

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
Parts 325 and 326 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York,

- by -

**ANTHONY LOPATOWSKI d/b/a
SAFEGUARD EXTERMINATING SERVICES INC.,**

Respondent.

ORDER

DEC File No.
R2-20130111-12

This administrative enforcement proceeding involves allegations of the staff of the New York State Department of Environmental Conservation (“Department”) that respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. (“respondent”) violated article 33 of the Environmental Conservation Law (“ECL”) and parts 325 and 326 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) by:

- (i) failing to have the requisite pesticide business insurance from February 12, 2000 to at least January 5, 2013, in violation of 6 NYCRR 325.23(g);
- (ii) failing to have the requisite pesticide business registration while applying pesticides from February 29, 2000 to at least January 5, 2013, in violation of ECL 33-0907(1), ECL 33-1301(8-a), and 6 NYCRR 325.23(a);
- (iii) failing to have the requisite commercial pesticides applicator certification while applying pesticides at least thirty-one (31) times during the years 2008 through 2012, in violation of ECL 33-1301(8);
- (iv) failing to maintain daily use records for at least thirty-one (31) commercial pesticides applications during the years 2008 through 2012, in violation of ECL 33-1205(1) and 6 NYCRR 325.25(a);
- (v) failing to submit annual reports for the years 2008-2012 comprising five (5) violations of ECL 33-1205(1) and 6 NYCRR 325.25(b); and
- (vi) possessing two restricted-use pesticides without the requisite purchase permit and without being a certified applicator, comprising two (2) violations of ECL 33-0903, ECL33-1301(7) and 6 NYCRR 326.7(a) (see Complaint ¶¶ 32-43).

On April 22, 2014, a hearing to address these alleged violations was convened before D. Scott Bassinson, 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.

Although personally served with the notice of hearing and complaint on January 12, 2014, respondent failed to file an answer to the complaint, and failed to attend the January 28, 2014 pre-hearing conference. As a consequence of respondent’s failure to answer or appear in this matter, the ALJ recommends that I grant staff’s motion for a default judgment, with two modifications.

Liability

With respect to the first (operation of a pesticide business without the requisite insurance) and second (commercial application of pesticides without a pesticide business registration) causes of action, the evidence reflects that respondent applied pesticides illegally only during the period of April 2008 through January 5, 2013. I agree with the ALJ that it would not be proper to find violations of the insurance and business registration requirements during years for which there is no evidence in the record that respondent actually applied pesticides. I therefore adopt the ALJ’s recommendation to hold that respondent violated the insurance and business registration requirements only for the period 2008 through January 5, 2013, rather than for the period of February 2000 through January 5, 2013 as alleged in the complaint.

The ALJ also recalculated the number of violations relating to respondent’s failure to register his pesticide business. Staff alleged in effect that each application of a pesticide during a period for which there is no pesticide business registration is a separate violation of the registration requirement. The ALJ, however, concluded that the most reasonable interpretation is to calculate the failure to register based upon how often a business is required to register, and not each time pesticides were applied (see Hearing Report, at 8 and fn 6). I agree with the ALJ’s analysis.

Based on the foregoing, the ALJ found that respondent committed a total of 76 violations (see Hearing Report, at 10-11).

I concur with the ALJ that, with these modifications, staff is entitled to a default judgment pursuant to 6 NYCRR 622.15, and that, at the hearing, Department staff presented a prima facie case on the merits, and proved its case by a preponderance of the evidence (see Hearing Report, at 7-10). Accordingly, staff is entitled to a judgment based on the record evidence.

Penalty

With respect to the civil penalty, Department staff sought an order imposing a civil penalty pursuant to ECL 71-2907(1), which establishes a civil penalty not to exceed five thousand dollars (\$5,000) for a first violation, and not to exceed ten thousand dollars (\$10,000) for a subsequent offense. Department staff also considered applicable agency guidance (see

Hearing Report, at 10). The ALJ recommends a reduction in Department staff's requested civil penalty to one hundred twenty-one thousand dollars (\$121,000). I agree with the ALJ's revision to staff's requested civil penalty which took into consideration the reduction in the years of insurance violations and the reduction in the number of violations relating to the business registration requirement as discussed above, among other factors (see also Hearing Report, at 10-13).

The civil penalty recommended by the ALJ is authorized and appropriate. As the ALJ found, the evidence in this matter – including respondent's own written and signed statement admitting to many of the violations – demonstrates a long-standing disregard for complying with the relevant legal requirements. Respondent has held himself out as a licensed exterminator and has applied pesticides over a number of years, at locations including at least two schools and several apartment buildings – without acquiring insurance, registering the business, obtaining proper applicator certifications, maintaining daily use records or filing annual reports. Respondent was also unlawfully in possession of two restricted use pesticides.

I also agree with the ALJ that staff's request that I order respondent "to become and remain in compliance with the ECL and Title 6 of the NYCRR" is unnecessary. Respondent is already required to comply with the ECL and the applicable regulations and further language to that effect is not needed.

