

IAS PART 11

At a _____ Term of the Supreme Court,
State of New York, New York County,
~~Part~~ _____, at the Courthouse,
60 Centre Street, New York, New York,
on the 14th day of December, 2003.
J.S.C.

Present: Hon

HON. JOAN A. MADDEN

Justice

SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY

-----X
ELIOT SPITZER, Attorney General of the State of New
York, and the STATE OF NEW YORK,

Plaintiffs,

-against-

DOW AGROSCIENCES LLC,

Defendant.
-----X

Index No. 403920/03

**CONSENT ORDER
AND JUDGMENT**

WHEREAS plaintiffs Eliot Spitzer, Attorney General of the State of New York, and the State of New York (together the "State") having filed a complaint dated November ____, 2003 ("Complaint") (a copy of which is attached as Exhibit A) pursuant to New York Executive Law § 63(12), Environmental Conservation Law (ECL) Articles 33 and 71, and General Business Law (GBL) §§ 349 and 350-d seeking judgment, among other things, assessing civil penalties, awarding restitution and damages, and providing injunctive relief against defendant Dow AgroSciences LLC ("Dow AgroSciences") arising from its alleged (i) distribution and sale of pesticides within the State of New York where the claims made in its advertising for pesticides differ in substance from the representations made in connection with its registration of those

products, and (ii) dissemination within the State of New York of print and Internet broadcast advertising containing false or misleading claims that, among other things, Dow AgroSciences' pesticide products are "safe" for humans and for the environment, in violation of the GBL and of an Assurance of Discontinuance pursuant to Executive Law § 63(15) between DowElanco, a predecessor of Dow AgroSciences, and the New York State Attorney General, dated January 20, 1994 ("Assurance"); and

WHEREAS Dow AgroSciences filed an Answer to the Complaint dated November ____, 2003 (a copy is annexed as Exhibit B) disputing the State's contentions that its advertising for pesticide products is either false or misleading, or that it has violated any law, or that it has violated the Assurance in any way. By entering into this consent order and judgment, Dow AgroSciences is not agreeing with any of the State's allegations, and does not admit that it has violated any federal, state or local law, or that it has breached the terms of any agreement; and

WHEREAS Dow AgroSciences and the State are willing to enter into this consent order and judgment in order to resolve the claims set forth in the Complaint without protracted litigation and have consented to the terms contained herein, and to the entry of this consent order and judgment for the purpose of settling and compromising the action, without any admission of the facts or of the validity of the claims alleged in the Complaint;

IT IS HEREBY ORDERED AND DECREED that:

Definitions

1. The following terms apply to this consent order and judgment:

A. “**Accompany**” means, with respect to Advertising in print document and electronic recording formats, to be distributed at the same time to the same recipients. With respect to the Internet, the term means to appear on the same Page as Advertising (as defined below), specifically including a pop-up on that Page or an embedded link within the text of the Advertising on that Page; however the term Accompany shall not include links (*e.g.*, a menu or hyperlink not within the text) where the viewer purposefully selects an option and is transferred to a different Page.

B. “**Advertisement**” or “**Advertising**” means any Document containing words or images that describe the qualities, attributes or advantages of a Dow AgroSciences Pesticide Product(s), and that advocates or promotes the purchase or use of such Products(s), that is Published by Dow AgroSciences to the general public, or that is Published by Dow AgroSciences in trade, industry or commerce. The term does not include:

- (1) Documents Published solely to officers, employees or contractors of Dow AgroSciences or of its Affiliated Companies.
- (2) Dow AgroSciences’ research results, so long as they are identified as such and include the research data or a summary thereof.
- (3) Public Concern Statements, as defined below.
- (4) Statements made in compliance with paragraph 12 of this consent order and judgment.
- (5) Pesticide and Pesticide Product “labels” or “labeling,” as those terms are defined by or under FIFRA § 2(p), 7 U.S.C. § 136(p).

