

**NEW YORK STATE
DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

In the Matter of the Alleged Violations of Articles 33 and 71 of the New York State Environmental Law and Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York,

ORDER

DEC File Nos.
R2-20090522-317
& R2-20090713-434

- by -

CORONA HEIGHTS TRADING INC.,

Respondent.

This administrative enforcement proceeding concerns alleged violations of articles 33 and 71¹ of the Environmental Conservation Law (“ECL”) and order on consent DEC File Nos. R2-20090522-317 and R2-20090713-434 that respondent signed on May 10, 2010 (“consent order”). The consent order, which became effective on May 11, 2010, addressed respondent’s sale of unregistered pesticides. It imposed a civil penalty of thirteen thousand dollars (\$13,000) on respondent, of which seven thousand five hundred dollars (\$7,500) was payable and five thousand five hundred dollars (\$5,500) was suspended contingent upon respondent remaining in compliance with the terms of the consent order for a period of two (2) years from the effective date of the order (see consent order, § I, at 6).

Staff of the New York State Department of Environmental Conservation (“DEC” or “Department”) commenced this administrative enforcement proceeding against respondent by filing a motion for order without hearing in lieu of complaint dated April 9, 2012 with the Office of Hearings and Mediation Services, and serving respondent by certified mail return receipt requested, on April 10, 2012. Respondent received the papers on April 11, 2012. Accordingly, service of process was accomplished pursuant to section 622.3 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

In its motion, Department staff alleges that respondent failed to comply with the terms of the consent order. Department staff had sent a letter to respondent, dated August 10, 2011, notifying respondent that it was in violation of the terms of the consent order and that, with respect to the payable portion of the penalty, it had an outstanding balance of five thousand dollars (\$5,000). Department staff further stated that if payment of the outstanding balance of the payable portion was not made by September 12, 2011, the suspended penalty amount of five thousand five hundred dollars (\$5,500) would be “activated” (Affidavit of Louise Munster [“Munster Affidavit”], Exhibit [“Exh.”] C), for a total payable penalty of ten thousand five hundred dollars (\$10,500). Respondent did not pay the outstanding balance of the payable penalty.

¹Department staff alleges a violation of the consent order, which is a violation of ECL 71-2907(1). Therefore, the caption is being modified by including a reference to article 71 of the ECL.

In its motion for order without hearing, Department staff requests that the Commissioner:

- (1) hold respondent liable for violating ECL article 33, title 6 of NYCRR and the consent order;
- (2) direct respondent to pay the payable amount that is still outstanding under the consent order, which is five thousand dollars (\$5,000), and the suspended portion of the penalty under the consent order, which is five thousand five hundred dollars (\$5,500), for a total of ten thousand five hundred dollars (\$10,500); and
- (3) direct respondent to pay a further penalty in the amount of five thousand dollars (\$5,000) for violating the consent order.

Respondent failed to respond to Department staff's motion.

The matter was assigned to Administrative Law Judge ("ALJ") Helene G. Goldberger, who prepared the attached summary hearing report ("Hearing Report"). ALJ Goldberger recommends that respondent's failure to fully pay the payable portion of the penalty imposed by the consent order constitutes a violation of the consent order and that respondent be ordered to pay the amount still outstanding under the consent order and the suspended portion of the penalty under the consent order, for a total of ten thousand five hundred dollars (\$10,500) (Hearing Report, at 5). The ALJ does not recommend assessing a further penalty for the alleged violations of the consent order, on the ground that Department staff and respondent "agreed to a stipulated penalty in the event of a violation of the order [and] that is the sum that the Department is limited to when assessing a penalty for violation of the terms of the order" (*id.*).

Based on the record, I adopt, in part, the hearing report as my decision in this matter, subject to the following comments.

