STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 BROADWAY
ALBANY, NEW YORK 12233-1010

In the Matter

- of -

Alleged Violations of Article 33
of the New York State
Environmental Conservation Law (ECL)
and Parts 320 through 326 of Title 6 of the
Official Compilation of Codes, Rules and
Regulations of the State of New York (6 NYCRR),

- by -

GREEN THUMB LAWN CARE, INC.,

Respondent.

DEC Case No. CO7-20060824-1

DECISION AND ORDER OF THE ACTING COMMISSIONER

November 10, 2010

DECISION AND ORDER OF THE ACTING COMMISSIONER

This matter involves the administrative enforcement of alleged violations of commercial lawn application provisions of the New York Environmental Conservation Law (ECL), accompanying regulations, and a 2002 order on consent. The alleged violations are based on the improper renewal of a contract for the commercial lawn application of pesticides.

I. Background

Staff of the New York State Department of Environmental Conservation (Department) commenced this administrative enforcement proceeding against respondent Green Thumb Lawn Care, Inc., by service of an amended complaint, dated October 12, 2006.

Respondent owns and operates a registered pesticide business in Schenectady, New York. According to staff, in May 2005, respondent applied lawn pesticides at a residential property located at 211 Brattle Road, Syracuse, New York, in violation of the Environmental Conservation Law (ECL), part 325 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), and the provisions of a previous order on consent executed with the Department.

Respondent, through its attorney, filed an answer to staff's amended complaint on December 22, 2006 (see Exhibit D attached to respondent's Affirmation in Response to Motion for Summary Judgment dated April 19, 2007). Thereafter, in accordance with 6 NYCRR 622.12, Department staff served a notice of motion and motion for order without hearing, both dated April 6, 2007, by certified mail and regular first class mail upon respondent and its attorney, respectively, on April 10, 2007.

The motion for order without hearing and attorney brief in support of the motion alleged violations of the ECL, 6 NYCRR part 325, and a 2002 order on consent arising out of respondent's application of pesticides on May 9, 2005, at 211 Brattle Road, Syracuse, New York. Specifically, staff's motion alleged that respondent

> 1. made a pesticide application without a written contract, in violation of ECL 33-1001(1) and 6 NYCRR 325.40(a)(6);
>
> 2. failed to list the dates when pesticide applications would occur, in violation of 6 NYCRR 325.40(a)(1);

3. violated provisions of the "Schedule of Compliance" of order on consent R4-2001-0709-82 by failing to specify dates of pesticide application with no more than a seven day range; and

4. violated provisions of the "Schedule of Compliance" of order on consent R4-2001-0709-82 by failing to obtain the signature of the property owner or owner's agent on the written contract or on a separate document, "such as a copy of any pre-payment check or a credit car [sic] authorization or other payment receipt in the exact amount specified in the written contract."

Pursuant to 6 NYCRR 622.12(c), respondent, by its attorney Walter T. Burke, Esq., filed an affirmation in response dated April 19, 2007, along with supporting documents in opposition to staff's motion with the Department's Office of Hearings and Mediation Services on April 20, 2007.

The matter was assigned to Administrative Law Judge (ALJ) Helene G. Goldberger, who prepared the attached hearing report. ALJ Goldberger recommended that staff's motion be denied and summary judgment instead be granted to respondent. For the reasons stated below, I do not adopt the recommendations in ALJ Goldberger's hearing report as my decision in this matter.

Based upon the record in this proceeding, I conclude that no triable issue of fact is presented requiring a hearing. I also conclude that Department staff established the violations alleged in its motion to warrant granting summary judgment in its favor (see 6 NYCRR 622.14[d] and CPLR 3212[b]). Further, the proof filed by the parties establishes that respondent is not entitled to summary judgment dismissing the claims against it (see id.).

II. Preliminary Issues

1. Mismatched Causes of Action between the Amended Complaint and Motion for Order Without Hearing.

Respondent asserts that the causes of action in the amended complaint and motion for order without hearing are inconsistent. Specifically, respondent argues that he should not be subject to additional causes of action in the motion for order without hearing that were not pleaded in the amended complaint. The causes of action are illustrated in the following table.

Causes of Action Pleaded by Staff[1]

Amended Complaint	**Motion for Order Without Hearing**
1. Application of pesticides without written contract, in violation of ECL 33-1001(1)	1. Application of pesticides without written contract, in violation of ECL 33-1001(1) and 6 NYCRR 325.40(a)(6)
2. Failure to list dates when pesticide applications would occur, in violation of 6 NYCRR 325.40(a)(1)	2. Failure to list dates when pesticide applications would occur, in violation of 6 NYCRR 325.40(a)(1)
3. Failure to specify approximate dates of application with no more than 7-day range, in violation of 2002 order on consent	3. Failure to specify approximate dates of application with no more than 7-day range, in violation of 2002 order on consent
	4. Failure to obtain property owner's signature on written contract or on a separate document, "such as a copy of any pre-payment check or a credit car [sic] authorization or other payment receipt in the exact amount specified in the written contract," in violation of 2002 order on consent[2]

A motion for order without hearing can be served either in lieu of or in addition to a notice of hearing and complaint. 6 NYCRR 622.12(a). Here, the motion was filed in addition to, and not in lieu of a notice of hearing and complaint. However, while I recognize respondent's concern about the differences in the claims presented, I do not believe that those differences matter in this instance.

[1] The amended complaint denotes the alleged violations as "causes of action," while the motion for order without hearing denotes the alleged violations as "charges" with "specifications."

[2] This alleged violation is pleaded in the motion for order without hearing as a "specification" of the third charge, which is broadly denoted as "Violation of Consent Order R4-2001-0708-82." The number of the order on consent appears to contain a typo because it is referred to elsewhere in staff's motion as R4-2001-0709-82.

The first three causes of action are identical in the amended complaint and the motion for order without hearing, with the exception of the addition in the motion for order without hearing of a regulatory cite to support the first cause of action. This difference is without consequence.

The second difference that respondent points out is the addition of a fourth cause of action in the motion for order without hearing, which does not appear in the amended complaint. This claim states that that respondent violated the 2002 order on consent by not obtaining the property owner's signature on a written contract or on a separate document, "such as a copy of any pre-payment check or a credit car [sic] authorization or other payment receipt in the exact amount specified in the written contract."

This difference, too, is without consequence. I read this claim as an additional basis for the first cause of action addressing respondent's failure to have a valid contract with the property owner for the commercial lawn application of pesticides. I do not read it as adding a new claim or cause of action.

