

**ANALYSIS OF AGREEMENT CONTAINING CONSENT ORDER
TO AID PUBLIC COMMENT
*In the Matter of Nufarm Limited., File No. 081-0130***

I. Introduction

The Federal Trade Commission (“Commission”) has accepted, subject to final approval, an Agreement Containing Consent Order (“Consent Agreement”) from Nufarm Limited (“Nufarm” or “Respondent”) to remedy the anticompetitive effects stemming from Nufarm’s acquisition of A.H. Marks Holding Limited (“A. H. Marks”). Under the terms of the Consent Agreement, Nufarm is required to divest to Commission-approved buyers certain A. H. Marks assets, including regulatory permits and intellectual property, and take certain additional measures to restore competition in the markets for three phenoxy herbicide products: MCPA, MCPP-p, and 2,4DB.

On March 5, 2008, Nufarm acquired A. H. Marks. Both parties held, or had access to, regulatory approvals from the United States Environmental Protection Agency (“EPA”) to sell MCPA, MCPP-p, and 2,4DB in the United States. The Commission’s complaint alleges that the acquisition and acquisition agreement violated Section 7 of the Clayton Act, as amended, 15 U.S.C. § 18, and Section 5 of the Federal Trade Commission Act (“FTC Act”), as amended, 15 U.S.C. § 45, by lessening competition in the United States markets for the sale of the phenoxy herbicides: MCPA, MCPP-P, and 2,4DB.

The Consent Agreement has been placed on the public record for thirty (30) days for receipt of comments by interested persons. Comments received during this period will become part of the public record. After thirty (30) days, the Commission will review the Consent Agreement and comments received and decide whether to withdraw from the proposed Consent Agreement, modify it, or make final the Consent Agreement’s proposed Decision and Order.

II. The Products and Structure of the Markets

With its acquisition of A.H. Marks, Nufarm obtained monopoly positions in the United States markets for two phenoxy herbicide markets (MCPA and MCPP-p) and reduced a third phenoxy herbicide market (2,4DB) to a duopoly. Phenoxy herbicides are post-emergent selective broadleaf herbicides which are designed to act on full or partially grown weeds without damaging surrounding plants. They are used widely in the turf, lawn care, and agriculture industries to eliminate existing broadleaf weeds safely and cheaply. Nufarm and A.H. Marks sold these herbicides to agricultural and turf and lawn care formulators in their raw form as “technical” ingredients for their formulated herbicide products. Agricultural formulators generally purchase MCPA for use on cereal crops, such as wheat and barley, and 2,4DB for peanut and alfalfa crops. Turf and lawn care formulators purchase MCPP-p for turf care products used by landscape professionals or consumers. Each of the three herbicides is a highly cost-effective herbicide for its intended use with no equivalent substitutes. More expensive herbicides are generally used as complements and combined with phenoxy herbicides such as MCPA, MCPP-p, or 2,4DB, to increase the effectiveness of formulated herbicide products.

III. Entry

Entry into the markets for MCPA, MCPP-p and 2,4DB would not be timely, likely, or sufficient to deter or counteract the anticompetitive effects of the acquisition. In order to obtain approval to sell herbicides for use on crops, turf, or lawns in the United States, the Environmental Protection Agency (“EPA”) requires manufacturers to submit extensive environmental and toxicology testing data. Herbicide manufacturers often generate such data by forming industry task forces to share the costs of testing. Later entrants are often required to compensate members of the task force to obtain intellectual property rights to existing testing data by either purchasing the rights to the data or obtaining a seat on the task force. The costs associated with obtaining either the testing data or a task force seat to enter the markets for MCPA, MCPP-p, and 2,4DB are high compared to the limited potential sales revenues available to an entrant in each of these markets. Additionally, obtaining EPA approval for the manufacture and sale of each of the relevant products can take several years due to the presence of regulatory barriers. As a result, entry into each relevant market would require substantial sunk costs that would make entry unattractive. In addition, prior to the acquisition, Nufarm had entered into contracts with several of its task force members which posed barriers to entry by these firms. Therefore, the prospect of entry into the relevant markets is very limited and does not alleviate the concerns about the adverse competitive effects of the acquisition.

IV. Effects of the Acquisition

The acquisition is likely to cause significant competitive harm to consumers in the relevant U.S. markets for MCPA, MCPP-p, and 2,4DB by eliminating the direct and substantial competition between Nufarm and A.H. Marks. There is evidence that Nufarm acquired A.H. Marks with the expectation that it would be able to increase prices as a result of the merger. In addition, the evidence indicated that in some instances Nufarm may have increased its prices for the three herbicides following the merger. As a result, the transaction increased the likelihood that Nufarm could unilaterally exercise market power and raise prices in each of the relevant markets.

