UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
Ag-Air Flying Services, Inc.,	**)**	**Docket No. FIFRA-10-2005-0065**
	)	
Respondent	**)**	

ORDER GRANTING COMPLAINANT'S MOTION FOR DEFAULT FOR FAILURE TO SUBMIT ADDITIONAL DISCOVERY

On November 22, 2005, Complainant filed a Motion for Additional Discovery, requesting Respondent to produce certain documents. By Order dated December 19, 2005, the Motion was granted and Respondent was required to submit the documents on or before January 6, 2006.
Complainant filed a Motion for Default on January 20, 2006 based upon Respondent's failure to submit the required documents. Respondent did not file a Response to the Motion for Default within the time allotted.[1] For the reasons which follow, the Motion for Default will be **GRANTED**.

I. Background

The Complaint in this matter, issued on January 21, 2005, alleges that Respondent violated Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136j(A)(2)(G), by using a registered pesticide in a manner inconsistent with its labeling during an aerial application. The Respondent denied the alleged violation in its Answer, and asserted affirmative defenses. On March 22, 2005, a Prehearing Order was issued requiring the parties to submit their respective prehearing exchange information, including proposed exhibits and a list of proposed witnesses, by certain dates. Complainant timely submitted its Prehearing Exchange. However, Respondent failed to submit its prehearing exchange by its due date of June 3, 2005 as required by the Prehearing Order of this Tribunal, and did not move for an extension of time to file such information as permitted by Rule 22.7(b) of the Consolidated Rules of Practice ("Rules") (40 C.F.R. § 22.7(b)), applicable in this proceeding.[2]

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[1] See discussion below regarding the Order on Complainant's Motion for Leave to File Out of Time and to Shorten Time for Responsive Pleadings.

[2] Respondent was served with a copy of the Rules with the Complaint in accordance with Rule 22.14(b) (40 C.F.R. § 22.14(b)) and such Rules were explicitly referenced in the Prehearing Exchange Order.

Two weeks after the Respondent's deadline had passed, on June 17, 2005, Complainant filed a Motion for Default, on grounds that Respondent had still not filed its prehearing exchange. Thirteen days later, on June 30, 2005, Respondent requested a three day extension of time to file its response to the Motion for Default, which was granted, giving Respondent until July 11th to file its response to the Motion for Default. On July 11, 2005, Respondent mailed its "Objection to Motion for Default, and Request for Leave to File, Late, the Respondent's Discovery, with Disclosure of Expected Evidence and Experts at Time of Hearing." In its Objection, Respondent stated that it "submits its proposed prehearing evidence with request for leave to file said discovery late," and listed proposed exhibits, but enclosed only a summary of testimony of and a curriculum vitae for one of the witnesses, and a statement of another witness. Also in its Objection, Respondent requested an *additional* extension of ten days to respond to the Motion for Default, asserting that Complainant has not submitted documents requested in Respondent's Answer,[3] and listed arguments in its defense to the allegations in the Complaint. Extending great leniency to Respondent, by Order dated July 20, 2005, this Tribunal denied the Motion for Default and granted Respondent even more time, until August 19, 2005, to file its prehearing exchange.[4] In doing so, however, Respondent was warned that, "In the event . . . that Respondent fails to strictly abide by the requirements of this Order or the Rules regarding proceedings in this case, Complainant's Motion for default may be revived or refiled." Order on Motion for Extensions, dated July 20, 2005, at 3. On August 19, 2005, Respondent sent by first class mail its Prehearing Exchange. Both Respondent's Objection to Motion for Default and its Prehearing Exchange were only *mailed*, but not *filed*, by the due dates, and thus too were technically submitted late. *See*, Rule 22.5(a), 40 C.F.R. § 22.5(a)("A document is filed when it is received by the appropriate Clerk.")

