

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of General Counsel, Region 4
1130 North Westcott Road, Schenectady, NY 12306-2014
P: (518) 357-2048 | F: (518) 357-2087
www.dec.ny.gov

CERTIFIED - RETURN RECEIPT REQUESTED
7017 1070 0001 0125 9166

January 3, 2019

Scott Morris
The Davey Tree Expert Company
P.O. Box 451
141 Wade Road
Latham, NY 12110

Re: Order on Consent
R4-2018-0920-179

Dear Mr. Morris:

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

This will also acknowledge receipt of \$2,500 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: S. Whelen

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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

ORDER ON CONSENT
R4-2018-0920-179

-by-

The Davey Tree Expert Company
P.O. Box 451
141 Wade Road
Latham, NY 12110

Respondent

WHEREAS:

1. The Department of Environmental Conservation ("Department") has jurisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides, pursuant to ECL Article 33.
2. Respondent, The Davey Tree Expert Company, is a corporation which provides tree, utility, lawn care, and environmental consulting services throughout the United States and Canada with a branch office located at 141 Wade Road, Latham, New York (Albany County).
3. Respondent is a person as defined in ECL 33-0101 (33).
4. On June 22, 2018, Department staff observed Respondent's applicator making a residential pesticide application to 32 Gala Place, Niskayuna, New York ("site").

First Violation

5. ECL 33 – 1301.1(b) provides 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 any of the following:

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 trade-mark 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."*

6. At the time of the June 22, 2018 inspection, Department staff observed that Respondent's employee stored pesticides in a container which lacked a label displaying the manufacturer, registrant, or person for whom manufactured as well as the name, brand, or trademark under which the article is sold, in violation of ECL 33 – 1301.1(b).

Second Violation

7. Regulations at 6 NYCRR 325.2(b) provide that "*Pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department.*"

8. At the time of the June 22, 2018 inspection, Department staff reviewed Respondent's application records and determined that Respondent's employee applied the pesticide Signature Fertilizer with 0.2% Merit (EPA Reg. No. 432-1349-34704) at a rate of 4.8-pounds/1,000-sqft, which exceeds the label allowed rate, in violation of regulations at 6 NYCRR 325.2(b).

Third Violation

9. Regulations at 6 NYCRR 325.25(a) provide that "*All businesses required to register pursuant to section 325.23 of this Part shall keep true and accurate records in a manner specified by the department showing: the kind and quantity of each pesticide used; dosage rates; methods of application; target organisms; and the use, date and place of application for each pesticide used. These records shall be maintained on an annual basis and retained for a minimum of three years and shall be available for inspection upon request by the department.*"

10. At the time of the June 22, 2018 inspection, Department staff observed that Respondent's employee failed to record the place of application and the dosage rate for all applications of the pesticide Drive XLR8 (EPA #7969-272) which were made on that day, in violation of regulations at 6 NYCRR 325.25(a).

11. ECL 33-1301 (8) provides, *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

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

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

I. Civil Penalty

With respect to the aforesaid violations, a civil penalty in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) which shall be payable to the New York State Department of Environmental Conservation by Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department.

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. 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, its directors, officers, employees, servants, agents, successors or assigns.

IV. 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.

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

VI. 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 Respondents 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 Respondent, its agents, its servants, its employees, its successors and its 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 or any other third party, 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.

VII. The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed by the party to be bound, pursuant to Paragraph IV of this Order. No informal oral or written advice, guidance, suggestion or comment by the Department regarding any report, proposal, plan, specification, schedule, comment or statement made or submitted by Respondent shall be construed as relieving Respondent of his obligations to obtain such formal approvals as may be required by this Order.

VIII. Compliance with the terms and conditions of this Order shall be in full civil settlement of the violations cited in this Order.

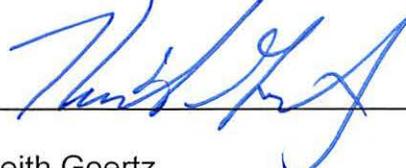
IX. Respondent shall comply with the attached Schedule of Compliance which is incorporated into this Order.

X. Compliance with this Schedule shall not be a defense to subsequent violations.

DATED: January 3 2019
Rotterdam, New York

Basil Seggos,
Commissioner
New York State Department of
Environmental Conservation

By: _____


Keith Goertz
Regional Director
Regional 4

CONSENT BY RESPONDENT

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

The Davey Tree Expert Company

SIGNED: Ma [Signature]

TITLE: Environmental Programs

DATE: 12-19-18

STATE OF Ohio

COUNTY OF Portage) ss.:

On the 19 day of December in the year 2018 before me, the undersigned, a Notary Public in and for the State, personally appeared Michael Venev personally known to me or proved to me on the basis of satisfactory evidence to be the individual whose name is subscribed to the within instrument and acknowledged to me that he executed the same in his capacity, and that by his signature on the instrument, the individual, or the person upon behalf of which the individual acted, executed the instrument.

Mary Ann Schaefer
Notary Public
Qualified in the County of: Portage
My Commission Expires:



SCHEDULE OF COMPLIANCE

1. Within thirty (30) days of the effective date of this Order, Respondent shall submit to the Department, a signed and notarized Compliance Verification Affidavit ("CVA," enclosed) certifying that those actions specified in this document, have been completed, along with any supporting documentation.

This document should be addressed and sent to:

Sarah Whelen
NYS Department of Environmental Conservation
Region 4
Bureau of Pesticides
1130 North Westcott Rd
Schenectady, NY 12306

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

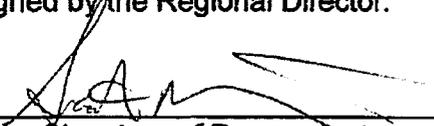
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-by-

The Davey Tree Expert Company
P.O. Box 451
141 Wade Road
Latham, NY 12110

Respondent

I, Scott Morris, being duly sworn, do depose and say that I am the Assistant District Manager of The Davey Tree Expert Company, and that I have complied with the requirements of paragraph No. 1 of the Order on Consent's Schedule of Compliance (R4-2018-0920-179) effective on the date signed by the Regional Director.


Signature of Respondent

Subscribed and sworn to before me
On this 19 day of December, 2018


Notary Public

