

4/25/91

UNITED STATES  
ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF )  
 )  
URSCHEL LABORATORIES, INC., ) Docket No. V-W-89-R-35  
 )  
Respondent )

INTERLOCUTORY ORDER FOR  
PARTIAL ACCELERATED DECISION AS TO LIABILITY AND  
DENYING RESPONDENT'S MOTION FOR ACCELERATED DECISION

Pursuant to Section 22.20(a) of the Consolidated Rules of Practice, 40 C.F.R. Part 22, I hereby render, sua sponte, a partial accelerated decision in favor of the U.S. Environmental Protection Agency (EPA or Complainant) as to liability in this proceeding without further hearing.

I. Background

This proceeding was initiated on July 17, 1989, when an administrative complaint was filed under Section 3008(a)(1) of the Resource Conservation and Recovery Act of 1976, as amended (RCRA or the Act), 42 U.S.C. § 6928(a)(1). The complaint alleged that Urschel Laboratories, Inc. (Respondent) owns and operates a facility which generates, treats and stores hazardous waste, and that Respondent failed to demonstrate proof of financial assurance for bodily injury and property damage to third parties caused by sudden accidental occurrences arising from operations of the facility, in violation of Subtitle C of RCRA, Section 3004,

42 U.S.C. § 6924; the Indiana Administrative Code (I.A.C.), Ind. Rev. Stat. 1985, as amended; and regulations adopted by the Indiana Environmental Management Board, including Title 329 I.A.C. 3-22-24.

Respondent filed an answer on July 31, 1989, denying generally the violations alleged in the complaint and setting forth two affirmative defenses: first, that it requested a variance for liability insurance, pursuant to 320 I.A.C. 4.1-22-24(c), from the Indiana Department of Environmental Management (IDEM), and second, that it requested from IDEM an administrative change of status from a treatment, storage, or disposal facility to a "small quantity generator," providing it with a closure plan. Respondent stated that these requests had not been finally acted upon as of the date of the answer.

Both parties submitted prehearing exchange documents. On May 8, 1990, Respondent filed a Motion for Accelerated Decision and Judgment for Respondent (Motion), with attached statement of material facts as to which Respondent contends no genuine issue exists (Statement), and proposed conclusions of law. Complainant filed objections to the motion (Objection), and Respondent submitted a response to Complainant's objections and response to Complainant's corrected prehearing exchange.

Respondent owned two 1,000 gallon fiberglass tanks buried next to its machinery manufacturing facility in Valparaiso, Indiana. One tank held water-soluble waste, primarily spent cutting and cooling oils. The other held primarily naptha, degreasers, solvents and spent machinery oils, which were petroleum based

waste.<sup>1</sup> Consequently, Respondent was deemed an owner or operator of a facility which stores hazardous waste; such waste included EPA hazardous waste Numbers F001, D001 and D002 as listed by regulation, 40 C.F.R. Part 261, Subparts C and D. Respondent was therefore subject to standards for owners and operators of hazardous waste treatment, storage and disposal facilities, set forth in 329 I.A.C. 3.1-1 et seq.<sup>2</sup>

On November 19, 1980, Respondent filed a notification of hazardous waste activity, and on January 19, 1983 Respondent filed Part A of the RCRA permit application with the EPA.<sup>3</sup> Due to the tardiness of that filing, EPA entered into a Consent Agreement with Respondent allowing it to operate as if it had interim status until a final permit determination is made.<sup>4</sup> On October 18, 1985, IDEM advised Respondent that there was no record of financial assurance for closure or liability coverage as required by 320 I.A.C. 4.1-22-1 through 4.1-22-35.<sup>5</sup> Respondent sent IDEM letters stating that, because it planned to store material in the tanks for less than 90 days before being disposed of elsewhere, Respondent was not a treatment, storage or disposal (TSD) facility, and therefore

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<sup>1</sup>Statement ¶2; Exhibits C, E, attached to Statement; Answer, Exhibits 1, 3.

<sup>2</sup>Complaint ¶¶ 7, 8; Answer ¶¶ 7, 8, Exhibit 3; Complainant's Prehearing Exchange (PHE), Exhibit 2.

