

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**

File No. R4-2008-0818-129

- by -

Earl Van Wormer, III.  
D/B/A Professional Nuisance Wildlife and  
Pest Control

Respondent

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WHEREAS:

1. The Department has jurisdiction in all matters pertaining to the distribution, sale, use and transportation of pesticides, pursuant to ECL Article 33.
2. Respondent, Earl Van Wormer, III does business as Professional Nuisance Wildlife and Pest Control and is in the business of applying pesticides.
3. The Respondent is a person as defined in ECL Section 33-0101(33).
4. On July 29, 2008, Department staff conducted inspections at Professional Nuisance Wildlife and Pest Control, located at 1498 St Rte 145, Sloansville, New York ("business") and at a residence located at 4870 St Rte 145, Cobleskill, New York ("residence").
5. The inspection of the business by Department staff revealed that on July 17, 2008, Respondent had applied 2 lbs of Rid-A-Critter (EPA registration number 58630-2) to 800 cubic feet of the attic of the residence to repel bats, birds and rodents. Respondent placed approximately 1-2 inches of the pesticide granules into styrofoam bowls and placed them around the attic on boards for a total application of 2 lbs. Respondent did not provide a copy of the pesticide information, including any warnings, contained on the pesticide's label to the owner of the residence prior to the application of the pesticide to the attic.
6. On July 21, 2008, Respondent returned to the residence after receiving an odor complaint from the owner of the residence. Respondent observed that some of the styrofoam containers had tipped over and pesticide granules had fallen onto and into the ceiling insulation in the attic. This is a direct application of the pesticide. Respondent removed most of the pesticide containers and contaminated insulation.

7. On July 28, 2008, Respondent again returned to the residence after the owner complained that the odor was still strong. Respondent attempted to remove the rest of the pesticide granules. Respondent informed the owner that he successfully removed 95 % of the product from the attic and that the remaining 5% could not be removed because it had fallen onto and into the attic insulation.

8. The Rid-A-Critter label states “DO NOT APPLY THE PRODUCT DIRECTLY IN THE ATTIC OR WALL VOID”.

9. The inspection of the residence by Department staff revealed a strong odor on the second floor of the house and in the attic. Staff observed pesticide granules lying in small piles on insulation near the access door to the attic.

10. 6 NYCRR 325.2 (b) provides that pesticides are to be used only in accordance with label and labeling directions or as modified or expanded and approved by the department.

11. Respondent’s application of the pesticide, which resulted in pesticide granules being spilled directly onto and into the ceiling insulation in the attic of the residence is a violation of 6 NYCRR 325.2 (b).

12. ECL 33-905.5(a) provides that every 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.

13. Respondent’s failure to provide the owner of the residence with a copy of the information, including any warning, contained on the label for Rid-A-Critter is a violation of ECL 33-905.5(a).

14. ECL 71-2907 provides that any person who violates any provision of Article 33 of the ECL or any rule or regulation promulgated thereunder shall be liable for a civil penalty not to exceed five thousand dollars (\$5,000) for a first violation and not to exceed ten thousand dollars (\$10,000) for a subsequent offense.

15. Respondent has affirmatively waived his 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 of the aforesaid violation, a civil penalty in the amount of TWO THOUSAND FIVE HUNDRED DOLLARS (\$2,500) is hereby assessed against the Respondent. FIVE HUNDRED DOLLARS (\$500) 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.

The balance of the penalty, TWO THOUSAND DOLLARS (\$2,000), is suspended and shall not be payable, provided that Respondent fully complies with the requirements of this Order in a timely fashion. In the event that Respondent fails to comply with the requirements of this Order the entire suspended portion of the penalty shall become due and payable upon written notice to Respondent without prejudicing the Department from seeking further appropriate penalties for violations of this Order by Respondent.

II. The provisions of this Order shall be deemed to bind Respondent, his agents, employees, and all persons, firms, corporations acting under or for it.

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 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, 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 Engineer  
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 Respondent, his agents, his servants, his employees, his successors and his 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 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.

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 in this 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

CONSENT BY RESPONDENT

Respondent hereby consents to the issuing and entering of this Order, waives his right to a hearing herein, and agrees to be bound by the provisions, terms and conditions contained herein.

\_\_\_\_\_  
Earl Van Wormer, III  
D/B/A Professional Nuisance Wildlife  
and Pest Control

DATE:\_\_\_\_\_

STATE OF NEW YORK            )  
  )ss.:  
COUNTY OF                            )

On the\_\_day of \_\_\_\_\_in the year\_\_\_\_\_ before me, the undersigned, a Notary Public in and for the State, personally appeared \_\_\_\_\_, 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.

\_\_\_\_\_  
Notary Public  
Qualified in the County of:  
My Commission Expires:

## SCHEDULE OF COMPLIANCE

1. Respondent shall submit to the Department documentation proving that the contaminated insulation was removed from the 800 sq. ft. pesticide application area in the attic of the residence at 4870 St Rte 145 and that new insulation was installed within such area.