

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 7
11201 RENNER BOULEVARD
LENEXA, KANSAS 66219**

Received by
EPA Region 7
Hearing Clerk

IN THE MATTER OF:

ESE Alcohol, Inc.

AND

Pioneer Hi-Bred International, Inc.

RESPONDENTS.

Docket No. RCRA-07-2022-0002

**Proceeding under Section 7003 of the
Resource Conservation and Recovery Act,
42 U.S.C. § 6973.**

ADMINISTRATIVE ORDER ON CONSENT

I. INTRODUCTION

1. This Administrative Order on Consent (Order) is entered into voluntarily by the United States Environmental Protection Agency, Region 7, and Respondents ESE Alcohol, Inc. (ESE Alcohol) and Pioneer Hi-Bred International, Inc. (Pioneer). This Order provides for the performance of response actions by Respondents to address wastes generated by the ethanol production facility located at 310 East Highway 96, Leoti, Kansas.

2. In issuing this Order, EPA intends for Respondents to prevent and/or remedy the potential endangerment to human health or the environment from activities involving solid waste or constituents of such waste, and to ensure that the work ordered by EPA is designed and implemented to protect human health and/or the environment. Respondents shall perform the work in accordance with this Order, plans, standards, specifications and schedules set forth in this Order or developed by Respondents and approved by EPA pursuant to this Order.

3. The EPA has determined that Respondents have contributed or are contributing to the past or present handling, storage, treatment, transportation or disposal of solid waste or constituents of such waste that may present an imminent and substantial endangerment to health or the environment.

4. The EPA has determined that issuing this Order pursuant to Section 7003 of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6973, is necessary to protect human health and/or the environment.

5. The EPA has notified the State of Kansas of this action pursuant to Section 7003(a) of RCRA, 42 U.S.C. § 6973(a), on September 8, 2021.

6. Respondents' participation in this Order shall not constitute or be construed as an admission of liability. Respondents neither admit nor deny the factual allegations and legal conclusions set forth in this Order (Sections V and VI, Findings of Fact and Conclusions of Law and Determinations), including, without limitation, allegations identifying materials as solid waste, allegations of rate of application of land applied materials, and allegations of potential endangerment to human health and/or the environment.

7. EPA and Respondents acknowledge that this Order has been negotiated by the parties in good faith and that this Order is fair, reasonable, and in the public interest.

II. JURISDICTION

8. This Order is issued under the authority vested in the Administrator of EPA by Section 7003 of RCRA, 42 U.S.C. § 6973, which authority has been delegated to the Regional Administrators of EPA, and redelegated to the Director of the Enforcement and Compliance Assurance Division of EPA Region 7.

9. Respondents agree to undertake and complete all actions required by the terms and conditions of this Order. In any action by EPA or the United States to enforce the terms of this Order, Respondents consent to and agree not to contest the authority or jurisdiction of the Director of the Enforcement and Compliance Assurance Division to issue or enforce this Order, and agree not to contest the validity of this Order or its terms or conditions.

III. PARTIES BOUND

10. This Order shall apply to and be binding upon Respondents and Respondents' employees, agents, successors, assigns, heirs, trustees, receivers, and upon all persons, including contractors and consultants, acting on behalf of Respondents. Respondents are jointly and severally responsible for carrying out all actions required by this Order. Any change in the ownership or corporate status of Respondents, including any transfer of assets or real or personal property, shall not alter Respondents' responsibilities under this Order unless approved in writing by EPA.

11. Respondents shall provide a copy of this Order to all current owners or subsequent owners or successors before a controlling interest in ownership rights, stock, assets or the Site by ESE Alcohol is transferred. Respondents shall be responsible for and liable for completing all the activities required pursuant to this Order, regardless of whether there has been a transfer of ownership or control of the Site or whether said activities are to be performed by employees, agents, contractors, subcontractors, laboratories, or consultants of Respondents. Respondents shall provide a copy of this Order within 7 days of the Effective Date, or the date that such services are retained, to all contractors, subcontractors, laboratories, and consultants that are retained to conduct or monitor any portion of the work performed pursuant to this Order.

Respondents shall condition all contracts or agreements with contractors, subcontractors, laboratories and/or consultants in connection with this Order, on compliance with the terms of this Order. Respondents shall ensure that their contractors, subcontractors, laboratories, and consultants comply with this Order.

12. Not later than twenty (20) days prior to any voluntary transfer by Respondent ESE Alcohol of any interest in the Site or Facility, Respondent ESE Alcohol shall notify the EPA of the proposed transfer. In the case of a voluntary transfer through a bankruptcy, Respondent ESE Alcohol shall notify the EPA within 24 hours of the decision to transfer its property interests. Respondent ESE Alcohol shall notify the EPA of any involuntary transfers immediately upon Respondent ESE Alcohol's initial receipt of notice of any involuntary transfer. Not later than three (3) days after any transfer, Respondent ESE Alcohol shall submit copies of the transfer documents to the EPA.

IV. DEFINITIONS

13. Unless otherwise expressly provided herein, terms used in this Order that are defined in RCRA or the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136*l*, shall have the meaning assigned to them in those statutes. Whenever the terms listed below are used the following definitions apply:

- a. "Day" shall mean a calendar day.
- b. "Effective Date" shall be the effective date of this Order pursuant to Section XXIV (Effective Date).
- c. "Facility" shall mean Respondent ESE Alcohol's ethanol production facility at 310 East Highway 96 and the seed receiving facility at 127 North County Road 15 ½, in Leoti, Kansas.
- d. "Levels of Ecological Concern" shall mean concentrations of pesticides that may result in significant ecological risk consistent with exposure and toxicity data available in current EPA risk assessment guidance.
- e. "Remediation Area" shall mean any area at the Site where wastes (e.g., treated seed, wet distillers grain, process wastewater, lagoon sludge) have been managed, placed, stored, or land applied from January 1, 2020 to the present, at which pesticide concentrations are present above Levels of Ecological Concern.
- f. "Site" shall mean the Facility and all areas where wastes containing pesticides have come to be located. This includes any location where wet distillers grain, wastewater, or lagoon sludge from Respondent ESE Alcohol's operations have been placed, stockpiled, stored, or land applied since 1998.

