UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
REGION I
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July 18, 2012

Eurika Durr
Clerk of the Board
Environmental Appeals Board
U.S. Environmental Protection Agency
Colorado Building
1341 G Street, N.W., Suite 600
Washington, D.C. 20005

Re: Brief in Response to Appellant's Notice of Appeal and Opening Brief
In the Matter of Munce's Superior Petroleum Products, Inc.
Docket No. CWA-01-2010-0040

Dear Ms. Durr:

Please find attached the response brief of Appellee, U.S. Environmental Protection Agency, Region 1 ("EPA"), in the above-captioned matter, filed herewith the U.S. EPA Environmental Appeals Board.

EPA and Appellant are continuing to negotiate in hopes of reaching a settlement in this matter. Yet, in order to ensure a timely filing, EPA is submitting this brief in response to Appellant's Notice of Appeal and Opening Brief now before a settlement agreement has been finalized.

Please note that I will be on vacation from July 23 to August 6, 2012, during which time questions and correspondence should be directed to Attorney Jeff Kopf of this office. Mr. Kopf can be reached at 617-918-1796.

Respectfully submitted,

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BEFORE THE ENVIRONMENTAL APPEALS BOARD
UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C.

IN RE:	)	
	)	EPA Region 1
Munce's Superior Petroleum Products, Inc.	)	EPA Docket No.:
620 Main Street	)	CWA-01-2010-0040
Gorham, New Hampshire 03581	)	
	)	
Appellant.	)	
	)	

RESPONSE BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, REGION 1

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INTRODUCTION

Complainant, U.S. Environmental Protection Agency, Region 1 ("EPA"), provides this response brief, in accordance with the Consolidated Rules of Practice, 40 C.F.R. § 22.30(a)(2), in opposition to the Appellant's Notice of Appeal in the above-captioned matter. Appellant's Notice of Appeal was filed with the Regional Hearing Clerk on June 18, 2012.

QUESTIONS PRESENTED BY APPELLANT

I. Did EPA's administrative penalty action against the Appellant violate the automatic stay requirement of section 362(a) of the Bankruptcy Code, 11 U.S.C. § 362(a), ("automatic stay")?

II. Does the Bankruptcy Court have exclusive jurisdiction to fix the value of EPA's penalty assessment against Appellant given that EPA has filed a proof of penalty claim in the Appellant's pending bankruptcy proceeding?

III. Did the Default Order, entered against Appellant by the Acting Presiding Officer for Region 1 (the "APO") on May 17, 2012, violate the automatic stay by establishing that payment of the assessed penalty was due within 30 days of the date on which the Default Order became final?

FACTUAL AND PROCEDURAL BACKGROUND

EPA filed an Administrative Complaint and Notice of Opportunity to Request a Hearing ("Complaint") in this matter on July 21, 2010 against Munce's Superior Petroleum Products, Inc. ("MSPPI") and Munce's Superior, Inc. ("MSI") (collectively, "Appellant"). The Complaint alleged that Appellant violated certain provisions of the Clean Water Act ("CWA") and attendant regulations by 1) failing to respond to an information request as required by § 308 of the CWA, 33 U.S.C. § 1318, and 2) failing to prepare and/or fully implement a Spill Prevention, Control and Countermeasure ("SPCC") plan at certain of Appellant's properties as required under § 311(j) of the CWA, 33 U.S.C. § 1321(j), and attendant regulations. *Complaint* at 9. On March 16, 2011, Appellant filed for Chapter 11 bankruptcy in the United States Bankruptcy Court for the District of New Hampshire; this bankruptcy proceeding is ongoing.

After Appellant failed to timely file an Answer to the Complaint, EPA filed a Motion for Default Order on July 12, 2011 and requested that a penalty of $46,403 be assessed against Appellant. Before ruling on this motion, the APO issued an Order to Clarify and Supplement the Record ("Clarification Order") on December 15, 2011. On January 27, 2012, Appellant submitted a Suggestion of Bankruptcy and Response to Order to Clarify and Supplement the Record ("Respondent's Suggestion") in which Appellant claimed that 1) because EPA had filed a proof of claim in Appellant's bankruptcy case for civil penalties for CWA violations, EPA's civil penalty claim could only be adjudicated in the Bankruptcy Court and not in an administrative proceeding before an APO; and 2) EPA's administrative penalty action must be stayed pending resolution of the bankruptcy proceeding. *Respondent's Suggestion* at ¶ 4.

