

**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-866**

In the Matter of	:	
	:	
	:	
	:	
Edwin Andújar Bermúdez dba	:	
Truly Nolen Pest Control De Caguas,	:	
	:	Docket No. FIFRA-02-2017-5302
Respondent	:	

ORDER ON DEFAULT AS TO LIABILITY

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136i; Section 113(d) of the Clean Air Act, as amended, 42 U.S.C. § 7413(d) ("CAA"); and the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment and Revocation or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules"). This proceeding was initiated by a Complaint filed by the Director of the Division of Enforcement and Compliance Assistance, U.S. EPA, Region 2 ("Complainant") against Edwin Andújar Bermúdez doing business as Truly Nolen Pest Control De Caguas ("Respondent") for violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) and the CAA requirements set forth at 40 C.F.R. §§ 82.13(z)(1) and (z)(2).

On March 23, 2017, Complainant filed a Motion for Default Judgment on Liability

against Respondent ("Motion" or "motion for default order on liability"), including a Memorandum in Support of Complainant's Motion for Default Judgement on Liability ("Memorandum") and Exhibits thereto, and a Declaration prepared by Jennie Yu, Assistant Regional Counsel for Complainant ("Declaration"), finding Respondent liable for the violations alleged in the Complaint. On June 23, 2017, Complainant filed a Notice of Correction of Docket Numbers, changing the docket number on the Motion from FIFRA-02-2016-5306 to FIFRA-02-2016-5302. To date, Respondent has not replied to the Motion. A party may be found to be in default, after motion, upon failure to file a timely answer to a complaint. Default by Respondent constitutes an admission of all of the facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Pursuant to the Consolidated Rules, the record in this matter and the following Findings of Fact and Conclusions of Law, Complainant's motion for default order on liability is hereby granted.

STATUTORY AND REGULATORY BACKGROUND

1. Section 2(s) of FIFRA, 7 U.S.C. § 136(s), defines "person" as any individual, partnership, association, corporation, or any organized group of persons whether incorporated or not.
2. Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), and 40 C.F.R. § 171.2(a) define a "certified applicator" as any individual who is certified under Section 11 of FIFRA, 7 U.S.C. § 136i, as authorized to use or supervise the use of any pesticide which is classified for restricted use.
3. Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3), and 40 C.F.R. § 171.2(a)(9) define a "commercial applicator" as an applicator who uses or supervises the use of any pesticide which is classified for restricted use for any purpose or on any property.

4. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. § 152.5, define a "pest," in part, as any insect.
5. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" as, among other things, "(1) any substance or mixture of substances intended for preventing, destroying, repelling or mitigating any pest."
6. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines the term "label" as written, printed, or graphic matter on or attached to, the pesticide or device or any of its containers or wrappers.
7. Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), defines the term "labeling" 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.
8. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), defines the term "to use any registered pesticide in a manner inconsistent with its labeling" as to use any registered pesticide in a manner not permitted by the labeling.
9. Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), states that it is unlawful for any person "to use any registered pesticide in a manner inconsistent with its labeling."
10. Section 602(a) of the CAA, 42 U.S.C. § 7671a(a), directs the Administrator of EPA to publish a list of class I substances, and to add to that list any other substance that the Administrator finds causes or contributes significantly to harmful effects on the stratospheric ozone layer.
11. Section 603 of the CAA, 42 U.S.C. § 7671b, sets forth monitoring and reporting requirements for producers, importers or exporters of class I controlled substances, and authorizes the EPA Administrator to amend the monitoring and reporting regulations of class I and class II substances.

