UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
LIPSCOMB INDUSTRIES, INC.	)	FIFRA DOCKET NO. 6-028-C
DALLAS, TEXAS	)	
	)	
RESPONDENT	)	
	)	

DECISION AND ORDER DENYING MOTION FOR DEFAULT

By motion for default and proposed order dated June 23, 1998, the Complainant, Multimedia Planning and Permitting Division Director for the United States Environmental Protection Agency (EPA), Region 6, sought issuance of a default order assessing a civil penalty in the amount of six thousand dollars ($6,000) against Lipscomb Industries, Inc., the Respondent. Complainant alleged that Respondent violated Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), by selling an unregistered and misbranded pesticide. Pursuant to the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (Consolidated Rules), 40 C.F.R. Part 22, and based on the entire record in this matter, Complainant's motion for default is denied.

I. STATUTORY AND REGULATORY BACKGROUND

The main issue of concern here is whether the administrative record sufficiently shows that Complainant considered all statutory factors under FIFRA Section 136l(a)(4), during the recommendation of a civil penalty against Respondent. FIFRA Section 136l(a)(4) states that Complainant shall "consider the appropriateness of the penalty to the size of the business of the person charged, the effect on the person's ability to continue in business, and the gravity of the violation."

In default actions such as this one, controlling regulations including 40 C.F.R. § 22.17(a) authorize a finding of default "upon failure to timely answer a complaint," while 40 C.F.R. § 22.24 requires Complainant submit evidence showing that "the violation occurred" and the "proposed civil penalty ... is appropriate." In addition, 40 C.F.R. § 22.15(a) provides that an answer to a complaint is untimely if it is not filed with the Regional Hearing clerk within twenty (20) days after service of the complaint.

II. FINDINGS OF FACT

Due to controlling statutory and regulatory provisions, and based on the entire record, this tribunal makes the following findings of fact:

1. Complainant served Respondent with the complaint, a copy of the Consolidated Rules, and the Enforcement Response Policy for FIFRA dated July 2, 1990, by certified mail, return receipt requested, on August 19, 1997. A copy of the complaint's properly executed return receipt dated August 28, 1997, was attached to Complainant's June 23, 1998, motion for default.

2. Respondent failed to file an answer to the complaint with the Regional Hearing Clerk within twenty (20) days of Respondent's receipt of the complaint.

3. Complainant served Respondent with a motion for default and proposed order by certified mail, return receipt requested, on June 23, 1998. Complainant's motion for default and proposed order did not include any analysis or description explaining why the proposed penalty was appropriate.

4. Respondent failed to file a reply to the motion for default order with the Regional Hearing Clerk within twenty (20) days of receipt of the motion.

5. This tribunal served Respondent with an August 13, 1998, Order to Show Cause. The Order to Show Cause required Respondent to explain its failure to respond to the complaint and motion for default, on or before August 31, 1998.

6. Respondent failed to serve a response to the Order to Show Cause with the Regional Hearing Clerk on or before August 31, 1998.

7. Respondent, through legal counsel, submitted a September 17, 1998, letter to this tribunal. The letter advised that the Respondent, Lipscomb Industries, Inc., was no longer in business or existence.

III. **CONCLUSIONS OF LAW**

Pursuant to controlling statutory and regulatory standards, and based on the entire record, this tribunal makes the following conclusions of law:

1. Within twenty (20) from service, Respondent was required to file a written answer to the complaint with the Regional Hearing Clerk. See 40 C.F.R. § 22.15(a). A written answer must "clearly and directly admit, deny or explain each of the factual allegations contained in the complaint with regard to which respondent has any knowledge," and include "arguments which are alleged to constitute the grounds of a defense." See 40 C.F.R. § 22.15(b). The answer should also specify the facts in dispute, and request a hearing, if appropriate. See 40 C.F.R. § 22.15(b).

2. Respondent's September 17, 1998, letter was not timely filed with the Regional Hearing Clerk, as required by

40 C.F.R. § 22.15(a). However, Complainant's June 23, 1998, motion for default and proposed order failed to address statutory penalty determination factors as required by FIFRA Section 136l(a)(4). Additionally, Complainant's motion for default and proposed order failed to provide any analysis concerning the appropriateness of the recommended penalty. As such, Complainant failed to sufficiently establish a prima facie case supporting the appropriateness of the recommended penalty as required by 40 C.F.R. § 22.24.

