7/31/90

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D. C. 20460

OFFICE OF ADMINISTRATIVE LAW JUDGES

IN THE MATTER OF	:	
BASIN REFINING, INC.	:	DOCKET NO. RCRA-VI-626-H
Respondent	:	

Resource Conservation and Recovery Act, 42 USC §§6901 et seq.; Bankruptcy Code, 11 USC §§101 et seq. Respondent was held liable as the owner of a hazardous waste facility for violations of RCRA which arose after respondent's plan of reorganization under Chapter 11 of the Bankruptcy Code was confirmed. No civil penalty was assessed in view of respondent's lack of financial resources and the greater importance of proper closure of the facility as set forth in the compliance order.

APPEARANCES:

Mark A. Peycke, United States Environmental Protection Agency, Region VI, 1445 Ross Avenue, Dallas, Texas, for the complainant;

Diana C. Dutton, Akin, Gump, Strauss, Hauer & Feld, 4100 First City Center, 1700 Pacific Avenue, Dallas, Texas, for the respondent.

BEFORE: J. F. GREENE
Administrative Law Judge

SUMMARY JUDGEMENT

This is a proceeding initiated by a Complaint, Compliance Order and Notice of Opportunity for Hearing (complaint) issued on September 30, 1986 under Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6928(a). The United States Environmental Protection Agency (EPA) may enforce RCRA in the State of Oklahoma, which has received final authorization to carry out a hazardous waste management program under section 3006 of RCRA, 42 U.S.C. §6926. Respondent is alleged in the complaint to have violated RCRA and regulations promulgated thereunder, as well as the Oklahoma Controlled Industrial Waste Disposal Act, Okla. Stat. Ann. Tit. 63 (984) (OCIDWA), and the Rules and Regulations for Industrial Waste Management (Rules) promulgated thereunder. Specifically, respondent is charged with failing to minimize the possibility of any unplanned sudden or non-sudden release of hazardous waste or hazardous waste constituents to air, soil, or surface water, as required by 40 CFR §265.31 and Rules 7.1.6 and 7.2.1; failing to implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility, as required by 40 CFR §265.90 and Rule 7.1.6; failing to prepare and maintain at its facility a written closure plan, as required by 40 CFR §265.112 and Rule 7.1.6; failing to prepare and maintain at its facility a written post-closure plan, as required by 40 CFR §265.118 and Rule 7.1.6; failing to establish financial assurance for closure of its waste management units, as required

by 40 CFR §265.143 and Rule 7.1.15.2.1; failing to establish financial assurance for postclosure care of its waste management units, as required by 40 CFR §265.147(a) and Rule 7.1.15.1.1; failing to demonstrate financial responsibility to third parties caused by sudden non-sudden accidental occurences, as required by 40 CFR §265.147(a) and (b) and Rule 7.1.15.1.1; and continued treatment, storage or disposal of hazardous waste without a permit or interim status, in violation of section 3005 of RCRA, 42 U.S.C. §6925. Complainant proposed a civil administrative penalty of $157,500 for these alleged violations.

The parties issued an agreed stipulation on February 16, 1989, in which respondent essentially admitted the violations charged in the complaint (stipulation ¶¶ 26-37). On April 28, 1989, respondent filed a Motion for Accelerated Decision (motion) and attached memorandum in support (memorandum), asserting that on the basis of the stipulation, the complaint raises no genuine issue of material fact (motion at 1-2). Respondent asserts that it was not the owner or operator of the refinery, which is the hazardous waste facility at issue in this case. Respondent also asserts that the relief sought by complainant constitutes a claim against respondent's Chapter 11 bankruptcy estate and was discharged when respondent emerged from bankruptcy. Additionally, respondent claims that it should not be held liable for the remedies sought in the complaint because respondent's period of ownership and control of the facility was so short in relation to the overall life of the refinery. Finally, respondent argues that its

insolvency prevents it from achieving compliance, that this proceeding renders the refinery worthless and unmarketable, and that EPA should be required to pursue prior owners of the refinery.

