

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law (ECL) of the State of New York and Parts 320-329 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**ORDER**

DEC Case No.  
R1-20150116-172

-by-

**MARK TUMOLO d/b/a  
BONSAI BOY OF NEW YORK,**

Respondent.

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This administrative enforcement proceeding addresses allegations by staff of the New York State Department of Environmental Conservation (Department or DEC) that Mark Tumolo d/b/a Bonsai Boy of New York (respondent) violated ECL article 33 and accompanying regulations at 6 NYCRR parts 325 and 326 at its facility at 1091 Montauk Highway, East Patchogue, New York (facility). Department staff, in its complaint dated March 28, 2016, listed fifteen causes of actions, which set forth the following allegations:

- First Cause of Action: Respondent violated ECL 33-0903(1) and 33-1301(7) and 6 NYCRR 326.7(a), by purchasing and possessing a restricted use pesticide, Talstar P Professional Insecticide, without a purchase permit or private applicator certification;
- Second Cause of Action: Respondent violated ECL 33-1205(2)(b) and 6 NYCRR 325.25(d), by failing to maintain a record of the purchase and use of a restricted use pesticide, Talstar P Professional Insecticide;
- Third Cause of Action: Respondent violated 6 NYCRR 325.2(c), by failing to utilize an approved anti-siphon device to fill equipment containing pesticides;
- Fourth Cause of Action: Respondent violated ECL 33-1301(1)(b) by storing a pesticide (Decathlon 20% WP Greenhouse and Nursery Insecticide) in an unlabeled backpack sprayer;
- Fifth Cause of Action: Respondent violated ECL 33-1301(1)(b), by storing a pesticide in a container, other than the registrant's or the manufacturer's unbroken immediate container, with no label affixed to the container;
- Sixth Cause of Action: Respondent violated 6 NYCRR 325.2(b) by failing to adhere to a pesticide's label and labeling directions by applying the pesticide, Decathlon 20% WP

Greenhouse and Nursery Insecticide, at a rate four times greater than the label's recommended application rate;

- Seventh Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to adhere to a pesticide's label and labeling directions by applying a pesticide, Ortho Home Defense Max Perimeter & Indoor Insect Killer, on an agricultural establishment in contravention of label directions which stated "For residential indoor and outdoor use only;"
- Eighth Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to post warning signs notifying employees of the establishment of pesticide applications at the facility;
- Ninth Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to post specific information in a central location about the pesticides applied at the facility for thirty days following the expiration of the restricted entry interval;
- Tenth Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to post, in a central location, a pesticide safety poster and emergency medical care information;
- Eleventh Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to provide employee workers with pesticide safety training;
- Twelfth Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to provide employee handlers with pesticide safety training;
- Thirteenth Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to provide all the required decontamination supplies for pesticide handlers for thirty days following the expiration of the restricted entry interval;
- Fourteenth Cause of Action: Respondent violated 6 NYCRR 325.2(b), by failing to assure the employee handler read the pesticide label or was informed of the safety requirements before applying the pesticide Decathlon 20% WP Greenhouse and Nursery Insecticide; and
- Fifteenth Cause of Action: Respondent violated ECL 33-0701 and 33-1301(1)(a) and 6 NYCRR 326.14(a), by causing or allowing the sale of an unregistered pesticide, Dyna-Gro Pure Neem Oil.

See Complaint, Exhibit 2 at ¶¶ 24-69; see also Exhibits 14 and 15.)

Administrative Law Judge (ALJ) Michael S. Caruso of the Department's Office of Hearings and Mediation Services was assigned to this matter. ALJ Caruso prepared the attached hearing report, which I adopt as my decision in this matter, subject to my comments below.

As set forth in the ALJ's hearing report, respondent failed to file an answer to the complaint served by Department staff in this matter and failed to appear at a pre-hearing conference scheduled for May 18, 2016 (see Hearing Report at 8-9 [Finding of Fact No. 36]). A hearing was convened on October 19, 2016 but no one appeared on behalf of respondent (see Hearing Report at 2). At the hearing, Department staff moved to withdraw its eighth cause of action alleging that respondent failed to post warning signs notifying employees of the establishment of pesticide applications at the facility in violation of 6 NYCRR 325.2[b]). The ALJ granted staff's motion (see Hearing Report at 9, 12).

As a consequence of respondents' failure to answer or appear in this matter, the ALJ recommends that Department staff's motion for a default judgment be granted (see Hearing Report at 16). Upon review of staff's testimony and evidence submitted in support of its motion for default judgment, the ALJ held that staff provided proof of the facts sufficient to support the other fourteen (14) causes of action asserted in the complaint, as required (see Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3). I agree with the ALJ's holding that Department staff has submitted sufficient proof to support a default judgment with respect to those fourteen causes of action in the complaint, and I concur that staff is entitled to a judgment on default pursuant to 6 NYCRR 622.15 as recommended by the ALJ.

Furthermore, at the hearing, Department staff presented (other than on the withdrawn eighth cause of action) a prima facie case on the merits on the remaining fourteen causes of action noted above, and proved its case on those causes of action by a preponderance of the evidence (see Hearing Report at 10-14). Accordingly, staff is entitled to a judgment based on record evidence on staff's first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action in its complaint.

With respect to penalty, ECL 71-2907(1) provides that any person who violates article 33 of the ECL (Pesticides) or any regulations promulgated pursuant thereto shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for a first violation and not to exceed ten thousand dollars (\$10,000) for a subsequent offense. Department staff seeks a penalty of fourteen thousand dollars (\$14,000) based on fourteen violations, and the ALJ recommends that I impose a civil penalty in that amount (see Hearing Report at 14 and 17). A civil penalty of fourteen thousand dollars (\$14,000) is supported and appropriate.

I direct that respondent submit the civil penalty to the Department within thirty (30) days of the service of this order on respondent, as requested by staff in the proposed order and recommended by the ALJ.

Department staff has requested that my order in this matter enjoin "respondent from any further actions causing said violations to continue" (Complaint, Exhibit 2, Wherefore clause ¶ II). Respondent is required to comply with all applicable pesticide regulations and laws, and further language to that effect in this order is not needed.

