UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	:	
	:	
	:	
Edwin Andújar Bermúdez dba	:	Honorable Helen Ferrara
Truly Nolen Pest Control de Caguas	:	Presiding Officer
	:	
	:	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.	:	

MOTION FOR ORDER OF DEFAULT ON PENALTIES

Complainant hereby moves the Presiding Officer, pursuant to 40 C.F.R. §§ 22.16(a) and 22.17(b), for an order of default assessing penalties against the Respondent for the violations alleged in the Complaint. Specifically, Complainant seeks a penalty against the Respondent in the following amounts:

$49,100 for the violations of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), alleged in Counts 1-55 of the Complaint, and

$105,560 for the violations of the Clean Air Act and its implementing regulations at 40 C.F.R. Part 82 alleged in Counts 56 and 57.

In brief, the Respondent Edwin Andújar Bermúdez (hereinafter referred to as "Respondent or Andújar") doing business as Truly Nolen Pest Control de Caguas, conducts a commercial pesticide control business from an establishment located in Caguas, Puerto Rico. On March 5 and 7, 2016,

Complainant caused to be served, by certified mail, return-receipt requested, upon the Respondent's physical and business mailing address a copy of the Complaint, alleging violations of FIFRA and of the CAA. Enclosed with the Complaints were copies of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination of Suspension of Permits ("Consolidated Rules"), found at 40 C.F.R. Part 22. To date, the Respondent has not filed an Answer.

On March 23, 2017, pursuant to 40 C.F.R. § 22.16 and in the manner provided by 40 C.F.R. § 22.5(b)(2), Complainant filed a Motion for Default Judgment for Liability seeking an Order finding the Respondent liable for the violations alleged in the Complaint. Complainant sent the Motion for Default Judgment for Liability, along with all supporting documentation, by certified mail, return-receipt requested, to the Respondent's physical and business mailing address. One green card was personally signed by Andújar on April 1, 2017 and the other green card was signed by Ana R. Figueroa on April 1, 2017. Both signed green cards were returned to EPA. The Respondent never replied to the Complainant's Motion for Default for Liability. An Order for Default on Liability ("Order") was then issued by this Court on September 14, 2017 with the following findings:

- that the Complaint was properly served on the Respondents;
- that the Respondent failed to answer the Complaint within 30 days;
- that the Respondent is liable for fifty-five (55) violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), use of a pesticide in a manner inconsistent with its labeling, as set out in Counts 1 through 55 of the Complaint; and
- that the Respondent is liable for two violations of the Clean Air Act and its implementing regulations at 40 C.F.R. Part 82, namely the failure to report and to keep records of required information regarding the purchase and use of methyl bromide, as set out in Counts 56 and 57 in the Complaint.

The Order further stated that "there is an expectation that a Motion for Default Judgment on Liability and Order granting same contemplates a second Motion for Penalty." Accordingly, Complainant respectfully submits the Motion for an Order of Default On Penalty, including a Memorandum in Support of Complainant's Motion and Exhibits thereto; Declarations of Audrey Moore, Pesticide Team Leader, Pesticides and Toxic Substances Branch, EPA, Region 2, and Natalie Topinka, an Environmental Scientist in the Air Enforcement and Compliance Assurance Branch, EPA Region 5; and a proposed Order of Default on Penalties.

Any response by the Respondent to Complainant's present motion must be filed within fifteen (15) days after service of such motion, in accordance with 40 CFR § 22.16(b) (Response to Motions). A failure to respond by any party within the designated period constitutes a waiver of any objection to the motion.

Date March 14, 2019
New York, NY

Respectfully submitted,

Jeannie M. Yu
Assistant Regional Counsel
Waste & Toxic Substances Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866
(212) 637-3205 (phone)

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion for Order of Default on Penalties, dated March 14, 2019, along with the following supporting papers (Memorandum in Support, Exhibits including two Declarations, and Proposed Order), were sent this day in the following manner to the addresses listed below:

Original and Copy Hand-Carried to the Regional Hearing Clerk

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

Copy Hand-Carried to the EPA Region 2 Regional Judicial Officer

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

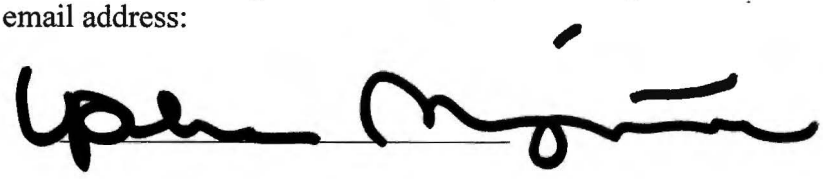
Copy by Certified Mail/Return Receipt Requested and Regular Mail to:

Peter Diaz Santiago, Esq.
PMB No. 301, P.O. Box 194000
220 Manuel Domenech
San Juan, Puerto Rico 00919

Peter Diaz Santiago, Esq
PMB No. 301, P.O. Box 194000
San Juan, Puerto Rico 00919-4000
Oficinapeterdiaz@gmail.com
pdiazfederalcases@gmail.com

In addition, I certify that a PDF version of the foregoing Complainant's Motion for Default Judgment for Penalty, along with Memorandum in Support, Exhibits including two Declarations, and a Proposed Order, were electronically sent to the following email address:
Ferrara.helen@epa.gov

Dated: March 14, 2019
New York, New York



Yolanda Majette
Office of Regional Counsel
Waste & Toxic Substances Branch Secretary

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
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MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR ORDER OF DEFAULT ON PENALTIES

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COMPLAINANT'S (EPA'S) LIST OF EXHIBITS

Exhibit 1: EPA's Complaint against the Respondent filed with EPA Regional Hearing Clerk on March 1, 2016 and mailed to the Respondent's addresses.

Exhibit 2: EPA's Motion for Default Judgment for Liability, Memorandum in Support of Complainant's Motion for Default Judgment for Liability (without attachments), Declaration of Jeannie M. Yu in Support of Complainant's Motion for Default Judgment for Liability

Exhibit 3: Green Cards evidencing receipt by Respondent Andújar of Complainant's Motion for Default Judgment On Liability on March 27, 2017 and April 1, 2017

Exhibit 4: Order of Default On Liability issued September 14, 2017

Exhibit 5: FIFRA Penalty Worksheet for Respondent Andújar

Exhibit 6: CAA Penalty Worksheet for Respondent Andújar

Exhibit 7: FIFRA Enforcement Response Policy December 2009

Exhibit 8: CAA Stationary Source Penalty Policy October 1991

Exhibit 9: Declaration of Audrey Moore

Exhibit 10: Declaration of Natalie Topinka

Exhibit 11: U.S. Department of Justice CAA Waiver Letter, dated February 11, 2016

Exhibit 12: Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66643 (November 6, 2013) and EPA Memorandum dated December 6, 2013, on Amendments to EPA Civil Penalty Policies to Account for Inflation

Exhibit 13: This Court's scheduling Order issued September 12, 2018

Complainant, by and through the United States Environmental Protection Agency ("EPA" or "Complainant"), Region 2, Office of Regional Counsel, submits this Memorandum in support of its Motion, brought pursuant to 40 C.F.R. §§ 22.16 and 22.17, for an Order of Default on Penalties against the Respondent Edwin Andújar Bermúdez (hereinafter referred to as "Respondent or Andújar") doing business as Truly Nolen Pest Control de Caguas 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 the Clean Air Act ("CAA") requirements set forth at 40 C.F.R. §§ 82.13(z)(1) & (2) committed at various locations in Puerto Rico.

I. AUTHORITY FOR GRANTING THE EPA MOTION FOR ORDER OF DEFAULT ON PENALTIES

Pursuant to 40 C.F.R. § 22.17(a), if a respondent fails to file an Answer(s), in accordance with the 30-day period set forth in 40 C.F.R. § 22.15(a), to the Complaint, the respondent may be found in default upon motion. "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). Forty C.F.R. § 22.17(b) further dictates that "A motion for default may seek resolution of all or part of the proceeding. Where the motion requests the assessment of a penalty. . . against a defaulting party, the movant must specify the penalty. . . and state the legal and factual grounds for the relief requested." Finally, pursuant to 40 C.F.R. § 22.17(c):

> When the Presiding Officer finds that default has occurred, he/she shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision under these Consolidated Rules of Practice. The relief proposed in the complaint or the

motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

In the present case, this Court issued an Order of Default on Liability ("Order") on September 14, 2017. See Exhibit 4, and Background, below. Accordingly, EPA now seeks an Order for Default on Penalty against the Respondent broken down as follows (and as further described in the respective penalty calculation worksheets (Exhibits 5 & 6), and in Sections III. A.1. and 2., below):

1) $49,100 against Andújar for the FIFRA violations alleged in counts 1 to 55. See Exhibit 5 (FIFRA Penalty Calculation Worksheet); and

2) $105,560 against Andújar for the CAA violations alleged in counts 56 and 57. See Exhibit 6 (CAA Penalty Calculation Worksheet).

This motion is based on, and supported by, the following: a.) the Complaint (Exhibit 1, supra); b) Motion for an Order of Default On Penalty, including a Memorandum in Support of Complainant's Motion and Exhibits thereto b) the attached Declarations of Audrey Moore (Exhibit 9) and Natalie Topinka (Exhibit 10) c) Penalty Computation Worksheets for FIFRA violations for Counts 1-55, attached hereto as Exhibit 5; c) Penalty Computation Worksheet for CAA for Counts 56 and 57, attached hereto as Exhibit 6. Together, these documents establish a sound justification for imposing the penalty sought in the Motion for the violations in the Complaint.

II. FACTUAL BACKGROUND

Respondent' business activities include pest control services, specifically the use of restricted use pesticides ("RUPs") for compensation. RUPs applied by Respondent in 2013, 2014, and 2015, included Meth-O-Gas Q, EPA Reg. No. 5785-41 ("Meth-Q"), which contains

100% methyl bromide as its active ingredient. Under FIFRA, the Respondent is a commercial applicator of pesticides. Andújar is a certified applicator of pesticides and he personally applied MethQ in manner inconsistent with its labeling.

On April 15 and May 14, 2015, duly authorized inspectors from EPA and the Puerto Rico Department of Agriculture (PRDA) conducted inspections of the Truly Nolen Pest Control de Caguas facility located at Urb. Miraflores, Block 16-15, Calle 29, Bayamon, Puerto Rico ("TN Inspections"), and collected records and statements regarding Respondent's applications and purchases of MethQ for the period from September 2013 through the dates of the inspections. In addition, on various dates in 2015, duly authorized inspectors from EPA and PRDA conducted inspections of M & P Pest Control, Inc. ("M & P"), located at 1332 Ave. Jesus T. Pinero, San Juan, Puerto Rico ("M & P Inspections'). Truly Nolen had purchased MethQ from M & P. During the M & P inspections, EPA collected records and statements concerning Andújar's purchases of MethQ during the period September 13, 2013 through February 26, 2015. In addition, M & P provided a response, dated July 17, 2015, to EPA's May 26, 2015 Information Request Letter ("IRL") concerning its sales and distributions of MethQ and lack of compliance with the applicable CAA reporting and recordkeeping requirements.

Based on the TN Inspections and M & P inspections, the M & P response to EPA's IRL, and as further explained below, EPA determined that Respondent did not comply with FIFRA in that it used MethQ in a manner inconsistent with its labeling and did not comply with the CAA reporting and recordkeeping requirements for methyl bromide, an ozone depleting substance.

On March 1, 2016, the Complainant commenced a civil administrative enforcement action against Andújar with the issuance of an administrative Complaint 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), and the EPA Consolidated Rules of Practice Governing the Administrative Assessment and Revocation or Suspension of Permits ("Consolidated Rules" or "CROP"), 40 C.F.R. Part 22. See Exhibit 1 (Complaint).

The Complaint alleged 55 violations of FIFRA requirements. Pursuant to Section 3 of FIFRA, 7 U.S.C. § 136a, the EPA-registered label for MethQ sets forth specific instructions regarding use of the pesticide, including how and where the product is to be applied. See Exhibit 1 (Paragraph 54). Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling. In the course of fifteen applications of MethQ, Andújar committed 55 separate violations of FIFRA § 12(a)(2)(G), specifically consisting of: a) 10 applications to a site not specified in the MethQ labeling. See Exhibit 1 (Paragraphs 58, 60-62 & 67); b) 15 applications not supervised by a regulatory agent as required by the MethQ labeling. See Exhibit 1 (Paragraphs 58, 63 & 67); c) 15 application applications without the personal protective equipment required by the MethQ Labeling. See Exhibit 1 (Paragraphs 58, 64 & 67); and d) 15 applications without a direct detection device required by the MethQ Labeling. See Exhibit 1 (Paragraphs 58, 65 and 67). Each instance of the Respondent's failure 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 Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed against the Respondent. See Exhibit 4 (Order of Default on Liability, Conclusions of Law (Paragraphs 2 & 3).

Additionally, the Complaint cited the following CAA requirements which had been violated by Andújar:

1) Forty C.F.R. § 82.13(z)(1). Every applicator 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 justifys its use.

2) Forty C.F.R. § 82.13(z)(2). Every applicator that purchases methyl bromide that was produced or imported solely for quarantine and/or preshipment ("QPS") applications shall provide to the distributors from whom it purchased, prior to shipment, a certification that the methyl bromide will be used only for QPS applications.

Andújar failed to collect and maintain the required QPS document for 15 applications. See Exhibit 1 (Paragraphs 70-75). Andújar'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). See Exhibit 4, Conclusions of Law (Paragraph 4 & 5).

Andújar also purchased the methyl bromide from a distributor without providing, prior to shipment, a certification that the methyl bromide purchased would be used only for QPS applications. See Exhibit 1 (Paragraphs 77-81). Andújar's failure to comply with the reporting requirements of 40 C.F.R. § 82.13(z)(2) for the period May 27, 2013 to 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). See Exhibit 4, Conclusions of Law (Paragraph 7).

The Complaint proposed the statutory maximum penalty under FIFRA and CAA for the violations identified in counts 1 through 57 in the Complaint. See Exhibit 1 (Page 12). However, the Motion for Order of Default on Penalties and this Memorandum seek a lower penalty in

accordance with applicable EPA Enforcement Response policies discussed in Section III. A. 1 and 2, below.

The Complaint stated that, pursuant to the CROP, failure to timely file an answer could constitute a binding admission of all allegations in the complaint and could result in the issuance of a default order requiring payment of a civil penalty without further proceedings 30 days after the default order becomes final under 40 CFR § 22.27(c). See Exhibit 1 (Paragraph C. on Page 18). Forty C.F.R. § 22.15(d) states that failure to admit, deny or explain any material allegation of fact in a complaint is deemed to be an admission of the allegation. To date, the Respondent has failed to file an Answer to the Complaint.

On March 23, 2017, pursuant to 40 C.F.R. §22.16 and in the manner provided by 40 C.F.R. §22.5(b)(2), Complainant filed a Motion for Default Judgment for Liability, with accompanying papers in support (including a Memorandum, Exhibits thereto, and a Declaration prepared by Jeannie M. Yu, Assistant Regional Counsel for Complainant ("Yu Declaration")), seeking an Order finding Respondent liable for the violations alleged in the Complaint. See Exhibit 2 (Complainant's Motion for Default Judgment on Liability and Supporting Documents). Pursuant to 40 C.F.R. §22.5(b)(2), service of filed documents other than the complaint must be made via one of several methods, such as first-class mail (including certified mail, return receipt requested), overnight mail, priority mail or any reliable commercial delivery service. In the present case, on March 23, 2017, the Complainant sent the Motion for Default Judgment for Liability, along with all supporting documentation, by certified mail, return receipt requested, to Andújar's physical and business mailing addresses. One green card was personally signed by Andújar on April 1, 2017 and the other green card was signed by Ana R. Figueroa on April 1, 2017. See Exhibit 3 (Green Cards evidencing receipt by Respondent of Motion for Default

Judgment for Liability). Respondent never replied to the Complainant's Motion for Default Judgment on Liability. Subsequently, an Order for Default on Liability ("Order") was issued by this Court on September 14, 2017. See Exhibit 4. In the Order, this Court found that the Complaint was properly served on the Respondent and that the Respondent failed to answer the Complaint within 30 days. This Court further found that 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), for which a penalty may be assessed against the Respondent pursuant to FIFRA. See Exhibit 4 (Paragraphs 2 & 3, Conclusions of Law section). Specifically, this Court found Andújar liable for fifty-five (55) violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), use of a pesticide in a manner inconsistent with its labeling, as set out in Counts 1 through 55 of the Complaint, for the time period from September 13, 2013 through February 26, 2015. The Order also found Andújar liable for two violations of the Clean Air Act and its implementing regulations at 40 C.F.R. Part 82, namely the failure to report and to keep records of required information regarding the purchase and use of methyl bromide, as set out in Counts 56 and 57 of the Complaint. The time period for Count 56 is from September 13, 2013 through February 26, 2015 and the time period for Count 57 is from May 27, 2013 to September 9, 2014. See Exhibit 4, Conclusions of Law (Paragraphs 4-7).

The Order explicitly states that an order that does not determine remedy along with liability is not an initial decision, unless it resolves "all issues and claims in the proceeding." See Exhibit 4 (Paragraph 13 of Conclusions of Law). The Order further notes that "there is an expectation that a Motion for Default Judgment on Liability and Order granting same

contemplates a second Motion for Penalty." Id.[1] Accordingly, EPA now seeks an Order of Default which assesses civil penalties against Respondent as further explained in Section III.A.1. & 2, below.

III. COMPLAINANT IS ENTITLED TO PENALTIES FOR THE VIOLATIONS ASSESSED IN THE COMPLAINT

A. The Proposed FIFRA and CAA Penalties are Appropriate Under the Statutes and the Applicable EPA Enforcement Response Policies

The CROP, at 40 C.F.R. § 22.17(c), provides that when the Administrative Law Judge 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).

Since Andújar is a commercial applicator, the FIFRA civil penalties were determined in accordance with Sections 14(a)(1) and (4) of FIFRA, 7 U.S.C. §§ 136*l*(a)(1) and (4) and EPA's FIFRA Enforcement Response Policy ("ERP"), dated December 2009 (as adjusted for

[1] Accordingly, your Honor set an initial deadline on or before October 30, 2017 for Complainant to file and serve a Motion for Penalty, together with supporting documentation which will provide factual grounds for the proposed penalty, in accordance with 40 C.F.R. §§ 22.5 and 22.16. Id. at page 16. On September 28, 2017, Complainant's counsel filed a request for an extension of time to file a Motion for Penalty. By Order dated October 5, 2017, your Honor granted the motion and extended the deadline to file a Motion for Penalty until April 30, 2018. On April 19, 2018, Complainant's counsel filed a second request for extension of time to file a Motion for Penalty. By Order dated April 23, 2018, your Honor granted that motion and extended the deadline to file a Motion for Penalty until August 28, 2018. On August 9, 2018, Complainant's counsel filed a third request for extension of time to file a Motion for Penalty and requested a Scheduling Order. By Order dated August 9, 2018, your Honor granted that motion and extended the deadline to file a Motion for Penalty through January 28, 2019. By Order dated September 12, 2018, your Honor issued a Scheduling Order directing the Respondent to file financial records in this matter. On January 28, 2019, Complainant's counsel filed a fourth request for extension of time to file a Motion for Penalty. By Order dated January 29, 2019, your Honor granted that motion and extended the deadline to file a Motion for Penalty through March 14, 2019.

inflation).[2] See Exhibit 7 ("FIFRA ERP" or "ERP"). The CAA penalties were determined in accordance with Section 113(d) of the CAA and EPA's 1991 CAA Stationary Source Civil Penalty Policy ("CAA Penalty Policy").[3] See Exhibit 8 ("CAA Penalty Policy"). The proposed penalty calculations are set forth in the Penalty Calculation Worksheets. See Exhibit 5 for Counts 1 through 55 and Exhibit 6 for Counts 56 and 57 of the Complaint. An explanation of the methodology for EPA's Calculation of the Penalty under both the FIFRA and CAA statutes in this proceeding is explained below. Also, a detailed explanation of the penalty calculations, and a description of the different types of violations and/or the serious harm to human health and the environment posed by the FIFRA and CAA violations can be found in the respective Declarations of Audrey Moore and Natalie Topinka, which are attached to this Memorandum in Support of Complainant's Motion for Order of Default On Penalties. See Exhibit 9 (Declaration of Audrey Moore) and Exhibit 10 (Declaration of Natalie Topinka).

1. The FIFRA Penalty Calculation is Appropriate Under FIFRA and the FIFRA ERP

Under FIFRA Section 14(a)(1), a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty up to $5,000 for each violation of FIFRA. EPA

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[2] 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, and regulations promulgated under the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19, (See 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 cited in the Complaint.

[3] Section 113(d)(1) of 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 Debt Collection Improvement Act of 1996, and regulations promulgated under the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19, 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.

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 reflected in the FIFRA ERP, which 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. See Exhibit 5[4] (FIFRA ERP). The FIFRA ERP is designed by EPA to provide a 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 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 which considers 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 (*e.g.*, application) of a registered 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 the Respondent is a

[4] www.epa.gov/enforcement/waste/documents/policies/fifra-erp1209.pdf

Category III Business Size (lowest category, gross revenues under $1 million per year under the FIFRA ERP; see further discussion under b) *Size of Business* below). Each Gravity Level 2 violation committed by a Category 3 Size Business warrants a base penalty of $4,250 per violation under the civil penalty matrix for FIFRA § 14(a)(1) violators in the FIFRA ERP. See Exhibit 5 (Table 2 Civil Penalty Matrix for FIFRA Section 14(a)(1) violators, 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. See Exhibit 5 (Appendix B, page 34). The values assigned to these gravity adjustment criteria are set out in Table 3 and Appendix B of the FIFRA ERP (Exhibit 5, Table 3, page 20 and Appendix B, page 34), and they were applied to the facts of this case. The gravity criteria are then added up for a total gravity value. Total gravity values may then result in the assessment of the matrix value or in the upward or downward adjustment of the matrix value.

Total gravity adjustment criteria with values falling between 9 and 11 result in the assessment of the matrix value ($4,250) 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 Exhibit 5 (Table 3, Page 20). In other words, the base penalty of $4,250 for each of the ninety (90) pesticide use violations alleged in the Complaint was adjusted upwards to $5,950.

For the first gravity adjustment criterion, pesticide toxicity, there are three values that can be assigned (either 1, 2 or 3), depending on the severity of the toxicity of the chemical. EPA

assigned the maximum value of 3 to this criterion, because MethQ, the fumigant Respondent misused, has a category 1 (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 values (5) to each, because the potential harm to human health and the environment from MethQ misuse is serious and widespread.[5] 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. 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 MethQ which was applied in contravention of the label requirements. In addition to the potential adverse serious human health effects it poses, methyl bromide causes serious and widespread environmental harm because it vaporizes and depletes the ozone layer. Consequently, MethQ production and use was banned internationally in 1987 pursuant to the Montreal Protocol (Treaty) on Substances that Deplete the Ozone Layer, except for very limited circumstances.

For the fourth gravity adjustment criterion, compliance history, a value of 0 was assigned, since the Respondent had no prior FIFRA violations within the past five (5) years. To be considered a compliance history for purposes of Appendix B of the ERP, the prior violation must have occurred within five years of the present violation. Finally, for the fifth factor, culpability, EPA assigned a value of 2, because the violations resulted from Respondent' negligence. Respondent' business involves the application of fumigants in homes and businesses and, in

[5] 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 Exhibit 5 (Appendix B, footnote 1).

Puerto Rico, requires licensure of the individual applicator and of the business. As a licensed member of the regulated community, the 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. The Respondent knew or should have known that MethQ was not allowed to be used in dwellings (e.g., residences) or structures not used for the commercial storage or handling of commodities. Lack of knowledge by the Respondent should not reduce culpability; doing so would be tantamount to encouraging ignorance of FIFRA and its requirements.

The total value for the five gravity adjustment criteria thus totals to 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 Exhibit 5 (Page 16). Accordingly, EPA staff determined that there were fifty-five (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 required 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 million per year), by the

number of violations (55) equals $327,250. 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 Exhibit 5, 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 mentioned above, the adjusted penalty is $5,950 for each use violation. Using the Table 4 (Graduated Penalty Table) in Exhibit 5 (page 25), the graduated penalty calculation for Category III Size of Business Respondent would proceed as follows: The first five use violations are assessed at 100% of the adjusted base penalty; violations 6 – 20 are assessed at 10% of the adjusted base penalty; violations in excess of 20 are assessed at 5% of the adjusted base penalty. See Exhibit 5 (FIFRA Penalty Calculation Worksheet for Andújar, supra. In this case, the total proposed final penalty[6] for the Respondent, using the graduated penalty matrix, comes to $49,100 (rounded up to the nearest hundredth). The $49,100 amount for the Respondent reflects the gravity of the violation in accord with Section 14(a)(4) of FIFRA.

Based on the foregoing, the proposed penalty appropriately considers the gravity of the violations.

b) *Size of business*

[6] 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' uses of MethQ were a permissible use, then 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, Complainant believes that the proposed penalties are sufficiently high to capture Respondent's economic benefit and create a deterrent effect.

A second statutory factor in determining a penalty under Section 14(a)(4) of FIFRA 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 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 two tables for evaluating size of business, one for violators identified in FIFRA §14(a)(1) and another for those identified in FIFRA §14(a)(2)(private applicators or other persons not included in Section 14(a)(1)). Andújar is a commercial applicator covered by Section 14(a)(1). See Exhibit 1. The table for Section 14(a)(1) applicators establishes three categories of such violators: Category I is the highest category for companies or individuals with gross revenue over Ten Million Dollars ($10,000,000); Category II is the second highest category for companies or individuals with gross revenues between One and Ten Million Dollars ($1,000,000 - $10,000,000); and Category III is the lowest size of business category, for companies or individuals with gross revenues under One Million Dollars ($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 the current date to obtain Truly Nolen's financial information. Truly Nolen has ignored all such attempts. Truly Nolen'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 $59,500 for the Respondent thus takes appropriate account of the size of business statutory factor.

c) *Ability to continue in business*

A third statutory factor to be considered in determining a penalty under Section 14(a)(4) of FIFRA is the effect of the penalty on the person'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.

Moreover, where a respondent(s) 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. In re: New Waterbury, Ltd., 5 E.A.D. 529, 542 (Oct. 20, 1994). In the present matter, Respondent has not filed an Answer to the Complaint. Respondent's counsel informally raised an alleged inability to pay but has refused to provide financial documentation of any kind even after a direct order by this court to do so. See Exhibit 13. 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 upon ability to pay -- by the Respondent in the present case -- has been waived.

In summary, 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 Respondent's ability to continue in business to the maximum extent possible and in accordance with FIFRA.

2. The CAA Penalty Calculation is Appropriate Under the CAA and the CAA Penalty Policy

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

tenth) against Andújar for its 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 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 statutory limit on EPA's administrative penalty authority was originally $200,000 but has been revised to $320,000 for violations that occur after December 6, 2013 and on or before November 2, 2015, pursuant to the Debt Collection Improvement Act of 1996, 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 Enforcement and Compliance Assistance (Director) 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, waivers of CAA Section 113(d)'s time and penalty limits on administrative enforcement actions. In this case, the penalty sought against Andújar 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 DOJ for the time limitation was sought in this case. On January 18, 2016, EPA Region 2's Director sent a Waiver Request to EPA's Office of Enforcement and Compliance Assistance, which was forwarded to the U.S. Department of Justice, requesting a waiver only of the time limit for period of violation. On February 11, 2016, the U.S. Department of Justice

Environmental Enforcement Section, on behalf of the Attorney General, consented to EPA Region's Waiver Request and determined that the proposed administrative action involving violations of reporting and recordkeeping in connection with a Class VI controlled ozone depleting substance (namely, methyl bromide) was appropriate for administrative action. See Exhibit 11 (U.S. Department of Justice CAA Waiver Letter, dated February 11, 2016).

As a result of the TN and M & P Inspections, the collection of records and statements at those inspections, and M & P's response to EPA's IRL, EPA determined that Andújar failed to maintain, for every application, a document from the commodity owner, shipper or their agent setting forth said commodity owner, shipper or agent's request for 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, Andújar failed to provide the distributor from which it purchased the methyl-bromide containing pesticides 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 Stationary Source Penalty Policy of 1991 ("CAA Penalty Policy"). The CAA Penalty Policy provides guidance to facilitate the consistent application of the civil penalty statutory factors. See Exhibit 8[7] at page 1.

Section 113(e)(1) of 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

[7] https://www.epa.gov/sites/production/files/documents/penpol.pdf

include the economic benefit of non-compliance, seriousness of the violation, the duration or length 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 (Exhibit 8, page 8) provides 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: i) the importance to the regulatory scheme, ii) the length of time of the violation, and iii) the size of the violator/business. See Exhibit 8 (pages 9, 11, 12 and 14).

i. Importance to the regulatory scheme. In this matter, Andújar'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. Andújar'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 methyl bromide to it, that the methyl bromide 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 Exhibit 10 (Natalie Topinka Declaration, Paragraph 12). 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. See Exhibit 8 (bottom of page 12, recordkeeping violation). 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 Andújar's violation of 40 C.F.R. § 82.13(z)(1), which required it to maintain a record from a commodity owner requesting the use of methyl bromide for a QPS purpose, EPA calculated the length of time of the violation by looking at Andújar's records of pesticide applications. The violation period cited in the Complaint reflects the total days between the first date of a methyl bromide application through the last date of such an application. For Andújar, there were 532 days between the first date of application (9/13/2013) and the last date (2/26/2015). The CAA Penalty Policy suggests a Time of Violation Gravity Adjustment of $20,000 be added for violations which persist over a time period of 13 to 18 months, which EPA applied. See Exhibit 8 (page 12). See also Exhibit 4.

For Andújar's violation of 40 C.F.R. § 82.13(z)(2), involving the failure to provide a distributor a certification that the methyl bromide it purchased would be used only for a QPS application, EPA reviewed Andújar's purchase invoices. The violation period reflects the date of Andújar's first methyl bromide purchase through the date of the last such purchase. For Andújar, there were 471 days between the first date of purchase (5/27/2013) and the last date (9/9/2014). The CAA Penalty Policy suggests a Time of Violation Gravity Adjustment of $20,000 be added for violations which persist over a time period of 1 to 18 months, which EPA applied. See Exhibit 8 (page 12). See also Exhibit 6.

iii. Size of business. EPA has made many attempts since the initial meeting held in 2015 to the current date to obtain Truly Nolen's financial information. Truly Nolen 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 Exhibit 8 (page 14).

The preliminary total penalty calculated against Andújar under the CAA Penalty Policy thus comes to $72,000. However, the Debt Collection Improvement Act (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 account of the impact of inflation, EPA in 2013 issued policy guidance stating that calculations under Agency penalty policies should also be increased to reflect inflation. See Exhibit 12 (Civil Monetary Penalty Inflation Adjustment Rule, 78 Fed. Reg. 66643 (November 6, 2013) and EPA Memorandum dated December 6, 2013, on Amendments to EPA Civil Penalty Policies to Account for Inflation)[8].

In arriving at the final penalty, EPA 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. See Exhibit 12 (Page 5 (Chart Reflecting Inflation Adjustment Multipliers) of EPA Memorandum dated December 6, 2013, on Amendments to EPA Civil Penalty Policies to Account for Inflation). Based on the inflationary adjustments, the final proposed penalty that EPA seeks against Andújar for the CAA recordkeeping and reporting violations is $105,561. See Exhibit 6, supra (CAA Penalty Calculation Matrix).

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

[8] As previously indicated, in footnotes 2 & 3, 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.

the overall civil penalty," it does not bear a separate burden for each of the statutory penalty factors. See In re Spitzer Great Lakes Ltd., 9 E.A.D. 302, 320 (June 30, 2000); In re: CDT Landfill Corp., 11 E.A.D. 88, at 116-17 (June 5, 2003). 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, 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 respondent must rebut this conclusion with evidence that the penalty is inappropriate. In the present case, as detailed below, EPA has carefully considered each of the penalty assessment criteria in Section 113(e)(1) of the CAA, and it is up to Andújar 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 caselaw 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 In the Matter of: New Waterbury, Ltd., 5 E.A.D. 529, 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; In re: CDT Landfill Corp., 11 E.A.D. 88, at 120 & n.60 (June 5, 2003). In the present matter, based on no verifiable financial information provided by Andújar, 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/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 does 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 do not raise any ability to pay defense, the penalty need not be adjusted based upon this statutory factor. Id. at *124. Furthermore, 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 showing sales figures, the presumption of ability to pay was not rebutted and the penalty was not adjusted. Likewise, in the present matter, Andújar 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 penalty need not be adjusted based on the ability to pay factor.

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, 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 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. See New Waterbury, 5 E.A.D. at 542. In the present case, since Respondent failed to file an Answer and failed to produce any evidence to support its inability to pay claim, this Court may conclude that the proposed penalty does not warrant a reduction based upon ability to pay and that any objection to the penalty based on this factor has been waived by the Respondent.

c) *Compliance History and Good-faith Efforts*

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 Andújar. Therefore, no upward adjustment to the penalty was made for compliance history. Prior to the issuance of the Complaint, Andújar had not demonstrated any good-faith efforts to comply with the CAA, and has not bothered to respond to the Complaint nor to participate in this proceeding in any way after the Complaint was issued. Therefore, no adjustments were therefore made based on this factor.

d) *Economic Benefit*

Finally, EPA attempted to assess whether Respondent Andújar realized an economic benefit from its non-compliance. As laid out in the FIFRA section above, 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 costs," 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. 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 Andújar's recordkeeping and reporting

violations was *de minimis,* and EPA exercised its discretion not to seek additional penalties to recoup economic benefit.

For the foregoing reasons, the proposed CAA penalty of $105,560 against Andújar 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). Therefore, good cause exists for granting the Motion for Default on Penalty for the CAA violations alleged in the Complaint.

IV. CASELAW SUPPORTS GRANTING COMPLAINANT'S MOTION FOR A DEFAULT JUDGMENT ON PENALTY AGAINST RESPONDENT

The proposed penalties sought by Complainant are appropriate and should be granted. That EPA can seek an Order of Default on Liability and Penalty under FIFRA on the grounds that the Respondent failed to file an Answer to the Complaint is well-established. See In the Matter of: Pan American Growers Supply Inc., 2010 EPA ALJ Lexis 25 (Nov 30, 2010); In the Matter of: To Your Rescue! Services, 2004 EPA RJO Lexis 339 (Dec 13, 2004), modified 2005 EPA App. Lexis 25 (Sep. 30, 2005); In Matter of: Greier Ag Center, 2004 EPA RJO Lexis 187 (Feb 4, 2004); In the Matter of: Scientific Pest Control Company, 2004 EPA RJO Lexis 189 (Feb 10, 2004); In the Matter of: National Healthcare Mgf. Corp. (f/k/a Gam-Med Packaging Corp, 2000 EPA RJO Lexis 85 (Jan 25, 2000). Likewise, there are several EPA Administrative Law Judge or Regional Judicial Officer decisions granting an Order of Default on Liability and Penalty in CAA cases on the grounds that the Respondent failed to file an Answer to the Complaint. See In the Matter of: Bob Jones Tire Corporation, 2004 EPA RJO Lexis 191 (Sept 29, 2004); In the Matter of: CD Roberts Company, 2004 EPA RJO Lexis 192 (Sept 14, 2004); In re: Rufus Monzon d/b/a Du-Rite Cleaners, 2004 EPA RJO 470 (Aug 9, 2004).

The EPA Environmental Appeals Board has not hesitated to enter or uphold and affirm Orders of Default in cases such as the present case where the respondent failed to file an answer to the complaint and where circumstances clearly indicate that the imposition of the remedy requested is warranted. See In re: Jonway Motorcycle (USA) Co., et al., 2014 EPA App. Lexis 45 (Nov 14, 2014)(CAA case affirming default order for failure to file an answer to the complaint); In re: To Your Rescue! Services, 2005 EPA App. Lexis 5 (Sept. 30, 2005) (FIFRA case affirming Order of Default for failure to file an answer to the complaint); In the Matter of: Thermal Reduction Company Inc., 4 EAD 128 (July 27, 1992) (EPCRA case affirming Order of Default for failure to file an answer to the complaint); In the Matter of: Midwest Bank & Trust Company, Inc., 1989 ALJ Lexis 43 (Sept. 29, 1989), aff'd by Katszon Bros, Inc., v. U.S.E.P.A., 839 F.2d 1396 (10th Cir. 1988).

A respondent's failure to admit, deny or explain any material factual allegation in the complaint constitutes an admission of the allegations and a waiver of its right to a hearing on such factual allegations. 40 C.F.R. § 22.15(d) and 40 C.F.R. §22.17(a). Like the respondents in the cases cited above, Andújar has not filed an answer to the complaint. Based on the facts and law, an Order of Default on Penalty is entirely appropriate in this matter and EPA's motion for judgment on penalty should be granted pursuant to 40 C.F.R. § 22.17(a).

V. IMPOSING A SUBSTANTIAL PENALTY IS NECESSARY TO HELP DETER FUTURE FIFRA PESTICIDE MISUSE AND CAA REPORTING AND RECORDKEEPING VIOLATIONS

A major purpose of the assessment of civil penalties is to deter future violations by Respondent as well as similar violations by other members of the regulated community. See *e.g.*, U.S. v. Ekco Housewares, Inc., 853 F. Supp. 975, 989 (N.D. Ohio 1994), aff'd on reh'g, 62 F.3d 806 at 816 (6th Cir. 1995); United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp.

314, 322 (D.S.C. 1988) aff'd in part, vacated in part, 865 F. 2d 1261 (4th Cir. 1988); see U.S. v. Phelps Dodge Industries, Inc., 589 F. Supp. 1340, 1358 (S.D.N.Y. 1984); United States v. Mac's Muffler Shop, Inc. 25 E.R.C. 1369, 1375 (N.D. Ga. 1986); United States v. Swingline, Inc., 371 F. Supp. 37, 47 (EDNY 1974). Deterrence is only effective when the probability that a significant penalty will be imposed outweighs the cost-effectiveness of non-compliance creating a substantial monetary risk to a potential violator. Moreover, "penalties assessed by judges should be sufficiently higher than penalties to which the Agency would have agreed in settlement to encourage violators to settle." Tull v. United States, 481 U.S. 412, 425 (1987)(citing legislative history of Clean Water Act penalty provision).

In the present case, which EPA commenced pursuant to Section 14(a)(1) of FIFRA, 7 U.S.C. §136*l*(a)(1), and Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1), a substantial penalty is necessary to reaffirm the message that the label is the law and that EPA regards such violations to be quite serious. Pesticide applicators are not to disregard the instructions on labels as to the proper use of pesticides in the course of any application, and the circumstances of this case demonstrate the potential hazards. In not following the instructions on the label, Respondent applied a highly toxic pesticide to various venues (*e.g.*, inside a residence) where such applications were not authorized by the label and where the risk of harm to humans, including himself, was particularly high. Because of MethQ's exceptional risk to the environment, compliance with the CAA record keeping and reporting requirements are essential to EPA's stratospheric protection efforts. These factors, as set out in the foregoing, justify the penalty EPA is seeking against this respondent.

VI. COMPLAINANT'S MOTION FOR ORDER OF DEFAULT FOR PENALTIES SHOULD BE GRANTED

In this Memorandum, the Complainant has specified the penalties it seeks under FIFRA and the CAA for the violations committed by Andújar. Complainant has stated the legal and factual grounds for the penalties requested. As 40 C.F.R. Section 22.17(c) states: *The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.* As the relief requested by Complainant is consistent with the FIFRA and CAA, as reflected in the applicable FIFRA and CAA penalty policies, the relief requested is entirely consistent and appropriate and therefore should be granted.

Based on the foregoing, Complainant's counsel respectfully asserts that good cause exists for granting the motion for default with respect to penalty against the Respondent for the violations set forth in the Complaint.

Dated: March 14, 2019
New York, New York

Respectfully submitted,

Jeannie M. Yu
Assistant Regional Counsel
Office of Regional Counsel
Waste and Toxic Substances Branch
U.S. Environmental Protection Agency
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3205
Yu.jeannie@epa.gov

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	:	
	:	
	:	
Edwin Andújar Bermúdez dba	:	Honorable Helen Ferrara
Truly Nolen Pest Control de Caguas	:	Presiding Officer
	:	
	:	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.	:	

ORDER OF DEFAULT ON PENALTIES

I. Background

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C. § 136*l*(a), and Section 113(d) of the Clean Air Act, 42 U.S.C. § 7413(d) ("CAA"), and the United States Environmental Protection Agency's ("EPA") Consolidated Rules of Practice Governing the Administrative Assessment and Revocation or Suspension of Permits ("Consolidated Rules"), 40 C.F.R. Part 22. This proceeding was initiated on March 1, 2016, with the issuance of an Administrative Complaint ("Complaint") by the Director, Division of Enforcement and Compliance Assistance of EPA, Region 2 ("Complainant") against Respondent Edwin Andújar Bermúdez (hereinafter referred to as "Respondent or Andújar") doing business as Truly Nolen Pest Control de Caguas for violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) and of CAA requirements set forth at 40 C.F.R. §§ 82.13(z)(1) and (z)(2).

