

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

In the Matter of

**Oliver Exterminating Services Corporation,**

**RESPONDENT**

Proceeding under the Federal Insecticide,  
Fungicide and Rodenticide Act, as amended.

**CONSENT AGREEMENT  
AND FINAL ORDER**

Docket No. FIFRA-02-2002-554

U.S. ENVIRONMENTAL  
PROTECTION AGENCY-REG. II  
2012 SEP 28 P 1:20  
REGIONAL HEARING  
CLERK

**PRELIMINARY STATEMENT**

This administrative proceeding for the assessment of a civil penalty is initiated pursuant to Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA" or the "Act"), as amended, 7 U.S.C. § 136l(a), and the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties (CROP), at 40 C.F.R. Part 22.

Complainant in this proceeding is the Director of the Division of Enforcement and Compliance Assistance (DECA), United States Environmental Protection Agency (EPA), Region 2. Pursuant to Section 22.13(b) of the CROP, where the parties agree to settlement of one or more causes of action before filing of an Administrative Complaint, a proceeding may be simultaneously commenced and concluded by issuance of a Consent Agreement and Final Order (CA/FO) pursuant to 40 C.F.R. §§ 22.18(b)(2) and 22.18(b)(3). Complainant and Respondent agree that settling this matter by entering into this CA/FO pursuant to 40 C.F.R. §§ 22.13(b),

22.18(b)(2) and 22.18(b)(3) of the CROP, is an appropriate means of resolving this matter without litigation.

**EPA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW**

1. Respondent is Oliver Exterminating Services Corporation.
2. Respondent is located at 16 Utuado Street, in Hato Rey, Puerto Rico 00936.
3. Respondent is a "person" as that term is defined in FIFRA Section 2(s), 7 U.S.C. § 136(s), and as such, is subject to FIFRA and the regulations promulgated thereunder.
4. The term "pesticide" is defined as any substance or mixture of substances intended for preventing, destroying, repelling, or mitigating any pest, under Section 2(u) of FIFRA, 7 U.S.C. § 136(u).
5. The term "pest" is defined as any insect, rodent, nematode, fungus, weed, or any form of terrestrial or aquatic plant or animal life or virus, bacteria or other micro-organism, under Section 2(t) of FIFRA, 7 U.S.C. § 136(t).
6. Termites are pests within the meaning of Section 2(t) of FIFRA, 7 U.S.C. § 136(t) and 40 C.F.R. § 152.5.
7. The term "label" is defined as the written, printed or graphic matter on, or attached to, the pesticide or device or any of its containers or wrappers, under Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1).
8. The term "labeling" is defined as all labels and all other written, printed or graphic matter accompanying the pesticide or device at any time or to which reference is

made on the label or in literature accompanying the pesticide, under Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2).

9. To use any registered pesticide in a manner inconsistent with its labeling is defined as the use of any registered pesticide in a manner not permitted by the labeling, under Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee).

10. It is unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling, under Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G).

11. On or about June 17, 2011, Respondent applied approximately forty (40) pounds of Vikane<sup>®</sup> Specialty Gas Fumigant (Vikane), EPA Reg. No. 62719-4, along with four (4) ounces of Chloropicrin, a warning agent, at Ms. Yanira Viera's wooden home, located at Road No. 834 Km, 2.5 Interior, Hato Nuevo Ward, Guaynabo, Puerto Rico (the "Property"), to eliminate an infestation of termites.

12. Vikane's label, among others, states the following:

- a. **Restricted Use Pesticide due to Inhalation Toxicity**  
For sale to and use only by Certified Applicators or persons under their direct supervision and only for those uses covered by the Certified Applicator's certification.
- b. **Keep Out of the Reach of Children**
- c. **DANGER POISON PELIGRO**  
If you do not understand the label, find someone to explain it to you in detail
- d. **Precautionary Statements: Hazards to Humans and Domestic Animals**  
Extremely Hazardous Liquid And Vapor Under Pressure \* Inhalation of Vapors May Be Fatal \* Liquid May Cause Freeze Burns of Exposed Skin  
Do not get in eyes, on skin, or on clothing. Vikane gas fumigant is odorless.  
Exposure to toxic levels may occur without warning or detection by the user.