V. Terms of the Proposed Decision and Order

The Consent Agreement preserves competition in each of the relevant markets alleged in the complaint by requiring that Nufarm divest certain A.H. Marks assets to new entrants and take additional measures to restore competition in the markets for MCPA, MCPP-p, and 2,4DB. Specifically, Nufarm has agreed to sell A.H. Marks’ EPA registration and task force seat for MCPA to Albaugh Inc., and A.H. Marks’ EPA registration and task force seat for MCPP-p to PBI Gordon Corp. Nufarm has also agreed to modify its contractual agreements with Dow and Aceto relating to MCPA and 2,4-DB, which restricted these firms’ competitive activities in the markets for MCPA and 2,4-DB. Staff has evaluated the proposed divestitures and modifications and concluded that these measures are sufficient to remedy the anticompetitive effects resulting from the transaction.

For both MCPA and MCPP-p, the purchase of a task force seat and EPA registration will permit each divestiture purchaser to enter and compete in these markets. By acquiring A.H. Mark's task force seat and EPA registration, the divestiture purchasers will obtain EPA approval to distribute the herbicide in the United States and certify additional manufacturing sources of the herbicides. In addition to the task force seat and EPA registration, Nufarm is required to enter into supply agreements with each divestiture purchaser to permit these purchasers to compete with Nufarm as wholesale suppliers of the herbicides while new manufacturing sources are developed.

With respect to MCPA, Nufarm would divest AH Mark's MCPA Task Force Seat and EPA registrations relating to MCPA to Albaugh. Albaugh is a qualified divestiture candidate that is uniquely situated to use the A.H. Marks assets and supply contract to compete with Nufarm in the market for MCPA. Albaugh is the largest privately-owned formulator of crop protection products. Albaugh is headquartered in Ankeny, Iowa and sells exclusively in the United States. Within the crop protection industry, Albaugh has extensive relationships with firms at every level of distribution. Given Albaugh's position, commitment, and experience in the MCPA market, staff believes that divestiture of A.H. Marks' MCPA assets will enable Albaugh to restore the competition lost as a result of the transaction.

With respect to MCPP-p, Nufarm would divest A.H. Mark's MCPP-p Task Force Seat and EPA registrations relating to MCPP-p to PBI Gordon and enter a three-year supply arrangement. PBI Gordon, headquartered in Kansas City, Missouri, is a privately held company founded in 1947. PBI Gordon is a long-standing player in the turf care industry. Its primary business is the development, manufacture, and marketing of herbicides, pest management, and related products to the lawn, garden, professional turf, and specialty agricultural markets. It has an extensive distribution network and a wide customer base. PBI Gordon's presence in the market, combined with its expertise with herbicides, will ensure it will use the assets to compete with Nufarm in the market for MCPP-p.

The Consent Agreement also addresses concerns regarding Nufarm's agreements with Dow and Aceto by preventing Nufarm from enforcing agreements which may limit or restrict competitive entry in the MCPA and 2,4DB markets. Pursuant to Section V of the proposed Decision and Order, Nufarm agreed not to enforce any provision, or otherwise take any future action, restricting competition in the manufacture or sale of MCPA, 2,4DB or MCPP-p. Nufarm's compliance with these provisions will enable Dow and Aceto to enter these respective markets, as manufacturers and/or wholesalers, and compete with Nufarm for sales. Equally important, Dow and Aceto will be able to use their task force seats and registrations to sponsor new entrants to the United States markets for these herbicides. The resulting entry, or threat of entry, is likely to serve as an additional competitive constraint in both the MCPA and 2,4DB markets. Lastly the Consent Agreement contains several other significant provisions. Section IV of the proposed Order permits Nufarm's customers to terminate their contracts with Nufarm with respect to the products. Section VII requires Nufarm to notify the Commission if it: (a) acquires any task force seat or registration with respect to the products or (b) enters into any agreements with task force members or registrants that contain non-compete, joint-marketing or other provisions restricting competition. Section VIII requires Nufarm to divest the MCPA and

MCP-p assets to a trustee in the event Nufarm fails to comply with the divestiture obligations for these assets in the proposed Order.

The purpose of this analysis is to facilitate public comment on the proposed Decision and Order. This analysis is not intended to constitute an official interpretation of the Consent Agreement and the proposed Decision and Order.