

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

REGION 5 77 WEST JACKSON BOULEVARD CHICAGO, IL 60604-3590

REPLY TO THE ATTENTION OF: LC-8J

<u>CERTIFIED MAIL</u> <u>Receipt No. 7001 0320 0006 0182 4387</u>

Mr. Craig Harmer Gardens Alive, Inc. 5100 Schenley Place Lawrenceburge, Indiana 47025

Consent Agreement and Final Order, Docket No. FIFRA-05-2008-0015

Dear Mr. Harmer:

Enclosed pleased find a copy of a fully executed Consent Agreement and Final Order concerning violations of the Federal Insecticide Fungicide & Rodenticide Act (FIFRA), 7 §§ U.S.C.136 (a), in resolution of the above case. This document was filed on May 27, 2008 with the Regional Hearing Clerk.

The civil penalty in the amount of \$28,000 is to be paid in the manner prescribed in paragraphs 80 thru 82. Please be certain that the number **BD** 2750845P015 and the docket number are written on both the transmittal letter and on the check. Payment is due by 26 June 2008. (within 30 calendar days of the filing date).

Thank you for your cooperation in resolving this matter. Sincerely,

Terence Bonace Pesticides and Toxics Compliance Section

Enclosures

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY REGION 5

IN RE:	
III KE.	
GARDENS ALIVE, INC.) CONSENT AGRREMENT
LAWRENCEBURG, INDIANA) AND FINAL ORDER
	DOCKET NO. FIFRA-05-2008-0015
Respondent.	}

CONSENT AGREEMENT AND FINAL ORDER

I. Preliminary Statements

- This is an administrative action commenced and concluded under Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, as amended (FIFRA),
 U.S.C. §1361(a), and the Consolidated Rules of Practice Governing the
 Administrative Assessment of Civil Penalties and the Revocation/Termination or
 Suspension of Permits (Consolidated Rules), as codified at 40 C.F.R. Part 22.
- 2. Complainant is the Director of the Land and Chemicals Division, United States Environmental Protection Agency (U.S. EPA), Region 5.
- 3. Respondent is Gardens Alive, Inc., a corporation organized under the laws of the State of Indiana with a place of business at 5100 Schenley Place, Lawrenceburg, Indiana 47025.

II. Jurisdiction/Waiver of Right to Hearing

4. Where the parties agree to settle one or more causes of action before the filing of a complaint, the administrative action may be commenced and concluded simultaneously by the issuance of a consent agreement and final order (CAFO).

40 C.F.R. § 22.13(b).

- 5. 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.
- 6. Respondent consents to the assessment of the civil penalty specified in this CAFO and to the terms of this CAFO.
- 7. Respondent admits the jurisdictional allegations in this CAFO and neither admits nor denies the factual allegations in this CAFO.
- 8. Respondent waives its right to request a hearing as provided at 40 C.F.R. §22.15(c), any right to contest the allegations in this CAFO, and its right to appeal this CAFO.
 - 9. Respondent certifies that it is complying with FIFRA, 7 U.S.C. § 136 to 136y.

III. Factual Allegations and Alleged Violations

- 10. Respondent is a "person" as defined at Section 2(s) of FIFRA, 7 U.S.C. § 136(s).
- 11. Respondent owned or operated a place of business located at 5100 Schenley Place, Lawrenceburg, Indiana during the calendar years 2006 and 2007.
- 12. On November 8, 2006, Respondent's Internet site at www.gardensalive.com, provided the opportunity to purchase Lawn-Gard Bioinsecticide, EPA Reg. No. 62719-473-56872.
- 13. On June 11, 2007, Respondent's Internet site at www.gardensalive.com, provided the opportunity to purchase Bio Boost TM All Natural Biostimulant; Sea Rich TM Foliar Spray, Soap Shield Fungicidal Soap, EPA Reg. No. 67702-2-56872; Escar-Go! Slug & Snail Control, EPA Reg. No. 67702-3-56872; Bulls-Eye TM

Bioinsecticide, EPA Reg. No. 62719-314-56872; and Plant Guardian ™ Liquid Concentrate Biofungicide for the Home and Garden.

14. Lawn-Gard Bioinsecticide, BioBoost [™] All Natural Biostimulant, Sea Rich [™] Foliar Spray, Soap Shield Fungicidal Soap, Escar-Go! [™] Slug & Snail Control; Bulls Eye [™] Bioinsecticide; Guard [™] Seed Treatment and Plant Guardian [™] Liquid Concentrate Biofungicide for the Home and Garden are "pesticides" as defined at Section 2(u) of FIFRA, 7 U.S.C. § 136(u).