<sup>3</sup>Complaint ¶7, Answer ¶7.

<sup>4</sup>Complaint ¶9; Answer ¶9; Complainant's PHE, Exhibit 3.

<sup>5</sup>Complaint ¶11; Answer ¶11; Complainant's PHE, Exhibit 4. The regulations have since been revised, and the relevant sections are renumbered 329 I.A.C. 3-22-1 through 3-22-35.

requested a "generator only" permit.<sup>6</sup> The request was denied because Respondent currently stored hazardous waste for longer than 90 days, and Respondent was informed by IDEM that it was subject to closure requirements.<sup>7</sup>

On July 29, 1987, Mr. Jeffrey Stevens of IDEM conducted a record review of Respondent's facility and found that it had not submitted financial assurance.<sup>8</sup> A letter of warning that Respondent was not in compliance with the Indiana RCRA financial assurance rules, 320 I.A.C. 4.1-22-1 through 4.1-22-35, was issued to Respondent on August 5, 1987, setting a deadline within which to respond of September 4, 1987.<sup>9</sup> Respondent requested a 30-day extension, and requested an example of a trust fund to comply with closure and post-closure financial assurance.<sup>10</sup> On September 29, 1987, a second letter of warning was issued, with a deadline of October 28, 1987, within which to bring the facility into compliance with the financial assurance rules.<sup>11</sup>

Respondent satisfied the financial assurance requirement for closure of the facility, by a trust agreement and irrevocable

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<sup>6</sup>Complainant's PHE, Exhibits 5, 6; Respondent's PHE, Exhibits 5, 6. See, 40 C.F.R. § 262.34.

<sup>7</sup>Complainant's PHE, Exhibit 7. It is noted that the liability coverage requirement applies to owners and operators of TSD facilities and not to merely generators of hazardous waste. 329 I.A.C. 3-22-24.

<sup>8</sup>Complainant's PHE, Exhibit 8.

<sup>9</sup>Complainant's PHE, Exhibit 9; Respondent's PHE, Exhibit 7.

<sup>10</sup>Complainant's PHE, Exhibits 10, 11.

<sup>11</sup>Complainant's PHE, Exhibit 12.

standby letter of credit, submitted to IDEM on or about November 24, 1987.<sup>12</sup> However, financial assurance of liability for sudden accidental occurrences was not addressed or demonstrated, so Jeffrey Stevens of IDEM telephoned counsel for Respondent to remind him of the lack of liability insurance.<sup>13</sup> Thereafter, Respondent submitted to IDEM evidence of the attempts and difficulties in obtaining liability insurance, including a letter from its insurance agent.<sup>14</sup> By letter dated January 25, 1988, Respondent requested from IDEM a variance from the liability insurance requirement.<sup>15</sup> The complaint alleges that no further response to IDEM's letters of warning had been received from Respondent.<sup>16</sup>

Up until the time of the complaint, Respondent corresponded with IDEM to submit a closure plan and revision of the plan, and to seek removal from the "TSD list."<sup>17</sup> The closure plan and revision were determined to be inadequate by IDEM, and Respondent was, inter alia, again reminded to document financial assurance and liability

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<sup>12</sup>Complainant's PHE, Exhibits 13, 14; Respondent's PHE, Exhibit 8.

<sup>13</sup>Complainant's PHE, Exhibit 14; Respondent's PHE, Exhibit 9.

<sup>14</sup>Respondent's PHE, Exhibits 12, 13.

<sup>15</sup>Answer, Exhibit 1; Respondent's PHE, Exhibits 14, 15; Statement, Exhibits C, D. Respondent suggested in its request that the Letter of Credit establishing financial assurance for closure also serve as liability coverage.

<sup>16</sup>Complaint ¶ 22.

