

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of 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

ORDER

DEC File No.
R7-20070709-39

-by-

**ALLAM AFIFY and
AFIFY MANAGEMENT CORPORATION,**

Respondents.

This administrative enforcement proceeding concerns the alleged failure of respondents Allam Afify and Afify Management Corporation to comply with the requirements of New York State law in the application of pesticides at an apartment building located at 188 Hawley Street, Binghamton, New York.

In accordance with 6 NYCRR 622.3(a)(3), staff of the New York State Department of Environmental Conservation (Department) commenced this proceeding against respondents by service of a notice of hearing and complaint dated May 20, 2011, by certified mail. Respondents received Department staff's papers on May 23, 2011.

In its complaint, Department staff sets forth two causes of action, alleging that respondents: (1) directed and allowed employees to make commercial pesticide applications without proper certification or supervision in violation of ECL 33-1301(8) and 6 NYCRR 325.7(a); and (2) failed to maintain true and accurate records of pesticide applications in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c).

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

By papers dated September 22, 2011, Department staff moved for a default judgment and order. A copy of staff's motion

papers were mailed to respondents. Respondents have not submitted a response to the motion.

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.

I concur with the ALJ's determination that Department staff is entitled to a finding of liability for respondents' failure to comply with State laws and regulations governing the proper application of pesticides and recordkeeping of such applications.

Department staff requested a civil penalty of two thousand dollars (\$2,000). In support of the requested civil penalty, staff noted that the civil penalty amount is within the range authorized by ECL 71-2907(1) and consistent with DEC's Civil Penalty Policy (see DEE-1, dated June 20, 1990) and the Department's enforcement guidance memorandum entitled "DEE-12, Pesticide Enforcement Policy," dated March 26, 1993. As justification for the penalty, Department staff cites respondents' unresponsiveness to Department staff's efforts to settle this matter through consent order, the economic benefit that respondents obtained by not hiring certified pesticide applicators and keeping proper records, and the danger posed to the public by respondents' actions. Based on this record, a civil penalty of \$2,000 is authorized and appropriate.

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 default judgment is granted.
- II. Respondents Allam Afify and Afify Management Corporation are adjudged to be in default and to have waived the right to be heard in this enforcement proceeding. As a result, the alleged violations are deemed to have been admitted by respondents.
- III. Respondents Allam Afify and Afify Management Corporation are adjudged to have violated ECL 33-1205(1), ECL 33-1301(8), 6 NYCRR 325.7(a), and 6 NYCRR 325.25(c), arising from the application of pesticides at an apartment building at 188 Hawley Street, Binghamton, New York.

IV. Respondents Allam Afify and Afify Management Corporation are hereby assessed a civil penalty in the amount of two thousand dollars (\$2,000). This amount is due and payable within thirty (30) days after service of this order upon respondents. Payment shall be made in the form of a cashier's check, certified check or money order made payable to the "New York State Department of Environmental Conservation" and mailed or hand-delivered to the Department at the following address:

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

V. All communications from respondents to Department staff 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 Allam Afify and Afify Management Corporation, their agents, successors, and assigns, in any and all capacities.

New York State Department of
Environmental Conservation

By: _____/s/_____
Joseph J. Martens
Commissioner

Dated: Albany, New York
November 20, 2011

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SUMMARY REPORT

DEC File No.
R7-20070709-39

-by-

**ALLAM AFIFY and
AFIFY MANAGEMENT CORPORATION,**

Respondents.

Staff of the Department of Environmental Conservation (DEC Staff) brought this administrative enforcement action against Allam Afify and Afify Management Corporation (respondents) for: (1) directing and allowing employees to make commercial pesticide applications without proper certification or supervision in violation of ECL 33-1301(8) and 6 NYCRR 325.7(a); and (2) failing to maintain true and accurate records of pesticide applications in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c). These violations occurred on or before May 30, 2007 at an apartment building located at 188 Hawley Street, Binghamton, New York. DEC Staff requests an order from the Commissioner finding the respondents liable for the alleged violations and imposing a two thousand dollar (\$2,000) payable civil penalty.

A notice of hearing and complaint were mailed to the respondents, by certified mail, return receipt requested, on May 20, 2011 and received on May 23, 2011. The respondents failed to file an answer to the complaint. By papers dated September 22, 2011, DEC Staff moved for a default judgment and order against the respondents pursuant to 6 NYCRR 622.15. DEC Staff mailed a copy of the default motion and supporting papers to the respondent. As of the date of this default summary report, the DEC Office of Hearings and Mediation Services has not received any response from or on behalf of the respondents.

