

Proposed Administrative Consent Agreement

Background Summary

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Subject: Brownies Landscaping
39 Clark Lane
Whitefield, ME 04353

Date of Incident(s): May 9, 2021

Background Narrative: On May 9, 2021, company owner Tim Brown made commercial pesticide applications at two separate sites in Augusta. Brown was not a licensed applicator at the time of the applications. Tree injection applications were made to City of Augusta trees at Buker Community Center and Williams Park to control brown tail moth infestations. Trees were drilled then injected with Vivid II Microinjection capsules. Although Brown discussed the brown tail moth infestation with city staff, city staff did not authorize Brown to make the pesticide applications.

Brown did not keep the required commercial pesticide application records for these applications and did not post the application sites as required by Board regulations.

Applicators need to follow label directions for the pesticides they apply. Under the Directions for Use section the Vivid II label, the following language is written “Microinjection units containing VIVID II may require up to several minutes or more to empty depending on the health of the treated tree and local weather conditions. Empty units must not be left on the tree. If the microinjection unit does not completely empty within a few hours then carefully remove the capsule”. The capsules were not removed from the trees until the evening of May 18, 2021.

Brown did not wear the label required chemical resistant gloves and protective eyewear when making the applications and did not post the treated ornamental trees.

Summary of Violation(s):

- CMR 01-026 Chapter 20 Section 6(D) requires that no person may apply a pesticide to a property of another unless prior authorization for the pesticide application has been obtained from the owner, manager, or legal occupant of that property.
- 22 M.R.S. § 1471-D (1) (A) and CMR 01-026 Chapter 31 Section 1(A) III. Any commercial applicator must be a certified commercial applicator or under the direct supervision of a certified applicator.
- 7 U.S.C. § 136j (a)(2)(G), 7 M.R.S. § 606 (2)(B) and 22 M.R.S. § 1471 D (8)(F). Using a pesticide inconsistent with its label directions.
 - Did not remove the microinjection units within a few hours after the applications.
 - Did not wear all personal protective equipment required by the pesticide label.
- CMR 01-026 Chapter 28 Section 3(B)1(a) requires posting when commercial pesticide applications are made to outdoor ornamentals and CMR 01-026 Chapter 28 Section 3(B)2 prescribes those posting requirements.

Rationale for Settlement: The diverse types of violations indicated the operating practices of this company and its lack of adherence to pesticide regulations. The violations involving safety included potential pesticide exposure to both the applicator himself and the public. The sites treated were high traffic areas used by children.

Attachments: Proposed Consent Agreement

STATE OF MAINE
DEPARTMENT OF AGRICULTURE, CONSERVATION AND FORESTRY
BOARD OF PESTICIDES CONTROL

In the Matter of:)	
Brownies Landscaping)	ADMINISTRATIVE CONSENT AGREEMENT
38 Clark Lane)	AND
Whitefield, Maine 04353)	FINDINGS OF FACT

This Agreement by and between Brownies Landscaping (hereinafter called the "the Company") and the State of Maine Board of Pesticides Control (hereinafter called the "Board") is entered into pursuant to 22 M.R.S. §1471-M (2)(D) and in accordance with the Enforcement Protocol amended by the Board on December 13, 2013.

The parties to this Agreement agree as follows:

1. That the Company specializes in hazardous tree removal, pruning, crane-assisted tree removal, forestry mulching and plant healthcare.
2. That on May 18, 2021, Christopher Blodgett, the Parks Supervisor for the City of Augusta, called the Board and stated he noticed a number of capsules had been injected into two trees at Buker Community Center, located at 22 Armory Street, Augusta and into two trees at Williams Park, located at 59 Bangor Street, Augusta. Blodgett thought the capsules were placed there by Company owner Tim Brown, based on previous conversations he had with Brown and Christopher Chase, the Director of Parks and Recreation. Brown, who is an unlicensed applicator, proposed making tree injections under Blodgett's commercial master applicator's license to Blodgett and also at a separate meeting with Chase and Rich Wurpel, Augusta's horticulturalist.
3. That in response to Blodgett's contact with the Board described in paragraph two, a Board inspector met with Blodgett on May 18, 2021. Blodgett told the inspector Brown informed him that he did not have a pesticide applicator's license but that he could work under Blodgett's commercial master applicator license affiliated with the city of Augusta. Blodgett said he told Brown that he does not have the required category to treat ornamental trees and that Board regulations did not allow Brown to make pesticide applications under his license and that he would verify this with the Board.
4. That on May 18, 2021, the Board inspector documented the pesticide applications that were made at both the Buker Community Center and at Williams Park. At Buker Community Center 12 insecticide capsules were injected 25.75 inches from the ground into tree #1 which had a 67 ½ inch circumference, and 10 insecticide capsules were injected 21.75 inches from the ground into tree #2 which had a 60 ½ inch circumference. At Williams Park 10 insecticide capsules were injected 27 ½ inches from the ground into tree #1 which had a 52-inch circumference, and 10 insecticide capsules were injected 34 inches from the ground into tree #2 which had a 46-inch circumference. The inspector also took digital photos of the injected trees at both sites.
5. That based on the inspector's assessment of both application sites described in paragraph four, the number of pesticide capsules injected into the trees at Buker Community Center and Williams Park totaled 42 capsules.
6. That in response to the information received in paragraph two, a Board Inspector conducted a follow up inspection with Company owner Tim Brown on May 24, 2021.
7. That during the inspection described in paragraph six, Brown told the inspector he had met with Chase, and Wurpel. Brown further told the inspector brown tail moth treatment to city trees was discussed at that

