

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 2

October 21, 2021 @ 12:07 pm

USEPA – Region II

Regional Hearing Clerk

In the Matter of

Douglas Plant Health Intermediate, Inc.,

Respondent.

**Proceeding to Assess a Civil Penalty
Under Section 14(a) of the Federal
Insecticide, Fungicide, and Rodenticide
Act, 7 U.S.C. § 136l(a)**

**CONSENT AGREEMENT AND
FINAL ORDER**

Docket No. FIFRA-02-2022-5204

Consent Agreement

1. This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), and Sections 22.13(b) and 22.18(b)(2) and (3) of the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits (CROP)* as codified at 40 C.F.R. Part 22. Pursuant to Section 22.13(b) of the Consolidated Rules of Practice, where the parties agree to settlement of one or more causes of action before the filing of an administrative complaint, a proceeding may be simultaneously commenced and concluded by the issuance of a Consent Agreement and Final Order pursuant to 40 C.F.R. §§ 22.18(b)(2) and (3).

2. The Complainant is the Director of the Enforcement and Compliance Assurance Division, United States Environmental Protection Agency (EPA), Region 2.

3. Respondent is Douglas Plant Health Intermediate, Inc. (PHI), a corporation organized pursuant to and existing under the laws of the State of Delaware, with its principal place of business an office located at 1550 East Old 210 Highway, Liberty, Missouri 64068.

4. The parties agree that settling this action without the filing of a Complaint or the adjudication of any issue of fact or law is in their interest and in the public interest.

5. Respondent consents to the assessment of the civil penalty specified in this Consent Agreement and to its terms and requirements, and further consent to the issuance of the accompanying Final Order ratifying this Consent Agreement.

Jurisdiction and Waiver of Right to Hearing

6. Respondent admits the jurisdictional allegations set forth in this Consent Agreement, and it neither admits nor denies the factual allegations set forth in this Consent Agreement.

7. Respondent waives its right to request a hearing as provided at 40 C.F.R. § 22.15(c), and any right it may have to contest the allegations in this Consent Agreement and to seek and obtain review by the Environmental Appeals Board or judicial review in any federal court.

Statutory Background

8. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines the term “person” to mean “any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.”

9. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), defines the term “pest” to include “any...fungus, weed or...any other form of terrestrial or aquatic plant...life...which the Administrator [of EPA] declares to be a pest under” FIFRA.

10. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines, in relevant part, the term “pesticide” to mean[] “any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest....”

11. Pursuant to Section 2(v) of FIFRA, 7 U.S.C. § 136(v), the term “plant regulator” does not include “any substance or mixture of substances” that are “not [intended] for pest destruction.”

12. Section 2(w) of FIFRA, 7 U.S.C. § 136(w), defines, in relevant part, the term “producer” to mean “the person who manufactures, prepares, compounds, propagates, or processes any pesticide...or active ingredient used in producing a pesticide.”
13. Section 2(dd) of FIFRA, 7 U.S.C. § 136(dd), defines, in relevant part, the term “establishment” to mean “any place where a pesticide...or active ingredient used in producing a pesticide is produced, or held, for distribution or sale.”
14. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines, in relevant part, the term “distribute or sell” to “mean[] to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.”
15. Section 3(a) of FIFRA, 7 U.S.C. § 136a(a), provides, in relevant part, that “no person in any State may distribute or sell to any person any pesticide that is not registered under this subchapter” (subchapter II of chapter 6) of FIFRA.
16. Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), provides, in relevant part, that “[a]ny producer operating an establishment registered under this section shall” annually inform EPA “of the type and amounts of pesticides and...active ingredients used in producing pesticides...which the producer is currently producing; which the producer has produced during the past year; and which the producer has sold or distributed during the past year.”
17. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), provides, in relevant part, “it shall be unlawful for any person in any State to sell or distribute to any person...any pesticide that is not registered under” FIFRA.
18. Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), provides, in relevant part,

“it shall be unlawful for any person in any State to sell or distribute to any person...registered pesticide the composition of which differs at the time of its distribution or sale from its composition as described in the statement required in connection with its [FIFRA] registration.”

19. Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L), provides, in relevant part, that “it shall be unlawful for any person...who is a producer to violate any of the provisions in section 136e of this title,” with said provision having been quoted in relevant part in paragraph 16, above.

20. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), provides, in relevant part, that “[a]ny registrant ...wholesaler, dealer, retailer, or other distributor who violates any provision of this subchapter may be assessed a civil penalty by [EPA] of not more than \$5,000 for each offense....” The Federal Civil Penalties Inflation Adjustment Act of 1990, as amended, 28 U.S.C. § 2461 *note*, and its implementing regulations at 40 C.F.R. Part 19, have increased this amount to \$20,528 for each offense occurring after November 2, 2015, where penalties are assessed on or after December 23, 2020.

Factual Allegations and Alleged Violations

21. Respondent’s predecessor-in-interest was Growth Products, Ltd. (“Growth Products”), a corporation organized pursuant to and existing since 1984 under the laws of the State of New York, with its principal place of business located at 80 Lafayette Avenue, White Plains, New York 10603.

22. Respondent purchased Growth Products in 2018.

23. Respondent is, and Growth Products was for all times relevant to the matters asserted below, a corporation, and therefore, each constitutes(ed) a “person” as that term is defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

24. For the times relevant to the matters alleged below, Growth Products specialized, and now Respondent engages, in the business of developing, manufacturing and marketing plant health

products. Such products include fertilizers, micro-nutrients, biological control products, and pesticides for commercial agriculture and for domestic uses.

25. For all times set forth herein, Growth Products, and now Respondent, has been a “registrant” of pesticides within the meaning of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1).

26. For all times set forth herein, Growth Products, and now Respondent, has been a “producer” of pesticides within the meaning of Section 2(w) of FIFRA, 7 U.S.C. § 136(w), and Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

27. Growth Products registered its facility at 25 Home Street, White Plains, New York 10606 with EPA on November 21, 1997 (the “Home Street facility”) as a pesticide-producing establishment. It was registered with establishment number 71065-NY-1. PHI registered a second facility at 80 Lafayette Avenue, White Plains New York 10603 (the “Lafayette Avenue facility”) as a pesticide producing establishment on October 23, 2018. The Lafayette Avenue facility was registered with establishment number 71065-NY-2.

28. On June 8, 2016, pursuant to Sections 8 and 9 of FIFRA, duly delegated EPA, Region 2, inspectors conducted an inspection at Growth Products’ offices. The inspection was conducted following EPA having received information that Growth Products had been selling unregistered products with pesticidal claims. The inspection was also conducted to determine the supplier(s) of the active ingredients of the registered biological fungicides produced and distributed or sold by Growth Products.

29. As a follow-up to the June 2016 inspection and to obtain additional and clarifying information, duly designated EPA, Region 2, inspectors conducted, pursuant to Sections 8 and 9 of FIFRA, an additional inspection at Growth Products’ offices on February 7, 2018.

30. As a result of the two inspections and upon review of all the information EPA obtained during those inspections and subsequent thereto, Region 2 staff documented that Growth Products had sold and distributed and had offered to sell and distribute a number of pesticides.

31. More specifically, as a result of the two inspections and based upon a review of all follow-up information EPA obtained, EPA has determined that Respondent's predecessor-in-interest manufactured, and in calendar year 2017 sold or distributed the following products with explicitly pesticidal claims (the names under which such products were sold or distributed are indicated in quotation marks):

- a. at least 12 separate sales (and distributions) of "Essential plus 1-0-1 100% Soil Amendment and Root Stimulator with 21 L-amino acids" (Essential);
- b. at least 30 separate sales (and distributions) of "SITKO SA 0-7-17" (SITKO);
- c. at least 135 separate sales (and distributions) of "Recover RX 3-18-18 RX Foliar Formulation with Salicylic Acid and Phosphorous Sources" (Recover RX)
- d. at least 49 separate sales (and distributions) of "Green Speed Si 0-2-5 7% Soluble Potassium Silicate with Phosphite and 2% Humic Acid" (Green Speed);
and
- e. at least 15 separate sales (and distributions) of "TKO Phosphite 0-0-26 100% Phosphite" (TKO-26).

