BEFORE THE ENVIRONMENTAL BOARD OF REVIEW

STATE OF OHIO

ALLIED-SIGNAL, INC., ET AL.	:	Case No. EBR 182702-182712
CITY OF TOLEDO	:	Case No. EBR 182730
U. S. REDUCTION	:	Case No. EBR 182734
MULBERRY PHOSPHATES	:	Case No. EBR 992735
VALLET PAINT SERVICE	:	Case No. EBR 182741
REFINERS TRANSPORT & TERMINAL	:	Case No. EBR 482742
Appellants,	:	
	:	RULING ON MOTIONS TO
v.	:	DISMISS, VACATE, AND
	:	SUMMARY DECISION
DONALD SCHREGARDUS, DIRECTOR OF ENVIRONMENTAL PROTECTION	:	
Appellee.	:	Issued: February 23, 1994

This matter comes before the Board upon various requests by the above-captioned Appellants that the Board dismiss or vacate the Orders of the Director of the Ohio Environmental Protection Agency (OEPA), issued March 20, 1992, which constitute the subject matter of this appeal.

WITH REGARD TO ALLIED SIGNAL APPELLANTS:

These Appellants allege: 1) that the Director was without the statutory authority to issue these orders; 2) that even if he was so authorized, the orders are improperly issued to these Appellants; and, 3) that the Director was required to provide an opportunity for an adjudication hearing before the Agency prior to the issuance of these orders. Responses and replies were filed.

After a review of the filings, a consideration of the oral arguments, cited case law, and extensive discussion amongst the Board, it is the unanimous ruling of this Board that the Motion to Dismiss regarding the first issue is not well taken, and denied.

With regard to the issue of the necessity of providing a prior adjudication hearing and the propriety of the orders which were issued, it is the opinion of a majority of the Board that a prior adjudication hearing was not required.

Member Hammond is of the opinion that, based on the facts of the case at hand, a hearing before the Director was required and the Director's failure to conduct such a hearing invalidates the resulting orders.

WITH REGARD TO VALLET PAINT SERVICE CO. (Case No. EBR 482741)

On August 6, 1992, Appellant Vallet Paint Service filed a motion containing arguments similar to that filed by the Allied Signal group. The Board incorporates by reference the findings set out above for the Allied Signal motion, and denies Vallet Paint's Motion to Vacate.

WITH REGARD TO THE CITY OF TOLEDO (Case No. EBR 182730)

On August 6, 1992, the City of Toledo filed a Motion For Summary Disposition relative to the liability of the generators and transporters in the instant action. In that Motion, the City argued, first that a prior adjudication hearing was required by R.C. Chapter 119 and the failure of the Ohio EPA to provide such a hearing renders the Final Findings and Orders unlawful. The City further argued that in the event that the Board should determine that a prior adjudication hearing was not necessary and that the Final Findings and Orders were lawfully issued, that it should also determine that the Director was authorized to issue the orders to all of the named parties, including the generators and transporters. Stated another way, it is the City's contention that the term "person" in the relevant statutes should be read broadly enough to encompass entities that are generators or transporters of hazardous and industrial wastes.

In keeping with the decision set out above, a majority of the Board disagrees that a prior adjudication hearing was required, and overrules this part of the City's Motion. On the latter point, however, the Board unanimously agrees with the City to the extent that we hold as a matter of law that the term

"person" as used in the relevant statutes is broad enough to encompass those entities listed on the Director's Order.

WITH REGARD TO U.S. REDUCTION (Case No. EBR 182734)

On August 6, 1992, counsel for U.S. Reduction filed a Motion for Summary Decision with the Board, requesting that the Board summarily decide this matter in favor of its client. The Board finds this motion not well taken, and denies this request.

WITH REGARD TO REFINERS TRANSPORT (EBR Case No. EBR 182742)and

WITH REGARD TO MULBERRY PHOSPHATES, INC./ROYSTER (Case No. EBR 992735)

In addition to the jurisdictional arguments raised by the other Appellants, Refiners Transport (Refiners) and Mulberry Phosphates (MPI) request that the Board dismiss these Orders pursuant to their status as protected bankrupts.

On August 30, 1991, Appellant Refiners Transport filed a petition requesting relief under Chapter 11 of the U.S. Bankruptcy Code. MPI, formerly known as Royster Company, is also under the protection of the Bankruptcy Court. The record demonstrates that on April 8, 1991, the Royster Company and its two affiliated companies, also filed for reorganization under Chapter 11 of the Bankruptcy Code.

The automatic stay provision of the Bankruptcy Code, Sec.362(a), affords bankrupt debtors a fundamental protection from creditors under the bankruptcy law. That section provides that, as a general rule, once a petition for bankruptcy is filed, the filing operates as a stay of:

> "1) the commencement or continuation, including the issuance or employment of process or a judicial, administrative, or other proceeding against the debtor that was or could have been commenced before the commencement of the case under this title, or to recover a claim against the debtor that arose before the commencement of the case under this title."

