



UNITED STATES
 ENVIRONMENTAL PROTECTION AGENCY
 REGION 6
 DALLAS, TEXAS



IN THE MATTER OF:)
)
)
 SMITH DIST. INC.)
 HOUSTON, TEXAS) FIFRA DOCKET NO. 6-116C
)
 RESPONDENT)
)
)
)

DEFAULT ORDER AND INITIAL DECISION

On July 22, 1998, the Complainant filed a Complaint and Notice of Opportunity for Hearing (Complaint) against the Respondent, alleging violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA). The Complaint sought a \$5,500 civil penalty. No answer was filed by the Respondent. On May 26, 1999, the Presiding Officer issued an Order to Show Cause, requiring EPA to file a motion for a default order by June 18, 1999, or show cause by June 18, 1999, why the Complaint should not be dismissed for lack of prosecution.

The Order to Show Cause was issued because over ten months had passed since the Complaint was filed, and the Respondent had not filed an answer. However, the Complainant had not filed a motion for a default order. The Presiding Officer could not, *sua sponte*, find the Respondent in default for failing to file an answer. The

Presiding Officer noted that unless some action was taken by the Complainant, this case could remain on his docket indefinitely.

However, the Complainant failed to file a response to the Order to Show Cause. Thus, the Complainant will be found in default for failing to respond to the Presiding Officer's order. 40 C.F.R. § 22.17(a). "Default by Complainant constitutes a waiver of complainant's right to proceed on the merits of the action, and shall result in the dismissal of the complaint with prejudice." *Id.* Therefore, it is hereby **ORDERED** that the Complaint is dismissed with prejudice.

Pursuant to 40 C.F.R. § 22.17(c), this Order constitutes an Initial Decision of the Presiding Officer. Any party may appeal this Order by filing a notice of appeal and an accompanying appellate brief with the Environmental Appeals Board (EAB) within thirty (30) days after service of this order, and simultaneously serving all other parties and nonparty participants. 40 C.F.R. § 22.30(a). Otherwise, this Order becomes a final order forty-five (45) after service unless the EAB elects to review this Order on its own initiative. 40 C.F.R. § 22.27(c).

Dated this 2nd day of November, 1999.

/S/
Evan L. Pearson
Regional Judicial Officer

CERTIFICATE OF SERVICE

I hereby certify that on the _____ day of November, 1999, I served true and correct copies of the foregoing Default Order and Initial Decision on the following in the manner indicated below:

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Sybil Smith
President, Registered Agent
Smith Dist. Inc.
272 Shadowdale
Houston, Texas 77043

CERTIFIED MAIL - RETURN RECEIPT REQUESTED _____

Clerk of the Environmental Appeals Board (1103B)
U.S. Environmental Protection Agency
401 M Street, S.W.
Washington, D.C. 20460

INTEROFFICE MAIL

James W. Redd, Jr.
Case Preparation Officer
Pesticides Section (6PD-P)
Multimedia Planning and Permitting
Division
U.S. EPA - Region 6
1445 Ross Avenue
Dallas, Texas 75202-2733

Lorena S. Vaughn
Regional Hearing Clerk