The Respondent never filed an Answer to the Complaint. Accordingly, on March 23, 2017, Complainant filed a Motion for Default Judgment on Liability ("Motion for Default for Liability with accompanying papers in support (including a Memorandum in support, Exhibits thereto, and a Declaration prepared by Jeannie M. Yu, Assistant Regional Counsel for Complainant ("Yu Declaration")), seeking an Order finding the Respondent liable for the violations alleged in the Complaint. The Respondent was served with the Motion on or about April 1, 2017. The Respondent never replied to the Complainant's Motion for Default for Liability. An Order for Default on Liability ("Default Order on Liability") was issued by this Court on September 14, 2017.

In the Order, this Court found that the Complaint was properly served on the Respondent and that the Respondent failed to answer the Complaint within 30 days. This Court further found that each of the 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), for which a penalty may be assessed against the Respondent pursuant to FIFRA. Specifically, this Court found Respondent liable for fifty-five (55) violations of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), use of a pesticide in a manner inconsistent with its labeling, as set out in Counts 1 through 55 of the Complaint, for the time period from September 13, 2013 through February 26, 2015. The Order also found Respondent liable for two violations of the Clean Air Act and its implementing regulations at 40 C.F.R. Part 82, namely the failure to report and to keep records of required information regarding the purchase and use of methyl bromide, as set out in Counts 56 and 57 in the Complaint. The time period for Count 56 is from September 13, 2013 through February 26, 2015 and the time period for Count 57 is from May 27, 2013 to September 9, 2014.

In the Order of Default on Liability entered on September 14, 2017, the Respondent was found to be in default and liable for each of the charges in the Complaint. That Order of Default on Liability is incorporated herein by reference.

The Default Order on Liability did not constitute an Initial Decision in accordance with 40 C.F.R. § 22.17(a) because a default order that does not determine a remedy along with liability is not an initial decision until it resolves "all issues and claims in the proceeding." There therefore is an expectation that a Motion for Default Judgment on Liability and Order granting same contemplates a second Motion on Penalty. Accordingly, the Default Order on Liability set a deadline for Complainant to file and serve the Motion for Penalty, together with supporting documentation providing factual grounds for the proposed penalty, in accordance with 40 C.F.R. §§ 22.15 and 22.16.

On or about March 14, 2019[1], Complainant filed a Motion for an Order of Default On Penalty ("Motion for Penalty"), including a Memorandum in Support of Complainant's Motion ("Memorandum") and Exhibits thereto, and Declarations of Audrey Moore, Pesticide Team Leader, Pesticides and Toxic Substances Branch, EPA, Region 2, and Natalie Topinka, an Environmental Scientist in the Air Enforcement and Compliance Assurance Branch, EPA Region 5, seeking an Order of Default with respect to penalties for the FIFRA and CAA violations set out in the Complaint.

Entry of Default

[1] For good cause shown, Complainant sought and received four extensions of time to file a Motion for Penalty. The first extension was from October 30, 2017 to April 30, 2018. The second extension was granted by your honor until August 28, 2018. The third extension of time was granted until January 28, 2019. The fourth extension of time was granted until March 14, 2019.

In the Motion for Penalty, Complainant requests the issuance of an Order assessing penalties against the Respondent for the FIFRA violations set out in counts 1 through 55 of the Complaint and for the CAA violations set out in counts 56 and 57 of the Complaint.

The Consolidated Rules provide:

> A party may be found to be in default, after motion, upon failure to file a timely Answer to a complaint. Default by the Respondent constitutes 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).

The Consolidated Rules further provide:

> When the Presiding Officer finds that default has occurred, he shall issue a default order against the defaulting party as to any or all parts of the proceeding unless the record shows good cause why a default order should not be issued. . .The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act. 40 C.F.R. §22.17(c).

The Environmental Appeals Board ("EAB") has explained that, though there is a strong preference in the law for cases to be resolved on their merits, the Consolidated Rules provide for default as an essential tool to prevent litigants from abusing the administrative litigation process. Fulton Fuel Co., CWA Appeal No. 10-03, 2010 EPA App. LEXIS 41, 7-8 (EAB Sept 9, 2010) (citing JHNY, Inc., 12 EAD 372, 385-93 (EAB 2005).

Pursuant to 40 C.F.R. Section 22.17(b), where the motion requests the assessment of a penalty against a defaulting party, the movant must specify the penalty and state the legal and factual grounds for the relief requested.

In the present matter, the Complainant's Memorandum in support of the Motion, the penalty worksheets submitted as exhibits thereto, and the Declarations of Audrey Moore and Natalie Topinka, describe how the penalties were calculated under FIFRA and the CAA, and provide the legal and factual grounds for the relief requested. Together, these documents

establish a sound justification for imposition of the penalties sought in the Motion for the violations. Accordingly, Complainant's Motion for an Order of Default on Penalties is granted and the proposed civil penalty of $49,100 for counts 1 through 55 is assessed against the Respondent for the FIFRA pesticide misuse violations and the proposed civil penalty of $105,560 for counts 56 and 57 is assessed against him for the CAA reporting and recordkeeping violations.

II. Assessment of Penalty

FIFRA Section 12(a)(2)(G) states that it shall be unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling. Section 14(a)(1) of FIFRA, 7 U.S.C. §136*l*(a)(1) provides that ". . . any commercial applicator. . . who violates any provision of this subchapter may be assessed a civil penalty of not more than $5,000 for each offense." Pursuant to the Debt Collection Improvement Act of 1996, and regulations promulgated under the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R. Part 19, (see 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 in the Complaint.

40 C.F.R. Part 82, Subpart A, Production and Consumption Controls for Ozone Depleting Substances, sets forth reporting and recordkeeping requirements for pest control applicators as follows: 40 C.F.R. §82.13(z)(1) requires every applicator 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 agent, requesting the use of methyl bromide for QPS applications and citing the regulatory requirement that

justifies its use. In addition, 40 C.F.R.§82.13(z)(2) requires that every applicator that purchases methyl bromide that was produced or imported solely for QPS applications must provide to the distributors from whom they purchase, prior to shipment, a certification that the methyl bromide will be used only for QPS applications. CAA Section 113(d)(1)(B), 42 U.S.C. §7413(d)(1)(B) makes it unlawful to violate any requirement or prohibition of this subchapter or subchapter III, IV-A, V, or VI of this chapter, including but not limited to, a requirement or prohibition of any rule promulgated under this chapter.

Section 113(d)(1)(B) of the CAA provides that "[t]he Administrator may issue an administrative order against any person assessing a civil penalty of up to $25,000, per day of violation, whenever, on the basis of any available information, the Administrator finds that such person---. . . (B) has violated. . . any other requirement or prohibition of this subchapter or subchapter III, IV-A, V or VI of this chapter, including but not limited to, a requirement or prohibition of any rule promulgated under this chapter." Pursuant to the Debt Collection Improvement Act of 1996, and regulations promulgated under the Civil Monetary Penalty Inflation Adjustment Rule, codified at 40 C.F.R Part 19, for violations occurring between January 13, 2009 and November 2, 2015, the statutory maximum penalty is $37,500 and may be assessed per day of violation. The revised statutory maximum remained the same throughout the time period of violations cited in the Complaint.

When assessing a civil penalty under FIFRA's provisions, Section 14(a)(4) requires the Administrator to take account the appropriateness of the 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. The gravity of the harm to human health and the environment resulting from misuse of methyl bromide, a neurotoxin, in contravention of the label requirements is very serious. In

addition to the potential adverse serious health effects it poses, methyl bromide causes serious and widespread environmental harm because it vaporizes and depletes the ozone layer.

When assessing a civil penalty under CAA's provisions, Section 113(e) requires the Administrator to take account of (in addition to such other factors as justice may require) 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, payment by the violator of penalties previously assessed for the same violation, the economic benefit of noncompliance, and the seriousness of the violation. In this case, 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 keep records and to provide a certification to the distributor, prior to the distributor's delivery of methyl bromide to it, that the methyl bromide 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.

The Consolidated Rules further provide that the Presiding Officer in an administrative enforcement action—

> Shall determine the amount of the recommended civil penalty based on the evidence in the record and in accordance with any penalty criteria set forth in the Act. The Presiding Officer shall consider any civil penalty guidelines issued under the Act. The Presiding Officer shall explain in detail in the initial decision how the penalty to be assessed corresponds to any penalty criteria set forth in the Act. If the Presiding Officer decides to assess a penalty different in amount from the penalty proposed by complainant, the Presiding Officer shall set forth in the initial decision the specific reasons for the increase or decrease. If the respondent has defaulted, the Presiding Officer shall not assess a penalty greater than that proposed by complainant in the complaint, the prehearing exchange or the motion for default, whichever is less. 40 C.F.R. §2.27(b).

EPA issued the "FIFRA Enforcement Response Policy" ("FIFRA ERP"), dated December 2009 (as adjusted for inflation) to guide the calculations of civil penalties assessed under FIFRA Section 14(a)(1). See ERP at https://www.epa.gov/sites/production/files/documents/fifra-erp1209.pdf

Additionally, EPA issued the "Clean Air Act Stationary Source Penalty Policy" ("CAA Penalty Policy"), dated October 1991 (as adjusted for inflation), which provides guidance to facilitate the consistent application of the civil penalty statutory factors by courts and the EPA Administrator. See CAA Penalty Policy at https://www.epa.gov/sites/production/files/documents/penpol.pdf

Though the FIFRA ERP and CAA Penalty Policies are not binding upon the Presiding Officer, they must be considered and "should be applied whenever possible because such policies 'assure that statutory factors are taken into account and are designed to assure that penalties are assessed in a fair and consistent manner." Carroll Oil Co., 10 E.A.D. 635, 656 (EAB 2002)(quoting M.A. Bruder & Sons, Inc., 10 E.A.D. 598, 613 (EAB 2002). Complainant's calculation of the penalties consistent with the Penalty Policies, as adjusted by the 2013 Penalty Inflation Adjustments, specifically applies the civil penalty factors enumerated in each statute to the facts at hand.

Upon review, Complainant's moving papers set forth penalties that are based in the evidence in the record and accord with the statutory penalty criteria set forth in FIFRA § 14(a)(4) and CAA § 113(e). The calculations as set out in the worksheets and further described in detail in Section III A. 1 and 2. of the memorandum (pages 15- 31) are therefore incorporated by reference.

In conclusion, I find the proposed penalties against the Respondent in the amount of $49,100, for Counts 1 through 55 for pesticide misuse violations under FIFRA, and $105,560, for Counts 56 and 57 for reporting and recordkeeping violations under the CAA are authorized under FIFRA and CAA and the penalties are reasonable and appropriate under Section 14(a)(1) of FIFRA and the FIFRA ERP and under Section 113(d)1)(B) of the CAA and CAA Penalty Policy. Moreover, the proposed penalties are not clearly inconsistent with the record of proceeding or FIFRA and the CAA. See 40 C.F.R. §22.17(c). Accordingly, these penalties are assessed against the Respondent.

CONCLUSIONS OF LAW

1. The Conclusions of Law set forth in the Order of Default on Liability issued on September 14, 2017, are incorporated herein by reference. See 40 C.F.R. § 21.17(b), (c).
2. The $49,100 civil administrative penalty against the Respondent for the pesticide misuse violations under FIFRA is authorized and the penalty is appropriate and reasonable under Section 14(a)(1) of FIFRA. The proposed penalty is not clearly inconsistent with the record of proceeding or FIFRA. 40 C.F.R. §22.17(c).
3. The $105,560 civil administrative penalty against the Respondent for the reporting and recordkeeping violations under the CAA is authorized and the penalty is both appropriate and reasonable under Section 113(d)(1)(B) of the CAA and the CAA Penalty Policy. The proposed penalty is not clearly inconsistent with the record of proceeding or the CAA. 40 C.F.R. §22.17(c).

ORDER

1. The Respondent is assessed a civil administrative penalty in the amount of $154,660.

2. Payment of the full amount of this civil penalty shall be made within thirty (30) days of the date on which the Initial Decision becomes a final order pursuant to 22.27(c) of the Rules of Practice, 40 C.F.R. §22.27(c), by one of the following means:

   a) By submitting a cashier's check or a certified check in the amount of the penalty, payable to "Treasurer, United States of America," and mailed via U.S. Postal Service to:

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

   b) By submitting a cashier's check or a certified check in the amount of the penalty, payable to "Treasurer, United States of America," and mailed via expedited delivery service (UPS, FedEx, DHL, etc.) to:

      U.S. Environmental Protection Agency
      Government Lockbox 979077
      1005 Convention Plaza
      SL-MO-C2-GL
      St. Louis, MO 63101

   c) By the Fedwire electronic method described at the following Agency website: http://www.epa.gov/cfo/finservices/payment_instructions.htm[2]

3. A transmittal letter identifying the subject case and EPA docket number, FIFRA-02-2016-5302, as well as Respondent's name and address, must accompany each check.

[2] The Fedwire electronic method is where Payers authorize a Financial Institution to initiate an electronic ("Fedwire") payment to the Federal Reserve Bank of New York ("FRBNY").

4. If the Respondent fails to pay the penalties within the prescribed statutory period after entry of the final order, interest on the civil penalty may be assessed. 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. §22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties, unless (1) an appeal is taken to the Environmental Appeals Board within thirty (30) days after service of this Initial Decision pursuant to 40 C.F.R. §22.30(a); (2) a party moves to set aside the default pursuant to 40 C.F.R. §22.17(c); or (3) the Environmental Appeals Board elects to review this Initial Decision upon its own initiative pursuant to 40 C.F.R. §22.30(b).

SO ORDERED.

Dated:

New York, New York

_____

Helen Ferrara
Regional Judicial Officer

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

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

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

In the Matter of	:	
Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas	:	Honorable Helen Ferrara Presiding Officer
Respondent,	:	Docket No. FIFRA-02-2016-5306
Proceeding Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and the Clean Air Act, as amended	:	

MOTION FOR DEFAULT JUDGMENT ON LIABILITY

Complainant, pursuant to 40 C.F.R. §§ 22.16(a) and 22.17(b), hereby moves the Presiding Officer for an order finding the Respondent in default and liable for the violations alleged in the Complaint. Specifically, Complainant requests that this Court find that Respondent is in default for failing to file an Answer to the Complaint and that: (1) Edwin Andújar Bermúdez (hereinafter "Respondent" or "Andújar") is liable for violations of the requirements of the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA") alleged in Counts 1 through 55 (FIFRA violations) of the Complaint; and for violations of the requirements of the Clean Air Act ("CAA") set out in Counts 56 and 57 (CAA violations) of the Complaint. Complainant's motion is fully supported by the attached Complaint, Memorandum in Support, the Declaration of Jeannie M. Yu, and the accompanying exhibits.

In brief, Andújar, as Truly Nolen Pest Control de Caguas, conducts a commercial pesticide control business from an establishment located at Urb. Miraflores, 16-15 Calle 29, Bayamón, Puerto Rico 00957-3707 and with a mailing address at Post Office (P.O.) Box 7155, Caguas, Puerto Rico 00726. On March 1, 2016, Complainant caused to be served, by certified mail and return-receipt requested, upon the Respondent at his business' physical and mailing addresses (as well as upon his counsel, Peter Diaz, who represented him during the pre-filing negotiation period with EPA) a copy of the Complaint, alleging violations of the FIFRA and of the CAA. Enclosed with the Complaints were copies of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination of Suspension of Permits ("Consolidated Rules"), found at 40 C.F.R. Part 22. Additionally, on April 28, 2016, Complainant sent to attorney Diaz, by certified mail and return-receipt requested and email, a letter memorializing the non-response of his clients and enclosing copies of the Complaint and the Consolidated Rules. Furthermore, on May 17, 2016, Complainant sent, by certified mail and return-receipt requested, to the Respondent a copy of the Complaint and the Consolidated Rules, along with a letter alerting him that the deadline to file an Answer had passed and of EPA's intention to seek a default order.

An Answer to the Complaint was due on or about April 6, 2016. To date, the Respondent has not filed an Answer to the Complaint nor has his presumptive counsel done so upon the Respondent's behalf.

Any response by the Respondent to Complainant's present motion must be filed within fifteen (15) days after service of such motion, in accordance with 40 CFR § 22.16(b) (Response to Motions). A failure to respond by any party within the designated period constitutes a waiver of any objection to the motion.

Date: March 23, 2017
New York, New York

Respectfully submitted,

Jeannie M. Yu
Assistant Regional Counsel
Waste & Toxic Substances Branch
U.S. Environmental Protection Agency, Region 2
290 Broadway, 16th Floor
New York, NY 10007-1866

CERTIFICATE OF SERVICE

I hereby certify that a true copy of the Motion for Default Judgment for Liability, dated March 23, 2017, along with the following supporting papers (Memorandum in Support, Declaration and Order) was sent this day in the following manner to the addresses listed below:

Original and Copy Hand-Carried to the Regional Hearing Clerk

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

Copy Hand-Carried to the Regional Judicial Officer

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

Copy by Certified Mail/Return Receipt Requested and Regular Mail to:

Edwin Andújar Bermúdez dba
Truly Nolen Pest Control De Caguas
P. O. 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

Dated: March 23, 2017
New York, New York

Yolanda Majette
Office of Regional Counsel
Waste & Toxic Substances Branch Secretary

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	:	
Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas	:	Honorable Helen Ferrara Presiding Officer
Respondent,	:	Docket No. FIFRA-02-2016-5306
Proceeding Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and the Clean Air Act, as amended	:	

ORDER

The Complainant has moved for default judgment on liability under the Complaint against Edwin Andújar Bermúdez ("Respondent") doing business as Truly Nolen Pest Control De Caguas.

This Court finds that the Complaint was properly served on the Respondent and that the Respondent failed to answer the Complaint within 30 days. Subsequently, Complainant made two attempts to contact the Respondent as well as his attorney regarding the filing of an Answer. To date, Respondent has not filed an Answer. The failure of the Respondent to file an Answer to the Complaint resulted in the filing of a Motion for Default Judgment on liability accompanied by a memorandum of law in support of said Motion.

For the reasons stated in the motion and based upon my review of the memorandum of law in support of said motion, and the exhibits attached therein, an Order of Default for Liability is granted against the Respondent pursuant to 40 C.F.R. § 22.17(a). Default constitutes, for purposes of the pending proceeding only, that Respondent is deemed to have admitted all facts

alleged in the Complaint and to have waived his right to contest such factual allegations. 40 C.F.R. § 22.17(a). The factual elements alleged against the Respondent in the Complaint provide a proper foundation to establish liability for violations of the requirements alleged in the Complaint. Specifically, I find that Edwin Andújar Bermúdez is liable for fifty-five (55) violations of Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), of the Federal Insecticide, Fungicide & Rodenticide Act, use of a pesticide in a manner inconsistent with its labeling, as set out in Counts 1 through 55 of the Complaint. I further find Edwin Andújar Bermúdez liable for two violations of the Clean Air Act and its implementing regulations at 40 CFR Part 82, failure to report and to keep records of required information regarding the purchase and use of methyl bromide, as set out in Counts 56 and 57 of the Complaint.

So ORDERED.

_____
Helen Ferrara
Regional Judicial Officer

Dated: _____
New York, New York

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	
Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas	Honorable Helen Ferrara Presiding Officer
Respondent,	Docket No. FIFRA-02-2016-5306
Proceeding Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and the Clean Air Act, as amended	

DECLARATION

I, Jeannie M. Yu, Assistant Regional Counsel, Office of Regional Counsel ("ORC"), U.S. Environmental Protection Agency, Region 2 ("EPA"), declare that the following is offered in support of the motion for a default order on liability in the above-captioned proceeding and is true and correct to the best of my knowledge, information and belief:

1. At my direction, on October 8, 2015, an ORC Secretary, Yolanda Majette, sent a pre-filing letter to Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas ("Respondent" or "Andújar") at both the physical street address of the business (Urb. Miraflores, 16-15 Calle 29, Bayamón, Puerto Rico 00957-3707 ("Bayamón address")) and at the business' post office box mailing address (P.O. Box 7155, Caguas, Puerto Rico 00726 ("P.O. Box address")). Respondent received the letter at both mailing addresses.

2. A meeting between the parties and a period of pre-filing negotiations preceded the filing of the civil administrative Complaint in this matter. During that time, Andújar was represented by counsel Peter Diaz ("Diaz"), located at 420 Avenida Ponce de Leon, Suite 1001, San Juan, Puerto Rico 00918.

3. On March 1, 2016, at my direction, Ms. Majette filed the "Complaint, Compliance Order, and Notice of Opportunity for Hearing" ("Complaint"), including a Certificate of Service, in this matter, together with a copy of the Consolidated Rules of Practice ("the Rules") upon the Regional Hearing Clerk and caused the Complaint and the Rules to be mailed to the Respondent by certified mail, return receipt requested to the P.O. Box address and the

Bayamón address. (See Memorandum of Law, Exhibit 1 (Complaint). A copy of the certificate of service is page 22 of the Complaint in Exhibit 1. See Memorandum of Law, Section II A., paragraphs 1 & 2, pages 8-9.

4. A U.S. Postal domestic return receipt for the Complaint and the Rules mailed to the Bayamón address was signed and dated March 5, 2016 by Jesenia Andújar, on behalf of the Respondent, and returned to EPA. See Memorandum of Law, Section II A., paragraph 3, page 9 and Exhibit 2.

5. A U.S. Postal domestic return receipt for the Complaint and the Rules mailed to the P.O. Box address was signed and dated March 7, 2016, personally by Andújar, and returned to EPA. See Memorandum of Law, Section II A., paragraph 4, page 9 and Exhibit 3.

6. The Complaint advised Respondent of his right to a Hearing and explained that, in order to avoid being found in default upon motion by Complainant, a written Answer, which may include a request for a Hearing, had to be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, 290 Broadway (16th Floor), New York, NY 10007-1866, within thirty (30) calendar days of receipt of the Complaint. In addition, the Complaint 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 and with regard to which Respondent had any knowledge. 40 C.F.R. Section 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in their Answer, the allegation is deemed denied. 40 C.F.R. Section 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. Section 22.15(b).

7. A courtesy copy of the Complaint was e-mailed to Mr. Diaz, on March 1, 2016, to the email address that Diaz had previously used in correspondence with EPA counsel. The email address is pdiazfederalcases@gmail.com See Memorandum of Law, Section II B., paragraph 1, page 10 and Exhibits 5 & 6.

8. At my direction, on April 28, 2016, Ms. Majette sent, by certified mail return receipt, a letter to Mr. Diaz informing him that his client, Andújar, had accepted service of the Complaint on March 7, 2016; that no Answer to the Complaint had been filed that the Answer was due on or about April 6, 2016; that his client may be found in default upon motion; and about the legal effects of such default. The letter also requested confirmation in writing within five business days as to whether Mr. Diaz was currently retained as counsel for the Respondent. The letter further specified that if EPA did not receive such written confirmation, the Agency would conclude that Mr. Diaz no longer represented the Respondent. Mr. Diaz was served on May 2, 2016 with this letter. A green card was signed by Yashira Mendez on behalf of Diaz. See Memorandum of Law, Section II C, paragraphs 1 - 3, pages 11 & 12.

9. At my direction, on May 17, 2016, Ms. Majette sent, by certified mail return receipt, a letter to Andújar at the P.O. Box address and the Bayamon address. EPA's May 17, 2016 letter alerted the Respondent to the following: (i) that the deadline for filing an Answer to the Complaint had passed; (ii) that EPA believed that he was no longer represented by Diaz; and (iii) that EPA issued a similar letter to Diaz. Further the letter 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 me or EPA attorney Carolina Jordan Garcia if he intended to file an Answer to EPA's Complaint. A copy of this letter was also sent to Mr. Diaz. See Memorandum of Law, Section II D., paragraphs 1 - 3, pages 12-13.

10. The U.S. Postal domestic return receipt for the May 17, 2016 letter to the post office box address was signed by Ana Figueroa for the Respondent, dated May 20, 2016, and returned to EPA. See Memorandum of Law, Section II D., paragraph 2, page 13.

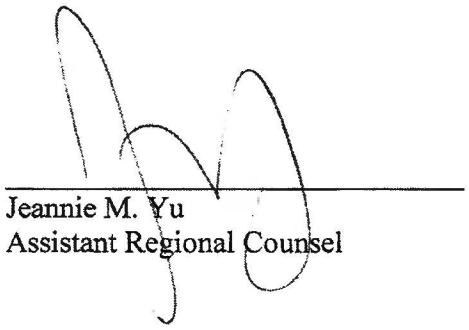
11. The U.S. Postal domestic return receipts for the May 17, 2016 letter to the post office box address was personally signed by Andújar, dated May 20, 2016, and returned to EPA. See Memorandum of Law, Section II D., paragraph 2, page 13.

12. At my direction, Ms. Majette emailed and mailed copies of EPA's May 17, 2016 letter to Mr. Diaz. See Memorandum of Law, Section II D., paragraph 3, page 13.

13. To date, I have not received a response from the Respondents or Mr. Diaz to any of the letters or emails which, at my direction, ORC Secretary Yolanda Majette sent to Respondent and Mr. Diaz. Moreover, Respondents or Mr. Diaz have not requested an extension of time to Answer the Complaint and I have not been served with an Answer to the Complaint.

14. In response to my inquiries, Karen Maples, Regional Hearing Clerk, U.S. EPA Region 2, informed me that no Answer in response to the Complaint in this matter has been filed by or on behalf of either Respondent as of March 21, 2017. (An E-Mail is annexed as Attachment to this Declaration).

Dated: March 23, 2017
New York, NY.



Jeannie M. Yu
Assistant Regional Counsel

Yu, Jeannie

From: Maples, Karen
Sent: Tuesday, March 21, 2017 3:21 PM
To: Yu, Jeannie
Subject: RE: Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas Docket No. FIFRA-02-2016-5306

Hi Jeannie,

Nothing has been filed.

Karen

From: Yu, Jeannie
Sent: Tuesday, March 21, 2017 12:44 PM
To: Maples, Karen <Maples.Karen@epa.gov>
Subject: RE: Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas Docket No. FIFRA-02-2016-5306

Has an Answer been filed yet since the last email you sent me?

From: Maples, Karen
Sent: Tuesday, January 31, 2017 8:08 AM
To: Yu, Jeannie <Yu.Jeannie@epa.gov>
Subject: RE: Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas Docket No. FIFRA-02-2016-5306

No answer received.

From: Yu, Jeannie
Sent: Friday, January 27, 2017 11:35 AM
To: Maples, Karen <Maples.Karen@epa.gov>
Subject: Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas Docket No. FIFRA-02-2016-5306

Karen,

Has an Answer been filed in this case?

Thank you.

Jeannie M. Yu
Assistant Regional Counsel
U.S. Environmental Protection Agency
290 Broadway, 16th Floor
New York, New York 10007
(212) 637-3205

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	
Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas	Honorable Helen Ferrara Presiding Officer
Respondent,	Docket No. FIFRA-02-2016-5306
Proceeding Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and the Clean Air Act, as amended	

MEMORANDUM IN SUPPORT OF COMPLAINANT'S MOTION FOR DEFAULT JUDGMENT ON LIABILITY

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Exhibit 1: EPA Complaint against Respondent filed with the EPA Regional Hearing Clerk and mailed to the Respondent on March 1, 2016.

Exhibit 2: Certified Mail Return Receipt Green Card for the Complaint sent to the Bayamón address signed and dated March 5, 2016 by Jesenia Andújar.

Exhibit 3: Certified Mail Return Receipt Green Cards for the Complaint sent to P.O. Box address personally signed and dated March 7, 2016, by Edwin Andújar.

Exhibit 4: March 6, 2017 Email from Jeannie Yu to the Regional Hearing Clerk. Attached to the email are USPS green cards showing completion of service for the Complaint.

Exhibit 5: Email Correspondence between Peter Diaz and Jeannie Yu prior to the filing of the Complaint.

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Exhibit 8: EPA's April 28, 2016 letter to Respondent's then-counsel Peter Diaz.

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Exhibit 14: EPA Secretary Yolanda Majette's May 17, 2016 email to Respondent's then-counsel Peter Diaz, attaching EPA's May 18, 2016 letters to Andújar.

Exhibit 15: Andújar's commercial insecticide application license #2912.

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Exhibit 18: April 5, 2015 and May 14, 2015 Notices of Pesticide Use/Misuse Inspection.

Exhibit 19: August 7, 2015 PRDA Notice of Violation.

Exhibit 20: Sample/Representative Invoices for Application of Methyl Bromide-containing pesticides.

Exhibit 21: Truly Nolen Webpage.

Exhibit 22: EPA's FIFRA Investigation Summary.

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Exhibit 25: M&P sales receipt of a methyl bromide containing product to Truly Nolan Caguas.

Introduction

Complainant, by and through the United States Environmental Protection Agency ("EPA"), Region 2, Office of Regional Counsel, submits this Memorandum in support of its Motion, brought pursuant to 40 CFR §§ 22.16 and 22.17, for an order finding Edwin Andújar Bermúdez, doing business as Truly Nolen Pest Control De Caguas, (hereinafter "Andújar" or "Respondent") in default for Respondent's failure to file an Answer to EPA's civil administrative Complaint, and further finding Respondent liable for the violations alleged in the Complaint. The Complaint alleged that the Respondent applied restricted use pesticides containing methyl bromide in a manner inconsistent with the products' labeling in violation of Section 12(a)(2)(G) of the Federal Insecticide, Rodenticide & Fungicide Act ("FIFRA"), 7 U.S.C. § 136j(a)(20(G). Additionally, the Complaint alleged that the Respondent violated the Clean Air Act ("CAA") requirements for reporting and keeping records of the purchase and use of an ozone-depleting substance, methyl bromide, set out at 40 CFR §§ 82.13(z)(1) and (z)(2). The civil administrative Complaint is a result of EPA's wide-spread investigation of the use and distribution of methyl bromide-containing pesticides in Puerto Rico and the U.S. Virgin Islands ("USVI") following a very serious pesticide poisoning incident in the USVI. In March 2015, a family vacationing in St. John suffered serious and permanent harm after being exposed to methyl bromide that was used to fumigate a condominium unit located directly below their vacation rental.

I. LEGAL STANDARD FOR DEFAULT

Pursuant to 40 CFR § 22.17(a), if a respondent fails to file a timely Answer(s) [*i.e.* in accordance with the 30-day period set forth in 40 CFR § 22.15(a)] to the Complaint, the

respondent may be found in default upon motion. Further, "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 CFR § 22.17(a).

II. FACTUAL BACKGROUND: SERVICE OF PROCESS

On March 1, 2016, as required by 40 CFR § 22.5(a), an original and one copy of the Complaint was filed with the Regional Hearing Clerk for EPA Region 2 to initiate the present action. See Exhibit 1. On the same date, Complainant effected proper service of the Complaint upon the Respondent and sent a copy to his presumptive counsel. Counsel for Complainant followed up service with additional copies of the Complaint and numerous efforts to remind the Respondent and his attorney of the obligation to respond.

A. *Service of Complaint to Andújar*

(1) On March 1, 2016, EPA, Region 2 issued a civil administrative Complaint against Andújar 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) ("CAA"). See Exhibit 1, *supra*. The Complaint specifies the FIFRA statutory and regulatory background as well as the CAA statutory and regulatory background. The Complaint also specifies the factual and legal basis in support of the violations alleged in counts 1 – 57 of the Complaint.

(2) Pursuant to 40 CFR § 22.5(b)(1), a copy of the signed original of the Complaint, including Certificate of Service, along with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation/Termination or Suspension of

Permits (hereinafter "Consolidated Rules of Practice") was sent, by certified mail with return receipt requested ("green card"), to Andújar at the addresses set forth in the cover/transmittal letter for the complaint and in the certificate of service, page 22, of the Complaint (See Exhibit 1, *supra*). The certified letters were sent to 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").

(3) The Respondent was served with the Complaint on March 5, 2016 at the Bayamón address. The green card was signed and dated March 5, 2016 by Jesenia Andújar. (See Exhibit 2).

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

(5) Pursuant to 40 CFR § 22.5(b)(1)(iii), green cards evidencing proof of service (*i.e.*, properly executed receipt) of the Complaint upon the Respondent were received by the EPA Region 2 Hearing Clerk. (See Exhibit 4).

(6) The Complaint advised the Respondent of his right to a Hearing and explained that, in order to avoid being found in default upon motion by Complainant, a written Answer, which could include a request for a Hearing, had to be filed with the Regional Hearing Clerk, U.S. Environmental Protection Agency, Region 2, 290 Broadway, (16th Floor), New York, NY

10007-1866, within thirty (30) calendar days of receipt of the Complaint. 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 CFR § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 CFR § 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 the Respondent disputes (and thus intends to place at issue in the proceeding) and (3) whether the Respondent(s) requests a hearing. 40 CFR § 22.15(b).

(7) The Respondent did not file an Answer to the Complaint with the Regional Hearing Clerk within thirty calendar days of receipt of such Complaint or by April 6, 2016. See Yu Declaration, Paragraph 8.

(8) To date, the Respondent has not filed an Answer to the Complaint with the Regional Hearing Clerk nor has he contacted the Presiding Officer to request any extension of time to file an Answer or communicated with EPA's counsel about doing so. See Yu Declaration, Paragraph 13 and 14.

B. *Service of Complaint to then-Counsel for Andújar*

(1) Prior to issuance of the Complaint, Peter Diaz, Esq. ("Mr. Diaz") represented the Respondent in pre-filing negotiations regarding the FIFRA and CAA violations alleged in the Complaint (See Yu Declaration Paragraph 2). (See Exhibit 5). Therefore, a courtesy copy of the Complaint was also emailed to Mr. Diaz on March 1, 2016, to the email address Mr. Diaz had previously used in correspondence with EPA counsel: pdiazfederalcases@gmail.com. (See Exhibit 6).

(2) In a March 1, 2016 CBS news story, Mr. Diaz told reporters that he will contest the complaint. See Exhibit 7. To date, Mr. Diaz has not filed an Answer to the Complaint with the Regional Hearing Clerk on behalf of the Respondent nor has he even contacted the Presiding Officer to request any extension of time to file an Answer or communicated with EPA's counsel about doing so. See Yu Declaration, Paragraphs 13 and 14.

C. *Follow-up Notice and Copies of Complaint Package Sent to Then-Counsel for Andújar*

(1) On April 28, 2016, EPA sent, by certified mail with return receipt requested and via email (from ORC Secretary Yolanda Majette), a letter to Mr. Diaz ("Diaz Letter") informing him that the Respondent had accepted service of the Complaint on March 5, 2016 and March 7, 2016; that no Answer to the Complaint had been filed; that the Answer to the Complaint was due on or about April 6, 2016; that his client might be found in default upon motion; and about the legal effects of such default. (See Exhibits 8 & 9.)

(2) Additionally, EPA's April 28, 2016 letter requested confirmation in writing within five business days as to whether Mr. Diaz was currently retained as counsel for Respondent. The Diaz letter further specified that if EPA did not receive such written confirmation, the Agency would conclude that Mr. Diaz no longer represented the Respondent. Copies of the Complaint, Consolidated Rules of Practice, and the United States Postal Service return receipts (*e.g.*, green cards) showing delivery were enclosed with the letter and were attached to the email from Yolanda Majette. (See Exhibits 8 & 9).

(3) Mr. Diaz was served on May 2, 2016 with this letter, at the address on his letterhead, 420 Avenida Ponce de Leon, Suite 1001, San Juan, Puerto Rico 00918 (the green card signed by Yashira Mindez). See Exhibit 10 and Yu Declaration, Paragraph 8.

(4) 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 letters and emails, he has not responded to EPA with any confirmation (written or oral) that he currently represents the Respondent. (See Yu Declaration, Paragraphs 13 and 14).

D. *Follow-up Notice and Copies of Complaint Package Sent to Andújar*

(1) 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 Bayamón address. (See Exhibit 11). 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 Andújar stated that EPA intended to seek a default order against the Respondent, set forth the legal effects of such default order, and requested that the Respondent contact EPA counsel Yu or EPA attorney Carolina-Jordán García 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 for the April 28, 2016 Diaz letters, along with the green card receipts, were enclosed with the May 17, 2016 letter to Andújar. (See Exhibit 11, *supra).*

(2) 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 Edwin Andújar). (See Exhibits 12 & 13).

(3) Copies of the May 17, 2016 letters sent to Andújar were also mailed and emailed by Yolanda Majette to Mr. Diaz on May 17, 2016. (See Exhibit 14).

III. ARGUMENT: COMPLAINANT HAS SATISFIED THE GOVERNING LEGAL STANDARDS FOR A DEFAULT TO BE ENTERED

A. *Complainant Used a Proper Method of Service.*

Forty CFR § 22.5(b)(1)(ii)(A) states: "Service shall be made personally, by certified mail with return receipt requested, or by any reliable commercial delivery service that provides written verification of delivery." Where a complainant chooses to serve the complaint by United States Postal Service or commercial delivery service, it is "obligated to follow the procedural rules for that type of service." In the Matter of Lester Sykes, Docket No. TSCA-05-2008-0013, at 3-4 (ALJ July 30, 2013) ("[T]he standard for service of a complaint by reliable commercial service. . . is the same as that of certified mail—the signature of the intended recipient or its authorized representative for proper service.") Complainant "must use the certified mail and return receipt requested services available from the United States Postal Service (USPS) for this method of service to be proper." Id. at 5. In the present case, on March 1, 2016, EPA sent copies of the Complaint, along with the Consolidated Rules of Practice, via USPS by certified mail with return receipt requested to Andújar at his P.O. Box address and to his Bayamón address. (See Exhibit 1, *supra).* Thus, EPA satisfied a proper method of service by mailing the Complaint via certified mail with return receipt requested.

B. *Complainant Used Proper Service Materials*

Forty CFR § 22.5(b)(1)(i) requires that complainant serve "a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice." In the present case, the Complainant sent a copy of the signed original of the Complaint, including a Certificate of Service, cover letter, and a copy of the Consolidated Rules to the Respondent; the documents were received by the Respondent, as evidenced by the U.S. Postal Service Product and Tracking Information and the signed green card return receipts. (See Exhibits 2 and 3, *supra).* Thus, Complainant used "proper service materials" in compliance with the requirements of 40 CFR § 22.5(b)(1)(i).

C. *Complainant Used a Proper Address for the Respondent*

Proof that mail is properly addressed, stamped and deposited in an appropriate receptacle has long been accepted as establishing a strong rebuttable presumption of delivery to the addressee. See In the Matter of Tifa Limited, 1999 EPA ALJ Lexis 55 (July 7, 1999) and 2000 EPA App Lexis 17 (June 5, 2000). In the present matter, on March 1, 2016, Counsel for Complainant's secretary, Yolanda Majette, caused to be mailed a copy of the Complaint by certified mail, return receipt requested, to the P.O. Box and Bayamón addresses Respondent uses for his pest control business. (See Certificate of Service Exhibit 1, page 22, *supra*).

Several documents confirm that the above-mentioned post office mailing address is the correct address for Andújar's business. Documents that list the P.O. Box address as the proper mailing address for Andújar include: Andújar's commercial insecticide application license #2912 (Exhibit 15); certificate for the commercial application of Restricted use pesticides (Exhibit 16);

Pesticide Use Investigation Report (Exhibit 17); 4/5/15 and 5/14/15 Notices of Pesticide use/misuse Inspection (Exhibit 18): an 8/7/2015 PRDA Notice of Violation (Exhibit 19), "Truly Nolen Pest Control de Caguas" invoices to clients (Exhibit 20), and Truly Nolen's webpage (Exhibit 21). Finally, that the Complaint was personally received by Andújar at the P.O. Box address, as evidenced by his signature on the signed Green Card, is further proof that the Complaint was properly addressed. See Exhibit 3, *supra*.

Documents that list the Bayamón address as the physical location of the business, and therefore a proper mailing address, include: EPA's FIFRA Investigation Summary (Exhibit 22); EPA Receipt for Samples (Exhibit 23); Andujar affidavit signed 4/15/15 (Exhibit 24); 4/5/15 and 5/14/15 Notices of Pesticide use/misuse Inspection (Exhibit 18); a M&P sales receipt (Exhibit 25) and that the Complaint was signed for by Jesenia Andújar at the Bayamón address, is additional proof that the Complaint was properly addressed. (See Exhibit 2, *supra).*

D. *Complainant Included a Proper Addressee for Service by Mail on Corporations and Individuals*

Where respondent is an individual and complainant uses certified mail with return receipt requested, 40 CFR § 22.5(b)(1)(i) requires that the complainant address the service materials to the respondent or a representative authorized to receive service on respondent's behalf. In the present case, EPA addressed the service materials to "Edwin Andújar Burmúdez doing business as Truly Nolen Pest Control De Caguas." Thus, the Complainant included a "proper addressee" for service by mail to Andújar in compliance with 40 CFR § 22.5(b)(1)(i).

