CERTIFICATE OF SERVICE

I hereby certify that the **Initial Decision and Default Order** by Regional Judicial Officer Helen Ferrara in the matter of **Tower Exterminating Corp. a/k/a Tower & Son Exterminating Corp. And Wilson J. Torres Rivera, Docket No. FIFRA-02-2016-5306,** was served on the parties as indicated below:

First Class Mail -	Wilson J. Torres Rivera c/o Tower & Son Exterminating Corp. P.O. Box 1045 Bayamon, Puerto Rico 00960
	Wilson J. Torres Rivera, President Tower & Son Exterminating Corp. P.O. Box 1045 Bayamon, Puerto Rico 00960
Electronic File –	Environmental Appeals Board www.EPA.GOV/EAB (official file)
Pouch Mail –	Assistant Administrator for Enforcement and Compliance Assurance 1200 Pennsylvania Avenue, N.W. (2201A) Washington, D.C. 20460
Inter Office Mail –	Bruce Aber, Esq. Assistant Regional Counsel USEPA - Region II 290 Broadway, 16th Floor New York, New York 10007-1866

Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: October 9, 2019

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

IN THE MATTER OF: **Tower Exterminating, Corp. aka Tower & Son Exterminating Corp. and Wilson J. Torres Rivera** P.O. Box 1045 Bayamón, Puerto Rico 00960 Respondents.	Docket No. **FIFRA-02-2016-5306** Proceeding under 7 U.S.C. § 136*l*(a), Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act and 42 U.S.C. § 7413 (d), Section 113 (d) of the Clean Air Act

INITIAL DECISION AND DEFAULT ORDER

By *Motion for Order of Default on Penalties* ("Penalty Motion"), the Complainant, the Director, Division of Enforcement and Compliance Assistance ("DECA"), Region 2 ("Region") now known as the Enforcement and Compliance Assurance Division ("ECAD"), of the United States Environmental Protection Agency ("EPA" or "Complainant"), has moved for the assessment of civil penalties against Tower Exterminating Corp., also known as Tower & Son Exterminating Corp. ("Respondent Tower") and Wilson J. Torres Rivera ("Respondent Torres") (together, "Respondents") for violations of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), 7 U.S.C § 136j(a)(2)(G) and of the Clean Air Act ("CAA") requirements set forth at 40 C.F.R. §§ 82.13(z)(1) and (z)(2). Specifically, the Complainant requested assessment of civil penalties in the total amount of Two Hundred Thirty-

Eight Thousand and Six Hundred Twenty-Two Dollars ($238,622.00) broken down as follows: One Hundred Seventy Nine Thousand and One Hundred Twenty-Two Dollars($179,122.00) against Respondent Towers, comprised of One Hundred Nineteen Thousand Six Hundred Twenty-Two Dollars ($119,622.00) for CAA violations and Fifty-Nine Thousand Five Hundred Dollars ($59,500.00) for FIFRA violations, and Fifty-Nine Thousand Five Hundred Dollars ($59,500.00) against Respondent Torres for FIFRA violations.

Pursuant to the *Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties,* 40 C.F.R. Part 22 ("Consolidated Rules"), and based upon the record in this matter, the *Order of Default on Liability* ("Default Order") and the following *Findings of Fact*, *Conclusions of Law* and *Determination of Penalty*, civil penalties are hereby assessed as follows: $179,122.00 against Respondent Towers ($119,622.00 for CAA violations and $59,500.00 for FIFRA violations), and $59,500.00 against Respondent Torres for FIFRA violations.

BACKGROUND

This is a proceeding under Section 14(a) of the FIFRA, 7 U.S.C. § 136*l*(a) and Section 113(d) of the CAA, 42 U.S.C. § 7413(d) and governed by the Consolidated Rules.

The Region initiated this proceeding by issuing an *Administrative Complaint* ("Complaint") on March 1, 2016, against Respondents Tower and Torres. In its Complaint, the Region alleged that Respondents had committed ninety (90) separate violations of FIFRA Section 12 (a)(2)(G) as follows: forty-one (41) applications of a restricted use pesticide containing methyl bromide, Meth-O-Gas Q, EPA Reg. No. 5785-41 ("MethQ") to a site not specified in the MethQ labeling, forty-one (41) applications of MethQ that were not supervised

by a regulatory agent as required by the MethQ labeling. and eight violations for the improper storage of eight cylinders of MethQ in contravention of the storage requirements on the MethQ label.

Additionally, Complainant cited the following CAA requirements which only Respondent Tower violated: 40 C.F.R. § 82.13(z)(1), by failing to maintain documents from the MethQ commodity owner, shipper, or agent, requesting the use of MethQ for quarantine and/or preshipment ("QPS") applications; and, 40 C.F.R. § 82.13(z)(2), by purchasing MethQ from a distributor without providing, prior to shipment, a certification that the MethQ purchased would be used only for QPS purposes.

The Complaint stated on Page 21 as follows:

> If Respondent(s) fail in their Answer(s) 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(s) fail 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, Respondents may be found in default upon motion. 40 C.F.R. § 22.17(a). Default by Respondent(s) constitutes, for purposes of the pending proceeding only, an admission of all the facts alleged in the Complaint and a waiver of the Respondent(s)' right to contest such factual allegations. 40 C.F.R. § 22.17 (a). Following a default by Respondent(s) 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(s) 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(s), 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(s) without further proceedings on the date the default order becomes final under 40 C.F.R. § 22.17(c). 40 C.F.R. § 22.17(d).

Neither Respondent filed an Answer to the Complaint.

On December 15, 2016, the Complainant filed a *Motion for Default Judgement for Liability* ("Default Motion"), seeking a determination that Respondents were liable for the alleged violations, to which the Respondents again did not respond. On August 10, 2017, the Undersigned issued a Default Order, granting the Complainant's Default Motion by finding that Respondents were liable for the violations alleged in the Complaint and Default Motion.

The Region filed the Penalty Motion, together with a *Memorandum in Support of Complainant's Motion for Order of Default on Penalties* and attachments thereto ("Penalty Memorandum") on October 18, 2018. To date, the Respondents have not filed an Answer to the Complaint or otherwise responded to the Default Motion, the Penalty Motion, or any of the other motions or orders discussed in the Default Order and herein.

FINDINGS OF FACT

The *Statutory and Regulatory Background*, together with the *Findings of Fact* on which the Default Order was based, were set forth on Pages 2 through 18 of the Default Order, a copy of which is attached and incorporated herein. Pursuant to 40 C.F.R. § 22.17(c) and based upon the entire record, I make the following findings of fact, some of which are reiterated from the Default Order:

FIFRA Liability Against Respondents Tower and Torres

Use of a Registered Pesticide in a Manner Inconsistent with its Label (Application)
(Counts 1 through 82)

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

2. Respondents conducted applications of MethQ at 41 application sites, set out in the table in Paragraph 33 beginning on page 11 of the Default Order, which were not specified in the MethQ labeling.

3. None of the 41 MethQ applications referred to in the Paragraph 1, above, were supervised by a regulatory agent, as required by the MethQ labeling.

Use of a Registered Pesticide in a Manner Inconsistent with its Label (Storage)
(Counts 83 through 90)

4. Respondent Tower purchased eight containers from M & P Pest Control ("M & P"), a distributor of methyl bromide as defined in 40 C.F.R. § 82.3, in the quantities and on the dates set forth in the table in Paragraph 38 on page 14 of the Default Order.

5. As set forth in more detail in Paragraphs 38 through 43 of the Default Order, Respondents stored each container of MethQ in the pesticide storage area at the Tower Facility that was not outdoors and well ventilated as required by the Meth Q labeling.

6. In addition, Respondents failed to store at least one container of MethQ in a secured manner, as required by the MethQ labeling.

CAA Liability Against Respondent Tower Only

Failure to Comply with CAA Recordkeeping Requirements
(Count 91)

7. Pursuant to 40 C.F.R. § 82.13(z)(1), every applicator of methyl bromide produced or imported solely for 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.

8. As set forth in more detail in Paragraphs 44 through 49 of the Default Order, Respondent Tower failed to collect and maintain the document described in the previous

paragraph for any of the 41 applications detailed in the table in Paragraph 48 on page 15 of the Default Order.

Failure to Comply with CAA Reporting Requirements
(Count 92)

9. 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.

10. As set forth in more detail in Paragraphs 50 through 57 of the Default Order, Respondent Tower purchased containers of MethQ from M&P from February 4, 2013 to December 24, 2014, in the quantities and on the dates set forth in the table in Paragraph 51 on page 18 of the Default Order without providing, prior to shipment, a certification that the MethQ purchased would be used only for QPS applications.

Service of Process and Failure to Answer Complaint

A detailed discussion of the service of the Complaint and the Default Motion on both Respondents together with additional attempts to communicate with Respondents and their Counsel at that time, and Respondents' failure to answer the Complaint or respond to any additional communications, including the Default Motion, is set forth on Pages 18 through 22 of the Default Order, and further discussed on Pages 22 through 29 of the Default Order. The Default Order established proper service of the Complaint and the Default Motion on Respondents. The following summarizes the most important findings and supplements the Default Order with more recent information.