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 hereby granted. By failing to answer, respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. waived his right to be heard at the hearing. Accordingly, the factual allegations in Department staff's complaint are deemed to have been admitted by respondent.
- II. Moreover, based upon a preponderance of the evidence introduced at hearing, respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. is adjudged to have violated:
 - A. 6 NYCRR 325.23(g), five (5) times by operating a pesticides application business during the period April 2008 through January 5, 2013 without having the requisite pesticide business insurance;
 - B. ECL 33-0907(1), ECL 33-1301(8-a) and 6 NYCRR 325.23(a), two (2) times by applying pesticides during the period 2008 through January 5, 2013 without having the requisite pesticide business registration;
 - C. ECL 33-1301(8), thirty-one (31) times by applying pesticides on thirty-one (31) occasions without possessing the requisite commercial pesticide applicator certification;

- D. ECL 33-1205(1) and 6 NYCRR 325.25(a), thirty-one (31) times by not maintaining pesticide use records with respect to thirty-one (31) pesticide applications;
- E. ECL 33-1205(1) and 6 NYCRR 325.25(b), five (5) times by failing to submit annual reports to the Department during the years 2008 through 2012 during which he applied pesticides; and
- F. ECL 33-0903, ECL 33-1301(7) and 6 NYCRR 326.7(a), two (2) times, by:
 - 1. possessing restricted use pesticide Delta Dust Insecticide in 2010 without a purchase permit and without being a certified applicator; and
 - 2. possessing restricted use pesticide Ditrac Tracking Powder in 2013 without a purchase permit and without being a certified applicator.

III. Respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. is hereby assessed a civil penalty in the amount of one hundred twenty-one thousand dollars (\$121,000), which is due and payable within thirty (30) days of the service of a copy of this order upon 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:

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

IV. All communications from respondent to the Department concerning this order shall be directed to Karen Mintzer, Esq., at the address referenced in paragraph III of this order.

¹ This matter was originally handled by Region 2 Regional Attorney Louis Oliva. Subsequent to the hearing, Attorney Oliva transferred to the Department's Albany office. Accordingly, Attorney Karen Mintzer, who is now serving as Regional Attorney for Region 2, is hereby substituted in this order as the Department contact for this matter.

- V. The provisions, terms and conditions of this order shall bind Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc., and his 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: June 11, 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
Parts 325 and 326 of Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York,

- by -

**ANTHONY LOPATOWSKI d/b/a
SAFEGUARD EXTERMINATING SERVICES INC.,**

Respondent.

HEARING REPORT

DEC File No.
R2-20130111-12

Procedural History

Respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. (“respondent”) was served with a notice of hearing and complaint dated January 2, 2014. The complaint alleges that respondent violated article 33 of the Environmental Conservation Law (“ECL”) and parts 325 and 326 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (“6 NYCRR”) by:

- (i) failing to have the requisite pesticide business insurance from February 12, 2000 to at least January 5, 2013, in violation of 6 NYCRR 325.23(g);
- (ii) failing to have the requisite pesticide business registration while applying pesticides at least thirty-one (31) times, from February 29, 2000 to at least January 5, 2013, in violation of ECL 33-0907(1), ECL 33-1301(8-a), and 6 NYCRR 325.23(a);
- (iii) failing to have the requisite commercial pesticides applicator certification while applying pesticides at least thirty-one (31) times during the years 2008 through 2012, in violation of ECL 33-1301(8);
- (iv) failing to maintain daily use records for at least thirty-one (31) commercial pesticides applications during the years 2008 through 2012, in violation of ECL 33-1205(1) and 6 NYCRR 325.25(a);
- (v) failing to submit annual reports for the years 2008 through 2012 comprising five (5) violations of ECL 33-1205(1) and 6 NYCRR 325.25(b); and

- (vi) possessing two restricted use pesticides without the requisite purchase permit and without being a certified applicator, comprising two (2) violations of ECL 33-0903, ECL 33-1301(7) and 6 NYCRR 326.7(a)

(see Complaint ¶¶ 32-43).

The complaint seeks an order of the Commissioner: (i) holding that respondent violated the cited ECL and regulatory provisions; (ii) imposing upon respondent, pursuant to ECL 71-2907(1), a civil penalty “in an amount no less than” two hundred forty-nine thousand five hundred dollars (\$249,500);¹ and (iii) directing respondent “to become and remain in compliance with the ECL and Title 6 of NYCRR” (see Complaint, at 6, Wherefore clause).

Respondent was personally served with the notice of hearing and complaint on January 12, 2014 (see Staff Exhibit [Ex.] 2). The notice of hearing stated, among other things, that (i) a pre-hearing conference before Administrative Law Judge (“ALJ”) Richard Wissler of the Department’s Office of Hearings and Mediation Services was scheduled for January 28, 2014 at 11 a.m. at the Region 2 offices of the Department of Environmental Conservation (“Department”), located at One Hunters Point Plaza, 47-40 21st Street, Long Island City, New York; (ii) respondent was required to serve an answer to the complaint within twenty days of receipt; (iii) failure to answer timely, or to attend the pre-hearing conference, would result in a default under 6 NYCRR 622.15 and a waiver of the right to a hearing; and (iv) if respondent failed to appear, the hearing may be convened at a time and place set by the Hearing Officer, and an Order may be issued against respondent (see Notice of Hearing, at 1-2).

Respondent did not appear at the pre-hearing conference held on January 28, 2014, and has not filed an answer or otherwise appeared in this proceeding.

On April 22, 2014, a hearing was convened before the undersigned ALJ D. Scott Bassinson at the Department’s Region 2 offices, at approximately 10:20 a.m. Department staff was represented by Madeline E. Gwyn, Esq. and Region 2 Regional Attorney Louis P. Oliva, Esq.

At the beginning of the hearing, staff counsel stated on the record that respondent did not appear for the January 28, 2014 pre-hearing conference, has not filed an answer, and has otherwise made no contact with the Department even though served with the notice of hearing and complaint. Pursuant to 6 NYCRR 622.15, Department staff then made an oral motion for a default judgment based upon respondent’s failure to answer the complaint. I reserved on the motion and staff proceeded with its evidentiary case.