- g. “Work” shall mean all the activities and requirements specified in Section VIII (Work to be Performed) and the attached Work Plan, which is incorporated by reference into this Order.

V. FINDINGS OF FACT

14. Respondent ESE Alcohol, Inc. is a Kansas corporation and is located at 310 East Highway 96, Leoti, Kansas.

15. Respondent Pioneer Hi-Bred International, Inc. is an Iowa corporation that does business in Kansas.

16. From approximately 1998 to May of 2021, Respondent ESE Alcohol manufactured ethanol at the Facility. Among the ethanol feedstock was seed treated with pesticides. At times, these pesticides included ipconazole, chlorantraniliprole, clothianidin, tebuconazole, thiabendazole, and thiamethoxam. Such pesticides are bound to seeds prior to planting to protect them from diseases, insects, or other pests.

17. In the process of manufacturing ethanol, Respondent ESE Alcohol generated materials, including process wastewater, lagoon sludge, and wet distillers grain. At times, these materials contained the pesticides listed in Paragraph 16, above.

18. On March 15 and 16, 2021, EPA inspected the Facility to evaluate Respondent ESE Alcohol’s compliance with RCRA and the Clean Water Act (CWA). During the inspection, EPA obtained samples of process wastewater, lagoon sludge, and WDG for analysis to determine concentrations of ipconazole, chlorantraniliprole, clothianidin, thiamethoxam, thiabendazole, and tebuconazole, among other pesticides.

19. On September 1, 2021, EPA emailed to Respondent ESE Alcohol a request for information pursuant to RCRA § 3007 and CWA § 308, requesting additional information regarding Respondent’s operations at the Site. EPA also advised that, based on preliminary inspection sampling results, ESE Alcohol should stop land application of WDG and process wastewater immediately.

20. Respondent ESE Alcohol complied with EPA’s advisement to stop land application of WDG and process wastewater. At the present time, Respondent ESE Alcohol has no treated seed in its possession, and no process wastewater or WDG is present at the Site. Approximately 2,000 tons of lagoon sludges are currently stockpiled at the Site.

21. Respondent ESE Alcohol provided a response to EPA’s request for information on September 29, 2021.

22. Respondent Pioneer supplied Respondent ESE Alcohol with the seed treated with the pesticides identified in Paragraph 16, above. From January 2018 to August 31, 2021, Pioneer sent approximately 1.3 million bushels of treated seed to the Facility.

23. The Site contains six unlined earthen holding ponds, or lagoons, for storage and treatment of process wastewater. These lagoons also contained sludges, which are materials that settle and accumulate at the bottom of the lagoons.

24. Respondent ESE Alcohol stored WDG and sludge from its operations in stockpiles at the Site before land applying the materials. The stockpiles are located at Northwest $\frac{1}{4}$, Southeast $\frac{1}{4}$, Section 05, Township 18 South, Range 36 West in Wichita County, Kansas. The stockpile area does not have a liner and is exposed to ambient air.

25. From at least 1998 to May of 2021, Respondent ESE Alcohol utilized process wastewater, lagoon sludge, and WDG from its operations by land applying the materials as fertilizer, soil amendments, and soil conditioner on certain agricultural fields in Wichita County, Kansas. Such land application was undertaken by Respondent ESE Alcohol pursuant to Kansas Agricultural Water Pollution Control Permit No. I-UA26-NP01.

26. Respondent ESE Alcohol land applied 7,575 tons of solids (WDG and sludge) in 2021, and 11,354 tons of WDG and sludge in 2020. Respondent ESE Alcohol generally rotated application of solids to fields on a yearly basis. The two-year average application rate of solids for 2020-2021 was 4.07 tons per acre.

27. The pesticides ipconazole, chlorantraniliprole, clothianidin, thiamethoxam, thiabendazole, and tebuconazole can accumulate in the environment. Further, toxicity studies have found that clothianidin and thiamethoxam are highly toxic to bees, with effects manifesting as decreased brood numbers and reduced adult survival. These pesticides can also be highly toxic to non-target terrestrial invertebrates, as well as birds and mammals exposed via residues in the environment.

28. EPA has determined that the estimated land application rates of the pesticide-containing materials from Respondent ESE Alcohol's operations are above the maximum application rates evaluated in EPA's Office of Pesticides Programs' ecological risk assessments for those pesticides. Application rates above maximum approved application rates may result in environmental concentrations that pose a significant risk to pollinators and terrestrial wildlife.

29. Respondents' handling, storage, and disposal of treated seed, WDG, process wastewater, and lagoon sludge may adversely affect pollinators as well as birds and mammals commonly found in agricultural areas of western Kansas.

30. Without actions to remove on-site lagoon sludges and remediate land application areas with high concentrations of pesticides, the potential risks posed to pollinators and wildlife may continue.

VI. CONCLUSIONS OF LAW AND DETERMINATIONS

Based on the information in the Findings of Fact set forth above and the administrative record supporting this Order, EPA has determined that:

31. Respondents are each a “person” as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

32. The constituents of WDG, process wastewater, lagoon sludge, and treated seed waste, including but not limited to ipconazole, clothianidin, chlorantraniliprole, tebuconazole, thiabendazole, and thiamethoxam, are discarded materials, and are therefore “solid wastes” as defined by Section 1004(27) of RCRA, 42 U.S.C. § 6903(27).

33. The past and/or present handling, storage and disposal of solid waste at the Site may present an imminent and substantial endangerment to human health and/or the environment within the meaning of Section 7003(a) of RCRA, 42 U.S.C. § 6973(a). Without actions to mitigate the potential hazards posed by the solid wastes, the potential risks posed by the solid wastes or constituents of such wastes may continue.

34. Respondents have contributed to the handling, storage, and/or disposal of solid wastes at the Site by sending treated seed to the Facility for processing and/or storing and land applying the WDG, lagoon sludge, and process wastewater at the Site.

35. The actions required by this Order may be necessary to protect human health and/or the environment because of the potential endangerment caused by the handling, storage and disposal of solid wastes or constituents of such wastes at the Site.

