

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

<p>In the Matter of the Alleged Violations of Article 33 of the New York State Environmental Conservation Law (ECL) and Parts 320 through 326 of title 6 of the Official Compilation of Codes, Rules and Regulation of the State of New York (NYCRR)</p> <p style="text-align: center;">-by-</p> <p>William J. Polak, III, d/b/a William Polak Farm</p>	<p>Ruling on Motion for Order Without Hearing</p> <p>DEC #CO 1-2004-0107</p> <p>October 25, 2006</p>
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Summary

This ruling denies the motion for order without hearing filed by the Staff of the Department of Environmental Conservation (DEC Staff) because material issues of fact exist. A hearing will be scheduled in this matter upon receipt of a statement of readiness from DEC Staff.

Proceedings

By Notice of Hearing and Complaint dated July 12, 2006, DEC Staff alleged thirty-six violations of Environmental Conservation Law (ECL) Article 33 and Title 6 of the Official Completion of the Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 320 through 326 involving improper pesticide practices at respondent's farm on Church Lane, in Aquebogue, Suffolk County.

The Notice of Hearing and Complaint were personally served on the respondent, William J. Polak, III, on July 19, 2006.

By motion dated July 24, 2006, DEC Staff moved for an Order Without Hearing on the first alleged violation, only. Accompanying DEC Staff's motion were: a notice of motion; an affidavit in support by DEC Staff counsel Alyce M. Glibert; a draft order; and eight exhibits.

Respondent filed an answer, dated August 3, 2006, denying all alleged violations. Respondent also filed an Affidavit in Opposition to Motion for Order Without Hearing dated August 11, 2006.

On August 29, 2006, this matter was assigned to

Administrative Law Judge P. Nicholas Garlick.

Discussion

DEC Staff's complaint contains 36 alleged violations of laws and regulations involving pesticides. In its complaint, DEC Staff seeks an order: declaring the respondent liable for each of the violations; directing compliance with the law in the future; and an unspecified monetary penalty. Attached to the complaint are two Notices of Violation (NOV), dated September 16, 2004 and September 6, 2002. Both of these NOV's are addressed to William J. Polak, Jr., the respondent's father.

In its Notice of Motion, DEC Staff states it seeks an order finding the respondent liable only on the first cause of action, specifically, that William J. Polak, III, used herbicides in a manner inconsistent with label instructions by application of a pesticide that was prohibited for use in Suffolk County, New York in violation of 6 NYCRR 325.2(b). This section reads:

325.2(b) "Pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department."

In its motion, DEC Staff argues that the respondent violated 6 NYCRR 325.2(b) when he applied a pesticide, Dual II MAGNUM, to crops on his farm in a manner inconsistent with the label instructions in 2002.

DEC Staff also argues that the respondent and his father, William J. Polak, Jr. were involved in a common plan or design to purchase illegal pesticides from outside New York State, transport the illegal pesticides into New York and use the illegal pesticides on their crops in order to increase their profit margins. DEC Staff cite ECL 71-2909 which states:

"Any person knowingly aiding or abetting any other person in the violations of any provision of article 33 of this chapter [Environmental Conservation Law] or any rule, regulation, or order of the department made pursuant thereto shall be subject to the same punishment and penalty as that prescribed by this title for the violation by such other person."

The evidence supplied with DEC Staff's motion to support its claim that the respondent violated 6 NYCRR 325.2(b) includes, a copy of the label for Dual II MAGNUM, a receipt for the purchase of five, two-and-one-half gallon containers of DUAL II MAGNUM

from a vendor in Lancaster, Pennsylvania and two handwritten statements signed by the respondent.

The label of Dual II MAGNUM states: "NOTE: NOT FOR SALE, USE OR DISTRIBUTION IN NASSAU OR SUFFOLK COUNTY, NEW YORK." The receipt from the Pennsylvania vendor is made out to Polak Farms and dated March 18, 2002.

The first handwritten statement is a Voluntary Statement, signed and sworn to by the respondent dated March 24, 2004. It states, in relevant part, "I purchased the Dual Magnum in Pennsylv. a couple of years ago not knowing that it was not registered in Suffolk County, so in finding out that I could not use it, I did not use it so I got rid of it. I brought it to the pick-up program + left it by some other chemicals and took off, I was busy at the time and had not time to see anyone about where I was supposed to put it, so I have no paperwork on it. I was just happy to get rid of it."