I concur with the ALJ that respondent's failure to pay five thousand dollars (\$5,000) of the seven thousand five hundred dollar (\$7,500) payable portion of the thirteen thousand dollar (\$13,000) civil penalty imposed by the consent order constituted a violation of the consent order. The failure to pay any portion of the non-suspended penalty is a violation of the terms of the consent order making the suspended portion of the penalty (five thousand five hundred dollars [\$5,500]) due and payable. As noted, the ALJ has determined that respondent should pay ten thousand five hundred dollars (\$10,500), which is the suspended portion of the penalty plus the outstanding amount of the non-suspended penalty under the consent order, and I agree.

In this proceeding, Department staff requests that an additional civil penalty in the amount of five thousand dollars (\$5,000) be assessed for respondent's failure to comply with the terms of the consent order, namely, failure to pay part of the penalty due and owed to the Department. Imposing a penalty for failure to comply with the terms of a consent order is appropriate and warranted (*see* ECL 71-2907[1] ["any person who violates any provision of article 33 of the chapter or any rule, regulation or order issued thereunder . . . shall be liable" for a civil penalty of up to five thousand dollars (\$5,000) for the first violation and up to ten thousand dollars (\$10,000) for each additional violation (emphasis added)]; *see also* Matter of Manjit Raju, Order of the Commissioner, December 30, 2010, at 5 ["imposing some penalty for

failing to comply with the payment terms of a consent order is appropriate and warranted]; Order on Consent Enforcement Policy, Aug. 28, 1990, at 2 [failure to comply with the provisions of a consent order “is punishable under the law”]).

The ALJ concluded, however, that, because a portion of the penalty under the consent order was suspended, Department staff is limited to the penalty amount under the consent order and no further penalty for noncompliance with the consent order may be imposed (see Hearing Report, at 4). As discussed below, the ALJ is incorrect.

The consent order in this matter represented a settlement of respondent’s civil liability for various pesticide violations, and respondent agreed to be bound by the provisions, terms and conditions of the consent order (see Consent Order, at 3, ¶ 16). Respondent signed a consent order that required it to pay a penalty. It failed to do so and has offered no explanation for its failure to satisfy that obligation. That failure to comply led to this enforcement proceeding and its attendant costs. Indeed, as noted, Department staff, by its letter of August 10, 2011, granted respondent a grace period in which to pay the amount of the non-suspended portion of the penalty that was due and owing, but respondent failed to make the required payment. Respondent offered no explanation as to why it failed to meet its obligations under the consent order, and has clearly disregarded its payment obligation under the consent order.

In executing a consent order, a respondent accepts obligations that it must fulfill (see Matter of Hudson Valley Industrial Park, Inc., Order of the Commissioner, Dec. 13, 1991, at 1; see also Matter of Manjit Raju, at 4-5; Civil Penalty Policy [DEE-1, dated June 20, 1990], at 5 [the economic benefit of delayed compliance and avoided costs are factors to include when assessing a civil penalty for failure to comply with the provisions of the ECL]). In this instance, respondent’s actions have been particularly derelict (see, e.g., Affirmation of Louis P. Oliva, Esq., in support of motion for an order without a hearing, dated April 9, 2012 [Oliva Aff.], ¶ 20).²

The ALJ states that “the staff and respondent agreed to a stipulated penalty in the event of a violation of the order” (see Hearing Report, at 5). The order on consent, however, nowhere contains the term “stipulated penalty” (see Oliva Aff., Exh. B). Rather, the order on consent assesses a total civil penalty of thirteen thousand dollars (\$13,000) “[f]or the violations described above” in the order on consent (id. at 3), and states that five thousand five hundred dollars (\$5,500) of that total was “suspended upon the condition that Respondent remains in compliance with each term, provision and condition of this Order” (id. at 4).

The ALJ apparently equates “suspended penalties” with “stipulated penalties,” but provides no relevant support.³ Although both types of penalties may provide incentive to a

² Pursuant to the consent order in this matter, respondent had to provide the Department with documentation that the unregistered pesticide products were properly disposed of or returned to the manufacturer or distributor (see Munster Affidavit, Exh. B, at 4, § II). Neither staff’s motion papers nor this record indicate whether respondent complied with those requirements.