C. **“Affiliated Companies”** means The Dow Chemical Company and its subsidiaries.

D. **“Document”** means a print document (*e.g.* brochure, pamphlet, magazine, fact or product description sheet, print advertisement), the electronic recording of a radio broadcast or television broadcast, or Internet (as defined below) Page, or an electronic recording (*i.e.*, compact disc, videotape and DVD). For purposes of the Internet, the term means all words and images that appear on an Internet (as defined below) Page. The term excludes Pesticide and Pesticide Product “labels” or “labeling,” as those terms are defined by or under FIFRA § 2(p), 7 U.S.C. § 136(p).

E. **“Dow AgroSciences”** means Dow AgroSciences, LLC, and includes its successors, assigns, officers, employees and agents who are directed or controlled by Dow AgroSciences LLC.

F. **“Dow AgroSciences Pesticide Product(s)”** means (i) a Pesticide or Pesticide Product registered for sale in the State of New York by Dow AgroSciences, (ii) MCPA 2-Ethylhexyl Ester Technical, U.S. Environmental Protection Agency (“EPA”) Reg. No. 62719-064; MCPA Acid Technical, EPA Reg. No. 62719-060; MCPP Technical, EPA Reg. No. 62719-063; Atrazine Technical, EPA Reg. No. 62719-456, and (iii) a Dow AgroSciences’ Pesticide that (1) is registered by EPA as a Technical Active Ingredient, and (2) Dow AgroSciences does not have an end-use Pesticide Product containing such Technical Active Ingredient registered by New York, and (3) the Technical Active Ingredient is formulated by a third party into end-use Pesticide Product(s) registered by the State of New York, and (4) the Pesticide Product(s)

containing the Technical Active Ingredient is distributed or sold within the State of New York, and (5) the Attorney General's office has sent Dow AgroSciences a written notice correctly stating that the Dow AgroSciences Pesticide Product meets the criteria of paragraph 1(F) (iii) (1 through 4) and that the Pesticide is a Dow AgroSciences Pesticide Product for purposes of this consent order and judgment, and (6) thirty (30) days has elapsed from the date of such notice from the Attorney General's office to Dow AgroSciences.

G. **"FIFRA"** means the Federal Insecticide, Fungicide and Rodenticide Act, 7 U.S.C. §§ 136-136y, as it now exists or as it may in the future be amended, renumbered or recodified.

H. **"Internet"** means a Dow AgroSciences website maintained for the U.S. market which features Dow AgroSciences Pesticide Products, the content of which website is controlled by Dow AgroSciences, and where an Advertisement or Advertising may be seen or heard. The term does not include platforms such as Uniform Resource Locator (URL) extensions on the world wide web maintained for countries other than the United States, or that only advertise products which are registered in countries other than the United States, or whose content clearly indicates that the words or images are intended solely for countries other than the United States.

I. **"Page"** shall mean, for purposes of the Internet, on the same screen or page displayed at one time or from one specific URL extension.

J. **"Pesticide"** has the same meaning as that term under 6 NYCRR § 325.1(aw) as it now exists or as it may in the future be amended, renumbered or recodified.

K. **“Pesticide Product”** has the same meaning as 6 NYCRR § 326.1(s) as it now exists or as it may in the future be amended, renumbered or recodified.

L. **“Product Advertisement”** means any Advertisement for a Dow AgroSciences Pesticide Product(s).

M. **“Public Concern Statement”** means a Published Document, the predominant content of which consists of:

(1) Any statement(s) by Dow AgroSciences expressly refuting or defending against other statement(s) or allegation(s) Published in trade, industry, commerce or to the general public against Dow AgroSciences, any Dow AgroSciences Pesticide or Pesticide Product or the pesticide industry generally (“Allegation(s)”) so long as the Allegation(s) to which the Dow AgroSciences’ statements respond are identified (*i.e.* are clear from either the context or content) within Dow AgroSciences’ statement(s) and the Document containing the Dow AgroSciences’ statement(s) does not Accompany a Product Advertisement.

(2) Information from or statement(s) by Dow AgroSciences in connection with any kind of pending or threatened litigation, or any kind of government regulatory action, so long as the connection is clear from either the context or content of the Document containing such statement(s) and the Document containing such statement(s) does not Accompany a Product Advertisement.

