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## UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

### BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	)	
	)	
U. S. DEPARTMENT OF THE NAVY,	)	Docket No. RCRA-
III - 9006 - 062	)	
Naval Air Station Oceana,	)	
	)	
Respondent	)	

**ORDER STAYING  
PROCEEDINGS AS TO LIABILITY ISSUES**

By Motion dated May 20, 1999, Respondent requested an order staying proceedings as to the penalty in this matter. Complainant had no objection to the Motion, and by Order dated June 4, 1999, the stay was granted until the date that the Department of Justice Office of Legal Counsel issues its opinion as to EPA's authority to assess penalties against Federal facilities for alleged violations of UST requirements. The present Order stays proceedings as to issues of liability for the reasons set forth below.

The Complaint in this matter was filed on September 29, 1998, pursuant to Section 9006 of the Resource Conservation and Recovery Act (RCRA). The Complaint alleged two counts of violation arising from Respondent's alleged failure to maintain certain equipment on underground storage tanks (USTs) at Respondent's facility at the Naval Air Station Oceana. Count I of the Complaint was withdrawn by Order dated January 21, 1999. On January 12, 1999, Respondent served a Motion for Partial Accelerated Decision as to Count II of the Complaint. Complainant responded and filed a Cross Motion for Accelerated Decision on January 27, 1999 (Cross Motion). The parties filed responsive pleadings, and on April 13, 1999, presented oral argument on their respective motions for accelerated decision.

On April 16, 1999, the General Counsel of the Department of Defense, pursuant to

Executive Order 12146, submitted to the Department of Justice Office of Legal Counsel (OLC) a request for an opinion on whether EPA has authority to assess monetary penalties for violations of RCRA section 9006 . On May 20, 1999, Respondent requested a stay of the penalty portion of this proceeding, in light of the request and the binding effect of OLC's opinion on both parties. Respondent clarified that such stay would not affect Part II (allegations of Count II) and Part III (the Compliance Order) of the Complaint. The stay was requested until the dispute is resolved by OLC, provided that if Respondent prevails on the issue of liability, the stay should be lifted and an "initial decision" entered. In response, stating that it does not object to the Motion to Stay, Complainant asserted that it is EPA's understanding that OLC has requested that the parties stay the proceedings before EPA, and that a decision from OLC could be rendered as early as July of 1999.

A stay of proceedings is a matter of discretion for the presiding judge. See, *Landis v. North American Co.*, 299 U.S. 248, 254-55 (1936); *Unitex Chemical Corp.*, EPA Docket No. TSCA-92-H-08, 1993 EPA ALJ LEXIS 146 (ALJ, Order Staying Proceedings, March 18, 1993)(granting a stay of one year or until decision by D.C. Circuit, whichever occurs first, where D.C. Circuit had already scheduled briefs and oral argument, and decision would affect most or all claims in the administrative proceeding). Generally, both liability and penalty issues are stayed where the purpose of ruling on liability is for the purpose of determining whether or not a respondent is subject to a penalty. Where a ruling on liability also affects the issue of whether or not to impose a compliance order, proceedings have been stayed only as to the penalty. This partial stay allows a decision on liability and imposition of a compliance order to be issued expeditiously, avoiding delay in a respondent's compliance with the statutes and regulations at issue. See, *Department of the Army, Walter Reed Army Medical Center*, EPA Docket No. RCRA-III-9006-052 and *Department of the Army, Walter Reed Army Medical Center, Forest Glen Annex*, EPA Docket No. RCRA-III-9006-054 (Summary of Prehearing Conference, and Order Granting Motion for Accelerated Decision as to Liability and Granting Request for Stay of Proceedings as to Penalty Issues, May 25, 1999)(ordering respondent to comply with the compliance order proposed in the complaint).

