

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

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In the Matter of the Alleged Violations of Article 33 of the 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"),

**ORDER**

DEC Case No.  
R1-20051215-266

- by -

**MAXWELL FISHON, PRESIDENT OF MAX'S  
EXTERMINATORS, INC., A.K.A. MAX'S  
EXTERMINATING, AND MAX'S EXTERMINATORS,  
INC., A.K.A. MAX'S EXTERMINATING,**

Respondents.

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On April 25, 2006, staff of the New York State Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding against respondents Maxwell Fishon and Max's Exterminators, Inc., a.k.a. Max's Exterminating with service of a notice of pre-hearing conference and hearing, and a verified complaint each dated March 14, 2006.

In accordance with section 622.3(a)(3) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), respondents were served by certified mail, return receipt requested. The verified complaint was received by respondents on April 28, 2006, thereby completing service (see 6 NYCRR 622.3[a][3]).

In its verified complaint dated March 14, 2006, Department staff alleges that respondent Max's Exterminators, Inc. operated a commercial pesticide business. The verified complaint also alleges that respondent Maxwell Fishon individually operated Max's Exterminators, Inc. and offered pesticide services under additional business names, including Max's Exterminating. Respondent Maxwell Fishon is also alleged to be a certified pesticide applicator (identification no. C1-272625) (see 6 NYCRR 325.1[1]).

Department staff set forth eight causes of action in the verified complaint by which it alleged that respondents violated various provisions of the pesticides law (Environmental Conservation Law ["ECL"] article 33) and implementing regulations

(6 NYCRR part 325). These included failing to register a pesticide business, failing to give notice prior to applying pesticides, failing to maintain records and to submit annual reports to the Department, failing to use equipment with anti-siphoning devices, failing to display the required numbered stickers, failing to use the appropriate containers and failing to follow label directions when applying pesticides.

Respondents failed to file an answer to the March 14, 2006 verified complaint. With a cover letter dated October 16, 2006, Department staff filed a motion for a default judgment, of the same date, with the Department's Office of Hearings and Mediation Services, and the matter was assigned to Administrative Law Judge ("ALJ") Daniel O'Connell. After reviewing Department staff's motion papers, the ALJ prepared the attached default summary report. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

I conclude that the verified complaint alleges sufficient facts upon which to impose liability on the corporate respondent Max's Exterminators, Inc., as well as upon respondent Maxwell Fishon, individually, as the operator of both incorporated and non-incorporated pesticide businesses, as well as a certified pesticide applicator (cf. Matter of RGLL, Inc., Commissioner's Decision and Order, Jan. 21, 2005, at 4).

Based upon the record, I also conclude that the civil penalty proposed by Department staff and recommended by the ALJ is appropriate given respondents' poor compliance history, the gravity of the violations, and the potential harm to human health and the environment. These circumstances, which are discussed in the ALJ's report, support the proposed civil penalty requested by Department staff. The record also supports staff's request to revoke respondent Maxwell Fishon's commercial applicator certification (No. C1-272625) in accordance with 6 NYCRR 325.13(a).

In this administrative enforcement action, Department staff is not seeking to recover the suspended portion of the civil penalty assessed pursuant to the order on consent that Maxwell Fishon signed on April 21, 2003, on behalf of respondents (File No. R1-20030131-31). The civil penalty assessed by this order is in addition to and without prejudice to any civil penalty that respondents may owe and Department staff may seek under the April 21, 2003 order on consent.

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

I. Pursuant to 6 NYCRR 622.15, Department staff's motion for a default judgment is granted.

II. Respondents Maxwell Fishon and Max's Exterminators, Inc., a.k.a. Max's Exterminating, are adjudged to be in default and to have waived the right to a hearing in this enforcement proceeding. Accordingly, the allegations against respondents, as contained in the March 14, 2006 verified complaint, are deemed to have been admitted by respondents.