VII. ORDER ON CONSENT

Based upon the administrative record for the Site and the Findings of Fact and Conclusions of Law and Determinations set forth above, and in consideration of the promises set forth herein, the following is agreed to and ordered:

36. Respondents shall comply with all provisions of this Order, including all documents and Work Plans incorporated herein pursuant to this Order, and all applicable laws. Respondents shall fully cooperate with EPA and its authorized representatives in carrying out the provisions of this Order, including taking all actions set forth below within the time periods and in the manner prescribed.

37. Respondents shall finance and perform the Work in accordance with this Order, including plans, standards, specifications and schedules set forth or developed by Respondents and approved by EPA pursuant to this Order. Respondents shall take no action in connection with solid waste present at the Site other than those actions agreed to by EPA and Respondents in accordance with Section VIII (Work To Be Performed).

VIII. WORK TO BE PERFORMED

38. Respondents shall perform all Work set forth in this Order, including the Work set forth in the attached Work Plan, which is marked "Attachment" and incorporated herein by reference.

39. Project Coordinator. Within seven (7) days of receipt of a copy of EPA's executed signature page to this Order, Respondents shall notify EPA in writing of the name, address, phone number, email address and qualifications of their Project Coordinator. The EPA Project Coordinator will be:

Edwin G. Buckner PE
Compliance Officer
EPA Region 7, ECAD/CB/RCRA
11201 Renner Blvd.
Lenexa, Kansas 66219
(913) 551-7621
Buckner.Edwin@epa.gov.

Each Project Coordinator shall be responsible for overseeing the implementation of this Order. EPA and Respondents have the right to change their respective Project Coordinators. The other party must be notified in writing at least ten (10) days prior to the change. Unless otherwise provided, all reports, correspondence, notices, or other submittals relating to or required under this Order shall be in writing and shall be sent electronically to the EPA Project Coordinator at the email address specified above. All correspondence shall include a reference to the case caption EPA Docket No. RCRA-07-2022-0002.

40. EPA will approve or disapprove of Respondents' Project Coordinator (original or replacement) based upon the person's qualifications and ability to effectively perform this role. The qualifications of the persons undertaking the Work for Respondents shall be subject to EPA's review for verification that such persons meet minimum technical background and experience requirements of the EPA. All persons under the direction and supervision of Respondents' Project Coordinator must possess all necessary professional licenses required by federal and state law.

41. Respondents shall undertake and complete all the Work to the satisfaction of EPA, pursuant to RCRA § 7003, 42 U.S.C. § 6973. Within twenty-five (25) days of the Effective Date of this Order or within twenty-five (25) days of entering a contract for Work, Respondents shall notify EPA in writing of the names, titles and qualifications of the personnel, including agents, contractors, subcontractors, consultants and laboratories, to be used in carrying out the Work required by this Order. Respondent may change agents, contractors, subcontractors, consultants and laboratories upon written notice to EPA.

42. Respondents' obligation to perform the Work will begin on the Effective Date of this Order.

43. The Work undertaken pursuant to this Order shall be conducted in compliance with all applicable EPA guidance, policies and procedures, and with this Order, and is subject to EPA approval.

44. The Sampling and Remediation Plans required by the Work Plan shall include a schedule of the Work to be performed and shall be submitted to EPA for approval. Following EPA's approval or modification of those Plans, the Plans are incorporated into this Order and Respondents shall implement the Plans in accordance with the schedule and provisions approved by EPA.

IX. EPA APPROVAL OF DELIVERABLES

45. Deliverables required by this Order, including the Sampling Plan and Remediation Plan required by the Work Plan, shall be submitted to EPA for approval or modification. All deliverables must be received at EPA by the due date specified in this Order or by schedules developed pursuant to this Order. Deliverables shall be provided to the EPA Project Coordinator in Paragraph 39 above.

46. After review of any deliverable that is required pursuant to this Order, EPA will: (a) approve, in whole or in part, the submission; (b) approve the submission on specified conditions; (c) modify the submission to cure the deficiencies; (d) disapprove, in whole or in part, the submission, by providing an explanation as to the basis for such disapproval and directing that Respondents modify the submission to remedy the submission in accordance with EPA's explanation; or (e) any combination of the above.

47. On receipt of a notice of disapproval, in whole or in part, pursuant to this Section, Respondents shall, within ten (10) days or such longer time as specified by EPA in such notice, correct the deficiencies and resubmit the deliverable for approval. Any stipulated penalties applicable to the submission, as provided in Section XVI (Penalties), shall accrue during the 10-day opportunity to cure period or otherwise specified period but shall not be payable unless the

resubmission is disapproved or modified due to a material defect as provided in paragraph 45 and 46.

48. Notwithstanding the receipt of a notice of disapproval pursuant to this Section, Respondents shall proceed, at the direction of EPA, to take any action required by any non-deficient portion of the submission. Implementation of any non-deficient portion of a submission shall not relieve Respondents of any liability for penalties for noncompliance regarding the deficient portion of the deliverable.

49. In the event that a resubmitted deliverable, or portion thereof, is disapproved by EPA, EPA may again require Respondents to correct the deficiencies in accordance with the preceding paragraphs. EPA also retains the right to modify or develop the plan, report, or other item. Respondents shall implement any action as required in a deliverable that has been modified or developed by EPA, subject only to Respondent's right to invoke the procedures set forth in Section XV (Dispute Resolution).

50. If on resubmission, a deliverable is disapproved or modified by EPA due to a material defect, Respondents shall be deemed to have failed to submit such deliverable timely and adequately, unless Respondents invoke the dispute resolution procedures set forth in Section XV (Dispute Resolution) and EPA's actions to disapprove or modify a deliverable is overturned pursuant to that Section. The provisions of Section XV (Dispute Resolution) and Section XVI (Penalties) shall govern the implementation of the Work and accrual and payment of any stipulated penalties during Dispute Resolution. If EPA's disapproval or modification is upheld, stipulated penalties shall accrue for such violation from the date on which the initial submission was originally required, as provided in Section XVI (Penalties).

