

**IN THE MATTER OF THERMEX ENERGY
CORPORATION AND RICHARD W. FORSYTHE**

RCRA (3008) Appeal No. 91-3

ORDER ON MOTION FOR INTERLOCUTORY APPEAL

Decided June 30, 1992

Syllabus

On April 23, 1991, the Presiding Officer summarily dismissed Richard W. Forsythe as a Respondent in this case, relying primarily on *In re Southern Timber Products, Inc.*, RCRA (3008) Appeal No. 89-2 (November 13, 1990). The Presiding Officer declined to certify the issue for interlocutory appeal, and Complainant has moved for a non-certified interlocutory appeal.

Held: Complainant has shown, pursuant to 40 CFR §22.29(c), that exceptional circumstances exist and that to delay resolution of the matter would be contrary to the public interest, and the motion for interlocutory appeal is therefore granted. The issue of Forsythe's liability involves genuine issues of material fact that require an evidentiary hearing to resolve, and the orders dismissing Forsythe are therefore vacated, and the case is remanded for further proceedings.

Before Environmental Appeals Judges Ronald L. McCallum, Edward E. Reich, and Timothy J. Dowling (Acting).

Opinion of the Board by Judge Dowling:

Before the Environmental Appeals Board¹ is Complainant's motion for interlocutory appeal filed under Section 22.29(c) of the Agency's Consolidated Rules of Practice. The motion seeks review and reversal of two April 23, 1991 orders by the Presiding Officer that dismiss Richard W. Forsythe as a Respondent. For the reasons set forth below, those orders are vacated, and the case is remanded for further proceedings.

¹The Environmental Appeals Board, as the Administrator's delegatee, has authority to decide interlocutory appeals under 40 CFR §22.29. See 57 Fed. Reg. 5320 (Feb. 13, 1992).

I. BACKGROUND

On December 30, 1988, U.S. EPA Region VIII filed a Complaint against Thermex Energy Corporation alleging violations of Section 3005(e) of the Resource Conservation and Recovery Act of 1976 ("RCRA"), 42 U.S.C. §6901 et seq., as well as 40 CFR Part 262, which sets forth standards for generators of hazardous waste under RCRA. The alleged violations involve Thermex's blasting agent production and storage facility in Natrona County, Wyoming. The Complaint contains a proposed compliance order to compel Thermex (1) to determine the types of hazardous wastes at the facility; (2) to remove all hazardous wastes from the facility to a licensed hazardous waste disposal facility; and (3) to otherwise come into full compliance with RCRA and the implementing rules. The Complaint also proposes a civil penalty of \$70,000.

Richard W. Forsythe is President, Chief Executive Officer, Chairman of the Board, and principal shareholder of Thermex. On October 4, 1989, Complainant moved to amend the Complaint to add Forsythe as a Respondent, and on November 27, 1989, the Presiding Officer granted the motion.

Respondents have now removed all hazardous waste from the facility and have otherwise fully complied with the proposed compliance order. The only issues that remain are whether Respondents violated RCRA and the implementing rules and, if so, whether Complainant's proposed \$70,000 penalty is appropriate. Thermex is now in bankruptcy proceedings, and Complainant has filed a "Proof of Claim" for the \$70,000 proposed penalty. Complainant asserts, however, that it is a subordinated, unsecured creditor, and it does not anticipate that Thermex will be able to pay any significant penalty.

On March 19, 1991, Respondents filed a motion for partial summary judgment, requesting that Forsythe be dismissed as a party. On April 23, 1991, the Presiding Officer issued two orders granting the motion to dismiss Forsythe. The dismissal is based largely on the Final Decision in *Southern Timber Products, Inc.*, RCRA (3008) Appeal No. 89-2 (November 13, 1990), which declined to hold a corporate officer personally liable for violations of RCRA rules (Part 265) applicable to "owners and operators" of hazardous waste management facilities.

On April 30, 1991, Complainant moved for certification of the ruling for interlocutory appeal under 40 CFR §22.29(a), but the Pre-

siding Office declined to certify the matter. Complainant then filed the instant motion.

II. DISCUSSION

Where a Presiding Officer declines to certify a ruling for interlocutory appeal, the Board may review the ruling on interlocutory appeal only if it determines, "upon motion of a party and in exceptional circumstances, that to delay review would be contrary to the public interest." 40 CFR §22.29(c). Absent such a determination, review must wait until issuance of an initial decision that disposes of all issues.