11. On March 1, 2016, EPA issued a Complaint against both Respondents pursuant

to Section 14(a) of the FIFRA, 7 U.S.C. § 136*l*(a) and Section 113(d) of the CAA, 42 U.S.C. § 7413(d). *See* Penalty Memorandum, Exhibit 1.

12. Pursuant to 40 C.F.R. § 22.5(b)(1), a true and correct copy of the Complaint, including Certificate of Service, along with the Consolidated Rules, was sent by certified mail with return receipt requested ("green card") to the Respondents at the address set forth in the Certificate of Service. (Penalty Memorandum, Exhibit 1 at page 25).

13. As discussed in the attached Default Order, proper service of the Complaint upon both Respondents was established.

14. To date, neither Respondent has filed an Answer to the Complaint in this matter or submitted payment of the civil penalty proposed in the Complaint.

15. On December 16, 2016, Complainant filed a Default Motion. The company officer who signed for the Complaint, Daisy Nieves, signed the green cards accompanying the Default Motion and they were returned to EPA.

16. The Respondents did not file a response to the Default Motion or other attempts at communication by the Complainant.

17. On August 10, 2017, the Undersigned issued a Default Order, granting Complainant's motion that the Respondents be found liable for the violations alleged in the Complaint and reiterated in the Default Motion. While the Default Order stated that, pursuant to 40 C.F.R. § 22.17(a), the Respondents' failure to file a timely answer or otherwise respond to the Complaint was grounds for the entry of a default order against the Respondents, it was noted that 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." Hence, the Default Order issued in this matter did not constitute an initial decision in accordance with 40 C.F.R.

§ 22.17(c), and there was an expectation that the Default Order would be followed by a penalty motion, including a penalty calculation. Therefore, the Complainant was ordered to file and serve a motion for penalty no later than October 11, 2017.

18. On September 28, 2017, Complainant filed a motion for extension of time through April 11, 2018 to serve a penalty motion due to extensive hurricane damage which impacted telecommunications and business operations throughout the Commonwealth of Puerto Rico.

19. Complainant's motion was granted by order dated October 15, 2017.

20. On April 4, 2018, the Complainant filed another motion for extension of time through October 11, 2018, again based on unprecedented island wide hurricane damage to Puerto Rico.

21. On April 11, 2018, Complainant's motion was granted.

22. On October 9, 2018, Complainant filed, for good cause shown, another motion for extension of time through October 18, 2018.

23. On October 9, 2018, the Undersigned granted the requested extension of time.

24. On October 18, 2018, Complainant filed a Penalty Motion, together with a Penalty Memorandum.

25. To date, neither Respondent has responded to the Penalty Motion.

CONCLUSIONS OF LAW

The legal basis for concluding that each Respondent is liable for the violations alleged in the Complaint and Default Motion are set forth in the *Conclusions of Law* of the Default Order, Pages 29 through 32, and reiterated in part herein. The determination of violations and penalty is further based upon the following:

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

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

3. Based on the *Findings of Fact* set forth in the Default Order and herein, Respondent Torres and Respondent Tower completed 41 MethQ applications as follows:

a. 41 applications to a site not specified in the MethQ labeling;

b. 41 applications not supervised by a regulatory agent as required by the MethQ labeling;

4. Each of the Respondents' eighty-two (82) failures to comply with a specific requirement of the MethQ label, as described above, constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling in violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed against each of the Respondents pursuant to the FIFRA.

5. Based on the *Findings of Fact* set forth in the Default Order and herein, Respondents stored eight containers of MethQ in the pesticide storage area at the Tower Facility that was not outdoors or well ventilated as required by the MethQ labeling.

6. The failure of each Respondent to store each of the eight containers of MethQ in an outdoor or well-ventilated pesticide storage area constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling and is a violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), for which a penalty may be assessed against each of the Respondents pursuant to the FIFRA.

7. Pursuant to 40 C.F.R. § 82.13(z)(l), every applicator of methyl bromide produced or imported solely for QPS purposes must collect and maintain, for three years, for every application, a document from the commodity owner, shipper or their agent, requesting the use of methyl bromide for QPS applications and citing the regulatory requirement that justifies its use.

8. Based on the *Findings of Fact* set forth in the Default Order and above, Respondent Tower failed to collect and maintain the document described in the previous paragraph for the 41 applications.

9. Respondent Tower's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82. l3(z)(1) for the period February 27, 2013 to March 19, 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).

10. 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.

11. Based on the *Findings of Fact* set forth in the Default Order and above, Respondent Tower failed to provide to M&P, the distributor from which Tower purchased the MethQ, prior to shipping, a certification that the MethQ purchased will be used only for QPS application.

12. Respondent Tower's failure to comply with the reporting requirements of 40 C.F.R. § 82.13(z)(2) from February 4, 2013 through December 24, 2014, constitutes a violation of the CAA, for which a civil penalty maybe assessed under Section 113(d)(1)(B), 42 U.S.C. § 7413(d)(1)(B).

13. The proceeding was commenced in accordance with 40 C.F.R. §§ 22.13 and 22.14.

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

15. Respondents' failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Respondents pursuant to 40 C.F.R. § 22.17(a).

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

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

DETERMINATION OF PENALTY

The EPA's proposed civil penalty is $59,500 against each Respondent for FIFRA violations and $119,622 against Tower for CAA violations. Based on the record in this matter, the Undersigned concludes that the penalty, broken down as stated herein, is consistent with the statutory factors for determining a civil penalty under FIFRA Section 14(a)(1), CAA Section 113(d)(1)(B) and the applicable EPA policies on civil penalties.[1]

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

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

> Complainant proposes at this time that both of the Respondents be assessed the statutory maximum penalties authorized by FIFRA and that only one Respondent, Towers, also be assessed the statutory maximum penalties authorized by the CAA. After an exchange of information has occurred, pursuant 40 C.F.R. § 22.19, Complainant will file a document with a specific proposed penalty for each Respondent and an explanation of how the proposed penalty was calculated in accordance with the criteria in FIFRA and the CAA. (Complaint, Page 15).

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

Since Respondents Tower and Torres are both commercial applicators, proposed FIFRA civil penalties were determined in accordance with Sections 14(a)(1) and (4) of the FIFRA, 7 U.S.C. §§ 136*l*(a)(1) and (4) and EPA's *FIFRA Enforcement Response Policy* ("FIFRA ERP"), dated December 2009, and adjusted for inflation. Section 14(a)(1) of the FIFRA, 7 U.S.C. § 136*l*(a)(1), states that "[a]ny commercial applicator who violates any provision of this subchapter may be assessed a civil penalty by the Administrator of not more than $5,000 for each offense." Pursuant to the *Debt Collection Improvement Act of 1996* ("DCIA"), and regulations promulgated under the *Civil Monetary Penalty Inflation Adjustment Rule*, codified at 40 C.F.R.

Part 19 (*See* Table 1, Section 19.4) for violations occurring between January 13, 2009 and November 2, 2015, the revised statutory maximum of $7,500 may be assessed for each offense. This revised statutory maximum remained the same throughout the time period of violations as cited in the Complaint.

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

Complainant set forth the proposed penalty calculations in the Penalty Calculation Worksheets, attached to the Penalty Memorandum as follows: Exhibits 4 and 6 for Counts 1 through 90 and Exhibit 5 for Counts 91 and 92 of the Complaint. The methodology for EPA's calculation of the penalty under both the FIFRA and CAA in this proceeding was thoroughly reviewed and is summarized herein. In support of its proposed penalty, Complainant included the declarations of EPA personnel with first-hand knowledge of the calculation of the proposed penalties. *See* Penalty Memorandum, Exhibit 9 (*Declaration of Audrey Moore*) and Exhibit 10 (*Declaration of Natalie Topinka*).

Calculation of the FIFRA Penalty

EPA determined the proposed FIFRA penalty in this case in light of the statutory factors set forth in Section 14(a)(4) of the FIFRA, including the gravity of the violation, the

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

a) *Gravity of the Violation*

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

In this case, the Respondents' violations involved the use (specifically, the application and storage) of a registered use pesticide in a manner inconsistent with its labeling, an unlawful act pursuant to Section 12(a)(2)(G) of the FIFRA. Under the FIFRA ERP, the gravity level for pesticide misuse is Level 2 (code 2AA). The FIFRA ERP further correlates the initial gravity assessment by the size of the violator's business. In the instant matter, EPA determined that, pursuant to the FIFRA ERP, each Respondent was a Category III Business Size (lowest category, gross revenues under One Million Dollars ($1,000,000) per year; see further discussion under *Size of Business* below for details on how this factor was calculated). Accordingly, each Gravity

Level 2 violation committed by a Category III size business warrants a base penalty of $4,250 per violation under the civil penalty matrix for FIFRA Section 14(a)(1) violators in the FIFRA ERP. (FIFRA ERP, Table 2, *Civil Penalty Matrix for FIFRA Section 14(a)(1)*, Page 19).