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

- I. Department staff's motion for a default judgment pursuant to 6 NYCRR 622.15 is granted on staff's first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action in the complaint. By failing to answer or appear in this proceeding, respondent Mark Tumolo d/b/a Bonsai Boy of New York waived his right to be heard at a hearing.
- II. Moreover, based upon record evidence, respondent Mark Tumolo d/b/a Bonsai Boy of New York is adjudged to have violated:
  - A. ECL 33-0903(1) and 33-1301(7) and 6 NYCRR 326.7(a), by purchasing and possessing a restricted use pesticide, Talstar P Professional Insecticide, without a purchase permit or private applicator certification;
  - B. ECL 33-1205(2)(b) and 6 NYCRR 325.25(d), by failing to maintain a record of the purchase and use of a restricted use pesticide, Talstar P Professional Insecticide;
  - C. 6 NYCRR 325.2(c), by failing to utilize an approved anti-siphon device to fill equipment containing pesticides;
  - D. ECL 33-1301(1)(b), by storing a pesticide (Decathlon 20% WP Greenhouse and Nursery Insecticide) in an unlabeled backpack sprayer;
  - E. ECL 33-1301(1)(b), by storing a pesticide in a container, other than the registrant's or the manufacturer's unbroken immediate container, with no label affixed to the container;
  - F. 6 NYCRR 325.2(b), by failing to adhere to a pesticide's label and labeling directions by applying the pesticide, Decathlon 20% WP Greenhouse and Nursery Insecticide, at a rate four times greater than the label's recommended application rate at the facility;
  - G. 6 NYCRR 325.2(b), by failing to adhere to a pesticide's label and labeling directions by improperly applying on an agricultural establishment a pesticide, Ortho Home Defense Max Perimeter & Indoor Insect Killer, designated for residential indoor and outdoor use only;
  - H. 6 NYCRR 325.2(b), by failing to post specific information in a central location about the pesticides applied at the facility for thirty days following the expiration of the restricted entry interval;
  - I. 6 NYCRR 325.2(b), by failing to post, in a central location, a pesticide safety poster and emergency medical care information;

- J. 6 NYCRR 325.2(b), by failing to provide employee workers with pesticide safety training;
  - K. 6 NYCRR 325.2(b), by failing to provide employee handlers with pesticide safety training;
  - L. 6 NYCRR 325.2(b), by failing to provide all the required decontamination supplies for pesticide handlers for thirty days following the expiration of the restricted entry interval for pesticides applied at the facility;
  - M. 6 NYCRR 325.2(b), by failing to assure the employee handler read the pesticide label or was informed of the safety requirements before applying the pesticide Decathlon 20% WP Greenhouse and Nursery Insecticide at the facility; and
  - N. ECL 33-0701 and 33-1301(1)(a) and 6 NYCRR 326.14(a), by causing or allowing the sale of an unregistered pesticide, Dyna-Gro Pure Neem Oil.
- III. Within thirty (30) days of the service of this order upon respondent Mark Tumolo d/b/a Bonsai Boy of New York, respondent shall pay a civil penalty in the amount of fourteen thousand dollars (\$14,000) by certified check, cashier's check or money order made payable to the New York State Department of Environmental Conservation. The penalty payment shall be sent to the following address:
- Office of General Counsel, Region 1  
NYS Department of Environmental Conservation  
SUNY at Stony Brook  
50 Circle Road  
Stony Brook, New York 11790-3409  
Attn: Kari E. Wilkinson, Esq.
- IV. Any questions or other correspondence regarding this order shall also be addressed to Kari E. Wilkinson, Esq. at the address referenced in paragraph III of this order.

- V. The provisions, terms and conditions of this order shall bind respondent Mark Tumolo d/b/a Bonsai Boy of New York, and his agents, successors and assigns, in any and all capacities.

For the New York State Department  
of Environmental Conservation

By: \_\_\_\_\_/s/\_\_\_\_\_  
Basil Seggos  
Commissioner

Dated: Albany, New York  
November 8, 2017

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DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Alleged Violations of Article 33 of the Environmental Conservation Law (ECL) of the State of New York and Parts 320-329 of Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR),

**HEARING REPORT**

DEC Case No.  
R1-20150116-172

-by-

**MARK TUMOLO D/B/A  
BONSAI BOY OF NEW YORK,**

Respondent.

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Procedural History

Staff of the New York State Department of Environmental Conservation (Department) served respondent Mark Tumolo d/b/a Bonsai Boy of New York (respondent) with a notice of pre-hearing conference, hearing and complaint, dated March 28, 2016, alleging violations of ECL article 33 and its implementing regulations, 6 NYCRR parts 325 and 326, at respondent's greenhouses located at 1091 Montauk Highway, East Patchogue, New York for:

1. purchasing and possessing a restricted use pesticide without a purchase permit or private applicator certification;
2. failing to maintain a record of the purchase and use of a restricted use pesticide;
3. failing to utilize an approved anti-siphon device to fill equipment containing pesticides;
4. storing a pesticide in an unlabeled backpack sprayer;
5. storing a pesticide in a container other than the registrant's or the manufacturer's unbroken immediate container with no label affixed to the container;
6. failing to adhere to a pesticide's label and labeling directions by applying the pesticide at a rate four times greater than the label recommended application rate;
7. failing to adhere to a pesticide's label and labeling directions by applying a pesticide designated for residential indoor and outdoor use only on an agricultural establishment;
8. failing to post warning signs notifying employees of the establishment of pesticide applications in the greenhouses;
9. failing to post specific information in a central location about pesticides applied in the greenhouses for thirty days following the expiration of the restricted entry interval;
10. failing to post, in a central location, a pesticide safety poster and emergency medical care information;
11. failing to provide employee workers with pesticide safety training;

12. failing to provide employee handlers with pesticide safety training;
13. failing to provide all the required decontamination supplies for handlers for thirty days following the expiration of the restricted entry interval;
14. failing to assure the employee handler read the pesticide label or was informed of the safety requirements before applying a pesticide; and
15. causing or allowing the sale of an unregistered pesticide.

The complaint seeks an order of the Commissioner (1) finding respondent in violation of ECL 33-0903(1), 33-1301(7) and 6 NYCRR 326.7(a) (first cause of action), ECL 33-1205(2)(b) and 6 NYCRR 325.25(d) (second cause of action), 6 NYCRR 325.2(c) (third cause of action), ECL 33-1301(1)(b) (fourth and fifth causes of action), 6 NYCRR 325.2(b) (sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action),<sup>1</sup> and ECL 33-0701, 33-1301(1)(a) and 6 NYCRR 326.14(a) (fifteenth cause of action); (2) assessing a civil penalty in the amount of twenty-nine thousand dollars (\$29,000); (3) enjoining respondent from any further actions causing said violations to continue; and (4) granting such other relief as the Commissioner may deem just, proper, and appropriate.