51. All deliverables required to be submitted to EPA under this Order shall, on approval or modification by EPA, be incorporated into and be enforceable under this Order. In the event that EPA approves or modifies a portion of a deliverable required to be submitted to EPA, the approved or modified portion shall be enforceable under this Order.

X. MODIFICATION OF THE WORK PLAN

52. If at any time during the implementation of the Work, Respondents identify a need for a revision of the Work Plan, including the Sampling Plan or Remediation Plan, Respondents shall submit a memorandum documenting the need for the modification or revision to the EPA Project Coordinator. EPA in its discretion will determine if the modification or revision is warranted and may provide written approval or disapproval. If EPA disapproves of the requested modification or revision, EPA shall provide an explanation for its disapproval. Any approved modified compliance date or Work Plan modification is incorporated by reference into this Order.

53. In the event of any action or occurrence during the performance of the Work that constitutes an emergency situation or may present an immediate threat to human health and the environment, Respondents shall immediately take all appropriate action to minimize such emergency or threat and shall immediately notify the EPA's Project Coordinator. Respondents shall take such immediate and appropriate actions in consultation with EPA's Project Coordinator. Respondents shall then submit to EPA written notification of such emergency or threat at the Site within three (3) calendar days of such discovery. Respondents shall thereafter submit to EPA for approval, within twenty (20) days, a plan to mitigate this threat. EPA will approve or modify this plan, and Respondents shall implement this plan as approved or modified by EPA. In the case of an extreme emergency, Respondents may act as it deems appropriate, at their own risk, to protect human health or the environment.

XI. DOCUMENT CERTIFICATION

54. Any report or other document submitted by Respondents pursuant to this Order which makes recommendations as to whether or not further actions are necessary or makes any representation concerning Respondents' compliance or noncompliance with any requirement of this Order shall be certified by a responsible corporate officer of Respondents. A responsible corporate officer means: a president, secretary, treasurer, or vice-president in charge of a principal business function, or any other person who performs similar policy or decision-making functions.

55. The certification required by the paragraph above, shall be in the following form:

I certify under penalty of law that this document and all attachments were prepared under my direction or supervision in accordance with a system designed to assure that qualified personnel properly gather and evaluate the information submitted. Based on my inquiry of the person or persons who manage the system, or those persons directly responsible for gathering the information, the information submitted is, to be the best of my knowledge and belief, true, accurate, and complete. I am aware that there are significant penalties for submitting false information, including the possibility of fine and imprisonment for knowing violations.

Signature: _____

Name: _____

Title: _____

Date: _____

XII. SAMPLING, ACCESS AND DATA AVAILABILITY

56. All results of sampling, testing, modeling or other data generated (including raw data if requested) by Respondents, or on Respondents' behalf, during implementation of this Order shall be validated by Respondents and submitted to EPA within thirty (30) days of Respondents' receipt of the validated data. Respondents shall tabulate data chronologically by media. EPA will make available to Respondents data generated by EPA (including raw data if requested) for the purposes of oversight of the Work unless it is exempt from disclosure by any federal or state law or regulation.

57. Respondents shall orally notify EPA at least ten (10) days prior to conducting field sampling. At EPA's request, Respondents shall allow split or duplicate samples to be taken by EPA or EPA's representative.

58. Site Access. Pursuant to RCRA § 3007(a), 42 U.S.C. § 6927(a), Respondent ESE Alcohol shall provide access to the Site, at reasonable times and upon reasonable notice, to EPA's contractors and oversight officials. Respondents shall also provide access at reasonable times to EPA, EPA's contractors and oversight officials to all records and documentation in its possession or control, including those records and documents in the possession or control of Respondents' contractors and employees, related to the conditions at the Site and the actions conducted pursuant to this Order. Respondents shall use their best efforts to gain access to areas owned by or in the possession of someone other than Respondents, as necessary to implement this Order, as described in Paragraph 60. Such access shall be provided to EPA, its contractors and oversight officials. These individuals shall be permitted to move freely about the Site and appropriate off-site areas to conduct actions that EPA determines to be necessary. EPA, its contractors, and oversight officials shall notify Respondents of their presence on the Site by presenting their credentials and signing in at Respondent ESE Alcohol's main office area. All parties with access to the Site under this paragraph shall comply with all approved health and safety plans and regulations.

59. Pursuant to this Section, any denial of access at reasonable times to any portion of the Site property where a request for access was made for the purposes of enforcing the requirements of RCRA or this Order shall be construed as a violation of the terms of this Order subject to the penalty provisions outlined in Section XVI (Penalties).

60. Access Agreements. Where action under this Order is to be performed in areas owned by, or in possession of, someone other than Respondents, Respondents shall use their best efforts to obtain all necessary access agreements. Any such access agreement shall provide for access by EPA and its representatives to move freely to conduct actions that EPA determines to be necessary. The access agreement shall specify that Respondents are not EPA representatives with respect to any liabilities associated with activities to be performed. Respondents shall

provide EPA's Project Coordinator with copies of any access agreements. Respondents shall immediately notify EPA if after using Respondents' best efforts they are unable to obtain such agreements within the time required. Best efforts as used in this paragraph shall include, at a minimum, a certified letter from Respondents to the present owner of such property requesting access agreements to permit Respondents, EPA, and EPA's authorized representatives to enter such property, and the offer of payment of reasonable sums of money in consideration of granting access. Respondents shall, within ten (10) days of their receipt of a denial of access, submit in writing, a description of their efforts to obtain access. EPA may, at its discretion, assist Respondents in obtaining access. In the event EPA obtains access, Respondents shall undertake the Work on such property and Respondents shall reimburse EPA for all costs and attorney fees incurred by the United States in obtaining such access.

61. Confidential Business Information. Respondents may assert a claim of business confidentiality covering part or all the information submitted to EPA pursuant to the terms of this Order under 40 C.F.R. § 2.203 in the manner described at 40 C.F.R. § 2.203(b) and substantiated with the information described at 40 C.F.R. 2.204(e)(4). Information EPA determines is confidential will be given the protection specified in 40 C.F.R. Part 2, Subpart B. If no such claim or substantiation accompanies the information when it is submitted to EPA, it may be made available to the public by EPA or the state without further notice to Respondents. Respondents agree not to assert confidentiality claims with respect to any data related to Site conditions, sampling, monitoring or the Work performed pursuant to this Order.