III. Respondents are adjudged to have violated ECL 33-0907(1) and 33-1301(8-a), and 6 NYCRR 325.23(a) when they operated Max's Exterminators, Inc., between January 1, 2001 and March 25, 2005, and Max's Exterminating between November 1, 2002 and March 13, 2003 without registering these pesticide businesses with the Department.

IV. Respondents are adjudged to have violated ECL 33-0905(5) on March 17, 2005 when they failed to provide a written copy of the information on the pesticide label to the occupants of a dwelling prior to the application of the pesticide.

V. Respondents are adjudged to have violated ECL 33-1205 and 6 NYCRR 325.25 by failing to maintain accurate records about the pesticides used on 21 separate occasions during calendar years 2003, 2004 and 2005.

VI. Respondents are adjudged to have violated ECL 33-1205(1) and 6 NYCRR 325.25(b) because they did not file annual reports concerning pesticide use for calendar years 2001, 2002, 2003 and 2004.

VII. Respondents are adjudged to have violated 6 NYCRR 325.2(c) from November 25, 2002 to March 25, 2005 when respondents failed to use pesticide application equipment with an effective anti-siphon device to prevent backflow.

VIII. Respondents are adjudged to have violated ECL 33-1301(1)(b) on or about March 25, 2005 when they used pesticide that was not in the registrant's or manufacturer's unbroken, immediate container.

IX. Respondents are adjudged to have violated 6 NYCRR 325.26(a) on March 25, 2005 when respondents did not display

numbered stickers on opposite sides of the vehicle used to transport pesticide application equipment.

X. Respondents are adjudged to have violated 6 NYCRR 325.2(b) on March 17, 2005 by failing to use pesticides in accordance with label directions.

XI. Respondents are hereby jointly and severally assessed a total civil penalty in the amount of seventy-nine thousand dollars (\$79,000). The total civil penalty shall be due and payable within thirty (30) days after service of this order upon respondents. Payment 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 mailed to the Department's Region 1 Office at the following address: 50 Circle Road, Stony Brook, New York 11790, ATTN: Kari Wilkinson, Esq.

XII. Respondent Maxwell Fishon's commercial pesticide applicator certification (No. C1-272625) is hereby revoked.

XIII. All communications from respondents to the Department concerning this order shall be made to Acting Regional Attorney Craig Elgut, New York State Department of Environmental Conservation, 50 Circle Road, Stony Brook, New York 11790.

XIV. The provisions, terms and conditions of this order shall bind respondents Maxwell Fishon and Max's Exterminators, Inc., a.k.a. Max's Exterminating, and their agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/  
Louis A. Alexander  
Assistant Commissioner<sup>1</sup>

Dated: March 20, 2007  
Albany, New York

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<sup>1</sup> By memorandum dated March 14, 2007, Acting Executive Deputy Commissioner Carl Johnson delegated decision making authority in this matter to Assistant Commissioner Louis A. Alexander.

TO: Maxwell Fishon (via certified mail)  
President  
Max's Exterminators, Inc.  
5720 Old Sunrise Highway  
Massapequa, New York 11758

Max's Exterminators, Inc. (via certified mail)  
5720 Old Sunrise Highway  
Massapequa, New York 11758

Kari Wilkinson, Esq. (via regular mail)  
Associate Regional Attorney  
New York State Department of  
Environmental Conservation  
Division of Legal Affairs, Region 1  
50 Circle Road  
Stony Brook, New York 11790

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of Alleged Violations  
of article 33 of the 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:

Default  
Summary Report

Index No.:  
R1-20051215-266

Maxwell Fishon, President of Max's Exterminators, Inc.  
a.k.a. Max's Exterminating, and  
Max's Exterminators, Inc. a.k.a. Max's Exterminating,

RESPONDENTS.

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**Proceedings**

On April 25, 2006, the Region 1 Staff of the Department of Environmental Conservation (the Department Staff or Staff) duly served a notice of pre-hearing conference and hearing, and verified complaint upon Maxwell Fishon, President of Max's Exterminators, Inc., a.k.a. Max's Exterminating and Max's Exterminators, Inc., a.k.a. Max's Exterminating (Respondents) by certified mail, return receipt requested. The notice of pre-hearing conference and hearing, and the verified complaint are each dated March 14, 2006.