N. **“Publish”** or **“Published”** means the dissemination to the general public, or the dissemination in trade, industry or commerce of a Document in the State of New York by any means including, without limitation, print, billboard, broadcast, mailing, distribution, and the

Internet. In the context of the Internet, "Publish" shall include making accessible to residents of New York.

O. "Technical Active Ingredient" is a manufacturing use Pesticide registered and labeled for formulation into an end-use Pesticide Product.

Injunction

Pesticide Advertising

2. Dow AgroSciences shall cease and desist from Publishing in the State of New York, or through the Internet, any Product Advertisement that represents, directly or by implication, that:

A. Any Dow AgroSciences Pesticide Product(s) (i) is safe, non-toxic, harmless or free from risk to humans or pets, or (ii) has been proven safe for humans or pets.

B. The registration of any Pesticide or Pesticide Product by EPA or by New York State means that the Dow AgroSciences Pesticide Product (i) is safe, non-toxic or harmless, (ii) has been approved by EPA or the State, or (iii) has been fully tested for all potential adverse effects.

C. Any Dow AgroSciences Pesticide Product(s) is as safe or safer, or no more toxic or less toxic, than non-pesticide consumer products or activities unrelated to pest control.

D. Any Dow AgroSciences Pesticide Product(s) (i) is safe, non-toxic, harmless or free from risk to the environment, or (ii) has been proven safe for the environment.

E. The classification of a Dow AgroSciences Pesticide Product as a restricted use Pesticide or Pesticide Product is unrelated to potential adverse effects on humans or the environment.

3. Nothing in this consent order and judgment shall preclude Dow AgroSciences from making representations in an Advertisement:

A. Regarding (1) the degree and type of risk(s) (*e.g.*, neurotoxicity, carcinogenicity, or non-target lethality) associated with a Pesticide or Pesticide Product, including, without limitation, a Dow AgroSciences Pesticide Product registered under EPA's Reduced Risk Pesticide Program or a recipient of the Presidential Green Chemistry Challenge Award, if used in accordance with all label precautionary statements and directions, or (2) comparative safety or toxicity, or comparative environmental impacts or benefits, between Pesticides or Pesticide Products, including, without limitation, Dow AgroSciences Pesticide Products registered under EPA's Reduced Risk Pesticide Program or recipients of the Presidential Green Chemistry Award, registered for use on the same target pest(s) under the same or similar circumstances of use or labeled uses, or (3) specific environmental characteristics or attributes of Dow AgroSciences Pesticide Products, including, without limitation, Dow AgroSciences Pesticide Products registered under EPA's Reduced Risk Pesticide Program or recipients of the Presidential Green Chemistry Award, so long as such Advertisement, containing representations described in (1), (2), or (3) read as a whole, (i) does not make representations that substantially differ from any claims made for the Pesticide Product as part of the statements made in connection with the Pesticide's or Pesticide Product's registration or re-registration

pursuant to FIFRA or the ECL, and (ii) is not misleading with respect to whether the representation applies to the formulated product or to one or more specific ingredients(s) (e.g. the active ingredients(s)).

B. That EPA registration or re-registration indicates that EPA has determined that the Pesticide or Pesticide Product will perform its intended function without any unreasonable risk to man or the environment, taking into account the economic, social, and environmental costs and benefits of the use of the Pesticide or Pesticide Product.

C. That the labels and /or labeling of Dow AgroSciences Pesticide Products have been reviewed and accepted by the EPA under FIFRA.

D. Regarding the comparative impact, benefits, or effects, including crop safety, of the Dow AgroSciences Pesticide Product on or to the crops, plants, animals (excluding pets) or non-living objects on which the Pesticide Product is properly registered for use.

Publishing Advertisements Via The Internet

4. Dow AgroSciences shall cease and desist from Publishing through the Internet any Product Advertisement Accompanied by any Public Concern Statement(s).

