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UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of)	
)	
B & R Oil Company, Inc.,)	[UST] Docket No. RUST-007-91
)	
Respondent)	

ORDER DENYING RESPONDENT'S MOTION TO DISMISS

This matter arises under Section 9006 of the Resource Conservation and Recovery Act ("RCRA"), as amended, 42 U.S.C. § 6991e. Respondent is charged by the U.S. Environmental Protection Agency ("EPA") with failure to meet the Financial Responsibility requirements imposed upon owners and operators of underground storage tanks ("USTs") by regulations codified at 40 C.F.R. Part 280.¹ The complaint and compliance order assessed a proposed penalty of \$340,756.² EPA subsequently issued an amended complaint and compliance order, which assesses a proposed penalty of \$541,488.³

Respondent filed a motion to dismiss the complaint, averring that: (1) EPA does not have jurisdiction to assess a civil penalty in an administrative action initiated pursuant to RCRA Section 9006, 42 U.S.C. § 6991e, and (2) administrative enforcement of the terms of the compliance order is unnecessary because Respondent has come into compliance with the cited regulations.⁴

EPA filed a brief response to Respondent's motion.⁵ For the reasons that follow, Respondent's motion to dismiss is denied.

In support of its jurisdictional claim, Respondent cites RCRA Section 9006(a), which provides as follows:

¹ Complaint, Findings of Violation, Compliance Order, and Notice of Opportunity for Hearing, August 19, 1991. The complaint alleges violation of 40 C.F.R. § 280.91(b), 40 C.F.R. § 280.93, 40 C.F.R. § 280.94 and 40 C.F.R. § 280.107.

² *Id.* at 5.

³ Amended Complaint, Findings of Violation, Compliance Order, and Notice of Opportunity for Hearing, September 16, 1991 at 5.

⁴ Respondent's Motion to Dismiss, received February 4, 1992.

⁵ U.S. EPA's Response to Respondent's Motion to Dismiss, February 7, 1992.

(a) compliance orders

(1) Except as provided in paragraph (2), whenever on the basis of any information, the Administrator determines that any person is in violation of any requirement of this subchapter, the Administrator may issue an order requiring compliance within a reasonable specified time period or the Administrator may commence a civil action in the United States district court in which the violation occurred for appropriate relief, including a temporary or permanent injunction.

(2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State with a program approved under section 6991c of this title the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

(3) If a violator fails to comply with an order under this subsection within the time specified in the order, he shall be liable for a civil penalty of not more than \$25,000 for each day of continued noncompliance.

Considered out of context, Section 9006(a) supports Respondent's position. It authorizes the administrative assessment of a penalty only if the violator fails to comply with a compliance order. However, a subsequent provision of the statute, apparently overlooked by Respondent, provides as follows:

(c) Contents of order

any order issued under this section shall state with reasonable specificity the nature of the violation, specify a reasonable time for compliance, and assess a penalty, if any, which the Administrator determines is reasonable taking into account the seriousness of the violation and any good faith efforts to comply with the applicable requirements.

RCRA Section 9006(c), 42 U.S.C. § 6991e (emphasis added).

This provision grants the Agency authority to issue a compliance order which itself assesses a penalty.⁶ Here, this is precisely what EPA has done. The mechanism for enforcement

⁶ In addition, if Respondent fails to comply with the compliance order, it may be subject to additional penalties, as set forth under 42 U.S.C. § 6991e(a)(3).

of the penalty is the complaint, issued in accordance with Section 22.01(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties and the Revocation or Suspension of Permits. 40 C.F.R. § 22.01(a).

Accordingly, Respondent's assertion that EPA lacks jurisdiction to assess a civil penalty via the instant complaint is without merit, and cannot serve as grounds for dismissal.

Turning to Respondent's second proffered ground for dismissal, Respondent maintains that it "has fully complied with the terms of the Compliance Order," and that as a result, "this action is unnecessary to enforce the terms of the Compliance Order."⁷

The complaint in this matter, however, assesses a penalty for past regulatory violations. As EPA states:

Even assuming that Respondent has come into compliance, the Complaint alleges violations which existed at least until the formal submittal of the Indiana plan to U.S. EPA for approval. These violations must be addressed, either in a Consent Agreement and Final Order or in a formal administrative hearing.⁸

EPA is correct. The question of whether Respondent is currently in compliance with the cited regulations, while relevant to any penalty determination,⁹ is irrelevant in the context of Respondent's Motion to Dismiss. Consequently, Respondent's alleged compliance cannot serve as grounds for dismissal.

⁷ Respondent's Motion to Dismiss at 1, 5.

⁸ Memorandum in Support of U.S. EPA's Response to Respondent's Motion for Decision to Dismiss, February 7, 1992 at 2.

⁹ See Section 9006(c), 42 U.S.C. § 6991e(c).

ORDER

Accordingly, Respondent's Motion to Dismiss is denied.

Carl C. Charneski

Carl C. Charneski
Administrative Law Judge

Issued: March 11, 1996
Washington, D.C.