<sup>17</sup>Answer, Exhibit 3.

coverage, in a notice of deficiency dated September 13, 1988.<sup>18</sup> However, after the complaint was filed, IDEM approved with modifications Respondent's closure plan and revisions, in a letter dated August 30, 1989.<sup>19</sup> Respondent then submitted to IDEM, on September 22, 1989, material designed to meet the financial test option of complying with the financial liability requirement for sudden accidental occurrences, 329 I.A.C. 3-22-24.<sup>20</sup> The financial test covered the years 1987, 1988 and 1989, and was found to be in proper form by Mr. Stevens of IDEM.<sup>21</sup> Respondent completed total closure of its facility, thereby eliminating hazardous waste storage activity, as certified by Respondent on December 28, 1989, and confirmed by IDEM by letter dated January 25, 1990, thus rendering Respondent a small quantity generator.<sup>22</sup> The IDEM letter noted that the storage tanks would continue to be used for less than ninety (90)-day storage.

## II. Argument

Based upon the facts as presented, Respondent argues that this proceeding should be dismissed by applying the doctrine of

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<sup>18</sup>Id. Other correspondence with IDEM, including a Letter of Warning dated October 20, 1988, and Respondent's subsequent compliance, related to violations of the Indiana Administrative Code other than the violation at issue in this proceeding. Answer, Exhibit 4.

<sup>19</sup>Respondent's PHE, Exhibit 16.

<sup>20</sup>Complainant's PHE, Exhibit 15; Respondent's PHE, Exhibit 17; Statement, Exhibit E.

<sup>21</sup>Complainant's PHE, Exhibit 18.

<sup>22</sup>Respondent's PHE, Exhibit 19; Statement, Exhibit F.

equitable estoppel in light of its good faith efforts to comply with the liability coverage requirement, the unavailability of liability insurance, its small quantity generator status,<sup>23</sup> its unanswered request to IDEM for a variance from the liability coverage requirements, and considering that it at all times had sufficient financial resources to meet any liability it would have incurred. In addition, Respondent argues that state regulation of RCRA preempts parallel federal regulation. Finally, Respondent asserts that the proposed penalty of \$9,500 is unwarranted considering that there was no harm to the environment and that it subsequently complied with the liability coverage requirement.

Opposing this motion, Complainant points out that EPA has continuing overview authority under Section 3008(a) of RCRA to enforce the regulatory requirement at issue in this proceeding, and contends that material issues exist which require a hearing for final disposition. Complainant sees a factual conflict in the Respondent's submissions: in the answer, Respondent denies that a record review revealed the violation, and in an affidavit, it claims that it tried but was unable to secure environmental liability coverage;<sup>24</sup> yet a letter, dated January 21, 1988, from Respondent's insurance agent, Paul Burston, shows that Respondent could probably have obtained pollution liability insurance from

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<sup>23</sup>Respondent argues that it was a small quantity generator between January 1985, and January 1986, and after September 8, 1987. Respondent's Response to Complainant's Corrected Prehearing Exchange, dated June 1, 1990; Respondent's PHE, Exhibit 1.

<sup>24</sup>Affidavit of Ralph A. Burns, dated May 21, 1990, Respondent's Additional Material to Append to Statement.

National Union Fire Insurance Co.,<sup>25</sup> and moreover, Respondent had pollution liability coverage until 1986.<sup>26</sup>

In addition to the conflicting evidence, Complainant argues that a hearing is warranted because the request for a variance does not remove nunc pro tunc the violation, which Respondent has allegedly been continuously in violation of since July 29, 1987. Complainant further argues that application of the doctrine of equitable estoppel is "highly questionable at best against a sovereign [EPA]."<sup>27</sup> Contending that impossibility of performance is not a complete defense nor in fact the case, Complainant asserts that Respondent could have met the regulatory requirement at issue by the financial asset/liability test, and that Respondent has not shown that insurance was unavailable. Finally, Respondent's claim that insurance was "prohibitive" is, in Complainant's opinion, a reason to proceed to a hearing "both on the degree of violation here and the imposition of an appropriate penalty . . . ."<sup>28</sup>

### III. Discussion

On the threshold question of jurisdiction, Section 3008(a) of RCRA empowers EPA to enforce a State program authorized under 3006 of RCRA, and this power includes enforcement of state regulations

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<sup>25</sup>Respondent's PHE, Exhibit 13.