"Claim", in turn, is defined in 11 U.S.C. Sec. 101 as a right to payment, whether or not such right is reduced to judgement, liquidated or unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured, or unsecured.

Exceptions to the general rule do exist, however, one of which is enumerated in subsection (b)(4) of Sec. 362. This subsection exempts certain actions from the operation of the stay provisions, and allows governmental units to commence actions which operate to enforce the state's police power. The legislative history of the bankruptcy code makes it clear that one of the purposes of this exception is to protect public health and safety. That history provides:

> "Thus where a governmental unit is suing a debtor to prevent or stop ..environmental protection...the action or proceeding is not stayed under the automatic stay." H.R.Rep. No.95-595,S.Rep.No.95-989,. from Midalantic Nat.Bank v N.J.Dept of E.P. 474 U.S. 494 (1985) at p.504.

Refiners and MPI argue that pursuant to Section 362 and the statutory definition of claim, that the Orders of the Director are claims, and are stayed as to them. The Director, on the other hand, argues that his Orders fall within the exemption from the Stay provided in Section 362(b)(4).

While the Board agrees that what the Director is asking of the Appellants in these orders will require the expenditure of money, the Board is not of the opinion that this fact necessarily places those requests within the definition of "claim". On this point, the Board finds the language of the court in In Re Torwico Electronics, Inc. 8 F.3rd 146 (Cir. 1993) instructive. In that case, the New Jersey Department of Environmental Protection and Energy (NJDEPE) had attempted, by means of an administrative order, to force Torwico, a Chapter 11

debtor, to comply with its obligations under state environmental laws, arguing that it was exercising its regulatory powers in so doing. The bankruptcy court had declared that the administrative order constituted a claim under the Bankruptcy Code, and entered judgment in favor of the debtor. NJDEPE appealed this ruling to the appropriate district court, which concluded that the state's attempt to affect compliance with environmental laws was not a claim. The Third Circuit Court of Appeals affirmed the district court's decision. That court discussed at some length the landmark case of Ohio v Kovacs, 469 U.S. 274 (1985), and distinguished what the state was requesting in this instance from what the state had been requesting in Kovacs. This court determined that because Ohio had been requesting that Mr.Kovacs pay money directly to them, their request was a claim. They then determined that because New Jersey was not requesting that the money be paid directly to them, the order was an exercise of the police power rather than a claim, and thus exempt from the automatic stay provision. Specifically, they stated that "... a cleanup order that accomplishes the dual objectives of removing accumulated wastes and stopping or ameliorating ongoing pollution emanating from such wastes is not a dischargeable claim". Torwico, supra at 149. Further, the court concluded that a state can exercise its regulatory powers and force compliance with its laws , even if the debtor must expend money to comply. According to this court, under Kovacs, what the state cannot do is force the debtor to pay money to the state.

It is the opinion of the Board that the record before us does not satisfactorily demonstrate what the Order of the Director will require of the Appellants, thus making a determination regarding whether it is stayed or not

impossible at this point in the proceeding. Therefore, the Board finds the Motions to Dismiss not well taken at this time.

THE ENVIRONMENTAL BOARD OF REVIEW

Julianna F. Bull, Chairwoman

Toni E. Mulrane, Vice-Chairwoman

Jerry Hammond, Member

Entered in the Case File of the Board this 23rd day of February, 1994.

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MEMORANDUM

TO: Judi Trail
Deputy Chief Counsel

FROM: Jack Van Kley, Chief
Environmental Enforcement Section

DATE: March 1, 1994

RE: Allied-Signal Decision

Enclosed for your information is a copy of a decision I obtained in the Allied-Signal case from the EBR overruling the Appellants' motions to summarily vacate Director's findings and orders requiring five companies and the City of Toledo to fix hazardous waste and water pollution problems at the Dura Avenue Landfill in Toledo.

The companies argued that, under two Ohio statutes authorizing Ohio EPA to issue orders, Ohio EPA has no authority to order companies to clean up the landfill unless they actually own the landfill. These companies sent or transported waste to the landfill but, they argued, did not act as owners or operators of the landfill. All of the companies as well as the City of Toledo argued that Ohio EPA had to hold an adjudicatory hearing before issuing any findings and orders. One of the companies argued that Ohio EPA could not issue orders requiring it to clean up the landfill because the company is in reorganization. The EBR rejected all of these arguments. This is the first time that any tribunal has recognized any Ohio EPA authority to order clean up of a property by persons whose waste were taken to the property, where these persons did not actually own or operate the property. Because there are many of these sites in Ohio, this is an important precedent for future agency actions.

cc: OEPA Attorneys