

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

In the Matter

- of -

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

- by -

**TRACTOR SUPPLY COMPANY,**

Respondent.

DEC Case No. R6-20060515-35

DECISION AND ORDER OF THE COMMISSIONER

August 8, 2008

## DECISION AND ORDER OF THE COMMISSIONER

Staff of the Department of Environmental Conservation ("Department") commenced this administrative enforcement proceeding by moving, pursuant to section 622.12 of title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York ("6 NYCRR"), for an order without hearing in lieu of complaint against respondent Tractor Supply Company. Department staff's motion was submitted together with a notice of motion and a memorandum in support of the motion with several attachments.

Department staff alleges that respondent violated provisions of article 33 of the Environmental Conservation Law ("ECL") and 6 NYCRR part 326 by offering for sale, possessing for purposes of resale or otherwise possessing a restricted use pesticide (TalstarOne Multi-Insecticide ["TalstarOne"]) at three of respondent's store locations without the required commercial permit. Respondent did not answer or otherwise respond to the motion.

The matter was assigned to Administrative Law Judge ("ALJ") P. Nicholas Garlick who prepared the attached ruling and hearing report. Subject to my comments below, I adopt the ALJ's rulings on liability and penalty in part.

### Liability

A commercial permit issued by the Department is required for the distribution, sale, offer for sale, purchase for the purpose of resale or possession for the purpose of resale of a restricted use pesticide (see ECL 33-0901[1] and 33-1301[5], 6 NYCRR 326.3[a]). Respondent does not have a commercial permit to sell restricted use pesticides at the three store locations (Utica, Plattsburgh, and Horseheads, New York) cited by Department staff.

The ALJ held that on this unopposed motion for order without hearing, the administrative equivalent of a CPLR 3212 motion for summary judgment (see 6 NYCRR 622.12), Department staff established a prima facie case of respondent's liability for violations of ECL 33-0901(1) and 33-1301(5) by offering containers of a restricted use pesticide for sale at two of respondent's store locations in Utica and Plattsburgh, respectively. I concur with the ALJ's determinations regarding the liability of respondent for these offering for sale charges at the two locations.

The ALJ concluded, however, that Department staff failed to make a prima facie showing that respondent offered containers of a restricted use pesticide for sale at respondent's store in Horseheads in violation of ECL 33-0901(1) and 33-1301(5). The ALJ held that the only evidence supporting respondent's offer for sale of the restricted use pesticide TalstarOne at the Horseheads store was the hearsay statement of a complainant commercial pesticide applicator contained in the affidavit of the Department inspector, Christopher Wainwright. In his affidavit, Mr. Wainwright indicated that the complainant informed him that "he noticed the facility was offering for sale TalstarOne, EPA registration number 279-3206, which he believed was classified as a restricted use pesticide" (Wainwright Affidavit, ¶ 3). On inspection, Department inspector Wainwright did not find any of the referenced product on the sales shelf, but did find it in the store's possession (see id., second ¶4).

Although I conclude that Department staff failed to make a prima facie showing of a violation at the Horseheads store, I do so for reasons different from those presented by the ALJ. By holding that Department staff failed to make a prima facie case of offer for sale, the ALJ in effect applied the rule applied in civil court proceedings that a movant cannot support a summary judgment motion with hearsay evidence (see, e.g., Phillips v Joseph Kantor & Co., 31 NY2d 307, 313 [1972]).

However, unlike civil court proceedings, hearsay evidence is admissible in an administrative adjudicatory proceeding and can be the basis of an administrative enforcement determination (see State Administrative Procedure Act ["SAPA"] § 306[1][agencies need not observe the rules of evidence observed by courts, but shall give effect to the rules of privilege recognized by law]; Matter of Gray v Adduci, 73 NY2d 741, 742 [1988]; People ex rel. Vega v Smith, 66 NY2d 130, 139 [1985]; Matter of Concerned Citizens Against Crossgates v Flacke, 89 AD2d 759, 760 [3d Dept 1982], affd for reasons stated below 58 NY2d 919 [1983]). Accordingly, Department staff's proof in support of summary judgment should not have been rejected on the hearsay basis alone.

