UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 BROADWAY
NEW YORK, NY 10007-1866

MAR - 1 2016

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Edwin Andújar Bermúdez
dba Truly Nolen Pest Control de Caguas
PO Box 7155
Caguas, Puerto Rico 00726

Edwin Andújar Bermúdez
dba Truly Nolen Pest Control de Caguas
Urb. Miraflores,
16-15 Calle 29,
Bayamón, Puerto Rico 00957-3707

Re: Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas
Docket No. FIFRA-02-2016-5302

Dear Mr. Andújar:

Enclosed is a copy of the Complaint and Notice of Opportunity for Hearing and other documents, in the above-referenced proceeding. This Complaint alleges violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. 136 et seq.

You have the right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint.

If you wish to contest the allegations or the penalty proposed in the Complaint, you must file an Answer, within *thirty (30) days* of your receipt of the enclosed Complaint, to the United States Environmental Protection Agency (EPA) Regional Hearing Clerk at the following address:

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

If you do not file an Answer within thirty (30) days of receipt of this Complaint and have not obtained a formal extension for filing an Answer from the Regional Judicial Officer, a default order may be entered against you, and a penalty may be assessed without further proceedings.

Whether or not you request a formal hearing, you may request an informal conference with EPA to discuss any issues relating to the alleged violations and the amount of the proposed penalty. EPA encourages all parties against whom it files a Complaint to pursue the possibility of a settlement by participating in an informal conference with EPA. However, a request for an informal conference *does not* substitute for a written Answer, affect what you may choose to say in a written Answer, or extend the thirty (30) days by which you must file an Answer to request a hearing.

Enclosed are copies of the Consolidated Rules of Practice, which govern this proceeding. For your general information and use, I also have enclosed an Information Sheet for U.S. EPA Small Business Resources which may or may not apply to you.

If you have any questions or wish to schedule an informal settlement conference, please contact the attorney whose name is listed in the Complaint.

Sincerely,

Dore LaPosta, Director
Division of Enforcement and Compliance Assistance

Enclosures

cc: Karen Maples, Regional Hearing Clerk (w/o enclosures)

Peter Diaz,
Attorney for Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas
420 Avenida Ponce de León Suite 1001
San Juan, Puerto Rico 00918-3491

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

U.S. Environmental Protection Agency, Reg 2
2016 MAR 01 PM 2:07
REGIONAL HEARING CLERK

In the Matter of	:	
	:	
	:	
Edwin Andújar Bermúdez dba	:	COMPLAINT AND NOTICE OF
Truly Nolen Pest Control De Caguas	:	OPPORTUNITY FOR HEARING
	:	
	:	Docket No. FIFRA-02-2016-5302
Respondent.	:	
	:	
Proceeding Under the Federal	:	
Insecticide, Fungicide, and	:	
Rodenticide Act, as amended, and	:	
the Clean Air Act, as amended.	:	

This Complaint and Notice of Opportunity for Hearing (hereinafter referred to as the "Complaint") is filed pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136*l*(a); Section 113(d) of the Clean Air Act, as amended, 42 U.S.C. § 7413(d) ("CAA"); and in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of Permits, 40 C.F.R. Part 22 ("Consolidated Rules of Practice" or "CROP").

The Complainant in this proceeding, the Director of the Division of Enforcement and Compliance Assistance, United States Environmental Protection Agency, Region 2 ("EPA"), has been duly delegated the authority to institute this action.

This Complaint serves notice of EPA's preliminary determination that Edwin Andújar Bermúdez (hereinafter referred to as "Respondent") doing business as Truly Nolen Pest Control De Caguas, from a location at Urb. Miraflores, Block 16-15, Calle 29, Bayamon, Puerto Rico (the "Facility"), has violated provisions of FIFRA and the CAA.

FIFRA 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."

CAA Statutory and Regulatory Background

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.

Background

24. Methyl Bromide is the active ingredient in certain restricted use pesticides regulated under FIFRA, 7 U.S.C. § 136 et seq.

25. Meth-O-Gas Q, EPA Reg. No. 5785-41 ("MethQ"), is a pesticide registered pursuant to FIFRA § 3.

26. MethQ's active ingredient is 100% methyl bromide.

27. 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.

28. 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.

29. M & P Pest Control is a "distributor of methyl bromide" as that term is defined by 40 C.F.R. § 82.3.

30. 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").

