

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

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 File No.
R7-20100308-17

- by -

JAMES NICHOLS and BEN WALKER, L.L.C.,

Respondents.

This proceeding concerns allegations that, on or about February 1, 2010, an employee or employees of respondents James Nichols and Ben Walker, L.L.C., illegally applied the pesticide Hot Shot Fogger at the Edward-James Apartments, located at 2828 James Street, Syracuse, New York (site).

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding against respondents by personally serving, on August 7, 2010, a notice of hearing and complaint dated June 23, 2010. Environmental Conservation Officer Paul S. Sherman served the papers upon respondent James Nichols, the managing member of Ben Walker, L.L.C.

According to Department staff's complaint, at an inspection at the Edward-James Apartments, a Department Pesticide Control Specialist discovered that a member of respondents' maintenance staff applied the pesticide Hot Shot Fogger (EPA Registration Number 9688-254-8845), in violation of article 33 of the New York Environmental Conservation Law (ECL) and applicable regulations. Specifically, the complaint alleged three causes of action:

1. Respondents James Nichols and Ben Walker, L.L.C., directed and allowed commercial pesticide applications to be made at the site by an employee or employees without proper commercial pesticide applicator

certifications or supervision, in violation of ECL 33-0905(1) and 6 NYCRR 325.7(a);

2. Respondents James Nichols and Ben Walker, L.L.C., failed to maintain true and accurate records of pesticide applications at the site, in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c); and
3. Respondents James Nichols and Ben Walker, L.L.C., failed to ensure that label requirements were followed at the site with regard to the use of Hot Shot Foggers, in violation of 6 NYCRR 325.2(a).

Respondents failed to file an answer to the complaint. Pursuant to 6 NYCRR 622.4(a), respondents' time to serve an answer to the complaint expired, and has not been extended by Department staff.

Department staff subsequently filed a motion for a default judgment, dated September 9, 2010, 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. I adopt the ALJ's report as my decision in this matter, subject to the following comments.

After service of the default motion, respondent James Nichols contacted the ALJ and also engaged in a series of unsuccessful negotiations with Department staff. Respondent Nichols filed a submission dated January 24, 2011, which the ALJ treated as an attempt by respondent Nichols to reopen the default. The ALJ, upon review of the submission and the remaining record, determined that respondent Nichols failed to demonstrate that good cause for the default existed and, accordingly, that respondent failed to demonstrate that the default should be reopened (see Summary Default Report, at 7). As the ALJ noted, although respondent Nichols claimed that he was not served, respondent did not address the information in Environmental Conservation Officer Sherman's affidavit that indicated that respondent was in fact served.

I concur with the ALJ's determination that the record does not warrant reopening the default and that Department staff is entitled to a default judgment on the three causes of action set forth in the complaint.

I also concur with the ALJ's recommendation that a civil penalty in the amount of \$7,000 be imposed. The civil penalty is authorized and appropriate based on this record. In this regard, Department staff has offered a detailed explanation of the penalty request, including an identification of aggravating factors (see Motion for Default Judgment and Order, September 9, 2010, at ¶¶ VIII-IX).

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 James Nichols and Ben Walker, L.L.C., are adjudged to be in default and to have waived their rights to a hearing in this proceeding. Accordingly, the allegations against respondents, as set forth in Department staff's complaint, are deemed to have been admitted by respondents.
- III. Respondents are adjudged to have violated ECL 33-0905(1), ECL 33-1205(1), 6 NYCRR 325.2(a), 6 NYCRR 325.7(a), and 6 NYCRR 325.25(c).
- IV. Respondents James Nichols and Ben Walker, L.L.C., are assessed, jointly and severally, a civil penalty in the amount of seven thousand dollars (\$7,000). The civil penalty is due and payable within thirty (30) days after service of this order upon respondents. 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:

Margaret A. Sheen, Esq.
Assistant Regional Attorney
NYSDEC, Region 7
615 Erie Boulevard West
Syracuse, NY 13204-2400

- V. All communications from respondent to the Department concerning this order shall be directed to Margaret A. Sheen, Esq., at the address referenced in paragraph IV of this order.

VI. The provisions, terms, and conditions of this order shall bind respondents James Nichols and Ben Walker, L.L.C., and their 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: March 30, 2011
Albany, New York

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

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

SUMMARY REPORT

DEC File No.
R7-20100308-17

- by -

JAMES NICHOLS and BEN WALKER, L.L.C.,

Respondents.