The second handwritten statement is a Supporting Affidavit, signed by the respondent on September 2, 2004. It states "My father and I own Wm. J. Polak Jr. Farms in Aquebogue. In March and April 2004, DEC inspectors Bruce Cronemeyer and Chris Spies came to inquire about my pesticide use, specifically, Dual II Magnum. I had heard that the use of this product was illegal in Long Island, so I told him I didn't use it, and got rid of it at the Clean Sweep program. Today, investigators McDermott and Maggio have come to my farm questioning my earlier statements. I realize I shouldn't have made those incorrect statements, so I am making this statement to explain what actually happened. I bought the product in Pennsylvania in 2002, and didn't know it was illegal. At the time it was the only product we would use under plastic to get a jump on the season. My father, Wm. J. Polak, Jr. handles the herbicide applications on our farm, and applied the product per label directions. We used it up on the beginning of the season in 2002. I disposed of the empty containers either in the regular trash or my burn barrel, I don't remember which. I have previously used Dual II which was always legal. I did not know that Dual II Magnum was significantly different when I bought it. I asked the retailer what the difference is, and he said it's stronger so you use less. This is my true statement, and I feel much better now that I have explained truthfully, and a huge weight has been lifted off my shoulders. Please take this into consideration. I just want to do things the right way + try to continue farming, which is something I always wanted to do since I was a child."

DEC Staff argues that this evidence is sufficient for the

Commissioner to grant its motion for order without hearing. DEC Staff apparently seeks only a Commissioner's determination with regard to liability, since no reference to a civil penalty amount nor justification for such penalty is in the motion papers. DEC Staff's original complaint in this matter also makes no specific civil penalty demand, only that the respondent "pay a civil penalty in an amount that is deemed appropriate not to exceed the maximum amount allowed by law within 30 days from the date of service of a copy of the Order in this matter."

In his answer, dated August 3, 2006, the respondent denies knowledge or information sufficient to form a belief as to the alleged violation. In a separately filed affidavit in opposition to motion for order without hearing, dated August 11, 2006, the respondent denies the first cause of action asserted by DEC Staff. He states he did not purchase, transport, or apply the pesticide in question. Specifically, he states that his father (now deceased) owned most of the farm land and operated the farming business and that he, the respondent, was an employee of the business and was paid on a weekly basis (a copy of a 2003 W-2 form was attached to the affidavit). As the operator of the farm, the respondent's father was responsible for all matters relating to pesticides. The respondent states that his father bought the pesticides in Pennsylvania and the receipt submitted by DEC Staff reflects the respondent's father's pesticide license number (P1007890). The respondent continues that his prior statements to the contrary were written by DEC personnel. He states he was instructed to sign the statement as written and not shown the September 2, 2004 statement and not told to have an attorney review the statement before signing it. If he had reviewed it, he would have discovered the error in the statement. He states that he accompanied his father on the trip to Pennsylvania. His purpose in going had to do with a purchase of furniture while his father went to look at farming equipment and purchased the pesticide.

Ruling

DEC's Uniform Enforcement Hearing Procedures state that a "contested motion for order without hearing will be granted if, upon all 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" (6 NYCRR 622.12(d)). The CPLR states in relevant part, 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." This section continues "the motion shall be

denied if any party shall show facts sufficient to require a trial of any issue of fact" (CPLR 3212(b)).

In this case, the three sworn statements from the respondent all provide different versions of the facts surrounding the alleged violation. A determination of liability at this point would involve determining which version of facts in the respondent's various statements accurately reflects the events in question. Since material facts are at issue, a hearing is necessary to determine the facts in this case, prior to making a recommendation to the Commissioner. Accordingly, DEC Staff's motion for order without hearing is denied. A hearing will be scheduled in this matter upon receipt of a statement of readiness from DEC Staff.

/s/

Albany, New York
October 25, 2006

P. Nicholas Garlick
Administrative Law Judge

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