E. *Properly Executed Receipt for Service of Process was Returned to the Region*

Forty CFR § 22.5(b)(1)(iii) specifies that "[p]roof of Service of the Complaint must be made by affidavit of the person making personal service, or by properly executed receipt.[1] For the mailing of the March 1, 2016 Complaint to Andújar, proof of service was made by "properly executed receipt." The green card return receipt for the mailing to the P.O. Box address was signed personally by Andújar. As such, the green card for the mailing to the P.O. Box address constitutes properly executed receipt. See Exhibit 3, *supra.*

As a matter of the fact and law, as detailed above, Respondent may be found to be in default as a result of the Respondent's failure to file an Answer to EPA's properly served Complaint.

IV. FACTS IN COMPLAINT DEEMED ADMITTED BY VIRTUE OF DEFAULT

Forty CFR § 22.17(a) states, in part, that "[d]efault 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." Accordingly, the following facts, sufficient for a finding of liability for the violations alleged, are deemed admitted by virtue of Respondent's default in this matter.

A. *General Facts*

The following general facts necessary to a finding of liability for all counts were set out in the Complaint. These facts established that the Respondent is subject to FIFRA and the CAA

[1] Due to an administrative error, the Regional Hearing Clerk received proof of service of the Complaint on 3/6/17. See Exhibit 4.

and that the pesticide purchased and used by Andújar is regulated under the statutes. Respondent is subject to FIFRA (and its implementing regulations) by virtue of being a person and a commercial pest control applicator as those terms are defined by the statutes, and who moreover used a registered pesticide containing the active ingredient methyl bromide. As such, he is subject to FIFRA and its implementing regulations. Additionally, these facts established that Andújar is subject to the CAA by virtue of having purchased and used methyl bromide, an ozone depleting substance whose production and use is limited by international treaty and the CAA to very limited circumstances, including use as a pesticide for quarantine and preshipment purposes. As such, Andújar is subject to the CAA and its implementing regulations.

(1) Respondent has engaged in commercial activities providing pest control services using pesticides. See Paragraph 50 of Complaint.

(2) Respondent has been a certified applicator within the meaning of Section 2(e)(1) of FIFRA and 40 CFR § 171.2(a)(8). See Paragraph 51 of Complaint.

(3) Respondent has been a commercial applicator within the meaning of Section 2(e)(3) of FIFRA and 40 CFR § 171.2(a)(9). See Paragraph 52 of Complaint.

(4) Respondent is a person as defined in FIFRA and as such is subject to FIFRA and the regulations promulgated thereunder. See Paragraph 49 of Complaint.

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

(6) MethQ's active ingredient is 100% methyl bromide. See Paragraph 26 of the Complaint.

(7) Methyl bromide is an ozone depleting chemical subject to the CAA and its implementing regulations at Part 82. See Paragraphs 13 to 16 of the Complaint.

(8) M & P Pest Control, Inc. (hereainafter "M & P") sold or otherwise distributed MethQ to Andújar between September 2013 and February 2015. See Paragraph 38 of Complaint.

(9) Andújar admitted during the April 15th 2015 EPA Inspection that he purchased the MethQ he applied from M&P. See Paragraph 45 of Complaint.

(10) Andújar is an applicator of methyl bromide within the meaning of 40 CFR § 82.3. See Paragraph 71 of the Complaint.

(11) The methyl bromide used by Andújar was produced solely for quarantine or regulatory use (quarantine and preshipment ("QPS") applications). See Paragraph 54a. of the Complaint.

(12) Andújar is a person defined by Section 302(e) of the CAA, 42 USC § 7602(e). See Paragraph 70 of the Complaint

(13) Andújar has been subject to the CAA and the regulations at 40 CFR Part 82 promulgated thereunder. See Paragraph 72 of the Complaint.

B. *Use of A Registered Pesticide in a Manner Inconsistent with its label (Application Violations)*

Section 12 (a)(2)(G) makes it unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling. The following facts sufficient for a finding of liability on the part of the Respondent for 55 violations of FIFRA § 12(a)(2)(G), 7 USC § 136j, were set out in the Complaint. These facts describe the use instructions on the methyl bromide label, which does not allow the pesticide to be used (*i.e.*, applied) in dwellings (*e.g.*, residences) and require that a supervisory regulatory agent be present for the application. These facts further lay out Respondent's failures to comply with these requirements. The Respondent's failures to comply with the pesticide label use requirements subject him to liability for misuse of a pesticide under this section of FIFRA.

(1) The MethQ Label and MethQ booklet (collectively the "MethQ labeling") set forth precautionary and specific directions regarding use, storage, handling, sale and disposal of MethQ. See Paragraph 27 of Complaint.

(2) M & P provided the MethQ Labeling with the sale of every MethQ container. See Paragraphs 32 & 37 of Complaint.

(3) The MethQ canisters which M & P sold to Respondent Andújar bore the MethQ labeling. See Paragraph 39 of Complaint.

(4) The MethQ label had directions, including but not limited to the following statements:

a. For Quarantine/Regulatory Use Only. See Paragraph 54 a. and h. of the Complaint.
b. Supervision by Regulatory Agent Required. See Paragraphs 54 a. and h. of Complaint.
c. It is a violation of Federal Law to use this product in a manner inconsistent with its labeling. See Paragraph 54 e. of Complaint.

(5) The MethQ labeling specifies permitted application sites, crops, and pests. See Paragraph 56 of the Complaint.

(6) 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. See Paragraph 57 of Complaint.

(7) Andújar applied/used the MethQ on the dates and at the locations identified in the Table in Paragraph 58 (page 9) of the Complaint.

(8) Respondent used/applied MethQ at ten (10) application sites which were not specified in the MethQ labeling. See Paragraphs 58 through 62 of Complaint

(9) During the April 15, 2015 inspection of Respondent' facility, Andújar acknowledged that he performed all MethQ applications without the supervision of a regulatory agent. See Paragraph 46 a. of the Complaint.

(10) Respondent conducted 15 applications of MethQ which were not supervised by a regulatory agent as required by the MethQ labeling. See Paragraph 63 of Complaint.

(11) Respondent conducted 15 applications without the PPE required by the MethQ Labeling. See Paragraph 64 of Complaint.

(12) Respondent conducted 15 applications without a direct detection device required by the MethQ Labeling. See Paragraph 65 of Complaint.

(13) In the course of the fifteen (15) applications identified in Paragraph 58 of the Complaint, Andújar committed 55 separate violations of FIFRA 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. See Paragraph 67 of Complaint.

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, an unlawful act under FIFRA Section 12(a)(2)(G), 7 USC § 136j(a)(2)(G), for which a penalty may be assessed against the Respondent pursuant to FIFRA § 14(a)(1), 7 USC §136*l*.

C. *CAA Liability for Failure to Comply with Recordkeeping Requirements*

The regulation at 40 CFR §82.13(z)(1) sets out the duty of an applicator of methyl bromide produced for quarantine and preshipment (QPS) purposes to collect and maintain a document from the commodity owner, shipper or agent that requests that the methyl bromide pesticide be used for quarantine and preshipment (QPS) applications only and cites the regulatory requirements that justify its use for the requested application. The following facts sufficient for a finding of liability on the part of Respondent for violation of this regulation were set out in the Complaint. Respondent's failures to comply with the recordkeeping requirements of 40 CFR §82.13(z)(1) subject it to liability for a violation of the CAA.

(1) Andújar applied/used the MethQ on the dates and at the locations identified in the Table in Paragraph 74 of the Complaint.

(2) MethQ's active ingredient is 100% methyl bromide. See Paragraph 26 of the Complaint.

(3) Andújar is an applicator of methyl bromide within the meaning of 40 CFR § 82.3 See Paragraph 71 of the Complaint.

(4) The methyl bromide used by Andújar was produced solely for quarantine or preshipment (QPS) applications. See Paragraph 54(h) of the Complaint.

(5) Respondent failed to collect and maintain, for the 15 applications identified in the Tables in Paragraphs 58 and 74 of the Complaint, a document from the commodity owner, shipper or his agent, requesting the use of methyl bromide for QPS applications and citing the regulatory requirements that justify the use of methyl bromide. See 74 Paragraph of the Complaint.

Respondent's failure to comply with the recordkeeping requirements of 40 CFR § 82.13(z)(1) for the period September 13, 2013 through February 26, 2015 constitutes a violation of the CAA, for which a penalty may be assessed under Section 113(d)(1)(B), 42 U.S.C. § 7413(d)(1)(B). See Paragraph 75 of the Complaint.

D. *CAA Liability Against Andújar for Failure to Comply with Reporting Requirements*

The regulation at 40 CFR §82.13(z)(2) sets out the duty of an applicator of methyl bromide produced for QPS purposes to provide a certification to the seller/supplier, prior to shipment, that the methyl bromide purchased will only be used for QPS applications. The following facts sufficient for a finding of liability on the part of Andújar for violations of this section were set out in the Complaint. Respondent's failures to comply with the reporting requirements of 40 CFR §82.13(z)(2) subject him to liability for a violation of the CAA.

(1) Andújar purchased containers of MethQ from M & P, a distributor, on the dates identified in the Table in Paragraph 78 of the Complaint. See also, Paragraph 38 of the Complaint.

(2) Andújar did not provide certifications to M & P stating that that the methyl bromide purchased would be used only for QPS applications. See Paragraphs 40, 79 and 80 of the Complaint.

(3) From May 27, 2013 to September 9, 2014, Andújar purchased methyl bromide from M & P without providing, prior to shipment, a certification that the MethQ purchased would be used only for QPS applications. See Paragraph 80 of the Complaint.

Respondent's failures to comply with the reporting requirements of 40 CFR § 82.13(z)(2) for the period May 27, 2013 through September 9, 2014 constitute a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(1)(B), 42 USC § 7413(d)(1)(B).

V. DEFAULT HAS OCCURRED IN THIS MATTER

(1) Complainant commenced this administrative proceeding according to 40 CFR §§ 22.3, 22.13(a) and 22.14, when it filed the Complaint with the Hearing Clerk on March 1, 2016. See Attachment 1, supra.

(2) On March 1, 2016, EPA mailed (by certified mail with return receipt requested) a copy of the signed original of the Complaint, along with a copy of the Consolidated Rules of Practice, to Andújar.

(3) As laid out more fully in Section IV, above, EPA's Complaint sets out all factual elements necessary to establish the liability of Respondent Andújar for 55 violations of FIFRA and for 2 violations of the CAA.

(4) EPA mailed the Complaint and letters to the proper address and addressee for the Respondent. The Complaint packages were properly addressed to Andújar at two different mailing addresses and such packages were sent to the proper mailing addresses (P.O. Box address and the Bayamon address) for the Respondent.

(5) Complainant effected proper service upon the Respondent on or about March 7, 2016 when Respondent Andújar personally signed the USPS Certified Mail Return Receipt for the Complaint package.

(6) The delivery of the Complaint satisfied the requirements for service of process as defined by 40 CFR § 22.4(b)(1).

(7) To date, no Answer to the Complaint has been filed with the Regional Hearing Clerk nor has any response to EPA's letters informing Respondent and his one-time counsel of an impending default motion been received. Thus, Respondent has shown a consistent pattern of ignoring EPA's requests to file an Answer.

Based on the foregoing, Complainant's counsel respectfully asserts that good cause exists for granting the motion for default with respect to liability against the Respondent for the violations set forth in the Complaint.

Respectfully submitted,

Jeannie M. Yu
Assistant Regional Counsel
Office of Regional Counsel
Waste and Toxic Substances Branch
U.S. Environmental Protection Agency
290 Broadway, 16th floor
New York, New York 10007-1866
212-637-3205
Yu.jeannie@epa.gov

Dated: March 21, 2017
New York, New York

SENDER: COMPLETE THIS SECTION

- Complete items 1, 2, and 3.
- Print your name and address on the reverse so that we can return the card to you.
- Attach this card to the back of the mailpiece, or on the front if space permits.

1

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

9590 9402 2107 6132 9361 50

2. Article Number *(Transfer from service label)*
7016 0910 0000 4441 4496

COMPLETE THIS SECTION ON DELIVERY

A. Signature
X Edwin Andújar ☐ Agent ☐ Addressee

B. Received by *(Printed Name)* Edwin Andujar C. Date of Delivery

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

CAGUAS
APR 01 2017
00725 PR

3. Service Type
☐ Adult Signature
☐ Adult Signature Restricted Delivery
☐ Certified Mail®
☐ Certified Mail Restricted Delivery
☐ Collect on Delivery
☐ Collect on Delivery Restricted Delivery
☐ Insured Mail
☐ Insured Mail Restricted Delivery (over $500)
☐ Priority Mail Express®
☐ Registered Mail™
☐ Registered Mail Restricted Delivery
☐ Return Receipt for Merchandise
☐ Signature Confirmation™
☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

United States
Postal Service

Jeannie M. Yu, Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA - Region 2
290 Broadway - 16th Floor
New York, NY 10007-1866

Edwin Andújar Bermúdez
Truly Nolen Pest Control De Caguas - Motion for Default - Docket Number: FIFRA-02-2016-5306

+1866

Tracking Number: 70160910000044414496

Product & Tracking Information

Postal Product:

Features:
Certified Mail™

DATE & TIME	STATUS OF ITEM	
April 1, 2017, 1:54 pm	**Delivered**	**CAGUAS,**
Your item was delivered at 1:54 pm on April 1, 2017 in CAGUAS, PR 00725.		
March 27, 2017, 5:23 am	Available for Pickup	CAGUAS,
March 27, 2017, 5:18 am	Arrived at Unit	CAGUAS,
March 26, 2017, 6:01 pm	Arrived at USPS Facility	SAN JUAN

Thank You!
Yolanda Julec Majette
Office of Regional Counsel
Waste & Toxic Substances Branch Secretary
USEPA – Region 2
290 Broadway 16th Floor
New York, NY 10007-1866
(212) 637-3740 Main
(212) 637-3199 Fax
majette.yolanda@epa.gov Email

"Let no one come to you without leaving better or happier."
Mother Teresa

Yu, Jeannie

From: Majette, Yolanda
Sent: Tuesday, April 11, 2017 4:24 PM
To: Yu, Jeannie
Cc: Shapiro, Naomi; Maples, Karen
Subject: Truly Nolen Pest Control - Motion for Default
Attachments: Truly Nolen Motion for Default green card to the PO Box 7155 address.pdf

Importance: High

Jeannie-
Here is the scanned copy of the returned green card for the Truly Nolen Pest Control Motion for Default to Edwin Andujar Bermudez at the PO Box 7155 address. Below is the delivery confirmation details from the USPS website. I will send the details for the Urb. Miraflores 16-15 Calle 29 address in a separate email.

SENDER: *COMPLETE THIS SECTION*

- **Complete items 1, 2, and 3.**
- **Print your name and address on the reverse so that we can return the card to you.**
- **Attach this card to the back of the mailpiece, or on the front if space permits.**

1 Article Addressed to:

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

9590 9402 2107 6132 9361 43

7016 2070 0001 1397 4437

COMPLETE THIS SECTION ON DELIVERY

A. Signature

X Jose R. Figueroa ☐ Agent ☐ Addressee

B. Received by (Printed Name) Jose R. Figueroa | C. Date of Delivery 3/27/17

D. Is delivery address different from item 1? ☐ Yes
If YES, enter delivery address below: ☐ No

3. Service Type

- ☐ Adult Signature
- ☐ Adult Signature Restricted Delivery
- ☑ Certified Mail®
- ☐ Certified Mail Restricted Delivery
- ☐ Collect on Delivery
- ☐ Collect on Delivery Restricted Delivery
- ☐ Insured Mail
- ☐ Insured Mail Restricted Delivery (over $500)
- ☐ Priority Mail Express®
- ☐ Registered Mail™
- ☐ Registered Mail Restricted Delivery
- ☑ Return Receipt for Merchandise
- ☐ Signature Confirmation™
- ☐ Signature Confirmation Restricted Delivery

PS Form 3811, July 2015 PSN 7530-02-000-9053 Domestic Return Receipt

USPS TRACKING #

9590 9402 2107 6132 9361 43

First-Class Mail
Postage & Fees Paid
USPS
Permit No. G-10

United States
Postal Service

Jeannie M. Yu, Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA - Region 2
290 Broadway - 16th Floor
New York, NY 10007-1866

Edwin Andújar Bermúdez dba
Truly Nolen Pest Control De Caguas - Motion for Default - Docket Number: FIFRA-02-2016-5306

Tracking Number: 70162070000113974437

Updated Delivery Day: Monday, March 27, 2017

Product & Tracking Information

Postal Product:

Features:
Certified Mail™

DATE & TIME	STATUS OF ITEM
March 27, 2017, 4:42 pm	**Delivered, Left with Individual**
Your item was delivered to an individual at the address at 4:42 pm on March 27, 2017 in BAYAMON, PR	
March 27, 2017, 7:51 am	Arrived at Unit
March 26, 2017, 6:01 pm	Arrived at USPS Facility
March 25, 2017, 5:08 pm	In Transit to Destination

Thank You!
Yolanda Julec Majette
Office of Regional Counsel
Waste & Toxic Substances Branch Secretary
USEPA – Region 2
290 Broadway 16th Floor
New York, NY 10007-1866
(212) 637-3740 Main
(212) 637-3199 Fax
majette.yolanda@epa.gov Email

"Let no one come to you without leaving better or happier."

Yu, Jeannie

From: Majette, Yolanda
Sent: Tuesday, April 11, 2017 4:35 PM
To: Yu, Jeannie
Cc: Shapiro, Naomi; Maples, Karen
Subject: Truly Nolen Pest Control - Motion for Default
Attachments: Truly Nolen Motion for Default green card to the Urb. Miraflores 16-15 Calle 29 address.pdf

Importance: High

Jeannie-
Here is the scanned copy of the returned green card for the Truly Nolen Pest Control Motion for Default to Edwin Andujar Bermudez at the Urb. Miraflores 16-15 Calle 29 address. Below is the delivery confirmation details from the USPS website. I have placed the green cards in your mailbox.

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

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

ORDER ON DEFAULT AS TO LIABILITY

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

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

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

STATUTORY AND REGULATORY BACKGROUND

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

4. Section 2(t) of FIFRA, 7 U.S.C. § 136(t), and 40 C.F.R. § 152.5, define a "pest," in part, as any insect.

5. Section 2(u) of FIFRA, 7 U.S.C. § 136(u), defines the term "pesticide" as, among other things, "(1) any substance or mixture of substances intended for preventing, destroying. repelling or mitigating any pest."

6. Section 2(p)(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 does not exceed $37,500 (the amount as adjusted by 40 C.F.R.§19.4), and the first alleged date of violation occurred no more than 12 months prior to the initiation of administrative action, except where the Administrator and the Attorney General of the United States jointly determine that the matter involving a larger penalty amount or longer period of violations is appropriate for the administrative penalty action.

23. The Administrator and the Attorney General of the United States, each through their respective delegates, have determined jointly that an administrative penalty action is appropriate for the period of violation alleged in this Complaint.

FINDINGS OF FACT

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

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

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

8. At the M & P Inspections, the inspectors collected records and statements, including records and statements regarding Respondent's purchases of MethQ during the period September 2013 through February 2015.

9. During the March 26, 2015 M & P Inspection, representatives of M & P provided the inspectors with a copy of the MethQ Labeling, described in Paragraph 4, above, which M & P provided with the sale of every MethQ canister.

10. On May 26, 2015, acting under the authority and pursuant to the provisions of Section 8(b) of FIFRA, 7 U.S.C. § 136f(b), and of Section 114a of the CAA, 42 U.S.C. § 7414, EPA sent M & P an Information Request Letter ("IRL") requesting information and records regarding the import, distribution, and application of methyl bromide.

11. The IRL specifically requested, along with other reporting and recordkeeping documents, that M & P provide copies of certifications that M & P received from applicators stating that the quantity of methyl bromide ordered would be used solely for quarantine or preshipment applications as required by 40 C.F.R. § 82.13(y)(2).

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

13. In the M & P Response, M & P stated, as a response to the portion of the IRL discussed in Paragraph 11, that "We don' t have any these (sic)documents."

14. In the M & P Response, M & P provided EPA with a copy of the MethQ Booklet, described in Paragraph 4, above, which M & P further asserted that it distributed with the sale of every MethQ canister.

15. M & P sold or otherwise distributed MethQ to Respondent between September 2013

and February 2015.

16. Upon information and belief, the MethQ canisters M & P sold Respondent bore the MethQ Labeling described in Paragraph 4, above.

17. During the October 19, 2015 Inspection, Mr. Michael Pantoja, the president of M & P stated that "no applicator gave any QPS documentation to M & P."

18. Acting under the authority and pursuant to the provisions of Section 9(a) of FIFRA, 7 U.S.C. § 136g(a), duly-authorized EPA and PRDA Inspectors inspected Respondent's Facility, on April 15, 2015 and on May 14, 2015 ("April Inspection" and "May Inspection" respectively, or collectively, the "TN Inspections").

19. During the TN Inspections, the inspectors provided a Notice of Pesticides Use/Misuse Inspection form to Respondent which identified the reason for each of the Inspections and the violations suspected.

20. During the April Inspection, the inspectors collected ten (10) pesticide application records documenting Respondent's use of MethQ, for which they issued a Receipt for Samples document.

21. During the April Inspection, the inspectors requested that the Respondent provide all records in his possession related to the purchase and use of methyl bromide.

22. Respondent did not provide EPA with the records from each commodity owner requesting the quarantine and preshipment use of methyl bromide and citing legal justification for such use.

23. During the April Inspection, Respondent made the following statements regarding the MethQ applications to the inspectors:

a. that he performed all MethQ applications without the supervision of a regulatory agent;

b. that he did not have a direct reading device to measure the air concentration levels of methyl bromide (MethQ) during applications;

c. that he did not have and/or did not own a self-contained breathing apparatus (SCBA) for use during the MethQ applications; and

d. that he purchased the MethQ he applied from M &P.

24. During the May Inspection, the inspectors collected five (5) additional pesticide application records documenting Respondent's use of MethQ, for which they issued a Receipt for Samples document.

FIFRA Liability

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

25. Respondent has been, and continues to be, a "person" as defined by FIFRA § 2(s), 7 U.S.C. § 136(s), and as such is subject to FIFRA and the regulations promulgated thereunder.

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

27. Respondent is, and has been at all times pertinent to this Complaint, a "certified applicator" within the meaning of Section 2(e)(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, 13, and 16, above:

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

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

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

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

a. On page 1, in large bold letters -
"METHO-O-GAS ®Q
COMMODITY FUMIGANT
FOR QUARANTINE/REGULATORY USE ONLY
SUPERVISION BY REGULATORY AGENT REQUIRED"

b. "READ THIS BOOKLET AND ENTIRE LABEL CAREFULLY PRIOR TO USE. USE THIS PRODUCT ACCORDING TO LABEL INSTRUCTIONS."

c. Same as 30(b) above

d. Same as 30(c) above

e. Same as 30(d) above.

f. Same as 30(e) above.

g. Same as 30(f) above.

h. Same as 30(g) above

i. "This is a limited use label for quarantine/regulatory purposes and is to be used by or under the supervision of a State or Federal agency."

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

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

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

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

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

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

inside of a freight car.

36. The "residences" identified in nine (9) of the applications listed in the table in Paragraph 34, above, are not application sites specified in the MethQ Labeling.

37. The museum identified in one of the applications listed in the table in Paragraph 34, above, is not an application site specified in the MethQ Labeling.

38. Respondent conducted applications of MethQ at ten (10) application sites, set out in the table in Paragraph 34, above, which were not specified in the MethQ Labeling.

39. None of the fifteen (15) MethQ applications set out in the table in Paragraph 34 above, was supervised by a regulatory agent.

40. For each of the fifteen (15) applications set out in the table in Paragraph 34, Respondent failed to use the following PPE:

    a. SCBA, and

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

41. For each of the fifteen (15) applications set out in the table in Paragraph 34, above, Respondent failed to use a direct reading device.

42. Each of Respondent' s failures to comply with a specific requirement of the MethQ Label constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling, in violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G).

43. In the course of the fifteen (15) MethQ applications set out in the table in Paragraph 34, above, Respondent committed 55 separate violations of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), specifically consisting of:

    a. 10 applications to a site not specified in the MethQ Labeling;

b. 15 applications not supervised by a regulatory agent as required by the MethQ labeling;

c. 15 applications without the PPE required by the MethQ Labeling; and

d. 15 applications without a direct detection device required by the MethQ Labeling.

44. Each of Respondent's fifty-five (55) failures to comply with specific requirements of the MethQ Label is a violation of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed pursuant to FIFRA.

CAA Liability

Failure to Comply With CAA Recordkeeping Requirements
(Count 56)

45. Respondent is, and has been at all times pertinent to this Complaint, a "person," as that term is defined by Section 302(e) of the CAA, 42 U.S.C. § 7602(e).

46. Respondent is, and has been at all times pertinent to this Complaint, an "applicator" of methyl bromide within the meaning of 40 C.F.R. § 82.3.

47. Respondent is, and has been at all times pertinent to this Complaint, subject to the CAA and the regulations at 40 C.F.R. Part 82 promulgated thereunder.

48. Pursuant to 40 C.F.R. § 82.13(z)(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)(1)(B) 42 U.S.C. § 7413(d)(1)(B).

Service of Process and Failure to Answer Complaint

56. On March 1, 2016, EPA issued a civil administrative Complaint against Respondent pursuant to Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a) and Section 113(d) of the CAA, 42 U.S.C. § 7413(d). *See* Memorandum, Exhibit 1.

57. On March 1, 2016, and pursuant to 40 C.F.R. § 22.5(b)(1), Complainant mailed to Respondent, by certified mail, return receipt requested ("green card"), a true and correct copy of the Complaint, including Certificate of Service and the Consolidated Rules, at both Post Office Box 7155, Caguas, Puerto Rico 00726 ("P.O. Box address") and Urb. Miraflores, 16-15 Calle 29, Bayamón, Puerto Rico 00957-3707 ("Bayamón address"). *See* Memorandum, Exhibits 2 and 3.

58. The Complaint explicitly stated that if Respondent wished to avoid being found in default, Respondent must file a written Answer to the Complaint with the Regional Hearing Clerk no later than thirty (30) days after service of the Complaint. EPA, Region 2 may make a motion pursuant to § 22.17 of the Consolidated Rules seeking a default order thirty (30) days after Respondent's receipt of the Complaint unless Respondent files an Answer within that time. Default by the Respondent constitutes admission of all facts alleged in the Compliant 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 Compliant at page 17, stated the following:

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

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

59. The Respondent was served with the Complaint on March 5, 2016 at the Bayamón address. The green card was signed and dated by Jesenia Andújar. *See* Memorandum, Exhibit 2. The Respondent was served with the Complaint on March 7, 2016 at the P.O. Box address. The green card as signed and dated by the Respondent, Andújar, himself. *See* Memorandum, Exhibit 3.

60. To date, the Respondent has not filed an Answer to the Complaint with the Regional Hearing Clerk nor has he contacted the Presiding Officer to request any extension of time to file an Answer or communicated with EPA's counsel about doing so. *See* Declaration, Paragraphs 8, 13 and 14.

61. On March 1, 2016, a courtesy copy of the Complaint was sent by email to Peter Diaz, Esq. ("Mr. Diaz"), who represented the Respondent in pre-filing negotiations regarding the FIFRA and CAA violations alleged in the Complaint, at the email address previously used in correspondence with EPA counsel: diazfederalcases@gmail.com. *See* Declaration, Paragraph 2; Memorandum, Exhibits 5 and 6.

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

63. To date, Mr. Diaz has not filed an Answer to the Complaint on behalf of Respondent with the EPA Region 2 Regional Hearing Clerk, nor has he contacted the Presiding

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

64. On April 28, 2016, EPA sent, by certified mail with return receipt request and via email, a letter to Mr. Diaz informing him that the Respondent had accepted service of the Complaint on March 5, 2016 and March 7, 2016; that no Answer to the Complaint had been filed; that the Answer to the Compliant was due on or about April 6, 2016; that his client might be found in default upon motion; and about the legal effects of such default. Additionally, EPA's April 28th letter requested confirmation in writing within five business days as to whether Mr. Diaz was currently retained as counsel for Respondent. EPA's letter further specified that if EPA did not receive such written confirmation, EPA would conclude that Mr. Diaz no longer represented the Respondent. Copies of the Complaint, Consolidated Rules, and the U.S. Postal Service return receipts (*e.g.*, green cards) showing delivery were enclosed with the letter and were attached to the email. *See* Memorandum, Exhibits 8 and 9.

65. Mr. Diaz was served on May 2, 2016 with EPA's April 28th letter, at the address on his letterhead, 420 Avenida Ponce de Leon, Suite 1001, San Juan, Puerto Rico 00918. *See* Memorandum, Exhibit 10; Declaration, Paragraph 8.

66. Mr. Diaz has not contacted EPA or the EPA Regional Hearing Clerk since the filing of the Complaint, and notwithstanding EPA's written requests by letter and emails, he has not responded to EPA with any confirmation (written or oral) that he currently represents the Respondent. *See* Declaration, Paragraphs 13 and 14.

67. On May 17, 2016, EPA sent, by certified mail with return receipt requested, letters to Respondent Andújar at both the P.O. Box address and the Bayamon address. The EPA letters stated the following: (i) that the deadline for filing an Answer to the Complaint

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

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

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

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

CONCLUSIONS OF LAW

This determination of violation is based upon the following:

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

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

required by 40 C.F.R. § 82.13(z)(2).

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

with EPA regulations and practice.

ORDER

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

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

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

So ORDERED.

Dated: September 14, 2017
New York, New York

Helen Ferrara
Regional Judicial Officer

CERTIFICATE OF SERVICE

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

First Class Mail -

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

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

Inter Office Mail -

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

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: September 15, 2017

FIFRA PENALTY CALCULATION MATRIX	12/3/2009 ERP WITH CONTAINER CONTAINMENT VIOLATIONS AFTER 1/12/2009				
Respondent:	Truly Nolen Pest Control de Caguas				
Respondent Address:	PO Box 7155, Caguas, PR 00726 (other address is Urb. Miraflores, Block 16-15, Calle 29, Bayamon, Puerto Rico)				
Docket Number:	FIFRA-02-2016-5302				
Prepared By:	A. Reddy				
Date:	2_23_16				
DESCRIPTION OF COUNTS	**Counts 1-55**				
Appendix A					
1. Statutory Violation	12(a)(2)(g)				
2. FTTS Code	2ga				
3. Violation Level (1-4)	2	#N/A	#N/A	#N/A	#N/A
Table 2					
4. Violator Cat. §14(a)(1) or §14(a)(2)	14(a)(1)				
5. Size of Business Category (I-III)	III				
14(a)(2) ONLY 1st Offense? (Yes/No)					
Table 1					
6. Base Penalty	$4,250.00	$0.00	$0.00	$0.00	$0.00
Appendix B					
7. Gravity Adjustments:					
a. Pesticide Toxicity	3				
b. Human Exposure	5				
c. Human Injury	0				
d. Environmental Harm	5				
e. Compliance History	0				
f. Culpability	2				
Total Gravity Adjustment Value	15	0	0	0	0
Table 3					
WHAT TYPE OF ACTION?	**Civil Penalty**	**No Action**	**No Action**	**No Action**	**No Action**
g. Percent Adjustment	40%	0%	0%	0%	0%
h. Dollar Adjustment	$1,700.00	$0.00	$0.00	$0.00	$0.00
8. Final Penalty	$5,950.00	$0.00	$0.00	$0.00	$0.00
# Counts of Same Violation	55				
Graduated Penalty Adjustments					
Counts 1-5 100% of Per Violation Penalty	5	#N/A	#N/A	#N/A	#N/A
Counts 6-20 10% of Per Violation Penalty	15	#N/A	#N/A	#N/A	#N/A
Counts >20 5% of Per Violation Penalty	35	#N/A	#N/A	#N/A	#N/A
TOTAL PENALTY FOR COUNT	$49,087.50	$0.00	$0.00	$0.00	$0.00

9. Combined Total Penalty	$49,087.50
10. Rounded to Nearest $100	**$49,100.00**

Additional Discounts (Each Discount is Taken off the Previous Discount Amount)

Percentage	Reason

ACTUAL PROPOSED PENALTY AMOUNT	**$49,100.00**

DESCRIPTION OF COUNTS	Description of Count 6	Description of Count 7	Description of Count 8	Description of Count 9	Description of Count 10
Appendix A					
1. Statutory Violation					
2. FTTS Code					
3. Violation Level (1-3/4)	#N/A	#N/A	#N/A	#N/A	#N/A
Table 2					
4. Violator Cat. §14(a)(1) or §14(a)(2)					
5. Size of Business Category (I-III)					
14(a)(2) ONLY 1st Offense? (Yes/No)					
Table 1					
6. Base Penalty	$0.00	$0.00	$0.00	$0.00	$0.00
Appendix B					
7. Gravity Adjustments:					
a. Pesticide Toxicity					
b. Human Exposure					
c. Human Injury					
d. Environmental Harm					
e. Compliance History					
f. Culpability					
Total Gravity Adjustment Value	0	0	0	0	0
Table 3					
WHAT TYPE OF ACTION?	No Action	No Action	No Action	No Action	No Action
g. Percent Adjustment	0%	0%	0%	0%	0%
h. Dollar Adjustment	$0.00	$0.00	$0.00	$0.00	$0.00
8. Final Penalty	$0.00	$0.00	$0.00	$0.00	$0.00
# Counts of Same Violation					
Graduated Penalty Adjustments					
Counts 1-40 100% of Per Violation Penalty	#N/A	#N/A	#N/A	#N/A	#N/A
Counts 41-350 10% of Per Violation Penalty	#N/A	#N/A	#N/A	#N/A	#N/A
Counts >350 1% of Per Violation Penalty	#N/A	#N/A	#N/A	#N/A	#N/A
TOTAL PENALTY FOR COUNT	$0.00	$0.00	$0.00	$0.00	$0.00

CAA PENALTY CALCULATION MATRIX			Clean Air Act Stationary Source Civil Penalty Policy (October 25, 1991)
Respondent:	**Edwin Andujar dba Truly Nolen Pest Control de Caguas**		
Respondent Address:	PO Box 7155 Caguas, PR 00726		
Docket Number:	FIFRA-02-2016-5302		
Prepared By:	A. Trivedi		
Date:	1/14/2016		
VIOLATIONS	**Count 1 - MeBr QPS Recordkeeping**	**Count 2 - MeBr QPS Reporting**	
Statutory Provision	113(d)(1)(B)	113(d)(1)(B)	
Regulation	40 C.F.R. 82.13(z)(1)	40 C.F.R. 82.13(z)(2)	
Narrative Summary	failure to maintain record from commodity owner requesting use of QPS MeBr and citing legal justification for such use and retaining such record for 3 years	failure to provide distributor, prior to shipment of QPS MeBr, certification that MeBr would only be used for QPS applications	*Count 1 Recordkeeping Dates of Violation: 9/13/2013 - 2/26/2015* *Count 2 Reporting Dates of Violation: 5/27/2013 - 9/9/2014*
Preliminary Deterrence Amount	**Count 1 Recordkeeping**	**Count 2 Reporting**	
Economic Benefit	$ -	$ -	
Gravity: Importance to Regulatory Scheme	$ 15,000.00	$ 15,000.00	Failure to keep required records ($15,000) / Failure to report ($15,000)
Gravity: Length of Time of Violation	$ 20,000.00	$ 20,000.00	Recordkeeping: 17 months ($20,000) / Reporting: 15 months ($20,000)
Size of the Violator	$ 2,000.00		
Preliminary Total	**$ 72,000.00**		*Total days of violation: 532 Recordkeeping + 471 Reporting = 1,003. Days of violation prior to and including Dec. 6, 2013: 279. Days of violation Dec. 7, 2013, and later = 724.* --- *279 / 1,003 = 27.8% of penalty should be inflated by factor of 1.4163. 724 / 1,003 = 72.2% of penalty should be inflated by factor of 1.4853.*
27.8% of Preliminary Total	*$ 20,016.00*		
72.2% of Preliminary Total	*$ 51,984.00*		
Inflation Adjustment to pre-12/6/13 Amount	$ 28,348.66		
Inflation Adjustment to post-12/6/13 Amount	$ 77,211.84		
Total	**$ 105,560.50**		
Adjustments Factors			
a. Degree of Willfulness or Negligence			
b. Degree of Cooperation			
c. History of Noncompliance			
d. Environmental Damage			
Total Adjustment to Gravity	$ -		
ADJUSTED TOTAL PENALTY	**$105,560**		

FIFRA ENFORCEMENT RESPONSE POLICY

FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT

Waste and Chemical Enforcement Division
Office of Civil Enforcement
Office of Enforcement and Compliance Assurance
United States Environmental Protection Agency

December 2009

FIFRA ENFORCEMENT RESPONSE POLICY

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I. INTRODUCTION

This document sets forth guidance for the U.S. Environmental Protection Agency (EPA or the Agency) to use in determining the appropriate enforcement response and penalty amount for violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA or the Act).[1] The goal of this Enforcement Response Policy (ERP) is to provide fair and equitable treatment of the regulated community, predictable enforcement responses, and comparable penalty assessments for comparable violations. The policy is designed to allow swift resolution of environmental problems and to deter future violations of FIFRA by respondents, as well as other members of the regulated community.

This policy supersedes the "Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA)" issued on July 2, 1990 and other FIFRA penalty policies, except for the following policies, which remain in effect: the June 2007 "Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement"; the September 1997 "FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final"; and the September 1991 "Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations." These policies are to be used as supplements to this policy to determine the appropriate enforcement response for the referenced programs. We have attached these policies as appendices to this document for ease of use.

This guidance applies only to violations of EPA's civil regulatory programs. It does not apply to enforcement pursuant to criminal provisions of laws or regulations that are enforced by EPA. The procedures set forth in this document are intended solely for the guidance of government professionals. They are not intended and cannot be relied on to create rights, substantive or procedural, enforceable by any party in litigation with the United States. The Agency reserves the right to act at variance with this policy and to change it at any time without public notice.

II. OVERVIEW OF THE POLICY

This Enforcement Response Policy is divided into three main sections. The first section, "Determining the Level of Action," describes the Agency's options for responding to violations of FIFRA. The second section, "Assessing Civil Administrative Penalties," elaborates on EPA's policy and procedures for calculating civil penalties to be assessed in administrative cases against persons who violate FIFRA. The third section, the appendices, contains tables to be used in calculating civil penalties for this ERP and the other FIFRA penalty policies that remain in effect. The appendices to this ERP are: (1) Appendix A - FIFRA Violations and Gravity Levels; (2) Appendix B - Gravity Adjustment Criteria; (3) Appendix C - The Summary of Tables; (4) Appendix D - The FIFRA Civil Penalty Calculation Worksheet; (5) Appendix E - "Enforcement Response Policy for FIFRA Section 7(c), Pesticide Producing Establishment Reporting Requirement" (June 2007); (6) Appendix F – "FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final" (September 1997); and Appendix G – Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations.

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[1] For purposes of this Policy and its Appendices, the terms "pesticide" and "pesticide product" include, as applicable, "pesticide," "antimicrobial pesticide," "device," "pesticide product," "pesticidal substance," and/or "plant incorporated protectant" as these terms are defined and used in FIFRA § 2(u), (mm), and (h), and 40 C.F.R. Parts 152 - 174.

III. DETERMINING THE LEVEL OF ACTION

Once the Agency finds that a FIFRA violation has occurred, EPA will need to determine the appropriate level of enforcement response for the violation. FIFRA provides EPA with a range of enforcement options. These options include:

-- Notices of Warning under sections 9(c)(3), 14(a)(2), and 14(a)(4);

-- Notices of Detention under section 17(c);

-- Stop Sale, Use, or Removal Orders under section 13(a);

-- Seizures under section 13(b);

-- Injunctions under section 16(c);

-- Civil administrative penalties under section 14(a);

-- Denials, suspensions, modifications, or revocations of applicator certifications under 40 C.F.R. Part 171;

-- Referral for criminal proceedings under section 14(b); and

-- Recalls.

To ensure national consistency in FIFRA enforcement actions, EPA enforcement professionals should use this ERP as a guide in considering the facts and circumstances of each case and the company's compliance history to ensure an enforcement response appropriate for the particular violations. Each of the potential enforcement responses is discussed below.

A. Notices of Warning

FIFRA §§ 14(a)(2), 14(a)(4), and 9(c)(3) provide EPA with the authority to respond to certain violations of FIFRA with a Notice of Warning (NOW) to the violator. Under FIFRA § 14(a)(2), EPA may not assess a penalty for violations by a private applicator or other person not covered by section 14(a)(1) without having issued a written warning or citation for a prior violation of FIFRA by that person, "except that any applicator not included [in paragraph 14(a)(1)] who holds or applies registered pesticides, or uses dilutions of registered pesticides, only to provide a service of controlling pests without delivering any unapplied pesticide to any person so served . . . may be assessed a civil penalty . . . of not more than $500 for the first offense nor more than $1,000 for each subsequent offense." For all persons not covered by the exception in section 14(a)(2), EPA should issue a Notice of Warning for a first-time violation.