Department staff served the notice of pre-hearing conference, hearing and complaint on respondent by certified mail return receipt requested on March 28, 2016 (see Staff Exhibit 1). Respondent received service on March 30, 2016 (id.). Respondent failed to file an answer to the complaint, and failed to appear at a pre-hearing conference scheduled for May 18, 2016, as directed in the notice of pre-hearing conference, hearing and complaint (see Staff Exhibit 2).

On July 29, 2016, Department staff filed and served a statement of readiness requesting the matter be scheduled for hearing (Hearing Record). The Office of Hearings and Mediation Services served a notice of hearing on Department staff and respondent, dated August 9, 2016, by first class mail advising the parties that the hearing in this matter would be held on October 19, 2016 at 10:00 a.m. in a hearing room at the Department's Region 1 Offices, 50 Circle Drive, Stony Brook, New York. By letter dated October 11, 2016, Chief Administrative Law Judge James T. McClymonds advised the parties that the matter had been assigned to me. At 10:45 a.m. on October 19, 2016, the adjudicatory hearing was convened before me in Room 116 at the Department's Region 1 Offices. Department staff was represented by Kari E. Wilkinson, Esq., Assistant Regional Attorney. No one appeared on behalf of respondent.

Department staff indicated that it was prepared to proceed with the hearing, proffering two staff witnesses. Noting for the record that respondent had failed to answer the complaint, failed to appear for the pre-hearing conference and failed to appear for the adjudicatory hearing, Department staff moved orally for a default judgment pursuant to 6 NYCRR 622.15 and also sought judgment on the merits. I reserved on the default motion, allowing the record to remain open for Department staff to submit the documentation required by 6 NYCRR 622.15(b).

Department staff called two witnesses, Sarah Whelen, Pesticide Control Specialist 1, and Christopher Spies, Pesticide Control Specialist 2. In all, seventeen (17) exhibits were received in evidence.

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<sup>1</sup> The eighth, ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action also allege respondent failed to comply with the requirements of 40 CFR part 170, Worker Protection Standard.

Applicable Statutory and Regulatory Provisions

ECL 33-0701 Scope of Registration.

“Every pesticide which is used, distributed, sold, or offered for sale within this state or delivered for transportation or transported in intrastate commerce or between points within this state through any point outside this state shall be registered every two years with the office of the commissioner; provided that any pesticide imported into this state, which is registered under the provisions of any federal act providing for the registration of pesticides may, in the discretion of the commissioner, be exempted from registration under this article, when sold or distributed in the unbroken immediate container in which it was originally shipped.”

ECL 33-0903 Purchase permits.

“1. A purchase permit or certification identification card is required for the purchase, possession or use of a restricted use pesticide.”

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ECL 33-1205 Recordkeeping and reporting

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“2.b. All private applicators shall maintain, at a minimum, records of the restricted pesticides purchased, crop treated by such, method of application, and date of application or applications. This information 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.”

\* \* \*

ECL 33-1301 Unlawful acts

“It shall be unlawful:

“1. For any person to distribute, sell, offer for sale or use within this state or deliver for transportation or transport in intrastate commerce or between points within this state through any point outside this state any of the following:

“a. Any pesticide which has not been registered pursuant to the provisions of this article or any pesticide if any of the claims made for it or any of the directions for its use differ in substance from the representations made in connection with its registration, or if the composition of a pesticide differs from its composition as represented in connection with its registration; provided that in the discretion of the commissioner a change in the

labeling or formula of a pesticide may be made within a registration period without requiring reregistration of the product.

“b. Except as specified in regulation authorizing alternative pesticide containers, any pesticide unless it:

(1) is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing

(i) the name and address of the manufacturer, registrant, or person for whom manufactured;

(ii) the name, brand, or trademark under which said article is sold; and

(iii) the net weight or measure of the content; subject, however, to such reasonable variations as the commissioner may permit;

\* \* \*

“7. For any person to purchase or possess, except for the purpose of re-sale, or use any restricted use pesticide without a purchase permit issued by the commissioner or without being a certified applicator.”

\* \* \*

#### 6 NYCRR 325.2. Requirements for the use of pesticides

\* \* \*

“(b) Pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department.

(c) All equipment containing pesticides and drawing water from any water source shall have an effective anti-siphon device to prevent backflow.”

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#### 6 NYCRR 325.25. Records and reports

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“(d) Records and reports. The private applicator shall maintain a record on forms to be provided by the department of the restricted use pesticides purchased, the crop treated by such, their method of application, and the date of their application or applications. This information 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.”

#### 6 NYCRR 326.7. Purchase permits, restrictions

“(a) It shall be unlawful for any person to purchase or possess, except for the purpose of resale pursuant to section 326.3(d) of this Part, or use any restricted pesticide unless said

person shall have applied for and been issued a purchase permit or who shall have purchased the restricted pesticide in accordance with the provisions of section 326.8(e) of this Part.

“(b) Purchase permits may be issued by the commissioner to persons who regularly use and apply pesticides as a significant part of their gainful employment or livelihood as determined by the commissioner. Such persons may include, but not be limited to, Federal, State, county and municipal officers responsible for pest control, registered custom applicators of pesticides, structural pest control operators, farmers, orchardists, nurserymen, arborists, Christmas tree growers, veterinarians, personnel responsible for pest control operation in industrial establishments, golf courses, camps, schools, hospitals, correctional facilities, jails, prisons, parks, highways, railroads and utilities.”

#### 6 NYCRR 326.14. General requirements for pesticide product registration

“(a) Every pesticide product which is used, distributed, sold, or offered for sale within this State or delivered for transportation or transported in intrastate commerce or between points within this State through any point outside this State shall first be registered with the commissioner, except a pesticide product in the possession of any carrier while lawfully engaged in transporting a pesticide within the State, if such carrier shall upon request by the department, permit the commissioner or his/her designated agent to copy all records showing the transactions in and movement of the pesticide product.”

