BEFORE THE ADMINISTRATOR
U.S ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON D.C.

In the Matter of:	)	
	)	
Fisher-Calo Chemicals and Solvents Corp.	)	RCRA Appeal No. 85-5
	)	
Docket No. IND064700883	)	
	)	
	)	

ORDER DENYING PETITION FOR REVIEW

In a joint petition filed pursuant to 40 CFR §124.19, Fisher-Calo Chemicals and Solvents Corp. and David Fisher [1/] (petitioners) seek review of a decision by EPA Region V denying a hazardous waste management permit for Fisher-Calo's storage facility located in Kingsbury, Indiana. An application for the permit had been submitted by the corporation under the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. §6901 et seq. After reviewing the petition for review , Region V's response in opposition thereto, Fisher-Calo's reply to the Region's response, [2/] and the materials submitted for the record, I hold that further review is unwarranted and deny the petition. [3/]

1/ David Fisher is Fisher-Calo's president. He joins in Fisher-Calo's petition in his individual capacity as the owner of the land on which Fisher-Calo's facility is located.

2/ Although Fisher-Calo made arrangements with the Chief Judicial Officer to submit its reply by the latter part of January 1986, the reply together with a "Motion for Extension of Time to File Reply" was not submitted until mid-February 1986. Region V opposes the Motion for Extension. Nevertheless, I have decided to grant Fisher-Calo's Motion. The reply brief is accepted and has been fully considered.

3/ Review of RCRA permit decisions is discretionary. Petitions for review of RCRA permit decisions are not usually granted unless the permit determination is clearly erroneous or involves

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In Fisher-Calo s opinion I lack the authority to make this determination because this proceeding supposedly has been stayed by operation of the federal bankruptcy laws. In that regard, in an undated document styled "Notice," which was received on January 23, 1986, Fisher-Calo's bankruptcy attorney advised EPA's Chief Judicial Officer that Fisher-Calo had filed a petition for relief under the United States Bankruptcy Code on February 1, 1985. 4/ The Notice stated:

> Please keep in mind the automatic stay provisions of Section 362 of the United States Bankruptcy Code, Title 11 of the United States Code.
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> . . . As a result of the automatic stay provisions, which as of this date remain fully in effect as to all matters (including environmental protection matters) the special environmental counsel, Mr. Gordon A. Etzler, has been advised to cease proceeding until such time as the automatic stay is modified.

In other words, Fisher-Calo believes that filing its Chapter 11 bankruptcy petition had the effect of automatically staying further proceedings on its RCRA permit, even including the instant proceedings which are for the purpose of determining whether I

(Footnote No. 3 Cont'd)

an exercise of discretion or policy that is important and therefore should be reviewed as a discretionary matter. 40 CFR §124.19(a)(1) and (2)(1985). The burden of demonstrating that the permit decision should be reviewed is on the party petitioning for review. Petitioners have simply not met that burden in this instance.

4/ The petition was filed under Chapter 11 of the Bankruptcy Code which provides for reorganization rather than liquidation of a debtor company.

should review Region V's decision denying Fisher-Calo's permit application. [5/] The automatic stay provisions are part of the Bankruptcy Code and are found at 11 U.S.C. §362(a). [6/]

5/ Fisher-Calo currently is operating its facility under interim status. With this final Agency order denying its permit application, Fisher-Calo's interim status is automatically terminated. RCRA §3005(e). Upon termination of interim status Fisher-Calo must execute its closure responsibilities pursuant to 40 CFR §265.112 (1985), which almost certainly will necessitate an expenditure of funds by Fisher-Calo.

6/ 11 U.S.C. §362(a) states, among other things:

> (a) Except as provided in subsection (b) of this section, a petition filed under section 301, 302, or 303 of this title . . . operates as a stay, applicable to all entities, of--
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> (1) the commencement or continuation, including the issuance or employment of process, of 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;
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> (3) any act to obtain possession of property of the estate or of property from the estate;
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> (4) any act to create, perfect, or enforce any lien against property of the estate;
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> (5) any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case under this title.

(Subparagraphs (6), (7), and (8) have been omitted since they have no arguable relevance to these proceedings. Fisher-Calo argues its position regarding automatic stay based only on subparagraphs (1), (3), (4) and (5). Subparagraph 2, which is similar to (3) - (5), is omitted because Fisher-Calo did not refer to it).

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Region V responded to the "Notice" by writing a letter to Fisher-Calo's bankruptcy attorney, with copies to the Bankruptcy Judge and Chief Judicial Officer, pointing out that "11 U.S.C. §362(b)(4) provides that the filing of a petition for relief under the Bankruptcy Code does not operate as a stay 'of the commencement or continuation of an action or proceeding by a government unit to enforce such government unit's police or regulatory power.'" The Region went on to characterize RCRA permit proceedings as falling within §362(b)(4)'s exemption. I agree for the reasons set forth below.[7/]

The issue which I must address is whether this proceeding should be automatically stayed pursuant to §362(a), or exempted from automatic stay pursuant to §362(b)(4). This is not the first

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(Footnote No. 6 Cont'd)

Despite Fisher-Calo's argument to the contrary I agree with Region V -- the only subsection of §362 that has any relevance to these proceedings is §362(a)(1).

I note with interest that the bankruptcy petition was filed before the Region issued its final permit decision (denial). It is curious that Fisher-Calo waited to invoke automatic stay until now when it clearly had the opportunity to do so when this matter was being considered at the Regional level.