In its response to the Clarification Order and to Respondent's Suggestion ("Complainant's Response to Clarification Order"), EPA explained that the administrative penalty action against Appellant qualified for an exception under the Bankruptcy Code to the automatic stay, which exempts legal proceedings by governmental units acting under their police or regulatory powers. *Complainant's Response to Clarification Order* at 4; *see also* Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4). EPA further informed the APO that as a result of this exception, Appellant's bankruptcy proceeding did not require a stay of the administrative penalty action and the automatic stay did not affect EPA's authority to seek entry of a civil penalty judgment for Appellant's environmental law violations. *Complainant's Response to Clarification Order* at 4-5.

Subsequently, the APO made the following determinations: 1) that Appellant's bankruptcy proceeding did not prevent the entry of a default judgment against Appellant, *Initial Decision* at 7; 2) that Appellant was in default for failing to file an Answer to the Complaint, and

that therefore, Appellant was deemed to have admitted to all of the facts alleged in the Complaint, *Init. Dec.* at 8; and 3) that Appellant violated §§ 308 and 311 the CWA and attendant regulations in the manner alleged in the Complaint, *Init. Dec.* at 8-11. After considering several factors in accordance with EPA's "Civil Penalty Policy for Section 311(b)(3) and Section 311(j) of the Clean Water Act" (the "CWA Penalty Policy"), the APO assessed a penalty of $46,403 for Appellant's CWA violations. *Init. Dec.* at 15-21.

Appellant timely filed a Notice of Appeal of this Initial Decision on June 18, 2012. As a basis for its appeal, appellant again raises the arguments that its pending bankruptcy proceeding stripped the APO of jurisdiction to assess a civil penalty against it and that EPA's administrative penalty action was subject to the automatic stay. *Brief for Appellant* at 6-8. On July 3, 2012, EPA filed an unopposed motion with the Environmental Appeals Board ("EAB") for an extension of time to file its brief in response to Appellant's Notice of Appeal and Opening Brief. On July 6, 2012, the EAB granted EPA's motion and allowed EPA until July 30, 2012 to file this brief in response.

STANDARD OF REVIEW

In enforcement proceedings under 40 C.F.R. Part 22, the EAB must either "adopt, modify, or set aside the findings of fact and conclusions of law or discretion contained in the decision or order being reviewed, and shall set forth in the final order the reasons for its actions." 40 C.F.R. § 22.30(f). The EAB has interpreted this to mean that it "reviews an [administrative law judge's] factual findings and legal conclusions *de novo*." *In re Vico Constr. Corp. and Amelia Venture Properties, L.L.C.*, 12 E.A.D. 298, 313 (EAB 2005). The EAB reviews penalty determinations *de novo*, but "generally will not substitute its judgment for that of a presiding

officer absent a showing that the presiding officer committed clear error or an abuse of discretion in assessing the penalty." *In re Phoenix Constr. Servs., Inc.*, 11 E.A.D. 379, 390 (EAB 2004).

SUMMARY OF THE ARGUMENT

The APO acted correctly to enter a default judgment against Appellant and to fix the value of the penalty owed by Appellant for violations of the CWA and attendant regulations. Because the administrative penalty action was an exercise of EPA's police and regulatory authority to protect the public health and welfare, the penalty action was exempt from the automatic stay pursuant to the exception set forth at Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4). Therefore, Appellant's ongoing bankruptcy proceeding had no bearing on the legality of EPA's administrative penalty action against Appellant. As a result, EPA's administrative proceeding was the proper venue to both establish that Appellant violated environmental laws and to assess the total amount of the penalty owed for such violations.