Although hearsay evidence is admissible in administrative adjudicatory proceedings, it must nonetheless be sufficiently reliable, relevant and probative to provide a basis for the agency's determination (see Matter of Dadson Plumbing Corp. v Goldin, 104 AD2d 346 [1st Dept 1984], affd as modified on other grounds 66 NY2d 713 [1985]).

Ordinarily, when hearsay evidence is offered at the evidentiary portion of an administrative adjudicatory proceeding, the circumstance that such evidence is hearsay goes to the evidence's weight (see Matter of Tubridy, Decision of the Commissioner, April 19, 2001, at 9). At the summary judgment stage of proceedings, however, weight of evidence is not considered. Rather, the issue is whether the moving party has offered sufficient evidence to support a prima facie case for summary judgment.<sup>1</sup> The test for sufficiency of evidence in the administrative context is the substantial evidence test -- whether the factual "finding is supported by the kind of evidence on which responsible persons are accustomed to rely in serious affairs." . . . Put another way, substantial evidence 'means such relevant proof as a reasonable mind may accept as adequate to support a conclusion or ultimate fact'" (People ex rel. Vega v Smith, 66 NY2d 130, 139 [citations omitted]; see also 300 Gramatan Ave. Assoc. v State Div. of Human Rights, 45 NY2d 176, 181 [1978] ["substantial evidence consists of proof within the whole record of such quality and quantity as to generate conviction in and persuade a fair and detached fact finder that, from that proof as a premise, a conclusion or ultimate fact may be extracted reasonably -- probatively and logically"]).

In this case, however, I conclude that the hearsay evidence offered in support of the "offer for sale or possess for purposes of resale" element of the ECL 33-0901(1) and 33-1301(5) charges at respondent's Horseheads store is insufficient to establish a prima facie case. Granted, complainant's assertion that he noticed that respondent was offering TalstarOne for sale at the Horseheads store is directly relevant and probative. Both the complainant and the New York State registered structural pesticide application business he owns are specifically identified (see Wainwright Affidavit, ¶ 3). However, although Department inspector Wainwright found TalstarOne at the Horseheads store, he did not find the product on the sales shelf (see id. second ¶ 4). In addition, the complainant did not specifically state that the TalstarOne was on the sale shelves. The store manager indicated that one container of TalstarOne had just been received by the store, but in accordance with a "Buy Back" memorandum from respondent's headquarters, the container was being returned (id. & Attachment C-1). The store manager subsequently provided Mr. Wainwright with the shipping receipt indicating that the container had been returned (id. & Attachment

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<sup>1</sup> Because Department staff's motion is unopposed, I do not address the quantum of proof a respondent must provide to raise a triable issue of fact and, thus, avoid summary judgment.

C-2). The record indicates that the store manager followed reasonable and appropriate steps for the prompt return of this product following its receipt at the store. On these submissions, I do not conclude that Department staff established a prima facie case that respondent violated ECL 33-0901(1) and 33-1301(5) at the Horseheads store.

Department staff also charged violations of 6 NYCRR 326.2(a) at all three stores. However, the language of the regulatory provision quoted in the motion is not the language of section 326.2(a), but rather the language of 6 NYCRR 326.3(a). Section 326.3(a) provides:

It shall be unlawful for any person to distribute, sell, offer for sale, purchase for the purpose of resale, or possess for the purpose of resale, any restricted pesticide unless said person shall have applied for, and been issued a commercial permit.

Because Department staff quoted this language in the motion, which serves as the complaint in this matter, respondent is on notice of the operative regulatory provision that underlies the charge. Moreover, the proof submitted on the motion establishes a violation of section 326.3(a). Thus, respondent would not be prejudiced if the pleadings are amended to conform to the proof (see Matter of Wilder, ALJ Hearing Report, at 3-4, adopted by Supplemental Order of the Acting Commissioner, Sept. 27, 2005). Accordingly, I conclude that respondent is liable for violations of section 326.3(a) at its Utica and Plattsburgh stores but not, based upon the previous discussion, at the Horseheads store.

