



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

MAR - 3 2020

Filed March 3, 2020 @ 11:00 am
USEPA – Region II
Regional Hearing Clerk

CERTIFIED MAIL
RETURN RECEIPT REQUESTED
Article Number: 7018 1830 0000 9640 0089

Mr. Michael Pantoja Lopez, President
M & P Pest Control, Inc.
PO Box 360910
San Juan, PR 00919-4449

Re: In the Matter of M & P Pest Control, Inc.
Docket No. FIFRA-02-2020-5303

Dear Mr. Pantoja:

Enclosed is a copy of the Complaint and Notice of Opportunity for Hearing and other documents, in the above-referenced proceeding, issued to M & P Pest Control, Inc (hereinafter “Respondent”). This Complaint alleges violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. Section 136 *et seq.* and the Clean Air Act (CAA), as amended, 42 U.S.C. Section 7401 *et seq.*

The Respondent has a right to a formal hearing to contest any of the allegations in the Complaint and/or to contest the penalty proposed in the Complaint.

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

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

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

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

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

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

Sincerely,

A handwritten signature in blue ink, appearing to read "Dore LaPosta".

Dore LaPosta, Director
Enforcement and Compliance Assurance Division

Enclosures

cc: Karen Maples, Regional Hearing Clerk (w/o Consolidated Rules and Small Business Resources Information Sheet)

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION 2

Filed March 3, 2020 @ 11:00 am

USEPA – Region II

Regional Hearing Clerk

In the Matter of:

M & P Pest Control, Inc.

Respondent

Proceeding Under the Federal
Insecticide, Fungicide, and
Rodenticide Act, as amended, and
the Clean Air Act, as amended.

COMPLAINT and
NOTICE OF OPPORTUNITY
TO REQUEST A HEARING

FIFRA-02-2020-5303

PRELIMINARY STATEMENT

The United States Environmental Protection Agency (“EPA”) issues this Complaint and Notice of Opportunity for Hearing (“Complaint”) to M & P Pest Control, Inc. (“M & P” or “Respondent”) for violations of the Clean Air Act (“CAA”), 42 U.S.C. § 7401 *et seq.*, and the Federal Insecticide, Fungicide, and Rodenticide Act (“FIFRA”), 7 U.S.C. § 136 *et seq.*, in accordance with the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties, 40 C.F.R. Part 22 (“CROP”). The authority to find violations and issue Complaints has been delegated to the Complainant, the Director of the Enforcement and Compliance Assistance Division (“ECAD”) for the U.S. Environmental Protection Agency, Region 2 (“EPA”).

This Complaint serves notice of EPA’s preliminary determination that Respondent, from its facility located at 1332 Jesús T. Piñero Avenue, San Juan, Puerto Rico, violated provisions of the CAA and FIFRA. Pursuant to Sections 113(d) and (e) of the CAA, 42 U.S.C. §§ 7413(d) and (e), Section 14(a) of FIFRA, 7 U.S.C. § 1361(a), and the Federal Civil Penalties Inflation Act of 2015, 28 U.S.C. § 2461.

Complainant, as and for her Complaint against Respondent, hereby alleges upon information and belief:

CAA Statutory and Regulatory Background

1. 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.
2. 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.
3. 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.

4. 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.
5. Appendix F to 40 C.F.R. Part 82, Subpart A, lists ozone-depleting chemicals, and includes methyl bromide (CH₃Br).
6. The use of methyl bromide, a class I ozone-depleting substance, for Quarantine and Preshipment (“QPS”) 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.
7. 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 exemptions. One exemption, 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.
8. 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.
9. 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.
10. 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.
11. Forty C.F.R. § 82.3 defines “applicator” as the person who applies methyl bromide.
12. 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.
13. Section 113(d) of the CAA, 42 U.S.C. § 7413(d), provides that the Administrator may assess a civil administrative penalty for each violation of the CAA.
14. 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 \$320,000 (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.

15. 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.

FIFRA Statutory and Regulatory Background

16. 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.

17. Pursuant to Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), the term “to distribute or sell” means to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

18. 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.

19. 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.

20. 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.”

21. Section 2(p)(1) of FIFRA, 7 U.S.C. § 136(p)(1), defines the term “label” as written, printed, or graphic matter on or attached to, the pesticide or device or any of its containers or wrappers.

22. 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.

23. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), defines the phrase “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.