<sup>26</sup>However, the insurance policies excluded coverage for sudden accidental occurrences. Statement, Exhibit A, Affidavit of Paul Burston, dated October 24, 1989, ¶¶ 3, 4, and exhibits attached thereto.

<sup>27</sup>Objection at 4.

<sup>28</sup>Id. at 5.



issued thereunder.<sup>29</sup> This is so even where the State has "acted" in some limited fashion, provided the State has received notice from EPA of a violation.<sup>30</sup> There is no issue raised here as to such notice.<sup>31</sup>

The fundamental question presented is whether Respondent has shown that no genuine issue of material fact exists and that Respondent is entitled to judgment as a matter of law, which is the standard for granting a motion for accelerated decision set forth in Rule 22.20, 40 C.F.R. Part 22. Respondent has presented several arguments as defenses to liability, but they may only be considered in mitigation of a civil penalty, because they do not rise to the level of excusing Respondent's failure to demonstrate liability coverage, as required by 329 I.A.C. 3-22-24(a).

That provision of the Indiana Hazardous Waste Rules states as follows, in pertinent part:

After July 1, 1982, an owner or operator of a hazardous waste treatment, storage, or disposal facility . . . must demonstrate financial responsibility for bodily injury and property damage to third parties caused by

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<sup>29</sup>In re Landfill, Inc., RCRA (3008) Appeal No. 86-8, (Final Decision, November 30, 1990) at 2, n.2; citing, inter alia, Wyckoff Co. v. EPA, 796 F.2d 1197, 1200-01 (9th Cir. 1986); United States v. T & S Brass and Bronze Works, Inc., 681 F. Supp. 314; 317 n.1, 319 n. 3 (D. SC. 1988), modified, 865 F.2d 1261 (4th Cir. 1989); In re CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal NO. 87-11 (Final Decision, August 18, 1988) at 3; See also, In re Willis Pyrolizer Company, RCRA (3008) Appeal No. 84-3 (Final Decision, February 20, 1986).

<sup>30</sup>In re Southern Timber Products, Inc., RCRA (3008) Appeal No. 89-2 (Final Decision, November 13, 1990), at 10-11.

<sup>31</sup>See, Complainant's PHE, Exhibit 18.

sudden accidental occurrences arising from operations of the facility . . . .

. . . . This liability coverage may be demonstrated in one (1) or three (3) ways, as follows:

(1) . . . . by having liability insurance . . . .

(2) . . . . by passing a financial test for liability coverage as specified in subsection (f) or by using the corporate guarantee for liability coverage as specified in subsection (g).

(3) An owner or operator may demonstrate the required liability coverage through use of the financial test, insurance, the corporate guarantee, a combination of the financial test and insurance, or a combination of the corporate guarantee and insurance.

329 I.A.C. 3-22-24(a). It is undisputed that Respondent did not demonstrate liability coverage as specified in the regulation until the submittal dated September 22, 1989, which was after the complaint was filed. It is also clear that Respondent owned a treatment, storage or disposal facility<sup>32</sup> and was required to submit and maintain the liability coverage until after it certified that final closure had been completed in accordance with an approved closure plan.<sup>33</sup> Therefore, Respondent's contention that

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<sup>32</sup>See, Complainant's PHE, Exhibits 1, 2, 7, 17, 19; Respondent's PHE, Exhibit 19; Statement, Exhibit F.

<sup>33</sup>329 I.A.C. 3-22-24(e) provides:

Within sixty (60) days after receiving certifications from the owner or operator and an independent registered professional engineer that final closure has been completed in accordance with the approved closure plan, the commissioner will notify the owner or operator in writing that he is no longer required by this section to maintain liability coverage for that facility, unless the commissioner has reason to believe that closure has not been in accordance with the

it was a small quantity generator after September 8, 1987, does not relieve it of the requirement to comply with 329 I.A.C. 3-22-24(a).

