

**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
(ECL) and Part 325 of Title 6 of the Official Compilation
of Codes, Rules and Regulations of the State of New York
(6 NYCRR),

- by -

SLS ALBANY, LLC,

Respondent.

ORDER

DEC File No.
R4-2016-0510-95

Background

This administrative enforcement proceeding addresses allegations of staff of the New York State Department of Environmental Conservation (Department or DEC) that respondent SLS Albany, LLC, d/b/a Scotts Lawn Service, violated ECL Article 33, 6 NYCRR 325.23(h), and 6 NYCRR 325.25(a) in the application of commercial pesticides on April 1, 2016. Respondent is a registered pesticide application business operating under registration #13492 and is located at 437 Second Street, Schenectady, New York (see Affidavit of Brayton Pendell, sworn to September 14, 2016 [Pendell Affidavit], ¶ 5 & attachment 1 [Business Registration Details]).

Department staff served a notice of hearing and complaint dated July 25, 2016 on respondent by certified mail, which respondent received on July 28, 2016 (see Affirmation of Dusty Renee Tinsley, Esq., dated September 14, 2016 [Tinsley Affirmation], ¶¶ 2-3 & attachments 2-3 [certified mail receipt and USPS tracking]). Respondent failed to file an answer to the complaint (see Tinsley Affirmation, ¶ 6). Department staff seeks an order:

- (i) holding respondent liable for thirteen (13) alleged violations of the State's pesticide regulations as a result of respondent's application of commercial pesticides on April 1, 2016; and
- (ii) imposing a civil penalty of eleven thousand five hundred dollars (\$11,500)

See Tinsley Affirmation, ¶¶ 24-25 & attachment 1 (Complaint ¶¶ 6-18 & Wherefore Clause ¶ I).

Administrative Law Judge (ALJ) P. Nicholas Garlick of the DEC's Office of Hearings and Mediation Services was assigned to the matter. ALJ Garlick prepared the attached default summary report, which I adopt as my decision in this matter, subject to my comments below.

Discussion

Liability

Department staff alleged that respondent committed thirteen (13) violations. With respect to the first cause of action, Department staff alleged that respondent, on April 1, 2016, conducted eleven (11) commercial pesticide applications at various locations -- using Ortho Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) (see Tinsley Affirmation, ¶¶ 19-20; Pendell Affidavit, ¶¶ 12-13). During these applications, respondent failed to employ “at least one certified commercial pesticide applicator or technician, certified in the proper category in which the business intends to engage at each location,” in violation of 6 NYCRR 325.23(h) (Tinsley Affirmation, ¶ 24; see also Pendell Affidavit, ¶¶ 14-17).

With respect to the second cause of action, Department staff alleged that respondent committed two (2) violations of 6 NYCRR 325.25(a). These violations arise from respondent’s failure to keep true and accurate records, including documenting the target organism, with respect to the April 1, 2016 commercial pesticide applications of Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) at 5 Hazaltine Lane, Clifton Park, New York (see Tinsley Affirmation, ¶ 25; Pendell Affidavit, ¶ 20).

I agree with the ALJ that Department staff’s motion for a default judgment should be granted. Staff has satisfied the requirements of 6 NYCRR 622.15(b) by submitting proof of service on respondent of the notice of hearing and complaint, proof of respondent’s failure to answer or appear, and a proposed order (see Default Summary Report at 4).

In its papers, Department staff also submitted proof of service of the default judgment motion on respondent, and presented sufficient evidence demonstrating that respondent committed the alleged violations (see Default Summary Report at 4-5). Accordingly, Department staff is entitled to a default judgment.

Civil Penalty

Department staff has requested a civil penalty of eleven thousand five hundred dollars (\$11,500) (see Tinsley Affirmation, ¶ 34c & attachment 1 [Complaint, Wherefore Clause, ¶ I]). ECL 71-2907(1) provides that any person who violates any provision of ECL article 33 or any rule, regulation or order issued thereunder or commits any offense described in ECL 33-1301 shall be liable for a civil penalty not to exceed five thousand dollars for the first violation, and not to exceed ten thousand dollars for a subsequent offense.

In this matter, Department staff has shown eleven (11) violations for the first cause of action, and two (2) violations for the second cause of action, which results in a maximum statutory penalty of \$125,000. Although staff’s requested penalty is below this statutory amount, based on the information that staff has provided, it is authorized and appropriate in the circumstances of this matter (see e.g. Pendell Affidavit, ¶¶ 24-25; Tinsley Affirmation, ¶¶ 31-32).