24. Section 2(gg) of FIFRA, 7 U.S.C. § 136(gg), defines the term “to distribute or sell” as to distribute, sell, offer for sale, hold for distribution, hold for sale, hold for shipment, ship, deliver for shipment, release for shipment, or receive and (having so received) deliver or offer to deliver.

25. Section 3 of FIFRA, 7 U.S.C. § 136a, sets out the requirements to register a pesticide. Except as provided in this subchapter, no person may distribute or sell to any person any pesticide that is not registered.

26. Section 3(d) of FIFRA, 7 U.S.C. § 136a(d), directs the Administrator to classify pesticides as general use, restricted use, or both.

27. Section 3(d)(1)(C) of FIFRA, 7 U.S.C. § 136a(d)(1)(C), states in relevant part that:

If the Administrator determines that the pesticide, when applied in accordance with its directions for use, warnings and cautions and for the uses for which it is registered, or for one or more of such uses, or in accordance with a widespread and commonly recognized practice, may generally cause, without additional regulatory restrictions, unreasonable adverse effects on the environment, including injury to the applicator, the Administrator shall classify the pesticide, or the particular use or uses to which the determination applies, for restricted use.

28. Section 3(d)(1)(C)(ii) of FIFRA, 7 U.S.C. § 136a(d)(1)(C)(ii) further specifies that:

If the Administrator classifies a pesticide, or one or more uses of such pesticide, for restricted use because of a determination that its use without additional regulatory restriction may cause unreasonable adverse effects on the environment, the pesticide shall be applied for any use to which the determination applies only by or under the direct supervision of a certified applicator, or *subject to such other restrictions as the Administrator may provide by regulation*.

29. Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), states that it is unlawful for any person to distribute or sell, or to make available for use, or to use, any registered pesticide classified for restricted use for some or all purposes other than in accordance with section [3a(d); 7 U.S.C. §] 136a(d) of this title and any regulations thereunder.

30. 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.”

31. Section 14(a)(1), 7 U.S.C. § 136l(a)(1), states in relevant part that any wholesaler, dealer, retailer or other distributor who violates any provision of FIFRA may be assessed a civil penalty.

Factual Background and History

32. Respondent is a corporation dedicated to the sale and/or distribution of pesticides from its store located at 1332 Jesús T. Piñero Avenue, San Juan, Puerto Rico (the “store” or “Facility”).

33. Among the products Respondent sold from at least January 2013 to April 2015 were methyl-bromide-containing pesticides, including Meth-O-Gas® Q, EPA Reg. No.5785-41 (“MethQ”).

34. MethQ’s active ingredient is 100% methyl bromide.

35. MethQ is a commodity fumigant produced by Great Lakes Chemical Corporation solely for QPS applications.

36. 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 Respondent 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 Inspections”).

37. At the Inspections, the inspectors observed the storage of new and full MethQ cylinders and requested information regarding the storage of returned, empty, and used MethQ cylinders.

38. At the Inspections, the inspectors collected records and statements, including records and statements regarding Respondent’s purchase and sale of MethQ during the period from January 2013 through April 2015.

39. During the March 26, 2015 Inspection, Respondent’s representatives provided the inspectors with a copy of the MethQ Label and MethQ booklet which M & P asserted that it provided with the sale of each MethQ canister.

40. The MethQ label (MOGQ-8 REV.C) (the “Label”) and MethQ booklet (MOGQ-2 REV.GLK398F) (the “Booklet”) (collectively the “MethQ Labeling”) Respondent provided sets forth precautionary statements and specific directions regarding use, storage, handling, sale and disposal of MethQ.

41. The following statements are clearly displayed on the MethQ Label received from Respondent:

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

**“COMMODITY FUMIGANT
FOR QUARANTINE/REGULATORY USE ONLY”**

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. “MethQ may be used for quarantine/regulatory commodity fumigation only.”

e. “Store in a secure manner either outdoors under ambient conditions or indoors in a well-ventilated area.”

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, GLK398F [Booklet].”

42. 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**

- b. “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.”
- c. “STORAGE, HANDLING AND DISPOSAL
Do not contaminate water, food or feed by storage or disposal.
Storage and Handling of Cylinders. Store in a secure manner either outdoors under ambient conditions or indoors in a well-ventilated area. Post as a pesticide storage area.
Store cylinders upright, secured to prevent tipping, as allowed by design.”

43. 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.

44. The IRL 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 QPS applications as required by 40 C.F.R. § 82.13(y)(2).