Respondent's request for a variance also does not excuse its noncompliance. The request was submitted several months after the warning letters were issued, and cannot even be considered a prompt, diligent effort to comply. The decision cited by Respondent, United States v. Allegan Metal Finishing Co., *supra*, does not support any argument that the variance request itself amounts to compliance with the regulations; it merely points out the "functional equivalen[cy]" of variances and permit modification requests. Moreover, both the federal regulation, 40 C.F.R. § 265.147(c), as well as the state regulation, 329 I.A.C. § 3-33-24(c), dealing with variances call for processing a variance request as if it were a permit modification.<sup>34</sup> Those state and

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approved closure plan.

<sup>34</sup>329 I.A.C. 3-22-24(c) provides:

If an owner or operator can demonstrate to the satisfaction of the commissioner that the levels of financial responsibility required by subsection (a) or (b) are not consistent with the degree and duration of risk associated with treatment, storage, or disposal at the facility or group of facilities, the owner or operator may obtain a variance from the commissioner. The request for a variance must be submitted in writing to the commissioner. If granted, the exemption will take the form of an adjusted level of required liability coverage, such level to be based on the commissioner's assessment of the degree and duration of risk associated with ownership or operation of the facility or group of facilities.

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federal regulatory provisions do not authorize any deviation from the level of liability coverage required by regulation, 329 I.A.C. § 3-22-24 and 40 C.F.R. § 265.147, until after the variance has been granted. Similarly, the state and federal provisions dealing with permit modification requests, 329 I.A.C. 3-36-2 and 329 I.A.C. 3-39-3, and 40 C.F.R. §§ 270.41 and 270.42, do not authorize noncompliance with the existing permit conditions, except under certain limited conditions specified in the federal regulations.<sup>35</sup> Therefore, the request for variance does not exempt Respondent from demonstrating and maintaining the financial liability coverage as required in the regulation, and is not a defense to liability for failing to comply with that requirement, albeit the variance request went unanswered by IDEM.

The doctrine of equitable estoppel does not alter this conclusion. In addressing the question of whether equitable

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. . . The commissioner will process a variance request as if it were a permit modification request under 329 IAC 3-36-2 and subject to the procedures of 329 IAC 3-39-3.

40 C.F.R. § 147(c) contains similar language, including, "The Regional Administrator will process a variance request as if it were a permit modification request under § 270.41(a)(5) of this chapter and subject to the procedures of § 124.5 of this chapter."

<sup>35</sup>See, 40 C.F.R. § 270.42(b)(6)(iii), which states in pertinent part, "If the Director fails to make one of the decisions . . . by the 120th day after receipt of the permit modification request, the permittee is automatically authorized to conduct the activities described in the modification request for up to 180 days . . . . The authorized activities must be conducted as described in the permit modification request and must be in compliance with all appropriate standards of 40 C.F.R. Part 265."

estoppel may be invoked against the United States government, the Supreme Court has said:

When the Government is unable to enforce the law because the conduct of its agents has given rise to an estoppel, the interest of the citizenry as a whole in obedience to the rule of law is undermined. It is for this reason that it is well settled that the Government may not be estopped on the same terms as any other litigant. Petitioner urges us to expand this principle into a flat rule that estoppel may not in any circumstances run against the Government. We have left the issue open in the past, and do so again today. Though the arguments the Government advances for the rule are substantial, we are hesitant, when it is unnecessary to decide this case, to say that there are no cases in which the public interest in ensuring that the Government can enforce the law free from estoppel might be outweighed by the countervailing interest of citizens in some minimum standard of decency, honor, and reliability in their dealings with their Government. But however heavy the burden might be when an estoppel is asserted against the Government, the private party surely cannot prevail without at least demonstrating that the traditional elements of an estoppel are present.<sup>36</sup>

That doctrine, as applied here, would estop EPA from enforcing the liability coverage requirement presumably because of the omission of IDEM to respond to the requests for a variance or small-generator-only status. As discussed in American Jurisprudence, in United States v. Allegan Metal Finishing Co., supra, and in Heckler v. Community Health Services of Crawford County, Inc., supra, all of which are cited by Respondent, the