A state citation for a violation that would also be considered a violation under FIFRA, can be used to meet the requirement of a citation for a prior violation under FIFRA § 14(a)(2). For this purpose, the prior citation may be a notice of warning and does not have to include a penalty. The prior citation does not have to be related to the current violation; it may be for any FIFRA violation.

Regions may issue a NOW or assess a penalty of up to $500[2] for the first offense by any applicator within the scope of the exception set forth in section 14(a)(2). Section 9(c)(3) permits EPA to issue a written Notice of Warning for minor violations of FIFRA in lieu of instituting a penalty action if the Administrator believes that the public interest will be adequately served by this course of action. Generally, a violation will be considered minor under this section if the total "gravity adjustment value," as determined from Appendix B of this ERP, is three or less. A Notice of Warning may also be appropriate for certain first-time recordkeeping violations as listed in Appendix A (for example, late Section 7 reports that meet the guidelines of the FIFRA Section 7 ERP). FIFRA § 14(a)(4) provides that EPA may choose to issue a Notice of Warning in lieu of a penalty action if EPA determines that the violation occurred despite the exercise of due care or the violation did not cause significant harm to health or the environment.

B. Notices of Detention

A shipment of a pesticide or device may not be imported into the United States until EPA makes a determination of the admissibility of that shipment. FIFRA § 17 authorizes EPA to refuse admission of a pesticide or device into the United States if EPA determines that the pesticide or device violates any provisions of the Act. EPA may deny entry of a pesticide or device by refusing to accept the Notice of Arrival or by issuing a Notice of Detention and Hearing. Upon receiving a copy of the Notice of Detention, the Department of Homeland Security, through the U.S. Customs and Border Protection (Customs), will refuse delivery to the consignee. If the consignee has neither requested a hearing nor exported the pesticide or device within 90 days from the date of the notice, Customs will oversee destruction of the pesticide or device.

Customs regulations for enforcement of FIFRA § 17(c) (19 C.F.R. Part 12.110 - 12.117) allow Customs to release a shipment to the importer or the importer's agent before EPA inspects the shipment only if (1) the Customs District Director receives a completed Notice of Arrival signed by EPA indicating the shipment may be released and (2) the importer executes a bond in the amount of the value of the pesticide or device, plus duty. When a shipment of pesticides is released under bond, the shipment may not be used or otherwise disposed of until the Administrator has determined the admissibility of that shipment. Should the shipment subsequently be refused entry and the importer or agent fails to return the pesticide or device, the bond is forfeited.

C. Stop Sale, Use, or Removal Orders (SSURO)

FIFRA § 13 provides EPA the authority to issue a Stop Sale, Use, or Removal Order (SSURO) to any person who owns, controls, or has custody of a pesticide or device, whenever EPA has reason to believe on the basis of inspection or tests that:

(1) a pesticide or device is in violation of any provision of the Act;

(2) a pesticide or device has been, or is intended to be, distributed in violation of the Act; or

(3) the registration of a pesticide has been cancelled by a final order or has been suspended.

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[2] Each of the FIFRA penalty amounts referenced in this document has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. The inflation adjustment is based on the date of the violation. See 40 C.F.R. Part 19.

EPA should generally seek a civil penalty in addition to the SSURO when EPA confirms that a violation of FIFRA has occurred. EPA has established criteria to ensure judicious use of the authority to stop the sale or use of a pesticide and to order its removal. SSUROs can be a useful enforcement response, particularly for more serious violations and situations that pose a significant risk, as described further below.

1. Issuance of a SSURO

A SSURO is among the most expedient and effective remedies available to EPA in its efforts to prevent illegal sale, distribution, and use of pesticides. Unlike a seizure, EPA does not need to bring action in federal court and does not need to take custody of the materials. The advantages of a SSURO over other responses are that: (1) it may be issued whenever EPA has *reason to believe* that the product is in violation of the Act; (2) it is easier to prepare and issue than a seizure; (3) it governs all of the product under the ownership, custody, or control of the individual receiving the SSURO regardless of where the product is located; (4) it can be written to include future amounts of the product that may come into custody of the respondent; and (5) it can easily be adapted to particular circumstances.

EPA should issue a SSURO against persons who own, control, or have custody of pesticides in the following categories:

-- Pesticides for which there is reason to believe that there is a potential hazard to human health or the environment because they are either not registered or are over-formulated, under-formulated, or adulterated as to present a potentially serious health hazard.[3]

-- Pesticides or devices with labeling that is materially misleading or fraudulent and, if followed by a user, is likely to cause a significant health hazard or serious adverse environmental effect. For example, a pesticide lacking a required restricted use label is an especially serious labeling violation. A SSURO should be issued for labeling on products that: (1) are ineffective for the purposes claimed; (2) are so chemically deficient as to affect the product's efficacy; or (3) bear false or misleading safety claims.

-- Pesticides or devices that are the subject of a recall in instances where the responsible party refuses to remove, is recalcitrant in removing, or is unable to remove the product from the channels of trade.

-- Pesticides or devices that are in violation of FIFRA and for which a civil penalty has been issued but the registrant has not brought the product into compliance.

-- Pesticides that have been suspended under FIFRA § 6.

EPA may also issue a SSURO if a product has been cancelled under any section of FIFRA or suspended under FIFRA §§ 4 or 3(c)(2)(B) and the existing stock deadlines have expired at that level of sale, distribution, or use. In addition, EPA may issue a SSURO to address serious violations that present a threat of harm where there has also been a large volume of sales.

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[3] This may include pesticides packaged in improper or damaged containers, or pesticides that are so inadequately labeled as to make their safe or effective use unlikely or impossible.

When a SSURO is issued to a basic registrant for a registered pesticide product, the issuing office should ensure that the terms of the SSURO are equally applicable to the supplemental registrations of the product, as appropriate. In those cases, the SSURO should separately cite the supplemental registrations and copies should be sent to all known supplemental registrants.

D. Seizures

FIFRA § 13(b) gives EPA the authority to initiate *in rem* condemnation proceedings in U.S. District Court. Once a court grants EPA's request for authority to conduct a seizure, FIFRA § 9(b)(3) authorizes officers or employees designated by the Administrator to obtain and execute warrants for the purpose of seizing any pesticide or device that is in violation of the Act. Seizures may be executed with the assistance of the U.S. Marshals Service.

Under FIFRA § 13(b), EPA may initiate seizure actions in District Court against any pesticide or device that is being transported or, having been transported, remains unsold or in original unbroken packages, or that is sold or offered for sale in any state, or that is imported from a foreign country, if:

(1) a pesticide is adulterated or misbranded;
(2) a pesticide is unregistered;
(3) a pesticide has labeling that does not bear the information required by the Act;
(4) a pesticide is not colored or discolored as required;
(5) a pesticide bears claims or directions for use that differ from those made in connection with its registration;
(6) a device is misbranded; or
(7) a pesticide or device causes unreasonable adverse effects on the environment even when used in accordance with FIFRA requirements.

These circumstances are similar to the circumstances under which EPA would issue a SSURO. Because a SSURO is an administrative action, it can be issued more quickly than a seizure, which requires judicial action. The SSURO is therefore the more expedient enforcement response. Nevertheless, the Agency should consider initiating a seizure in the following circumstances:

- EPA has issued a SSURO but the recipient of the order has not complied with it;
- EPA has reason to believe that a person, if issued a SSURO, would not comply with it;
- The pesticide at issue is so hazardous that it should be removed from the marketplace, place of storage, or place of use to prevent any chance of harm to human health or the environment;
- The seizure will be used to support a recall; or
- It is necessary to dispose of products being held under a SSURO for which the responsible party has indicated it will not take corrective action.

E. Injunctive Relief

FIFRA § 16(c) gives EPA the authority to initiate actions in U.S. District Court seeking permanent injunction, preliminary injunction, or temporary restraining order. Because an injunction is an extraordinary form of relief, the Agency's arguments supporting injunction must be clear and compelling. As a party seeking permanent injunction, EPA would need to demonstrate one of the following: (1) other remedies would be inadequate or not available administratively either in restraining the violation or in preventing unreasonable risk to human health or the environment; (2) the Agency has already diligently exercised all appropriate administrative remedies (such as SSUROs and civil penalties) yet the violation or threat of violation continues unabated; or (3) irreparable injury, loss, or damage will result if the relief sought is not granted.

When seeking a preliminary injunction or temporary restraining order, the U.S. must demonstrate that: (1) immediate and irreparable injury, loss, or damage will result if the requested relief is not granted; and (2) EPA is likely to prevail at trial, based on the facts before the court.

Under FIFRA, a number of specific circumstances may justify injunctive relief. These include:

- Violation of a Section 6 suspension or cancellation order;
- Violation of a SSURO where a civil penalty or criminal prosecution would not provide a timely or effective remedy to deter further violations;
- Continued production, shipment, sale, distribution, or use of an unregistered pesticide after the Agency has taken civil or criminal action;
- A person continues to sell, distribute, or make available for use a restricted use pesticide (RUP) other than in accordance with FIFRA § 3(d), after the Agency has taken an enforcement response;
- A person continues to violate the FIFRA § 17 import or export requirements after the Agency has taken an enforcement response;
- A person continues to use a pesticide in a manner inconsistent with its labeling, in a manner contrary to an experimental use permit, or repeats any violation of FIFRA, after EPA has taken an enforcement response.

F. Civil Administrative Penalties

A civil penalty is the preferred enforcement response for most violations. A civil penalty is appropriate where the violation:

(1) presents an actual or potential risk of harm to humans or the environment,[4] or would impede EPA's ability to fulfill the goals of the statute; and
(2) was apparently committed as a result of ordinary negligence (as opposed to criminal negligence), inadvertence, or mistake; and the violation either:
(a) involves a violation by any registrant, commercial applicator, wholesaler, dealer, retailer, or other distributor, or any applicator within the scope of the exception set forth in FIFRA § 14(a)(2) (no prior warning is required by FIFRA for violators in this category); or
(b) involves a private applicator or other person not listed above who has received a prior Notice of Warning or citation for a FIFRA violation (as described in section III.A).

FIFRA § 14(a)(1) provides that a registrant, commercial applicator, wholesaler, dealer, or other distributor may be assessed a civil penalty of up to $5,000 for each violation. FIFRA § 14(a)(2) authorizes the Administrator to assess a private applicator or other person a penalty of up to $1,000 for each violation occurring after the issuance of a Notice of Warning or a citation for a prior FIFRA violation. Additionally, any applicator within the scope of the exception set forth in FIFRA § 14(a)(2) may be assessed a civil penalty of up to $500 for the first offense, and up to $1,000 for each subsequent offense.

Each of these penalty amounts has been increased pursuant to the Debt Collection Improvement Act of 1996, which requires federal agencies to periodically adjust the statutory maximum penalties to account for inflation. EPA has thus increased the maximum penalty amounts for FIFRA violations. For violations of FIFRA § 14(a)(1) that occur on or after January 12, 2009, the maximum civil penalty has increased to $7,500 for each violation. Violations prior to that date may be assessed up to $6,500 for each violation. For violations of FIFRA § 14(a)(2) that occur on or after January 12, 2009, the maximum civil penalty has increased to $1,100 for each violation following the first offense by both private applicators and any applicator within the scope of the exception set forth in FIFRA § 14(a)(2). Additional penalty inflation increases are expected to occur periodically and such increases are incorporated by reference into this ERP.

As the statutory definitions of "distribute or sell" and "commercial applicator" indicate, and as the conference report for the Federal Pesticide Act of 1978[5] confirms, any applicator, including a "for hire" applicator, who holds or applies an unregistered pesticide to provide a service of controlling pests without delivering any unapplied pesticide, will be considered a distributor of pesticides and will be subject to the higher penalties set forth in FIFRA § 14(a)(1) and 14(b)(1). Any applicator, other than a private applicator, who uses or supervises the use of a restricted use pesticide (RUP), whether or not that applicator is certified, is a commercial applicator and is subject to the higher penalties set forth in section 14(a)(1) and 14(b)(1). Any applicator, including a certified applicator, who holds or applies a general use pesticide (GUP) or an unclassified pesticide in violation of FIFRA will be subject to the lower penalties set forth in section 14(a)(2) and 14(b)(2).

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[4] In such cases, the Agency should consider issuing a SSURO or other injunctive relief in addition to a civil penalty.
[5] Senate Report No. 95-1188, September 12, 1978, pp. 44 and 45.

G. Denials, Suspensions, Modifications, or Revocations of Applicator Certifications

Regulations governing certification of pesticide applicators (40 C.F.R. Part 171) authorize EPA to deny, suspend, or revoke a federally issued applicator certification if the holder of the certification violates FIFRA or its regulations. The Agency views enforcement actions affecting certification status as a very strong measure, to be taken only when the "public health, interest, or welfare warrants immediate action," 40 C.F.R. § 171.11(f)(5)(i). Therefore, EPA will deny, suspend, modify, or revoke a federal certification only in response to serious violations or against persons with a history of noncompliance.

1. Suspension

In response to violations by applicators that have previously received a civil complaint for FIFRA violations and where none of the factors for revocation (discussed in paragraph G.2. below) are present, EPA will seek suspension of the individual applicator's federal certification, as well as assess a civil penalty against the employer. EPA may also suspend certifications of commercial applicators who violate restricted use pesticides recordkeeping requirements, 40 C.F.R. § 171.11(c)(7); 40 C.F.R. § 171.11(f)(1)(iii). For purposes of this section of the policy, EPA will not distinguish between commercial and private applicators. A suspension has a more substantial impact on commercial applicators because it affects their primary business activity. Recommended suspension periods are set forth on the chart below.

Recommended Suspension Periods

	First enforcement action	**Second enforcement action**[6]	**Third enforcement action**
Enforcement remedy	Penalty action	Penalty action	Penalty action
Base suspension period	N/A	4 months	6 months
Additional suspension time for multiple violations	N/A	2 months for each additional violation (up to a limit of 8 months total)	2 months for each additional violation (up to a limit of 12 months total)

If EPA decides to suspend certification, it must notify the applicator of the grounds upon which the suspension is based and the time period during which the suspension will be in effect. In order for the suspension to function as a deterrent, the suspension should take effect during the time when the applicator is most likely to be applying restricted use pesticides. In cases where the violation involved keeping fraudulent records (*i.e.*, where the violator intentionally concealed or misrepresented the true circumstances and the extent of the use of restricted use pesticides), EPA may revoke the violator's certification in response to the initial infraction.

[6] For purposes of this section, the second and third enforcement actions must occur within five years of the original civil administrative complaint.

2. Denial/Revocation

The denial or revocation of a certification deprives an applicator of the authority to apply restricted use pesticides and forces the applicator to acquire or re-acquire certification. EPA will not consider an application to acquire or re-acquire certification for at least six months following a denial or revocation. Therefore, EPA will deny or revoke a certification only where:

(1) a violation resulted in a human fatality or created an imminent danger of a fatality;
(2) a violation resulted in severe damage to the environment or created an imminent danger of severe damage to the environment;
(3) a misuse violation has resulted in significant contamination of food and water;
(4) the violator's certification has been suspended as a result of a previous serious violation;
(5) the violator's certification has been suspended three times within the past five years; or
(6) a person has maintained or submitted fraudulent records or reports.

If EPA pursues an action to deny, revoke, or modify an applicator's certification, EPA will notify the applicant or federal certificate holder of:

(1) the ground(s) upon which the denial, revocation, or modification is based;
(2) the time period during which the denial, revocation, or modification is effective, whether permanent or otherwise;
(3) the conditions, if any, under which the individual may become certified or recertified; and
(4) any additional conditions EPA may impose.

EPA must also provide the federally certified applicator an opportunity to request a hearing prior to final Agency action to deny, revoke, or modify the certificate.

H. Recalls

1. Suspended or Cancelled Products

FIFRA § 19(b) gives EPA the authority to recall pesticide products if the registration of a pesticide has been suspended and cancelled and EPA finds that a recall is necessary to protect public health or the environment. Where the product registration has been suspended or cancelled, EPA will request either a voluntary or mandatory recall. When EPA believes that a recall is necessary to protect public health or the environment and the product registration has not been suspended or cancelled, EPA may request an informal recall, which is also voluntary.

EPA should only request a recall where the evidence clearly supports the need for such action. EPA will base the decision that a product should be withdrawn from the market on information in the sample file, including laboratory analyses, staff evaluations and opinions, and other available information. All information supporting a recall decision should be included in the official file.

a. Mandatory Recalls

If a product is suspended and cancelled, a voluntary recall by the registrant and others in the chain of distribution may be sufficient. However, if the Agency believes that a voluntary recall will not ensure protection of human health or the environment, mandatory recall procedures under FIFRA §§ 19(b)(3) and (4) can be used to require registrants, distributors, or

sellers of a cancelled pesticide to:

(1) recall the pesticide;

(2) make available storage facilities to accept and store existing stocks of the suspended and cancelled pesticide;

(3) inform the EPA of the location of the storage facility;

(4) inform the EPA of the progress of the recall;

(5) provide transportation of the pesticide on request; and

(6) take reasonable steps to inform holders of the recall and transportation provisions.

Persons conducting the recall must comply with transportation, storage, and disposal requirements set forth in the recall plan developed and approved under FIFRA § 19(b).

b. Voluntary Recalls

Recalls other than those described in section 1.a., above, are voluntary. A voluntary recall is appropriate if EPA finds that it can be "as safe and effective as a mandatory recall." Voluntary recalls can be used where the cancelled product is either potentially hazardous when used as directed, ineffective for the purposes claimed, or significantly violative in nature. For a voluntary recall, EPA will ask the registrant to develop a recall plan. The effectiveness of these recalls depends on the cooperation of the company involved. The company may seek EPA's assistance in developing or implementing a recall plan, but it is not required to do so.

2. Other Recalls

A product does not have to be suspended or cancelled for EPA to request a recall. The Agency should consider asking the company to do an informal recall of a product when its use as directed by the label is likely to result in:

(1) injury to the user or handler of the product;

(2) injury to domestic animals, fish, wildlife, or plant life;

(3) physical or economic injury because of ineffectiveness or due to the presence of actionable residues; or

(4) identifiable adverse effects on the environment.

For example, EPA may issue an informal recall for an antimicrobial product that fails efficacy testing for a public health organism when the product is distributed to hospitals or other health care facilities.

In cases posing more serious threats, the Agency may monitor the progress of an informal recall and may ask the company to submit progress reports and to notify state officials to ensure that the recall occurs. These informal recalls are generally accompanied by a civil penalty action or a SSURO. In cases where a recall is necessary but the level of potential hazard is not great or when it is unlikely that significant amounts of the defective product remain in the marketplace, the recall may be conducted entirely by the company with no monitoring by EPA or state officials.

I. Criminal Proceedings

FIFRA § 12 specifically lists the unlawful acts that are subject not only to civil and administrative enforcement but also to criminal enforcement. (For further information on criminal enforcement investigations see Chapter 18 of the Pesticides Inspection Manual, "FIFRA

Criminal Enforcement.") Section 14(b) provides the authority to proceed with criminal sanctions against violators, as follows.

- A registrant, applicant for a registration, or producer who knowingly violates the Act is subject, upon conviction, to a fine of not more than $50,000 or imprisonment for up to one year, or both.

- A commercial applicator of a restricted use pesticide, or any other person not described above who distributes or sells pesticides or devices, who knowingly violates the Act is subject, upon conviction, to a fine of not more than $25,000 or imprisonment for up to one year, or both.

- A private applicator or other person not included above who knowingly violates the Act is subject, upon conviction, to a fine of not more than $1,000, or imprisonment for not more than 30 days, or both.

FIFRA § 14(b)(1) and (2) include the requirement that the violation be committed "knowingly." An act is committed "knowingly" by a person who has the general intent to do the action(s) constituting the violation. A specific intent to violate FIFRA or knowledge of its regulations is not a necessary element of the crime. Thus, the government must generally prove that the defendant knew of the conduct that constituted the violation and that the person's action(s) was voluntary and intentional and not the result of an accident or mistake of fact.

In addition, pursuant to the Alternative Fines Act (18 U.S.C. § 3571), the FIFRA criminal fine amounts for an individual or an organization[7] may be substantially increased if the violation results in death. All acts of the regulated community exhibiting actual or suspected criminal conduct should be discussed with EPA's regional or Headquarters Criminal Enforcement Counsel or brought to the attention of the Criminal Investigation Division (CID) for possible investigation.

1. Parallel Criminal and Civil Proceedings

Although the majority of EPA's enforcement actions are brought as either a civil action or a criminal action, there are instances when it is appropriate to bring both a civil and a criminal enforcement response. These include situations where the violations merit the deterrent and retributive effects of criminal enforcement, yet a civil action is also necessary to obtain an appropriate remedial result, and where the magnitude or range of the environmental violations and the available sanctions make both criminal and civil enforcement appropriate.

Active consultation and cooperation between EPA's civil and criminal programs, in conformance with all legal requirements including OECA's Parallel Proceedings Policy (September 24, 2007), is critical to the success of EPA's overall enforcement program. The success of any parallel proceedings depends upon coordinated decisions by the civil and criminal programs as to the timing and scope of their activities. For example, it will often be important for the criminal program to notify civil enforcement managers that an investigation is about to become overt or known to the subject. Similarly, the civil program should notify the criminal

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[7] As used in Title 18 of the United Sates Code, the term "organization" means a person other than an individual.

program when there are significant developments that might change the scope of the relief. In every parallel proceeding, communication and coordination should be initiated at both the staff and manager levels and should continue until resolution of all parallel matters.

J. State and Federal Roles in Enforcement of FIFRA

State governments have primary enforcement authority for both civil and criminal pesticide use violations under FIFRA §§ 26 and 27. States are allowed 30 days to commence appropriate enforcement actions for such violations. While Congress delegated to the states primary enforcement authority for pesticide use violations, FIFRA does not create exclusive enforcement jurisdiction in the states. A state may waive its primary enforcement responsibility or make a referral to the United States for federal action.

EPA has primary enforcement authority over violations concerning the sale or distribution of pesticides. Examples of such violations include failure to report a pesticide's unreasonable adverse effects on the environment, distribution of an unregistered pesticide, violations of a cancellation order or an EPA SSURO, and fraudulent labeling, advertising, or registration of a pesticide. FIFRA violations that are not use violations may be investigated and prosecuted on the federal level without waiting for state authorities to exercise their enforcement responsibility. Under most circumstances EPA will inform the state of an EPA investigation being conducted within its borders.

K. Press Releases and Advisories

EPA may, at its discretion, issue a press release or advisory to notify the public of the filing of an enforcement action, settlement, or adjudication concerning a person's violation of FIFRA. A press release can be a useful tool to notify the public of Agency actions for FIFRA noncompliance and to educate the public on the requirements of FIFRA. Some regions routinely issue press releases to inform the public of FIFRA settlements. Issuance of a press release or advisory must not be an item of negotiation during settlement.

IV. ASSESSING CIVIL ADMINISTRATIVE PENALTIES

A. Computation of the Penalty

In determining the amount of a civil penalty, FIFRA § 14(a)(4) requires EPA to consider the appropriateness of the penalty to the size of respondent's business, the effect of the penalty on respondent's ability to continue in business, and the gravity of the violation.

For each type of violation associated with a particular product, the penalty amount is determined in a seven-step process considering the Section 14(a)(4) criteria listed above. These steps are:

(1) determine the number of independently assessable violations [Section IV.A.1. Independently Assessable Violations];

(2) determine the size of business category for the violator, using Table 1 [Section IV.A.2. Size of Business];

(3) determine the gravity of the violation for each independently assessable violation using Appendix A [Section IV.A.3. Gravity of Violation];

(4) determine the "base" penalty amount associated with the size of business (Step 2) and the gravity of violation (Step 3) for each independently assessable violation, using the matrices in Table 2 [Section IV.A.4. Base Penalty Amount];

(5) determine the "adjusted" penalty amount based on case-specific factors using the Gravity Adjustment Criteria in Appendix B and Table 3 [Section IV.A.5. Adjustment for Case-Specific Factors];

(6) calculate the economic benefit of noncompliance [Sections IV.A.6. Economic Benefit of Noncompliance]; and

(7) consider the effect that payment of the total penalty amount plus economic benefit of noncompliance derived from the above calculation will have on the violator's ability to continue in business [Section IV.A.7 Ability to Continue in Business/Ability to Pay].

A civil penalty may be further modified in accordance with Section IV.B.1. Graduated Penalty Calculations, Section IV.B.2. Voluntary Disclosure, and Section IV.B.3. Adjusting the Proposed Civil Penalty in Settlement.

1. Independently Assessable Violations

A separate civil penalty, up to the statutory maximum, will be assessed for each independent violation of the Act. A violation is considered independent if it results from an act (or failure to act) which is not the result of any other violation for which a civil penalty is to be assessed or if at least one of the elements of proof is different from any other violation.

Consistent with the above criteria, the Agency considers violations that occur from each sale or shipment of a product (by product registration number, not individual containers) or each sale of a product to be independent violations.[8] There may also be situations where two unlawful acts arise out of one sale or shipment, such as the sale of a product that is both a misbranded pesticide and an unregistered pesticide. Similarly, under the pesticide use regulations, one application of a pesticide may lead to multiple misuse violations. For example, if an applicator mixes pesticides over the rate prescribed by the label and during the same application allows pesticide to drift onto non-target areas, each of those acts would be a separately assessable violation of FIFRA § 12(a)(2)(G).

Each of these independent violations of FIFRA is subject to civil penalties up to the statutory maximum. For example, when EPA can document that a registrant has distributed a misbranded product (one single EPA product registration number) in four separate shipments, EPA will allege four counts of selling or distributing a misbranded product. Similarly, when EPA can document that a registrant has shipped four separate misbranded products (four separate EPA product registration numbers) in a single shipment, EPA will plead four counts of selling or

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[8] Independent violations which can be documented as both per sale and per shipment are to be calculated only as either per sale or per shipment, whichever is more appropriate based on the supporting documentation.

distributing a misbranded product. In use cases that EPA handles, the Agency will allege three misuse violations when a commercial applicator who misuses a restricted use product on three occasions (either three distinct applications or three separate sites). If a dealer sells a restricted use pesticide (RUP) to six uncertified persons, other than in accordance with FIFRA § 3(d), EPA will plead six violations of FIFRA.

On the other hand, the Agency will assess a penalty for one violation arising from a single event or action (or lack of action) that is an unlawful act under FIFRA for multiple reasons unless the event or action results in two unlawful acts for which at least one element of proof differs. For instance, a person can be assessed a civil penalty of up to the statutory maximum for the sale and/or distribution of an unregistered, cancelled or suspended pesticide under FIFRA § 12(a)(1)(A). If the unregistered pesticide is actually a product whose registration had been cancelled, EPA cannot allege two separate violations of FIFRA § 12(a)(1)(A) since the sale or distribution related to a single event or transaction. However, the Agency could separately allege a violation of a cancellation order under FIFRA § 12(a)(2)(K). In this example, the violation of the cancellation order is independent of the sale and distribution of the unregistered product.

Another example of a dependent violation is multiple misbrandings on a single product label. EPA may assess a count of misbranding each time that a misbranded product is sold or distributed. For example, a registrant who sells or distributes four distinct shipments of a misbranded pesticide product generally may be assessed four counts of misbranding.
If a single product label is misbranded in one way or ten ways, as defined by FIFRA § 2(q), it is still misbranding on a single product label and is considered a single violation of FIFRA § 12(a)(1)(E). Note, however, for pesticide use regulations, where the applicator fails to follow two label requirements, for example, does not follow the prescribed application rate and does not provide the prescribed personal protective equipment, there are two separate violations.

When a product label is grossly misbranded such that two or more misbrandings assigned Level 2 in Appendix A are present, the gravity level is adjusted upward to a Level 1 to address the seriousness of the misbranding.

2. Size of Business

In order to provide equitable penalties, civil penalties that will be assessed for violations of FIFRA will generally decrease as the size of the business decreases. Size of business is determined based on an individual's or a company's gross revenues from all revenue sources during the prior calendar year. If revenue data for the previous year appears to be unrepresentative of the general performance of the business or the income of the individual, an average of the gross revenues for the three previous years may be used. Further, the size of business and gross revenue figures are based on the corporate family rather than a specific subsidiary or division of the company which is involved with the violation (including all sites owned or controlled by the foreign or domestic parent company) unless the subsidiary or division is independently owned.

As shown in the FIFRA Civil Penalty Matrices in Table 2, the appropriateness of the penalty to the size of the respondent's business is based on three distinct size of business categories. Further, because gross revenues of persons listed in FIFRA § 14(a)(1) [registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors] will generally be higher than gross incomes of persons listed in FIFRA § 14(a)(2) [private applicators and other

persons not listed in 14(a)(1)], the policy has separate size of business categories for Section 14(a)(1) persons and Section 14(a)(2) persons. The size of business categories for FIFRA § 14(a)(1) and Section 14(a)(2) violators are listed in Table 1. Revenue includes all revenue from an entity and all of the entity's affiliates. When no information of any kind is available concerning a respondent's size of business, the penalty should be calculated using the Category I size of business.

TABLE 1

For section 14(a)(1) violators, the size of business categories are:

I - over $10,000,000 a year
II - $1,000,000 - $10,000,000 a year
III - under $1,000,000 a year

For section 14(a)(2) violators, the size of business categories are:

I - over $1,000,000 a year
II - $300,000 - $1,000,000 a year
III - under $300,000 a year

3. Gravity of the Violation

The "gravity level" established for each violation of FIFRA is listed in Appendix A of this ERP. 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. The gravity level, which is determined from the chart in Appendix A, is then used to determine a base penalty figure from the FIFRA Civil Penalty Matrices in Step 4 below. In Step 5, the dollar amount derived from the matrix can be adjusted upward or downward depending on the actual circumstances of each violation.

4. Base Penalty Amount

The size of business categories and gravity levels are broken out in the FIFRA Civil Penalty Matrices shown in Table 2. Each cell of the matrix represents the Agency's assessment of the appropriate civil penalty, within the statutory maximum, for each gravity level of a violation and for each size of business category. Because FIFRA imposes different statutory ceilings on the maximum civil penalty that may be assessed against persons listed in FIFRA Section 14(a)(1) and persons listed in Section 14(a)(2), this policy has separate penalty matrices for Section 14(a)(1) violators and Section 14(a)(2) violators.

With the exception of any applicator within the scope of the exception set forth in FIFRA § 14(a)(2), EPA will only use the Section 14(a)(2) penalty matrix for persons falling under FIFRA § 14(a)(2) who have previously been issued a Notice of Warning or prior citation.[9]

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[9] FIFRA § 14(a)(2) states that private applicators are only subject to civil penalties after receiving a notice of warning or following a citation for a prior violation. A notice of warning or citation for a prior

When a civil penalty is the appropriate response for a first-time violation by any applicator within the scope of the exception set forth in FIFRA § 14(a)(2), EPA will seek the statutory maximum civil penalty. Subsequent violations will be assessed using the FIFRA § 14(a)(2) civil penalty matrix below.

TABLE 2

Civil Penalty Matrix for FIFRA § 14(a)(1)

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $10,000,000**	**II -- $1,000,000 - $10,000,000**	**III – under $1,000,000**
Level 1	$7,500	7,150	7,150
Level 2	7,150	5,670	4,250
Level 3	5,670	4,250	2,830
Level 4	4,250	2,830	1,420

Civil Penalty Matrix for FIFRA § 14(a)(2) [10]

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $1,000,000**	**II -- $300,000 - $1,000,000**	**III – under $300,000**
Level 1	$1,100	1,100	1,100
Level 2	1,100	1,030	770
Levels 3 & 4	1,030	770	650

5. Adjustments for Case-Specific Factors

The Agency has assigned adjustments, based on the gravity adjustment criteria listed in Appendix B, 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,

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violation may include an action by either EPA or a delegated state if the prior violation would be a violation of federal law.

[10] This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a "for hire" applicator using a registered general use pesticide, subsequent to the issuance of a prior civil penalty.

and the culpability of the violator. Then the gravity adjustment values from each gravity category listed in Appendix B are to be totaled. The dollar amount found in the matrix will be raised or lowered, not to exceed the statutory maximum, based on the total gravity values in Table 3. Once this base penalty amount is calculated, it should be rounded to the nearest $100, in accordance with Amendments to Penalty Policies to Implement Penalty Inflation Rule 2008 - (Nakayama, 2008).[11]

TABLE 3

Total Gravity Value from Appendix B	**Enforcement Remedy**
3 or below	No action or Notice of Warning (60% reduction of matrix value recommended where multiple count violations exist)
4	Reduce matrix value 50%
5	Reduce matrix value 40%
6	Reduce matrix value 30%
7	Reduce matrix value 20%
8	Reduce matrix value 10%
9 to 11	Assess matrix value
12	Increase matrix value 10% **
13	Increase matrix value 20% **
14	Increase matrix value 30% **
15	Increase matrix value 40% **
16	Increase matrix value 50% **
17 or above	Increase matrix value 60% **
** Matrix value can only be increased to the statutory maximum.	

6. Economic Benefit of Noncompliance

The Agency's Policy on Civil Penalties (EPA General Enforcement Policy #GM-21), dated February 16, 1984, mandates the recapture of any significant economic benefit of noncompliance (EBN) that accrues to a violator from noncompliance with the law. Economic benefit can result from a violator delaying or avoiding compliance costs or when the violator realizes illegal profits through its noncompliance. A fundamental premise of the 1984 Policy is that economic incentives for noncompliance are to be eliminated. If, after the penalty is paid, violators still profit by violating the law, there is little incentive to comply. Therefore, enforcement professionals should always evaluate the economic benefit of noncompliance in calculating penalties. Note that economic benefit can only be added to the proposed penalty up to the statutory maximum penalty.

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 violations alleged in the complaint. In the interest of simplifying and expediting an enforcement action, enforcement professionals may use the "rules of thumb" (discussed in section 6.b below) to

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[11] http://www.epa.gov/compliance/resources/policies/civil/penalty/amendmentstopenaltypolicies-implementpenaltyinflationrule08.pdf

determine if the economic benefit will be significant. Distribution and sale of unregistered and misbranded pesticides are examples of violations that are likely to result in significant economic benefits. For certain FIFRA requirements, the economic benefit of noncompliance may be relatively insignificant (e.g., failure to submit a report on time).

EPA generally will not settle cases for an amount less than the economic benefit of noncompliance. However, the Agency's 1984 Policy on Civil Penalties explicitly sets out three general areas where settling for less than the economic benefit may be appropriate. Since the issuance of the 1984 Policy, the Agency has added a fourth exception for cases where ability to pay is a factor. The four exceptions are:

- The economic benefit component is an insignificant amount (defined for purposes of this policy as less than $10,000);
- There are compelling public concerns that would not be served by taking a case to trial;
- It is unlikely, based on the facts of the particular case as a whole, that EPA will be able to recover the economic benefit in litigation; and
- The company has documented an inability to pay the total proposed penalty.

a. Economic Benefit from Delayed Costs and Avoided Costs

Delayed costs are expenditures that have been deferred by the violator's failure to comply with the requirements. The violator eventually will spend the money to achieve compliance. Delayed costs are either capital costs (i.e. equipment), if any, or one-time non-depreciable costs (e.g., registration fees for pesticides that are eventually registered).

Avoided costs are expenditures that will never be incurred, as in the case of an unlawfully distributed unregistered pesticide that is subsequently removed from commerce and never registered by the Agency. In this example, avoided costs include all the costs associated with product registration because the product was never registered. Those costs were never and will never be incurred. Those avoided costs might include the registration fees, annual maintenance fees, and costs associated with the testing that would have been required to support a pesticide registration or to support specific claims about the product.

b. Calculation of Economic Benefit from Delayed and Avoided Costs

Since 1984, it has been Agency policy to use either the BEN computer model or "rules of thumb" to calculate the economic benefit of noncompliance. The "rules of thumb" are straight-forward methods to calculate economic savings from delayed and avoided compliance expenditures. They are discussed more fully in the Agency's General Enforcement Policy #GM-22, entitled "A Framework for Statute-Specific Approaches to Penalty Assessments," issued on February 16, 1984, at pages 7-9. The "rule of thumb" methodology is available in a Lotus spreadsheet available to EPA enforcement professionals from the Special Litigation and Projects Division of the Office of Civil Enforcement. Enforcement professionals may use the "rules of thumb" whenever the economic benefit penalty is not substantial (generally under $10,000) and use of an expert financial witness may not be warranted. If the "rules of thumb" yield an amount

over $10,000, the case developer should use the BEN model and/or an expert financial witness to calculate the higher economic benefit penalty. Using the "rules of thumb," the economic benefit of delayed compliance may be estimated at: 5% per year of the delayed one-time capital costs, if any, and/or one-time non-depreciable costs for the period from the date the violation began until compliance was or is expected to be achieved. For avoided annual costs, the "rule of thumb" is the annual expenses avoided until the date compliance is achieved less any tax savings. These rules of thumb do not apply to avoided one-time or avoided capital costs. Enforcement professionals should calculate the economic benefit of avoided one-time and avoided capital costs, if any, by using the BEN model.

The primary purpose of the BEN model is to calculate economic savings for settlement purposes. The model can perform a calculation of economic benefit from delayed or avoided costs based on data inputs, including optional data items and standard values already contained in the program. Enforcement professionals wishing to use the BEN model should take the Basic BEN training course offered by the Special Litigation and Projects Division in cooperation with NETI. Enforcement professionals who have questions while running the model can access the model's help system which contains information on how to: use BEN, understand the data needed, and understand the model's outputs.

The economic benefit component should be calculated for the entire period for which there is evidence of noncompliance, i.e., all time periods for which there is evidence to support the conclusions that the respondent was violating FIFRA and thereby gained an economic benefit. Such evidence should be considered in the assessment of the penalty assessed for the violations alleged or proven, up to the statutory maximum for those violations. In certain cases, credible evidence may demonstrate that a respondent received an economic benefit for noncompliance for a period longer than the period of the violations for which a penalty is sought. In such cases, it may be appropriate to consider all of the economic benefit evidence in determining the appropriate penalty for the violations for which the respondent is liable. For example, in a case where credible evidence demonstrates that a respondent sold an unregistered pesticide during the past four years but the specific violations for which EPA has chosen to seek a penalty all occurred within the past two years, the economic benefit should be calculated for the four-year period. In such a case, the economic benefit component of the penalty for the specific sales transactions during the past two years should be based on a consideration of the economic benefit gained for the four-year period, but the total penalty is limited to the statutory maximum for the specific violations alleged and proven.[12]

In most cases, the violator will have the funds gained through non-compliance available for its continued use and/or competitive advantage until it pays the penalty. Therefore, for cases in which economic benefit is calculated by using BEN or by a financial expert, the economic benefit should be calculated through the anticipated date a consent agreement would be entered. If the matter goes to hearing, this calculation should be based on a penalty payment date corresponding with the relevant hearing date. It should be noted that the respondent will continue to accrue additional economic benefits after the hearing date, until the assessed penalty is paid. However, there are exceptions for determining the period of economic benefit when

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[12]When considering the economic benefit of noncompliance that accrued to the respondent more than five years prior to the filing of a complaint or a pre-filing Consent Agreement, the litigation team should consult with the Waste and Chemical Enforcement Division.

using a "rule of thumb." In those instances, the economic benefit is calculated in the manner described in the first paragraph of this subsection.

c. Economic Benefit Gained from Illegal Sales of Unregistered Pesticides

In addition to delayed and avoided costs, an economic benefit may accrue to a violator of FIFRA from the sale of unregistered or misbranded pesticides. The economic benefit derived from sales of unregistered or misbranded pesticides is sometimes referred to as "illegal profits" or "illegal competitive advantage." Illegal profits economic benefit is fundamentally different from the economic benefit calculated by using the BEN model. Unlike the delayed/avoided benefits addressed through BEN, this type of economic benefit is based on the profits generated by violating the law. Care should be taken to insure that any calculation of a benefit derived from illegal profits does not include profits attributable to lawful operations of the facility or delayed or avoided costs already accounted for in the BEN calculation. In most cases, a violator will realize either benefits from delayed/avoided costs or from illegal profits; however, whenever the facts and circumstances of the case provide a sufficient basis to calculate illegal profits and the Region is able to obtain sufficient information, the Region should calculate the benefits due to illegal profits and add it to any other type of economic benefit that has been calculated.

