

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
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CERTIFIED - RETURN RECEIPT REQUESTED
7017 1070 0001 0125 8510

July 11, 2018

Thomas Astemborski
T & P Lawn and Landscape, Inc.
220 Rotterdam Corporate Park
Schenectady, NY 12306

Re: Order on Consent
R4-2018-0614-149

Dear Mr. Astemborski:

Enclosed please find a copy of the fully executed Order on Consent referenced above.

This will also acknowledge receipt of \$500 1st of 3 payments of the civil penalty pursuant to Paragraph I. Your second payment of \$500 is due on or before August 14, 2018.

Sincerely,



Stephen Repsher
Assistant Regional Attorney
Region 4

Enclosure

ec: M. Leidy



Department of
Environmental
Conservation

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER ON CONSENT

R4-2018-0614-149

-by-

T & P Lawn and Landscape, Inc.
220 Rotterdam Corporate Park
Schenectady, NY 12306,

Respondent.

WHEREAS:

Jurisdiction

1. The New York State Department of Environmental Conservation (Department) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to §33-0301 of the Environmental Conservation Law (“ECL”), among other authorities. The Department is and has been responsible for the regulation of the use, and for the enforcement of the provisions of law governing the use of pesticides in the State pursuant to ECL Article 33 and the rules and regulations promulgated thereunder at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR) Part 325.
2. Respondent, T & P Lawn and Landscape, Inc., is a domestic corporation engaged in the commercial pest control business in the State of New York.
3. Respondent is a person as defined in ECL § 33-0101(33).

VIOLATIONS

4. On March 27, 2018, Department staff conducted a routine compliance inspection of Respondent’s facility and records.
5. During the March 27, 2018 inspection, Department staff discovered that on August 10, 2015, Respondent applied the pesticide Insecticide III (EPA #9198-167) to a residential property at a rate of approximately 1.9 lbs./1000 sq. ft.

6. The product label for Insecticide III states “FOR USE ON GOLF COURSE TURF ONLY.”

7. The product label for Insecticide III specifies a maximum application rate of 1.7 lbs./1000 sq.ft.

8. Regulations at 6 NYCRR § 325.2(b) state that “Pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department.”

9. Respondent’s failure to apply a pesticide in accordance with its labeling directions is a violation of 6 NYCRR § 325.2(b).

10. During the March 27, 2018 inspection, Department staff observed that all of Respondent’s records from the years 2015 to 2017 failed to include the method of application and place of application.

11. During the March 27, 2018 inspection, Department staff observed that many of Respondent’s records from the years 2015 to 2017 failed to include the target organism.

12. Regulations at 6 NYCRR § 325.25(a) require all pesticide business to “keep true and accurate records in a manner specified by the department showing: the kind and quantity of each pesticide used; dosage rates; methods of application; target organisms; and the use, date and place of application for each pesticide used. These records shall be maintained on an annual basis and retained for a minimum of three years and shall be available for inspection upon request by the department.”

13. Respondent’s failure to keep true and accurate records regarding the method(s) and place(s) of application, and target organism(s), constitute violations of 6 NYCRR § 325.25(a).

14. During the March 27, 2018 inspection, Department staff examined a representative sample of Respondent’s written commercial lawn application contracts and observed that the sample failed to include the following required information:

- the approximate date(s) of application (only the month was provided);
- the statement: “The property owner or 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;”
- the total number of commercial lawn applications to be provided;
- the total cost of the commercial lawn applications to be provided (only the cost of non-pesticide products was included);
- a list of pesticides to be applied, including the generic names of the active ingredients;

- the warnings that appear on the label(s) of pesticide(s) to be applied that are pertinent to the protection of humans, animals or the environment;
- the business registration number and applicator certification number; and
- the signature of the pesticide business or applicator.

15. Regulations at 6 NYCRR § 325.40(a) provide, in relevant part:

Prior to a commercial lawn application the pesticide applicator or business providing these services must enter into a written contract with the owner of the property to which the commercial lawn application is to be made or the owner's agent. A written contract must:

- (1) specify the approximate date or dates of application or applications; The following statement must be prominently displayed in the contract: "The property owner or 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";
- (2) state the total number of commercial lawn applications to be provided;
- (3) state the total cost of the commercial lawn application service to be provided; and
- (4) include a written copy, in at least 12-point type of:

- (i) a list of pesticides to be applied including brand names and generic names of active ingredients;
- (ii) any warnings that appear on the label(s) of pesticide(s) to be applied that are pertinent to the protection of humans, animals or the environment; and
- (iii) the name, address, telephone number and pesticide business registration number of the pesticide business providing the commercial lawn application service and the pesticide applicator certification identification card number of the person employed by the pesticide business who will provide or supervise the commercial lawn application service;

....

(6) be signed by both the pesticide applicator or business providing the commercial lawn application and the owner or owner's agent of the property to which the commercial lawn application is to be made;

16. Regarding the approximate date(s) of application, Department Policy DSHM-PES-05-11 ("Compliance with Certain Provisions of Commercial Lawn Application Regulations") states that: "[f]or the purposes of 6 NYCRR 325.40, the Department interprets the term 'approximate date' as a span of consecutive calendar days no greater than 21 calendar days."

17. Respondent's failure to include the information cited in Paragraph 15 above are in violation of 6 NYCRR § 325.40(a).

Civil Penalty

18. ECL § 71-2907 (1) provides, *inter alia*, that "any person who violates any provisions of article 33 of this chapter or any rule, regulation or order issued thereunder . . . shall be liable . . . for a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense."

Waiver of Hearing

19. Respondent has affirmatively waived its right to notice and hearing in the manner provided by law and has consented to the issuing and entering of this Order and agrees to be bound by its terms, provisions and conditions contained within the Order.

