UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2
290 Broadway
New York, NY 10007

IN THE MATTER OF: **Edwin Andújar Bermúdez dba** **Truly Nolen Pest Control De Caguas,** Respondent	Docket No. **FIFRA-02-2016-5302** Proceeding under 7 U.S.C. § 136*l*(a), Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act and 42 U.S.C. § 7413 (d), Section 113 (d) of the Clean Air Act

INITIAL DECISION AND DEFAULT ORDER

By *Motion for Order of Default on Penalties* ("Penalty Motion"), the Complainant, the Director, Division of Enforcement and Compliance Assistance ("DECA"), Region 2 ("Region") now known as the Enforcement and Compliance Assurance Division ("ECAD"), of the United States Environmental Protection Agency ("EPA" or "Complainant"), has moved for the assessment of civil penalties against Edwin Andújar Bermúdez doing business as Truly Nolen Pest Control De Caguas ("Respondent" or "Truly Nolen") for violations of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C § 136j(a)(2)(G), and of the Clean Air Act ("CAA") requirements set forth at 40 C.F.R. §§ 82.13(z)(1) and (z)(2). Specifically, the Complainant requested assessment of civil penalties in the total amount of One Hundred Fifty Four Thousand Six Hundred Sixty Dollars ($154,660.00) broken down as follows: Forty Nine Thousand and One Hundred Dollars ($49,100.00) for FIFRA violations and One Hundred and Five Thousand Five Hundred and Sixty Dollars ($105,560.00) for CAA violations.

Pursuant to the *Consolidated Rules of Practice Governing the Administrative*

Assessment of Civil Penalties, 40 C.F.R. Part 22 ("Consolidated Rules"), and based upon the record in this matter, the *Order on Default as to Liability* ("Default Order") and the following *Findings of Fact*, *Conclusions of Law* and *Determination of Penalty*, civil penalties are hereby assessed as follows: $154,660.00 comprised of $49,100.00 for FIFRA violations and $105,560.00 for CAA violations.

BACKGROUND

This is a proceeding under Section 14(a) of the FIFRA, 7 U.S.C. § 136*l*(a) and Section 113(d) of the CAA, 42 U.S.C. § 7413(d) and governed by the Consolidated Rules. The Region initiated this proceeding by issuing an *Administrative Complaint* ("Complaint") on March 1, 2016, against Respondent.

In its Complaint, Complainant alleged that Respondent had committed fifty five (55) separate violations of FIFRA Section 12 (a)(2)(G) as follows: ten (10) applications of a restricted use pesticide containing methyl bromide, Meth-O-Gas Q, EPA Reg. No. 5785-41 ("MethQ") to a site not specified in the MethQ labeling; fifteen (15) applications of MethQ that were not supervised by a regulatory agent as required by the MethQ labeling; fifteen (15) applications of MethQ in which protective equipment (PPE) was not used as required by the MethQ labeling; and, fifteen (15) applications of MethQ in which a direct reading device was not used as required by the MethQ labeling.

Additionally, Complainant cited the following CAA requirements which Respondent violated: 40 C.F.R. § 82.13(z)(1), by failing to comply with recordkeeping requirements by not maintaining documents from the MethQ commodity owner, shipper, or agent, requesting the use of MethQ for quarantine and/or preshipment ("QPS") applications; and, 40 C.F.R. § 82.13(z)(2), by failing to comply with reporting requirements by purchasing MethQ from a distributor

without providing, prior to shipment, a certification that the MethQ purchased would be used only for QPS purposes.

The Complaint stated on Page 18 as follows:

> 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 the facts alleged in the Complaint and a waiver of the 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. § 22.17(c). 40 C.F.R. § 22.17(d).

On page 19, the Complaint further provided as follows:

> At an informal conference with representative(s) of the 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 specific facts or circumstances that Respondent wishes to raise.

Respondent did not file an Answer to the Complaint.

On March 23, 2017, the Complainant filed a *Motion for Default Judgement for Liability* ("Default Motion"), together with a *Memorandum in Support of Complainant's Motion for Default Judgment on Liability* ("Liability Memorandum") and attachments thereto, seeking a determination that Respondent was liable for the alleged violations, to which the Respondent again did not respond. On September 14, 2017, the Undersigned issued the Default Order, granting the Complainant's Default Motion by finding that Respondent was liable for the violations alleged in the Complaint and Default Motion.

The Region filed the Penalty Motion, together with a *Memorandum in Support of Complainant's Motion for Order of Default on Penalties* and attachments thereto ("Penalty Memorandum") on March 14, 2019. To date, the Respondent has not filed an Answer to the Complaint or otherwise responded to the Default Motion, the Penalty Motion, or any of the other motions or orders discussed in the Default Order and herein.

The Undersigned reiterates the Statutory and Regulatory Background, Findings of Fact, Service of Process and Failure to Answer Complaint, and Conclusions of Law sections from the Default Order to ensure that all relevant information is contained in this decision for ease of review.

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)(l) 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 is below a certain threshold 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. *See* discussion on page 39, below.

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, reiterates 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) ("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. ("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.

I. 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 Section 2(s) of FIFRA, 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)(l) of FIFRA, 7 U.S.C.§ 136(e)(l), 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 and 16, above:

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

II. "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 types: (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
F U M I G A N T
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, and 16, 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.

III. 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)(l), 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)(l)(B), 42 U.S.C. § 7413(d)(l)(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)(l)(B), 42 U.S.C. § 7413(d)(l)(B).

SERVICE OF PROCESS AND FAILURE TO ANSWER COMPLAINT

1. On March 1, 2016, EPA issued a civil administrative Complaint against Respondent pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a) and Section 113(d) of the CAA, 42 U.S.C. § 7413(d). *See Penalty Memorandum*, Exhibit 1.
2. 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 a 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 Liability Memorandum*, Exhibits 2 and 3.
3. 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 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 the Respondent requests a hearing. 40 C.F.R. § 22.15(b).

4. 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 Liability Memorandum*, Exhibit 2. The Respondent was served with the Complaint on March 7, 2016 at the P.O. Box address. The green card was signed and dated by the Respondent, Andújar. *See Liability Memorandum,* Exhibit 3.