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

In this case, as demonstrated below, EPA's calculation of gravity adjustment factors (pesticide toxicity, harm to human health and the environment, prior history of non-compliance and culpability) totaled a value of 15, which calls for a 40% increase to the matrix value. *See* FIFRA ERP, Table 3, Page 20. Therefore, the proposed base penalty of $4,250 for each of the 90 pesticide use violations alleged in the Complaint was adjusted upwards by 40%, to $5,950.

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

neurotoxin, and is a restricted use pesticide associated with severe chronic health effects.

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

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

Finally, for the fifth factor, culpability, EPA assigned a value of two, based on the following considerations. First, the Respondents' 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 licensed members of the regulated community, Respondents knew or should

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

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

have known of their obligations to comply with the labeling requirements for pesticides under the FIFRA. Further, Respondents 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. Respondents knew or should have known that the MethQ was not allowed to be used in dwellings (residences) or structures not used for the commercial storage or handling of commodities as application sites. Moreover, Respondents knew or should have known of the MethQ storage requirements. Lack of actual knowledge by Respondent should not reduce culpability; doing so would be tantamount to encouraging ignorance of the FIFRA and its requirements.

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

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* FIFRA ERP, Page 16. Accordingly, EPA staff determined that there were 90 independent violative acts in this case (41 applications to a site not specified in the MethQ labeling, 41 applications that were not supervised by a regulatory agent as required by the MethQ labeling and eight violations for the improper storage of eight cylinders of MethQ). EPA could also have sought additional penalties for application and storage violations as set forth in on Page 19 of its Penalty Memorandum but declined to do so.

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

Multiplying the adjusted base penalty of $5,950 for a Level 2 Violation (pesticide misuse) and Category III Size of business (gross revenues under $1,000,000 per year), by the number of violations (90) equals $535,500 in potential penalties against each Respondent. However, in instances where there is evidence of multiple use violations involving the same pesticide, EPA may use a "graduated" penalty calculation, as specified in the FIFRA ERP. *See* FIFRA ERP, Section IV.B.1., Pages 25-26.

To calculate penalties using the graduated penalty method, the adjusted penalty amount is first determined, based on the five gravity adjustment factors discussed above. In this case, as stated above, the adjusted penalty is $5,950 for each use violation. Using Table 4, the *Graduated*

Penalty Table, on Page 25 of the FIFRA EFP, EPA set forth the graduated penalty calculation for Category III Size of Business respondents as follows: the first five use violations are assessed at 100% of the adjusted base penalty; violations 6 through 20 are assessed at 10% of the adjusted base penalty; violations in excess of 20 are assessed at 5% of the adjusted base penalty. *(FIFRA Penalty Calculation Worksheet for Tower* and *FIFRA Penalty Calculation Worksheet for Torres,* Exhibits 4 and 6 respectively, to the Penalty Memorandum). In this case, the total proposed final penalty using the graduated penalty matrix comes to $59,500 for each Respondent.

Based on the foregoing, the Undersigned agrees with EPA's conclusion that the $59,500 penalty for each Respondent reflects the gravity of the violation in accord with Section 14(a)(4) of the FIFRA.

b) *Size of business*

A second statutory factor discussed in EPA's penalty calculations is the "appropriateness of the penalty to the size of the Respondents' business." Under the FIFRA ERP, calculation of a penalty based on the size of Respondents' business is determined from Respondents' gross revenues from all sources during the prior calendar year and is incorporated into the initial matrix value and gravity adjustments as described in the previous section.

The FIFRA ERP offers a table for evaluating size of business for violators identified pursuant to FIFRA Section 14(a)(1) as commercial applicators. As aforementioned, Respondents Tower and Torres are both commercial applicators covered by Section 14(a)(1). The table for Section 14(a)(1) applicators establishes three categories of such applicators, the third of which, Category III, is applicable to companies or individuals with gross revenues under $1,000,000.

Under the FIFRA ERP, "revenue includes all revenue from an entity and all of the entity's affiliates." Based on review of Respondent Tower's Commonwealth of Puerto Rico tax

returns for calendar years 2012, 2013, and 2104, which the company provided during the brief and unsuccessful prefiling settlement negotiations in 2015, and of Tower's annual filings with the *Puerto Rico Department of State Registry of Corporations and Entities* (https://prcorpfiling.f1hst.com/CorporationSearch.aspx), EPA staff determined that neither of the Respondents was likely to have gross revenues over $1,000,000 and therefore fit within the Category III for size of business. The Respondents' 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. Therefore, Undersigned finds that the proposed FIFRA penalty of $59,500 for each Respondent takes appropriate account of the size of business statutory factor.

c) *Ability to continue in business*

EPA correctly considered a third statutory factor in determining a penalty under Section 14(a)(4) of the FIFRA, namely the effect of the penalty on the Respondents' ability to continue in business. Section 14(a)(4) of the FIFRA does not impose a burden on the Complainant to prove that the Respondents are 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 respondent, independent commercial financial reports, or other credible sources.

In the present matter, prior to the issuance of the complaint, no financial information or documentation was provided by Torres and no current financial information had been submitted by Tower. Tower's tax information from 2012-2014 was used to determine that Tower and Torres fit within the Category III size of business category in the FIFRA penalty matrix, as described in the section above. However, such tax return information is now four years old and outdated and is not a reliable basis upon which to determine the effect of the proposed FIFRA penalties on the current ability of Respondent Tower to continue in business. EPA staff were, however, able to review the publicly available Annual Filings submitted by Tower to the *Puerto Rico Department of State Registry of Corporations and Entities.* For the most recent three years (2015, 2016 and 2017), the total assets of Tower, as reported on the submitted balance sheets for each of those years, have been increasing substantially each year, to over One Hundred Thousand Dollars ($100,000) in 2017, thus indicating a stronger financial condition and presumably greater resources to pay a penalty and continue in business.

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

to pay at issue. *New Waterbury*, 5 E.A.D. at 541; *Spitzer Great Lakes*, 9 E.A.D. at 321; *In re: CDT Landfill Corp.*, 11 E.A.D. 88, 122 (EAB 2003); *In re: Donald Cutler,* 11 E.A.D. 622, 632 (EAB 2004).

Moreover, where a respondent(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. *New Waterbury*, 5 E.A.D. at 542.

In the instant case, Respondents have not filed an Answer to the Complaint and have not formally raised an inability to pay defense. Respondent's failure meant the usual pre-hearing process did not occur. Accordingly, as the EAB in *New Waterbury* held, any objection by either Respondent to the penalty based upon ability to pay has been waived in the present case.

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

Calculation of the CAA Penalty

Section 113(d)(1) of the CAA, 42 U.S.C. § 7413(d)(1) authorizes the EPA Administrator to issue a civil administrative penalty order against any person who has violated the Act or its implementing regulations. In this case, EPA seeks a penalty of $119,622 against Tower only for violations of 40 C.F.R. Part 82, Subpart A, *Production and Consumption Controls for Ozone Depleting Substances,* as explained further below. However, the Act restricts that authority to

matters where the total penalty sought is below a certain threshold and the first date of violation occurred no more than twelve (12) months prior to the initiation of the administrative action. The Act allows for an exception to the penalty amount and time limitation where the Administrator and the Attorney General jointly determine that a matter involving a larger penalty amount or longer period of violation is appropriate for administrative action. Section 113(d)(1). The original statutory limit on EPA's administrative penalty authority of $200,000 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 DCIA, 31 U.S.C. § 3701. *See* 40 C.F.R. Part 19.

Pursuant to *EPA Delegation of Authority 7-6-A* and *EPA Region 2 Delegation of Authority 7-6-A,* the Director of ECAD is duly delegated the authority to issue CAA administrative civil penalty complaints and to seek from DOJ, in concurrence with EPA's Office of Enforcement and Compliance Assurance, waivers of the CAA Section 113(d)'s time and penalty limits. In this case, the penalty sought against Tower for CAA violations is $119,622, 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 U.S. Department of Justice ("DOJ") for the time limitation was sought in this case. On January 18, 2016, EPA Region 2's Director sent a Waiver Request to EPA's Office of Enforcement and Compliance Assistance, which was forwarded to the DOJ, requesting a waiver of the time limit for the period between the first date of violation and the initiation of EPA's civil administrative action. On February 11, 2016, the DOJ Environmental Enforcement Section, on behalf of the Attorney General, consented to EPA Region 2's Waiver Request and determined that the proposed administrative action involving violations of reporting and recordkeeping requirements in connection with a Class VI controlled ozone depleting

substance (namely, methyl bromide) was appropriate for administrative action. (*U.S. Department of Justice CAA Waiver Letter dated February 11, 2016*, Penalty Memorandum, Exhibit 11).