Department staff in addition also charged violations of 6 NYCRR 326.2(g), with respect to the possession of the pesticide at all three locations.<sup>2</sup> Department staff has made a prima facie showing of respondent's liability for violations of 6 NYCRR 326.2(g). However, I decline on this record to impose a civil penalty on the Horseheads store for a violation of section 326.2(g) with respect to the possession of a restricted use pesticide where the pesticide was promptly returned and for which return shipping documentation was provided to the Department.

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<sup>2</sup> Section 326.2(g) of 6 NYCRR reads, in pertinent part as follows: "Any product whose label limits use to commercial pesticide applicators only may be distributed, sold, purchased, possessed and used only upon issuance of a commercial permit or certification identification card."

## Number of Violations

The ruling and hearing report concludes that respondent is liable for nine separate violations as the result of its offer for sale and possession of nine containers of a restricted use pesticide. Department staff, however, does not seek a per container penalty, but rather seeks a per store penalty.

ECL 71-2907(4) provides that "[w]hen a violation consists of the sale, or the offering or exposing for sale or exchange of any prohibited article or substance, the sale of each one of several packages shall constitute a separate violation [emphasis added]." By its express terms, this provision imposes a per container penalty only where the actual sale of a prohibited article or substance has occurred. Here, Department staff acknowledges in their memorandum supporting the motion that "it is unknown if Respondent sold quantities of the restricted-use pesticide" (Department Staff Memorandum Supporting Motion for Order Without Hearing, at 4).

Department staff's memorandum also states that the requested penalty of \$30,000 was derived, not by considering the number of pesticide containers involved, but by assessing the statutory maximum of \$10,000 for each of the three store locations where violations were found. The alleged violations were identified during three inspections, conducted on April 14 and 27, and May 5, 2006, at three different store locations. On the basis of the violations identified during these inspections, Department staff requested a penalty of \$30,000 by assessing the "\$10,000 maximum [multiplied by] three (3) locations" (*id.*). Therefore, on the record before me and in consideration of the foregoing, I decline to hold respondent liable for each container of a restricted use pesticide that respondent offered for sale or possessed.<sup>3</sup>

## Penalty

I conclude that the penalty requested by Department staff and recommended by the ALJ for the Utica and Plattsburgh stores is appropriate and justified under the circumstances presented here. Respondent has been the subject of three orders

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<sup>3</sup> Because Department staff did not request a per container penalty and did not allege the actual sale of a restricted use pesticide, I do not reach the question whether, under the circumstances, a registered "restricted use" pesticide is a "prohibited article or substance" under ECL 71-2907(4).

on consent with the Department over the past five years involving violations of article 33 of the ECL and its implementing regulations. Violations addressed under these orders on consent include the offer for sale of unregistered and restricted use pesticides without a commercial permit. These orders on consent document respondent's poor compliance history and demonstrate the existence of a predicate offense. Therefore, in accordance with ECL 71-2907(1), each violation of article 33 alleged by Department staff is a "subsequent offense" for which respondent is liable for a maximum statutory penalty of \$10,000.

Respondent's prior violations indicate that a significant penalty is necessary to deter respondent from further unlawful acts. This result is also appropriate given that the violations were found at the Utica and Plattsburgh stores over the course of two weeks, indicating a continuing pattern of noncompliance. Therefore, I conclude the record is sufficient to justify a penalty of \$10,000 for the Utica store and a penalty of \$10,000 for the Plattsburgh store requested by Department staff and recommended by the ALJ.