Count I

- 15. Complainant incorporates by reference the allegations contained in paragraphs 10 through 14 above.
- 16. On June 11, 2007, Respondent distributed Lawn-Gard ™ Bioinsecticide on its web site at www.gardensalive.com with the claim that the pesticide was "non-chemical."
 - 17. Lawn-Gard TM Bioinsecticide contains the chemical halofenozide.
- 18. The claim identified in paragraph 16 was not approved by the Office of Pesticide Programs, U.S. EPA, in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 19. The claim identified in paragraph 16 differs substantially from claims made as part of the statement submitted in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 20. Respondent's sale or distribution of the registered pesticide Lawn-Gard ™ Bioinsecticide constitutes an unlawful act pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), in that a claim made for this pesticide as a part of its sale or

distribution substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count II

- 21. Complainant incorporates by reference the allegations contained in paragraphs10 through 14 of this Complaint.
- 22. On June 11, 2007, Respondent distributed Bulls-Eye ™ Bioinsecticide on its web site at www.gardensalive.com with the following claims:

"Targets garden troublemakers but leaves their natural enemies alone"

"A member of a totally new class of pest control, naturally derived Bulls-Eye achieves results like nothing else now available to organic gardeners"

"Bulls-Eye stops damage almost immediately. Bulls-Eye works faster than most other natural products, stopping damage of targeted insects in little more than an hour."

"Allows beneficial insects to defend your garden. Bulls-Eye zeroes in on specific insect pests without affecting lady beetles, lacewings, minute pirate bugs, big-eyed bugs and other helpful garden bugs."

"Goes a long way. Because Bulls-Eye is so effective, just small amount of the concentrate controls pests over a large area. Keeps at least two years on the shelf, too."

"Bulls-Eye is made by fermenting bacteria (sacharopolyspora spinosa). Scientist have found that fermentation of this bacterium produces two metabolites that are highly toxic to a wide range of insect pests. Bulls-Eye contains both of these metabolites, making it a particularly potent bioinsecticide-one that controls many more pests than Bacillus thuringiensis (Bt)."

"When insect pests eat, or simply come in contact with plants sprayed with Bulls-

Eye they stop feeding almost immediately. Bulls-Eye attacks the insects' nervous system in about one hour. Any new pests that arrive on the scene over the next week or two will suffer the same fate! Meanwhile, natural enemies-such as lady beetles and lacewings-remain to defend your garden against pests not targeted by Bulls-Eye."

"Breaks down in sunlight and does not persist in the soil. "

7 ;

"Controls:...cutworm, elm beetle...fall webworm...willow leaf beetle..."

- 23. The claims identified in paragraph 22 were not approved by the Office of Pesticide programs, U.S. EPA, in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 24. The claims identified in paragraph 22 differ substantially from claims made as part of the statement submitted in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. §136a.
- 25. Respondent's sale or distribution of the registered pesticide Bulls-Eye™ Bioinsecticide constitutes an unlawful act pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. §136j(a)(1)(B), in that claims made for this pesticide as a part of its sale or distribution substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. §136a.

Count III

- 26. Complainant incorporates by reference the allegations contained in paragraph 10 through 14 of this Complaint.
- 27. On June 11, 2007, Respondent distributed Escar-Go! ™ Slug & Snail Control on its web site at www.gardensalive.com with the following claims:

"Controls in hard-to-reach areas...it provides control in any area that slugs frequenteven in mulched beds."

"Controls better than other standard remedies. Test after test, here and in Europe, has proven that Escar-Go! controls slugs as well as, or better than, diatomaceous earth (D.E.) and other slug and snail remedies, including the standard chemical controls. Though D.E. is a favored organic control, we've seen slugs actually "slime" their way right over a pile of D.E. to get to the plants they covet! Plus, unlike D.E., you won't have to reapply Escar-Go! after every rain."