Furthermore, the automatic stay exemption allows actions that seek an entry of a judgment; in contrast, actions to enforce, i.e. collect on, a monetary judgment are prohibited by the automatic stay. The APO's entry of a default order that established the date upon which the penalty assessed against Appellant became due was not a proceeding to collect the assessed penalty. Such an action would require an attempt to seize Appellant's property in satisfaction of the penalty assessment. Instead, the Default Order was an entry of a judgment against Appellant, and was therefore permitted under the automatic stay exemption.

ARGUMENT

I. EPA's administrative penalty action against Appellant was exempt from the automatic stay.

Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4), provides that when a governmental unit engages in a legal action against a party that has filed for bankruptcy, such

action is not subject to the automatic stay if the purpose of the action is to exercise the police or regulatory powers of the governmental unit. Otherwise, the automatic stay operates to halt any legal proceedings that would affect a bankrupt party's assets. 11 U.S.C. § 362(a). Thus, as Appellant correctly points out, legal actions by a governmental unit are not exempt from the automatic stay if they do not qualify as an exercise of police or regulatory power. *Brief for Appellant* at 6. To determine whether a governmental action is an exercise of police or regulatory power, and would therefore be exempt from the automatic stay, courts ask what the primary purpose of the action is. *See, e.g., Safety-Kleen, Inc. v. Wyche*, 274 F.3d 846, 865-66 (4th Cir. 2001); *In re Commerce Oil Co.*, 847 F.2d 291, 295 (6th Cir. 1988); *In re Strong*, 2002 Bankr. LEXIS 1783, at *9-10 (Bankr. D. Neb.); *Martin v. Safety Electric Constr. Co.*, 151 B.R. 637, 639 (D. Conn. 1993); *In re Chateaugay Corp.*, 115 B.R. 28, 31 (Bankr. S.D.N.Y. 1988). If the purpose of the governmental unit's legal action is "to promote public safety and welfare or to effectuate public policy, [the automatic stay exception at] § 362(b)(4) applies," but if the governmental unit seeks "to protect the government's pecuniary interest in the debtor's property or to protect private rights, § 362(b)(4) does not apply." *In re Strong*, 2002 Bankr. LEXIS 1783, at *10.

EPA exercised its police and regulatory power in initiating and prosecuting the administrative penalty action against Appellant because the agency's primary purpose in doing so was to advance public policy by enforcing and upholding a set of environmental laws that protect the public health and safety. *See* CWA § 101(a), 33 U.S.C. § 1251(a) (outlining public policy objectives of the CWA); *In re Commerce Oil Co.*, 847 F.2d at 296 (explaining that "punishing wrongdoers, deterring illegal activity [and]...providing for the costs of administration ...are exercises of the [government's] regulatory power to effectuate public policy"). The

legislative history of the automatic stay clearly explains that when a governmental unit sues a debtor "to prevent or stop violation of fraud, *environmental protection*, consumer protection, safety or similar police or regulatory laws, or attempt[s] *to fix damages for violation of such law*, the action should not be stayed by section 362." S. Rep. No. 989, 95th Cong., 2d Sess. 52 (1978) (emphasis added). One of the main objectives of a penalty action against a violator of environmental law is to prevent or stop such violations by making noncompliance more expensive than compliance and thereby encourage business practices that are in keeping with environmental regulations. As one court explained, "[a]ny pecuniary benefit accruing to the government is of secondary importance to this regulatory interest." *United States v. LTV Steel Co.*, 269 B.R. 576, 583 n.8 (W.D. Pa. 2001).

The opinion in *United States v. LTV Steel Co.*, which pertained to an enforcement action under the Clean Air Act, offers a clear explanation for why penalty actions qualify as an exercise of police or regulatory power. In *LTV Steel*, the court explained that "the government's ability to seek civil penalties to punish those companies that violate [environmental law] is one of the primary regulatory enforcement tools [granted by Congress]…and falls squarely within the ordinary meaning of 'police and regulatory power.'" *Id.* at 582. The court went on to explain that "the threat of civil penalties is a valuable deterrent" and "a primary regulatory tool" available to EPA to prevent environmental degradation. *Id.* at 583. The court further reasoned that if deterrence was not considered a police or regulatory power, and was therefore not exempted from the automatic stay, "there would be little incentive for companies 'teetering on the edge of the bankruptcy abyss' to comply with [environmental laws], as even the calculation of a civil penalty could be avoided with the filing of a bankruptcy petition." *Id.* at 583 n.8 (quoting *In re Berg*, 230 F.3d 1165, 1168 (9th Cir. 2000)).