Retention Of Advertisements And Substantiation Of Claims

5. Dow AgroSciences shall retain all of its Public Concern Statements, statements described in paragraph 12 of this consent order and judgement, and Advertisements subject to this consent order and judgment for at least three (3) years following the date of last Publication. Dow AgroSciences shall provide to the Attorney General's office copies of any such statements and Advertisements within thirty (30) days of receipt of a written request.

6. If requested, Dow AgroSciences shall provide to the Attorney General's office substantiation for any claim or representation contained in any Advertisement subject to this consent order and judgment, and for any statements described in paragraph 12 of this consent order and judgment. A request for substantiation shall be in writing, and shall specify the claim(s), representation(s) or statements for which substantiation is requested and the Advertisement in which the claim(s), representation(s) or statements appeared. Dow AgroSciences shall provide the requested substantiation within thirty (30) days of its receipt of a written request. If the claim or representation for which substantiation is requested concerns the degree or type of risk of one or more Pesticides or Pesticide Products, the substantiation shall specify the types of hazards (*e.g.*, human health, environmental, acute or chronic) and exposures (*e.g.*, route, duration and magnitude) considered.

Compliance Program

7. Dow AgroSciences shall review all Advertisements being Published by Dow AgroSciences or its agents in the State of New York, or on the Internet, as of the effective date of this consent order and judgment. Within ninety (90) days after the effective date, Dow AgroSciences shall provide an affidavit to the Attorney General's office : (i) stating that it has completed the review of current Advertisements subject to this consent order and judgment; (ii) identifying any Advertisement Dow AgroSciences has determined to withdraw pursuant to paragraph 2 of this consent order and judgment; and (iii) detailing all steps taken to remove any withdrawn Advertisement from Publication.

8. Dow AgroSciences shall implement procedures to ensure compliance with this consent order and judgment, as well as with laws applicable to Advertising in the State of New York. Procedures implemented by Dow AgroSciences shall include, but not be limited to the following:

A. The Dow AgroSciences Director of Ethics and Compliance (Compliance Director) shall oversee compliance with this consent order and judgment. Dow AgroSciences shall ensure that all Advertising is reviewed by and approved by an attorney or attorneys who shall be designated by the Compliance Director. Within thirty (30) days after the effective date of this consent order and judgment, Dow AgroSciences shall provide to the Attorney General's office the name of the designated attorney(s). With reasonable notice to the Attorney General's office, Dow AgroSciences may substitute attorneys responsible for this role at any time.

B. No Advertisement shall be Published in the State of New York unless it has been reviewed and approved by the appointed attorney or duly designated assistant attorney.

C. Dow AgroSciences shall maintain records of all Advertisements reviewed pursuant to the requirements of this consent order and judgment. The records shall reflect: (i) the person(s) involved in drafting each Advertisement, (ii) the dates of review and approval of each Advertisement, and (iii) the name of the attorney that performed the final review and approval of each Advertisement. Records required pursuant to this subparagraph shall be maintained for at least three (3) years from the date that the Advertisement is last Published in the State of New York.

D. Within ninety (90) days of the effective date of this consent order and judgment, Dow AgroSciences shall prepare a written manual setting out (i) the requirements of federal and New York State law, (ii) the requirements of this consent order and judgment, and (iii) other relevant information, including the Federal Trade Commission's most current "Guides for the Use of Environmental Marketing Claims" applicable to Advertising (such Guides are intended for training and reference purposes, and not intended to be incorporated or subject to the injunctive portions of this consent order and judgment). During that same period, Dow AgroSciences shall establish procedures for routing Advertisements for compliance review and record maintenance requirements. A copy of the manual shall be provided to each Dow AgroSciences employee involved in creating or reviewing Advertising, and to advertising agency personnel responsible for creating or reviewing Advertising. Dow AgroSciences shall maintain a record identifying each recipient of the manual. A copy of the manual shall also be provided to the Attorney General's office.