Complainant moved for judgment on the pleadings, and submitted a brief in support (brief), on April 28, 1989. Complainant maintains that respondent is properly charged with ownership of the facility, and that the stipulation provides prima facie evidence that respondent violated the regulations as alleged in the complaint. Contending that the bankruptcy action does not bar the government from seeking to enforce compliance with environmental statutes, complainant cites several cases holding that environmental actions are not subject to a stay.[1] Complainant argues that respondent was not required to have control of the facility to comply with most of the requirements and that the compliance date for some of the violations was before the trustee in bankruptcy and the unsecured creditor's committee took control of the facility. Complainant requests adoption of the proposed penalty and the proposed compliance order set forth in its brief.

Because documents outside the pleadings, such as the stipulation, are referred to in complainant's motion and must be considered in the adjudication of this matter, complainant's motion

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[1] Section 362(a) of the Bankruptcy Code stays the commencement or continuation of any action that could have been commenced against the debtor prior to the filing of the bankruptcy petition, with certain exceptions set forth in section 362(b) 11 U.S.C. § 362(a)(b).

for judgment on the pleadings will be treated as a motion for summary judgment.[2] Such a motion is granted under Rule 56 of the Federal Rules of Civil Procedure if there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law.

There do not appear to be any genuine issues of material fact as to liability in this matter, as respondent has conceded (motion at 1-2, memorandum at 2). Several questions of law which involve bankruptcy issues are raised, including whether respondent may be held liable under RCRA as an owner or operator of the facility in light of the Chapter 11 reorganization proceeding, and whether any debt or claim brought by complainant was discharged in the Chapter 11 proceeding.

Respondent argues that it had no possession or control over operations of the facility from June 1981, when respondent filed a voluntary petition for protection under Chapter 11 of the Bankruptcy Code, until March 9, 1988, when respondent asserts that it resumed control over the facility (motion at 2; memorandum at

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[2] While the administrative law judge is not bound by the Federal Rules of Civil Procedure and the federal courts, they are instrumental as guidance. In federal judicial courts, a motion for judgment on the pleadings is converted to a motion for summary judgment if the judge considers affidavits and other materials outside the pleadings. Sage International Ltd. v. Cadillac Gage Co., 556 F. Supp. 381, 383-384 (E.D. Mich. 1982), Sager Glove Corp. v. Aetna Insurance Co., 317 F. 2d 439, 441 n. 1 (7th Cir. 1963), cert. denied, 375 U.S. 921 (1963)

3-4; see stipulation, ¶ 7).[3] Respondent points out that it operated the refinery only from January 1981 through May 1981; then the refinery was leased to various entities until June 1982, when it was permanently shut down by respondent (motion at 3, stipulation, ¶¶ 4-6). Because the refinery was controlled and operated by the unsecured creditor's committee and the trustee from June 1981 until March 9, 1988, respondent argues, the bankruptcy estate, with the trustee as its representative, was responsible for environmental compliance during that time period (motion at 5; memorandum at 8).

Respondent asserts that it cannot be held liable as an operator of the facility because it lacked the requisite degree of control over waste disposal activities and that it cannot be liable as an owner because the bankruptcy estate owned the refinery from the time of commencement of the bankruptcy case until March 9, 1988, which was after the complaint was filed (memorandum at 3-4).

