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 12
 13 **UNITED STATES**
 14 **ENVIRONMENTAL PROTECTION AGENCY**
 15 **REGION IX**
 16 **75 HAWTHORNE STREET**
 17 **SAN FRANCISCO, CA 94105**

18
 19 In the matter of:)
 20) U.S. EPA Docket No. FIFRA-09-2023-0030
 21 Wilbur-Ellis Company, LLC)
 22) **CONSENT AGREEMENT**
 23) and
 24) **FINAL ORDER PURSUANT TO**
 25 Respondent.) **SECTIONS 22.13 AND 22.18**
 26)
 27)
 28)

29 **I. CONSENT AGREEMENT**

30 The United States Environmental Protection Agency (“EPA”) and Wilbur-Ellis
 31 Company, LLC (“Wilbur-Ellis” or “Respondent”) agree to settle this matter and consent to the
 32 entry of this Consent Agreement and Final Order (“CAFO”). This CAFO simultaneously
 33 initiates and concludes this proceeding in accordance with 40 C.F.R. §§22.13(b) and 22.18(b).

34 **A. AUTHORITY AND PARTIES**

35 1. This administrative proceeding for the assessment of a civil administrative penalty
 36 is initiated pursuant to section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7
 37 U.S.C. § 136, et seq. (hereinafter referred to as “FIFRA” or the “Act”), and the Consolidated
 38 Rules of Practice Governing the Administrative Assessment of Civil Penalties and the
 39 Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22.

40 2. Complainant is the Manager of the Toxics Section of the Enforcement and
 Compliance Assurance Division, EPA Region IX, who has been duly delegated to commence

1 and settle an enforcement action in this matter.

2 3. Respondent is Wilbur-Ellis Company, LLC (“Wilbur-Ellis”), a California limited
3 liability company that provides pest control services from its businesses in California, including
4 in Soledad and Salinas.

5 **B. STATUTORY AND REGULATORY AUTHORITIES**

6 4. Under section 2(s) of FIFRA, 7 U.S.C. §136 s), a person is “any individual,
7 partnership, association, corporation, or any organized group of persons whether incorporated or
8 not.”

9 5. The term “pest” includes (1) any insect, rodent, nematode, fungus, weed, or (2)
10 any other form of terrestrial or aquatic plant or animal life or virus, bacteria, or other micro-
11 organism (except viruses, bacteria, or other micro-organisms on or in living man or other living
12 animals) which the Administrator declares to be a pest under FIFRA section 25(c)(1). Section
13 2(t) of FIFRA, 7 U.S.C. §136(t). The term “weed” means any plant which grows where not
14 wanted. Section 2(cc) of FIFRA, 7 U.S.C. §136(cc).

15 6. Under section 2(u) of FIFRA, 7 U.S.C. §136(u), a pesticide is, among other
16 things, “any substance or mixture of substances intended for preventing, destroying, repelling, or
17 mitigating any pest.”

18 7. The implementing regulation at 40 C.F.R. §152.8 lists products that are not
19 pesticides *because they are not for use against pests*, including that a substance or article is not
20 a pesticide *because it is not intended for use against “pests* if it is a fertilizer product not
21 containing a pesticide. 40 C.F.R. §152.8(a). [emphasis added]

22 8. The implementing regulation at 40 C.F.R. § 152.15 further explains that “[a]
23 pesticide is any substance (or mixture of substances) intended for a pesticidal purpose, i.e., use
24 for the purpose of preventing, destroying, repelling, or mitigating any pest or use as a plant
25 regulator, defoliant, or desiccant. A substance is considered to be intended for a pesticidal
26 purpose, and thus to be a pesticide requiring registration, if: (a) The person who distributes or
27 sells the substance claims, states, or implies (by labeling or otherwise); (1) That the substance
28 (either by itself or in combination with any other substance) can or should be used as a pesticide;
29 or (2) That the substance consists of or contains an active ingredient and that it can be used to
30 manufacture a pesticide; or (b) The substance consists of or contains one or more active
31 ingredients and has no significant commercially valuable use as distributed or sold other than: (1)

1 use for pesticidal purpose (by itself or in combination with any other substance); (2) use for
2 manufacture of a pesticide; or (c) The person who distributes or sells the substance has actual or
3 constructive knowledge that the substance will be used, or is intended to be used, for a pesticidal
4 purpose.”