**NOW, THEREFORE,** having considered this matter, it is **ORDERED** that:

I. Department staff's motion for order without hearing pursuant to 6 NYCRR 622.12 is granted in part.

II. Respondent Tractor Supply Company violated ECL 33-0901(1) and 33-1301(5), and 6 NYCRR 326.2(g) and 326.3(a).

III. Respondent Tractor Supply Company is assessed a civil penalty of twenty thousand dollars (\$20,000) for the violations set forth in paragraph II above at the Utica and Plattsburgh stores. Payment of this penalty shall be by cashier's check, certified check or money order drawn to the order of the "New York State Department of Environmental Conservation" and mailed (by certified mail, return receipt requested or by overnight delivery) or hand delivered to: Judy Drabicki, Regional Director, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.

IV. All communications from respondent Tractor Supply Company to Department staff concerning this order shall be made to Judy Drabicki, Regional Director, New York State Department of Environmental Conservation, Region 6, 317 Washington Street, Watertown, New York 13601.

V. The provisions, terms, and conditions of this order shall bind respondent Tractor Supply Company, its successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

/s/

By: \_\_\_\_\_  
Alexander B. Grannis  
Commissioner

Dated: August 8, 2008  
Albany, New York



TO: Tractor Supply Company (Via Certified Mail)  
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Joel A. Cherry, Esq. (Via Certified Mail)  
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NYS DEC, Region 6  
317 Washington Street  
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<sup>4</sup> This matter was handled by James T. King, Esq., Mr. Young's predecessor as regional attorney. Because Mr. King has left the Department, this order and the accompanying ALJ's Ruling and Report on Motion for Order Without Hearing are being forwarded to Mr. Young.

In the Matter of the Alleged  
Violations of Article 33 of  
the Environmental Conservation  
Law (ECL) and Part 326 of  
Title 6 of the Codes, Rules  
and Regulations of the State  
of New York

ALJ's Ruling and  
Report on Motion for  
Order Without Hearing

-by-

DEC #R6-20060515-35

**TRACTOR SUPPLY COMPANY,**

Respondent.

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### **Summary**

This unopposed motion for order without hearing (the administrative equivalent of summary judgment) was brought by the Staff of the Department of Environmental Conservation (DEC staff) against Tractor Supply Company (respondent) by service of the motion and supporting papers. DEC staff alleged the respondent possessed and offered for sale containers of TalstarOne Multi-Insectide, a registered pesticide, at three of its stores in New York: Utica, Plattsburgh and Horseheads. Based on the evidence submitted with its motion, DEC staff has established it is entitled to summary judgment for four violations at the Utica store, four at the Plattsburgh store, and one in Horseheads. The ALJ recommends that the Commissioner impose a civil penalty of \$30,000 based, in part, on the respondent's poor compliance history as evidenced by the three past orders on consent between DEC staff and this respondent for similar violations.

### **Proceedings**

By papers dated December 4, 2006, DEC Staff initiated this administrative enforcement proceeding against the respondent. A notice of motion for order without hearing, motion and supporting papers were served upon Joel Cherry, Esq., General Counsel, as well as Tractor Supply Company (c/o C.T. Corporation System) on December 11, 2006 and December 8, 2006, respectively. Accompanying the motion were: a memorandum in support of the motion by then DEC regional attorney James T. King; affidavits of DEC staff members John M. Gracey, Brian A. Primeau, and Christopher Wainwright; copies of three previous orders on

consent executed between this respondent and DEC; an affidavit of service; as well as a copy of the label for the pesticide TalstarOne Multi-Insecticide.

No response has been received from the respondent, and the time to respond has expired.