- 28. The claims identified in paragraph 27 were not approved by the Office of Pesticide Programs, U.S. EPA, in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. §136a.
- 29. The claims identified in paragraph 27 differ substantially from claims made as part of the statement submitted in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 30. Respondent's sale or distribution of the registered pesticide Escar-Go! ™ Slug & Snail Control constitutes an unlawful act pursuant to Section 12(a)(1)(B) of FIFRA, 7 U.S.C. § 136j(a)(1)(B), in that claims made for this pesticide as a part of its sale or distribution substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count IV

- 31. Complainant incorporates by reference the allegations contained in paragraph 10 through 14 of this Complaint.
 - 32. On June 11, 2007, Respondent distributed Soap-Shield® Fungicidal Soap on its

web site at www.gardensalive.com with the following claims:

- "Natural disease control"
- "More effective than its competition"
- "Effective at much lower concentrations of copper than other copper-based products"
- "More rain resistant"
- "Disease fighting power never before seen in an all-natural fungicide"
- "Environmentally friendly"
- "Environmentally superior to the standard copper fungicides on the market"
- "All-in-one fungicide"
- 33. The claims identified in paragraph 32 were not approved by the Office of Pesticide Programs, U.S. EPA, in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 34. The claims identified in paragraph 32 differ substantially from claims made as part of the statement submitted in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 35. Respondent's sale or distribution of the registered pesticide Soap-Shield® Fungicidal Soap constitutes an unlawful act pursuant to section 12(a)(1)B) of FIFRA 7 U.S.C. § 136j(a)(1)(B), in that claims made for this pesticide as a part of its sale or distribution substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count V

36. Complaint incorporates by reference the allegations contained in paragraphs 10 through 14 of this Complaint.

- 37. On June 11, 2007, Respondent distributed Plant Guardian™ Liquid Concentrate Biofungicide on its web site at www.gardensalive.com with the following claim: "All-natural and environmentally friendly."
- 38. The claim identified in paragraph 37 is not approved by the Office of Pesticide Programs, U.S. EPA, in connection with the registration of Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 39. The claim identified in paragraph 37 differs substantially from claims made as part of the statement submitted in connection with the registration on Respondent's product pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
- 40. Respondent's sale or distribution of the registered pesticide Plant Guardian[™] Liquid Concentrate Biofungicide constitutes an unlawful act pursuant to section 12(a)(1)(B) of FIFRA, 7 U.S.C. §136j(a)(1)(B), in that claims made for this pesticide as a part of its sale or distribution substantially differ from any claims made for it as a part of the statement required in connection with its registration under Section 3 of FIFRA, 7 U.S.C. § 136a.

Count VI

- 41. Complainant incorporates by reference the allegations contained in paragraph 10 through 14 of this Complaint.
- 42. On October 4, 2007, Respondent's Internet site at <u>www.gardensalive.com</u> advertised Green Guard™ Seed Treatment as a fungicidal seed treatment and plant growth hormone.
- 43. On October 4, 2007, the Respondent's Internet site at www.gardensalive.com provided the opportunity to purchase the Green GuardTM Seed Treatment.

- 44. On October 4, 2007, Respondent's Internet site at www.gardensalive.com claimed, stated or implied that Green Guard™ Seed Treatment is a plant growth regulator and fungicide.
- 45. Respondent was a distributor with a supplemental distribution agreement with Eden Bioscience Corporation for Messenger seed Treatment, EPA Reg. No. 69834-6-56872, as permitted under 40 C.F.R. § 152.132.
- 46. EPA Reg. No. 69834-6 was transferred to 71771-4 on or about March 23, 2007.
- 47. On or about March 23, 2007, Respondent's supplemental distribution for 69834-6 was cancelled.
- 48. Green GuardTM Seed Treatment is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. §152.15(a)(1).
- 49. Green GuardTM Seed Treatment registration was cancelled on March 23, 2007 and is therefore not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
- 50. Respondent's distribution or sale of the unregistered pesticide

 Green GuardTM Seed Treatment constitutes an unlawful act pursuant to Section

 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count VII

- 51. Complainant incorporates by reference the allegations contained in paragraphs 10 through 14 of this Complaint.
- 52. On June 11, 2007, Respondent's internet site at www.gardensalive.com advertised BioBoostTM All Natural Biostimulant with the following claims: "enhances

plant growth," "BioBoost contains vitamins, minerals and other powerful yet gentle plant growth stimulants," "Roots grow more vigorously," and "Photosynthesis is enhanced."

