearing and complaint upon the respondent and a proposed order.

In the ruling, with respect to the relief sought by staff, I asked for support for staff's request for injunctive relief as well as a specific penalty amount and rationale for same. In a brief dated November 22, 2006, Ms. Gilbert provided staff's response to these inquiries.

Discussion

Injunctive Relief

The complaint requests an order that enjoins the respondent from all pesticide applications within New York State in addition to a civil penalty. I could find no provision for injunctive relief in an administrative proceeding pursuant to ECL § 71-2907. Section 71-2911 provides that the Department, "acting through the attorney general, may bring suit against such person [a violator of any provision of Article 33] in any court of competent jurisdiction to restrain such person from continuing such violation . . ." In response to my request for support for this injunction, DEC counsel cites to ECL § 33-3003(1) [sic]. ECL

§ 33-0303(1) is a broad statute that gives the Commissioner authority over the use and regulation of pesticides. Accordingly, counsel deduces that this includes the authority to bar an individual from pesticide application. Ms. Gilbert argues that my reliance on ECL § 71-2911 is misplaced.

In support, staff cites In the Matter of Johnson Orchards and Farms, Inc, 70 Misc. 2d 647 (Albany Co. Sup. Ct. 1972), in which a respondent challenged DEC's jurisdiction to impose a penalty based on ECL § 71-1929(3) which provides that penalties shall be recoverable in an action brought by the Attorney General. In this case involving water pollution violations, the court found that DEC had jurisdiction to impose administrative penalties. However, ECL § 71-2907 is organized with separate provisions for administrative and civil sanctions. Moreover, ECL § 71-2911, entitled "Injunction against violation", specifically provides that the Department, "acting by the attorney general, may bring suit against [a] person in any court of competent jurisdiction to restrain such person from continuing such violation . . ." Thus, it plainly appears that the Legislature intended that where injunctive relief was sought by the Department that it must obtain such relief in court.

Where two statutes are in conflict with each other, and one of the provisions is general in nature while the other is specific, then it is settled law that the provision which is specific will control. People ex rel. Knoblauch v. Warden, 216 N.Y. 154, 156-157 (1915).

In terms of interpretation, staff requests deference "as an agency responsible for administration of a statute to determine the construction of its terms." Because the statute specifically explains how the agency is to go about obtaining injunctive relief, I did not find the language ambiguous. Thus, there is no reason for such deference. Statutes § 129(b).

Staff's reliance on State of New York v. Sour Mountain Realty, Inc., 276 AD2d 8 (2d Dep't 2000) for support of its request for an injunctive remedy is not correct. In that case, the Department sought and obtained an injunction from Justice Judith A. Hillery of Dutchess County Supreme Court and the Second Department affirmed. The courts found that a landowner had stated an intention to violate the law concerning protection of an endangered species. Thus, this case does not support staff's request for relief in this administrative default proceeding.

It is useful to examine what staff is seeking. If staff is looking for an admonishment that respondent adheres to the laws

in the future, such an order is unnecessary as everyone is bound by the environmental laws and regulations. Even without any Commissioner's order, the respondent is barred from applying pesticides without certification. However, if staff wishes to prohibit the respondent from ever applying pesticides in New York State, whether or not he has fulfilled the necessary legal requirements, I do not find that there is authorization in the ECL for the Department staff to obtain this order in an administrative setting.

Monetary Penalty

In its brief, staff has specified the amount of $124,000 as the penalty that it seeks. Counsel cites to the factors in the civil penalty policy and the pesticides enforcement guidance memorandum as support. She states that the respondent was uncooperative as he did not respond to the staff's initial issuance of a consent order and that the staff served three notices of hearing and complaint - one unclaimed, one by an environmental conservation officer and one through the Secretary of State's office. In addition, counsel reiterates that the respondent failed to attend the scheduled pre-hearing conference or to file an answer.