5. 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 an extension of time to file an Answer or communicated with EPA's counsel about doing so. *See Penalty Memorandum*, Exhibit 2, *Declaration of Jeannie M. Yu* ("*Declaration*"), Paragraphs 8, 13 and 14.

6. 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 Liability Memorandum*, Exhibits 5 and 6.

7. In a March 1, 2016 CBS news story, Mr. Diaz told reporters that he would contest the Complaint. *See Liability Memorandum,* Exhibit 7.

8. 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 Penalty Memorandum*, Exhibit 2, *Declaration,* Paragraphs 13 and 14.

9. On April 28, 2016, EPA sent, by certified mail with return receipt requested 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; no Answer to the Complaint had been filed; the Answer to the Complaint was due on or about April 6, 2016; his client might be found in default upon motion; and, the legal ramifications 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 Liability Memorandum,* Exhibits 8 and 9.

10. 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 Liability Memorandum*, Exhibit 10; *Penalty Memorandum*, Exhibit 2, *Declaration*, Paragraph 8.

11. 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 continued to represent the Respondent. *See Penalty Memorandum,* Exhibit 2*, Declaration,* Paragraphs 13 and 14.

12. 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 Jeannie 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 Liability Memorandum,* Exhibit 11.
13. 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 Liability Memorandum,* Exhibits 12 and 13.
14. 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 Liability Memorandum,* Exhibit 14.

15. On March 23, 2017, Complainant filed a Default Motion together with a Liability Memorandum and exhibits thereto, against Respondent. *See Penalty Memorandum,* Exhibit 2, *EPA's Motion for Default Judgement for Liability.*

16. On June 23, 2017, the Complainant filed a *Notice of Correction of the Docket Numbers in the Motion for Default Judgment Documents Submitted In An Action Against Respondent*, replacing the number mistakenly referenced in that motion (Docket Number FIFRA-02-2016-5306) with the correct number (Docket Number FIFRA-02-2016-5302).

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

18. As aforementioned, a Default Order was issued on September 14, 2017, finding the Respondent liable for the violations alleged in the Complaint and the Default Motion. The Default Order directed the Complainant to file a motion for penalty no later than October 30, 2017. See *Penalty Memorandum*, Exhibit 4, *Order of Default on Liability*.

19. On September 28, 2017, the Complainant filed a *Motion for Extension of Time* requesting a six-month (180 days) extension due to the impact to businesses resulting from the widespread damage caused to the island of Puerto Rico by Hurricanes Maria and Irma.

20. An *Order Extending Complainant's Time to File Motion for Penalty* through April 30, 2018 was issued on October 5, 2017.

21. Complainant filed its second motion for extension of time on April 19, 2018, requesting an additional four-month (120 days) extension due to the continuing impact of the widespread destruction and damage caused by Hurricanes Irma and Maria. Complainant notes that inquiries by EPA led it to conclude that Respondent was not yet fully operational. Also, Complainant noted confusion as to whether Respondent was still represented by counsel.

22. An *Order Extending Complainant's Time to File Motion for Penalty* through August 28, 2018 was issued on April 23, 2018.

23. On August 9, 2018, the Complainant filed a *Motion for Extension of Time and Scheduling Order*, requesting an additional extension of five months (150 days) based on the fact that Respondent's prior counsel had resumed representation of Respondent and settlement negotiations between the parties were progressing. These negotiations were to include the production of financial documents by the Respondent.

24. The Undersigned issued an *Order Extending Complainant's Time to File Motion for Penalty and Agreeing to Issue Scheduling Order* on August 9th; said Order provided for an extension through January 28, 2019.

25. On September 5, 2018, a *Status Report* was filed by Complainant, stating that no financial records necessary for Complainant to evaluate the merits of Respondent's hardship claim were submitted by Respondent.

26. A *Scheduling Order* directing Respondent to file financial records to support a claim of hardship no later than September 28, 2018 was issued on September 12, 2018. The Order also directed the parties to file a joint status report no later than October 5, 2018. No financial records were filed by Respondent, and the parties did not file a joint status report as directed.

27. On October 25, 2018, Complaint filed a *Status Report* stating that Respondent had yet to produce financial records to support his financial hardship claims, settlement negotiations were suspended, and a motion for penalty would be filed.

28. On January 28, 2019, Complainant moved for a forty-five-day extension of time through March 14, 2019 due to the lengthy furlough of EPA which delayed Complainant's progress on completing the motion for penalty.

29. An *Order Extending Complainant's Time to File Motion for Penalty and Agreeing to Issue Scheduling Order* was issued on January 29, 2019, extending Complainant's time to file a penalty motion through March 14, 2019 and directing the parties to file a joint status report no later than March 4, 2019.

30. On February 28, 2019 the Complainant submitted a *Status Report*, summarizing Complainant's unsuccessful attempts to contact Respondent and committing to the filing of a penalty motion no later than March 14, 2019.

31. As stated above, Complainant filed the Penalty Motion, together with the Penalty Memorandum and attachments there, on March 14, 2019.

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

CONCLUSIONS OF LAW

The legal basis for concluding that Respondent is liable for the violations alleged in the Complaint and Default Motion are set forth in the *Conclusions of Law* of the Default Order, Pages 20 through 22, and reiterated in part herein, as follows:

1. Jurisdiction is conferred by Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a), and Section 113(d) of the CAA, as amended, 42 U.S.C. § 7413(d).

2. FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G) requires that restricted use pesticides such as methyl bromide be used in accordance with the labeling.

3. During the 15 MethQ applications set forth in the table on page 14 above, the Respondent committed 55 separate violations of FIFRA as follows:

   a. 10 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;

d. 15 applications without a direct detection device required by the Meth Q labeling.

4. As established by the Default Order, each of the Respondent's fifty-five (55) failures to comply with a specific requirement of the MethQ label, as described above, constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling in violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed against the Respondent pursuant to the FIFRA.

5. Pursuant to 40 C.F.R. § 82.13(z)(l), every applicator of methyl bromide produced or imported solely for QPS purposes must collect and 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.

6. As set forth in the *Findings of Fact* set forth above, Respondent failed to collect and maintain the documents described in the previous paragraph for the 15 applications set forth on page 17, above.

7. As established by the Default Order, Respondent's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82. l3(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).

8. 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.

