

ATTORNEY GENERAL OF THE STATE OF NEW YORK
ENVIRONMENTAL PROTECTION BUREAU

In the Matter of

Investigation by ERIC T. SCHNEIDERMAN, Assurance No. 15-111
Attorney General of the State of New York, of:

**WAL-MART STORES, INC., a Delaware
corporation, on behalf of itself and its
subsidiaries**

Respondent.

ASSURANCE OF DISCONTINUANCE

On June 20, 2014, the Office of the Attorney General of the State of New York (“OAG”) commenced an investigation, pursuant to Section 63(12) of the Executive Law of New York, of Wal-Mart Stores, Inc. (Walmart), regarding Walmart’s compliance with New York’s Environmental Conservation Law (ECL) article 17, title 21 and Agriculture and Markets Law (AML) § 146-g, collectively referred to as the Nutrient Runoff Law. This Assurance of Discontinuance (the Assurance) contains the findings of OAG’s investigation and the relief agreed to by OAG and Walmart (collectively, the Parties).

OAG FINDINGS

1. New York enacted the Nutrient Runoff Law in 2010 to help reduce the amount of phosphorus entering the State’s waterways from non-agricultural sources. *See* L. 2010, ch. 205. The Nutrient Runoff Law restricts the sale and use of “phosphorus fertilizer.” *See* ECL §§ 17-2103. “Fertilizer,” as defined in ECL § 17-2101(2), has the same meaning as “specialty fertilizer” in AML § 143 (b), which is “commercial fertilizer distributed primarily for non-farm use, such as home gardens, lawns, shrubbery, flowers, golf courses, municipal parks, cemeteries,

greenhouses and nurseries, and such other use as the commissioner may define by regulation.”

“Phosphorus fertilizer” is a fertilizer “in which the available phosphate (P205) content is greater than 0.67 percent by weight, excluding compost.” ECL § 17-2101(4). Among other restrictions, the Nutrient Runoff Law forbids a person from applying or authorizing the application of phosphorus fertilizers to lawn or non-agricultural turf unless (1) a soil test indicates that additional phosphorus is needed for growth of that lawn, or (2) the fertilizer is being used for a newly-established lawn or non-agricultural turf during the first growing season. *See* ECL § 17-2103(1). “Lawn” or “non-agricultural turf” means “any non-crop land area that is covered by any grass species,” but not “flower or vegetable gardens, pastures, hayland, trees, shrubs, turf grown on turf farms, or any form of agricultural production.” ECL § 17-2101(3).

2. The Nutrient Runoff Law also imposes two requirements on retailers who “sell” or “offer for sale” phosphorus fertilizers intended for use on lawns or non-agricultural turf. *See* ECL § 17-2103(2); AML § 146-g. First, the retailer must display such phosphorus fertilizers separately from fertilizers that contain less than 0.67 percent available phosphate by weight (hereinafter referred to as “phosphorus-free fertilizers”). AML § 146-g (a). Second, the retailer must post a “clearly visible sign” in the vicinity of the phosphorus fertilizers that is “at least eight and one-half inches by eleven inches in size” and states the requirements of the Nutrient Runoff Law. AML § 146-g(b). A retailer who sells or offers for sale qualifying fertilizers without complying with these requirements is subject to penalties of up to \$500 for the first violation, and up to \$1,000 for each subsequent violation. ECL §§ 17-2103(2), 71-1945(1).

3. In June and July of 2014, OAG investigated 18 Walmart stores selling lawn fertilizers across New York. At 16 of those stores, OAG found 20 locations where one or more phosphorus fertilizers intended for use on lawns or non-agricultural turf was being displayed

adjacent to one or more phosphorus-free fertilizers, in violation of AML § 146-g(a). OAG inspectors also found 20 displays of phosphorus fertilizers intended for use on lawns or non-agricultural turf that were not accompanied by the signage required by AML § 146-g(b). OAG conducted follow-up inspections at 4 stores in September 2014, and documented 14 additional violations.

