

**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  
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CERTIFIED - RETURN RECEIPT REQUESTED  
7017 1070 0001 0125 8633

October 12, 2018

Sean Rivage  
Rivage Landscaping, LLC  
31 Roosevelt Boulevard  
Cohoes, NY 12047

Re: Order on Consent  
R4-2018-0914-174

Dear Mr. Rivage:

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

This will also acknowledge receipt of \$11,000 the civil penalty pursuant to Paragraph I.

Sincerely,



Stephen Repsher  
Assistant Regional Attorney  
Region 4

Enclosure

cc: 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**  
R4-2018-0914-174

-by-

Rivage Landscaping, LLC  
31 Roosevelt Boulevard  
Cohoes, NY 12047,

Respondent.

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**WHEREAS:**

**JURISDICTION**

1. The New York State Department of Environmental Conservation (Department) is the State agency with jurisdiction over the environmental law and policy of the State pursuant to §33-0301 of the Environmental Conservation Law (“ECL”), among other authorities. The Department 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, Rivage Landscaping, LLC, is a domestic limited liability company engaged in the commercial pest control business in the State of New York.
3. Respondent is a person as defined in ECL § 33-0101(33).

**VIOLATIONS**

**Restricted Use Violation**

4. On June 28, 2018, Department staff conducted a routine compliance inspection of Respondent’s facility and records.
5. As a result of the June 28, 2018 inspection, Respondent informed Department staff that it had purchased an unspecified quantity of a restricted use pesticide, *The Andersons*

*Turf Products Fertilizer with 0.2% Merit Insecticide* (EPA Reg. No. 432-1349-9198) (“*Merit*”) from A.M. Leonard, Inc., a supplier based in Ohio.

6. On August 1, 2018, Department staff spoke with staff at A.M. Leonard to request sales records demonstrating all dates and amounts of *Merit* purchased by Respondent.

7. On August 9, 2018, Department staff received the sales records forwarded by A.M. Leonard and determined that on or about May 10, 2018, Respondent purchased one hundred sixty (160) fifty-pound bags of *Merit*; and that on or about March 6, 2017, Respondent purchased two hundred forty (240) fifty-pound bags of *Merit*.

8. At all relevant times, Respondent did not possess a purchase permit for *Merit*, and was not a certified applicator.

9. ECL § 33-1301(7) states that it shall be unlawful “[f]or any person to purchase or possess, except for the purpose of re-sale, or use any restricted use pesticide without a purchase permit issued by the commissioner or without being a certified applicator.”

10. Respondent’s 2017 and 2018 purchases of a restricted use pesticide, without a purchase permit, and without being a certified applicator, constitute two distinct violations of ECL § 33-1301(7).

#### Uncertified Applicator Violation

11. On August 28, 2018, Department staff conducted a further compliance inspection upon observing an employee of Respondent in a truck owned by Respondent at residential premises to which pesticide appeared to have been applied.

12. During the August 28, 2018 inspection, Department staff confirmed that an employee of Respondent, who did not possess a pesticide applicator certification, applied a pesticide, *Tenacity* (EPA Reg. No. 100-1267) to the subject premises without certification, and without working under the direct supervision of a certified applicator.

13. ECL § 33-1301(8) states that it is unlawful “[f]or any person to engage in application of pesticides without a pesticide applicator certificate registration issued by the commissioner, except while working under the direct supervision of a certified applicator.”

14. The application of *Tenacity* by Respondent’s employee without a pesticide applicator certificate and without direct supervision from a certified applicator violates ECL § 33-1301(8).

#### Pesticide Container Violation

15. During the August 28, 2018 inspection, Department staff observed that the one

(1)-gallon container used by Respondent to apply *Tenacity* displayed a label that was torn and illegible.

16. During the August 28, 2018 inspection, Department staff further observed that Respondent used two (2) twelve (12)-gallon tanks containing a pesticide mix of *Tenacity* to which no labeling information was affixed.

17. ECL § 33-1301(1)(b) requires pesticides to be used in their original registrant's or manufacturer's container, affixed with a label on the outside of container or wrapper that may be clearly read and 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.

18. Respondent's use of one container with a torn and illegible container, and of two containers to which no required label information was affixed violates ECL § 33-1301(1)(b).

#### Pesticide Label Violation

19. During the June 28, 2018 inspection, Department staff observed that on June 11, 2018, Respondent failed to provide to occupants of premises where pesticide was to be applied with a copy of the information contained on the label of the pesticide to be applied.