12. Pursuant to the authority in Section 603 of the CAA, 42 U.S.C. § 7671b, the Administrator of EPA promulgated regulations governing stratospheric ozone depleting substances, which are set forth at 40 C.F.R. Part 82.
13. Appendix A to 40 C.F.R. Part 82, Subpart A, lists class I controlled substances, and includes methyl bromide (CH₃Br) as a class I, Group VI controlled substance.
14. Appendix F to 40 C.F.R. Part 82, Subpart A, lists ozone-depleting chemicals and includes methyl bromide (CH₃Br).
15. The use of methyl bromide, a class I ozone-depleting substance, for quarantine and preshipment purposes is regulated under Section 604(d)(5) of the CAA, 42 U.S.C. § 7671c(d)(5), and the implementing regulations at 40 C.F.R. Part 82.
16. Section 604 of the CAA, 42 U.S.C. § 7671c, provides for the phase-out of production and consumption of class I substances, with certain exceptions. One exception, set forth at Section 604(d)(5) of the CAA, 42 U.S.C. § 7671c(d)(5), provides that, to the extent consistent with the Montreal Protocol's quarantine and preshipment provisions, the EPA Administrator shall exempt from the phase-out the production, importation, and consumption of methyl bromide to fumigate commodities entering or leaving the United States or any State for purposes of compliance with Animal and Plant Health Inspection Service (U.S. Department of Agriculture) requirements or other international, Federal, State or local food protection standards.
17. Pursuant to 40 C.F.R. § 82.3, "quarantine applications" are, with respect to class I, Group VI controlled substances, treatments to prevent the introduction, establishment and/or spread of quarantine pests (including diseases), or to ensure their official control, where: (1) official control is that performed by, or authorized by, a national (including state, tribal or local) plant, animal or environmental protection or health authority; (2) quarantine pests are pests of

potential importance to the areas endangered thereby and not yet present there, or present but not widely distributed and being officially controlled.

18. Pursuant to 40 C.F.R. § 82.3, "preshipment applications" are, with respect to class I, Group VI controlled substances, those non-quarantine applications applied within 21 days prior to export to meet the official requirements of the importing country or existing official requirements of the exporting country. Official requirements are those which are performed by, or authorized by, a national plant, animal, environmental, health or stored product authority.
19. Section 302(e) of the CAA, 42 U.S.C. § 7602(e), and 40 C.F.R. § 82.3 define "person" as any individual or legal entity, including an individual, corporation, partnership, association, state, municipality, political subdivision of a state, Indian tribe; any agency, department, or instrumentality of the United States; and any officer, agent, or employee thereof.
20. 40 C.F.R. § 82.3 defines "applicator" as the person who applies methyl bromide.
21. Pursuant to 40 C.F.R. § 82.3, "distributor of methyl bromide" means the person directly selling a class I, Group VI controlled substance to an applicator.
22. Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), limits the Administrator's authority to matters where the total penalty sought does not exceed \$37,500 (the amount as adjusted by 40 C.F.R. § 19.4), and the first alleged date of violation occurred no more than 12 months prior to the initiation of administrative action, except where the Administrator and the Attorney General of the United States jointly determine that the matter involving a larger penalty amount or longer period of violations is appropriate for the administrative penalty action.
23. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violation alleged in this Complaint.

FINDINGS OF FACT

Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, the undersigned, as Presiding Officer in this matter, makes the following findings of fact:

1. Methyl bromide is the active ingredient in certain restricted use pesticides regulated under FIFRA, 7 U.S.C. § 136 *et seq.*
2. Meth-O-Gas Q, EPA Reg. No. 5785-41 ("MethQ"), is a pesticide registered pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a.
3. MethQ's active ingredient is 100% methyl bromide.
4. The MethQ label (MOGQ-8 REV.C) (the "Label") and MethQ booklet (MOGQ-2 REV.GLK398F) (the "Booklet") (collectively the "MethQ labeling") set forth precautionary statements and specific directions regarding use, storage, handling, sale and disposal of MethQ.
5. M & P Pest Control, Inc. (hereinafter "M & P"), located at 1332 Ave. Jesus T. Pinero, San Juan, Puerto Rico, has been a distributor of pesticides at all times pertinent to this Complaint.
6. M & P Pest Control is a "distributor of methyl bromide" as that term is defined by 40 C.F.R. § 82.3.
7. Acting under the authority and pursuant to the provisions of Section 9(a) of FIFRA, 7 U.S.C. § 136g(a), duly-authorized Puerto Rico Department of Agriculture ("PRDA") and EPA Inspectors conducted inspections of M & P on the following dates: March 25-26, 2015, March 31, 2015, April 8, 2015, April 16, 2015, April 17, 2015, April 22, 2015, May 13, 2015, May 20, 2015, and October 19, 2015

(collectively, the "M & P Inspections").