45. The IRL also requested that M & P provide copies of its quarterly reports to EPA, stating the quantity of methyl bromide ordered and delivered to QPS applicators in the previous quarter, as required by 40 C.F.R. § 82.13(y)(4).

46. On July 17, 2015, Respondent provided a response (the “Response”) to EPA’s IRL.

47. In the Response, Respondent stated, as a response to the portion of the IRL discussed in Paragraphs 43, 44 and 45, that “We don’t have any of these documents.”

48. In the Response, Respondent again provided EPA with a copy of the MethQ Booklet, which M & P further asserted that it distributed with the sale of every MethQ canister.

49. In the Response, Respondent provided EPA with evidence that it sold or otherwise distributed MethQ between January 2013 and April 2015.

50. During the October 19, 2015 Inspection, the EPA inspector asked Mr. Michael Pantoja, M & P’s president, whether M & P collected any QPS forms from its customers. Mr. Pantoja stated that “no applicator gave any QPS documentation to M & P.”

51. During the October 19, 2015 Inspection, Mr. Michael Pantoja stated that he “did not know” about reporting and recordkeeping requirements under the CAA.

52. 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 multiple inspections in 2015 of the purchasers of the MethQ Respondent sold between January 2013 and April 2015 (“Applicator Inspections”).

53. At the Applicator Inspections, the inspectors collected records from the purchasers of MethQ sold by Respondent. Such records included sales receipts, application records, and documentation of returns of empty MethQ cylinders to Respondent.

Count 1

Failure to request a certification from the applicator stating that the methyl bromide would be used solely for QPS applications

54. Complainant realleges each allegation contained in Paragraphs 1 through 53, inclusive, as if fully set forth herein.

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

56. Respondent is, and has been at all times pertinent to this Complaint, a “distributor” of methyl bromide within the meaning of 40 C.F.R. § 82.3.

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

58. Pursuant to 40 C.F.R. § 82.13(y)(2), distributors of methyl bromide must receive certifications from applicators, prior to delivery, stating that the quantity of methyl bromide purchased will be used solely for QPS applications.

59. As a result of the Inspections described in paragraphs 36-38 and 52-53, above, and based upon EPA’s review of documentary evidence, statements collected, and further information provided by M & P and the applicators who purchased MethQ from Respondent, EPA determined that M & P, as a distributor of methyl bromide-containing pesticides, failed to request or receive a certification from any purchaser stating that the methyl bromide would be used solely for QPS applications for each one of its sales of methyl bromide from January 3, 2013 through April 17, 2015.

60. At no time did Respondent:

- a) ask a purchaser if the MethQ would be used for a QPS application;
- b) request a certification of QPS use from a purchaser; or
- c) collect or receive a certification of QPS use from a purchaser.

61. Respondent delivered MethQ to purchasers without requesting or receiving certifications over 100 times between January 3, 2013 and April 17, 2015, including:

Date	Invoice #	Amount of MethQ Sold (50 lb Canisters)
March 6, 2015	218798	1
April 6, 2015	220407	3
April 6, 2015	220293	1
April 15, 2015		1

62. Each of Respondent’s deliveries of MethQ without receipt of a QPS certification is a failure or refusal to comply with 40 C.F.R § 82.13 (y)(2).

63. Each of Respondent's failures to comply with the recordkeeping requirements of 40 C.F.R § 82.13 (y)(2) for the period January 3, 2013 to April 17, 2015, constitutes an independent violation of the CAA, for which civil penalties may be assessed under Section 113(d)(1)(B), 42 U.S.C § 7413(d)(1)(B).

Count 2

Failure to report to EPA, within 45 days after the end of each quarter, the quantity of methyl bromide delivered

64. Complainant realleges each allegation contained in Paragraphs 1 through 63, inclusive, as if fully set forth herein.

65. Pursuant to 40 C.F.R. § 82.13(y)(4), distributors of methyl bromide produced or imported solely for QPS shall report to EPA, within 45 days after the end of each quarter, the quantity of methyl bromide delivered to a QPS applicator.

66. As a result of the Inspections described in paragraphs 36, 37 and 38, above, and based upon EPA's review of documentary evidence, statements collected, and further information provided by M & P and the applicators who purchased MethQ from Respondent, EPA determined that M & P, as a purchaser and distributor of methyl bromide-containing pesticides, failed to report to EPA, within 45 days after the end of each quarter, the quantity of methyl bromide ordered and delivered from January 3, 2013 through April 17, 2015.