On November 22, 2005, in response to Respondent's Prehearing Exchange, Complainant filed a Motion for Additional Discovery requesting that Respondent produce "the full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," and "other documents which

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[3] Respondent's request, contained in its Answer, for Complainant to submit documents, is not consistent with the Rules. Rule 22.19(e)(1) provides that *"**After** the information exchange* provided for in paragraph (a) of this section, a party may move for ***additional*** discovery." 40 C.F.R. § 22.19(e)(1) (emphasis added). This is a "mechanism for discovery should any be necessary *after* the parties have completed their prehearing exchange." 64 Fed. Reg. 40138, 40160 (preamble to Final Rule amending 40 C.F.R. Part 22, July 23, 1999)(emphasis added). Motions for other discovery must be filed in accordance with the requirements of 40 C.F.R. § 22.16(a). Complainant was not required under the Rules or any order of this Tribunal to submit the documents requested by Respondent in the Answer. Such request also appears to be inconsistent with Federal Rules of Civil Procedure. *See*, Federal Rule of Civil Procedure 26(d).

[4] In resetting the deadline for filing the Respondent's Prehearing Exchange until August 19th, this Tribunal gave the Respondent almost *five* months from the Prehearing Order to draft and submit its Prehearing Exchange.

may show pertinent facts about the aerial application of *Warrior* by Respondent on the morning of June 22, 2004," including documents which specify the droplet size for the pesticide applied by Respondent, documents which show the specific type of nozzle used during the application, documents which specify the orifice size of the nozzle used during the application, documents which specify the angle of the nozzle during application, documents which specify the boom pressure during the application, documents which show the speed of the aircraft at each point depicted in the "GPS SATLOC system" computer printout, documents which show the elevation of the aircraft at the points along the flight, and documents which show maintenance and testing of the spray boom and nozzle set-up prior to and following the application.[5] Motion at 2-3. This Motion was granted, pursuant to 40 C.F.R. § 22.19(e)(1), by Order dated December 19, 2005. The December 19th Order set a due date of January 6, 2006 for Respondent to submit the requested additional discovery documents.

II. Discussion

The Motion for Default for Failure to Submit Additional Discovery, filed on January 20, 2005, just before 9:00 a.m. Pacific Standard Time, states that, to date, Respondent has failed to submit the additional discovery which was as required to be submitted two weeks earlier (on or before January 6, 2005) by this Tribunal's Order of December 19, 2005.

On January 20, 2006, at 12:36 p.m. Pacific Standard Time, Respondent's counsel sent an e-mail message to Respondent's counsel, with a copy by e-mail to the undersigned's staff attorney, stating that he is attaching the information Complainant's counsel requested. The e-mail message further states that Respondent's counsel received a voice mail message asking whether he would object to a default order regarding discovery, and that Respondent does object to it. The attachment to the e-mail states as follows:

> EPA requests:
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> 1. 310 microns
> 2. CP-09-3e
> 3. .078-.125
> 4. 5 deg
> 5. 30 psi
> 6. 130.7 to 141.2 working speed
> 7. Aircraft working height of 3 to 5 feet above crop
> 8. Maintenance and testing is very limited, on a daily basis, due to only 1 moving part, and that being the diaphragm in the check valves. Although I can see my booms and

[5] Complainant requested these documents in response to Respondent's claim that computerized records of its aircraft show that it had not sprayed the pesticide in the inappropriate area as alleged by Complainant.

> nozzles while piloting the aircraft, I believe it is very important to exit the aircraft after every load, to inspect the booms, valves, and do a general walk around of the aircraft as it is not uncommon to have a gun pointed at you or fireworks shot at you while applying pesticides on the Yakima Indian reservation.

Items 3 and 6 do not indicate the units for the numerical figures. Respondent did not submit any "documents" which specify or show the information as requested in the Motion. Even if this e-mail attachment could be considered a document which specifies information requested, there is no indication of who authored this document, except that the e-mail message suggests that it is from his "client," presumably the representative of Respondent's company, Red Beierle. Furthermore, the e-mail attachment does not include all of the information that Respondent was ordered to provide, as it does not include "the full data file from the 'GPS SATLOC system' for the flight on June 22, 2004," nor does it explain Respondent's failure to produce such information. Moreover, the information attached to the e-mail was supplied two weeks after the deadline established by Order of this Tribunal for submitting such additional discovery, without any sufficient justification or motion for extension of time in regard thereto. Therefore, it is concluded that Respondent stands in violation of the Order, dated December 19, 2005, regarding the submission of Additional Discovery.