9. Based on the *Findings of Fact* set forth above, Respondent failed, prior to shipping, to provide to M & P, the distributor from which Respondent purchased the MethQ, a certification that the MethQ purchased on the dates set forth on page 18, above, will be used only for QPS application.

10. As established by the Default Order, 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 maybe assessed under Section 113(d)(1)(B), 42 U.S.C. § 7413(d)(1)(B).

11. The proceeding was commenced in accordance with 40 C.F.R. §§ 22.13 and 22.14 of the Consolidated Rules.

12. The Complaint in this action was served upon Respondent in accordance with 40 C.F.R. § 22.5(b)(1).

13. 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).

14. Respondent's default constitutes an admission of the allegations and a waiver of the Respondents' right to a hearing on such factual allegations. 40 C.F.R. §§ 22.17(a) and 22.15(d).

15. Respondent's failure to file a timely Answer to the Complaint was grounds for the entry of a Default Order against the Respondents. 40 C.F.R. § 22.17. However, that Default Order did not constitute an initial decision in accordance with 40 C.F.R. § 22.17(c). Based upon a reading of the regulation along with pertinent portions of the preamble, there is an expectation that a motion for default judgment on liability and an order granting same contemplates a motion for penalty, which was filed by Complainant on March 14, 2019.

DETERMINATION OF PENALTY

The EPA's proposed civil penalty against Respondent is $49,100 for FIFRA violations and $105,560 for CAA violations. Based on the record in this matter, the Undersigned concludes that the penalty, broken down as stated herein, is consistent with the statutory factors for determining a civil penalty under FIFRA Section 14(a)(1), CAA Section 113(d)(1)(B) and the applicable EPA policies on civil penalties.[1]

The Consolidated Rules, at 40 C.F.R. § 22.17(c), provide that when the presiding officer finds that default has occurred, the relief proposed in the complaint shall be ordered unless the penalty requested is "clearly inconsistent" with the record of the proceeding or the Act. *See In the Matter of Pan American Growers Supply, Inc.*, 2010 EPA ALJ Lexis 26 (November 30, 2010). In the instant case, the Complaint stated, on page 12:

> 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 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.

As a result of Respondent's default, there was never the exchange of information that the Complainant had anticipated. However, based on the record, the Penalty Motion proposes specific penalties and provides a detailed explanation of the calculation of these penalties. In its Penalty Motion, Complainant proposed less than a statutory maximum for the violations enumerated herein, based on the reasoning set forth below.

Since Respondent is a commercial applicator, the proposed FIFRA civil penalty was determined in accordance with Sections 14(a)(1) and (4) of FIFRA, 7 U.S.C. §§ 136*l*(a)(1) and

[1] 40 C.F.R. § 22.27(b) directs that the Presiding Officer consider, in addition to any factors enumerated in the statute, any civil penalty guidelines issued under the statute.

(4) and EPA's *FIFRA Enforcement Response Policy* ("FIFRA ERP"), dated December 2009, and adjusted for inflation. *See Penalty Memorandum*, Exhibit 7. Section 14(a)(1) of FIFRA, 7 U.S.C. § 136*l*(a)(1), states that "[a]ny commercial applicator who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." Pursuant to the *Debt Collection Improvement Act of 1996* ("DCIA"), and regulations promulgated under the *Civil Monetary Penalty Inflation Adjustment Rule*, codified at 40 C.F.R. Part 19 (*See Penalty Memorandum,* Exhibit 12, Table 1, Section 19.4) for violations occurring between January 13, 2009 and November 2, 2015, the revised statutory maximum of $7,500 may be assessed for each offense. This revised statutory maximum remained the same throughout the time period of violations as cited in the Complaint.

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), states that "the Administrator [EPA] may issue an administrative order against any person assessing a civil administrative penalty up to $25,000, per day of violation." Pursuant to the DCIA, and regulations promulgated under the *Civil Monetary Penalty Inflation Adjustment Rule* for violations occurring between January 13, 2009 and November 2, 2015, the statutory maximum of $37,500 may be assessed per day of violation. This revised statutory maximum remained the same throughout the time period of violations cited in the Complaint.

Complainant set forth the proposed penalty calculations in the Penalty Calculation Worksheets, attached to the *Penalty Memorandum* as follows: Exhibit 5 for Counts 1 through 55 and Exhibit 6 for Counts 56 and 57 of the Complaint. The methodology for EPA's calculation of the penalty under both FIFRA and CAA in this proceeding was thoroughly reviewed and is summarized herein. In support of its proposed penalty, Complainant included the declarations of EPA personnel with first-hand knowledge of the calculation of the proposed penalties. *See*

Penalty Memorandum, Exhibit 9, *Declaration of Audrey Moore*, and Exhibit 10, *Declaration of Natalie Topinka*.

Calculation of the FIFRA Penalty

EPA determined the proposed FIFRA penalty in this case in light of the statutory factors set forth in Section 14(a)(4) of FIFRA, including the gravity of the violation, the appropriateness of the penalty to the size of the Respondent's business, and the effect of the penalty on the Respondent's ability to continue in business, as well as the FIFRA ERP. The FIFRA ERP (*Penalty Memorandum,* Exhibit 7) sets forth EPA's policy and procedures for considering these statutory factors and for calculating civil penalties to be assessed against persons who violate FIFRA. The FIFRA ERP is designed to provide fair and equitable treatment of the regulated community by ensuring that similar enforcement responses and comparable penalty assessments will be made for comparable violations in a manner consistent with the statutory factors.

a) *Gravity of the Violation*

A statutory factor in determining a penalty under Section 14(a)(4) of the FIFRA is the "gravity of the violation." Appendix A of the FIFRA ERP sets forth gravity levels for each type of violation of FIFRA. The levels represent an assessment of the relative gravity or seriousness of each violation, taking into consideration the actual or potential harm to human health and/or the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute.