Staff called two witnesses: Environmental Conservation Officer (“ECO”) Jennifer Okonuk, and Marcus Pitter, Pesticides Control Specialist II. Both witnesses are employees of

¹ Given due process concerns, I will consider Department staff’s request for a penalty of “no less than” two hundred forty-nine thousand five hundred dollars (\$249,500) to be a request for that specific amount (see, e.g., Matter of Reliable Heating Oil, Inc., Decision and Order of the Commissioner, October 30, 2013, at 3).

the Department. In addition, Department staff submitted the following documents for the record, all of which were received in evidence:

1. Proposed Order.
2. Affidavit of Service of Bradley J. Buffa, sworn to January 23, 2014, reflecting personal service on respondent.
3. Copies of 23 invoices from Safeguard Exterminating Inc. ranging in date from April 19, 2008 to May 22, 2010.
4. Three photographs of items found during a search of respondent's vehicle following a traffic stop of respondent on June 4, 2010:
 - a. A business card of Safeguard Exterminating Services Inc., identifying respondent Anthony Lopatowski as a "C.C.P.A.;"²
 - b. Respondent's New York driver's license;
 - c. A one pound container of "Delta Dust Insecticide."
5. Copies of invoices from, and checks made payable to Safeguard Exterminating, dated between January 2011 and November 2012.
6. Voluntary Consent to Search vehicle form, filled out and signed by respondent, dated January 5, 2013.
7. Three photographs of items found during a search of respondent's vehicle following his consent to search on January 5, 2013:
 - a. Several Safeguard Exterminating business cards in the vehicle's glove compartment;
 - b. An open box containing a bag of white powder;
 - c. An open box containing a bag of white powder.
8. Printout of document from the Department's CertAdmin Database dated April 17, 2014, regarding pesticide applicator certification status of Anthony Lopatowski.
9. Printout of document from the Department's Pesticide Business Registration Database dated April 17, 2014, regarding registration status of Safeguard Exterminating Service Inc.

Default Provisions

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint (see 6 NYCRR 622.4[a]). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing" (6 NYCRR 622.15[a]). In addition, attendance by a respondent at a scheduled pre-hearing conference is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing" (6 NYCRR 622.8[c]; see also 6 NYCRR 622.15[a]).

² ECO Okonuk testified that "C.C.P.A." is the acronym for Certified Commercial Pesticide Applicator.

Upon a respondent's failure to answer a complaint and/or failure to appear for a pre-hearing conference, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order (see 6 NYCRR 622.15[b][1]-[3]).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them" (Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 [citations omitted]). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim" (Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3).

In this matter, in addition to the factual allegations of the complaint, Department staff provided proof at the April 22, 2014 hearing to support the causes of action set forth in the complaint. Accordingly, the following findings of fact are based upon a preponderance of the evidence consisting of the testimony of the witnesses, documents submitted as exhibits, and the rest of the record including the notice of hearing, complaint and any documents attached thereto.³

Findings of Fact

1. Respondent Anthony Lopatowski is an individual who, at all relevant times, has owned and operated a pesticide application business known as Safeguard Exterminating Services Inc., located at various times at 77 Driggs Ave., Brooklyn, NY, and/or 94A Jewel Street, Brooklyn, NY 11222 (Staff Exs. 3, 4A, 7A, 8, 9; Complaint Ex. A).
2. The Department maintains a database that identifies pesticide businesses that are registered with the Department, identifies applicators associated with such businesses, and reflects whether such businesses carry insurance, any history of enforcement, and payment of fees (Testimony of Marcus Pitter; Staff Ex. 9).
3. Safeguard Exterminating Services Inc. was initially registered with the Department as a pesticide business on March 1, 1989 (Staff Ex. 9).
4. Safeguard Exterminating Services Inc.'s registration with the Department expired in February 2000 and remained expired as of April 17, 2014 (Testimony of Marcus Pitter; Staff Ex. 9).

³ Department staff attached as Exhibit A to the complaint a copy of a Voluntary Statement written and signed by respondent (see Complaint ¶ 8, and Ex. A thereto). ECO Okonuk testified that she witnessed respondent's preparation of and signature on the Voluntary Statement, and she signed the statement as a witness. The Voluntary Statement is part of the record of this proceeding because it was attached to the complaint (see CPLR 3014 ["A copy of any writing which is attached to a pleading is a part thereof for all purposes"]; see also 6 NYCRR 622.17[b] ["The record of the hearing must include: the ... complaint"]).

5. Safeguard Exterminating Services Inc.'s insurance expired in 2000 and remained expired as of April 17, 2014 (Testimony of Marcus Pitter; Staff Ex. 9; Complaint Ex. A).
6. Safeguard Exterminating Services Inc. has not submitted an annual report since 2000 (Testimony of Marcus Pitter).
7. The Department maintains a database, known as the "CertAdmin Database," that certified commercial pesticide applicators and the organization or business with which such applicators are associated, as well as the categories for which the applicators are certified (Testimony of Marcus Pitter; Staff Ex. 8).
8. Respondent Anthony Lopatowski was a certified commercial pesticides applicator, initially registered with the Department in 1987 (Staff Exs. 8 and 9).
9. Respondent Anthony Lopatowski's certification as a commercial pesticides applicator expired in 2000, and has not been renewed since that time (Testimony of Marcus Pitter; Staff Ex. 8).
10. On June 4, 2010, following a traffic stop of respondent Anthony Lopatowski by Environmental Conservation Investigators Sara Komonchak and Thomas Graham, respondent consented to a search of his vehicle (Testimony of Jennifer Okonuk; Complaint ¶¶ 4-5).
11. A search of respondent's vehicle by Environmental Conservation Officer ("ECO") Jennifer Okonuk on June 4, 2010 led to the discovery of the following items:
 - a. Business cards of Safeguard Exterminating Services Inc. identifying respondent Anthony Lopatowski as a "C.C.P.A.," an acronym for Certified Commercial Pesticide Applicator;
 - b. Personal Protective Equipment;
 - c. A spray canister;
 - d. Twenty-three invoices from "Safeguard Exterminating Inc." to various individuals and companies ranging in date from April 19, 2008 to May 22, 2010, including two invoices relating to schools and many relating to apartment buildings; and
 - e. A one-pound container labeled "Delta Dust Insecticide"(Testimony of Jennifer Okonuk; Staff Exs. 3, 4A, 4B, 4C).
12. Delta Dust Insecticide, EPA Registration No. 432-772, is a restricted use pesticide in New York State (Testimony of Marcus Pitter; see also http://www.dec.ny.gov/docs/materials_minerals_pdf/pestprod.pdf)
13. Subsequent to the June 4, 2010 encounter with respondent, ECO Okonuk contacted customers of respondent, and obtained from the customers additional invoices from

