

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 33 of the New York State Environmental Conservation Law 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.
R2-20090810-506

- by -

EXCELLENT PEST CONTROL LLC,

Respondent.

This administrative enforcement proceeding concerns allegations that respondent Excellent Pest Control LLC (“respondent”), a limited liability company located in Jamaica, New York, violated article 33 of the New York State Environmental Conservation Law (“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 engaging in the commercial application of pesticides without the required pesticide business registration.

Staff of the New York State Department of Environmental Conservation (“Department”) commenced this proceeding by service of a notice of motion for order without hearing in lieu of complaint. By ruling dated July 9, 2015, staff’s motion was denied and the matter was scheduled for hearing. On September 21, 2015, a hearing to address the alleged violation was convened before D. Scott Bassinson, an Administrative Law Judge (“ALJ”) with the Department’s Office of Hearings and Mediation Services. ALJ Bassinson prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

I agree with the ALJ that staff proved by a preponderance of the evidence at hearing that respondent engaged in the business of applying pesticides without having registered with the Department as a pesticide business. Respondent started its business in December 2008 (see Affirmation of Louis P. Oliva, Esq., dated April 10, 2013 [“Oliva Affirmation”], ¶ 5). Respondent applied pesticides on a number of occasions in 2009 prior to the date (August 6, 2009) when respondent became registered with the Department as a pesticide business.

The business registration requirement is an important element in the Department’s regulation of pesticides and the violation of this requirement is identified as a “High Priority Violation – Tier #2” (see DEE-12 –Pesticide Enforcement Policy, rev. March 26, 1993, under “Enforcement Priorities”). Furthermore, respondent has been recalcitrant in resolving this violation (see e.g. Oliva Affirmation ¶¶ 22-23; Hearing Report at 9) and has obtained some economic benefit in its late registration as a pesticide business (see Hearing Report at 9). However, as the ALJ notes, no evidence was presented in this proceeding that respondent,

subsequent to becoming registered as a pesticide business in August 2009, committed any violations relating to its pesticide activities (see id.). Respondent did commit to sending in the registration fee following a state inspection in mid-2009 (see Exhibit A [Voluntary Statement of Aruna Advani dated July 30, 2009 attached to Affidavit of Robert Freese, DEC Pesticide Control Specialist, sworn to March 7, 2013 and included as part of Oliva Affirmation]).

ECL 71-2907(1) provides that any person who violates any provision of ECL article 33 (Pesticides) or any rule, regulation or order issued thereunder shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for a first violation. The ALJ recommends that a civil penalty of three thousand five hundred dollars (\$3,500) be imposed. Based on my review of the record, the ALJ's recommended civil penalty is authorized and appropriate.

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

- I. Respondent Excellent Pest Control LLC is adjudged to have violated ECL 33-0907(1), ECL 33-1301(8-a) and 6 NYCRR 325.23(a) by applying pesticides in 2009 without having the requisite pesticide business registration.
- II. Respondent Excellent Pest Control LLC is hereby assessed a civil penalty in the amount of three thousand five hundred dollars (\$3,500), which is due and payable within thirty (30) days of the service of a copy of this order on respondent. Payment shall be made in the form of a certified check, cashier's check or money order payable to the order of the "New York State Department of Environmental Conservation." The penalty payment shall be sent by certified mail, overnight delivery, or hand delivery to the Department at the following address:

Madeline Gwyn Warner, Esq.
Assistant Regional Attorney
NYS Department of Environmental Conservation
Region 2
1 Hunter's Point Plaza
47-40 21st Street
Long Island City, NY 11101-5407

- III. All communications from respondent to the Department concerning this order shall be directed to Madeline Gwyn Warner, Esq., at the address referenced in paragraph II of this order.

- IV. The provisions, terms and conditions of this order shall bind Excellent Pest Control LLC, and its agents, successors and assigns, in any and all capacities.

For the New York State Department of
Environmental Conservation

By: _____/s/_____
Basil Seggos
Acting Commissioner

Dated: November 30, 2015
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

HEARING REPORT

DEC Case No.
R2-20090810-506

- by -

EXCELLENT PEST CONTROL LLC,

Respondent.

I. Background

This administrative enforcement proceeding concerns allegations that respondent Excellent Pest Control LLC (“respondent”), a limited liability company located in Jamaica, New York, violated article 33 of the New York State Environmental Conservation Law (“ECL”) and part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”).