In this case, the Respondent's violations involved the use (specifically, the application and storage) of a registered use pesticide in a manner inconsistent with its labeling, an unlawful act pursuant to Section 12(a)(2)(G) of FIFRA. Under the FIFRA ERP, the gravity level for pesticide misuse is Level 2 (code 2AA). The FIFRA ERP further correlates the initial gravity

assessment by the size of the violator's business. In the instant matter, EPA determined that, pursuant to the FIFRA ERP, Respondent was a Category III Business Size (lowest category, gross revenues under One Million Dollars ($1,000,000) per year; see further discussion under *Size of Business* below for details on how this factor was calculated). Accordingly, each Gravity Level 2 violation committed by a Category III size business warrants a base penalty of $4,250 per violation under the civil penalty matrix for FIFRA Section 14(a)(1) violators in the FIFRA ERP. *See Penalty Memorandum,* Exhibit 7, FIFRA ERP, Table 2, *Civil Penalty Matrix for FIFRA Section 14(a)(1)*, Page 19.

After determining this base matrix value, the FIFRA ERP requires consideration of five gravity adjustment criteria: (1) pesticide toxicity; (2) harm to human health; (3) harm to the environment; (4) the compliance history of the violator; and (5) the culpability of the violator. The values assigned to these gravity adjustment criteria are set out in Table 3, Page 29 and Appendix B, Page 34, of the FIFRA ERP, and they were applied to the facts of this case. EPA then added up the gravity criteria for a total gravity value. Total gravity adjustment criteria with values falling between 9 and 11 result in no adjustments to the base matrix value in Appendix B of the FIFRA ERP, while values below that range result in a downward adjustment and values above that range result in an upward adjustment.

In this case, as demonstrated below, EPA's calculation of gravity adjustment factors (pesticide toxicity, harm to human health and the environment, prior history of non-compliance and culpability) totaled a value of 15, which calls for a 40% increase to the matrix value. *See Penalty Memorandum,* Exhibit 7, FIFRA ERP, Table 3, Page 20. Therefore, the proposed base penalty of $4,250 for each of the 55 pesticide use violations alleged in the Complaint was adjusted upwards by 40%, to $5,950.

For the first gravity adjustment criterion, pesticide toxicity, there are three values that can be assigned, depending on the severity of the toxicity of the chemical. EPA assigned the maximum value of three to this criterion, because MethQ, the pesticide that Respondents misused, has a Category I (highest) toxicity, bears the signal word "Danger" on its label, acts as a neurotoxin, and is a restricted use pesticide associated with severe chronic health effects.

For the second and third gravity adjustment criteria, harm to human health and the environment, EPA assigned the highest possible value, five, to each, because the potential harm to human health and the environment from MethQ misuse is serious and widespread.[2] With regard to harm to human health, exposure to MethQ, which is 100% methyl bromide, can cause damage to the central nervous system and respiratory system, including seizures, kidney damage, nerve damage and death.[3] In addition to the potentially serious adverse human health effects it poses, methyl bromide causes serious and widespread environmental harm because it vaporizes and depletes the ozone layer. Consequently, methyl bromide production and use, except in very limited circumstances, had been banned internationally in 1987 pursuant to the *Montreal Protocol (Treaty) on Substances that Deplete the Ozone Layer*.

EPA assigned a value of zero to the fourth gravity adjustment criterion, compliance history, since the Respondent had no prior FIFRA violations within the past five years. As EPA correctly states in its Penalty Memorandum, pursuant to Appendix B of the ERP, the prior violation must have occurred within five years of the present violation to impact the compliance history criterion.

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[2] Under the FIFRA ERP, serious or widespread harm refers to actual or potential harm which does not meet the parameters of minor harm or negligible harm. *See* FIFRA ERP, Appendix B, footnote 1.

[3] In its Penalty Memorandum, EPA noted that, in March 2015, a family of four vacationing in St. John, U.S. Virgin Islands, became gravely ill and suffered severe and permanent neurological damage as the result of direct exposure to methyl bromide which was applied in contravention of the label requirements.

Finally, for the fifth factor, culpability, EPA assigned a value of two, based on the following considerations. First, the Respondent's business involves the application of fumigants in homes and businesses and, in Puerto Rico, requires licensure of the individual applicator and of the business. As a licensed member of the regulated community, Respondent knew or should have known of his obligations to comply with the labeling requirements for pesticides under FIFRA. Further, Respondent knew or should have known of the requirements explicitly articulated on the MethQ label, which states, "Commodity Fumigant," for "Quarantine/Regulatory Use Only," "Supervision by a Regulatory Agent Required," and lists the allowable application sites and the commodities to which MethQ may be applied. Respondent knew or should have known that the MethQ was not allowed to be used in dwellings (residences) or structures not used for the commercial storage or handling of commodities as application sites. Lack of actual knowledge by Respondent should not reduce culpability; doing so would be tantamount to encouraging ignorance of FIFRA and its requirements.

Based on the information summarized above, EPA calculated a total value for the five gravity adjustment criteria of 15 [3 (toxicity) + 5 (harm to human health) + 5 (harm to environment) +0 (compliance history) + 2 (culpability)] resulting in an adjusted base penalty of $5,950 per violation.

For pesticide commercial applicators, the ERP for FIFRA allows independently assessable charges for misuse to include each aspect of an application performed contrary to the label's requirements. *See Penalty Memorandum,* Exhibit 7, FIFRA ERP, Page 16. Accordingly, EPA staff determined that there were 55 independent violative acts in this case: 10 applications to a site not specified in the MethQ labeling; 15 applications that were not supervised by a regulatory agent as required by the MethQ labeling; 15 applications without the PPE requirement

by the MethQ labeling; and, 15 applications without a direct detection device required by the MethQ labeling.

Multiplying the adjusted base penalty of $5,950 for a Level 2 Violation (pesticide misuse) and Category III Size of business (gross revenues under $1,000,000 per year), by the number of violations (55) equals $327,250 in potential penalties against Respondent. However, in instances where there is evidence of multiple use violations involving the same pesticide, EPA may use a "graduated" penalty calculation, as specified in the FIFRA ERP. *See Penalty Memorandum,* Exhibit 7, FIFRA ERP, Section IV.B.1., Pages 25-26.

To calculate penalties using the graduated penalty method, the adjusted penalty amount is first determined, based on the five gravity adjustment factors discussed above. In this case, as stated above, the adjusted penalty is $5,950 for each use violation. Using Table 4, the *Graduated Penalty Table*, on Page 25 of the FIFRA EFP, EPA set forth the graduated penalty calculation for Category III Size of Business respondents as follows: the first five use violations are assessed at 100% of the adjusted base penalty; violations 6 through 20 are assessed at 10% of the adjusted base penalty; violations in excess of 20 are assessed at 5% of the adjusted base penalty. *(Penalty Memorandum,* Exhibit 5, *FIFRA Penalty Calculation Worksheet for Respondent Andujar).* In this case, the total proposed final penalty using the graduated penalty matrix comes to $49,100, rounded up to the nearest hundredth.