³ Neither of the administrative decisions cited by the ALJ supports the proposition that a suspended penalty in a consent order is in reality a stipulated penalty that precludes the Department from seeking additional penalties for violations of the consent order (see Hearing Report, at 4 [citing Matter of Manjit Raju, Order of the Acting

respondent to comply with the terms of an order on consent, they are quite distinct, and each is addressed to different violations.

Suspended penalties are part of the total penalty assessed against a respondent for the violations to which the order on consent applies. There are various reasons why penalties imposed pursuant to a consent order may be suspended. For example, as stated above, suspension of all or a portion of a penalty may serve as an incentive for a respondent to comply with a remedial schedule set forth in a consent order. Suspended penalties may also be appropriate for first time violators, or may allow a respondent with limited resources to utilize those resources to implement the remedial activities required in the consent order. By comparison, stipulated penalties in a consent order are intended to address violations of the consent order itself.

The Department's Civil Penalty Policy separately defines and describes these two types of penalty (see DEE-1, ¶ VI.B. [suspended penalties "are based on past violations" and the Department "should not rely exclusively on suspended penalties" to ensure future compliance with a consent order]; see also *id.* ¶ VI.C. [stipulated penalties "should be used in addition to or in concert with suspended penalties and should be high enough to be a disincentive for delaying project completion"]). Thus, if the Department seeks in a particular matter to include in a consent order stipulated penalties that would become due should a respondent violate one or more terms of that order, it will do so expressly and separately from the civil penalties in the consent order imposed for past violations (see also Elements of NYSDEC SPDES Order on Consent, <http://www.dec.ny.gov/chemical/68028.html> ["[s]uspended penalties involve holding part of the penalty for past violations in abeyance" whereas "[s]tipulated penalties are penalties for future violations of the terms of an order"]).

The order on consent in this matter does not contain any reference to stipulated penalties, and I will not interpret the order on consent in a manner that imposes upon the parties terms that they did not include and, thus, terms to which they did not agree (see e.g. *Oliva Aff.*, Exh. B, at 5, ¶ VII ["The provisions hereof shall constitute the complete and entire Order between Respondent and the Department"]).

Nor will I interpret the order on consent to contain a waiver of any right by the Department that is not stated in the order. The order on consent does not contain any express or implied waiver of the Department's statutory right to seek penalties for violations of the order (see e.g. ECL 71-2907[1] [providing for a five thousand dollar (\$5,000) penalty to be assessed against "any person who violates any provision of (ECL) article 33 ... or any ... order issued thereunder"]). Indeed, in the consent order here at issue, the Department specifically reserved "all its legal, administrative and equitable rights ... granted to it pursuant to statute" "[e]xcept as expressly provided herein" (*id.* at 5, ¶ III). Therefore, the ALJ's reading of the order on consent,

Commissioner, December 30, 2010, and *Matter of Carney's Restaurant*, Decision and Order of the Commissioner, January 14, 2010)). Moreover, the ALJ appears to distinguish violations of the remedial activity provisions of the consent order from the penalty provisions of the consent order, stating that staff "has not indicated that there are continuing *substantive violations* of the ECL" in this case (Hearing Report, at 4-5 [italics added]). The ALJ is incorrect. Failure to pay any portion of a civil penalty required under a consent order is a violation of a provision of such order, and is therefore a "substantive violation of the ECL" (see ECL 71-2907[1]).