8. At the M & P Inspections, the inspectors collected records and statements, including records and statements regarding Respondent's purchases of MethQ during the period September 2013 through February 2015.
9. During the March 26, 2015 M & P Inspection, representatives of M & P provided the inspectors with a copy of the MethQ Labeling, described in Paragraph 4, above, which M & P provided with the sale of every MethQ canister.
10. On May 26, 2015, acting under the authority and pursuant to the provisions of Section 8(b) of FIFRA, 7 U.S.C. § 136f(b), and of Section 114a of the CAA, 42 U.S.C. § 7414, EPA sent M & P an Information Request Letter ("IRL") requesting information and records regarding the import, distribution, and application of methyl bromide.
11. The IRL specifically requested, along with other reporting and recordkeeping documents, that M & P provide copies of certifications that M & P received from applicators stating that the quantity of methyl bromide ordered would be used solely for quarantine or preshipment applications as required by 40 C.F.R. § 82.13(y)(2).
12. On July 17, 2015, M & P provided a response (the "M & P Response") to EPA's IRL.
13. In the M & P Response, M & P stated, as a response to the portion of the IRL discussed in Paragraph 11, that "We don' t have any these (sic) documents."
14. In the M & P Response, M & P provided EPA with a copy of the MethQ Booklet, described in Paragraph 4, above, which M & P further asserted that it distributed with the sale of every MethQ canister.
15. M & P sold or otherwise distributed MethQ to Respondent between September 2013

and February 2015.

16. Upon information and belief, the MethQ canisters M & P sold Respondent bore the MethQ Labeling described in Paragraph 4, above.
17. During the October 19, 2015 Inspection, Mr. Michael Pantoja, the president of M & P stated that "no applicator gave any QPS documentation to M & P."
18. Acting under the authority and pursuant to the provisions of Section 9(a) of FIFRA, 7 U.S.C. § 136g(a), duly-authorized EPA and PRDA Inspectors inspected Respondent's Facility, on April 15, 2015 and on May 14, 2015 ("April Inspection" and "May Inspection" respectively, or collectively, the "TN Inspections").
19. During the TN Inspections, the inspectors provided a Notice of Pesticides Use/Misuse Inspection form to Respondent which identified the reason for each of the Inspections and the violations suspected.
20. During the April Inspection, the inspectors collected ten (10) pesticide application records documenting Respondent's use of MethQ, for which they issued a Receipt for Samples document.
21. During the April Inspection, the inspectors requested that the Respondent provide all records in his possession related to the purchase and use of methyl bromide.
22. Respondent did not provide EPA with the records from each commodity owner requesting the quarantine and preshipment use of methyl bromide and citing legal justification for such use.
23. During the April Inspection, Respondent made the following statements regarding the MethQ applications to the inspectors:

- a. that he performed all MethQ applications without the supervision of a regulatory agent;
 - b. that he did not have a direct reading device to measure the air concentration levels of methyl bromide (MethQ) during applications;
 - c. that he did not have and/or did not own a self-contained breathing apparatus (SCBA) for use during the MethQ applications; and
 - d. that he purchased the MethQ he applied from M & P.
24. During the May Inspection, the inspectors collected five (5) additional pesticide application records documenting Respondent's use of MethQ, for which they issued a Receipt for Samples document.

FIFRA Liability

Use of a Registered Pesticide in a Manner Inconsistent with its Label (Application) **(Counts 1 through 55)**

25. Respondent has been, and continues to be, a "person" as defined by FIFRA § 2(s), 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.
26. Respondent engages, and at all times pertinent to this Complaint has engaged, in commercial activities providing pest control services using pesticides.
27. Respondent is, and has been at all times pertinent to this Complaint, a "certified applicator" within the meaning of Section 2(e)(1) of FIFRA, 7 U.S.C. § 136(e)(1), and 40 C.F.R. § 17.2(a)(8).
28. Respondent is, and has been at all times pertinent to this Complaint, a "commercial applicator" within the meaning of Section 2(e)(3) of FIFRA, 7 U.S.C. § 136(e)(3), and 40 C.F.R. § 171.2(a)(9).