Based on the foregoing, the Undersigned agrees with EPA's conclusion that the $49,100 penalty reflects the gravity of the violation in accord with Section 14(a)(4) of FIFRA.

b) *Size of Business*

A second statutory factor discussed in EPA's penalty calculations is the "appropriateness of the penalty to the size of the Respondent's business." Under the FIFRA ERP, calculation of a

penalty based on the size of Respondent's business is determined from Respondent's gross revenues from all sources during the prior calendar year and is incorporated into the initial matrix value and gravity adjustments as described in the previous section.

The FIFRA ERP offers a table for evaluating size of business for violators, whom, like Respondent, are identified pursuant to FIFRA Section 14(a)(1) as commercial applicators. The table for Section 14(a)(1) applicators establishes three categories of such applicators, the third of which, Category III, is applicable to companies or individuals with gross revenues under $1,000,000.

Under the FIFRA ERP, "revenue includes all revenue from an entity and all of the entity's affiliates." EPA has made many attempts since the initial meeting held in 2015 to obtain Truly Nolen's financial information, but Respondent has ignored all such attempts. Respondent's attorney, during a brief telephone conversation in 2018, indicated that his client had an inability to pay a substantial penalty. However, to date, no evidence substantiating the Respondent's claims of inability to pay has been provided to EPA. Based on the brief conversation, EPA staff determined that the Respondent was unlikely to have gross revenues over One Million Dollars and therefore would fit within the Category III Size of business. The Respondent's category size was then used to establish the appropriate (lowest) matrix value and graduated adjustments to the gravity-based penalty as described in the previous section, above. The proposed FIFRA penalty of $49,100 for the Respondent thus takes appropriate account of the size of business statutory factor.

c) *Ability to Continue in Business*

EPA correctly considered a third statutory factor in determining a penalty under Section 14(a)(4) of FIFRA, namely the effect of the penalty on the Respondent's ability to continue in

business. Section 14(a)(4) of FIFRA does not impose a burden on the complainant to prove that the respondent is able to remain in business notwithstanding the penalty. *See In the Matter of: Kay Dee Veterinary Division*, 2 E.A.D. 646 (October 27, 1988). Rather, complainant must merely show that it considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors.

In order to establish a *prima facie* case that a penalty amount is appropriate in light of a respondent's ability to pay and the effect of the penalty on the ability to continue in business, EPA need not provide specific financial information on the matter; instead it is sufficient to provide general financial information, such as gross sales volume, "from which it can be inferred that the respondent's ability to pay should not affect the penalty amount." *In the Matter of William E. Comley, Inc.*, 2003 EPA ALJ Lexis 7, 11 (Jan. 31, 2003), aff'd at 11 E.A.D. 247 (citing *In re James C. Lin and Lin Cubing, Inc.*, 5 E.A.D. 595, 599 (EAB 1994), and *New Waterbury*, 5 E.A.D. 529, at 541-42 (October 20, 1994)). EPA may obtain general information regarding a respondent's ability to continue in business from the respondent, independent commercial financial reports, or other credible sources.

In the present matter, Andújar is a franchisee of the large national company Truly Nolen Pest control. However, to date, Respondent has not provided any financial information or documentation to EPA. Furthermore, EPA staff has been unable to obtain any publicly available information and/or annual filings on Truly Nolen.

Prior Agency decisions have noted that EPA's ability to gather financial information about a respondent is limited at the outset of a case, and a respondent is in the best position to provide relevant financial records about its own financial condition. *See Spitzer Great Lakes,* 9 E.A.D. 302, 321 (EAB 2000); *New Waterbury*, 5 E.A.D. at 541. Therefore, the complainant may

presume that the respondent has an ability to pay the penalty until respondent puts its ability to pay at issue. *New Waterbury*, 5 E.A.D. at 541; *Spitzer Great Lakes*, 9 E.A.D. at 321; *In re: CDT Landfill Corp.*, 11 E.A.D. 88, 122 (EAB 2003); *In re: Donald Cutler,* 11 E.A.D. 622, 632 (EAB 2004).

Moreover, where a respondent does not raise its ability to pay as an issue in its answer, or fails to produce any evidence to support an inability to pay claim after being apprised of that obligation during the pre-hearing process, EPA may properly argue and the presiding officer may conclude that any objection to the penalty based upon ability to pay has been waived under the Agency's procedural rules and thus this factor does not warrant a reduction of the proposed penalty. *New Waterbury*, 5 E.A.D. at 542.

In the instant case, Respondent has not filed an Answer to the Complaint. Respondent's counsel informally raised an inability to pay claim but has refused to provide financial documents of any kind even after a direct order by this court to so. *See Penalty Memorandum*, Exhibit 13, *This Court's Scheduling Order issued September 12, 2018*. Respondent's failure to answer meant the usual pre-hearing process did not occur. Accordingly, as the EAB in *New Waterbury* held, any objection to the penalty based on ability to pay by the Respondent has been waived in the present case.

EPA staff also considered the economic benefit of non-compliance, which measures the financial benefit gained from a violator's non-compliance but had insufficient information to incorporate it into the final proposed penalty. Economic benefit incorporates both "avoided costs," those costs completely averted by the violator's failure to comply with the applicable regulations, as well as "delayed cost," those costs that are deferred but eventually paid by the violator in order to achieve compliance. The economic benefit of noncompliance is calculated

using EPA's BEN computer model, which determines the net present value of the economic gain. As none of Respondent's uses of MethQ were a permissible use, any profits made by the Respondent using MethQ should be considered an economic benefit. However, information regarding profits can only be obtained from the respondent. Absent Respondent's cooperation and provision of financial information, Complainant has been unable to calculate the economic benefit and no additional amount was added to the gravity-based penalty to capture the economic benefit. Notwithstanding this lack of information, the Undersigned agrees with Complainant's conclusion that the proposed penalties are sufficiently high to capture Respondent's economic benefit and create a deterrent effect.