The Rules provide at 40 C.F.R. § 22.17(a) that "A party may be found to be in default . . . upon failure to comply with the information exchange requirements of § 22.19(a) or an order of the Presiding Officer . . . ." The Rules provide at 40 C.F.R. § 22.17(c), "When the Presiding Officer finds that a default has occurred, he shall issue a default order against the defaulting party, as to any or all parts of the proceeding unless that record shows good cause why a default order should not be issued." The Rules also provide that "Where a party fails to provide information within its control as required pursuant to this section [40 C.F.R. § 22.19], the Presiding Officer may, in his discretion: (1) Infer that the information would be adverse to the party failing to provide it; (2) Exclude the information from evidence; or (3) Issue a default order under § 22.17(c)." The issue here is whether the record of this proceeding shows good cause not to issue a default order, but instead to draw an inference adverse to Respondent, exclude the information from evidence, or not take any action against Respondent for its failure to comply with the December 19th Order.

The Environmental Appeals Board (EAB) has recently stated that "where a respondent fails to adhere to a procedural requirement, [the EAB] has traditionally applied a 'totality of circumstances' test to determine whether a default order should be . . . entered . . . ." *JHNY, Inc.* CAA Appeal No. 04-09 (Final Order, September 30, 2005), slip op. at 16-17. The EAB considers several factors under this test: the alleged procedural omission, considering whether a procedural requirement was indeed violated, whether a particular procedural violation is proper grounds for a default order, and whether there was a valid excuse or justification for not

complying with the procedural requirement. *Id.*, slip op. at 17.[6] The EAB stated that it is not necessary to find repeated failures to timely submit prehearing exchange information in order to issue a default order. *Id.*, slip op. at 24. The EAB upheld a default order upon respondent's tardiness in filing, and failure to attach proposed exhibits to, the initial prehearing exchange statement, where respondent alleged that the documents were provided to complainant in settlement discussions. *Id.*

In Federal court, sanctions may be assessed for failure to comply with discovery orders under Federal Rule of Civil Procedure 37(b)(2), in order to protect the court's integrity and prevent abuses of the judicial process. *Webb v. District of Columbia*, 146 F.3d 964 (D.C. Cir. 1998). The D.C. Circuit has set forth three basic justifications to support the use of default judgment or dismissal as a sanction: (1) the party's behavior has severely hampered the other party's ability to present his case, or that he has been so prejudiced by the misconduct that it would be unfair to require him to proceed further in the case; (2) the prejudice caused to the judicial system when the party's conduct has put "an intolerable burden on a district court by requiring the court to modify its own docket and operations in order to accommodate the delay; and (3) the need "to sanction conduct that is disrespectful to the court and to deter similar misconduct in the future." *Webb*, 146 F.3d at 971 (citing *Shea v. Donohoe Construction Company*, 795 F.2d 1071 (D.C. Cir. 1986)).

An analysis of this case, considering the factors set forth by the EAB and the D.C. Circuit, begins with the circumstances and substance of the Respondent's response to the Motion for Default must be examined, among other circumstances of this case. The Motion for Default was filed on January 20th, and was received in the undersigned's office on January 23rd by facsimile. Along with the Motion for Default, Complainant filed a Motion for Leave to File Out of Time and to Shorten Time for Responsive Pleadings, and a Motion for Continuance of Hearing Date. In light of the impending hearing scheduled to start on February 14, 2006, the time for Respondent to file a response to the Motion for Default was shortened by Order dated January 24, 2006, and Respondent was given until January 26, 2006 to file such response. Respondent received copies of the Order by facsimile and e-mail on January 24th. Upon inquiry from the undersigned's staff attorney, the Regional Hearing Clerk reported on January 27, 2006 that no response to the Motion for Default had been filed in her office by the Respondent.