29. Respondent is, and has been at all times pertinent to this Complaint, subject to FIFRA and the regulations promulgated thereunder.

30. The following statements are clearly displayed on the MethQ Label received by Respondent and referenced in Paragraphs 4 ,9, 13, and 16, above:

a. At the top of the label and in all bolded capital letters:

**"COMMODITY FUMIGANT
FOR QUARANTINE/REGULATORY USE ONLY
SUPERVISION BY REGULATORY AGENT
REQUIRED."**

b. "The acceptable air concentration level for persons exposed to methyl bromide is 5ppm (20 mg/m³). The air concentration level is measured by a direct reading detection device, such as a Matheson-Kitagawa, Draeger, or Sensidyne."

c. "Do not allow entry into the treated area by any person before this time, unless protective clothing and a respiratory protection device (NIOSH/MSHA approved self-contained breathing apparatus (SCBA) or combination air-supplied/SCBA respirator) is worn."

d. **PERSONAL PROTECTIVE EQUIPMENT (PPE) ... "Applicators and other handlers must wear:** ... Full-face or safety glasses with brow and temple shields (Do NOT wear goggles) ... When the acceptable air concentration level is above 5 ppm and a respirator is required, protect the eyes by wearing a full-face respirator. No respirator is required if the air concentration level of methyl bromide in the working area is measured to be **5 ppm** or less. A respirator is required if the acceptable air concentration level of **5 ppm** is exceeded at any time. The respirator must be one of the following type: (a) a supplied-air respirator (MSHA/NIOSH approval number prefix TC-19C) OR (b) a self-contained breathing apparatus (SCBA) (MSHA/NIOSH approval number prefix TC- 13F)."

e. "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

f. "This fumigant is a highly hazardous material ... Before using, read and follow all label precautions and directions."

g. "All persons working with this fumigant must be knowledgeable about the hazards, and trained in the use of required respiratory protection equipment and detector devices, emergency procedures, and proper use of the fumigant."

- h. "MethQ may be used for quarantine/regulatory commodity fumigation only
Supervision by regulatory agent is required."
- i. "You must carefully read and understand the accompanying use direction, GLK 398F [Booklet], in order to use MethQ."
- j. "Observe all safety and precautionary statements as set forth in the accompanying use directions, GLK398F [Booklet]."

31. The directions for use in the MethQ Booklet GLK398F include:

- a. On page 1, in large bold letters -
**"METHO-O-GAS ®Q
 COMMODITY FUMIGANT
 FOR QUARANTINE/REGULATORY USE ONLY
 SUPERVISION BY REGULATORY AGENT REQUIRED"**
- b. "READ THIS BOOKLET AND ENTIRE LABEL CAREFULLY PRIOR TO USE.
 USE THIS PRODUCT ACCORDING TO LABEL INSTRUCTIONS?"
- c. Same as 30(b) above
- d. Same as 30(c) above
- e. Same as 30(d) above.
- f. Same as 30(e) above.
- g. Same as 30(f) above.
- h. Same as 30(g) above
- i. "This is a limited use label for quarantine/regulatory purposes and is to be used by
 or under the supervision of a State or Federal agency."

32. The MethQ Labeling specifies permitted application sites, crops, and pests.

33. The MethQ Labeling does not allow dwellings (*e.g.*, residences) or structures not used
 for the commercial storage or handling of commodities as application sites.