\* \* \*

#### Findings of Fact

The following facts are found based upon the preponderance of evidence presented at the hearing, see 6 NYCRR 622.11(c):

1. Respondent Mark Tumolo d/b/a Bonsai Boy of New York (respondent) is the owner of greenhouses located at 1091 Montauk Highway, East Patchogue, NY (facility). See Testimony of Sarah Whelen; Staff Exhibits 2, 4, 7, and 14.
2. Respondent grows bonsai plants at the facility for sale to the public. See Testimony of Sarah Whelen.
3. Department staff inspected respondent’s facility on October 28, 2014 and November 6, 2014 after learning that respondent advertised the sale of Dyna-Gro Neem Oil as an “Organic Pest Control Concentrate” on respondent’s website. Neem oil is not labeled as a pesticide and is not registered as a pesticide with the Department. See Testimony of Sarah Whelen; Staff Exhibits 4, 5 and 6.
4. Department staff spoke with Mark Tumolo and Charles Garcia during the inspection on October 28, 2014. See Testimony of Sarah Whelen; Testimony of Christopher Spies; Staff Exhibit 14.

5. Respondent and Mr. Garcia provided staff with information, requested by staff, regarding the purchase, possession, storage and use of pesticides at the facility. See Testimony of Sarah Whelen; Testimony of Christopher Spies; Staff Exhibit 14.
6. Mr. Garcia is an employee of respondent who mixed, loaded, transferred or applied pesticides at the facility. See Testimony of Sarah Whelen; Testimony of Christopher Spies; Staff Exhibit 14.
7. Respondent stored the pesticide Decathlon 20% WP Greenhouse and Nursery Insecticide (Decathlon 20% WP) (EPS Registration No. 432-1402-59807) in a four-gallon backpack sprayer which was not labeled with the name of the product, the EPA registration number, and the name and address of the manufacturer of the product. See Testimony of Sarah Whelen; Staff Exhibits 7, 8 and 9.
8. Respondent applied Decathlon 20% WP in and around the facility on October 21, 2014. See Testimony of Sarah Whelen; Testimony of Christopher Spies; Staff Exhibit 14.
9. Respondent's employee, Mr. Garcia, applied one tablespoon of Decathlon 20% WP to four gallons of water to control ants in and around the facility. See Testimony of Sarah Whelen.
10. The recommended application rate of Decathlon 20% WP for the control of ants is 36 grams per 100 gallons of water. See Testimony of Sarah Whelen; Staff Exhibit 8.
11. There are 6 grams in a tablespoon. See Testimony of Sarah Whelen; Staff Exhibit 8 at 5.
12. The recommended application rate of Decathlon 20% WP for four gallons of water is 1.44 grams. See Testimony of Sarah Whelen; Staff Exhibit 8.<sup>2</sup>
13. Respondent applied Decathlon 20% WP at a rate more than four times greater than the recommended application rate. See Testimony of Sarah Whelen; Staff Exhibit 8.
14. Respondent's facility did not have an anti-siphon or backflow prevention device installed on the water lines supplying water to garden hoses used to fill equipment containing pesticides with water. See Testimony of Sarah Whelen; Testimony of Christopher Spies; Staff Exhibit 10.
15. Respondent purchased, possessed and used a restricted use pesticide, Talstar P Professional Insecticide (Talstar P) (EPA Registration No. 279-3206) at the facility. See Testimony of Sarah Whelen; Staff Exhibits 7, 11, 14 and 15.
16. Sarah Whelen is a Pesticide Control Specialist 1 in the Department's Region 1 Division of Materials Management, Bureau of Pest Management, whose responsibilities include investigation and inspection of businesses that use pesticides, and the enforcement of the

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<sup>2</sup> 36 grams per 100 gallons of water/100 = .36 grams per gallon of water x 4 = 1.44 grams per 4 gallons of water.

pesticide laws and regulations. Ms. Whelen is authorized to access and inspect the Department's New York State Pesticide Administration Database (NYSPAD). NYSPAD is a database maintained by the Department and contains pesticide registration records, and applicator and business entity records, which records include listings of certified pesticide applicators and businesses permitted to purchase and use restricted use pesticides. See Testimony of Sarah Whelen; Staff Exhibit 3.

17. On or about October 28, 2014 and on October 17, 2016, Ms. Whelen searched the certified pesticide applicator and business entity records contained in NYSPAD for any certification of Mark Tumolo or Charles Garcia as private or commercial applicators of pesticides and any permit issued to Mark Tumolo d/b/a Bonsai Boy of New York to purchase and use a restricted use pesticide. See Testimony of Sarah Whelen.
18. As a result of her search, Ms. Whelen confirmed that Mark Tumolo and Charles Garcia never held a private or commercial applicator certification to purchase, possess and use restricted use pesticides at respondent's facility and respondent never held a permit to purchase restricted use pesticides. See Testimony of Sarah Whelen.
19. The container of Talstar P had been opened and about one-eighth of the container had been used prior to the October 28, 2014 inspection. See Testimony of Sarah Whelen; Staff Exhibits 7 and 14.
20. Respondent did not have any record of the purchase or use of Talstar P. See Testimony of Sarah Whelen.
21. Respondent stored a Malathion containing pesticide product in an unlabeled clear container that was not the manufacturer's container. See Testimony of Sarah Whelen; Staff Exhibit 12.
22. Respondent used Ortho Home Defense Max to treat for ants in and around the facility. See Testimony of Sarah Whelen; Staff Exhibit 12.
23. The label for Ortho Home Defense Max states "For residential indoor and outdoor use only". See Testimony of Sarah Whelen; Staff Exhibit 13.
24. The restricted entry interval for the Decathlon 20% WP applied at the facility on October 21, 2014 is 12 hours. See Testimony of Christopher Spies; Staff Exhibit 8 at 4.
25. The label for Decathlon 20% WP states "Agricultural Use Requirements: Use this product only in accordance with its labeling and with the Worker Protection Standard, 40 CFR part 170." See Staff Exhibit 8 at 4.
26. Respondent did not post specific information at a central location in the facility about the Decathlon 20% WP applied on October 21, 2014 for 30 days after the expiration of the restricted entry interval. See Testimony of Christopher Spies; Staff Exhibit 14.