The Undersigned concludes that, in calculating the proposed penalty, EPA appropriately considered the seriousness or gravity of the violations, the size of Respondent's business, and the effect of the penalty on the Respondent's ability to continue in business in accordance with FIFRA.

Calculation of the CAA Penalty

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1) authorizes the EPA Administrator to issue a civil administrative penalty order against any person who has violated the Act or its implementing regulations. In this case, EPA seeks a penalty of $105,560 (rounded to the nearest hundredth) against Respondent for violations of 40 C.F.R. Part 82, Subpart A, *Production and Consumption Controls for Ozone Depleting Substances,* as explained further below. However, the Act restricts that authority to matters where the total penalty sought is below a certain threshold and the first date of violation occurred no more than twelve (12) months prior to the initiation of the administrative action. The Act allows for an exception to the penalty amount and time limitation where the Administrator and the Attorney General jointly determine that a matter

involving a larger penalty amount or longer period of violation is appropriate for administrative action. Section 113(d)(1). The original statutory limit on EPA's administrative penalty authority of $200,000 has been revised to $320,000 for violations that occur after December 6, 2013 and on or before November 2, 2015, pursuant to the DCIA, 31 U.S.C. § 3701. *See* 40 C.F.R. Part 19.

Pursuant to *EPA Delegation of Authority 7-6-A* and *EPA Region 2 Delegation of Authority 7-6-A,* the Director of ECAD is duly delegated the authority to issue CAA administrative civil penalty complaints and to seek from DOJ, in concurrence with EPA's Office of Enforcement and Compliance Assurance ("OECA"), waivers of the time and penalty limits established by CAA Section 113(d). In this case, the penalty sought against Respondent for CAA violations is $105,561, well under the above-mentioned penalty limit. However, the first date of violation occurred more than 12 months prior to the initiation of EPA's civil administrative action on March 1, 2016. Accordingly, a waiver from the U.S. Department of Justice ("DOJ") for the time limitation was sought in this case. On January 18, 2016, EPA Region 2's Director sent a Waiver Request to OECA, which was forwarded to DOJ, requesting a waiver of the time limit for the period between the first date of violation and the initiation of EPA's civil administrative action. On February 11, 2016, the DOJ Environmental Enforcement Section, on behalf of the Attorney General, consented to EPA Region 2's Waiver Request and determined that the proposed administrative action involving violations of reporting and recordkeeping requirements in connection with a Class VI controlled ozone depleting substance (namely, methyl bromide) was appropriate for administrative action. *(Penalty Memorandum,* Exhibit 11, *U.S. Department of Justice CAA Waiver Letter dated February 11, 2016*,).

As a result of the inspection of Respondent's and M & P's facilities, the collection of records and statements at those inspections, and M & P's response to EPA's IRL, as set forth in

the Default Order and herein, EPA determined that Respondent failed to collect and maintain, for three years, for every application, a document from the commodity owner, shipper or their agent setting forth said commodity owner, shipper or agent's request of the use of methyl bromide and citing the regulatory requirement that justifies its use for quarantine/regulatory use in accordance with the definitions in 40 C.F.R. Part 82, Subpart A, as required by 40 C.F.R. § 82.13(z)(1). In fact, no such document could legally be generated as none of the applications were conducted for a QPS purpose. Moreover, Respondent failed to provide the distributor from which it purchased the methyl bromide containing pesticides, M & P, with a certification that the quantity it purchased would only be used for quarantine fumigation, as further required by 40 C.F.R. § 82.13(z)(2).

In calculating the CAA penalties for these violations, Region 2 staff looked to Section 113(d)(1)(B), 42 U.S.C. § 7413(d)(1)(B) of the CAA and the *CAA Station Source Penalty Policy of 1991* ("CAA Penalty Policy") (*Penalty Memorandum,* Exhibit 8). The CAA Penalty Policy provides guidance to facilitate the consistent application of the civil penalty statutory factors.

Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1) sets forth the statutory penalty assessment criteria for determining the amount of any penalty to be assessed. These factors include economic benefit of non-compliance, seriousness of the violation, the duration of the violation, the size of the business, the economic impact of the penalty on the business, prior compliance history and good-faith efforts to comply.

a) *Seriousness of the Violations*

The CAA Penalty Policy provides for a method of calculating a penalty to reflect the "seriousness of the violation" in a gravity component. In measuring the seriousness of the violation, EPA considered the: i) importance to the regulatory scheme; ii) the length of time of

the violation: and, iii) the size of the violator/business.

i. Importance to the regulatory scheme. In this matter, Respondent's failure to create and maintain records or to submit reports to EPA as required by 40 C.F.R. Part 82 contravened the essence of the regulatory scheme. The purpose of the recordkeeping and reporting requirements is to ensure that methyl bromide is used only as intended in order to minimize risk of harm to human health and the environment. Respondent's failure to request and keep records from commodity owners and to provide a certification to the distributor, prior to the distributor's delivery of MethQ, that the MethQ would be used for quarantine and/or preshipment purposes only, increased the likelihood of methyl bromide misuse and its corresponding harm to human health and the environment. *See Penalty Memorandum,* Exhibit 10, *Declaration of Natalie Topinka*. In such circumstances, the Policy recommends a penalty of $15,000 for each failure to create or maintain a record or to submit a required report. Therefore, prior to adjustments, EPA elected to begin the calculation for each violation (reporting and recordkeeping) with a base penalty of $15,000 for each.

ii. Length of time of the violations. For Respondent's violation of 40 C.F.R. § 82.13(z)(1), which required it to maintain for three years 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, EPA calculated the length of time of the violation by looking at Respondent's records of pesticide applications. The violation period cited in the Complaint reflects the total days between the first date of a MethQ application through the last date of such an application. For Respondent, there were 532 days between the first date of application (September 13, 2013) and the last date (February 26, 2015). The CAA Penalty Policy suggests a length of time of violation gravity adjustment of $20,000 be added for violations

which persist over a period of 13 to 18 months, which EPA applied. *See Penalty Memorandum,* Exhibits 6 and 8.

