

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

IN THE MATTER OF:

Oliver Exterminating

RESPONDENT

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

DOCKET NUMBER FIFRA-02-2010-5305

MOTION

U.S. ENVIRONMENTAL
PROTECTION AGENCY-REG. II
2011 JAN 25 P 4: 30
REGIONAL HEARING
CLERK

**Informative Motion Regarding Progress Made in Filing an Executed
Consent Agreement and Final Order and
Second Request for Extension of Time to File**

COMES NOW Complainant, the U.S. Environmental Protection Agency ("EPA" or "Complainant") through the undersigned attorney, and respectfully alleges, prays and requests as follows:

On December 22, 2010, Complainant and Oliver Exterminating (Respondent), (herein together the "Parties") reached an agreement as to the final language and terms of the Consent Agreement and Final Order (CA/FO) in settlement of the above captioned matter. Pursuant to the November 29, 2010 Order issued by the Honorable Susan L. Biro, Chief Administrative Law Judge, the Parties have until January 30, 2011, to file the fully executed CA/FO.

Respondent's legal representation, Benjamín Hernández Nieves, Esq., has provided Complainant with his client's signature of the CA/FO (see **Attachment 1, page 10**).

As informed previously, the CA/FO's concurrence process involves the approval of several EPA officers in Region 2's San Juan and New York offices for their review, concurrence and signatures. The concurrence process has finalized in Region 2's San Juan (see **Attachment 1, first page**) and Edison offices and is currently in our New York offices for their review and concurrence. Also, in order to file a duly executed CA/FO, the signature of the Regional Administrator is required. Once this process concludes, the fully executed CA/FO will immediately be filed.

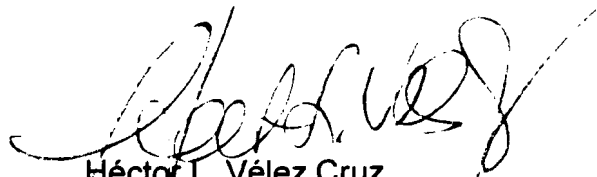
This Motion has been filed today in order to have the Chief Administrative Law Judge, Honorable Susan L. Biro, take notice of the progress made in the approval process to file a fully executed CA/FO.

In light of the above, Complainant requests the Honorable Chief Administrative Law Judge to grant the Parties twenty (20) additional days from the January 30, 2011 deadline, until February 19, 2011, in order to file the duly executed CA/FO and notify its execution to the Presiding Officer.

This Motion was discussed today, January 20, 2011, with Benjamín Hernández

Nieves, Esq., attorney for the Respondent, who agreed to the filing of this motion.

Respectfully submitted, in San Juan, Puerto Rico, this 20th day of January, 2011.



Héctor L. Vélez Cruz
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region II
Centro Europa Bldg., Suite 207
1492 Ponce de León Ave.
San Juan, PR 00907-4127
(787) 977-5850 (office)
(787) 729-7748 (fax)
velez.hector@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

IN THE MATTER OF:

DOCKET NUMBER FIFRA-02-2010-5305

Oliver Exterminating

RESPONDENT

Proceeding Under the Federal Insecticide,
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Certificate of Service

I certify that I have this day caused to be sent the foregoing *Informative Motion and Second Request for Extension of Time to File Executed Consent Agreement and Final Order*, dated January 20, 2011, and bearing the above-referenced docket number, in the following manner to the respective addressees below:

Original and copy by facsimile, **Overnight Mail** to:

Karen Maples
Regional Hearing Clerk
Region II
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, NY 10007-1866
Fax (212) 637-3202.

Copy by facsimile, **Regular Mail** to:

Attorney for Respondent:
Benjamin Hernández Nieves, Esq.
P.O. Box 8343
Fernández Juncos Station
San Juan, P.R. 00910-0343
Tel: (787) 758-1338/758-4840
Fax: (787) 758-2399
bhernandez@prtc.net.

Copy by facsimile, **Overnight Mail** to:

Chief Administrative Law Judge
Honorable Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
Fax (202) 565-0044.

Date

January 20, 2011

Name

[Handwritten Signature]

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2**

IN THE MATTER OF:

Oliver Exterminating

RESPONDENT

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

**CONSENT AGREEMENT
AND FINAL ORDER**

Docket No. FIFRA-02-2010-5305

U.S. ENVIRONMENTAL
PROTECTION AGENCY
REGION 2
JAN 25 2011 4:30 PM
FEDERAL CLERK
HEARING ROOM

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, as amended, 7 U.S.C. Section 136/(a) (hereinafter referred to as "FIFRA" or the "Act").