31. 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.

32. 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 27, above, which M & P provided with the sale of every MethQ canister.

33. 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.

34. 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).

35. On July 17, 2015, M & P provided a response (the "M & P Response") to EPA's IRL.

36. In the M & P Response, M & P stated, as a response to the portion of the IRL discussed in Paragraph 34, that "We don't have any these (sic) documents."

37. In the M & P Response, M & P provided EPA with a copy of the MethQ Booklet, described in Paragraph 27, above, which M & P further asserted that it distributed with the sale of every MethQ canister.

38. M & P sold or otherwise distributed MethQ to Respondent between September 2013 and February 2015.

39. Upon information and belief, the MethQ canisters M & P sold Respondent bore the MethQ Labeling described in Paragraph 27, above.

40. 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."

41. 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").

42. 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.

43. 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.

44. 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.

45. 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.

46. 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.

47. 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

Counts 1-55
Use of a Registered Pesticide in a Manner Inconsistent with its Label (Applications)

48. Complainant realleges each allegation contained in Paragraphs 1 through 47, inclusive, as if fully set forth herein.

49. 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.

50. Respondent engages, and at all times pertinent to this Complaint has engaged, in commercial activities providing pest control services using pesticides.

51. 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. § 171.2(a)(8).

52. 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).

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

54. The following statements are clearly displayed on the MethQ Label received by Respondent and referenced in Paragraphs 27, 32, 37, and 39, 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-Kitaghawa, 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]."

55. 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 54(b) above

d. Same as 54(c) above

e. Same as 54(d) above.

f. Same as 54(e) above.

g. Same as 54(f) above.

h. Same as 54(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."

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

57. 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.

58. Respondent applied MethQ bearing the MethQ Labeling referenced in Paragraphs 27, 32, 37, and 39, above, and containing the statements set out in Paragraphs 54 and 55, 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

59. 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.

60. The "residences" identified in nine (9) of the applications listed in the table in Paragraph 58, above, are not application sites specified in the MethQ Labeling.

61. The museum identified in one of the applications listed in the table in Paragraph 58, above, is not an application site specified in the MethQ Labeling.

62. Respondent conducted applications of MethQ at ten (10) application sites, set out in the table in Paragraph 58 above, which were not specified in the MethQ Labeling.

63. None of the fifteen (15) MethQ applications set out in the table in Paragraph 58 above, was supervised by a regulatory agent.

64. For each of the fifteen (15) applications set out in the table in Paragraph 58, Respondent failed to use the following PPE:

a. SCBA, and
b. Full face or safety glasses with brow and temple shields.

65. For each of the fifteen (15) applications set out in the table in Paragraph 58, above, Respondent failed to use a direct reading device.

66. Each of Respondent's failures to comply with a specific requirement of the MethQ Label, as described in Paragraphs 50 to 55, 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).

67. In the course of the fifteen (15) MethQ applications set out in the table in Paragraph 58, 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.

68. 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

Count 56
Failure to Comply With CAA Recordkeeping Requirements

69. Complainant realleges each allegation contained in Paragraphs 1 through 68, inclusive, as if fully set forth herein.

70. 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).

71. 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.

72. 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.

73. 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.

74. 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

75. Respondent's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82.13(z)(1) 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).

Count 57
Failure to Comply With CAA Reporting Requirements

76. Complainant realleges each allegation contained in Paragraphs 1 through 75, inclusive, as if fully set forth herein.

77. 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.

78. 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.

79. 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.

80. 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.

81. 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).

PROPOSED CIVIL PENALTY

Complainant proposes at this time that Respondent be assessed the statutory maximum penalties authorized by FIFRA and the CAA. After an exchange of information has occurred, pursuant to 40 C.F.R. § 22.19, Complainant will file a document with a specific proposed penalty and an explanation of how the proposed penalty was calculated in accordance with the criteria in FIFRA and the CAA. Pursuant to 40 C.F.R. § 22.14(a)(4)(ii), the text below provides the number of violations for which a penalty is sought, a brief explanation of the severity of each violation alleged and a recitation of the relevant statutory penalty authority of FIFRA and the CAA. Complainant intends to seek penalties for each violation alleged in each Count.