For Respondent's violation of 40 C.F.R. § 82.13(z)(2), involving the failure to provide to a distributor a certification that the methyl bromide Tower purchased would be used only for a QPS application, EPA reviewed Respondent's purchase invoices. The violation period reflects the date of Respondent's first MethQ purchase through the date of the last such purchase. There were 471 days between the first date of purchase (May 27, 2013) and the last date (September 9, 2014). The CAA Penalty Policy suggests a length of time of violation gravity adjustment of $20,000 be added for violations which persist over a period of 1 to 18 months, which EPA applied. *See Penalty Memorandum,* Exhibits 6 and 8.

iii. Size of business. EPA has made many attempts since the initial meeting with Respondent was held in 2015 to obtain Truly Nolen's financial information. Respondent has ignored all such attempts. Based on a brief telephone conversation with Truly Nolen's attorney in 2018, EPA staff determined that the Respondent was unlikely to have gross revenues over $100,000. For the size of violator category penalty, the CAA Penalty Policy suggests a Size of Violator adjustment of $2,000 be added for an entity with a net worth under $100,000, which EPA applied. *See Penalty Memorandum,* Exhibit 8, page 14.

The preliminary total penalty calculated against Respondent under the CAA Penalty Policy thus comes to $72,000. However, the DCIA and 40 C.F.R Part 19, promulgated pursuant to the DCIA, direct EPA to adjust the statutory maximum penalties to account for inflation. Consistent with the Congressional direction to raise penalties to take into account the impact of inflation, EPA issued policy guidance stating that calculations under Agency penalty policies should also be increased to reflect inflation. *See Penalty Memorandum,* Exhibit 12, *Civil*

Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66643 (November 6, 2013).

EPA, in arriving at the final proposed penalty, used the inflation adjustment factor of 1.4163 for violations occurring before December 6, 2013, and an inflation factor of 1.4853 for those occurring after December 6, 2013, as set forth in EPA's *Chart Reflecting Inflation Adjustment Multiplier* in the EPA Memorandum *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)* (*Penalty Memorandum,* Exhibit 12)[4]. Based on the inflationary adjustments, the final proposed penalty that EPA seeks against Respondent for the CAA recordkeeping and reporting violations is $105,561. *See Penalty Memorandum*, Exhibit 6, *CAA Penalty Worksheet for Respondent Andujar*,

As discussed below, EPA staff also considered the additional four statutory factors mentioned in Section 113(e)(1) of the CAA; however, this analysis did not result in adjustment of the final proposed penalty. While EPA "bears the burden of proof on the appropriateness of the overall civil penalty," it does not bear a separate burden for each of the statutory penalty factors. *See Spitzer Great Lakes,* 9 E.A.D. at 320; *CDT Landfill Corp.,* 11 E.A.D. at 116-17. If EPA shows that it "considered each of the statutory factors and that the recommended penalty is supported by its analysis of those factors," the "burden then shifts to the Respondent to rebut EPA's *prima facie* case by showing that the proposed penalty is not appropriate either because EPA failed to consider a statutory factor or because the evidence shows that the recommended calculation is not supported." *Spitzer Great Lakes,* 9 E.A.D. at 320. Thus, consistent with *Spitzer*, if EPA shows that it considered and applied the statutory factors in its penalty calculation, the

[4] As previously indicated, the statutory maximum penalty under Section 113(d)(1) of the CAA did not increase between January 13, 2009 and November 2, 2015. This was because of the methodology required to be used to compute the statutory maximum. The penalty policy numbers were, however, increased after December 6, 2013 to reflect inflation.

respondent must rebut this conclusion with evidence that the penalty is inappropriate. In the present case, as detailed below, the Undersigned agrees that EPA has carefully considered each of the penalty assessment criteria in Section 113(e)(1) of the CAA, and it was Respondent's responsibility to rebut the penalty determination, which it has not done.

b) *Economic Impact of The Penalty*

With regard to the economic impact of the penalty on the business (*i.e*., ability to pay), CAA case law has held that EPA can establish a *prima facie* case by simply relying on general financial information regarding the respondent's financial status, which can support the inference that the penalty assessment need not be reduced. *See New Waterbury*, 5 E.A.D. at 542-43*, supra; accord In re Commercial Cartage Co.,* 7 E.A.D. 784, 807 (July 30, 1998) (applying the *New Waterbury* analysis regarding parties' burdens of proof on "ability to pay" in CAA determinations); *CDT Landfill Corp.*, 11 E.A.D. at 120 & n.60. In the present matter, based on the lack of verifiable financial information provided by Respondent*,* it is extremely difficult to evaluate the economic impact of the penalty on the business. There is no evidence to suggest that a reduction for this factor is appropriate.

Moreover, CAA case law suggests that an ability to pay is to be presumed in the absence of information otherwise. Any respondent may raise the issue of ability to pay and/or ability to continue in business as an affirmative defense in its answer. *See In the Matter of: The Barden Corporation,* 2002 EPA ALJ Lexis 46 (August 9, 2002). In *Barden*, a CAA case, the respondent did not raise as a defense inability to pay the proposed penalty, nor did it present any facts warranting a downward adjustment of the penalty. The ALJ stated that where the respondent does not raise any ability to pay defense, the penalty need not be adjusted based upon this statutory factor. *Id*. at *124. *In the Matter of: Asbestex, Environmental Group Company,* 2002

EPA ALJ Lexis 23 (April 24, 2002), also a CAA case, the respondent proffered no financial information to support its assertion of adverse economic impact and the ALJ stated that, even with the availability of a Dun & Bradstreet report showing sales figures, the presumption of ability to pay was not rebutted and the penalty was not adjusted. Similarly, in the present matter, Respondent has not formally raised any inability to pay defense, has not proffered any financial information to assert "adverse economic impact" and has not rebutted the presumption of ability to pay.

Furthermore, the EAB has stated that when EPA's ability to obtain financial information about a respondent is limited at the outset of a case, "a respondent's ability to pay may be presumed until it is put at issue by a respondent." *New Waterbury,* 5 E.A.D. at 541. As the party with control over the relevant records, the respondent must, upon request, provide evidence to show that it is not able to pay the proposed penalty. *Id.* at 542 (quoting *Spitzer Great Lakes,* 9 E.A.D. at 302). If the respondent fails to raise its inability to pay as an issue in its Answer or fails to produce any evidence to support its inability to pay claim, a presiding officer may conclude that a reduction of the proposed penalty is not warranted based upon ability to pay and any objection to the penalty based on this factor has been waived. *See New Waterbury*, 5 E.A.D. at 542.

