

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

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

- by -

ORDER

JOHN WELCH ENTERPRISE, INC.,

DEC Case No.
R8-2017-0719-81

Respondent.

This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent John Welch Enterprise, Inc., which operates a lawn service business with business offices located at 1723 State Route 444, Victor (Ontario County), New York, violated various provisions of the Environmental Conservation Law of the State of New York (ECL) article 33 (Pesticides), and its implementing regulations at 6 NYCRR part 325 (Application of Pesticides). Respondent, a registered pesticide application business, employed John Welch, who is respondent's President, and Richard McEvoy.

Department staff commenced this proceeding by serving a notice of hearing and complaint dated October 11, 2017 (Complaint) upon John Welch Enterprise, Inc. Respondent timely filed an answer dated October 20, 2017.

In the Complaint, Department staff set forth four causes of action:

- First cause of action: Staff alleged that respondent violated ECL 33-0905(1) and 33-1301(8), and 6 NYCRR 325.7(a) and 325.23(h), by not having at least one employee who was properly certified as a commercial pesticide applicator or technician at a time when respondent conducted twenty-three (23) commercial pesticide applications;
- Second cause of action: Staff alleged that respondent violated ECL 33-0905(5)(a) by failing to provide the required notification to the occupants of the premises prior to applying pesticides on those premises;
- Third cause of action: Staff alleged that respondent violated ECL 33-1205(1) and 6 NYCRR 325.25(a) by failing to keep true and accurate records concerning the kind

and quantity of each pesticide used, dosage rates, methods of application, target organisms, and use, date, and place of the application for each pesticide used; and

- Fourth cause of action: Staff alleged that respondent violated ECL 33-1001(1) and 33-1001(2), and 6 NYCRR 325.40(a), by failing to include in its commercial lawn contracts all the items legally required to be included in commercial lawn contracts.

(See Complaint ¶¶ 7-31.)

Subsequently, with a cover letter dated February 13, 2018, Department staff filed a notice of motion for order without hearing, a motion for order without hearing, and supporting documents. In addition, staff duly served respondent with a copy of the motion papers. In the February 13, 2018 motion, Department staff sought summary judgment on all the violations alleged in its Complaint.¹ To date, neither the DEC's Office of Hearings and Mediation Services nor the ALJ has received a response from respondent to staff's motion. Accordingly, respondent John Welch Enterprise, Inc. has defaulted on the motion for order without hearing.

The matter was assigned to Administrative Law Judge Daniel P. O'Connell (ALJ) who prepared the attached summary report. I hereby adopt the summary report as my decision in this matter, subject to my comments below.

Liability

ECL 33-0301 states that the purpose of article 33 is to regulate the registration, commercial use, purchase and custom application of pesticides. As the statute sets forth, pesticides, "if improperly used, may injure health, property and wildlife" (*id.*). The State Legislature has declared that the regulation of the registration, commercial use, purchase and custom application of pesticides "is needed in the public interest" (*id.*). Compliance with the statutory and regulatory requirements governing pesticides is critical to public protection.

Department staff conducted a review of respondent's operating practices prior to commencement of this proceeding. On December 13, 2016, DEC Pesticide Control Specialist Justin Schoff inspected the offices of respondent John Welch Enterprise, Inc. (*see* Affidavit of Justin Schoff dated September 17, 2018 [Schoff Aff] ¶ 9). Based on Mr. Schoff's inspection, he determined that from September 23, 2016 to September 30, 2016, respondent conducted 23 commercial pesticide applications at various locations at a time when neither of respondent's applicators (Mr. Welch and Mr. McEvoy) held a valid pesticide applicator certification from the Department (*see* Schoff Aff ¶¶ 17 [no respondent employee who was a certified commercial pesticide applicator or technician during this period] and 18). Other than Messrs. Welch and McEvoy, nothing in the record shows that respondent employed any other certified pesticide applicators or technicians.

¹ Although the Complaint referenced dates ranging from September 21, 2016 to May 31, 2017 (*see* Complaint ¶¶ 13 and 14), staff's motion for order without hearing set the period of time from September 23, 2016 to September 30, 2016 (*see* Affirmation of Dusty Renee Tinsley dated February 13, 2018 in Support of Motion for Order without Hearing [Tinsley Aff], ¶¶ 28, 29, and 31).

Mr. Schoff's inspection also revealed various pesticide notification, recordkeeping and contract deficiencies (Schoff Aff ¶¶ 21-26, and 29-32). The deficiencies identified as a result of staff's review were the basis for staff's causes of action in this proceeding.

The ALJ in his summary report addressed each of the four causes of action in detail (see Summary Report at 8-11). With respect to the first cause of action, the applicable statute and regulations require that any person who engages in the commercial or private application of pesticides or in the sale of restricted use pesticides must be certified (see ECL 33-0905[1] and 6 NYCRR 325.7[a]; Summary Report at 9). Furthermore, it is unlawful for any person to apply pesticides without a pesticide applicator certificate registration, unless that person is working under the direct supervision of a certified applicator (see ECL 33-1301[8] and 6 NYCRR 325.23[h]; Summary Report at 9).

The record shows that at the time of the 23 pesticide applications from September 23, 2016 to September 30, 2016, both Mr. Welch's and Mr. McEvoy's certifications had lapsed. Accordingly, neither Mr. Welch nor Mr. McEvoy possessed a valid pesticide applicator certificate and neither were working under the direct supervision of a certified applicator (see Schoff Aff ¶¶ 17 and 18; see also Summary Report at 9).

As to the second cause of action, ECL 33-0905(5)(a) requires every applicator to provide the occupants of any dwelling with a copy of the information on the label, including any warnings contained on the label of the pesticide to be applied. This information is to be supplied in either a written, digital or electronic format. In addition, the certified pesticide applicator must have a written copy of the label information in his or her possession. Respondent did not provide the legally required notice prior to the application of pesticides at various locations from September 23, 2016 to September 30, 2016 (see Schoff Aff ¶ 21; Tinsley Aff ¶ 39; see also Summary Report at 9-10).

With respect to the third cause of action, ECL 33-1205(1) and 6 NYCRR 325.25(a) require businesses to keep true and accurate records about the pesticides they have applied. The required records include, among other things, the registration number assigned by the United States Environmental Protection Agency (EPA), the product name, the amount applied and the method used to apply the pesticide, the date on which the pesticide was applied, the target organisms, as well as the location of the application including the ZIP code. Mr. Schoff's review of respondent's records found respondent did not record all the information required by ECL 33-1205(1) and 6 NYCRR 325.25(a) (see Schoff Aff ¶ 25 [specifying the information that was missing]; see also Summary Report at 10).

Finally, the statute and regulations set forth the terms and conditions to be contained in contracts entered into between an applicator and the property owner concerning the commercial application of lawn pesticides (see ECL 33-1001[1], ECL 33-1001[2] and 6 NYCRR 325.40[a]). Respondent's contracts, as provided to Mr. Schoff, failed to include the required information (see Summary Report at 11 [noting deficiencies in contracts]); see also Schoff Aff ¶¶ 29-32).

