

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

In the Matter of Alleged Violations of
Environmental Conservation Law (“ECL”) Article 33
and Title 6 of the Official Compilation of Codes,
Rules and Regulations of the State of New York (“6 NYCRR”),

ORDER

DEC Case No.
R4-2008-0818-130

-by-

MOHAWK OPPORTUNITIES, INC.,

Respondent.

This administrative enforcement proceeding concerns the application of pesticides by a non-certified applicator in a manner inconsistent with the pesticide’s labeling instructions. The pesticides were applied at the office premises of respondent Mohawk Opportunities, Inc. (“MOI”), located at 600 Franklin Street, Suite 202, Schenectady, New York.

On February 9, 2009, staff of the New York State Department of Environmental Conservation (“Department” or “DEC”) commenced this proceeding against MOI by serving, by certified mail, a motion for order without hearing in lieu of complaint dated February 9, 2009. Respondent received the motion papers on February 11, 2009. The motion papers included the affidavit dated February 6, 2009, of Selinda Schlierman, a Pesticide Control Specialist Trainee 2 in the Department’s Region 4 office (“Schlierman Affidavit”). Ms. Schlierman states that she inspected the premises on August 8, 2008. During that visit, MOI’s executive director, Eileen Cregg, stated that on July 31, 2008 and August 1, 2008, 24 cans of fumigant (a pesticide) and between 18 and 20 cans of fumigant, respectively, were set off by one or more MOI employees at the premises (Schlierman Affidavit, ¶ 6). MOI did not use a certified pesticide applicator on either of those occasions.

Department staff referred the matter to the Office of Hearings and Mediation Services under cover of a letter dated February 11, 2009[9]. Respondent filed a timely response to the motion, which included a letter from respondent’s attorney and an affidavit dated February 26, 2009 from MOI executive director Eileen Cregg (“Cregg Affidavit”). The matter was assigned to Administrative Law Judge (“ALJ”) Molly T. McBride. I adopt the ALJ’s report as my decision in this matter, subject to the following comments.

ECL article 33 and its implementing regulations at 6 NYCRR parts 320-329 establish requirements governing the use and application of pesticides. In this proceeding, no dispute exists concerning the charges of the application of pesticides by a noncertified applicator or the application of pesticides inconsistent with their labeling requirements. Accordingly, respondent violated, respectively, 6 NYCRR 325.7(a) and 325.2(b).

Department staff is requesting a civil penalty in the amount of \$9,000. ECL 71-2907 provides for a civil penalty of \$5,000 for a first violation of ECL article 33 and its implementing rules and regulations and \$10,000 for each subsequent offense.¹ Thus, the penalty requested by Department staff is within the statutory maximum given the two violations of 6 NYCRR part 325 that were committed on the two separate dates.

The ALJ notes that respondent, a not-for-profit organization providing services to the mentally and physically disabled, did not benefit economically from the illegal application of pesticides and that the application was conducted without the knowledge of senior management or maintenance staff. Subsequent to the fumigation, MOI arranged to clean the premises, which cost MOI seven thousand eight hundred dollars (see Attachment A to the Cregg Affidavit). The MOI executive director states that respondent MOI has no history of environmental violations and fully cooperated with the Department's investigation (see Cregg Affidavit ¶¶ 6 & 16; see also Schlierman Affidavit ¶ 6 [referencing MOI's voluntary statement]). Following the incident, MOI also conducted an education program for its employees concerning proper pesticide use.

In light of respondent's affirmative efforts with respect to the cleanup and employee education governing the use of pesticides, and MOI's limited financial resources and social service responsibilities, the ALJ is recommending that the staff-requested penalty of nine thousand dollars be suspended in its entirety, contingent upon respondent's compliance with ECL article 33 for a period of five (5) years.

The ALJ states that "no actual harm has been noted" (Hearing Report, at 4). I disagree. The misuse of pesticides at the office premises (the release of approximately forty [40] containers of fumigant by non-certified applicators over two days, at a level far exceeding what was proper for the space being treated) was significant. It caused damage to property that resulted in substantial cleanup costs. It led to the evacuation of the entire building because of odors (see Schlierman Affidavit, ¶ 8), with a clear potential for human exposure.

In these circumstances, I decline to suspend the penalty in its entirety. I have considered, however, the cleanup activity that respondent has undertaken subsequent to the fumigation, the employee education program regarding pesticide use that it conducted after the incident, as well as its cooperation with Department staff in its investigation. I also have given consideration to respondent's limited financial resources.²

In considering the facts of this matter and the penalty guidelines set forth in the Department's Pesticide Enforcement Guidance Memorandum, DEE-12, March 26, 1993, I hereby impose a fine of nine thousand dollars (\$9,000) which was the amount requested by

¹ The Schlierman affidavit, in addition to referencing ECL 71-2907 as the basis for the penalty, cites to ECL 71-1307(1) with respect to the penalty.

