

## **Proposed Administrative Consent Agreement Background Summary**

**Subject:** David Sherman  
Essex Power Services, Inc.  
55 Union Street, 4<sup>TH</sup> Floor  
Boston, MA 02108

**Date of Incident(s):** August 3, 2012

**Background Narrative:** On August 3, 2012, the Board received a complaint call from an Oakland resident. The caller said he observed a man applying what appeared to be an herbicide to weeds growing on top of the dam outlet of Messalonskee Lake in Oakland. The caller thought the way the material was being applied made it inevitable that some was going into the water. The caller stopped and talked to the applicator who told him it was an herbicide he was applying.

On August 9, 2012, a Board inspector conducted a follow-up inspection with the Essex Power Services, Inc. employee who made the application and confirmed he applied Bayer Advanced Dura Zone Ready to Use Weed & Grass Killer (EPA Reg. # 72155-103) to the top of the dam spillway on August 3<sup>rd</sup>. The label for this product stated:

- “Intended for outdoor residential use” and
- “To protect the environment, do not allow pesticide to enter or run off into storm drains, drainage ditches, gutters or surface waters”.

### **Summary of Violation(s):**

- 7 U.S.C. § 136j (a)(2)(G), 7 M.R.S.A. § 606 (2)(B) and 22 M.R.S.A § 1471-D(8)(F), use of a pesticide inconsistent with the product labeling
- 22 MRSA §1471-E, no person shall apply or cause to be applied a pesticide to the waters of the State without obtaining a waste discharge license from the Department of Environmental Protection
- 22MRSA §1471-D(8)(C), used or supervised the use of pesticides applied in a careless, negligent or faulty manner or in a manner which is potentially harmful to the public health, safety or welfare or the environment

**Rationale for Settlement:** This was a ready-to -use product; no mixing was involved. Approximately ½ ounce of active ingredients was applied in this case. This amount would not likely result in any meaningful environmental consequences. No license was required in this case; the target site was inside a locked gate.

**Attachments:** Proposed Consent Agreement

STATE OF MAINE  
DEPARTMENT OF AGRICULTURE, FOOD AND RURAL RESOURCES  
BOARD OF PESTICIDES CONTROL

David Sherman )  
Essex Power Services, Inc. ) ADMINISTRATIVE CONSENT AGREEMENT  
55 Union Street, 4<sup>TH</sup> Floor ) AND  
Boston, MA 02108 ) FINDINGS OF FACT

This Agreement, by and between Essex Power Services, Inc. (hereinafter called the "Company") and the State of Maine Board of Pesticides Control (hereinafter called the "Board"), is entered into pursuant to 22 M.R.S.A. §1471-M (2)(D) and in accordance with the Enforcement Protocol amended by the Board on June 3, 1998.

The parties to this Agreement agree as follows:

1. That the Company is in the hydro power business and manages hydro dams.
2. That on August 6, 2012, the Board received a call from a concerned citizen in Oakland who reported that on August 3, 2012, he observed a man applying what appeared to be an herbicide to weeds growing on the boards on the top of the dam at the outlet of Messalonskee Lake in Oakland. The caller thought the application was made in such a way that it was inevitable that some of the chemical was going into the water. The caller stopped and talked to the applicator who confirmed he was applying an herbicide as observed. The caller got the applicator's contact information.
3. That on August 7, 2012, a Board inspector met with William Heinz, the production manager of Essex Power Services, Inc. an associated branch of the Company, and documented the herbicide label that company employee David Sherman applied as described in paragraph two. That product was Bayer Advanced Dura Zone (EPA Reg. # 72155-103). This is a ready-to-use weed and grass killer.
4. That on August 9, 2012, the same Board inspector met with David Sherman at the Messalonskee dam site to conduct a follow-up inspection. Sherman confirmed he applied Bayer Advanced Dura Zone on August 3, 2012, to the weeds on the boards on the top of the Snow Pond (otherwise known as Messalonskee Lake) Dam spillway in Oakland to control vegetation. Based on the interview with Sherman and the amount of herbicide remaining in the jug, the inspector determined less than ¼ of a gallon of herbicide was applied to spot treat the weeds and was applied as alleged in paragraph two.
5. That the Bayer Advanced Dura Zone label specifies the product is "intended for outdoor residential use".
6. That the dam at the outlet of Messalonskee Lake in Oakland is not a residential site.
7. That the Bayer Advanced Dura Zone label states "To protect the environment, do not allow pesticide to enter or run off into storm drains, drainage ditches, gutters or surface waters".
8. That based on the circumstances described in paragraphs two, three, and four, the way the herbicide was applied allowed it to enter surface water.
9. That the circumstances described in paragraphs one through eight constitute the use of a pesticide inconsistent with the product labeling in violation of 7 U.S.C. § 136j (a)(2)(G), 7 M.R.S.A. § 606 (2)(B) and 22 M.R.S.A § 1471-D(8)(F).

10. That the circumstances described in paragraphs one through eight were in violation of the following, 22MRSA §1471-D(8)(C) which reads, "used or supervised the use of pesticides applied in a careless, negligent or faulty manner or in a manner which is potentially harmful to the public health, safety or welfare or the environment".
11. That 22 MRSA §1471-E provides that no person shall apply or cause to be applied a pesticide to the waters of the State without obtaining a waste discharge license from the Department of Environmental Protection.
12. That the Company did not obtain a waste discharge license from the Department of Environmental for the pesticide caused to be applied to the water of Messalonskee Lake, as described in paragraphs two, three, and four.
13. That Messalonskee Lake is a water of the State.
14. That the circumstances described in paragraphs two, three, four, eleven, twelve and thirteen constitute a violation of 22 MRSA §1471-E.
15. That the Board has regulatory authority over the activities described herein.
16. 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.
17. That this Agreement shall not become effective unless and until the Board accepts it.
18. That, in consideration for the release by the Board of the causes of action which the Board has against the Company resulting from the violations referred to in paragraphs nine, ten and fourteen, the Company agrees to pay to the State of Maine the sum of \$400. (Please make checks payable to Treasurer, State of Maine).

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

ESSEX POWER SERVICES, INC.

By:  Date: 1/25/2013

Type or Print Name: Andrew Locke, Treasurer

BOARD OF PESTICIDES CONTROL

By: \_\_\_\_\_ Date: \_\_\_\_\_

Henry Jennings, Director

APPROVED

By: \_\_\_\_\_ Date: \_\_\_\_\_

Mark Randlett, Assistant Attorney General