20. ECL § 33-0905(5)(a) requires that "[e]very certified applicator shall, prior to the application of a pesticide within or on the premises of a dwelling, supply the occupants therein with a copy of the information, including any warnings, contained on the label of the pesticide to be applied. Such information shall be supplied in either a written, digital or electronic format . . . . "

21. Respondent's failure to provide the occupants of the premises to which pesticides were applied on June 11, 2018 violates ECL § 33-0905(5)(a).

#### Pesticide Usage Violation

22. Following the June 28, 2018 inspection, Respondent delivered to Department staff the daily use records for June 11, 2018, which were not in Respondent's possession at the time of inspection.

23. The product label for *Merit* specifies that it is to be applied at the rate of 3.5 to 4.5 pounds per 1,000 square feet.

24. Upon review of Respondent's daily use records for June 11, 2018, Department staff observed that on that date Respondent applied *Merit* to twelve (12) properties at the rate of 5 pounds per 1,000 square feet.

25. During the August 28, 2018 inspection, Department staff observed that Respondent wore shorts and a short-sleeved shirt during the application of *Tenacity*. The product label for *Tenacity* requires applicators to wear personal protective equipment ("PPE") consisting of long sleeves and pants.

26. During the August 28, 2018 inspection, Department staff further observed that Respondent refilled empty containers of *Tenacity* with additional pesticide. The product label for *Tenacity* prohibits the container from being reused or refilled.

27. During the August 28, 2018 inspection, Department staff determined that Respondent applied *Tenacity* at the rate of 1 oz. per gallon of water for post-emergent treatment. The product label for *Tenacity* specifies that it is to be applied at the rate of 4 to 8 oz. per acre in at least 30 gallons of water for post emergent treatment (i.e., 0.133 to 0.2667 oz. per gallon).

28. Regulation 6 NYCRR § 325.2(b) states that "[p]esticides are to be used only in accordance with label and labeling directions or as modified or expanded by the department."

29. Respondent's applications of *Merit* in excess of the dosage rate specified on the product label on June 28, 2018 violates 6 NYCRR § 325.2(b).

30. Respondent's reuse of empty *Tenacity* containers, exceedance of the specified application rate, and failure to wear proper (PPE) in the application of *Tenacity* on August 28, 2018, all in contravention of product label requirements, is in further violation of 6 NYCRR § 325.2(b).

#### Written Contract Violations

31. During the June 28, 2018 inspection, Department staff observed that Respondent failed to include in its written commercial lawn application contracts any warnings that appear on the labels of pesticides that were applied on June 11, 2018.

32. Regulation 6 NYCRR § 325.40(a)(4)(ii) requires a pesticide applicator to enter into a written commercial lawn application contract with the owner of the property to which pesticide is to be applied, which is written in at least 12-point font, and which contains certain elements of information including, "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."

33. Respondent's failure to include in its written contracts any product label(s) warnings of the pesticide(s) to be applied on June 11, 2018 violates 6 NYCRR § 325.40(a)(4)(ii).

34. During the August 28, 2018 inspection, Department staff observed that Respondent placed two (2) notification markers on the front lawn of the premises along the curb which were not clearly visible from outside the treated area, and that no markers were placed at common points of entry adjacent to the treated area, along walkways leading to the front or side door.

35. Regulation 6 NYCRR §325.40(h) requires, in relevant part, that visual notification markers:

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

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

36. Respondent's failure to post visual notification markers that were clearly visible from outside the treated area and at common points of entry adjacent to the treated areas violates 6 NYCRR § 325.40(h).

#### Recordkeeping & Reporting Violation

37. During the June 28, 2018 inspection, Department staff observed that Respondent's pesticide use records failed to record the dosage rate for the twelve (12) applications on June 11, 2018 of *Lesco Redzone 2 Herbicide* (EPA Reg. No. 228-589).

38. During the August 28, 2018 inspection, Department staff observed that following the application of *Tenacity*, Respondent did not complete a pesticide use record that included the product name, EPA registration number, quantity of pesticide used, date of application, address, dosage rate, method of application, and target organism.

39. ECL § 33-1205(1), in relevant part, requires all commercial applicators to maintain pesticide use records for each pesticide application containing the following information:

- 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).