For the first time, staff explains that the source of the information surrounding these violations was a complaint by a homeowner whose dog died a few days after an application of lawn pesticides. One of the attachments to the brief is the report by Christopher Spies, a DEC Pesticides Control Specialist. In this report, Mr. Spies explains that as a result of the complaint by Mrs. Casuscelli made on July 22, 2003, he conducted an inspection at the business and residence of the respondent on February 27, 2004. Mr. Spies had made several attempts to reach Mr. DeCrescenzo (the owner of the respondent business) prior to getting access on February 27, 2004.

This inspection revealed that the landscaping business was not registered and that Mr. DeCrescenzo, the only member of the company to perform pesticide applications, was not certified as a pesticide applicator. Mr. DeCrescenzo explained to Mr. Spies that he had been operating under the name Island Landscape L.C.P. Corp. for the prior 3 years. In response to Mr. Spies' request, Mr. DeCrescenzo produced 3 contracts from 2003 explaining that he only maintained the contracts for the prior year and did not have any yet for 2004. He did not have any pesticide application records and could not identify the specific names or EPA registration numbers for the products he used. Mr. De Crescenzo told Mr. Spies during this interview that he did not provide his

clients with copies of pesticide product labels, any lists of substances to be applied, or label warning information. He told Mr. Spies that he did not keep an inventory of the products he used as he only bought sufficient amounts for each day's usage. Mr. DeCrescenzo explained that he only used granular products and did not spray. Mr. Spies inspected the respondent's work truck and found that it did not have the required decals. See, Exhibit F annexed to staff's brief.

Also attached to staff's brief is a copy of a typewritten statement by Nunzio DeCrescenzo in which he admits to knowing that landscapers are required to obtain certification "to apply chemicals." He explains that he had taken the required class twice but was unable to pass the examination. See, Exhibit E annexed to staff's brief.

While these documents are informative in terms of establishing that the respondent had been operating his landscape business for at least 3 years without adhering to the pesticide laws and regulations, there is little documentation to establish how often he applied pesticides.

Staff maintains that the respondent avoided costs by 1) not registering the business; 2) not taking the certification exam; 3) not obtaining certification; 4) not employing trained staff; 5) and not following precautionary methods required by regulations. However, counsel does not provide any information as to what these costs are other than to state, without any support, that a conservative estimate of the economic benefit would be $30,000 per year. See, Staff Br., p. 7. As counsel notes, the respondent's ability to pay a penalty is a factor that is the burden of the respondent to prove and he has failed to do so.

It is clear that the respondent operated at least for 3 years. The contracts that staff included indicate that the respondent provided a variety of landscaping services that could include the application of pesticides and that the respondent offered these services during five different periods during each year - from March through December. But a reading of the contracts submitted with staff's brief does not reveal what exact services were provided and how often. Staff suggests that pesticides were applied five times a year at each residence, however, there is no definitive proof of such actions and in any case, there is no detail with respect to what substances were applied and in what quantity.

Concerning the potential harm, staff maintains that it

"appears to have been very significant." While there is no proof of actual harm as the inspector stated that there was no substantiation that even the one complaint related to the application of pesticides, staff is correct that the potential was considerable. See, Staff's Br., Ex. F, p. 3.

The staff's brief does not show how the calculations were performed to determine that a penalty of $124,000 is appropriate. Based upon the penalties allowed by statute and the fact that the respondent had acted in clear violation of law and regulation over a period of three years, I have made the following conclusions regarding the penalty.

ECL § 71-2907 provides for a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense. The Department staff have alleged that the respondent has violated essentially eight separate provisions of Article 33 and the implementing regulations in 2001, 2002, and 2003.[1] Because there are few details with respect to operations of this pesticide business, I recommend that the penalties be calculated based on one incident per year.

The civil penalty policy of the Department provides that several factors are considered in calculation of a penalty. These are the gravity of the violation, the cooperation of the respondent, the respondent's compliance history, and the economic benefit obtained by the respondent in not adhering to the statutory requirements.