DEC Staff's default motion papers consist of the following documents: (1) a motion for default judgment and order; (2) the

affirmation of DEC Staff counsel Margaret A. Sheen, Esq.; and (3) a cover letter. Attached to Ms. Sheen's affirmation are: (1) affidavits of service of the default motion on the respondents; (2) a copy of the notice of hearing and complaint; and (3) a proposed order in this matter. DEC Staff provided an affidavit of service for the notice of hearing and complaint under a separate cover letter dated October 12, 2011.

DISCUSSION

Subdivision 622.15(a) of 6 NYCRR (default procedures) provides that a respondent's failure to file a timely answer, or other specified failures to respond, constitutes a default and a waiver of a respondent's right to a hearing. Subdivision 622.15(b) of 6 NYCRR states that a motion for default judgment must contain: "(1) proof of service upon the respondent of the notice of hearing and complaint or such other document which commenced the proceeding; (2) proof of the respondent's failure to appear or failure to file a 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 met the requirements of 6 NYCRR 622.15 and the complaint sets forth two causes of action for which relief can be granted. The complaint alleges that the respondents: directed and allowed employees to make commercial pesticide applications without proper certification or supervision in violation of ECL 33-1301(8) and 6 NYCRR 325.7(a); and failed to maintain true and accurate records of pesticide applications in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c). These violations occurred on or about May 30, 2007 at an apartment building owned by Afify Management Corporation located at 188 Hawley Street, Binghamton, New York. In her affirmation, Ms. Sheen states that no answer has been received, though it was due no later than June 13, 2011. Based on this information, DEC Staff is entitled to a default in this matter.

DEC Staff requests language in the Commissioner's order imposing a civil penalty of two thousand dollars (\$2,000). In support of DEC Staff's recommended penalty amount, Ms. Sheen states that the requested civil penalty is within the range authorized by ECL 71-2907(1), which authorizes a penalty of up to \$5,000 for the first violation of any provision of ECL article 33, or any rule or regulation promulgated thereunder. She also states that the requested civil penalty amount is consistent with DEC's Civil Penalty Policy (see DEE-1, dated June 20, 1990) and the Department's pesticide guidance memorandum entitled "DEE-12, Pesticide Enforcement Policy," dated March 26, 1993. She cites as justification for the penalty respondents' unresponsiveness to DEC Staff's efforts to settle this matter through consent order, the economic benefit that respondents enjoyed by not hiring certified pesticide applicators and keeping proper records, and the danger posed to the public by respondents' actions. Ms. Sheen states that this is respondents' first violation. Based on this, it is reasonable for the Commissioner to conclude that DEC Staff's requested civil penalty is justified in this case.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. At the time of the violations, Afify Management Corporation was an active domestic corporation with a principal executive office at 106 Henry Street, Binghamton, New York. This corporation was dissolved by proclamation on April 27, 2011. At the time of the violations, Allam Afify was the chairman or chief executive officer of the corporation. Afify Management Corporation owns an apartment building located at 188 Hawley Street, Binghamton, New York. At this apartment building on or about May 30, 2007, Afify Management Corporation and Allam Afify: 1) directed and allowed employees to make commercial pesticide applications without proper certification or supervision in violation of ECL 33-1301(8) and 6 NYCRR 325.7(a); and (2) failed to maintain true and accurate records of pesticide applications in violation of ECL 33-1205(1) and 6 NYCRR 325.25(c).
2. Afify Management Corporation and Allam Afify were served with a copy of the notice of hearing and complaint on May 23, 2011 by certified mail. No answer was received, though it was due on or before June 13, 2011. Afify Management

Corporation and Allam Afify are in default and have waived their right to a hearing.

3. Environmental Conservation Law 71-2907(1) provides that a person who violates any of the provisions of Article 33, or who fails to perform any duty imposed by thereunder, shall be liable for a civil penalty of up to \$5,000 for the first violation.

RECOMMENDATION

The Commissioner should issue an order finding the respondents Afify Management Corporation and Allam Afify liable for violating: ECL 33-1301(8), 6 NYCRR 325.7(a), ECL 33-1205(1), and 6 NYCRR 325.25(c). For these violations, the Commissioner should impose a payable civil penalty of the two thousand dollars (\$2,000).

/s/

P. Nicholas Garlick
Administrative Law Judge

Dated: November 2, 2011
Albany, NY