Respondent is charged with violating certain requirements of 40 CFR Part 265. The owner or operator of a facility is required to comply with these provisions if the facility treats, stores or

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[3] On March 9, 1988 the Bankruptcy Court for the Northern District of Texas entered an Order Approving Waiver of Certain Rights Under Plan of Reorganization, which, inter alia, relieved the unsecured creditor's committee and the First RepublicBank Dallas from any obligations and liabilities to respondent for any condition in respect of the refinery, including any failure to comply with Oklahoma or federal industrial waste disposal regulations. (stipulation ¶ 9, and Exhibit F attached to stipulation).

disposes of hazardous waste.[4] An initial question arises here as to who the owner or operator is during the bankruptcy proceeding. The refinery came under the ownership of the bankruptcy estate as of the commencement of the bankruptcy proceeding, i.e. June 6, 1981, under 11 U.S.C. §541. See, In re Peerless Plating Co., 17 ELR 20826, 20828, 70 Bankr. 943 (W.D. Mich. 1987). In regard to operation of a facility involved in bankruptcy, 28 USC §959 (b) provides:

> Except as provided in section 1166 of title 11, ... a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver, or manager according to the requirements of the valid laws of the State in which the property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof.

The Supreme Court in Ohio v. Kovacs, 469 US 274, 285 (1985) has stated that it does not question "that anyone in possession of the [hazardous waste] site - whether it is Kovacs ... or the bankruptcy trustee - must comply with the environmental laws of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the water of the State, or refuse to remove the source of such conditions."

The respondent's Plan of Reorganization states that Robert

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[4] Respondent has stipulated that its refinery is a facility that treated, stored or disposed of hazardous waste (stipulation ¶¶ 17, 18, 19).

Yaquinto, Jr. is the trustee in bankruptcy for respondent.[5] When a trustee is appointed in a chapter 11 case, the trustee displaces current management and assumes the decisionmaking functions. In re Clinton Centrifuge Inc. 85 Bankr. 980, 984 (E.D. Pa. 1988). Therefore it would appear that the trustee and bankruptcy estate would be liable for any violations of RCRA, the regulations promulgated thereunder, and the requirements of the state RCRA program in the State of Oklahoma which arose during the pendency of respondent's bankruptcy proceeding.

The next question that arises is the duration of the bankruptcy estate's ownership and of the trustee's control. Respondent resumed ownership of the facility upon confirmation of respondent's Plan of Reorganization, which confirmation was entered on December 31, 1984. (stipulation ¶8) Section 1141 (b) of the Bankruptcy Code, 11 USC §1141(b), provides, "[e]xcept as otherwise provided in the plan or the order confirming the plan, the confirmation of a plan vests all of the property of the estate in the debtor." Therefore, and because the plan and confirmation do not make provision concerning ownership, as owner of the facility, respondent was required to comply with the requirements of RCRA

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[5] Exhibit A, attached to Stipulation. All references to exhibits hereinafter refer to the exhibits attached to the stipulation. The Plan of Reorganization defines respondent as the debtor in possession. However, "[i]f ... a trustee is appointed in the Chapter 11 case, there will not be a debtor in possession." Notes of the Advisory Committee on the Rules, 11 U.S.C. app. Bankruptcy Rule 2011 (1988).

and OCIDWA during its period of ownership prior to June 6, 1981 and after December 31, 1984.

The question of whether or not respondent failed to comply with such requirements during these periods of ownership is addressed in association with determining when EPA's "claim" against Respondent arose. A "claim" is defined in section 101 (4) of the Bankruptcy Code, 11 U.S.C. §101(4), as a

> (A) right to payment whether or not such right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured; or
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> (B) right to equitable remedy for breach of performance if such breach gives rise to a right to payment, whether or not such right to an equitable remedy is reduced to judgment, fixed, contingent, matured, unmatured, disputed, undisputed, secured, or unsecured.

A debt is merely a liability on a claim. 11 U.S.C. §101(11). The definition of "claim" is very broad, and has been applied to an order to clean up a hazardous waste site, as well as an order to pay a monetary penalty for violation of environmental laws. Ohio v. Kovacs, 469 U.S. 274 (1985). The issue of when complainant's claim arose is significant with respect to discharges of claims in bankruptcy. If the claim arises prior to confirmation of the Chapter 11 plan, then the claim is considered discharged, and the EPA will be estopped from seeking recovery from the

reorganized Basin Refining, Inc.[6]