Under the provision of the Rules that "Any party who fails to respond within the designated period waives any objection to the granting of the motion" (40 C.F.R. § 22.16(b)), Respondent could be deemed to have waived an objection to the Motion for Default. Respondent, however, did submit by e-mail on January 27th to Complainant's counsel and the undersigned's staff attorney, a Memorandum Opposing the Motion for Default (Opposition). The certificate of service on the Opposition states that on January 26, 2006, Respondent's

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[6] On a motion to *set aside* a default order, the EAB considers whether the defaulting party would likely succeed on the substantive merits if a hearing were held. *JHNY*, slip op. at 17.

counsel "caused to be mailed, U.S. Priority (one day service) Mail (and return receipt requested)" the Opposition to the Regional Hearing Clerk, the undersigned, and Complainant's counsel. Again, Respondent's counsel did not *file* the document by the due date, but asserts that it was only *mailed* on the due date. This is an example of yet another failure of Respondent's counsel to comply with the Rules and/or this Tribunal's orders.

In its Opposition, Respondent asserts that he was not in the office from December 20, 2005 until January 23, 2006, "having been quite ill" and that the discovery requested has been delivered. [7] As to the full data file from the SATLOC system, Respondent asserts:

> the DOS program for the SATLOC track is proving difficult to take apart and download for the EPA to use for its own purposes (ignoring for the moment the copyright proprietary rights of the manufacturer). The respondent has intended to simply turn on the respondent's computer at the evidentiary hearing, and run the SATLOC track that has been recorded, which conclusively proves the actual location of the release of *Warrior* . . . .

Respondent asserts in its Opposition that it sent a second e-mail message to Complainant's counsel on January 23, 2006, which stated, *inter alia*, "I have had to take our computer to a computer professional to have this particular log extracted. The original program is in DOS form. I have been assured by these professionals that they will be able to get the needed information as quickly as possible." Respondent asserts that there are issues of material fact regarding Respondent's liability or the affirmative defenses, that Complainant does not have sufficient evidence to proceed, and that the penalty proposed is not a fair and reasonable application of the statutory and policy factors. Respondent requests that if further evidence is needed, both parties should be granted the opportunity to discover the evidence. Respondent argues that it has "been encumbered with procedural hocus-pocus when the parties simply need to settle down and try this case on the facts" and that Complainant has "clouded this action with procedural maneuverings, [and] accusations of intransigence by the respondent."[8]

Respondent's only argument relevant to its failure to comply timely with the December 19th Order is his counsel's bald statement that he was ill. The only argument relevant to its failure to submit a complete response to the December 19th Order is that the log needs to be extracted by a computer professional, which has not yet been done. Respondent does not state when it was submitted to the computer professional, or when the information will be submitted

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[7] Respondent appears to challenge the shortened response time set in the January 24th Order on the basis that the parties have "stipulated to a continuance" of the hearing. However, the motions for continuance of the hearing have not been granted.

[8] Such comments evidence a disrespect as well as a disregard for the procedural rules of this Tribunal.

to Complainant. Respondent does not explain why it waited until January 23rd to state these circumstances, given the fact that Respondent knew since the Motion for Additional Discovery was filed on November 23, 2005 that Complainant was requesting the SATLOC data file. Respondent does not explain why it did not submit a motion for extension of time to submit the information, other than the assertion that its counsel was ill. Respondent expects to release the information only during the hearing, which undermines the purposes of discovery and the policies of avoiding surprise at hearing. This would severely hamper the Complainant's case, and it would be unfair to require Complainant to proceed to hearing, facing such surprise evidence.