27. Respondent did not post a pesticide safety poster and emergency medical care information in a central location at the facility about the pesticides applied at the facility. See Testimony of Christopher Spies; Staff Exhibit 14.
28. Respondent did not provide pesticide safety training for employees about the pesticides applied at the facility. See Testimony of Christopher Spies; Staff Exhibit 14.
29. Respondent did not provide pesticide safety training for Mr. Garcia, the pesticide handler, about the pesticides applied at the facility. See Testimony of Christopher Spies; Staff Exhibit 14.
30. Respondent did not provide all of the required decontamination supplies such as soaps, single use towels, and emergency eyewash for handlers for 30 days after the expiration of the restricted entry interval for the Decathlon 20% WP applied on October 21, 2014. See Testimony of Christopher Spies; Staff Exhibit 14.
31. Respondent did not assure that Mr. Garcia, as handler of the pesticide, read the pesticide label or was informed of the safety requirements before applying Decathlon 20% WP and failed to provide Mr. Garcia with access to the product labeling during handling activities. See Testimony of Christopher Spies; Staff Exhibit 14.
32. Christopher Spies is a Pesticide Control Specialist 2 in the Department's Region 1 Division of Materials Management, Bureau of Pest Management, whose responsibilities include investigation and inspection of businesses that use pesticides, inspections for consistency with the federal Worker Protection Standard, outreach to the regulated community, and the enforcement of the pesticide laws and regulations. See Testimony of Christopher Spies; Staff Exhibit 17.
33. Department staff prepared an inspection report during the October 28, 2014 inspection of respondent's facility, which respondent signed. Staff provided a copy of the signed inspection report to respondent on that date. See Testimony of Sarah Whelen; Testimony of Christopher Spies; Staff Exhibit 14.
34. Ms. Whelen sent respondent a notice of violation and order on consent on November 13, 2014, which was received by respondent on November 17, 2014. See Testimony of Sarah Whelen; Staff Exhibit 15.
35. As shown by U.S. Postal Service signed receipt, respondent was served personally, on March 30, 2016, with the notice of pre-hearing conference, hearing and complaint dated March 28, 2016, alleging violations of ECL article 33 and its implementing regulation, 6 NYCRR parts 320-329. See Staff Exhibit 1; see also Hearing Record.
36. Respondent failed to file an answer to the complaint, failed to appear at a pre-hearing conference scheduled for May 18, 2016, as directed in the notice of pre-hearing conference, hearing and complaint, and failed to appear for the adjudicatory hearing

scheduled in the matter on October 19, 2016 as directed in the notice of hearing. See Hearing Record.

### Discussion

A respondent upon whom a complaint has been served must serve an answer within 20 days of receiving a notice of hearing and complaint. See 6 NYCRR 622.4(a). A respondent's failure to file a timely answer "constitutes a default and a waiver of respondent's right to a hearing." 6 NYCRR 622.15(a). In addition, attendance by a respondent at a scheduled pre-hearing conference or hearing is mandatory, "and failure to attend constitutes a default and a waiver of the opportunity for a hearing." 6 NYCRR 622.8(c); see also 6 NYCRR 622.15(a) ("A respondent's ... failure to appear at the hearing or the pre-hearing conference ... constitutes a default and a waiver of respondent's right to a hearing").

Upon a respondent's failure to answer a complaint or failure to appear for a pre-hearing conference or hearing, Department staff may make a motion to an ALJ for a default judgment. Such motion must contain (i) proof of service upon respondent of the notice of hearing and complaint; (ii) proof of respondent's failure to appear or to file a timely answer; and (iii) a proposed order. See 6 NYCRR 622.15(b)(1)-(3).

As the Commissioner has held, "a defaulting respondent is deemed to have admitted the factual allegations of the complaint and all reasonable inferences that flow from them." Matter of Alvin Hunt, d/b/a Our Cleaners, Decision and Order of the Commissioner, July 25, 2006, at 6 (citations omitted). In addition, in support of a motion for a default judgment, staff must "provide proof of the facts sufficient to support the claim." Matter of Queen City Recycle Center, Inc., Decision and Order of the Commissioner, December 12, 2013, at 3.

The record establishes that: (i) Department staff served the notice of hearing and complaint upon respondent; (ii) respondent failed to file an answer to the complaint and failed to appear at a pre-hearing conference scheduled for May 18, 2016, as directed in the notice of pre-hearing conference, hearing and complaint; and (iii) respondent failed to appear for the adjudicatory hearing scheduled in the matter on October 19, 2016, as directed in the notice of hearing. At the October 19, 2016 hearing, Department staff provided proof of facts sufficient to support staff's claims. Department staff provided its proposed order on October 24, 2016 and the record was closed. The Department is entitled to a default judgment in this matter pursuant to the provisions of 6 NYCRR 622.15, subject to my comments below.

At the October 19, 2016 hearing, Department staff moved orally to withdraw staff's eighth cause of action, alleging respondent failed to post warning signs notifying employees of pesticide applications in the greenhouse in violation of 40 CFR 170.120, and to reduce the civil penalty requested in the complaint from twenty-nine thousand dollars (\$29,000) to fourteen thousand dollars (\$14,000). Department staff's motion to withdraw the eighth cause of action and to reduce the civil penalty is granted, as there is no prejudice to respondent in withdrawing violations alleged or reducing the penalty requested.

### First Cause of Action

Department staff alleges that respondent purchased and possessed a restricted use pesticide, Talstar P, without a purchase permit or private applicator certification. Respondent possessed a container of Talstar P at the time of the inspection (Finding of Fact No. 15). ECL 33-0903(1) requires a purchase permit or certification identification card to purchase, possess or use a restricted use pesticide. ECL 33-1301(7) prohibits any person from purchasing, possessing or using any restricted use pesticide without a purchase permit or without being a certified applicator. Similarly, 6 NYCRR 326.7 prohibits any person from purchasing, possessing or using any restricted use pesticide without a purchase permit.

Department staff has proven by a preponderance of the evidence that respondent possessed Talstar P without a purchase permit or without being a certified applicator (Findings of Fact Nos. 15, 17 and 18) in violation of ECL 33-0903(1) and 33-1301(7) and 6 NYCRR 326.7(a).

### Second Cause of Action

Department staff alleges that respondent failed to maintain records regarding the purchase and use of Talstar P. The container of Talstar P had been opened and about one eighth of the contents had been used (Finding of Fact No. 19). Respondent had no record of respondent's purchase of Talstar P or its use (Finding of Fact No. 20).

ECL 33-1205(2)(b) and 6 NYCRR 325.25(d) require all private applicators to maintain records of purchase and use of restricted use pesticides. A private application is any application of any pesticide for the purposes of producing an agricultural commodity on property owned by the applicator or applicator's employer (see ECL 33-0101[38]). Similarly, 6 NYCRR 325.1(ba) defines private application of pesticides as the application of a restricted use pesticide for the purposes of producing an agricultural commodity on property owned by the applicator or applicator's employer. Respondent applied pesticides for the purposes of producing bonsai plants, which are by definition an agricultural commodity (see 6 NYCRR 325.1[e]). Accordingly, I conclude that respondent is a private applicator.