FIFRA VIOLATIONS

EPA's FIFRA Penalty Authority and Overview of FIFRA Enforcement Response Policy

Pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a), as amended, Complainant proposes the assessment of a civil penalty of up to $7,500 per day against Respondent for each of the applicable violations of FIFRA alleged in this Complaint.

For the FIFRA violations alleged above, the proposed civil penalty will be determined in accordance with Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a), as amended, which authorizes the assessment of a civil penalty of up to $7,500 for each violation of "any provision of" subchapter II of FIFRA, 7 U.S.C. §§ 136-136y. (Pursuant to the Debt Collection Improvement Act of 1996 ("DCIA"), and the Civil Monetary Penalty Inflation Adjustment Rules, 61 Fed. Reg. 69360 (December 31, 1996), 69 Fed. Reg. 7121 (February 13, 2004), and 73 Fed Reg. 75345 (December 11, 2008) (collectively, "Inflation Rules"), as codified at 40 C.F.R. Part 19, the statutory maximum assessment per violation was raised to $7,500 for violations occurring after January 12, 2009.)

For purposes of determining the amount of any penalty to be assessed, Section 14 of FIFRA requires that EPA "shall consider the appropriateness of such penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation" (Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4)).

In developing the proposed penalty for the violations alleged in this Complaint, Complainant will take into account the particular facts and circumstances of this case, to the extent known at the time, and use EPA's "FIFRA Enforcement Response Policy [for] The Federal Insecticide, Fungicide and Rodenticide Act," dated December 2009 (hereinafter referred to as the "ERP"). This guidance policy provides rational, consistent and equitable calculation methodologies for applying the statutory penalty criteria enumerated above to particular cases to develop a gravity-based penalty for each violation. A copy of the ERP is available upon request or may be obtained from the Internet at this address: http://www.epa.gov/enforcement/fifra-enforcement-response-policy.

Complainant may adjust each gravity-based penalty upward or downward based upon the violator-specific and environmental sensitivity adjustment factors described in the ERP. In addition, Complainant may add a component to reflect any economic benefit gained by Respondent for failing to comply with the regulatory requirement. Complainant will also consider, if raised, Respondent's ability to pay a civil penalty. The burden of raising and demonstrating an inability to pay rests with Respondent.

As a basis for calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will consider, among other factors, facts and circumstances unknown to Complainant at the time of issuance of this Complaint that become known after the Complaint is issued.

Counts 1-55 – Use of a Registered Pesticide in a Manner Inconsistent with its Label, in violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j (a)(2)(G).

For each type of violation associated with a particular product, the penalty amount is determined under the seven-step process in the ERP that considers the Section 14(a)(4) criteria. These steps using the tables and Appendixes in the ERP are as follows:

(1) *Number of independently assessable violations:* The Agency considers each failure of an applicator to follow a distinct label requirement to be an independently assessable violation of FIFRA § 12(a)(2)(G). The number of violations and days of violations are set out in Counts 1-55, above. Each of these independent violations of FIFRA is subject to civil penalties up to the statutory maximum.

(2) *Size of business category for the violator:* In order to provide equitable penalties, civil penalties assessed for violations of FIFRA generally increase as the size of the Respondent increases.

(3) *Gravity of the violation for each independently assessable violation:* The level assigned to each violation of FIFRA represents an assessment of the relative severity of each violation. The relative severity of each violation considers the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute. MethQ is a highly toxic restricted use pesticide. In conducting each of the fifteen applications described herein, Respondent deviated substantially and in multiple ways from the requirements of the MethQ labeling, endangering himself, his customers, potentially others, and the environment.

(4) *"Base" penalty amount associated with the size of business and the gravity of violation for each independently assessable violation:* The size of business categories and gravity levels are broken out in the ERP Penalty Matrices. FIFRA imposes different statutory ceilings on the maximum civil penalty that may be assessed against persons listed in FIFRA § 14(a)(1) and persons listed in Section 14(a)(2), and the ERP sets out separate penalty matrices for each. As a certified applicator, Respondent is a FIFRA § 14(a)(1) business.

(5) *"Adjusted" penalty amount based on case-specific factors using the gravity adjustment criteria:* The Agency has assigned adjustments, for each violation relative to the specific characteristics of the pesticide involved, the harm to human health and/or harm to the environment, compliance history of the violator, and the culpability of the violator. The gravity adjustment values from each gravity category listed in Appendix B of the ERP are to be totaled. Once this base penalty amount is calculated, it is to be rounded to the nearest $100.