Staff of the New York State Department of Environmental Conservation (“Department” or “staff”) commenced this proceeding by service of a motion for order without hearing in lieu of complaint, dated April 10, 2013, asserting one cause of action, alleging that respondent engaged in the commercial application of pesticides without the required business registration in violation of ECL § 33-0907(1), ECL § 33-1301(8-a) and 6 NYCRR § 325.23(a) for a period of time ending in August 2009. Staff’s motion requested that the Commissioner issue an order: (i) finding that respondent violated ECL article 33 and “Title 6 of the NYCRR;” and (ii) imposing a civil penalty in an amount “no less than” five thousand dollars (\$5,000). See Motion for Order Without Hearing at 7, Wherefore Clause ¶¶ 1, 2.

In response to staff’s motion, respondent served a document sworn to by Aruna Advani, who identifies herself as respondent’s President. See Response to Motion for Order Without Hearing, sworn to on May 8, 2013. On July 9, 2015, I issued a Ruling on Motion for Order Without Hearing (“July 2015 Ruling”) denying Department staff’s motion for order without hearing. In the July 2015 Ruling, I informed the parties that I would hold a conference call to establish the future scheduling for the matter. See id. at 7. Following respondent’s refusal to participate in a conference call, I sent to the parties a Memorandum dated July 22, 2015 in which I directed the parties to, among other things: (i) inform me in writing no later than July 29, 2015 as to whether the parties intended to seek discovery in this matter, and to identify such discovery; and (ii) serve all discovery no later than Wednesday, August 12, 2015.

On July 27, 2015, counsel for staff sent an email to me, copying respondent, attaching a memorandum stating that staff did not intend to serve any discovery. By letter dated August 12, 2015, signed by Ms. Advani, respondent served on Department staff a discovery demand seeking “any evidence that the DEC intends to introduce at a Hearing, including but not limited to” five listed categories of information. Department staff thereafter served a response to respondent’s discovery request dated August 20, 2015, attaching responsive documents. I issued to the parties a formal Notice of Hearing on September 2, 2015, scheduling the hearing for September 21, 2015, to commence at 10:00 a.m., at the Department’s Region 2 offices. See Notice of Hearing dated September 2, 2015.

As per the Notice of Hearing, an adjudicatory hearing was held in the Department’s Region 2 offices on September 21, 2015. Although scheduled to commence at 10:00 a.m., no one appeared on behalf of respondent until 10:40 a.m. Department staff was represented by Madeline Gwyn Warner, Esq., Assistant Regional Attorney. Respondent was not represented by counsel, but was represented by Aruna Advani, who stated on the record that she was respondent’s President, and that she had the authority to act in a representative capacity for respondent in this matter. See Hearing Transcript (“Tr.”) at 6:11-7:12; see also 6 NYCRR § 622.10(c)(2). Staff called two witnesses to testify, Robert Freese, a Pesticide Control Specialist 1 who testified via video conference, see Tr. at 18:11-25:13, and Robert Jablonski, a pesticide Control Specialist Level 2. See Tr. 26:5-38:18. Although given the opportunity to cross-examine both staff witnesses, respondent’s representative Ms. Advani cross-examined staff witness Jablonski only. See Tr. at 25:9-13; 38:19-77:7. Six exhibits were entered into evidence, four on behalf of staff and two on behalf of respondent. See Exhibit Chart attached hereto.

As discussed below, I recommend that the Commissioner hold that respondent Excellent Pest Control LLC violated ECL § 33-0907(1), ECL § 33-1301(8), and 6 NYCRR § 325.23(a), and that, pursuant to ECL § 71-2907, the Commissioner impose on respondent a civil penalty in the amount of two thousand five hundred dollars (\$2,500).

II. Findings of Fact¹

1. Respondent Excellent Pest Control LLC was a pesticide business registered with the Department beginning on August 6, 2009.
2. Respondent Excellent Pest Control LLC was not a registered pesticide business prior to August 6, 2009.
3. Aruna Advani was President of respondent Excellent Pest Control LLC.
4. Aruna Advani was a certified commercial pesticide applicator.
5. Prior to August 6, 2009, Aruna Advani applied pesticides under her commercial pesticide applicator certification.