as limiting the Department with respect to penalties it can seek for respondent's violations of the order, is in error.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.
- II. Respondent Corona Heights Trading Inc. is adjudged to have failed to comply with consent order DEC File Nos. R2-20090522-317 and R2-20090713-434 and to have violated ECL 71-2907(1).
- III. Within thirty (30) days of the service of this order on respondent, respondent shall submit payment of fifteen thousand five hundred dollars (\$15,500), comprised of:
 - A. Five thousand dollars (\$5,000), representing the outstanding unpaid amount of the non-suspended civil penalty under consent order DEC File Nos. R2-20090522-317 and R2-20090713-434;
 - B. Five thousand five hundred dollars (\$5,500), representing the suspended portion of the civil penalty under consent order DEC File Nos. R2-20090522-317 and R2-20090713-434; and
 - C. A civil penalty of five thousand dollars (\$5,000) for respondent's violation of the consent orders.

Payment of the fifteen thousand five hundred dollars (\$15,500) shall be by cashier's check, certified check, or money order drawn to the order of the New York State Department of Environmental Conservation and mailed or hand-delivered to:

Louis P. Oliva, Esq.
Regional Attorney
NYSDEC, Region 2
47-40 21st Street
Long Island City, NY 11101

- IV. All communications from respondent to the Department concerning this order shall be directed to Louis P. Oliva, Esq., at the address referenced in paragraph III of this order.

- V. The provisions, terms and conditions of this order shall bind respondent Corona Heights Trading Inc., and its agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

/s/

By: _____

Joseph J. Martens

Commissioner

Dated: February 20, 2014
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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Summary Hearing
Report

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

NYSDEC File No.
R2-20090522-317
& R2-20090713-434

- by -

CORONA HEIGHTS TRADING INC.,

Respondent.

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Proceedings

By notice of motion for order without hearing dated April 9, 2012, the staff of the New York State Department of Environmental Conservation (DEC or Department) commenced this enforcement proceeding against respondent Corona Heights Trading Inc. (Corona Heights) for alleged violations of Article 33 of the Environmental Conservation Law (ECL) and a 2010 order on consent.¹ On April 10, 2012, by certified mail return receipt requested, the Department staff served its notice of motion and supporting statements and exhibits on the respondent. The United States Post Office delivered the staff's motion papers to the respondent on April 11, 2012.

As of this date, Corona Heights has not responded to the staff's motion and the time to do so (by May 1, 2012) has passed. On April 20, 2012, Chief Administrative Law Judge James T. McClymonds assigned the matter to me.

Staff's Charges

Regional Attorney Louis P. Oliva submitted to the Office of Hearings and Mediation Services (OHMS) Department staff's motion for order without hearing consisting of the notice of motion dated April 9, 2012; Mr. Oliva's affirmation dated April 9, 2012; the New York State Department of State Division of Corporations Entity Information re: Corona Heights Trading Inc. (Exhibit A [Ex.]); the order on consent dated May 11, 2010 (Ex. B); affidavit of DEC

¹ The caption of the staff's notice of motion indicates that the alleged violations are of ECL Article 33 and Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR). The staff sets forth as its cause of action allegations that the respondent failed to comply with the 2010 order on consent and was therefore in violation of ECL § 71-2907(1) and the order on consent. ECL § 71-2907(1) sets forth penalties for violations of Article 33 and rules, regulations or orders issued thereunder but does not set forth enforceable requirements.

Region 2 legal assistant Louise Munster dated April 9, 2012 with the quarantine order dated May 11, 2009 (Ex. A); order on consent dated May 11, 2010 (Ex. B); letter dated August 10, 2011 from Regional Attorney Oliva to Corona Heights (Ex. C); and affidavit of Office of General Counsel secretary Regina Seetahal dated April 9, 2012.

The staff has alleged that the respondent has failed to comply with the terms of the 2010 order on consent by failing to pay \$5,000 out of the \$7,500 payable penalty. Based upon this alleged violation, the Department staff seeks an order requiring the payment of the balance of the payable penalty as well as the suspended penalty of \$5,500 and an additional penalty of \$5,000 for violation of the order. The staff states in its supporting affirmation that enforcement of the pesticide laws is important to protect public health and the environment. Oliva Affirmation (Aff.), ¶ 15. Staff notes that the respondent was selling unregistered pesticides at its business and while the consent order is an efficient means to settle violations, the failure of Corona Heights to comply with the order is yet another indicator of lack of cooperation and noncompliance. Oliva Aff, ¶ 20.

