

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

7. Section 2(p)(2) of FIFRA, 7 U.S.C. § 136(p)(2), defines the term "labeling" as all labels and all other written, printed or graphic matter accompanying the pesticide or device at any time, or to which reference is made on the label or in literature accompanying the pesticide.

8. Section 2(ee) of FIFRA, 7 U.S.C. § 136(ee), defines the term "to use any registered pesticide in a manner inconsistent with its labeling" as to use any registered pesticide in a manner not permitted by the labeling.

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

10. Section 14(b)(4) of FIFRA, 7 U.S.C. § 136l(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)(1), 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®
 COMMODITY FUMIGANT
 FOR QUARANTINE/REGULATORY USE ONLY
 SUPERVISION BY REGULATORY AGENT REQUIRED.”**

- b. “READ THIS BOOKLET AND ENTIRE LABEL CAREFULLY PRIOR TO USE. USE THIS PRODUCT ACCORDING TO LABEL INSTRUCTIONS.”
 - c. Same as 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. § 136I(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. § 136l(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) (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.

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. § 82.13(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)(1)(B), 42 U.S.C. § 7413(d)(1)(B).

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

9. Based on the Findings of Fact set forth above, Respondent 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:

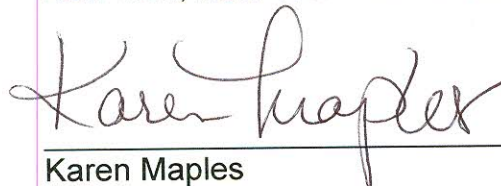
First Class Mail -

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 -

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Karen Maples
Regional Hearing Clerk
USEPA - Region II

Dated: August 11, 2017