Therefore, any right to payment that the EPA may have against respondent for violations of the environmental regulations mentioned herein above, would be discharged if the claim arose prior to December 31, 1984. A claim, even a contingent claim, arises under the Bankruptcy Code at "the time when the acts giving rise to the alleged liability were performed." In re Chateaugay Corp., 87 Bankr 779, 796 (S.D.N.Y. 1988), quoting In re Johns-Manville Corp. 57 Bankr. 680, 690 (Bankr S.D.N.Y. 1986), aff'd on other grounds sub nom. Pension Benefit Guaranty Corp., v. LTV Corp., 875 F. 2d 1008 (2nd Cir.), cert. granted, 110 S.Ct 321 (1989). In re Chateaugay Corp., Nos. 87 Civ. 8144, 88 Civ. 0834 (S.D.N.Y. March 16, 1990) (available on Lexis, Bkrtcy Library, Cases file) discusses the issue of a contingent claim, which is one in which "the debtor's legal duty to pay does not come into existence until triggered by the occurrence of a future event and such future occurrence was within the actual or presumed contemplation of the parties at the time the original relationship of the parties was created." In re All Media Properties, Inc., 5 Bankr. 126, 133 (Bankr. S.D. Tex. 1980), aff'd, 646 F. 2d 193 (5th

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[6] 11 U.S.C. §1141(c) and (d) provide in pertinent part:
(c) After confirmation of a plan, the property dealt with by the plan is free and clear of all claims and interests of creditors. . . .
(d)(1) Except as otherwise provided... the confirmation of a plan - (A) discharges the debtor from any debt that arose before the date of such confirmation. . . .

Cir. 1981). In Chateaugay, the court held, in the context of violations of the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), "a discharge in bankruptcy cannot properly rest upon the mere pre-petition existence of ... hazardous waste. Where, however, there has been a pre-petition release or threatened release of hazardous waste, there does exist an event that would render any claims arising from that circumstance dischargeable pursuant to the broad definition of a 'claim' set forth in the Bankruptcy Code."

In the context of a contract claim under the Contract Dispute Act of 1978, the Third Circuit held that a claim arises, for purposes of determining dischargeability in a Chapter 11 bankruptcy, not when the breaches of contract occurred, but when the General Services Administration's officer in authority had knowledge, from a "pre-award" audit and preliminary investigation, of an apparent breach of contract. In re Remington Rand Corp., 836 F. 2d 825 831-832 (3rd Cir. 1988). Applied to the instant matter, EPA's claim arose when EPA had knowledge of apparent RCRA violations at respondent's facility.

Respondent contends that EPA's claims arose prior to confirmation because the refinery was shut down in 1982, and points out that all waste disposal took place prior to June 1982, and that Section 3005 of RCRA, which required respondent to file a Part B permit application, took effect November 8, 1984, over a month prior to confirmation.

While it is possible that a release into air, soil, or surface water of hazardous waste occurred prior to confirmation of respondent's Plan of reorganization, there is no evidence in the record of such a release or threatened release prior to the 1985 inspection. Moreover, the complaint does not charge respondent with violations that necessarily occurred during the time that the hazardous waste disposal took place. Rather, the complaint charges respondent with violations associated with the maintenance of a hazardous waste facility. Several of the allegations refer to noncompliance on or about the dates of the December 3-8, 1985, inspection: failure to minimize releases from the facility, to implement a groundwater monitoring program, and to prepare and maintain written closure and post-closure plans, and treating, storing or disposing of hazardous waste without a permit or interim status. (complaint ¶¶ 18, 21, 24, 27, 28). While the remainder of the violations alleged are not accompanied in the complaint by a date of violation (complaint ¶¶ 30 33, 36, 39), the parties have stipulated only to the respondent's noncompliance with the regulations subsequent to the date of confirmation, that is, at the time of inspection in December, 1985, or on November 8, 1985, at the time of filing the complaint.[7] There is no basis provided in