32. Each of Essential, SITKO, Recover RX, Green Speed and TKO-26 as sold and distributed by Growth Products is a "pesticide" within the meaning of Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

33. At the times of each of the 12 separate sales and distributions of Essential, the 30 separate sales and distributions of SITKO, the 135 separate sales and distributions of Recover RX, the

49 separate sales and distributions of Green Speed and the 15 separate sales and distributions of TKO-26, none of these pesticides had been registered with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a.

34. At or around the times of the sales and distributions of the aforementioned five pesticide products, Respondent's predecessor-in-interest also produced and offered for sale and distribution three other pesticide products: (a) "SAR [Systemic Acquired Resistance] Activator SA" (SAR-SA); (b) "Sil-Guard 0-2-5" (Sil-Guard); and (c) "TKO Phosphite 0-29-26" (TKO-29).

35. Each of SAR-SA, Sil-Guard and TKO-29 was a "pesticide" within the meaning of Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

36. At the times each of SAR-SA, Sil-Guard and TKO-29 was being offered for sale and distribution, none of them had been registered with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a.

37. Each instance of the sale and distribution (or offering to sell and distribute) a pesticide or pesticide product that had not been previously registered with EPA under Section 3 of FIFRA, 7 U.S.C. § 136a, constitutes a separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

38. For each such separate and distinct violation of Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), EPA may assess against Respondent, as the successor-in-interest to Growth Products, a penalty pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as updated.

39. As a result of the two inspections and upon review of all the information EPA obtained during those inspections and subsequent thereto, Region 2 staff determined that, on at least 12 separate occasions, Growth Products had produced at the Home Street facility and then sold and distributed two registered pesticides, commercially known as "Companion Liquid Biological

Fungicide 2-3-2” (CLB-232), EPA Reg. No. 71065-3; and (b) “Companion Biological Fungicide Wettable Powder (CBF), EPA Reg. No. 71065-4.

40. The composition of the CLB-232 and of the CBF produced and distributed or sold by Growth Products differed from the composition described in the statements required and provided to EPA in the respective registration submissions made for each product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a(a). The active ingredient used to produce each was derived and/or obtained from a source different from the source specified in the Confidential Statements of Formula submitted as part of the EPA registration process.

41. Each such instance of a sale or distribution of a registered pesticide for which the actual composition (active ingredient) of the pesticide differs from the composition (active ingredient) described in that product’s registration statement constitutes a separate and distinct violation of Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C).

42. For each such separate and distinct violation of Section 12(a)(1)(C) of FIFRA, 7 U.S.C. § 136j(a)(1)(C), EPA may assess against Respondent, as the successor-in-interest to Growth Products, a penalty pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as updated.

43. As a result of the two inspections and upon review of all the information EPA obtained during those inspections and subsequent thereto, Region 2 staff determined that, for several calendar years, including calendar year 2016, Growth Products failed to file an annual production report for the Home Street facility required pursuant to Section 7(c) of FIFRA, 7 U.S.C. § 136e(c), the production of CLB-232 and CBF.

44. Each such failure to provide EPA with an annual production report constitutes a separate and distinct violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. § 136j(a)(2)(L).

45. For each separate and distinct violation of Section 12(a)(2)(L) of FIFRA, 7 U.S.C. §

136j(a)(2)(L), EPA may assess against Respondent, as the successor-in-interest to Growth Products, a penalty pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l(a)(1), as updated.

Civil Penalty

46. Pursuant to Section 14(a)(4) of FIFRA, 7 U.S.C. § 136l(a)(4), Complainant determined that an appropriate civil penalty to settle this action is \$437,000. In determining the penalty amount Complainant has considered the appropriateness of the penalty to the size of Respondent's business, the effect on Respondent's ability to continue in business, and the gravity of the violations. Complainant also considered EPA's Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act, dated December 2009 (FIFRA ERP), as well as Respondent's cooperation with EPA throughout this matter, including instituting a voluntary stop sale for certain products, and voluntary audit of all marketing materials and labels for all products sold by Respondent.