¹ Findings of Fact Nos. 1-5 were established based upon my examination of the evidence filed by the parties on the Motion for Order Without Hearing. See July 2015 Ruling, at 6 (citations to the record supporting the findings of fact); see also 6 NYCRR § 622.10(c)(2).

6. Respondent, a New York limited liability company, initially filed with the New York Department of State on November 21, 2008. See DEC Exhibit (“DEC Ex.”) 2.
7. Aruna Advani is the sole member of respondent Excellent Pest Control LLC. See Tr. at 78:17-21 (Advani testimony that respondent “is a one-member LLC. I am the sole and only member of Excellent Pest Control. The sole member is the LLC. They are both conjoined and constitutes one entity”); see also id. at 79:7- 9 (“I am the LLC. LLC is not separate from me”); 79:16-18 (same); 80:3-4 (same).
8. On or about January 12, 2009, respondent performed two applications of pesticides – one application of “Contrac” and one application of “Advion” – at 7035 Broadway, Jackson Heights, New York. See DEC Ex. 1A; see also Tr. at 20:24-23:2 (Freese testimony); DEC Ex. 3, at second page 1, third line (Contrac), and at page 3, twelfth line (Advion); Respondent Ex. (“Resp. Ex.”) 1, at page 1, lines 3 and 4 in January entries.
9. In April 2009, respondent performed two applications of pesticides – one application of “Maxforce” and one application of “Contrac” – at 435 E 114 St., New York, New York. See DEC Ex. 1B; see also Tr. at 23:3-25:6 (Freese testimony); DEC Ex. 3, at second page 1, twenty-first line (Contrac), and at page 3, line at bottom of page (Maxforce); Resp. Ex. 1, at page 2, lines 8 and 9 in April entries.

III. Discussion

A. Liability – Conclusions of Law

ECL § 33-0907(1) states that “Any pesticide business or agency as defined in this article shall register with the commissioner.” See also 6 NYCRR § 325.23(a) (“each business offering, advertising or providing the services of commercial application of pesticides ... must register annually with the department”). A “pesticide business” is defined in the statute as “any person providing commercial application of pesticides for hire.” ECL § 33-0101(36). A “person” is defined as “any individual, partnership, association, corporation organized group of persons whether incorporated or not ... or any other legal entity whatever.” ECL § 33-0101(33).

ECL § 33-1301(8-a) states in relevant part as follows: “It shall be unlawful ... [f]or any person or business to engage in the business of applying pesticides unless the business is registered by the commissioner.” See also ECL § 33-0101(9) (defining “business registration” as “the requirement of each person or business providing services of commercial application of pesticides, either entirely or as part of the business, to register with the department”).

As set forth above, the record on the motion for order without hearing established, among other things, that (i) respondent was not a registered pesticide business prior to August 6, 2009; and (ii) Ms. Advani, a certified pesticides applicator and President of respondent, applied pesticides prior to the date on which respondent became a registered pesticides business. The only factual questions remaining for the hearing, then, were whether respondent applied

pesticides prior to becoming a registered pesticides business and, if so, how many times respondent applied pesticides prior to becoming a registered pesticides business.

According to respondent, respondent did not apply pesticides at any time prior to registering with the Department; to the extent there is any evidence relating to the application of pesticides during the relevant period, all such applications were performed by Ms. Advani either on behalf of other registered businesses or in her own individual capacity. As discussed below, however, the evidence introduced at the hearing establishes by a preponderance of the evidence that respondent applied pesticides at least four times without being a registered business.

DEC Ex. 1A is an invoice dated January 12, 2009, on respondent's letterhead, reflecting charges to a customer for "Exterminating Services" performed at 7035 Broadway, Jackson Heights, New York, comprised of the application the pesticide Contrac in the basement and the application of the pesticide Advion in the kitchen and bathroom. See DEC Ex. 1A. Respondent's name is at the top of the invoice, along with its address and two telephone numbers. Ms. Advani's name is not on the invoice. See id. Mr. Freese testified that he reviewed this document during a business record inspection, and that Ms. Advani sent him a copy by email. See Tr. at 19:19-23:2.

Similarly, DEC Ex. 1B is an invoice dated April 7, 2009, on respondent's letterhead, reflecting charges to a customer for "Exterminating Services" performed at 435 E 114th St., New York, New York, comprised of the application of the pesticide Maxforce in the kitchen and bathroom, and the application of the pesticide Contrac in the basement. See DEC Ex. 1B. As with DEC exhibit 1A, respondent's name is at the top of this invoice, along with its address and two telephone numbers. Ms. Advani's name is not on the invoice. This invoice also contains the phrase "For Excellent Pest Control" at the bottom of the document. See id. Mr. Freese testified that he reviewed this document during a business record inspection, and that Ms. Advani sent him a copy by email. See Tr. at 23:6-25:6.