- “Safeguard Exterminating Service” and copies of checks made payable to “Safeguard Exterminating,” dated between January 2011 and November 2012 (Testimony of Jennifer Okonuk; Staff Ex. 5).
14. The additional invoices that ECO Okonuk obtained from respondent’s customers reflect the application of pesticides twice a month at two buildings, and at different locations within each building. For example, Invoice #10183, dated January 27, 2011, reflects two \$80 charges, one for January 8, 2011 and the other for January 20, 2011. The invoice states that it relates to application of pesticides as per an “Apt. List” as well as in public areas and trash rooms (see Staff Ex. 5).
 15. On January 5, 2013, ECO Okonuk and ECO Christopher Lattimer waited for respondent at 118-11 84th Avenue, Jamaica, NY, after ECO Okonuk learned that respondent would be applying pesticides at the building that day (Testimony of Jennifer Okonuk; Complaint ¶ 7).
 16. On January 5, 2013, ECO Okonuk saw a “sign-up sheet” in the apartment building, relating to apartment dwellers who had signed up for application of pesticides in their apartment (Testimony of Jennifer Okonuk).
 17. On January 5, 2013, respondent signed a Voluntary Consent to Search form consenting to a search of his vehicle by ECO Okonuk (Testimony of Jennifer Okonuk; Staff Ex. 6).
 18. ECO Okonuk’s search of respondent’s vehicle on January 5, 2013 led to the discovery of, among other things, the following items:
 - a. Business cards of Safeguard Exterminating Services Inc. located in the glove compartment of respondent’s vehicle; and
 - b. An open box containing a bag of white powder(see Testimony of Jennifer Okonuk; Staff Exs. 7A, 7B, 7C).
 19. On January 5, 2013, respondent prepared and signed a Voluntary Statement that included his statements that he came to 118-11 84th Avenue that day “to exterminate building as a license exterminator” and that he treated the building “monthly and talk to supt. [probably “superintendent”] (Complaint Ex. A). Respondent also wrote in his Voluntary Statement that he owns Safeguard Exterminating and had 10 customers, but did not have any records, insurance or labels (id.).
 20. Respondent also wrote in his Voluntary Statement that he “had Ditrac Powder restricted use – rodent control” (id.).
 21. Respondent told ECO Okonuk that he was at the 118-11 84th Avenue location on January 5, 2013 to apply pesticides (Testimony of Jennifer Okonuk).

22. ECO Okonuk sent for testing, by Peter Furdyna, an Environmental Chemist with the Department, some of the white powder from the box found in respondent's vehicle on January 5, 2013 (Testimony of Jennifer Okonuk).
23. Testing of the powder found in respondent's possession on January 5, 2013 revealed that the powder contained diphacinone, the active ingredient in Ditrac Tracking Powder, and the results were consistent with Ditrac Tracking Powder (Testimony of Marcus Pitter; Testimony of Jennifer Okonuk).
24. Ditrac Tracking Powder, EPA Registration No. 12455-56, is a restricted use pesticide in New York State (Testimony of Marcus Pitter; see also http://www.dec.ny.gov/docs/materials_minerals_pdf/pestprod.pdf)

Discussion

As set forth above, although respondent was personally served with the notice of hearing and complaint (see Staff Ex. 2), he did not appear at the January 28, 2014 pre-hearing conference that was identified in the notice of hearing. Nor did respondent serve an answer or otherwise respond to the allegations in the complaint (Hearing Record). Department staff has submitted a proposed order (see Staff Ex. 1). Department staff has therefore satisfied the requirements of 6 NYCRR 622.15(b), and its motion for a default judgment should be granted.

In addition, the proof at the hearing conducted in respondent's absence demonstrates by a preponderance of the evidence that respondent has committed violations of the ECL and relevant regulations, as discussed in more detail below.

Failure to Register Pesticide Business

Each person or business providing services of commercial application of pesticides must register with the Department and pay a registration fee (see ECL 33-0907[1]; ECL 33-0101[9]; ECL 33-0911[3]; ECL 33-1301(8-a); 6 NYCRR 325.23[a]). Pesticide business registration is valid for three years (ECL 33-0907[4]).⁴ Department staff proved by a preponderance of the evidence at hearing that respondent operated a commercial pesticide application business between 2008 and 2012 but did not register with the Department or pay the registration fee during that period.⁵

⁴ The registration statute was amended in 2002, increasing from one year to three years the period for which a registration is valid.

⁵ The Second Cause of Action in the complaint alleges that respondent failed to register his pesticide business "while applying pesticides from February 29, 2000 to at least January 5, 2013" (see Complaint ¶¶ 34-35; see also Testimony of Marcus Pitter). While it is possible, if not probable, that respondent applied pesticides during that entire 13 year period, the record lacks evidence that respondent actually applied pesticides during the period between 2000 and 2007. I therefore recommend that the Commissioner find these violations to have occurred only during the period 2008 through January 5, 2013 (see Staff Exs. 3 and 5).