As a result of the Tower and M & P Inspections, the collection of records and statements at those inspections, and M & P's response to EPA's Information Request Letter, as set forth in the Default Order and herein, EPA determined that Tower failed to collect and maintain, for three years, for every application, a document from the commodity owner, shipper or their agent setting forth said commodity owner, shipper or agent's request of the use of methyl bromide and citing the regulatory requirement that justifies its use for quarantine/regulatory use in accordance with the definitions in 40 C.F.R. Part 82, Subpart A, as required by 40 C.F.R. § 82.13(z)(1). Moreover, Tower failed to provide the distributor from which it purchased the methyl bromide containing pesticides, M & P, with a certification that the quantity it purchased would only be used for quarantine fumigation, as further required by 40 C.F.R. § 82.13(z)(2).

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

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

a) *Seriousness of the Violations*

The CAA Penalty Policy provides for a method of calculating a penalty to reflect the

"seriousness of the violation" in a gravity component. In measuring the seriousness of the violation, EPA considered the: i) importance to the regulatory scheme, ii) the length of time of the violation, and iii) the size of the violator/business.

i. Importance to the regulatory scheme. In this matter, Tower'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. Tower's failure to request and keep records from commodity owners and to provide a certification to the distributor, prior to the distributor's delivery of MethQ, that the MethQ would be used for quarantine and/or preshipment purposes only, increased the likelihood of methyl bromide misuse and its corresponding harm to human health and the environment. (*See Natalie Topinka Declaration*, Penalty Memorandum, Exhibit 10, 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. 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 Tower's violation of 40 C.F.R. § 82.13(z)(1), which required it to maintain for three years a document from the commodity owner, shipper or their agent, requesting the use of methyl bromide for QPS applications and citing the regulatory requirement that justifies its use, EPA calculated the length of time of the violation by looking at Tower's records of pesticide applications. The violation period cited in the Complaint reflects the total days between the first date of a MethQ application through the last date of such an application. For Tower, there were 692 days between the first date of

application (April 27, 2013) and the last date (March 19, 2015). The CAA Penalty Policy suggests a length of time of violation gravity adjustment of $25,000 be added for violations which persist over a period of 19 to 24 months, which EPA applied.

For Tower's violation of 40 C.F.R. § 82.13(z)(2), involving the failure to provide to a distributor a certification that the methyl bromide Tower purchased would be used only for a QPS application, EPA reviewed Tower's purchase invoices. The violation period reflects the date of Tower's first MethQ purchase through the date of the last such purchase. For Tower, there were 688 days between the first date of purchase (February 4, 2013) and the last date (December 23, 2014). The CAA Penalty Policy suggests a length of time of violation gravity adjustment of $25,000 be added for violations which persist over a period of 19 to 24 months, which EPA applied.

iii. Size of business. For Tower, the size of business was determined by reference to the Commonwealth financial tax return that it provided to EPA in 2015. In 2015, Tower's total reported net worth was under $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.

The preliminary total penalty calculated against Tower under the CAA Penalty Policy thus comes to $82,000. However, the DCIA and 40 C.F.R Part 19, promulgated pursuant to the DCIA, direct EPA to adjust the statutory maximum penalties to account for inflation. Consistent with the Congressional direction to raise penalties to take account of the impact of inflation, EPA issued policy guidance stating that calculations under Agency penalty policies should also be increased to reflect inflation. *See Civil Monetary Penalty Inflation Adjustment Rule*, 78 Fed. Reg. 66643 (November 6, 2013).

EPA, in arriving at the final proposed penalty, used the inflation adjustment factor of 1.4163 for violations occurring before December 6, 2013, and an inflation factor of 1.4853 for those occurring after December 6, 2013, as set forth in EPA's *Chart Reflecting Inflation Adjustment Multiplier* in the EPA Memorandum *Amendments to the U.S. Environmental Protection Agency's Civil Penalty Policies to Account for Inflation (Effective December 6, 2013)* (Penalty Memorandum, Exhibit 12). Based on the inflationary adjustments, the final proposed penalty that EPA seeks against Tower for the CAA recordkeeping and reporting violations is $119,622. *See CAA Penalty Worksheet for Respondent Towers*, Penalty Memorandum, Exhibit 5.

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

b) *Economic Impact of The Penalty*

With regard to the economic impact of the penalty on the business (*i.e.*, ability to pay), CAA 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 New Waterbury*, 5 E.A.D. at 542-43, *supra; accord In re Commercial Cartage Co.*, 7 E.A.D. 784, 807 (July 30, 1998) (applying the *New Waterbury* analysis regarding parties' burdens of proof on "ability to pay" in CAA determinations); *CDT Landfill Corp.*, 11 E.A.D. at 120 & n.60. In the present matter, based on the limited financial information provided by Tower (three years of tax returns only as recent as 2014) and publicly available filings submitted by Tower to the *Puerto Rico Department of State Registry of Corporations and Entities,* it is difficult to evaluate the economic impact of the penalty on the business. However, Tower's filings with the *Puerto Rico Department of State Registry of Corporations and Entities* for the years 2015, 2016 and 2017 suggest that the economic impact of the penalty on the business will be less now than in prior years due to an increase in total assets over the past three years. There is no evidence to suggest that a reduction for this factor is appropriate.

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

statutory factor. *Id.* at *124. 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 report showing sales figures, the presumption of ability to pay was not rebutted and the penalty was not adjusted.

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

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

c) *Compliance History and Good-faith Efforts*

In its Penalty Memorandum, EPA also considered the violator's compliance history (an upward adjustment only) and good-faith efforts to comply. There is no evidence of a prior

history of non-compliance by Tower. Therefore, EPA proposed no upward adjustment to the proposed penalty based on the factor of compliance history.

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

d) *Economic Benefit*

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

For the foregoing reasons, this Court concludes that EPA's proposed CAA penalty of $119,622 against Tower was calculated appropriately and in accordance with the statutory factors identified in Section 113(e)(1) of the CAA, 42 U.S.C. § 7413(e)(1), and the Undersigned adopts the proposed penalty for the CAA violations set forth herein.

DEFAULT ORDER

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

1. Respondent Tower is assessed and ordered to pay a civil penalty in the total amount of One Hundred Seventy-Nine Thousand and One Hundred Twenty-Two Dollars ($179,122.00), comprised of One Hundred Nineteen Thousand Six Hundred Twenty-Two Dollars ($119,622.00) for CAA violations and Fifty-Nine Thousand Five Hundred Dollars ($59,500.00) for FIFRA violations.

2. Respondent Torres is assessed and ordered to pay a civil penalty in the amount of Fifty-Nine Thousand Five Hundred Dollars ($59,500.00), for FIFRA violations.

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

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

BY U.S. POSTAL SERVICE

United States Environmental
Protection Agency
Fines and Penalties
Cincinnati Finance Center
P. O. Box 979077
St. Louis, MO 63197-9000

BY OVERNIGHT MAIL

U.S. Bank
1005 Convention Plaza
Mail Station SL-MO-C2GL
ATTN Box 979077
St. Louis, MO 63101
Contact: Natalie Pearson
Tel.: (314) 418-4087

b. If Respondents choose to pay electronically, the transfer shall be made to:

i. BY WIRE TRANSFER

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

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

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

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

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

3. Respondents shall also send copies of this payment to each of the following:

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

And

Bruce Aber, Esq.
U.S. Environmental Protection Agency, Region 2
290 Broadway
New York, New York 10007

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

5. Failure to pay the penalty in full according to the above provisions will result in referral of this matter to the United States Department of Justice or the United States Department of the Treasury for Collection.

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

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

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

IT IS SO ORDERED.

Dated: October 8, 2019

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

Attachment to Initial Decision and Default Order

ORDER OF DEFAULT ON LIABILITY

Issued August 10, 2017

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

IN THE MATTER OF: Tower Exterminating, Corp. aka Tower & Son Exterminating Corp. and Wilson J. Torres Rivera, P.O. Box 1045 Bayamon, Puerto Rico 00960 Respondents.	Docket No. **FIFRA-02-2016-5306** Proceeding under 7 U.S.C. § 136j(a)(2)(G), Section 12(a)(2)(G) of the Federal Insecticide, Rodenticide & Fungicide Act and 40 C.F.R. Sections 82.13(z)(1), (2) of the Clean Air Act

ORDER OF DEFAULT ON LIABILITY

This is a proceeding under Section 14(a) of the Federal Insecticide, Fungicide and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136*l*(a), and 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 ("Consolidated Rules"), 40 C.F.R. Part 22. This proceeding was initiated by an Administrative Complaint ("Complaint") filed by the Director, Division of Enforcement and Compliance Assistance of EPA, Region 2 ("Complainant") against Tower Exterminating Corp., also known as Tower & Son Exterminating Corp. ("Respondent Tower") and Wilson J. Torres Rivera ("Respondent Torres") (together, "Respondents") for violation of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G) and CAA requirements set forth at 40 C.F.R. §§ 82.13(z)(1) and (z)(2).