As noted, Mr. Welch, the President of respondent John Welch Enterprise, Inc., filed a letter dated October 20, 2017 addressing the allegations in the Complaint. Department staff

included a copy of respondent's answer with staff's motion for order without hearing. The ALJ considered the answer in his evaluation of liability in this matter. I have reviewed the answer as well. Nothing in the answer disturbs the findings of respondent's liability.

Penalty and Remedial Relief

--Penalty

ECL 71-2907(1) authorizes the Commissioner to assess administrative sanctions for violations of any provision of ECL article 33, its implementing regulations, and any order issued by the Commissioner. Pursuant to ECL 71-2907(1), the maximum civil penalty for the first violation is \$5,000, and the maximum for any subsequent offense is \$10,000.

Department staff offered an affidavit by Christopher Wainwright with two exhibits to support the civil penalty of \$19,500 requested in staff's motion for order without hearing (see Affidavit of Christopher Wainwright sworn to September 20, 2018 [Wainwright Aff], ¶ 3). Mr. Wainwright stated that he relied on the factors identified in DEE-1 (Civil Penalty Policy dated June 20, 1990) to adjust the requested civil penalty. According to Mr. Wainwright, the established violations are considered high priority violations pursuant to the guidance in DEE-12 (Pesticide Enforcement Policy revised March 26, 1993) (see Wainwright Aff ¶ 10).

The ALJ, in his review of staff's calculation of the penalty determined that a higher total of violations could be applied and also noted that calculation for the violations set forth in the second cause of action would be somewhat higher (see Summary Report at 13-14). With adjustments, the ALJ also recommended a civil penalty of \$19,500.

I hereby adopt the ALJ's penalty recommendation which, based on this record, is authorized and appropriate. I direct that this penalty be paid within sixty (60) days of the service of this order upon respondent. Respondent may, upon good cause shown, request an extension of the date by which the civil penalty is due. Any such request must be in writing, setting forth the reasons for the request. The granting of any extension shall be at the discretion of Department staff.

--Remedial Relief

Department staff also requested that the Commissioner's order direct respondent to provide copies of:

- pesticide application records with all commercial pesticide application service entries for the thirty (30) days following the effective date of the Order, consistent with the requirements set forth in ECL article 33 and 6 NYCRR part 325;
- all commercial lawn contracts that respondent has entered for the forty (40) days following the effective date of this Order containing the information required by ECL article 33 and 6 NYCRR part 325; and

- all emails or mailings that respondent sent prior to the application of a pesticide with or on the premises of a dwelling to the occupants, including a copy of the information contained on the label of the pesticide to be applied, for the thirty (30) days following the effective date of this Order.

Staff's request is authorized and reasonable (see Summary Report at 15). I am directing that respondent submit this information within sixty (60) days of the date of the service of this order upon it.

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

- I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted.
- II. Based on record evidence, respondent John Welch Enterprise, Inc. is adjudged to have violated:
 - A. ECL 33-0905(1), ECL 33-1301(8), 6 NYCRR 325.7(a) and 6 NYCRR 325.23(h), by conducting twenty-three (23) commercial pesticide applications between September 23, 2016 and September 30, 2016, at a time when its applicators did not possess valid pesticide applicator certificates or were not working under the direct supervision of a certified applicator;
 - B. ECL 33-0905(5)(a), by failing to provide the required notification prior to applying pesticides at twenty-three (23) various locations where respondent applied pesticides from September 23, 2016 to September 30, 2016;
 - C. ECL 33-1205(1) and 6 NYCRR 325.25(a), by failing to keep true and accurate records concerning the pesticides used during the period from September 23, 2016 to September 30, 2016; and
 - D. ECL 33-1001(1), ECL 33-1001(2) and 6 NYCRR 325.40(a), by failing to include all the statutory and regulatory information items required in its commercial lawn contracts.
- III. I hereby assess a civil penalty in the amount of nineteen thousand five hundred dollars (\$19,500) upon respondent John Welch Enterprise, Inc. Respondent shall pay the civil penalty by check, cashier's check or money order made payable to the

New York State Department of Environmental Conservation within sixty (60) days of the service of this Order upon it. Such payment shall be submitted to:

Dusty Renee Tinsley, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414.

Respondent may, upon good cause shown, request an extension of the date by which the civil penalty is due. Any such request must be in writing, setting forth the reasons for the request, and submitted to Dusty Renee Tinsley, Esq. at the above-referenced address. The granting of any extension shall be at the discretion of Department staff.

- IV. Within sixty (60) days of the date of the service of this order upon respondent, respondent John Welch Enterprise, Inc. is to furnish the following information to the Department:
- A. copies of all pesticide application records with all commercial pesticide application service entries for the thirty (30) days following the effective date of the Order consistent with the requirements set forth in ECL article 33 and 6 NYCRR part 325;
 - B. copies of all commercial lawn contracts that respondent has entered into within the forty (40) days following the effective date of this Order containing the information required by ECL article 33 and 6 NYCRR part 325; and
 - C. copies of all emails or mailings that respondent sent to occupants prior to the application of a pesticide within or on the occupants' premises, including a copy of the information contained on the label of the pesticide to be applied, for the thirty (30) days following the effective date of this Order.

The above-referenced information is to be submitted to:

Dusty Renee Tinsley, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 8
6274 East Avon-Lima Road
Avon, New York 14414.

- V. Any questions or other correspondence regarding this Order shall be addressed to Dusty Renee Tinsley, Esq. at the address referenced in Paragraphs III and IV of this Order.

VI. The provisions, terms and conditions of this Order shall bind respondent John Welch Enterprise, Inc. and its agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: May 27, 2020
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

- by -

SUMMARY REPORT

John Welch Enterprise, Inc.,

DEC Case No.

R8-2017-0719-81

Respondent.

Proceedings

Staff from the Department's Region 8 office (Avon, New York) commenced the captioned proceeding by serving a notice of hearing and complaint, dated October 11, 2017, upon John Welch Enterprise, Inc. (respondent). In four causes of action, the complaint alleged that respondent, who operates a lawn service business, violated various provisions of the Environmental Conservation Law of the State of New York (ECL) article 33 (Pesticides), and implementing regulations at title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) part 325 (Application of Pesticides). Staff served the October 11, 2017 notice of hearing and complaint upon respondent by certified mail, return receipt requested. Respondent received staff's notice of hearing and complaint on October 13, 2017. (*See* 6 NYCRR 622.3[a][1] and [3].)

John Welch, President of John Welch Enterprise, Inc., timely filed an answer dated October 20, 2017. Department staff received the answer on October 26, 2017. (*See* 6 NYCRR 622.4.)

Subsequently, with a cover letter dated February 13, 2018, Department staff filed a notice of motion for order without hearing, a motion for order without hearing, and supporting documents, as provided by 6 NYCRR 622.12. Staff filed a copy of the motion papers with the Office of Hearings and Mediation Services (OHMS) by regular mail. In addition, staff duly served respondent with a copy of the motion papers by certified mail, return receipt requested. Respondent received its copy of the motion papers on February 15, 2018. Attached to this report is a list of the documents associated with staff's February 13, 2018 motion.

Staff's February 13, 2018 notice of motion for order without hearing advised John Welch Enterprise, Inc. to send a response to the motion to the Chief Administrative Law Judge (ALJ) at OHMS within 20 days from receipt of the motion. The notice further advised respondent that the failure to respond to the motion would constitute a default.