5 ***Use of a pesticide in a manner inconsistent with its labeling***

6 9. Pursuant to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §136j(a)(2)(G), it shall be
7 unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

8 10. The term “label” is defined as “the written, printed, or graphic matter on, or
9 attached to, the pesticide or device or any of its containers or wrappers.” Section 2(p)(1)(A) of
10 FIFRA, 7 U.S.C. § 136(p)(1)(A).

11 11. Section 2(p) of FIFRA, 7 U.S.C. § 136(p), defines “labeling” in part, as “all labels
12 and all other written, printed, or graphic matter –

13 (A) accompanying the pesticide or device at any time; or

14 (B) to which reference is made on the label or in literature accompanying the
15 pesticide...” and defines “label” as “the written, printed, or graphic matter on, or
16 attached to, the pesticide or device or any of its containers or wrappers.”

17 12. The term “to use any registered pesticide in a manner inconsistent with its
18 labeling” means to use any registered pesticide in a manner not permitted by the labeling [except
19 that the term shall not include exceptions not relevant to this case]. Section 2(ee) of FIFRA, 7
20 U.S.C. § 136(ee).

21 ***Unregistered Pesticide***

22 13. The term “to distribute or sell” means to distribute, sell, offer for sale, hold for
23 distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or
24 receive and (having so received) deliver or offer to deliver. The term does not include the
25 holding or application of ***registered*** pesticides or use dilutions thereof by any applicator who
26 provides a service of controlling pests without delivering any unapplied pesticide to any person
27 so served. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg). [emphasis added]

28 14. Section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), states that it is unlawful
29 for any person in any State to distribute or sell to any person any pesticide that is not registered
30 under the Act. See also 40 C.F.R. 152.15, which also provides that no person may distribute or
31 sell any pesticide that is not registered under the Act, with certain exceptions not applicable here.

1 *Penalty*

2 15. Any registrant, commercial applicator, wholesaler, dealer, retailer, or other
3 distributor who violates any provision of the Act may be assessed a civil penalty of not more
4 than \$23,494 for violations that occurred after November 2, 2015 and are assessed on or after
5 January 6, 2023. Section 14(a)(1) of the Act, 7 U.S.C. § 136l(a)(1), as amended by the Civil
6 Monetary Penalty Inflation Adjustment Rule, 40 C.F.R. Part 19.

7 **C. COMPLAINANT’S ALLEGATIONS**

8 Complainant alleges:

9 16. Respondent is a “person” as that term is defined by section 2(s) of FIFRA, 7
10 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

11 17. Respondent is a “commercial applicator” as defined by Section 2(e)(3) of FIFRA,
12 7 U.S.C. § 136(e)(3) as well as a pesticide distributor.

13 18. In a letter dated June 22, 2022, the California Department of Pesticide Regulation
14 (CDPR) referred to EPA Region 9 for review and appropriate enforcement action each of the
15 matters giving rise to this action.

16 ***Counts 1 & 2: Use of a pesticide in a manner inconsistent with its labeling***

17 19. Orthene 97, EPA Reg. No. 5481-8978, has the active ingredient of Acephate, and
18 is toxic to birds and highly toxic to bees. Its label states “It is a violation of Federal Law to use
19 this product in a manner inconsistent with its labeling. READ ENTIRE LABEL. USE
20 STRICTLY IN ACCORDANCE WITH PRECAUTIONARY STATEMETNS AND
21 DIRECTIONS AND WITH APPLICABLE STATE AND FEDERAL REGULATIONS” and
22 also states, in part:

- 23
- 24 • “Do not apply at wind speeds greater than 10 mph at the application site.”
 - 25 • “For ground boom applications, apply ... when wind speed is 10 mph or
26 less at the application site as measured by an anemometer.”
 - 27 • “The applicator also must use all other measures necessary to control
28 drift.”