² Respondent argues against imposition of a penalty in part because its funding is received from the government (see, e.g., Cregg Affidavit, ¶ 13). The source of a respondent's funding does not relieve a respondent from payment of a penalty, and respondent's argument is rejected. The Hearing Report notes that the cleanup and the pending action have "deterred" respondent employees from their work (see Hearing Report, at 3). This is not a mitigating circumstance here. Respondent violated environmental requirements regarding the use of pesticides and is responsible for the necessary cleanup.

Department staff and recommended by the ALJ. Based on the circumstances of this case, I am suspending eight thousand dollars (\$8,000) of the penalty, contingent on respondent MOI's compliance with all applicable pesticide laws and regulations. If respondent does not violate any pesticide laws and regulations from the date of this order through December 31, 2015, the suspended amount of the penalty (\$8,000) will then be extinguished. The unsuspended portion of the penalty, that is, one thousand dollars (\$1,000), will be due and payable within thirty (30) days of service of this order upon respondent.

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

- I. Pursuant to 6 NYCRR 622.12, Department staff's motion for order without hearing is granted.
- II. Respondent Mohawk Opportunities, Inc. is adjudged to have violated 6 NYCRR 325.7(a) and 325.2(b).
- III. Respondent Mohawk Opportunities, Inc. is assessed a civil penalty in the amount of nine thousand dollars (\$9,000). Of that amount, one thousand dollars (\$1,000) is to be paid within thirty (30) days of the service of this order upon respondent. Payment is to be made 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 T. Phillips, Esq.
Assistant Regional Attorney
New York State Department of Environmental Conservation
Region 4 Office, Division of Legal Affairs
1130 North Westcott Road,
Schenectady, New York 12306-2014

The remaining portion of the penalty, eight thousand dollars (\$8,000), shall be suspended contingent upon respondent complying with all pesticide laws and regulations from the date of this order through December 31, 2015 ("compliance period"). If respondent commits no violations of pesticide law or regulations during the compliance period, the suspended portion of the penalty shall be extinguished. If respondent violates any pesticide law or regulation during the compliance period, the suspended portion of the penalty will become immediately due and payable and shall be submitted to Jill T. Phillips, Esq., Assistant Regional Attorney at the above-referenced address.

- IV. All communications from respondent to Department staff concerning this order shall be made to Jill T. Phillips, Esq., at the address listed in paragraph III of this order.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

-of-

the Alleged Violations of the Environmental
Conservation Law Article 33 and Title 6
of the Official Compilation
of Codes, Rules and Regulations of the State of
New York (6 NYCRR) Part 325 by

MOHAWK OPPORTUNITIES, Inc.,

Respondent

DEC File No. R4-2008-0818-130

HEARING REPORT

-by-

/s/

Molly T. McBride
Administrative Law Judge

PROCEEDINGS

Pursuant to Part 622 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR Part 622), the New York State Department of Environmental Conservation (Department, Department Staff) served a motion for order without hearing on Mohawk Opportunities, Inc. (respondent) by motion dated February 9, 2009.

Department staff alleged that respondent violated Environmental Conservation Law (ECL) Article 33 and 6 NYCRR Part 325. The violations are alleged to have occurred on July 31, 2008 and August 1, 2008. It is alleged that respondent caused the commercial application of pesticides by a non-certified applicator at 600 Franklin Street, Schenectady, New York and used pesticides contrary to labeling instructions.

This enforcement proceeding was commenced by Department staff in February 2009 by service of Motion for order without hearing in lieu of complaint. Department staff's motion was served on respondent and filed with the Office of Hearings and Mediation Services. The matter was assigned to Administrative Law Judge (ALJ) Molly T. McBride. Respondent timely served an affidavit in opposition to the motion.

POSITION OF THE PARTIES

Department

The Department contends that respondent violated the above noted statutes and regulations in that it caused or allowed the commercial application of pesticides by a non-certified applicator. The pesticide use occurred on July 31 and August 1, 2008, at a commercial office building where respondent's business is operated. Twenty-four (24) cans of fumigant were released on July 31 and another 18-20 cans of fumigant were released on August 1, 2008. Section 325.7(a) of 6 NYCRR provides that an individual must not engage in the commercial application of pesticides unless that individual is a certified applicator. Section 325.2(b) provides that pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the Department.