Indeed, in its Motion for Default, Complainant asserts that it is prejudiced by the lack of timely filing of discovery information, and states that the anticipated testimony of an expert witness who would rely on the requested information is potentially jeopardized, and that a timely filing of the discovery may have allowed Complainant the opportunity to produce modeling of the flight and application of pesticide by Respondent, which could then be presented at the hearing. It is apparent that Complainant is being prejudiced by the unnecessary time and expense involved in prosecuting this case, for which it seeks a penalty of only $3,120, resulting from Respondent's counsel's persistent violations of the Rules applicable to this proceeding and the Orders of this Tribunal. While Respondent's difficulties of being a solo practitioner are understood, as well as his asserted illness and issues related to the dissolution of his marriage and custody of his children, the delays and lack of cooperation by Respondent's counsel in this case have gone beyond excusable behavior and have stepped up to the level of abuse of the administrative litigation process. If Respondent's counsel was unable to submit documents on behalf of his client in the course of this proceeding in the time allotted, he could have easily submitted a one-paragraph motion for extension of time, or he could have requested assistance of other counsel. He chose to do neither, and instead, as evidenced by the record in this case, he has caused Complainant as well as this Tribunal to unnecessarily expend significant amounts of time and effort responding to his repeated failures to comply with procedural Rules and Orders of this Tribunal. Delaying the smooth progress of this case and increasing the costs of the litigation to opposing party, this Tribunal, and thus the public in general, in such a manner, are not tolerable litigation tactics.

And such tactics by Respondent's counsel have continued. During the Prehearing Conference held on January12, 2006, Respondent asserted for the first time that the four days set for hearing of this case established by Order of this Tribunal issued *four months ago*, in September 2005, is insufficient.[9] Respondent claims that he still requires the three days to

[9] By Order dated September 1, 2005, the hearing of this case was originally scheduled to commence on February 7 and continue through February 10, as necessary, a period of four days, in Yakima, Washington. On the basis that Respondent had a conflict regarding those dates, by Order dated September 8, 2005, the hearing was rescheduled to commence on February 14 and continue through February 17, again a period of four days. The Hearing Order of September 1, 2005 also set a due date of November 30, 2005 for "all pre-hearing motions." Respondent did

present his case in chief and a day and a half for rebuttal as initially proposed in his prehearing exchange and thus with Complainant require seven to eight full days of hearing time. Further, aware that Complainant in an effort to minimize its travel expenses would like to try the case straight through, he has indicated that he and his client are not available for hearing except for one week in March, and one week a few weeks later in April, then not again until October 2006. *See*, Stipulated Motion for Continuance of Hearing, dated January 25, 2006, and facsimile received on January 26, 2006 from Respondent's counsel's staff.

This Tribunal has an obligation to manage proceedings in an efficient manner, under Section 555(b) of the Administrative Procedure Act, which requires each Federal agency to proceed to conclude a matter presented to it within a reasonable time,[10] and under the Rules. The hearing in this case was set by this Tribunal for four days, despite the initial estimates of the parties in their Prehearing Exchanges indicating that the case might take a few days longer to try, based upon this Tribunal's years of experience in such matters. This Tribunal has found that the estimates of hearing length offered in the parties' initial Prehearing Exchanges generally overstate the time required because as cases proceed towards hearing, the issues requiring presentation during an oral hearing - those on which there are actual contested issues of material fact, are narrowed by decisions on Motions and stipulations of the parties.[11] Moreover, in cases such as this, with a proposed penalty of only $3,120 and, more importantly, a claim of *inability to pay* that even that nominal penalty, it is simply fiscally illogical for the Respondent and his counsel to propose to expend four days at hearing, or more, in that even at a modest hourly rate of $100, counsel fees for the just hearing itself would consume more than the total proposed penalty.[12] Thus, Respondent's counsel's late request to reset the hearing, for an increased length, combined with his claimed unavailability to appear in such hearing until October 2006, *ten months from now*, is concluded to be simply another unjustified delay tactic.[13]

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not file any motion by the due date in regard to the length of hearing time set.

[10] Consistent with this mandate, the Office of Administrative Law Judges has adopted a policy of having its cases, on average, be fully adjudicated or settled within eighteen months of receipt by this Office.