### **Findings of Fact**

1. TalstarOne Multi-Insecticide, EPA registration 279-3206, is a restricted use pesticide in New York State. This product was registered on December 23, 2005 and re-registered on July 26, 2006.
2. On April 14, 2006, DEC staff member John M. Gracey conducted an inspection of Tractor Supply Company, 790 Horatio Street, Utica, NY. During this inspection he identified one product, TalstarOne Multi-Insecticide, EPA Registration Number 279-3206, as a restricted use pesticide. Tractor Supply Company does not have a commercial permit to sell restricted use pesticides at this location. On April 20, 2006, he returned and removed four one-quart containers of TalstarOne Multi-Insecticide from the sales area of the store and placed them under quarantine in the lay-a-away area of the facility's storage room. He then prepared a notice of violation regarding this incident dated April 24, 2006 and sent it to the store by certified mail where it was received the following day.
3. On April 27, 2006, DEC staff member Brian A. Primeau conducted an inspection of Tractor Supply Company, 29 Della Drive, Plattsburgh, NY. During this inspection he identified one product, TalstarOne Multi-Insecticide, EPA Registration Number 279-3206, as a restricted use pesticide. Tractor Supply Company does not have a commercial permit to sell restricted use pesticides at this location. Four one-quart containers of Talstar One Multi-Insecticide were removed from the sales area of the store and placed under quarantine in the receiving area at the rear of the store.
4. On May 5, 2006, DEC staff member Christopher Wainwright conducted an inspection of Tractor Supply Company, 1020 Center Street, Horseheads, Chemung County, NY. This inspection was done as the result of a complaint by a Mr. Hank Woodarski that the store was selling TalstarOne, EPA Registration Number 279-3206, without the proper permit. During his inspection, Mr. Wainwright did not find TalstarOne on the sales shelf, but spoke to the store

manager who stated that one container had been received, but was going to be returned to the distributor. Mr. Wainwright quarantined the container under a conditional release, allowing it to be shipped to the distributor with proof of such shipment provided to DEC staff.

5. On May 8, 2006, DEC staff member Primeau received a one page fax from Joel A. Cherry, VP and General Counsel, Tractor Supply Co., 200 Powell Place, Brentwood, TN. This fax stated that Tractor Supply Company had effected the immediate removal (and return to the vendor) of TalstarOne from all of its New York Stores. Mr. Cherry was served with a copy of the instant motion and supporting papers on December 11, 2006.

## **Discussion**

### ***Liability***

In this unopposed motion for order without hearing, DEC Staff alleges that the respondent committed violations of both the ECL and implementing regulations at its three stores in Utica, Horseheads and Plattsburgh. A motion for order without hearing is governed by the same principles that govern summary judgment pursuant to CPLR 3212. Section 622.12(d) provides that a contested motion for an order without hearing will be granted if, upon all the papers and proof filed, the cause of action or defense is established sufficiently to warrant granting summary judgment under the New York Civil Practice Law and Rules (CPLR) in favor of any party. The Commissioner has provided extensive direction concerning the showing the parties must make in their respective motions and replies, and how the parties' filings will be evaluated. Here, where Department staff's motion is unopposed, staff must make a prima facie showing to establish its factual allegations and must demonstrate that these facts entitle staff to prevail as a matter of law (see *Matter of Amanda J. Bice*, VISTA Index No. CO7-20050322-2, Order, April 19, 2006 with attached Hearing Report on Motion for Order without Hearing, April 11, 2006, at 6; *Matter of Richard Locaparra, d/b/a L&L Scrap Metals*, DEC Case No. 3-20000407-39, Final Decision and Order, June 16, 2003 at 4).

Mr. Gracey's affidavit states that during his April 20, 2006 inspection of the Utica store, he removed four one-quart containers of TalstarOne Multi-Insecticide from the sales area of the store and placed them under quarantine in the lay-away area of the facility's storage room. Tractor Supply Company does not

have a commercial permit to sell restricted use pesticides at this location. The affidavit is un rebutted and establishes a prima facie case that the respondent offered the pesticide for sale in violation of ECL 33-0901(1) and 33-1301(5), and 6 NYCRR 326.2. Because each container constitutes a separate violation, four violations occurred at the Utica store.