2. Staff's Reliance on a Later Adopted Program Policy.

Respondent also argues that he should not be found to have violated any provisions of the regulations based on the application of a Department program policy interpreting those regulations. Specifically, respondent argues that the policy should not apply here because it (1) was adopted and became effective after the date of the pesticide application at issue and (2) functions like a regulation and should have been adopted as a regulation.

I agree with respondent as to the timing of the policy. The policy that respondent refers to is entitled "Policy DSHM-PES-05-11 Compliance with Certain Provisions of Commercial Lawn Application Regulations." See Staff's Motion for Order Without Hearing, Exh D. This policy was adopted on May 11, 2005 – two days after the May 9, 2005, commercial lawn application on which staff bases its motion – and it was not effective until 30 days later, June 10, 2005. Staff should not have relied on this later adopted policy, and it plays no part in this decision and order.[3] Rather, my determinations are based solely on the ECL, the

[3] Since the policy does not apply to these facts, I decline to reach respondent's alternative argument that it should have been adopted as a regulation.

regulations, and the 2002 order on consent.

3. Papers Submitted in Support of Motion for Order Without Hearing.

The ALJ took issue with the papers that staff submitted in support of its motion for order without hearing. A motion for order without hearing is served with "supporting affidavits reciting all the material facts and other available documentary evidence." 6 NYCRR 622.12(a). Motions for order without hearing are governed by the same principles that govern summary judgment motions brought pursuant to CPLR 3212 (see 6 NYCRR 622.12[d]; see also Matter of Richard Locaparra, d/b/a L&L Scrap Metals, Commissioner's Final Decision and Order, June 16, 2003, at 3). When affidavits are submitted in support of a motion, they should be made only by those with knowledge of the facts. An attorney's affidavit has no probative force, unless the attorney happens to have first-hand knowledge of the facts, which is the exception rather than the rule (see Zuckerman v City of New York, 49 NY2d 557 [1980]; Deronde Products, Inc. v Steve General Contractor, Inc., 302 AD2d 989 [4th Dept 2003]).

Staff's motion papers consisted of the notice of motion; motion; a brief signed by staff counsel, Alyce M. Gilbert, Esq.; and the affidavit of Charles H. Phelps, a member of the Department's staff, which was submitted for the limited purpose of establishing that respondent was listed in the Department's database as a registered pesticide business. Annexed to the brief were six exhibits, the Phelps affidavit being one of them.

While these papers do not include a "supporting affidavit reciting all of the material facts and other available documentary evidence," the facts are not in dispute. Rather, the legal interpretation given to these facts is at issue. Indeed, copies of three key documents (the 2002 order on consent, the 2004 contract, and the property owner's check for partial payment of services for the 2005 season) were submitted by both parties. A fourth key document (the 2005 renewal information respondent provided to the owner) was submitted by respondent as an exhibit to its attorney's affirmation.[4]

[4] While the attorney's affirmation has no probative force, the document annexed to that affirmation – the 2005 renewal information – speaks for itself and I am considering it in this matter.

III. The Alleged Violations

1. No Valid Written Contract for the 2005 Season.

I disagree with the ALJ's conclusion that respondent had a valid written contract with the owner for the 2005 commercial lawn application season. While respondent did enter into a written contract with the owner of the Syracuse premises for the 2004 season, that contract was not renewed in accordance with the ECL, the applicable regulations, or the 2002 order on consent.

The ECL requires that a pesticide applicator and a property owner must enter into a written contract prior to the application of commercial lawn pesticides. ECL 33-1001(1). The written contract is to specify "the approximate date or dates of application, number of applications, and total cost for the service to be provided." Id. The applicator is to provide the property owner with a copy of the contract in at least 12 point type. Id. The statute does not differentiate between "initial" contracts and "renewal" contracts – the requirements are the same.

Additionally, the regulations provide that a contract is valid if it is signed by the property owner and the pesticide applicator. 6 NYCRR 325.40(a)(6). As an alternative to the owner's signature on the contract itself, the applicator can have "a separate document that specifically evidences the owner's . . . signature as acceptance of the written contract, such as a copy of a prepayment check, in the exact amount specified in the written contract for the agreed-upon services." Id. The requirement of a "prepayment check, in the exact amount specified in the written contract" implements the "total cost" requirement in ECL 33-1001(1). Thus, pursuant to section 325.40(a)(6), a copy of a check from the property owner that is written for the full amount of the services specified in the written contract would suffice as the owner's signature to effectuate a written contract.

The 2002 order on consent is consistent with the statutory and regulatory mandates. The order on consent reiterates the statutory mandate that written contracts are required, along with the owner's signature. The order on consent further provides the above-quoted regulatory language concerning the alternative to having the owner's signature on the contract itself:

> "The signature of the owner or owner's agent is not required if the pesticide applicator or business possesses a separate document

> that specifically evidences the owner or owner's agent signature as acceptance of the written contract such as a copy of any pre-payment check or a credit card authorization or other payment receipt in the exact amount specified in the written contract for the agreed-upon services."

2002 Order on Consent, Attachment A, at 10. Thus, the order on consent confirms the regulatory requirement that a written contract does not have to be signed by the property owner. Rather, the owner's signature may appear on a separate document, which could be a copy of a pre-payment check for the full amount of the services specified in the contract.

Here, the property owner and respondent entered into a contract on January 20, 2004, for the commercial lawn application of pesticides for that year. Department Staff's Motion for Order Without Hearing, Exh E. The contract was signed by both the property owner and respondent, and the total contract amount was $257.43 plus tax. Id. The next year, respondent sent information to the property owner, dated January 2005, about a renewal of services for the coming season. Respondent's Affirmation in Response to Motion for Order Without Hearing, Exh F. The renewal information stated that enclosed was a "coupon book" and product labels, and that to continue service, the property owner should mail the first coupon payment by February 1st. Id. The property owner sent a check dated May 6, 2005, in the amount of $147.32, as partial payment of the services for the 2005 season. Id. Because the renewal was not effectuated with either a signed written contract or prepayment in full, it does not constitute a valid written contract for the purposes of ECL 33-1001(1) or 6 NYCRR 325.40(a)(6).

At the outset, I must emphasize that a renewal of a contract for the commercial lawn application of pesticides is a contract itself, governed by the same regulatory provisions for any other contract for commercial lawn applications. Thus, I disagree with the ALJ's analysis that section 325.40(a)(6) does not apply to contract renewals, and that only section 325.40(a)(7) applies to contract renewals. Both provisions apply to renewals. The former provision, section 325.40(a)(6), establishes the basic requirements for written contracts – whether initial or renewal. The latter provision, section 325.40(a)(7), establishes that if a contract is amended during its term (whether it be denoted a contract, a contract renewal, or a multi-year contract), the amendment must also be in writing and further, that the applicator "must obtain written proof of acceptance of the owner

or owner's agent of such contract amendments prior to applying pesticides." Section 325.40(7) does not relax the basic requirements for contracts set forth in section 325.40(6).