The violations in this matter are serious as they involve the application of potentially harmful chemicals in residences and businesses. But the staff was unable to provide details regarding any pesticide applications and therefore it is not possible to determine the extent, if any, of the environmental

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[1] Three of these allegations involve violations of different provisions of Article 33 and the regulations but are essentially the same three violations. The respondent's failure to obtain a certified pesticide applicator's license is a violation of ECL §§ 33-0905(1) and 33-1301(8), and 6 NYCRR § 325.7(a). The respondent's failure to register its pesticide business with the State is a violation of ECL §§ 33-0907(1) and 33-1301(8-a), and 6 NYCRR § 325.23(a). Respondent's failure to maintain appropriate records is a violation of ECL § 33-1205(1) and 6 NYCRR § 325.25. Accordingly, I am recommending that these omissions are accounted for as three rather than eight separate violations.

harm. Moreover, staff has not provided any probative information concerning the economic benefit gained by the respondent by not complying with these laws.

However, these laws were specifically created to maximize public safety in the application of pesticides by assuring that applicators are qualified to handle these substances and that the public is provided with the information it needs to assess the use of pesticides. As stated in ECL § 33-0301, while the Legislature has deemed the use of these materials beneficial in order to control pests, ". . . such materials, if improperly used, may injure health, property and wildlife. It is hereby declared to be a matter of legislative determination that the regulation of the registration, commercial use, purchase and custom application of pesticides is needed in the public interest and that in the exercise of the police power all persons be required to register to obtain permits before engaging in such activities." L. 1972, c. 664, § 2. The Department staff's complaint is indicative of the respondent's total lack of adherence to the pesticide regulatory scheme that New York enforces and therefore, these violations are very serious.

In addition to the civil penalty policy, the Department maintains a pesticide enforcement guidance memorandum (EGM) that sets forth a penalty schedule for "first offense minimums." This guidance states that these minimum penalty levels should be doubled on second or subsequent offenses. In addition, this guidance states that these amounts should be considered in light of the policies set forth in the civil penalty policy regarding economic benefit and the gravity of the offense.

The pesticide EGM provides for a $1,000 penalty for failure to obtain business or agency registration (for first offense), failure to obtain applicator certification (per year or portion thereof, per person), violation of commercial lawn care or contract requirements (per violation), and for failure to file annual report (per report); $200 for lack of equipment identification (per violation); and $250 for each recordkeeping violation.

Based upon this schedule, I calculate a minimum penalty of $28,500. I made this calculation based upon a finding of a $5,000 penalty for each of the following violations: 1) failure to register; 2) failure to obtain applicator certification; 3) failure to enter into written contract with owner of premises that are subject to pesticide application prior to application; 4) failure to deliver copies of information, hazards, and labels to occupants of premises subject to pesticide

application; and 5) failure to file annual report. Each of these violations is subject to a $1000 penalty for the first violation and a doubling of the penalty for subsequent violations. The staff has established violations in 2001, 2002, and 2003, making a minimum of $5,000 for each of these violations totaling $25,000. The recordkeeping violations of failure to maintain required records and to keep copies of lawn application contracts are $250 each for the first violation and $500 for the second and third violations thus providing a total penalty of $2500 for the two separate violations over three years. And, the failure to display the required decals on the business vehicle amount to a total penalty of $1000 ($200 for the first violation and $400 for the second and third violations).

The respondent has violated these laws over a course of three years and has failed to respond to the notice of hearing and complaint indicating a lack of cooperation. In addition, by letter dated March 5, 2004, staff contacted the respondent regarding these allegations and the respondent failed to reply. Based upon this information, there is no demonstration of any cooperation by the respondent.

With respect to economic benefit, as noted above, staff has not provided any specific information to demonstrate how much respondent saved by not complying with the regulatory requirements. However, it is patently unfair to businesses that adhere to environmental requirements to have to compete with those who violate the laws.

Based upon these factors, I am recommending that the Commissioner order a civil penalty of $50,000 - slightly less than the doubling of the penalty I could calculate based upon the established violations and the pesticide EGM.

Conclusion

Staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.15(b). Therefore, in accordance with 6 NYCRR § 622.15(c), this summary report is hereby submitted to the Commissioner, accompanied by a proposed order.

/s/
_____
Helene G. Goldberger
Administrative Law Judge

Dated: Albany, New York
December 7, 2006

TO: Island Landscape LCP, Corp.

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