The information on these documents is corroborated by other documentary evidence. For example, respondent introduced into evidence a document entitled "Applicator/Technician Pesticide Annual Report" for the "Report Year" of 2009. See Resp. Ex. 1. The document contains nine columns: (i) EPA Pesticide Registration No.; (ii) Product Name; (iii) Quantity Used; (iv) Units; (v) Date of Application; (vi) County Code; (vii) Address; (viii) Municipality/City/Village; and (ix) Zip Code. The document includes respondent's registration number (under the heading "Bus/Agency Reg. No.") and Ms. Advani's applicator certification number (under "Certification ID No."). See id. at first unnumbered page. This report confirms the information in respondent's invoices, reflecting that pesticides Contrac and Advion were applied at 7035 Broadway Jackson Heights on January 12, 2009, and Contrac and Maxforce were applied at 435 E 114 St. in April 2009. See id. at first and second unnumbered pages; see also DEC Exs. 1A and 1B.²

² Although respondent's invoice to the customer states that respondent applied 15 pounds of Contrac on January 12, 2009, both spreadsheets received in evidence at the hearing reflect that 4 pounds of Contrac were applied at that location on that day. Compare DEC Ex. 1A with DEC Ex. 3 and Resp. Ex. 1. The discrepancy in quantity is immaterial; both documents are evidence that respondent applied the pesticides Contrac and Advion at that location

Department staff submitted a spreadsheet that further corroborates information in respondent's invoices. See DEC Ex. 3. According to staff witness Mr. Jablonski, the spreadsheet reflects applications of pesticides during the year 2009. See Tr. at 31:15-25. As Mr. Jablonski explained, each line of text in the spreadsheet contains: (i) Ms. Advani's applicator certification number; (ii) respondent's registration number; (iii) the EPA registration number of the pesticide that was commercially applied; (iv) the name of the pesticide applied; (v) the quantity of pesticide applied; (vi) the date the pesticide was applied; (vii) county code; and (viii) the street address at which the pesticides were applied. See id. at 35:1-36:5.

Consistent with respondent's invoices and the report submitted by respondent, this spreadsheet reflects that the pesticides Contrac and Advion were applied at 7035 Broadway, Jackson Heights, 11372, on January 12, 2009, see DEC Ex. 3 (third line on the second "Page 1" - Contrac; twelfth line on "Page 3" - Advion), and that the pesticides Contrac and Maxforce were applied at 435 E 114 St., New York, 10029 in April 2009. See DEC Ex. 3 (twenty-first line on the second "Page 1" - Contrac; last line on "Page 3" - Maxforce).

At the hearing, respondent offered no testimony or other evidence to demonstrate that the two Excellent Pest Control invoices (DEC Exs. 1A and 1B) were not what they appear to be, or were otherwise inaccurate. Respondent did not cross-examine Mr. Freese, the department employee who testified that he saw these invoices during a records inspection and that Ms. Advani had emailed the invoices to him. Indeed, respondent did not address these invoices at all.

Respondent focused instead on the two spreadsheets (DEC. Ex. 3; Resp. Ex. 1), attempting on cross-examination to establish that one cannot tell from those documents whether respondent applied the pesticides or Ms. Advani applied the pesticides in her individual capacity. See e.g. Tr. at 51:19-52:6; 53:3-54:6. Both spreadsheets relate to the application of pesticides during 2009, and all entries contain both Ms. Advani's certification number and respondent's business registration number. See DEC Ex. 3 and Resp. Ex. 1. Thus, the face of these two documents indicate that all of the applications of pesticides in 2009 were performed by Ms. Advani on behalf of respondent. Because respondent did not obtain a registration number until August 2009, however, one must infer either that these documents were created after respondent obtained a registration number, or were edited after August 2009 to add respondent's registration number. Thus, the inclusion of the registration number in entries that pre-date August 2009 is not dispositive with respect to whether the pre-August applications were performed by respondent.

