

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

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

ORDER

DEC Case No.
R3-19990629-18

– by –

**Toraco Landscaping Services, Inc., and
Gustavo Torena,**

Respondents.

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WHEREAS:

1. Pursuant to a notice of hearing and complaint dated November 18, 2003, the New York State Department of Environmental Conservation (“DEC” or “Department”) staff commenced an administrative enforcement proceeding against Toraco Landscaping Services, Inc. and Gustavo Torena (“respondents”).

2. Respondent Toraco Landscaping Services, Inc. is an inactive domestic business corporation with principal offices at 220 N. Highland Avenue, Ossining, Westchester County, New York.

3. Respondent Gustavo Torena is the president of Toraco Landscaping Services, Inc.

4. Respondents were served with a notice of hearing and complaint on November 21, 2003. Service of process was accomplished in accordance with section 622.3 of title 6 of the Official Compilation of the Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

5. The complaint alleged that the respondents violated numerous statutory and regulatory provisions applicable to pesticides, including: engaging in the commercial application of pesticides without being a certified applicator or working under the direct supervision of a certified applicator; engaging in the business of applying pesticides without being a registered pesticide business; failing to enter into contracts with the property owners prior to commercial lawn applications and failing to provide the required information (including dates of application, number of applications, substances to be applied, and any warnings) to the property owners;

failing to maintain pesticide application records; and failing to file pesticide annual reports with the Department.

6. Compliance with the requirements of article 33 (Pesticides) of the Environmental Conservation Law (“ECL”), including recordkeeping, reporting, business registration and applicator certification, is essential to ensure the proper protection of the environment in the use of pesticides.

7. Pursuant to section 71-2913 of the ECL, in construing and enforcing the provisions of article 33 of the ECL, the acts of a director, officer, agent or other person acting for or employed by Toraco Landscaping Services, Inc. and acting within the scope of his or her employment are deemed the acts of the corporation.

8. Neither respondent answered the complaint or otherwise appeared and, pursuant to 6 NYCRR 622.4(a), respondents’ time for serving an answer to the complaint expired on December 11, 2003.

9. This matter was referred to the Office of Hearings and Mediation Services and assigned to Administrative Law Judge (“ALJ”) Daniel P. O’Connell.

10. With a cover letter dated April 16, 2004, DEC staff filed a notice of motion and supporting papers in support of a motion for a default judgment.

11. I hereby adopt the summary report of ALJ O’Connell dated April 29, 2004, a copy of which is attached to this order.

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

I. Pursuant to 6 NYCRR 622.15, respondents are adjudged to be in default and to have waived their right to a hearing in this enforcement proceeding. Accordingly, the allegations in the complaint are deemed admitted.

II. Department staff’s motion for a default judgment pursuant to 6 NYCRR 622.15 is granted.

III. Respondents are found to have violated ECL 33-0907, ECL 33-1001(1), ECL 33-1205(1), ECL 33-1301(8), and ECL 33-1301(8-a), and 6 NYCRR 325.7(a), 6 NYCRR 325.23(a), 6 NYCRR 325.25(a), and 6 NYCRR 325.25(b).

IV. Respondents Toraco Landscaping Services, Inc. and Gustavo Toreno are assessed a civil penalty in the amount of fourteen thousand dollars (\$14,000.00). The liability of respondents for this civil penalty is joint and several. No later than thirty (30) days after service of a copy of this order, payment of the civil penalty shall be made in the form of a cashier’s check, certified check or money order payable to the order of the “New York State Department of Environmental Conservation” and delivered to the Department at the following address: New

York State Department of Environmental Conservation, Region 3, 21 South Putt Corners Road, New Paltz, New York 12561-1696, Attn: Division of Legal Affairs - Civil Penalty Coordinator.

V. All communications between respondents and the Department concerning this order shall be made to Assistant Regional Attorney Jennifer David Hesse, Esq., New York State Department of Environmental Conservation, 21 South Putt Corners Road, New Paltz, New York 12561-1696.

VI. The provisions, terms and conditions of this order shall bind respondents and respondents' successors, heirs and assigns in any and all capacities.

For the New York State Department of
Environmental Conservation

/s/

By: _____
Erin M. Crotty, Commissioner

Dated: Albany, New York
July 6, 2004

To: Toraco Landscaping Services, Inc.
220 North Highland Avenue
Ossining, NY 10562

Gustavo Torena
220 North Highland Avenue
Ossining, NY 10562

Jennifer David Hesse, Esq.
Assistant Regional Attorney
NYSDEC - Region 3
21 South Putt Corners Road
New Paltz, NY 12561-1696

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

Summary Report

TORACO LANDSCAPING SERVICES, INC
and GUSTAVO TORENA
220 North Highland Avenue
Ossining, New York 10562

Case No.: R3-19990629-18

RESPONDENTS.