Department staff has proven by a preponderance of the evidence that respondent failed to maintain records of the purchase and use of Talstar P in violation of ECL 33-1205(2)(b) and 6 NYCRR 325.25(d).

### Third Cause of Action

Department staff alleges that respondent does not have or utilize an approved anti-siphon or backflow prevention device installed at the facility to prevent pesticides from being drawn back into water lines. Section 325.2(c) of 6 NYCRR requires all equipment containing pesticides and drawing water from any water source to have an effective anti-siphon device to prevent backflow. Part 325, section 325.2 entitled "Requirements for the use of pesticides" is silent as to whom 6 NYCRR 325.2(a), (b) and (c) applies. Subdivision 325.2(d) applies to

certified applicators, certified technicians or commercial pesticide apprentices. As there is no applicability section to part 325 and no restrictive language to subdivisions 325.2(a), (b) and (c), I conclude those subdivisions apply to any “person” as that term is defined in 6 NYCRR 325.1(a). This is consistent with the standard rule of statutory construction, that whenever a general and a particular provision are provided in the same statute, the general does not overrule the particular, but applies only where the particular provision is inapplicable (see People v Lawrence, 64 NY2d 200, 204 [1984]; Statutes § 238). I also note 6 NYCRR 325.2 used to be entitled “Restrictions on the use of pesticides by certified applicators” as evidence of the broader intent of the regulation since its amendment in March 1993.

Staff’s proof demonstrates by a preponderance of the evidence that respondent used a garden hose to fill pesticide sprayers and that neither the garden hoses or water lines in respondent’s building utilized an anti-siphon or backflow prevention device to fill equipment containing pesticides (Finding of Fact No. 14) in violation of 6 NYCRR 325.2(c).

#### Fourth Cause of Action

Department staff alleges respondent stored Decathlon 20% WP in an unlabeled four-gallon backpack sprayer in violation of ECL 33-1301(1)(b). ECL 33-1301(1)(b)(1) makes it unlawful for “any person to distribute, sell, offer for sale or use within this state:

“b. Except as specified in regulation authorizing alternative pesticide containers, any pesticide unless it:

(1) is in the registrant's or the manufacturer's unbroken immediate container, and there is affixed to such container, and to the outside container or wrapper of the retail package, if there be one, through which the required information on the immediate container cannot be clearly read, a label bearing

- (i) the name and address of the manufacturer, registrant, or person for whom manufactured;
- (ii) the name, brand, or trademark under which said article is sold; and
- (iii) the net weight or measure of the content; subject, however, to such reasonable variations as the commissioner may permit[.]”

Pursuant to 6 NYCRR 325.1(ax), pesticide use is defined to include the “transport, storage or handling” of a pesticide “after the manufacturer’s seal is broken.”

Department staff’s proof demonstrates that the four-gallon backpack sprayer contained Decathlon 20% WP and that the sprayer was unlabeled (Finding of Fact No. 7). Staff has demonstrated by a preponderance of the evidence that respondent stored (used) Decathlon 20% WP in an unlabeled container in violation of ECL 33-1301(1)(b).

#### Fifth Cause of Action

Department staff alleges respondent stored Malathion in an unlabeled clear container that was not the manufacturer’s container in violation of ECL 33-1301(1)(b). Department staff’s proof demonstrates that respondent stored Malathion in an unlabeled container (Finding of Fact

No. 21). Staff has demonstrated by a preponderance of the evidence that respondent stored (used) Malathion in an unlabeled container in violation of ECL 33-1301(1)(b).

#### Sixth Cause of Action

Department staff alleges that respondent failed to adhere to the label and labeling directions for Decathlon 20% WP when respondent applied the pesticide in and around the greenhouses. Department regulations provide, “Pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department” (6 NYCRR 325.2[b]).

During staff’s October 28, 2014 inspection, staff learned from respondent’s handler, Mr. Garcia, that one tablespoon of Decathlon 20% WP was mixed with four gallons of water. Department staff has proven by a preponderance of the evidence that respondent applied Decathlon 20% WP at rate four times greater than the rate recommended on the label (Findings of Fact Nos. 8-13) in violation of 6 NYCRR 325.2(b).

#### Seventh Cause of Action

Department staff alleges respondent failed to adhere to the label and labeling directions for Ortho Home Defense Max when respondent applied the pesticide in and around the greenhouses. Department staff has proven by a preponderance of the evidence that respondent applied Ortho Home Defense Max at respondent’s agricultural establishment and that Ortho Home Defense Max is only to be used for residential indoor and outdoor use (Findings of Fact Nos. 22 and 23). As such, Department staff has proven that respondent violated 6 NYCRR 325.2(b).

#### Eighth Cause of Action

As discussed above, Department staff withdrew its eighth cause of action alleging respondent failed to post warning signs notifying employees of pesticide applications in the greenhouse in violation of 40 CFR 170.120.

#### Ninth, Tenth, Eleventh, Twelfth, Thirteenth and Fourteenth Causes of Action

Department staff alleges, in staff’s ninth, tenth, eleventh, twelfth, thirteenth and fourteenth causes of action, that respondent violated the Worker Protection Standard, 40 CFR part 170. The Worker Protection Standard requires workplace practices intended to reduce and eliminate employee exposure to pesticides. Part 170 sets forth standards for workers (Subpart B - applicable when any pesticide product is used on an agricultural establishment in the production of agricultural plants) and pesticide handlers (Subpart C - applicable when any pesticide is handled for use on an agricultural establishment). As a greenhouse, growing bonsai plants, respondent’s facility is by definition an agricultural establishment producing agricultural plants (see 40 CFR 170.3 definitions of “agricultural establishment” and “agricultural plant”). In addition, respondent is an “agricultural employer” and “handler employer” and respondent’s employee, Mr. Garcia is a “handler” of pesticides as those terms are defined in 40 CFR 170.3.

As an agricultural employer, respondent is responsible for compliance with 40 CFR 170.102 through 170.160 (Subpart B - Standard for Workers). As a handler employer, respondent is responsible for compliance with 40 CFR 170.202 through 170.260 (Subpart C - Standard for Pesticide Handlers).

For agricultural use requirements, the product label for Decathlon 20% WP directs that the pesticide only be used “in accordance with its labeling and with the Worker Protection Standard, 40 CFR part 170.” (See Finding of Fact No. 25.) The labeling, therefore, requires compliance with the Worker Protection Standard. The Department’s regulations require that “[p]esticides are to be used only in accordance with label and labeling directions . . . .” (See 6 NYCRR 325.2[b].) Accordingly, failure to adhere to the requirements of the Worker Protection Standard constitutes a failure to use Decathlon 20% WP in accordance with label and labeling directions and is a violation of 6 NYCRR 325.2(b).