Department staff requests that respondent submit the civil penalty within thirty (30) days and I am directing that the penalty be submitted within thirty (30) days of service upon respondent.

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

- I. Department staff's motion for default judgment against respondent SLS Albany, LLC, pursuant to 6 NYCRR 622.15, is granted. By failing to answer or appear in this proceeding, respondent waived its right to a hearing.
- II. Moreover, based upon proof of the facts submitted, respondent SLS Albany, LLC, is adjudged to have violated 6 NYCRR 325.23(h) a total of eleven times and 6 NYCRR 325.25(a) a total of two times.
- III. Within thirty (30) days of service of this order on respondent, SLS Albany, LLC, shall pay a civil penalty in the amount of eleven thousand five hundred dollars (\$11,500) by certified check, cashier's check, or money order made payable to the New York State Department of Environmental Conservation.
- IV. The penalty payment shall be mailed or hand-delivered to the Department at the following address:

Dusty Renee Tinsley, Esq.
NYSDEC Region 8
6274 East Avon-Lima Road
Avon, New York 14414
- V. Any questions or other correspondence regarding this order shall also be directed to Attorney Tinsley at the address referenced in paragraph IV, above.

VI. The provisions, terms, and conditions of this order shall bind respondent SLS Albany, LLC and its agents, successors, and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Basil Seggos
Commissioner

Dated: May 11, 2017
Albany, New York

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

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

- by -

SLS Albany, LLC,

Respondent.

**DEFAULT
SUMMARY REPORT**

DEC File No.
R4-2016-0510-95

PROCEEDINGS

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding by service of a notice of hearing and complaint, dated July 25, 2016, upon respondent SLS Albany, LLC by certified mail return receipt requested. Respondent received the pleadings on July 28, 2016. The notice of hearing instructed respondent that a written answer must be filed within twenty days of respondent's receipt of the complaint. No answer has been received.

The complaint alleges two causes of action; first, that the respondent conducted eleven commercial pesticide applications at various locations using Ortho Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) on April 1, 2016 without employing at least one certified commercial pesticide applicator or technician, certified in the proper category in which the business engages at each location required to be registered, in violation of 6 NYCRR 325.23(h). In the second cause of action, Department staff alleges respondent failed to keep true and accurate records, including documenting the target organism, for two April 1, 2016 commercial pesticide applications at 5 Hazaltine Lane, Clifton Park, New York, of Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPS Reg. #538-316) in violation of 6 NYCRR 325.25(a).

With a cover letter dated September 14, 2016, Department staff filed a motion for default judgment pursuant to 6 NYCRR 622.15. This matter was assigned to me on September 30, 2016. Department staff provided an affidavit of service for the default motion on respondent with a cover letter dated February 3, 2017.

In its default motion, Department staff seeks an order of the Commissioner: (1) finding respondent in default for failing to file an answer; (2) finding respondent liable for the alleged violations; (3) assessing a total civil penalty of \$11,500; and (4) imposing such other relief as may be just, proper, and appropriate.

APPLICABLE REGULATORY PROVISIONS

Section 325.23(h). Business and agency registration.

"(h) No business or agency providing the services of commercial application of pesticides shall engage in the commercial use of pesticides unless the business has at least one employee who is a certified commercial pesticide applicator or technician, certified in the proper category in which the business intends to engage at each location required to be registered. A registered business using pesticides in category 7 - industrial, institutional, or structural; category 5 - aquatics; category 1 - agriculture; or businesses applying pesticides by aircraft must employ at least one certified commercial pesticide applicator, certified in these categories."

Section 325.25(a). Records and reports.

"(a) All businesses required to register pursuant to section 325.23 of this Part shall keep true and accurate records in a manner specified by the department showing: the kind and quantity of each pesticide used; dosage rates; methods of application; target organisms; and the use, date and place of application for each pesticide used. These records shall be maintained on an annual basis and retained for a minimum of three years and shall be available for inspection upon request by the department."