E. Within ninety (90) days of the effective date of this consent order and judgment, Dow AgroSciences shall commence, and thereafter continue, training each Dow AgroSciences employee, and advertising agency personnel, involved in creating or reviewing Advertising regarding the requirements of federal and New York State law, including the requirements of this consent order and judgment, applicable to Advertising. Dow AgroSciences shall maintain records of all training conducted pursuant to the requirements of this subparagraph. The records shall reflect: (i) the date, location and duration of each training session, (ii) the person who conducted the training session, and (iii) each person who attended

the training session. The records shall be maintained for at least three (3) years from the date of the training session.

9. Within sixty (60) days of its receipt of a written request, Dow AgroSciences shall provide to the Attorney General's office a copy of any record required to be maintained pursuant to the terms of this consent order and judgment, beyond the statements and Advertisements covered by paragraph 5 of this consent order and judgment.

10. In recognition of the parties' mutual desire for Dow AgroSciences to implement an effective compliance program and for a shared understanding of the laws and standards applicable to Advertising, the Attorney General's office agrees that when it becomes aware of statements or representations made in Dow AgroSciences' Advertising that it believes violate this consent order and judgment or other applicable law, the Attorney General's office will provide written notice to Dow AgroSciences. Following such notification, Dow AgroSciences shall have fourteen (14) days, or such other time as the parties may agree to, in which to make a written or oral presentation to the Attorney General's office concerning the Advertising. If, after the presentation, the Attorney General's office determines that some or all of the Advertising violates the terms of this consent order and judgment or other applicable law, it shall notify Dow AgroSciences in writing. If Dow AgroSciences retracts the Advertising to which the determination applies within seven (7) days of receipt of that notice, that conduct shall be significant mitigating factor in that the parties understand that because of prompt action and correction on behalf of Dow AgroSciences, the Attorney General's office has no obligation to bring any enforcement action but will preserve the right to bring an action if in its best judgment,

an action is needed. The intent of this paragraph is to promote compliance with this consent order and judgment and with the laws applicable to Advertising; it does not obligate the Attorney General's office to continuously monitor Dow AgroSciences' Advertisements Published in New York or through the Internet nor does it create a presumption that an Advertisement not brought to Dow AgroSciences' attention is in compliance with applicable laws or this consent order and judgment.

Penalty

11. Without admitting any pre-existing liability or obligation to do so, Dow AgroSciences shall pay to the State of New York the sum of two million dollars (\$2,000,000.00) as a civil penalty. Five hundred thousand dollars (\$500,000.00) of such amount shall be paid within thirty 30 days of the effective date of this consent order and judgment. The balance of one million five hundred thousand dollars (\$1.5 million) shall be paid on or before January 30, 2004. Such payments shall be made by check payable to the "State of New York," delivered to the New York State Attorney General's Office, Environmental Protection Bureau, 120 Broadway, 26th Floor, New York, New York, 10271, Attention: Lemuel M. Srolovic, Assistant Attorney General.

Miscellaneous

12. Nothing in this consent order and judgment shall prohibit Dow AgroSciences from Publishing in the State of New York, or through the Internet:

A. Quotations, with attribution, of published statements made by or on behalf of EPA, the U.S. Food and Drug Administration, the Federal Trade Commission, the U.S.

Department of Agriculture, the Centers for Disease Control and Prevention, the U.S. Department of State, the U.S. Department of the Interior or the New York State Department of Environmental Conservation (or a statement by Dow AgroSciences fairly and accurately conveying the substance and source of any such statement) regarding Dow AgroSciences Pesticide Products that have been registered by EPA as Reduced Risk Pesticides or regarding Dow AgroSciences Products that have received a Presidential Green Chemistry Challenge Award.

B. Statements by Dow AgroSciences concerning pest management procedures or practices that are not required to be registered under federal or New York State law.

13. Upon (i) this consent order and judgment becoming effective and (ii) complete payment of the amount stated in paragraph 11, the claims set forth in the State's Complaint in this action shall be deemed dismissed, with prejudice, and all claims concerning advertising of Pesticide or Pesticide Products by Dow AgroSciences, including without limitation, claims under New York Executive Law § 63(12), ECL § 33-1301(1)(a), and GBL §§ 349 and 350, arising from any Advertisement Published by Dow AgroSciences before the date that this consent order and judgment is executed by the parties, whether known or unknown to the Attorney General's office, shall be released.