Staff has alleged that respondent violated the foregoing provisions “at least thirty-one (31) times” (Complaint ¶ 35). This number corresponds to staff’s characterization of the number of invoices obtained by ECO Okonuk from respondent and respondent’s customers (see Complaint ¶¶ 5-6 [identifying a total of 31 invoices]). Staff alleges in effect that each *application* of a pesticide during a period for which there is no pesticide business registration is a separate and distinct violation of the *registration* requirement. The statute and regulations are silent on how to calculate the number of violations of the registration requirement. The most reasonable interpretation of the statute, however, is to calculate the failure to register based upon how often a business is required to register; that is, one continuing violation during each three year period, commencing on the date of the first application of pesticides without having such registration. Such interpretation is consistent with and further supported by staff’s allegations that (i) respondent violated the requirement to have pesticide business insurance once each year it failed to have the requisite insurance, and (ii) respondent violated the requirement to file annual reports once each year it failed to so file, rather than each time it applied pesticides during these five year periods.⁶ I therefore recommend that the Commissioner hold that respondent violated the business registration requirements twice during the five year period of 2008 through 2012: once upon the first application of pesticides in April 2008, and a second time as of April 2011, three years after the first violation.⁷

Failure to Have Pesticide Business Insurance

Businesses subject to the registration requirements are also required to have insurance (see 6 NYCRR 325.23[g]). Staff alleges that respondent “fail[ed] to have the requisite pesticide business insurance from February 12, 2000 to at least January 5, 2013” (Complaint ¶ 33). Department records reflect that Safeguard Exterminating Services Inc. had insurance from March 1989 until February 2000 (see Staff Ex. 9). Staff witness Marcus Pitter testified that he checked the relevant Department records and determined that Safeguard had no insurance after it lapsed in 2000 (Testimony of Marcus Pitter). In January 2013, respondent admitted in his signed Voluntary Statement that he did not have insurance (see Complaint Ex. A). I therefore recommend that the Commissioner hold that respondent violated 6 NYCRR 325.23(g) by not possessing the requisite insurance.

Although I agree with staff’s allegation that respondent violated the insurance requirement, I do not agree with staff’s calculation of the total number of violations of that requirement. Staff asserts that respondent operated a pesticide business without the requisite insurance for thirteen years, from February 12, 2000 to at least January 5, 2013 (see Complaint ¶ 33; Justification, at 1). While it is possible, if not probable, that respondent has been conducting his business throughout the entire period of time since his business registration and insurance

⁶ This interpretation is also consistent with the Department’s Pesticide Enforcement Policy (DEE-12, rev. March 26, 1993), which sets a minimum penalty amount for each violation of the business registration requirement, and describes each violation as an “offense” rather than on a “per incident” basis (compare, e.g., Pesticide Enforcement Policy minimum penalties for certain violations on a “per incident” basis, e.g. sale of a restricted use pesticide, possession of a restricted use pesticide by a person not certified, violation of seizure, stop use or quarantine order, failure to obtain aquatic permit).

⁷ The evidence established that respondent continued to apply pesticides throughout the two periods (see, e.g., Finding of Fact Nos. 11[d], 13).

lapsed in 2000, the evidence submitted at hearing relates only to respondent's application and possession of pesticides during the period 2008 through January 5, 2013, a total of five years (see discussion above at 7-8, and n. 5). I therefore recommend that the Commissioner hold that respondent violated the insurance requirements five times.

Application of Pesticides Without Pesticide Applicator Certification

Persons engaging in the commercial application of pesticides must be certified and possess, on their person, a valid identification card issued by the Department (see 6 NYCRR 325.7[a]). It is unlawful for any person to engage in the application of pesticides without being certified or working under the direct supervision of a certified applicator (see ECL 33-1301[8]).

The evidence in this matter reflects that, although respondent was at one time a certified pesticide applicator, his certification lapsed in 2000 and had not been renewed as of April 17, 2014 (Testimony of Marcus Pitter; Staff Ex. 8). Staff witness Pitter also testified that an effort was made to determine whether respondent was working as an apprentice under the direct supervision of a certified applicator, but no such evidence was found (Testimony of Marcus Pitter). Although certifications are valid for three or five years, depending on the type of certifications (see ECL 33-0905[3]), it is unlawful "to engage in application of pesticides" without the certification (ECL 33-1301[8]). I therefore recommend that the Commissioner hold that: (i) each application of pesticides without proper certification is a separate violation; and (ii) respondent therefore violated ECL 33-1301(8) thirty-one times by applying pesticides on thirty-one occasions without possessing the requisite commercial pesticide applicator certification.

Failure to Maintain Daily Use Records

Commercial pesticide applicators are required to maintain pesticide use records for each pesticide application (see ECL 33-1205[1]; 6 NYCRR 325.25[a]). Respondent admitted in his signed Voluntary Statement that he did not have any records (see Complaint Ex. A). I therefore recommend that the Commissioner hold that respondent violated ECL 33-1205(1) and 6 NYCRR 325.25(a) between 2008 and 2012 by not maintaining pesticide use records for 31 of the pesticide applications reflected in the invoices admitted into evidence at the hearing (see Exs. 3 and 5).