In eight causes of action, the March 14, 2006 verified complaint alleges that Respondents violated various provisions of the pesticides law and implementing regulations, which include failing to register a pesticide business; failing to give notice prior to applying pesticides; failing to maintain records, and to submit annual reports; failing to use equipment with anti-siphoning devices, and having the required numbered stickers; failing to use the appropriate containers, and to follow label directions when applying pesticides.

The March 14, 2006 notice of pre-hearing conference and hearing stated that, pursuant to 6 NYCRR 622.4, Respondents must serve an answer upon Department Staff within twenty days of receiving the verified complaint. As provided for by 6 NYCRR 622.8, the notice also scheduled a pre-hearing conference for May 3, 2006 at 11:00 a.m. at the Department's Region 1 Office on the SUNY Stony Brook campus. The notice stated that if Respondents failed either to file an answer or to attend the pre-hearing conference, they would be in default and would waive their right to a hearing.

With a cover letter dated October 16, 2006, Kari Wilkinson, Esq., Assistant Regional Attorney, Region 1, filed a motion for

default judgment and order dated the same with supporting papers against Respondents. The supporting papers consisted of an affirmation by Ms. Wilkinson dated October 16, 2006 with attached Exhibits A, B, C, D and E, which are described below.

According to Ms. Wilkinson's affirmation, she served the March 14, 2006 notice of pre-hearing conference and hearing, and the verified complaint by certified mail return receipt requested. Exhibit A is a copy of the signed domestic return receipt, and Exhibit B is a copy of the tracking slip for the certified mail, which demonstrates that the Staff's papers were delivered to Respondents on April 28, 2006. Exhibit C is a copy of Staff's March 14, 2006 notice of pre-hearing conference and hearing, and verified complaint.

Exhibit D is a copy of a fully executed order on consent dated April 21, 2003 signed by Maxwell Fishon. The April 21, 2003 order on consent resolved violations of the pesticide law and implementing regulations by Respondents that related to, among other things, providing notice prior to applying pesticides; failing to have at least two employees of the pesticide business present during the application of pesticides; using equipment to apply pesticides with anti-siphoning devices; and maintaining records. For the violations resolved by the April 21, 2003 order on consent, Respondents were assessed a total civil penalty of \$8,000. Of that total amount, \$5,000 was paid, and \$3,000 was suspended provided Respondents complied with the terms and conditions of the April 21, 2003 order on consent.

The March 14, 2006 verified complaint asserts, in part, that Respondents repeated some of the violations previously resolved by the April 21, 2003 order on consent. For example, Staff alleges in the second cause of action in the March 14, 2006 verified complaint (see ¶¶ 11-13) that Respondents did not provide residents notice prior to applying pesticides. Staff asserts in the third cause of action in the verified complaint (see ¶¶ 14-20) that Respondents failed to maintain records. Finally, Department staff alleges in the fifth cause of action of the March 14, 2006 verified complaint (see ¶¶ 36-38) that Respondents used equipment to apply pesticides without anti-siphoning devices.

Exhibit E is a copy of a proposed order for the Commissioner's signature.

The bases for Staff's motion for default judgment are Respondents' failure to: (1) appear at the May 3, 2006 pre-

hearing conference; and (2) file a timely answer to the March 14, 2006 verified complaint.

