UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF	)	
	)	
DONALD L. LEE AND PIED PIPER PEST CONTROL, INC.,	)	Docket No. FIFRA 09-0796-92-13
	)	
Respondents	)	

ORDER DENYING MOTION FOR
DEFAULT AND DIRECTING FURTHER PROCEDURES

I. Preliminary Statement

This civil administrative proceeding for the assessment of a civil penalty was initiated by the issuance of a complaint by the United States Environmental Protection Agency (EPA or Complainant) pursuant to Section 14(a) of the Federal Insecticide, Fungicide, and Rodenticide Act, 7 U.S.C. § 136 et seq., (FIFRA). The complaint charges, in nine counts, that Donald L. Lee and Pied Piper Pest Control, Inc. (Respondents) have violated Sections 12(a)(2)(K) and 12(a)(2)(A) of FIFRA, 7 U.S.C. §§ 136j(a)(2)(K) and 136j(a)(2)(A). More specifically, in Counts I through VIII Respondents are charged with making commercial applications of chlordane after the date of the cancellation order for the chemical in violation of Section 12(a)(2)(K) of FIFRA. In Count IX, Respondents are charged with violating the Section 12(a)(2)(A) of FIFRA by partially tearing the label on a fifty-five gallon drum of chlordane and replacing it with a different partial label pasted over the drum's original label.

II. Findings and Discussion

On November 21, 1991, the Director of the Air and Toxics Division, EPA Region IX issued a Complaint and Notice of Opportunity for Hearing (complaint) to Respondents pursuant to Section 14(a) of FIFRA alleging that Respondents had violated Sections 12(a)(2)(K) and 12(a)(2)(A) of FIFRA [7 U.S.C. §§ 136j(a)(2)(K) and 136j(a)(2)(A) by its use of the chemical product chlordane after the effective date of its cancellation and by detaching, altering, defacing or destroying, in whole or in part, the label on a drum of chlordane. The complaint was served by certified mail, return receipt requested, on Donald Lee, President, Pied Piper Pest Control, 615 Spice Island Drive, #7, Sparks, NV 89431.

The complaint proposed the assessment of a civil penalty of $55,000.00 that was calculated in accordance with Section 14(a) of FIFRA [7 U.S.C. § 136l(a)] and the Guidelines for the Assessment of Civil Penalties, 39 Fed. Reg. 27711 (July 31, 1974). The cover letter which transmitted the complaint referred to the Enforcement Response Policy for the Federal Insecticide, Fungicide, and Rodenticide Act of July 2, 1990, in describing the calculation of the penalty. The complaint has since been amended (amended complaint) so that "the Enforcement Response Policy for the Federal Insecticide, Fungicide and Rodenticide Act dated July 2, 1990" has been substituted for "the Guidelines for the Assessment of Civil Penalties (39 F.R. 27711)" in the complaint. (See Order of September 29, 1992.)

On December 18, 1991, counsel for Respondents filed an answer denying the alleged violations. With respect to the proposed penalty, the answer stated that "PIED PIPER PEST CONTROL, INC., a Nevada corporation was prior to the closing of its business a category III business whose gross annual sales never exceeded THREE HUNDRED THOUSAND ($300,000.00) DOLLARS. Proof of the gross sales of PIED PIPER PEST CONTROL, INC., in the form of sales tax returns, Federal Income Tax Returns and other documents will be submitted at the appropriate time." Further, the answer stated that Pied Piper Pest Control, Inc., is no longer in business.

By my order of March 11, 1992, the undersigned was designated as the Administrative Law Judge to preside in this proceeding.

On March 26, 1992, counsel for Complainant filed a status report stating that a proposed Consent Agreement and Final Order had been forwarded to counsel for Respondents on March 12, 1992, and that there had been no response to date.

On April 2, 1992, counsel for Respondents filed a traverse to the status report stating that Respondents had responded to the proposed Consent Agreement on March 23, 1992, and requested a settlement conference with Complainant for the purpose of resolving this matter.

On April 7, 1992, the undersigned Presiding Officer issued a letter directing the counsel for the Complainant to file a statement on or before May 20, 1992, as to whether this matter had been settled, or as to the status of settlement negotiations. The prehearing letter further directed:

> If the case is settled, the Consent Agreement and Final Order signed by the parties should be submitted no later than June 17, 1992. If a Consent Agreement and Final Order have not been signed by that date, the prehearing exchange directed above should be mailed or delivered to the Regional Hearing Clerk, the opposing party and the undersigned Presiding Officer on June 17, 1992. The parties will be expected to make this prehearing exchange unless prior to the due date a motion for an extension of time has been filed pursuant to 40 C.F.R. 22.07(b). The parties will then have until June 29, 1992, to reply to statements or allegations of the other party contained in the prehearing exchange.