67. As of the date of the filing of this Complaint, Respondent has still not filed a quarterly report with EPA for the quantity of methyl bromide delivered to MethQ applicators from January 3, 2013 through April 17, 2015.

68. Respondent violated 40 C.F.R. § 82.13(y)(4) by failing to report to the EPA the quantity of methyl bromide delivered to MethQ applicators for each of the quarters in which such sales took place.

69. Respondent's failures to comply with the reporting requirements of 40 C.F.R § 82.13 (y)(4) for the period May 15, 2013 to -August 17, 2015, constitute continuing violations of the CAA, for which civil penalties may be assessed under Section 113(d)(1)(B), 42 U.S.C § 7413(d)(1)(B).

Count 3

Sale of a RUP for some or all purposes other than in accordance with Section 136a(d) of FIFRA

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

71. Respondent is, and has been at all times pertinent to this Complaint, a "person," as that term is defined by Section 2(s) of FIFRA, 7 U.S.C. § 136(s).

72. Respondent "distributes or sells" "pesticides" as those terms are defined in Sections 2(u) and (gg) of FIFRA, 7 U.S.C. §§ 136(u) and (gg).

73. At all times relevant to this Complaint, Respondent was a wholesaler, dealer, retailer, or other distributor within the meaning of Section 14(a)(1) of FIFRA, 7 U.S.C. § 136l.

74. The sale and distribution of restricted use pesticides containing methyl bromide is regulated by both FIFRA and the CAA.

75. Respondent is, and has been at all times pertinent to this Complaint, subject to FIFRA and the CAA.

76. The CAA regulations set out at 40 C.F.R. Part 82 are “other restrictions as the Administrator may provide by regulation” further restricting the sale of restricted use pesticides within the meaning of Section 3(d) of FIFRA, 7 U.S.C. § 136a(d).

77. None of Respondent’s sales of MethQ listed in the table at paragraph 61, above, were made in compliance with the regulations at 40 C.F.R. § 82.13(y).

78. Each of Respondent’s sales of MethQ, as described in paragraphs 59-61 above, is a violation of Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F).

79. Each of Respondent’s failures to comply with the requirements of Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), constitutes an independent violation of FIFRA for which a civil penalty may be assessed under Section 14 of FIFRA, 7 U.S.C §136l(a).

Count 4

Respondent used a registered pesticide in a manner inconsistent with its labeling.

80. Complainant realleges each allegation contained in Paragraphs 1 through 79, inclusive, as if fully set forth herein.

81. Pursuant to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G), it is unlawful for any person to use any registered pesticide in a manner inconsistent with its labeling.

82. During the April 17, 2015 Inspection, the April 22, 2015 Inspection, and the May 13, 2015 Inspection, PRDA and EPA inspectors observed that, contrary to the directions in the MethQ Labeling, Respondent failed to (1) secure cylinders in storage to prevent tipping; (2) store cylinders in a well-ventilated area; and (3) have the methyl bromide storage area properly identified as a pesticide storage area.

83. Respondent failed to follow the precautionary statements and specific directions regarding storage stated in the product’s label.

84. During the April 17, 2015 Inspection, PRDA and EPA inspectors observed eight (8) MethQ cylinders in a storage area located inside the M & P store. The M & P store is an air-conditioned structure and all the windows were closed at the time of the inspection.

85. During the April 17, 2015 Inspection, PRDA and EPA inspectors observed that the storage area for MethQ cylinders was not identified as a pesticide storage area.

86. During the April 17, 2015 Inspection, PRDA and EPA inspectors observed that the eight (8) MethQ cylinders in the storage area were not secured to a rack or wall.

87. During the April 22, 2015 Inspection, PRDA and EPA inspectors observed seven (7) MethQ cylinders stored in an area outside the M & P store.
88. During the April 22, 2015 Inspection, PRDA and EPA inspectors observed that the MethQ storage area was not identified as a pesticide storage area.
89. During the April 22, 2015 Inspection, PRDA and EPA inspectors observed that the seven (7) MethQ cylinders in the storage area were not secured to a rack or wall.
90. During the May 13, 2015 Inspection, PRDA and EPA inspectors observed that nine (9) MethQ cylinders were stored in the outside storage area.
91. During the May 13, 2015 Inspection, PRDA and EPA inspectors observed that the MethQ storage area was not identified as a pesticide storage area.
92. During the May 13, 2015 Inspection, PRDA and EPA inspectors observed that the nine (9) MethQ cylinders in the storage area were not secured to a rack or wall.
93. Each of Respondent's failures to store each of the Meth Q cylinders in a manner consistent with its labeling constitutes a separate use of a registered pesticide in a manner inconsistent with its labeling and an unlawful act under FIFRA § 12(a)(2)(G), 7 U.S.C. § 136j (a)(2)(G), for which a penalty may be assessed.
94. Each of Respondent's failures to comply with the requirements of Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(F), constitutes an independent violation of FIFRA, for which a civil penalty may be assessed under Section 14 of FIFRA, 7 U.S.C §136l(a).