On December 15, 2016, Complainant filed a Motion for Default Judgment on Liability ("Motion for Default"), including a Memorandum in Support of Complainant's Motion for Default Judgement on Liability ("Memorandum") and Exhibits thereto, and a Declaration prepared by Bruce Aber, Assistant Regional Counsel for Complainant ("Declaration"), finding Respondents liable for the violations alleged in the Complaint. To date, Respondents have not replied to the Motion for Default. A party may be found to be in default, after motion, upon failure to file a timely Answer to a complaint. Default by Respondents constitutes an admission of all of the facts alleged in the Complaint and a waiver of Respondents' right to contest such factual allegations. 40 C.F.R. § 22.17(a). Pursuant to the Consolidated Rules at 40 C.F.R. Part 22, the record in this matter and the following Findings of Fact and Conclusions of Law, Complainant's Motion for Default 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 14(b)(4) of FIFRA, 7 U.S.C.§136*l*(b)(4), states that "the act, omission or failure of any officer, agent or other person acting for or employed by any person shall in every case be also deemed to be the act, omission, or failure of such person as well as that of the person employed."

11. 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.

12. 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.

13. 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.

14. 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.

15. Appendix F to 40 C.F.R. Part 82, Subpart A, lists ozone-depleting chemicals and includes methyl bromide (CH3Br).

16. 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.

17. 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.

18. 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.

19. 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.

20. 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.

21. 40 C.F.R. § 82.3 defines "applicator" as the person who applies methyl bromide.

22. 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.

23. 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.

24. 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 regarding Respondent Tower's purchases of MethQ during the period February 4, 2013 through December 24, 2014.

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 container.

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 container.

15. M & P sold or otherwise distributed MethQ to Respondent Tower between February 2013 and December 2014.

16. Upon information and belief, the MethQ canisters M & P sold to Respondent Tower 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 the Respondent Tower's facility ("Tower Facility"), on April 13, 2015, April 15, 2015 and on May 11, 2015 (individually or collectively referred to as the "Tower Inspections").

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

20. During the April 13, 2015 and May 11, 2015 inspections, the inspectors requested that the Respondents provide all records in their possession relating to their purchase and use of methyl bromide.

21. During the April 13, 2015 and May 11, 2015 inspections, the inspectors collected forty-one (41) pesticide application records documenting Respondents' use of MethQ, for which they issued a Receipt for Samples document.

22. Respondents 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 15, 2015 inspection, Respondent Torres 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 receive any Chemtura applicator training or any other fumigation training.

FIFRA Liability Against Respondents Tower and Torres

Use of a Registered Pesticide in a Manner Inconsistent with its Label (Applications)
(Counts 1 through 82)

24. Respondents have been, and continue to be, "persons" as defined by FIFRA § 2(s), 7 U.S.C. § 136(s), and as such are subject to FIFRA and the regulations promulgated thereunder.

25. Respondents engage, and at all times pertinent to this Complaint have engaged, in commercial activities providing pest control services using pesticides.

26. Respondent Torres 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)(l), and 40 C.F.R. § 171.2(a)(8).

27. Each of the Respondents 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).

28. Each of the Respondents is, and has been at all times pertinent to this Complaint, subject to FIFRA and the regulations promulgated thereunder.

29. The following statements are clearly displayed on the MethQ Label received by Respondent Tower and referenced in Paragraphs 4, 9, 14, 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. "It is a violation of Federal law to use this product in a manner inconsistent with its labeling."

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

d. "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."

e. "MethQ may be used for quarantine/regulatory commodity fumigation only. Supervision by regulatory agent is required."

f. "You must carefully read and understand the accompanying use direction, GLK 398F [Booklet], in order to use MethQ."

g. "Observe all Safety and precautionary statements as set forth in the accompanying use directions, GLK39.8F [Booklet]."

h. "Store in a secure manner either outdoors under ambient conditions or indoors in a well-ventilated area."

30. 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 BYREGULATORY AGENT REQUIRED."

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

c. Same as 29(b) above

d. Same as 29 (c) above

e. Same as 29 (d) above.

f. "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."

g. Same as 29 (h) above.

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

32. 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.

33. Respondents applied MethQ bearing the MethQ Labeling referenced in Paragraphs 4, 9, 14, and 16, above, and containing the statements set out in Paragraphs 29 and 30, above, on the following dates and at the following locations:

	Date	Location	Treatment Site/Type of Structure	Invoice Number	Target Pest
1	4/27/2013	Bayamon, PR	Residence	Illegible	Drywood Termite (DWT)
2	7/23/2013	Montehiedra, PR	Residence	Illegible	DWT
3	7/31/2013	Miramar	Residence	Illegible	DWT
4	9/14/2013	Cond El Monte, PR	Residence	Illegible	DWT
5	10/4/2013	Trujillo Alto, PR	Business (Doors)	Illegible	DWT
6	10/24/2013	Viego San Juan, PR	Residence	Illegible	DWT
7	11/2/2013	Cidra, PR	Residence	Illegible	DWT & PPB

8	11/19/2013	San Juan, PR	Business	Illegible	DWT & PPB
9	11/27/2013	Romany Park, PR	Residence	Illegible	DWT & Powder Post Beetles (PPB)
10	11/29/2013	Guaynabo, PR	Residence	Illegible	DWT
11	12/3/2013	El Cortijo Bay, PR	Residence	Illegible	DWT
12	12/28/2013	Old San Juan, PR	Residence	Illegible	DWT
13	3/7/2014	Miramar, PR	Residence	Illegible	moth
14	3/13/2014	La Torrimas, PR	Residence	Illegible	DWT
15	3/--/2014	Gurabo, PR	Residence	Illegible	DWT
16	4/11/2014	Rio Piedras, PR	Nursing Home	Illegible	DWT, moth
17	5/27/2014	Ponce, PR	Business (Kitchen area)	Illegible	DWT
18	7/18/2014	Illegible	For MJ Exterminating (wood panels)	19079	DWT
19	8/6/2014	Illegible	Illegible	27679	DWT
20	8/18/2014	San Juan, PR	Business	Illegible	DWT
21	8/19/2014	Primavera, PR	Illegible	27801	DWT
22	9/11/2014	Ciudad Jardin, Gurabo, PR	Residence	Illegible	DWT
23	10/1/2014	San Juan, PR	Residence	Illegible	DWT
24	10/1/2014	Illegible	Illegible	Illegible	DWT
25	10/3/2014	Illegible	Illegible	27916	DWT
26	10/8/2014	Guaynabo, PR	Residence	Illegible	DWT
27	11/13/2014	San Juan, PR	Residence	28021	DWT
28	11/20/2014	Illegible	For Degoss Exterminating (4 Drawers)	Illegible	Illegible
29	12/4/2014	San Juan, PR	Residence	2_232	DWT
30	12/8/2014	Mirabar, PR	Residence	23505	DWT
31	12/8/2014	Illegible	For MJ Exterminating (20 chairs)	Illegible	DWT
32	12/10/2014	Illegible	For Home Garden (8 Cabinets)	Illegible	Illegible
33	12/18/2014	Mayaguez, PR	For Temirio Construction (In San Sebastian School –Chairs & Desks)	Illegible	Illegible

34	Illegible	Illegible	For Alicia Exterminating (Wood Pieces)	Illegible	DWT & Moth
35	Illegible	Illegible	For LR Exterminating (Book Shelves)	Illegible	Illegible
36	1/12/2015		Home & Garden Cabinets	Illegible	DWT
37	1/15/2015	For MJ Exterminating	Living room/dining room	Illegible	DWT & PPB
38	2/14/2015	Las Piedras, PR	Residence	28281	DWT
39	2/14/2015	Illegible	Illegible	28280	DWT
40	2/16/2015	Illegible	Boat	28777	DWT
41	3/19/2015	Illegible	For VM Exterminating (Closet)	300	Illegible

34. Respondents conducted applications of MethQ at forty-one (41) application sites, set out in the table in Paragraph 33 above, which were not specified in the MethQ Labeling.

35. None of the forty-one (41) MethQ applications set out in the table in Paragraph 33 above, was supervised by a regulatory agent.

36. In the course of the forty-one (41) MethQ applications set out in the table in Paragraph 33, above, Respondent Torres and Respondent Tower each committed 82 separate violations of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), specifically consisting of:

a. 41 applications to a site not specified in the MethQ Labeling;

b. 41 applications not supervised by a regulatory agent as required by the MethQ Labeling;

37. Each of the Respondents' failures to comply with a specific requirement of the MethQ Label, as described in Paragraphs 33 to 36, 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 each of the Respondents pursuant to FIFRA.

Use of a Registered Pesticide in a Manner Inconsistent with its Label (Storage)
(Counts 83 through 90)

38. On six separate occasions Respondent Tower purchased containers of MethQ from M & P Pest Control, Inc. bearing the MethQ Labeling referenced in Paragraphs 4, 9, 14, and 16, above, and containing the statements set out in Paragraphs 29 and 30, above. The purchases were made on the following dates and in the following quantities:

	Date	Invoice	Quantity
1	2/4/2013	195273	1 50-pound container
2	11/13/2013	189768	1 50-pound container
3	3/27/2014	198333	2 50-pound containers
4	6/23/2014	203547	1 50-pound container
5	9/9/2014	208747	2 50-pound containers
6	12/24/2014	215130	1 50-pound container

39. During the April 15, 2015 inspection, an inspector observed that the pesticide storage area at the Tower Facility was neither outdoors nor well ventilated.