34. Respondent applied MethQ bearing the MethQ Labeling referenced in Paragraphs 4 ,9,

13, and 16, above, and containing the statements set out in Paragraphs 30 and 31, above, at the following dates, times, and locations:

	Date	Location	Treatment Site/ Type of Structure	Invoice Number
1	02/26/2015	Agua Buena, PR	Residence/Closet	6832
2	02/20/2015	Bayamon, PR	Residence/Kitchen	6830
3	02/11/2015	Guaynabo, PR	Residence /Bedroom	6083
4	02/06/2015	San Juan, PR	Residence/Kitchen	6082
5	12/05/2014	Caguas, PR	Residence/Kitchen	Illegible
6	11/30/2014	Bayamon, PR	Residence/Bedroom	6690
7	09/26/2014	Bayamon, PR	Residence/Kitchen	6596
8	09/19/2014	Illegible	Residence/Kitchen	6585
9	09/10/2014	Caguas, PR	Door/Museum	6568
10	04/07/2014	Bayamon, PR	Residence/Furniture	6308
11	11/22/2013*	Bayamon, PR	Kitchen	053388
12	10/25/2013	Bayamon, PR	Wood Package	053375
13	10/11/2013*	Bayamon, PR	Wagon	053330
14	09/27/2013*	Bayamon, PR	Wood Panels	053322
15	09/13/2013*	Bayamon, PR	Kitchen	053271

35. During the May Inspection, Respondent indicated that the asterisked applications (invoices 11, 13, 14, and 15) memorialized in the previous paragraph were performed

inside of a freight car.

36. The "residences" identified in nine (9) of the applications listed in the table in Paragraph 34, above, are not application sites specified in the MethQ Labeling.
37. The museum identified in one of the applications listed in the table in Paragraph 34, above, is not an application site specified in the MethQ Labeling.
38. Respondent conducted applications of MethQ at ten (10) application sites, set out in the table in Paragraph 34, above, which were not specified in the MethQ Labeling.
39. None of the fifteen (15) MethQ applications set out in the table in Paragraph 34 above, was supervised by a regulatory agent.
40. For each of the fifteen (15) applications set out in the table in Paragraph 34, Respondent failed to use the following PPE:
 - a. SCBA, and
 - b. Full face or safety glasses with brow and temple shields.
41. For each of the fifteen (15) applications set out in the table in Paragraph 34, above, Respondent failed to use a direct reading device.
42. Each of Respondent's failures to comply with a specific requirement of the MethQ Label constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling, in violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G).
43. In the course of the fifteen (15) MethQ applications set out in the table in Paragraph 34, above, Respondent committed 55 separate violations of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), specifically consisting of:
 - a. 10 applications to a site not specified in the MethQ Labeling;

- b. 15 applications not supervised by a regulatory agent as required by the MethQ labeling;
 - c. 15 applications without the PPE required by the MethQ Labeling; and
 - d. 15 applications without a direct detection device required by the MethQ Labeling.
44. Each of Respondent's fifty-five (55) failures to comply with specific requirements of the MethQ Label is a violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed pursuant to FIFRA.

CAA Liability

***Failure to Comply With CAA Recordkeeping Requirements
(Count 56)***

45. Respondent is, and has been at all times pertinent to this Complaint, a "person," as that term is defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e).
46. Respondent is, and has been at all times pertinent to this Complaint, an "applicator" of methyl bromide within the meaning of 40 C.F.R. § 82.3.
47. Respondent is, and has been at all times pertinent to this Complaint, subject to the CAA and the regulations at 40 C.F.R. Part 82 promulgated thereunder.
48. Pursuant to 40 C.F.R. § 82.13(z)(1), applicators of methyl bromide produced or imported solely for quarantine and/or preshipment ("QPS") applications must maintain, for three years, for every application, a document from the commodity owner, shipper or their agent, requesting the use of methyl bromide for QPS applications and citing the regulatory requirement that justifies its use.
49. Respondent failed to maintain the document described in the previous paragraph for any of the following fifteen (15) applications:

	Date	Location	Invoice Number
1	02/26/2015	Agua Buena, PR	6832
2	02/20/2015	Bayamon, PR	6830
3	02/11/2015	Guaynabo, PR	6083
4	02/06/2015	San Juan, PR	6082
5	12/05/2014	Caguas, PR	Illegible
6	11/30/2014	Bayamon, PR	6690
7	09/26/2014	Bayamon, PR	6596
8	09/19/2014	Illegible	6585
9	09/10/2014	Caguas, PR	6568
10	04/07/2014	Bayamon, PR	6308
11	11/22/2013	Bayamon, PR	053388
12	10/25/2013	Bayamon, PR	053375
13	10/11/2013	Bayamon, PR	053330
14	09/27/2013	Bayamon, PR	053322
15	09/13/2013	Bayamon, PR	053271

50. Respondent's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82.13(z)(l) for the period September 13, 2013 to February 26, 2015 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(1)(B), 42 U.S.C. § 7413(d)(1)(B).

