



Graham, Richard, d/b/a R. Graham Pest Control - Order, June 6, 2011 Order, June 6, 2011

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

In the Matter of the Notice of Intent to Revoke the Business Registration Issued Pursuant to Title 9 of Article 33 of the Environmental Conservation Law, and Part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York to

**RICHARD GRAHAM, d/b/a
R. Graham Pest Control,**

Registrant.

ORDER

DEC Case No. R4-2010-1027-120

Registrant Richard Graham, doing business as (d/b/a) R. Graham Pest Control, is in the business of applying pesticides. This administrative enforcement proceeding addresses allegations that registrant failed to comply with a May 25, 2010 order of the Commissioner of Environmental Conservation (2010 order) and that registrant has been applying pesticides without a valid pesticide applicator certification.

On or about February 17, 2011, staff of the Bureau of Pesticides of the Region 4 office of the New York State Department of Environmental Conservation (Department) served registrant with a Notice of Intent to Revoke Business Registration (notice), pursuant to title 9 of article 33 of the Environmental Conservation Law (ECL) and section 325.23(e)(5) of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR). The notice referenced registrant's violation of the 2010 order, specifically his failure to provide a completed record for a pesticide application on February 13, 2009, at 585 Washington Avenue, Albany, New York, and a copy of the pesticide apprentice training documentation for his apprentice. In addition, the notice indicated that registrant's individual commercial pesticide application license had lapsed.

In response to the notice, registrant, by letter dated March 12, 2011, requested a hearing pursuant to 6 NYCRR § 325.13(b).

Assistant Regional Attorney Jill Phillips provided Chief Administrative Law Judge James T. McClymonds with a statement of readiness dated April 26, 2011. The matter was assigned to Administrative Law Judge (ALJ) Helene G. Goldberger who prepared the attached report subsequent to a hearing held on May 24, 2011.

I adopt the ALJ's report as my decision in this matter. Department staff has demonstrated its entitlement to judgment as a matter of law on its claims that registrant has not complied with the 2010 order. In addition, Department staff proved that registrant continued to apply pesticides, including restricted pesticides, on numerous occasions after registrant's individual commercial pesticide application license lapsed.

Registrant's violations are very serious. Absent sufficient training, documentation of pesticide applications, and appropriate legal certification, the public health and environment are potentially jeopardized by improper pesticide usage. Accordingly, in the circumstances presented in this proceeding, I conclude that revocation of registrant's pesticide business registration is appropriate and warranted.

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

I. Registrant Richard Graham, d/b/a R. Graham Pest Control, is adjudged to have committed the following violations:

A. Registrant failed to comply with the May 25, 2010 order of Commissioner Alexander B. Grannis by:

(a) not providing a completed record for a pesticide application on February 13, 2009, at 585 Washington Avenue, Albany, New York, and

(b) not producing required apprentice training documentation for his pesticide apprentice; and

B. Registrant applied pesticides without a valid pesticide applicator's certification in violation of 6 NYCRR 325.7 (a).

II. As a result of the violations set forth in paragraph I of this order, the pesticide business registration of Richard Graham, d/b/a R. Graham Pest Control, is hereby revoked.

III. All communications from registrant to the Department concerning this order shall be

made to Jill Phillips, Esq., Assistant Regional Attorney, New York State Department of Environmental Conservation, Region 4, 1130 North Westcott Road, Schenectady, New York 12306.

IV. The provisions, terms and conditions of this order shall bind registrant Richard Graham, d/b/a R. Graham Pest Control, and his agents, successors and assigns, in any and all capacities.

For the New York State Department
of Environmental Conservation

/s/

By: _____
Joseph J. Martens
Commissioner

Dated: June 6, 2011
Albany, New York

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION
625 Broadway
Albany, New York 12233-1550

In the Matter

- of -

the Notice of Intent to Revoke the Business Registration issued pursuant to Environmental Conservation Law, Article 33, Title 9 and Part 325 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York to:

**RICHARD GRAHAM, d/b/a
R. Graham Pest Control
3406 State Street
Schenectady, New York,**

Registrant.