The overwhelming consensus of federal and administrative case law supports the proposition that administrative penalty actions are an exercise of a governmental unit's police or regulatory authority and are, therefore, exempt from the automatic stay. The EAB has held that the automatic stay exemption "covers actions…where the agency is seeking to assess a penalty for past violations of environmental regulations." *In re: Patrick J. Neman*, 5 E.A.D. 450, 454 n.1 (EAB 1994). Numerous federal courts have arrived at this conclusion as well. *See, e.g.*, *Safety-Kleen, Inc.*, 274 F.3d at 865-66 (explaining that legal proceedings initiated for the purpose of deterring environmental noncompliance are not subject to the automatic stay); *In re Commerce Oil Co.*, 847 F.2d at 296 (finding that a hearing, the primary purpose of which is "to determine whether and to what extent [an environmental law] was violated and to review the damages and penalties assessed…in light of those violations," is "a regulatory action in the purest sense"; *United States v. Nicolet, Inc.*, 857 F.2d 202, 209 (3rd Cir. 1988) (concluding that exemptions to the automatic stay allow EPA to assess civil penalties for violations of environmental statutes); *In re Strong*, 2002 Bankr. LEXIS 1783, at *10 (explaining that "[s]tate and federal enforcement of environmental protection laws and regulations against debtors has been allowed to proceed under § 362(b)(4) because the primary purpose of such laws is to promote public safety and welfare").

Furthermore, as Appellant was aware before filing notice of this appeal, the United States Bankruptcy Court for the District of New Hampshire has already issued an order in Appellant's bankruptcy case that held that an administrative penalty action for violations of oil spill laws is exempt from the automatic stay. In June 2011, the United States Bankruptcy Court for the District of New Hampshire issued an order ruling that the automatic stay did not apply to an action brought against Appellant by the State of New Hampshire in which the state sought, *inter*

alia, an entry of judgment for civil penalties for state environmental law violations.[1] *In re Munce's Superior Petroleum Products, Inc.*, No. 11-10975-JMD, slip op. at 1 (Bankr. D.N.H. June 21, 2011). The nature and alleged violations in the State's action were very similar to those in EPA's administrative penalty action. The State's suit alleged that Appellant violated "New Hampshire's oil discharge or spillage laws…by causing or suffering the discharge of oil from their facilities and failing to construct and maintain required spill protection at their facilities." Petition for Preliminary and Permanent Injunctive Relief and Civil Penalties at 1, *State of New Hampshire Department of Environmental Services v. Munce's Superior Petroleum Products, Inc.* (New Hampshire Superior Court, July 19, 2010). Similarly, EPA's administrative penalty action alleged violations of EPA's Spill Prevention, Control and Countermeasure Rule set forth at 40 C.F.R. Part 112, the purpose of which is to prevent the discharge of oil into waters of the United States. *Complaint* at 9-15; *see* 40 CFR § 112.1(a)(1).

Thus, the Bankruptcy Court handling Appellant's case has already determined that the State's suit against Appellant is exempt from the automatic stay, and may therefore proceed, because the State's suit was "brought for the purpose of protecting public health and safety, and the environment, and to effectuate public policy." *In re Munce's Superior Petroleum Products, Inc.*, No. 11-10975-JMD, slip op. at 1 (Bankr. D.N.H. June 21, 2011). There is no question, therefore, that EPA's administrative penalty action, which seeks civil penalties for markedly

[1] Appellant argues that this order is not relevant to the question of whether the APO in EPA's administrative penalty action had the authority to fix the value of the penalty owed by Appellant for its CWA violations. *Brief for Appellant* at 8. Appellant's reason for this argument seems to be that, unlike in EPA's assessment of civil penalties, the State was not required to consider the economic impact of a penalty on the Appellant before seeking entry of a judgment. Whatever the State of New Hampshire's procedure for determining and levying penalties on environmental law violators, any such difference between federal and state policy has no bearing on the key issue, which is that the United States Bankruptcy Court for the District of New Hampshire has already ruled that a governmental unit seeking entry of judgment for civil penalties for violations of environmental oil spill laws is not subject to the automatic stay provision. *In re Munce's Superior Petroleum Products, Inc.*, No. 11-10975-JMD, slip op. at 1 (Bankr. D.N.H. June 21, 2011).

similar violations, also qualifies for an exemption under the automatic stay for the same reasons that the Bankruptcy Court has already articulated.