The 2002 order on consent similarly provides that "[r]enewals of [] contracts [for commercial lawn applications] may be in the form of a cancelled check or other method of approval by the customer." This language does not dispense with the requirement that the copy of the check must indicate payment in full, as set forth in the very next paragraph in the order on consent:

> "The signature of the owner or owner's agent is not required if the pesticide applicator or business possesses a separate document that specifically evidences the owner or owner's agent signature as acceptance of the written contract such as a copy of any pre-payment check or a credit card authorization or other payment receipt in the exact amount specified in the written contract for the agreed-upon services."

2002 Order on Consent, Attachment A, at 10. To interpret the 2002 order on consent in the manner advocated by respondent would contravene the regulatory language.

The legislative history of ECL article 33, title 10 establishes the important public policy of requiring written contracts that list, among other things, the total cost for the services to be provided and the approximate dates of commercial lawn applications. The statute was enacted in 1987 in response to abuses occurring in a rapidly growing industry that had little oversight. The legislative purpose was stated as follows:

> "The legislature finds that over the last five years there has been extensive growth in the commercial lawn care industry, and that this growth has attracted a small number of unscrupulous and inadequately trained individuals. Further, the legislature finds that some of the chemicals employed in providing such services are hazardous if improperly applied and that without proper notification and warning, exposure to such chemicals may constitute unnecessary risk to the public health. Therefore, it is the purpose of this legislation to protect the

> public by requiring that commercial lawn care operators enter into written contracts with their customers and disclose the name of pesticides to be applied and warn of any hazards associated with its use."

L 1987, ch 559, § 1.

The Assembly sponsor of the bill that became title 10 stated that "[s]ince 1979, there has been a 260 percent increase in the use of lawn care services in the United States and Canada" and that "little is known about these pesticide products, and many unscrupulous businessmen have taken advantage of New Yorkers' search for the perfect lawn with fly-by-night lawn care operations." Letter from Assemblyman Francis J. Pordum, to Hon. Evan A. Davis, Executive Chamber, dated July 27, 1987, Bill Jacket, L 1987, ch 559, at 6 (urging that the Governor approve the bill). The bill had two major components, one of which was the requirement that applicators enter into written contracts with consumers, which included specific information about the identity of the applicator, the pesticides to be applied, the cost of the service, and dates of application. Id. at 8.

In commenting on the bill and urging its approval, the then-Attorney General stated that his office "received numerous complaints" about commercial lawn applications. Letter from Attorney General Robert Abrams, dated July 29, 1987, Bill Jacket, L 1987, ch 559, at 22. He further stated that the complaints included "the legality of contracts and other questionable business practices," such as the failure to provide dates of application. Id. The Attorney General expounded further:

> "Investigation by the Attorney General's office of the business practices of lawn care applicators has revealed that it is an industry practice to enter into oral contracts with customers for the application of pesticides. Many complaints have been received by this office that these oral contracts are automatically renewed from one year to the next without the customer's expressed consent. Other complaints received by the Attorney General's office indicate that some lawn care companies interpret a general inquiry from a homeowner as a request for service. Such cases result in unintended applications of pesticides and wrongful billing of unwitting customers."

Id. at 22-23.

Thus, ECL article 33, title 10, was enacted to correct abuses within the commercial lawn application industry. Key concerns centered around the lack of written contracts, the lack of information about the total cost of services, the lack of information about the dates of application, and the "automatic" renewals of contracts. The legislature corrected these deficiencies so that customers could be better informed and therefore protect themselves, their families, and their pets.

On this record, staff has met its burden that respondent did not enter into a valid contract for the renewal of a commercial lawn application of pesticides, in violation of ECL 33-1001(1), 6 NYCRR 325.40(a)(6), and the 2002 order on consent. The property owner neither signed the contract for the 2005 season nor paid for the services in full, as evidenced by a copy of a check or some other document.

2. Dates of Pesticide Application Not Specified Correctly for 2005 Season.

Staff alleged that that respondent did not include (1) the year of the dates of application, as required by Department policy, and (2) the dates of application with a seven day span, as required by 6 NYCRR 325.40(a)(1) and the 2002 order on consent.

I agree with the ALJ that not stating the year of application is a nonissue. First, as stated above, Department staff cannot rely on a policy that was neither adopted nor effective as of the date of the alleged violation. Second, in any event, the "renewal information" was in fact dated January 2005, leaving no mistake that the renewal was for the 2005 season. Respondent's Affirmation in Response to Motion for Order Without Hearing, Exh F.

However, I disagree with the ALJ as to the dates of application. I determine instead that respondent did not list the dates of application on the renewal information as required by section 325.40(a)(1) and the 2002 order on consent. The second page of the renewal information lists the dates for "planned lawn services for this season" as follows:

Early Spring	-	April 1 – May 30
Late Spring	-	May 15 – July 10
Summer	-	July 1 – August 31

Early Fall	-	August 15 – November 1
Late Fall	-	October 1 – December 15

These dates, which are not even presented as "application dates," are even more wide-ranging than the application dates listed in the initial (2004) contract. See Respondent's Affirmation in Response to Motion for Order Without Hearing, Exh A. This hardly provides a property owner with sufficient information to take precautions prior to the application of commercial lawn pesticides. Thus, these dates do not satisfy the regulatory requirement of "specify[ing] the approximate date or dates of application or applications," as required by section 325.40(a)(1).

Moreover, the 2002 order on consent required the applicator to specify the approximate date or dates of application with no more than a seven day range. The renewal information includes no application dates whatsoever, much less application dates with a seven day range.[5] Even if the dates in the renewal information could be deemed application dates, they are much greater than seven day ranges.

Therefore, staff has proven that respondent violated 6 NYCRR 325.40(a)(1) and the 2002 order on consent by not including dates of application for the 2005 season with a seven day range.