FINDINGS OF FACTS

The following facts are found based upon the documents submitted with and in support of Department staff's motion for a default judgment:

1. Respondent SLS Albany, LLC d/b/a Scotts Lawn Service is a registered pesticide application business operating under registration #13492 and is located at 437 Second Street, Schenectady, New York (see Pendell affidavit ¶ 5 & attachment 1).
2. Chad Purdy was employee of respondent on April 1, 2016. His commercial pesticide applicator license issued by the Department expired on December 21, 2015 and he renewed his license on April 18, 2016 (see Pendell affidavit ¶¶ 8-11 & attachment 2).
3. Ortho Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) are commercial pesticides registered with the Environmental Protection Agency (see Pendell affidavit ¶ 12 & attachment 3).
4. On April 22, 2016, Department staff member Brayton Pendell conducted an inspection of respondent (see Pendell affidavit ¶ 7).
5. On April 1, 2016, Chad Purdy conducted eleven commercial pesticide applications using Ortho Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) (see Pendell affidavit ¶ 13 & attachment 4). On April 1, 2016, respondent did not employ at least one certified commercial pesticide applicator or technician, certified in the proper category in which the business engages at each location required to be registered (see Pendell affidavit ¶ 16).
6. On April 1, 2016, respondent failed to keep true and accurate records, including documenting the target organism, for the April 1, 2016 commercial pesticide applications of Weed B Gon Pro (EPA Reg. #228-292) and Scotts Fertilizer 22-0-8 with Halts II (EPS Reg. #538-316) for applications done at 5 Hazaltine Lane, Clifton Park, New York (see Pendell affidavit ¶ 18 & attachment 5).

7. Respondent failed to file an answer to the complaint as directed by the notice of hearing (see Tinsley affirmation ¶ 6).

DISCUSSION

The respondent's failure to timely file an answer constitutes a default and a waiver of respondent's right to a hearing (6 NYCRR 622.15[a]). Department staff's motion for a default judgment must include proof of service of the notice of hearing and complaint, proof of respondent's failure to file a timely answer, and a proposed order (see 6 NYCRR 622.15[b]). In addition, staff must serve the default motion papers on the respondents or their representatives (see Matter of Dudley, Decision and Order of the Commissioner, July 24, 2009).

As stated in the Commissioner's decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Commissioner Decision and Order, July 25, 2006, at 6), "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them [citations omitted]." In Matter of Queen City Recycle Center, Inc., the Commissioner stated that "consistent with the requirements applicable to default judgment motions under the CPLR, this decision and order directs that staff must submit proof of the facts constituting the claim charged" (Decision and Order of the Commissioner, December 12, 2013, at 3 [citations omitted]). The Commissioner went on to direct that "[u]pon submission of the motion and supporting materials, the ALJ will review the record to determine whether staff's papers have stated a claim, and that staff's penalty request and remedial relief are supported" (id. [citation omitted]).

In the instant proceeding, Department staff has satisfied the requirements of 6 NYCRR 622.15(b) by providing proof of service of the notice of hearing and complaint (see Tinsley Affirmation, Attachment 4), proof of respondent's failure to timely answer the amended complaint (see Tinsley Affirmation ¶ 6), and a proposed order (see Tinsley Affirmation, Attachment 5). Respondent received the notice of hearing and complaint on July 28, 2016. Its answer was due on or about August 17, 2016. Ms. Tinsley's affirmation demonstrates that respondent has not filed an answer. In addition, Department staff served a copy of the motion for default judgment on respondent (see Affidavit of Service of Jill Viscusi, sworn to February 3, 2017) consistent with the Commissioner's directive in Dudley, supra. To date, the Office of Hearings and Mediation Services has not received a

reply from respondent regarding Department staff's motion. Accordingly, staff's motion is unopposed.

Included with Department staff's motion papers is the affidavit of Brayton Pendell who is employed by the Department as a Pesticide Control Specialist. Mr. Pendell states that he conducted an inspection of respondent on April 22, 2016 and determined that at the time of the April 1, 2016 pesticide applications, the pesticide applicator license for Chad Purdy had lapsed. Mr. Pendell also determined that Mr. Purdy had failed to document the target organisms for two commercial pesticide applications done at 5 Hazaltine Lane, Clifton Park, New York (see Pendell Affidavit ¶¶1-20).

Attached to Mr. Pendell's affidavit are documents supporting his statements including: respondent's business registration details; Chad Purdy's applicator detail; registration information for Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) and Ortho Weed B Gon Pro (EPA Reg. #228-292); records of eleven pesticide applications done on April 1, 2016 by Mr. Purdy; and a record of the application of the two pesticides on April 1, 2016 at 5 Hazaltine Lane without documentation of the target organism (see Pendell Affidavit, attachments 1-5). Based on this information, Department staff has, consistent with Matter of Queen City Recycle Center, supra, provided proof of the facts sufficient to support staff's claims against respondent.