4. On December 17, 2014, OAG sent a letter to Walmart's General Counsel notifying her of the results of the investigation. Settlement negotiations ensued between the Parties, resulting in a settlement the terms of which are set forth below. As part of its consideration of this matter, Walmart decided to stop selling phosphorus fertilizers for use on lawns or non-agricultural turf in all Walmart and Sam's Club stores in the State of New York, and to stop selling phosphorus fertilizers through Walmart.com to customers in New York. OAG recognizes that Walmart's voluntary discontinuance of such sales, while not required by law, would nevertheless satisfy the State's concerns regarding the company's future compliance with the Nutrient Runoff Law.

PROSPECTIVE RELIEF

WHEREAS, Walmart neither admits nor denies OAG's Findings (1)-(4) above;

WHEREAS, OAG is willing to accept the terms of this Assurance pursuant to Executive Law § 63(15) and to discontinue its investigation described above; and

WHEREAS, the Parties each believe the obligations imposed by this Assurance are prudent and appropriate;

IT IS HEREBY UNDERSTOOD AND AGREED, by and between the Parties that:

6. All payments and correspondence made in connection with the Assurance must reference Assurance No. 15-111.

7. Unless otherwise defined, all terms in this Assurance have the definitions set forth in ECL § 17-2101 and AML § 143.

8. In consideration of the making and execution of this Assurance, and within 30 days thereafter, Walmart agrees that it will pay by check payable to the State of New York \$98,000 in penalties.

9. Walmart further agrees that, beginning 30 days after the execution of this Assurance, it will not sell phosphorus fertilizers intended for use on lawn or non-agricultural turf at Walmart stores and Sam's Club stores in the State of New York. Additionally, beginning 30 days after the execution of this Assurance, Walmart will not sell phosphorus fertilizers intended for use on lawn or non-agricultural turf through Walmart.com to customers in New York State.

10. If, at any time during the duration of this Assurance, Walmart wishes to sell phosphorus fertilizers for use on lawn or non-agricultural turf at Walmart stores or Sam's Club stores in New York State, or to customers in New York State through Walmart.com, it must give OAG at least 60 days advance notice of its intention to resume such sales. In such notification, Walmart must describe the steps it would take to ensure its future compliance with the Nutrient Runoff Law. Furthermore, Walmart must commit to display educational materials, such as pamphlets, approved by OAG in the vicinity of all displays of phosphorus fertilizers intended for use on lawn or non-agricultural turf and to disclose sales data for such phosphorus fertilizer sales for a three (3) year time period to OAG. The adequacy of these commitments will be subject to OAG review and approval, in the form of a supplement to this Assurance, prior to the re-introduction of phosphorus fertilizers.

11. This Assurance and the obligations agreed to herein shall terminate three (3) years from the effective date of the Assurance.

MISCELLANEOUS

12. OAG has agreed to the terms of this Assurance based on, among other things, the representations made to OAG by Walmart and their counsel and OAG's own factual investigation set forth in Findings (1)-(4) above. To the extent that any material representations are later found to be inaccurate, this Assurance is voidable by OAG in its reasonable discretion upon thirty (30) days written notice to Walmart.

13. If the Assurance is voided or materially breached, Walmart agrees that any statute of limitations or other time-related defenses applicable to the subject of the Assurance and any claims arising from or relating thereto are tolled from and after the date of this Assurance. In the event the Assurance is voided or materially breached, Walmart expressly agrees and acknowledges that this Assurance shall in no way bar or otherwise preclude OAG from commencing, conducting or prosecuting any investigation, action or proceeding, however denominated, related to the Assurance, against Walmart, or from using in any way any statements, documents or other materials produced or provided by Walmart prior to or after the date of this Assurance.

14. No representation, inducement, promise, understanding, condition, or warranty not set forth in this Assurance has been made to or relied upon by Walmart in agreeing to this Assurance.