Proceedings

Region 3 Staff of the Department of Environmental Conservation (Department Staff) commenced this enforcement action by personally serving a notice of hearing and complaint, dated November 18, 2003, upon Gustavo Torena as President of Toraco Landscaping Services, Inc. (Respondents). The notice of hearing stated that Respondents would be in default and would waive their right to a hearing if they did not answer the complaint within 20 days of receiving it (*see* 6 NYCRR 622.4[a]; 622.15). The notice of hearing did not schedule a pre-hearing conference.

The November 18, 2003 complaint asserts that Gustavo Torena is President of Toraco Landscaping Services, Inc., which is located at 220 N. Highland Avenue, Ossining (Westchester County), New York. Based on Department Staff's inspection of Toraco Landscaping Services' office on March 26, 1999, the complaint alleges five causes of action. Respondents allegedly violated:

1. ECL 33-1301(8) and 6 NYCRR 325.7(a) by engaging in the commercial application of pesticides without obtaining a pesticide applicator certification or working under the supervision of a certified applicator;
2. ECL 33-0907, 6 NYCRR 325.23(a) and ECL 33-1301(8-a) by engaging in the business of applying pesticides without registering the business with the Department;
3. ECL 33-1001(1) by making commercial lawn applications without entering into written contracts with the property owners or providing the owners with the pesticides labels;
4. ECL 33-1205(1) and 6 NYCRR 325.25(a) by failing to keep and maintain records of pesticide applications; and
5. ECL 33-1205(1) and 6 NYCRR 325.25(b) by failing to file annual reports with the Department in the years 2000 and 2001.

With a cover letter dated April 16, 2004, Department Staff filed a notice of motion; an affidavit of service by Jennifer J. Cutter; and an affirmation in support of Department Staff's

motion for a default judgment by Jennifer David Hesse, Esq., Assistant Regional Attorney, with attached Exhibits A through E. Exhibit A is an affidavit of personal service by Environmental Conservation Officer (ECO) Troy Basford. According to the affidavit, ECO Basford personally served a copy of the November 18, 2003 notice of hearing and complaint upon Respondents on November 21, 2003. Exhibit B is a copy of the November 18, 2003 notice of hearing and complaint.

Exhibit C is a copy of a cover letter from Department Staff dated November 25, 2003 with a copy of a draft Order on Consent. The November 25, 2003 cover letter reminds Respondents of their obligation to answer the complaint if they find the terms of the draft Order on Consent unacceptable.

Exhibit D is an affidavit by Thomas DeChillo, Pesticide Control Specialist II, which outlines Department Staff's justification for the requested civil penalty. Attached to Exhibit E is Exhibit 1, which is a copy of a report prepared by Mr. DeChillo on March 26, 1999 during his inspection of Toraco Landscaping Services' office on that date. Exhibit E is a proposed judgment and order for the Commissioner's consideration.

Department Staff served Respondents with a copy of the motion for default judgment by certified mail. As of the date of this Summary Report, the Office of Hearings and Mediation Services has not received any reply from Respondents.

Findings of Fact

1. On March 26, 1999, Gustavo Torena was operating Toraco Landscaping Services, Inc. from an office located at 220 N. Highland Avenue, Ossining, New York.
2. On November 21, 2003, ECO Troy Basford personally served Gustavo Torena as President of Toraco Landscaping Services, Inc. with a copy of the November 18, 2003 notice of hearing and complaint. The notice of hearing references 6 NYCRR 622.4, and states that Respondents must answer the complaint within 20 days after receiving it. The notice states further that failure to file a timely answer would result in a default and waiver of Respondents' right to a hearing.
3. Respondents' answer was due on December 11, 2003. Gustavo Torena and Toraco Landscaping Services, Inc. did not file an answer to the November 18, 2003 notice of hearing and complaint by December 11, 2003. To date, no answer has been received.
4. Respondents obtained economic benefits from not complying with the applicable provisions of the pesticide statute and regulations. At the time of the inspection and subsequent to it, Mr. Torena was not a certified pesticide applicator. The certification fee

at the time of the violations was \$5.00 per year until April 1, 2002 when the fee increased to \$75.00.

5. Respondents did not register the business. At the time of the violations, the registration fee was \$50.00 per year. To register a pesticide business with the Department, the business must provide proof of liability insurance. Because the business was not registered with the Department, it can be reasonably inferred that the business did not have the required liability insurance.
6. Respondents did not file an annual report for 2002. Although the complaint limits the violations of ECL 33-1205(1) and 6 NYCRR 325.25(b) to 2000 and 2001, the absence of an annual report for 2002 establishes a pattern of non-compliance with the applicable statutory and regulatory requirements. The continued lack of compliance is an aggravating factor relevant to the civil penalty calculation.

