

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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In the Matter of the Violations of the Environmental Conservation Law  
("ECL") Article 33 and Title 6, Part 325 of the Official  
Compilation of Codes, Rules and Regulations of the State of  
New York ("6 NYCRR")

ORDER ON CONSENT

File No. R4-2008-0709-106

- by -

The Davey Tree Expert Company  
5 Northway Lane No.  
Latham, NY 12110

Respondent

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WHEREAS:

1. The New York State Department of Environmental Conservation (DEC) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to §3-301 of the Environmental Conservation Law (ECL), among other authorities. In particular, DEC is and has been responsible for the regulation of the use, and for the enforcement of the provisions of law governing the use of pesticides in the State, pursuant to ECL Article 33 and the rules and regulations promulgated thereunder at Title 6 of the Official Compilation of Codes, Rules and Regulations of the State of New York (6 NYCRR), Part 325.

2. Respondent, The Davey Tree Expert Company, is a residential and commercial tree and lawn care service.

3. Respondent is a person as defined in ECL §33-0101 (33).

4. On June 25, 2008, Department staff conducted an inspection of the facility.

**First Violation**

5. At the time of the June 25, 2008 inspection, Department staff reviewed Respondent's daily use records and discovered that the records did not include the methods of application.

6. Regulations at ECL 33-1205 provide that:

1. All commercial applicators shall maintain pesticide use records for each pesticide application containing the following:

- a. EPS registration number;
- b. product name;
- c. quantity of each pesticide used;
- d. date applied;
- e. Location of application by address (including five-digit zip code).

Such records shall be maintained for a period of not less than three years. All commercial applicators shall file, at least annually, a report or reports containing such information with the department on computer diskette or in printed form on or before February first for the prior calendar year. All commercial applicators shall also maintain corresponding records of the dosage rates, methods of application and target organisms for each pesticide application. These records shall be maintained on an annual basis and retained for a period of not less than three years and shall be available for inspection upon request by the department.

7. Respondent violated regulations at ECL 33-1205 by failing to include the methods of application in their daily use records.

### **Second Violation**

8. On June 25, 2008, Department staff observed that the service container on the hydraulic sprayer which had been recently used in an application and still contained a pesticide mixture, was unlabeled.

9. Regulations at ECL 33.1301 provide that 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 or any of the following:

(b) Except as specified in regulation authorizing alternative pesticide containers, any pesticide unless it 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:

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

(2) The name, brand, or trade-mark under which said article is sold; and

(3) The net weight or measure of the content; subject, however, to such reasonable variations as the Commissioner may permit.

10. Respondent violated regulations at ECL 33.1301 by being in possession of a hydraulic sprayer on which the service container, which contained a pesticide mixture, was unlabeled.

### **Third Violation**

11. Regulations at 6 NYCRR Part 325.40 provide that:

This section shall be effective on January 1, 2004. The requirements of this section pertain to any commercial lawn application of a pesticide except for the application of a pesticide to a right-of-way (unless required pursuant to paragraph 325.1 (s)(4).

(i) Pesticide Product Labels. As provided in Environmental Conservation Law Section 33-0905, every certified applicator must, prior to application of a pesticide within or on the premises of a dwelling, supply the occupants therein with a written copy of the information, including any warnings, contained on the label(s) of the pesticide(s) to be applied.

(1) Every certified applicator must, prior to the application of a pesticide within or on the premises of a multiple dwelling, building, or structure other than a dwelling, supply the owner or the owner's agent, with a written copy of the information, including all warnings, contained on the label(s) of the pesticide(s) to be applied. The owner or owner's agent must make available upon request at reasonable times the written copy of the information contained on the label to the occupants or residents of such multiple dwelling, building, or structure.

(2) The certified applicator may exclude from the written copy of the information on the label(s) instructions that do not pertain to the commercial lawn application. If such information is excluded, the applicator or business must note on the label that it is an amended label and the applicator and business must provide the complete label, if requested by the owner or owner's agent.

12. Respondent violated regulations at 6 NYCRR Part 325.40 by failing to provide a homeowner (20 Louise Drive, Latham) with a written copy of the information contained on the pesticide label, prior to the application of pesticides.

### **Fourth Violation**

13. Regulations at 6 NYCRR Part 325.40 provide that:

(h) Visual notification marker posting. Visual notification markers:

(1) must be placed such that the top of the marker is at least twelve inches above the ground; and

(2) must be placed by the pesticide applicator or business making the commercial lawn application prior to the application and remain posted for a period of not less than 24 hours following the application; and

(3) must be placed such that the front of the marker is clearly visible from outside the

treated area; and

(4) must be placed not more than fifty (50) feet apart along the perimeter of the treated area in the event that markers used are between four inches by five inches in size and five inches by five inches in size; or not more than one-hundred (100) feet apart along the perimeter of the treated area in the event that markers used are at least five inches by six inches in size; and

(5) must also be placed at common points of entry adjacent to the treated areas including, but not limited to, driveways and walkways; and

(6) need not be placed at any portion of the perimeter of the treated premises or treated area which is rendered impassible by a fence, wall, hedge or similar device or natural topographic feature; provided, however, every treated premises or treated area must be marked by at least two visual notification markers, except only one visual notification marker is required when an individual tree or shrub is treated which can only be approached from one direction.

14. Respondent violated regulations at 6 NYCRR Part 325.40(h)(2) by placing the visual markers around the application sites after the application had been made rather than before making the application.