SUMMARY

This summary report recommends that the Commissioner issue an order finding the respondents in default in this matter and imposing a civil penalty of \$7,000 jointly and severally upon the respondents.

PROCEEDINGS

On August 7, 2010, Environmental Conservation Officer ("ECO") Paul S. Sherman personally served a notice of motion and complaint, dated June 23, 2010, on respondent James Nichols. Mr. Nichols is the managing member of Ben Walker, L.L.C. No answer was filed.

By motion dated September 9, 2010, DEC Staff moved for a default against the respondents. DEC Staff's default motion papers included the following: (1) a cover letter; (2) the default motion; (3) an affirmation in support of the motion by DEC Staff counsel Margaret Sheen, Esq.; (4) an affidavit of service by ECO Sherman; (5) copies of the notice of hearing, complaint and cover letter dated June 23, 2010; and (6) a proposed order. These papers were mailed to the respondents, Ronald J. Pelligra, Esq., and DEC's Office of Hearings and Mediation Services.

This matter was assigned to me on September 14, 2010.

By letter dated September 14, 2010, Ronald J. Pelligra, Esq. informed me that he would not be representing the respondents in this case. Mr. Pelligra wrote again on September 24, 2010. In this letter he stated that he was now representing the respondents and that he sought to negotiate a settlement.

By letter dated September 28, 2010, I wrote to the parties and informed them that because DEC Staff had not included proof of service of the default motion on the respondents, that I could not address DEC Staff's default motion.

With a cover letter dated October 5, 2010, DEC Staff counsel sent a copy of the affidavit of service for the notice of hearing and complaint.

I again wrote the parties on October 8, 2010, to inform them that I still did not have proof of service for the default motion.

With a cover letter dated October 15, 2010, DEC Staff counsel mailed a copy of the affidavit of service of the default motion on Mr. Nichols.

After I received a telephone call from Mr. Nichols on October 29, 2010, a conference call with all the parties was scheduled for November 4, 2010. On this call, Mr. Nichols stated that Mr. Pelligra was not representing the respondents. He requested time to find new counsel and for negotiations to continue. DEC Staff counsel consented to a two week adjournment and I confirmed this in an email to the parties.

A second conference call occurred on November 18, 2010. During this call, the parties stated that negotiations had not been successful. Mr. Nichols requested an additional two weeks to find counsel, which was granted. I confirmed this in an email to the parties.

A third conference call was scheduled for December 2, 2010. However, Mr. Nichols was not available at the scheduled time. I immediately sent an email to the parties granting Mr. Nichols an opportunity to file a submission and establishing a deadline of December 13, 2010.

On December 3, 2010, Mr. Nichols emailed stating that he could not afford an attorney and requesting copies of the papers

in this matter. DEC Staff counsel promptly emailed copies to Mr. Nichols.

Mr. Nichols did not make a submission by December 13, 2010.

On December 20, 2010, Mr. Nichols sent another email stating that he would have to represent himself. He also asked why he was named personally as a respondent and asked for an opportunity to be heard.

I responded to Mr. Nichols by email dated January 7, 2011 and allowed a submission to be filed by January 24, 2011.

By email dated January 24, 2011, Mr. Nichols submitted his unsworn response.

FINDINGS OF FACT

1. Ben Walker, L.L.C. is the owner of the Edward-James Apartments located at 2828 James Street, Syracuse, New York.
2. James Nichols is the managing member of Ben Walker, L.L.C.
3. On or about February 1, 2010, a member of the respondents' maintenance staff made pesticide applications of Hot Shot Foggers, EPA registration number 9688-254-8845, at the Edward-James Apartments.
4. On August 7, 2010, Environmental Conservation Officer ("ECO") Paul S. Sherman personally served a notice of hearing and complaint, dated June 23, 2010, on respondent James Nichols.
5. 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 would result in a default and a waiver of the respondents' right to a hearing. The twenty day time period expired on August 27, 2010 and the respondents failed to serve an answer.
6. On September 9, 2010, DEC Staff moved for a default against the respondents. The motion included a proposed order.