However, where the parties have established that the respondent has already complied with the compliance order set forth in the complaint, issues of liability therein become moot, except with respect to any penalty issues. See, *United States Air Force, Tinker Air Force Base*, EPA Docket No. UST-6-98-002-A0-1 (ALJ, May 19, 1999)(where parties established that respondent complied with compliance order, ruling on motion for accelerated decision that EPA is not authorized to assess punitive penalties against Federal agencies for UST violations disposes of all issues in the proceeding, including issues of liability).

The Compliance Order set forth in the Complaint in this proceeding requires Respondent to fulfill the following three requirements: (1) to come into compliance with the regulations Respondent is alleged in Count I to have violated, by providing release detection monitoring for two USTs at its facility; (2) to "come into compliance with 40 C.F.R. § 280.20(c)(1)(i) . . . for tank 830C either by certifying that the fill pipe without spill prevention equipment remains, and will remain, locked and unavailable for use, or by installing spill prevention equipment on the fill pipe currently without spill prevention equipment;" and (3) within 45 days of the effective date of the Compliance Order, to submit a written report to EPA certifying Respondent's compliance with the terms of the Compliance Order.

Count I of the Complaint having been withdrawn, the first requirement is irrelevant to the remaining issues of liability, which pertain only to Count II. The second requirement has been satisfied, as shown in the Affidavit of James Bailey, dated January 20, 1999, and in the inspection report, attached respectively as Exhibits 4 and 7 to Complainant's Cross Motion for Accelerated Decision on Liability. Mr. Bailey states in his Affidavit that he performed the inspection of Respondent's facility on July 31, 1997, which gave rise to the Complaint. Mr. Bailey states further therein that Respondent's facility representative "agreed to lock the fill pipe that lacked spill control equipment by placing a padlock through the twin latches on the assembly, so that product transfers through that pipe would be impossible without a key to the lock." The inspection report states that "[a] lock

was installed on the unsecured fill port during the inspection," and indicates that the pipe would be unavailable for use to fill the tank. This report was referenced by counsel for Respondent on the record at the oral argument on April 13, 1999, in the following excerpt from the transcript:

LT. DOOLIN [Lieutenant Joel A. Doolin, counsel for Respondent]: \* \* \* \*  
Interesting though, in that same observation of the single - of the  
inspector - his name is Jim Bailey, and you've read his affidavit,  
there's also a footnote showing two things, Your Honor. One, immediate  
corrective action was taken . . . . And let me quote you in Mr. Bailey's  
own words, as documented in the Complainant's own exhibit. Quote, "This  
situation was corrected during the inspection. Facility personnel  
installed a lock on the second fill port cap. After this action fuel  
could be added to the tank only via the primary fill port."\* \* \* \*

Tr. 16. As of the date of the oral argument, the pipe was still locked, as indicated by Lieutenant Doolin's statement at the oral argument: ". . . the tank right now, the cap is capped and locked." Tr. 28. Counsel for Complainant does not dispute that the cap on the pipe at issue is properly locked.

The parties have not established as satisfied the one remaining requirement of the Compliance Order, that is for Respondent to formally report to EPA within 45 days its compliance with the Order. However, there is no compelling need to impose such a requirement prior to a decision on the penalty issues in this proceeding, particularly where the issues of liability are complex and highly contested, and where preparation of a decision on the penalty issues in this proceeding likely will be commenced within the next few months.<sup>(1)</sup> Thus, a determination on issues of liability in this proceeding is essentially moot in relation to the Compliance Order.

This proceeding is hereby **STAYED** with respect to all issues of liability, as well as issues as to the penalty, until the date that the Department of Justice Office of Legal Counsel issues its opinion as to EPA's authority to assess penalties against Federal facilities for alleged violations of UST requirements.

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Susan L. Biro  
Chief Administrative Law Judge

Dated: July 6, 1999  
Washington, D.C.

1. The OLC is expected to issue its decision as to EPA's authority to assess penalties against Federal facilities for UST violations within the next couple of months.



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