IV. Penalty

Staff is seeking a civil penalty in the amount of $19,000. This amount is well within the penalties authorized under the ECL and the 2002 order on consent. I have determined that respondent has violated the ECL, the regulations, and the 2002 order on consent in three ways: (1) failure to have a contract for the 2005 season in violation of ECL 33-1001(1), 6 NYCRR 325.40(a)(6), and the 2002 order on consent; (2) failure to specify dates of application in violation of 6 NYCRR 325.40(a)(1); and (3) failure

[5] Arguably, the 2004 contract does not satisfy the seven day range requirement, either. Immediately underneath the wide-ranging application dates in the 2004 contract is this language: "(Application Dates ± 14 days due to weather or operating conditions)." The only time a seven day range is mentioned in the 2004 contract relates to a waiver, i.e., if the owner does not waive notification of application dates, five specific weeks for the applications are set forth. Yet, the contract states that by signing the contract, the property owner waives notification of the dates, rendering meaningless the dates with the seven day range. In any event, staff is not alleging a violation based on the 2004 contract.

to specify dates of application with a seven day range in violation of the 2002 order on consent.

Pursuant to ECL 71-2907(1), a violation of article 33, a regulation, or an order is subject to a $5,000 penalty for a first violation and a $10,000 penalty for a subsequent violation. The violations here are considered subsequent violations because of the prior order on consent, and thus are subject to a civil penalty of no more than $10,000 each, for a total of $30,000. Moreover, the $5,000 suspended portion of the 2002 order on consent is due for the violation of the order, bringing the overall total of a potential penalty to $35,000. Staff's request of $19,000 is well within this amount.

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

I. Department staff's motion for order without hearing against respondent Green Thumb Lawn Care, Inc., is granted.

II. The motion for summary judgment of respondent Green Thumb Lawn Care, Inc., is denied.

III. Respondent Green Thumb Lawn Care, Inc., is adjudged to have failed to have a written contract for the application of commercial lawn pesticides at 211 Brattle Road, Syracuse, New York, on May 9, 2005, in violation of ECL 33-1001(1), 6 NYCRR 325.40(a)(6), and an order on consent (DEC File No. R4-2001-0709-82) dated April 2, 2002.

IV. Respondent Green Thumb Lawn Care, Inc., is adjudged to have failed to specify dates of application of commercial lawn pesticides at 211 Brattle Road, Syracuse, New York, in violation of 6 NYCRR 325.40(a)(1).

V. Respondent Green Thumb Lawn Care, Inc., is adjudged to have failed to specify dates of application of commercial lawn pesticides with no more than a seven day range at 211 Brattle Road, Syracuse, New York, in violation of an order on consent (DEC File No. R4-2001-0709-82), dated April 2, 2002.

VI. Respondent Green Thumb Lawn Care, Inc., is assessed a civil penalty in the amount of nineteen thousand dollars ($19,000), payable within 30 days of the date of service of this decision and order. Five thousand dollars ($5,000) of this total civil penalty is the payment of the suspended penalty in the 2002 order on consent (DEC File No. R4-2001-0709-82), dated April 2, 2002. Payment of the $19,000 total civil penalty shall be made in the

form of a cashier's check, certified check, or money order made payable to the order of the "New York State Department of Environmental Conservation" and shall be delivered by certified mail, overnight delivery, or hand delivery to the Department of Environmental Conservation at the address in paragraph VII below.

VII. All communications from respondent to the Department concerning this decision and order shall be made to:

Michael P. Naughton, Esq.[6]
Office of General Counsel
New York State Department of
Environmental Conservation
625 Broadway, 14th Floor
Albany, New York 12233-1500

VIII. The provisions, terms, and conditions of this decision and order shall bind respondent Green Thumb Lawn Care, Inc., and its successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

By: _____/s/_____
Peter M. Iwanowicz
Acting Commissioner

Dated: November 10, 2010
Albany, New York

[6] Attorney Alyce M. Gilbert, who handled this matter on behalf of Department staff, is no longer with the Department.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Alleged Violations of Article 33 of the Environmental Conservation Law and Parts 320 through 326 of the Official Compilation of Codes, Rules and Regulations of the State of New York	**Hearing Report**
	DEC Case No. CO7-20060824-1

- by-

GREEN THUMB LAWN CARE, INC.,

Respondent.

Summary of Ruling

The Department of Environmental Conservation's (DEC or Department) staff's motion for summary order is denied and summary judgment is granted to the respondent.

Proceedings

Department staff is represented by Alyce M. Gilbert, Esq. of the Department's Division of Environmental Enforcement, Albany, New York. The respondent is represented by Walter T. Burke, Esq. of Burke & Casserly, P.C., Albany, New York.

The Department staff commenced this enforcement proceeding against the respondent, Green Thumb Lawn Care, Inc., by service of an amended complaint on or about October 12, 2006.[1] By certified mail and by regular first class mail, on April 10, 2007, the DEC staff served the respondent and its counsel, respectively, with its motion for order without hearing. In its amended complaint, staff alleges violations of the pesticide laws and regulations regarding an application made on or about May 9, 2005. Specifically, staff alleges that: (1) the respondent made a pesticide application without a written contract in violation of Environmental Conservation Law § 33-1001(1); (2) the respondent failed to list the dates when pesticide applications would occur in violation of § 325.40(a)(1) of Title 6 of the New York Compilation of Codes, Rules and Regulations (6 NYCRR); and

[1] The Department staff 's motion papers do not provide any background regarding the initiation of this matter. In the respondent's responsive papers, the attorney's affirmation identifies the service of the amended complaint and this pleading is annexed as Exhibit C to that document. Neither party provides information regarding a prior complaint if one existed.

(3) the respondent failed to specify the approximate date or dates of application in violation of a consent order it entered into in 2002.

In the staff's motion for order without hearing, the staff alleges that the respondent: (1) made a pesticide application on or about May 9, 2005 without a written contract in violation of ECL § 33-1001(1) and 6 NYCRR § 325.40(a)(6); (2) failed to list the dates when pesticide applications would occur in violation of 6 NYCRR § 325.40(a)(1); (3) failed to specify the dates of application with no more than a seven day range in violation of the 2002 consent order; and (4) failed to obtain the property owner or owner's agent's signature on the written contract or on a separate document.

On April 17, 2007, the Department's Office of Hearings and Mediation Services (OHMS) received the staff's motion for order without hearing and on April 20, 2007, the OHMS received the respondent's affirmation in response.

In support of staff's motion, Alyce M. Gilbert, Esq. submitted:

1) notice of motion dated April 6, 2007
2) motion for order without hearing dated April 6, 2007
3) Attorney's brief in support of motion for order without hearing
4) Exhibit A - Department of State Entity Information
5) Exhibit B - Affidavit of DEC Pesticide Control Specialist 2 Charles H. Phelps dated April 2, 2007
6) Exhibit C- Order on Consent dated April 2, 2002
7) Exhibit D - Policy DSHM-PES-05-11 - Compliance with Certain Provisions of Commercial Lawn Application Regulations dated May 11, 2005
8) Green Thumb Lawn Care contract dated 1/20/04 for 2/04 – 1/05 for Hodge – 211 Brattle Road, Syracuse, NY and
9) copy of portions of receipt of payment from Mr. & Mrs. Sean Hodge and partial payment.