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<sup>36</sup>Heckler v. Community Health Services of Crawford County, Inc., 467 U.S. 51, 60-61 (1984) [Footnotes omitted]. Accord, Office of Personnel Management v. Richmond, 496 U.S. \_\_\_, 110 L.Ed.2d 387, 397, 110 S.Ct. 2465 (1990).

elements of equitable estoppel are that the party claiming the defense "relied on its adversary's conduct 'in such a manner as to change its position for the worse,' and 'that the reliance must have been reasonable in that the party claiming the estoppel did not know nor should it have known that its adversary's conduct was misleading.'"<sup>37</sup> Stated differently, and more applicable to the case at hand, the essential elements of estoppel by nondisclosure, or inaction, are: (1) ignorance of the party claiming estoppel of the matter asserted; (2) silence where there is a duty to speak, amounting to misrepresentation or concealment of a material fact; (3) action by the party relying on the misrepresentation or concealment; and (4) damages resulting if estoppel is denied.<sup>38</sup>

Here, the failure of IDEM to respond to Respondent's requests for variance and generator status do not amount to a misrepresentation or concealment of a material fact. Respondent had no reason to assume that its requests would be granted, or should be deemed granted, and to act in reliance thereon, by failing to obtain liability coverage as outlined in 329 I.A.C. 3-22-24(a). Moreover, the doctrine of estoppel "should only be applied cautiously and only when equity clearly requires it to be done."<sup>39</sup>

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<sup>37</sup>Allegan, 696 F.2d at 290, quoting Heckler, 467 U.S. at 62; 28 Am. Jur. 2d Estoppel § 27 (1966, and Suppl. 1990).

<sup>38</sup>Nelson v. Chicago Mill & Lumber Corp., 76 F.2d 17, 21, 100 A.L.R. 87 (8th Cir. 1935); Minnesota Mining & Manufacturing Co. v. Blume, 533 F. Supp. 493, 517, 525 (S.D. Ohio 1978); 28 Am. Jur. 2d Estoppel § 53.

<sup>39</sup>28 Am. Jur. 2d § Estoppel 28, p. 631.

The situation at hand is not one in which it should be applied, perhaps especially because Respondent apparently had sufficient financial resources to meet any liability it may have incurred, but inexplicably did not submit proof of such resources to IDEM. The regulation clearly requires a demonstration, not merely acquisition, of liability coverage. Respondent's untimely demonstration, after the complaint was filed, that it had adequate financial resources during the time period in question, does not constitute compliance with the regulation. To consider such post-complaint efforts to comply as a defense to liability would render the financial assurance regulation ineffectual; TSD facility owners and operators could ignore it until an enforcement action instituted against them prompts them to demonstrate liability coverage, resulting in a waste of government time and resources.

Furthermore, if Respondent's financial resources were such that it could have demonstrated liability coverage by means of the financial test during the time in question, then compliance was clearly not impossible for Respondent, albeit commercial liability insurance was unavailable. If such insurance is not available or not practical, that is, prohibitively expensive, then Respondent bears the burden of complying with the financial assurance requirement through other methods listed in the regulation, such as the financial test.<sup>40</sup> Impossibility of obtaining liability insurance does not excuse failure to demonstrate financial

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<sup>40</sup>See, supra at 9-10; In re Landfill, Inc., RCRA (3008) Appeal No. 86-8 (Final Decision, November 30, 1990), at 17, 19.

assurance for liability, and is not an available defense with respect to determining whether a Respondent has complied with the liability coverage requirements.<sup>41</sup>

Good faith effort in attempting to obtain insurance is similarly not available as a defense to noncompliance with the regulatory requirements.<sup>42</sup> However, such good faith efforts, as well as impossibility or impracticality of obtaining insurance, are relevant to determining the amount of civil penalty.<sup>43</sup> Additionally, Respondent's arguments that it periodically communicated with IDEM in regard to financial assurance, and that it caused no harm to human health or the environment, may only be considered in mitigation of any civil penalty assessed.