In the present matter, as stated above, Respondent has not formally raised any inability to pay defense, has not proffered any financial information to assert "adverse economic impact" and has not rebutted the presumption of ability to pay. Thus, the Undersigned concludes that the proposed penalty does not warrant a reduction based upon ability to pay and any objection to the penalty based on this factor has been waived by the Respondent.

c) *Compliance History and Good-faith Efforts*

In its Penalty Memorandum, EPA also considered the violator's compliance history (an upward adjustment only) and good-faith efforts to comply. There is no evidence of a prior history of non-compliance by Respondent. Therefore, EPA proposed no upward adjustment to the proposed penalty based on the factor of compliance history.

Prior to the issuance of the Complaint, Respondent had not demonstrated any good-faith efforts to comply with the CAA and has not responded to the Complaint or participated in this proceeding in any way after the Complaint was issued. No adjustments to the proposed penalty were therefore made by EPA based on this factor. The Undersigned finds that no adjustment due to either compliance history or good faith effort to comply factors are warranted.

d) *Economic Benefit*

Finally, EPA attempted to assess whether Respondent realized an economic benefit from its non-compliance. As discussed in the FIFRA section above, economic benefit incorporates both avoided costs and delayed costs, and is calculated using EPA's BEN Computer Model, which determines the net present value of the economic gain. The CAA Penalty Policy provides the Region the discretion not to seek economic benefit where the benefit derived is less than $5,000. In this case, EPA determined that the economic benefit associated with Respondent's recordkeeping and reporting violations was *de minimis,* and EPA exercised its discretion not to seek additional penalties to recoup economic benefit. The Undersigned adopts EPA's finding in this Order.

For the foregoing reasons, this Court concludes that EPA's proposed CAA penalty of $105,560 was calculated appropriately and in accordance with the statutory factors identified in Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), and the Undersigned adopts the proposed

penalty for the CAA violations set forth herein.

DEFAULT ORDER

Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, including 40 C.F.R. § 22.17, Complainant's 2018 Penalty Motion is GRANTED, an *Initial Decision and Default Order* is hereby ISSUED, and Respondent is ordered to comply with all the terms of this Order:

1. Respondent is assessed and ordered to pay a civil penalty in the total amount of One Hundred Fifty Four Thousand Six Hundred Sixty Dollars ($154,660.00) broken down as follows: Forty Nine Thousand and One Hundred Dollars ($49,100.00) for FIFRA violations and One Hundred and Five Thousand, Five Hundred and Sixty Dollars ($105,560.00) for CAA violations.

2. Respondent shall pay the civil penalty to the "Treasurer of the United States of America" within thirty (30) days after this *Initial Decision and Default Order* has become a final order pursuant to 40 C.F.R. § 22.27(c). Respondent shall clearly identify, regardless of the form of payment, the name and docket number of the case, set forth in the caption on the first page of this document. The payment methods are described below:

a. If Respondent chooses to pay by cashiers' or certified check, the check shall be mailed to:

BY U.S. POSTAL SERVICE	BY OVERNIGHT MAIL
United States Environmental Protection Agency Fines and Penalties Cincinnati Finance Center P. O. Box 979077 St. Louis, MO 63197-9000	U.S. Bank 1005 Convention Plaza Mail Station SL-MO-C2GL ATTN Box 979077 St. Louis, MO 63101 Contact: Natalie Pearson Tel.: (314) 418-4087

b. If Respondent chooses to pay electronically, the transfer shall be made to:

i. BY WIRE TRANSFER

Federal Reserve Bank of New York
ABA = 021030004
Account = 68010727
SWIFT address = FRNYUS33
33 Liberty Street
New York, NY 10045

Field Tag 4200 of the Fedwire message should read "D 68010727 Environmental Protection Agency" or

ii. BY AUTOMATED CLEARINGHOUSE (ACH) (also known as REX or remittance express)

ACH for receiving US currency
PNC Bank
808 17th Street, NW
Washington, DC 20074
ABA = 051036706
Transaction Code 22 - checking
Environmental Protection Agency
Account 310006—CTX Format
Contact: Jesse White
Tel.: (301) 887-6548

c. Online Payment Option is available through the Department of Treasury. This payment option can be accessed through WWW.PAY.GOV. Enter sfo 1.1 in the search field. Open form and complete required fields.

3. Respondent shall send copies of this payment, by regular mail or email, to each of the following:

Regional Hearing Clerk
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, New York 10007
Maples.karen@epa.gov

And

Jeannie Yu, Esq.
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007
Yu.jeannie@epa.gov.

4. The payment must be received at the above address on or before thirty (30) calendar days after this *Initial Decision and Default Order* has become final.

5. 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.

6. Pursuant to the *Debt Collection Act*, 31 U.S.C. § 3717, EPA is entitled to assess interest and penalties on debts owed to the United States and a charge to cover the cost of processing and handling a delinquent claim.

7. This *Default Order* constitutes an *Initial Decision,* as provided in 40 C.F.R. §§ 22.17(c) and 22.27(a). This *Initial Decision* shall become a *Final Order* forty-five (45) days after it is served upon the Complainant and Respondent and without further proceedings unless: (1) a party moves to reopen a hearing; (2) a party appeals this *Initial Decision* to the EPA Environmental Appeals Board within thirty (30) days of service of the *Initial Decision*, in accordance with 40 C.F.R.§ 22.30; (3) a party moves to set aside the *Default Order* that constitutes this *Initial Decision,* or; (4) the Environmental Appeals Board elects to review the *Initial Decision* on its own initiative. *See* 40 C.F.R. § 22.27(c).

8. Under 40 C.F.R. § 22.30, any party may appeal this Order by filing an original and one copy of a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board within thirty (30) days after this *Initial Decision* is served upon the parties.

IT IS SO ORDERED.

Dated: June 3, 2021

HELEN FERRARA
Digitally signed by HELEN FERRARA
Date: 2021.06.03 09:41:42 -04'00'

Helen S. Ferrara
Regional Judicial Officer/Presiding Officer
U.S. EPA Region 2