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 of the State of New York and Parts 320 through 326 of Title 6 of the New York Compilation of Codes, Rules and Regulations

Ruling

File No. R1-20040413-81

by:

Island Landscape LCP, Corp.,

Respondent.

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Proceedings

On October 12, 2006, pursuant to § 622.15 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR), staff of the Division of Environmental Enforcement (DEE) of the New York State Department of Environmental Conservation (DEC or Department) filed a notice of motion for default judgment with the Department's Office of Hearings and Mediation Services (OHMS). The notice of motion and supporting papers provide that pursuant to Business Corporation Law § 306 (b), on July 12, 2006, staff served the New York State Department of State with two copies of a notice of hearing and complaint against respondent Island Landscape LCP, Corp., concerning alleged violations of Article 33 of the Environmental Conservation Law (ECL) and Parts 320 - 326 of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR).

For the years 2001, 2002, and 2003, the staff alleges in its complaint: 1) failure to obtain certification prior to application of pesticides; 2) failure to annually register a pesticide business with the Department; 3) failure to display required stickers on business vehicle; 4) failure to enter into written contract with owner of premises that are subject to pesticide application prior to application; 5) failure to maintain required records; 6) failure to file annual pesticide reporting law report with Department; 7) failure to keep copies of lawn application contracts; and 8) failure to deliver copy of information, hazards, and labels to occupants of premises subject to pesticide application.

Included with staff's notice of motion are copies of the service of process cover sheet filed with the Department of State, the entity information obtained from the Department of State's website, the affidavit of service and mailing by DEE attorney Alyce M. Gilbert, and a copy of the notice mailed to the respondent by Department staff along with the notice of hearing and complaint. Staff also includes a proposed Commissioner's order with its motion papers.

The notice of hearing states that the respondent must serve its answer to the complaint within twenty days of receipt of the complaint and attend a pre-hearing conference scheduled for August 29, 2006 or be subject to a default and waiver of the right to a hearing. The respondent failed to serve its answer within the twenty days provided by the regulation and to date no answer has been filed. In addition, the respondent failed to attend the scheduled pre-hearing conference. See, 6 NYCRR § 622.4(a).

Discussion

Failure to answer a complaint is a basis for a default judgment pursuant to 6 NYCRR § 622.15. This regulation requires that a motion for a default judgment contain: (1) proof of service upon the respondent of the document which commenced the proceeding; (2) proof of the respondent's failure to appear or to timely file an answer; and (3) a proposed order. The staff has submitted an affidavit of service and mailing of the notice of hearing and complaint. This documentation proves that staff served its notice and complaint consistent with the requirements of 6 NYCRR § 622.3(3) and the Civil Practice Law and Rules § 311(a)(1) and BCL § 306. Alyce Gilbert, Esq. has affirmed that the respondent has failed to serve an answer and the time to serve said answer - August 1, 2006 - has passed. 6 NYCRR § 622.4(a). Ms. Gilbert also affirmed that the respondent, despite having been notified of the consequences of not attending the August 29, 2006 pre-hearing conference, failed to attend. Ms. Gilbert has also provided a proposed order.

Accordingly, the staff has met the requirements of 6 NYCRR § 622.15 and met its burden with respect to a finding of liability.

With respect to the relief requested by staff, the complaint requests an order that enjoins the respondent from all pesticide applications within New York State and the payment of a civil penalty " . . . in an amount deemed appropriate not to exceed the maximum amount allowed by law . . ." With respect to staff's request for injunctive relief, I could find no such provision for this relief in an administrative proceeding pursuant to ECL § 71-2907. Section 71-2911 provides that the Department, "acting through the attorney general, may bring suit against such person [a violator of any provision of Article 33] in any court of competent jurisdiction to restrain such person from continuing such violation . . ." Accordingly, I request that the Department staff provide me with written support for its request for injunctive relief.

With respect to penalties, ECL § 71-2907 provides for a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense. The Department staff have alleged that the respondent has violated essentially eight separate provisions of Article 33 and the implementing regulations in 2001, 2002, and 2003.[1]

[1] Three of these allegations involve violations of different provisions of Article 33 and the regulations but are essentially the same three violations. The respondent's failure to obtain a certified pesticide applicator's license is a violation of ECL §§ 33-0905(1) and 33-1301(8), and 6

However, staff does not provide any dates or details with respect to operations of this pesticide business so I cannot determine whether many of the violations spanned more than one date, more than one incident, or more than one individual (in the case of the applicator certification) thus providing the bases for greater penalties.

The civil penalty policy of the Department provides that several factors are considered in calculation of a penalty. These are the gravity of the violation, the cooperation of the respondent, the respondent's compliance history, and the economic benefit obtained by the respondent in not adhering to the statutory requirements. In addition to the Department's civil penalty policy, DEC also maintains a pesticide enforcement guidance memorandum (EGM) (3/26/93) that sets forth a penalty schedule for "first offense minimums." This guidance states that these minimum penalty levels should be doubled on second or subsequent offenses. In addition, this guidance states that these amounts should be considered in light of the policies set forth in the civil penalty policy regarding economic benefit and the gravity of the offense.

The violations in this matter are serious as they involve the application of potentially harmful chemicals in residences and businesses. But the staff has provided no details regarding any pesticide applications and therefore it is not possible to determine the extent, if any, of the environmental harm. Moreover, staff has not set forth what is the economic benefit gained by the respondent by not complying with these laws.

Accordingly, I direct the staff to provide me with a request for a specific penalty amount as well as the support for such relief.

Conclusion

Staff's motion for a default judgment meets the requirements of 6 NYCRR § 622.15(b) as outlined above. Therefore, the respondent is liable for the violations asserted by staff in its complaint. However, because staff did not provide a specific request for a penalty and there is insufficient information in the complaint to form a conclusion regarding an appropriate penalty, the staff must submit further detail to me on the penalty request. In addition, staff must also support its request for injunctive relief.

/s/

Dated: Albany, New York
October 24, 2006

Helene G. Goldberger
Administrative Law Judge

NYCRR § 325.7(a). The respondent's failure to register its pesticide business with the State is a violation of ECL §§ 33-0907(1) and 33-1301(8-a), and 6 NYCRR § 325.23(a). Respondent's failure to maintain appropriate records is a violation of ECL § 33-1205(1) and 6 NYCRR § 325.25. Accordingly, I am recommending that these omissions are accounted for as three rather than eight separate violations.

TO: Island Landscape LCP, Corp.
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