NOW, having considered this matter and being duly advised, **IT IS ORDERED THAT:**

I. **Civil Penalty.** Respondent is assessed a civil penalty in the amount ONE THOUSAND TWO HUNDRED FIFTY DOLLARS (\$1,250). Payment of the civil penalty is due per the following payment schedule, and shall be paid by company or bank check, made payable to the NYS Department of Environmental Conservation:

1. \$500 to be paid with the return of the signed and notarized Order;
2. \$500 by Friday, August 10, 2018; and
3. \$250 by Friday, September 14, 2018.

II. **Binding Effect.** The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or controlled by it.

III. **Communications.** Except as otherwise specified in this Order, any reports, submissions, and notices herein required shall be made to:

For the Department:

NYS Department of Environmental Conservation
Region 4
Bureau of Pesticides
Attn: Michael Leidy
1130 North Westcott Road
Schenectady, NY 12306

For the Respondent:

T & P Lawn and Landscape, Inc.
Attn: Thomas Astemborski
220 Rotterdam Corporate Park
Schenectady, NY 12306

IV. Summary Abatement. The terms of this Order shall not be construed to prohibit the Commissioner or his duly authorized representative from exercising any summary abatement powers, either at common law or as granted pursuant to statute or regulation.

V. Indemnification. Respondent shall indemnify and hold harmless the Department, the State of New York, and their representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, its directors, officers, employees, servants, agents, successors or assigns, except to the extent that any such claims arise or result from the acts or omissions by the Department, the State of New York, or its employees.

VI. Modification. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee, such change to be made only upon written agreement of the parties.

VII. Effective Date. This Order is deemed effective on the date signed by the Department. The Department will provide Respondent a fully executed copy of this Order as soon as practicable following the effective date of this Order.

VIII. Scope. Except as specifically provided in this Order, nothing contained in this Order shall be construed as barring, diminishing, adjudicating or in any way affecting:

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the Department or State may have against Respondent for any other violations of the ECL, rules or regulations promulgated thereunder;

B. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against anyone other than Respondent, its agents, its servants, its employees, its successors and its assigns; and

C. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes of action, defenses or demands whatsoever that it may have to a judicial review of the validity and binding effect of this Order and whether or not this Order has been entered into voluntarily by Respondent.

IX. Review of Submitted Documentation.

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.

2. The Department shall review each submittal from Respondent pursuant to this Order to determine whether it was prepared, and whether the work performed to generate the data in the submittal was prepared, in accordance with this Order and with generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3(a). If the Department disapproves a submittal, it shall notify Respondent in writing and shall specify the reasons for disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all the stated reasons for disapproval of the initial submittal.

3(b). After receipt of a revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submittal is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accept such modifications as may be specified by the Department to make it approvable. If Respondent does not accept such modifications, the revised submittal will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order, or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies shall be reasonable and consistent with customary engineering standards.

X. **Access.** To ensure compliance with the ECL and this Order, Respondent shall not deny the Commissioner or his duly authorized representative access at all reasonable times to inspect Respondent's New York facilities and all pesticide records for applications within the State of New York.

XI. **Schedule of Compliance.** Respondent shall comply with the attached Schedule of Compliance.

XII. **Termination.** This Order shall terminate upon the Department's determination that Respondent has complied with all the requirements of this Order.

DATED: July 10, 2018
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:


Keith Goertz
Regional Director
Region 4

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives its rights to notice and hearing herein and agrees to be bound by the provisions, terms and conditions contained herein.

SIGNED: Paul M. Astemborski
PRINTED: Paul M. Astemborski
TITLE: President
DATE: July 10, 2018

STATE OF NEW YORK)
) ss.:
COUNTY OF Schenectady)

On the 10th day of July in the year 2018, before me, the undersigned,

personally appeared Paul M. Astemborski, personally known
(*Full name*)

to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that s/he executed the same in his/her capacity, and that by his/her signature on said instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Paul M. Marco
Notary Public
Qualified in the County of: Schenectady
My Commission Expires: 11/3/18

DIANE M. MARCO
Notary Public, State of New York
Certified Schenectady County
#4876004
Commission Expires: 11/3/18

SCHEDULE OF COMPLIANCE

- (1) **Within thirty (30) days of the effective date of this Order**, Respondent shall submit to the Department a sampling of 20 pesticide application record entries, covering applications made between March 28, 2018 and June 14, 2018, which demonstrate full compliance with the regulations at 6 NYCRR § 325.25(a).
- (2) **Within thirty (30) days of the effective date of this Order**, Respondent shall submit to the Department a signed and notarized Compliance Verification Affidavit ("CVA," enclosed) certifying that the actions necessary to comply with the Department's regulatory program, and those actions specified in this document, have been completed, along with any supporting documentation.
- (3) Compliance with this Schedule shall not be a defense to subsequent violations.

The signed and notarized CVA should be addressed to:

Michael Leidy
NYS Department of Environmental Conservation
Region 4
Bureau of Pest Management
1130 North Westcott Road
Schenectady, NY 12306

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

AFFIDAVIT

-by-

T & P Lawn and Landscape, Inc.
220 Rotterdam Corporate Park
Schenectady, NY 12306,

Respondent.

I, Paul M. Astemborski, being duly sworn, do depose and say
(Full Name)
that I have complied with the requirements of Paragraph No. 1 of the Order on Consent's
Schedule of Compliance (File# R4-2018-0614-149) effective on the date signed by the
Regional Director.

Paul M. Astemborski
Signature of Respondent

Subscribed and sworn to before me
on this 10th day of July, 20 18

Diane M. Marco
Notary Public

DIANE M. MARCO
Notary Public, State of New York
Certified Schenectady County
#4876004
Commission Expires: 11/3/18