[7] Specifically, the parties stipulated that respondent had not demonstrated financial responsibility for sudden and non-sudden accidental occurrences, and had not submitted a closure plan for all land disposal units at the time of the filing of the complaint on September 30, 1986 (stipulation ¶¶ 32, 33, 36). The parties stipulated that respondent had failed to submit Part B of the permit application and to certify compliance with groundwater

the record to conclude that EPA's claims in this matter arose prior to confirmation of respondent's plan of reorganization, and therefore they are not discharged. Consequently, respondent is liable for all of the violations alleged in the complaint, all of which arose subsequent to confirmation, during respondent's ownership of the facility.

Respondent's argument that its ownership and control of the refinery is short in relation to the life of the refinery, and that it therefore should not be liable for the remedies sought in the complaint, does not affect this conclusion. Respondent, as owner of the property, is responsible for compliance with RCRA in order to maintain the hazardous waste facility, regardless of the length of duration of its ownership.

Respondent's final argument in its motion and memorandum is that its insolvency prevents it from achieving compliance, and that it has no assets with which to pay a penalty. While this argument has no bearing on the issue of liability, it may be considered in determining an appropriate compliance order and the amount of civil penalty.

Insolvency does not relieve persons subject to RCRA from complying with the obligation to properly contain and dispose of

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be in violation of those requirements before that date, thus no claim arose until that date. (stipulation ¶¶ 34, 35; see, section 3005 of RCRA). The remainder of the requirements alleged to have been violated by respondent were stipulated by the parties to have been violated at the time of inspection in December 1985.

hazardous waste. In re SED, James B. Caldwell, & John Olmsted, Docket No. TSCA-IV-86-0001 at 18 n. 43 (Initial Decision, December 8, 1988), aff'd on issue of liability, TSCA Appeal No. 89-1 (Final Order, March 28, 1990). See also, U. S. v. Wheeling-Pittsburgh Steel Corp., 818 F. 2d 1077, 1086-1087 (3rd Cir. 1987) (pending Chapter 11 proceeding did not relieve company of compliance schedule for installation of air pollution control equipment mandated by Clean Air Act state implementation plan, and consent decree; economic infeasibility likewise is not a proper basis for staying compliance with the Clean Air Act); In re Commonwealth Oil Refining Co., 805 F. 2d 1175, 1183-1184 (5th Cir. 1986), cert. denied 483 U.S. 1005 (1987) (EPA may compel respondent to properly close a hazardous waste facility even though the respondent is in Chapter 11 bankruptcy proceedings). Therefore, the mere fact that a debtor must expend scarce financial resources in order to bring a facility into compliance with RCRA does not excuse such compliance.

The proposed compliance order appears to be a reasonable schedule of procedures necessary to bring respondent's facility into compliance with RCRA, to prevent further contamination and to properly contain and dispose of the hazardous waste located at respondent's facility. It is concluded that the proposed compliance order submitted by complainant in its Brief in Support of Judgment on the Pleadings should be adopted herein as an Order

of the Administrative Law Judge. [8]

Findings of Fact and Conclusions of Law

1. Respondent Basin Refining, Inc. is subject to the provisions of RCRA, by virtue of its ownership of a "facility," as defined by Section 1-1001 of OCIDWA, Rule 1.1.10 and 40 C.F.R. §26-.10, which is used for treating, storing, or disposing of hazardous waste.

2. Respondent was the owner of the facility at the time the alleged violations occurred.

3. Respondent violated 40 C.F.R. §265.31 and Rules 7.1.6 and 7.2.1 by failing to maintain and operate its facility in a way that minimizes the possibility of a fire, explosion, or any unplanned sudden or non-sudden release of hazardous waste or hazardous constituents to air, soil or surface water which could threaten human health or the environment.

4. At the time of the December 1985 inspection, respondent was in violation of 40 C.F.R. §265.90 and Rule 7.1.6 by failing to implement a groundwater monitoring program capable of determining the facility's impact on the quality of groundwater in the uppermost aquifer underlying the facility.