7. Section 33-0905(1) of the Environmental Conservation Law and 6 NYCRR 325.7(a) requires a person who engages in the commercial application of pesticides to be certified. Respondent James Nichols and respondent Ben Walker, L.L.C. directed and allowed employees to make commercial pesticide applications without proper commercial pesticide applicator certifications or supervision.
8. Section 33-1205(1) of the Environmental Conservation Law and 6 NYCRR 325.25(c) require applicators to keep records for each pesticide application. Respondent James Nichols and respondent Ben Walker, L.L.C. failed to maintain true and accurate records of pesticide applications.
9. Section 325.2(b) of 6 NYCRR requires pesticides to be used only in accordance with label directions. Respondent James Nichols and respondent Ben Walker, L.L.C. failed to follow label requirements with regard to the use of Hot Shot Foggers, EPA registration number 9688-254-8845, which were applied for control of cockroaches.

DISCUSSION

DEC Staff has moved for a default judgment and order pursuant to section 622.15 of title 6 of the New York Code of Rules and Regulations (6 NYCRR 622.15). This section authorizes such motion when respondents fail to timely answer. The regulation also requires that the motion must contain: (1) proof of service of the notice of hearing and complaint; (2) proof of the respondents' failure to appear or timely answer; and (3) a proposed order.

In Matter of Alvin Hunt d/b/a Our Cleaners, (Decision and Order of the Commissioner, July 25, 2006), the Commissioner set forth the process to be followed by an administrative law judge (ALJ) in reviewing a default motion. First, an examination of the proof of service of notice of hearing and complaint is required as well as the proof of the respondent's failure to appear or file a timely answer. Then an ALJ must consider whether the complaint states a claim upon which relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, DEC Staff has supplied the affidavit of personal service signed by ECO Paul Sherman. In his affidavit, ECO Sherman states that he personally served James Nichols with

a copy of the notice of hearing and complaint on August 7, 2010 at 11:30 a.m. The affidavit includes a physical description of Mr. Nichols and details from his driver's license, including his date of birth. In his unsworn e-mail submission of January 24, 2011, Mr. Nichols states he did not receive service at any time. Since this statement is unsworn and does not address any alleged deficiencies with ECO Sherman's affidavit of service, Mr. Nichols' statement should not be given any weight. Therefore, the Commissioner should conclude that Mr. Nichols was served with the notice of hearing and complaint and that this service also effected service on Ben Walker, L.L.C., because Mr. Nichols is the managing member¹ of the LLC (see CPLR 311-a). In addition, according to the New York State Department of State's Division of Corporations' website, Ronald Pelligra, Esq. is designated as the person that DOS will mail process to, if accepted on behalf of the entity. Mr. Pelligra acknowledges receipt of the papers in this case in his September 14, 2010 letter to James McClymonds, DEC's Chief ALJ.

As proof of the respondents' failure to timely serve an answer or appear, DEC Staff counsel states in her affirmation that respondents failed to file an answer or have any contact with the department. In his unsworn e-mail submission, Mr. Nichols does not contest DEC Staff's allegation that no answer was timely filed. He does state that he believes he called EPA to discuss the matter as soon as he was made aware of the situation. Based on this information, DEC Staff has shown that the respondents failed to answer and thus defaulted. The lack of detail and confusion in Mr. Nichols e-mail about whether or not he contacted DEC Staff and who he may have contacted, is not sufficient to demonstrate his appearance in this matter before the default. Accordingly, the respondents have waived the right to a hearing on liability for the causes of action set forth in the complaint.

DEC Staff includes a proposed order with its motion and, therefore, the Commissioner can conclude that the requirements set forth in 6 NYCRR 622.15 have been met.

As stated above, the Commissioner also requires an ALJ to evaluate whether a complaint sets forth a claim upon which

¹ In its complaint, DEC Staff asserts that Mr. Nichols is the managing member of Ben Walker, L.L.C. Mr. Walker, in his unsworn email submission of January 24, 2011 states he is a member of the LLC and does not address or contradict DEC Staff's contention that he is the managing member.

relief may be granted and if so, whether the penalty and any remedial measures sought by staff are warranted and sufficiently supported.