[11] It is the understanding of this Tribunal that despite Complainant's request, Respondent's counsel has indicated an unwillingness to stipulate anything in regard to this case. Furthermore, Respondent has not presented a cooperative attitude in communications with this Tribunal's staff.

[12] Counsel fees incurred during the hearing itself, are of course not the only expense of hearing. For example, Respondent has indicated a desire to call expert witnesses from Arizona to testify at the hearing, which will certainly increase the cost of hearing. There are also expenses involved in hearing preparation and potentially post hearing briefing activity.

[13] Under the Administrative Procedure Act, a Respondent is entitled to an "opportunity" for a hearing. 5 U.S.C. § 554(c)(2). He is not entitled under the APA to have a hearing

The alternatives to a default order would not result in an efficient, fair and impartial adjudication of the issues in this case. To deny the Motion for Default and allow this case to proceed to hearing either on the date currently scheduled (in two weeks), to schedule the hearing for the two weeks available to Respondent upon the unlikely chance that the 14 proposed witnesses, Presiding Judge, and Complainant's counsel are available those weeks, or to wait until October to commence the hearing, would either prejudice Complainant such that it would be unfair to require Complainant to proceed further in the case, and/or would put a burden on this Tribunal by requiring it to modify its docket and operations in order to accommodate the delay. Moreover, drawing an adverse inference against Respondent for failure to comply with the December 19th Order would effectively deprive Respondent of its chief arguments in defense of the Complaint, which would eventually lead to a result similar to a default order, and would result in a waste of the parties' and this Tribunal's time and resources. Excluding the evidence from the hearing would severely hamper Complainant's preparation for cross examination of Respondent's witnesses and its ability to rebut Respondent's case.

After careful consideration of the facts and circumstances of this case, based upon Respondent's counsel's persistent, unjustified, violation of the Orders of this Tribunal and Rules, a default is deemed appropriate in this action. While a default has been considered a drastic remedy, and affects the client rather than its counsel, the Supreme Court has stated that clients must be held accountable for the acts and omissions of their attorneys. *Link v. Wabash R. Co.*, 370 U.S. 626 (1962) (client may be held to suffer consequences of dismissal of its lawsuit because of its attorney's failure to attend a pretrial conference); *Taylor v. Illinois*, 484 U.S. 400, 417-18 (1988) (Court stated that "it is not unfair to hold petitioner responsible for his lawyer's misconduct" and excluded witness testimony for failure to identify timely the witness, in violation of discovery rules). The Court in *Link* stated, "Petitioner voluntarily chose this attorney as his representative in the action, and he cannot now avoid the consequences of the acts or omissions of this freely selected agent. Any other notion would be wholly inconsistent with our system of representative litigation, in which each person is deemed bound by the acts of his lawyer agent." 370 U.S. at 633. If an attorney's conduct falls substantially below what is reasonable in the circumstances, the client's remedy against the attorney is a suit for malpractice.

The Rules of Practice provide that "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). Therefore, the facts alleged in the Complaint are taken as true. If, however, Complainant has failed to state allegations of fact in the Complaint that support the elements of the violation alleged, then a default order should not be issued. In other words, Complainant must set forth the prima facie elements of the case: that Respondent is a "person", and a "commercial applicator", who used a registered pesticide in a manner inconsistent with its labeling, and acted in an unlawful manner

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whenever he so desires, for as long as he so desires. He may squander such opportunity by repeatedly violating the Orders of the Tribunal and Rules of Proceeding without sufficient justification.

according to Section 12(a)(2)(G) of FIFRA, 7 U.S.C. § 136j(a)(2)(G). The Complaint alleges that Respondent made an aerial application of the RUP *Warrior* on June 22, 2002, during which application Respondent sprayed grave vines on Heidi Bolong's property, and the label for *Warrior* does not allow application to grape vines. Complainant has submitted proposed evidence in its Prehearing Exchange in support of these allegations. Upon review of the Complaint and Prehearing Exchange, it is concluded that the allegations properly state a claim for using a registered pesticide in a manner inconsistent with its labeling, in violation of Section 12(a)(2)(G) of the Federal Insecticide, Fungicide and Rodenticide Act (FIFRA), 7 U.S.C. § 136j(A)(2)(G).

