

the undersigned ALJ, which was conducted on January 7, 1998. During this teleconference, the parties were asked to make arguments in support of their outstanding motions.

Although Complainant had sought an order on its Motion For Default under Part 22.17(b) of the Rules of Practice, it intended that such order only address the *liability* phase of the proceeding and agreed to conduct an evidentiary hearing in the *penalty* phase of the litigation in April, 1998.⁽¹⁾ Moreover, Complainant's initial Motion For Default was based exclusively on Respondent's failure to comply with the prehearing order of the ALJ.

As the issue of liability became the theme of the teleconference, the discussion focused on Respondent's defenses to liability, i.e., lack of knowledge of applicable regulations; history of compliance; and good faith efforts to comply once it became aware of RCRA requirements for used oil transporting and processing. Complainant sought to rebut these arguments citing *inter alia*, the strict liability component of the RCRA statute. As a result of these arguments, the undersigned made a preliminary ruling granting Complainant's Motion For Default.

On January 8, 1998, Respondent faxed the undersigned a request that no order on default be entered, and raised alleged meritorious defenses to the issue of liability. On January 9, 1998, Complainant faxed a Memorandum in Opposition to Respondent's Motion Requesting That the Court Not Enter Its Default Order. Complainant again provided argument in support of a default order, but only as to Respondent's *liability*.

Upon further consideration, and in the name of fundamental fairness to the Respondent, the undersigned declines to grant Complainant's Motion For Default, either as presented, or *sua sponte*. Section 22.17(c) mandates that any order granting default include findings and conclusions on all material issues, including *penalty*. Complainant's good faith attempt to secure judgment on *liability only* is properly the subject of a Motion for Accelerated Decision, pursuant to 40 C.F.R. Section 22.20(a), which authorizes the ALJ to render an accelerated decision as to all or any part of the proceeding.

Respondent's failure to comply with numerous prehearing orders and the resulting confusion generated in this proceeding, has not only tested the patience of the court, but in other circumstances, might well have resulted in the granting of a motion favorable to EPA. However, despite Respondent's dilatory conduct, no showing of prejudice against the Complainant has been made as a result of Respondent's late-filed prehearing exchange.

ORDER

Pursuant to 40 C.F.R. Section 22.17(d) of the Rules of Practice, the undersigned sets aside his preliminary default ruling, and **DENIES** Complainant's Motion For Default based on Respondent's late-filed prehearing exchange. Concomitantly, Respondent's Motion To Accept Its Prehearing Exchange is **GRANTED**.

An evidentiary hearing on both liability and the penalty phase of this litigation will be set for April of 1998. As instructed in the January 7, 1998, teleconference, the parties are to notify the undersigned of the exact date and location of such hearing. As further instructed, the parties will reduce to writing any understandings or agreements regarding the presentation or admission of any evidence, or any stipulations appropriate for the conduct of this proceeding.

Stephen J. McGuire

Administrative Law Judge

Date: January 9, 1998

Washington, D.C.

1. In support of its initial Motion For Entry of Default Order On Liability, dated November 4, 1997, Complainant had attached a draft Order for the ALJ's signature which on p. 10 likewise indicates EPA's intention that a "hearing on penalties" be held.

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