In support of the respondent's opposition, Walter T. Burke, Esq. of Burke & Casserly, P.C., submitted:

1) Attorney's affirmation in Response to Motion for Summary Judgment dated April 19, 2007
2) Exhibit A - Green Thumb Lawn Care contract dated 1/20/04 for Hodge (same as no. 8 above)
3) Exhibit B - Notice of Violation dated June 8, 2005
4) Exhibit C - Amended Complaint dated Oct. 12, 2006

5) Exhibit D - Answer dated December 22, 2006
6) Exhibit E - Order on Consent (same as no. 6 above), and
7) Exhibit F - Green Thumb Lawn Care renewal information dated January 2005.

FACTS

The facts underlying staff's allegations are not in dispute. The respondent is a registered pesticide business that performs lawn care. See, Exs. A and B annexed to Staff Attorney's brief (Br.) and Exs. A, B, and C annexed to Burke Affirmation (Aff.). In 2001, DEC staff inspected the respondent's business and found several violations of Article 33 of the ECL including failure to enter into written contracts with owners of the properties which were to receive pesticide application in violation of ECL § 33-1001(1). See, order on consent, ¶¶ 5-7, annexed as Ex. C to Staff Atty's Br. The respondents failed to set forth approximate dates of application in the contract in violation of ECL § 33-1001(1). Id., ¶ 6. To resolve these allegations, the respondents which included the firm 's president, John Knutson, entered into a consent order that became effective on April 2, 2002. Id.

The schedule of compliance annexed to this consent order provides, *inter alia*, that the respondents "agrees to specific [sic] approximate dates of application with no more than a seven day range." Id., p. 9, ¶ 2. In addition, the respondents agreed to add to their contracts that contained a notification waiver this language, "[i]f specific treatment dates are not waived, your application dates are the week of May 30, the week of July 10, the week of August 31, the week of November 1 and the week of December 15." Id., p. 9, ¶ 2. The consent order also provides "[o]ther week long time frames may be substituted for these dates in the contract or with mutual agreement of the customer." Id., p. 9, ¶ 2.

To address the written contract requirements, the consent order requires that the respondent "enter into signed contracts for service from all customers prior to providing such service. Id., p. 10, ¶ 3. Renewals of such contracts may be in the form of a cancelled check or other method of approval by the customer." Id., p. 10, ¶ 3. In addition, the order paraphrases the language of 6 NYCRR § 325.40(6): "the signature of the owner or owner's agent is not required if the pesticide applicator or business possesses a separate document that specifically evidences the owner or owner's agent signature as acceptance of the written contract for the agreed-upon services. However,

notification waiver is not considered signed unless the contract is actually signed. In such an event, the respondent will do the service only on the contract specified dates or other week by dates mutually agreed to with the customer." Id., p. 10, ¶ 3.

On behalf of the respondent, John Knutson entered into a contract dated January 20, 2004 with property owners Mr. and Mrs. Hodge concerning lawn care services for their property located at 211 Brattle Road, Syracuse, New York for the period of February 2004 through January 2005. See, Burke Aff., Ex. A. The total cost for these services is indicated on the contract to be $257.43 plus tax. Id. On the top of this contract there is a general schedule of application dates for planned lawn services: "Early Spring - April 7 - May 21, Late Spring - June 1 - July 14, Summer - July 21 - September 7; Early Fall - September 7 - October 21; Late Fall - October 14 - December 1." Id. Towards the bottom of the contract there is an "Application Date Waiver" which states that "[b]y signing this agreement, the purchaser waives their [sic] right to be pre-advised to the 48-hour initial notification and to specific treatment dates. Green Thumb pledges treatment applications will be done in a timely manner. Per DEC, "the property owner or the owner's agent may request the specific date or dates of the application(s) to be provided and if so requested, the pesticide applicator or business must inform of the specific dates and include that date or dates in the contract. If specific treatment dates are not waived or contract is unsigned, your application dates will be in the week of May 21, the week of July 14, the week of August 31, the week of October 21 and the week of December 1." Id. This contract has a signature that appears to be made by one of the Hodges as it looks to be the same signature that appears on their check for partial payment annexed as Ex. F to the Burke Affirmation. Id.

By a notice dated January 2005, the respondent invited customers to renew their contracts with the respondent by mailing their first payment by February 1, 2005. See, Burke Aff., Ex. F. The second page of this notice included a schedule of planned lawn services. Id. The periods included in this schedule spanned approximately 60 days such as "Early Spring - April 1 - May 30." Id. By check dated May 6, 2005, the Hodges paid the respondent $147.32 - a portion of the total contract price. Id., 2d pg.

Having determined that the respondent violated the aforementioned provisions of Article 33 of the ECL and Part 325 of 6 NYCRR, on or about October 12, 2006, DEC staff served an amended complaint upon respondent. See, Burke Aff., Ex. C. The

respondent served its answer on or about December 22, 2006. See, Burke Aff., Ex. D.

Position of Staff

Failure to Have a Signed Contract

It is the staff's position that the respondent did not have a valid contract with the Hodges for the 2005 season because the property owner did not sign the contract and paid for the services with a partial payment. Therefore, according to staff, there was no acceptance of a written contract pursuant to ECL § 33-1001(1) and 6 NYCRR § 325.40(a)(6). Based upon the same arguments, staff maintains that the respondent also violated consent order R4-2001-0709-82 with respect to the written contract requirement.

In addition to the language of the pertinent statute, regulations, and the consent order, staff relies on Policy DSHM-PES-05-11, "Compliance with Certain Provisions of Commercial Lawn Application Regulations" issued May 11, 2005 (effective June 11, 2005) as further support for its position that a partial payment does "not serve as evidence of contract acceptance on the part of the property owner . . ." See, Staff Br., Ex. D, p. 18.

Specification of Dates for Service

Citing to 6 NYCRR § 325.40(a)(1) and DEC Policy DSHM-PES-01-11 at p. 19, staff also argues that the written contract must specify the approximate dates of commercial lawn application and that the word "date" is interpreted by Department policy as including the year. Because respondent's contract did not set forth the year in which the application would occur, staff argues that the dates set forth in the respondent's contract with the Hodges are "invalid."

