

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION

Office of the General Counsel, Deputy Commissioner & General Counsel
625 Broadway, 14th Floor, Albany, New York 12233-1010
P: (518) 402-8543 | F: (518) 402-9018
www.dec.ny.gov

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ENFORCEMENT DISCRETION LETTER REGARDING the REQUIREMENTS for COMMERCIAL LAWN APPLICATION CONTRACTS and the POSSESSION of a PESTICIDE LABEL by an APPLICATOR

To Whom It May Concern:

This is to advise you that, subject to the terms set forth in this letter, the New York State Department of Environmental Conservation (DEC) will exercise its authority to utilize enforcement discretion with respect to the commercial lawn application contract requirements set forth in certain provisions of 6 NYCRR Part 325 and the possession of a pesticide label by an applicator requirement set forth in Environmental Conservation Law (ECL) Section 33-0905(5)(a) and (b). The stipulations of this enforcement discretion are set forth below. DEC will exercise this authority regarding the provisions outlined below until the earliest of either three years from the date of this letter, until this discretion is revoked, or until DEC revises 6 NYCRR 325.40 (Commercial Lawn Application Contract) and 325.2 (Requirements for the Use of Pesticides) with respect to the provisions discussed below. All other provisions of 6 NYCRR Parts 320 through 329 and Article 33 of the ECL not addressed in any other valid enforcement discretion letters remain in full effect and may be enforced.

I. Possession of a Pesticide Label by a Pesticide Applicator During Application

ECL 33-0905(5)(a) and (b) require pesticide applicators to have in their possession a written copy of the information, including any warnings, contained on the label of the pesticide to be applied within or on the premises of a residence or a multiple residential structure. Section 325.2(d) of 6 NYCRR requires pesticide applicators to have a copy of the New York State registered pesticide label in their custody while using a pesticide. Although the ECL requires a written copy, the regulation does not specify the format in which the label must be maintained.

The Electronic Signatures and Records Act (ESRA) Article 3 of State Technology Law (STL) and its corresponding regulations in Part 540 of 9 NYCRR have established that an electronic record used by a person shall have the same force and effect as those records not produced by electronic means. Therefore, pursuant to STL Article 3 and Part 540 of 9 NYCRR DEC will utilize enforcement discretion to allow pesticide applicators to possess copies of the New York State accepted pesticide labels in electronic or non-electronic format to comply with the label information requirements in ECL 33-0905(5)(a) and (b) and section 325.2(d) of 6 NYCRR. In addition, electronic or non-electronic labels must be available for inspection by DEC upon request.



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However, this enforcement discretion does not apply to pesticide container labels. Pesticide containers must display the appropriate information in written format due to the definition of label in ECL 33-0101(28). A label "means the written, printed, or graphic matter on, or attached to, the pesticide, or its immediate container and any outside containers or wrappers." An electronic version of the pesticide container label would not be compliant with this definition since the electronic label could not be on or attached to the pesticide container.

II. 2011 Revisions to ECL 33-1001

Section 33-1001(1) of the ECL requires an applicator to enter into a written commercial lawn application contract with a customer prior to application and section 33-1001(2) requires the applicator to supply the customer with copies of three specific informational items prior to application. This provision was amended in 2011 to allow the customer to determine whether the three required informational items described in ECL 33-1001(2) should be provided to them in written, digital, or electronic format and no longer requires these items to be in 12-point type. Section 325.40(a) of 6 NYCRR does not reflect these statutory amendments, since the statute was amended after the regulations were adopted, and still requires written contracts to include these three components. Since the statute has changed, DEC will exercise its enforcement discretion regarding section 325.40(a) of 6 NYCRR and no longer require the following information items to be provided as a component of the commercial lawn application contract or provided in 12-point type:

- (1) List of pesticides to be applied including brand names and generic names of active ingredients;
- (2) Any warnings that appear on the label of pesticides to be applied that are pertinent to the protection of humans, animals or the environment; and
- (3) Name, address, telephone number and pesticide business registration number of the pesticide business providing the commercial lawn application service and the pesticide applicator certification identification card number of the person employed by the pesticide business providing or supervising the commercial lawn application service.

However, in accordance with the ECL, the pesticide business or applicator must provide these three items prior to the application of the pesticide in a format specified by the customer.

In the same manner described above, in which DEC is providing enforcement discretion to allow the possession of labels in either electronic or non-electronic format based upon the ESRA, STL Article 3, and Part 540 of 9 NYCRR, DEC will allow the written contract required by ECL 33-1001(1) and section 325.40(a) of 6 NYCRR, and the information required by ECL 33-1001(2) to be provided to the customer in an electronic or non-electronic format as specified or agreed to by the customer.

III. Warranty Requests

There may be cases where a customer is not satisfied with the outcome of a commercial lawn application due to ineffective control of the target pest. In these cases, lawn care companies may opt to: reapply pesticides, if the label directions allow for reapplication; spot treat; or apply a different pesticide for the same target species to the warranted area. The provisions set forth in section 325.40(a)(2) of 6 NYCRR make it difficult to satisfy the customer in these situations, because it requires the total number of commercial lawn applications to be provided in the commercial lawn application contract and any additional applications would require a contract amendment under section 325.40(a)(7) of 6 NYCRR. Section 325.40(a)(7) further requires the pesticide applicator or business to obtain written proof of acceptance of contract amendments from the owner or owner's agent prior to applying pesticides, which may prevent or delay this warranty work from occurring.