(6) *Economic benefit of noncompliance:* An economic benefit component should be calculated and added to the gravity-based penalty component when a violation results in "significant" economic benefit to the violator. "Significant" is defined as an economic benefit that totals more than $10,000 for all FIFRA violations alleged in the complaint.

(7) *Violator's ability to continue in business:* FIFRA § 14(a)(4) requires the Agency to consider the effect of the penalty on a respondent's ability to continue in business when determining the amount of the civil penalty.

In instances where the Agency obtains records which evidence multiple applications, sales or distributions for the same violations, the Region may apply a "graduated" penalty calculation.

CAA VIOLATIONS

EPA's CAA Penalty Authority and Overview of CAA General Policy

Section 113(d) of the CAA, 42 U.S.C. § 7413(d), provides that the Administrator may assess a civil administrative penalty of up to $25,000 per day for each violation of the CAA. As previously noted, the DCIA requires EPA periodically to adjust its civil monetary penalties for inflation. Pursuant to the DCIA, EPA adopted regulations entitled Civil Monetary Penalties Inflation Adjustment Rule which are codified at 40 C.F.R. Part 19 ("Part 19"). The maximum civil penalty per day for each violation that occurred from January 12, 2009 until now is $37,500.

In determining the amount of penalty to be assessed, Section 113(e) of the CAA requires that the Administrator consider the size of the business, the economic impact of the penalty on the business, the violator's full compliance history and good faith efforts to comply, the duration of the violation as established by any credible evidence, the payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, the seriousness of the violation, and other factors as justice may require.

In calculating a specific penalty pursuant to 40 C.F.R. § 22.19(a)(4), Complainant will consider, among other factors, facts and circumstances unknown to Complainant at the time of issuance of the Complaint that become known after the Complaint is issued.

Pursuant to Section 113(d) of CAA, 42 U.S.C. § 7413(d), as amended, Complainant proposes the assessment of a civil penalty of up to $37,500 per day against the Respondent for each of the applicable violations alleged in this Complaint.

The violations alleged in Counts 56 and 57 would result in the Respondent being liable for the assessment of administrative penalties pursuant to Section 113(d) of the CAA. The proposed penalty will be prepared in accordance with the criteria in Section 113(e) of the CAA, and in accordance with the guidelines set forth in EPA's Clean Air Act Stationary Source Civil Penalty Policy, as amended (General Policy). EPA's General Policy reflects EPA's application of the factors set forth in Section 113(e) of the Act and provides guidance on how EPA is to calculate penalties for the CAA. The policy indicates that EPA should propose a penalty consisting of an economic benefit component and a gravity component. The economic benefit component is the economic benefit the violator gained as a result of the violation. The gravity component, in turn, consists of elements based on the actual or potential harm caused by the violation, the

significance of the regulation in question to the regulatory scheme, the sensitivity of the environment and the size of the violator.

Economic benefit: The General Policy provides the Region the discretion not to seek economic benefit where the benefit derived from the CAA violations is less than $5,000.

Gravity: The General Policy also indicates that the Region should recover penalties that reflect the "seriousness" of the violation in a gravity component. In measuring the seriousness of these violations, the Region may consider the importance to the regulatory scheme, the duration of the violation, and the size of the violator.

Size of the violator: In order to provide equitable penalties, civil penalties assessed for violations of the CAA will generally increase as the size of the business increases.

Count 56 - Recordkeeping—Failure to maintain records from commodity owner requesting use of QPS Methyl Bromide and citing legal justification for such use for 3 years, in violation of 40 C.F.R. § 82.13(z)(1).

Gravity: Respondent's failure to create and maintain records as required by 40 C.F.R. Part 82 contravened the essence of the regulatory scheme.

Importance to regulatory scheme: The Respondent, by failing to keep the required record, deviated substantially from the regulation. Recordkeeping allows regulatory agencies to confirm that QPS methyl bromide is being used properly.

Duration of violation: The violation period reflects the total number of days between the first date of a methyl bromide application for which no record was kept through the last date of such an application.

Count 57 - Reporting—Failure to provide certifications to distributor, prior to shipment of QPS methyl bromide, that methyl bromide will only be used for QPS applications, in violation of 40 C.F.R. § 82.13(z)(2).