In our view, exceptional circumstances exist in this case sufficient to warrant immediate review of the decision to dismiss Forsythe. As noted by Complainant, unless the orders at issue are reviewed now, Complainant would be forced to litigate against Thermex alone. The Presiding Officer would presumably exclude as irrelevant evidence bearing upon Forsythe's role in Thermex, his activities at the Natrona facility, his connection to the alleged violations, and other aspects of his involvement that bear upon the issue of his liability. If the orders dismissing Forsythe were then reversed on appeal of the initial decision, additional evidentiary hearings would be required. Such a bifurcated hearing would lead to an inefficient use of the Agency's adjudicative resources. Moreover, Complainant would be placed in the untenable position of having to decide whether to pursue potentially costly litigation against an insolvent corporation without knowing whether the corporation would be able to pay a civil penalty or whether Forsythe would be reinstated as a Respondent. Faced with such uncertainty, Complainant might well decide to direct its enforcement resources elsewhere, leaving the issues of Forsythe's and Thermex's liability and the penalty amount unresolved. The public interest in vigorous and fully effective enforcement of the environmental laws warrants immediate review of the issue.

Having concluded that interlocutory review is appropriate, we now address the issue of Forsythe's dismissal. In our view, the dismissal is premature for two reasons. First, *Southern Timber* involved the issue of whether a corporate officer was an "owner" or "operator" of the facility and thus liable for violations of Part 265 of the rules. In large measure, the analysis turned on the specific wording of the regulatory definition of "operator." See *Southern Timber* (Final Decision), slip op. at 16-25; *Southern Timber* (Order on Motion for Reconsideration), slip op. at 16-38. In contrast, Forsythe is alleged to be liable for violations of rules that apply to hazardous waste

generators, a matter not directly controlled by *Southern Timber*. Second, the Order on Motion for Reconsideration (pp. 19–29) in *Southern Timber* makes clear that the general issue of corporate officer liability under RCRA is a factually sensitive matter that requires investigation into the nature and extent of the role played by the corporate officer. In the case at hand, viewing the evidence in the light most favorable to Complainant,² we believe there is a genuine issue of material fact as to Forsythe's role at the Natrona facility and his liability for the alleged violations.³ Accordingly, the matter is not amenable to summary disposition at this time.⁴

The April 23, 1991 orders dismissing Forsythe as a Respondent are vacated, and the case is remanded for further proceedings.⁵

So ordered.

²Although the Agency's Consolidated Rules do not directly address the issue, it is well established that on a motion for summary judgment, the evidence should be viewed in the light most favorable to the non-moving party. See 6 J. Moore, W. Taggart & J. Wicker, *Moore's Federal Practice*, ¶ 56.15 (2d ed. 1992).

³For example, Complainant presented evidence that Forsythe (1) was regularly updated on environmental problems at the Natrona facility; (2) was regularly informed of the actions and expenditures required to effect environmental compliance; and (3) more significantly, exercised final authority for the allocation of funds for corrective measures, and made or approved all significant expenditures for correcting environmental problems. See April 12, 1991 Stephens Affidavit. This evidence stands in sharp contrast to the evidence adduced in *Southern Timber*, which failed to show that the officer at issue had final authority for plant operations or significant expenditure of funds. See Order on Motion for Reconsideration, at 25–29. While we express no view as to whether Stephens' testimony by itself would be sufficient to support a finding that Forsythe is personally liable for the violations at issue, when combined with Forsythe's position as President, Chief Executive Officer, Chairman of the Board, and principal shareholder of Thermex, it creates a genuine issue of material fact that warrants further exploration at trial.

⁴In fairness to the Presiding Officer, it should be noted that the Order on Motion for Reconsideration in *Southern Timber* was issued after Forsythe was dismissed as a Respondent. Although certain language in the *Southern Timber* Final Decision could be read to suggest broad immunity under RCRA for corporate officers, the Order on Motion for Reconsideration makes clear that the issue entails a factual inquiry into the nature and role of the officer's activities.

⁵By letter dated June 30, 1991, Respondents allege that counsel for Complainant has improperly coerced a former Thermex employee into withdrawing an affidavit that supports Respondents' position as to Forsythe's liability. Respondents request that this proceeding be stayed until the matter is fully investigated. We express no view as to these allegations, and we leave it to the Presiding Officer to determine in the first instance what effect, if any, they should have on future proceedings.