Failure to File Annual Reports

Commercial pesticide applicators are required to file annual reports containing the information found in the pesticide use records described in ECL 33-1205(1)(a)-(e) (see ECL 33-1205[1]; 6 NYCRR 325.25[b]). Department staff alleges, and Mr. Pitter's testimony at the hearing confirms, that respondent failed to submit annual reports for the years 2008-2012 (see Complaint ¶ 41; Testimony of Marcus Pitter). I therefore recommend that the Commissioner hold that respondent violated ECL 33-1205(1) and 6 NYCRR 325.25(b) five times by failing to submit annual reports during the years 2008-2012 during which he applied pesticides as reflected in the invoices admitted into evidence at the hearing (see Exs. 3 and 5).

Possession of Restricted Use Pesticides Without Purchase Permit or Certification

It is unlawful for any person to possess a restricted use pesticide without a purchase permit or without being a certified applicator (see ECL 33-0903[1]; ECL 33-1301[7]; 6 NYCRR 326.7[a]). The evidence at the hearing established that respondent possessed the restricted use pesticide Delta Dust Insecticide in June 2010, without a purchase permit and without being a certified applicator at that time (see Finding of Fact Nos. 9, 11, 12). The evidence at the hearing also established that respondent possessed the restricted use pesticide Ditrac Tracking Powder in January 2013, without a purchase permit and without being a certified applicator at that time (see Finding of Fact Nos. 9, 19, 20, 22, 23, and 24).

I therefore recommend that the Commissioner hold that respondent violated ECL 33-0903, ECL 33-1301(7) and 6 NYCRR 326.7(a) two times, by: (1) possessing restricted use pesticide Delta Dust Insecticide in 2010 without a purchase permit and without being a certified applicator; and (2) possessing restricted use pesticide Ditrac Tracking Powder in 2013 without a purchase permit and without being a certified applicator.

Civil Penalty

Department staff seeks an order imposing a civil penalty upon respondent pursuant to ECL 71-2907(1) in the amount of “no less than” two hundred forty-nine thousand dollars (\$249,500) (see Complaint at 6, Wherefore Clause ¶ 2).⁸ In a closing statement at the end of the hearing, counsel explained how the requested civil penalty was calculated, and submitted a document entitled “Justification for Requested Penalty” (“Justification”). Staff’s civil penalty request is based upon an analysis of the penalty statute, ECL 71-2907(1), the Department’s Pesticide Enforcement Policy (DEE-12, rev. March 26, 1993), and the Department’s Civil Penalty Policy (DEE-1, June 20, 1990). As discussed below, I recommend that the Commissioner impose a civil penalty of one hundred twenty-one thousand dollars (\$121,000).

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]). The first step in a civil penalty analysis is to calculate the maximum possible penalty under the statute (see DEE-1, at 4). Staff argues that respondent has committed a total of 113 violations, but has only used the initial violation figure of \$5,000 for all violations, to arrive at a total maximum penalty of \$565,000 (see Justification, at 1). Pursuant to the statute, however, the maximum civil penalty for 113 violations would be \$1,125,000 (\$5,000 for the first violation, plus a total of \$1,120,000 for the 112 additional violations).

As discussed above, I do not agree with staff’s calculation of the total number of violations. I recommend that the Commissioner hold that respondent committed a total of 76 violations, rather than 113 as alleged by staff, as follows:

⁸ As discussed in footnote 1 above, and in accordance with prior Commissioner Decisions and Orders, I interpret staff’s request as one for the specific amount set forth in the complaint.

2 violations of the business registration requirement
5 violations of the insurance requirement
31 violations of the applicator certification requirement
31 violations of the daily use records requirement
5 violations of the annual reporting requirement
2 violations regarding possession of restricted use pesticides

Based on a total of 76 violations, the maximum statutory civil penalty under ECL 71-2907(1) would be \$755,000 (\$5,000 for the first violation, plus \$750,000 [\$10,000 each for the 75 additional violations]).

Following a determination of the maximum possible penalty, the civil penalty analysis includes consideration of “benefit” and “gravity” components under the Department’s Civil Penalty Policy. The benefit component “is an estimate of the economic benefit of delayed compliance, including the present value of avoided capital and operating costs and permanently avoided costs which would have been expended if compliance had occurred when required” (DEE-1, at 5). The benefit component “should also include any other economic benefits resulting from noncompliance” (*id.*). The gravity component analysis includes consideration of several factors, including: (i) potential harm and actual damage caused by the violation, and relative importance of the type of violation in the regulatory scheme; (ii) culpability; (iii) violator cooperation; (iv) history of noncompliance; (v) ability to pay; and (vi) “unique factors” providing staff with discretion to adjust penalties higher or lower due to factors not identified in the policy (*see* DEE-1, at 7-11).

I agree with staff’s analysis of the benefit and gravity components in this matter. Respondent has derived economic benefit from noncompliance, including avoiding paying pesticide business registration fees, pesticide applicator exam fees and other fees (*see* Justification, at 2; *see also* Testimony of Marcus Pitter [discussing fees associated with pesticide certification categories]).

With respect to the gravity component, Staff established by a preponderance of the evidence that respondent has been operating in violation of statutory and regulatory requirements for at least five years, and illegally applied pesticides on at least 31 occasions during that period of time. Respondent’s actions, and his own admissions, unequivocally demonstrate a flagrant and total disregard for complying with the relevant legal requirements. The record reflects that respondent has not held a commercial pesticides applicator certification, registered his business, or obtained the required insurance, since 2000. Respondent has nevertheless readily admitted, as recently as January 2013, that he holds himself out as a “license[d] exterminator” and provides services to ten customers on a monthly basis, but has no records or insurance (Complaint Ex. A; Finding of Fact No. 19). In addition, respondent has not filed annual reports for at least five years. Respondent’s violations include repeated application of pesticides at two schools, and many apartment buildings (*see* Finding of Fact 11[d]; *see also* Ex. 3, at ninth and tenth unnumbered pages [stating that “monthly service” was provided to “Metropolitan Preschool, Inc. Early Intervention Center” and “Metropolitan Preschools, Inc. Williamsburg N. Side Preschool”]). Finally, during this period of illegal operation, respondent improperly twice

possessed restricted use pesticides, Delta Dust Insecticide and Ditrac Tracking Powder (see Finding of Fact Nos. 9, 11, 12, 19, 20, 22, 23, 24; Complaint Ex. A).