Staff argues that the 2002 consent order required that respondent's contracts include applications with no more than a seven day time span and that these contracts be signed by the property owner or "be evidenced by payment in full by check or credit cards." Staff states that because respondent used dates with a forty-five day span and "attempted to renew the 2004 contract by acceptance of partial payment. . .," it violated the consent order.

Penalty

With respect to penalties, staff has requested a payable penalty of $19,000. Based upon prior violations of Article 33, the staff states that the respondent is liable for up to $10,000 per violation. ECL § 71-2907(1).[2] Staff explains that because the respondent is charged with four violations of the ECL and the regulations, the maximum penalty would be $40,000.

In its brief, the staff states that the respondent has "prospered financially as the result of the contract renewals." Therefore, staff argues that a penalty of $3,000 would be appropriate to address the economic benefit component of the civil penalty policy. Staff requests $2,000 for the gravity component of the policy and $3,000 to address the Department's costs in bringing this proceeding. Staff explains that the respondent is not entitled to downward adjustments in the penalty because its conduct was intentional, there was no cooperation with the Department, the respondent had two prior violations that were settled in the two prior consent orders and respondent had not argued that it was not able to pay a penalty in negotiations.

Citing to the Pesticide Enforcement Guidance Memorandum dated March 1993, staff calculates an additional $4,000 penalty based upon a doubling of $1,000 for the lack of contract and $1,000 for the lack of specific application dates. Staff cites to the two prior consent orders as grounds to double these amounts.

Staff argues that the violation of the 2002 consent order warrants an imposition of the $5,000 suspended penalty plus a punitive penalty of $2,000 "to persuade the violator to take precautions against falling into non-compliance again since the [r]espondent has a history of non-compliance."

Staff states that its proposed penalty is substantially under the $40,000 statutory maximum.

[2] Staff cites to two prior consent orders - R4-2003-0613-60 and R4-2001-0709-82. However, only the latter order was produced with the staff's papers and no specific information was provided on the former. In any case, because the prior consent order addressed prior violations, a penalty of $10,000 per violation would be applicable assuming liability is found.

Respondent's Position

Allegations Beyond Amended Complaint

Initially, respondent identifies that while the amended complaint sets forth three causes of action [1) pesticide application without a written contract in violation of ECL § 33-1001(1); 2) failure to list dates when pesticide application would occur in violation of 6 NYCRR § 325.40(a)(1); 3) violation of the 2002 consent order by failing to specify the approximate date(s) of application], the motion for order without hearing adds a violation of 6 NYCRR § 325.40(a)(6) [application of pesticides without a written contract] and a second violation of the 2002 consent order [failure to obtain the property owner's signature.] Respondent argues that if staff sought to hold it responsible for these non-pled violations, staff should have sought leave to further amend its complaint. Because staff points to the four alleged violations as grounds for a potential penalty of $40,000, respondent objects to the addition of these causes of action outside the complaint.

Written Contract Requirement

Respondent argues that it did not violate ECL § 33-1001(1) or 6 NYCRR § 325.40(a)(6) because it had a valid written contract that it entered into with the homeowners on January 20, 2004 that it renewed properly for the 2005 season. According to the respondent, Green Thumb Lawn Care, Inc. was permitted to renew the 2004 contract pursuant to 6 NYCRR § 325.40(a)(7) and the 2002 consent order. Respondent explains that the 2004 contract at issue was renewed for the 2005 season by sending the homeowner a renewal letter and payment coupons and receiving "payment from the [h]omeowner." As the homeowner sent a check for $147.32, respondent argues that this evinces renewal of the "2004 original, signed contract for the 2005 season."

Respondent maintains that DEC staff's position with respect to the consent order is in error because it "contravenes the intent and understanding of the parties who entered into the Order . . .," and ". . .misconstrues and mischaracterizes the language contained in the Order . . ." Respondent posits that the parties to the consent order understood the respondent's pattern of using contract renewals and partial payments and that this system was acceptable to DEC staff. In addition, respondent claims that because the relevant homeowner was treated as a "Call Ahead" customer, respondent made contact with the Hodges prior to any applications at that property.

Respondent also claims that the DEC's position misinterprets the consent order as the order states: ". . . to satisfy the requirement of ECL Section 33-1000 [sic] to enter into a written contract with the customer, [r]espondent shall enter into signed contracts for service from all customers prior to providing such service. Renewals of such contracts may be in the form of a cancelled check **or other method of approval by the customer.**" [emphasis added by respondent.] Respondent interprets this language as meaning that renewals were permitted by a partial payment check. Respondent maintains that DEC staff, in combining the two paragraphs in the consent order relating to written contracts into one, has confused requirements for original contracts with those pertaining to renewals. Accordingly, respondent concludes that full payment for services is required to demonstrate approval where there is no signed contract. Thus, because the 2004 contract was signed by the homeowner, renewals were permitted and the consent order allows for them in "the form of a cancelled check or other method of approval by the customer," respondent concludes it had a valid renewal of the contract and there was no violation.

Concerning this same allegation, respondent argues that DEC staff's reliance on 6 NYCRR § 325.40(a)(6) is also unfounded because the requirement for a signed contract or full payments in this provision pertains to original contracts rather than renewals. The respondent disagrees with Department's staff's view that the provision in this subsection regarding "written proof" applies to the entire section of the regulation.

Specification of Dates of Service

With respect to the Department's staff allegations that the respondent violated the regulations and the consent order by not including specific approximate dates, respondent contends that the 2004 contract properly listed the approximate dates that service was to be provided. Respondent further explains that the 2005 renewal letter sets forth approximate dates of service, including the year.

In response to DEC staff's reliance on the Policy DSHM-PES-05-11 with respect to these allegations, the respondent argues that the policy came into effect after the date of the alleged violation and should not be given the same weight as the relevant law and regulation. The respondent admits that the policy provides that the year must be included on all written contracts. The respondent notes that the policy is effective on May 11, 2005 - two days after the date that the DEC staff alleges

the violation took place.[3] The respondent objects to the Department staff's interpretation of "approximate dates" to include the year and maintains that if this was clear from the regulation, a policy would not be needed to explain it. According to the respondent, it should not be "accountable for his inability to be a proverbial mind reader and anticipate how the DEC would interpret that phrase."

The respondent also points to language in the consent order that was required to be contained in contracts (and according to respondent's counsel was written by DEC) and was included in the 2004 contract - specifically, the waiver language which sets forth dates of application (without noting years). Therefore, according to respondent, it was simply following the terms of the order on consent.