Because EPA's administrative penalty action against Appellant fits into the "police and regulatory powers" exemption of § 362(b)(4) of the Bankruptcy Code, that legal proceeding was not subject to the automatic stay. As a result, the Bankruptcy Court did not, as Appellant contends, have exclusive jurisdiction to adjudicate EPA's claim against Appellant. *Brief for Appellant* at 6-7. Contrary to Appellant's suggestion, it is immaterial that the reason for Appellant's noncompliance with the CWA was Appellant's insolvency. *Id.* at 6. Appellant's financial situation did not change the objective of EPA's administrative penalty action, which was to deter further legal infractions and to encourage compliance with environmental laws. As established above, this is a regulatory purpose, not a pecuniary one, and therefore, the administrative proceeding was the proper venue for adjudicating EPA's administrative penalty claim against Appellant.

II. Because EPA's administrative penalty action against Appellant was exempt from the automatic stay, the APO was not precluded from fixing the amount of the penalty to be assessed against Appellant.

Appellant cites no legal authority for its contention that, "[e]ven if the underlying administrative action is not stayed by section 362 of the Bankruptcy Code, the Bankruptcy Court remains the proper venue for fixing the value of the EPA's claim." *Brief for Appellant* at 7. On the contrary, since EPA's administrative penalty action was not subject to the automatic stay, that proceeding was the proper venue for both determining that Appellant owed a penalty for its environmental violations and for fixing the value of that penalty. *See First Alliance Mortg. Co. v. First Alliance Mortg. Co.*, 264 B.R. 634, 648 (C.D. Cal. 2001) (holding that "the regulatory

and police powers exception [contained in § 362(b)(4)]...includes actions to *fix the amount of damages* for past conduct....") (emphasis added).

In support of its argument that the Bankruptcy court was the "proper" venue for determining the penalty amount owed to EPA, Appellant suggests that, since the Bankruptcy Court is the repository for all of its financial information, the Bankruptcy Court was best suited to determine what the value of the penalty should be. *Brief for Appellant* at 7. Appellant misunderstands the distinction between the purpose of EPA's administrative proceeding and the purpose of the bankruptcy proceeding. The EPA administrative proceeding was the proper venue for assessing the amount that is owed as a penalty for Appellant's environmental law violations. This process establishes that Appellant owes a debt to EPA and determines the value of that debt. The Bankruptcy Court, on the other hand, is the proper venue for determining how much a given creditor will receive in payment for a debt. *See* 11 U.S.C. §§ 1121-1129. Thus, although EPA's administrative proceeding would not be the proper venue for determining how much of Appellant's estate should go toward satisfying its debt to the government, EPA's administrative proceeding was the proper venue for fixing the total value of that debt.

Appellant also asserts that only the Bankruptcy Court may determine the amount of the penalty owed by Appellant to EPA because "EPA has submitted itself to the Bankruptcy Court's jurisdiction by filing a proof of claim." *Brief for Appellant* at 8. Again, Appellant misunderstands the different functions of each proceeding. By filing a proof of claim with the Bankruptcy Court, EPA did not concede exclusive jurisdiction to that venue to adjudicate the value of EPA's administrative penalty claim against Appellant. Rather, filing a proof of claim served only to establish, for purposes of the Bankruptcy Court's eventual distribution of

Appellant's assets to creditors, that EPA had a right to receive payment on a debt owed by Appellant. *See* 11 U.S.C. §§ 101(5), 501.