Gravity: Respondent's failure to provide the required certifications for MethQ contravened the regulatory scheme.

Importance to regulatory scheme: The Respondent, by failing to submit a required certification, deviated substantially from the regulation. Certification requirements help distributors report to EPA that QPS methyl bromide is being sold for QPS purpose.

Duration of violation: The violation period reflects the total number of days between the first date of a methyl bromide purchase for which no certification was provided to the distributor through the last date of such a purchase.

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

The rules of procedure governing this civil administrative litigation were originally set forth in 64 Fed. Reg. 40138 (July 23, 1999), entitled, "CONSOLIDATED RULES OF PRACTICE GOVERNING THE ADMINISTRATIVE ASSESSMENTS OF CIVIL PENALTIES, ISSUANCE OF COMPLIANCE OR CORRECTIVE ACTION ORDERS, AND THE REVOCATION, TERMINATION OR SUSPENSION OF PERMITS", and are codified at 40 C.F.R. Part 22. A copy of these rules accompanies the Complaint.

A. Answering the Complaint

Where Respondent intends to contest any material fact upon which the Complaint is based, to contend that the proposed penalty and/or the Compliance Order is inappropriate or to contend that Respondent is entitled to judgment as a matter of law, Respondent must file with the Regional Hearing Clerk of EPA, Region 2, both an original and one copy of a written answer to the Complaint, and such Answer must be filed within 30 days after service of the Complaint. 40 C.F.R. §§ 22.15(a) and 22.7(c). The address of the Regional Hearing Clerk of EPA, Region 2, is:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th floor
New York, New York 10007-1866

(**NOTE:** Any documents that are filed after the Answer has been filed should be filed as specified in "D" below.)

Respondent shall also then serve one copy of the Answer to the Complaint upon Complainant and any other party to the action. 40 C.F.R. § 22.15(a).

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 and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks 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 Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

Respondent's failure affirmatively to raise in the Answer facts that constitute or that might constitute the grounds of their defense may preclude Respondent, at a subsequent stage in this proceeding, from raising such facts and/or from having such facts admitted into evidence at a hearing.

B. Opportunity to Request a Hearing

If requested by Respondent in its Answer, a hearing upon the issues raised by the Complaint and Answer may be held (40 C.F.R. § 22.15(c)). If, however, Respondent does not request a hearing, the Presiding Officer (as defined in 40 C.F.R. § 22.3) may hold a hearing if the Answer raises issues appropriate for adjudication (40 C.F.R. § 22.15(c)).

Any hearing in this proceeding will be held at a location determined in accordance with 40 C.F.R. § 22.35(b). A hearing of this matter will be conducted in accordance with the applicable provisions of the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 551-59, and the procedures set forth in Subpart D of 40 C.F.R. Part 22.

C. Failure to Answer

If Respondent fails in its Answer to admit, deny, or explain any material factual allegation contained in the Complaint, such failure constitutes an admission of the allegation. 40 C.F.R. § 22.15(d). If Respondent fails to file a timely [i.e. in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a)] Answer to the Complaint, Respondent may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent constitutes, for purposes of the pending proceeding only, an admission of all facts alleged in the Complaint and a waiver of Respondent's right to contest such factual allegations. 40 C.F.R. § 22.17(a). Following a default by Respondent for a failure to timely file an Answer to the Complaint, any order issued therefore shall be issued pursuant to 40 C.F.R. § 22.17(c).

Any penalty assessed in the default order shall become due and payable by Respondent without further proceedings 30 days after the default order becomes final pursuant to 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d). If necessary, EPA may then seek to enforce such final order of default against Respondent, and to collect the assessed penalty amount, in federal court or through other appropriate means. Any default order requiring compliance action shall be effective and enforceable against Respondent without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.27(c). 40 C.F.R. § 22.17(d).

