

THE COMMONWEALTH OF MASSACHUSETTS

EXECUTIVE OFFICE OF ENERGY AND ENVIRONMENTAL AFFAIRS



Department of Agricultural Resources

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October 30, 2017

Karen Galligan
Southborough Department of Public Works
Superintendent
Town of Southborough
147 Cordaville Road
Southborough, MA 01772

LETTER OF WARNING

Dear Ms. Galligan:

This shall serve as a Letter of Warning for the Town of Southborough. The Massachusetts Department of Agricultural Resources, Pesticide Division (the "Department") conducted an investigation of the Town of Southborough upon which the Department concluded that 333 CMR 10.14(1), 11.02, 11.03(1), 11.03(2), 11.03(4), 11.03(11), 11.03(12), 11.04(1), 11.04(3), 11.04(4), and 11.07 were violated.

Applicable Law

Record Keeping Requirements

(1) All certified commercial applicators, all certified private applicators, and all licensed applicators or their employers, are required to keep true and accurate operational records containing the following information on each application of a pesticide:

- (a) Place of application;*
- (b) Date of application;*
- (c) The brand or registered name of the pesticide;*
- (d) The EPA registration number of the pesticide;*
- (e) The amount of pesticide applied;*
- (f) The purpose for which the pesticide was applied;*
- (g) Method of application;*
- (h) The persons certified or licensed by the Department who participated in the planning and execution of the application;*

333 CMR 10.14

Definitions

Right(s)-of-Way (ROW), any roadway, or thoroughfare on which public passage is made and any corridor of land over which facilities such as railroads, powerlines, pipelines, conduits, channels or communication lines or bicycle paths are located.

333 CMR 11.02

Definitions

Wetlands Determination, a written determination of the boundaries of Wetlands and boundaries of areas within 100 feet of Wetlands in accordance with the regulations of the Department of Environmental Protection (DEP) at 310 CMR10.05(3)(a)1. and 2.. 310 CMR 10.03(6)(b) require applicants not eligible for a public utility exemption to submit these determinations with their VMPs if they will apply herbicides within 100 feet of wetlands and will not submit a Notice of Intent under M.G.L.c. 131, §40, the Wetlands Protection Act. In order to obtain a Wetlands Determination, the applicant should submit a request to the conservation commission on maps of a scale that will enable the conservation commission or Department of Environmental Protection to find and delineate the boundaries of Wetlands and buffer zones within the vicinity of the right-of-way herbicide management area. To be considered "valid", the Wetlands Determination should be made no sooner than six months immediately prior to the submission of the Vegetation Management Plan. The Wetlands Determination shall cover the period of the Vegetation Management Plan only and shall expire at the end of the five year period of that Vegetation Management Plan.

333 CMR 11.02

General Provisions

(1) No person shall use an herbicide for the purpose of clearing or maintaining a right-of-way unless appropriately certified by the Department, or licensed by the Department and working under the on-site supervision of an appropriately certified applicator.

333 CMR 11.03(1)

General Provisions

(2) No person shall use an herbicide for the purpose of clearing or maintaining a right-of-way except in accordance with a Vegetation Management Plan (VMP) and a Yearly Operational Plan (YOP) as approved by the Department. The YOP shall be available at the work site at all times during herbicide applications and be made available to the Department and municipal officials including the Conservation Commission and Board of Health upon reasonable request.

333 CMR 11.03(2)

General Provisions

(4) The perimeter of any sensitive areas which are not readily identifiable on the ROW shall be identified with a clearly visible marker system, consistent with the VMP, prior to any herbicide application.

333 CMR 11.03(4)

General Provisions

(11) No person shall use an herbicide for the purpose of clearing or maintaining a right-of-way unless that person has obtained the most current available map of public ground water sources from the Department of Environmental Protection.

333 CMR 11.03(11)

General Provisions

(12) No person shall use an herbicide for the purpose of clearing or maintaining a right-of-way unless that person has done one or more of the following:

- (a) obtained a current list of identified Private Wells within 100 feet of the right-of-way from the Board of Health, or*
- (b) obtained a current list of all private wells, within 100 feet of the right of way from the Department of Agricultural Resources private well registry; or*
- (c) followed an alternative Private Well identification method outlined in an approved YOP.*

333 CMR 11.03(12)

Sensitive Area Restrictions

General

In any sensitive area:

- (a) No more than the minimum labeled rate of herbicide for the appropriate site, pest, and application method shall be applied.*
- (b) Herbicides shall only be applied selectively by low pressure, using foliar techniques or basal or cut-stump applications, or other method approved for use by the Department.*
- (c) No person shall apply herbicides for the purpose of clearing or maintaining a right-of-way in such a manner that results in drift to any area within 10 feet of standing or flowing water in a wetland; or area within 400 feet of a public drinking water supply well; or area within 100 feet of any Class A surface water used as a public water supply; or area within 50 feet of a Private Well.*
- (d) Only herbicides specified by the Department as acceptable for use in sensitive areas pursuant to the Cooperative Agreement executed between the Department of Agricultural Resources and the Department of Environmental Protection on July 1-2, 1987, or future amendments thereto, shall be used in sensitive areas. Applicants proposing to use an herbicide which has been registered for use on rights-of-way but has not yet been evaluated pursuant to the provisions of the Cooperative Agreement may request that such herbicides be evaluated pursuant to said provisions. For an herbicide that has been evaluated pursuant to the provisions of the Cooperative Agreement, applicants proposing to use such herbicide in a manner inconsistent with the terms and conditions of use imposed in the guidelines may request a modification or waiver of such terms or conditions. A request for such modification or waiver shall provide a detailed rationale for use, with all relevant data including but not limited to environmental fate, efficacy and human health effects of the proposed herbicide. Such herbicides and/or uses shall be subject to the evaluation standards adopted by the Departments of Agricultural Resources and Environmental Protection in the Cooperative Agreement.*

333 CMR 11.04(1)

Sensitive Area Restrictions

(3) State-listed Species Habitat

- (a) Any person proposing to apply an herbicide within any State-listed Species Habitat who does not have a current Yearly Operational Plan approved in writing by the Division of Fisheries and Wildlife pursuant to 321 CMR 10.14(12), shall submit all necessary materials required for review pursuant to 321 CMR 10.18.*
- (b) The management of vegetation within existing utility rights-of-way shall be exempt from the requirements of 321 CMR 10.18 through 10.23, provided that the management is carried out in accordance with a Yearly Operational Plan approved in writing by the Division of Fisheries and Wildlife, pursuant to 321 CMR 10.14(12).*
- (c) No person shall apply an herbicide within State-listed Species Habitat unless the application is approved by the Division of Fisheries and Wildlife pursuant to 333 CMR 11.04 (3a and 3b), and such approval is submitted to the Department.*

333 CMR 11.04(3)

Sensitive Area Restrictions

(4) Wetlands, Waters Over Wetlands, Riverfront Areas, and Certified Vernal Pools

- (a) No herbicide shall be applied on or within 10 feet of a Wetland or Water Over a Wetland, within 10 feet of the mean annual high-water line of any River, or within 10 feet of any Certified Vernal Pool.*

(b) No herbicide shall be applied on or within a distance of between 10 feet and 100 feet of any Wetland or Water Over a Wetland, within a distance of 10 feet from the mean annual high-water line of any River and the outer boundary of any Riverfront Area, or within a distance of 10 feet from any Certified Vernal Pool and the outer boundary of any Certified Vernal Pool Habitat unless:

1. A minimum of 12 months has elapsed since the last application to the site; and
2. Herbicides are applied selectively by low pressure, using foliar techniques or basal or cut-stump applications.

333 CMR 11.04(4)

Public Notification

(1) At least 21 days in advance of application of herbicide to a right-of-way in any city or town, the applicant shall notify the Department, the board of health and the local public water supplier and, by registered mail, the mayor, city manager or chairman of the board of selectman, and the conservation

commission in the municipality where the right-of-way lies. The notice shall include the following information: the approximate dates on which such herbicide application shall commence and conclude, provided however, that said application shall not commence more than ten days before nor conclude

more than ten days after said approximate dates; the method and locations of application; a Department-approved Herbicide Fact Sheet on the active ingredient(s) of the herbicide(s) used; the EPA registration number(s) for the herbicide(s) used; the name, title, business address and phone number of the

certified commercial applicator or licensed applicator, or the contractor, employer or employees responsible for carrying out the application. Where specific information required for this notice is already contained in the current YOP that is on file with the local official, the applicant may incorporate the appropriate pages of the YOP by reference in its notice to that official, indicating that these pages are also directly available from the applicant upon request.

(2) This public notice may run concurrently with the public notice and comment period in 333 CMR 11.06(3), provided that the notice is distributed at least 21 days prior to the herbicide application, and that, prior to the herbicide application, the public notice and comment period has closed and the Department has granted YOP approval without modifications. When the Department's final approval requires modifications or application dates are selected after YOP approval, separate notice under 333 CMR 11.07(a) is required.

(3) At least 48 hours prior to the application referred to in 11.07(a), the applicant must publish a conspicuous notice in at least one newspaper of general circulation in the city or town where the right-of-way lies. The notice must appear in the local section of the newspaper and measure at least four by five

inches in size. The notice shall contain the following information: the method and locations of pesticide application; the approximate dates on which the pesticide application shall commence and conclude, provided that the applications shall not commence more than ten days before nor conclude ten days after said approximate dates; a list of potential pesticides to be used; a description of the purpose of the application; and the name, title, business address and phone number of a designated contact person representing the applicant from whom any citizen may request further information. The notice should apply only to the calendar year in which the notice is published. Upon request the notice must be made available to the Department.

333 CMR 11.07

Carl Guyer, Complainant, Town of Southborough

The Massachusetts Department of Environmental Protection forwarded a complaint from Carly Guyer (Guyer) to the Department on August 3, 2017, regarding a potential Rights of Way (ROW) application.. Guyer provided the Department with an email statement in regards to what he witnessed. Guyer stated that throughout the neighborhood he routinely walks he noticed plants turning brown and dying off.

