

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

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In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law of the State of New York (“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**

Case No.  
R1-20091118-170

-by-

**Joe Turner, Jr. d/b/a/ JT Jr. Landscaping, Inc.,**

Respondent.

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This administrative enforcement proceeding concerns the alleged failure of respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc., to comply with 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”). On July 20, 2012, staff of the New York State Department of Environmental Conservation (“Department”) served respondent with a notice of pre-hearing conference, hearing, and complaint, as well as a verified complaint. The complaint alleged twelve causes of action, including operation of an unregistered pesticide application business, failure to make and maintain records of pesticide applications, failure to enter into written contracts that complied with the applicable legal requirements, and failure to use an effective anti-siphon device when filling equipment containing pesticides.

Pursuant to 6 NYCRR 622.4(a), a respondent must serve an answer within twenty (20) days of receiving the notice of hearing and complaint. Respondent received the complaint on July 24, 2012, and respondent’s answer was due by August 13, 2012. Respondent failed to answer the complaint. The notice of pre-hearing conference, hearing, and complaint stated that at 10:00 a.m. on October 3, 2012, a pre-hearing conference would be held at the Department’s Region 1 office, 50 Circle Road, Stony Brook, New York. Respondent did not appear at the pre-hearing conference before Administrative Law Judge (“ALJ”) Richard R. Wissler. At the pre-hearing conference, Department Staff made an oral motion for default judgment, and proffered documents in support of the motion, which were received into the record.

Subsequently, the matter was assigned to ALJ Maria E. Villa who prepared the attached default summary report, which I adopt as my decision in this matter. As set forth in the ALJ’s report, respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc., failed to file an answer to the complaint served by Department staff in this matter, and failed to appear at a pre-hearing conference scheduled for October 3, 2012 (see Default Summary Report, at 7, Finding of Fact No. 13).

As a consequence of respondent's failure to answer or appear in this matter, the ALJ recommended that Department staff's motion for a default judgment be granted (see Default Summary Report, at 7). I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15.

ECL 71-2907(1) provides for a penalty of not to exceed more than five thousand dollars (\$5,000) for a first violation, and not to exceed ten thousand dollars (\$10,000) for a subsequent offense. Department staff originally requested a penalty of nine thousand dollars (\$9,000) in this matter, which staff indicated was consistent with the requested penalties in other pesticide cases. Staff subsequently renewed its request for a penalty of nine thousand dollars (\$9,000), but asked that four thousand dollars (\$4,000) of that penalty be suspended.

Although staff's requested penalty is below the statutory amount authorized by ECL 71-2907(1), staff indicates that the amount requested is within the range authorized by the Department's Civil Penalty Policy (DEE-1, June 20, 1990), and is consistent with the Department's Pesticide Enforcement Policy (DEE-12, issued January 20, 1987, revised March 26, 1993). The ALJ granted staff's request, providing for a payable penalty of five thousand dollars (\$5,000) (see Default Summary Report, at 4, 7).

No specific explanation was provided for the request to suspend four thousand dollars (\$4,000) of the civil penalty, nor did staff identify any contingency which, if failed to be satisfied, would require the suspended amount to be due and payable. Accordingly, as no explanation or identification of a contingency was provided, I am treating this suspension request to be a reduction of the requested penalty amount and hereby assess a civil penalty in the amount of five thousand dollars (\$5,000), with no amount suspended.

As the record indicates, respondent has, on several occasions, applied pesticides when his pesticide business registration was expired. The applicable laws and regulations (see ECL 33-0907[1], 33-1301[8-a], and 6 NYCRR 325.23[a]) require that a business offering, advertising or providing the services of commercial application of pesticides register with the Department.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted. By failing to answer or appear at the pre-hearing conference in this matter, respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc., waived his right to be heard at the hearing. Accordingly, the allegations of the complaint are deemed to have been admitted by respondent.
- II. Based upon the allegations of the complaint, and the documents submitted in support of the motion, respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping,

Inc., is adjudged to have violated ECL 33-0907(1), 33-1001, 33-1205(1), and 33-1301(8-a), and 6 NYCRR 325.2(c), 325.23(a), 325.25, and 325.40(a).

III. Respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc., is hereby assessed a civil penalty in the amount of five thousand dollars (\$5,000). Within thirty (30) days of the service of this order upon respondent, respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc., shall submit payment of the civil penalty by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment of five thousand dollars (\$5,000) shall be sent to the following address:

Office of General Counsel – Region 1  
New York State Department of Environmental Conservation  
Stony Brook University  
50 Circle Road  
Stony Brook, New York 11790-3409  
Attn: Jennifer Ukeritis, Esq.

IV. Any questions or other correspondence regarding this order shall also be addressed to Jennifer Ukeritis, Esq. at the address referenced in paragraph III of this order.

V. The provisions, terms and conditions of this order shall bind respondent Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc., his agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Joseph J. Martens  
Commissioner

Dated: Albany, New York  
December 13, 2012

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

DEFAULT SUMMARY  
REPORT

CASE NO.  
R1-20091118-170

-by-

**Joe Turner, Jr., d/b/a JT Jr. Landscaping, Inc.,**  
Respondent.

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Proceedings

Respondent Joe Turner, Jr., d/b/a JT Jr. Landscaping, Inc. ("respondent"), was served by staff of the New York State Department of Environmental Conservation ("Department staff") with a notice of pre-hearing conference, hearing and complaint, and verified complaint, all dated July 20, 2012. Department Staff's complaint alleged twelve causes of action, including violations of Environmental Conservation Law Article 33 and its implementing regulation, Part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), as follows:

First Cause of Action: violation of ECL 33-0907(1), 33-1301(8-a), and 6 NYCRR 325.23(a), by applying pesticides during the 2003 calendar year, after expiration of respondent's business registration on December 31, 2002.

Second Cause of Action: violation of ECL 33-0907(1), 33-1301(8-a), and 6 NYCRR 325.23(a), by applying pesticides on or about June 1, 2007, after the expiration of respondent's business registration on December 31, 2006.

Third Cause of Action: violation of ECL 33-1205(1) and 6 NYCRR 325.25, by failing to make and maintain true and accurate records of commercial pesticide applications. Specifically, records provided for the 2000 calendar year during inspection failed to indicate "dosage rate," "target pest," "method of application," and "place of application."

Fourth Cause of Action: violation of ECL 33-1205(1) and 6 NYCRR 325.25, by failing to make and maintain true and accurate records of commercial pesticide applications. Specifically, records provided for the 2001 calendar year during inspection failed to indicate "dosage rate," "target pest," "method of application," and "place of application."

Fifth Cause of Action: violation of ECL 33-1205(1) and 6 NYCRR 325.25, by failing to make and maintain true and accurate records of commercial pesticide applications. Specifically, records provided for the 2002 calendar year during inspection failed to indicate “dosage rate,” “target pest,” “method of application,” and “place of application.”

Sixth Cause of Action: violation of ECL 33-1205(1) and 6 NYCRR 325.25, by failing to make and maintain true and accurate records of commercial pesticide applications. Specifically, records provided for the 2003 calendar year during inspection failed to indicate “dosage rate,” “target pest,” “method of application,” and “place of application.”

Seventh Cause of Action: violation of ECL 33-1001 and 6 NYCRR 325.40(a), by failing to enter into a written contract, in compliance with the statute and regulations, with customers before conducting commercial pesticide lawn applications. Specifically, the written contracts for the 2001 calendar year failed to indicate total number of applications, pertinent label warnings, and a list of brand/generic names of active ingredients.

Eighth Cause of Action: violation of ECL 33-1001 and 6 NYCRR 325.40(a), by failing to enter into a written contract, in compliance with the statute and regulations, with customers before conducting commercial pesticide lawn applications. Specifically, the written contracts for the 2002 calendar year failed to indicate pertinent label warnings, and a list of brand/generic names of active ingredients.

Ninth Cause of Action: violation of ECL 33-1001 and 6 NYCRR 325.40(a), by failing to enter into a written contract, in compliance with the statute and regulations, with customers before conducting commercial pesticide lawn applications. Specifically, the written contracts for the 2003 calendar year failed to indicate pertinent label warnings, and a list of brand/generic names of active ingredients.

