

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

In the Matter of the Alleged Violation
of Article 33 of the Environmental
Conservation Law of the State of New
York,

ORDER

DEC File No.
R4-2010-0611-52

- by -

HANCOCK GOLF AND COUNTRY CLUB, INC.,

Respondent.

This proceeding concerns an alleged violation of Environmental Conservation Law (ECL) § 33-0905 by respondent Hancock Golf and Country Club, Inc. which operates a golf course in Hancock, New York. Specifically, staff of the New York State Department of Environmental Conservation (Department) alleges in its complaint that respondent directed and allowed an employee, who was not a certified pesticide applicator, to apply a pesticide (Bayleton 1%, EPA Reg. #43121-43-3) at its golf course in fall 2009 and spring 2010 to control snow mold.

Department staff commenced this administrative enforcement proceeding against respondent Hancock Golf and Country Club, Inc., by service of a notice of hearing and complaint dated January 31, 2011, by certified mail. Respondent received the notice of hearing and complaint on February 5, 2011.

Respondent failed to file an answer to the complaint. Pursuant to 6 NYCRR 622.4(a), respondent's time to serve an answer to the complaint expired on February 25, 2011, and has not been extended by Department staff.

Department staff filed a motion for default judgment, dated March 2, 2011, with the Department's Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge (ALJ) P. Nicholas Garlick, who prepared the attached default summary report in which he determined that Department staff is entitled to a default judgment and order. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

With respect to the civil penalty, Department staff requested a penalty in the amount of two thousand dollars (\$2,000) in its complaint and its motion for default judgment. In calculating the amount of the civil penalty, Department staff considered such factors as the prevention of injuries to public health, property, wildlife, and the environment (see Affirmation of Jill Phillips, Esq., in Support of Motion for Default Judgment and Order, March 2, 2011, at ¶ 9). Department staff also considered the Department's Civil Penalty Policy and Pesticide Enforcement Policy with respect to the civil penalty (see id.).

Based on the record, I conclude that the proposed civil penalty is appropriate.

In addition, Department staff requested that respondent be prohibited from allowing the application of pesticides at the golf course unless the pesticide applicator has a New York State Commercial Pesticide Applicator Certification in category 3A or 3B (ornamental and turf pest control) (see 6 NYCRR 325.16[c][1] and [2]). No need exists for me to order this requirement (see Matter of Island Landscape LCP, Corp., Order of the Assistant Commissioner, February 8, 2007, at 5). By law, respondent is required to use a properly certified applicator for the application of pesticides at its golf course. Failure to do so would constitute a violation of the applicable legal requirements.

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. Respondent Hancock Golf and Country Club, Inc., is adjudged to be in default and to have waived its right to a hearing in this proceeding. Accordingly, the allegations against respondent, as set forth in Department staff's complaint, are deemed to have been admitted by respondent.
- III. Respondent is adjudged to have violated ECL § 33-0905.
- IV. Respondent Hancock Golf and Country Club, Inc., is assessed a civil penalty in the amount of two thousand dollars (\$2,000). The civil penalty is due and payable within thirty (30) days after service of this order upon respondent. Payment of the civil penalty 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:

Jill Phillips, Esq.
Assistant Regional Attorney
NYSDEC, Region 4
1130 North Westcott Road
Schenectady, NY 12306

- V. All communications from respondent to the Department concerning this order shall be directed to Jill Phillips, Esq., at the address set forth in paragraph IV of this order.
- VI. The provisions, terms and conditions of this order shall bind respondent Hancock Golf and Country Club, Inc., and its agents, successors, and assigns in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/
By: _____
Joseph J. Martens
Commissioner

Dated: April 5, 2011
Albany, New York

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

In the Matter of Alleged Violation
of Article 33 of the Environmental
Conservation Law, of the State of New York,

Default Summary
Report

DEC File No.
R4-2010-0611-52

-by-

HANCOCK GOLF AND COUNTRY CLUB, INC.,

Respondent.

Staff of the Department of Environmental Conservation ("DEC Staff") commenced this administrative enforcement proceeding by serving a notice of hearing and complaint upon Hancock Golf and Country Club, Inc. ("respondent") at 522 Golf Course Road, Hancock, New York (the "site"). The complaint alleged the respondent violated Environmental Conservation Law ("ECL") section 33-0905, by directing and allowing an employee, who was not a certified pesticide applicator, to apply a pesticide (Bayleton 1%, EPA Reg. #43121-43-3) at the golf course in the Fall of 2009 and the Spring of 2010 to control Snow Mold.