e. **Tarpaulin Fumigation**

Open operable windows. When tarping, use highly resistant material such as vinyl coated nylon, or polyethylene of at least 4 mil[imeters] thickness. Seal all seams. Seal all low edges of the cover (such as with soil, sand, or weighted 'snakes'). To minimize the escape of gas through the soil and to avoid injury to nearby plants, wet soil outward from foundation to cover it if not sufficiently moist to act as a barrier for the gas.

f. **Warning Agent**

**Chloropicrin** is a warning agent introduced to the structure during fumigation . . . which causes smarting of the eyes, tears, and discomfort, and has a very disagreeable pungent odor at very low concentrations. Chloropicrin must be used by persons certified to apply Vikane or under their supervision. Fumigators must observe the precautionary statements and safety recommendations appearing on the label of this product.

g. **Posting of Fumigated Areas**

The applicator must post all entrances to the fumigated areas with signs bearing in English and Spanish:

1. The signal word DANGER/PELIGRO and the SKULL and CROSSBONES symbol.
2. The statement "Area under fumigation, DO NOT ENTER/NO ENTRE".
3. The date of fumigation.
4. Name of fumigant used.
5. Name, address, and telephone number of the applicator.

13. On or about June 20, 2011, an EPA designated Puerto Rico Department of Agriculture Pesticides Inspector (EPA Inspector) conducted an inspection of the Property in response to complaints from neighbors.

14. During the June 20, 2011 inspection, the EPA Inspector gathered photographs, site diagrams, printed labels, consumer complaints, and voluntary statements from police and from neighbors of the Property.

15. During the June 20, 2011 inspection, the EPA Inspector discovered that between Saturday, June 18 and Sunday, June 19, 2011, neighbors of the Property noticed that a section in the top portion of the tarpaulin had opened up.

16. During the June 20, 2011 inspection, the neighbors and police advised the EPA Inspector that they attempted to contact Respondent, but that nobody answered the telephone numbers posted on the sign outside the Property.

17. On or about June 29, 2011, a duly designated EPA Inspector conducted a follow-up inspection of Respondent's offices.

18. During the June 29, 2011 inspection, the EPA Inspector noted that the tarpaulin had opened up due to the issues relating to the installation, combined with weather conditions.

19. At all relevant times to this CA/FO, Respondent has applied pesticides or directed the application of pesticides that are classified as "restricted use pesticides" under Section 3(d)(1) of FIFRA, 7 U.S.C. § 136a(d)(1), and 40 C.F.R. §§ 152.160 and 171.2(a)(23).

20. At all relevant times to this CA/FO, Respondent has been a "certified applicator" and "commercial applicator" within the meaning of Sections 2(e)(1) and (3) of FIFRA, 7 U.S.C. §§ 136(e)(1) and (3), and 40 C.F.R. § 171.2(a)(8) and (9).

21. At all times relevant to this CA/FO, Respondent has employed people as pesticide applicators to conduct pesticide applications throughout the Commonwealth of Puerto Rico.

22. Section 14(b)(4) of FIFRA, 7 U.S.C. § 136l(b)(4), states that "the act, omission, or failure of any officer, agent or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed." FIFRA, therefore, deems the acts, omissions, or failures individuals acting on Respondent's behalf as those of Respondent.

23. On August 14 and 29, and September 6 and 11, 2012, the parties met to discuss settlement.

### CONSENT AGREEMENT

Based upon the foregoing, and pursuant to Sections 22.13(b) and 22.18 of the CROP, 40 C.F.R. §§ 22.13(b) and 22.18, and pursuant to Section 14(a) FIFRA, 7 U.S.C. § 136/(a), it is hereby agreed that:

1. Respondent certifies that it is in compliance with the requirements of FIFRA, 7 U.S.C. § 136 *et seq.* and its implementing regulations. Respondent shall hereafter maintain compliance with the statutory provisions of FIFRA and its implementing regulations.

2. Respondent shall pay a civil penalty, on or before 45 calendar days after the date of signature of the Final Order at the end of this document, in the amount of FIVE THOUSAND DOLLARS (\$5,000.00) in settlement of this matter.