It is concluded that the record does not show good cause for why a default order should not be issued. Accordingly, Respondent is hereby found liable for the violation alleged in the Complaint.

Complainant's Motion for Default requests that the proposed penalty be assessed. The Rules provide:

> If the order resolves all outstanding issues and claims in the proceeding, it shall constitute the initial decision . . . . The relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act.

Complainant calculated the proposed penalty in accordance with the 1990 Enforcement Response Policy for FIFRA ("ERP"), and has taken into account the statutory factors in Section 14(a) of FIFRA, namely, the size of the business, effect on ability to continue in business, and gravity of the violation. Complainant's Prehearing Exchange, Exhibit 8. Complainant calculated a proposed base penalty of $3,900, which is the matrix value in Appendix C of the ERP, as adjusted for inflation under the Civil Penalty Inflation Adjustment Rules, for the category of the smallest businesses, Category III, with gross revenues of $0 to $300,000, and a Level 2 gravity of the violation. Complainant determined the gravity level from Appendix A of the ERP, which provides that violations of FIFRA § 12(a)(2)(g) are assessed a gravity level of 2. Complainant then decreased the base penalty by $780, representing a 20% reduction from $3,900, based on the pesticide toxicity (assessed at the highest level because *Warrior* is a Restricted Use Pesticide), lowest level of potential harm to human health, lowest level of potential environmental harm, no history of noncompliance, and culpability (assessed at mid-level for apparent negligence). *Id.*

Complainant has submitted in its Prehearing Exchange a printout, which appears to be from American Business Directory, of a listing for Ag Air, last revised July 2004, showing sales of $84,000. To date, Respondent has not submitted any documents in support of any reduction of the penalty based on effect of the penalty on its ability to continue in business.

It is concluded that the proposed penalty is consistent with the record of this case and with the statutory penalty factors of FIFRA.

ORDER

1. For failing to comply with this Tribunal's Order for Additional Discovery, as concluded above, Respondent is hereby found in **DEFAULT.**

2. Respondent Ag-Air Flying Services, Inc. is hereby assessed a civil administrative penalty in the amount of $ **3,120.**

3. Payment of the full amount of this civil penalty shall be made within thirty (30) days after this Initial Decision becomes a final order under 40 C.F.R. § 22.27(c), as provided below. Payment shall be made by submitting a certified or cashier's check in the amount of $ 3,120, payable to "Treasurer, United States of America," and mailed to:

EPA - Region 10
Regional Hearing Clerk
P.O. Box 360903M
Pittsburgh, PA 15251

4. A transmittal letter identifying the subject case and EPA docket number as well as Respondent's name and address, must accompany the check.

5. If Respondent fails to pay the penalty within the prescribed statutory period after entry of this Order, interest on the penalty may be assessed. *See,* 31 U.S.C. § 3717; 40 C.F.R. § 13.11.

5. Pursuant to 40 C.F.R. § 22.27(c), this Initial Decision shall become a final order forty-five (45) days after its service upon the parties and without further proceedings unless (1) a party moves to reopen the hearing within twenty (20) days after service of this Initial Decision, pursuant to 40 C.F.R. § 22.28(a); (2) an appeal to the Environmental Appeals Board is taken within thirty (30) days after this Initial Decision is served upon the parties; or (3) the Environmental Appeals Board elects, upon its own initiative, to review this Initial Decision, pursuant to 40 C.F.R. § 22.30(b).[14]

Susan L. Biro

[14] For good cause, this Tribunal may set aside a default. 22 C.F.R. § 22.17(c). If Respondent has such *good cause*, it is strongly encouraged to file a motion setting forth such cause as expeditiously as possible. The mere right to file such a Motion does not delay the running of the time for filing an appeal.

Chief Administrative Law Judge

Date: January 27, 2006
Washington, D.C.