### **Findings of Fact**

1. On April 25, 2006, Assistant Regional Attorney Kari Wilkinson served a copy of the notice of pre-hearing conference and hearing, and verified complaint dated March 14, 2006 upon Maxwell Fishon as president of Max's Exterminators, Inc. a.k.a. Max's Exterminating by registered mail return receipt requested.
2. Referring to 6 NYCRR 622.4, the March 14, 2006 notice of pre-hearing conference and hearing states that Respondents must serve an answer upon DEC Staff within twenty days of receiving the notice of pre-hearing conference and hearing, and verified complaint.
3. As provided for by 6 NYCRR 622.8, the notice also scheduled a pre-hearing conference for May 3, 2006 at 11:00 a.m. at the Department's Region 1 Office on the SUNY Stony Brook campus. The notice states that if Respondents failed either to file an answer or to attend the pre-hearing conference, they would be in default and would waive their right to a hearing.
4. With respect to the March 14, 2006 verified complaint, the time for Respondents to serve an answer expired on May 18, 2006. As of the date of Department staff's default motion, Respondents had not filed an answer.
5. On April 21, 2003, Maxwell Fishon, on behalf of Respondents, signed an order on consent (File No. R1-20030131-31), which resolved violations of the pesticide law (ECL article 33) and implementing regulations associated with, among other things: (1) providing notice prior to applying pesticides; (2) using anti-siphon equipment to apply pesticides; and (3) maintaining use records. For the violations resolved by the April 21, 2003 order on consent, Respondents were assessed a total civil penalty of \$8,000. Of the total amount, Respondents paid \$5,000. The balance of \$3,000 was suspended provided Respondents complied with the terms and conditions of the April 21, 2003 order on consent.
6. The Department has issued Maxwell Fishon a commercial pesticide applicator certification (No. C1-272625).

### Discussion

According to the Department's hearing regulations, a respondent's failure either to file a timely answer or to appear at a pre-hearing conference constitutes a default and a waiver of the respondent's right to a hearing (see 6 NYCRR 622.15[a]). Under these circumstances, Department staff may move for a default judgment. Consistent with 6 NYCRR 622.15(b), Staff's October 16, 2006 motion for default judgment included:

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

#### 1. Liability

Assistant Regional Attorney Wilkinson's October 16, 2006 affirmation with Exhibits A and B demonstrate service of the March 14, 2006 notice of pre-hearing conference and hearing, as well as the verified complaint upon Respondents in a manner consistent with the requirements outlined in 6 NYCRR 622.3(a)(3). In addition, Ms. Wilkinson's affirmation demonstrates that Respondents did not timely file any answer to the verified complaint. Based on these circumstances, Respondents have defaulted and waived their right to a hearing, and Department staff is entitled to a default judgment pursuant to 6 NYCRR 622.15(a).

Staff, however, may not rely on Respondents' failure to appear at the May 3, 2006 pre-hearing conference as an additional basis for the default judgment. The May 3, 2006 pre-hearing conference was scheduled within the twenty day period provided for filing the answer. The Commissioner has previously determined that a respondent must be afforded the full regulatory period in which to answer prior to scheduling the date of the pre-hearing conference. As a result, the Commissioner has held that a respondent's failure to appear at a "pre-answer, pre-hearing conference" cannot be relied upon as a basis for a default judgment. (See *Matter of Kuldeep Singh*, Commissioner's Decision and Order, December 17, 2003.) As noted above, the only basis, therefore, for a default judgment that may be relied upon here is Respondents' failure to file any answer.

2. Relief

The Department Staff has provided a proposed order with its motion papers. The proposed order would assess a total civil penalty of \$79,000, and would require Maxwell Fishon to surrender his commercial pesticide applicator certification (No. C1-272625).

When a respondent defaults, he waives the right to a hearing and is deemed to have admitted the factual allegations of the complaint with respect to liability for the violations charged. Department staff, nevertheless, still has the obligation to prove damages. (See *Matter of Alvin Hunt d/b/a Our Cleaners*, Decision and Order of the Commissioner, July 25, 2006, at 3-4.)

Pursuant to ECL 71-2907(1), any person who violates any provision of ECL article 33 or any rule, regulation or order issued thereunder, or commits any offense described in ECL 33-1301 shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for the first violation, and not to exceed ten thousand dollars (\$10,000) for a subsequent offense.