Concerning DEC staff's use of the policy to bolster its case, the respondent argues that it was promulgated in violation of the State Administrative Procedures Act (SAPA) that places "strict requirements for how regulations are passed, . . ."

With respect to the Department staff's allegations that the respondent violated the consent order for failing to list a seven day span on which applications would occur and for failing to get the homeowner's signature on the contract, the respondent maintains that the latter assertion did not appear in the amended complaint and was stated for the first time in the DEC's staff's motion. But in any case, the respondent reiterates that its renewal was in compliance with the order on consent because the respondent entered into a "valid original, signed contract for 2004 and a valid contract for 2005."

As for the seven day span allegation, the respondent states that the original contract set out the dates of service including a list of one week dates for the application. The respondent explains further that the 2005 renewal letter provided to the homeowners by the respondent included the dates of application and ". . . in effect, renewed the one week (7 day) dates listed in the 2004 contract." The respondent refers back to the order on consent that permitted the notification waiver. The 2004 original contract contained the seven day span of dates and the notification waiver. The respondent argues that these are not mutually exclusive. The respondent maintains that the DEC staff's position that since the 2004 contract was signed, the seven day window was invalid would force the respondent to either

[3] The policy is dated May 11, 2005 but it indicates that it will take effect 30 days from the date of issuance and therefore, it was not effective until June 11, 2005.

forego the use of notification waivers - a use sanctioned by the order on consent - or to violate the statute with an unsigned contract.

In conclusion, the respondent states that the Department staff has not met it burden on its motion for summary judgment and it should be denied.

DISCUSSION

Section 622.12 of 6 NYCRR provides for an order without hearing when upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the CPLR in favor of any party. And, "summary judgment is appropriate when no genuine, triable issue of material fact exists between the parties and the movant is entitled to judgment as a matter of law." In the Matter of Frank Perotta, 1996 WL 172282 (Commissioner's Decision and Ruling 1/10/96). The regulation also provides that "[t]he motion must be denied with respect to particular causes of action if any party shows the existence of substantive disputes of fact sufficient to require a hearing . . ."

Section 3212(b) of the CPLR provides that a motion for summary judgment shall be granted, ". . . if, upon all the papers and proof submitted, the cause of action or defense shall be established sufficiently to warrant the court as a matter of law in directing judgment in favor of any party. Except as provided in subdivision (c) of this rule the motion shall be denied if any party shall show facts sufficient to require a trial of any issue or fact."

Staff's Claims May Be Raised for First Time in Motion for Order Without Hearing

According to the Civil Practice Law and Rules (CPLR), a motion for summary judgment may only be made after joinder of issue - after both the complaint and the answer have been served. CPLR 3212(a). In this matter, staff made the motion after the pleadings were served but in its motion, it added two claims that did not appear in the amended complaint. These are the allegations that the respondent violated 6 NYCRR § 325.40(a)(6) - making a pesticide application without a written contract and that it violated the order on consent with respect to a second claim - failure to obtain the property owner's signature on the contract. The facts underlying these claims fall under the causes of action the staff made in its amended complaint.

Staff did allege in its amended complaint that the respondent violated ECL § 33-1001(1) by having performed a pesticide application without a written contract but did not reference 6 NYCRR § 325.40(a)(6). This section of the regulations provides that the contract for pesticide services must be signed by the applicator or business providing the services as well as the property owner or agent but that this signature is not required if another document demonstrates acceptance such as a prepayment check; "in the exact amount specified in the written contract for the agreed-upon services. . ."

Section 622.12(a) of 6 NYCRR provides that the Department staff may commence an enforcement proceeding by serving, in the same manner as a notice of hearing and complaint, a motion for order without hearing. The respondent is given the opportunity to submit its response which in this case serves in essence as an amended answer. Procedurally, the difficulty here is that the staff has already amended its complaint once and the regulations require that after a first amendment, a party may amend by permission of the ALJ or the Commissioner. 6 NYCRR § 622.5. In this instance, staff did not seek such permission and in effect has gone around this requirement by making the motion with new allegations. However, because I do not believe that this procedural issue changes the outcome in this instance and because the respondent has been given the opportunity to respond to these additional claims, I will consider them substantively.

Staff's second claim that the respondent violated the 2002 consent order because it failed to obtain the property owner's signature on the contract is subsumed by the claim in the amended complaint that the respondent failed to enter into a written contract for pesticide services. However, based upon my ruling above, if the respondent was found liable for this violation, it could face additional penalties for violations of both the statute and consent order.

Alleged Violation of ECL § 33-1001(1), 6 NYCRR § 325.40(a)(6), and the 2002 Consent Order

Other than the Phelps affidavit that speaks only to the registration of the respondent's pesticide business, the DEC staff's motion for summary order does not contain an affidavit by someone knowledgeable of the facts. See, Siegel, New York Practice, § 281, p. 464 (4th ed.) Instead, an "attorney's brief in support of motion for order without hearing" is annexed to the

notice of motion along with the above described exhibits. The respondent submitted an attorney's affirmation. However, given that there is no substantial dispute as to the facts underlying the allegations and because the parties have provided copies of the relevant documents, these papers are sufficient to rule upon the motion.

Staff claims that the respondent violated ECL § 33-1001(1), 6 NYCRR § 325.40(a)(6) and the 2002 consent order because it possessed a 2004 contract with a partial payment check for 2005. The documents presented by the parties bear out that the respondent entered into a written contract for lawn care services with the Hodges for the period of February 2004 through January 2005. Staff Br., Ex. E. In January 2005, the respondent renewed this contract with a letter that set forth the periods of treatment for the upcoming season and described the nature of the services. The Hodges accepted this renewal with a partial payment of $147.32 paid by check dated May 6, 2005. Burke Aff., Ex. F.

Staff claims that the partial payment did not renew the contract relying primarily on 6 NYCRR § 325.40(a)(6) that requires the signature of the owner or their agent on a contract or payment in full of the contract by check. Staff Br. ¶ 7. The staff has failed to show there was a violation of § 325.40(a)(6) with respect to the 2005 contract renewal because this subsection of the regulations applies to an original contract. The staff does not dispute that there is a signed contract for the 2004 season. Staff Br., ¶ 5. Section 325.40(a)(7) speaks to renewals and requires that [t]he pesticide applicator or business must obtain written proof of acceptance of the owner . . . of such contract amendments prior to applying pesticides." The Hodges' partial payment after the receipt of the respondent's renewal letter evidences agreement to the renewal. Burke Aff., Ex. F.