62. Privileged Documents. If Respondents assert a legally recognized privilege in lieu of providing documents, Respondents shall provide EPA with the following: (1) the title of the document, record, or information; (2) the date of the document, record, or information; (3) the author's name and title; (4) the name and title of each addressee and recipient; (5) a description of the contents; and (6) the privilege asserted by Respondents. However, no documents, reports or other information created or generated pursuant to the requirements of this Order shall be withheld on the grounds that they are privileged.

63. All data, information, and records created or maintained relating to any solid waste found at the Site shall be made available to EPA upon request unless Respondents assert a claim that such documents are legally privileged from disclosure. Respondents shall have the burden of demonstrating to EPA by clear and convincing evidence that such privilege exists.

64. No claim of confidentiality shall be made with respect to any data, including, but not limited to, all sampling, analytical, monitoring, hydrogeological, scientific, chemical, or engineering data, or any other documents or information evidencing conditions at or around the Site.

65. Nothing in this Order shall be construed to limit EPA's right of access, entry, inspection, and information gathering pursuant to applicable law, including but not limited to RCRA and the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9601 *et seq.*

XIII. COMPLIANCE WITH OTHER LAWS

66. Respondents shall perform all actions required pursuant to this Order in accordance with all applicable local, state, and federal laws and regulations. Respondents shall obtain or cause their representatives to obtain all permits and approvals necessary under such laws and regulations in a timely manner so as not to delay the Work required by this Order.

XIV. RECORD RETENTION

67. Respondents shall preserve all documents and information, including raw data, relating to the Work performed under this Order, or relating to any solid waste or hazardous waste found at the Site, for five (5) years following completion of the Work.

68. Respondents shall make available to EPA all employees and persons, including contractors, who engage in activities under this Order and ensure their cooperation with EPA with respect to this Order.

69. After the five-year retention period and ninety (90) days before any document or information is destroyed, Respondents shall notify EPA that such documents and information are available to EPA for inspection, and upon request, shall provide the originals or copies (at no extra cost) of such documents and information to EPA. Notification shall be in writing and shall reference the effective date, caption, and docket number of this Order and shall be addressed to the Project Coordinator. In addition, Respondents shall provide documents and information retained under this Section at any time before expiration of the five-year retention period at the written request of EPA.

70. All documents pertaining to this Order shall be stored by Respondents in a centralized location at the Site, or an alternative location mutually approved by EPA to promote easy access by EPA or its representatives.

XV. DISPUTE RESOLUTION

71. Respondents shall raise any disputes concerning the Work required under this Order to EPA, in writing, within fifteen (15) days after receiving written notice from EPA regarding any aspect of the Work that Respondents dispute. EPA and Respondents shall expeditiously and informally attempt to resolve any disagreements. EPA and Respondents' Project Coordinators shall first confer in an effort to resolve the dispute. If the Project Coordinators are unable to informally resolve the dispute within three (3) days of the first

conference, Respondents shall notify EPA, within five (5) days, in writing of their objections. Written objections shall identify Respondents' objections, state the basis for those objections, and provide all data, analyses, and information relied upon by Respondents. EPA and Respondents then have an additional fourteen (14) days from EPA's receipt of the objections to reach agreement. If an agreement is not reached within the fourteen (14) days, Respondents may request in writing, within five (5) days, a determination resolving the dispute by EPA's Division Director of the Compliance and Enforcement Assurance Division. The request should provide all information that Respondents believe is relevant to the dispute. If such request is submitted within five (5) days, the Division Director shall issue a determination in writing. EPA's final decision shall be incorporated into and become an enforceable part of this Order and shall no longer be subject to dispute pursuant to this Order. Respondents shall proceed in accordance with the Division Director's decision regarding the matter in dispute, regardless of whether Respondents agree with the decision. If Respondents do not agree to perform or do not actually perform the Work in accordance with EPA's decision, EPA reserves the right in its sole discretion to conduct the Work itself, seek reimbursement from Respondents, seek enforcement of this Order, seek stipulated penalties, and/or any other appropriate relief. Any disputes arising under this Order are not subject to judicial review until such time as EPA seeks to enforce this Order.

72. If EPA and Respondents reach agreement on the dispute at any stage, the agreement shall be set forth in writing and shall, upon signature of both parties, be incorporated into and become an enforceable part of this Order.

73. The existence of a dispute and EPA's consideration of matters placed in dispute shall not excuse, toll, or suspend any compliance obligation or deadline required pursuant to this Order during the pendency of the dispute resolution process except as agreed by EPA in writing. The invocation of dispute resolution does not stay the accrual of stipulated penalties under this Order.

XVI. PENALTIES

74. Stipulated Penalties. Any time Respondents fail to comply with any requirement of this Order, Respondents shall be liable for stipulated penalties in the amounts set forth in this Section unless EPA has approved the extension of a deadline. Compliance with this Order shall include completion of an activity or any matter in accordance with this Order, and within the specified time schedules approved under this Order.

	<u>1-10 Days</u>	<u>11-30 Days</u>	<u>31-60 Days</u>	<u>Over 60 Days</u>
Failure to submit a Work Plan component on time	\$300	\$500	\$800	\$1,500
Failure to meet a deadline in an approved Work Plan document	\$500	\$800	\$1,500	\$2,500

75. Penalties shall begin to accrue on the day after the complete performance is due or the day a violation occurs and shall continue to accrue through the final day of correction of the violation or completion of the activity. Payment shall be due within thirty (30) days of receipt of a demand letter from EPA. Nothing herein shall prevent the simultaneous accrual of separate stipulated penalties for separate violations of this Order, even where those violations concern the same event (e.g., submission of a Work Plan that is late and is of unacceptable quality).