As noted above, respondent received its copy of the motion papers on February 15, 2018. Consequently, respondent's response to the motion was due by March 7, 2018. To date, neither OHMS nor Department staff received a response from respondent to staff's motion. Therefore, John Welch Enterprise, Inc. has defaulted on the motion for order without hearing, which constitutes a waiver of its right to a hearing (*see* 6 NYCRR 622.12[b]).

By letter dated March 28, 2018, Chief ALJ James T. McClymonds assigned the motion to me. For the reasons outlined in this summary report, the Commissioner should grant staff's unopposed motion for order without hearing.

I. Department Staff's Complaint and Motion

The October 11, 2017 complaint asserted the following. Respondent, John Welch Enterprise, Inc., is a lawn service corporation with business offices located at 1723 State Route 444, Victor (Ontario County), New York 14564. Effective through August 31, 2018, respondent was a registered pesticide application business (Registration No. 15624).¹ Respondent employs John Welch, who is the owner, and Richard McEvoy. Department staff inspected respondent's office on December 13, 2016.

According to the first cause of action, Mr. McEvoy conducted 23 commercial pesticide applications at various locations between September 23, 2016 and September 30, 2016. However, during this period, Mr. Welch's certification had expired and Mr. McEvoy's certification had lapsed. With respect to the pesticide applications identified above, respondent did not have at least one employee who was properly certified as a commercial pesticide applicator or technician. Based on these circumstances, staff alleged that respondent violated ECL 33-0905(1) and 33-1301(8), as well as 6 NYCRR 325.7(a) and 325.23(h), for each of the 23 commercial pesticide applications undertaken by Mr. McEvoy between September 23, 2016 and September 30, 2016.²

Prior to the application of a pesticide within or on the premises of a dwelling, every certified applicator must provide the occupants with a copy of the information on the label of the pesticide to be applied, pursuant to ECL 33-0905(5)(a). The label information includes any warnings. The notice may be provided in writing, or electronically in digital format. In the second cause of action, Department staff alleged that respondent violated ECL 33-0905(5)(a) by failing to provide the required notification prior to applying pesticides at various locations from September 23, 2016 to September 30, 2016.

In the third cause of action, staff alleged that respondent violated the requirements outlined in ECL 33-1205(1) and 6 NYCRR 325.25(a) by failing to keep true and accurate records

¹ Based on staff's motion papers, it is not known whether respondent filed a timely renewal of its business registration and, if so, whether the Department renewed the business registration. The commencement of the captioned proceeding predates the period when John Welch Enterprise, Inc. was required to file a renewal.

² With respect to staff's motion, the period when the violations allegedly occurred is from September 23, 2016 to September 30, 2016 (*see* ¶¶ 28, 29, and 31 of Tinsley Affirmation).

concerning the kind and quantity of each pesticide used, the dosage rates, the methods of application, the target organisms, as well as the use, date, and location of the application for each pesticide used. According to the complaint, these violations allegedly occurred from September 23, 2016 to September 30, 2016.

According to the fourth cause of action, respondent allegedly violated the requirements outlined in ECL 33-1001(1) and 33-1001(2), as well as 6 NYCRR 325.40(a) because respondent's commercial lawn contracts did not include all the items outlined in the statutory and regulatory provisions.

For relief, Department staff requested an order from the Commissioner that would assess a total civil penalty of \$19,500. Department staff also requested that the Commissioner's order direct respondent to provide the following. First, respondent should provide copies of all records with all commercial pesticide application service entries for the 30 days following the effective date of the order, consistent with the requirements outlined in ECL article 33 and 6 NYCRR part 325. Second, respondent should provide copies of all commercial lawn contracts entered into within the last 40 days from the effective date of the order. Finally, respondent should provide copies of all emails or mailings that it sent prior to the application of a pesticide including a copy of the information presented on the label of the pesticide for the 30 days subsequent to the effective date of the order.

In addition to a notice of hearing and complaint, the regulations at 6 NYCRR 622.12(a) provide that Department staff may also serve a motion for order without hearing on the complaint together with supporting affidavits that detail all the material facts and other documentary evidence. In the February 13, 2018 motion, staff seeks summary judgment on all the violations alleged in the complaint (*compare* ¶¶ 14, 19, 24, and 31 of the complaint *with* ¶¶ 34, 41, 48, and 58 of Tinsley Affirmation).

In a letter to the parties dated September 10, 2018, I advised Department staff that the form of the affidavits provided with the motion was not acceptable. The letter provided staff with the opportunity to correct the affidavits and resubmit them. With a cover letter dated September 25, 2018, Department staff provided me with revised affidavits. In support of the motion for order without hearing, staff's proof consists of an affidavit by Justin Schoff, sworn to September 17, 2018 (Schoff Affidavit), with attached exhibits (OHMS Exhs. 5-11) to support the alleged violations (*see* ¶¶ 17, 35, 42, 49, and 59 of Tinsley Affirmation). In addition, staff offered an affidavit by Christopher Wainwright, sworn to September 20, 2018 (Wainwright Affidavit), who provided a civil penalty calculation and justification for the relief requested in the motion (*see* ¶ 62 of Tinsley Affirmation).

II. Respondent's Answer to the October 11, 2017 Complaint

Mr. Welch, as President of John Welch Enterprise, Inc., filed a letter dated October 20, 2017 answering the October 11, 2017 complaint. Department staff included a copy of

respondent's October 20, 2017 answer with staff's February 13, 2018 motion for order without hearing.³

With respect to the first cause of action, Messrs. McEvoy and Welch alleged that they were initially certified, but admitted that Mr. Welch did not have all required continuing education credits, and that Mr. McEvoy did not realize that his certification had expired. Had they been aware of any lapses in their respective certification requirements, Messrs. McEvoy and Welch asserted that they would not have applied pesticides after September 21, 2017 until their respective certifications were up to date.

With respect to the second cause of action, Messrs. Welch and McEvoy admitted that they were not aware of the details of the notification requirements that must be provided prior to the application of pesticides. Nevertheless, according to the answer, Messrs. Welch and McEvoy alleged that they always flag the properties prior to applying any pesticides.

Concerning the third cause of action, Messrs. Welch and McEvoy asserted that they track and report every application throughout the year. Mr. Welch asserted that the Department has accepted respondent's annual report required by the pesticide reporting law (PRL). Because the Department has accepted respondent's annual report, respondent denied that it was out of compliance with the record keeping requirements outlined in ECL 33-1205(1) and 6 NYCRR 325.25(a).

Messrs. Welch and McEvoy admitted that respondent's contracts are "in bad shape" with respect to the fourth cause of action. Respondent denied, however, that it is deliberately trying to avoid any compliance requirements.

According to respondent's October 20, 2017 letter, Messrs. Welch and McEvoy welcomed Mr. Schoff when he came to inspect respondent's offices on December 13, 2016 with the expectation that the inspection would improve business practices and compliance with the applicable regulatory requirements. Respondent alleged that its employees use great care when applying pesticides.

Respondent objected to the requested civil penalty of \$19,500. In addition to paying taxes to New York State, respondent asserted that it pays annual registration fees, as well as fees associated with continuing education and the applicators' certification requirements to operate the business. According to respondent, the business fees paid to New York State total \$1,300. Respondent argued that the alleged violations are clerical in nature, and that the requested civil penalty would adversely impact his business.