- 53. On June 11, 2007, the Respondent's Internet site at www.gardensalive.com provided the opportunity to purchase the BioBoost All Natural Biostimulant.
- 54. On June 11, 2007, Respondent's Internet site at www.gardensalive.com claimed, stated or implied that BioBoostTM All Natural Biostimulant is a plant growth regulator.
- 55. On June 11, 2007, Respondent advertised on its Internet site BioBoostTM All Natural Biostimulant.
- 56. BioBoostTM All Natural Biostimulant is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. §152.15(a)(1).
- 57. BioBoostTM All Natural Biostimulant is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
- 58. Respondent's distribution or sale of the unregistered pesticide BioBoostTM All Natural Biostimulant constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

Count VIII

- 59. Complainant incorporates by reference the allegations contained in paragraphs 10 through 14 of this Complaint.
- 60. On June 11, 2007, Respondent's internet site at www.gardensalive.com advertised Sea RichTM Foliar Spray with the following claims: "promotes growth, enhancing fruit size," "Promotes strong plant growth..." and "To enhance fruit size,

apply two weeks after bloom, repeat 10 days later."

- 61. On June 11, 2007, the Respondent's Internet site at www.gardensalive.com provided the opportunity to purchase the Sea Rich Foliar Spray.
- 62. On June 11, 2007, Respondent, on its Internet site at www.gardensalive.com, claimed, stated or implied that Sea RichTM Foliar Spray is a plant growth regulator.
- 63. On June 11, 2007, Respondent advertised on its Internet site Sea RichTM Foliar Spray.
- 64. Sea RichTM Foliar Spray is a pesticide as defined by Section 2(u) of FIFRA, 7 U.S.C. § 136(u), and 40 C.F.R. §152.15(a)(1).
- 65. Sea RichTM Foliar Spray is not registered as a pesticide as required by Section 3(a) of FIFRA, 7 U.S.C. § 136a(a).
- 66. Respondent's distribution or sale of the unregistered pesticide Sea RichTM Foliar Spray constitutes an unlawful act pursuant to Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A).

IV. Settlement of Claims/Reservation of Rights

- 67. Complainant and Respondent, having sought to informally settle this matter, have agreed to the terms of this consent agreement in order to resolve this action without trial or litigation. 40 C.F.R. § 22.18 (b) and (c).
- 68. Respondent neither admits nor denies the factual allegations contained in this consent agreement, 40 C.F.R. § 22.18(b), and nothing herein shall be construed as an admission of liability by Respondent.
- 69. The terms of this consent agreement and attached final order constitute a settlement by Complainant for all claims for civil penalties pursuant to Section 14(a) of

FIFRA, 7 U.S.C. § 1361(a), for the alleged violations of FIFRA specified in Section III of this consent agreement.

- 70. Compliance with this consent agreement and attached final order shall not be a defense to any other actions commenced pursuant to Federal, state and local environmental laws and it is the responsibility of Respondent to comply with all applicable provisions of FIFRA and any other Federal, state or local laws and regulation.
- 71. Nothing in this consent agreement and attached final order is intended to nor shall be construed to operate in any way to resolve any criminal liability.
- 72. Complainant hereby reserves all of its statutory and regulatory powers, authorities, rights and remedies, both legal and equitable. This consent agreement and attached final order shall not be construed as a covenant not to sue, release, waiver or limitation of any right, remedy, power or authority, which Complainant has under FIFRA or any other statutory, regulatory or common law enforcement authority of the United States.
- 73. Respondent reserves all rights it may have under Federal, states or local statute, regulation or common law, except those rights it has expressly waived under paragraphs 5 and 6 of this consent agreement and attached final order.
- 74. The entry of this consent agreement and final order and Respondent's consent to comply shall not limit or otherwise preclude Complainant from taking additional enforcement action should Complainant determine that such actions are warranted, except as it relates to those matters resolved by this consent agreement and attached final order.