5. At the time of the inspection in December, 1985, respondent had not prepared and maintained at the facility a written closure plan for closure of the hazardous waste management units at the facility, in violation of 40 C.F.R. §265.112 and Rule 7.1.6.

6. At the time of the inspection in December, 1985, respondent had not prepared and maintained at the facility a written post-closure plan for the hazardous waste management units at the facility, in violation of 40 C.F.R. §265.118 and Rule 7.1.6.

7. By failing to establish financial assurance at the time of the inspection in December, 1985, for closure of the facility, respondent violated 40 C.F.R. §265.143 and Rule 7.1.15.2.1.

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[8] Costs of environmental remediation do not constitute a "claim" against the bankruptcy estate, because the violations at issue arose after the plan of reorganization was confirmed. Therefore the reorganized debtor, not the bankruptcy estate, is responsible for compliance with this Order.

8. By failing to establish financial assurance at the time of inspection in December, 1985, for post-closure of its hazardous waste management units, respondent violated 40 C.F.R. §265.145 and Rule 7.1.15.2.1.

9. By failing to demonstrate, at the time of the filing of the complaint, financial responsibility for bodily injury and property damage to thrid parties caused by sudden accidental occurrences arising from operation of the facility, respondent violated 40 C.F.R. §265.147(a) and Rule 7.1.15.1.1.

10. By failing to demonstrate, at the time of the filing of the complaint, financial responsibility for bodily injury and property damage to third parties caused by non-sudden accidental occurrences arising from operation of the facility, respondent violated 40 C.F.R. §265.147(b) and Rule 7.1.15.1.1.

11. The Part B application not having been filed, and compliance with all applicable groundwater monitoring and financial responsibility requirements not having been certified on or before November 8, 1985, respondent's interim status terminated on November 8, 1985, and by continuing to treat, store or dispose of hazardous waste, respondent violated Section 3005(e)(2) of RCRA, 42 U.S.C. §6925(e)(2).

12. This proceeding does not involve a dischargeable claim against the bankruptcy estate because the violations at issue did not arise until after confirmation of respondent's Plan of Reorganization.

PENALTY

Insolvency may have an impact on the amount of civil penalty, assessed because the Final RCRA Civil Penalty Policy (Penalty Policy) dated May 8, 1984, authorizes a reduction in the civil penalty assessed based on a respondent's ability to pay such a penalty. The burden to demonstrate inability to pay rests on the respondent. Penalty Policy at 20.

Accordingly, Respondent has presented a 1988 tax return, an affidavit of Michael B. Wisenbaker, a 1988 Form 1120 federal tax

return, an unaudited income statement, balance sheet, and accounts payable listing for three months ending March 31, 1990, and an income statement, balance sheet, and accounts payable listing for the year ending December 31, 1989. Affidavit and Exhibit G, attached to stipulation; respondent's response to order requesting financial information (Financial Information) dated June 19, 1990. Respondent did not submit a federal tax return for the year 1989, because respondent filed a Form 7004 for extension of time to file the 1989 tax return until September 17, 1990. See, Financial Information. In his affidavit, dated February 10, 1989, Michael Wisenbaker, sole owner and shareholder of Basin Refining, Inc. since 1987, asserts that respondent has no assets apart from the refinery itself. He states that respondent has attempted to reopen the refinery to reinstitute operations but such attempts demonstrated that operating the refinery is not economically feasible, and states that several listed experts in refinery matters have supported such conclusion.

The 1988 federal income tax return reveals a negative taxable income of $33,381,499, with accounts payable in an amount of $24,938,217, and $8,843,902 of notes payable in less than one year. Moreover, in the Order Approving Waiver of Certain Rights under Plan of Reorganization, dated March 9, 1988, ¶ 3, the bankruptcy court found that respondent had been unable to find a purchaser for

the refinery since the plan of reorganization was confirmed, [9] commenting that respondent believes that due to claims asserted by EPA, the refinery is "virtually impossible to sell and is of no value."