***Failure to Comply With CAA Reporting Requirements
(Count 57)***

51. Pursuant to 40 C.F.R. § 82.13(z)(2), every applicator that purchases methyl bromide that was produced or imported solely for QPS applications shall provide to the distributors from whom they purchase, prior to shipment, a certification that the methyl bromide will be used only for QPS applications.

52. Respondent purchased MethQ from M & P on the following 2 dates:

	Invoice Number	Date	Unit Purchased	Amount Purchased
1	203423	05/27/2013	1	50 lb.
2	208728	09/09/2014	1	50 lb.

53. As a result of the M & P Inspections, EPA determined that M & P did not receive certifications from Respondent stating that the methyl bromide purchased would be used only for QPS applications.

54. From May 27, 2013 to September 9, 2014, Respondent purchased methyl bromide from M & P without providing, prior to shipment, a certification that the MethQ purchased would be used only for QPS applications.

55. Respondent's failure to comply with the reporting requirements of 40 C.F.R. § 82.13(z)(2) from May 27, 2013 through September 9, 2014 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(1)(B) 42 U.S.C. § 7413(d)(1)(B).

Service of Process and Failure to Answer Complaint

56. On March 1, 2016, EPA issued a civil administrative Complaint against Respondent pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 1361(a) and Section 113(d) of the CAA, 42 U.S.C. § 7413(d). *See* Memorandum, Exhibit 1.
57. On March 1, 2016, and pursuant to 40 C.F.R. § 22.5(b)(1), Complainant mailed to Respondent, by certified mail, return receipt requested ("green card"), a true and correct copy of the Complaint, including Certificate of Service and the Consolidated Rules, at both Post Office Box 7155, Caguas, Puerto Rico 00726 ("P.O. Box address") and Urb. Miraflores, 16-15 Calle 29, Bayamón, Puerto Rico 00957-3707 ("Bayamón address"). *See* Memorandum, Exhibits 2 and 3.
58. The Complaint explicitly stated that if Respondent wished to avoid being found in default, Respondent must file a written Answer to the Complaint with the Regional Hearing Clerk no later than thirty (30) days after service of the Complaint. EPA, Region 2 may make a motion pursuant to § 22.17 of the Consolidated Rules seeking a default order thirty (30) days after Respondent's receipt of the Complaint unless Respondent files an Answer within that time. Default by the Respondent constitutes admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. If a default order is entered, the proposed penalty may be assessed and the proposed compliance measures may be required, without further proceedings. In addition, the Complaint at page 17, stated the following:

Respondent(s)' Answer to the Complaint must clearly and directly admit, deny or explain each of the factual allegations that are contained in the Complaint with regard to which Respondent(s) have any knowledge. 40 C.F.R. § 22.15(b). Where Respondent(s) lack knowledge of a particular factual allegation and so states in its

Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that each Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether the Respondent(s) requests a hearing. 40 C.F.R. § 22.15(b).