In the October 20, 2017 answer, respondent identified a competitor, and asserted that this business was "100% illegal." According to respondent, Department staff issued this competitor

³ For the following reasons, staff argued that respondent's October 20, 2017 answer does not comply with the requirements outlined in 6 NYCRR 622.4. Respondent did not expressly admit or deny the allegations asserted in the complaint, or state whether respondent had insufficient information upon which to form an opinion. In addition, respondent did not assert any affirmative defenses. (See ¶¶ 13, 15, and 16 of Tinsley Affirmation.)

a “stern warning,” but did not commence any enforcement action such as the captioned proceeding.

Based on the foregoing, respondent argued that the Commissioner should not assess any civil penalty. In addition, the Commissioner should provide a period during which respondent would come into compliance with all applicable requirements.

Although respondent answered the October 11, 2017 complaint, respondent did not respond to staff’s February 13, 2018 motion for order without hearing.

Findings of Fact

The following findings of fact are established, as a matter of law, for the purposes of this proceeding.

1. Staff served the February 13, 2018 motion for order without hearing upon John Welch Enterprise, Inc. (respondent) by certified mail, return receipt requested. On February 15, 2018, the US Postal Service delivered a copy of staff’s motion papers to respondent’s offices located at 1723 State Route 444 in Victor (Ontario County), New York 14564. (See OHMS Exhs. 14, 15, 16, and 17.)
2. John Welch Enterprise, Inc. is an active domestic business corporation registered with the New York State Department of State, Division of Corporations. Respondent operates a lawn service business, and is registered with the Department as a pesticide business. Respondent’s pesticide registration number is 15624. As of the date of staff’s motion, respondent’s registration was effective until August 31, 2018. (See ¶¶ 4 and 5 of Schoff Affidavit; OHMS Exhs. 5 and 6.)
3. Since April 2013, Justin Schoff has worked as a Pesticide Control Specialist I in the Department’s Region 8 office (Avon, New York) (see ¶ 1 of Schoff Affidavit).
4. On December 13, 2016, Mr. Schoff inspected the offices of John Welch Enterprise, Inc. (see ¶ 9 of Schoff Affidavit).
5. John Welch is the president of John Welch Enterprise, Inc. Effective until September 22, 2016, Mr. Welch was a certified pesticide applicator, and his certification number is C8878086. In order to keep his certification current, Mr. Welch was required to renew his certification with the Department by September 21, 2016, but he did not. (See ¶¶ 14 and 15 of Schoff Affidavit; OHMS Exhs. 5 and 7.) Therefore, as of the date of staff’s motion, Mr. Welch has not been a certified pesticide applicator since September 22, 2016.

6. Richard McEvoy is an employee of John Welch Enterprise, Inc. Effective until May 22, 2016, Mr. McEvoy was a certified pesticide applicator, and his certification number is C8873363. In order to keep his certification current, Mr. McEvoy was required to renew his certification with the Department by May 21, 2016. However, Mr. McEvoy did not renew his certification in a timely manner. Rather, he renewed his certification on December 27, 2016. (See ¶¶ 14 and 16 of Schoff Affidavit; OHMS Exhs. 8 and 9.) Consequently, from May 22, 2016 until December 27, 2016, Mr. McEvoy was not a certified pesticide applicator.
7. During the December 13, 2016 inspection, Mr. Schoff reviewed respondent's commercial pesticide application records. Mr. Schoff determined that from September 23, 2016 to September 30, 2016, respondent conducted 23 commercial pesticide applications at various locations. However, during this period, neither Mr. Welch nor Mr. McEvoy held a valid pesticide applicator certification from the Department. (See ¶¶ 17 and 18 of Schoff Affidavit; OHMS Exh. 10.) Other than Messrs. Welch and McEvoy, nothing in the record shows that John Welch Enterprise, Inc. employs any other certified pesticide applicators.
8. On 23 occasions between September 23, 2016 to September 30, 2016 neither Mr. Welch nor Mr. McEvoy provided the notice required by ECL 33-0905(5)(a) to occupants prior to applying pesticides (see ¶ 21 of Schoff Affidavit).
9. OHMS Exhibit 10 is a copy of a spreadsheet provided to Mr. Schoff by respondent's representative during the December 13, 2016 inspection. The spreadsheet is a record of the pesticides that Messrs. Welch and McEvoy applied from September 23, 2016 to September 30, 2016.
10. Subsequent to applying pesticides on 23 occasions between September 23, 2016 and September 30, 2016, respondent did not log the following information as part of its record keeping practice. Respondent did not note the EPA registration number, the product name, the method used to apply the pesticide, as well as the target organisms. (See ¶ 25 of Schoff Affidavit; OHMS Exh. 10.)
11. OHMS Exhibit 11 is a set of three contracts, dated May 2, 2016, May 4, 2016, and May 10, 2016, that respondent provided to Mr. Schoff during the December 13, 2016 inspection. Among other things, these contracts did not include the date or dates of the applications, the number of applications, and the total cost of the services. The contracts did not include information concerning the pesticides that were going to be applied, such as either the brand name or generic name of the active ingredients, as well as any warnings related to the protection of human and animal health, and the environment. Finally, the contracts were not signed by both a representative of the pesticide business and the property owner. (See ¶¶ 30 and 31 of Schoff Affidavit; OHMS Exh. 11.)

Discussion

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the Civil Practice Law and Rules (CPLR) in favor of any party. “Summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law” (*Matter of Frank Perrotta*, Partial Summary Order of the Commissioner, January 10, 1996, at 1, *adopting* ALJ Summary Report).

CPLR 3212(b) provides that a motion for summary judgment must be granted, “if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party.” After the moving party has presented a prima facie case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue (*see Matter of Locaparra*, Commissioner’s Decision and Order, June 16, 2003, at 3-4).

As noted above, respondent did not respond to Department staff’s motion. Therefore, whether respondent received the motion is a concern, particularly because respondent answered the October 11, 2017 complaint.

In addition to serving a notice of hearing and complaint, Department staff may also serve a motion for order without hearing. The method of service of the motion must be in the same manner as service of a notice of hearing and complaint. (*See* 6 NYCRR 622.12[a].) Staff must serve a notice of hearing and complaint either by personal service consistent with the CPLR, or by certified mail (*see* 6 NYCRR 622.3[a][3]). Here, staff chose to serve the February 13, 2018 motion for order without hearing upon respondent by certified mail.

To demonstrate proper service of the motion upon respondent, staff sent Chief ALJ McClymonds a cover letter dated February 23, 2018 with an affidavit of service by Tammy Schubmehl, sworn to February 23, 2018 (*see* OHMS Exh. 14). According to the affidavit of service, Ms. Schubmehl placed a copy of the motion papers in an envelope, and mailed that envelope with its contents to respondent via certified mail, return receipt requested. In addition, the February 23, 2018 affidavit of service references the following three exhibits.

The first exhibit is a copy of staff’s February 13, 2018 cover letter to Chief ALJ McClymonds, which references staff’s motion for order without hearing and supporting papers. The cover letter states that staff sent a copy of the motion for order without hearing and supporting papers to John Welch Enterprise, Inc. by certified mail, return receipt requested. (*See* OHMS Exh. 15.)