As the first cause of action in the March 14, 2006 verified complaint (see ¶¶ 7-10), Department staff alleges that the pesticide business known as Max's Exterminators, Inc. was not registered for a five year period from January 1, 2001 through March 25, 2005 in violation of ECL 33-0907(1), 33-1301(8-a) and 6 NYCRR 325.23(a). In addition, Department staff alleged that the pesticide business known as Max's Exterminating was not registered for a two year period from November 1, 2002 through March 13, 2003 in violation of ECL 33-0907(1), 33-1301(8-a) and 6 NYCRR 325.23(a). As noted above, Respondents' default has resulted in a waiver of their right to a hearing and they are deemed to have admitted the factual allegations for all the violations charged in the March 14, 2006 verified complaint.

With respect to determining the appropriate civil penalty, the Department's Pesticide Enforcement Guidance Memorandum (DEE-12, issued January 20, 1987, revised March 26, 1993) characterizes the failure to register a pesticide business annually as a "high priority" violation. DEE-12 recommends a minimum civil penalty of \$1,000 for the first offense, and states further that the minimum recommended amounts should be doubled for the second and any subsequent offenses. In addition, the civil penalties recommended in DEE-12 are minimums that would be applied when a respondent voluntarily enters into an order on consent. When, as here, an administrative enforcement proceeding

is necessary to establish a respondent's liability, significantly higher penalties should be imposed (see DEE-12 ¶ 4).

Therefore, the Commissioner should assess a substantial civil penalty (e.g. \$21,000) for the violations related to Respondents' failure to register the pesticide businesses for the following reasons. First, the requirement to register a pesticide business has been assigned a high regulatory priority. Second, Respondents continued to operate these separate businesses without registering them on an annual basis over periods of two and five years, respectively.

As the second cause of action in the March 14, 2006 verified complaint (see ¶¶ 11-13), Department staff alleges that on or about March 17, 2005, Respondents failed to give occupants of a dwelling notice prior to applying pesticides. This type of violation is also assigned a high priority in DEE-12. According to the April 21, 2003 order on consent (see Exhibit D, ¶ 6), Respondents previously failed to provide the required notice prior to applying pesticides in August 2002. The Commissioner should consider the previous violation identified in the April 21, 2003 order on consent to be a significant aggravating factor, which demonstrates a poor compliance history, and assess the maximum civil penalty for the same violation alleged in the March 14, 2006 verified complaint (e.g. \$5,000).

Department staff alleges in the third cause of action (see March 14, 2006 verified complaint ¶¶ 14-20) that Respondents violated ECL 33-1205(1) and 6 NYCRR 325.25 by failing to maintain accurate records about the pesticides used on a daily basis during the years 2003, 2004 and 2005. According to the verified complaint, Respondents failed in 2003 to maintain accurate use records on five separate occasions. In 2004, Respondents failed to maintain accurate use records on 13 separate occasions. In 2005, Respondents failed to maintain accurate use records on three occasions. The total number of occurrences is 21.

In DEE-12, the recommended civil penalty for failing to maintain accurate use records is \$250 per violation. According to the April 21, 2003 order on consent (see Exhibit D, ¶¶ 15-16), Respondents previously failed to maintain accurate daily use records on nine separate occasions from 2000 to 2002. The Commissioner should consider the prior record keeping violations identified in April 21, 2003 order on consent to be a significant aggravating factor when determining the appropriate civil penalty with respect to the same violations that occurred from 2003 to

2005. Accordingly, the Commissioner should assess a substantial civil penalty for the record keeping violations (e.g. \$30,000).

As the fourth cause of action in the March 14, 2006 verified complaint (see ¶¶ 21-35), Department staff alleges that from 2001 through 2004, Respondents failed to file annual reports in violation of ECL 33-1205(1) and 6 NYCRR 325.25(b). DEE-12 distinguishes violations associated with maintaining daily use records from filing annual reports, and recommends a civil penalty of \$1,000 for failing to file an annual report. The Commissioner should assess a substantial civil penalty (e.g. \$12,000).