47. Respondent shall pay, by any one of the three methods set forth below, a civil penalty in the amount of **FOUR HUNDRED THIRTY-SEVEN THOUSAND DOLLARS (\$437,000)**. Such payment must be received by EPA on or before thirty (30) days from the date on which the Acting Regional Administrator signs the Final Order which is located at the end of this CAFO (Due Date).

a. Cashier's or Certified Check: If payment is made by cashier's check or by certified check, such check shall be made payable to the "Treasurer, United States of America," and shall be identified with a notation thereon listing the following: **In the Matter of Douglas Plant Health Intermediate, Inc., Docket No. FIFRA-02-2022-5204**. If payment is made by either form of check, such payment shall be mailed by either of the following methods:

STANDARD DELIVERY

United States Environmental Protection Agency
Fines & Penalties
Cincinnati Finance Center
P.O. Box 979077
St. Louis, Missouri 63197-9000

SIGNED RECEIPT CONFIRMATION DELIVERY (Fedex, DHL, UPS, USPS, Certified, Registered, etc.)

United States Environmental Protection Agency
Government Lockbox 979077
1005 Convention Plaza
SL-MO-C2-GL
St. Louis, MO 63101

b. Fedwire: If Respondent chooses to make payment electronically through Fedwire, Respondent shall provide the following information to its remitter bank (Federal Reserve Bank of New York) when each payment is made:

- a. Amount of payment
- b. SWIFT address: **FRNUS33, 33 Liberty Street, New York, NY 10045**
- c. Account Code for Federal Reserve Bank of New York receiving payment: **68010727**
- d. Federal Reserve Bank of New York ABA routing number: **021030004**
- e. Field Tag 4200 of the Fedwire message should read: **“D 68010727 Environmental Protection Agency”**
- f. Name of Respondent: **Douglas Plant Health Intermediate, Inc.**
- g. Case Docket Number: **FIFRA-02-2022-5204**

c. On-line payment: If Respondent chooses to make on-line payment, Respondent shall go to **www.pay.gov** and enter SFO 1.1 in the search field on the tool bar on the Home Page; select Continue under “EPA Miscellaneous Payments – Cincinnati Finance Center;” and open the form and complete the required fields. Once payment has been made, Respondent shall email proof of payment to **Spielmann.Lee@epa.gov** and **Wise.Milton@epa.gov** and shall note on the subject line **In the Matter of Douglas Plant Health Intermediate, Inc., FIFRA-02-2022-5204.**

48. Failure to pay the full amount of the penalty, according to the above provisions, will

result in the referral of this matter to the United States Department of Justice and/or the United States Department of Treasury for collection and/or other appropriate action. The validity, amount and appropriateness of the civil penalty are not reviewable in a collection action.

49. Pursuant to 31 U.S.C. § 3717 and 40 C.F.R. § 13.11, EPA is entitled to assess interest, administrative costs and late payment penalties on outstanding debts owed to the United States, including the United States Environmental Protection Agency, and a charge to cover costs of processing and handling delinquent claims.

a. Interest: Any unpaid portion of a civil penalty must bear interest at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. § 3717(a)(1). Interest will therefore begin to accrue on any portion of the civil penalty not paid by the relevant Due Date(s) specified above. Interest will be assessed at the rate of the United States Treasury tax and loan rate in accordance with 40 C.F.R. § 13.11(a).

b. Handling Charges: Pursuant to 31 U.S.C. § 3717(e)(1), a monthly handling charge of fifteen dollars (\$15.00) shall be assessed for each thirty (30) day calendar period, or any portion thereof, following the date the payment was to have been made, in which payment of the amount remains in arrears.

c. Late Penalty Charge: A late penalty charge of six percent (6%) per year will be assessed monthly on any portion of the civil penalty that remains delinquent more than ninety (90) calendar days. 40 C.F.R. § 13.11(c). The late payment penalty on any portion of the civil penalty that remains delinquent more than ninety days shall accrue from the first day payment is delinquent. 31 C.F.R. § 901.9(d).

50. The civil penalty, including any payment(s) for interest or late payment and handling charges that come due, constitutes a penalty within the meaning of 26 U.S.C. § 162(f) and does not constitute a deductible expenditure for purposes of federal or state law.

General Provisions

51. Respondent certifies that, to the best of its knowledge, it is currently in compliance with applicable provision of FIFRA, 7 U.S.C. §§ 136-136y, and its implementing regulations.

52. Respondent explicitly and knowingly consents to the assessment of the civil penalty as set forth in this Consent Agreement and agrees to pay the penalty in accordance with the terms of this Consent Agreement. Full payment of the penalty shall only resolve Respondent's liability for federal civil penalties for the violations described in paragraphs 31-45, above. Full payment of this penalty shall not in any case affect the authority of EPA or the United States to pursue appropriate injunctive or other equitable relief or criminal sanctions for any violations of law.