The second exhibit is a signed copy of the certified mail receipt attached to the envelope delivered by the US Postal Service to respondent (*see* OHMS Exh 16). As described in the

affidavit of service (OHMS Exh. 14), Ms. Schubmehl enclosed a copy of the motion papers in the envelope sent to respondent.

Third, OHMS Exhibit 17 is a copy of the tracking sheet provide by the US Postal Service for the motion papers sent to respondent. The tracking sheet demonstrates that the US Postal Service delivered a copy of staff's motion papers to respondent's offices located at 1723 State Route 444 in Victor, New York 14564, on February 15, 2018.

Based on the foregoing, I conclude that Department staff served respondent with a copy of the February 13, 2018 motion for order without hearing and supporting papers by certified mail in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3), and 622.3(b), which references 6 NYCRR 622.12 (Motion for Order without Hearing).

In the absence of a response to staff's February 13, 2018 motion for order without hearing, respondent is in default, and has not identified any material facts that would require a hearing (*see* 6 NYCRR 622.12[b]). Moreover, as discussed further below, staff has supported its motion with affidavits from pesticide control specialists who described the violations of the pesticides law (ECL article 33) and implementing regulations (6 NYCRR part 325). Department staff also provided a civil penalty calculation and justification for it, as well as the other relief requested in the motion. Based upon my review of the affidavits and the attached exhibits, I conclude that Department staff's proof presents a prima facie showing pursuant to 6 NYCRR 622.12(a). Accordingly, I recommend that the Commissioner grant staff's February 13, 2018 motion for order without hearing.

I. Liability

Department staff offered an affidavit by Justin Schoff, sworn to September 17, 2018, and seven exhibits (OHMS Exhs. 5-11) in support of the February 13, 2018 motion. Since April 2013, Mr. Schoff has worked as a Pesticide Control Specialist I in the Department's Region 8 office (Avon, New York) (*see* ¶ 1 of Schoff Affidavit).

On December 13, 2016, Mr. Schoff inspected the office of John Welch Enterprise, Inc. located at 1723 State Route 444 in Victor (Ontario County), New York (*see* ¶ 9 of Schoff Affidavit). John Welch Enterprise, Inc. is an active domestic business corporation registered with the New York State Department of State, Division of Corporations. Respondent operates a lawn service business, and is registered with the Department as a pesticide business. respondent's pesticide registration number is 15624. As of the date of staff's motion, respondent's registration was effective until August 31, 2018. (*See* ¶¶ 4 and 5 of Schoff affidavit; OHMS Exhs. 5 and 6.)

A. First Cause of Action – Certified Applicators

Pursuant to the definitions provided at ECL 33-0101(33) and 6 NYCRR 325.1(au), the respondent business as well as its employees, John Welch and Richard McEvoy, are persons.

The statute and regulations require that any person who engages in the commercial or private application of pesticides or in the sale of restricted use pesticides must be certified (*see* ECL 33-0905[1] and 6 NYCRR 325.7[a]). According to the statute and implementing regulations, it is unlawful for any person to apply pesticides without a pesticide applicator certificate registration, unless that person is working under the direct supervision of a certified applicator (*see* ECL 33-1301[8] and 6 NYCRR 325.23[h]).

John Welch is an employee of John Welch Enterprise, Inc. Effective until September 22, 2016, Mr. Welch was a certified pesticide applicator, and his certification number is C8878086. In order to keep his certification current, Mr. Welch was required to renew his certification with the Department by September 21, 2016, but he did not. (*See* ¶¶ 14 and 15 of Schoff Affidavit; OHMS Exh. 7.) Therefore, Mr. Welch has not been a certified pesticide applicator since September 22, 2016.

Richard McEvoy is an employee of John Welch Enterprise, Inc. Effective until May 22, 2016, Mr. McEvoy was a certified pesticide applicator, and his certification number is C8873363. In order to keep his certification current, Mr. McEvoy was required to renew his certification with the Department by May 21, 2016. However, Mr. McEvoy did not renew his certification in a timely manner. Rather, he did not renew his certification until December 27, 2016. (*See* ¶¶ 14 and 16 of Schoff Affidavit; OHMS Exhs. 8 and 9.) Consequently, from May 22, 2016 until December 27, 2016, Mr. McEvoy was not a certified pesticide applicator.

During the December 13, 2016 inspection, Mr. Schoff reviewed respondent's commercial pesticide application records. Mr. Schoff determined that from September 23, 2016 to September 30, 2016, respondent conducted 23 commercial pesticide applications at various locations. However, during this period, neither Mr. Welch nor Mr. McEvoy held a valid pesticide applicator certification from the Department. (*See* ¶¶ 17 and 18 Schoff Affidavit; OHMS Exh. 10.) Other than Messrs. Welch and McEvoy, nothing in the record shows that John Welch Enterprise, Inc. employs any other certified pesticide applicators. Accordingly, on 23 separate occasions from September 23, 2016 to September 30, 2016, respondent violated the legal requirements outlined in ECL 33-1301(8) and 6 NYCRR 325.23(h) that prohibit any person from applying pesticides without either possessing a valid pesticide applicator certificate, or working under the direct supervision of a certified applicator.

B. Second Cause of Action – Notice

Prior to the application of pesticides within or on the premises of any dwelling, ECL 33-0905(5)(a) requires every applicator to provide the occupants of any dwelling with a copy of the information on the label of the pesticide. The label information, among other things, includes any warnings. The required notice may be provided in writing, or electronically in digital format. In addition, the certified pesticide applicator must have a copy of the label information with him or her during the application process.

During the December 13, 2016 inspection, Mr. Schoff inquired of Mr. Welch whether respondent provided the notice required by ECL 33-0905(5)(a) prior to the application of

pesticides. Mr. Schoff reported in his affidavit, that Mr. Welch did not provide the required notice (*see* ¶ 21 of Schoff Affidavit). Referring to respondent's October 20, 2017 answer, Department staff also noted that respondent admitted to its failure to provide the notice required by ECL 33-0905(5)(a) (*see* ¶ 39 of Tinsley Affirmation). Based on the foregoing, I conclude that respondent violated ECL 33-0905(5)(a), on 23 separate occasions, by failing to provide the required notice prior to applying pesticides at various locations from September 23, 2016 to September 30, 2016.

C. Third Cause of Action – Record Keeping

ECL 33-1205(1) and 6 NYCRR 325.25(a) require businesses to keep true and accurate records about the pesticides they have applied. The required records include, among other things, the registration number assigned by the US Environmental Protection Agency (EPA), the product name, the amount applied and the method used to apply the pesticide, the date on which the pesticide was applied, the target organisms, as well as the location of the application including the ZIP code.

OHMS Exhibit 10 is a copy of a spreadsheet provided to Mr. Schoff by respondent's representative during the December 13, 2016 inspection. The spreadsheet is a record from September 23, 2016 to September 30, 2016 of the pesticides that respondent applied. Mr. Schoff observed that respondent did not record all the information required by ECL 33-1205(1) and 6 NYCRR 325.25(a) onto this spreadsheet. The following required information was missing. Respondent did not provide the EPA registration number, the product name, the method used to apply the pesticide, as well as the target organisms. (*See* ¶ 25 of Schoff Affidavit; OHMS Exh. 10.)