Discussion

Motion for Default Judgment

According to the Department's enforcement hearing regulations, a Respondent's failure to file a timely answer, or even if a timely answer has been filed, a Respondent's failure to appear at the pre-hearing conference, constitutes a default and a waiver of Respondent's right to a hearing (*see* 6 NYCRR 622.15[a]). Under these circumstances, Department Staff may move for a default judgment. Pursuant to 6 NYCRR 622.15(b), Department Staff's motion must contain:

1. Proof of service upon Respondent of the notice of hearing and complaint or other such document which commenced the proceeding;
2. Proof of Respondent's failure to appear at a pre-hearing conference, or to file a timely answer; and
3. A proposed order.

To commence a DEC administrative enforcement action, service of the notice of hearing and complaint may be by personal service consistent with the New York State Civil Practice Law and Rules (*see* 6 NYCRR 622.3[a][3]). According to his affidavit, ECO Basford personally served the notice of hearing and complaint upon Respondents. Therefore, service of the notice of hearing and complaint was in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3).

ECO Basford's affidavit also shows that Respondents received the November 18, 2003 notice of hearing and complaint on November 21, 2003. Therefore, Respondent's answer was due twenty days hence, which was December 11, 2003 (*see* 6 NYCRR 622.4[a]). According to

the April 16, 2004 affirmation by Jennifer David Hesse, Esq., Assistant Regional Attorney, Respondents did not answer the complaint in a timely manner. Therefore, Respondents have defaulted on their obligation to answer Department Staff's November 18, 2003 complaint. Department Staff has established a prima facie entitlement to a default judgment.

Relief

The complaint states, and Department Staff's motion papers reiterate, that ECL 71-2907(1) authorizes a civil penalty not to exceed \$5,000 for the first violation of ECL article 33 and its implementing regulations, and an additional civil penalty not to exceed \$10,000 for subsequent violations. For the five violations alleged in the November 18, 2003 complaint, the total maximum civil would be \$35,000. In the complaint, and in Mr. DeChillo's affidavit, Department Staff requests a total civil penalty of \$14,000.

Department Staff based the civil penalty request on the guidance outlined in the Department's Civil Penalty Policy, issued June 20, 1990, and the Pesticide Enforcement Guidance Memorandum, issued March 26, 1993 (Pesticide EGM). According to Department Staff, the requested civil penalty includes a consideration of the economic benefits Respondents obtained by not complying with the regulations, as well as a gravity component.

According to Mr. DeChillo's affidavit, Respondents obtained substantial benefits by not complying with the applicable provisions of the pesticide statute and regulations. At the time of the inspection and subsequent to it, Mr. Torena was not a certified pesticide applicator. The certification fee at the time of the violations was \$5.00 per year until April 1, 2002 when the fee increased to \$75.00. To obtain certification, training is required (*see* 6 NYCRR 325.8), which requires a commitment of time and other resources. Respondents, therefore, avoided the costs associated with obtaining the required certification.

Furthermore, Respondents did not register the business. At the time of the violations, the registration fee was \$50.00 per year. According to Mr. DeChillo's affidavit, providing proof of liability insurance is a requirement of registering a pesticide business with the Department. Because the business was not registered with the Department, it can be reasonably inferred that the business had no liability insurance. The avoided cost of liability insurance provided Respondents with an additional economic benefit.

In his affidavit, Mr. DeChillo explains that certifying pesticide applicators, and registering businesses are critical elements of the Department's regulatory scheme. Without this information, the Department does not know who the regulated entities are, which limits Department Staff's ability to implement the regulatory program established by ECL article 33 effectively.

Based on Mr. DeChillo's affidavit, Respondents did not file an annual report for 2002. Although the complaint limits the violations of ECL 33-1205(1) and 6 NYCRR 325.25(b) to 2000 and 2001, Mr. DeChillo states that the absence of an annual report for 2002 establishes a pattern of non-compliance with the applicable statutory and regulatory requirements. A pattern of non-compliance is an aggravating factor relevant to the civil penalty calculation.

The civil penalty requested by Department Staff is substantially less than the maximum civil penalty authorized by statute. It is consistent with the guidance outlined in the Department's Civil Penalty Policy and the Pesticide EGM given the regulatory significance of the violations, and the aggravating circumstances identified by Department Staff. Based on the foregoing discussion, the Commissioner should assess the full amount of the civil penalty requested by Department Staff.

Conclusions

Respondents have defaulted on their obligation to file an answer to the November 18, 2003 complaint. As a result, Gustavo Torena and Toraco Landscaping Services, Inc. have waived their right to a hearing. Department Staff has established a prima facie entitlement to a default judgment.

Recommendation

The Commissioner should grant Department Staff's motion for default judgment. The Commissioner should assess the recommended civil penalty of \$14,000, and direct Respondents to comply with all applicable statutory and regulatory requirements.

/s/

Daniel P. O'Connell
Administrative Law Judge

Dated: Albany, New York
April 29, 2004