PROPOSED CIVIL PENALTY

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

CAA VIOLATIONS

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

Section 113(d) of the CAA, 42 U.S.C. § 7413(d), provides that the Administrator may assess a civil administrative penalty of up to \$25,000 per day for each violation of the CAA. As previously noted, the DCIA requires EPA periodically to adjust its civil monetary penalties for inflation. Pursuant to the DCIA, EPA adopted regulations entitled Civil Monetary Penalties Inflation Adjustment Rule which are codified at 40 C.F.R. Part 19 ("Part 19"). The maximum civil penalty per day for each violation that occurred from January 12, 2009 through November 12, 2015 is \$37,500. The maximum

civil penalty per day for each violation that occurred from January 12, 2009 and continuing as of the date of filing of this Complaint is \$48,192.

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

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

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

The violations alleged in Counts 1 and 2 would result in Respondent being liable for the assessment of administrative penalties pursuant to Section 113(d) of the CAA. The proposed penalty will be prepared in accordance with the criteria in Section 113(e) of the CAA, and in accordance with the guidelines set forth in EPA's Clean Air Act Stationary Source Civil Penalty Policy, as amended (General Policy). EPA's General Policy reflects EPA's application of the factors set forth in Section 113(e) of the Act and provides guidance on how EPA is to calculate penalties for the CAA. The policy indicates that EPA should propose a penalty consisting of an economic benefit component and a gravity component. The economic benefit component is the economic benefit the violator gained as a result of the violation. The gravity component, in turn, consists of elements based on the actual or potential harm caused by the violation, the significance of the regulation in question to the regulatory scheme, the sensitivity of the environment and the size of the violator.

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

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

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

Count 1 – Recordkeeping- Failure to receive certifications from applicators, prior to delivery, stating that the quantity of methyl bromide purchased would be used solely for QPS applications, in violation of 40 C.F.R. § 82.13(y)(2).

Count 2 - Reporting —Failure to report to EPA, within 45 days after the end of each quarter, the quantity of Methyl Bromide produced for QPS purposes delivered to purchasers, in violation of 40 C.F.R. § 82.13(y)(4).

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

Importance to regulatory scheme: Respondent, by failing to collect QPS certifications or to report deliveries of methyl bromide produced for QPS purposes, deviated substantially from the regulations. Receipt of QPS certifications is intended to assure that methyl bromide produced for QPS applications is sold only to applicators with valid QPS purposes. Reporting allows regulatory agencies to confirm that QPS methyl bromide is being used properly.

Duration of violation: The violation period for Count 1 reflects the total number of days between the first date of a methyl bromide purchase for which no certification was provided to the distributor through the last date of such a purchase. The violation period for Count 2 reflects the total number of days after the period of 45 days after the end of the first quarter in which methyl bromide was delivered and for which no report was submitted to EPA pursuant to 40 C.F.R. § 82.13(y)(4) through the date of filing of this Complaint.

FIFRA VIOLATIONS

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

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

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

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

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

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

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

Count 3 -Sale of a RUP for some or all purposes other than in accordance with Section 136a(d), in violation of Section 12(a)(2)(F) of FIFRA, 7 U.S.C. § 136(a)(2)(F).

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

(1) *Number of independently assessable violations:* The Agency considers each failure of an applicator to follow a distinct label requirement to be an independently assessable violation of FIFRA § 12(a)(2)(G). For Count 3, each one of the sales listed in the table at paragraph 61 is an independent violation subject to civil penalties up to the statutory maximum. For Count 4, each one of Respondent's failures to use methyl bromide as instructed in its labeling, constitutes an independent violation of Section 12(a)(2)(G), for which a civil penalty may be assessed. For Count 4, Respondent may be assessed a penalty for 56 independent violations of the label requirements regarding storage of cylinders.