59. The Respondent was served with the Complaint on March 5, 2016 at the Bayamón address. The green card was signed and dated by Jesenia Andújar. *See* Memorandum, Exhibit 2. The Respondent was served with the Complaint on March 7, 2016 at the P.O. Box address. The green card as signed and dated by the Respondent, Andújar, himself. *See* Memorandum, Exhibit 3.
60. To date, the Respondent has not filed an Answer to the Complaint with the Regional Hearing Clerk nor has he contacted the Presiding Officer to request any extension of time to file an Answer or communicated with EPA's counsel about doing so. *See* Declaration, Paragraphs 8, 13 and 14.
61. On March 1, 2016, a courtesy copy of the Complaint was sent by email to Peter Diaz, Esq. ("Mr. Diaz"), who represented the Respondent in pre-filing negotiations regarding the FIFRA and CAA violations alleged in the Complaint, at the email address previously used in correspondence with EPA counsel: diazfederalcases@gmail.com. *See* Declaration, Paragraph 2; Memorandum, Exhibits 5 and 6.
62. In a March 1, 2016 CBS news story, Mr. Diaz told reporters that he will contest the Complaint. *See* Memorandum, Exhibit 7.
63. To date, Mr. Diaz has not filed an Answer to the Complaint on behalf of Respondent with the EPA Region 2 Regional Hearing Clerk, nor has he contacted the Presiding

Officer to request an extension of time to file an Answer or communicated with EPA's Counsel about doing so. *See* Declaration, Paragraphs 13 and 14.

64. On April 28, 2016, EPA sent, by certified mail with return receipt request and via email, a letter to Mr. Diaz informing him that the Respondent had accepted service of the Complaint on March 5, 2016 and March 7, 2016; that no Answer to the Complaint had been filed; that the Answer to the Compliant was due on or about April 6, 2016; that his client might be found in default upon motion; and about the legal effects of such default. Additionally, EPA's April 28th letter requested confirmation in writing within five business days as to whether Mr. Diaz was currently retained as counsel for Respondent. EPA's letter further specified that if EPA did not receive such written confirmation, EPA would conclude that Mr. Diaz no longer represented the Respondent. Copies of the Complaint, Consolidated Rules, and the U.S. Postal Service return receipts (*e.g.*, green cards) showing delivery were enclosed with the letter and were attached to the email. *See* Memorandum, Exhibits 8 and 9.
65. Mr. Diaz was served on May 2, 2016 with EPA's April 28th letter, at the address on his letterhead, 420 Avenida Ponce de Leon, Suite 1001, San Juan, Puerto Rico 00918. *See* Memorandum, Exhibit 10; Declaration, Paragraph 8.
66. Mr. Diaz has not contacted EPA or the EPA Regional Hearing Clerk since the filing of the Complaint, and notwithstanding EPA's written requests by letter and emails, he has not responded to EPA with any confirmation (written or oral) that he currently represents the Respondent. *See* Declaration, Paragraphs 13 and 14.
67. On May 17, 2016, EPA sent, by certified mail with return receipt requested, letters to Respondent Andújar at both the P.O. Box address and the Bayamon address. The EPA letters stated the following: (i) that the deadline for filing an Answer to the Complaint

had passed; (ii) that EPA believed that the Respondent was no longer represented by Mr. Diaz; (iii) that EPA issued a letter to Mr. Diaz on April 28, 2016, informing him that the Answer to the Complaint was due on or about April 6, 2016; (iv) that Mr. Diaz received the letter on May 2, 2016; and (v) that Mr. Diaz had not responded to the letter or filed an Answer on his behalf. Further, the letter to Respondent stated that EPA intended to seek a default order against the Respondent, set forth the legal effects of such default order, and requested that the Respondent contact EPA counsel Yu or EPA attorney Carolina-Jordan Garcia if he intended to file an Answer to the Complaint. Copies of the Complaint, the Consolidated Rules of Practice and the green cards for the Complaint and the April 28, 2016 Diaz letter, along with the green card receipts, were enclosed with the May 17, 2016 letter to Respondent. *See Exhibit 11.*

68. On May 20, 2016, the Respondent was served with the EPA May 17, 2016 letter at the Bayamón address (green card was signed by Ana Figueroa) and at the P.O. Box address (green card was personally signed by Andújar). *See Memorandum, Exhibits 12 and 13.*

69. Copies of the May 17, 2016 letters sent to Respondent were also mailed and emailed by EPA to Mr. Diaz on May 17, 2016. *See Memorandum, Exhibit 14.*

70. To date, the Respondent has not filed a response to the Motion.

CONCLUSIONS OF LAW

This determination of violation is based upon the following:

1. Jurisdiction is conferred by Section 14(a) of the FIFRA, 7 U.S.C. § 1361, and Section 113(d) of the CAA, 42 U.S.C. § 7413(d).

