

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 8626

March 8, 2019

David Marren
Vice President of Safety and Regulatory Affairs
F.A. Bartlett Tree Expert Company Inc.
7051 Main Street
Manchester, VT 05255

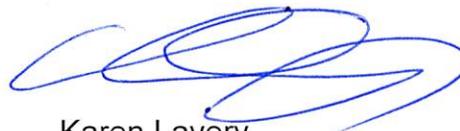
Re: Order on Consent
R4-2018-0309-45

Dear Mr. Marren:

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

This will also acknowledge receipt of \$23,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen Lavery
Assistant Regional Attorney
Region 4

Enclosure

ec: M. Solan
M. Nichols, BECI



Department of
Environmental
Conservation

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),

-by-

ORDER ON CONSENT
R4-2018-0309-45

F.A. Bartlett Tree Expert Company Inc.
7051 Main Street
Manchester, VT 05255

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 F.A. Bartlett Tree Expert Company Inc., owns/operates a worldwide tree and shrub care services and insect management business with an office located at 7051 Main Street, Manchester, Vermont.
3. Respondent is a person as defined in ECL § 33-0101 (33).

Violations

4. Respondent has violated ECL Article 33 and regulations at 6 NYCRR §325, in the form and manner set forth in "*Appendix A*" (attached).

Civil Penalties

5. ECL 71-2907 (1) 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

6. 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 violations identified in this Order, Respondent is hereby assessed a civil penalty of TWENTY THREE THOUSAND DOLLARS (\$23,000) which shall be payable to the New York State Department of Environmental Conservation by money order, or certified check at the time this Order is signed, notarized and returned to the Department.

II. Communications

All communications required herein shall be made to: Department -- DEC Region 4, 1130 North Westcott Road, Schenectady, NY 12306, Attention- Mark Solan, mark.solan@dec.ny.gov. All communications shall include a reference to the Order on Consent Case Number R4-2018-0309-45.

III. Access

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

IV. Summary Abatement

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.

V. Indemnification

Respondent shall indemnify and hold DEC, New York State, and their representatives and employees harmless for all claims, suits, 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.

VI. Review of Submittals

1. All documents which Respondent must submit pursuant to this Order are subject to Department approval.
2. The Department shall review each of the submittals Respondent makes pursuant to this Order 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 generally accepted technical and scientific principles. The Department shall notify Respondent in writing of its approval or disapproval of the submittal. All Department-approved submittals shall be incorporated into and become an enforceable part of this Order; and Respondent shall implement them in accordance with their respective schedules and terms, as approved.

3. a. If the Department disapproves a submittal, it shall so notify Respondent in writing and shall specify the reasons for its disapproval. Within the time frame set forth in that written notification, Respondent shall make a revised submittal to the Department that addresses and resolves all of the Department's stated reasons for disapproving the first submittal.

b. After receipt of the revised submittal, the Department shall notify Respondent in writing of its approval or disapproval. If the revised submission is not approvable as submitted, the Department, at its option, may disapprove it or may approve it on condition that Respondent accepts such modifications as may be specified by Department to make it approvable. If Respondent does not accept such modifications, the revised submission will be disapproved. If the Department disapproves the revised submittal, Respondent shall be in violation of this Order. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order.

4. Respondent shall modify and/or amplify and expand a submittal upon the Department's direction to do so if the Department determines, as a result of reviewing data generated by an activity required under this Order or as a result of reviewing any other data or facts, that further work is necessary. The Department agrees that any modifications it specifies will be reasonable and consistent with customary engineering standards.

VII. Binding Effect

The provisions of this Order shall inure to the benefit of and be binding upon the Department and Respondent and its successors (including successors in title) and assigns.

VIII. Modification

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.

IX. Entire Order

The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein.

X. Effective Date

The effective date of this Order shall be the date it is signed by the Regional Director.

XI. Reservation of Rights

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.