7. Ability to Continue in Business/Ability to Pay

FIFRA § 14(a)(4) requires the Agency to consider the effect of the penalty on the respondent's ability to continue in business when determining the amount of the civil penalty. There are several sources available to assist enforcement professionals in determining a respondent's ability to pay. Enforcement professionals considering a respondent's ability to continue in business should consult "A Framework for Statute-Specific Approaches to Penalty Assessments," (cited above) and EPA General Enforcement Policy PT.2-1 (previously codified as GM-#56), entitled "Guidance on Determining a Violator's Ability to Pay a Civil Penalty" (December 16, 1986). In addition, the Agency has three computer models available to help assess whether violators can afford compliance costs and/or civil penalties: ABEL, INDIPAY and MUNIPAY. INDIPAY analyzes individual taxpayers' claims about inability to pay. MUNIPAY analyzes cities, towns, and villages' ability to pay. These models are designed for settlement purposes only.

ABEL is an EPA computer model that is designed to assess inability to pay claims from corporations and partnerships. The evaluation is based on the firm's excess cash flow. ABEL looks at the money coming into the entity, and the money going out. It then looks at whether the excess cash flow is sufficient to cover the firm's environmental responsibilities (i.e., compliance costs) and the proposed civil penalty. Because the program only focuses on a violator's cash flow, there are other sources of revenue that should also be considered to determine if a firm is unable to pay the full penalty. These include:

- Certificates of deposit, money market funds, or other liquid assets;
- Reduction in business expenses such as advertising, entertainment, or compensation of corporate officers;
- Sale or mortgage of non-liquid assets such as company cars, aircraft, or land;

- Related entities (e.g., the violator is a wholly owned subsidiary of Fortune 500 company).

The complaint will notify the respondent of its right under the statute to have EPA consider its ability to continue in business in determining the amount of the penalty. Any respondent may raise the issue of ability to pay/ability to continue in business in its answer to the complaint or during the course of settlement negotiations. If a respondent raises the inability to pay as a defense in its answer or in the course of settlement negotiations, the Agency should ask the respondent to present appropriate documentation, such as tax returns and financial statements. The respondent must provide records that conform to generally accepted accounting principles and procedures at its expense. If the proposed penalty exceeds the respondent's ability to pay, the penalty may be reduced to a level consistent with FIFRA § 14(a)(4). If a respondent does not provide sufficient information to substantiate its claim of inability to pay the calculated penalty, then EPA may draw an inference from available information that the respondent has the ability to pay the calculated penalty.[13]

A respondent may argue that it cannot afford to pay the proposed penalty even though the penalty as adjusted does not exceed EPA's assessment of its ability to pay. In such cases, EPA may consider a delayed payment schedule calculated in accordance with Agency installment payment guidance and regulations.[14] In exceptional circumstances, EPA may also consider further adjustment below the calculated ability to pay.

Finally, EPA will generally not collect a civil penalty that exceeds a violator's ability to pay as evidenced by a detailed tax, accounting, and financial analysis. However, it is important that the regulated community not choose noncompliance as a way of aiding financially troubled businesses. Therefore, EPA reserves the option, in appropriate circumstances, of seeking a penalty that might exceed the respondent's ability to pay, cause bankruptcy, or result in a respondent's inability to continue in business. Such circumstances may exist where the violations are egregious or the violator refuses to pay the penalty. However, if the case is generated out of an EPA regional office, the case file must contain a written explanation, signed by the regional authority duly delegated to issue and settle administrative penalty orders under FIFRA, which explains the reasons for exceeding the "ability to pay" guidelines. To ensure full and consistent consideration of penalties that may cause bankruptcy or closure of a business, the regions should consult with the Waste and Chemical Enforcement Division (WCED).[15]

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[13] Note that under the Environmental Appeals Board ruling in *In re: New Waterbury*, LTD, *5* E.A.D. 529 (EAB 1994), in administrative enforcement actions for violations under statutes that specify ability to pay (which is analogous to ability to continue in business) as a factor to be considered in determining the penalty amount, EPA must prove it adequately considered the appropriateness of the penalty in light of all of the statutory factors. Accordingly, enforcement professionals should be prepared to demonstrate that they considered the respondent's ability to continue in business as well as the other statutory penalty factors and that their recommended penalty is supported by their analysis of those factors. EPA may obtain information regarding a respondent's ability to continue in business from the respondent, independent commercial financial reports, or other credible sources.

[14] *See*, 40 C.F.R. § 13.18.

[15] In accordance with the November 1, 1994 memorandum entitled, "Final List of Nationally Significant Issues and Process for Raising Issues to TPED." This final implementation guidance was developed in follow-up to Steve Herman's July 11, 1994 memorandum on "Redelegation of Authority and Guidance on Headquarters' Involvement in Regulatory Enforcement Cases."

B. Modifications of the Penalty

1. Graduated Penalty Calculations

In instances where inspectors or case developers obtain records which evidence multiple sales or distributions for the same violations, the Region may apply a "graduated" penalty calculation. The graduated method should only be applied after a consideration of the actual or potential serious or widespread harm caused by the violations, the toxicity of the pesticides involved, and the culpability of the violator. The graduated penalty method should not be used in cases involving highly culpable violators or violations that caused an actual serious or widespread harm to human health or the environment. In cases involving violations that present *potential* serious or widespread harm to human health or the environment, the Region should decide whether application of the graduated penalty method is appropriate based on the circumstances of the individual case.

In no case is the graduated penalty method mandated and the Agency maintains its statutory right to assess penalties of up to the statutory maximum for each violation, when appropriate. For highly culpable parties the penalty should be calculated at the full value for all violations. After considering the factors described above and determining that a graduated penalty method is appropriate, the Region may calculate the penalty in accordance with Table 4 below. Table 4 provides for three separate graduated systems based on the three "size of business" categories.

TABLE 4

Graduated Penalty Tables

Number of Distributions	CATEGORY I "SIZE OF BUSINESS" RESPONDENTS
1 – 100	100% of calculated per violation penalty
101 – 400	25% of per violation penalty
> 400	10% of per violation penalty

Number of Distributions	CATEGORY II "SIZE OF BUSINESS" RESPONDENTS
1 – 20	100% of calculated per violation penalty
21 – 40	25% of per violation penalty
> 40	10% of per violation penalty

Number of Distributions	CATEGORY III "SIZE OF BUSINESS" RESPONDENTS
1 – 5	100% of calculated per violation penalty
6 – 20	10 % of per violation penalty
> 20	5% of per violation penalty

Graduated penalties should generally be calculated separately for each type of violation and for each product (in other words, on a "per product violation" basis). In cases involving similar product violations (for example, violations involving products that contain the same

active ingredient and the same violative conduct on the part of the respondent), the Agency has the discretion to group together similar product violations for the graduated penalty calculation.

To calculate penalties using the graduated penalty method, the "adjusted" penalty amount must first be determined in accordance with Steps 1-5 of section IV.A Computation of the Penalty, above. The next step is to apply the graduated penalty calculation separately for each product violation, beginning with the first sale/distribution at 100% and proceeding to calculate the reduced penalty depending on the size of business. After the graduated penalty amount is calculated for each separate product violation, the Agency should add together the graduated penalty amounts for all of the product violations.

For example, a Category II business distributes two products with a total of three violations. For Product 1, the Agency is alleging misbranding (a Level 3 violation) and distribution of an unregistered pesticide (a Level 1 violation), each for 61 shipments. For Product 2, the Agency is alleging distribution of an unregistered pesticide (a Level 1 violation) for 90 shipments. After applying the case-specific factors, no adjustments to the base penalties were made. The graduated penalty calculation would proceed as follows:

Product 1, Misbranding (Level 3):

Violations 1-20 @ 100% =	20 violations @ $ 4,250 =	$ 85,000
Violations 21- 40 @ 25% =	20 violations @ $ 1,063 =	$ 21,260
Violations 41- 61 @ 10% =	21 violations @ $ 425 =	$ 8,925

Product 1, Unregistered (Level 2):

Violations 1-20 @ 100% =	20 violations @ $ 5,670 =	$113,400
Violations 21- 40 @ 25% =	20 violations @ $ 1,418 =	$ 28,360
Violations 41- 61 @ 10% =	21 violations @ $ 567 =	$ 11,907

Product 2, Unregistered (Level 2):

Violations 1-20 @ 100% =	20 violations @ $ 5,670 =	$113,400
Violations 21- 40 @ 25% =	20 violations @ $ 1,418 =	$ 28,360
Violations 41- 90 @ 10% =	50 violations @ $ 567 =	$ 28,350

When the graduated penalty method is applied to the example case, the penalty is $438,962, which is significantly lower than the $1,115,420 [(61 x 4,250) + (61 x 5,670) + (90 x 5, 670)] penalty that would be calculated without applying the graduated penalty.

2. Voluntary Disclosure

Facilities that conduct an environmental audit or implement a compliance management system and promptly self-disclose any violations may be eligible for a significant reduction in the gravity-based penalty if they meet the nine criteria established in EPA's Audit Policy (Incentives for Self-Policing: Disclosure, Correction and Prevention of Violations: Final Policy Statement, April 11, 2000). A facility may also be eligible for penalty reductions if they meet the specific criteria outlined in the "Small Business Compliance Policy" (May 11, 2000). If a facility self-discloses violations that do not qualify under the Audit Policy or Small Business Compliance Policy, the Agency may consider a company's willingness to disclose as good faith (see Section IV.B.3.b.i. Good Faith Adjustments).

3. Adjusting the Proposed Civil Penalty in Settlement

Certain circumstances may justify adjustment of the proposed penalty. These circumstances may come to EPA's attention when a respondent files an answer to a civil complaint or during pre-filing settlement discussions under the *Consolidated Rules of Practice Governing Administrative Assessment of Civil Penalties*, 40 C.F.R. Part 22.

a. Factual Changes

EPA will recalculate the proposed penalty if the respondent can demonstrate that the size of business category, the gravity level, or the gravity adjustment criteria (Appendix B) used to derive the penalty is inaccurate. Adjustments to the proposed civil penalty may also be appropriate if the respondent can demonstrate an inability to pay the civil penalty (see Section IV.A.7. Ability to Continue in Business/Ability to Pay). Where additional facts indicate that the original penalty is not appropriate, EPA will calculate a new penalty consistent with the new facts. The burden is on the respondent to raise those factors which may justify the recalculation.

b. Negotiations Involving Only the Amount of the Penalty

In some cases the respondent may admit to all jurisdictional and factual allegations alleged in the complaint and may desire a settlement conference limited to the amount of the proposed penalty. The following sections describe adjustments that EPA may consider during settlement negotiations if the specific case meets the criteria set forth below.

i. Good Faith Adjustments

During the course of settlement negotiations, EPA may consider evidence of significant good faith efforts by the respondent to comply with FIFRA prior to the discovery of the violation(s) by EPA or a state as well as the respondent's good faith efforts to comply with FIFRA expeditiously after the discovery of the violation(s) by EPA or a state. In such instances, EPA may reduce the penalty by as much as 20 percent below the proposed penalty, if such a reduction would serve the public interest. A reduction for good faith efforts to comply is not mandated in any case. Such a reduction in penalty should only occur where there is an appropriate showing by respondent and finding by the Agency. Additionally, no reduction based on good faith efforts of the respondent should extend beyond a total of 20 percent of the proposed penalty without a showing of "special circumstances," as discussed below. No downward adjustment should be made if the Respondent fails to correct the violation(s) promptly after EPA or a state discovers the violation(s). Moreover, no downward adjustment should be made because respondent lacks knowledge concerning either applicable requirements or violations committed by respondent.

ii. Special Circumstances/Extraordinary Adjustments

Should EPA determine in a particular case that equity would not be served by adjusting the proposed penalty by only the allowable 20 percent adjustment for good faith, the FIFRA program manager may approve an adjustment to the proposed penalty for up to an additional 20 percent. In such cases, the case file must include substantive reasons why the extraordinary reduction of the civil penalty was appropriate, including: (1) setting forth the facts of the case; (2) why the penalty derived from the FIFRA civil penalty matrices and gravity adjustment was

inequitable; (3) how all other methods for adjusting or revising the proposed penalty would not adequately resolve the inequity; and (4) the manner in which the adjustment of the penalty effectuated the purposes of the Act. The FIFRA program manager's concurrence in the extraordinary reduction must be included in the case file.

iii. Supplemental Environmental Projects (SEPs)

To further EPA's goals to protect and enhance public health and the environment, certain environmentally beneficial projects, or Supplemental Environmental Projects (SEPs), may be included in the settlement. SEPs are environmentally beneficial projects which a respondent agrees to undertake in settlement of an environmental enforcement action, but which the respondent is not otherwise legally required to perform. In return, some percentage of the cost of the SEP is considered as a factor in establishing the final penalty to be paid by the respondent. EPA has broad discretion to settle cases with appropriate penalties. Evidence of a violator's commitment and ability to perform a SEP is a relevant factor for EPA to consider in establishing an appropriate settlement penalty. While SEPs may not be appropriate in settlement of all cases, they are an important part of EPA's enforcement program. Whether to include a SEP as part of a settlement of an enforcement action is within the sole discretion of EPA. EPA will ensure that the inclusion of a SEP in settlement is consistent with "EPA Supplemental Environmental Projects Policy," effective May 1, 1998, or as revised.

APPENDICES

Appendix A - FIFRA Violations and Gravity Levels

Appendix B - Gravity Adjustment Criteria

Appendix C - Summary of Tables

Appendix D - FIFRA Civil Penalty Calculation Worksheet

Appendix E – Enforcement Response Policy for FIFRA Section 7(c) – Pesticide Producing Establishment Reporting Requirements

Appendix F – FIFRA: Worker Protection Standard (WPS) Penalty Policy – Interim Final

Appendix G – Enforcement Response Policy for the FIFRA Good Laboratory Practices (GLP) Regulations

APPENDIX A

FIFRA VIOLATIONS AND GRAVITY LEVELS

FIFRA SECTION	CODE	VIOLATION	LEVEL
12(a)(1)(A)	1AA	Sold or distributed a pesticide NOT REGISTERED under section 3 or one whose registration was CANCELLED or SUSPENDED, except to the extent authorized by the administrator.	1
12(a)(1)(A)	1AB	Registrant, wholesaler, dealer, retailer, or any other distributor ADVERTISED, or otherwise "offered for sale" in any medium a pesticide that was NOT REGISTERED under section 3 or that was CANCELLED or SUSPENDED, other than in accordance with Agency policy.	2
12(a)(1)(B)	1BA	CLAIMS made for a pesticide as part of its sale or distribution differed substantially from those accepted in connection with registration	2
12(a)(1)(B)	1BB	Registrant, wholesaler, dealer, retailer, or the other distributor ADVERTISED, or otherwise "offered for sale" in any medium a registered pesticide product for an UNREGISTERED USE, other than in accordance with Agency policy.	2
12(a)(1)(C)	1CA	Sold or distributed a pesticide whose COMPOSITION DIFFERED from the composition represented in the registration	2
12(a)(1)(D)	1DA	Sold or distributed a pesticide that has not been COLORED or DISCOLORED pursuant to section 25(c)(5)	2
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(A)	1EA	Sold or distributed a pesticide or device which is MISBRANDED in that the labeling has a statement, design, or graphic representation that is false or misleading.	2[1]
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(B)	1EB	Sold or distributed a pesticide or device which is MISBRANDED in that the package or other container or wrapping does not conform to the standards established pursuant to section 25(c)(3) (e.g., not contained in child-resistant packaging or safety containers).	2[1]
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(C)	1EC	Sold or distributed a pesticide or device that is MISBRANDED in that it is an imitation of, or is offered for sale under the name of, another pesticide.	2[1]
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(D)	1ED	Sold or distributed a pesticide or device that is MISBRANDED in that the label did not bear the registration number assigned under section 7.	4
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(E)	1EE	Sold or distributed a pesticide or device that is MISBRANDED in that any words, statements, or other information required by the Act were not prominently placed on the label or labeling in such a way as to make it readable or understandable.	3
12(a)(1)(E) 12(a)(1)(F) 2(q)(1)(F)	1EF	Sold or distributed a pesticide or device that is MISBRANDED in that the label, or labeling accompanying it, did not contain directions for use necessary to make the product effective and to adequately protect health and the environment.	1
12(a)(1)(E)	1EG	Sold or distributed a pesticide or device that is MISBRANDED in	2[1]

FIFRA SECTION	CODE	VIOLATION	LEVEL
12(a)(1)(F) 2(q)(1)(G)		that the label did not contain a warning or caution statement adequate to protect health and the environment (precautionary statements)	
12(a)(1)(E) 2(q)(1)(H)	1EH	Sold or distributed a non-registered pesticide intended for export that is MISBRANDED in that the label did not have a prominently displayed "Not Registered for Use in the United States of America"	2[1]
12(a)(1)(E) 2(q)(2)(A)	1EI	Sold or distributed a pesticide that is MISBRANDED in that the label did not bear an ingredient statement on the immediate container which is presented or displayed under customary conditions of purchase.	3
12(a)(1)(E) 2(q)(2)(B)	1EJ	Sold or distributed a pesticide that is MISBRANDED in that the labeling does not contain a statement of the use classification under which the product was registered	2
12(a)(1)(E) 2(q)(2)(C)	1EK	Sold or distributed a pesticide that is MISBRANDED in that there is not a label affixed to the pesticide container, and to the outside wrapper of the retail package if the required information on the immediate container cannot be clearly read, a label bearing all of the following information: (i) the name and address of the producer, registrant, or person for whom produced (ii) the name brand, or trademark under which the pesticide is sold (iii) the net weight or measure of the contents; and (iv) when required by regulation, the registration number assigned to the pesticide.	 3 4 4 3
12(a)(1)(E) 2(q)(2)(D)	1EL	Sold or distributed a pesticide that is MISBRANDED in that the pesticide is sold in quantities highly toxic to man and the label failed to bear the skull and crossbones, and the word "poison," prominently in red on a contrasting background color, and a statement of practical treatment.	1
12(a)(1)(E) 2(c)(1)-(3)	1EM	Sold or distributed a pesticide that is ADULTERATED in that: (i) the strength or purity falls below the professed standard of quality expressed on the labeling; (ii) any substance has been substituted wholly or in part for the pesticide; or (iii) any valuable constituent of the pesticide has been wholly or in part abstracted.	2
12(a)(2)(A)	2AA	DETACHED, ALTERED, DEFACED, OR DESTROYED, in whole or in part, any LABELING required under the Act.	2
12(a)(2)(B)(i)	2BA	Refused to PREPARE, MAINTAIN, or SUBMIT any RECORDS required under sections 5, 7,[ii] 8, 11, or 19.	2
12(a)(2)(B)(ii)	2BB	Refused to SUBMIT any REPORTS required by or under sections 5, 6, 7,[2] 8, 11, or 19.	2
12(a)(2)(B)(ii)	2BC	A registrant refused to submit REPORTS under section 6(a)(2) regarding UNREASONABLE ADVERSE EFFECTS of their pesticide.	1
12(a)(2)(B)(iii)	2BD	Person refused to allow ENTRY, INSPECTION, COPYING OF RECORDS, or SAMPLING authorized by this Act.	2
12(a)(2)(C)	2CA	Person gave a GUARANTY or undertaking provided for in section	2

FIFRA SECTION	CODE	VIOLATION	LEVEL
		12(b) which was FALSE in any particular.	
12(a)(2)(D)	2DA	Person used their personal advantage or revealed to persons other than those authorized by the Act any INFORMATION acquired under the Act that was CONFIDENTIAL.	3
12(a)(2)(E)	2EA	Registrant, wholesaler, dealer, retailer, or other distributor ADVERTISED a RESTRICTED USE PESTICIDE without indicating that the product was restricted.	2
12(a)(2)(F)	2FA	Person DISTRIBUTED, SOLD, MADE AVALIABLE FOR USE, or USED a RESTRICTED USE PESTICIDE for a purpose other than in accordance with section 3(d) or regulations issued.	~~3~~ 2
12(a)(2)(F)	2FB	Person distributed, sold, or made available for use, or used, a RESTRICTED USE PESTICIDE without maintaining the RECORDS required by regulations (A Notice of Warning should be issued for first-time partial violations. Violations continuing subsequent to the issuance of a civil complaint are to result in a suspension- see "Denials, Suspensions, Modifications, or Revocations of Applicator Certifications" section of this ERP).	2
12(a)(2)(G)	2GA	Person USED a registered pesticide in a manner inconsistent with its labeling.	2
12(a)(2)(H)	2HA	Person USED a pesticide under an EXPERIMENTAL USE PERMIT contrary to the provisions of the permit.	2
12(a)(2)(I)	2IA	Person violated any order issued under section 13 (*i.e.,* STOP SALE, USE, OR REMOVAL ORDER, or SEIZURES.	1
12(a)(2)(J)	2JA	Person violated any SUSPENSION ORDER issued under section 6.	1
12(a)(2)(J)	2JB	Person violated any SUSPENSION ORDER issued under section 3(c)(2)(B) or 4.	2
12(a)(2)(K)	2KA	Person violated any CANCELLATION ORDER issued under the Act on grounds of UNREASONABLE ADVERSE EFFECTS.	1
12(a)(2)(K)	2KB	Person violated any CANCELLATION ORDER issued under the Act on grounds OTHER THAN UNREASONABLE ADVERSE EFFECTS.	2
12(a)(2)(K)	2KC	Person failed to submit a SECTION 6(g) NOTICE when required.	2
12(a)(2)(K)	2KD	Person submitted a NOTABLY LATE SECTION 6(g) NOTICE.	3
12(a)(2)(K)	2KE	Person submitted an INCOMPLETE or INCORRECT SECTION 6(g) NOTICE.	3
12(a)(2)(L) 7(a)[2]	2LA	PRODUCED a pesticide or active ingredient subject to the Act in an UNREGISTERED ESTABLISHMENT.	2
12(a)(2)(L) 7(c)(1)[2]	2LB	Producer FAILED TO SUBMIT, or submitted NOTABLY LATE, a REPORT to the administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the year, and which they sold or distributed during the past year.	2
12(a)(2)(L) 7(c)(1)[2]	2LC	Producer submitted a LATE REPORT to the administrator, under SECTION 7, which indicates the types and amounts of pesticides or active ingredients which they are currently producing, which they produced during the year, and which they sold or distributed during	4

FIFRA SECTION	CODE	VIOLATION	LEVEL
		the past year (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within three year timeframe from the first violation).	
12(a)(2)(L) 7(c)(1)[2]	2LD	Producer submitted an INCOMPLETE SECTION 7 REPORT with MINOR OMISSIONS of the required information (civil complaint issued only if the producer does not respond to a Notice of Warning or there is a subsequent violation within three year timeframe from the first violation).	3
12(a)(2)(L) 7(c)(1)	2LE	Producer submitted an INCOMPLETE or a FALSE SECTION 7 REPORT with MAJOR OMISSIONS or ERRORS of the required information.	2
12(a)(2)(L) 7(c)2	2LF	Upon request of the administrator for the purposes of the issuance of a section 13 Stop Sale Orders, a PRODUCER FAILED TO PROVIDE the names and addresses of any recipients of any pesticides produced in any of his registered establishments.	1
12(a)(2)(M)	2MA	Person KNOWINGLY FALSIFIED all or any part of an application for registration, application for an experiment use permit, any information submitted under section 7, any records required to be maintained by the Act, any reports filed under the Act, or any information marked as confidential and submitted to the administrator under any provision of the Act.	1
12(a)(2)(N)	2NA	A registrant, wholesaler, dealer, retailer, or other distributor FAILED TO FILE REPORTS (other than reports addressed in the section 7(c) ERP) required by the Act.	2
12(a)(2)(O)	2OA	Person ADDED A SUBSTANCE TO or TOOK any substance from a pesticide in a manner that may defeat the purpose of the Act.	2
12(a)(2)(P)	2PA	Person USED a pesticide in TESTS ON HUMAN BEINGS in violations of the conditions specified by the Act.	1
12(a)(2)(Q)[3]	2QA	Person FALSIFIED INFORMATION RELATING to the TESTING of any pesticide (or any of its ingredients, metabolites, or degradation products)that the person knows will be furnished to the administrator, or will become a part of any records required to be maintained by the Act	1
12(a)(2)(Q)[3]	2QB	Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a HIGH LEVEL GLP violation.	2
12(a)(2)(Q)[3]	2QC	Person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a MID LEVEL GLP violation.	3
12(a)(2)(Q)[3]	2QD	14(a)(1) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation.	4
12(a)(2)(Q)[3]	2QE	14(a)(2) person falsely represented compliance with the FIFRA Good Laboratory Practice (GLP) regulations as a result of a LOW LEVEL GLP violation.	3
12(a)(2)(R)[3]	2RA	Person submitted DATA KNOWN TO BE FALSE in support of registration.	1

FIFRA SECTION	CODE	VIOLATION	LEVEL
12(a)(2)(S)[4]	2SA	Person sold, distributed, or used an UNREGISTERED pesticide in violation of a REGULATION ISSUED UNDER SECTION 3(a).	
12(a)(2)(S)[4]	2SB	Person violated any REGULATION ISSUED UNDER SECTION 19.	

[1] If a label has two or more Level 2 misbranding violations, the appropriate gravity level is increased to Level 1.

[2] Section 7(c)(1) violations are covered in the Enforcement Response Policy for FIFRA Section 7(c), Pesticide producing Establishment Reporting requirement dated June 2007.

[3] Violations regarding laboratory practice are covered in the FIFRA Good Laboratory Practice (GLP) Regulations dated September 30, 1991.

[4] Gravity levels for these violations will be assigned in subsequent ERPs.

APPENDIX B

GRAVITY ADJUSTMENT CRITERIA[1]

VIOLATION GRAVITY OF HARM	VALUE	CIRCUMSTANCES
Pesticide	3	Toxicity - Category I pesticides, signal word "Danger," restricted use pesticides (RUPs), pesticides with flammable or explosive characteristics (*i.e.*, signal words "Extremely Flammable" or "Flammable"), or pesticides that are associated with chronic health effects (mutagenicity, oncogenicity, teratogenicity, etc.) or pesticide is unregistered and the ingredients or labeling indicate Category I toxicity.
	2	Toxicity - Category II, signal word "Warning" or pesticide unregistered and unknown, but not expected to meet Category I toxicity criteria.
	1	Toxicity – Category III or IV, signal word "Caution" or pesticide unregistered and ingredients lower or minimum risk category.
Harm to Human Health	5	Actual serious or widespread[1] harm to human health.
	3	Unknown or potential serious or widespread harm to human health
	1	Minor[2] potential or actual harm to human health.
	0	Negligible[3] harm to human health anticipated.
Environmental Harm	5	Actual serious or widespread[1] harm to the environment (*e.g.*, crops, water, livestock, wildlife, wilderness, or other sensitive natural areas).
	3	Unknown or potential serious or widespread[1] harm to the environment health
	1	Minor[2] potential or actual harm to the environment.
	0	Negligible[3] harm to the environment anticipated.
Compliance History[4]	4	Violator with more than one prior violation of FIFRA.
	2	Violator with one prior violation of FIFRA.
	0	No prior FIFRA violations.
Culpability[5]	4	Knowing or willful violation of the statute.[6] Knowledge of the general hazardousness of the activity.
	2	Culpability unknown or violation resulting from negligence.
	1	Violation resulted from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation.
	0	Violation was neither knowing nor willful and did not result from negligence. Violator instituted steps to correct the violation immediately after discovery of the violation.

APPENDIX B NOTES

[1] For the purposes of this ERP, serious or widespread harm refers to actual or potential harm which does not meet the parameters of minor harm or negligible harm, as described below.

[2] For the purposes of this ERP, minor harm refers to actual or potential harm which is, or would be of short duration, no lasting effects or permanent damage, effects are easily reversible, and harm does not, or would not result in significant monetary loss.

[3] For the purposes of this ERP, negligible harm refers to no actual or potential harm or actual or potential harm which is insignificant or unnoticeable and has no lasting effects or permanent damage or monetary loss.

[4] The following considerations apply when evaluating compliance history for the purposes of Appendix B:

(a) In order to constitute a prior violation, the prior violation must have resulted in: (1) a final order, either as a result of an uncontested complaint, or as a result of a contested complaint which is finally resolved against the violator; (2) a consent order, resolving a contested or uncontested complaint by the execution of a consent agreement; (3) the payment of a civil penalty by the alleged violator in response to the complaint, whether or not the violator admits to the allegations of the complaint; or (4) conviction under the FIFRA's criminal provisions.

A notice of warning (NOW) will not be considered a prior violation for the purposes of the gravity adjustment criteria, since no opportunity has been given to contest the notice. Additionally, a stop sale, use, or removal order (SSURO) issued under FIFRA section 13 will not be considered as compliance history.

(b) To be considered a compliance history for the purposes of Appendix B, the violation must have occurred within five years of the present violation. This five-year period begins on the date of a final order, consent order, or payment of a civil penalty.

(c) Generally, companies with multiple establishments are considered as one when determining compliance history. If one establishment of a company commits a FIFRA violation, it counts as history when another establishment of the same company, anywhere in the country, commits another FIFRA violation

(d) An enforcement action or citation issued by a state lead agency will count as a prior violation if all the above considerations are met.

[5] EPA enforcement officials are not required to determine culpability at the time the complaint is issued (especially if this information is not readily available). EPA enforcement officials may instead assign a weighting factor of 2 (culpability unknown), at the time of the issuance of the complaint. Culpability adjustments may be reconsidered during settlement negotiations.

[6] The Agency may also consider criminal proceedings for "knowing and willful" violations. See the "Criminal Proceedings" section of this ERP.

APPENDIX C
SUMMARY OF TABLES

TABLE 1

SIZE OF BUSINESS CATEGORIES

Section 14(a)(1) violators:
I - over $10,000,000 a year
II - $1,000,000 - $10,000,000
III - under $1,000,000

Section 14(a)(2) violators:
I - over $1,000,000 a year
II - $300,000 - $1,000,000
III - under $300,000

TABLE 2

FIFRA CIVIL PENALTY MATRICES

Civil Penalty Matrix for FIFRA § 14(a)(1)

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $10,000,000**	**II - $1,000,000 - $10,000,000**	**III – under $1,000,000**
Level 1	$7,500	7,150	7,150
Level 2	7,150	5,670	4,250
Level 3	5,670	4,250	2,830
Level 4	4,250	2,830	1,420

Civil Penalty Matrix for FIFRA § 14(a)(2) *

	SIZE OF BUSINESS		
LEVEL OF VIOLATION	**I – over $1,000,000**	**II - $300,000 - $1,000,000**	**III – under $300,000**
Level 1	$1,100	1,100	1,100
Level 2	1,100	1,030	770
Level 3 & 4	1,030	770	650

* This 14(a)(2) matrix is only for use in determining civil penalties issued subsequent to a notice of warning or following a citation for a prior violation, or in the case of a "for hire" applicator using a registered general use pesticide, subsequent to the issuance of a prior civil penalty.

TABLE 3

GRAVITY ADJUSTMENT CRITERIA

Total Gravity Value from Appendix B	Enforcement Remedy
3 or below	No action or Notice of Warning (60% reduction of matrix value recommended where multiple count violations exist)
4	Reduce matrix value 50%
5	Reduce matrix value 40%
6	Reduce matrix value 30%
7	Reduce matrix value 20%
8	Reduce matrix value 10%
9 to 11	Assess matrix value
12	Increase matrix value 10% **
13	Increase matrix value 20% **
14	Increase matrix value 30% **
15	Increase matrix value 40% **
16	Increase matrix value 50% **
17 or above	Increase matrix value 60% **

** Matrix value can only be increased to the statutory maximum.

APPENDIX D
FIFRA CIVIL PENALTY CALCULATION WORKSHEET

Respondent: **Docket No.:**	**Brief Description of Violation**
APPENDIX A 1. Violation	
2. FTTS Code & Violation Level	
TABLE 1 3. Violator Category & Size of Business Category	
APPENDIX A 4. Gravity of the Violation	
TABLE 2 5. Base Penalty	
APPENDIX B 6. Gravity Adjustments	
a. Pesticide Toxicity	
b. Harm to Human Health	
c. Environmental Harm	
d. Compliance History	
e. Culpability	
f. Total Gravity Adjustment (Add 6a - 6e)	
TABLE 3 7. Percent & Dollar Adjustment	
8. Economic Benefit	
TABLE 4 9. Graduated Penalty	
10. Final Penalty	

Case Development Officer

Date

Example
FIFRA CIVIL PENALTY CALCULATION WORKSHEET

Respondent: **Docket No.:**	**Brief Description of Violation**
APPENDIX A 1. Violation	§12(a)(1)(C)
2. FTTS Code & Violation Level	1CA / 2
TABLE 1 3. Violator Category & Size of Business Category	§14(a)(1) / Category I
APPENDIX A 4. Gravity of the Violation	2
TABLE 2 5. Base Penalty	$7,150
APPENDIX B 6. Gravity Adjustments a. Pesticide Toxicity	1
b. Harm to Human Health	3
c. Environmental Harm	3
d. Compliance History	0
e. Culpability	2
f. Total Gravity Adjustment (Add 6a - 6e)	9
TABLE 3 7. Percent & Dollar Adjustment	Assess Matrix Value
8. Economic Benefit	
TABLE 4 9. Graduated Penalty	Not applied
10. Final Penalty	**$7,150 x 10 Violations = $71,500**

Case Development Officer

Date

For the full CAA Stationary Source Penalty Policy October 1991

please go to the following link:

https://www.epa.gov/sites/production/files/documents/penpol.pdf

An excerpt of the relevant portion of the policy, pages 11-14, is included in this exhibit

b. Toxicity of the pollutant

Violations of NESHAPs emission standards not handled by a separate appendix and non-NESHAP emission violations involving pollutants listed in Section 112(b)(1) of the Clean Air Act Amendments of 1990*: $15,000 for each hazardous air pollutant for which there is a violation.

c. Sensitivity of environment (for SIP and NSPS cases only).

The penalty amount selected should be based on the status of the air quality control district in question with respect to the pollutant involved in the violation.

1. Nonattainment Areas

i. Ozone:

Extreme	$18,000
Severe	16,000
Serious	14,000
Moderate	12,000
Marginal	10,000

ii. Carbon Monoxide and Particulate Matter:

Serious	$14,000
Moderate	12,000

iii. All Other Criteria Pollutants: $10,000

2. Attainment area PSD Class I: $ 10,000

3. Attainment area PSD Class II or III: $ 5,000

d. Length of time of violation

To determine the length of time of violation for purposes of calculating a penalty under this policy, violations should be assumed to be continuous from the first provable date of violation until the source demonstrates compliance if there have been no significant process or operational changes. If the source has affirmative evidence, such as continuous emission monitoring data,

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* An example of a non-NESHAP violation involving a hazardous air pollutant would be a violation of a volatile organic compound (VOC) standard in a State Implementation Plan involving a VOC contained in the Section 112(b)(1) list of pollutants for which no NESHAP has yet been promulgated.

to show that the violation was not continuous, appropriate adjustments should be made. In determining the length of violation, the litigation team should take full advantage of the presumption regarding continuous violation in Section 113(e)(2). This figure should be assessed separately for each violation, including procedural violations such as monitoring, recordkeeping and reporting violations. For example, if a source violated an emissions standard, a testing requirement, and a reporting requirement, three separate length of violation figures should be assessed, one for each of the three violations based on how long each was violated.

Months	Dollars
0 - 1	$ 5,000
2 - 3	8,000
4 - 6	12,000
7 - 12	15,000
13 - 18	20,000
19 - 24	25,000
25 - 30	30,000
31 - 36	35,000
37 - 42	40,000
43 - 48	45,000
49 - 54	50,000
55 - 60	55,000

2. Importance to the regulatory scheme

The following violations are also very significant in the regulatory scheme and therefore require the assessment of the following penalties:

Work Practice Standard Violations:
- failure to perform a work practice requirement: $10,000-15,000
  (See Appendix III for Asbestos NESHAP violations.)

Reporting and Notification Violations:
- failure to report or notify: $15,000
- late report or notice: $5,000
- incomplete report or notice: $5,000 - $15,000

(See Appendix III for Asbestos NESHAP violations.)

Recordkeeping Violations:
- failure to keep required records: $15,000
- incomplete records: $5,000 - $15,000

Testing Violations:
- failure to conduct required performance testing or testing using an improper test method: $15,000
- late performance test or performing a required test method using an incorrect procedure: $5,000

Permitting Violations:
- failure to obtain an operating permit: $15,000
- failure to pay permit fee: See Section 502(b)(3)(C)(ii) of the Act

Emission Control Equipment Violations:
- failure to operate and maintain control equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- intermittent or improper operation or maintenance of control equipment: $5,000-15,000

Monitoring Violations:
- failure to install monitoring equipment required by the Clean Air Act, its implementing regulations or a permit: $15,000
- late installation of required monitoring equipment: $5,000
- failure to operate and maintain required monitoring equipment: $15,000

Violations of Administrative Orders[5]: $15,000

Section 114 Requests for Information Violations:
- failure to respond: $15,000
- incomplete response: $5,000 - $15,000

Compliance Certification Violations:
- failure to submit a certification: $15,000
- late certifications: $5,000
- incomplete certifications: $5,000 - $15,000

Violations of Permit Schedules of Compliance:
- failure to meet interim deadlines: $5,000
- failure to submit progress reports: $15,000
- incomplete progress reports: $5,000 - $15,000
- late progress reports: $5,000

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[5] This figure should be assessed even if the violation of the administrative order is also a violation of another requirement of the Act, for example a NESHAP or NSPS requirement. In this situation, the figure for violation of the administrative order is in addition to appropriate penalties for violating the other requirement of the Act.

A penalty range is provided for work practice violations to allow Regions some discretion depending on the severity of the violation. Complete disregard of work practice requirements should be assessed the full $15,000 penalty. Penalty ranges are provided for incomplete notices, reports, and recordkeeping to allow the Regions some discretion depending on the seriousness of the omissions and how critical they are to the regulatory program. If the source omits information in notices, reports or records which document the source's compliance status, this omission should be treated as a failure to meet the requirement and assessed $15,000.

A late notice, report or test should be considered a failure to notify, report or test if the notice or report is submitted or the test is performed after the objective of the requirement is no longer served. For example, if a source is required to submit a notice of a test so that EPA may observe the test, a notice received after the test is performed would be considered a failure to notify.

Each separate violation under this section should be assessed the corresponding penalty. For example, a NSPS source may be required to notify EPA at startup and be subject to a separate quarterly reporting requirement thereafter. If the source fails to submit the initial start-up notice and violates the subsequent reporting requirement, then the source should be assessed $15,000 under this section for each violation. In addition, a length of violation figure should be assessed for each violation based on how long each has been violated. Also, a figure reflecting the size of the violator should be assessed once for the case as a whole. If, however, the source violates the same reporting requirement over a period of time, for example by failing to submit quarterly reports for one year, the source should be assessed one $15,000 penalty under this section for failure to submit a report. In addition, a length of violation figure of $15,000 for 12 months of violation and a size of the violator figure should be assessed.

3. Size of the violator

Net worth (corporations); or net current assets (partnerships and sole proprietorships):

Under $100,000	$2,000
$100,001 - $1,000,000	5,000
1,000,001 - 5,000,000	10,000
5,000,001 - 20,000,000	20,000
20,000,001 - 40,000,000	35,000
40,000,001 - 70,000,000	50,000
70,000,001 - 100,000,000	70,000
Over 100,000,000	70,000 + $25,000 for every additional $30,000,000 or fraction thereof

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	:	
Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas	:	Honorable Helen Ferrara, Presiding Officer
Respondent,	:	Docket No. FIFRA-02-2016-5302
Proceeding Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and the Clean Air Act, as amended	:	

DECLARATION OF AUDREY MOORE

I, Audrey Moore, in accordance with 28 U.S.C. § 1746, state that the following is true and correct to the best of my knowledge, information and belief:

1. I am the Pesticides Team Leader for the EPA Region 2 Pesticide and Toxic Substances Branch, based in EPA's Edison, New Jersey office. I work in the Division of Enforcement and Compliance Assistance.

2. I have been employed by EPA since 1990. I have been involved with the federal pesticide program since 1995. I handle programmatic and enforcement related matters under the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA") and the regulations promulgated thereto. My duties involve supervision of staff in selection of targets for inspections, preparation of information request letters, enforcement case development, preparation of administrative Complaints, including penalty computation work sheets, and settlement of enforcement cases. I also have inspected numerous facilities for the purpose of evaluating compliance with FIFRA.

3. In the present civil administrative case involving the above-captioned Respondent, Region 2's staff performed the following actions: (i) inspected the Respondent Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas's ("Truly Nolen") facility in April and May of 2015; (ii) identified violations of FIFRA and the CAA committed by Truly Nolen; and (iii) calculated the penalty for violations under FIFRA in accordance with the December 2009 FIFRA Enforcement Response Policy ("FIFRA ERP").

4. As part of my official duties at EPA as the Pesticides Team Leader, I have reviewed the calculation of the penalties for the violations of the FIFRA requirements alleged in the Complaint in the above-captioned matter and I believe the calculations to be appropriate

and in accordance with the FIFRA statute, the FIFRA ERP, the Debt Collection Improvement Act of 1996, the Civil Monetary Penalty Inflation Adjustment Rule, as codified at 40 C.F.R. Part 19 and the EPA December 6, 2013 Memorandum entitled "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)."