In the Plattsburgh store, during his April 27, 2006, inspection DEC Staff member Brian A. Primeau removed four one-quart containers of TalstarOne Multi-Insecticide from the sales area of the store and placed them under quarantine in the receiving area at the rear of the store. Tractor Supply Company does not have a commercial permit to sell restricted use pesticides at this location. Mr. Primeau's un rebutted affidavit is sufficient to establish a prima facie case and demonstrate that the respondent offered the pesticide for sale in violation of ECL 33-0901(1) and 33-1301(5), and 6 NYCRR 326.2. Since each container constitutes a separate violation, four violations occurred at the Plattsburgh store.

In the Horseheads store, during his May 5, 2006, inspection DEC Staff member Christopher Wainwright did not find TalstarOne on the sales shelf. Mr. Wainwright conducted his inspection based upon a complaint of a pesticide applicator, Mr. Woodarski, who stated that he had seen the pesticide being offered for sale at this store. During his inspection, Mr. Wainwright spoke to the store manager who stated that one container had been received, but was going to be returned to the distributor. This container was then quarantined and returned to the distributor. In this case, DEC Staff has not shown by this evidence that it has established a prima facie case that the pesticide was offered for sale. No affidavit from Mr. Woodarski is included with staff's papers and the only indication that the pesticide was offered for sale is hearsay. Accordingly, DEC Staff has not established a prima facie case that a violation occurred of ECL 33-0901, ECL 33-1301 or 6 NYCRR 326.2(a). DEC Staff has shown that the store did possess the pesticide and did not possess a commercial permit. This is a violation of 6 NYCRR 326.2(g).

### ***Civil Penalty Amount***

In its motion, DEC staff seeks a civil penalty of thirty thousand dollars (\$30,000). This amount is based upon a calculation of \$10,000 per store. DEC staff acknowledges that since it is unknown if or how much TalstarOne was sold, it is not possible to determine the economic benefit associated with these violations. However, DEC staff argues for a significant penalty due to the gravity of the violations. As DEC staff notes, one

purpose of civil penalties is to deter the respondent and others from future violations.

DEC staff also argues that a significant penalty is warranted in this case due to the compliance history of the respondent. On October 3, 2002, the respondent entered into a consent order with DEC admitting to offering for sale unregistered pesticides at its Lockport and Dunkirk stores and paying a \$15,000 civil penalty. On April 2, 2003, the respondent entered into a second consent order with DEC staff admitting to offering for sale unregistered pesticides and restricted use pesticides without a commercial permit at its store in Sherill, Oneida County. A civil penalty of \$6,000 was called for with \$2,000 suspended upon proof of returning the unregistered and restricted pesticides to the manufacturer. On August 22, 2005, the respondent entered into a third consent order, this time involving pesticide violations at its Arcade, Sherill and Warsaw stores. These violations resulted in a \$50,000 civil penalty, \$10,000 of which was suspended.

In this case, the respondent offered eight containers of TalstarOne Multi-Insecticide for sale, four in Utica and four in Plattsburgh. The ninth violation involves the Horseheads store. In this instance, DEC staff did not prove that Talstar was offered for sale, only that it was in the store's possession.

The maximum civil penalty in this case is ninety thousand dollars (\$90,000), ten thousand dollars (\$10,000) per violation (ECL 71-2907(1)). The Department's civil penalty policy states that a "history of violations subsequent to environmental enforcement actions is usually evidence that the violator has not been deterred by the previous enforcement response.... [T]he penalties on subsequent enforcement actions should be more severe." In this case, given the past compliance history of this respondent in the area of unauthorized pesticide possession and sales, DEC Staff is more than justified in seeking a civil penalty of \$30,000. In fact, if DEC Staff had not limited its demand in its motion for order without hearing, I would recommend a penalty substantially higher than the one sought.

### **Conclusion**

No material issue of fact exists and, therefore, no hearing is required. DEC Staff has established nine violations and is entitled to a judgment as a matter of law and the relief requested.

**Recommendation**

I recommend that the Commissioner issue an Order finding the respondent, Tractor Supply Company liable for the nine violations described above, and impose a civil penalty of thirty thousand dollars (\$30,000).

/s/

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P. Nicholas Garlick  
Administrative Law Judge

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