Respondent

Respondent acknowledges that the violations did occur. It notes that the pesticides were used by company employees without the permission or knowledge of senior management or building

maintenance. The employees acted in good faith. Further, after the use of the pesticides, respondent immediately undertook remediation. The cost of that remediation was seven thousand eight hundred dollars (\$7,800.00). Also, management conducted training for its employees concerning the proper protocol to be used with regard to pesticide use at the building. Additionally, they argue that senior management expended approximately 45-50 hours of time to this incident and fully cooperated with the Department throughout the investigation. No monetary benefit was realized by respondent. Respondent claims that it has been an "environmentally sensitive" entity in many ways.

Respondent notes that it is a not-for-profit agency that services mentally and physically challenged adults and is funded almost entirely by government money and claims that a penalty is not warranted here. The company argues that any imposition of fines would force them to divert funds that would otherwise be used to serve those in need. Respondent claims that it completely cooperated with the Department and has taken every responsible action to correct the violations and ensure that nothing like this happens again.

FINDINGS OF FACT

1) Respondent was served with a motion for order without hearing on February 9, 2009, by regular mail. Respondent opposed the motion by service of an affidavit in opposition to the motion dated February 26, 2009, admitting the violations but opposing any fines.

2) Employees of respondent company set off approximately 42 cans of pesticide spray at its office located at 600 Franklin Street, Schenectady, New York on July 31 and August 1, 2008.

3) The employees responsible for the release of the fumigant were non-certified pesticide applicators.

4) The fumigant released was not used in accordance with labeling directions.

5) Respondent had the site remediated after the fumigant was released.

6) Respondent has cooperated with Department staff during the investigation and remediation.

CONCLUSIONS OF LAW

1) Section 622.11(b)(1) of 6 NYCRR states: "The department staff bears the burden of proof on all charges and matters which they affirmatively assert in the instrument which initiated the proceeding."

2) Respondent violated 6 NYCRR 325.7(a) in that employees, non-certified pesticide applicators, released pesticides in the building located at 600 Franklin Street, Schenectady, New York on July 31 and August 1, 2008.

3) Respondent violated 6 NYCRR 325.2(b) in that the pesticides released by respondent employees were not used in accordance with labeling instructions.

4) ECL 71-2907 provides that for all violations of ECL Article 33 and its implementing regulations (including 6 NYCRR Part 325) there shall be a penalty of up to \$5,000.00 for one violation and up to \$10,000.00 for any subsequent violation.

DISCUSSION

Staff has asked for a penalty of \$9,000.00. Respondent has admitted the acts that constitute the violations alleged by the Department. The use of the pesticides and the risk of injury to the public and the environment were apparently not considered or not understood by the employees responsible. Unfortunately they did not consult the management or building maintenance before taking these actions. Respondent did take responsibility and undertook a clean up, at great expense, as soon as the incident occurred. Respondent has also taken affirmative steps to prevent a similar incident in the future. Respondent is a not-for-profit agency that serves those in need in the community. It is funded with government money. No doubt the clean up bill created a hardship for respondent. The associated work related to the clean up of the pesticide and the pending action with this Department has deterred respondent employees from the important work that they do. Respondent has fully acknowledged the seriousness of the event and has educated its employees so that another incident like it does not happen in the future.

I have taken into consideration the financial circumstances of respondent. As a not-for-profit agency serving those in need in our community, there would be a harm to the public if a fine is levied. I see no benefit to the Department or the people of the State if a fine is levied. If a fine is levied, respondent

may have to use money that would otherwise be used to serve their clients.

The Department's Civil Penalty Policy Enforcement Directive dated June 20, 1990 provides the Department's policy and gives **guidance** (emphasis added) for developing penalties for violations of the ECL. The Department has two main goals: punish the violator and deter future violations. The Policy states that the penalty should equal the gravity component, plus the benefit component, plus or minus any adjustments.

It was demonstrated that respondent did make every effort to address the problem as soon as it learned of it. Nothing was presented to show that respondent has a history of prior violations. The Department's Civil Penalty Policy Enforcement Directive identifies economic benefit as a factor in determining an appropriate penalty. No proof was offered as any benefit to respondent in using the pesticide. The Policy also looks to the gravity of the violation or the risk or actual damage done as a result of the violation. As noted, the potential for injury to persons, wildlife and vegetation was great. Fortunately, no actual harm has been noted. No persons were injured.

When these criteria are viewed in light of the actual damages that occurred, respondent's actions in correcting the problem and educating employees so that future incidents do not occur, as well as its current financial circumstances, a suspended penalty is appropriate in light of the unique facts and circumstances.

RECOMMENDATION

Respondent has admitted to all of the violations and I recommend an Order be issued reflecting that. As to the penalties for the violations, based upon the facts of this proceeding, I recommend the penalty requested by Department staff be levied against respondent, but the penalty be suspended so long as respondent has no violations of ECL Article 33 within five (5) years of the date of the order issued by the Commissioner.