14. Upon becoming effective, this consent order and judgment shall supercede and replace the Assurance. No provision or obligation of the Assurance shall be enforceable after the effective date of this consent order and judgment.

15. Nothing in this consent order and judgment shall be construed so as to deprive any person of any private right under the law.

16. This consent order and judgment shall become effective on the date it is "So Ordered" by the Court.

17. All written communications and notices pursuant to this consent order and judgment shall be sent by certified mail, overnight courier delivery, or by facsimile, with proof of delivery, as follows:

If to the Attorney General's office:

New York State Attorney General's Office
120 Broadway
New York, New York 10271-0332
Facsimile No. 212-416-6007

Attn: Chief, Affirmative Litigation Section
Environmental Protection Bureau

If to Dow AgroSciences:

Dow AgroSciences LLC
9330 Zionsville Road
Indianapolis, Indiana 46268-1054
Facsimile No. 317-337-4847

Attn: Global Legal Counsel, Litigation

With a copy to

Attn: Global Ethics and Compliance Director

Upon notice to the other party, each party may change the recipient of service identified above.

18. Each of the undersigned representatives of the parties certifies that he or she is fully authorized to execute this order and judgment on behalf of the relevant party.

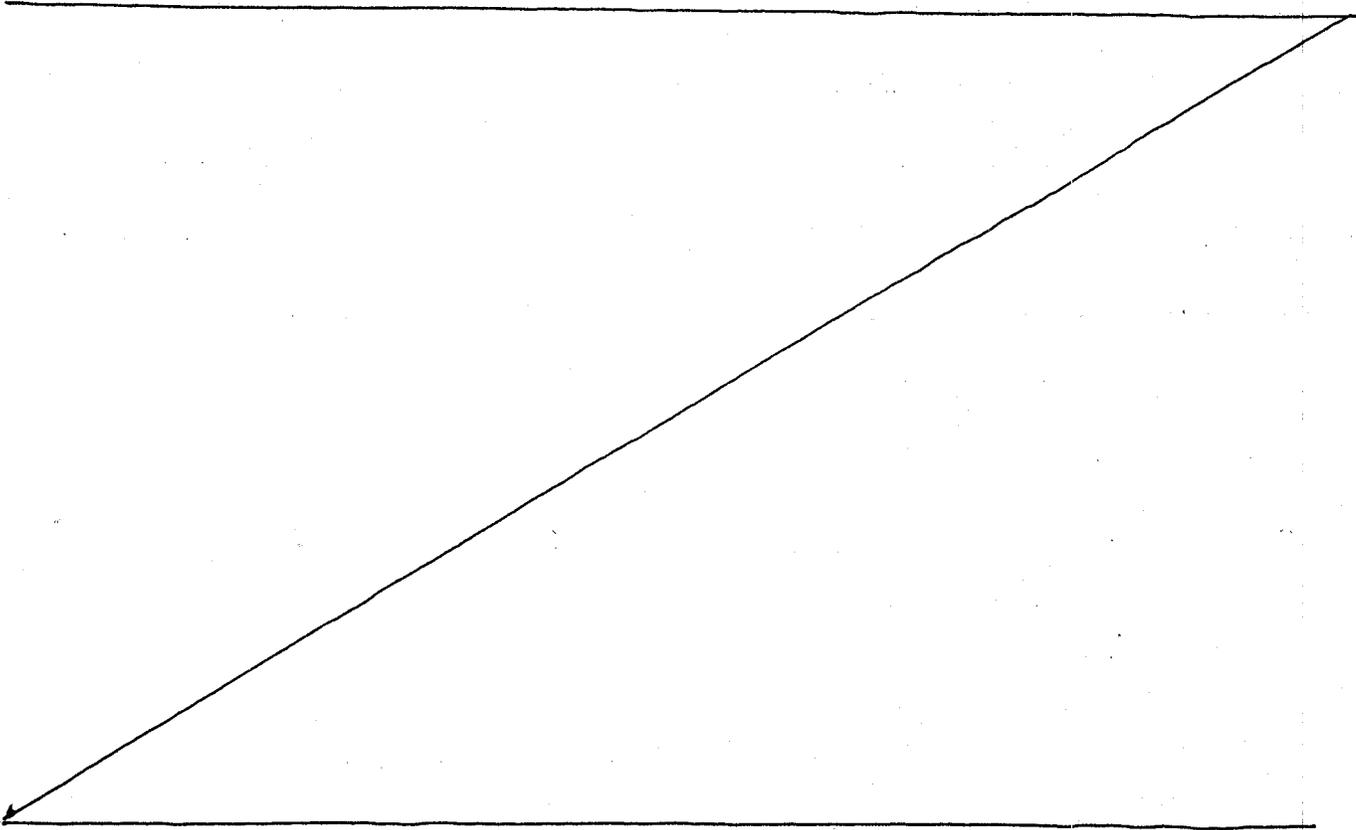
Continuing Jurisdiction

19. The parties understand that it may be appropriate and necessary to modify this consent order and judgment in light of changes that may occur in the technology of Pesticides or Pesticide Products, in Publishing, in government regulatory programs, or in other pertinent areas. Accordingly, either party to this consent order and judgment may request that the other party agree to a modification in those circumstances. The parties agree that if such a request is made, they shall discuss and consider the requested modification, and they shall reasonably cooperate with each other in connection with such a request. Nothing in this paragraph shall require either party to agree to a modification, nor shall anything in this paragraph constitute a waiver of any right by either party to seek judicial modification of this consent order and judgment.