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 officers, directors, agents, servants, employees, successors and assigns;

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

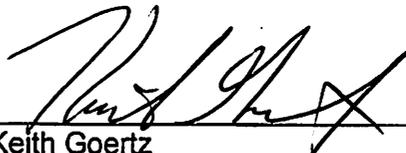
XII. Respondent's right to assert all available defenses to any claims, actions, proceedings, suits, causes of actions or demands made or commenced by the State or the Department provided, however, that Respondent waives all legal or equitable rights claims, actions, proceedings, appeals, suits, causes 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.

XIII. This Order shall not be construed in any respect to inure to the benefit of any third party.

DATED: *March 6*, 2019
Rotterdam, New York

Basil Seggos
Commissioner
New York State Department of
Environmental Conservation

BY:



Keith Goertz
Regional Director
Region 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.

F.A. Bartlett Tree Expert Company, Inc.

SIGNED: David G. Marner

TITLE: Vice President

DATE: 3/5/19



STATE OF SC)

COUNTY OF York) ss.:

On the 5th day of March in the year 2019 before me, the undersigned, a Notary Public in and for the State, personally appeared David G. Marner 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.

Patricia L. Powell

Notary Public

Qualified in the County of:

My Commission Expires: 06/01/2026

Appendix A

1. Department staff reviewed Respondent's 2011 pesticide application records. The respondent made two applications of *Onyx insecticide* (EPA registration number 279-3177) on April 22, 2011 and May 10, 2011 at a Nursery, located in Petersburg NY 12138.

§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.

- *Onyx insecticide* (EPA registration number 279-3177) label states do not use in greenhouses, nurseries. Not for use on plants being grown for sale or other commercial use. Respondent made two applications of *Onyx Insecticide* in violation of 6 NYCRR 325.2(b).
2. Department staff reviewed Respondent's 2011 pesticide application records. The respondent made an application of *Xytect 2F insecticide* (EPA registration number 42750-115-74779) on May 4, 2011 at a Nursery located in Petersburg NY 12138.

§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.

- *Xytect 2 F insecticide* (EPA registration number 42750-115-74779) label states "Not for use in commercial greenhouses, nurseries or on grasses grown for seed or on commercial fruit and nut trees". Respondent applied pesticide in violation of 6 NYCRR 325.2(b).
3. Department staff reviewed Respondent's 2011 pesticide application records. The respondent's records indicate the following applications were made at an address located in Petersburg NY 12138:

April 22, 2011 *Onyx insecticide* (EPA registration number 279-3177)

April 22, 2011 *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220)

May 4, 2011 *Xytect 2F insecticide* (EPA registration number 42750-115-74779)

May 10, 2011 *Onyx insecticide* (EPA registration number 279-3177)

§ECL 33-1205. Recordkeeping and reporting

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

- a. EPA 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.

- Respondent failed to list the four applications noted above on the 2011 annual report submitted to the Department in violation of ECL 33-1205(1).
- 4.** Department staff reviewed Respondent's 2013 pesticide application records. The respondent made six applications of *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220) in New York State.

§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.

- *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220) registration was suspended in New York State on March 31, 2013. Respondents records indicate five applications of an unregistered pesticide *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220) at an address located in Petersburg NY on April 29, May 1, May 10, May 30, and May 31, 2013. Records also indicate one application of an unregistered pesticide *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220) at an address located in Sushan NY on May 10, 2013.

5. Department staff reviewed Respondent's 2013 pesticide application records. The respondent's records indicate the following applications were made at an address, located in Petersburg NY 12138:

May 1, 2013 *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220)

May 1, 2013 *Onyx Pro Insecticide* (EPA Registration number 279-4269)

May 30, 2013 application of *Propiconazole 14.3 Fungicide* (EPA registration number 66222-41-73220)

May 30, 2013 application of *Onyx Pro Insecticide* (EPA Registration number 279-4269)

§ECL 33-1205. Recordkeeping and reporting

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

- a. EPA 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.

- Respondent failed to list the four applications noted above on the 2013 annual report submitted to the Department in violation of ECL 33-1205(1).