Appendix I to the Department's Pesticide Enforcement Policy (DEE-12, rev. March 26, 1993) contains a schedule of minimum penalties to guide staff in establishing appropriate penalties for violations such as those at issue here. The policy states that the amounts in the schedule represent "first offense minimums" which "should be doubled to determine a minimum penalty level on second, or subsequent offenses" (DEE-12, App. I, § II). Although staff cites this policy generally, staff has not provided a discussion of the application of each penalty "minimum" for each violation in this case; rather staff argues generally that penalties in this case should be higher than the minimum because staff has had to proceed to hearing, and "[t]o account for inflation that has occurred over the past twenty years" since the policy was last revised in 1993 (Justification, at 1). I agree with staff that respondent's actions are particularly egregious, and that penalties significantly higher than the minimum penalties set forth in DEE-12 are warranted.

With respect to the first cause of action, alleging a failure to have insurance, DEE-12 does not provide a minimum penalty to be assessed (see DEE-12, App. I, at § IV [Business, Applicator and Use Offenses]). As discussed above at pages 8-9, I revised the number of violations of the insurance requirement from thirteen alleged by staff to five. The maximum statutory penalty for these violations would be \$45,000 (\$5,000 for the first violation, \$40,000 for the additional four violations). Staff has requested, and I recommend, that the Commissioner impose a \$2,500 civil penalty for each of the violations of the insurance requirement, and I recommend a total civil penalty of \$12,500 for the five violations.

With respect to the second cause of action, alleging a failure to obtain business registration, I have revised the number of violations from thirty-one alleged by staff to two (see discussion above at pages 7-8). The maximum statutory penalty for two violations would be \$15,000 (\$5,000 for the first violation, \$10,000 for the additional violation). DEE-12 provides that, for a first "offense," the minimum penalty would be \$1,000, with an additional \$100 for each "additional offense or different product" (id.). In my view, the failure to register a pesticide business is significant, and warrants a substantial penalty. Staff has requested, and I recommend, that the Commissioner impose a \$2,500 civil penalty for each of the two violations of the business registration requirement, for a total civil penalty of \$5,000.

With respect to the third cause of action, ECL 33-1301(8) provides in relevant part that it is unlawful "[f]or any person to *engage in application of pesticides* without a pesticide applicator certificate registration" (emphasis added). Staff alleges that respondent applied pesticides at least thirty-one times during the years 2008-2012 without having the requisite pesticide applicator certification. DEE-12 provides a minimum penalty of \$2,000 for pesticide "misuse, *including unlawful application,*" in cases in which it is unknown whether there has been exposure to such pesticides (id.). DEE-12 also sets forth a minimum penalty for failure to obtain an applicator certification of "\$1,000 per year or portion thereof, per person" (id.). Given the statutory prohibition of "application of pesticides" without a certification, I agree with staff's allegation that each application of pesticides by respondent without being certified is a separate violation, and have recommended that the Commissioner so hold. The maximum statutory

penalty for thirty-one violations would be \$305,000 (\$5,000 for the first violation, \$300,000 for the additional thirty violations). Staff has requested, and I recommend, that the Commissioner impose a \$2,500 civil penalty for each of the thirty-one violations relating to the third cause of action, for a total civil penalty of \$77,500.

With respect to the fourth cause of action, ECL 33-1205(1) provides in relevant part that [“a]ll commercial applicators shall maintain pesticide use records *for each pesticide application...*” (emphasis added) (see also 6 NYCRR 325.25[a]). Staff alleges that respondent failed to maintain daily use records for at least thirty-one applications of pesticides during the period of 2008 through 2012. The maximum statutory penalty for thirty-one violations would be \$305,000 (\$5,000 for the first violation, \$300,000 for the additional thirty violations). DEE-12 sets forth a minimum penalty for recordkeeping violations⁹ of \$250 “per violation.” Staff has requested that the Commissioner impose a \$1,500 civil penalty for each of the thirty-one recordkeeping violations, without mentioning the minimum penalty for such violations as set forth in DEE-12, or explaining how staff arrived at a per-violation penalty amount that is six times the DEE-12 minimum. Given the number and breadth of violations in this case, I recommend the Commissioner impose a \$500 civil penalty for each of the thirty-one recordkeeping violations, for a total civil penalty of \$15,500.

The fifth cause of action alleges that respondent failed to file annual reports five times, in violation of ECL 33-1205(1) and 6 NYCRR 325.25(b). The maximum statutory penalty for five violations would be \$45,000 (\$5,000 for the first violation, \$40,000 for the additional four violations). DEE-12 sets forth a minimum civil penalty of \$1,000 “per report” for failure to file business annual report. Staff has requested that the Commissioner impose a \$1,500 civil penalty for each of the five violations, without mentioning the minimum penalty for such violations as set forth in DEE-12. Given that the annual report requirement is contained in the “recordkeeping and reporting” statute and regulation, I recommend that the Commissioner treat this as a recordkeeping violation, and impose a \$500 civil penalty for each of the five annual report violations, for a total civil penalty of \$2,500.