3. Although Respondent's September 17, 1998, letter does not comport in every respect with the requirements for answers set forth in 40 C.F.R. § 22.15, it asserts a general defense to the proposed penalty. The letter included the following language, "Lipscomb Industries, Inc.[,] is no longer in business or existence." This representation raises questions concerning Respondent's ability to pay and continue in business, as Respondent is allegedly no longer an operating business or legal entity. With the above in mind, and because Complainant failed to sufficiently establish a prima facie case supporting the appropriateness of the proposed penalty pursuant to 40 C.F.R. § 22.24, Respondent's letter constitutes a ground for defense to the proposed penalty, in accordance with 40 C.F.R. § 22.15(b).

4. Although Respondent's September 17, 1998, letter is construed as a defense to the proposed penalty, the future Administrative Law Judge assigned to this action, will in his or her discretion, determine the appropriateness of an oral hearing regarding the proposed penalty pursuant to 40 C.F.R. § 22.15(c).

IV. **DISCUSSION**

Generally, the law favors resolution of cases on their merits. To the contrary, default judgements are ill-favored, drastic remedies, and courts resort to them only in extreme situations. See Sun Bank of Ocala v. Pelican Homestead Savings Association, 874 F.2d 274, 276 (5th Cir. 1989). When, as in this case, the Complainant fails to present prima facie evidence and analysis sufficient to show that all statutory factors were considered in assessing an appropriate civil penalty, this tribunal cannot serve as a rubber-stamp with respect to Complainant's penalty proposal. See Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396, 1401 (10th Cir. 1988).

Once again, statutory penalty determination factors mandate consideration of the appropriateness of the penalty to the size of the person's business, the effect on the person's ability to continue in business, and the gravity of the

violation. Here, record information (Attachment D to the complaint) pertinent to the appropriateness of the proposed penalty includes a "FIFRA Civil Penalty Calculation Worksheet." However, this worksheet, on its face, shows that only some of the FIFRA Section 136l(a)(4) penalty determination factors were considered.

Without question, naught in the administrative record shows that Complainant adequately considered the effect the proposed penalty would have on the Respondent's ability to continue in business. Neither did Complainant's motion for default and proposed order include an analysis of mandatory penalty determination factors in support of the penalty recommendation. As such, Complainant failed to sufficiently present prima facie evidence and analysis supporting imposition of the proposed penalty in accordance with FIFRA Section 136l(a)(4) and 40 C.F.R. § 22.24. See In Re New Waterbury, Ltd., 5 E.A.D. 529, 537-539 (EAB 1994).

V. **DECISION AND ORDER**

For the above reasons supported by record evidence, and by the power vested in this tribunal consistent with 40 C.F.R. § 22.16(c), Complainant's motion for default pursuant to 40 C.F.R. § 22.17 is hereby denied. The EPA Region 6 Hearing

Clerk shall forward all documents filed in this proceeding to the Chief Administrative Law Judge in accordance with 40 C.F.R. § 22.21(a).

SO ORDERED this 22ND day of October 1998.

/S/

GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

In the Matter of Lipscomb Industries, Inc., Respondent, Docket No. 6-028-C

CERTIFICATE OF SERVICE

I, Lorena S. Vaughn, Regional Hearing Clerk for the Region 6, U.S. Environmental Protection Agency located in Dallas, Texas, hereby certify that I served true and correct copies of the foregoing Order dated October 22, 1998, on the persons listed below, in the manner and date indicated:

Mr. Reedy Mac Spigner, Esq.
1700 Alma Drive, Ste. 225
Plano, Texas 75075

U.S. CERTIFIED MAIL
RETURN RECEIPT REQUESTED

Mr. Gary Smith, Esq.
U.S. EPA Region 6 (6EN-LW)
1445 Ross Avenue
Dallas, Texas 75202-2733

HAND DELIVERY

Dated:

_____
Lorena S. Vaughn
Regional Hearing Clerk