In this case, the DEC Staff's complaint alleges three causes of action related to pesticide applications made on or about February 1, 2010 at the Edward-James Apartments, 2828 James St., Syracuse, New York. Specifically, DEC Staff alleges that the respondents; (1) directed and allowed employees to make commercial pesticide applications without proper commercial pesticide applicator certifications or supervision, in violation of ECL 33-0905(1) and 6 NYCRR 325.7(a); (2) failed to maintain true and accurate records of pesticide applications, in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c); and (3) failed to follow label requirements with regard to the use of Hot Shot Foggers, EPA registration number 9688-254-8845 which were applied for control of cockroaches, in violation of 6 NYCRR 325.2(b). The complaint contains sufficient allegations for the Commissioner to conclude that each of these causes of action is stated such that relief may be granted.

In its complaint and default motion, DEC Staff seeks a civil penalty of \$7,000. No other remedial relief is requested. In her affirmation, DEC Staff counsel states that the civil penalty requested is within the range authorized by ECL 71-2907(1) and consistent with both the Department's Civil Penalty Policy issued June 20, 1990 and the Department's Pesticide Enforcement Guidance Memorandum issued on January 20, 1987. The maximum penalty authorized for these violations is \$5,000 each or a total of \$15,000. In this case, DEC Staff argues that the \$7,000 requested penalty is justified based on the lack of response from the respondents to the allegations, the benefits they received (including the avoided costs of hiring a certified pesticide applicator and paperwork retention requirements), and the gravity of the violations. The respondents' failure to apply the pesticide in accordance with the label directions is a high priority violation and could result in unhealthy exposures to the pesticide and potentially significant environmental harm. The information contained in DEC Staff's motion is sufficient for the Commissioner to conclude that a penalty of \$7,000 is justified in this case.

As discussed above, after service of the default motion, Mr. Nichols did contact me and also engaged in a series of unsuccessful negotiations with DEC Staff. These contacts can be considered an appearance for the purposes of determining the civil penalty amount. Accordingly, I authorized Mr. Nichols to

make a submission which was eventually received on January, 24, 2011.

Mr. Nichols' submission may be an attempt to reopen the default, pursuant to section 622.15(d), which requires a showing that a meritorious defense is likely to exist and that good cause for the default exists. With respect to a possible meritorious defense, Mr. Nichols claims that he: (1) did not purchase the pesticide; (2) did not set them off; (3) did not instruct that they be set off; and (4) was not there when the pesticides were applied. Because of this, he does not know if the instructions were followed or if records were kept. He also notes that no one was injured and argues that because the pesticides were applied in a residential unit, that the application should be considered residential, not commercial. While some of these arguments might be used as a timely defense to the allegations in the complaint, the issue is moot because of Mr. Nichols' failure to show that good cause for the default exists. As discussed above, ECO Sherman's affidavit of service demonstrates proper service. Mr. Nichols unsworn claim that he was not served, without addressing the information in ECO Sherman's affidavit, fails to demonstrate that a good cause for the default exists. Accordingly, Mr. Nichols has failed to demonstrate that the default in this case should be reopened.

CONCLUSIONS OF LAW

1. Respondent James Nichols and respondent Ben Walker, L.L.C. were served with the notice of hearing and complaint on August 7, 2010. Neither respondent filed a timely answer. Both respondents have defaulted in this matter.
2. Respondent James Nichols and respondent Ben Walker, L.L.C. directed and allowed employees to make commercial pesticide applications without proper commercial pesticide applicator certifications or supervision in violation of ECL 33-0905(1) and 6 NYCRR 325.7(a).
3. Respondent James Nichols and respondent Ben Walker, L.L.C. failed to maintain true and accurate records of pesticide applications in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c).
4. Respondent James Nichols and respondent Ben Walker, L.L.C. failed to ensure that label requirements were followed with regard to the use of Hot Shot Foggers, EPA registration

number 9688-254-8845, which were applied for control of cockroaches, in violation of 6 NYCRR 325.2(a).

5. Environmental Conservation Law 71-2907(1) provides for a maximum administrative sanction of \$5,000 for the first violation of any provision of article 33 of the ECL, or any regulation promulgated thereunder.

RECOMMENDATION

The Commissioner should issue an order finding the respondents in default, finding them liable for the three causes of action alleged in the complaint, and imposing a civil penalty of \$7,000 jointly and severally upon the respondents.

.

/s/

Albany, New York
March 25, 2011

P. Nicholas Garlick
Administrative Law Judge