40. During the April 15, 2015 inspection, an inspector observed that at least one of the eight containers of MethQ in the pesticide storage area at the Tower Facility was not stored in a secure manner.

41. Respondents stored each container of MethQ set out in the table in Paragraph 38 above, in the pesticide storage area at the Tower Facility that was indoors and not well ventilated.

42. Respondents stored at least one container of MethQ set out in the table in Paragraph 38 above, in an unsecured manner.

43. Each of the Respondents' failures to store the eight containers of MethQ in an outdoor or well-ventilated pesticide storage area constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling and is a violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. Section 136j(a)(2)(G), for which a penalty may be assessed against each of the Respondents pursuant to FIFRA.

CAA Liability Against Respondent Tower Only

Failure to Comply with CAA Recordkeeping Requirements
(Count 91)

44. Respondent Tower 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).

45. Respondent Tower 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.

46. Respondent Tower 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.

47. Pursuant to 40 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 justifies its use.

48. Respondent Tower failed to collect and maintain the document described in the previous paragraph for any of the following forty-one (41) applications:

	Date	Location	Treatment Site/Type of Structure	Invoice Number	Target Pest

1	4/27/2013	Bayamon, PR	Residence	Illegible	Drywood Termite (DWT)
2	7/23/2013	Montehiedra, PR	Residence	Illegible	DWT
3	7/31/2013	Miramar	Residence	Illegible	DWT
4	9/14/2013	Cond El Monte, PR	Residence	Illegible	DWT
5	10/4/2013	Trujillo Alto, PR	Business (Doors)	Illegible	DWT
6	10/24/2013	Viego San Juan, PR	Residence	Illegible	DWT
7	11/2/2013	Cidra, PR	Residence	Illegible	DWT & PPB
8	11/19/2013	San Juan, PR	Business	Illegible	DWT & PPB
9	11/27/2013	Romany Park, PR	Residence	Illegible	DWT & Powder Post Beetles (PPB)
10	11/29/2013	Guaynabo, PR	Residence	Illegible	DWT
11	12/3/2013	El Cortijo Bay, PR	Residence	Illegible	DWT
12	12/28/2013	Old San Juan, PR	Residence	Illegible	DWT
13	3/7/2014	Miramar, PR	Residence	Illegible	moth
14	3/13/2014	La Torrimas, PR	Residence	Illegible	DWT
15	3/--/2014	Gurabo, PR	Residence	Illegible	DWT
16	4/11/2014	Rio Piedras, PR	Nursing Home	Illegible	DWT, moth
17	5/27/2014	Ponce, PR	Business (Kitchen area)	Illegible	DWT
18	7/18/2014	Illegible	For MJ Exterminating (wood panels)	19079	DWT
19	8/6/2014	Illegible	Illegible	27679	DWT
20	8/18/2014	San Juan, PR	Business	Illegible	DWT
21	8/19/2014	Primavera, PR	Illegible	27801	DWT
22	9/11/2014	Ciudad Jardin, Gurabo, PR	Residence	Illegible	DWT
23	10/1/2014	San Juan, PR	Residence	Illegible	DWT
24	10/1/2014	Illegible	Illegible	Illegible	DWT
25	10/3/2014	Illegible	Illegible	27916	DWT
26	10/8/2014	Guaynabo, PR	Residence	Illegible	DWT
27	11/13/2014	San Juan, PR	Residence	28021	DWT
28	11/20/2014	Illegible	For Degoss Exterminating (4 Drawers)	Illegible	Illegible
29	12/4/2014	San Juan, PR	Residence	2_232	DWT
30	12/8/2014	Mirabar, PR	Residence	23505	DWT

31	12/8/2014	Illegible	For MJ Exterminating (20 chairs)	Illegible	DWT
32	12/10/2014	Illegible	For Home Garden (8 Cabinets)	Illegible	Illegible
33	12/18/2014	Mayaguez, PR	For Temirio Construction (In San Sebastian School –Chairs & Desks)	Illegible	Illegible
34	Illegible	Illegible	For Alicia Exterminating (Wood Pieces)	Illegible	DWT & Moth
35	Illegible	Illegible	For LR Exterminating (Book Shelves)	Illegible	Illegible
36	1/12/2015		Home & Garden Cabinets	Illegible	DWT
37	1/15/2015	For MJ Exterminating	Living room/dining room	Illegible	DWT & PPB
38	2/14/2015	Las Piedras, PR	Residence	28281	DWT
39	2/14/2015	Illegible	Illegible	28280	DWT
40	2/16/2015	Illegible	Boat	28777	DWT
41	3/19/2015	Illegible	For VM Exterminating (Closet)	300	Illegible

49. Respondent Tower's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82.13(z)(1) for the period February 27, 2013 to March 19, 2015 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(I)(B), 42 U.S.C. § 7413(d)(1)(B).

Failure to Comply with CAA Reporting Requirements
(Count 92)

50. 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.

51. Respondent Tower purchased containers of MethQ from M & P on the following six dates:

	Date	Invoice	Quantity
1	2/4/2013	195273	1 50-pound container
2	11/13/2013	189768	1 50-pound container
3	3/27/2014	198333	2 50-pound containers
4	6/23/2014	203547	1 50-pound container
5	9/9/2014	208747	2 50-pound containers
6	12/24/2014	215130	1 50-pound container

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

53. From February 4, 2013 to December 24, 2014, Respondent Tower purchased methyl bromide from M & P without providing, prior to shipment, a certification that the MethQ purchased would be used only for QPS applications.

54. Respondent Tower's failure to comply with the reporting requirements of 40 C.F.R. § 82.13(z)(2) from February 4, 2013 through December 24, 2014 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(I)(B), 42 U.S.C. § 7413(d)(I)(B).

Service of Process and Failure to Answer Complaint

55. On March 1, 2016, EPA issued a civil administrative Complaint against both Respondents 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.

56. Pursuant to 40 C.F.R. § 22.5(b)(1), a true and correct copy of the Complaint, including Certificate of Service, along with the Consolidated Rules, was sent by certified mail with return receipt requested ("green card") to the Respondents, Tower and Torres, at the address

set forth in the certificate of service (*see* Memorandum, Exhibit 1 at page 25) which was Post Office (P.O.) Box 1045, Bayamon, Puerto Rico 00960. *See* Memorandum, Exhibit 2.

57. The Complaint, at page 20, explicitly stated, that:

> 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).

58. Each Respondent was served with the Complaint on March 7, 2016, at the Bayamón post office box mailing address, as indicated on the U.S. Postal Service Product and Tracking Information (*see* Memorandum, Exhibit 3), and as indicated by the signed green cards, which were signed but not dated by Daisy Nieves, the President and Treasurer of Tower. *See* Memorandum, Exhibit 4.

59. To date, neither Respondent has filed an Answer to the Complaint in this matter or submitted payment of the civil penalty proposed in the Complaint. *See* Declaration, Para. 18.

60. On March 1, 2016, a courtesy copy of the Complaint was also emailed to Peter Diaz, Esq. ("Mr. Diaz"), who represented both Respondents in pre-filing negotiations regarding FIFRA and CAA violations alleged in the Complaint, at the email address previously used in correspondence with EPA counsel: diazfederalcases@gmail.com. *See* Declaration, Para. 2; Memorandum, Exhibit 13.

61. On March 1, 2016, Mr. Diaz sent an email to EPA counsel, Mr. Aber, which acknowledged that he had received the Complaint, and stated: "I will Answer soon." *See* Memorandum, Exhibit 14.

62. The Associated Press reported that Respondent Tower was represented by Mr. Diaz and Mr. Diaz was interviewed about the representation by various news media. *See* Memorandum, Exhibit 15.

63. Based on his response and his interviews with various news media, it is clear that Mr. Diaz was aware of the Complaint.

64. To date, Mr. Diaz has not filed with the EPA Region 2 Regional Hearing Clerk an Answer to the Complaint in this matter on behalf of either Respondent, nor has he submitted payment of the civil penalty proposed in the Complaint, 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 17, 18.

65. On April 28, 2016, EPA sent, by certified mail with return receipt requested and via email (from EPA Office of Regional Counsel Secretary Yolanda Majette), a letter to Mr. Diaz ("Diaz Letter") informing him that both Respondents had accepted service of the Complaint on 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 clients might be found in default upon motion; and about the legal effects of such default. *See* Memorandum, Exhibit 16.

66. Additionally, EPA's Diaz letter requested confirmation in writing within five business days as to whether Mr. Diaz was currently retained as counsel for Respondents. The Diaz letter further specified that if EPA did not receive such written confirmation, EPA would conclude that Mr. Diaz no longer represented the Respondents. 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 from Ms. Majette. *See* Memorandum, Exhibit 17.