29 20. On or about July 24, 2018, Respondent applied pesticides including the pesticide
30 Orthene 97, EPA Reg. No. 5481-8978, to a crop of head lettuce on Luis Scattini & Son’s
31 Breschini ranch in Monterey County, California using a tractor with a spray boom. Wind speed
was over 13 mph during this application. The Wilbur-Ellis applicator was judging wind speed

1 based on what he could feel and observe without the use of an anemometer (wind gauge). The
2 Wilbur-Ellis employee supervising the application was using the Weather Channel, not an
3 anemometer.

4 21. On or about July 25, 2018, Respondent's employee applied pesticides including
5 the pesticide Orthene 97, EPA Reg. No. 5481-8978, to a crop of celery on Merrill Farms'
6 Broome ranch in in Monterey County, California using a tractor with a spray boom. Wind speed
7 was over 16 mph during this application. The Wilbur-Ellis applicator was judging wind speed
8 based on what he could feel and observe without the use of an anemometer. The Wilbur-Ellis
9 employee supervising the application had left his anemometer in his truck.

10 22. On or about July 24, 2018 and on or about July 25, 2018, Respondent applied the
11 pesticide Orthene 97, EPA Reg. No. 5481-8978, using a tractor with spray boom when the wind
12 speed was over 10 mph and in each instance Respondent failed to measure wind speed with an
13 anemometer.

14 23. Application of the pesticide Orthene 97, EPA Reg. No. 5481-8978, when the wind
15 speed is over 10 mph and measuring the wind speed by visual observations in lieu of the use of a
16 anemometer is use of this pesticide in a manner not permitted by its labeling.

17 24. On or about July 24, 2018 and on or about July 25, 2018, Respondent used
18 Orthene 97, EPA Reg. No. 5481-8978, in a manner inconsistent with its labeling and in each of
19 these instances Respondent violated Section 12(a)(2)(G) of FIFRA, 7 U.S.C. §136j(a)(2)(G) by
20 using a registered pesticide in a manner inconsistent with its labeling.

21 ***Count 3: Distribution and Sale of Unregistered Pesticide***

22 25. On or about June 5, 2019, Respondent's employee applied 7-7-0-7 acid fertilizer
23 to control weeds as defined by Section 2(cc) of FIFRA, 7 U.S.C. §136(cc) on Merrill Farms'
24 Broome ranch in in Monterey County, California.

25 26. At the times relevant to Respondent's use of 7-7-0-7 acid fertilizer at Merrill
26 Farms' Broome ranch on or about June 5, 2019, the weeds to be controlled included yellow
27 nutsedge.

28 27. On or about May 29, 2019, Respondent's employee recommended that
29 approximately five acres at Merrill Farms' Broome ranch be treated with Respondent's 7-7-0-7
30 acid fertilizer because "pest is present."

31 28. At Merrill Farms' Broome ranch on or about June 5, 2019, Respondent used its 7-

1 7-0-7 acid fertilizer against a pest. This use of Respondent's 7-7-0-7 acid fertilizer by
2 Respondent was intended for a pesticidal purpose, i.e., used for the purpose of preventing,
3 destroying, repelling, or mitigating weeds.

4 29. Respondent distributed or sold Respondent's 7-7-0-7 acid fertilizer after claiming
5 that the 7-7-0-7 acid fertilizer can or should be used as a pesticide. Respondent has actual
6 knowledge that Respondent's 7-7-0-7 acid fertilizer would be used, and was intended to be used,
7 for a pesticidal purpose.

8 30. At the times relevant to Respondent's use of 7-7-0-7 acid fertilizer at Merrill
9 Farms' Broome ranch, Respondent's 7-7-0-7 acid fertilizer is a pesticide.

10 31. Respondent's 7-7-0-7 acid fertilizer is not a registered pesticide under the Act.

11 32. On or about June 5, 2019, Respondent "distributed or sold" 7-7-0-7 acid fertilizer
12 as the term "to distribute or sell" is defined by Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg). In
13 this instance, Respondent violated section 12(a)(1)(A) of FIFRA, 7 U.S.C. § 136j(a)(1)(A), by
14 distributing or selling an unregistered pesticide.