76. If payment is not made within thirty (30) days of the date of Respondents' receipt from EPA of a written demand for payment of penalties, interest shall begin to accrue on any unpaid stipulated penalty balance beginning on the first day after Respondents' receipt of EPA's demand letter and will accrue until such penalties and interest have been paid in full. Interest shall accrue at the Current Value of Funds Rate established by the Secretary of the Treasury. An additional penalty of six percent (6%) per annum on any unpaid principal shall be assessed for any stipulated penalty payment which is overdue for ninety (90) days or more. The applicable rate of interest shall be the rate in effect at the time the interest accrues pursuant to 31 U.S.C. § 3717.

77. Respondents shall make payments by money order, certified check, company check, electronic funds transfer, or cashier's check payable to the Treasurer of the United States within thirty (30) days of Respondents' receipt of EPA's request, and shall be submitted to the following address:

U.S. EPA
Fines and Penalties
Cincinnati Finance Center
PO Box 979077
St. Louis, Missouri 63197-9000

78. Docket number RCRA-07-2022-0002 shall be clearly typed on the payment to ensure proper credit. Respondents shall send simultaneous notices of such payments, including copies of the money order, certified check, company check, electronic funds transfer, or cashier's check to the EPA Project Coordinator and to barton.kasey@epa.gov.

79. The payment of penalties shall in no way alter Respondents' obligation to comply with the terms and conditions of this Order. The stipulated penalties set forth in this Section do not preclude EPA from pursuing any other remedies or sanctions which may be available to EPA by reason of Respondents' failure to comply with any of the terms and conditions of this Order.

80. Violation of this Order may subject Respondents to civil penalties of at least \$15,352 per violation per day. The assessment of penalties is provided for in Section 7003(b) of RCRA, 42 U.S.C. § 6973(b), as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701, and the Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015, 28 U.S.C. § 2461, and implementing regulations at 40 C.F.R. Part 19. Should Respondents violate this Order or any portion hereof, EPA may carry out the required actions unilaterally, pursuant to any applicable authorities, and may seek judicial enforcement of this Order.

XVII. RESERVATION OF RIGHTS

81. Notwithstanding any other provisions of this Order, the United States retains all of its authority to take, direct, or order any and all actions necessary to protect public health or the environment or to prevent, abate, or minimize an actual or threatened release of hazardous substances, pollutants, or contaminants, or hazardous or solid waste or constituents of such wastes, on, at, or from the Site, including but not limited to the right to bring enforcement actions under RCRA, CERCLA, and any other applicable statutes or regulations.

82. EPA reserves all its statutory and regulatory powers, authorities, rights, and remedies, both legal and equitable, which may pertain to Respondents' failure to comply with any of the requirements of this Order, including without limitation the assessment of penalties under Section 7003 of RCRA, 42 U.S.C. § 6973.

83. This Order shall not be construed as a covenant not to sue, release, waiver, or limitation of any rights, remedies, powers, claims, and/or authorities, civil or criminal, which EPA has under RCRA, CERCLA, or any other statutory, regulatory, or common law authority of the United States.

84. This Order is not intended to be, nor shall it be construed to be, a permit. EPA's approval of the Sampling Plan and Remediation Plan required by the Work Plan does not constitute a warranty or representation that the Work will achieve the required performance standards. Compliance by Respondents with the terms of this Order shall not relieve Respondents of their obligations to comply with RCRA or any other applicable local, state, or federal laws and regulations.

85. Notwithstanding any other provision of this Order, no action or decision by EPA pursuant to this Order including without limitation, decisions by any authorized representative of EPA, shall constitute final agency action giving rise to any right of judicial review prior to EPA's initiation of a judicial action to enforce this Order, including an action for penalties or an action to compel Respondents' compliance with the terms and conditions of this Order.

XVIII. OTHER CLAIMS

86. By issuance of this Order, the United States and EPA assume no liability for injuries or damages to persons or property resulting from any acts or omissions of Respondents. The United States or EPA will not be deemed a party to any contract, agreement or other arrangement entered into by Respondents or their officers, directors, employees, agents, successors, assigns, heirs, trustees, receivers, contractors, or consultants in carrying out actions pursuant to this Order.

87. Respondents waive all claims against the United States relating to or arising out of conduct of this Order, including contribution and counter claims.

88. Respondents shall bear their own litigation costs and attorney fees.

89. In any subsequent administrative or judicial proceeding initiated by the United States for injunctive or other appropriate relief relating to the Site, Respondents shall not assert, and may not maintain, any defense or claim based upon the principles of waiver, res judicata, collateral estoppel, issue preclusion, claim-splitting, or other defenses based on upon any contention that the claims raised by the United States in the subsequent proceeding were or should have been raised in the present matter.

XIX. MODIFICATION OF THIS ORDER

90. Except for Modification of the Work Plan, including the Sampling Plan and Remediation Plan, as provided in Section X, this Order may only be modified by the mutual agreement of EPA and Respondents. Any agreed modifications shall: (1) be in writing; (2) be signed by all parties; (3) become effective on the date of EPA signature; (4) and be incorporated into this Order.

91. No informal advice, guidance, suggestion, or comment by EPA regarding reports, plans, specifications, schedules, or any writing submitted by Respondents shall relieve Respondents of their obligation to obtain such formal approval as may be required by this Order, and to comply with all requirements of this Order unless it is formally modified. Any deliverables, plans, technical memoranda, reports, specifications, schedules and attachments required by this Order are, upon approval by EPA, incorporated into and enforceable under this Order.

XX. ADDITIONAL WORK

92. EPA may determine or Respondents may propose that certain tasks are necessary in addition to or in lieu of the tasks included in any EPA-approved Work Plan, including any Sampling Plan or Remediation Plan, when such additional work is necessary to meet the objectives set forth in this Order. EPA may determine that Respondents shall perform any additional work and EPA will specify, in writing, the basis for its determination that any additional work is necessary. Within ten (10) days after the receipt of such determination, Respondents shall have the opportunity to meet or confer with EPA to discuss any additional work. Respondents shall submit for EPA approval a work plan for any additional work. Such work plan shall be submitted within twenty (20) days of Respondents' receipt of EPA's determination that any additional work is necessary, or according to an alternative schedule established by EPA. Upon approval of a work plan for any additional work, Respondents shall implement the work plan for any additional work in accordance with the schedule and provisions contained therein. The work plan for any additional work shall be incorporated by reference into this Order.