67. Mr. Diaz was served on May 6, 2016 with the Diaz Letter, at the address on his letterhead, 420 Avenida Ponce de Leon, Suite 1001, San Juan, Puerto Rico 00918. *See* Memorandum, Exhibit 18.

68. Other than Mr. Diaz's March 1, 2016 email to Mr. Aber, 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 Respondents. *See* Declaration, Paragraph 17.

69. On May 18, 2016, EPA sent, by certified mail with return receipt requested, separate letters to Respondents Tower and Torres at the P.O. Box 1045 address in Bayamón, Puerto Rico. *See* Memorandum, Exhibit 19. The EPA letters stated the following: (i) that the deadline for filing an Answer to the Complaint has passed; (ii) that EPA believed that neither Respondent continued to be represented by Mr. Diaz; (iii) that EPA issued identical letters to Mr. Diaz on April 28, 2016 and May 5, 2016, informing him that the Answer to the Complaint was due on or about April 6, 2016; (iv) that Mr. Diaz received both of the letters on the same date, May 6, 2016; and (v) that Mr. Diaz had not responded to the letters or filed an Answer on their behalf. Further, the letters to Respondent Tower and Respondent Torres stated that EPA intended to seek a default order against Respondents, set forth the legal effects of such default order, and requested that the Respondents contact Mr. Aber, EPA counsel or EPA attorney Carolina-Jordán García if they intended to file an Answer to the Complaint. Copies of the

Complaint, the Consolidated Rules, the green cards for the Complaint and the April 28, 2016 and May 5, 2016 Diaz letters, and the green cards' receipts, were enclosed with the May 18, 2016 letters to Respondents. *See* Memorandum, Exhibit 19.

70. On May 23, 2016, Respondents were served with EPA's May 18, 2016 letters at the Bayamón post office box address (green cards were signed by Ms. Nieves for Respondent Tower and Respondent Torres) and U.S. Postal Service Product and Tracking Information confirmed that the letters were delivered to each Respondent on May 23, 2016. *See* Memorandum, Exhibit 20.

71. Copies of the May 18, 2016 letters which were sent to both Respondent Tower and Respondent Torres were mailed and emailed by Ms. Majette to Mr. Diaz on May 18, 2016. *See* Memorandum, Exhibit 21.

72. To date, the Respondents have not filed a response to the Motion for Default Judgment on Liability.

DISCUSSION

Before proceeding to the findings of a violation and appropriate penalty, it is necessary to determine whether service of process was proper and effectual, for if service was invalid then default cannot enter. Respondents have not challenged the service of the Complaint as inadequate, nor have Respondents denied that they actually received the documents served. However, default judgments are not favored by modern procedure (*see In the Matter of Rod Bruner and Century 21 Country North*, EPA Docket No. TSCA-05-2003-0009, May 19, 2003), and an entry of default may be set aside for good cause shown (40 C.F.R. § 22.17(c)). Therefore, I will consider the following facts: 1) Ms. Nieves, rather than Respondent Torres, signed for

both Respondent Torres and Respondent Tower; and 2) Ms. Nieves did not include the date when signing the return receipts.

Rule 4(d) of the Federal Rules of Civil Procedure ("FRCP") appears to require personal delivery of a Complaint, but the FRCP are not binding on administrative agencies. *See Hess & Clark, Division of Rhodia, Inc. v. FDA*, 495 F.2d 975, 984 (D.C.Cir. 1974). Administrative agencies are free to fashion their own rules for service of process so long as these rules satisfy the fundamental guarantees of fairness and notice. *See Katzson Bros., Inc. v. United States Environmental Protection Agency*, 839 F.2d 1396, 1399 (10th Cir. 1988).[1] The court in the *Katzson Brothers* decision concluded that the Consolidated Rules and the requirements of due process alone determine whether EPA's service of process is proper. *See In the Matter of C.W. Smith, Grady Smith, & Smith's Lake Corporation*, Docket No. CWA-04-2001-1501, 2002 EPA ALJ LEXIS 7 (ALJ, February 6, 2002). EPA has established its own rules of procedure in its Consolidated Rules.

The Consolidated Rules, 40 C.F.R. Part 22, provide that:

> Complainant shall serve on respondent, or a representative authorized to receive service on respondent's behalf, a copy of the signed original of the complaint, together with a copy of these Consolidated Rules of Practice. 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. 40 C.F.R. §22.5(b)(1).

In the instant case, one of the Respondents, Tower, is a corporation organized under the laws of Puerto Rico. As to corporations, the Consolidated Rules provide:

> Where respondent is a domestic or foreign corporation...complainant shall serve an officer, partner, a managing or general agent, or any other person authorized by

[1] Although *Katzson Brothers* analyzed the former version of the Consolidated Rules, the minor differences between the applicable sections of the Consolidated Rules and the former version is insignificant for purposes of the current analysis.

> appointment or by Federal or state law to receive service of process. 40 C.F.R. § 22.5(b)(1)(ii)(A).

Pursuant to 40 C.F.R. §22.5(b)(1), service may be made upon a Respondent directly or to "a representative authorized to receive service on Respondent's behalf." Abundant case law demonstrates that the return receipt need not bear the addressee's signature. See e.g., *In the Matter of A.B.E.F. Dev Corp. and Herminio Cotto Construction, Inc.*, Docket No. CWA-02-2010-3465, at 9 (RJO Feb 15, 2012) ("Although Herminio Cotto did not sign for the Complaint, the Complaint was properly addressed to him.") The term "representative" as used in Section 22.5(b)(1) of the Consolidated Rules, as cited above, is to be construed broadly and with flexibility, and is not limited to an officer, partner, agent or comparable relationship when serving a corporation. *Id.*

In reviewing EPA Environmental Appeals Board's *Katzson Bros.* decision, the United States Court of Appeals for the Tenth Circuit held: "[The] Consolidated Rules do not require direct personal service .... Service to a 'representative' encompasses a personal secretary ... who regularly receives and signs for certified mail. '" If 'representative' was intended to be read narrowly to include only officers, partners, and agents, it would have been [so] qualified." *Katzson Bros.* at 1399; *see also, City of Orlando*, 1999 EPA ALJ Lexis at n.4 (persons identified by § 22.5(b)(1(ii) "of necessity operate through assistants and the clerical act of signing a return receipt would commonly, if not universally, be delegated to subordinate employees").

It is clear that, as stated by the 10th Circuit in *Katzson Bros.*, the Consolidated Rules do not require direct, personal service of the named Respondent or, in the case of a corporation, an officer, partner, agent, etc.; the letter needs only to be addressed to an officer, partner, agent, etc. In fact, due process does not require actual notice; due process requirements are satisfied if the

agency employs a procedure reasonably calculated to achieve notice. *Katzson Bros.* at 1400; *In the Matter of Herman Roberts*, Docket No. OPA 99-512, 2000 WL 1660913 (EPA Region VI 2000). Under this standard, the proper inquiry is whether the Complaint was sufficiently directed at the respondent (or in the cases of a corporation, an officer, agent, etc.) in order that the representative who actually receives the mail will know to whom it should be delivered. *See C.W. Smith, supra*; *In the Matter of Medzam, Ltd.*, Docket No. IF&R II-470-C, 1992 EPA App. Lexis 1 (July 20, 1992).

Therefore, before the issue of Ms. Nieves signature on the green cards in lieu of the signatures of the addressees can be discussed, it must be determined that the Complainant included proper addresses for service by mail on both the corporate respondent, Tower, and the individual respondent, Torres. Where respondent is a corporation and complainant uses certified mail with return receipt requested, 40 C.F.R. § 22.5(b)(1)(ii) requires that complainant address the service materials to any of the following persons identified therein ("an officer, partner, a managing or general agent or any other person authorized by appointment or by Federal or State law to receive service of process"). In the present case, the Complainant addressed the service materials to "Wilson J. Torres Rivera, President," as the officer of the corporation. Thus, the Complainant included a "proper addressee" for service by mail to Respondent Tower in compliance with 40 C.F.R. § 22.5(b)(1)(ii).

Where respondent is an individual and complainant uses certified mail with return receipt requested, 40 C.F.R. § 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 "Wilson J. Torres Rivera" individually, thus including a proper addressee for service by mail to Torres in compliance with 40 C.F.R. §

22.5(b)(1)(i). In light of the information reviewed above, it is clear that the service materials were properly addressed to each Respondent. I find that the Complainant did utilize a procedure calculated to achieve notice to Respondents and that the Complainant was reasonable in assuming that the person signing for Respondents would know to whom to direct the Complaint.

The first issue as to the adequacy of service in this case arises because the person signing the return receipts, Ms. Nieves, was not the individual whose name appeared on the address above the name and address of Respondent Torres or Respondent Tower. Based on the discussion herein, I believe that it is only necessary for me to determine whether the individual who accepted delivery, Ms. Nieves, is authorized in both cases "to receive service on respondent's behalf." 40 C.F.R. § 22.5(b)(1)(i).