75. This consent agreement and attached final order constitutes the entire agreement between Complainant and Respondent.

V. Payment of Penalty

- 76. Section 14(a) of FIFRA, 7 U.S.C. § 1361, authorizes a civil penalty of up to \$5,000 for each violation of FIFRA. Pursuant to the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C § 2461, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and regulations promulgated pursuant thereto at 40 C.F.R. Parts 19 and 27, see 61 Fed. Reg. 13514-13517 (March 20, 1977), this amount was increased to \$5,500 on or after January 31, 1997 and to \$6,500 for each offense of FIFRA that occurred after March 15, 2004.
- 77. Based on the facts presented above, the gravity of the violations alleged herein, the size of Respondent's business and Respondent's ability to continue in business in light of the proposed penalty, Complainant proposes that Respondent be assessed the following civil penalty for the violations alleged in Section III of this consent agreement and attached final order.
- 78. To prevent reoccurrence of this violation, Respondent has deleted from its web site and all advertising any claims associated with the products Lawn-Gard™
 Bioinsecticide, Bulls-Eye™ Bioinsecticide, Escar-Go™ Slug & Snail Control, Soap-Shield® Fungicidal Soap and Plant Guardian™ Liquid Concentrate Biofungicide that differ from claims made as part of the products' registration. In addition, Respondent has properly supplementally registered the product Green Guard ™ Seal Treatment according to 40 C.F.R. § 152.132. Finally, Respondent has removed plant growth

regulator claims made relating to the products Sea Rich™ Foliar Spray and BioBoost™ All Natural Biostimulant.

- 79. Consistent with the provisions of the FIFRA Enforcement Response Policy, Complainant has adjusted the penalty downward \$7,100 for "good attitude." Accordingly, Complainant agrees to mitigate the proposed civil penalty from \$35,100 to \$28,000.
 - 80. The Respondent agrees to pay the civil penalty of \$28,000.
- 81. Within 30 days after the effective date of this CAFO, Respondent must pay a \$28,000 civil penalty. Respondent must pay the penalty by sending a cashier's or certified check, payable to the "Treasurer, United States of America," to:

 [for checks sent by regular U.S. Postal Service mail]

U.S. EPA Fines and Penalties Cincinnati Finance Center P.O. Box 979077 St. Louis, MO 63197-9000

[for checks sent by express mail]

U.S. Bank 1005 Convention Plaza Mail Station SL-MO-C2GL St. Louis, MO 63101

The check must note the following: the case name, the docket number of this CAFO and the billing document number.

82. A transmittal letter stating Respondent's name, the case title, Respondent's complete address, the case docket number and the billing document number must accompany the payment. Respondent must send a copy of the check and transmittal letter to:

Regional Hearing Clerk (E-13J) U.S. EPA, Region 5 77 West Jackson Blvd. Chicago, IL 60604

Terence Bonace (LC-8J)
Pesticides and Toxics Compliance Section
U.S. EPA, Region 5
77 West Jackson Blvd.
Chicago, IL 60604

Susan Perdomo (C-14J)
Office of Regional Counsel
U.S. EPA- Region 5
77 W. Jackson Blvd.
Chicago, Illinois 60604

- 83. Respondent shall pay interest that accrues on any amount overdue under the terms of the consent agreement and attached final order at the rate established by the Secretary of the Treasury pursuant to 31 U.S.C. §3717. Respondent shall pay a late payment handling charge of \$15 which will be imposed after 30 days, with an additional charge of \$15 for each subsequent 30-day period over which an unpaid balance remains. In addition, Respondent shall pay a 6 percent per year penalty on any principal amount not paid within 90 days of the date of the attached final order is filed with the Regional Hearing Clerk
- 84. The Respondent's failure to comply with the provision of paragraphs 80, 81 and 83 shall result in the referral of this matter to the United States Department of Justice for collection.
- 85. The Respondent shall not deduct any penalty payment made pursuant to the provisions of this consent agreement and attached final order under any Federal, state or local tax law.

- 86. The Respondent consents to the issuance of the attached final order without further notice.
- 87. Each party shall bear its own costs and attorney's fees in connection with the action resolved by this consent agreement and attached final order. This consent agreement and attached final order shall become effective on the date that it is filed with the Regional Hearing Clerk, as required by 40 C.F.R. § 22.18(b)(3).
- 88. The foregoing consent agreement is hereby stipulated, agreed and approved for entry.

For Respondent:

E-Herrit	5-5-03
Eric Hamant, President	Date

For Complainant:

Margaret M. Guerriero, Director Land and Chemicals Division

FIFRA-05-2008-0015

Date

5/22/08

IN THE MATTER OF:

Gardens Alive, Inc.

Docket No. FIFRA-05-2008-0015

FINAL ORDER

This consent agreement and final order, as agreed to by the parties, shall become effective immediately upon filing with the Regional Hearing Clerk. This final order concludes this proceeding pursuant to 40 C.F.R. §§ 22.18 and 22.31. IT IS SO ORDERED.

Bharat Mathur

Acting Regional Administrator

United States Environmental Protection Agency

Region 5

2008 111/1 27 1911 25 33

REGIONAL HEARING CLERK