XXI. INDEMNIFICATION

93. Respondents shall indemnify, save and hold harmless the United States, its officials, agents, contractors, employees, and representatives from any and all claims or causes of action: (1) arising from, or on account of, act or omissions of Respondents, Respondents' directors, officers, employees, agents, successors, contractors or consultants in carrying out actions pursuant to this Order; and (2) for damages or reimbursement arising from or on account of any persons for performance of the Work on or relating to the Site, including claims on account of construction delays.

XXII. TERMINATION

94. The provisions of this Order shall be deemed terminated and satisfied upon written notice from EPA that Respondents have demonstrated that all the terms of this Order, including any additional work as may be performed pursuant to Section XX (Additional Work), and any stipulated penalties demanded by EPA under Section XVI (Penalties), have been addressed to the satisfaction of EPA. Termination of this Order shall not terminate Respondents' obligation to comply with Sections XIV (Record Retention), XVII (Reservation of Rights), and XXI (Indemnification).

95. Once sampling of a Remediation Area demonstrates that the legal parcel does not contain pesticides above Levels of Ecological Concern as defined at Paragraph 13(d), above, EPA shall release that legal parcel from this Order upon Respondents' written request.

XXIII. SEVERABILITY

96. If a court issues an Order that invalidates any provision of this Order or finds that Respondents have sufficient cause not to comply with one or more provisions of this Order, Respondents shall remain bound to comply with all provisions of this Order not invalidated or determined to be subject to a sufficient cause defense by the court's Order.

XXIV. EFFECTIVE DATE

97. This Order is shall be effective upon EPA's signature. Within two (2) business days of signing this Order, EPA will provide Respondents with a copy of the fully executed Order. The undersigned representative of each Respondent certifies that they are fully authorized to enter into the terms and conditions of this Order and to bind the party they represent to this document.

XXV. FORCE MAJEURE

98. Respondents agree to perform all requirements under this Order within the time limits established under this Order, unless the performance is delayed by a force majeure. For purposes of this Order, a force majeure is defined as any event arising from causes beyond the control of Respondents, or any entity controlled by Respondents or Respondents' contractors, which delays or prevents performance of any obligation under this Order despite Respondents' best efforts to fulfill the obligation. The requirements that Respondents exercise "best efforts to fulfill the obligation" includes using best efforts to anticipate any potential force majeure event and best efforts to address the effects of any potential force majeure event: (1) as it is occurring; and (2) following the potential force majeure event, such that the delay is minimized to the greatest extent possible. Force majeure does not include financial inability to complete the Work, increased cost of performance, changes in Respondents' business or economic circumstances, or inability to attain media cleanup standards.

99. If any event occurs or has occurred that may delay the performance of any obligation under this Order, whether or not caused by a force majeure event, Respondents shall orally notify EPA within forty-eight (48) hours of when Respondents knew or should have known that the event might cause a delay. Such notice shall: (1) identify the event causing the delay, or anticipated to cause delay, and the anticipated duration of the delay; (2) provide Respondents' rationale for attributing such delay to a force majeure event; (3) state the measures taken or to be taken to prevent or minimize the delay; (4) estimate the timetable for implementation of those measures; and (5) state whether, in the opinion of Respondent, such event may cause or contribute to an endangerment to public health or the environment. Respondent shall undertake best efforts to avoid and minimize the delay. Failure to comply with the notice provision of this paragraph and to undertake best efforts to avoid and minimize the delay shall waive any claim of force majeure by Respondents. Respondents shall be deemed to have notice of any circumstances of which their contractors had or should have had notice.

100. If EPA determines that a delay in performance or anticipated delay in fulfilling a requirement of this Order is or was attributable to a force majeure, then the time period for performance of that requirement will be extended as deemed necessary by EPA. If EPA determines that the delay or anticipated delay has been or will be caused by a force majeure, then EPA will notify Respondents, in writing, of the length of the extension, if any, for performance of such obligations affected by the force majeure. Any such extensions shall not alter Respondents' obligations to perform or complete other tasks required by this Order which are not directly affected by the force majeure.

101. If EPA disagreed with Respondents' assertion of a force majeure, then Respondents may elect to invoke the dispute resolution provision, and shall follow the procedures set forth in Section XV (Dispute Resolution). In any such proceeding, Respondents shall have the burden of demonstrating by a preponderance of the evidence that the delay or anticipated delay has been or will be caused by a force majeure, that the duration of the delay or the extension sought was or will be warranted under the circumstances, that Respondents' best efforts were exercised to avoid or mitigate the effects of the delay, and that Respondents complied with the requirements of this Section. If Respondents satisfy this burden, then EPA will extend the time for performance as EPA determines is necessary.

Agreed this 28th day of OCTOBER 2022

By: [Signature]
Signature

DUNN BERSON
Print Name

PRESIDENT
Title

ESE ALCOHOL, INC
Company Name

Signature

Print Name
SEE PAGE 21B

Title

Company Name

It is so ORDERED and Agreed:

By: **SEE PAGE 21C**

David Cozad, Director
Enforcement and Compliance Assurance Division
United States Environmental Protection Agency
Region 7

Date: _____

Agreed this 28th day of October 2022

By:

Signature

Print Name

See Page 21A

Title

Company Name

Timothy P. Allen
Signature

TIMOTHY P. GLENN

Print Name

EVP, Sales

Title

CORTEVA AGRISCIENCE

Company Name

It is so ORDERED and Agreed:

See Page 21C

By:

David Cozad, Director
Enforcement and Compliance Assurance Division
United States Environmental Protection Agency
Region 7

Date: _____

Agreed this _____ day of _____, 2022

By: _____
Signature

Print Name **SEE PAGE 21A**

Title

Company Name

Signature

Print Name **SEE PAGE 21B**

Title

Company Name

It is so ORDERED and Agreed:

By: _____
David Cozad, Director
Enforcement and Compliance Assurance Division
United States Environmental Protection Agency
Region 7

Date: _____

Attachment
RCRA § 7003 Work Plan
ESE Alcohol Site
ESE Alcohol, Inc. and Pioneer Hi-Bred International, Inc.