meeting and that Brown informed them microinjections into the city's trees required a pesticide applicator license which he did not have. Brown told Chase and Wurpel that city employee Chris Blodgett had his commercial master applicator's license and that he could do the work under Blodgett's license.

8. That during the inspection described in paragraphs six, Brown completed a written statement. Brown wrote "I told them I didn't have an applicator license and that using the microinjections needed that license and would have to be done by an applicator. Chris Blodgett has his masters and discussed with Bruce that I could work under his license and be fine".
9. That during the inspection described in paragraph six, the inspector confirmed the pesticide injected into two trees on city property at Buker Community Center and two trees at Williams Park by Brown on May 9, 2021, was Vivid II, EPA Reg No. 64014-10.
10. That Brown then showed the inspector a sales order he placed dated March 24, 2021. The inspector documented the sales order Brown placed for two boxes of Vivid II Microinjection, 25-count per box for a total of 50 pesticide capsules. Brown confirmed this purchase was made with the intent of using this pesticide to treat for brown tail moth at a later date and that all 50 capsules were applied during his May 9, 2021, applications at the Buker and Williams sites described in paragraph nine.
11. That during the inspection described in paragraph six, the inspector documented that on May 17, 2021, Brown also placed an additional order of ten boxes of Vivid II Microinjection, 25-count per box for a total of 250 pesticide capsules. At the time of the inspection, Brown said he had not yet received the order.
12. That on June 2, 2021, a Board inspector contacted Wurpel by phone to discuss the meeting he, Chase, and Brown had described in paragraphs two, seven, and eight. During the phone conversation Wurpel said at the meeting, Brown offered to make the pesticide application to the trees at the Buker Community Center and Williams Park sites with the pesticide that he had already bought, and that Brown said he could legally work under Blodgett's license. Wurpel said that Chase told Brown to hold off on making the pesticide application until he could check with Blodgett to find out if it was legal and that Chase was surprised when he later learned that Brown then made the application anyway.
13. That Wurpel also said Chase offered to purchase the Vivid II capsules from Brown, if it was determined that Brown would be unable to conduct the pesticide application. Chase was willing to reimburse Brown for his purchase of the Vivid II capsules and to store them until Brown was licensed to apply them.
14. That CMR 01-026 Chapter 20 Section 6(D) requires that no person may apply a pesticide to a property of another unless prior authorization for the pesticide application has been obtained from the owner, manager, or legal occupant of that property.
15. That Brown did not have authorization to make the pesticide applications on May 9, 2021, described in paragraphs nine and ten.
16. That the circumstances described in paragraphs two through twelve constitute a violation of CMR 01-026 Chapter 20 Section 6(D).
17. That the definition of a custom application in 22 M.R.S. § 1471-C(5)(A), includes an application made under contract or for which compensation is received or an application to a property open to use by the public.
18. That any person making a pesticide application that is a custom application, as defined under 22 M.R.S. § 1471-C(5)(A), must be a certified commercial applicator or under the direct supervision of a certified applicator in accordance with 22 M.R.S. § 1471-D (1) (A) and CMR 01-026 Chapter 31 Section 1(A) III