53. This Consent Agreement is not intended and is not to be construed to waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable federal, state, or local laws, rules, or regulations, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state, or local permit. This Consent Agreement is not intended and is not to be construed to waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

54. Compliance with the requirements and provisions of this Consent Agreement shall not constitute a defense to any subsequent (*i.e.*, following the filing of this document) action, suit or proceeding EPA (or the United States on behalf of EPA) may commence pursuant to any applicable federal statutory or regulatory provision for any violation(s) occurring after the date of the execution of the Final Order accompanying this Consent Agreement, or for any violation(s) of FIFRA statutory or regulatory requirements or prohibitions not alleged herein but that may have occurred prior to the date of the execution of the Final Order accompanying this Consent Agreement.

55. Respondent consents to the use of electronic signatures in this matter and to service upon it of a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk via electronic mail to the following addressee(s): **flyons@schiffhardin.com**. Delivery of the fully executed documents to the email addresses in this paragraph shall constitute Respondent's receipt and acceptance of the CAFO.

56. Any responses, documentation, and other communication submitted to EPA in connection with this Consent Agreement shall be sent by regular mail and email to:

Michael Brannick
Lead Paint & Pesticides Compliance Section
Enforcement and Compliance Assurance Division
U.S. Environmental Protection Agency – Region 2
2890 Woodbridge Avenue, MS 500
Edison, New Jersey 08837
brannick.michael@epa.gov

and

Lee A. Spielmann
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency – Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866
spielmann.lee@epa.gov

Unless the above-named EPA contacts are later advised otherwise by electronic mail, EPA shall address any written future correspondence (including any correspondence related to payment of the penalty in accordance with the provisions of this Consent Agreement), to the addressee identified in the preceding paragraph.

57. Respondent has read the Consent Agreement, understands its terms, finds it to be acceptable, and consents to its issuance and its terms. Respondent agrees that this Consent Agreement, as it is subsequently to be ratified with execution of the accompanying Final Order, constitutes the entire agreement between the parties and all terms of settlement are set forth herein.

58. The terms of this Consent Agreement bind Respondent, its successors, and assigns.

Each person signing this agreement certifies that he or she has the authority to sign for the party whom he or she represents and to bind that party to its terms.

59. Each party agrees to bear its own costs and attorney fees in this action.

RESPONDENT:

BY:  _____
(Signature)

NAME: Wes Long

TITLE: CEO, Douglas Products

COMPANY NAME: Douglas Plant Health Intermediate, Inc.

DATE: October 14, 2021

COMPLAINANT:

For Dore LaPosta, Director
Enforcement & Compliance Assurance Division
U.S. Environmental Protection Agency Region 2

DATE: _____

FINAL ORDER

The Regional Administrator of EPA, Region 2, concurs in the foregoing Consent Agreement in the case of **In the Matter of Douglas Plant Health Intermediate, Inc. Docket Number FIFRA-02-2022-5204**. Said Consent Agreement, having been duly accepted and entered into by the parties, is hereby ratified and incorporated into this Final Order, which is hereby issued and shall take effect when filed with the Regional Hearing Clerk of EPA, Region 2. 40 C.F.R. § 22.31(b). This Final Order is being entered pursuant to the authority of 40 C.F.R. § 22.18(b)(3).

Walter Mugdan
Acting Regional Administrator
U.S. Environmental Protection Agency – Region 2
290 Broadway, 26th Floor
New York, New York 10007-1866

DATED: _____
New York, New York

CERTIFICATE OF SERVICE

I certify that I have this day caused to be sent the foregoing fully executed Consent Agreement and Final Order, bearing the above-referenced docket number, in the following manner to the respective addressees listed below:

By Electronic Mail:

Karen Maples
Office of the Regional Hearing Clerk
U.S. Environmental Protection Agency
Region 2
290 Broadway, 16th Floor
New York, New York 10007-1866
maples.karen@epa.gov

By Electronic Mail

Francis Lyons, Esq.
Schiff Hardin
flyons@schiffhardin.com

Dated: _____, 2021
New York, New York