Nor is it relevant to the question of which venue was proper for assessing the value of EPA's administrative penalty claim that the CWA requires "the Administrator or the Secretary, as the case may be, [to] take into account [in determining the amount of a penalty owed] the nature, circumstances, extent and gravity of the violation, …[the violator's] ability to pay, …the degree of culpability, economic benefit or savings (if any) resulting from the violation, and such other matters as justice may require." 33 U.S.C. § 1319(g)(3). Appellant is correct that these factors "must be considered by the authority fixing the EPA's claim." *Brief for Appellant* at 7. In Appellant's case, since EPA's administrative penalty action was not subject to the automatic stay, the appropriate authority to fix the value of Appellant's penalty was the APO.

Because Appellant failed entirely to respond to the complaint or to submit evidence to the APO of its inability to pay a penalty, the APO correctly did not make allowances in fixing the value of the penalty for Appellant's financial situation. *Init. Dec.* at 14. Appellant's suggestion that only the Bankruptcy Court could fix a value on EPA's administrative penalty claim because Appellant chose to share its financial information only with the Bankruptcy Court, and not the APO, is unsupported by any legal source. *Brief for Appellant* at 7. Appellant further suggests that, because Appellant's filing of a Suggestion of Bankruptcy must have made the APO aware of its financial situation, the APO should have taken Appellant's insolvency into account in determining the penalty amount. *Id.* However, EPA's CWA Penalty Policy provides:

> "Absent reliable information to the contrary, the litigation team should assume that the violator is viable, and that economic impact is minimal and not sufficient to cause a reduction to the proposed settlement…. [The economic impact of the penalty on the violator] should only be applied after analysis of copies of actual federal tax returns, audited financial statements, or financial information of comparable reliability."

"Civil Penalty Policy For Section 311(b)(3) and Section 311(j) of the Clean Water Act," Office of Enforcement and Compliance Assurance, at 15 (August 1998). Appellant submitted no financial data to the APO in EPA's proceeding. In order to have its extenuating circumstances considered in the determination of the penalty amount, the onus was on Appellant to respond to EPA's Complaint and submit the necessary information to EPA's administrative proceeding. Since Appellant failed to do this, the APO was correct to follow EPA's established policy and assume that Appellant was financially viable when setting the amount of the penalty. Furthermore, Appellant's ability to pay the penalty will effectively be considered in the bankruptcy proceeding wherein the court will determine the actual portion of the total debt to EPA that Appellant must pay.

III. The Default Order entered against Appellant did not violate the automatic stay by requiring the Appellant to pay the assessed penalty within 30 days of the date on which the Default Order became final.

As explained in the legislative history of the automatic stay, "...the [automatic stay] exception extends to permit...the entry of a money judgment, but does not extend to permit enforcement of a money judgment...." H.R. Rep. No. 595, 95th Cong., 2d Sess. 343 (1978). Accordingly, numerous federal courts have held that the automatic stay exception permits a governmental unit to fix civil liability and to enforce present compliance with environmental laws, even where an expenditure of funds may be necessary, as long as no attempt is made to collect on a monetary judgment based upon past violations.

The Third Circuit has provided a very useful explanation of the significance, for purposes of applying the automatic stay, of the difference between a legal proceeding to enter a judgment against a party that has filed for bankruptcy and an enforcement action to collect on such a judgment:

> "In common understanding, a money judgment is an order entered by the court or by the clerk, after a verdict has been rendered for plaintiff, which adjudges that the defendant shall pay a sum of money to the plaintiff. . . . As the legislative history [of the automatic stay] explicitly notes, the mere *entry* of a money judgment by a governmental unit is not affected by the automatic stay, provided of course that such proceedings are related to that government's police or regulatory powers.
>
> "Quite separate from the entry of a money judgment, however, is a proceeding to *enforce* that money judgment. The paradigm for such a proceeding is when, having obtained a judgment for a sum certain, a plaintiff attempts to seize property of the defendant in order to satisfy that judgment. It is this seizure of a defendant-debtor's property, to satisfy the judgment obtained by a plaintiff-creditor, which is proscribed by subsection 362(b)(5)."