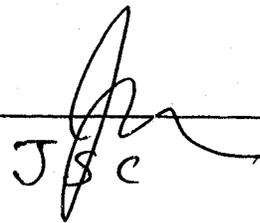
20. This Court shall retain jurisdiction over the parties for purposes of enforcing this consent order and judgment. The term of this consent order and judgment shall be at least five (5) years from its effective date, and shall not be more than ten (10) years. If, as of the fifth year anniversary of the effective date of this consent order and judgment there is no unresolved written notice from the Attorney General's office to Dow AgroSciences of any violations of this consent order and judgment which would constitute a material breach of this consent order and judgment by Dow AgroSciences, the obligations of Dow AgroSciences hereunder shall cease. In the event that a written notice of violation is sent by the Attorney General's office thirty (30) days or fewer preceding the fifth year anniversary, Dow AgroSciences shall be allowed thirty

(30) days past the fifth year anniversary date to resolve the matter to the satisfaction of the Attorney General's office, upon which the obligations of Dow AgroSciences hereunder shall then cease.

21. This consent order and judgment shall be binding on the parties' successors and, with respect to Dow AgroSciences, its assigns.



So Adjudged, Ordered & ENTER:



J A C

(CONSENTED AND AGREED TO:

DOW AGROSCIENCES LLC
9330 Zionsville Road
Indianapolis, IN 46268-1054

By: _____

Dated: _____

ORRICK, HERRINGTON & SUTCLIFFE LLP
Attorneys for Dow AgroSciences LLC
666 Fifth Avenue
New York, NY 10103-0001

By: _____

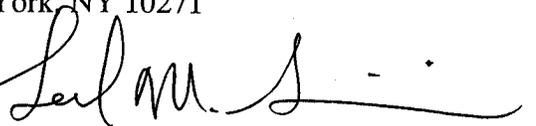
Richard W. Mark (212-506-3785)
Daniel J. Thomasch (212-506-3755)

Dated: _____

REC'D JUN 11 11 45 AM

Attorney General of the State
of New York

Attorney for Plaintiffs
New York State Department of Law
120 Broadway
New York, NY 10271

By: 

Lemuel M. Srolovic (212-416-8459)
Philip Bein (518-474-7178)
Assistant Attorneys General
Environmental Protection Bureau

Dated: December 1, 2003

~~SO ORDERED~~ and ENTER:

Dated: _____

ESG