DEC File No. R4-2010-1027-120

HEARING REPORT

- by -

/s/

Helene G. Goldberger
Administrative Law Judge

May 25, 2011

Proceedings

On or about February 17, 2011, staff of the Bureau of Pesticides of the Region 4 office of the New York State Department of Environmental Conservation (DEC or Department) served Registrant, Richard Graham, with a Notice of Intent to Revoke Business Registration, pursuant to Environmental Conservation Law (ECL), Article 33, Title 9 and § 325.23(e)(5) of Title 6 of the Official Compilation of Codes, Rules and Regulations (6 NYCRR), upon DEC staff's determination that the respondent failed to comply with a May 25, 2010 Commissioner's Order. Hearing Exhibit (Ex.) 2. Specifically, the Order required the registrant to provide to the Department: a) a completed record for a pesticide application on February 13, 2009 at 585 Washington Avenue, Albany, NY including information on the pesticide EPA registration number, dosage rate, and method of application; and b) a copy of the pesticide apprentice training documentation for apprentice Bill Kennedy. Ex. 5. In response to the Notice, by letter dated March 12, 2011, Mr. Graham requested a hearing pursuant to 6 NYCRR § 325.13(b). Ex. 3.

On April 26, 2011, Assistant Regional Attorney Jill Phillips provided Chief Administrative Law Judge (ALJ) James T. McClymonds with a Statement of Readiness dated April 26, 2011. Ex. 1. CALJ McClymonds assigned the matter to me on April 28, 2011. On May 3, 2011, I convened a conference call in which Ms. Phillips, Mr. Graham, and I agreed to hold a hearing on May 24, 2011. Ex. 4.

On May 24, 2011, I convened the revocation hearing in the DEC Region 4 headquarters at 1130 North Westcott Road, Schenectady, NY. Jill Phillips, Assistant Regional Attorney, NYSDEC, Region 4, represented Department staff. Richard Graham was pro se. The following exhibits were taken into evidence:

1. Statement of Readiness dated April 26, 2011

2. Notice of Intent to Revoke Business Registration dated February 17, 2011
3. Letter dated March 12, 2011 from Mr. Graham to Mark Solan and/or Regional Engineer
4. Notice of Hearing dated May 3, 2011
5. Commissioner's Order dated May 25, 2010 w/annexed default summary report by ALJ Dubois dated May 20, 2010
6. Notice of Inspection dated September 23, 2010
7. Voluntary Statement of Richard Graham dated September 23, 2010
8. CertAdmin Database - Report for Richard W. Graham dated May 10, 2011
9. Applicator/Technician Pesticide Annual Report (2010) for Richard Graham

These exhibits were taken into evidence without any objection from either party. The

Department staff did not make an opening statement. In his opening statement, Mr. Graham stated that due to extreme ignorance and procrastination "this came about." He explained that he had relied on support staff that had failed to keep records. He stated that while the results from these failings have been overwhelming, he plans to catch up and conduct business properly in the future.

The Department staff presented one witness - Mark Solan, Bureau of Pesticide Management, Pesticides Supervisor Control Specialist 2. Mr. Graham testified on his own behalf. The staff made a closing statement indicating that the revocation was justified by Mr. Graham's failure to comply with the Commissioner's Order and his application of pesticides without a certification. Mr. Graham closed by stating he was not aware that his certification had expired when he made those applications and that it was his intention to submit the required documentation, to pay the fees, and to reapply for his certification and registration.