D. Filing of Documents Filed After the Answer

Unless otherwise ordered by the Presiding Officer for this proceeding, all documents filed after Respondent has filed an Answer should be filed with the Headquarters Hearing Clerk acting on behalf of the Regional Hearing Clerk, addressed as follows:

If filing by the United States Postal Service:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, D.C. 20460

If filing by UPS, FedEx, DHL or other courier or personal delivery, address to:

Sybil Anderson
Headquarters Hearing Clerk
Office of the Administrative Law Judges
Ronald Reagan Building, Room M1200
U.S. Environmental Protection Agency
1300 Pennsylvania Avenue, N.W.
Washington, D.C. 20460

E. Exhaustion of Administrative Remedies

Where Respondent fails to appeal an adverse initial decision to the Agency's Environmental Appeals Board ("EAB") (see 40 C.F.R. § 1.25(e)), pursuant to 40 C.F.R. § 22.30, that initial decision thereby becomes a final order pursuant to the terms of 40 C.F.R. § 22.27(c), Respondent waives its right to judicial review. 40 C.F.R. § 22.27(d).

To appeal an initial decision to the EAB, Respondent must do so "[w]thin thirty (30) days after the initial decision is served." 40 C.F.R. § 22.30(a). Pursuant to 40 C.F.R. § 22.7(c), where service is effected by mail, "five days shall be added to the time allowed by these rules for the filing of a responsive pleading or document." Note that the 45-day period provided for in 40 C.F.R. § 22.27(c) [discussing when an initial decision becomes a final order] does not pertain to or extend the time period prescribed in 40 C.F.R. § 22.30(a) for a party to file an appeal to the EAB of an adverse initial decision.

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the

proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

Complainant has the authority to modify the amount of the proposed penalty, where appropriate, to reflect any settlement agreement reached with Respondent, to reflect any relevant information previously not known to Complainant, or to dismiss any or all of the charges, if Respondent can demonstrate that the relevant allegations are without merit and that no cause of action as herein alleged exists. Respondent is referred to 40 C.F.R. § 22.18.

Any request for an informal conference or any questions that Respondent may have regarding this complaint should be directed to:

Jeannie M. Yu, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. Environmental Protection Agency, Region 2
290 Broadway, Room 1635
New York, New York 10007-1866
212-637-3205

The parties may engage in settlement discussions irrespective of whether Respondent has requested a hearing 40 C.F.R. § 22.18(b)(1). Respondent's requesting a formal hearing does not prevent it from also requesting an informal settlement conference; the informal conference procedure may be pursued simultaneously with the formal adjudicatory hearing procedure. A request for an informal settlement conference constitutes neither an admission nor a denial of any of the matters alleged in the Complaint. Complainant does not deem a request for an informal settlement conference as a request for a hearing as specified in 40 C.F.R. § 22.15(c).

A request for an informal settlement conference does not affect Respondent's obligation to file a timely Answer to the Complaint pursuant to 40 C.F.R. §22.15. No penalty reduction, however, will be made simply because an informal settlement conference is held.

Any settlement that may be reached as a result of an informal settlement conference will be embodied in a written consent agreement. 40 C.F.R. § 22.18(b)(2). In accepting the consent agreement, Respondent waives its right to contest the allegations in the Complaint and waive its right to appeal the final order that is to accompany the consent agreement. 40 C.F.R. § 22.18(b)(2). To conclude the proceeding, a final order ratifying the parties' agreement to settle will be executed. 40 C.F.R. § 22.18(b)(3).

Respondent's entering into a settlement through the signing of such Consent Agreement and its complying with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the complaint. Respondent's entering into a settlement does not extinguish, waive, satisfy or

otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

If, instead of filing an Answer, Respondent wishes not to contest the Complaint and wants to pay the penalty within thirty (30) days after receipt of the Complaint, Respondent should promptly contact the Assistant Regional Counsel identified on the previous page.

COMPLAINANT:

Dore LaPosta, Director
Division of Enforcement and
Compliance Assistance
U.S. EPA, Region 2

Dated: 3/1/16,
New York, New York

CERTIFICATE OF SERVICE

This is to certify that I have this day caused to be mailed a copy of the foregoing Complaint, bearing docket number FIFRA-02-2016-5302 and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to:

Edwin Andújar Bermúdez
dba Truly Nolen Pest Control de Caguas
PO Box 7155
Caguas, Puerto Rico 00726

Edwin Andújar Bermúdez
dba Truly Nolen Pest Control de Caguas
Urb. Miraflores,
16-15 Calle 29,
Bayamón, Puerto Rico 00957-3707

I hand-carried the original and a copy of the foregoing Complaint to the office of the Regional Hearing Clerk, United States Environmental Protection Agency, Region 2.

Dated: March 1, 2016
New York, New York