3. Payment in accordance with the terms of this Consent Agreement shall be made by cashier's check, certified check or by electronic fund transfer (EFT). If payment is made by cashier's check or by certified check, such check shall be made payable to the **"Treasurer, United States of America,"** and shall be identified with a notation thereon listing the following: *In re Oliver Exterminating Services Corporation*, Docket No. FIFRA-02-2012-5304. If payment is made by either form of check, such payment shall be mailed to the following address:

*In the Matter of Oliver Exterminating Services Corporation*  
Docket No. FIFRA-02-2012-5304

U.S. Environmental Protection Agency  
Fines and Penalties  
Cincinnati Finance Center  
P.O. Box 979077  
St. Louis, Missouri 63197-9000

4. Alternatively, if Respondent chooses to make payment by EFT, Respondent shall then provide the following information to its remitter bank when payment is made:

- a. Amount of Payment
- b. SWIFT address: **FRNUS33, 33 Liberty Street, New York, New York  
10045**
- c. Account Code for Federal Reserve Bank of New York receiving payment:  
**68010727**
- d. Federal Reserve Bank of New York ABA routing number: 021030004
- e. Field Tag 4200 of the Fedwire message should read: D 68010727  
Environmental Protection Agency
- f. Name of Respondent: Oliver Exterminating Services Corporation
- g. Case Docket Number: FIFRA-02-2012-5304

5. Payment instructions:

- a. Payment shall be made in accordance with the instructions set forth in Paragraphs 2–4 of this Section. If Respondent makes the payment by cashier's check or certified check, then such check shall be received at the above-listed address on or before the date specified. If Respondent makes

the payment by the EFT method, then the EFT shall be received on or before the date specified.

- b. Whether Respondent makes payment by cashier's check, certified check or by the EFT method, Respondent shall promptly after such payment has been made, furnish reasonable proof that it has been made, and such proof shall be furnished to both:

Roberto M. Durango, Esq.  
Assistant Regional Counsel – Caribbean Team  
U.S. Environmental Protection Agency, Region 2  
City View Plaza II–Suite 7000  
#48 RD. 65 km 1.2  
Guaynabo, Puerto Rico 00968-8069

and

Karen Maples  
Regional Hearing Clerk  
U.S. Environmental Protection Agency, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, New York 10007

- c. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of Treasury for collection or other appropriate action.
- d. Furthermore, if the payment is not received on or before its due date, interest will be assessed at the annual rate established by the Secretary of the Treasury pursuant to the Debt Collection Act, 31 U.S.C. § 1317, on the overdue amount from the due date through the date of payment. In



addition, a late payment handling charge of fifteen dollars (\$15.00) will be assessed for each thirty (30) day period (or any portion thereof) following the due date in which the balance remains unpaid.

- e. A 6% per annum penalty will also be applied on any principal amount not paid within ninety (90) days of its due date. Any such non-payment penalty charge on the debt will accrue from the date the penalty payment becomes due and is not paid.
- f. Pursuant to 40 C.F.R. § 22.31(b), the effective date of this Consent Agreement and Final Order shall be the date of filing with the Regional Hearing Clerk, U.S. E.P.A. Region 2, New York, New York.

6. The civil penalty provided for in this Section constitutes a penalty within the meaning of 26 U.S.C. § 162(f), and is not a deductible expenditure for purposes of federal law.

7. Respondent has read the Consent Agreement, understands its terms, finds it to be reasonable and consents to the issuance and its terms. Respondent consents to the issuance of the accompanying Final Order. Respondent agrees that all terms of settlement are set forth herein.

8. For the purpose of this proceeding and in the interest of an expeditious resolution of this matter, Respondent (a) admits that EPA has jurisdiction pursuant to Section 14 of FIFRA, 7 U.S.C. Section 136l(a), to commence a civil administrative proceeding for the

allegations in the EPA Findings of Fact and Conclusions of Law section above; and (b) neither admits nor denies the facts alleged herein.

9. This Consent Agreement is being voluntarily and knowingly entered into by the Complainant and Respondent to resolve (conditional upon full payment of the civil penalty herein) the civil and administrative claims alleged in this Consent Agreement. Nothing herein shall be read to preclude EPA or the United States, on behalf of EPA, however, from pursuing appropriate injunctive or other equitable relief or criminal sanctions for any violation of law.

10. Respondent explicitly and knowingly consents to the assessment of the civil penalty as set forth in this Consent Agreement and agrees to pay the civil penalty in accordance with the terms of this Consent Agreement.

11. Respondent explicitly and knowingly waives its right to request or to seek any Hearing on this Consent Agreement or on the Findings of Fact and Conclusions of Law herein, or on the accompanying Final Order.

12. Respondent waives its right to appeal this Consent Agreement and the accompanying Final Order.

13. Respondent agrees not to contest the validity or any term of this Consent Agreement and Final Order in any action brought: a) by the United States, including EPA, to

enforce this Consent Agreement and Final Order, or b) to enforce a judgment relating to this Consent Agreement and Final Order.

14. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any criminal or civil action or other administrative proceeding, except in an action or proceeding to enforce or seek compliance with this Consent Agreement and its accompanying Final Order.

15. This Consent Agreement and Final Order does not relieve Respondent of its obligations to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state or local permit. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

16. Respondent explicitly waives any right it may have pursuant to 40 C.F.R. § 22.8 to be present during discussions with or to be served with and to reply to any memorandum or communication addressed to the Regional Administrator, Deputy Regional Administrator, or Regional Judicial Officer for Region 2, where the purpose of such discussion, memorandum, or communication is to discuss a proposed settlement of this matter or to recommend that such official accept this Consent Agreement and issue the attached Final Order.

17. This Consent Agreement and Final Order does not relieve Respondent of its obligations to comply with all applicable provisions of federal, state or local law, nor shall it be construed to be a ruling on, or a determination of, any issue related to any federal, state or local permit. This Consent Agreement and Final Order does not waive, extinguish, or otherwise affect Respondent's obligation to comply with all applicable provisions of FIFRA and the regulations promulgated thereunder.

18. Nothing in this Consent Agreement and Final Order shall be construed as a release from any other action under any law and/or regulation administered by EPA.

19. Each undersigned signatory to this Consent Agreement certifies that he or she is duly and fully authorized to enter into and ratify this Consent Agreement and Final Order and all the terms and conditions set forth in this Consent Agreement and Final Order.

20. The provisions of this Consent Agreement and Final Order shall be binding upon both EPA and Respondent, its officers/officials, agents, authorized representatives and successors or assigns.

21. Any failure by Respondent to perform fully any requirement herein will be considered a violation of this CA/FO, and may subject Respondent to a civil judicial action by the United States to enforce the provisions of this CA/FO.

22. Each party hereto agrees to bear its own costs and fees in this matter.

23. Respondent consents to service upon itself of a copy of this Consent Agreement and Final Order by an EPA employee other than the Regional Hearing Clerk.

**FOR OLIVER EXTERMINATING SERVICES CORPORATION:**

BY:  DATE: 9/19/2012  
**Michael E. Holston**  
General Manager  
Oliver Exterminating Services Corporation  
P. O. Box 363888  
San Juan, Puerto Rico 00936-3888

**FOR THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY:**

BY:  DATE: SEPTEMBER 25, 2012  
**Dore F. La Posta**  
Director  
Division of Enforcement and Compliance Assistance  
U.S. Environmental Protection Agency, Region 2

FINAL ORDER

The Regional Judicial Officer of the U.S. Environmental Protection Agency, Region 2, ratifies the foregoing Consent Agreement. The Consent Agreement entered into by the parties to this matter, is hereby approved, incorporated herein, and issued as an Order. The effective date of this Order shall be the date of filing with the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2, New York, New York.



**Helen S. Ferrara**  
Regional Judicial Officer  
U.S. Environmental Protection  
Agency – Region 2  
290 Broadway, 26<sup>th</sup> Floor  
New York, New York 10007

DATE: September 28, 2012

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
REGION 2

In the Matter of

Oliver Exterminating Services Corporation,

RESPONDENT

**CONSENT AGREEMENT  
AND FINAL ORDER**

Docket No. FIFRA-02-2012-5304

**CERTIFICATE OF SERVICE**

I hereby certify that, on the date noted below, the foregoing fully executed **Consent Agreement and Final Order**, bearing the above-referenced docket number was sent in the following manner:

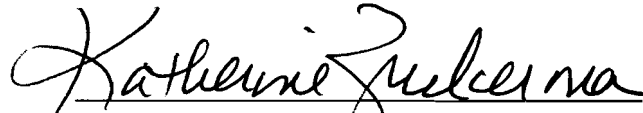
Original and Copy by Hand:

**Karen Maples**  
Regional Hearing Clerk  
U.S. EPA, Region 2  
290 Broadway, 16<sup>th</sup> Floor  
New York, NY 10007-1866

Copy by Certified Mail ~~and by Hand~~

**Benjamin Hernandez Nieves, Esq.**  
P.O. Box 8343  
Fernandez Juncos Station  
San Juan, Puerto Rico 00910-0343

Dated: Sept. 28, 2012

  
Katherine Zuckerman  
Secretary, ORC, Air Branch

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