The notice of hearing and complaint were served upon Hancock Golf and Country Club, Inc., by certified mail, return receipt requested, on February 5, 2011. Hancock Golf and Country Club, Inc., failed to file an answer to the complaint. By papers dated March 2, 2011, DEC Staff moved for a default judgment and order against the respondent pursuant to 6 NYCRR 622.15. DEC Staff mailed a copy of the default motion and supporting papers to the respondent which were received on March 15, 2011. As of the date of this default summary report, the DEC Office of Hearings and Mediation Services has not received any response from or on behalf of the respondent.

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision

622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a timely answer; and (3) a proposed order."

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Commissioner Decision and Order, July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]."

DEC Staff's default motion papers consist of the following documents: (1) a notice of motion; (2) a motion for default judgment and order; (3) the affirmation of DEC Staff counsel Jill Phillips; and (4) a cover letter. Attached to Ms. Phillips' affirmation are: (1) an affidavit of service of the notice of hearing and complaint; (2) a United States Postal Service's Track & Confirm receipt; (3) a copy of the notice of hearing and complaint; (4) a copy of a letter to the editor from the *Hancock Herald* dated May 19, 2010; and (5) a proposed order in this matter. DEC Staff's affidavit of service of the default motion shows service on March 15, 2011.

FINDINGS OF FACT

1. Hancock Golf and Country Club, Inc. owns a golf course located at 522 Golf Course Road, Hancock, New York.
2. In the Fall of 2009 and the Spring of 2010, the respondent directed and allowed an employee, who was not a certified pesticide applicator, to apply a pesticide (Bayleton 1%, EPA Reg. #43121-43-3) at the golf course.
3. On February 5, 2011, a notice of hearing and complaint in this matter were served on Hancock Golf and Country Club, Inc., at 522 Golf Course Road, Hancock, NY, by certified mail, return receipt requested. The receipt was returned showing delivery of the mailing.
4. The notice of hearing stated that an answer must be served upon DEC Staff within twenty days of receipt of the complaint. The notice of hearing also stated that failure to timely file an answer will result in a default and a

waiver of the respondent's right to a hearing. The twenty-day time period expired on February 25, 2011. Hancock Golf and Country Club, Inc. failed to serve an answer within the 20-day period.

5. On March 2, 2011, DEC Staff moved for a default judgment and order. The motion was served on the respondent on March 15, 2011. DEC Staff's motion papers included a proposed order.

DISCUSSION

The notice of hearing and complaint were served upon the respondent on February 5, 2011. Respondent failed to serve an answer within the time period specified in 6 NYCRR 622.4(a) and respondent defaulted in this matter.

DEC Staff has provided proof of service upon the respondent of the notice of hearing and complaint, proof that the respondent failed to appear or file a timely answer, and provided a proposed order. Accordingly, DEC Staff has met the requirements of 6 NYCRR 622.15(a). In addition, DEC Staff has provided proof of service of the default motion upon the respondent. DEC Staff's complaint contains sufficient allegations for the Commissioner to conclude that relief may be granted for the cause of action alleged. Therefore, DEC Staff is entitled to a default judgment and order in this matter.

Ms. Phillips affirmation states that the requested civil penalty of \$2,000 is within the range authorized by ECL 71-2907 which authorizes a penalty of up to \$5,000 for the first violation of any provision of ECL article 33, or any rule or regulation promulgated thereunder. Ms. Phillips also states that the requested civil penalty amount is consistent with the Department's Civil Penalty Policy and the Pesticide Enforcement Guidance Memorandum. Based on this, it is reasonable for the Commissioner to conclude that a penalty of \$2,000 is justified in this case.

CONCLUSIONS

1. Respondent Hancock Golf and Country Club, Inc. was served with the notice of hearing and complaint on February 5, 2011. The respondent failed to file a timely answer and has failed to file any answer as of

the date of this report. The respondent has defaulted in this matter.

2. Respondent violated ECL section 33-0905 by directing and allowing an employee, who was not a certified pesticide applicator, to apply a pesticide (Bayleton 1%, EPA Reg. #43121-43-3) at the golf course in the Fall of 2009 and the Spring of 2010.
3. Environmental Conservation Law 71-2907 provides that a person who violates any of the provisions of Article 33, or who fails to perform any duty imposed by thereunder shall be liable for a civil penalty of up to \$5,000 for a first offense.

RECOMMENDATION

I recommend that the Commissioner issue an order holding the respondent Hancock Golf and Country Club, Inc. liable for a violation of ECL 33-0905 and imposing a civil penalty of \$2,000.

/s/

Albany, New York
March 30, 2011

P. Nicholas Garlick
Administrative Law Judge