Tenth Cause of Action: violation of ECL 33-1001 and 6 NYCRR 325.40(a), by failing to enter into a written contract, in compliance with the statute and regulations, with customers before conducting commercial pesticide lawn applications. Specifically, respondent failed to enter into compliant written lawn care contracts with three clients during the 2007 calendar year.

Eleventh Cause of Action: violation of 6 NYCRR 325.2(c), by failing to use an effective anti-siphon device when filling equipment containing pesticides, on or about February 25, 2004.

Twelfth Cause of Action: violation of 6 NYCRR 325.2(c), by failing to use an effective anti-siphon device when filling equipment containing pesticides, on or about June 1, 2007.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL Article 33 and 6 NYCRR Part 325; (2) enjoining respondent from any further actions which would cause such violations to continue; (3) assessing a civil penalty in the amount of not less than nine thousand dollars (\$9,000); and (4) granting such other and further relief as the Commissioner may deem just and proper.

Respondent was served with the notice of hearing and complaint by certified mail, return receipt requested, on July 20, 2012. Pursuant to 6 NYCRR 622.4(a), an answer was due to be filed within twenty days of receipt of the notice of hearing and complaint. Respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for October 3, 2012, as directed in the notice of pre-hearing conference, hearing and complaint.

At the pre-hearing conference, Department staff made an oral motion for a default judgment pursuant to 6 NYCRR 622.15, and proffered documents in support of its motion. In particular, Department staff submitted the following documents for the record:

1. A cover letter; notice of pre-hearing conference, hearing and complaint; verified complaint; and verification, all dated July 20, 2012.
2. An affidavit of service by Carole Gajewski, sworn to on October 3, 2012, stating that on July 20, 2012, Ms. Gajewski served respondent via certified mail, and that the return receipt for certified mail was returned to the Department, date-stamped by the Amityville Post Office on July 25, 2012, and signed as accepted on July 24, 2012. The date-stamped and signed receipt was received by the Department on July 24, 2012, and a copy of the date-stamped and signed receipt was attached to the affidavit of service.
3. A proposed order.
4. A February 25, 2004 inspection report.
5. An April 15, 2009 inspection report.
6. A May 27, 2009 Notice of Violation.
7. The affidavit of Joseph Cutrone, sworn to October 4, 2012.
8. NYSDEC Pesticide Certification Record.
9. The October 5, 2012 affirmation of Jennifer M. Ukeritis, Esq. (the "Ukeritis Affirmation"), in support of Department Staff's request for a penalty of \$9,000, with \$5,000 payable and \$4,000 suspended.

The complaint requested that the Commissioner issue an order directing respondent to pay a civil penalty of nine thousand dollars (\$9,000). In the Ukeritis Affirmation, Department Staff renewed its request for a \$9,000 penalty, but asked that \$4,000 of the penalty be suspended. Department Staff's request for a suspension of a portion of the penalty is deemed to be a motion to amend the complaint to request a total payable penalty of \$5,000 in lieu of \$9,000, and that motion is granted.

According to the Ukeritis Affirmation, the requested penalty amount is consistent with penalty amounts imposed by the Department in similar cases. Exhibit 9. Moreover, the amount requested is within the range authorized by the Department's Civil Penalty Policy (DEE-1, June 20, 1990), and is consistent with the Department's Pesticide Enforcement Policy (DEE-12, issued January 20, 1987, revised March 26, 1993). Id.

#### Default Provisions

In accordance with 6 NYCRR 622.4(a), a respondent upon whom a complaint has been served must file an answer to the complaint within twenty days of the date of such service. A failure to timely file an answer to the complaint constitutes a default in the proceeding. As applicable herein, the Department's default procedures in an enforcement proceeding, found at 6 NYCRR 622.15, provide:

(a) A respondent's failure to file a timely answer or, even if a timely answer is filed, failure to appear at the hearing or the pre-hearing conference (if one has been scheduled pursuant to section 622.8 of this Part) constitutes a default and a waiver of respondent's right to a hearing. If any of these events occurs the department staff may make a motion to the ALJ for a default judgment.