Respondent has carried its burden of establishing inability to pay a penalty, to the extent that insolvency as of 1989 has been demonstrated. The only evidence submitted by respondent concerning its current financial condition is income statements, balance sheets and accounts payable listings, all of which are unverified and therefore do not carry much weight. In re F & K Plating Co., RCRA (3008) Appeal No. 86-1A at 9 (Final Decision, October 8, 1987) (unverified balance sheet, standing alone, is inadequate to establish inability to pay). However, in light of complainant's failure to contest the issue of respondent's ability to pay, it is concluded that respondent is unable to pay a civil penalty. [10] See, SED, Inc., James B. Caldwell and John Olmsted, TSCA Appeal No. 89-1 at 10-11 (Final Order, March 28, 1990) (proposed civil penalty of $2,270,000 reduced by Administrative Law Judge to $35,000 was

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[9] The parties have stipulated that respondent was unable to find a purchaser after confirmation of the plan (stipulation ¶ 8).

[10] Complainant noted in its Brief that some of the affirmative defenses raised in the answer

> "are vague and complainant is unable to address them without clarification. Because the counsel which filed the answer no longer represents Basin, complainant would request an opportunity to address any defenses which Basin still intends to assert after Basin clarifies the basis for such defense"..

Because complainant has had ample opportunity to address the defenses as clarified in respondent's memorandum, and complainant has not responded to respondent's motion, complainant has waived its opportunity to address the defenses.

further reduced to penalty amount of $1,465 requested by respondent because "complainant has not seen fit to oppose respondent's request for a reduced penalty in this case ...."). The Penalty Policy provides:

> When it is determined that a violator cannot afford the penalty prescribed by this policy, or that payment of all of a portion of the penalty will preclude the violator from acheiving compliance or from carrying out remedial measures which the Agency deems to be more important than the deterrence effect of the penalty (e.g. payment of the penalty would preclude proper closure/post-closure),

then straight penalty reductions may be considered.

Accordingly, no civil penalty is assessed, in view of the greater importance of applying respondent's financial resources to proper closure and post-closure care of the facility, as outlined in the following compliance order.

ORDER

It is hereby **ORDERED** that respondent shall comply with the following requirements:

1. To the extent that respondent is currently operating any hazardous waste management units at the site, immediately cease the addition of waste to any surface impounment, landfill or land treatment unit.

2. Not later than thirty days after receipt of this Order, cease all releases of hazardous waste or hazardous constituents to the soil, air and surface waters.

3. Not later than thirty days after receipt of this Order, submit to EPA and the Oklahoma State Department of Health (OSDH) a plan to identify and remediate all present releases of hazardous waste or hazardous constituents from the facility to the environment.

4. Not later than thirty days after receipt of this Order, submit to EPA and OSDH closure and post-closure plans which comply with the requirements of 40 CFR Subpart G, as incorporated by reference in Okla. Rules 7.1.6, 7.10, 7.12, 7.13 and Appendices 7A and 7C. After receiving comments on the proposed closure plan, respondent shall revise the plan to address fully all comments and shall resubmit it not later than thirty days after receipt of comments. Respondent in shall implement the plan as approved by OSDH.

5. Not later than sixty days after receipt of this Order, respondent shall submit a hydrogeologic investigation report and a proposed groundwater monitoring program for the facility. Not later than thirty days after approval of the groundwater monitoring program, respondent shall implement the program.

6. Not later than thirty days after receipt of this Order, respondent shall establish adequate financial assurance for closure and post-closure and submit evidence of such assurance to EPA.

7. Not later than thirty days after receipt of this Order,

respondent shall demonstrate financial responsibility for sudden and non-sudden accidental occurrences at the facility in accordance with Okla. Rule 7.1.15.1.1.

J. F. Greene
Administrative Law Judge

Dated: July 31, 1990
Washington, D.C.