2. In the course of the fifteen (15) MethQ applications set out in the table in Paragraph 34, above, Respondent committed 55 separate violations of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), specifically consisting of:
 - 10 applications to a site not specified in the MethQ Labeling;
 - 15 applications not supervised by a regulatory agent as required by the MethQ labeling;
 - 15 applications without the PPE required by the MethQ Labeling; and
 - 15 applications without a direct detection device required by the MethQ Labeling.
3. Each of Respondent's failures to comply with a specific requirement of the MethQ Label, as set forth in the Findings of Fact above, constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling, in violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed against Respondent pursuant to FIFRA.
4. As set forth in the Findings of Fact above, Respondent failed to collect and maintain the documents for any of the fifteen applications of methyl bromide required by 40 C.F.R. § 82.13(z)(l),
5. Respondent's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82.13(z)(l) for the period September 13, 2013 to February 26, 2015 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(1)(B), 42 U.S.C. § 7413(d)(1)(B).
6. As set forth in the Findings of Fact, above, Respondent, as a purchaser of methyl bromide, failed to provide M&P, as distributor, with certifications prior to shipment as

required by 40 C.F.R. § 82.13(z)(2).

7. Respondent's failure to comply with the reporting requirements of 40 C.F.R. § 82.13(z)(2) from May 27, 2013 through September 9, 2014 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(1)(B) 42 U.S.C. § 7413(d)(1)(B).
8. The proceeding was commenced in accordance with 40 C.F.R. § § 22.13 and 22.14 of the Consolidated Rules.
9. The Complaint in this action was served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1) of the Consolidated Rules.
10. Respondent's failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Respondent pursuant to 40 C.F.R. § 22.17(a).
11. Respondent's default constitutes an admission of the allegations and a waiver of Respondent's right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).
12. Respondent's failure to file a timely Answer to the Complaint is grounds for the entry of a Default Order against the Respondent. 40 C.F.R. § 22.17. However, it must be noted that this Order does not constitute an Initial Decision in accordance with 40 C.F.R. § 22.17(c).
13. A Default Order that does not determine remedy along with liability is not an initial decision, unless it resolves "all issues and claims in the proceeding." Based upon a reading of the regulation along with pertinent portions of the preamble, there is an expectation that a motion for default order on liability and Order granting same contemplates a second Motion for Penalty, to be filed by Complainant in accordance

with EPA regulations and practice.

ORDER

Based on the above Findings of Fact and Conclusions of Law, Complainant's Motion for Default Judgment on Liability is **GRANTED**. Specifically, I find Respondent liable for fifty-five (55) violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G). I further find Respondent liable for two violations of the Clean Air Act and its implementing regulations at 40 C.F.R. Part 82.

On or before October 30, 2017, Complainant is to file and serve the Motion for Penalty, together with supporting documentation which will provide factual grounds for the proposed penalty, in accordance with 40 C.F.R. §§ 22.5 and 22.16.

Respondents shall file a response no later than fifteen (15) days after service of the Motion for Penalty.

So ORDERED.

Dated: *September 14, 2017*
New York, New York


Helen Ferrara
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that the **Order On Default As To Liability** by Regional Judicial Officer Helen Ferrara in the matter of **Edwin Andujar Bermudez dba Truly Nolen Pest Control De Caguas, Docket No. FIFRA-02-2016-5302**, is being served on the parties as indicated below:

First Class Mail - Edwin Andujar Bermudez dba
Truly Nolen Pest Control De Caguas
P.O. Box 7155
Caguas, Puerto Rico 00726

Edwin Andujar Bermudez dba
Truly Nolen Pest Control De Caguas
Urb. Miraflores, 16-015 Calle 29
Bayamon, Puerto Rico 00957-3707

Inter Office Mail - Jeannie Yu, Esq.
Office of Regional Counsel
USEPA - Region II
290 Broadway, 16th Floor
New York, New York 10007-1866



Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: September 15, 2017