Accordingly, I conclude that Department staff has met its burden of providing proof of the facts sufficient to support its claim that respondent violated 6 NYCRR 325.23(h) and 6 NYCRR 325.25(a).

Penalties

Department staff requests that respondent be assessed a civil penalty of \$11,500. Staff cites the provisions of ECL 71-2907(1) that provides any person who violates any provision of article 33 of the ECL or any rule, regulation or order issued thereunder or commits any offense described in ECL section 33-1301 shall be liable for a civil penalty not to exceed five thousand dollars for the first violation, and not to exceed ten thousand dollars for a subsequent offense. In this case, Department staff has shown 11 violations for the first cause of action and 2 violations for the second, which results in a maximum statutory penalty of \$125,000.

Staff states it considered the Department's Civil Penalty Policy (DEE-1, June 20, 1990) and the Department's Pesticide Enforcement Policy (DEE-12, March 26, 1993) in determining its requested civil penalty. Department staff lists the following factors in support of the penalty requested: (1) the importance of enforcing pesticide laws to protect public health and the environment; (2) deterrence of future violations; and (3) the need for consistency in the application of pesticide laws. Department staff notes that the eleven violations in the first cause of action are categorized as Tier 2 violations in the Pesticide Enforcement Policy while the two violations in the second cause of action are categorized as Tier 3. Based on this, Department staff request a penalty of \$1,000 for each of the violations in the first cause of action and \$250 for the two violations in the second. I conclude that a total penalty of \$11,500 is supported and authorized.

RECOMMENDATIONS

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

1. granting Department staff's motion for default judgment pursuant to 6 NYCRR 622.15 against respondent SLS Albany, LLC;
2. holding that respondent SLS Albany, LLC committed eleven violations of 6 NYCRR 325.23(h) and two violations of 6 NYCRR 325.25(a);
3. directing respondent SLS Albany, LLC to pay a civil penalty of eleven thousand five hundred dollars (\$11,500);
4. directing respondent SLS Albany, LLC to submit the penalty payment to the following:

Dusty Renee Tinsley, Esq.
Assistant Regional Attorney
NYSDEC Region 4
1130 North Westcott Road
Schenectady, New York 12306; and

5. directing such other and further relief as the Commissioner may deem necessary and appropriate.

/s/

P. Nicholas Garlick
Administrative Law Judge

Exhibit Chart

Matter of SLS Albany, LLC

Attached to Complaint dated July 25, 2016

Exhibit #	Description
1	Copy of the Business Registration Details report for respondent from Department's website.
2	Copy of Applicator Detail for Chad Purdy and the 2016 Transaction History for Chad Purdy from the New York State Pesticide Applicator Database.
3	Information regarding Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) and Ortho Weed B Gon Pro (EPA Reg. #228-292).
4	Service records for Chad Purdy's service record for April 1, 2016.
5	Service report for applications made on April 1, 2016 at 5 Hazaltine Lane, Clifton Park, NY.

Attached to the Affirmation of Dusty Renee Tinsley, Esq. dated September 14, 2016

Exhibit #	Description
1	Notice of Hearing and Complaint with attachments (described above)
2	Certified mailing receipt
3	USPS tracking document showing service on July 28, 2016
4	Affidavit of service with attachments
5	Proposed order

Attached to the affidavit of Brayton Pendell dated September 14, 2016

Exhibit #	Description
1	Copy of the Business Registration Details report for respondent from Department's website.
2	Copy of Applicator Detail for Chad Purdy and the 2016 Transaction History for Chad Purdy from the New York State Pesticide Applicator Database.
3	Information regarding Scotts Fertilizer 22-0-8 with Halts II (EPA Reg. #538-316) and Ortho Weed B Gon Pro (EPA Reg. #228-292)
4	Service records for Chad Purdy's service record for April 1, 2016.
5	Service report for applications made on April 1, 2016 at 5 Hazaltine Lane, Clifton Park, NY.
6	Copy of the Department's Civil Penalty Policy (DEE-1, issued June 20, 1990).
7	Copy of the Department's Pesticide Enforcement Policy (DEE-12 revised March 26, 1993).
8	December 28, 2012 Consent Order.

Attached to the affidavit of Jill Viscusi dated February 3, 2017

Exhibit #	Description
1	Copy of cover letter to Chief ALJ McClymonds dated September 14, 2016.