Department staff has proven by a preponderance of the evidence that respondent violated the following requirements of the Worker Protection Standard, all in violation of 6 NYCRR 325.2(b):

- 40 CFR 170.122 for failing to post specific information in a central location about pesticides applied in the greenhouses, and specifically the pesticide Decathlon 20% WP applied in the greenhouse on October 21, 2014, for thirty days following the expiration of the restricted entry interval (ninth cause of action) (Finding of Fact No. 26);<sup>3</sup>
- 40 CFR 170.135 for failing to post, in a central location, a pesticide safety poster and emergency medical care information for the pesticides applied in the greenhouses (tenth cause of action) (Finding of Fact No. 27);
- 40 CFR 170.130 for failing to provide employee workers with pesticide safety training for the pesticides applied in the greenhouses (eleventh cause of action) (Finding of Fact No. 28);
- 40 CFR 170.230 for failing to provide employee handlers with pesticide safety training for the pesticides applied in the greenhouses (twelfth cause of action) (Finding of Fact No. 29);
- 40 CFR 170.250 for failing to provide all the required decontamination supplies for handlers for thirty days following the expiration of the restricted entry interval for the pesticides applied in the greenhouses, specifically Decathlon 20% WP applied by the employee handler on October 21, 2014 (thirteenth cause of action) (Finding of Fact No. 30); and
- 40 CFR 170.232 for failing to assure the employee handler read the pesticide label or was informed of the safety requirements before applying the pesticide Decathlon 20% WP (fourteenth cause of action) (Finding of Fact No. 31).

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<sup>3</sup> The information to be posted shall include the location and description of the treated area; the product name, EPA registration number, and active ingredient of the pesticide; the time and date the pesticide is to be applied; and the restricted entry interval for the pesticide. 40 CFR 170.122(c).

### Fifteenth Cause of Action

Department staff alleges respondent caused or allowed the sale of an unregistered pesticide in violation of ECL 33-0701 and 33-1301(a) and 6 NYCRR 326.14(a). ECL 33-0701 and 6 NYCRR 326.14(a) require every pesticide used, distributed, sold or offered for sale within the state to be registered with the commissioner. ECL 33-1301(a) makes it unlawful for any person to distribute, sell, offer for sale or use within the state any pesticide that has not been registered. Department staff's testimony and evidence demonstrate that respondent offered Dyna-Gro Neem Oil for sale as an organic pest control concentrate, and that Dyna-Gro Neem Oil is not labeled as a pesticide and is not registered as a pesticide with the Department (Finding of Fact No. 3). I conclude that Department staff has proven by a preponderance of the evidence that respondent violated ECL 33-0701 and 33-1301(a) and 6 NYCRR 326.14(a) by offering Dyna-Gro Neem Oil for sale as a pesticide.

### Penalty Requested

As noted above, Department staff moved orally at the October 19, 2016 hearing to reduce the penalty requested in the complaint from twenty-nine thousand dollars (\$29,000) to fourteen thousand dollars (\$14,000), and staff's motion is granted. Department staff's proposed order seeks a civil penalty of fourteen thousand dollars (\$14,000).

The requested civil penalty is consistent with the Department's DEE-12 Pesticide Enforcement Policy (March 26, 1993) as well as ECL article 71. ECL 71-2907(1) provides a penalty not to exceed five thousand dollars (\$5,000) for a first violation of ECL article 33 or any rule, regulation or order issued thereunder, and a penalty not to exceed ten thousand dollars (\$10,000) for a subsequent violation. Department staff applied the statutory maximum of five thousand dollars for a first violation to each of the fourteen alleged violations to determine a maximum penalty of seventy thousand dollars (\$70,000). Staff applied the minimum recommended penalties from the penalty schedules of DEE-12 and assessed a one thousand dollar (\$1,000) penalty to each of the fourteen alleged violations to determine the requested penalty of fourteen thousand dollars (\$14,000).

I conclude that staff's application of a one thousand dollar (\$1,000) penalty to each of the violations and the resulting fourteen thousand dollar (\$14,000) penalty on the violations proven are supported and appropriate.

### Conclusions of Law

1. By purchasing and possessing a restricted use pesticide, Talstar P, without a purchase permit or private applicator certification, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated ECL 33-0903(1) and 33-1301(7) and 6 NYCRR 326.7(a);
2. By failing to maintain a record of the purchase and use of a restricted use pesticide, Talstar P, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated ECL 33-1205(2)(b) and 6 NYCRR 325.25(d);

3. By failing to utilize an approved anti-siphon device to fill equipment containing pesticides, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(c);
4. By storing a pesticide, Decathlon 20% WP, in an unlabeled backpack sprayer, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated ECL 33-1301(1)(b);
5. By storing a pesticide, Malathion, in an unlabeled clear container, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated ECL 33-1301(1)(b);
6. By failing to adhere to a pesticide's label and labeling directions by applying the pesticide, Decathlon 20% WP, at a rate four times greater than the label's recommended application rate at the facility, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
7. By failing to adhere to a pesticide's label and labeling directions by applying a pesticide, Ortho Home Defense Max, designated for residential indoor and outdoor use only on an agricultural establishment, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
8. By failing to post specific information in a central location about the pesticide Decathlon 20% WP applied at the facility for thirty days following the expiration of the restricted entry interval, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
9. By failing to post, in a central location, a pesticide safety poster and emergency medical care information for pesticides applied at the facility, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
10. By failing to provide employee workers with pesticide safety training about pesticides applied at the facility, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
11. By failing to provide employee handlers with pesticide safety training for pesticides applied at the facility, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
12. By failing to provide all the required decontamination supplies for handlers for thirty days following the expiration of the restricted entry interval for pesticides applied at the facility, specifically Decathlon 20% WP, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b);
13. By failing to assure the employee handler read the pesticide label or was informed of the safety requirements before applying the pesticide Decathlon 20% WP, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated 6 NYCRR 325.2(b); and

14. By causing or allowing the sale of an unregistered pesticide, Dyna-Gro Pure Neem Oil, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated ECL 33-0701 and 33-1301(1)(a) and 6 NYCRR 326.14(a).