Respondent has submitted no documents to support Ms. Advani's claim that she conducted the pre-August 2009 pesticide applications in her individual capacity. Respondent submitted no invoices from Ms. Advani individually, or invoices from a different pesticide business, containing information corroborating any applications identified on the spreadsheets.

Staff did not cross-examine Ms. Advani, and therefore did not test her claim that she made all the pre-August applications in her individual capacity, or explore the specifics of any of

on that day. Liability is predicated on the application of pesticides without being registered, not the quantity of pesticides applied at that time.

the other pre-August 2009 pesticide applications referred to in the spreadsheets. As set forth above, however, the spreadsheets corroborate the information in respondent's invoices, which establish that respondent applied pesticides at least two times in January 2009 and at least two times in April 2009.

Based upon the evidence submitted at hearing, I hold that Department staff has satisfied its burden to prove, by a preponderance of the evidence, that respondent engaged in the business of applying pesticides without having registered with the Commissioner, in violation of ECL § 33-0907(1), ECL § 33-1301(8-a) and 6 NYCRR § 325.23(a). Respondent, a limited liability corporation, is a "person" within the meaning of the statute. See ECL § 33-0101(33); see also DEC Ex. 2 (NYS Department of State Entity Information sheet, reflecting that respondent is an LLC). It is undisputed that respondent did not register as a pesticide business until August 2009, see Finding of Fact Nos. 1 and 2 above; see also Issues Ruling at 6, and the evidence at the hearing established that respondent applied pesticides at least four times prior to becoming a registered pesticide business. I recommend that the Commissioner hold that respondent Excellent Pest Control LLC violated ECL § 33-0907(1), ECL § 33-1301(8-a) and 6 NYCRR § 325.23(a).

Staff has alleged that respondent applied pesticides on more than 100 occasions prior to becoming a registered business. See Motion for Order Without Hearing, at 3, ¶ 7 (alleging 122 applications); see also Tr. at 16:20-24 (123 applications); 36:7-13 (122 or 123 applications); 43:3-44:20 (115 or 116 applications). For purposes of establishing liability for applying pesticides without business registration, however, the number of applications is not determinative. Where, as here, a respondent is alleged to have violated the business registration requirement, the number of violations is determined by how often a business is required to register, not by how many times a respondent applied pesticides during a period in which the respondent was not registered. See Matter of Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc., Order of the Commissioner, June 11, 2015, at 2 (affirming Hearing Report, at 8, in which ALJ rejected staff position that each application of pesticides during a period without registration is a distinct violation, and determined that there is "one continuing violation during each three year period, commencing on the date of the first application of pesticides without having such registration").

The evidence in this case has established that respondent committed one violation of the business registration requirement when it applied pesticides during 2009 without being registered. The number of times that respondent applied pesticides up until August 6, 2009 without being registered does not bear on the number of *registration* violations.³

Respondent appears to take the position that possessing an applicator certification is all that is required to perform the commercial application of pesticides. See e.g. Tr. at 42:16-20

³ It is important to note that Ms. Advani was a certified applicator during the entire period at issue. Thus, unlike in the Lopatowski matter, the record here lacks evidence that pesticides were applied by someone who was not at the time certified to perform such applications. As the Commissioner held in Lopatowski, each application of pesticides by a person who is not a certified applicator is a distinct violation. See Matter of Lopatowski, Order of the Commissioner, at 3, ¶ II.C (adopting ALJ recommendation to find 31 separate violations for 31 applications of pesticides without certification); see id., ALJ Hearing Report, at 9.

(“you just have to have an applicator license, you don’t have to have a company, means you can do it on your own license”); see also *id.* at 54:21-60:9 (cross-examination of staff witness regarding requirement that a pesticide business employ at least one certified applicator); 81:17-22 (“without the applicator, the business will not be registered. The business is a stand-alone entity, has no status in the pest control industry. Therefore, business registration is redundant, it is the applicator who needs to be registered and not the business”); 82:6-13 (“Everything rests on my application, not the company ... it’s the applicator who is doing everything and so the company by itself has no meaning. It’s redundant”); 90:16-92:1 (“even if the business does not have registration, it’s ok ... you need a personal registration, which I had ... so the business not having a registration, it’s not an important thing”).