Complainant in this proceeding is the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency ("EPA" or "Agency"), Region 2. Complainant and Respondent, Oliver Exterminating, agree that settling this matter by entering into this Consent Agreement and Final Order (CA/FO) pursuant to 40 C.F.R. Section 22.18(b) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (hereinafter "CROP"), is an appropriate means of resolving this matter without further litigation.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 2

Name: H. Vélez Cruz Init: HVC Date: 12/27/2010 File name:

Symbol	ORC/CJ	CEP/PTS	DECA/PTS	DECA/PTS	DECA/PTS	ORC/WTS	ORC/WTS	ORC
Surname	H. Vélez	S. Cafrero	R. Kostas	A. Enache	H. Mazzucca	C. Phinizy	W. Sawyer	E. Schaaf
Date	12/27/10	12/27/10						

Symbol	DECA - DD	DECA - D	DRA	ORA	RA
Surname	P. Durack	D. LaPosta	G. Pavliou	L. Plevin	J. Enck
Date					

RESPONDENT

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

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

Docket No. FIFRA-02-2010-5305

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, as amended, 7 U.S.C. Section 136/(a) (hereinafter referred to as "FIFRA" or the "Act").

WAF
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EPA'S FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. On September 30, 2010, EPA issued a Complaint to Respondent for the assessment of a civil penalty, pursuant to Section 14(a) of the Act.
2. The Complaint alleged that on or about August 7, 2009, Respondent was hired by Mr. Celso González Anaya, owner of a wooden house located on Road No. 108, Km. 9.1, Mayagüez, Puerto Rico, to conduct pesticide applications throughout the property to eliminate an infestation of termites.
3. The Complaint also alleged that Respondent failed to comply with the requirements of the Vikane label by failing to:
 - a. provide Mr. Celso González with the Fact Sheet for Vikane prior to the parties entering into a fumigation agreement;
 - b. notify Mr. Celso González that he had to remove edible items from the structure before the fumigation if they could not be adequately sealed to prevent exposure to the product; and
 - c. post all entrances to the fumigated areas with signs bearing, in English and Spanish the signal word DANGER/PELIGRO, "Area under fumigation, DO NOT ENTER/NO ENTRE," date of fumigation, name of fumigant used, and name, address, and telephone number of the applicator.

with

4. Respondent's failure to comply with the specific requirements of the Vikane label is a violation of FIFRA §12(a)(2)(G), which makes unlawful the use of any registered pesticide in a manner inconsistent with its labeling.
5. The Complaint proposed a penalty of \$6,804.00.
6. On November 5, 2010, Respondent filed an answer to the Complaint, denying certain facts, admitting others, raising affirmative defenses and requesting a hearing.

CONSENT AGREEMENT

WA
Based upon the foregoing, and pursuant to Section 14(a) FIFRA, as amended, 7 U.S.C. § 136/(a), and 40 C.F.R. § 22. 18 of the CROP, it is hereby agreed by and between Complainant and Respondent, and voluntarily accepted by Respondent, that, for purposes of this Consent Agreement and in the interest of settling this matter expeditiously without the time, expense or uncertainty of a formal adjudicatory hearing on the merits, Respondent: (a) admits the jurisdictional allegations of the Complaint; (b) neither admits nor denies the non-jurisdictional allegations of the Complaint; (c) neither admits nor denies the EPA Findings of Fact or Conclusions of Law as set forth in this document; (d) consents to the assessment of the civil penalty as set forth below; (e) consents to the issuance of the Final Order accompanying this Consent Agreement;

and (1) waives its right to seek and obtain judicial review of, or otherwise contest, said Final Order.

Pursuant to 40 C.F.R. § 22.31 (b), the executed CA/FO shall become effective and binding when filed with the Regional Hearing Clerk of the Agency, Region 2.

It is further hereby agreed by and between Complainant and Respondent, and voluntarily accepted by Respondent, that there shall be compliance with the following terms and conditions:

1. Respondent shall pay a civil penalty in the amount of FIVE THOUSAND EIGHT HUNDRED FOUR DOLLARS (\$5,804.00) in settlement of this case.
2. Payment in accordance with the terms and schedule 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*, Docket Number FIFRA-02-2010-5305. If payment is made by either form of check, such payment shall be mailed to the following address:

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

3. 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: **FRNYUS33, 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**
- g. Case docket number: **FIFRA-02-2010-5305**

4. Payment instructions:

- a. Payment shall be in accordance with the instructions set forth in paragraphs 1-3 of this section, above. 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:

WH

Héctor L. Vélez Cruz, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
Centro Europa Bldg., Suite 417
1492 Ponce de León Avenue
San Juan, Puerto Rico 00907-4127;

and

Karen Maples
Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, N.Y. 10007-1866.

- W/H
- 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 the 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. § 3717, 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 also will be applied on any principal amount not paid within 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.