5. The civil penalty calculation for the FIFRA violations alleged in the Complaint is laid out in the Penalty Calculation Worksheets (Exhibit 5) and computes to a penalty of $49,100 to be assessed against the Respondent. Respondent has not responded in any way to the Complaint or to this proceeding after the filing of the Complaint.

FIFRA Penalty Calculation

6. Section 14(a) of FIFRA, 7 U.S.C. § 136*l*(a), governs the imposition of civil penalties for FIFRA violations. As modified by the Debt Collection Improvement Act of 1996 and the Civil Monetary Penalty Adjustments (see 40 C.F.R. § 19.4), FIFRA § 14(a)(1) specifies that violators identified in that subsection -- registrants, commercial applicators, wholesalers, dealers, retailers, or other distributors – are subject to a maximum civil penalty, for violations that occurred on January 12, 2009 or later, of $7,500 for each offense. Respondent Truly Nolen is a commercial applicator.

7. Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4), sets out three factors to also consider when setting penalty amounts: the gravity or seriousness 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' ability to continue in business.

8. The FIFRA ERP provides a method for EPA personnel to calculate penalties in a rational, equitable, and consistent manner that addresses all the statutory factors. It does so by setting out five steps to be used by EPA staff when calculating penalties in a FIFRA administration action.

9. The first step is to determine the gravity or "level" of the violation using Appendix A of the FIFRA ERP which assigns values to each type of possible violation of the statute. See Exhibit 7, Page 29. Appendix A designates each of Respondent's violations of FIFRA §12(A)(2)(G), 7 U.S.C. § 136j(A)(2)(G), the use of a registered pesticide in a manner inconsistent with its label, as a Level 2 violation.

10. The second step is to determine the size of business category of the Respondent. The FIFRA ERP, Table 1, Page 18, offers two tables for evaluating size of business, one for violators identified in FIFRA §14(a)(1) and another for those identified in FIFRA § 14(a)(2) (private applicators or other persons not included in Section 14(a)(1)). Respondent Truly Nolen is a commercial applicator covered by Section 14(a)(1). The table for Section 14(a)(1) violators establishes three categories of such violators: Category I is the highest category for companies or individuals with gross revenue over Ten Million Dollars ($10,000,000); Category II is the second highest category for companies or individuals with gross revenues between One and Ten Million Dollars

($1,000,000 - $10,000,000); and Category III is the size of business category for companies or individuals with gross revenues under One Million Dollars ($1,000,000). EPA has made many attempts since the initial meeting held in 2015 to the current date to obtain Truly Nolen's financial information. Truly Nolen has ignored all such attempts. Based on a brief telephone conversation with Truly Nolen's attorney in 2018, we believe the company has a net worth under $100,000 and therefore fits within the Category III size of business.

11. Step 3 is to use the FIFRA civil penalty matrices to select a base penalty amount associated with the gravity level of violation and the size of business. Looking at the appropriate penalty matrix, EPA staff found that Level 2 violations by Category III-size commercial applicators results in a matrix value, or recommended base penalty assessment, of $4,250 per violation. See Exhibit 7, Table 2, page 19.

12. Step 4 of the FIFRA ERP requires consideration of the following five gravity adjustment criteria: (1) pesticide toxicity; (2) harm to human health; (3) harm to the environment; (3) compliance history of the violator; and (4) culpability of the violator. See Exhibit 7, Appendix B, page 34. The values assigned to these gravity adjustment criteria are set out in Appendix B of the FIFRA ERP and can be applied to the facts of a given case. The gravity values are then added up for a total gravity value, see Table 3 of the FIFRA ERP, page 20. Total gravity values then result in the upward or downward adjustment of the matrix value selected in Step 3. In the current matter, EPA's calculation of the gravity values for each of the gravity adjustment criteria totaled a value of 15, which calls for a 40% increase in the matrix value; in other words, the base penalty of $4,250 for each of the fifty-five (55) pesticide use violations alleged in the Complaint was adjusted upwards to $5,950.

13. EPA staff considered the above-mentioned gravity adjustment criteria as follows: For the first criterion, pesticide toxicity, there are three values that can be assigned (either 1, 2 or 3), depending on the toxicity of the chemical. EPA assigned the maximum value of 3, since Meth-O-Gas Q, EPA Reg. No. 5785-41 ("Meth-Q"), the fumigant Respondent misused, has a category 1 (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 criteria, harm to human health and the environment, EPA assigned values of 5 each, because the potential harm to human health and the environment from MethQ misuse is serious. 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 seizure, kidney damage, nerve damage and death. 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 a result of exposure to MethQ applied in contravention of the label requirements. In addition to the potential adverse serious human health effects it poses, methyl bromide causes serious and widespread environmental harm because it vaporizes and depletes the ozone layer. Consequently, MethQ's use has been banned internationally pursuant to the Montreal Treaty (also known as the Montreal Protocol on Substances That Deplete the Ozone Layer), except in very limited circumstances.

14. For the fourth criterion, compliance history, EPA assigned a value of 0, since the Respondent had no prior FIFRA violations within the past 5 years. To be considered for the compliance history for purposes of Appendix B of the ERP, the prior violation must have occurred within five years of the present violation. Finally, for the fifth factor, culpability, EPA assigned a value of 2, because the violations resulted from Respondent' negligence. 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 member of the regulated community, Respondent knew or should have reasonably known of its obligation to comply with the requirements for use explicitly stated on the MethQ labels.

15. Respondent performed 55 MethQ applications in the relevant time period. The FIFRA ERP defines independently assessable charges for misuse to include ***each*** aspect of an application performed contrary to the label's requirements. Accordingly, EPA staff determined that there were fifty-five(55) independent violative acts in this case, broken down as follows: 10 applications to a site not specified in the MethQ labeling, 15 applications not supervised by a regulatory agent as required by the MethQ labeling; 15 applications without personal protective equipment required by MethQ labeling; and 15 applications without a direct detection device require by the MethQ labeling. As the MethQ label explicitly states that the product is a "Commodity Fumigant" and "For Quarantine/Regulatory Use Only," EPA could further have sought additional penalties for applications to targets that were not commodities and performed for purposes not for quarantine/regulatory use.

16. Multiplying the adjusted base penalty of $5,950 for a Level 2/Category III size of business by the number of violations (55) equals $327,250. However, in instances where, as here, there is evidence of multiple use violations involving the same pesticide, EPA may apply a "graduated" penalty calculation, as specified in the FIFRA ERP. See Exhibit 7, section IV.B.1. (pages 25-26). To calculate penalties using the graduated penalty method, the adjusted penalty amount is first determined, as we have done, based on the five gravity adjustment factors discussed above. In this case, the adjusted penalty is $5,950 for each use violation, as mentioned above. Using Table 4 (Graduated Penalty Table) on page 25 of the FIFRA ERP, the graduated penalty calculation for a Respondent that is a category III size of business would proceed as follows: The first 5 uses would be assessed at 100% of the calculated per violation penalty. The use violations 6-20 would be at 10% of per violation penalty. And use violations greater than 20 would be assessed at 5% of per violation penalty. See Exhibit 5 (Penalty Calculation Worksheet for FIFRA, supra). In this case, the total penalty using the graduated penalty matrix is $49,087.50, rounded up to the nearest hundredth is $49,100. The $49,100 penalty amount reflects the gravity value in accordance with Section 14(a)(4) of FIFRA.

17. EPA staff next considered the effect of the penalty on the ability of the Respondent to continue in business. Andújar is a franchisee of the large national company Truly Nolen Pest control. However, Truly Nolen has refused to provide any financial information since EPA's initial meeting in 2015. Without any information on Truly Nolen's financial

status, EPA staff is unable to conclude what effect the penalty would have on the company's ability to continue in business.

18. We then assessed the Economic Benefit component, which measures the financial benefit gained from a violator's noncompliance. 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 costs," 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. In the present case, since none of Respondent's uses of MethQ were a permissible use, then any profits are an economic benefit---this amount can only be obtained from the Respondent. Absent Respondent's cooperation and provision of financial information, EPA staff were unable to calculate the economic benefit of Respondent's violative acts. Notwithstanding this information, Complainant believes that the proposed penalties sought are sufficiently high as to create a deterrent effect.

19. As set out above, the proposed FIFRA penalty of $49,100 against the Respondent was calculated appropriately and in accordance with the statutory factors identified in Section 14(a)(4) of FIFRA, 7 U.S.C. § 136*l*(a)(4).

20. I therefore believe good cause exists for granting the motion for default with respect to penalty for the FIFRA violations alleged in the Complaint.

Dated: March 12, 2019
New York, New York

Respectfully submitted,

Audrey E. Moore

AUDREY MOORE
Pesticides Team Leader
U.S. Environmental Protection Agency
Region 2
Division of Enforcement & Compliance Assistance
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(732) 906-6809

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
Region 2

In the Matter of	:	
Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas	:	Honorable Helen Ferrara, Presiding Officer
Respondent,	:	Docket No. FIFRA-02-2016-5302
Proceeding Under the Federal Insecticide, Fungicide, and Rodenticide Act, as amended, and the Clean Air Act, as amended	:	

DECLARATION OF NATALIE TOPINKA

I, Natalie Topinka, in accordance with 28 U.S.C. § 1746, state that the following is true and correct to the best of my knowledge, information and belief:

1. I am an Environmental Scientist in the Air Enforcement and Compliance Assurance Branch, EPA Region 5, based in Chicago, Illinois. The EPA Region 5 office is designated as the Center of Excellence for enforcement of regulations implementing Title VI of the Clean Air Act ("CAA"), which pertains to the Protection of Stratospheric Ozone.

2. I have been employed by EPA since 2007. I have been involved with Region 5's CAA enforcement and compliance programs since the start of my employment. My duties include evaluating entities subject to CAA regulations for compliance with applicable provisions, determining proper corrective actions for entities found in violation of CAA requirements, calculating monetary penalties in accordance with EPA penalty policies and statutory requirements, and negotiating settlement agreements to resolve CAA violations. I have used the October 1991 CAA Stationary Source Civil Penalty Policy ("CAA Penalty Policy") to calculate penalties in accordance with the CAA on numerous occasions.

3. As an expert in CAA enforcement involving ozone-depleting substances, I was asked to assist Region 2 staff with the above-captioned matter. My work included assisting in identifying Respondents' violations of the CAA, calculating the appropriate penalties, and preparing the CAA Penalty Calculation Worksheet (Exhibit 6).

4. The civil penalty calculation for the CAA violations alleged in the Complaint computes to a penalty of $105,560 (rounded down to the nearest tenth) to be assessed against

Respondent Edwin Andújar Bermúdez dba Truly Nolen Pest Control De Caguas ("Truly Nolen").

5. As set out more fully below, I believe the calculations to be appropriate and in accordance with the CAA, the CAA Penalty Policy, the Debt Collection Improvement Act (DCIA) of 1996, the Civil Monetary Penalty Inflation Adjustment Rule, as codified at 40 C.F.R. Part 19, and the EPA December 6, 2013 Memorandum entitled "Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)."

CAA Penalty Calculation

6. Section 113(d) of the CAA authorizes EPA to issue a civil administrative penalty order against any person who has violated the CAA or its implementing regulations.

7. The Complaint in the instant matter alleged violations by Respondent Truly Nolen of the reporting and recordkeeping requirements for the use and purchase of methyl bromide promulgated pursuant to Section 604(d)(5) of the CAA, 42 U.S.C. § 7671c(d)(5), and set out at 40 C.F.R. Part 82, subpart A (Production and Consumption Controls for Ozone Depleting Substances).

8. Specifically, we determined, and the Complaint alleged, that Truly Nolen failed to maintain, for every application, a document from the commodity owner, shipper or their agent setting forth their 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). Moreover, Truly Nolen failed to provide the distributor from whom it purchased the methyl bromide containing pesticides with a certification that the quantity it purchased would be used for quarantine fumigation only, as further required by 40 C.F.R. § 82.13(z)(2).

9. Section 113(e) of the CAA, 42 U.S.C. § 7413(e) states that EPA shall consider, as appropriate, the following factors when setting penalty amounts: the seriousness of the violation, the duration of the violation, the size of business, the economic impact of the penalty on the business, and the violator's compliance history and good faith efforts to comply.

10. The CAA Penalty Policy provides a method for EPA personnel to calculate penalties in a rational, equitable, and consistent manner that addresses all the statutory factors.

11. In measuring the "seriousness of the violation" the CAA Penalty Policy directs EPA staff to consider: 1) the importance of compliance to the regulatory scheme; 2) the duration or length of time of the violation; and 3) the size of the violator.

12. In this case, Truly Nolen's failure to create and maintain records or to submit reports to EPA as required by 40 C.F.R. Part 82 contravenes the essence of the regulatory scheme.

The failure to report and keep records is a serious violation because methyl bromide is an ozone depleting substance and an extremely toxic pesticide. 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. Truly Nolen's failure to keep records and to provide a certification to the distributor, prior to the distributor's delivery of methyl bromide to Truly Nolen, that the methyl bromide would be used for Quarantine and Preshipment purposes only, increased the likelihood of methyl bromide misuse and its corresponding harm to human health and the environment In such circumstances, the CAA Penalty Policy recommends a penalty of $15,000 for each failure to maintain a record or to submit a required report. See Exhibit 8, page 12. We therefore elected to begin our calculation with a base penalty, prior to adjustments, of $15,000 for each violation (reporting and recordkeeping).

13. For Truly Nolen's violation of 40 C.F.R. § 82.13(z)(1), which required it to maintain a record from a commodity owner requesting the use of methyl bromide for a QPS purpose, we calculated the length of time of the violation by looking at Truly Nolen's records of pesticide applications. The violation period alleged in the Complaint reflects the total days between the first date of methyl bromide application through the last date of such an application. There were 532 days between the first date of application (9/13/2013) and the last date (2/26/2015). The CAA Penalty Policy suggests a Time of Violation Gravity Adjustment of $20,000 be added for violations which persist over a time period of 13 to 18 months, which we applied. See Exhibit 8, page 12.

14. For Truly Nolen's violation of 40 C.F.R. § 82.13(z)(2), involving the failure to provide a distributor a certification that the methyl bromide purchased would be used only for QPS applications, we reviewed Truly Nolen's purchases. The violation period alleged in the Complaint reflects the total days between the date of Truly Nolen's first methyl bromide purchase through the date of the last purchase. There were 471 days between the first date of purchase (5/27/2013) and the last date (09/09/2014). The CAA Penalty Policy suggests a Time of Violation Gravity Adjustment of $20,000 be added for violations which persist over a time period of 13 to 18 months, which we applied. See Exhibit 8, page 12.

15. For Truly Nolen, the size of violator is unknown. EPA has made many attempts since the initial meeting held in 2015 to the present date to obtain Truly Nolen's financial information. Truly Nolen has ignored all such attempts. Based on a brief conversation with Truly Nolen's attorney in 2018, we believe the company has a net worth under $100,000. For a violator entity of that size, the CAA Penalty Policy suggests a Size of Violator adjustment of $2,000 be added. See Exhibit 8, page 14.

16. The penalty against Truly Nolen incorporating the first three factors thus came to $72,000. Pursuant to the DCIA of 1996, and the implementing regulations set out at 40 C.F.R. Part 19, EPA must further adjust penalties to account for inflation. In accordance with the table at 40 C.F.R. § 19.4, EPA used an 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. See Exhibit 12. Based on these adjustments, the preliminary penalty that we calculated against Truly Nolen for the CAA reporting and

recordkeeping violations alleged in the Complaint came to $105,560 (rounded down to the nearest tenth).

17. We next considered the economic impact of the penalty on the business which is based on no financial information provided by Truly Nolen and no publicly available Annual Filings submitted by Truly Nolen to the Department of Puerto Rico Registry of Corporations and Entities. Therefore, no change to the penalty was made based on this limited information.

18. The final two statutory factors that EPA considered were the violator's compliance history (an upward adjustment only) and good faith efforts to comply. There was no evidence of prior history of non-compliance. Therefore, no upward adjustment to the penalty was made. Prior to the issuance of the Complaint, Truly Nolen demonstrated no good-faith efforts to comply and has not bothered to respond to the Complaint or this proceeding in any way. Therefore, no adjustments have been made based on this factor.

19. Finally, we attempted to assess whether Truly Nolen realized an economic benefit from its noncompliance. 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 costs," 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. The CAA Penalty Policy provides 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 the CAA reporting and recordkeeping violations alleged against Truly Nolen was de minimis and exercised its discretion not to seek penalties for economic benefit.

20. As set out above, the proposed CAA penalty of $105,560 against Truly Nolen was calculated appropriately and in accordance with the statutory factors identified in Section 113(e) of the CAA, 42 U.S.C. § 7413(e).

21. I therefore believe good cause exists for granting the motion for default with respect to penalty for the CAA violations alleged in the Complaint.

Dated: March 12, 2019
Chicago, Illinois

Respectfully submitted,

Natalie Topinka
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U.S. Environmental Protection Agency, Region 5
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U.S. Department of Justice

Environment and Natural Resources Division

DJ# 90-5-2-1-11513 – 2571469

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February 11, 2016

Dore LaPosta, Director
Division of Enforcement and Compliance Assurance
United States Environmental Protection Agency
290 Broadway
New York, New York 10007-1866

Re: Edwin Andujar d/b/a Truly Nolen Pest Control de Cagua, Bayamón, P.R.
Alternative Exterminating Comejen Corp., Bayamón, P.R.
Comejen Exterminating Corp., San Juan, P.R.
Merced Exterminating Service Corp., Juncos, P.R.
Tower Exterminating Corp., Bayamón, P.R.
Superior Angran family of companies, Guaynabo, P.R.

Dear Ms. LaPosta:

Under Section 113(d)(1) of the Clean Air Act, the Environmental Protection Agency has requested the Justice Department to determine that administrative action against the companies named above is appropriate although more than a year has passed since the first alleged date of violation. The proposed administrative action will involve violations of reporting and record-keeping violations in connection with a Class VI controlled ozone-depleting substance (namely, methyl bromide).

On behalf of the Attorney General, I hereby determine that this matter is appropriate for administrative action. EPA has not requested concurrence in, and I have not evaluated, settlement terms for the contemplated action.

Sincerely,

Robert E. Maher Jr.
Assistant Section Chief

cc: Phillip A. Brooks

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D C 20460

DEC - 6 2013

ASSISTANT ADMINISTRATOR
FOR ENFORCEMENT AND
COMPLIANCE ASSURANCE

MEMORANDUM

SUBJECT: Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)

FROM: Cynthia Giles
Assistant Administrator

TO: Regional Administrators
Deputy Regional Administrators

The purpose of this memorandum is to amend the EPA's existing civil penalty policies to account for inflation. Specifically, with the exception of penalties assessed under expedited settlement agreement (ESA) programs, this memorandum amends all existing penalty policies to increase the initial gravity-based penalties by 4.87 percent for violations that occur after December 6, 2013, the effective date of the 2013 Civil Monetary Penalty Inflation Adjustment Rule (2013 Penalty Inflation Rule or Rule). The 4.87 percent represents the cost-of-living adjustment, calculated pursuant to the formula prescribed in Section 5(b) of the Debt Collection Improvement Act (DCIA),[1] which was applied in developing the 2013 Rule.

This memorandum also provides guidance on pleading civil penalties for violations that occur before and after the effective date of the Rule, and when to apply the new maximum civil penalty amounts that may be sought in certain administrative enforcement actions brought under the Clean Water Act (CWA), Certain Alaskan Cruise Ship Operations Act (CACSOA), Safe Drinking Water Act (SDWA), Clean Air Act (CAA), the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), and the Emergency Planning and Community Right-to-Know Act (EPCRA).

I. Background

The DCIA requires each federal agency to issue regulations adjusting for inflation the statutory civil penalties that can be imposed under the laws administered by that agency. On November 6, 2013, the EPA promulgated the 2013 Penalty Inflation Rule pursuant to Section 4 of the DCIA; the Rule is effective December 6, 2013. (A copy of the Rule, as published at 78 Fed. Reg. 66643-48 (Nov. 6, 2013), is attached.) Under the Rule, only 20 out of 88 statutory penalty amounts are being increased for two reasons: (1) since 2008, when the last Penalty Inflation Adjustment Rule was promulgated, the rate of inflation has been low, resulting in a cost-of-living adjustment of only 4.87 percent for those penalties

[1] *See* the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. § 2461 note, as amended by the Debt Collection Improvement Act of 1996, 31 U.S.C. § 3701 note.

that were last adjusted in 2008; and (2) when the DCIA's mandatory rounding rules were applied to the inflation adjusted increment, the inflation adjusted amounts were, in most cases, insufficient to warrant an increase under the 2013 Rule. All violations occurring after December 6, 2013, the effective date of the Rule, are subject to the new, inflation-adjusted, statutory penalties.[2]

II. The DCIA's Formula for Calculating Cost-of-Living Adjustments to Civil Penalties

Pursuant to the DCIA, each federal agency is required to issue regulations adjusting for inflation all statutory civil monetary penalties that can be imposed pursuant to such agency's statutes. The purpose of these inflation adjustments is to maintain the deterrent effect of civil penalties, thereby promoting compliance with the law. Section 5 of the DCIA requires each agency to apply a specific formula and statutorily prescribed rounding rules to determine whether and to what extent statutory civil penalties should be increased to account for any changes in the cost-of-living. Under the DCIA, the cost-of-living adjustment (COLA) is determined by calculating the percentage increase, if any, by which the Consumer Price Index for all-urban consumers (CPI-U) for the month of June of the calendar year preceding the current adjustment exceeds the CPI-U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted. Accordingly, the COLA applied under the 2013 Rule equals the percentage by which the CPI-U for June 2012 (*i.e.*, June of the year preceding 2013, the year the Rule was published), exceeds the CPI-U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be).

III. Amendments to the EPA's Civil Penalty Policies

By this memorandum, the Office of Enforcement and Compliance Assurance (OECA) is amending the EPA's existing civil penalty policies to increase the initial gravity component of the penalty calculation by 4.87 percent for those violations subject to the new Rule, *i.e.*, violations occurring after December 6, 2013. As further discussed below, this memorandum does not increase penalty amounts that may be assessed under any of the EPA's ESA programs.

While not required specifically by the Act, we believe revising our civil penalty policies to account for inflation is consistent with the Congressional intent in passing the DCIA and is necessary to implement effectively the mandated penalty increases set forth in 40 C.F.R. Part 19. In addition, this is consistent with the practice we have been implementing since 1997, when we first amended the EPA's civil penalty policies to reflect the COLA applied under the 1996 Civil Monetary Penalty Inflation Adjustment Rule.[3] Accordingly, each non-ESA civil penalty policy is now modified to apply the appropriate guidelines set forth below. These new guidelines apply to civil penalty policies, regardless of whether the policy is used for determining a specific amount to plead in a complaint or for determining a bottom-line settlement amount.

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[2] Section 6 of the DCIA provides that "[a]ny increase under this Act in a civil monetary penalty shall apply only to violations that occur *after* the date the increase takes effect." [Emphasis added.]

[3] *See* Memorandum dated May 9, 1997, from Steven A. Herman, Assistant Administrator for Enforcement and Compliance Assurance (OECA), "Modifications to EPA Penalty Policies to Implement the Civil Monetary Penalty Inflation Adjustment Rule;" Memorandum dated September 21, 2004, from Thomas V. Skinner, Acting Assistant Administrator of OECA, "Modifications to EPA Penalty Policies to Implement the Civil Monetary Inflation Adjustment Rule" (2004 Memorandum); and Memorandum dated December 29, 2008, from Granta Y. Nakayama, Assistant Administrator for OECA, "Amendments to EPA Civil Penalty Policies to Implement the 2008 Civil Monetary Penalty Inflation Rule (Effective January 12, 2009)" (2008 Memorandum).

A complete list of all of the EPA's non-ESA penalty policies is provided at the end of this memorandum. Subsequent to the issuance of this memorandum, the division directors in the Office of Civil Enforcement and the Office of Site Remediation Enforcement may issue revised penalty matrices under program-specific penalty policies to reflect the following guidelines, as summarized in the chart at pages 5-6.

A. If all of the violations in a particular case occurred on or before the effective date of the 2013 Rule, penalty policy calculations should be consistent with the 2008 Memorandum.

B. For those judicial and administrative cases in which some or all of the violations occurred *after* the effective date of the 2013 Rule, the penalty policy calculations are modified by following these three steps:

1. Perform the economic benefit calculation for the entire period of the violation. Do not apply any mitigation for ability to pay or litigation considerations at this point.

2. Apply the gravity component of the penalty policy in the standard way for all violations according to the provisions of subparagraph 3 below. Do not apply any mitigation or adjustment factors at this point.

3.(a) ***For those penalty policies that were issued prior to January 31, 1997***: Calculate the gravity component according to the penalty policy. For violations that occurred after January 30, 1997 through March 15, 2004, multiply the gravity component by 1.1, reflecting the 10% first-time adjustment. For violations that occurred after March 15, 2004 through January 12, 2009, multiply the gravity component by 1.2895, reflecting both the 10% first-time adjustment and the 17.23% COLA [1.10 x 1.1723 = 1.2895]. For violations that occur after January 12, 2009 through December 6, 2013, multiply the gravity component by 1.4163, reflecting the 10% first-time adjustment, the 17.23% and the 9.83% COLAs [1.10 x 1.1723 x 1.0983 = 1.4163]. For violations that occur after December 6, 2013, multiply the gravity component by 1.4853, reflecting the 10% first-time adjustment, the 17.23%, the 9.83% and the 4.87% COLAs [1.10 x 1.1723 x 1.0983 x 1.0487= 1.4853].

Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If the violations occurred for a total of 10 days during the period after January 30, 1997 through March 15, 2004, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.1 = $11,000. If the violations occurred for 10 days during the period after March 15, 2004 through January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.2895 = $12,895. If 10 days of the violations occurred after January 12, 2009 through December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.4163= $14,163. If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.4853 = $14,853.

(b) ***For those penalty policies that were issued or revised after January 30, 1997, through March 15, 2004***: Calculate the gravity component according to the penalty policy. For violations that occurred after January 30, 1997 through March 15, 2004, use the gravity component set forth in the penalty policy, as the 10% first-time adjustment is reflected in those policies. For violations that occurred after March 15, 2004 through January 12, 2009, multiply the gravity component by 1.1723, reflecting the 17.23% COLA. For violations occurring after January 12, 2009 through December 6, 2013, multiply the gravity component by 1.2875, reflecting both the 17.23% and the 9.83% COLAs [1.1723 x 1.0983 = 1.2875]. For violations that occur after December 6, 2013, multiply the gravity component by 1.3502, reflecting the 17.23% COLA, the 9.83% and the 4.87% COLAs [1.1723 x 1.0983 x 1.0487 = 1.3502].

Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If the violations occurred for 10 days during the period after March 15, 2004 through January 12, 2009, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.1723 = $11,723. If 10 days of the violations occurred after January 12, 2009 through December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.2875 = $12,875. If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.3502 = $13,502.

(c) ***For those penalty policies that were issued or revised after March 15, 2004, through January 12, 2009***: Calculate the gravity component according to the penalty policy. For violations that occurred after March 15, 2004 through January 12, 2009, use the gravity component set forth in the penalty policy, as the 10% first-time adjustment and 17.23% COLA are reflected in those policies. For violations occurring after January 12, 2009 through December 6, 2013, multiply the gravity component by 1.0983, reflecting the 9.83% COLA. For violations occurring after December 6, 2013, multiply the gravity component by 1.1518, reflecting both the 9.83% and the 4.87% COLAs [1.0983 x 1.0487 = 1.1518].

Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If 10 days of the violations occurred after January 12, 2009 through December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.0983 = $10,983. If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.1518 = $11,518.

(d) ***For those penalty policies that were issued or revised after January 12, 2009, through December 6, 2013***: Calculate the gravity component according to the penalty policy. For violations that occurred after January 12, 2009 through December 6, 2013, use the gravity component set forth in the penalty policy, as the 9.83% COLA is reflected in these policies. For violations occurring after December 6, 2013, multiply the gravity component by 1.0487, reflecting the 4.87% COLA. Assume, for example, that under the applicable penalty policy, the initial gravity-based penalty is $1,000 for each day of violation. If 10 days of the violations occurred after December 6, 2013, the gravity inflation-adjusted penalty for those violations would be calculated as follows: 10 days x $1,000 = $10,000 x 1.0487 = $10,487.

Chart Reflecting Inflation Adjustment Multipliers		
Penalty Policy Issued Prior to January 30, 1997		
Date(s) of violation	**Inflation Adjustment Multiplier**	**Calculation Explanation**
January 31, 1997 through March 15, 2004	**1.1**	This value reflects the 10% first-time adjustment (*i.e.*, 1.1).
March 16, 2004 through January 12, 2009	**1.2895**	This value is adjusted by the COLA of 17.23% applied in the 2004 Memorandum (*i.e.*, 1.1 x 1.1723 = 1.2895).
January 13, 2009 through December 6, 2013	**1.4163**	This value is adjusted by the COLA of 9.83% applied in the 2008 Memorandum (*i.e.*, 1.1 x 1.1723 x 1.0983 = 1.4163).
After December 6, 2013	**1.4853**	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum (*i.e.*, 1.1 x. 1.1723 x 1.0983 x 1.0487 = 1.4853).
Penalty Policy Issued or Revised after January 30, 1997 through March 15, 2004		
Date(s) of violation	**Inflation Adjustment Multiplier**	**Calculation Explanation**
January 31, 1997 through March 15, 2004	**None - use gravity component in penalty policy**	There is no multiplier here because the 10% first-time adjustment is already reflected in the penalties.
March 16, 2004 through January 12, 2009	**1.1723**	This value reflects the COLA of 17.23% applied in the 2004 Memorandum, or 1.1723.
January 13, 2009 through December 6, 2013	**1.2875**	This value is adjusted by the COLA of 9.83% applied in the 2008 Memorandum (*i.e.*, 1.1723 x 1.0983 = 1.2875).
After December 6, 2013	**1.3502**	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum (*i.e.*, 1.1723 x 1.0983 x 1.0487 = 1.3502).

Penalty Policy Issued or Revised after March 15, 2004 through January 12, 2009		
Date(s) of violation	**Inflation Adjustment Multiplier**	**Calculation Explanation**
March 16, 2004 through January 12, 2009	**None - use gravity component in penalty policy**	There is no multiplier here because the 10% first-time adjustment and 17.23% COLA is already reflected in the penalties.
January 13, 2009 through December 6, 2013	**1.0983**	This value reflects the COLA of 9.83% applied in the 2008 Memorandum, or 1.0983.
After December 6, 2013	**1.1518**	This value is adjusted by the COLA of 4.87% applied in the 2013 Memorandum (*i.e.*, 1.0983 x 1.0487 = 1.1518).
Penalty Policy Issued or Revised after January 12, 2009 through December 6, 2013		
Date(s) of violation	**Inflation Adjustment Multiplier**	**Calculation Explanation**
January 13, 2009 through December 6, 2013	**None - use gravity component in penalty policy**	There is no multiplier here because the COLA of 9.83% applied in the 2008 Memorandum is already reflected in the penalties.
After December 6, 2013	**1.0487**	This value reflects the COLA of 4.87% applied in this 2013 Memorandum.
All Violations Occurred after December 6, 2013		
Date of Penalty Policy Revision or Issuance	**Inflation Adjustment Multiplier**	**Calculation Explanation**
Issued Prior to January 31, 1997	**1.4853**	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum (*i.e.*, 1.1 x. 1.1723 x 1.0983 x 1.0487 = 1.4853).
January 31, 1997 through March 15, 2004	**1.3502**	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum (*i.e.*, 1.1723 x 1.0983 x 1.0487 = 1.3502).
March 16, 2004 through January 12, 2009	**1.1518**	This value is adjusted by the COLA of 4.87% applied in this 2013 Memorandum (*i.e.*, 1.0983 x 1.0487 = 1.1518).
January 13, 2009 through December 6, 2013	1.0487	This value reflects the COLA of 4.87% applied in this 2013 Memorandum.

IV. Penalty Pleading

If all of the violations in a particular case occurred on or before the effective date of the 2013 Rule, the pleading practices set forth in the 2008 Memorandum should be applied. If some of the violations in a particular case occurred after the effective date of the 2013 Rule, then any penalty amount sought should reflect the newly adjusted civil penalty amounts for those violations.

For example, if a person tampered with a public water system on November 7, 2013, the maximum statutory penalty under SDWA Section 1432(c) would be $1,100,000. The prayer for relief under such facts would be written as follows:

> *Pursuant to Section 1432(c) of the Safe Drinking Water Act, 42 U.S.C. § 300i-1(c), and 40 C.F.R. Part 19, assess civil penalties against [name of Defendant] of not more than $1,100,000 for tampering with the public water supply on November 7, 2013.*

If violations occur after the effective date of the 2013 Rule (*i.e.*, after December 6, 2013), then any penalty amount pled should use the newly adjusted maximum amount, if any. For example, if an act of tampering occurs on December 7, 2013, the prayer for relief in a civil judicial complaint alleging a violation of Section 1432(c) of the SDWA would be written as follows:

> *Pursuant to Section 1432(c) of the Safe Drinking Water Act, 42 U.S.C. § 300i-1(c), and 40 C.F.R. Part 19, assess civil penalties against [name of Defendant] of not more than $1,150,000 for tampering with the public water supply on December 7, 2013.*

V. Administrative Penalty Caps for the CWA, CACSOA, SDWA, CAA, CERCLA and EPCRA

The 2013 Rule increases the statutory penalty amounts that may be sought for individual violations in administrative enforcement actions, as well as the total amounts that may be sought in a single administrative enforcement action under the CWA, the CACSOA, the SDWA, the CAA, the CERCLA and the EPCRA (commonly called "penalty caps").[4] For example, prior to the 2013 Rule, the EPA was authorized under CAA Section 205(c)(1) to assess administrative penalties not to exceed $295,000 for tampering with a vehicle or engine. After the effective date of the 2013 Rule, the EPA may assess an administrative penalty not to exceed $320,000 under CAA Section 205(c)(1). Note that the adjusted penalty caps apply if an action is filed or a complaint is amended after December 6, 2013, even if some or all of the violations occurred on or before December 6, 2013.

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[4] *E.g.*, the statutory maximum amount of administrative penalties that can be assessed under SDWA Section 1423(c)(1), 42 U.S.C. § 300h-2(c)(1), will increase from $177,500 to $187,500; the statutory maximum amount of administrative penalties that can be assessed under SDWA Section 1423(c)(2), 42 U.S.C. § 300h-2(c)(2), will increase from $177,500 to $187,500; the statutory maximum amount of administrative penalties that can be assessed under CAA Section 113(d)(1), 42 U.S.C. § 7413(d)(1), will increase from $295,000 to $320,000; the statutory maximum amount of administrative penalties that can be assessed under CAA Section 205(c)(1), 42 U.S.C. § 7524(c)(1), will increase from $295,000 to $320,000.

VI. Expedited Settlements

Expedited settlements offer "real time" enforcement in situations where violations are corrected and a penalty is obtained in a short amount of time, generally within 30-45 days of the issuance of an expedited settlement offer. Expedited settlements serve to achieve compliance while reducing transaction costs for both the EPA and the violator, as long as the violator comes into compliance promptly and pays the expedited penalty amount. Rather than apply the inflation factors across the board to expedited penalty amounts at this time, national program managers within OECA should review expedited penalty amounts periodically to determine whether they need to be adjusted to reflect inflation.

VII. Challenges in the Course of Enforcement Proceedings

If a respondent/defendant challenges the validity of any statutory maximum penalty amount, as adjusted in 40 C.F.R. Part 19, please notify the Special Litigation and Projects Division of the challenge, so that OECA, the Region and the U.S. Department of Justice, as appropriate, can coordinate our response before it is filed.

VIII. Further Information

Any questions concerning the 2013 Rule and its implementation can be directed to Caroline Hermann of OCE's Special Litigation and Projects Division at (202) 564-2876 or by email at hermann.caroline@epa.gov.

List of Existing Civil Penalty Policies Modified by this Memorandum

General

- Policy on Civil Penalties and A Framework for Statute-Specific Approaches to Penalty Assessments (2/16/84)
- Guidance on Use of Penalty Policies in Administrative Litigation (12/15/95)

Clean Air Act - Stationary Sources

- Clean Air Act Stationary Source Civil Penalty Policy (10/25/91)
- Clarifications to the October 25, 1991 Clean Air Act Stationary Source Civil Penalty Policy (1/17/92)
- Combined Enforcement Policy for Clean Air Act Sections 112(r)(1), 112(r)(7), and 40 C.F.R. Part 68 (6/20/12)
- National Petroleum Refinery Initiative Implementation: Application of Clean Air Action Stationary Source Penalty Policy for Violations of Benzene Waste Operations NESHAP Requirements (11/08/07)
- Appendix I - Permit Requirements for the Construction or Modification of Major Stationary Sources of Air Pollution (Revised 3/25/87)
- Clarification of the Use of Appendix I of the Clean Air Act Stationary Source Civil Penalty Policy (7/23/95)
- Appendix II - Vinyl Chloride Civil Penalty Policy (Revised 2/8/85)
- Appendix III - Asbestos Demolition and Renovation Civil Penalty Policy (Revised 5/5/92)
- Appendix IV - Volatile Organic Compounds Where Reformulation of Low Solvent Technology is the Applicable Method of Compliance (Revised 3/25/87)
- Appendix V - Air Civil Penalty Worksheet (3/25/87)
- Appendix VI - Volatile Hazardous Air Pollutant Penalty Policy (Revised 9/12)
- Appendix VII – Residential Wood Heaters (5/18/99)
- Appendix VIII - Manufacture or Import of Controlled Substances in Amounts Exceeding Allowances Properly Held Under 40 C.F.R. Part 82: Protection of Stratospheric Ozone (11/2/90)
- Appendix IX - Penalty Policy Applicable to Persons Who Perform Service for Consideration on a Motor Vehicle Air Conditioner Involving the Refrigerant or Who Sell Small Containers of Refrigerant in Violation of 40 C.F.R. Part 82 (7/19/93)
- Appendix X - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart F: Maintenance, Service, Repair, and Disposal of Appliances Containing Refrigerant (6/1/94)
- Appendix XI - Clean Air Act Civil Penalty Policy for Violations of 40 C.F.R. Part 82, Subpart C: Ban on Nonessential Products Containing Class I Substances and Ban on Nonessential Products Containing or Manufactured with Class II Substances (Not Dated)

Clean Air Act - Mobile Sources

- Volatility Civil Penalty Policy (12/1/89)
- Interim Diesel Civil Penalty Policy (2/8/94)
- Clean Air Act Mobile Source Penalty Policy: Vehicle and Engine Emissions Certification Requirements (1/16/09)

Clean Water Act

- Interim Clean Water Act Settlement Penalty Policy (3/1/95)
- Clean Water Act Section 404 Settlement Penalty Policy (12/21/01)
- Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act (8/1/98)
- Supplemental Guidance to the Interim Clean Water Act Settlement Penalty Policy (March 1, 1995) for Violations of the Construction Storm Water Requirements (2/5/08)

Comprehensive Environmental Response, Compensation, and Liability Act

- Interim Policy on Settlement of CERCLA Section 106(b)(1) and Section 107(c)(3) -- Punitive Damage Claims for Noncompliance with Administrative Orders (9/30/97)
- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (9/30/99)

Emergency Planning and Community Right-to-Know Act

- Enforcement Response Policy for Sections 304, 311, and 312 of the Emergency Planning and Community Right-to-Know Act and Section 103 of the Comprehensive Environmental Response, Compensation, and Liability Act (9/30/99)
- Enforcement Response Policy for Section 313 of the Emergency Planning and Community Right-to-Know Act (1986) and Section 6607 of the Pollution Prevention Act (1990) (Amended)(4/12/01)

Federal Insecticide, Fungicide, and Rodenticide Act

- FIFRA Enforcement Response Policy (12/09)
- Enforcement Response Policy for FIFRA Section 7(c) (5/10)
- Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act: Good Laboratory Practice (GLP) Regulations (9/30/91)
- FIFRA Worker Protection Standard Penalty Policy – Enforcement Interim Final (9/97)
- Enforcement Response Policy for the FIFRA Pesticide Container/Containment Regulations (Appendix H)(3/12)

Resource Conservation and Recovery Act, Subtitle C

- RCRA Civil Penalty Policy (6/23/03)
- Guidance on the Use of Section 7003 of RCRA (10/97)

RCRA, Subtitle I – UST

- U.S. EPA Penalty Guidance for Violations of UST Regulations, OSWER Directive 9610.12 (November 14, 1990)
- Guidance of Federal Field Citation Enforcement, OSWER Directive 9610.16 (October 6, 1993)

Safe Drinking Water Act - UIC

- Interim Final UIC Program Judicial and Administrative Order Settlement Penalty Policy - Underground Injection Control Guidance No. 79 (9/27/93)

Safe Drinking Water Act - PWS

- New Public Water System Supervision Program Settlement Penalty Policy (5/25/94)

Toxic Substances Control Act

- Guidelines for the Assessment of Civil Penalties Under Section 16 of TSCA (7/7/80) (Published in *Federal Register* on 9/10/80. Note that the first PCB penalty policy was published along with it, but the PCB policy is now obsolete.)
- Enforcement Response Policy for Reporting and Recordkeeping Rules and Requirements for TSCA Sections 8, 12, and 13 (3/31/1999)
- PCB Penalty Policy (4/9/90)
- TSCA Section 5 Enforcement Response Policy (6/8/89), amended (7/1/93)
- TSCA Good Laboratory Practices Regulations Enforcement Response Policy (4/9/85)
- Enforcement Response Policy for Test Rules Under Section 4 of the Toxic Substances Control Act (5/28/1986)
- Interim Final Enforcement Response Policy for the Asbestos Hazard Emergency Response Act (1/31/89)
- Enforcement Response Policy for Asbestos Abatement Projects; Worker Protection Rule (11/14/89)
- Section 1018 - Disclosure Rule Enforcement Response and Penalty Policy, December 2007
- Consolidated Enforcement Response and Penalty Policy for the Pre-Renovation Education Rule; Renovation, Repair and Painting Rule; and Lead-Based Paint Activities Rule, Interim Final Policy, August 2010

Attachment (2013 Penalty Inflation Rule)

cc: (w/attachment)
Steven Chester, OECA
Lawrence Starfield, OECA
Regional Counsel, Regions I - X
Director, Office of Environmental Stewardship, Region I
Director, Division of Enforcement and Compliance Assurance, Region II
Director, Office of Enforcement, Compliance, and Environmental Justice, Region III
Director, Office of Enforcement and Compliance Assurance, Region V
Director, Compliance Assurance and Enforcement Division, Region VI
Director, Office of Enforcement, Compliance and Environmental Justice, Region VIII
Director, Enforcement Division, Region IX
Director, Office of Civil Rights, Enforcement and Environmental Justice, Region X
Regional Media Division Directors
Regional Enforcement Coordinators, Regions I - X
OECA
W. Benjamin Fisherow, Chief, EES, DOJ
Deputy and Assistant Chiefs, EES, DOJ

and amended citations in two provisions of the construction standards to show the correct incorporation-by-reference section.