[ . . . ] 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. (*Emphasis added*)

40. Respondent's failure to include the dosage rate of pesticide used in its use records for June 11, 2018 violates ECL § 33-1205(1).

41. Respondent's failure to maintain pesticide use records after a pesticide application on August 28, 2018 is a further violation of ECL § 33-1205(1).

### **Civil Penalty**

42. ECL § 71-2907 (1) provides, *inter alia*, that "any person who violates any provisions of article 33 of this chapter or any rule, regulation or order issued thereunder . . . shall be liable . . . for a civil penalty not to exceed five thousand dollars for a first violation, and not to exceed ten thousand dollars for a subsequent offense."

### **Waiver of Hearing**

43. 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.** Respondent is assessed a civil penalty in the amount ELEVEN THOUSAND DOLLARS (\$11,000). 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 money order, company or bank check made payable to the NYS Department of Environmental Conservation. Payment of the civil penalty shall not alter Respondent's obligation to complete performance of the terms of this Order.

II. **Binding Effect.** The provisions of this Order shall be deemed to bind Respondent, its agents, employees, and all persons, firms, corporations acting under or controlled by it.

III. **Communications.** Except as otherwise specified in this Order, any reports, submissions, and notices herein required shall be made to:

For the Department:

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

For the Respondent:

Rivage Landscaping, LLC  
31 Roosevelt Boulevard  
Cohoes, NY 12047  
Attn: Sean Rivage

IV. **Summary Abatement.** 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.

V. **Indemnification.** Respondent shall indemnify and hold harmless the Department, the State of New York, and their 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, except to the extent that any such claims arise or result from the acts or omissions by the Department, the State of New York, or its employees.

VI. **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, such change to be made only upon written agreement of the parties.

VII. **Effective Date.** This Order is deemed effective on the date signed by the Department. The Department will provide Respondent a fully executed copy of this Order as soon as practicable following the effective date of this Order.

VIII. **Scope.** 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 Department or 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 agents, its servants, its employees, its successors and its assigns; and

C. 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.

IX. **Access.** To ensure compliance with the ECL and this Order, Respondent shall not deny the Commissioner or his duly authorized representative access at all reasonable times to inspect Respondent's New York facilities and all pesticide records for applications within the State of New York.

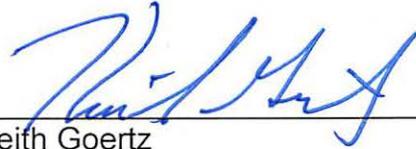
X. **Schedule of Compliance.** Respondent shall comply with the attached Schedule of Compliance.

XI. **Termination.** This Order shall terminate upon the Department's determination that Respondent has complied with all the requirements of this Order.

DATED: October 11, 2018  
Rotterdam, New York

Basil Seggos  
Commissioner  
New York State Department of  
Environmental Conservation

BY:



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Keith Goertz  
Regional Director  
Region 4



## **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 the actions necessary to comply with the Department’s regulatory program, and those actions specified in this document, have been completed, along with any supporting documentation.
- (2) Compliance with this Schedule shall not be a defense to subsequent violations.

The signed and notarized CVA should be addressed to:

Sarah Whelen  
NYS Department of Environmental Conservation  
Region 4  
Bureau of Pest Management  
1130 North Westcott Road  
Schenectady, NY 12306

**STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION**

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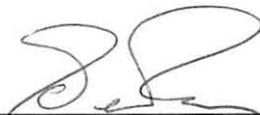
**AFFIDAVIT**

-by-

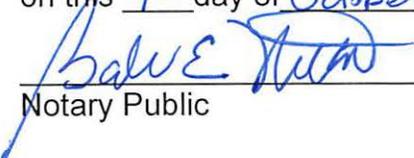
Rivage Landscaping, LLC  
31 Roosevelt Boulevard  
Cohoes, NY 12047,

Respondent.

I, Sean Rivage, being duly sworn, do depose and say  
(Full Name)  
that Rivage Landscaping, LLC, has complied with the requirements of Paragraph No. 1  
of the Order on Consent's Schedule of Compliance (File# R4-2018-0914-174) effective  
on the date signed by the Regional Director.

  
  
Signature of Respondent

Subscribed and sworn to before me  
on this 9<sup>th</sup> day of October, 2018

  
Notary Public

Barbara E. Norton  
Notary Public, State of New York  
Qualified in Schenectady County  
No. 01NO6282777  
Commission Expires May 28, 2021