The sixth cause of action alleges that respondent twice possessed restricted use pesticides without having the requisite purchase permit and without being a certified applicator, in violation of ECL 33-1301(7), ECL 33-0903 and 6 NYCRR 326.7(a). The maximum statutory penalty for two violations would be \$15,000 (\$5,000 for the first violation, \$10,000 for the additional violation). DEE-12 sets forth a minimum civil penalty of \$1,000 “per incident” for such violations. Staff has requested, and I recommend, that the Commissioner impose a \$4,000 civil penalty for each of the two violations relating to illegal possession of restricted use pesticides, for a total civil penalty of \$8,000.

This matter involves a respondent who clearly knows how to comply with the legal requirements for operating a pesticides application business. At one time, his business was registered and insured, and he was properly certified as an applicator. Respondent allowed these legal authorizations to lapse. The record establishes that, for at least five years, respondent held himself out – falsely – as a certified applicator, and has repeatedly applied pesticides in several

⁹ The statute cited in this cause of action, ECL 33-1205, is entitled “Recordkeeping and reporting” (see also 6 NYCRR 325.25 [entitled “Records and reports”]).

locations, potentially exposing schoolchildren, among others, to pesticides. Moreover, he has twice been found to possess restricted use pesticides without proper certification. Respondent's 76 violations established in this record are egregious.

I recommend that the Commissioner impose a civil penalty of one hundred twenty-one thousand dollars (\$121,000) for these violations. The requested civil penalty is fully consistent with prior precedent. See, e.g., Matter of Island Landscape LCP, Corp., Order of Assistant Commissioner, February 8, 2007; Matter of JR Tree Spraying, Inc. and Paul Ingrassia, Order of the Commissioner, November 15, 1999.

Additional Requested Relief

Department staff has also requested that the Commissioner order respondent "to become and remain in compliance with the ECL and Title 6 of the NYCRR" (Complaint, at 6, Wherefore Clause ¶ 3). This request is unnecessary. Respondent is already required to comply with ECL article 33 and the relevant regulations if he intends to operate a pesticide application business or work as a pesticide applicator (see, e.g., Matter of Island Landscape LCP, Corp., at 5). I therefore recommend that the Commissioner hold that staff's request in this regard is unnecessary.

Recommendations

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

1. Granting Department staff's motion for a default judgment, holding respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. in default pursuant to 6 NYCRR 622.15.
2. Holding that, based upon a preponderance of the evidence introduced at hearing, respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc.:
 - a. violated 6 NYCRR 325.23(g) five (5) times by operating a pesticides application business during the period April 2008 through January 5, 2013 without having the requisite pesticide business insurance;
 - b. violated ECL 33-0907(1), ECL 33-1301(8-a) and 6 NYCRR 325.23(a) two (2) times by applying pesticides during the period 2008 through January 5, 2013 without having the requisite pesticide business registration;
 - c. violated ECL 33-1301(8) thirty-one (31) times by applying pesticides on thirty-one (31) occasions without possessing the requisite commercial pesticide applicator certification;
 - d. violated ECL 33-1205(1) and 6 NYCRR 325.25(a) thirty-one (31) times by not maintaining pesticide use records with respect to thirty-one (31) pesticide applications;

- e. violated ECL 33-1205(1) and 6 NYCRR 325.25(b) five (5) times by failing to submit annual reports to the Department during the years 2008 through 2012 during which he applied pesticides; and
 - f. violated ECL 33-0903, ECL 33-1301(7) and 6 NYCRR 326.7(a) two (2) times, by:
 - i. possessing restricted use pesticide Delta Dust Insecticide in 2010 without a purchase permit and without being a certified applicator; and
 - ii. possessing restricted use pesticide Ditrac Tracking Powder in 2013 without a purchase permit and without being a certified applicator.
3. Directing respondent Anthony Lopatowski d/b/a Safeguard Exterminating Services Inc. to pay a civil penalty in the amount of one hundred twenty-one thousand dollars (\$121,000).

/s/

D. Scott Bassinson
Administrative Law Judge

Dated: July 8, 2014
Albany, New York

EXHIBIT CHART

Matter of Anthony Lopatowski d/b/a Safeguard Exterminating Service Inc. – Region 2

April 22, 2014

Edirol File No. 050522094435

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Proposed Order	✓	✓	Department Staff	
2	Affidavit of Service of Bradley J. Buffa, sworn to January 23, 2014, reflecting personal service on Anthony Lopatowski	✓	✓	Department Staff	
3	Copies of 23 Invoices from Safeguard Exterminating Inc. ranging in date from 4/19/2008 to 5/22/2010	✓	✓	Department Staff	
4A	Photograph of Business Card of Safeguard Exterminating Services Inc. and Anthony Lopatowski, C.C.P.A.	✓	✓	Department Staff	
4B	Photograph of Anthony Lopatowski New York State Drivers License	✓	✓	Department Staff	
4C	Photograph of 1 pound container of Delta Dust Insecticide	✓	✓	Department Staff	
5	Copies of Invoices from and Checks to Safeguard Exterminating	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
6	Voluntary Consent to Search Form, executed by Anthony Lopatowski on January 5, 2013	✓	✓	Department Staff	
7A	Photograph of Safeguard business cards in glove compartment of respondent's vehicle	✓	✓	Department Staff	
7B	Photograph of box containing bag of white powder	✓	✓	Department Staff	
7C	Photograph of box containing bag of white powder	✓	✓	Department Staff	
8	Printout of NYSDEC CertAdmin Database document dated 4/17/2014 re Pesticide Certification status of Anthony Lopatowski	✓	✓	Department Staff	
9	Printout of NYSDEC Pesticide Business Registration Database document dated 4/17/2014 re Registration status of Safeguard Exterminating Service Inc.	✓	✓	Department Staff	