In order to allow companies to provide the expected level of service to customers, DEC will utilize enforcement discretion to allow for customer-initiated warranty work without requiring amendments to the commercial lawn application contract if all of the following conditions are met:

- 1) The contract explains the ability, upon the customer's request, for follow up warranty work as authorized herein;
- 2) The contract identifies the number of commercial lawn applications as a range of applications from minimum to maximum, including warranty work (for example, 6 to 12 total applications), or the contract identifies the number of applications, as set by the approximate date or dates of application, and specifies that warranty applications, if conducted, will increase the number of applications specified in the contract at no additional cost;
- 3) The customer makes a request for warranty work and the warranty application is conducted within the approximate date or dates of application or the alternate date or dates of application as described in Department Policy DSHM-PES-05-11 "Compliance with Certain Provisions of Commercial Lawn Application Regulations,"
- 4) If a pesticide is specified in the contract, the specified pesticide is used;
- 5) If a pesticide is not specified in the contract, application information on the specific pesticide applied must be provided to the customer prior to the application;
- 6) The required label warnings for all pesticides to be applied must be supplied to the customer prior to the application;
- 7) Only one warranty application per initial application is provided;
- 8) The request from the customer for warranty work is documented by the company; and
 - o at a minimum the documentation shall contain the following:
 - Name and address of the customer;
 - Date of the request;
 - Reason for the request;

- Written, digital, or electronic response to the customer providing information on the follow-up application;
 - Date of follow-up pesticide application; and
 - Name and EPA registration number of the pesticide applied; and
- 9) The request documentation must accompany the requesting property owner's commercial lawn application contract for a minimum of 3 years following the expiration date of the contract.

IV. Substitutes for Property Owner/Agent Signature on Contracts

Business practices have changed since the commercial lawn application contract regulations were adopted. Previously, it was common practice for property owners to write checks to pay for agreed upon services, as reflected by the regulations. Section 325.40(a)(6) of 6 NYCRR requires that a commercial lawn application contract be signed by the owner or owner's agent of the property to which the commercial lawn application is to be made. However, the signature of the owner or owner's agent is not required under section 325.40(a)(6) of 6 NYCRR if the pesticide applicator or business obtains a separate document that specifically evidences the owner's or owner's agent's signature as acceptance of the written contract, such as a copy of a prepayment check in the exact amount specified in the written contract for the agreed upon services. The Department Policy associated with the regulations, DSHM-PES-05-11, clarified that the amount of the prepayment check can be either the exact amount specified for the commercial lawn application only or the full cost of the contract, including the cost of the commercial lawn application service and the cost of any other services provided under the contract.

Businesses and customers are frequently negotiating their commercial lawn application contracts electronically through emails and the internet, with payment typically being processed electronically. Obtaining a customer's signature for a contract is becoming increasingly more difficult and time consuming. Additionally, in keeping with practices followed today by most businesses, more customers want to pay for their commercial lawn application services online through the pesticide business's website.

To accommodate this need in the industry and provide more flexibility to businesses and customers, DEC will utilize enforcement discretion to allow the following to qualify as a separate document that evidences the owner's or owner's agent's acceptance of the contract, as required by section 325.40(a)(6) of 6 NYCRR:

- A receipt for payment of contract services prior to those serviced being provided in the exact amount specified in the contract for the commercial lawn application(s) only; or
- A receipt for payment of contract services prior to those serviced being provided in the exact amount specified in the contract for the full cost of the contract, including the cost of the commercial lawn application(s) service and the cost of any other services provided under the contract.

This enforcement discretion applies to the initial contract or any amendments to the initial contract pursuant to section 325.40(a)(7) of 6 NYCRR.

V. Total Cost of Commercial Lawn Applications Specified in Multi-year Contracts

Section 325.40(a)(3) of 6 NYCRR requires that the commercial lawn application contract state the total cost of the commercial lawn application service to be provided. However, the commercial lawn application contract regulation, section 325.40 of 6 NYCRR, and the accompanying policy, DSHM-PES-05-11, do not address the issue of the total cost of commercial lawn applications specified in multi-year contracts. Therefore, the DEC will utilize enforcement discretion to allow multi-year contracts to state the cost of the commercial lawn application services to be provided as a set amount per year for a set term of years (e.g., \$3,000 per year for 5 years) to satisfy the requirement of Section 325.40(a)(3) of 6 NYCRR. Additionally, DEC will utilize enforcement discretion to allow multi-year contracts to state the cost of the commercial lawn application services for the first year (e.g., \$1,000 for 2022) and state the set percentage rate per year by which such costs may increase for the remainder of the contract term (for example, "3% a year from 2022 to 2025") to satisfy the requirement of section 325.40(a)(3) of 6 NYCRR. Percentage rates of cost increase may change from year to year, but only if they are set percentages each year (for example: year 2 the costs increase by 2%, year 3 costs increase by 3.5%, etc.). Contracts may also charge a different set amount for each year (for example: year 1 \$1000, year 2 \$1100, year 3 \$1200, etc.).

Thank you for your cooperation in this matter. If you have any questions, please contact the Pesticides Enforcement and Compliance Assurance Section in the Bureau of Pesticides Management of the Division of Materials Management at (518) 402-8727.

Sincerely,



Thomas S. Berkman
Deputy Commissioner and
General Counsel

