

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER ON CONSENT

DEC Case NOs. R4-2009-0507-80

- by -

The Home Depot
2455 Paces Ferry Road
Atlanta, Georgia 30339

Respondent

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1. The Department is and has been responsible for the enforcement of Article 27 of the ECL which concerns management of the transportation, storage and disposal of hazardous waste.
 2. The New York State Department of Environmental Conservation (the "Department") is responsible for hazardous waste transportation, storage, and disposal pursuant to Article 27, Title 9 of the Environmental Conservation Law (the "ECL") and regulations promulgated thereunder in the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR").
 3. The Department is charged with administration of pesticide registration and use pursuant to ECL Article 33 and regulations promulgated thereunder in the 6 NYCRR. .
 - 4 Respondent, The Home Depot, 2455 Paces Ferry Road, Atlanta, Georgia 30339 operates a store at 135 Hannaford Plaza, Amsterdam, New York ("store").
 5. ECL Section 33-1301.1(b) provides, in relevant part, that: "It shall be unlawful: For any person to distribute, sell, offer for sale or use within this state, any pesticide unless it is in the registrant`s or the manufacturer`s unbroken immediate container..."
 - 6 . On April 28, 2009, Department staff inspected the store and observed that two ripped bags of Ortho BugBGon Max Insect Killer for Lawns (EPA Reg. #279-3240-239) were being offered for sale.
 7. Respondent`s offer for sale of the 2 ripped bags of pesticides identified in Paragraph 6 are each separate violations of ECL Article 33-1301.1(b).
 8. Respondent has affirmatively waived the 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 the terms, provisions and conditions contained therein.

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

I. Penalty

In respect of the aforesaid violations, a civil penalty in the amount of ONE THOUSAND DOLLARS (\$1,000). Respondent shall pay the civil penalty with the return of the signed and notarized Order on Consent to the Department.

II. Settlement of Claims and Reservation of Rights

This Order settles all claims for civil and administrative relief, including penalties, concerning the violations described in this Order on Consent against Respondent and its successors (including successors in title), assigns and all persons, subsidiary corporations and affiliated companies. The issuance of this Order settles all claims for civil and administrative relief, including penalties, for the violations cited in Paragraph 6.

III. Schedule of Compliance

Respondent shall complete the activities as called for in the attached Schedule of Compliance which is hereby incorporated into this Order on Consent.

IV. Reports

All reports and submissions required herein, unless otherwise indicated, shall be made to the Region 4 office of Department, 1130 North Westcott Road, Schenectady, New York 12306, Attn : Regional Solid & Hazardous Materials Engineer.

V. Binding Effect

The provisions of this Order on Consent shall inure to the benefit of and be binding upon the Department and Respondent, its successors (including successors in title) and assigns, and all persons, subsidiary corporations and affiliated companies.

VI. Access

For the purpose of monitoring or determining compliance with this Order on Consent, employees and agents of the Department shall be provided access to any facility, site or records owned, operated, controlled or maintained by Respondent, in order to inspect and/or perform such tests as the Department may deem appropriate, to copy such records, or to perform any other lawful duty or responsibility. This provision in no way waives or affects Respondent's right to exercise the attorney-client privilege.

VII. Failure, Default and Violation of Order on Consent

The failure of Respondent to comply with any provision of this Order on Consent, once having been adjudicated in an administrative or judicial proceeding, shall constitute a default and a failure to perform an obligation under this Order on Consent and shall be deemed to be a violation of both this Order on Consent and the ECL.

VIII. Summary Abatement

This Order on Consent 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.

IX. 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 this Order on Consent by Respondent, or by its trustees, officers, employees, servants, agents, successors or assigns, provided, however, that Respondent shall not be required to indemnify the Department, the State of New York, or their representatives or employees regarding any liability arising from unlawful, grossly negligent, reckless or intentionally tortious acts or omissions of the Department, the State of New York, or their representatives or employees.

X. Entire Agreement

The provisions hereof shall constitute the complete and entire Order on Consent issued to the Respondent concerning the violations as set forth herein. No terms, conditions, understandings or agreements purporting to modify or vary the terms hereof shall be binding unless made in writing and subscribed by the party to be bound, pursuant to the Modification provision of this Order on Consent. No informal oral or written advice, guidance, suggestions or comments by the Department regarding reports, proposals, plans, specifications, schedules, comments or statements made or submitted by Respondent shall be construed as relieving Respondent of its obligations to obtain such formal approvals as may be required by this Order on Consent.

XI. Effective Date

The effective date of this Order on Consent shall be the date it is signed by the Commissioner or her designee. The Department will provide Respondent (or the Respondent's counsel) with a fully executed copy of this Order on Consent as soon as practicable after this Order on Consent has been signed by the Commissioner or her designee.

XII. Modification

If Respondent desires that any provision of this Order on Consent be changed, Respondent shall make written application therefor to the Department, setting forth reasonable grounds for the relief sought. The Department shall have absolute discretion but will not arbitrarily withhold consent to the requested change.

XIII. Termination

This Order on Consent shall terminate one year from its effective date.

DATED: _____, 2009
Rotterdam, New York

ALEXANDER P. GRANNIS
COMMISSIONER
DEPARTMENT OF
ENVIRONMENTAL CONSERVATION

BY:

Eugene J. Kelly
Regional Director - Region 4

SCHEDULE OF COMPLIANCE

1. Within 30 days of the effective date of this Order, Respondent shall submit to the Department for review and approval a set of procedures for instructing employees on the appropriate regulatory procedures for handling and disposing of broken packages of pesticides. Respondent shall implement the procedures within 30 days of the Department approval of the procedures.

2. Within 90 days of the effective date of the Order, Respondent shall submit a revised State Insert for The Home Depot's SOP (SAF 09-65 Handling Hazardous Materials). The revision must address ECL Article 33-1301.1(b). It must state that overpack bags or bag patches may not be used at any time to repackage a damaged container of pesticides that will be put back out for sale in New York State (this includes all pesticide products offered for sale by any of Respondent's New York stores). Any damaged container of pesticides must be disposed of following department procedures for handling hazardous materials. Overpack bags or bag patches may only be used for disposal purposes to contain the spill.