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

(3) *Gravity of the violation for each independently assessable violation:* The level assigned to each violation of FIFRA represents an assessment of the relative severity of each violation. The relative severity of each violation considers the actual or potential harm to human health and the environment which could result from the violation and the importance of the requirement to achieving the goals of the statute. MethQ is a highly toxic restricted use pesticide.

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

(5) *"Adjusted" penalty amount based on case-specific factors using the gravity adjustment criteria:* The Agency has assigned adjustments, for each violation relative to the specific characteristics of the

pesticide involved, the harm to human health and/or harm to the environment, compliance history of the violator, and the culpability of the violator. The gravity adjustment values from each gravity category listed in Appendix B of the ERP are to be totaled. Once this base penalty amount is calculated, it is to be rounded to the nearest \$100.

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

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

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

PROCEDURES GOVERNING THIS ADMINISTRATIVE LITIGATION

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

A. Answering the Complaint

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

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

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

Respondent’s Answer to the Complaint must clearly and directly admit, deny, or explain each of the factual allegations that are contained in the Complaint and with regard to which Respondent has any knowledge. 40 C.F.R. § 22.15(b). Where Respondent lacks knowledge of a particular factual allegation and so states in its Answer, the allegation is deemed denied. 40 C.F.R. § 22.15(b). The Answer shall also

set forth: (1) the circumstances or arguments that are alleged to constitute the grounds of defense, (2) the facts that Respondent disputes (and thus intend to place at issue in the proceeding) and (3) whether Respondent requests a hearing. 40 C.F.R. § 22.15(b).

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

B. Opportunity to Request a Hearing

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

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

C. Failure to Answer

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

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

D. Filing of Documents Filed After the Answer

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

If filing by the United States Postal Service:

Headquarters Hearing Clerk
Office of the Administrative Law Judges

U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 1900R
Washington, D.C. 20460

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

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

E. Exhaustion of Administrative Remedies

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

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

INFORMAL SETTLEMENT CONFERENCE

Whether or not Respondent requests a formal hearing, EPA encourages settlement of this proceeding consistent with the provisions of the Act and its applicable regulations. 40 C.F.R. § 22.18(b). At an informal conference with a representative(s) of Complainant, Respondent may comment on the charges made in the Complaint, and Respondent may also provide whatever additional information that it believes is relevant to the disposition of this matter, including: (1) actions Respondent has taken to correct any or all of the violations herein alleged, (2) any information relevant to Complainant's calculation of the proposed penalty, (3) the effect the proposed penalty would have on Respondent's ability to continue in business and/or (4) any other special facts or circumstances Respondent wishes to raise.

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

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

Carolina Jordán-García, Esq.
Assistant Regional Counsel
Office of Regional Counsel-CT
Environmental Protection Agency
City View Plaza II, Suite 7000
48 Road 165, Km. 1.2
Guaynabo, PR 00968-8069
jordan-garcia.carolina@epa.gov

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

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

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

Respondent's entry into a settlement through the signing of such Consent Agreement and their compliance with the terms and conditions set forth in such Consent Agreement terminate this administrative litigation and the civil proceedings arising out of the allegations made in the complaint. Respondent's entry into a settlement does not extinguish, waive, satisfy or otherwise affect its obligation and responsibility to comply with all applicable statutory and regulatory requirements, and to maintain such compliance.

RESOLUTION OF THIS PROCEEDING WITHOUT HEARING OR CONFERENCE

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



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

Dated: 3/3/2020,
New York, New York

cc:

Dr. Alejandro E. Pérez Ramírez, Acting Director
Puerto Rico Department of Agriculture
Laboratorio Agrológico
#7 Carr. 693
Dorado, Puerto Rico 00646-3445

CERTIFICATE OF SERVICE

This is to certify that on March 3, 2020, I have caused to be mailed a copy of the foregoing Complaint, Compliance Order, and Notice of Opportunity for Hearing, bearing docket number FIFRA-02-2020-5303, and a copy of the Consolidated Rules of Practice, 40 C.F.R. Part 22, by certified mail, return receipt requested, to:

Mr. Michael Pantoja Lopez, President
M & P Pest Control, Inc.
PO Box 360910
San Juan, PR 00919-4449

I hand-carried the original and a copy of the foregoing Complaint, with the accompanying attachments, to the Office of Regional Hearing Clerk, United States Environmental Protection Agency, Region 2, at 290 Broadway, 16th floor, New York, New York 10007-1866.

Dated: 3/3/2020 Yolanda Majette [Signature]
New York, New York Yolanda Majette, Secretary