Karen Galligan, Superintendent, Southborough DPW

On August 9, 2017, I arrived at the Southborough DPW where I presented to Karen Galligan (Galligan), Superintendent, my credentials and a Notice of Inspection.

Galligan stated she was aware of the situation. She explained that [REDACTED], (Lic. #30534, category 37) sprayed poison ivy with Round Up Quick Pro (EPA Reg#524-535) along the roadways in town. Some areas sprayed were within 0-100' of inhabited areas. Shortly after he began spraying, a conservation agent informed her they could not apply herbicides without the appropriate plans and licenses. Galligan then told her [REDACTED] to stop all applications until the proper license was obtained and the plan was put into place. I also reviewed the application records being kept and found the records were missing the following:

- The EPA registration number of the pesticide
- The amount of pesticide applied
- The purpose for which the pesticide was applied
- Method of application
- The persons certified or licensed by the Department who participated in the planning and execution of the application

Findings

- Due to the fact that [REDACTED] applied Round Up Quick Pro to maintain vegetation along the roadside guardrails within the Town of Southborough without having a Massachusetts Pesticide Commercial Certification in Rights-of-Way (category 40), the Department finds that [REDACTED] used a herbicide to maintain Rights-of-Way without being appropriately certified therefore violating 333 CMR 11.03(1).
- Due to the fact that the Town of Southborough used Round Up Quick Pro to maintain vegetation along the roadside guardrails within the Town of Southborough without a current VMP and YOP, the Department finds that the Town of Southborough therefore violating 333 CMR 11.03(2).
- Due to the fact that Round Up Quick Pro was used in Limited Spray Areas (within 0-100' of inhabited area) and the Round Up Quick Pro is not a herbicide listed on the list of herbicide approved for use in sensitive areas, the Department finds that the Town of Southborough therefore violated 333 CMR 11.04(1)(d).
- Due to the fact that the Town of Southborough does not have a current YOP, the Department finds that there was no YOP reviewed by NHESP prior to the use of herbicides on ROWs therefore violating 333 CMR 11.04(3).
- Due to the fact that the Department did not receive the required application notification, the Department finds no notification of the use of herbicide to the Town of Southborough's ROW therefore violation 333 CMR 11.07.
- Due to the fact that there is no current YOP for the Town of Southborough, the Department finds that the Town of Southborough did not map and identify Sensitive Areas therefore violating 333 CMR 11.03(4) and 333 CMR 11.03(11).
- Due to the fact that there is no current VMP for the Town of Southborough, the Department finds that the Town of Southborough did not have a current Negative Determination of Applicability from the Southborough Conservation Commission or Massachusetts Department of

Environmental Protection therefore violating 333 CMR 11.02.

- Due to the fact that there is no current VMP or YOP for the Town of Southborough, the Department finds the Town of Southborough did not obtain private well information, map and identify them prior to the use of herbicides to the Town of Southborough's ROW therefore violating 333 CMR 11.03(12).
- Due to the fact that the Pesticide Application Records maintained by town employee [REDACTED] for the Town of Southborough and those records do not meet the Record Keeping Requirements, the Department finds the Town of Southborough did not maintain true and accurate pesticide applications records therefore violating 333 CMR 10.14(1).

Conclusion

Town of Southborough must do the following:

- Cease and desist the use of herbicides on the Town of Southborough's Rights-of-Way until completely compliant with 333 CMR 11.00.
- Place an advertisement in the local newspaper outline the details of the application of Round Up Quick Pro. The advertisement should follow the guidance in 11.07(3). Advertisement must include the date of application, herbicide used, exact location and the Town of Southborough's contact information for additional information. This advertisement must be posted in the local newspaper within 5 business days of receipt of this letter. A copy of the advertisement tear sheet must be submitted to the Department within 10 days of receipt of this letter.
- Maintain true and accurate pesticide application records in accordance with 333 CMR 10.14(1).
- Arrange a Use Observation with Inspection Edwards if the Town of Southborough chooses to use pesticides in the future as part of a Rights-of-Way program.

As set forth herein above, the Department has concluded that the Town of Southborough has violated 333 CMR 10.14(1), 11.02, 11.03(1), 11.03(2), 11.03(4), 11.03(11), 11.03(12), 11.04(1), 11.04(3), 11.04(4), and 11.07 and, as a result, has issued this Letter of Warning. In the event that the Town of Southborough fails to comply with the terms set forth herein above, the provisions of M.G.L. c. 132B and 333 CMR 10.14(1), 11.02, 11.03(1), 11.03(2), 11.03(4), 11.03(11), 11.03(12), 11.04(1), 11.04(3), 11.04(4), and 11.07 or any other applicable law or regulation, the Department may take further legal action. Should you have any questions regarding this matter, please feel free to contact me.

Sincerely,



Clayton L. Edwards
Massachusetts Department of Agricultural Resources
Pesticide Division
ROW Coordinator

Sent Certified and Regular Mail: 7005 1820 0002 3425 9417

Cc: [REDACTED], Applicator
Carl Guyer, Complainant