Based on the foregoing, I conclude that respondent violated the requirements outlined in ECL 33-1205(1) and 6 NYCRR 325.25(a), on 23 separate occasions at various locations from September 23, 2016 to September 30, 2016, by failing to keep true and accurate records concerning the EPA registration number, the product name, the method used to apply the pesticide, as well as the target organism.

D. Fourth Cause of Action - Contracts

The statute and regulations prescribe many of the terms and conditions of the contracts entered into between the applicator and the property owner concerning the commercial application of lawn pesticides. ECL 33-1001(1) requires all contracts to be in writing. In addition, the terms must specify the date or dates of the application, the number of applications and the total cost of the services. ECL 33-1001(2) requires the applicator to provide the property owner with a list of the substances that will be applied including either the brand name or generic name of the active ingredients, as well as any warnings related to the protection of human and animal health, and the environment.

Section 325.40(a) of 6 NYCRR reiterates most of the statutory requirements mentioned above, and requires the following additional information. The contract must include the name, address, telephone number, and registration number of the pesticide business, as well as the certification number of the applicator. In order to be valid, the contract must be signed by a representative of the pesticide business, such as the certified applicator, as well as the property owner.

OHMS Exhibit 11 is a set of three contracts that respondent provided to Mr. Schoff during the December 13, 2016 inspection. The contracts are dated May 2, 2016, May 4, 2016, and May 10, 2016. Mr. Schoff observed that respondent did not include all the information required by ECL 33-1001(1) and 33-1001(2), and by 6 NYCRR 325.40(a) in these contracts. Among other things, the contracts did not include the date or dates of the application, the number of applications, and the total cost of the services. The contracts did not include information concerning the pesticides that were going to be applied, such as either the brand name or generic name of the active ingredients, as well as any warnings related to the protection of human and animal health, and the environment. Finally, the contracts were not signed by both a representative of the pesticide business, such as Mr. Welch or Mr. McEvoy, and the property owner. (See ¶¶ 30 and 31 of Schoff Affidavit; OHMS Exh. 11.) Referring to respondent's October 20, 2017 answer, Department staff also noted that respondent admitted its contracts are "in bad shape" (see ¶ 57 of Tinsley Affirmation).

Accordingly, I conclude that respondent violated the requirements outlined in ECL 33-1001(1) and 33-1001(2), as well as 6 NYCRR 325.40(a) because the three commercial lawn contracts collected during the December 13, 2016 inspection did not include all the required terms and conditions.

II. Relief

For relief, Department staff requested an order from the Commissioner that would assess a total civil penalty of \$19,500. Staff also requested that the order direct respondent to provide copies of the following records. First, respondent should provide copies of all records concerning all commercial pesticide application service entries for the 30 days following the effective date of the order, consistent with all applicable statutory and regulatory requirements. Second, respondent should provide copies of all commercial lawn contracts executed within the last 40 days from the effective date of the order. Finally, respondent should provide copies of all emails or mailings that it sent prior to the application of a pesticide including a copy of the information presented on the label of the pesticide for the 30 days following the effective date of the order. (See ¶¶ 75 and 77 of Tinsley Affirmation.)

A. Department Staff's Civil Penalty Calculation

ECL 71-2907(1) authorizes the Commissioner to assess administrative sanctions for violations of any provision of ECL article 33, its implementing regulations, and any order issued

by the Commissioner. Pursuant to ECL 71-2907(1), the maximum civil penalty for the first violation is \$5,000, and the maximum for any subsequent offense is \$10,000.

Department staff offered an affidavit by Christopher Wainwright, sworn to September 20, 2018, and two exhibits (OHMS Exhs. 12-13) to support the civil penalty requested in the February 13, 2018 motion for order without hearing. Since July 2014, Mr. Wainwright has worked as a Pesticide Control Specialist II in the Department's Region 8 office (Avon, New York) (*see* ¶ 1 of Wainwright Affidavit). OHMS Exhibit 12 is a copy of the Department's *Civil Penalty Policy* (DEE-1), dated June 20, 1990. OHMS Exhibit 13 is a copy of the Department's *Pesticide Enforcement Policy* (DEE-12), dated March 26, 1993. (*See* ¶ 3 of Wainwright Affidavit).

Mr. Wainwright determined that the potential maximum civil penalty would be \$625,000 based on the following (*see* OHMS Exh. 12 at § IV.A.1). According to Mr. Wainwright, the motion proved 63 violations. The maximum civil penalty for the first violation would be \$5,000. The total for the remaining 62 violations would be \$62,000 (62 x \$10,000 per violation = \$620,000). Therefore, the total maximum civil penalty would be \$625,000. (*See* ¶ 5 of Wainwright Affidavit.)

Mr. Wainwright said that he relied on the factors identified in DEE-1 (OHMS Exh. 12) to adjust the requested civil penalty. Mr. Wainwright determined that the economic benefit associated with these violations would be de minimus. Accordingly, Mr. Wainwright did not recommend any adjustment to the requested civil penalty based on this factor. (*See* ¶¶ 6 and 7 of Wainwright Affidavit; OHMS Exh. 12 at § IV.C.)

According to Mr. Wainwright, the established violations are considered high priority violations pursuant to the guidance outlined in DEE-12 (OHMS Exh. 13). Because significant information is missing from respondent's commercial pesticide application records, Mr. Wainwright concluded that the Department cannot determine if respondent applied the pesticides properly. Also, given the lack of proper notification prior to the application of the pesticides, Mr. Wainwright reasonably concluded that the property owners did not have the opportunity to assess the potential impacts associated with the applications. (*See* ¶ 10 of Wainwright Affidavit; OHMS Exh. 13 at § IV [Enforcement Priorities]). After assessing the actual or potential environmental harm associated with these violations, Mr. Wainwright determined not to adjust the recommended civil penalty (*see* ¶ 11 of Wainwright Affidavit).

Nevertheless, I conclude that the potential environmental harm associated with these violations is significant because DEE-12 characterizes the violations as high priority. Mr. Wainwright correctly observed that the Department cannot determine that respondent applied the pesticides properly given the information missing from respondent's records. In addition, property owners were not given proper notice. Consequently, I conclude that these circumstances justify the requested civil penalty.

To determine the gravity component of the violations, Mr. Wainwright considered the factors outlined in § IV.E of DEE-1 (OHMS Exh. 12). With respect to culpability, Mr. Wainwright contended that Messrs. Welch and McEvoy knew, or should have known, the

applicable requirements considered in this proceeding based on their certification training. According to Mr. Wainwright, respondent demonstrated a level of cooperation to resolve the violations. First, Mr. McEvoy renewed his certification shortly after the December 2016 inspection. Second, Mr. Welch provided additional documentation to the Department in an effort to cure the deficiencies in the contracts. Mr. Wainwright noted that prior to the December 13, 2016 inspection, respondent had no known history of non-compliance. Finally, Mr. Wainwright is not aware that respondent could not pay the requested civil penalty. Based on these circumstances, Mr. Wainwright did not recommend any further adjustments to the requested civil penalty. (See ¶¶ 12 and 13 of Wainwright Affidavit; OHMS Exh. 12 [DEE-1 at §§ IV.D and IV.E.1 through 4].)

