

**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](http://www.dec.ny.gov)



Joe Martens  
Commissioner

CERTIFIED - RETURN RECEIPT REQUESTED

7012 3050 0000 4246 2682

February 7, 2014

Jeff Vining  
Senior Counsel  
Lowe's Home Centers, LLC  
P.O. Box 1000 (Mail Code NB6LG)  
Mooresville, NC 28115

Re: Order of Consent  
R4-2013-0927-118

Dear Mr. Vining:

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

This will also acknowledge receipt of \$1000 the civil penalty pursuant to Paragraph I.

Sincerely,



Karen S. Lavery  
Assistant Regional Attorney  
Region 4

Enclosure

ec: B. Pendell

STATE OF NEW YORK  
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

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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**  
R4-2013-0927-118

-by-

Lowe's Home Centers, LLC  
790 Loudon Road  
Latham, New York 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 '33-301 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, Lowe's Home Centers, LLC, owns/operates a retail store located at 790 Loudon Road, Latham, New York ("facility").
3. Respondent is a person as defined in ECL '33-0101 (33).
4. On August 20, 2013, Department staff conducted a routine Marketplace Inspection at the facility.
5. At the time of the inspection, Department staff observed for sale, three damaged containers of pesticide products in the lawn and landscaping section of the store. Specifically, (1) 32 oz. container of Round Up Weed and Grass Killer Concentrate (EPA Reg. # 71995-29) with a broken seal under the cap causing product residue to be visible on the outside of the container; (1) 32 oz. container of Bayer 2 in 1 Moss and Algae Killer (EPA Reg. # 67702-12-72155) with a damaged "on/off" switch, causing product residue to saturate the label and be visible on the outside of the container; (1) 32 oz. container of Bayer Vegetable and Garden Insect Spray (EPA Reg. # 72155-39), with a damaged "on/off" switch causing product residue to be visible on the outside of the container.

6. At the time of the inspection, Department staff observed for sale, six damaged containers of pesticides products in the garden/nursery section of the store. Specifically, (2) 43.92 lb. bags of Scotts Turf Builder Winterguard Plus 2 Weed Control Granules (EPA Reg. # 538-270), both bags with tears allowing granules to be visible on the floor near the display bin; (1) 43.89 lb. bag of Scotts Turf Builder 1 Plus 2 Weed Control Granules (EPA Reg. #538-270), with a tear on the bag which was taped however granules were still spilling out into the display bin due to adhesion loss of tape; (2) 18.37 lb. bags of Scotts Moss Control Granules (EPA Reg. # 538-223) both with tears near the corners of each bag; (1) 32 oz. container of Bug B Gone Max Ready to Spray (EPA Reg. #239-2685), leaking near the “neck” of the bottle causing residue to saturate the label and be visible on the outside of the container.

7. 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; or*

*(2) meets the requirements of subparagraph one of this paragraph except that the container has been accidentally damaged during handling prior to sale and the damage has been repaired by such person in accordance with his or her own specific "minor repair program" approved by the United States environmental protection agency pursuant to its October ninth, two thousand nine pesticide container repair interim policy. A copy of the approved program shall be forwarded to the department within thirty days of approval and shall be kept at the person's place of business and be available for department review upon request.*

*\* NB Effective until March 1, 2014”*

8. Respondent violated ECL 33-1301.1(b) by offering for sale, (9) damaged containers of general use pesticides.

### Civil Penalty

9. 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

10. 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 ONE THOUSAND DOLLARS (\$1,000) 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.

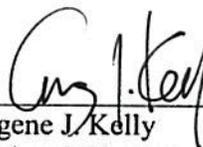
VII. The provisions of this Order constitute the complete and entire Order issued to the Respondent concerning resolution of the violations identified herein. No term, condition, understanding or agreement purporting to modify or vary any term hereof shall be binding unless made in writing and subscribed 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: 2/6, 2014  
Rotterdam, New York

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

BY:

  
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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.

Lowe's Home Centers, LLC *[Signature]*

SIGNED: *[Signature]*

TITLE: VPSO REGION 18

DATE: 1-13-14

STATE OF MA )

COUNTY OF worcester ) ss.:

On the 13<sup>th</sup> day of January in the year 2014 before me, the undersigned, a Notary Public in and for the State, personally appeared Jeffery Starnes 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.

Sanhita Bhattacharya  
Notary Public  
Qualified in the County of: worcester  
My Commission Expires:



*[Handwritten mark]*

## SCHEDULE OF COMPLIANCE

1. Within 120 days of the effective date of this Order, Respondent shall submit to the Environmental Protection Agency (“EPA”), a proposal for a “minor repair program” pursuant to EPA’s October 9, 2009 Pesticide Container Repair Interim Policy. A copy must also be submitted to the Department at the same time.
2. Within 120 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 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