As noted by the respondent, the 2002 consent order provides that "[r]enewals of such contracts may be in the form of a cancelled check or other method of approval by the customer." This does not say that the check must be for full payment and therefore, I find that the Hodges' check is sufficient proof of approval.[4] In its brief, staff cites to language in the 2002

[4] Counsel for the respondent argues in his affirmation that in the negotiations giving rise to the order on consent it was understood by the parties that the respondent relied upon renewals and that the majority of these were confirmed by partial payment. Burke Aff., ¶ 33. The courts view consent orders as contracts and thus, their meaning and purpose should be discerned from their "four corners." See, United States v. ITT Continental Baking Co., 420 US 223, 233 (1975); United States v. Armour & Co., 402 US 673, 681-682 (1971). The explicit language of the decree is given its plain meaning and is afforded great weight. Berger v. Heckler, 771 F.2d 1556, 1568 (2d Cir. 1985). The courts have enforced the terms of DEC consent orders. See, e.g., State v. Town of Walkill, 170

consent order that reiterates the language of 6 NYCRR § 325.40(a)(6) requiring a check or other payment receipt for the full amount of the contract when it is not signed. But this language is contained in a paragraph following the above referenced language of the order concerning renewals that does not specify full payment. Staff's Br., Ex. C, p. 10.

Without any support whatsoever, staff states in its brief that because § 325.40(a)(6) is the only place in the regulation that speaks to the specific proof required to evidence a contract it applies in all instances. Staff Br., p. 3. However, if the Department wished that result for renewals, that should have been stated.

As for the staff's reference to Policy DSHM-PES-05-11 in support of its argument that partial payment, without a signature on a contract, is insufficient to prove a valid pesticide contract, this policy did not become effective until over a month after the alleged violation took place on May 9, 2005. Staff Br., Ex. D, pp. 1-2. The policy provides information to aid pesticide applicators and businesses in complying with the relevant law and regulations. Id., p. 1. Thus, if it was not available until after the incident in question and did not take effect until a month afterward, it cannot be said to have served that function. Moreover, the policy reiterates the language of 6 NYCRR § 325.40(a)(6) but does not specify that full payment is required for renewals. Staff Br., Ex. D, p. 18. And, in the section of the policy that addresses "Approximate Date(s) of Application(s) in Commercial Law Application Contracts," the policy acknowledges that proof of acceptance of amendments to a contract pursuant to 6 NYCRR § 325.40(a)(7) must be provided - but nowhere is there a statement about full payment by check. Id., pp. 7-8. Therefore, the policy, even if it were applied here, does not aid the staff's case.

In conclusion, I deny staff's motion for summary order with respect to this cause of action and grant respondent summary judgment.

Alleged Failure to Specify Dates of Application

The second and third causes of action in staff's amended complaint are respondent's alleged failure on May 9, 2005, to specify the dates when pesticide applications would occur in violation of 6 NYCRR 325.40(a)(1) and the failure to specify

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AD2d 8, 10 (3d Dep't 1991). Thus, it is not appropriate or necessary in this case to look outside the written word of the 2002 order on consent to discern its meaning.

dates of application with no more than a seven day range in violation of the 2002 consent order. Burke Aff., Ex. C, ¶¶ 10-11. Section 325.40(a)(1) requires that prior to a commercial lawn application, the pesticide business or applicator must provide in the written contract the approximate date or dates of service. With respect to the 2004 contract, staff claims that the respondent did not provide a year and that Policy DSHM-PES-05-11 interprets the term "date" as including the year. Staff Br., p. 4. As noted above, this policy was not effective when the events in question took place and therefore, the respondent should not be held accountable for the interpretations in that document. A common use of the word "date" includes the year; however, in this case there is no issue because the 2004 contract provides at its top "$257.43 plus tax for 2/04 thru 1/05." Clearly the periods specified further down in the document refer to the 2004-2005 lawn season.

Among the violations that formed the basis for the 2002 order on consent, respondent John Knutson was said to have "only approximate dates of application in its contract with a 45 to 93 day range." Staff Br., Ex. C, ¶ 6. To address this violation, the schedule of compliance that is part of this order provides "[t]he Respondent agrees to specific approximate dates of application with no more than a seven day range. The Respondent will add to his contracts which have a notification waiver the following language:

> 'If specific treatment dates are not waived, your application dates are the week of May 30, the week of July 10, the week of August 31, the week of November 1 and the week of December 15.'

Other week long time frames may be substituted for these dates in the contract or with mutual agreement of the customer."

In the 2004 contract, as noted by Department staff, there is a section that lists the "planned lawn services for this season" and sets forth seasonal periods that range from 44-48 days. Clearly, these periods are greater than the seven day span set forth in the order. However, the 2004 contract also contains a notification waiver that includes the following language, "[i]f specific treatment dates are not waived or contract is unsigned, your application dates will be in the week of May 21, the week of July 14, the week of August 31, the week of October 21 and the week of December 1." This language parallels that set forth in the compliance schedule contained in the order. The contract was signed by the property owner so the application date waiver would seem to be effective although counsel for the respondent affirms

that these homeowners received a "call ahead." Burke Aff., ¶ 34. However, as there is no basis for finding that the attorney is the individual with personal knowledge of this status, I do not find this assertion probative. See, South Bay Center, Inc. v. Butler, Herrick & Marshall, 43 Misc. 2d 269, 271-272 (Sup. Ct. Nassau Co. 1964). Given that the order on consent acknowledges the use of the notification waiver, Department staff have not established the alleged violation with respect to the 2004 contract.

Accordingly, I deny staff's motion for summary order with respect to this cause of action and grant summary judgment to the respondent.

Penalty

Because I have determined to deny staff's motion for summary order and instead, grant summary judgment to the respondent, there is no penalty. However, I would note that staff's support for the $19,000 penalty is deficient.

With respect to staff's discussion regarding the economic benefit derived by respondent in accepting partial payments, there is no rationale given for the $3,000 sum assessed. This is true as well of the gravity discussion which fails to explain the basis for the $2,000 assessed for this criterion other than to provide generalizations. With respect to the estimate as to the Department's costs in bringing this proceeding of $3,000, there is no information provided to support this sum. Nowhere in staff's papers is there any information regarding a second consent order (R4-2003-0613-60) involving the respondent although its existence is relied upon by staff to bolster its penalty request.

CONCLUSION

Pursuant to 6 NYCRR §§ 622.12(d) and (e), based upon the Department staff's failure to establish the alleged violations and my finding that there are no material facts at issue warranting a hearing, I deny staff's motion for summary order and I grant summary judgment to the respondent.

Dated: May 2, 2007
Albany, New York

_____/s/_____
Helene G. Goldberger
Administrative Law Judge