With reference to Appendix I of DEE-12 (OHMS Exh. 13), Mr. Wainwright calculated the recommended civil penalty of \$19,500 in the following manner. With respect to the first cause of action concerning pesticide applications by uncertified applicators, he recommended a civil penalty of \$1,000. Collectively, for the notification violations related to the second cause of action, Mr. Wainwright recommended a civil penalty of \$1,000. According to Mr. Wainwright, the number of violations concerning the third cause of action, which are associated with record keeping requirements, totals 58. For each of these, Mr. Wainwright recommended a civil penalty of \$250 per violation for a total of \$14,500. Finally, during the December 13, 2016 inspection, Mr. Schoff collected copies of three contracts, which did not comply with the statutory and regulatory requirements. Mr. Wainwright recommended a civil penalty of \$1,000 for each of the three violations for a total of \$3,000. (See ¶ 14 of Wainwright Affidavit; OHMS Exh. [13 DEE - 12, Appendix I at §§ II, III, and IV].)

B. Alternative Apportionment

As noted above, Department staff based the civil penalty calculation on a total of 63 violations. With respect to the first cause of action, staff considered the lack of certification to be one violation. The second cause of action relates to the notice requirements. For purposes of the civil penalty calculation, staff grouped the notice violations together as a single violation. The fourth cause of action concerns deficient contracts. Staff collected three contracts at the December 13, 2016 inspection, and the recommended civil penalty is based on these three defective contracts. The remainder from the total number of 63 leaves 58 violations. These violations relate to record keeping requirements, which were alleged in the third cause of action. (See ¶¶ 5 and 14 of Wainwright Affidavit.) However, it is not clear how Mr. Wainwright determined that 58 record keeping violations occurred.

Rather, as outlined in the Findings of Fact, a total of 72 violations occurred. With respect to the first cause of action, Department staff demonstrated that respondent's employees, Messrs. Welch and McEvoy, conducted 23 separate pesticide applications at various locations between September 22, 2016 and September 30, 2016. During this period, neither Mr. Welch nor Mr. McEvoy held valid, effective certifications; their respective certifications had either expired or lapsed. Section IV of Appendix I to DEE-12 recommends a minimum civil penalty of \$1,000 per year or portion thereof, per person for violations concerning applicator certifications. Because two uncertified applicators were involved in these violations, the guidance recommends

a minimum civil penalty of \$1,000 per person for a total of \$2,000. Nevertheless, I adopt staff's request of \$1,000 as the civil penalty for the violations alleged in the first cause of action.

As alleged in the second cause of action, Department staff proved that respondent did not provide the required notice to the property owners prior to the 23 separate pesticide applications at various locations that occurred between September 22, 2016 and September 30, 2016. Section IV of Appendix I to DEE-12 recommends a minimum civil penalty of \$1,000 for each notification violation. Following the guidance with respect to these violations, however, would result in an assessment of \$23,000, which would exceed the total recommended civil penalty of \$19,500. Therefore, I recommend that the Commissioner assess a civil penalty of \$424 per each of the 23 violations for a total civil penalty of \$9,752 with respect to the notification requirements.⁴

After Messrs. Welch and McEvoy completed 23 separate pesticide applications at various locations between September 22, 2016 and September 30, 2016, Department staff showed, in the third cause of action, that respondent did not keep and maintain complete records about these applications in a manner consistent with the statutory and regulatory requirements. For record keeping violations, § III of Appendix I to DEE-12 recommends a minimum civil penalty of \$250 per violation. I adopt staff's recommendation of \$250 per violation with respect to the record keeping violations. Therefore, the total civil penalty for the record keeping violations associated with the 23 pesticide applications identified on OHMS Exhibit 10 would be \$5,750 (*i.e.*, 23 violations x \$250 per violation = \$5,750).

Finally, with respect to the fourth cause of action, Department staff obtained copies of three contracts during the December 13, 2016 inspection. Department staff proved that the terms and conditions of each of these three contracts did not comply with the prescribed statutory and regulatory requirements. For contract violations, § IV of Appendix I to DEE-12 recommends a minimum civil penalty of \$1,000 per violation. I adopt staff's recommendation with respect to these violations. Therefore, the total civil penalty for the violations related to the three deficient contracts would be \$3,000.

C. Respondent's Objections

In the October 20, 2017 answer, respondent objected to the requested civil penalty. Respondent contended that it would be burdensome to pay the recommended civil penalty given the taxes already paid to New York State, together with the costs of compliance related to obtaining and renewing the applicators' certifications, among other requirements. According to respondent, these additional compliance costs total \$1,300 per year.

Respondent, however, did not respond to staff's February 13, 2018 motion for order without hearing. Consequently, respondent did not substantiate the allegations asserted in its answer or otherwise refute the civil penalty calculation offered by Department staff in the

⁴ If the Commissioner adopts the recommendations concerning the alternative apportionment, this portion of the civil penalty (\$9,752) must be reduced by \$2.00 to \$9,750. Otherwise, the total assessed civil penalty (*i.e.*, \$19,502) would exceed the amount originally sought by staff in the October 11, 2017 complaint (*i.e.*, \$19,500).

motion. The Commissioner should not rely on these unsubstantiated allegations to adjust the civil penalty.

D. Additional Relief

In addition to a civil penalty, Department staff also requested various records from respondent related to: (1) the notification sent to occupants prior to the application of pesticides; (2) pesticide application records; and (3) copies of commercial lawn contracts. As discussed further below, applicators are required to prepare various records, maintain them and, upon request, provide copies of the records to the Department. Staff has requested these documents to ascertain respondent's compliance with the applicable notice, recordkeeping, and contractual requirements since staff's December 13, 2016 inspection.

First, staff asked the Commissioner to order respondent to provide copies of all emails or mailings that it sent prior to the application of a pesticide including a copy of the information presented on the label of the pesticide. The authority to request these records is found at ECL 33-0905. As noted above, notification requirements are outlined at ECL 33-0905(5)(a). Pursuant to ECL 33-0905(4), pesticide applicators are required to maintain records about the notifications that they provided, and to furnish those records to the Department upon request. With this request, Department staff seeks copies of the notification records made prior to the application of pesticides for a period of 30 days subsequent to the effective date of the Commissioner's order.

Second, staff also requested the Commissioner to order respondent to provide copies of all records with all commercial pesticide application service entries for the 30 days following the effective date of the order. The authority to request these records is found at ECL 33-1205 and 6 NYCRR 325.25. As noted above, the information that applicators must keep with respect to each pesticide application is identified in the statute at ECL 33-1205(1) and in the regulations at 6 NYCRR 325.25(a). Pursuant to the statute and regulations, applicators are required to keep and maintain use records for each pesticide application for up to three years, and to furnish those records to the Department upon request (*see* ECL 33-1205[1] and 6 NYCRR 325.25[a]). With this request, Department staff seeks copies of use records related to the application of pesticides for a period of 30 days following the effective date of the Commissioner's order.

