

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of Violations
of the Environmental Conservation Law
("ECL") Article 33 and
Title 6, Part 325 of the Official
Compilation of Codes, Rules and
Regulations of the State of
New York ("6 NYCRR"),

ORDER ON CONSENT

File No.
R4-2008-0527-76

Rossi Landscape, Inc.
P.O. Box 11250
Loudonville, NY 12211

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, Rossi Landscape, Inc., P.O. Box 11250, Loudonville, New York, operates a landscaping business.

3. Respondent is a person as defined in ECL §33-0101 (33).

4. On May 15, 2008, Department staff observed an employee of Respondent, applying pesticides at a residence located at 10 Graystone Road, Loudonville, New York ("site").

First Violation

5. On May 15, 2008, Department staff observed Respondent's vehicle at the site with pesticides and pesticide application equipment in a trailer and the vehicle lacking the proper registration stickers.

6. Regulations at 6 NYCRR 325.26(a) provide that:

(a) Each certified commercial applicator shall be provided by the department with a set of two numbered stickers for each piece of commercial application equipment.

These stickers shall be prominently displayed on opposite sides of each piece of such equipment or on opposite sides of each vehicle used in transporting such equipment except however:

- (1) Small pieces of hand held or portable equipment such as two and one-half gallon sprayers or back pack mistblowers do not require such stickers and;
- (2) noncommercial-type vehicles transporting small quantities of pesticides or portable pesticide equipment are not required to display the stickers if such display will change the rating of the vehicle and thereby limit its access to certain transportation routes normally used.

7. Respondent violated regulations at 6 NYCRR 325.26(a) by failing to have registration stickers on the commercial vehicle transporting pesticides.

Second Violation

8. On May 15, 2008, Department staff observed an unlabeled, one and one half gallon hand spreader containing an unknown pesticide.

9. Regulations at ECL 33.1301(b) provide 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 or any of the following:

(b) Except as specified in regulation authorizing alternative pesticide containers, any pesticide unless it 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:

(1) The name and address of the manufacturer, registrant, or person for whom manufactured;

(2) The name, brand, or trade-mark under which said article is sold; and

(3) The net weight or measure of the content; subject, however, to such reasonable variations as the Commissioner may permit.

10. Respondent violated regulations at ECL 33.1301 (b) by being in possession of an unlabeled one and one half gallon hand spreader containing an unknown pesticide.

Third Violation

11. On May 15, 2008, Respondent's employee who was applying pesticides at the site, was not a certified applicator/technician and was unable to contact a certified applicator within thirty (30) minutes.

12. Regulations at ECL 33-0905(1) provide that “any person who engages in the commercial or private application of pesticides or the sale of restricted use pesticides shall be certified by the commissioner except as provided in subdivision two of this section. No certification shall be valid unless the certified person also holds a valid identification card issued by the commissioner.”

13. Respondent violated regulations at ECL 33-0905(1) by engaging in the commercial application of pesticides without a certified applicator and without being able to contact a supervising applicator within thirty (30) minutes.

Fourth Violation

14. Respondent had previously registered its pesticide business with the DEC however on May 15, 2008, Respondent’s pesticide business was not registered with the DEC.

15. Regulations at 6 NYCRR 325.23 (a) provide that each agency that applies pesticide and each business offering, advertising or providing the services of commercial application of pesticides, either entirely or as part of the business, must register annually with the department on forms supplied by the department. Agency, as defined in section 33 of the ECL, means any state agency; municipal corporation; public authority; college, as that term is defined in the education law; railroad, as that term is defined in the railroad law; or telegraph, telephone, telegraph and telephone, pipeline, gas, electric, or gas and electric corporation as those terms are defined in the state transportation corporations law, which applies pesticides.

16. Respondent violated regulations at 6 NYCRR 325.23 (a) by failing to register their business with the DEC.

Civil Penalty

17. Regulations at ECL § 71-2901 (1) provide, *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

18. 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. With respect to the aforesaid violations, a civil penalty in the amount of ONE THOUSAND FIVE HUNDRED DOLLARS(\$1,500) is hereby assessed against the Respondent. 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 certified or bank check made payable to the NYS DEC.

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. 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.

IV. 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, his directors, officers, employees, servants, agents, successors or assigns.

V. 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.

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

VII. The Schedule of Compliance is incorporated into the Order and is enforceable thereunder.

VIII. All communications except where otherwise specifically directed should be sent to:

For Department:
Regional Pesticide Specialist
New York State Department
of Environmental Conservation
Region 4
1130 N. Westcott Road
Schenectady, New York 12306

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

X. 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 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 Respondents, their agents, their servants, their employees, their successors and their 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 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.

XI. A. Whenever the Department's approval of a submittal under the terms of this Order is required, the Department shall review such submittal 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 applicable state and federal regulations and laws 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 plans and reports shall be incorporated into and become an enforceable part of this Order.

B. 1. If the Department disapproves a submittal, its notice shall specify the reasons for disapproval. Respondent shall make a revised submittal to the Department within thirty (30) days after receiving written notice of disapproval that specifically addresses all of the Department's stated reasons for disapproving the first submittal.

2. After receipt of the revised submittal from Respondent, the Department shall notify Respondent in writing of its approval or disapproval. If the Department approves the revised submittal, it shall be incorporated into and become an enforceable part of this Order. If the Department disapproves the revised submittal, it shall notify the Respondent in writing and specify its reasons. The Department reserves its right to take whatever action it deems necessary after the second disapproval of a submittal.

XII. Compliance with the terms and conditions of this Order, including the Schedule of Compliance, shall be in full civil settlement of the violations alleged in this Order.

XIII. If more than one Respondent is a signatory to this Order, use of the term "Respondent" in this Order shall be deemed to refer to each Respondent identified in the Order.

DATED: _____, 2008
Rotterdam, New York

Alexander B. Grannis
Commissioner
New York State Department of
Environmental Conservation

BY:

Eugene J. Kelly
Regional Director
Region 4

SCHEDULE OF COMPLIANCE

1. Upon the effective date of this Order, Respondent shall cease all pesticide applications until a business registration certificate and an applicator/technician certification are obtained.
2. Within 30 days of the effective date of this Order, Respondent shall submit an application, appropriate fees, and proof of insurance for business registration.
3. Within 6 months of the effective date of this Order, Respondent shall employ and maintain the employment of a certified commercial applicator/technician at all times thereafter.
4. In the event that Respondent elects to discontinue the practice of pesticide application, it must submit to the Department, a notarized letter stating that the business will not offer or advertise to apply pesticides commercially without registering the pesticide business and at least one employee first becoming a certified applicator.