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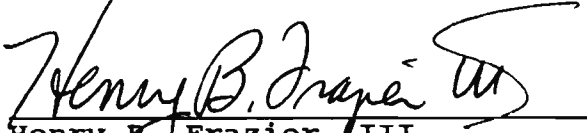
<sup>41</sup>United States v. Production Plated Plastics, Inc., 742 F. Supp. 956, 962 (W.D. Mich. 1990); Allegan Metal Finishing Co., 696 F. Supp. 285, 291. Impossibility of obtaining liability insurance also does not bar automatic loss of interim status for failing to demonstrate financial assurance by the regulatory deadline of November 8, 1985. United States v. Clow Water Systems, A Div. of McWare, Inc., 701 F. Supp. 1345, 1348 (S.D. Ohio 1988); United States v. T & S Brass & Bronze Works, Inc., 681 F. Supp. 314, 321 (D. S.C. 1988), aff'd in part, 865 F.2d 1261, No. 88-3531, slip op. at 4 (4th Cir. Dec. 22, 1988) (per curiam).

<sup>42</sup>Production Plated Plastics, Inc., 742 F. Supp. at 962; United States Environmental Protection Agency v. Environmental Waste Control, Inc., 710 F. Supp. 1172, 1213 (N.D. Ind. 1989); Clow Water Systems, 701 F. Supp. at 1348; T & S Brass and Bronze Works, 681 F. Supp. at 321; In re Willis Pyrolizer Company, RCRA (3008) Appeal No. 84-3 (Final Decision, February 19, 1986) at 2-3; In re Inland Metals Refining Co., Docket No. V-W-85-R-59 (Initial Decision, October 4, 1988).

<sup>43</sup>Production Plated Plastics, Inc., 742 F. Supp. at 962; In re Landfill, Inc., slip op. at 18; Clow Water Systems, 701 F. Supp. at 1348; In re Willis Pyrolizer Co., slip op. at 2-3; Allegan Metal Finishing Co., 696 F. Supp. at 291; Environmental Waste Control, Inc., 710 F. Supp. at 1213.



In summary, Respondent is not entitled to judgment as a matter of law on the basis of any defenses raised. However, I concur in Respondent's assertion that no genuine issue of material fact exists, with respect to the question of liability. Complainant has not successfully rebutted that assertion. Any conflict in the evidence with respect to impossibility or difficulty in obtaining insurance, is relevant only to the issue of the amount of penalty. I find that Respondent has violated 329 I.A.C. 3-22-24, as alleged in the complaint, and conclude that Complainant is entitled to judgment as a matter of law. Consequently, a partial accelerated decision on the issue of liability for the violation alleged in the complaint should be, and is hereby, rendered for Complainant. Pursuant to 40 C.F.R. Section 22.20(b)(2), I further find that the issue of the amount, if any, of the civil penalty, which appropriately should be assessed for the violation found herein, remains controverted and the hearing requested shall proceed for the purpose of deciding that issue.

  
Henry B. Frazier, III  
Chief Administrative Law Judge

Dated:

April 25, 1991  
Washington, DC

IN THE MATTER OF URSCHEL LABORATORIES, INC., Respondent  
Docket No. V-W-89-R-35

Certificate of Service

I hereby certify that this Interlocutory Order for Partial Accelerated Decision As To Liability and Denying Respondent's Motion for Accelerated Decision, dated April 25, 1991, was forwarded this day in the following manner to the below addressees:

Original by Regular Mail to:

Beverly Shorty  
Regional Hearing Clerk  
U.S. EPA, Region 5  
230 South Dearborn Street  
Chicago, IL 60604

Copy by Certified Mail,  
Return Receipt Requested, to:

Attorney for Complainant:

Alvin Liebling, Esquire  
Assistant Regional Counsel  
U.S. EPA, Region 5  
230 South Dearborn Street  
Chicago, IL 60604

Attorney for Respondent:

Donald J. Dreyfus, Esquire  
Suite 425 North  
1000 East 80th Place  
Merrillville, IN 46410

  
\_\_\_\_\_  
Doris M. Thompson  
Secretary

Dated: APR 25 1991