According to the consent order, the respondent was found to be selling unregistered pesticides in a DEC inspection on May 11, 2009, at which time, Department staff quarantined the illegal products. Oliva Aff., Ex. B, ¶¶ 3-5. In a second inspection on July 3, 2009, Department staff found many of the same brands of illegal products in the store. *Id.*, ¶¶ 6-8. Respondent failed to pay the agreed upon payable penalty in its entirety and did not respond to Mr. Oliva's letter of August 10, 2011 demanding the payment of the outstanding balance. Munster Aff., Ex. C.

Based upon these allegations, the Department staff is seeking a Commissioner's order finding that the respondent violated Article 33 of the ECL, Title 6 of the NYCRR and the 2010 order on consent and ordering payment of \$10,500 and an additional penalty of \$5,000.

In its motion papers, the staff does not make any mention of whether or not the respondent has fulfilled the consent order's requirements regarding the proper disposal of the illegal product.

Respondent's Position

Corona Heights has failed to submit a response to staff's motion and therefore, there is no record of its position.

FINDINGS OF FACT

Because the respondent has not responded to staff's motion, the only facts before me are those presented by Department staff.

1. The respondent is a New York State active corporation that operates a retail store at 108-23 Corona Avenue, Queens, New York. Oliva Aff., Exs. A, B.
2. On May 11, 2009, DEC inspector Robert Freese found four pesticides at the Corona

Heights' store that were not registered with the United State Environmental Protection Agency (EPA) or registered for sale in New York State in violation of ECL § 33-0701 and 6 NYCRR § 326.14(a). Munster Aff., Exs. A, B.

3. During the May 11th inspection, Department staff quarantined these products and the manager was ordered not to remove or tamper with them until further notice from the Department. Order on Consent, ¶ 5, Oliva Aff., Ex. B.

4. On July 3, 2009, Department staff returned to the respondent's store and found additional pesticide products that were not registered with EPA or registered for sale in New York State. *Id.*, ¶¶ 6-8. These products were among those same brands that were found during the May inspection.

5. As a result of the Department's enforcement actions with respect to these violations, the respondent entered into a consent order dated May 11, 2010. *Id.* Among the requirements of the order was for the respondent to pay a penalty of \$13,000 with \$5,500 of the penalty suspended. *Id.*, ¶ I. The payable portion of the penalty, \$7,500, was to be paid out on a schedule of 15 monthly payments of five-hundred dollars each beginning on May 30, 2010 and concluding on June 30, 2011. *Id.* The consent order also required the respondent to dispose of the 379 containers of pesticide products within 60 days of the order and to submit to DEC a compliance verification affidavit confirming this action within 65 days of the order.

6. The respondent made five payments but since the last one in September 2010 has failed to make any additional payments despite Department staff's notice to the respondent in August 2011 that Corona Heights was in violation of the consent order and warning "future legal action." Munster Aff., Ex. C.

CONCLUSIONS OF LAW

1. By failing to pay the balance of the payable penalty set forth in the May 2010 consent order, the respondent has violated the terms of that consent order.

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 CPLR in favor of any party. And, "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 Perotta*, Commissioner's Decision, January 10, 1996. Section 3212(b) of the CPLR provides that a motion for summary judgment shall 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." Once the moving party has put forward its case, the burden shifts to the non-movant to produce sufficient evidence to establish a triable issue. *Matter of Locaparra*, Commissioner's Decision, June 16, 2003.