(b) The motion for a default judgment may be made orally on the record ... and must contain:

- (1) proof of service upon the respondent of the notice of hearing and complaint...;
- (2) proof of the respondent's failure to appear or failure to file a timely answer;  
and
- (3) a proposed order.

As the Commissioner stated in the decision and order in Matter of Alvin Hunt, d/b/a Our Cleaners (Decision and Order dated 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]." Accordingly, the findings of fact set forth below are based upon the documents submitted into the record, as identified above.

### Applicable Regulatory Provisions

ECL 33-0907(1) and 33-1301(8-a), and Section 325.23(a) of 6 NYCRR, require annual registration of all pesticide agencies and businesses.

ECL 33-1001 states, in pertinent part, that:

- (1) [p]rior to any commercial lawn application the applicator shall enter into a written contract with the owner of the property or his agent specifying the approximate date or dates of application, number of applications, and total cost for the service to be provided and shall supply the property owner or his agent with a written copy in at least 12 point type of:
  - (a) a list of substances to be applied including brand names and generic names of active ingredients;
  - (b) any warnings that appear on the label of pesticides to be applied that are pertinent to the protection of humans, animals or the environment; and
  - (c) the company name, address, telephone number, business registration number and applicator certification identification card number.

Persons providing commercial lawn applications must maintain copies of all contracts required (ECL 33-1001(3)). Section 325.40(a) of 6 NYCRR contains a similar provision.

ECL 33-1205(1) requires commercial applicators to maintain pesticide use records for each pesticide application. Such records must include the EPA registration number, product name, quantity of each pesticide used, date applied, and location of application by address (including five-digit zip code). Commercial applicators must also maintain corresponding records of the dosage rates, methods of application, and identification of target organisms. Records must be available for inspection by the Department, maintained on an annual basis and retained for a minimum of three years.

Section 325.25 of 6 NYCRR provides that all businesses required to register by 6 NYCRR 325.23 shall maintain, and make available for inspection upon request by the Department, true and accurate records of the kind and quantity of each pesticide used; the dosage rates; the methods of application; the target organisms; and the use, date and place of application of each pesticide. Records must be available for inspection by the Department, maintained on an annual basis and retained for a minimum of three years.

Section 325.2(c) of 6 NYCRR requires that all equipment containing pesticides and drawing water from any water source shall have an effective anti-siphon device to prevent backflow.



### Findings of Fact

1. Respondent Joe Turner, Jr. is the owner of JT Jr. Landscaping, Inc., a business registered with the Department from May 1, 2000 until December 31, 2002. The registration was renewed on April 7, 2004 and again expired on December 31, 2006. Exhibits 1 and 7.
2. Respondent maintains an office at 81 Columbus Boulevard, Amityville, Suffolk County, New York. Exhibit 8.
3. On January 8, 2007, respondent wrote to the Department to cancel the business registration. JT Jr. Landscaping, Inc. has not been registered as a pesticide business with the Department since that time. Exhibit 7.
4. During calendar year 2003, after the expiration of his business registration on December 31, 2002, respondent applied pesticides. Exhibits 1, 4 and 6.
5. On or about June 1, 2007, after the expiration of his business registration on December 31, 2006, respondent applied pesticides. Exhibits 1, 5 and 6.
6. During 2000, 2002, and 2003, respondent failed to make and maintain true and accurate records of commercial pesticide applications. Specifically, records provided during the 2000 calendar year during inspection failed to indicate “dosage rate,” “target pest,” “method of application,” and “place of application.” Exhibits 1, 4 and 6.
7. During the 2001 calendar year, respondent failed to enter into a written contract that provided the information required by the Department’s regulations with customers prior to conducting commercial lawn applications. Specifically, the written contracts for 2001 provided during inspection failed to indicate total number of applications, pertinent label warnings, and a list of brand/generic names of active ingredients. Exhibits 1, 4 and 6.
8. During the 2002 calendar year, respondent failed to enter into a written contract that provided the information required by the Department’s regulations with customers prior to conducting commercial lawn applications. Specifically, the written contracts for 2002 provided during inspection failed to indicate pertinent label warnings and a list of brand/generic names of active ingredients. Exhibits 1, 4, and 6.
9. During the 2003 calendar year, respondent failed to enter into a written contract that provided the information required by the Department’s regulations with customers prior to conducting commercial lawn applications. Specifically, the written contracts for 2003 provided during inspection failed to indicate pertinent label warnings and a list of brand/generic names of active ingredients. Exhibits 1, 4 and 6.

