

New York State Department of Environmental Conservation

Office of General Counsel, Region 4

1130 North Westcott Road, Schenectady, New York 12306-2014

Phone: (518) 357-2048 • Fax: (518) 357-2087

Website: www.dec.ny.gov



Joe Martens
Commissioner

CERTIFIED - RETURN RECEIPT REQUESTED

7012 3050 0000 4246 3771

October 10, 2013

Arnold W. Proskin
The Proskin Law Firm
423 Loudon Rd
Albany, NY 12211

Re: Order of Consent
H.U.R.B. Landscaping, Inc
R4-2013-0820-108

Dear Mr. Proskin:

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

This will also acknowledge receipt of \$2000 the civil penalty pursuant to Paragraph I.

Sincerely,

Karen S. Lavery
Regional Attorney
Region 4

Enclosure

ec: B. Pendell

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
R4-2013-0820-108

-by-

H.U.R.B. Landscaping, Inc.
4278 Albany Street
Albany, NY 12205

Respondent

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 H.U.R.B. Landscaping, Inc. is a lawn maintenance company, located at 4278 Albany Street, Albany, New York ("facility").
3. Respondent is a person as defined in ECL §33-0101 (33).
4. On August 6, 2013, Respondent applied a pesticide product to a commercial property located at 1111 Troy-Schenectady Road, Latham, New York ("site").

First Violation

5. At the time of the August 6, 2013 application, the applicator was applying Lesco Prosecutor (EPA Reg. # 524-536-10404) and 2, 4-D LV4 (EPA Reg# 1381-102), the label on which requires the applicator to wear long sleeved shirt, long pants, shoes, socks and chemical resistant gloves.

6. 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.*”

7. Respondent violated 6 NYCRR 325.2 (b) by failing to don the label required personal protective equipment when mixing, loading or applying pesticides.

Second Violation

8. Respondent’s lawn care contract contains the following language regarding alternate dates: “*by initializing this box, you are waiving your right to be notified of changes in these dates.*”

9. Regulations at 6 NYCRR 325.40(c) provide that “*alternate date or dates. In the event that the commercial lawn application on the date or dates specified in the contract becomes infeasible, the pesticide applicator or business must provide the owner or owner's agent oral or written notice of any proposed alternate date or dates. The pesticide applicator or business must obtain acceptance from the owner or owner's agent of such alternate date or dates prior to initiating any commercial lawn application.*”

10. Respondent violated regulations at 6 NYCRR 325.40(c) by including language by which the owner/agent waives notification of alternate dates.

Third Violation

11. At the time of the August 6, 2013 application, Respondent’s pesticide applicator did not post visual notification markers around the perimeter of the treated areas prior to the application.

12. Regulations at 6 NYCRR 325.40 (h)(2) provide that visual notification markers “*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.*”

13. Respondent violated regulations at 6 NYCRR 325.40 (h)(2) by failing to post visual notification markers around the perimeter of the treated areas prior to the application.

Fourth Violation

14. At the time of the August 6, 2013 application, Respondent failed to provide Department staff with documentation to establish that applicator Jeff Barber received 40 hours of pesticide use experience under a certified applicator, as well as 8 hours of instruction on the requirements of 6 NYCRR 325.18.

15. Regulations at 6 NYCRR 325.10 (a) provide that “*each individual engaged in the commercial application of pesticides who is not a certified applicator or technician is considered a pesticide apprentice. An apprentice must be at least 16 years of age. An apprentice is required to receive 40 hours of pesticide use experience under the supervision of a certified applicator and receive a minimum of 8 hours of instruction on the requirements in section 325.18 of this Part, before such apprentice can apply general use pesticides under the off-site direct supervision of a certified applicator. It is the responsibility of the certified pesticide applicator or registered business to determine and so state that an apprentice is competent to perform applications.*”

16. Respondent violated regulations at 6 NYCRR 325.10 (a) by failing to provide to the Department, the required apprentice training documents for applicator Jeff Barber.

17. On September 26, 2013, Respondent submitted to the Department, documentation to establish Jeff Barber’s 40 hours of pesticide use experience under a certified applicator, as well as 8 hours of instruction on the requirements of 6 NYCRR 325.18.

Civil Penalty

18. ECL § 71-2901 (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

19. 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. In respect to the aforesaid violation, a civil penalty in the amount of TWO THOUSAND DOLLARS (\$2,000) is hereby assessed against the Respondent and shall be payable to the New York State Department of Environmental Conservation by money order or certified check.

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.

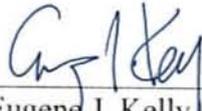
VII. The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed 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.

DATED: 10/10, 2013
Rotterdam, New York

Joseph J. Martens
Commissioner
New York State Department of
Environmental Conservation

BY:



Eugene J. Kelly
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.

H.U.R.B. Landscaping, Inc.

SIGNED: Rachel Boisvert

TITLE: PRESIDENT

DATE: 10-9-13

STATE OF New York

COUNTY OF Albany ss.:

On the 9th day of October in the year 2013 before me, the undersigned, a Notary Public in and for the State, personally appeared Rachel Boisvert 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.

[Signature]

Notary Public

Qualified in the County of: Albany

My Commission Expires: 11/30/13

APPROVED BY STOCKIN
Notary Public
New York
Qualified in Albany County
My Commission Expires 11/30/13

SCHEDULE OF COMPLIANCE

1. Within 30 days of signing this Order, Respondent must submit to the Department, a signed and notarized Compliance Verification Affidavit (“CVA”) (enclosed) certifying that actions necessary to come into compliance with the Department’s regulatory program, and those actions specified in this document, have been completed.

This document should be addressed and sent to:

Brayton Pendell
NYS Department of Environmental Conservation
Bureau of Pesticides Management
1130 North Westcott Rd
Schenectady, NY 12306

COMPLIANCE VERIFICATION AFFIDAVIT

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

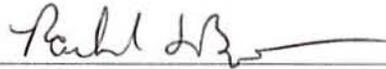
In the Matter of Violations
of the Environmental Conservation Law
("ECL") Article 33 and
Title 6 of the Official
Compilation of Codes, Rules and
Regulations of the State of
New York ("6 NYCRR"),

-by-

H.U.R.B. Landscaping, Inc.
4278 Albany Street
Albany, NY 12205

Respondent

I, Rachel Boisvert, being duly sworn, do depose and say that I am the president of H.U.R.B. Landscaping, Inc., and that I have complied with the requirements of paragraph No 1 of the Order on Consent's Schedule of Compliance (R4-2013-0820-108) effective on the date signed by the Regional Director.



Signature of Respondent

Subscribed and sworn to before me
On this 9th day of October 2013



Notary Public

ARNOLD W. FROSKIN
Notary Public New York
Qualified in Albany County
My Commission Expires 11/30/13