Department staff alleges in the fifth cause of action (see ¶¶ 36-38) that Respondents violated 6 NYCRR 325.2(c) by failing to use an effective anti-siphon device to prevent backflow on various occasions from November 25, 2002 through March 25, 2005. According to the April 21, 2003 order on consent (see Exhibit D, ¶¶ 13-14), Respondents previously failed to use an effective anti-siphon device to prevent backflow on November 25, 2002. DEE-12 assigns the "highest priority" to this type of violation because non-compliance may result in exposure of individuals in contravention of the product label instructions. The recommended civil penalty in DEE-12 is \$1,000 per violation. The Commissioner should consider the previous violation identified in the April 21, 2003 order on consent to be a significant aggravating factor which justifies substantially increasing the minimum recommended civil penalty (e.g. \$3,000).

In the sixth cause of action (see March 14, 2006 verified complaint ¶¶ 39-41), Department staff alleges that Respondents violated ECL 33-1301(1)(b) on March 25, 2005 when they used a pesticide that was not in the registrant's or manufacturer's unbroken, immediate container. DEE-12 assigns this type of violation the highest priority because the unlawful use may result in short or long-term human or animal injury, or may result in exposure to individuals in a manner contrary to product label instructions. For this violation, DEE-12 recommends a civil penalty of \$1,000 per violation. The Commissioner should consider Respondents' poor compliance history, which is established by the April 21, 2003 order on consent, as an aggravating factor that justifies a substantial increase in the recommended civil penalty for this violation (e.g. \$3,000).

In the seventh cause of action (see ¶¶ 42-44), Department staff alleges that Respondents violated 6 NYCRR 325.26(a) on or about March 25, 2005 when Respondents failed to display numbered

equipment stickers on opposite sides of the vehicle used to transport pesticide application equipment. The guidance in DEE-12 recommends a civil penalty of \$200. The Commissioner, however, should consider Respondents' poor compliance history as an aggravating factor that justifies a substantial increase in the recommended civil penalty (e.g. \$1,000).

Department staff alleges in the eighth cause of action (see March 14, 2006 verified complaint ¶¶ 45-49) that Respondents violated 6 NYCRR 325.2(b) on March 17, 2005 by failing to use pesticides in accordance with label directions. According to the verified complaint, Respondents did not follow the label directions for *Dragnet* (EPA Reg. No. 279-3062). The guidance provided in DEE-12 assigns the highest priority to this type of violation because the unlawful use may result in short or long-term human or animal injury, or may result in exposure to individuals contrary to product label instructions. For this violation, DEE-12 recommends a civil penalty of \$1,000 per violation. The Commissioner should consider Respondents' poor compliance history, which is established by the April 21, 2003 order on consent, as an aggravating factor that justifies a substantial increase in the recommended civil penalty (e.g. \$4,000).

Based on the foregoing discussion, Department staff has provided a reasoned explanation for the requested civil penalty of \$79,000. It is important to note that Department staff is not attempting in the captioned administrative enforcement action to recover the suspended portion of the civil penalty assessed in the April 21, 2003 order on consent. The requested amount sought here (i.e., \$79,000) is consistent with established Department guidance and appropriately considers Respondents' poor compliance history. Since signing the April 21, 2003 order on consent, Respondents have not fully and completely complied with all applicable laws and regulations based on the charges alleged in the March 14, 2006 verified complaint. The requested civil penalty is substantially less than the potential statutory maximum. In addition, Department staff has offered a reasoned explanation for the revocation of Maxwell Fishon's commercial pesticide applicator certification (No. C1-272625) (see 6 NYCRR 325.13[a]).

### **Conclusions**

1. Respondents have defaulted and, therefore, have waived their, respective, right to a hearing concerning their

liability for the violations alleged in the March 14, 2006 verified complaint.

2. Department staff has provided a justification for the requested civil penalty and other requested relief.

**Recommendation**

The Commissioner should issue the proposed order submitted by Department Staff, which would assess a total civil penalty of \$79,000, and revoke Maxwell Fishon's commercial pesticide applicator certification (No. C1-272625).

\_\_\_\_\_/s/  
Daniel P. O'Connell  
Administrative Law Judge