Pursuant to 6 NYCRR § 622.12(a), staff has supported its motion for an order without hearing with an affirmation from the Regional Attorney that describes the consent order and the respondent's failure to adhere to its terms. In addition, the Department staff has submitted the affidavit of DEC Region 2 legal assistant Louise Munster that describes the staff's inspection of the respondent's store and includes the May 2009 quarantine order. Ex. A, Munster Aff. Ms. Munster describes the payment schedule contained in the 2010 consent order and her efforts on Mr. Oliva's behalf to secure compliance when the respondent failed to complete its penalty payments. Munster Aff., ¶¶ 8-9. Staff also submitted the affidavit of DEC Office of General Counsel secretary Regina Seetahal who explains that she is responsible for maintaining records of penalty payments and confirms that Corona Heights failed to meet its obligations pursuant to the 2010 consent order. Seetahal Aff., ¶¶ 1-4.

The respondent has not submitted any response to the Department staff's motion and therefore has failed to provide any material fact that would require a hearing.

The staff has met its burden to show that the respondent has failed to meet the requirements of the consent order by failing to pay the outstanding balance of the payable penalty. *Edgar v. Jorling*, 225 AD2d 770, 771 (2d Dep't 1996), *lv to appeal den.*, 89 NY2d 801 (1996); 6 NYCRR § 622.12(c).

Accordingly, I find the respondent liable for violating the May 11, 2010 consent order.

Penalties

In its notice of motion, Department staff requests that the respondent be ordered to pay a civil penalty of \$5,000 in addition to the balance of the payable and suspended penalties set forth in the May 2010 consent order (total of \$15,500). Oliva Aff., ¶ 23. Mr. Oliva cites to ECL § 71-2907(1) that sets forth a civil penalty not to exceed \$5000 for a first violation of Article 33 and a penalty not to exceed \$10,000 for subsequent violations. In addition, the Regional Attorney provides a rationale for the penalty based upon the Civil Penalty Policy (DEE-1), the Order on Consent Enforcement Policy (DEE-2), and the Pesticide Enforcement Policy (DEE-12). I agree with the Department staff that the respondent's repeated violations of the pesticide law and its failure to cooperate with Department staff to address its violations of the consent order are serious. The Department staff has not presented any evidence of the respondent's failure to adhere to the remedial requirements of the consent order. Therefore, I must assume that the respondent has complied with the disposal requirements of the order.

Because the order on consent provides for a specific penalty of \$5,500 in the event that the respondent fails to comply with the terms of the order, I find that is the limit of what further penalties can be assessed with respect to violations of the specific terms of the order. In *Matter of Manjit Raju*, 2010 N.Y. ENV LEXIS 90, the Commissioner assessed an additional penalty against a respondent that failed to pay the penalty set forth in a consent order. But in that matter, the respondent had failed to pay the payable penalty and no mention is made of any suspended penalty term. In *Matter of Carney's Restaurant*, 2010 N.Y. ENV LEXIS 3, based on violations by the respondent of both prior consent orders and its State Pollutant Discharge Elimination System (SPDES) permit, the Commissioner ordered the respondent to pay the suspended

penalties contained in the prior orders and additional penalties. Again, in contrast to the facts in this matter, the Department staff has not indicated that there are continuing substantive violations of the ECL. Because the staff and respondent agreed to a stipulated penalty in the event of a violation of the order, that is the sum that the Department is limited to when assessing a penalty for violation of the terms of the order. A consent order is a contract and its terms bind the parties accordingly. *Matter of Exxon Mobil*, 2007 N.Y. ENV LEXIS 11 (Chief Administrative Law Judge James T. McClymonds).

CONCLUSIONS

The respondent's failure to pay the payable portion of the penalty set forth in the May 11, 2010 order was in violation of the consent order.

RECOMMENDATIONS

The respondent, Corona Heights Trading Inc. should be assessed a penalty of \$10,500. All penalties should be paid within 30 days of service of the Commissioner's order.

Albany, New York
May 15, 2012

/s/

Helene G. Goldberger
Administrative Law Judge