The law, however, is to the contrary. A “pesticide business” is defined in the statute as “any *person* providing commercial application of pesticides for hire.” ECL § 33-0101(36) (italics added). Moreover, the statute makes clear that “[i]t shall be unlawful ... [f]or any person or business to engage in the business of applying pesticides unless the business is registered by the commissioner.” ECL § 33-1301(8-a) (italics added). As a certified applicator, Ms. Advani may perform work for a registered business, but she may not conduct a pesticide business on her own based solely upon her applicator’s certification, and without registering as a business with the Department. The requirement that an applicator be certified is clearly distinct from the requirement that any *person* or business applying pesticides must register with the Department. Compare ECL § 33-0905 (regarding pesticide applicator certification) with ECL § 33-0907 (regarding pesticide business and agency registration). See also ECL § 33-0909 [distinguishing between certification and registration in the context of denial or revocation]. To comply with the statute and regulations, a pesticide business must both register with the Department and employ certified applicators. The requirements are not redundant.⁴

B. Civil Penalty

A person who violates any provision of ECL article 33 or any regulation thereunder shall be liable for a civil penalty of up to five thousand dollars (\$5,000) for a first violation and up to ten thousand dollars (\$10,000) for each subsequent offense. See ECL § 71-2907(1). As set forth above, the evidence at hearing established that respondent committed one violation of the registration requirement. Thus, the maximum statutory penalty in this case would be five thousand dollars (\$5,000) for that one violation.

In its motion for order without hearing, Department staff sought an order imposing a civil penalty in the amount of “no less than” five thousand dollars (\$5,000). See Motion for Order

⁴ In this case, given Ms. Advani’s admissions that she applied pesticides numerous times in her individual capacity, staff could have named her as an additional respondent. Staff could also have alleged that Ms. Advani – admittedly the sole person involved in respondent’s business, see e.g. Tr. at 83:1-2 (Ms. Advani’s testimony that she “is the sole member of the LLC, and performed all the applications. I did them all myself”) – was individually liable under a “responsible corporate officer” theory of liability. See e.g. Matter of Carney's Restaurant, Inc. v. State of New York, 89 A.D.3d 1250, 1253-1254 (3d Dep’t 2011); Matter of Cunningham, Decision and Order of the Commissioner, August 24, 2015, at 7-8. Staff pleaded neither of these theories, however, and I reach no conclusions with respect to them.

Without Hearing at 7, Wherefore Clause ¶ 2.⁵ In a closing argument at the end of the hearing, counsel for staff argued that “a penalty of \$5,000 is entirely justified” because “the maximum penalty in this instance is \$5,000 times 115 violations.” Tr. at 90:5-24. As set forth above, however, respondent did not commit 115 violations of the registration requirement; rather, respondent committed only one violation of the registration requirement.

The Department’s Pesticide Enforcement Policy (DEE-12, rev. March 26, 1993), and the Department’s Civil Penalty Policy (DEE-1, June 20, 1990) provide guidance in determining an appropriate civil penalty in this context. Appendix I to the Department’s Pesticide Enforcement Policy contains a schedule of “minimum penalty levels” “to guide staff in the establishment of penalties and remedies in consent orders....” DEE-12 (rev. March 26, 1993), App. I, § I. According to the policy, the minimum penalty level for failure to obtain business or agency registration is \$1,000 for the first offense, “plus \$100 for each additional offense or different product.” DEE-12, App. I, § IV.

The minimum penalties in the schedule, however, are intended as “an incentive available to respondents who choose settlement of violations by consent order.” *Id.* App. I, § I. The policy distinguishes between pre-hearing and post-hearing penalties:

[P]enalties assessed after a hearing in which Department staff proves the violation should be substantially higher than the minimum presented in this Schedule unless the respondent/defendant proves facts in substantial mitigation of the violation. Penalties assessed after hearing should contain a gravity component, a component for economic benefit derived from the non-compliance, and a component to reflect the Department’s costs incurred in bringing the proceeding, including but not limited to, sample analysis costs.

Id.; see also *id.* at 1 (penalty in adjudicated cases “must ... be significantly higher” than in consent orders); *id.* at § III (significant penalties warranted where business engages in willful conduct and where substantial administrative efforts required to bring business into compliance).

In this matter, staff seeks five thousand dollars (\$5,000), the maximum statutory penalty for the single business registration violation alleged and proven. With respect to the gravity of the violation, Department staff emphasizes the importance of the business registration requirement to the Department’s overall regulatory scheme. See Motion for Order Without Hearing, at 4, ¶¶ 19-20. As staff argues, registration requirements are critical to the Department’s understanding of the universe of regulated entities, and failure to register deprives the Department of its ability to review and control the regulated activities. See *id.* ¶ 20. Indeed, the Pesticide Enforcement Policy characterizes violations of business registration requirements, such as the violation proven here, as Tier #2 “high priority violations.” DEE-12, § IV.

