

6/28/96

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)
)
Evanston Motor Company) Docket No. RCRA-(3008)-VIII-95-06
)
Respondent)

CROSS ORDERS TO SHOW CAUSE

Proceedings

The Region 8 Office of the United States Environmental Protection Agency (the "Complainant") commenced this action by filing a Complaint dated June 22, 1995, on the Evanston Motor Company (the "Respondent"). The Complaint charges Respondent with four counts of violations of the Resource Conservation and Recovery Act ("RCRA") and its implementing regulations with regard to Respondent's handling of used motor oil at its facility in Evanston, Wyoming. The Complaint seeks assessment of a civil penalty of \$16,500 and implementation of a compliance order on Respondent. Respondent filed an Answer on July 17, 1995, through its attorneys, in which it denied most of the material allegations of the Complaint and raised several affirmative defenses. Respondent requested a hearing and settlement conference on the charges.

On December 18, 1995, before an Administrative Law Judge ("ALJ") was designated to preside in this matter, Complainant filed two motions: a Motion for an Accelerated Decision on Liability, and a Motion to Strike Affirmative Defenses. The undersigned ALJ was designated to preside in this proceeding on March 12, 1996. In a Prehearing Order dated March 28, 1996 the ALJ set a schedule in which the Respondent was allowed until April 19, 1996 to respond to Complainant's motions. That order also established a schedule for the filing of prehearing exchanges pursuant to the EPA Rules of Practice, 40 C.F.R. §22.19. The order provided that, notwithstanding the possible continuing pendency of the Complainant's motions, the parties were to file initial prehearing exchanges by May 24, 1996, and reply exchanges by June 14, 1996.

As of this date, the Respondent has not filed any response to Complainant's motions for accelerated decision and to strike affirmative defenses. Neither party has filed prehearing exchanges, and neither party has moved for an extension of time for such filings.

Order to Show Cause Why Respondent Should Not be Found in Default

The Respondent here failed to respond to the Complainant's

motions, and failed to comply with the order of the ALJ requiring filing of a prehearing exchange. The EPA Rules of practice provide that a party may be found in default "after motion or sua sponte, upon failure to comply with a prehearing or hearing order of the Presiding Officer . . ." 40 C.F.R. §22.17(a). "Default by respondent constitutes, for purposes of the pending action only, an admission of all facts alleged in the complaint and a waiver of respondent's right to a hearing on such factual allegations." Id. The respondent in default is also then liable for the full amount of the complaint's proposed civil penalty without further proceedings. In addition, the Respondent's failure to respond to Complainant's motions for accelerated decision on liability and to strike affirmative defenses may be deemed a waiver of any objections to the granting of the motions, pursuant to 40 C.F.R. §22.16(b).

The burden of proof is on the Complainant in this proceeding pursuant to 40 C.F.R. §22.24, and the Respondent is not necessarily required to produce any direct evidence under the Administrative Procedure Act, 5 U.S.C. §556(d). Nevertheless, the respondent is at least required to communicate with the court and Complainant concerning its intentions even if it elects not to file any prehearing exchange. In this case as well, the Respondent could be deemed at this time to have conceded its liability due to its failure to respond to Complainant's motion for accelerated decision. Before taking such drastic steps, however, and since Complainant has also not complied with the ALJ's order, Respondent will be given an opportunity to show cause why it has not responded or complied with the ALJ's order.

- Order

On or before July 19, 1996, Respondent is directed to show cause why it should not be found in default in this proceeding, and to indicate whether it desires to respond to Complainant's motions and to file a prehearing exchange. Complainant's reply, if any, must be filed by August 2, 1996. This order is being sent directly to Respondent, as well as to its attorney of record, as no response was received to the Prehearing Order which was sent only to Respondent's attorney.

Order to Show Cause Why Complainant Should Not be Found in Default

As described above, the Complainant has also failed to comply with the Prehearing Order requiring submission of its prehearing exchange by May 24, 1996. Complainant never requested an extension of time for such filing. Although it is true that Complainant earlier had filed motions for accelerated decision and to strike Respondent's affirmative defenses, in which several exhibits were included, that is not a substitute for complying with the order requiring a prehearing exchange. The Prehearing Order of March 28, 1996 specifically required filing the exchange notwithstanding the

possible continuing pendency of the motions.

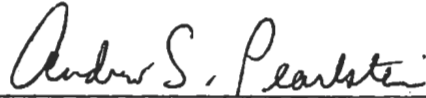
The Complainant may be found in default for failure to comply with the Prehearing Order, under 40 C.F.R. §22.17(a). Also under that section, the consequence of a default by the Complainant is dismissal of the Complaint with prejudice. Again, before taking such drastic action, Complainant will be allowed an opportunity to show cause why it should not be found in default and the Complaint dismissed with prejudice.

- Order

On or before July 19, 1996, Complainant must show such cause why it should not be found in default in this proceeding and the Complaint dismissed with prejudice. Respondent's reply, if any, must be filed by August 2, 1996.

Further Proceedings

After review of the parties' responses to these orders to show cause, the ALJ will issue a further order or orders as seem appropriate in this proceeding.



Andrew S. Pearlstein
Administrative Law Judge

Dated: June 28, 1996
Washington, D.C.

In the Matter of Evanston Motor Company
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CERTIFICATE OF SERVICE

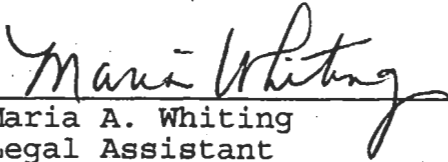
I certify that the foregoing Cross Orders to Show Cause, dated June 28, 1996, were sent by regular mail to the addressees listed below:

Tina Artemis
Regional Hearing Clerk
U.S. EPA Region 8
999 18th Street
Suite 500
Denver, CO 80202-2466

Brenda L. Harris, Esq.
Enforcement Attorney
U.S. EPA Region 8
999 18th Street
Suite 500 (8ENF-L)
Denver, CO 80202-2466

Mark W. Harris, Esq.
Harris and Cowan, P.C.
P.O. Box 130
Evanston, WY 82931-0130

David Madia
Evanston Motor Co.
100 Wasatch Road
P.O. Box 808
Evanston, WY 82931-0808



Maria A. Whiting
Legal Assistant
U.S. EPA - Mail Code 1900
Ofc. of Adm. Law Judges
401 M Street SW
Washington, DC 20460

Dated: June 28, 1996
Washington, D.C.