### Recommendation

Based upon the foregoing, I recommend that the Commissioner issue an order:

1. Granting Department staff's motion for default, holding respondent Mark Tumolo d/b/a Bonsai Boy of New York in default on the first, second, third, fourth, fifth, sixth, seventh, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth causes of action, pursuant to the provisions of 6 NYCRR 622.15;
2. Holding that, based upon the proof adduced at the adjudicatory hearing, respondent Mark Tumolo d/b/a Bonsai Boy of New York violated:
  - a. ECL 33-0903(1) and 33-1301(7) and 6 NYCRR 326.7(a) by purchasing and possessing a restricted use pesticide, Talstar P, without a purchase permit or private applicator certification;
  - b. ECL 33-1205(2)(b) and 6 NYCRR 325.25(d) by failing to maintain a record of the purchase and use of a restricted use pesticide, Talstar P;
  - c. 6 NYCRR 325.2(c) by failing to utilize an approved anti-siphon device to fill equipment containing pesticides;
  - d. ECL 33-1301(1)(b) by storing the pesticide, Decathlon 20% WP, in an unlabeled backpack sprayer;
  - e. ECL 33-1301(1)(b) by storing the pesticide, Malathion, in an unlabeled clear container;
  - f. 6 NYCRR 325.2(b) by failing to adhere to a pesticide's label and labeling directions by applying the pesticide, Decathlon 20% WP, at a rate four times greater than the label's recommended application rate at the facility;
  - g. 6 NYCRR 325.2(b) by failing to adhere to a pesticide's label and labeling directions by applying a pesticide, Ortho Home Defense Max, designated for residential indoor and outdoor use only, on an agricultural establishment;
  - h. 6 NYCRR 325.2(b) by failing to post specific information in a central location about the pesticides, and specifically Decathlon 20% WP, applied at the facility for thirty days following the expiration of the restricted entry interval;
  - i. 6 NYCRR 325.2(b) by failing to post, in a central location, a pesticide safety poster and emergency medical care information about the pesticides applied at the facility;
  - j. 6 NYCRR 325.2(b) by failing to provide employee workers with pesticide safety training about the pesticides applied at the facility;
  - k. 6 NYCRR 325.2(b) by failing to provide employee handlers with pesticide safety training about the pesticides applied at the facility;
  - l. 6 NYCRR 325.2(b) by failing to provide all the required decontamination supplies for handlers for thirty days following the expiration of the restricted entry interval for pesticides applied at the facility, and specifically Decathlon 20% WP;

- m. 6 NYCRR 325.2(b) by failing to assure the employee handler read the pesticide label or was informed of the safety requirements before applying the pesticide Decathlon 20% WP at the facility; and
  - n. ECL 33-0701 and 33-1301(1)(a) and 6 NYCRR 326.14(a) by causing or allowing the sale of an unregistered pesticide, Dyna-Gro Pure Neem Oil.
- 3. Directing respondent Mark Tumolo d/b/a Bonsai Boy of New York to pay a civil penalty in the amount of fourteen thousand dollars (\$14,000); and
  - 4. Directing such other and further relief as he may deem just and appropriate.

\_\_\_\_\_/s/\_\_\_\_\_  
Michael S. Caruso  
Administrative Law Judge

Dated: Albany, New York  
November 21, 2016

## EXHIBIT CHART

*Matter of Mark Tumolo d/b/a Bonsai Boy of New York*  
1091 Montauk Highway, East Patchogue, New York – DEC Case No. R1-20150116-172  
October 19, 2016 – Region 1 Office  
Edirol File No. 030329074225

| Exhibit No. | Description   | ID'd? | Rec'd ? | Offered By       | Notes |
|-------------|---|-------|---------|------------------|-------|
| 1           | Affidavit of Service of Carole Gajewski sworn to on October 19, 2016 with USPS Return Receipt signed March 30, 2016 | ✓     | ✓       | Department Staff |       |
| 2           | Notice of Pre-Hearing Conference, Hearing, and Complaint, dated March 28, 2016.                                     | ✓     | ✓       | Department Staff |       |
| 3           | Resume of Sarah Whelen, Pesticide Control Specialist 1.   | ✓     | ✓       | Department Staff |       |
| 4           | Copy of Bonsai Boy of New York website page listing “Fertilizers & Chemicals” for sale, dated October 27, 2014.     | ✓     | ✓       | Department Staff |       |
| 5           | Dyna-Gro, Pure Neem Oil, product information.   | ✓     | ✓       | Department Staff |       |
| 6           | Photos (2) of Dyna-Grow Pure Neem Oil container, taken November 6, 2014.  | ✓     | ✓       | Department Staff |       |

| Exhibit No. | Description   | ID'd? | Rec'd ? | Offered By       | Notes |
|-------------|---|-------|---------|------------------|-------|
| 7           | Photo of receipt for purchase of Decathlon 20% WP and photo of Ultra-Pure Oil, Decathlon 20% WP, and Talstar P with damaged labels, taken October 28, 2014. | ✓     | ✓       | Department Staff |       |
| 8           | Decathlon 20 WP 8oz Booklet, registered pesticide product label, from the New York State Pesticide Administration Database.                                 | ✓     | ✓       | Department Staff |       |
| 9           | Photos (2) of unlabeled backpack sprayer, taken October 28, 2014.   | ✓     | ✓       | Department Staff |       |
| 10          | Photo of water main at Bonsai Boy of New York, taken October 28, 2014.  | ✓     | ✓       | Department Staff |       |
| 11          | Talstar P, registered pesticide product label, from the New York State Pesticide Administration Database.   | ✓     | ✓       | Department Staff |       |
| 12          | Photos (2) of front and back of containers of Ortho Home Defense Max, Conserve SC, and unlabeled malathion bottles, taken October 28, 2014.                 | ✓     | ✓       | Department Staff |       |
| 13          | Ortho Home Defense Max Perimeter & Indoor Insect Killer, registered pesticide product label, from the New York State Pesticide Administration Database.     | ✓     | ✓       | Department Staff |       |

| Exhibit No. | Description  | ID'd? | Rec'd<br>? | Offered By       | Notes |
|-------------|--|-------|------------|------------------|-------|
| 14          | Inspection Report for October 28, 2014 Inspection of Bonsai Boy of New York, | ✓     | ✓          | Department Staff |       |
| 15          | Notice of Violation dated November 13, 2014 with Order on Consent.           | ✓     | ✓          | Department Staff |       |
| 16          | Penalty Calculation.   | ✓     | ✓          | Department Staff |       |
| 17          | Resume of Christopher Spies, Pesticide Control Specialist 2.                 | ✓     | ✓          | Department Staff |       |