15. Walmart represents and warrants, through the signatures below, that the terms and conditions of this Assurance are duly approved, and execution of this Assurance is duly authorized. Walmart shall not take any action or make any statement denying, directly or indirectly, the propriety of this Assurance or expressing the view that this Assurance is without factual basis. Nothing in this paragraph affects Walmart's (i) testimonial obligations or (ii) right

to take legal or factual positions in defense of litigation or other legal proceedings to which the OAG is not a party, or to assert defenses against allegations of violations of this Assurance or future violations of the Nutrient Runoff Law. This Assurance is not intended for use by any third party in any other proceeding and does not confer upon any such person any rights or remedies, and it is not intended, and should not be construed, as an admission of liability by Walmart.

16. This Assurance may not be amended except by an instrument in writing signed on behalf of the Parties to this Assurance, and any purported modification to this Assurance that is not recorded in a writing signed on behalf of the Parties shall be null and void.

17. This Assurance shall be binding on and inure to the benefit of the Parties and their respective successors and assigns, provided that no party, other than OAG, may assign, delegate, or otherwise transfer any of its rights or obligations under this Assurance without the prior written consent of OAG.

18. In the event that any one or more of the provisions contained in this Assurance shall for any reason be held to be invalid, illegal, or unenforceable in any respect, in the sole discretion of OAG such invalidity, illegality, or unenforceability shall not affect any other provision of this Assurance.

19. To the extent not already provided under this Assurance, Walmart shall, upon request by OAG, provide all documentation and information necessary for OAG to verify compliance with this Assurance.

20. All notices, reports, requests, and other communications to any party pursuant to this Assurance shall be in writing and shall be directed as follows:

If to Walmart, to:

Walmart US Legal-Compliance
508 S.W. 8th Street (MS 0505)

Bentonville, AR 72716-0505

cc:

Jeremy Snell
Associate General Counsel
Walmart US Legal
508 S.W. 8th Street (MS 0505)
Bentonville, AR 72716-0505
479-204-1096
Jeremy.Snell@walmartlegal.com

Don Wiseman
Sr. Associate General Counsel
Walmart US Legal
508 S.W. 8th Street (MS 0505)
Bentonville, AR 72716-0505
479-204-9143
Don.Wiseman@walmartlegal.com

If to the OAG, to:

Brian Lusignan
Assistant Attorney General
New York State Office of the Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224-0341
(518) 776-2399
Brian.Lusignan@ag.ny.gov

21. Acceptance of this Assurance by the OAG shall not be deemed approval by the OAG of any of the practices or procedures referenced herein, and Walmart shall make no representation to the contrary.

22. Pursuant to Executive Law § 63(15), evidence of a violation of this Assurance shall constitute *prima facie* proof of violation of the Nutrient Runoff Law in any action or proceeding thereafter commenced by OAG.

23. If a court of competent jurisdiction determines that Walmart has breached this Assurance, Walmart shall pay to OAG the cost, if any, of such determination and of enforcing this Assurance, including without limitation legal fees, expenses, and court costs.

24. The OAG finds the relief and agreements contained in this Assurance appropriate and in the public interest. The OAG is willing to accept this Assurance pursuant to Executive Law § 63(15), in lieu of commencing a statutory proceeding. This Assurance shall be governed by the laws of the State of New York without regard to any conflict of laws principles.

25. Nothing contained herein shall be construed as to deprive any person of any private right under the law.

26. This Assurance may be executed in counterparts, each of which shall be deemed to be an original, but all of which, taken together, shall constitute one and the same agreement. The Assurance shall be considered fully executed on the date on which the latter signature is executed.

IN WITNESS WHEREOF, this Assurance is executed by the Parties hereto on May 22, 2015.

ERIC T. SCHNEIDERMAN
Attorney General of the State of New York

By:



Brian Lusignan
Assistant Attorney General
Environmental Protection Bureau
The Capitol
Albany, NY 12224-0341
(518) 776-2399

Date: May 22, 2015

WAL-MART STORES, INC.

BY: David J. Ortiz
David J. Ortiz
Vice President/DMM - Outdoor Living

Date: May 21, 2015