5. The civil penalty provided for in this section constitutes a penalty within the meaning of 26 U.S.C. § 162(f).

6. By entering this Consent Agreement, Respondent hereby certifies to the best of the knowledge of the responsible official of Respondent that is in compliance with applicable FIFRA statutory and regulatory requirements with respect to any pesticide that it distributes and sells, offers for sale, holds for sale, holds for distribution and/or holds for shipment, and shall maintain such compliance.

7. Complainant shall mail to Respondent (to the representative designated below) a copy of the fully executed *CA/FO*, and Respondent consents to service of the *CA/FO* upon it by an employee of EPA other than the Regional Hearing Clerk of EPA, Region 2:

Benjamín Hernández Nieves, Esq.
P. O. Box 8343
Fernández Junco Station
San Juan, Puerto Rico 00910-0343

8. Respondent has read this Consent Agreement, understands its terms, and consents to the issuance of the Final Order accompanying this Consent Agreement and consents to making full payment of the civil penalty in accordance with the terms and schedule set forth above.
9. This CA/FO is not intended, and shall not be construed, to waive, extinguish or otherwise affect Respondent's obligation to comply with all applicable federal, state and local law and regulations, nor is it intended or to be construed to be a ruling on or determination of any issue related to any federal, state or local permit.
10. This Consent Agreement is being voluntarily and knowingly entered into by the parties to resolve (conditional upon full payment of the civil penalty in accordance with the terms and conditions set forth herein) the administrative claims alleged in the Complaint bearing docket number FIFRA-02-2009-5302. Notwithstanding the above, nothing herein shall affect the right of the EPA or the United States to pursue appropriate injunctive relief or otherwise seek equitable relief or criminal sanctions for any violation of law.
11. Respondent hereby waives its right to seek, or to obtain any hearing on the allegations made in the Complaint, and on the terms and conditions set forth in the Consent Agreement and its accompanying Final Order and/or on the EPA Findings of Fact and Conclusions of Law, above.

11/4

12. This Consent Agreement and any provision herein shall not be construed as an admission of liability in any adjudicatory or administrative proceeding, except in an action, suit or proceeding to enforce this Consent Agreement or any of its terms and conditions.
13. Respondent voluntarily waives any right or remedy it might have pursuant to 40 C.F.R. § 22.8 to be present during discussions with, or to be served with and reply to any memorandum or other communication addressed to, the Regional Administrator of EPA, Region 2, or the Deputy Regional Administrator of EPA, Region 2, where the purpose of such discussion, memorandum or other communication is to recommend that such official accept this Consent Agreement and issue the accompanying Final Order.
14. Each party shall bear its own costs and fees in connection with this proceeding.
15. The undersigned signatory for Respondent hereto certifies that: a) he or she is duly and fully authorized to enter into and ratify this Consent Agreement and all the terms and conditions set forth in this Consent Agreement, and b) he or she is duly and fully authorized to bind Respondent (including any successors) to comply with and abide by all the terms and conditions of this Consent Agreement.

CUH

In the Matter of Oliver Exterminating

Docket Number FIFRA-02-2010-5305

RESPONDENT: Oliver Exterminating

BY: Michael E. Holston
(Signature)

NAME: Michael E. Holston
(Please Print)

TITLE: General Manager

DATE: 12/22/2010

In the Matter of Oliver Exterminating

Docket Number FIFRA-02-2010-5305

COMPLAINANT:

Dore F. LaPosta, Director
Division of Enforcement
and Compliance Assistance
U.S. Environmental Protection
Agency - Region 2

DATE: _____

In the Matter of Oliver Exterminating

Docket Number FIFRA-02-2010-5305

FINAL ORDER

The Regional Administrator 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.

Judith A. Enck
Regional Administrator
U.S. Environmental Protection
Agency - Region 2
290 Broadway, 26th Floor
New York, New York 10007

DATE: _____

In the Matter of Oliver Exterminating

Docket Number FIFRA-02-2010-5305

Original and copy by facsimile, **Overnight Mail** to:

Karen Maples
Regional Hearing Clerk
Region II
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, NY 10007-1866
Fax (212) 637-3202.

Copy by facsimile, **Certified Mail, Return Receipt Requested** to:

Attorney for Respondent:
Benjamin Hernández Nieves, Esq.
P. O. Box 8343
Fernández Junco Station
San Juan, Puerto Rico 00910-0343

Copy by facsimile, **Overnight Mail** to:

Chief Administrative Law Judge:
Honorable Susan L. Biro
Office of Administrative Law Judges
U.S. Environmental Protection Agency
1099 14th Street, N.W., Suite 350
Washington, D.C. 20005
Fax (202) 565-0044.

Name: _____

Date: _____