In the DFR, OSHA stated that it would confirm the effective date of the DFR if it received no significant adverse comments. OSHA received eight favorable and no adverse comments on the DFR (*see* ID: OSHA–2013–0005–0008 thru –0015 in the docket for this rulemaking). Accordingly, OSHA is confirming the effective date of the final rule.

In addition to explicitly supporting the DFR, several of the commenters provided supplemental information. Mr. Charles Johnson of AltairStrickland stated that as a result of "[OSHA's] incorporating both the 1968 and the [2011] versions of the ANSI Z535 standard by reference[,] both manufacturers and employers will likely migrate to the newer versions and the older versions will likely fade away as demand declines" (ID: OSHA–2013–0005–0011). Mr. Johnson also commented that "[h]ad OSHA deleted the reference to the ANSI Z35.1–1968 language, these signs would require replacement at considerable and unnecessary cost to employers." *Id.*

A second commenter, Mr. Blair Brewster of MySafetySign.com, described several advantages and limitations of the updated ANSI signage standards, concluding that "[i]t would be arrogant to assume that a single standard is best. The ANSI Z535 designs, the traditional safety sign and tag designs, as well as the countless other designs to come, will all have their place and will all coexist" (ID: OSHA–2013–0005–0014).

A third commenter, Mr. Kyle Pitsor of the National Electrical Manufacturers Association (NEMA) stated that "[w]hile we would have preferred that the references to the outdated standards be removed entirely from OSHA's regulations, NEMA agrees that giving employers the option of using signs and tags that meet either the 1967–1968 or the most recent versions of the standards will provide the greatest flexibility without imposing additional costs" (ID: OSHA–2013–0005–0013). Mr. Pitsor also helpfully noted that, contrary to proposed §§ 1910.6(e)(65) and (e)(67) and 1926.6(h)(28)–(h)(30), the International Safety Equipment Association (ISEA) is not authorized to sell the ANSI Z535 standards proposed for incorporation by reference, and these standards are not sold on the ISEA Web site, *www.safetyequipment.org*. In response to Mr. Pitsor's comment, OSHA is correcting the incorporation-by-reference provisions in question in 29 CFR 1910.6 and 1926.6 in a separate **Federal Register** notice identifying the three locations where the public can purchase the updated ANSI Z535 standards.

Finally, OSHA received an email from Jonathan Stewart, Manager, Government Relations, NEMA, after the comment period ended (ID: OSHA–2013–0005–0015). In his email, Mr. Stewart mentioned NEMA's earlier comments to the docket (ID: OSHA–2013–0005–0013), and stated that "[w]hile reflective of NEMA's position, those comments did not include a clarification regarding the language that the NRPM used in Sec. 1926.200 Accident prevention signs and tags." He further indicated that "[t]he language, while not inaccurate, was unclear regarding which figure(s) it intended to reference in the ANSI Z535.2–2011 standard." Although this comment was late, OSHA considered it because it was a purely technical comment, pointing out an ambiguity in the cited provision's reference to figures in the updated version of the national consensus standard, ANSI Z535.2–2011. OSHA finds that the comment has merit, and accordingly is clarifying the language in 29 CFR 1926.200(b) and (c) specifying which figures employers must follow in ANSI Z535.2–2011.

List of Subjects in 29 CFR Parts 1910 and 1926

Signage, Incorporation by reference, Occupational safety and health, Safety.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this final rule. OSHA is issuing this final rule pursuant to 29 U.S.C. 653, 655, and 657, 5 U.S.C. 553, Secretary of Labor's Order 1–2012 (77 FR 3912), and 29 CFR part 1911.

Signed at Washington, DC, on October 30, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–26028 Filed 11–5–13; 8:45 am]

BILLING CODE 4510–26–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL–9901–66–OECA]

RIN 2020–AA49

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this action, EPA is promulgating a final rule that amends the Civil Monetary Penalty Inflation Adjustment Rule. This action is mandated by the Debt Collection Improvement Act of 1996 (DCIA) to adjust for inflation certain statutory civil monetary penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. The Agency is required to review the civil monetary penalties under the statutes it administers at least once every four years and to adjust such penalties as necessary for inflation according to a formula prescribed by the DCIA. The regulations contain a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation, since 1996.

DATES: This rule is effective December 6, 2013.

FOR FURTHER INFORMATION CONTACT: Caroline Hermann, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 564–2676.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, each federal agency is required to issue regulations adjusting for inflation the statutory civil monetary penalties [1] ("civil penalties" or "penalties") that can be imposed under the laws administered by that agency. The purpose of these adjustments is to

[1] Section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, defines "civil monetary penalty" to mean "any penalty, fine or other sanction that—(A)(i) is for a specific monetary amount as provided by federal law; or (ii) has a maximum amount provided for by federal law. . . ."

maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. EPA's initial adjustment to each statutory civil penalty amount was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997 ("the 1996 Rule"). EPA's second adjustment to civil penalty amounts was published in the **Federal Register** on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004 ("the 2004 Rule"). EPA's third adjustment to civil penalty amounts was published in the **Federal Register** on December 11, 2008 (73 FR 75340), as corrected in the **Federal Register** on January 7, 2009 (74 FR 626), and became effective on January 12, 2009 ("the 2008 Rule").

Where necessary under the DCIA, this rule, specifically Table 1 in 40 CFR 19.4, adjusts for inflation the maximum and, in some cases, the minimum amount of the statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 of 40 CFR 19.4 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision after the effective dates of the 1996, 2004 and 2008 rules. Where required under the DCIA formula, this rule amends the adjusted penalty amounts in Table 1 of 40 CFR 19.4 for those violations that occur after the effective date of this rule.

The formula prescribed by the DCIA for determining the inflation adjustment, if any, to statutory civil penalties consists of the following four-step process:

1. *Determine the Cost-of-Living Adjustment (COLA).* The COLA is determined by calculating the percentage increase, if any, by which the Consumer Price Index [2] for all-urban consumers (CPI–U) for the month of June of the calendar year preceding the adjustment exceeds the CPI–U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted.[3] Accordingly, the COLA applied under this rule equals the percentage by which the CPI–U for June 2012 (*i.e.*, June of the year preceding this year), exceeds the CPI–U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be). Given that the last inflation adjustment was published on December 11, 2008, the COLA for most civil penalties set forth in this rule was calculated by determining the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 2008 (218.815), resulting in a COLA of 4.87 percent. For those few civil penalty amounts that were last adjusted under the 2004 Rule, the COLA equals 20.97 percent, calculated by determining the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 2004 (189.7). In the case of the maximum civil penalty that can be imposed under section 311(b)(7)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(A), which is the sole civil penalty last adjusted under the 1996 Rule, the COLA is 46.45 percent, determined by calculating the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 1996 (156.7).

2. *Calculate the Raw Inflation Increase.* Once the COLA is determined, the second step is to multiply the COLA by the current civil penalty amount to determine the raw inflation increase.

3. *Apply the DCIA's Rounding Rule to the Raw Inflation Increase.* The third step is to round this raw inflation increase according to section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note. The DCIA's rounding rules require that any increase be rounded to the nearest multiple of: $10 in the case of penalties less than or equal to $100; $100 in the case of penalties greater than $100 but less than or equal to $1,000; $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000; $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000; $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and $25,000 in the case of penalties greater than $200,000. (*See* section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.)

4. *Add the Rounded Inflation Increase, if any, to the Current Penalty Amount.* Once the inflation increase has been rounded pursuant to the DCIA, the fourth step is to add the rounded inflation increase to the current civil penalty amount to obtain the new, inflation-adjusted civil penalty amount. For example, in this rule, the current statutory maximum penalty amounts that may be imposed under Clean Air Act (CAA) section 113(d)(1), 42 U.S.C. 7413(d)(1), and CAA section 205(c)(1), 42 U.S.C. 7524(c)(1), are increasing from $295,000 to $320,000. These penalty amounts were last adjusted with the promulgation of the 2008 Rule, when these penalties were adjusted for inflation from $270,000 to $295,000. Applying the COLA adjustment to the current penalty amount of $295,000 results in a raw inflation increase of $14,376 for both penalties. As stated above, the DCIA rounding rule requires the raw inflation increase to be rounded to the nearest multiple of $25,000 for penalties greater than $200,000. Rounding $14,376 to the nearest multiple of $25,000 equals $25,000. That rounded increase increment of $25,000 is then added to the $295,000 penalty amount to arrive at a total inflation adjusted penalty amount of $320,000. Accordingly, once this rule is effective, the statutory maximum amounts of these penalties will increase to $320,000.

In contrast, this rule does not adjust those civil penalty amounts where the raw inflation amounts are not high enough to round up to the required multiple stated in the DCIA. For example, under section 3008(a)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(a)(3), the Administrator may assess a civil penalty of up to $37,500 per day of noncompliance for each violation. This penalty was last adjusted for inflation under the 2008 Rule. Multiplying the applicable 4.87 percent COLA to the statutory civil penalty amount of $37,500, the raw inflation increase equals only $1,827.40; the DCIA rounding rule requires a raw inflation increase increment to be rounded to the nearest multiple of $5,000 for penalties greater than $10,000 but less than or equal to $100,000. Because this raw inflation increase is not sufficient to be rounded up to a multiple of $5,000, in accordance with the DCIA's rounding rule, this rule does not increase the $37,500 penalty amount. However, if during the development of EPA's next Civil Monetary Penalty Inflation Adjustment Rule, anticipated to be

[2] Section 3 of the DCIA defines "Consumer Price Index" to mean "the Consumer Price Index for all-urban consumers published by the Department of Labor." Interested parties may find the relevant Consumer Price Index, published by the Department of Labor's Bureau of Labor Statistics, on the Internet. To access this information, go to the CPI Home Page at: *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[3] Section 5(b) of the DCIA defines the term "cost-of-living adjustment" to mean "the percentage (if any) for each civil monetary penalty by which—(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law."

promulgated in 2017, the new inflation increase can be rounded up to the next multiple of $5,000, statutory maximum penalty amounts currently at $37,500 will be increased to $42,500.

Because of the low rate of inflation since 2006, coupled with the application of the DCIA's rounding rules, only 20 of the 88 statutory civil penalty provisions implemented by EPA are being adjusted for inflation under this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to review all statutory penalty amounts and adjust them as necessary to account for inflation in the year 2017 and every four years thereafter.

II. Technical Revision to Table 1 of 40 CFR 19.4 To Break Out Each of the Statutory Penalty Authorities Under Section 325(b) of the Emergency Planning and Community Right-To-Know Act (EPCRA)

EPA is revising the row of Table 1 of 40 CFR 19.4, which lists the statutory maximum penalty amounts that can be imposed under section 325(b) of EPCRA, 42 U.S.C. 11045(b), to break out separately the three penalty authorities contained in subsection (b). Since 1996, EPA has been adjusting for inflation all of the statutory maximum penalty amounts specified under EPCRA section 325(b), 42 U.S.C. 11045(b). Under past rules, the Agency has grouped the maximum penalty amounts that may be assessed under section 325(b) under the heading of 42 U.S.C. 11045(b) in Table 1 of 40 CFR 19.4. For example, under the 2009 Rule, Table 1 of 40 CFR 19.4 reflects that the statutory maximum penalties that can be imposed under any subparagraph of EPCRA section 325(b) are $37,500 and $107,500. Consistent with how the other penalty authorities are displayed under Part 19.4, Table 1 now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)). That is, upon the effective date of this rule, the statutory maximum penalty that can be imposed under section 325(b)(1)(A) is $37,500; the statutory maximum penalties that can be imposed under section 325(b)(2) are $37,500 and $117,500; and the statutory maximum penalties that can be imposed under section 325(b)(3) are $37,500 and $117,500.

III. Effective Date

Section 6 of the DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Thus, the new inflation-adjusted civil penalty amounts may be applied only to violations that occur after the effective date of this rule.

IV. Good Cause

Section 553(b) of the Administrative Procedure Act (APA) provides that, when an agency for good cause finds that "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest," the agency may issue a rule without providing notice and an opportunity for public comment. EPA finds that there is good cause to promulgate this rule without providing for public comment. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA to make periodic increases in civil penalty amounts by applying the adjustment formula and rounding rules established by the statute. Because the calculation of the increases is formula-driven and prescribed by statute, EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, it would serve no purpose to provide an opportunity for public comment on this rule. Thus, notice and public comment is unnecessary.

In addition, EPA is making the technical revisions discussed above without notice and public comment. Because the technical revisions to Table 1 of 40 CFR 19.4 more accurately reflect the statutory provisions under each of the subparagraphs of section 325(b) (*i.e.*, under 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)) and do not constitute substantive revisions to the rule, these changes do not require notice and comment.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and therefore is not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521. Burden is defined at 5 CFR 1320.3(b). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice and comment requirements.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action implements mandates specifically and explicitly set forth by Congress in the DCIA without the exercise of any policy discretion by EPA. By applying the adjustment formula and rounding rules prescribed by the DCIA, this rule adjusts for inflation the statutory maximum and, in some cases, the minimum, amount of civil penalties that can be assessed by EPA in an administrative enforcement action, or by the U.S. Attorney General in a civil judicial case, for violations of EPA-administered statutes and their implementing regulations. Because the calculation of any increase is formula-driven, EPA has no policy discretion to vary the amount of the adjustment. Given that the Agency has made a "good cause" finding that this rule is not subject to notice and comment requirements under the APA or any other statute (*see* Section IV of this notice), it is not subject to sections 202 and 205 of UMRA. EPA has also determined that this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule merely increases

the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely increases the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. This final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the U.S. Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this final rulemaking. The primary purpose of this final rule is merely to apply the DCIA's inflation adjustment formula to make periodic increases in the civil penalties that may be imposed for violations of EPA-administered statutes and their implementing regulations. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the statutory civil penalty amount, EPA cannot vary the amount of the civil penalty adjustment to address other issues, including environmental justice issues.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Dated: October 29, 2013.

Gina McCarthy,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, title 40, chapter I, part 19 of the Code of Federal Regulations is amended as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101–410, 28 U.S.C. 2461 note; Public Law 104–134, 31 U.S.C. 3701 note.

■ 2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

The increased penalty amounts set forth in the seventh and last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after December 6, 2013. The penalty amounts in the sixth column of Table 1 to § 19.4 apply to violations under the applicable statutes and regulations which occurred after January 12, 2009, through December 6, 2013. The penalty amounts in the fifth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations

which occurred after March 15, 2004, through January 12, 2009. The penalty amounts in the fourth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occurred after January 30, 1997, through March 15, 2004.

■ 3. Revise § 19.4 to read as follows:

§ 19.4 Penalty adjustment and table.

The adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts.

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
7 U.S.C. 136*l*.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$5,000	$5,500	$6,500	$7,500	$7,500
7 U.S.C. 136*l*.(a)(2)	FIFRA	$500/$1,000	$550/$1,000	$550/$1,100	$750/$1,100	$750/$1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	$25,000	$27,500	$32,500	$37,500	$37,500
15 U.S.C. 2647(a)	TSCA	$5,000	$5,500	$6,500	$7,500	$7,500
15 U.S.C. 2647(g)	TSCA	$5,000	$5,000	$5,500	$7,500	$7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	$5,000	$5,500	$6,500	$7,500	$7,500
31 U.S.C. 3802(a)(2)	PFCRA	$5,000	$5,500	$6,500	$7,500	$7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA).	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1319(g)(2)(A)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1319(g)(2)(B)	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(6)(B)(i)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1321(b)(6)(B)(ii).	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(7)(A)	CWA	$25,000/$1,000	$27,500/$1,100	$32,500/$1,100	$37,500/$1,100	$37,500/$2,100
33 U.S.C. 1321(b)(7)(B)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(C)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(D)	CWA	$100,000/$3,000	$110,000/$3,300	$130,000/$4,300	$140,000/$4,300	$150,000/$5,300
33 U.S.C. 1414b(d)(1)[1]	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	$600	$660	$760	$860	$860
33 U.S.C. 1415(a)	MPRSA	$50,000/$125,000	$55,000/$137,500	$65,000/$157,500	$70,000/$177,500	$75,000/$187,500
33 U.S.C. 1901 note (see 1408(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	$10,000/$25,000	$10,000/$25,000[2]	$10,000/$25,000	$11,000/$27,500	$11,000/$27,500
33 U.S.C. 1901 note (see 1408(a)(2)(B)).	CACSO	$10,000/$125,000	$10,000/$185,000	$10,000/$125,000	$11,000/$137,500	$11,000/$147,500
33 U.S.C. 1901 note (see 1408(b)(1)).	CACSO	$25,000	$25,000	$25,000	$27,500	$27,500
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g–3(g)(3)(A).	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g–3(g)(3)(B).	SDWA	$5,000/$25,000	$5,000/$25,000	$5,000/$27,500	$7,000/$32,500	$7,000/$32,500
42 U.S.C. 300g–3(g)(3)(C).	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300h–2(b)(1)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300h–2(c)(1)	SDWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
42 U.S.C. 300h–2(c)(2)	SDWA	$5,000/$125,000	$5,500/$137,500	$5,500/$157,500	$7,500/$177,500	$7,500/$187,500
42 U.S.C. 300h–3(c)	SDWA	$5,000/$10,000	$5,500/$11,000	$5,500/$11,000	$7,500/$16,000	$7,500/$16,000
42 U.S.C. 300i(b)	SDWA	$15,000	$15,000	$16,500	$16,500	$21,500
42 U.S.C. 300i–1(c)	SDWA	$20,000/$50,000	$22,000/$55,000[3]	$100,000/ $1,000,000	$110,000/ $1,100,000	$120,000/ $1,150,000
42 U.S.C. 300j(e)(2)	SDWA	$2,500	$2,750	$2,750	$3,750	$3,750
42 U.S.C. 300j–4(c)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300j–6(b)(2)	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300j–23(d)	SDWA	$5,000/$50,000	$5,500/$55,000	$6,500/$65,000	$7,500/$75,000	$7,500/$75,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972.	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(c)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(g)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(h)(2)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6934(e)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 6973(b)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
42 U.S.C. 6991e(a)(3)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6991e(d)(1)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6991e(d)(2)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 7413(d)(1)	CAA	$25,000/$200,000	$27,500/$220,000	$32,500/$270,000	$37,500/$295,000	$37,500/$380,000
42 U.S.C. 7413(d)(3)	CAA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 7524(a)	CAA	$2,500/$25,000	$2,750/$27,500	$2,750/$32,500	$3,750/$37,500	$3,750/$37,500
42 U.S.C. 7524(c)(1)	CAA	$200,000	$220,000	$270,000	$295,000	$380,000
42 U.S.C. 7545(d)(1)	CAA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9606(b)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9606(a)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9609(b)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 9609(c)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(1)(A)[4].	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(2)	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(b)(3)	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(c)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(d)(2)	EPCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 11045(d)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	$10,000	$10,000	$11,000	$16,000	$16,000
42 U.S.C. 14304(g)	BATTERY ACT	$10,000	$10,000	$11,000	$16,000	$16,000

[1] Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

[2] CRCSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub. L. 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of $20,000 and $50,000 under section 1432(a) of the SDWA, 42 U.S.C. 300i–1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107–188 (June 12, 2002), to $100,000 and $1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule ("2004 Rule"), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

[4] Consistent with how the EPA's other penalty authorities are displayed under Part 19.4, this Table now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

[FR Doc. 2013–26646 Filed 11–5–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2010–0836; FRL–9902–80–Region 6]

Approval and Promulgation of Implementation Plans; Texas; Procedures for Stringency Determinations and Minor Permit Revisions for Federal Operating Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: On September 10, 2013, EPA published a direct final rule approving portions of three revisions to the Texas State Implementation Plan (SIP) concerning the Texas Federal Operating Permits Program. The direct final action was published without prior proposal because EPA anticipated no adverse comments. EPA stated in the direct final rule that if we received relevant, adverse comments by October 10, 2013, EPA would publish a timely withdrawal in the **Federal Register**. EPA subsequently received timely adverse comments on the direct final rule. Therefore, EPA is withdrawing the direct final approval and will proceed to respond to all relevant, adverse comments in a subsequent action based on the parallel proposal published on September 10, 2013. As stated in the parallel proposal, EPA will not institute a second comment period on this action.

DATES: The direct final rule published on September 10, 2013 (78 FR 55221), is withdrawn as of November 6, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley (6PD–R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–R), Suite 1200, Dallas, TX 75202–2733. The telephone number is (214) 665–2115. Ms. Wiley can also be reached via electronic mail at *wiley.adina@epa.gov*.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 28, 2013.

Ron Curry,

Regional Administrator, Region 6.

Accordingly, the amendments to 40 CFR 52.2270 published in the **Federal Register** on September 10, 2013 (78 FR

and amended citations in two provisions of the construction standards to show the correct incorporation-by-reference section.

In the DFR, OSHA stated that it would confirm the effective date of the DFR if it received no significant adverse comments. OSHA received eight favorable and no adverse comments on the DFR (*see* ID: OSHA–2013–0005–0006 thru –0015 in the docket for this rulemaking). Accordingly, OSHA is confirming the effective date of the final rule.

In addition to explicitly supporting the DFR, several of the commenters provided supplemental information. Mr. Charles Johnson of AltairStrickland stated that as a result of "[OSHA's] incorporating both the 1968 and the [2011] versions of the ANSI Z535 standard by reference[,] both manufacturers and employers will likely migrate to the newer versions and the older versions will likely fade away as demand declines" (ID: OSHA–2013–0005–0011). Mr. Johnson also commented that "[h]ad OSHA deleted the reference to the ANSI Z35.1–1968 language, these signs would require replacement at considerable and unnecessary cost to employers." *Id.*

A second commenter, Mr. Blair Brewster of MySafetySign.com, described several advantages and limitations of the updated ANSI signage standards, concluding that "[i]t would be arrogant to assume that a single standard is best. The ANSI Z535 designs, the traditional safety sign and tag designs, as well as the countless other designs to come, will all have their place and will all coexist" (ID: OSHA–2013–0005–0014).

A third commenter, Mr. Kyle Pitsor of the National Electrical Manufacturers Association (NEMA) stated that "[w]hile we would have preferred that the references to the outdated standards be removed entirely from OSHA's regulations, NEMA agrees that giving employers the option of using signs and tags that meet either the 1967–1968 or the most recent versions of the standards will provide the greatest flexibility without imposing additional costs" (ID: OSHA–2013–0005–0013). Mr. Pitsor also helpfully noted that, contrary to proposed §§ 1910.6(e)(66) and (e)(67) and 1926.6(h)(28)–(h)(30), the International Safety Equipment Association (ISEA) is not authorized to sell the ANSI Z535 standards proposed for incorporation by reference, and these standards are not sold on the ISEA Web site, *www.safetyequipment.org*. In response to Mr. Pitsor's comment, OSHA is correcting the incorporation-by-reference provisions in question in 29 CFR 1910.6 and 1926.6 in a separate Federal Register notice identifying the three locations where the public can purchase the updated ANSI Z535 standards.

Finally, OSHA received an email from Jonathan Stewart, Manager, Government Relations, NEMA, after the comment period ended (ID: OSHA–2013–0005–0015). In his email, Mr. Stewart mentioned NEMA's earlier comments to the docket (ID: OSHA–2013–0005–0013), and stated that "[w]hile reflective of NEMA's position, those comments did not include a clarification regarding the language that the NRPM used in Sec. 1926.200 Accident prevention signs and tags." He further indicated that "[t]he language, while not inaccurate, was unclear regarding which figure(s) it intended to reference in the ANSI Z535.2–2011 standard." Although this comment was late, OSHA considered it because it was a purely technical comment, pointing out an ambiguity in the cited provision's reference to figures in the updated version of the national consensus standard, ANSI Z535.2–2011. OSHA finds that the comment has merit, and accordingly is clarifying the language in 29 CFR 1926.200(b) and (c) specifying which figures employers must follow in ANSI Z535.2–2011.

List of Subjects in 29 CFR Parts 1910 and 1926

Signage, Incorporation by reference, Occupational safety and health, Safety.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this final rule. OSHA is issuing this final rule pursuant to 29 U.S.C. 653, 655, and 657, 5 U.S.C. 553, Secretary of Labor's Order 1–2012 (77 FR 3912), and 29 CFR part 1911.

Signed at Washington, DC, on October 30, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–26288 Filed 11–5–13; 8:45 am]

BILLING CODE 4510–26–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL–9901–66–OECA]

RIN 2020–AA49

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this action, EPA is promulgating a final rule that amends the Civil Monetary Penalty Inflation Adjustment Rule. This action is mandated by the Debt Collection Improvement Act of 1996 (DCIA) to adjust for inflation certain statutory civil monetary penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. The Agency is required to review the civil monetary penalties under the statutes it administers at least once every four years and to adjust such penalties as necessary for inflation according to a formula prescribed by the DCIA. The regulations contain a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation, since 1996.

DATES: This rule is effective December 6, 2013.

FOR FURTHER INFORMATION CONTACT: Caroline Hermann, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 564–2676.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, each federal agency is required to issue regulations adjusting for inflation the statutory civil monetary penalties [1] ("civil penalties" or "penalties") that can be imposed under the laws administered by that agency. The purpose of these adjustments is to

[1] Section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, defines "civil monetary penalty" to mean "any penalty, fine or other sanction that—(A)(i) is for a specific monetary amount as provided by federal law; or (ii) has a maximum amount provided for by federal law. . . ."

maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. EPA's initial adjustment to each statutory civil penalty amount was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997 ("the 1996 Rule"). EPA's second adjustment to civil penalty amounts was published in the **Federal Register** on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004 ("the 2004 Rule"). EPA's third adjustment to civil penalty amounts was published in the **Federal Register** on December 11, 2008 (73 FR 75340), as corrected in the **Federal Register** on January 7, 2009 (74 FR 626), and became effective on January 12, 2009 ("the 2008 Rule").

Where necessary under the DCIA, this rule, specifically Table 1 in 40 CFR 19.4, adjusts for inflation the maximum and, in some cases, the minimum amount of the statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 of 40 CFR 19.4 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision after the effective dates of the 1996, 2004 and 2008 rules. Where required under the DCIA formula, this rule amends the adjusted penalty amounts in Table 1 of 40 CFR 19.4 for those violations that occur after the effective date of this rule.

The formula prescribed by the DCIA for determining the inflation adjustment, if any, to statutory civil penalties consists of the following four-step process:

1. *Determine the Cost-of-Living Adjustment (COLA).* The COLA is determined by calculating the percentage increase, if any, by which the Consumer Price Index [2] for all-urban consumers (CPI–U) for the month of June of the calendar year preceding the adjustment exceeds the CPI–U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted.[3] Accordingly, the COLA applied under this rule equals the percentage by which the CPI–U for June 2012 (*i.e.*, June of the year preceding this year), exceeds the CPI–U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be). Given that the last inflation adjustment was published on December 11, 2008, the COLA for most civil penalties set forth in this rule was calculated by determining the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 2008 (218.815), resulting in a COLA of 4.87 percent. For those few civil penalty amounts that were last adjusted under the 2004 Rule, the COLA equals 20.97 percent, calculated by determining the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 2004 (189.7). In the case of the maximum civil penalty that can be imposed under section 311(b)(7)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(A), which is the sole civil penalty last adjusted under the 1996 Rule, the COLA is 46.45 percent, determined by calculating the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 1996 (156.7).

2. *Calculate the Raw Inflation Increase.* Once the COLA is determined, the second step is to multiply the COLA by the current civil penalty amount to determine the raw inflation increase.

3. *Apply the DCIA's Rounding Rule to the Raw Inflation Increase.* The third step is to round this raw inflation increase according to section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note. The DCIA's rounding rules require that any increase be rounded to the nearest multiple of: $10 in the case of penalties less than or equal to $100; $100 in the case of penalties greater than $100 but less than or equal to $1,000; $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000; $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000; $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and $25,000 in the case of penalties greater than $200,000. (*See* section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.)

4. *Add the Rounded Inflation Increase, if any, to the Current Penalty Amount.* Once the inflation increase has been rounded pursuant to the DCIA, the fourth step is to add the rounded inflation increase to the current civil penalty amount to obtain the new, inflation-adjusted civil penalty amount. For example, in this rule, the current statutory maximum penalty amounts that may be imposed under Clean Air Act (CAA) section 113(d)(1), 42 U.S.C. 7413(d)(1), and CAA section 205(c)(1), 42 U.S.C. 7524(c)(1), are increasing from $295,000 to $320,000. These penalty amounts were last adjusted with the promulgation of the 2008 Rule, when these penalties were adjusted for inflation from $270,000 to $295,000. Applying the COLA adjustment to the current penalty amount of $295,000 results in a raw inflation increase of $14,376 for both penalties. As stated above, the DCIA rounding rule requires the raw inflation increase to be rounded to the nearest multiple of $25,000 for penalties greater than $200,000. Rounding $14,376 to the nearest multiple of $25,000 equals $25,000. That rounded increase increment of $25,000 is then added to the $295,000 penalty amount to arrive at a total inflation adjusted penalty amount of $320,000. Accordingly, once this rule is effective, the statutory maximum amounts of these penalties will increase to $320,000.

In contrast, this rule does not adjust those civil penalty amounts where the raw inflation amounts are not high enough to round up to the required multiple stated in the DCIA. For example, under section 3008(a)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(a)(3), the Administrator may assess a civil penalty of up to $37,500 per day of noncompliance for each violation. This penalty was last adjusted for inflation under the 2008 Rule. Multiplying the applicable 4.87 percent COLA to the statutory civil penalty amount of $37,500, the raw inflation increase equals only $1,827.40; the DCIA rounding rule requires a raw inflation increase increment to be rounded to the nearest multiple of $5,000 for penalties greater than $10,000 but less than or equal to $100,000. Because this raw inflation increase is not sufficient to be rounded up to a multiple of $5,000, in accordance with the DCIA's rounding rule, this rule does not increase the $37,500 penalty amount. However, if during the development of EPA's next Civil Monetary Penalty Inflation Adjustment Rule, anticipated to be

[2] Section 3 of the DCIA defines "Consumer Price Index" to mean "the Consumer Price Index for all-urban consumers published by the Department of Labor." Interested parties may find the relevant Consumer Price Index, published by the Department of Labor's Bureau of Labor Statistics, on the Internet. To access this information, go to the CPI Home Page at: *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[3] Section 5(b) of the DCIA defines the term "cost-of-living adjustment" to mean "the percentage (if any) for each civil monetary penalty by which—(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law."

promulgated in 2017, the new inflation increase can be rounded up to the next multiple of $5,000, statutory maximum penalty amounts currently at $37,500 will be increased to $42,500.

Because of the low rate of inflation since 2008, coupled with the application of the DCIA's rounding rules, only 20 of the 88 statutory civil penalty provisions implemented by EPA are being adjusted for inflation under this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to review all statutory penalty amounts and adjust them as necessary to account for inflation in the year 2017 and every *four* years thereafter.

II. Technical Revision to Table 1 of 40 CFR 19.4 To Break Out Each of the Statutory Penalty Authorities Under Section 325(b) of the Emergency Planning and Community Right-To-Know Act (EPCRA)

EPA is revising the row of Table 1 of 40 CFR 19.4, which lists the statutory maximum penalty amounts that can be imposed under section 325(b) of EPCRA, 42 U.S.C. 11045(b), to break out separately the three penalty authorities contained in subsection (b). Since 1996, EPA has been adjusting for inflation all of the statutory maximum penalty amounts specified under EPCRA section 325(b), 42 U.S.C. 11045(b). Under past rules, the Agency has grouped the maximum penalty amounts that may be assessed under section 325(b) under the heading of 42 U.S.C. 11045(b) in Table 1 of 40 CFR 19.4. For example, under the 2008 Rule, Table 1 of 40 CFR 19.4 reflects that the statutory maximum penalties that can be imposed under any subparagraph of EPCRA section 325(b) are $37,500 and $107,500. Consistent with how the other penalty authorities are displayed under Part 19.4, Table 1 now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)). That is, upon the effective date of this rule, the statutory maximum penalty that can be imposed under section 325(b)(1)(A) is $37,500; the statutory maximum penalties that can be imposed under section 325(b)(2) are $37,500 and $117,500; and the statutory maximum penalties that can be imposed under section 325(b)(3) are $37,500 and $117,500.

III. Effective Date

Section 6 of the DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Thus, the new inflation-adjusted civil penalty amounts may be applied only to violations that occur after the effective date of this rule.

IV. Good Cause

Section 553(b) of the Administrative Procedure Act (APA) provides that, when an agency for good cause finds that "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest," the agency may issue a rule without providing notice and an opportunity for public comment. EPA finds that there is good cause to promulgate this rule without providing for public comment. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA to make periodic increases in civil penalty amounts by applying the adjustment formula and rounding rules established by the statute. Because the calculation of the increases is formula-driven and prescribed by statute, EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, it would serve no purpose to provide an opportunity for public comment on this rule. Thus, notice and public comment is unnecessary.

In addition, EPA is making the technical revisions discussed above without notice and public comment. Because the technical revisions to Table 1 of 40 CFR 19.4 more accurately reflect the statutory provisions under each of the subparagraphs of section 325(b) (*i.e.*, under 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)) and do not constitute substantive revisions to the rule, these changes do not require notice and comment.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and therefore is not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521. Burden is defined at 5 CFR 1320.3(b). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice and comment requirements.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action implements mandates specifically and explicitly set forth by Congress in the DCIA without the exercise of any policy discretion by EPA. By applying the adjustment formula and rounding rules prescribed by the DCIA, this rule adjusts for inflation the statutory maximum and, in some cases, the minimum, amount of civil penalties that can be assessed by EPA in an administrative enforcement action, or by the U.S. Attorney General in a civil judicial case, for violations of EPA-administered statutes and their implementing regulations. Because the calculation of any increase is formula-driven, EPA has no policy discretion to vary the amount of the adjustment. Given that the Agency has made a "good cause" finding that this rule is not subject to notice and comment requirements under the APA or any other statute (*see* Section IV of this notice), it is not subject to sections 202 and 205 of UMRA. EPA has also determined that this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule merely increases

the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely increases the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. This final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the U.S. Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this final rulemaking. The primary purpose of this final rule is merely to apply the DCIA's inflation adjustment formula to make periodic increases in the civil penalties that may be imposed for violations of EPA-administered statutes and their implementing regulations. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the statutory civil penalty amount, EPA cannot vary the amount of the civil penalty adjustment to address other issues, including environmental justice issues.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Dated: October 29, 2013.

Gina McCarthy,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, title 40, chapter I, part 19 of the Code of Federal Regulations is amended as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101–410, 28 U.S.C. 2461 note; Public Law 104–134, 31 U.S.C. 3701 note.

■ 2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

The increased penalty amounts set forth in the seventh and last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after December 6, 2013. The penalty amounts in the sixth column of Table 1 to § 19.4 apply to violations under the applicable statutes and regulations which occurred after January 12, 2009, through December 6, 2013. The penalty amounts in the fifth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations

which occurred after March 15, 2004, through January 12, 2009. The penalty amounts in the fourth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occurred after January 30, 1997, through March 15, 2004.

■ 3. Revise § 19.4 to read as follows:

§ 19.4 Penalty adjustment and table.

The adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts.

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
7 U.S.C. 136l(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$5,000	$5,500	$6,500	$7,500	$7,500
7 U.S.C. 136l(a)(2)	FIFRA	$500/$1,000	$550/$1,000	$550/$1,100	$750/$1,100	$750/$1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	$25,000	$27,500	$32,500	$37,500	$37,500
15 U.S.C. 2647(a)	TSCA	$5,000	$5,500	$6,500	$7,500	$7,500
15 U.S.C. 2647(g)	TSCA	$5,000	$5,500	$6,500	$7,500	$7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	$5,000	$5,500	$6,500	$7,500	$7,500
31 U.S.C. 3802(a)(2)	PFCRA	$5,000	$5,500	$6,500	$7,500	$7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA).	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1319(g)(2)(A)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1319(g)(2)(B)	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(6)(B)(i)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1321(b)(6)(B)(ii).	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(7)(A)	CWA	$25,000/$1,000	$27,500/$1,100	$32,500/$1,100	$37,500/$1,100	$37,500/$2,100
33 U.S.C. 1321(b)(7)(B)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(C)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(D)	CWA	$100,000/$3,000	$110,000/$3,300	$130,000/$4,300	$140,000/$4,300	$150,000/$5,300
33 U.S.C. 1414b(d)(1)[1]	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	$600	$660	$750	$660	$660
33 U.S.C. 1415(a)	MPRSA	$50,000/$125,000	$55,000/$137,500	$65,000/$157,500	$70,000/$177,500	$75,000/$187,500
33 U.S.C. 1901 note (see 1408(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CASCO).	$10,000/$25,000	$10,000/$25,000[2]	$10,000/$25,000	$11,000/$27,500	$11,000/$27,500
33 U.S.C. 1901 note (see 1408(a)(2)(B)).	CASCO	$10,000/$125,000	$10,000/$125,000	$10,000/$125,000	$11,000/$137,500	$11,000/$147,500
33 U.S.C. 1901 note (see 1408(b)(1)).	CASCO	$25,000	$25,000	$25,000	$27,500	$27,500
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g–3(g)(3)(A).	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g–3(g)(3)(B).	SDWA	$5,000/$25,000	$5,000/$25,000	$5,000/$27,500	$7,000/$32,500	$7,000/$32,500
42 U.S.C. 300g–3(g)(3)(C).	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300h–2(b)(1)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300h–2(c)(1)	SDWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
42 U.S.C. 300h–2(c)(2)	SDWA	$5,000/$125,000	$5,500/$137,500	$6,500/$157,500	$7,500/$177,500	$7,500/$187,500
42 U.S.C. 300h–3(c)	SDWA	$5,000/$10,000	$5,500/$11,000	$6,500/$11,000	$7,500/$16,000	$7,500/$16,000
42 U.S.C. 300i(b)	SDWA	$15,000	$15,000	$16,500	$16,500	$21,500
42 U.S.C. 300i–1(c)	SDWA	$20,000/$60,000	$22,000/$66,000[4]	$100,000/ $1,000,000	$110,000/ $1,100,000	$120,000/ $1,150,000
42 U.S.C. 300j(a)(2)	SDWA	$2,500	$2,750	$2,750	$3,750	$3,750
42 U.S.C. 300j–4(c)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300j–6(b)(2)	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300j–23(d)	SDWA	$5,000/$50,000	$5,500/$55,000	$6,500/$65,000	$7,500/$70,000	$7,500/$75,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972.	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6925(c)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(g)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(h)(2)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6934(e)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 6973(b)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
42 U.S.C. 6991e(a)(3)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6991e(d)(1)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6991e(d)(2)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 7413(d)(1)	CAA	$25,000/$200,000	$27,500/$220,000	$32,500/$270,000	$37,500/$295,000	$37,500/$320,000
42 U.S.C. 7413(d)(3)	CAA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 7524(a)	CAA	$2,500/$25,000	$2,750/$27,500	$2,750/$32,500	$3,750/$37,500	$3,750/$37,500
42 U.S.C. 7524(c)(1)	CAA	$200,000	$220,000	$270,000	$295,000	$320,000
42 U.S.C. 7545(d)(1)	CAA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9606(b)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9606(a)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9609(b)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 9609(c)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(1)(A)[4].	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(2)	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(b)(3)	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(c)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(d)(2)	EPCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 11045(d)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	$10,000	$10,000	$11,000	$16,000	$16,000
42 U.S.C. 14304(g)	BATTERY ACT	$10,000	$10,000	$11,000	$16,000	$16,000

[1] Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

[2] CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub. L. 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of $20,000 and $50,000 under section 1432(a) of the SDWA, 42 U.S.C. 300i–1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107–188 (June 12, 2002), to $100,000 and $1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule ("2004 Rule"), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

[4] Consistent with how the EPA's other penalty authorities are displayed under Part 19.4, this Table now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

[FR Doc. 2013–26548 Filed 11–5–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2010–0895; FRL–9902–50–Region 6]

Approval and Promulgation of Implementation Plans; Texas; Procedures for Stringency Determinations and Minor Permit Revisions for Federal Operating Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: On September 10, 2013, EPA published a direct final rule approving portions of three revisions to the Texas State Implementation Plan (SIP) concerning the Texas Federal Operating Permits Program. The direct final action was published without prior proposal because EPA anticipated no adverse comments. EPA stated in the direct final rule that if we received relevant, adverse comments by October 10, 2013, EPA would publish a timely withdrawal in the **Federal Register**. EPA subsequently received timely adverse comments on the direct final rule. Therefore, EPA is withdrawing the direct final approval and will proceed to respond to all relevant, adverse comments in a subsequent action based on the parallel proposal published on September 10, 2013. As stated in the parallel proposal, EPA will not institute a second comment period on this action.

