UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY
REGION 6
DALLAS, TEXAS

IN THE MATTER OF:	)	
	)	
RODERICK L. DUDLEY AND	)	FIFRA DOCKET NO. 6-029-C
LAVETTE L. DUDLEY d/b/a	)	
RLD CHEMICAL MANUFACTURING	)	
	)	
RESPONDENTS	)	
	)	

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 twelve thousand dollars ($12,000) against Roderick L. Dudley and Lavette L. Dudley, the Respondents, doing business as RLD Chemical Manufacturing. Complainant alleged that Respondents violated Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA), 7 U.S.C. § 136l(a), by failing to register a pesticide producing establishment, and selling an unregistered, 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

This Decision and Order specifically addresses 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 Respondents. 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 Respondents 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 18, 1997. A copy of the complaint's properly executed return receipt dated August 22, 1997, was attached to Complainant's June 23, 1998, motion for default and proposed order.

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

3. Complainant filed a motion for default and proposed order dated June 23, 1998, with the Regional Hearing Clerk. Complainant also served the same to Respondents by certified mail, return receipt requested, on June 23, 1998. Complainant's motion for default and proposed order did not proffer evidence or analysis explaining why the proposed penalty was appropriate.

4. Respondents failed to file a reply to the motion for default and proposed order with the Regional Hearing Clerk.

5. This tribunal served Respondents with an August 17, 1998, Order to Show Cause. The Order to Show Cause required Respondents to explain its failure to respond to the complaint and motion for default, on or before September 4, 1998.

6. Respondents failed to serve a response to the Order to Show Cause with the Regional Hearing Clerk on or before September 4, 1998.

7. To date, Respondents have not provided any response whatsoever in this administrative penalty action.

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, Respondents were 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. Respondents' lack of participation in this administrative penalty action technically constitutes a default under 40 C.F.R. § 22.17(a), for failure to timely respond to the complaint 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). Further, Complainant also failed to satisfy the regulatory requirements for default proceedings. The motion for default and proposed order did not profile probative evidence and analysis concerning the appropriateness of the recommended penalty. See 40 C.F.R. § 22.24.

3. Despite Respondents' failure to comply with requirements for answers established by 40 C.F.R. § 22.15, no penalty will be assessed against Respondents at this time. Complainant's proposed penalty will not be assessed because Complainant failed to sufficiently present prima facie evidence and analysis supporting the appropriateness of the penalty proposal pursuant to 40 C.F.R. § 22.24.

IV. **DISCUSSION**

Without question, the law favors resolution of cases on their merits. Consequently, 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, 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 will not rubber-stamp Complainant's recommended penalty. See Katzson Bros., Inc. v. U.S. E.P.A., 839 F.2d 1396, 1401 (10th Cir. 1988).

As provided previously, 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 G 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.

Undoubtedly, nothing in the administrative record shows that Complainant adequately considered the effect the proposed penalty would have on Respondents' ability to continue in business. Complainant's motion for default and proposed order

proffered neither prima facie evidence (for example, a declaration by the person who calculated the penalty describing how mandatory penalty factors were considered), nor analysis demonstrating consideration of mandatory penalty determination factors. 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

Complainant and Respondents should note that this Decision and Order does not preclude Complainant from pursuing future default proceedings and presenting prima facie evidence, if any, consistent with statutory penalty factors mandated by FIFRA Section 136l(a)(4). Should Complainant employ default proceedings in the future, Respondents shall respond within twenty (20) days as required by 40 C.F.R. § 22.17(a). This tribunal will retain jurisdiction over this matter under 40 C.F.R. § 22.16(c).

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.

SO ORDERED this 18TH day of November 1998.

/S/

GEORGE MALONE, III
REGIONAL JUDICIAL OFFICER

In the Matter of RLD Chemical Manufacturing, FIFRA Docket No. 6-029-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 November 18, 1998, on the persons listed below, in the manner and date indicated:

Mr. Roderick L. Dudley
Ms. Lavette L. Dudley
1606 Bar Harbor
Dallas, Texas 75232

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