Complainant's Motion for Default states that Ms. Nieves, who signed as the President and Treasurer of Respondent Tower, is listed as an officer of Respondent Tower in the Puerto Rico Department of State Annual Information 2015, attached to the Memorandum as Exhibit 8. Thus, service was effectuated on Respondent Tower when Ms. Nieves received the Complaint.

As discussed above, Respondent Torres, through his then-counsel, Peter Diaz, directed EPA to send mail for each Respondent to the post office box mailing address making Ms. Nieves, who picked up the mail sent to this post office address, an appropriate representative for him as an individual as well. In *Herman Roberts*, an envelope containing the complaint was addressed to the individual respondent (Herman Roberts) at the respondent's business address, a post office box. See *Herman Roberts* at 214. The Presiding Officer in that case stated that "service of the Complaint [was] achieved in accordance with 40 C.F.R. § 22.5(b)(1)(i)" where the recipient was not the addressee but rather "someone associated with Respondent's business [who] had to go to the post office and sign for the envelope containing the

complaint. " The Presiding Officer found that the recipient in that case was a representative of the addressee because "this person had the authority to collect mail for the Respondent" *Id.* The Presiding Officer reasoned that as a result this representative "would be responsible for ensuring that all mail addressed to the Respondent would actually be delivered to the Respondent" and that "To hold otherwise would hinder service of process on individuals by certified mail. *Id.*

In *C.W. Smith, supra,* the Administrative Law Judge, in finding that there was sufficient service of process of a complaint on the respondent, cited *Herman Roberts* for the proposition that a person who signs a certified mail green card and picks up mail at a respondent's post office box is authorized to receive service of process under the Consolidated Rules.

In the present case, the Complaint was addressed to the individual Torres at his business address, a post office box. Ms. Nieves had access to Respondents' post office box, and it is reasonable to assume that Ms. Nieves was authorized to receive documents on Respondent Torres' behalf and regularly receives mail and signs for Respondent Torres. As she did for Respondent Tower, Ms. Nieves signed the return receipts on behalf of Respondent Torres for both the original mailing of a copy of the Complaint in March 2016 and the second mailing in May 2016. Applying the standard articulated in *Herman Roberts* and applied in *C.W. Smith* to the present matter, the fact that Ms. Nieves consistently received and signed for mail addressed to Torres at the post office box establishes that she was responsible for receiving and delivering mail addressed to him and is an authorized representative for him within the meaning of 40 C.F.R. § 22.5(b)(1). Service in this instance, accepted by Ms. Nieves at the post off box address supplied by Respondents' attorney in pre-filing negotiations in this matter, appears sufficient in light of the standards established by due process and the Consolidated Rules, discussed herein. Thus, proper service was effectuated to Respondent Torres by certified mail.

The second issue regarding service of the Complaint in this matter is presented by the fact that the copy of the return receipts did not indicate the date of Ms. Nieves signature. U.S. Postal Tracking information, however, indicates that Ms. Nieves must have signed the green cards on or about May 23, 2016.

The Consolidated Rules provide that the "[s]ervice of the complaint is complete when the return receipt is signed." 40 C.F.R. §22.7(c). Nothing in the Rules specifies that, for service to be effective, the return receipt must be dated. *See A.B.E.F. Dev. Corp* at 13. Therefore, it is only necessary for me to determine whether the Respondent has been afforded a reasonable time to file an Answer to the Complaint.

Forty C.F.R. § 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." For the mailing of the March 1, 2016 Complaint to Tower and Torres, proof of service was made by "properly executed receipt." The green card return receipts were signed at the Bayamon Post Office by Ms. Nieves on behalf of Tower and Torres. As such, the green cards constituted properly executed receipt. *See* Memorandum, Exhibit 4. The fact that Ms. Nieves did not "date" the return receipts is of no significance. See *A.B.E.F. Dev. Corp.* at 13 (reasoning that "[n]othing in the Rules specifies that, for service to be effective, the return receipt must be dated," and ordering default even though green card was not dated, because other information demonstrated that respondent's deadline to Answer had clearly passed). In the present matter, the deadline has already passed, as the U.S. Postal Service Product and Tracking Information indicates that the Complaints were delivered to each Respondent on March 7, 2016. *See* Memorandum, Exhibit 3. In addition, for the May 18, 2016 mailings of reminder letters to Tower and Torres (which, as previously noted, included additional copies of the Complaint and Consolidated Rules), there

was "properly executed receipt" because the green card receipts were signed by Ms. Nieves on behalf of Tower and Torres and, in this instance, the U.S. Postal Tracking information indicates that the signatures must have occurred on or about May 23, 2016. *See* Memorandum, Exhibit 20.

Based on these facts, service of process did indeed occur and that Respondents were given sufficient time file an Answer. I conclude that service of the Complaint is in compliance with the Consolidated Rules and satisfies due process requirements.

CONCLUSIONS OF LAW

This determination of violation is based upon the following:

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

2. Based on the Findings of Fact set forth above, in the course of the forty-one (41) MethQ applications set out in the table in Paragraph 33, above, Respondent Torres and Respondent Tower each committed 82 separate violations of FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), specifically consisting of:

   a. 41 applications to a site not specified in the MethQ Labeling;

   b. 41 applications not supervised by a regulatory agent as required by the MethQ Labeling;

3. Based on the Findings of Fact set forth above, each of the Respondents' failures to comply with a specific requirement of the MethQ Label, as described in Paragraphs 33 through 36 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 each of the Respondents pursuant to FIFRA.

4. Based on the Findings of Fact set forth in Paragraphs 38 through 42 above, each of the Respondents' failures to store each of the eight containers of MethQ in an outdoor or well-ventilated pesticide storage area constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling and is a violation of FIFRA Section 12(a)(2)(G), 7 U.S.C. Section 136j(a)(2)(G), for which a penalty may be assessed against each of the Respondents pursuant to FIFRA.

5. Pursuant to 40 C.F.R. § 82.13(z) (l), 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 justifies its use.

6. Based on the Findings of Fact set forth above, Respondent Tower failed to collect and maintain the document described in the previous paragraph for forty-one (41) applications set forth in Paragraph 48 above.

7. Based on the Findings of Fact set forth above, Respondent Tower's failure to comply with the recordkeeping requirements of 40 C.F.R. § 82. l3(z)(1), set forth in Paragraphs 44 through 49 for the period February 27, 2013 to March 19, 2015 constitutes a violation of the CAA, for which a civil penalty may be assessed under Section 113(d)(I)(B), 42 U.S.C. § 7413(d)(1)(B).

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

9. Based on the Findings of Fact set forth above, Respondent Tower failed to provide to M&P, prior to shipping, a certification that the methyl bromide purchased on the dates and in the quantities set forth in Paragraph 51 above, will be used only for QPS application, as set forth in Paragraph 53 above.

10. Based on the Findings of Fact set forth above, Respondent Tower's failure to comply with the reporting requirements of 40 C.F.R. § 82.13(z)(2) from February 4, 2013 through December 24, 2014, as set forth in Paragraphs 50 through 54, constitutes a violation of the CAA, for which a civil penalty maybe assessed under Section 113(d)(I)(B), 42 U.S.C. § 7413(d)(I)(B).

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

12. The Complaint in this action was served upon Respondents in accordance with 40 C.F.R. § 22.5(b)(1) of the Consolidated Rules.

13. Respondents' failure to file an Answer to the Complaint, or otherwise respond to the Complaint, constitutes a default by Respondents pursuant to 40 C.F.R. § 22.17(a).

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

15. Respondents' failure to file a timely Answer to the Complaint is grounds for the entry of a Default Order against the Respondents. 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). 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 Judgment on Liability and Order granting same contemplates a second Motion for Penalty.

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 Torres is liable for ninety (90) violations of Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G), of the Federal Insecticide, Fungicide & Rodenticide Act ("FIFRA"), use of a pesticide in a manner inconsistent with its labeling, as set out in Counts 25 through 73 of the Complaint. I further find that Respondent Tower is liable for ninety (90) violations of Section 12(a)(2)(G), 7 U.S.C. § 136j(a)(2)(G) of FIFRA, use of a pesticide in a manner inconsistent with its labeling, as alleged in Counts 25 through 73 of the Complaint, and for two violations of the Clean Air Act and its implementing regulations at 40 C.F.R. Part 82, failure to report and keep records of required information regarding the purchase and use of methyl bromide, as set out in Counts 25 through 47 and 74 through 92 of the Complaint.

On or before October 11, 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: August 10, 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 **Tower Exterminating Corp. aka Tower & Son Exterminating Corp., and Wilson J. Torres Rivera, Docket No. FIFRA-02-2016-5306,** is being served on the parties as indicated below:

First Class Mail -

Wilson J. Torres Rivera
c/o Tower & Son Exterminating Corp.
P.O. Box 1045
Bayamon, Puerto Rico 00960

Wilson J. Torres Rivera, President
Tower & Son Exterminating Corp.
P.O. Box 1045
Bayamon, Puerto Rico 00960

Inter Office Mail -

Bruce Aber, 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 11, 2017