FINDINGS OF FACT

1. Richard Graham is the owner of R. Graham Pest Control. He had a pesticide certification (i.d. number 4051682) that expired on November 21, 2010.
2. By Order dated May 25, 2010, DEC Commissioner Grannis found that Richard Graham had a) failed to record certain information about an application of pesticides on February 13, 2009, in the City of Albany in violation of ECL § 33-1205(1) and b) failed to maintain training documentation for his pesticide apprentice, Bill Kennedy, in violation of 6 NYCRR § 325.10. The Commissioner ordered the respondent to pay a penalty of \$2,250 and to produce the missing information within 30 days. Although the respondent paid the penalty, he failed to produce the records. Exs. 5 and 6.
3. On September 23, 2010, Selinda Schlierman, Pesticide Control Specialist 1, and Mark Solan, Pesticide Control Specialist 2, conducted an inspection of Richard Graham's business office at 3406 State Street in Schenectady, New York. As part of the inspection, they asked Mr. Graham for the records required by the Commissioner's May 25, 2010 Order. However, while Mr. Graham provided the application record for the February 13, 2009 application, it was lacking the EPA registration number and specific place of application. Ex. 6. With respect to Mr. Kennedy's training records, Mr. Graham provided a voluntary statement that the records were not available. Ex. 7.

4. Based upon Mr. Graham's failure to comply with the Commissioner's Order, on February 17, 2011, Department staff sent Mr. Graham a Notice of Intent to Revoke Business Registration. Ex. 2. In this Notice, staff also noted that Mr. Graham's individual commercial pesticide license had expired as of November 21, 2010 and he was not to engage in any commercial application of pesticides, the private application of restricted use pesticides, or the sale of restricted pesticides. *Id.*
5. Despite the lapse of his pesticide certification, Mr. Graham did apply pesticides on 49 occasions including 16 restricted use pesticide applications. Ex. 9.
6. Mr. Graham applied for renewal of his pesticide certification but failed to provide proof of required continuing education credits or provide a check for the applicable fees (\$750). Therefore, staff declined to process the application.

DISCUSSION

Section 325.13(a) of 6 NYCRR provides the bases for denial, suspension or revocation of certified applicators and technician certification. Among the reasons set forth in the regulation for revocation are: the applicant or certified pesticide applicator has failed to comply with any provision of Article 33 or the implementing rules or regulations (325.13[a][5]); the applicant or certified pesticide applicator has failed to demonstrate sufficient knowledge and experience concerning the proper use and application of pesticides (325.13[a][6]); and the applicant or certified applicator has failed to maintain records required by Part 325 or Article 33 (325.13[a][7]).

Mr. Graham was found by Commissioner Grannis in the 2010 Order to have violated Article 33 and Part 325 provisions by failing to maintain proper documentation of applications and failing to demonstrate sufficient knowledge and experience by his employee Mr. Kennedy. Moreover, Mr. Graham continued to apply pesticides, including restricted pesticides, after his certification lapsed.

While Mr. Graham testified to the administrative failures that he blamed for his failures to keep necessary records, to keep his employee and himself current on continuing education credits, and to pay appropriate fees, he did not dispute the Department staff's allegations.^[1] There is no question that Mr. Graham failed to provide the information required by the Commissioner's May 25, 2010 Order. In addition, he conducted pesticide applications after his certification expired. While I found Mr. Graham to be a credible witness and there is no reason to doubt his description of administrative support failure, it is not a viable defense to the Department staff's charges. The pesticide laws and regulations are critical to protecting the public from improper application of pesticides. See, Declaration of policy and purposes, ECL § 33-0310. Accurate recordkeeping and compliance with educational requirements are two key means by which the Department attempts to ensure that pesticide applicators are conducting this potentially harmful activity safely.

CONCLUSION AND RECOMMENDATION

I find that the Department staff's revocation of Richard Graham's business registration is appropriate based upon the facts presented by staff and Mr. Graham's own admissions.

^[1]The only fact to which he raised questions was Mr. Solan's statement that DEC Central Office routinely sends applicators reminders of the expiration of their certifications thirty days prior to the expiration date. Mr. Graham stated that he did not know if any notification was received by his office. However, he did not dispute that the certification itself contains the expiration date.