UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
LIPSCOMB INDUSTRIES, INC.,	)	DOCKET NO. FIFRA-VI-028-C
	)	
	)	
RESPONDENT	)	

ORDER DISMISSING CASE AND RETURNING FILE TO REGIONAL HEARING CLERK

The United States Environmental Protection Agency ("Complainant") initiated this administrative penalty action in the above cited matter by filing a Complaint and Notice of Opportunity for Hearing against the Respondent on August 19, 1997. The Complaint and Notice of Opportunity for Hearing was issued by the Complainant under the authority of Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act ("FIFRA"), as amended, 7 U.S.C. § 136l(a), and proposes a civil administrative penalty in the amount of $6,000. The file reflects that the Complaint was served on the Respondent and attorney William T. Sebesta by certified mail, return receipt requested, on August 28, 1997, and August 21, 1997, respectively.

The Complaint advised the Respondent that if it contests any material fact upon which the Complaint is based, contends that the amount of the penalty proposed is inappropriate, or contends that it is entitled to judgment as a matter of law, it shall file a written Answer to the Complaint with the Regional Hearing Clerk within twenty (20) days after service of the Complaint. The Complaint further advised the Respondent that a hearing upon the issues raised by the Complaint and Answer shall be held upon request of the Respondent in the Answer.

In addition, the Complaint advised the Respondent that if it failed to file an Answer within twenty (20) days after the filing of the Complaint, it could be found to be in default pursuant to 40 C.F.R. § 22.17. The Complaint states that default by the Respondent constitutes an admission of all facts alleged in the Complaint and a waiver of its right to a hearing under Section 14(a)(3) of FIFRA, and that the proposed penalty shall become due and payable by the Respondent without proceedings sixty (60) days after issuance of a final order upon default.

A timely written Answer to the Complaint in this matter was not filed by the Respondent.

On June 23, 1998, the Complainant filed a Motion for Default against the Respondent. In this motion for default, the Complainant requested the Presiding Judicial Officer to enter an order of default as to liability against the Respondent on the ground that the Respondent had failed to file an Answer to the Complaint and had not filed a request for extension of time to file an Answer as required under Section 22.07 of the Rules of Practice, 40 C.F.R. § 22.07. A certificate of service accompanying the Motion for Default reflects that the motion was sent to the Respondent by certified mail, return receipt requested, on June 23, 1998. A timely response to the Motion for Default was not filed by the Respondent.

On August 13, 1998, the Regional Judicial Officer issued an Order to Show Cause to the Respondent. In this Order to Show Cause, the Regional Judicial Officer directed the Respondent to show cause, by written justification served on or before August 31, 1998, why it should not be held in default for failure to respond to the administrative Complaint and why its right to object to the Complainant's default motion should not be waived.

On September 22, 1998, a letter dated September 17, 1998, responding to the Order to Show Cause was filed by counsel who stated that he represents Albert Lipscomb, individually. In this letter, counsel for Mr. Lipscomb stated that Lipscomb Industries, Inc. is no longer in business or existence.

On October 22, 1998, the Regional Judicial Officer entered a Decision and Order Denying Motion for Default. In this decision, the Regional Judicial Officer noted that although the Respondent's September 17, 1998, letter does not comport in every respect with the requirements for Answers set forth in Section 22.15 of the Rules of Practice, 40 C.F.R. § 22.15, the letter asserts a general defense to the proposed penalty. The Regional Judicial Officer found that in light of the representation that Lipscomb Industries, Inc. is no longer in business and because the Complainant had failed to establish sufficiently a prima facie case supporting the appropriateness of the proposed penalty under Section 22.15(b) of the Rules of Practice, 40 C.F.R. § 22.15(b), Respondent's September 17, 1998, letter constitutes a ground for defense to the proposed penalty pursuant to Section 22.15(b). The Regional Judicial Officer then noted that "[a]lthough 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)." The Regional Judicial Officer directed the Regional Hearing Clerk to forward all documents filed in this proceeding to the Chief Administrative Law Judge in accordance with Section 22.21(a) of the Rules of Practice, 40 C.F.R. § 22.21(a).

By letter dated October 22, 1998, the Regional Hearing Clerk forwarded to the Chief Administrative Law Judge a copy of the Complaint and Notice of Opportunity for Hearing filed by the Complainant against the Respondent along with the other documents filed thus far in the proceeding and requested that an Administrative Law Judge be assigned to conduct the hearing. On October 29, 1998, the Chief Administrative Law Judge designated the undersigned as the Administrative Law Judge to preside in the above captioned matter.

The federal regulations governing these proceedings are found at 40 C.F.R. §§ 22.01 et seq (the "Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits (the "Rules of Practice")). Section 22.21(a) of the Rules of Practice, 40 C.F.R. § 22.21(a), provides that when an Answer is filed, the Regional Hearing Clerk shall forward the Complaint, the Answer, and any other documents filed thus far in the proceeding to the Chief Administrative Law Judge who shall assign herself or another Administrative Law Judge as Presiding Officer. Section 22.16(c) of the Rules of Practice, 40 C.F.R. § 22.16(c), provides that the Regional Administrator shall rule on all motions filed or made before an Answer to the Complaint is filed. Pursuant to Section 22.04(b)(1) of the Rules of Practice, 40 C.F.R. § 22.04(b)(1), the

Regional Administrator may delegate his or her authority to a Regional Judicial Officer to act in a given proceeding.

In the instant matter, the Regional Judicial Officer reasonably found that the September 17, 1998, letter from an attorney representing Albert Lipscomb individually which responds to the Order to Show Cause asserts a general defense to the proposed penalty. However, I find that the September 17, 1998, letter response from Mr. Lipscomb's attorney cannot be construed reasonably as a timely filed Answer to the Complaint under Section 22.15 of the Rules of Practice. Also, the September 17, 1998, letter contains no indication that the Respondent requests a hearing before an Administrative Law Judge. Inasmuch as a timely Answer was not filed in this matter, the case is dismissed and returned to the Regional Hearing Clerk. See Sections 22.15, 22.21(a), (b) of the Rules of Practice. I emphasize that, as occurred in this case, it is appropriate that the Administrative Law Judge make the determination of whether a timely Answer to a Complaint has been filed.

Original signed by undersigned

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Barbara A. Gunning
Administrative Law Judge

Date: 11-30-98
Washington, DC