On April 30, 1992, counsel for Complainant filed a status report stating that counsel for the parties had spoken by telephone, that during the course of the conversation counsel for Respondents indicated that his client, Mr. Lee, had lost his license as a pest control operator and that his sole income was in the form of wages. The status report further stated that counsel was advised to forward to Complainant any evidence available which indicates Respondents' ability to pay and that such would be taken into consideration in fashioning a settlement proposal.

On May 28, 1992, counsel for Complainant filed a status report which stated that documents received from Respondents intended to show Respondents' ability to pay and licensing information from the Nevada Department of Agriculture were being reviewed "for the purpose of renewing Complainant's civil penalty offer in a settlement proposal."

No Consent Agreement and Final Order was filed by June 17, 1992. Moreover, neither party filed a prehearing exchange by that date and, even more importantly, neither party filed a motion for extension of time prior to the due date for the prehearing exchange.

On July 1, 1992, counsel for Complainant filed a tardy motion for an extension of time until July 8, 1992, to file the prehearing exchange. That motion offered no good cause for such an extension of time; in fact, it contained no justification whatsoever for an extension of time. The motion was also deficient in that it failed to provide any basis whatsoever to show that the failure of Complainant to make timely motion for extension of time was the result of excusable neglect. No action was taken to grant this deficient motion.

Complainant subsequently filed its prehearing exchange on July 7, 1992. No prehearing exchange has been received from Respondents.

On August 13, 1992, counsel for Complainant filed a status report which stated that "Respondent is apparently no longer interested in pursuing settlement discussions. . . ." A copy of the status report was served on counsel for Respondents.

On August 19, 1992, Complainant filed a motion for a default order, citing as a basis for such motion the Respondents' failure to file a prehearing exchange. A copy of the motion was served by regular mail upon counsel for Respondents.

On August 25, 1992, counsel for Respondents filed an opposition to the motion for a default order. The opposition was served upon the Regional Hearing Clerk and upon counsel for Complainant. However, it was not served upon the Presiding Officer and the Presiding Officer did not become aware of its existence until sometime later (see below).

On September 29, 1992, the undersigned Presiding Officer issued an order directing Complainant to submit the following for my consideration in connection with the motion for a default order:

> (a) copies of the documents submitted by Respondent relating to Respondent's ability to pay; and
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> (b) a detailed report on EPA's determination of the penalty, plus proposed findings respecting the factors that go into the penalty computation, including but not limited to, the size of Respondent's business and Respondent's ability to pay, considering such evidence as Respondent has submitted thereon.

A copy of this order was also served upon counsel for Respondents. No response from Respondents was received by the undersigned Presiding Officer.

On October 16, 1992, Complainant filed a response to my order of September 29, 1992. Therein Complainant referred to Respondents' opposition to the motion for a default order, dated August 25, 1992. Thereafter, the undersigned Presiding Officer secured a copy of said opposition from the Regional Hearing Clerk.

On November 4, 1992, the undersigned Presiding Officer conducted a teleconference call with counsel for Complainant and counsel for Respondents. During that teleconference, counsel for

Respondents admitted a lack of familiarity with the Consolidated Rules of Practice (CROP), 40 C.F.R. Part 22, which govern this proceeding. Counsel for Respondents also admitted Respondents' liability in this matter and stated that an amended answer would be filed within the next few days so admitting liability but contesting EPA's proposed penalty.

Section 22.17(a) of the Rules provides, in pertinent part:

> A party may be found to be in default . . . after motion or sua sponte, upon failure to comply with a prehearing . . . order of the Presiding Officer . . . .

This provision is analogous to Rule 55 of the Federal Rules of Civil Procedure (Fed. R. Civ. P.). While the Fed. R. Civ. P. do not govern the procedure of administrative agencies, consideration of those rules and the federal court precedent addressing them is often useful as guidance in deciding issues raised in administrative proceedings. It has been held under Rule 55 of the Fed. R. Civ. P. that "the default judgement must normally be viewed as available only when the adversary process has been halted because of an essentially unresponsive party. In that instance, the diligent party must be protected lest he be faced with interminable delay and continued uncertainty as to his rights."[1]

However, a diligent party is not entitled to a default order as a matter of right even when the unresponsive party is technically in default. In view of their harshness, default orders

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[1] H.F. Livermore Corp. v. Aktiengesellschaft Gebruder Loepfe, 432 F.2d 689, 691 (D.C. Cir. 1970) (per curiam).

are not favored by the law as a general rule and cases should be decided on their merits whenever reasonably possible.[2]

Under Rule 55 of the Fed. R. Civ. P., disposition of a request for default judgment lies within the court's sound discretion. Consideration is given to whether the party seeking the default judgment has suffered any prejudice and:

> Where a defendant's failure to plead or otherwise defend is merely technical, or where the default is de minimis, the court should generally refuse to enter a default judgment. On the other hand, where there is a reason to believe that defendant's default resulted from bad faith in his dealings with the court or opposing party, the district court may properly enter default and judgment against defendant as a sanction.[3]

As observed by a fellow Judge in a ruling on a Motion for Default Order in an EPA administrative proceeding:

> Administrative decisions under the environmental statutes are generally consistent with Federal court precedent on the issue of default judgments. Several administrative default judgments have been granted, where, in contrast to this proceeding, there was either no response to a motion for default, no response to either the complaint or the motion for default, or Respondent willfully failed to comply with prehearing exchange orders. On the other hand, a motion for default order was denied where a respondent submitted a prehearing exchange fourteen days after it was due, and there was "no contumacy, bad faith, or supine indifference shown by respondent," In re

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[2] Eitel v. McCool, 782 F.2d 1470, 1471-71 (9th Cir. 1986); Wilson v. Winstead, 84 F.R.D. 218, 219 (E.D. Tenn. 1979). See generally, Wright, Miller & Kane, Federal Practice and Procedure: Civil 2d Sections 2681-2685, pp. 398-429.

[3] 6 Moore's Federal Practice, Section 55.05[2], p. 55-24 (1991).

III. Conclusions

Indications of Respondents' responsiveness or diligence, in attempting to settle the case, may be found in Respondents' Opposition to Motion for Default Order in which Respondents allege that they sent Complainant financial documents supporting the defenses of inability to pay on May 14, 1992, as evidenced by Exhibit A attached to the opposition. Respondents also allege that they submitted a counteroffer to settle this matter on July 6, 1992, as evidenced by Exhibit B attached to the opposition. Based on these and other actions delineated in the memoranda, and counsel for Respondents' admitted lack of familiarity with 40 C.F.R. Part 22, I do not find bad faith, contumacy, or unresponsiveness on the part of the Respondents.

Moreover, it would clearly be a denial of justice in this matter to issue an order for default against Respondents for failure to comply with my prehearing directive when Complainant was likewise at fault. Complainant also failed to file a timely prehearing exchange. Complainant also failed to file a timely motion for an extension of time to file the prehearing exchange. Complainant's untimely motion for an extension of time was totally deficient in every respect and did not even warrant my consideration.

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[4] In re Testor Corporation, Docket No. V-W-90-R-16, (Order Denying Motion for Default and Setting Further Procedures, January 16, 1991) at 3 [footnotes omitted].

Complainant subsequently filed an untimely prehearing exchange.

While both Respondents and Complainant failed to meet the specific requirements of my prehearing letter, the nature of the failure, along with the absence of bad faith by Respondents, does not warrant the harsh penalty imposed by an order of default.

Complainant's motion for a default order is therefore DENIED.

To further confirm the results of the teleconference call, Respondents are directed to file an amended answer to the complaint no later than November 23, 1992. Thereafter, the undersigned Presiding Officer will take such action under the CROP as may be appropriate, including the possible issuance, sua sponte, of a partial accelerated decision on the question of liability.

Thereafter, the parties shall be granted thirty (30) days to pursue settlement discussions. If the matter has not been settled by a Consent Agreement and Final Order signed by the parties by January 22, 1993, the prehearing exchange directed by my letter of April 7, 1992, should be mailed or delivered by the Respondents to the Regional Hearing Clerk, the opposing party and the Presiding Officer on January 22, 1993. At the same time, on January 22, 1993, the Complainant may amend its previously filed prehearing exchange. The parties will then have until February 1, 1993 to reply to statements or allegations of the others contained in the prehearing exchange. Thereafter, a date for a hearing will be set in this matter.

So ORDERED.

Henry B. Frazier, III
Chief Administrative Law Judge

Dated: November 9, 1992
Washington, DC

IN THE MATTER OF DONALD L. LEE AND PIED PIPER PEST CONTROL, INC.
Respondent, Docket No. FIFRA 09-0796-C-92-13

Certificate of Service

I hereby certify that this Order Denying Motion for Default and Directing Further Procedures, dated NOV 9 1992, was mailed this day in the following manner to the below addressees:

Original by Regular Mail to:

Steven Armsey
Regional Hearing Clerk
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Copy by Regular Mail to:

Attorney for Complainant:

David M. Jones, Esquire
Assistant Regional Counsel
U.S. EPA, Region 9
75 Hawthorne Street
San Francisco, CA 94105

Attorney for Respondent:

John Ohlson, Esquire
Ohlson & Springgate
522 Lander Street
Reno, NV 89509

Doris M. Thompson
Secretary

Dated: NOV 10 1992