#### **Fifth Violation**

15. Regulations at 6 NYCRR Part 325.40 provide that:

(a) Written Contracts. Prior to a commercial lawn application, except a commercial lawn application on property owned, leased or rented by the employer of the pesticide applicator, the pesticide applicator or business providing these services must enter into a written contract with the owner of the property to which the commercial lawn application is to be made or the owner's agent. A written contract must:

a. (1) specify the approximate date or dates of application or applications; if requested by the property owner or owner's agent, the specific date or dates of the application(s) must be provided by the pesticide applicator or business and that date must be stated in the contract. The following statement must be prominently displayed in the contract: "The property owner or owner's agent may request the specific date or dates of the application(s) to be provided and, if so requested, the pesticide applicator or business must inform of the specific dates and include that date or dates in the contract.

(2) state the total number of commercial lawn applications to be provided; and

(3) state the total cost of the commercial lawn application service to be provided; and

(4) include a written copy, in at least 12-point type of:

- (i) a list of pesticides to be applied including brand names and generic names of active ingredients; and
  - (ii) any warnings that appear on the label(s) of pesticide(s) to be applied that are pertinent to the protection of humans, animals or the environment; and,
  - (iii) the name, address, telephone number and pesticide business registration number of the pesticide business providing the commercial lawn application service and the pesticide applicator certification identification card number of the person employed by the pesticide business who will provide or supervise the commercial lawn application service; and
16. Respondent violated regulations at 6 NYCRR Part 325.40(a)(4) (iii) by failing to document, in the written contract observed at the time of the inspection, Respondent's business registration number.

#### **Sixth Violation**

17. At the time of the inspection, Department staff observed two pesticide containers which previously contained the pesticide Merit, being used to store a different pesticide.

18. Regulations at 6 NYCRR Part 325.5 provide that:

(a) No pesticide container shall be sold or used for any purpose which involves the risk of exposure to humans or animals, including but not limited to, the storage of human or animal food or water; nor shall such containers be used for the storage of cooking utensils, dishes or clothing.

(b) No pesticide containers shall be sold or used for any other purpose unless such purpose has been approved by the commissioner in writing and the containers have been properly decontaminated.

19. Respondent violated regulations at 6 NYCRR 325.2 (b) by storing pesticides in a container which had previously contained another pesticide.

#### **Civil Penalty**

20. Regulations at ECL § 71-2901 (1) provide, *inter alia*, that "any person who violates any provisions of Article 33 of that chapter, or any rule, regulation or order issued thereunder, shall be liable for a civil penalty not to exceed \$5,000 for a first violation, and an additional penalty of up to \$10,000 for each subsequent violation."

#### **Waiver of Hearing**

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

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

I. With respect to the aforesaid violations, a civil penalty in the amount of TWO THOUSAND DOLLARS(\$2,000) is hereby assessed against the Respondent. Payment of the civil penalty is due upon the return of a signed and notarized copy of this Order to the Department. The civil penalty shall be paid by certified or bank check made payable to the NYS DEC.

II. The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or for them.

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

IV. Respondent shall indemnify and hold harmless the Department, the State of New York, and his representatives and employees for all claims, suits, actions, damages and costs of every name and description arising out of or resulting from the fulfillment or attempted fulfillment of the provisions hereof by Respondent, his directors, officers, employees, servants, agents, successors or assigns.

V. No change in this Order shall be made or become effective except as set forth by a written order of the Commissioner or the Commissioner's designee.

VI. Respondent shall allow duly authorized representatives of the DEC access to the site without proper notice, at such times as may be desirable or necessary in order for the DEC to inspect and determine the status of Respondent's compliance with this Order, the ECL and regulations promulgated thereunder.

VII. The Schedule of Compliance is incorporated into the Order and is enforceable thereunder.

VIII. All communications except where otherwise specifically directed should be sent to:

For Department:  
Regional Pesticide Specialist  
New York State Department of Environmental Conservation  
Region 4  
1130 N. Westcott Road  
Schenectady, New York 12306

IX. This Order is deemed effective on the date signed by the Department.

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

A. Any legal or equitable rights or claims, actions, proceedings, suits, causes of action or demands whatsoever that the State may have against Respondent for any other

violations of the ECL, rules or regulations promulgated thereunder or permits issued thereunder;

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

C. Whatever right the Department has to bring any action or proceeding against Respondent and/or any of Respondent's employees, servants, agents, successors, and assigns with respect to claims for natural resource damages; and

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

XI. A. Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal to determine whether it was prepared, and whether the work done to generate the data and other information in the submittal was done, in accordance with this Order and applicable state and federal regulations and laws and generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved plans and reports shall be incorporated into and become an enforceable part of this Order.

B. 1. If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within thirty (30) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. The Department reserves its right to take whatever action it deems necessary after the second disapproval of a submittal.

XII. Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violations alleged in this Order.

DATED: \_\_\_\_\_, 2008  
Rotterdam, New York

Alexander B. Grannis  
Commissioner  
New York State Department of  
Environmental Conservation

BY:

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Eugene J. Kelly  
Regional Director  
Region 4



## SCHEDULE OF COMPLIANCE

1. Respondent shall ensure that all contracts comply with regulations at 6 NYCRR Part 325.40 and all notification and postings must comply with the applicable laws, rules and regulations.