19. That the applications described in paragraphs nine and ten were done with the understanding that compensation was to be received and were done to properties open to use by the public.
20. That at the time of Brown's applications described in paragraphs nine and ten, Brown was neither a certified applicator nor under the direct supervision of a certified applicator and the application was made to city property open to use by the public and for compensation.
21. That the circumstances described in paragraphs nine, ten, and seventeen through twenty constitute violations of 22 M.R.S. § 1471-D (1) (A) and CMR 01-026 Chapter 31 Section 1(A) III.
22. That CMR 01-026 Chapter 50 Section 1(A) requires that commercial applicators maintain pesticide application records for a period of two years from the date of application. Such records shall be kept current by recording all the required information on the same day the application is performed. These records shall be maintained at the primary place of business and available for inspection by representatives of the Board at reasonable times, upon request.
23. That the date of the follow up inspection with Brown described in paragraph six, was sixteen days after the pesticide applications. Brown had yet to complete a pesticide application record for the pesticide applications described in paragraphs nine, and ten. Brown made assurances that the Board inspector would receive a copy of the invoice when the City of Augusta was billed for pesticide applications.
24. That the circumstances described in paragraphs nine, ten, twenty-two, and twenty-three constitute a violation of CMR 01-026 Chapter 50 Section 1(A).
25. That CMR 01-026 Chapter 28 Section 3(B)1(a) requires posting when commercial pesticide applications are made to outdoor ornamentals and CMR 01-026 Chapter 28 Section 3(B)2 prescribes those posting requirements.
26. That no posting was done for the commercial pesticide application made to the outdoor ornamental trees described in paragraphs nine and ten.
27. That the circumstances described in paragraphs nine, ten, twenty-five, and twenty-six constitute a violation of CMR 01-026 Chapter 28 Section 3(B)1(a) and CMR 01-026 Chapter 28 Section 3(B)2.
28. That 7 U.S.C. § 136j (a)(2)(G), 7 M.R.S. § 606 (2)(B) and 22 M.R.S. § 1471-D(8)(F) require that pesticides be used consistent with their labels.
29. That under the Directions for Use section the Vivid II label described in paragraphs nine and ten, the following language is written "Microinjection units containing VIVID II may require up to several minutes or more to empty depending on the health of the treated tree and local weather conditions. Empty units must not be left on the tree. If the microinjection unit does not completely empty within a few hours then carefully remove the capsule".
30. That from the inspection described in paragraph six, the inspector determined that Brown injected the trees at the Buker and Williams sites on May 9, 2021, but did not remove the capsules from the trees until the evening of May 18, 2021.
31. That the circumstances in paragraphs six, and twenty-eight through thirty constitute a violation of violation U.S.C. § 136j (a)(2)(G), 7 M.R.S. § 606 (2)(B) and 22 M.R.S. § 1471 D (8)(F).
32. That 7 U.S.C. § 136j (a)(2)(G), 7 M.R.S. § 606 (2)(B) and 22 M.R.S. § 1471-D(8)(F) require that pesticides be used consistent with their labels.

33. That under the Personal Protective Equipment section of the Vivid II label described in paragraphs nine and ten it states, handlers must wear chemical resistant gloves and protective eyewear.
34. That during the inspection described in paragraph six, the Board inspector determined that Brown did not wear chemical resistant gloves and protective eyewear.
35. That the circumstances in paragraphs six, and thirty-two through thirty-four constitute a violation of 7 U.S.C. § 136j (a)(2)(G), 7 M.R.S. § 606 (2)(B) and 22 M.R.S. § 1471-D(8)(F)
36. That the Board has regulatory authority over the activities described herein.
37. That the Company expressly waives:
 - a. Notice of or opportunity for hearing;
 - b. Any and all further procedural steps before the Board; and
 - c. The making of any further findings of fact before the Board
38. That this Agreement shall not become effective unless and until the Board accepts it.
39. That in consideration for the release by the Board of the cause of action which the Board has against the Company resulting from the violations referred to in paragraphs sixteen, twenty-one, twenty-four, twenty-seven, thirty-one, and thirty-five the Company agrees to pay a penalty to the State of Maine in the sum of \$3,000 (Please make checks payable to Treasurer, State of Maine).

IN WITNESS WHEREOF, the parties have executed this Agreement of four pages.

BROWNIES LANDSCAPING

By: _____ Date: _____

Type or Print Name: _____

BOARD OF PESTICIDES CONTROL

By: _____ Date: _____

Megan Patterson, Director

APPROVED:

By: _____ Date: _____

Mark Randlett, Assistant Attorney General