Finally, staff asked the Commissioner to order respondent to provide copies of all commercial lawn contracts entered into within the last 40 days from the effective date of the order. Commercial and residential lawn applications require written contracts. In addition, the terms and conditions of the contracts are prescribed by statute and regulation (*see* ECL 33-1001[1] and 6 NYCRR 324.40[a]). The authority to request these records retrospectively is found at 6 NYCRR 325.40(e). Section 325.40(e) of 6 NYCRR requires applicators to keep and maintain copies of their contracts for up to three years, and to furnish copies of those contracts to the Department upon request. With this request, Department staff seeks copies of these contracts for a period of 40 days following the effective date of the Commissioner's order.

Conclusions

1. Department staff served respondent with a copy of the February 13, 2018 motion for order without hearing and supporting papers by certified mail, return receipt requested, in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3), and 622.3(b).
2. On 23 separate occasions from September 23, 2016 to September 30, 2016, respondent violated the requirements outlined in ECL 33-1301(8) and 6 NYCRR 325.23(h) that prohibit any person from applying pesticides without either possessing a valid pesticide applicator certificate, or working under the direct supervision of a certified applicator.
3. On 23 separate occasions from September 23, 2016 to September 30, 2016, respondent violated ECL 33-0905(5)(a) by failing to provide the required notice prior to applying pesticides at various locations.
4. With respect to the pesticides applied at various locations on 23 separate occasions from September 23, 2016 to September 30, 2016, respondent violated the requirements outlined in ECL 33-1205(1) and 6 NYCRR 325.25(a) by failing to keep true and accurate records concerning the EPA registration number, the product name, the method used to apply the pesticide, as well as the target organism.
5. Respondent violated the requirements outlined in ECL 33-1001(1) and 33-1001(2), as well as 6 NYCRR 325.40(a) because the three commercial lawn contracts dated May 2, 2016, May 4, 2016, and May 10, 2016, do not include all the required terms and conditions.

Recommendations

1. The Commissioner should grant Department staff's unopposed motion for order without hearing dated February 13, 2018.
2. Based on the detailed discussion provided above, the Commissioner should conclude that respondent violated various provisions of ECL article 33 and its implementing regulations at 6 NYCRR part 325 concerning the use and application of pesticides.
3. For these violations, the Commissioner should assess a total civil penalty of \$19,500.

4. In addition to assessing a civil penalty, the Commissioner should require respondent to provide the following documents within 45 days from the effective date of the Order:
 - a. Copies of pesticide application records with all commercial pesticide application service entries for the 30 days following the effective date of the order, consistent with the requirements outlined in ECL article 33 and 6 NYCRR part 325;
 - b. Copies of all commercial lawn contracts entered into within the last 40 days containing all information required by ECL article 33 and 6 NYCRR part 325; and
 - c. Copies of all emails or mailings that respondent sent prior to the application of a pesticide within or on the premises of a dwelling to the occupants, including a copy of the information presented on the label of the pesticide to be applied, for the 30 days following the effective date of the order.

_____/s/_____
Daniel P. O'Connell
Administrative Law Judge

Dated: October 2, 2018
Albany, New York

Attachment – Papers Filed and Exhibit Chart

Papers Filed and Exhibit Chart
Matter of John Welch Enterprises, Inc.
DEC Case No. R8-2017-0719-81
Motion for Order Without Hearing

OHMS Exhibit Number	Description	Staff's ID Number	Staff's ID Number
	Department staff's cover letter dated February 13, 2018 for the Motion for Order without Hearing		
	Notice of Motion for Order without Hearing dated February 13, 2018		
	Motion for Order without Hearing dated February 13, 2018		
	Affirmation of Dusty Renee Tinsley, Esq., in support of the Motion for Order without Hearing dated February 13, 2018		
Duplicate of OHMS Exhibit No. 2	Department staff's cover letter dated October 11, 2017 with enclosed Notice of Hearing and Complaint dated October 11, 2017	Exhibit 1 to Affirmation	
Duplicate of OHMS Exh. Nos. 3 and 4	US Postal Service Certified Mail Receipt for Article No. 7017 1450 0000 2470 0105, postmarked October 11, 2017, and USPS Tracking Results. Delivered on October 13, 2017	Exhibit 2 to Affirmation	
1	Affidavit of Service of the October 11, 2017 Notice of Hearing and Complaint by Tammy Schubmehl, sworn to January 29, 2018.	Exhibit 3 to Affirmation	
2	Department staff's cover letter dated October 11, 2017		Exhibit 1 to Jan. 2018 Affidavit of Service
3	US Postal Service Certified Mail Receipt for Article No. 7017 1450 0000 2470 0105. Postmarked October 11, 2017		Exhibit 2 to Jan. 2018 Affidavit of Service

4	USPS Tracking Results for Article No. 7017 1450 0000 2470 0105. Delivered on October 13, 2017		Exhibit 3 to Jan. 2018 Affidavit of Service
	Answer, dated October 20, 2017, from John Welch, President of John Welch Enterprise Inc.	Exhibit 4 to Affirmation	
	Affidavit of Justin Schoff in support of Staff's Motion for Order without Hearing sworn to September 17, 2018	Exhibit 5 to Affirmation (see ¶ 17)	
5	New York State Department of State, Division of Corporations, Entity Information for John Welch Enterprise, Inc.		Exhibit 1 to the Schoff Affidavit
6	New York State Pesticide Administration Business Registration details for John Welch Enterprise, Inc. Registration No. 15624		Exhibit 2 to the Schoff Affidavit
7	New York State Pesticide Administration Certification of Commercial Pesticide Applicator for John Welch Certification No. C8878086 Lapsed on September 22, 2016		Exhibit 3 to the Schoff Affidavit
8	New York State Pesticide Administration Certification of Commercial Pesticide Applicator for Richard J. McEvoy Certification No. C8873363 Lapsed on May 22, 2016		Exhibit 4 to Schoff Affidavit
9	New York State Pesticide Administration Certification of Commercial Pesticide Applicator for Richard J. McEvoy Certification No. C8878086 Renewed on December 27, 2016		Exhibit 5 to Schoff Affidavit
10	Commercial Pesticide Application records for John Welch Enterprise, Inc. from September 23, 2016 to September 30, 2016		Exhibit 6 to Schoff Affidavit
11	Commercial Lawn Contracts signed May 2, 2016, May 4, 2016, and May 10, 2016		Exhibit 7 to Schoff Affidavit

	Affidavit of Christopher Wainwright in support of Staff's Motion for Order without Hearing, sworn to September 20, 2018	Exhibit 6 to Affirmation (see ¶ 62)	
12	Department's Civil Penalty Policy (DEE-1), dated June 20, 1990		Exhibit 1 to Wainwright Affidavit
13	Department's Pesticide Enforcement Policy (DEE-12), dated March 26, 1993		Exhibit 2 to Wainwright Affidavit
14	Department staff's cover letter dated February 23, 2018, and enclosed Affidavit of Service by Tammy Schubmehl, sworn to February 23, 2018.		
15	Department staff's cover letter dated February 13, 2018 for the Motion for Order without Hearing		Exhibit 1 to Feb. 2018 Affidavit
16	US Postal Service Certified Mail Receipt for Article No. 7016 2070 0001 0174 1416. Postmarked February 14, 2018		Exhibit 2 to Feb. 2018 Affidavit
17	USPS Tracking Results for Article No. 7016 2070 0001 0174 1416. Delivered on February 15, 2018		Exhibit 3 to Feb. 2018 Affidavit