Penn Terra Ltd. v. Dept. of Environ. Resources, 733 F.2d 267, 275 (3rd Cir. 1984) (emphasis in original). *Accord NLRB v. 15th Ave. Iron Works, Inc.*, 964 F.2d 1336, 1337 (2nd Cir. 1992) (explaining that the entry of a money judgment against the respondent was permitted under the Bankruptcy Code, but that the collection of funds under that judgment "requires a separate application to the bankruptcy court"); *NLRB v. Continental Hagen Corp.*, 932 F.2d 828, 834-35 (9th Cir. 1991) (finding that an entry of judgment pursuant to the enforcement provision of the NLRB's statute was permissible, but collection was not because "circuit and bankruptcy courts have drawn a distinction between the use of the terms 'entry' and 'enforcement' with regard to [the automatic stay provision]"); *Nicolet, Inc.*, 857 F.2d at 209 (holding that "[b]y simply permitting the government's claim to be reduced to a judgment, no seizure of property takes place," and "that Congress carefully made only enforcement of a money judgment subject to the automatic stay indicates strongly that mere entry of the judgment was not intended to be proscribed"); *Chao v. BDK Indus., L.L.C.*, 296 B.R. 165, 169 (C.D. Ill. 2003) (explaining that "the Bankruptcy Code draws a distinction between entry and enforcement of a money judgment, allowing entry but not enforcement"); *In Re: Travacom Communications, Inc.*, 300 B.R. 635,

638 (W.D. Pa. 2003) (explaining that "a governmental agency does not run afoul of an automatic stay" when the agency seeks to have a judgment entered against a defendant who has filed for bankruptcy as long as the agency "refrains from then attempting to enforce such judgment"); *LTV Steel Co.*, 269 B.R. at 582 (finding that "in language that is clear and unambiguous… Section 362(b)(4) only limits the government's police and regulatory power to *enforce* a money judgment outside of the bankruptcy" and that "[t]he government's power to seek *entry* of a civil penalty judgment for violations of the environmental laws is not precluded") (emphasis in original).

Thus, issuance of the Default Order against Appellant was proper in this action because the order constituted an entry of a judgment against Appellant, not an attempt to collect payment on the judgment. EPA fully understands that in order to collect on the judgment, it must go through the Bankruptcy Court. However, because the Default Order states that payment of the penalty "shall be made no later than 30 days from the date on which this Initial Decision becomes a final order," *Default Order* at 22, Appellant wishes to characterize the Default Order as an action to enforce a judgment against it. *Brief for Appellant* at 8-9. This characterization is incorrect. The language in the Default Order requiring payment to be made within 30 days of the decision becoming final merely establishes that once that 30-day time period has passed, Appellant owes EPA a debt. Without such language establishing when the penalty payment is due, EPA would not be able to show in the bankruptcy proceeding that it is a creditor of Appellant. Moreover, the Default Order does not qualify as an action to enforce the judgment against Appellant because nothing in the Default Order attempts "to seize property" of the Appellant "in order to satisfy that judgment." *Penn Terra Ltd.*, 733 F.2d at 275.

CONCLUSION

The EAB should affirm the APO's penalty assessment because the entire administrative penalty action, including the entry of a judgment against Appellant, was permitted pursuant to the automatic stay exception for governmental units at Section 362(b)(4) of the Bankruptcy Code, 11 U.S.C. § 362(b)(4). Additionally, the APO did not commit clear error or an abuse of discretion in imposing an administrative penalty of $46,403 on the Appellant. The EPA legal team arrived at this penalty amount by attentively applying the factors outlined in the CWA Penalty Policy, and the APO also considered these factors herself before entering the Default Order. Finally, the Default Order constitutes an entry of judgment against Appellant because it merely sets the due date for a debt that may be collected through the bankruptcy proceeding. The Default Order is not an enforcement action, and is therefore not prohibited by the automatic stay.

For the foregoing reasons, EPA requests that the EAB affirm the APO's penalty assessment against Appellant.

Respectfully submitted,

7/18/12
Date

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CERTIFICATE OF SERVICE

I hereby certify that the original and copies of this Response Brief were filed in the following manner on July 18, 2012:

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