15 **D. RESPONDENTS' ADMISSIONS**

16 33. In accordance with 40 C.F.R. § 22.18(b)(2), and for the purpose of this
17 proceeding, Respondent (i) admits that EPA has jurisdiction over the subject matter of this
18 CAFO and over Respondent; (ii) neither admits nor denies the specific factual allegations
19 contained in Section I.C of this CAFO; (iii) consents to any and all conditions specified in this
20 CAFO, (iv) agrees to pay, and consents to the assessment of, the civil administrative penalty
21 under Section I.E of this CAFO; (v) waives any right to contest the allegations contained in
22 Section I.C of this CAFO; and (vi) waives the right to appeal the proposed final order contained
23 in this CAFO.

24 **E. CIVIL ADMINISTRATIVE PENALTY**

25 34. Respondent consents to the assessment of a civil administrative penalty in the
26 amount of **TWENTY-FOUR THOUSAND EIGHT HUNDRED EIGHTY DOLLARS**
27 **(\$24,880)** as final settlement and complete satisfaction of the civil claims against Respondent
28 arising from the facts alleged in Section I.C of the CAFO and under the Act.

29 a. Respondent shall pay the civil penalty within thirty (30) days of the effective
30 date of this CAFO by one of the methods listed below:

- 1 i. Respondent may pay online through the Department of the Treasury
2 website at www.pay.gov. In the Search Public Form field, enter SFO 1.1,
3 click EPA Miscellaneous Payments - Cincinnati Finance Center, and
4 complete the SFO Form Number 1.1.
5
6 ii. Respondent may also pay the civil penalty using any method, or
7 combination of methods, provided on the following website:
8

9 <http://www2.epa.gov/financial/additional-instructions-making-payments-epa>

10 If clarification regarding a particular method of payment remittance is needed,
11 contact the EPA's Cincinnati Finance Center at (513) 487-2091.
12

13
14 b. Respondent shall identify payment with the name and docket number of this
15 case; and

16 c. Within 24 hours of payment, Respondent shall provide EPA with proof of
17 payment ("proof of payment" means, as applicable, a copy of the check, confirmation of credit
18 card or debit card payment, confirmation of wire or automated clearinghouse transfer, and any
19 other information required to demonstrate that payment has been made according to EPA
20 requirements, in the amount due, and identified with the name and docket number of this case),
21 including proof of the date payment was made, along with a transmittal letter, indicating
22 Respondent's names, the case title, and docket number, to the following addresses:

23 Regional Hearing Clerk
24 U.S. EPA, Region IX
25 r9HearingClerk@epa.gov
26

27 Julie Jordan
28 Toxics Section
29 Enforcement and Compliance Assurance Division
30 U.S. EPA, Region IX
31 Jordan.Julie@epa.gov
32

33 35. In the event that Respondent fails to pay the civil administrative penalty assessed
34 above by the due date, Respondent shall pay to EPA a stipulated penalty in the amount of FIVE
35 HUNDRED DOLLARS (\$500) for each day that payment is late in addition to the unpaid
36 balance of the penalty assessed above. Upon EPA's written demand, this stipulated penalty shall
37 immediately become due and payable.

38 36. If Respondent fails to pay the penalty assessed by this CAFO in full by the date
39 specified in Paragraph **34**, the entire unpaid balance and accrued interest shall become

1 immediately due and owing. Respondent's tax identification numbers may be used for collecting
2 or reporting any delinquent monetary obligation arising from this CAFO (see 31 U.S.C. § 7701).
3 If payment is not received in full by the date specified in Paragraph 20, interest, penalty and
4 administrative costs will accrue from the effective date of this CAFO as described at 40 CFR
5 §13.11. In addition, if this matter is referred to another department or agency (e.g., the
6 Department of Justice, the Internal Revenue Service), that department or agency may assess its
7 own administrative costs, in addition to EPA's administrative costs, for handling and collecting
8 Respondent's overdue debt. Respondent's failure to pay in full the civil administrative penalty by
9 its due date also may also lead to any or all of the following actions:

10 a. The debt being referred to a credit reporting agency, a collection agency, or to
11 the Department of Justice for filing of a collection action in the appropriate United States District
12 Court. 40 C.F.R. §§ 13.13, 13.14, and 13.33. In any such collection action, the validity, amount,
13 and appropriateness of the assessed penalty and of this CAFO shall not be subject to review.