DATES: The direct final rule published on September 10, 2013 (78 FR 55221), is withdrawn as of November 6, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley (6PD–R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–R), Suite 1200, Dallas, TX 75202–2733. The telephone number is (214) 665–2115. Ms. Wiley can also be reached via electronic mail at *wiley.adina@epa.gov*.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 28, 2013.

Ron Curry,

Regional Administrator, Region 6.

Accordingly, the amendments to 40 CFR 52.2270 published in the **Federal Register** on September 10, 2013 (78 FR

and amended citations in two provisions of the construction standards to show the correct incorporation-by-reference section.

In the DFR, OSHA stated that it would confirm the effective date of the DFR if it received no significant adverse comments. OSHA received eight favorable and no adverse comments on the DFR (*see* ID: OSHA–2013–0005–0008 thru –0015 in the docket for this rulemaking). Accordingly, OSHA is confirming the effective date of the final rule.

In addition to explicitly supporting the DFR, several of the commenters provided supplemental information. Mr. Charles Johnson of AltairStrickland stated that as a result of "[OSHA's] incorporating both the 1968 and the [2011] versions of the ANSI Z535 standard by reference[,] both manufacturers and employers will likely migrate to the newer versions and the older versions will likely fade away as demand declines" (ID: OSHA–2013–0005–0011). Mr. Johnson also commented that "[h]ad OSHA deleted the reference to the ANSI Z35.1–1968 language, these signs would require replacement at considerable and unnecessary cost to employers." *Id.*

A second commenter, Mr. Blair Brewster of MySafetySign.com, described several advantages and limitations of the updated ANSI signage standards, concluding that "[i]t would be arrogant to assume that a single standard is best. The ANSI Z535 designs, the traditional safety sign and tag designs, as well as the countless other designs to come, will all have their place and will all coexist" (ID: OSHA–2013–0005–0014).

A third commenter, Mr. Kyle Pitsor of the National Electrical Manufacturers Association (NEMA) stated that "[w]hile we would have preferred that the references to the outdated standards be removed entirely from OSHA's regulations, NEMA agrees that giving employers the option of using signs and tags that meet either the 1967–1968 or the most recent versions of the standards will provide the greatest flexibility without imposing additional costs" (ID: OSHA–2013–0005–0013). Mr. Pitsor also helpfully noted that, contrary to proposed §§ 1910.6(e)(66) and (e)(67) and 1926.6(h)(28)–(h)(30), the International Safety Equipment Association (ISEA) is not authorized to sell the ANSI Z535 standards proposed for incorporation by reference, and these standards are not sold on the ISEA Web site, *www.safetyequipment.org*. In response to Mr. Pitsor's comment, OSHA is correcting the incorporation-by-reference provisions in question in 29 CFR 1910.6 and 1926.6 in a separate Federal Register notice identifying the three locations where the public can purchase the updated ANSI Z535 standards.

Finally, OSHA received an email from Jonathan Stewart, Manager, Government Relations, NEMA, after the comment period ended (ID: OSHA–2013–0005–0015). In his email, Mr. Stewart mentioned NEMA's earlier comments to the docket (ID: OSHA–2013–0005–0013), and stated that "[w]hile reflective of NEMA's position, those comments did not include a clarification regarding the language that the NRPM used in Sec. 1926.200 Accident prevention signs and tags." He further indicated that "[t]he language, while not inaccurate, was unclear regarding which figure(s) it intended to reference in the ANSI Z535.2–2011 standard." Although this comment was late, OSHA considered it because it was a purely technical comment, pointing out an ambiguity in the cited provision's reference to figures in the updated version of the national consensus standard, ANSI Z535.2–2011. OSHA finds that the comment has merit, and accordingly is clarifying the language in 29 CFR 1926.200(b) and (c) specifying which figures employers must follow in ANSI Z535.2–2011.

List of Subjects in 29 CFR Parts 1910 and 1926

Signage, Incorporation by reference, Occupational safety and health, Safety.

Authority and Signature

David Michaels, Ph.D., MPH, Assistant Secretary of Labor for Occupational Safety and Health, U.S. Department of Labor, 200 Constitution Avenue NW., Washington, DC 20210, authorized the preparation of this final rule. OSHA is issuing this final rule pursuant to 29 U.S.C. 653, 655, and 657, 5 U.S.C. 553, Secretary of Labor's Order 1–2012 (77 FR 3912), and 29 CFR part 1911.

Signed at Washington, DC, on October 30, 2013.

David Michaels,

Assistant Secretary of Labor for Occupational Safety and Health.

[FR Doc. 2013–26336 Filed 11–5–13; 8:45 am]

BILLING CODE 4510–26–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 19

[FRL–9901–98–OECA]

RIN 2020–AA49

Civil Monetary Penalty Inflation Adjustment Rule

AGENCY: Environmental Protection Agency (EPA).

ACTION: Final rule.

SUMMARY: With this action, EPA is promulgating a final rule that amends the Civil Monetary Penalty Inflation Adjustment Rule. This action is mandated by the Debt Collection Improvement Act of 1996 (DCIA) to adjust for inflation certain statutory civil monetary penalties that may be assessed for violations of EPA-administered statutes and their implementing regulations. The Agency is required to review the civil monetary penalties under the statutes it administers at least once every four years and to adjust such penalties as necessary for inflation according to a formula prescribed by the DCIA. The regulations contain a list of all civil monetary penalty authorities under EPA-administered statutes and the applicable statutory amounts, as adjusted for inflation, since 1996.

DATES: This rule is effective December 6, 2013.

FOR FURTHER INFORMATION CONTACT: Caroline Hermann, Special Litigation and Projects Division (2248A), Office of Civil Enforcement, Office of Enforcement and Compliance Assurance, U.S. Environmental Protection Agency, 1200 Pennsylvania Avenue NW., Washington, DC 20460, (202) 564–2876.

SUPPLEMENTARY INFORMATION:

I. Background

Pursuant to section 4 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, each federal agency is required to issue regulations adjusting for inflation the statutory civil monetary penalties [1] ("civil penalties" or "penalties") that can be imposed under the laws administered by that agency. The purpose of these adjustments is to

[1] Section 3 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note, defines "civil monetary penalty" to mean "any penalty, fine or other sanction that—(A)(i) is for a specific monetary amount as provided by federal law; or (ii) has a maximum amount provided for by federal law. . . ."

maintain the deterrent effect of civil penalties and to further the policy goals of the underlying statutes. The DCIA requires adjustments to be made at least once every four years following the initial adjustment. EPA's initial adjustment to each statutory civil penalty amount was published in the **Federal Register** on December 31, 1996 (61 FR 69360), and became effective on January 30, 1997 ("the 1996 Rule"). EPA's second adjustment to civil penalty amounts was published in the **Federal Register** on February 13, 2004 (69 FR 7121), and became effective on March 15, 2004 ("the 2004 Rule"). EPA's third adjustment to civil penalty amounts was published in the **Federal Register** on December 11, 2008 (73 FR 75340), as corrected in the **Federal Register** on January 7, 2009 (74 FR 626), and became effective on January 12, 2009 ("the 2008 Rule").

Where necessary under the DCIA, this rule, specifically Table 1 in 40 CFR 19.4, adjusts for inflation the maximum and, in some cases, the minimum amount of the statutory civil penalty that may be imposed for violations of EPA-administered statutes and their implementing regulations. Table 1 of 40 CFR 19.4 identifies the applicable EPA-administered statutes and sets out the inflation-adjusted civil penalty amounts that may be imposed pursuant to each statutory provision after the effective dates of the 1996, 2004 and 2008 rules. Where required under the DCIA formula, this rule amends the adjusted penalty amounts in Table 1 of 40 CFR 19.4 for those violations that occur after the effective date of this rule.

The formula prescribed by the DCIA for determining the inflation adjustment, if any, to statutory civil penalties consists of the following four-step process:

1. *Determine the Cost-of-Living Adjustment (COLA).* The COLA is determined by calculating the percentage increase, if any, by which the Consumer Price Index [2] for all-urban consumers (CPI–U) for the month of June of the calendar year preceding the adjustment exceeds the CPI–U for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted.[3] Accordingly, the COLA applied under this rule equals the percentage by which the CPI–U for June 2012 (*i.e.*, June of the year preceding this year), exceeds the CPI–U for June of the year in which the amount of a specific penalty was last adjusted (*i.e.*, 2008, 2004 or 1996, as the case may be). Given that the last inflation adjustment was published on December 11, 2008, the COLA for most civil penalties set forth in this rule was calculated by determining the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 2008 (218.815), resulting in a COLA of 4.87 percent. For those few civil penalty amounts that were last adjusted under the 2004 Rule, the COLA equals 20.97 percent, calculated by determining the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 2004 (189.7). In the case of the maximum civil penalty that can be imposed under section 311(b)(7)(A) of the Clean Water Act, 33 U.S.C. 1321(b)(7)(A), which is the sole civil penalty last adjusted under the 1996 Rule, the COLA is 46.45 percent, determined by calculating the percentage by which the CPI–U for June 2012 (229.478) exceeds the CPI–U for June 1996 (156.7).

2. *Calculate the Raw Inflation Increase.* Once the COLA is determined, the second step is to multiply the COLA by the current civil penalty amount to determine the raw inflation increase.

3. *Apply the DCIA's Rounding Rule to the Raw Inflation Increase.* The third step is to round this raw inflation increase according to section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note. The DCIA's rounding rules require that any increase be rounded to the nearest multiple of: $10 in the case of penalties less than or equal to $100; $100 in the case of penalties greater than $100 but less than or equal to $1,000; $1,000 in the case of penalties greater than $1,000 but less than or equal to $10,000; $5,000 in the case of penalties greater than $10,000 but less than or equal to $100,000; $10,000 in the case of penalties greater than $100,000 but less than or equal to $200,000; and $25,000 in the case of penalties greater than $200,000. (*See* section 5(a) of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.)

4. *Add the Rounded Inflation Increase, if any, to the Current Penalty Amount.* Once the inflation increase has been rounded pursuant to the DCIA, the fourth step is to add the rounded inflation increase to the current civil penalty amount to obtain the new, inflation-adjusted civil penalty amount. For example, in this rule, the current statutory maximum penalty amounts that may be imposed under Clean Air Act (CAA) section 113(d)(1), 42 U.S.C. 7413(d)(1), and CAA section 205(c)(1), 42 U.S.C. 7524(c)(1), are increasing from $295,000 to $320,000. These penalty amounts were last adjusted with the promulgation of the 2008 Rule, when these penalties were adjusted for inflation from $270,000 to $295,000. Applying the COLA adjustment to the current penalty amount of $295,000 results in a raw inflation increase of $14,376 for both penalties. As stated above, the DCIA rounding rule requires the raw inflation increase to be rounded to the nearest multiple of $25,000 for penalties greater than $200,000. Rounding $14,376 to the nearest multiple of $25,000 equals $25,000. That rounded increase increment of $25,000 is then added to the $295,000 penalty amount to arrive at a total inflation adjusted penalty amount of $320,000. Accordingly, once this rule is effective, the statutory maximum amounts of these penalties will increase to $320,000.

In contrast, this rule does not adjust those civil penalty amounts where the raw inflation amounts are not high enough to round up to the required multiple stated in the DCIA. For example, under section 3008(a)(3) of the Resource Conservation and Recovery Act, 42 U.S.C. 6928(a)(3), the Administrator may assess a civil penalty of up to $37,500 per day of noncompliance for each violation. This penalty was last adjusted for inflation under the 2008 Rule. Multiplying the applicable 4.87 percent COLA to the statutory civil penalty amount of $37,500, the raw inflation increase equals only $1,827.40; the DCIA rounding rule requires a raw inflation increase increment to be rounded to the nearest multiple of $5,000 for penalties greater than $10,000 but less than or equal to $100,000. Because this raw inflation increase is not sufficient to be rounded up to a multiple of $5,000, in accordance with the DCIA's rounding rule, this rule does not increase the $37,500 penalty amount. However, if during the development of EPA's next Civil Monetary Penalty Inflation Adjustment Rule, anticipated to be

[2] Section 3 of the DCIA defines "Consumer Price Index" to mean "the Consumer Price Index for all-urban consumers published by the Department of Labor." Interested parties may find the relevant Consumer Price Index, published by the Department of Labor's Bureau of Labor Statistics, on the Internet. To access this information, go to the CPI Home Page at: *ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt.*

[3] Section 5(b) of the DCIA defines the term "cost-of-living adjustment" to mean "the percentage (if any) for each civil monetary penalty by which—(1) the Consumer Price Index for the month of June of the calendar year preceding the adjustment, exceeds (2) the Consumer Price Index for the month of June of the calendar year in which the amount of such civil monetary penalty was last set or adjusted pursuant to law."

promulgated in 2017, the raw inflation increase can be rounded up to the next multiple of $5,000, statutory maximum penalty amounts currently at $37,500 will be increased to $42,500.

Because of the low rate of inflation since 2008, coupled with the application of the DCIA's rounding rules, only 20 of the 88 statutory civil penalty provisions implemented by EPA are being adjusted for inflation under this rule. Assuming there are no changes to the mandate imposed by the DCIA, EPA intends to review all statutory penalty amounts and adjust them as necessary to account for inflation in the year 2017 and every four years thereafter.

II. Technical Revision to Table 1 of 40 CFR 19.4 To Break Out Each of the Statutory Penalty Authorities Under Section 325(b) of the Emergency Planning and Community Right-To-Know Act (EPCRA)

EPA is revising the row of Table 1 of 40 CFR 19.4, which lists the statutory maximum penalty amounts that can be imposed under section 325(b) of EPCRA, 42 U.S.C. 11045(b), to break out separately the three penalty authorities contained in subsection (b). Since 1996, EPA has been adjusting for inflation all of the statutory maximum penalty amounts specified under EPCRA section 325(b), 42 U.S.C. 11045(b). Under past rules, the Agency has grouped the maximum penalty amounts that may be assessed under section 325(b) under the heading of 42 U.S.C. 11045(b) in Table 1 of 40 CFR 19.4. For example, under the 2008 Rule, Table 1 of 40 CFR 19.4 reflects that the statutory maximum penalties that can be imposed under any subparagraph of EPCRA section 325(b) are $37,500 and $107,500. Consistent with how the other penalty authorities are displayed under Part 19.4, Table 1 now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)). That is, upon the effective date of this rule, the statutory maximum penalty that can be imposed under section 325(b)(1)(A) is $37,500; the statutory maximum penalties that can be imposed under section 325(b)(2) are $37,500 and $117,500; and the statutory maximum penalties that can be imposed under section 325(b)(3) are $37,500 and $117,500.

III. Effective Date

Section 6 of the DCIA provides that "any increase under [the DCIA] in a civil monetary penalty shall apply only to violations which occur after the date the increase takes effect." (*See* section 6 of the Federal Civil Penalties Inflation Adjustment Act of 1990, 28 U.S.C. 2461 note, as amended by the DCIA, 31 U.S.C. 3701 note.) Thus, the new inflation-adjusted civil penalty amounts may be applied only to violations that occur after the effective date of this rule.

IV. Good Cause

Section 553(b) of the Administrative Procedure Act (APA) provides that, when an agency for good cause finds that "notice and public procedure . . . are impracticable, unnecessary, or contrary to the public interest," the agency may issue a rule without providing notice and an opportunity for public comment. EPA finds that there is good cause to promulgate this rule without providing for public comment. The primary purpose of this final rule is merely to implement the statutory directive in the DCIA to make periodic increases in civil penalty amounts by applying the adjustment formula and rounding rules established by the statute. Because the calculation of the increases is formula-driven and prescribed by statute, EPA has no discretion to vary the amount of the adjustment to reflect any views or suggestions provided by commenters. Accordingly, it would serve no purpose to provide an opportunity for public comment on this rule. Thus, notice and public comment is unnecessary.

In addition, EPA is making the technical revisions discussed above without notice and public comment. Because the technical revisions to Table 1 of 40 CFR 19.4 more accurately reflect the statutory provisions under each of the subparagraphs of section 325(b) (*i.e.*, under 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)) and do not constitute substantive revisions to the rule, these changes do not require notice and comment.

V. Statutory and Executive Order Reviews

A. Executive Order 12866: Regulatory Planning and Review and Executive Order 13563: Improving Regulation and Regulatory Review

This action is not a "significant regulatory action" under the terms of Executive Order 12866 (58 FR 51735, October 4, 1993) and therefore is not subject to review under the Executive Orders 12866 and 13563 (76 FR 3821, January 21, 2011).

B. Paperwork Reduction Act

This action does not impose an information collection burden under the provisions of the Paperwork Reduction Act of 1995, 44 U.S.C. 3501–3521. Burden is defined at 5 CFR 1320.3(b). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

C. Regulatory Flexibility Act

Today's final rule is not subject to the Regulatory Flexibility Act (RFA), 5 U.S.C. 601–612, which generally requires an agency to prepare a regulatory flexibility analysis for any rule that will have a significant economic impact on a substantial number of small entities. The RFA applies only to rules subject to notice and comment rulemaking requirements under the APA or any other statute. This rule is not subject to notice and comment requirements under the APA or any other statute because although the rule is subject to the APA, the Agency has invoked the "good cause" exemption under 5 U.S.C. 553(b), therefore it is not subject to the notice and comment requirements.

D. Unfunded Mandates Reform Act

This action contains no federal mandates under the provisions of Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), 2 U.S.C. 1531–1538 for state, local, or tribal governments or the private sector. The action implements mandates specifically and explicitly set forth by Congress in the DCIA without the exercise of any policy discretion by EPA. By applying the adjustment formula and rounding rules prescribed by the DCIA, this rule adjusts for inflation the statutory maximum and, in some cases, the minimum, amount of civil penalties that can be assessed by EPA in an administrative enforcement action, or by the U.S. Attorney General in a civil judicial case, for violations of EPA-administered statutes and their implementing regulations. Because the calculation of any increase is formula-driven, EPA has no policy discretion to vary the amount of the adjustment. Given that the Agency has made a "good cause" finding that this rule is not subject to notice and comment requirements under the APA or any other statute (*see* Section IV of this notice), it is not subject to sections 202 and 205 of UMRA. EPA has also determined that this action is not subject to the requirements of section 203 of UMRA because it contains no regulatory requirements that might significantly or uniquely affect small governments. This rule merely increases

the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations.

E. Executive Order 13132 (Federalism)

This action does not have federalism implications. It will not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government, as specified in Executive Order 13132 (64 FR 43255, August 10, 1999). This rule merely increases the amount of civil penalties that could conceivably be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. Thus, Executive Order 13132 does not apply to this rule.

F. Executive Order 13175: Consultation and Coordination With Indian Tribal Governments

This action does not have tribal implications, as specified in Executive Order 13175 (65 FR 67249, November 9, 2000). This rule merely increases the amount of civil penalties that could be imposed in the context of a federal civil administrative enforcement action or civil judicial case for violations of EPA-administered statutes and their implementing regulations. This final rule will not have substantial direct effects on tribal governments, on the relationship between the federal government and Indian tribes, or on the distribution of power and responsibilities between the federal government and Indian tribes. Thus, Executive Order 13175 does not apply to this action.

G. Executive Order 13045: Protection of Children From Environmental Health Risks and Safety Risks

EPA interprets Executive Order 13045 (62 FR 19885, April 23, 1997) as applying only to those regulatory actions that concern health or safety risks, such that the analysis required under section 5–501 of the Executive Order has the potential to influence the regulation. This action is not subject to Executive Order 13045 because it does not establish an environmental standard intended to mitigate health or safety risks.

H. Executive Order 13211: Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use

This action is not subject to Executive Order 13211 (66 FR 28355, May 22, 2001), because it is not a significant regulatory action under Executive Order 12866.

I. National Technology Transfer and Advancement Act

Section 12(d) of the National Technology Transfer and Advancement Act of 1995 ("NTTAA"), 15 U.S.C. 272 note, directs EPA to use voluntary consensus standards in its regulatory activities unless to do so would be inconsistent with applicable law or otherwise impractical. Voluntary consensus standards are technical standards (e.g., materials specifications, test methods, sampling procedures, and business practices) that are developed or adopted by voluntary consensus standards bodies. NTTAA directs EPA to provide Congress, through the U.S. Office of Management and Budget, explanations when the Agency decides not to use available and applicable voluntary consensus standards. This action does not involve technical standards. Therefore, EPA did not consider the use of any voluntary consensus standards.

J. Executive Order 12898: Federal Actions To Address Environmental Justice in Minority Populations and Low-Income Populations

Executive Order 12898 (59 FR 7629, February 16, 1994) establishes federal executive policy on environmental justice. Its main provision directs federal agencies, to the greatest extent practicable and permitted by law, to make environmental justice part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects of their programs, policies, and activities on minority populations and low-income populations in the United States. EPA lacks the discretionary authority to address environmental justice in this final rulemaking. The primary purpose of this final rule is merely to apply the DCIA's inflation adjustment formula to make periodic increases in the civil penalties that may be imposed for violations of EPA-administered statutes and their implementing regulations. Thus, because calculation of the increases is formula-driven, EPA has no discretion in updating the rule to reflect the allowable statutory civil penalties derived from applying the formula. Since there is no discretion under the DCIA in determining the statutory civil penalty amount, EPA cannot vary the amount of the civil penalty adjustment to address other issues, including environmental justice issues.

K. Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801–808, as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. EPA will submit a report containing this rule and other required information to the U.S. Senate, the U.S. House of Representatives, and the Comptroller General of the United States prior to publication of the rule in the **Federal Register**. A major rule cannot take effect until 60 days after it is published in the **Federal Register**. This action is not a "major rule" as defined by 5 U.S.C. 804(2).

List of Subjects in 40 CFR Part 19

Environmental protection, Administrative practice and procedure, Penalties.

Dated: October 29, 2013.

Gina McCarthy,

Administrator, Environmental Protection Agency.

For the reasons set out in the preamble, title 40, chapter I, part 19 of the Code of Federal Regulations is amended as follows:

PART 19—ADJUSTMENT OF CIVIL MONETARY PENALTIES FOR INFLATION

■ 1. The authority citation for part 19 continues to read as follows:

Authority: Pub. L. 101–410, 28 U.S.C. 2461 note; Public Law 104–134, 31 U.S.C. 3701 note.

■ 2. Revise § 19.2 to read as follows:

§ 19.2 Effective date.

The increased penalty amounts set forth in the seventh and last column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occur after December 6, 2013. The penalty amounts in the sixth column of Table 1 to § 19.4 apply to violations under the applicable statutes and regulations which occurred after January 12, 2009, through December 6, 2013. The penalty amounts in the fifth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations

which occurred after March 15, 2004, through January 12, 2009. The penalty amounts in the fourth column of Table 1 to § 19.4 apply to all violations under the applicable statutes and regulations which occurred after January 30, 1997, through March 15, 2004.

■ 3. Revise § 19.4 to read as follows:

§ 19.4 Penalty adjustment and table.

The adjusted statutory penalty provisions and their applicable amounts are set out in Table 1. The last column in the table provides the newly effective statutory civil penalty amounts.

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
7 U.S.C. 136*l*.(a)(1)	FEDERAL INSECTICIDE, FUNGICIDE, AND RODENTICIDE ACT (FIFRA).	$5,000	$5,500	$6,500	$7,500	$7,500
7 U.S.C. 136*l*.(a)(2)	FIFRA	$500/$1,000	$550/$1,000	$650/$1,100	$750/$1,100	$750/$1,100
15 U.S.C. 2615(a)(1)	TOXIC SUBSTANCES CONTROL ACT (TSCA).	$25,000	$27,500	$32,500	$37,500	$37,500
15 U.S.C. 2647(a)	TSCA	$5,000	$5,500	$6,500	$7,500	$7,500
15 U.S.C. 2647(g)	TSCA	$5,000	$5,000	$5,500	$7,500	$7,500
31 U.S.C. 3802(a)(1)	PROGRAM FRAUD CIVIL REMEDIES ACT (PFCRA).	$5,000	$5,500	$6,500	$7,500	$7,500
31 U.S.C. 3802(a)(2)	PFCRA	$5,000	$5,500	$6,500	$7,500	$7,500
33 U.S.C. 1319(d)	CLEAN WATER ACT (CWA).	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1319(g)(2)(A)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1319(g)(2)(B)	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(6)(B)(i)	CWA	$10,000/$25,000	$11,000/$27,500	$11,000/$32,500	$16,000/$37,500	$16,000/$37,500
33 U.S.C. 1321(b)(6)(B)(ii).	CWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
33 U.S.C. 1321(b)(7)(A)	CWA	$25,000/$1,000	$27,500/$1,100	$32,500/$1,100	$37,500/$1,100	$37,500/$2,100
33 U.S.C. 1321(b)(7)(B)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(C)	CWA	$25,000	$27,500	$32,500	$37,500	$37,500
33 U.S.C. 1321(b)(7)(D)	CWA	$100,000/$3,000	$110,000/$3,300	$130,000/$4,300	$140,000/$4,300	$150,000/$5,300
33 U.S.C. 1414b(d)(1)[1]	MARINE PROTECTION, RESEARCH, AND SANCTUARIES ACT (MPRSA).	$600	$660	$760	$860	$860
33 U.S.C. 1415(a)	MPRSA	$50,000/$125,000	$55,000/$137,500	$65,000/$157,500	$70,000/$177,500	$75,000/$187,500
33 U.S.C. 1901 note (*see* 1409(a)(2)(A)).	CERTAIN ALASKAN CRUISE SHIP OPERATIONS (CACSO).	$10,000/$25,000	$10,000/$25,000[2]	$10,000/$25,000	$11,000/$27,500	$11,000/$27,500
33 U.S.C. 1901 note (*see* 1409(a)(2)(B)).	CACSO	$10,000/$125,000	$10,000/$125,000	$10,000/$125,000	$11,000/$137,500	$11,000/$147,500
33 U.S.C. 1901 note (*see* 1409(b)(1)).	CACSO	$25,000	$25,000	$25,000	$27,500	$27,500
42 U.S.C. 300g–3(b)	SAFE DRINKING WATER ACT (SDWA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g–3(g)(3)(A).	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300g–3(g)(3)(B).	SDWA	$5,000/$25,000	$5,000/$25,000	$6,000/$27,500	$7,000/$32,500	$7,000/$32,500
42 U.S.C. 300g–3(g)(3)(C).	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300h–2(b)(1)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300h–2(c)(1)	SDWA	$10,000/$125,000	$11,000/$137,500	$11,000/$157,500	$16,000/$177,500	$16,000/$187,500
42 U.S.C. 300h–2(c)(2)	SDWA	$5,000/$125,000	$5,500/$137,500	$6,500/$157,500	$7,500/$177,500	$7,500/$187,500
42 U.S.C. 300h–3(c)	SDWA	$5,000/$10,000	$5,500/$11,000	$6,500/$11,000	$7,500/$16,000	$7,500/$16,000
42 U.S.C. 300i(b)	SDWA	$15,000	$15,000	$16,500	$16,500	$21,500
42 U.S.C. 300i–1(c)	SDWA	$20,000/$50,000	$22,000/$55,000[3]	$100,000/ $1,000,000	$110,000/ $1,100,000	$120,000/ $1,150,000
42 U.S.C. 300j(e)(2)	SDWA	$2,500	$2,750	$2,750	$3,750	$3,750
42 U.S.C. 300j–4(c)	SDWA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 300j–6(b)(2)	SDWA	$25,000	$25,000	$27,500	$32,500	$32,500
42 U.S.C. 300j–23(d)	SDWA	$5,000/$50,000	$5,500/$55,000	$6,500/$65,000	$7,500/$70,000	$7,500/$75,000
42 U.S.C. 4852d(b)(5)	RESIDENTIAL LEAD-BASED PAINT HAZARD REDUCTION ACT OF 1992.	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 4910(a)(2)	NOISE CONTROL ACT OF 1972.	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6928(a)(3)	RESOURCE CONSERVATION AND RECOVERY ACT (RCRA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(c)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(g)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6928(h)(2)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6934(e)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 6973(b)	RCRA	$5,000	$5,500	$6,500	$7,500	$7,500

TABLE 1 OF SECTION 19.4—CIVIL MONETARY PENALTY INFLATION ADJUSTMENTS—Continued

U.S. Code Citation	Environmental statute	Statutory penalties, as enacted	Penalties effective after January 30, 1997 through March 15, 2004	Penalties effective after March 15, 2004 through January 12, 2009	Penalties effective after January 12, 2009 through December 6, 2013	Penalties effective after December 6, 2013
42 U.S.C. 6991e(a)(3)	RCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 6991e(d)(1)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 6991e(d)(2)	RCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 7413(b)	CLEAN AIR ACT (CAA)	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 7413(d)(1)	CAA	$25,000/$200,000	$27,500/$220,000	$32,500/$270,000	$37,500/$295,000	$37,500/$320,000
42 U.S.C. 7413(d)(3)	CAA	$5,000	$5,500	$6,500	$7,500	$7,500
42 U.S.C. 7524(a)	CAA	$2,500/$25,000	$2,750/$27,500	$2,750/$32,500	$3,750/$37,500	$3,750/$37,500
42 U.S.C. 7524(c)(1)	CAA	$200,000	$220,000	$270,000	$295,000	$320,000
42 U.S.C. 7545(d)(1)	CAA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9604(e)(5)(B)	COMPREHENSIVE ENVIRONMENTAL RESPONSE, COMPENSATION, AND LIABILITY ACT (CERCLA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9606(b)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9609(a)(1)	CERCLA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 9609(b)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 9609(c)	CERCLA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(a)	EMERGENCY PLANNING AND COMMUNITY RIGHT-TO-KNOW ACT (EPCRA).	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(1)(A)[4].	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(b)(2)	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(b)(3)	EPCRA	$25,000/$75,000	$27,500/$82,500	$32,500/$97,500	$37,500/$107,500	$37,500/$117,500
42 U.S.C. 11045(c)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 11045(c)(2)	EPCRA	$10,000	$11,000	$11,000	$16,000	$16,000
42 U.S.C. 11045(d)(1)	EPCRA	$25,000	$27,500	$32,500	$37,500	$37,500
42 U.S.C. 14304(a)(1)	MERCURY-CONTAINING AND RECHARGEABLE BATTERY MANAGEMENT ACT (BATTERY ACT).	$10,000	$10,000	$11,000	$16,000	$16,000
42 U.S.C. 14304(g)	BATTERY ACT	$10,000	$10,000	$11,000	$16,000	$16,000

[1] Note that 33 U.S.C. 1414b (d)(1)(B) contains additional penalty escalation provisions that must be applied to the penalty amounts set forth in this Table. The amounts set forth in this Table reflect an inflation adjustment to the calendar year 1992 penalty amount expressed in section 104B(d)(1)(A), which is used to calculate the applicable penalty amount under MPRSA section 104B(d)(1)(B) for violations that occur in any subsequent calendar year.

[2] CACSO was passed on December 21, 2000 as part of Title XIV of the Consolidated Appropriations Act of 2001, Pub. L. 106–554, 33 U.S.C. 1901 note.

[3] The original statutory penalty amounts of $20,000 and $50,000 under section 1432(c) of the SDWA, 42 U.S.C. 300i–1(c), were subsequently increased by Congress pursuant to section 403 of the Public Health Security and Bioterrorism Preparedness and Response Act of 2002, Public Law No. 107–188 (June 12, 2002), to $100,000 and $1,000,000, respectively. EPA did not adjust these new penalty amounts in its 2004 Civil Monetary Penalty Inflation Adjustment Rule ("2004 Rule"), 69 FR 7121 (February 13, 2004), because they had gone into effect less than two years prior to the 2004 Rule.

[4] Consistent with how the EPA's other penalty authorities are displayed under Part 19.4, this Table now delineates, on a subpart-by-subpart basis, the penalty authorities enumerated under section 325(b) of EPCRA, 42 U.S.C. 11045(b) (*i.e.*, 42 U.S.C. 11045(b)(1)(A), (b)(2), and (b)(3)).

[FR Doc. 2013–26648 Filed 11–5–13; 8:45 am]

BILLING CODE 6560–50–P

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA–R06–OAR–2010–0335; FRL–9902–50–Region 6]

Approval and Promulgation of Implementation Plans; Texas; Procedures for Stringency Determinations and Minor Permit Revisions for Federal Operating Permits

AGENCY: Environmental Protection Agency (EPA).

ACTION: Withdrawal of direct final rule.

SUMMARY: On September 10, 2013, EPA published a direct final rule approving portions of three revisions to the Texas State Implementation Plan (SIP) concerning the Texas Federal Operating Permits Program. The direct final action was published without prior proposal because EPA anticipated no adverse comments. EPA stated in the direct final rule that if we received relevant, adverse comments by October 10, 2013, EPA would publish a timely withdrawal in the **Federal Register**. EPA subsequently received timely adverse comments on the direct final rule. Therefore, EPA is withdrawing the direct final approval and will proceed to respond to all relevant, adverse comments in a subsequent action based on the parallel proposal published on September 10, 2013. As stated in the parallel proposal, EPA will not institute a second comment period on this action.

DATES: The direct final rule published on September 10, 2013 (78 FR 55221), is withdrawn as of November 6, 2013.

FOR FURTHER INFORMATION CONTACT: Ms. Adina Wiley (6PD–R), Air Permits Section, Environmental Protection Agency, Region 6, 1445 Ross Avenue (6PD–R), Suite 1200, Dallas, TX 75202–2733. The telephone number is (214) 665–2115. Ms. Wiley can also be reached via electronic mail at *wiley.adina@epa.gov*.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Incorporation by reference, Intergovernmental relations, Reporting and recordkeeping requirements.

Dated: October 28, 2013.

Ron Curry,

Regional Administrator, Region 6.

Accordingly, the amendments to 40 CFR 52.2270 published in the **Federal Register** on September 10, 2013 (78 FR

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

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

ORDER EXTENDING COMPLAINANT'S TIME TO FILE MOTION FOR PENALTY AND AGREEING TO ISSUE SCHEDULING ORDER

By Order dated September 14, 2017, the Undersigned granted Complainant's Motion for Default Judgment on Liability, and ordered Complainant to file and serve, on or before October 30, 2017, the Motion for Penalty providing factual grounds for the proposed penalty against Respondent in this matter.

On September 28, 2017, Complainant's Attorney filed, for good cause shown, a *Motion for Extension of Time,* requesting an additional six months (one-hundred and eighty days) to file and serve the Motion for Penalty. Based on the information provided by Complainant, an extension of time through April 30, 2018 for Complainant to file and serve a Motion for Penalty was granted by Order dated October 5, 2017.

On April 19, 2018, Complainant's Attorney filed, for good cause shown, a second *Motion for Extension of Time,* requesting an additional four months (one-hundred and twenty days) to file and serve the Motion for Penalty. The reasons cited for this request was that the impact of the widespread destruction and damage caused by Hurricanes Irma and Maria was

still being felt on the island of Puerto Rico. Finally, there was some confusion as to whether Respondent continued to be represented by counsel, further justifying a continuation of a temporary stay on further filings. Based on the information provided by Complainant, an extension of time through August 28, 2018 for Complainant to file and serve a Motion for Penalty was granted by Order dated April 23, 2018.

On August 9, 2018, Complainant's Attorney filed, for good cause shown and with the consent of counsel for Respondent, a *Motion for Extension of Time and Scheduling Order,* requesting an additional five months (one-hundred and fifty (150) days) to file and serve the Motion for Penalty. Complainant requests the extension because Respondent's prior counsel has resumed representation of Respondent and settlement negotiations are progressing. These negotiations include the production of financial documents by Respondent and the review of these documents by Complainant. In addition, Complainant seeks a scheduling order to encourage progress in this matter. The Undersigned finds that granting the extension and issuing a scheduling order are warranted and in the best interest of both parties.

ORDER

Based on the information provided by Complainant, an extension of time through January 28, 2019 for Complainant to file and serve a Motion for Penalty is hereby granted. In addition, the Undersigned orders the parties to produce a Joint Status Report no later than August 31, 2018. Based on the information set forth in that report, the Undersigned will issue a Scheduling Order no later than September 14, 2018.

Effective Date

The effective date of this Order shall be the date it is signed by the Regional Judicial Officer, below.

Date: **August 9, 2018**

Helen Ferrara
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that the **Order Extending Complainant's Time To File Motion For Penalty And Agreeing To Issue Scheduling Order** by Regional Judicial Officer Helen Ferrara in the matter of **Edwin Andujar Bermudez dba Truly Nolen Pest Control De Caguas, Docket No. FIFRA-02-2016-5302,** is being served on the parties as indicated below:

First Class Mail -

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

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

Inter Office Mail -

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

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: August 9, 2018

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

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

SCHEDULING ORDER

On August 9, 2018, Complainant's Attorney filed, for good cause shown and with the consent of counsel for Respondent, a *Motion for Extension of Time and Scheduling Order,* requesting an additional five months (one-hundred and fifty (150) days) to file and serve the Motion for Penalty. Complainant requests the extension because Respondent's prior counsel has resumed representation of Respondent and settlement negotiations are progressing. These negotiations include the production of financial documents by Respondent and the review of these documents by Complainant. In addition, Complainant seeks a scheduling order to encourage progress in this matter.

On August 9th, the Undersigned issued an *Order Extending Complainant's Time to File Motion for Penalty and Agreeing to Issue Scheduling Order*, granting an extension of time to file and serve a *Motion for Penalty* through January 28, 2019. In addition, the Undersigned ordered the parties to produce a Joint Status Report no later than August 31, 2018.

On September 5, 2018, Complainant's attorney filed a Status Report, stating that the Complainant had yet to receive financial records from Respondent, said records being necessary for Complainant to evaluate the merits of Respondent's financial hardship claim. The Complainant also explained that the Status Report was not filed by the deadline of August 31, 2018 due to earlier confusion as to whether the Respondent was represented by Counsel. By this Order, I confirm my electronic message of September 6, 2018, accepting the Status Report as timely filed.

The Undersigned finds that issuing the following scheduling order is warranted and in the best interest of both parties.

ORDER

Based on the information provided in the Status Report, the Undersigned directs the Respondent to file financial records in this matter to support its financial hardship claim, or show cause why such records shall not be filed, no later than September 28, 2018. The Undersigned also directs the parties to file a Joint Status Report no later than October 5, 2018.

Effective Date

The effective date of this Order shall be the date it is signed by the Presiding Officer, below.

Date: **September 12, 2018**

Helen Ferrara
Presiding Officer

CERTIFICATE OF SERVICE

I hereby certify that the **Order Extending Complainant's Time To File Motion For Penalty And Agreeing To Issue Scheduling Order** by Regional Judicial Officer Helen Ferrara in the matter of **Edwin Andujar Bermudez dba Truly Nolen Pest Control De Caguas, Docket No. FIFRA-02-2016-5302,** is being served on the parties as indicated below:

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Edwin Andujar Bermudez dba
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Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: September 12, 2018