⁵ In accordance with prior Commissioner Decisions and Orders, I interpret staff’s request as one for the specific amount set forth in the motion for order without hearing. See e.g. Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 3.

In addition, citing the Department's Civil Penalty Policy, staff argues that a penalty higher than the minimum penalty is appropriate where, as here, a respondent "is recalcitrant, is totally or relatively unresponsive to DEC enforcement action, negotiates in bad faith or seeks to delay resolution of the violation." Id. ¶ 21 (quoting DEE-1, § II); see also DEE-12, § III (significant penalty warranted where substantial administrative efforts required to bring business into compliance). According to staff, respondent has "consistently avoided communicating with the Department concerning settlement of this matter," including twice seeking "more time" to consider settlement offers and not responding for several months, and not agreeing to meet with Department staff until almost three years after staff mailed its first order on consent to respondent. See id. at 5-6, ¶¶ 22-23. Counsel for staff also argued at the hearing that Ms. Advani and Excellent Pest Control LLC obtained an economic benefit of \$900 by avoiding registering the business. See Tr. at 90:18-24.⁶

As she stated on the record throughout the hearing, Ms. Advani *is* Excellent Pest Control LLC. Ms. Advani testified that, after forming the business, she did not have enough money to pay the three years' registration fee required for registering the business. See Tr. at 84:16-85:2; see also Voluntary Statement Aruna Advani dated July 30, 2009, attached as Exhibit A to the March 7, 2013 Affidavit of Robert Freese, submitted with the Motion for Order Without Hearing.

Inability to pay the registration fee, however, does not excuse respondent's violation of the registration requirement; nor does it excuse respondent's application of pesticides without registration. Moreover, respondent has consistently sought to delay resolution of this matter, which was initiated more than six years ago after an inspection by staff witness Robert Freese. As set forth above, the minimum penalty in a settlement context for the violation proven here would be \$1,000 plus \$100 for each additional violation "or different product." DEE-12, Appendix I, § IV. In accordance with the Department's civil penalty and pesticide enforcement policies, I recommend that the Commissioner impose a civil penalty of three thousand five hundred dollars (\$3,500). Although it is less than the maximum statutory penalty for the violation, this penalty amount reinforces the importance of the business registration requirement and the serious nature of the violation. In making this recommendation, however, I also note that, on this record, neither respondent nor its certified applicator has committed any additional violations since August 6, 2009.

⁶ Staff presented no argument regarding the Department's costs incurred in bringing the proceeding.

IV. Recommendations

Based on the foregoing, I recommend that the Commissioner issue an order:

- A. Holding that, based upon a preponderance of the evidence introduced at hearing, respondent Excellent Pest Control LLC violated ECL § 33-0907(1), ECL § 33-1301(8-a) and 6 NYCRR § 325.23(a) by applying pesticides in 2009 without having the requisite pesticide business registration;
- B. Directing respondent Excellent Pest Control LLC to pay a civil penalty in the amount of three thousand five hundred dollars (\$3,500).

_____/s/_____
D. Scott Bassinson
Administrative Law Judge

Dated: October 26, 2015
Albany, New York

EXHIBIT LIST

Matter of Excellent Pest Control LLC, DEC Case No. 2-20090810-506

September 21, 2015 – Region 2, 1 Hunter's Point Plaza 47-40 21st Street Long Island City, NY

Exhibit No.	Description	Offered by	Received into Evidence
DEC 1A	Invoice dated January 12, 2009 on Excellent Pest Control letterhead	Staff	Yes
DEC 1B	Invoice dated April 7, 2009 on Excellent Pest Control letterhead	Staff	Yes
DEC 2	NYS Department of State Entity Information Sheet regarding Excellent Pest Control LLC, reflecting information through September 17, 2015	Staff	Yes
DEC 3	April 10, 2013 “2009 Identity.txt” spreadsheet	Staff	Yes
Resp. 1	Applicator/Technician Pesticide Annual Report for 2009	Respondent	Yes
Resp. 2	Pesticide Business or Agency Registration Application form	Respondent	Yes