10. On or about June 1, 2007, respondent failed to enter into a written contract with customers prior to conducting commercial lawn applications. Specifically, respondent failed to enter into a written contract with three customers during the 2007 calendar year. Exhibits 1, 5 and 6.
11. On or about February 25, 2004, and on or about June 1, 2007, respondent did not use an effective anti-siphon device when filling equipment containing pesticides. Exhibits 1, 4, 5, and 6.
12. On July 20, 2012, respondent was served with the notice of prehearing conference, hearing, and complaint, as well as the verified complaint, by certified mail, return receipt requested. The return receipt, date-stamped July 25, 2012 by the Amityville Post Office, was signed as accepted on July 24, 2012, and was received by the Department on July 26, 2012. Exhibit 2.
13. Respondent did not answer the complaint and did not appear at a pre-hearing conference scheduled for October 3, 2012, as directed in the notice of pre-hearing conference, hearing and complaint.

#### Discussion

The record of this proceeding demonstrates that respondent violated ECL Article 33 and Part 325 of 6 NYCRR by applying pesticides after the expiration of respondent's business registration, failing to make and maintain records, failing to enter into compliant written contracts, and failing to use an effective anti-siphon device when filling equipment containing pesticides. Specifically, respondent violated ECL 33-0907(1), 33-1001, 33-1205(1), and 33-1301(8-a), and 6 NYCRR 325.2(c), 325.23(a), 325.25, and 325.40(a).

The record shows that respondent did not answer the complaint and did not appear at a pre-hearing conference scheduled for October 3, 2012, as directed in the notice of pre-hearing conference, hearing and complaint. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15.

Department staff's proposed order and the \$5,000 civil penalty it seeks are consistent with the Department's penalty policy as well as applicable provisions of ECL article 71.

#### Recommendation

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

1. Granting Department staff's motion for default, finding respondent in default pursuant to the provisions of 6 NYCRR 622.15;

2. Finding respondent in violation of ECL Article 33 and Part 325 of 6 NYCRR, as alleged in the complaint;
3. Directing respondent to pay a civil penalty in the amount of five thousand dollars (\$5,000); and
4. Directing such other and further relief as he may deem just and proper.

\_\_\_\_\_/s/\_\_\_\_\_  
Maria E. Villa  
Administrative Law Judge

Dated: Albany, New York  
October 15, 2012

**EXHIBIT CHART**

*Matter of Joe Turner, Jr. d/b/a JT Jr. Landscaping, Inc. – Region 1*  
*Calendar Call: October 3, 2012*  
Edirol File No. 031103140728

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
1	Pleadings, including: cover letter; notice of pre-hearing conference, hearing and complaint; verified complaint; and verification, all dated July 20, 2012	✓	✓	Department Staff	
2	Affidavit of Service by Carole Gajewski, sworn to October 3, 2012, with attached signed and date-stamped return receipt for certified mail	✓	✓	Department Staff	
3	Proposed Order	✓	✓	Department Staff	
4	February 25, 2004 Inspection Report	✓	✓	Department Staff	
5	April 15, 2009 Inspection Report	✓	✓	Department Staff	
6	May 27, 2009 Notice of Violation	✓	✓	Department Staff	
7	Affidavit of Joseph Cutrone, sworn to October 4, 2012	✓	✓	Department Staff	

Exhibit No.	Description	ID'd?	Rec'd ?	Offered By	Notes
8	NYSDEC Pesticide Certification Record	✓	✓	Department Staff	
9	October 5, 2012 affirmation of Jennifer M. Ukeritis, Esq.	✓	✓	Department Staff	