I. Sampling Plan

1. Within ninety (90) days of the Effective Date, Respondents shall develop for EPA approval a Sampling Plan for representative sampling of all areas where wastes (i.e., treated seed, WDG, wastewater, lagoon sludge) have been managed, placed, stored, or land applied from January 2020 to present (Remediation Areas) to determine the concentration of pesticides in each area. The Sampling Plan shall include:
 - a. A plan and procedures for obtaining and analyzing samples from the stockpiled lagoon sludges at the Site.
 - b. A plan and procedures for obtaining and analyzing soil samples.
 - c. Description of all areas to be sampled, including the square footage or acreage and a map identifying each area.
 - d. Identification of all pesticides to be analyzed based on the types of treated seed products sent to the Facility.
 - e. A schedule for sampling activities. All sampling must be completed as expeditiously as practicable after EPA approval of the Sampling Plan.
 - f. Quality Assurance Project Plan (QAPP) for sampling and testing that conforms to EPA Guidance for Quality Assurance Project Plans, EPA QA/G-5, EPA 240-R-02-009 (Dec. 2002). The QAPP shall address quality assurance, quality control, and chain of custody procedures for all sampling, monitoring and analytical activities. The QAPP shall be incorporated into this Order by reference.
 - g. Data Quality Objectives for any data collection activity to ensure that data of known and appropriate quality are obtained, and that data are sufficient to support their intended use.
 - h. Health and Safety Plan (HASP) for sampling activities that complies with applicable Occupational Safety and Health Administration (OSHA) regulations.
2. Respondents shall ensure that laboratories used for analysis perform such analysis according to the applicable Environmental Chemistry Method available at: <https://www.epa.gov/pesticide-analytical-methods/environmental-chemistry-methods-ecm>. If methods other than EPA methods are to be used, Respondents shall specify all such protocols in the sampling plan. EPA may reject any data that does not meet the requirements of the approved sampling plan and EPA analytical methods and may require

resampling and additional analysis.

3. Respondents shall, upon EPA's request, make arrangements for EPA to conduct a performance and QA/QC audit of the laboratories chosen by Respondent, whether before, during, or after sample analyses. Upon EPA's request, Respondents shall have their laboratories perform analyses of samples provided by EPA to demonstrate laboratory QA/QC and performance. If the audit reveals deficiencies in a laboratory's performance or QA/QC, Respondents shall submit a plan to address the deficiencies and EPA may require resampling and additional analysis.
4. EPA reserves the right to require a change in laboratories for reasons which may include but shall not be limited to: QA/QC, performance, conflict of interest, or confidential agency audit information. In the event EPA requires a laboratory change, Respondents shall propose two alternative laboratories within 30 calendar days. Once EPA approves of the laboratory change, Respondents shall ensure that laboratory service shall be made available within 15 calendar days.
5. Upon approval of the Sampling Plan by EPA, Respondents shall implement the terms and conditions of the Sampling Plan.

II. Remediation Plan

6. Within ninety (90) days of receiving the final validated sampling results identified in the Sampling Plan, Respondents shall prepare a Remediation Plan for EPA approval to address areas where pesticide concentrations exceed Levels of Ecological Concern. The Remediation Plan shall include:
 - a. Final sampling results, including all QA/QC data.
 - b. Identification of areas where pesticide concentrations exceed Levels of Ecological Concern based on the sampling results.
 - c. Remediation methods for the stockpiled lagoon sludges at the Site. Depending on the concentration of the pesticides within these materials, these methods may include disposal at a facility that meets one of the following requirements:
 - i. Permitted under 40 C.F.R. Part 270;
 - ii. In interim status under 40 C.F.R. Parts 265 and 270;
 - iii. Authorized to manage hazardous waste by a State with a hazardous waste management program approved under 40 C.F.R. Part 271;
 - iv. Permitted, licensed, or registered by a State to manage municipal solid waste and is subject to 40 C.F.R. Part 258;

- v. Permitted, licensed, or registered by a State to manage non-municipal non-hazardous waste and is subject to the requirements in 40 C.F.R. §§ 257.5 through 257.30;
 - vi. Beneficially uses or reuses, or legitimately recycles or reclaims its waste, or treats its waste prior to beneficial use or reuse, or legitimate recycling or reclamation without placing the waste on the ground; or
 - vii. Such other disposal methods as approved by EPA.
- d. Prior to disposing of the lagoon sludges at an off-site facility, Respondents must submit all pertinent information regarding that facility to the EPA for approval. Pertinent information includes but is not limited to facility name; address; copies of permits; and description of disposal method. Respondents may not dispose of any wastes without EPA approval.
 - e. Remediation methods to reduce soil concentrations of pesticides below Levels of Ecological Concern and/or to limit pesticide availability to wildlife through contact, pollination, and ingestion until the pesticides degrade to those levels.
 - f. Measures to eliminate areas where water may collect or pool after rainfall events.
 - g. A schedule for implementation of remedial actions. The Remediation Plan must be initiated as soon as practicable upon EPA approval. Respondents shall undertake and complete the agreed upon remediation activities in accordance with the approved schedule.
 - h. Provisions for periodic soil sampling of Remediation Areas until the results demonstrate that pesticide levels are below Levels of Ecological Concern, including a schedule for such sampling at regular intervals.

III. Reporting Requirements

- 7. Respondents shall submit a written progress report by email concerning actions undertaken pursuant to the Order by the last calendar day of each month, starting with the month following the Effective Date until termination of the Order, unless EPA approves a different reporting schedule. These reports shall describe all significant developments during the preceding period, including the actions performed and any problems encountered, data received during the reporting period, and the developments anticipated during the next reporting period, including a schedule of actions to be performed, anticipated problems, and planned resolutions of past or anticipated problems. These reports shall also include, but not be limited to:

- a. Copies of all documentation for disposals made during the month, demonstrating the proper disposition of the wastes.
- b. Before and after photographs of all Remediation Areas addressed during the month.
- c. Copies of all testing and analysis, including sampling locations.
- d. The status of each Remediation Area.