14 b. The debt being collected by administrative offset (i.e., the withholding of
15 money payable by the United States to, or held by the United States for, a person to satisfy the
16 debt the person owes the Government), which includes, but is not limited to, referral to the
17 Internal Revenue Service for offset against income tax refunds. 40 C.F.R. Part 13, Subparts C
18 and H.

19 c. EPA may (i) suspend or revoke Respondent's licenses or other privileges; (ii)
20 suspend or disqualify Respondent from doing business with EPA or engaging in programs EPA
21 sponsors or funds; (iii) convert the method of payment under a grant or contract from an
22 advanced payment to a reimbursement method; or (iv) revoke a grantee's or contractor's letter-
23 of-credit. 40 C.F.R. §§ 13.17.


24 **F. RESPONDENT CERTIFICATION**

25 37. In executing this CAFO, Respondent certifies that the information it has supplied
26 concerning this matter was at the time of submission, and is at the time of signature to this
27 CAFO, truthful, accurate, and complete; and that Respondent has corrected the violations alleged
28 in Section I.C of this CAFO. Under 18 U.S.C. § 1001, submitting false or misleading
29 information can result in significant penalties, including the possibility of fines and
30 imprisonment for knowing submission of such information.

1 Respondent's officers, directors, employees, agents, servants, authorized representatives,
2 successors, and assigns.

3 45. The undersigned representatives of each party to this Consent Agreement certify
4 that each is duly authorized by the party whom he or she represents to enter into the terms and
5 conditions of this Consent Agreement and Final Order and bind that party to it.

6
7 Wilbur-Ellis Company, LLC:

8
9
10 Date: 1/27/23 By: 

11
12
13 Name: NATHAN HARRIGAN

14
15
16 Title: DIRECTOR-FIELD OPERATIONS

17

1 **UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**
2
3

4 Date: 2/9/2023

5 By:

MATTHEW
SALAZAR

Digitally signed by
MATTHEW SALAZAR
Date: 2023.02.09
14:32:22 -08'00'

6 MATT SALAZAR
7 Manager, Toxics Section
8 Enforcement and Compliance Assurance Division
9 U.S. Environmental Protection Agency,
10 Region IX
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12
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1 **II. FINAL ORDER**

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3 IT IS HEREBY ORDERED that this Consent Agreement and Final Order (EPA Docket
4 No. FIFRA-09-2023-0030) be entered and that Respondent shall pay a civil administrative
5 penalty in the amount of **TWENTY-FOUR THOUSAND EIGHT HUNDRED EIGHTY**
6 **DOLLARS (\$24,880)** plus interest in accordance with the terms of this Consent Agreement and
7 Final Order.

8
9
10 **STEVEN**
JAWGIEL

Digitally signed by
STEVEN JAWGIEL
Date: 2023.02.23
14:04:17 -08'00'

11
12 Steven L. Jawgiel
13 Regional Judicial Officer
14 U.S. EPA, Region IX

1 **CERTIFICATE OF SERVICE**

2 I hereby certify that the foregoing Consent Agreement and Final Order in the matter of Wilbur
3 Ellis Company, LLC (FIFRA-09-2023-0030) was filed with the Regional Hearing Clerk, U.S.
4 EPA, Region IX, 75 Hawthorne Street, San Francisco, CA 94105, and that a true and correct
5 copy of the same was sent to the following parties via electronic mail:

6 **RESPONDENT** Laura Fiffick
7 Wilbur Ellis Company LLC
8 345 California Street, 27th Floor
9 San Francisco, CA 94104
10 LFiffick@wilburellis.com

11 **RESPONDENT COUNSEL** Alan J. Sachs
12 Beveridge & Diamond
13 ASachs@bdlaw.com

14 **COMPLAINANT** Margaret Alkon
15 Assistant Regional Counsel
16 Alkon.Margaret@epa.gov

17 _____
18 Ponly J. Tu Date
19 Regional Hearing Clerk
20 U.S. EPA - Region IX
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