7/ Accordingly, as fully explained later in this order, this simply means that my determination not to review the Region's denial of Fisher-Calo's permit application is not automatically stayed. Of course, it is still possible for a bankruptcy court to issue a stay on a discretionary basis, upon motion of the trustee. U.S. v. Professional Sales Corp., No. 85 C 5791, slip. op (N.D. Ill, E.D. December 16, 1985); Garrity v. Goldstein (In re National Hospital & Institutional Builders Co.), 658 F.2d 39, 43 (2d Cir. 1981), cert. denied, 454 U.S. 1149 (1982); SEC v. First Financial Group of Texas, 645 F.2d 429, 440 (5th Cir. 1981); In re Skippers Interstate Service, Inc., 618 F.2d 9, 13 (7th Cir. 1980); In re Bel Air Chateau Hospital, Inc., 611 F.2d 1248, 1251 (9th Cir. 1979).

time the Agency has found it necessary to determine whether administrative proceedings under RCRA are exempt from §362(a)'s automatic stay provision. In Wheeling Pittsburgh Steel Corporation, RCRA (3008) Appeal No. 84-8 (September 18, 1985), the Agency's Chief Judicial Officer affirmed an initial decision in which an Administrative Law Judge issued a compliance order and assessed a civil penalty of $17,500 against the corporation as a result of a violation of RCRA and its implementing regulations. After the initial decision was issued, the corporation informed the Agency that it had filed for bankruptcy, contending that a petition in bankruptcy "operates as a stay of the continuation of all actions or proceedings against [it]" including the RCRA civil penalty proceeding. The Chief Judicial Officer held that the civil penalty proceeding, which was then on appeal before him, was exempted under §362(b)(4) from automatic stay. Accordingly, he issued a final Agency decision affirming the presiding officer's compliance order and civil penalty assessment. 8/

However, the matter did not end with the final Agency decision. In October 1985, the United States Bankruptcy Court for the Western District of Pennsylvannia dismissed Wheeling Pittsburgh's complaint that charged EPA with contempt for failing to comply with §362(a)'s

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8/ The Chief Judicial Officer also stated: "I make no finding today regarding the enforceability of this decision. That ultimately is a matter for the courts to decide." Wheeling Pittsburgh at 2.

automatic stay provision. Wheeling Pittsburgh Steel Corp. v. U.S. EPA, Bankruptcy Case No. 85-793 PGH, Adversary Case No. 85-0236 (October 31, 1985).[9/] The Bankruptcy Court rejected Wheeling Pittsburgh's claim that §362(a)'s automatic stay was applicable to the penalty proceeding. The Court indicated that enforcement of EPA's compliance order against Wheeling Pittsburgh could proceed.[10/] The Court also permitted the entry (but restricted the enforcement) of a money judgment for civil penalties against Wheeling Pittsburgh.[11/]

In summary, the Bankruptcy Court held that §362(a)'s automatic stay provision was inapplicable to the Agency's civil penalty proceeding against Wheeling Pittsburgh. Indeed, the Court specifically permitted enforcement of EPA's compliance order (which required closing of Wheeling Pittsburgh's hazardous waste facility) despite the fact that compliance would likely diminish the debtor's resources.

9/ In December 1986, the U.S Court of Appeals for the fourth circuit dismissed (without written opinion) Wheeling Pittsburgh's appeal of the Agency's final order upon an uncontested motion of the government that the proper forum was the District Court for the District of Columbia. A separate appeal of the Agency's final order is pending before the District Court for the District of Columbia.

10/ The compliance order required Wheeling Pittsburgh to close its hazardous waste storage facililty in accordance with a plan approved by the Agency.

11/ The Court held that the enforcement of any such monetary judgment against Wheeling Pittsburgh "shall not be permitted during the pendency of the bankruptcy proceeding without an order from this court authorizing the same."

There is no reason, as far as I can tell, why the principles underlying the Chief Judicial Officer's and the U.S. Bankruptcy Court's decisions in Wheeling Pittsburgh should not apply with equal vigor here. The fact that Wheeling Pittsburgh involved a RCRA penalty proceeding while Fisher-Calo involves a RCRA permit proceeding is of no significance. The question to be resolved in each case is identical, i.e., is the particular proceeding automatically stayed under §362(a) or is it exempted from such stay under §362(b)(4)?

§362(b)(4) provides that the filing of a petition for relief under the Bankruptcy Code does not operate as a stay "of the commencement or continuation of an action or proceeding by a government unit to enforce such government unit's police or regulatory power." Clearly a RCRA penalty proceeding is a "proceeding by a government unit to enforce such government unit's police or regulatory power." Similarly, a RCRA permit proceeding falls within §362(b)(4)'s exemption. The Agency's permitting authority (i.e., the Agency's authority to grant or deny permits) is clearly "regulatory" in nature, and is one means by which the Agency exercises or "enforces" its regulatory powers. Accordingly, a RCRA permit proceeding is also a "proceeding by a government unit to enforce such government unit's . . . regulatory power" and

therefore, like a RCRA penalty proceeding, is exempt from automatic stay pursuant to §362(b)(4).[12/]

Fisher-Calo claims that this permit proceeding is not an exercise in regulatory power but rather is an attempt by the Agency to enforce a claim against the property of the bankrupt estate. Fisher-Calo's Reply to Response of EPA at 3. (Fisher-Calo's Reply). Fisher-Calo also claims that §362(b)(4)'s exemption is applicable only to those RCRA proceedings convened for the purpose of averting "an imminent and substantial endangerment of an actual or threatened release of a hazardous substance." Fisher-Calo's Reply at 5, 6. Fisher-Calo is wrong on both counts.

Fisher-Calo's Claim that the Permit Proceeding is an Agency Attempt to Enforce a Property Claim

It is difficult to fathom precisely what Fisher-Calo means by its property claim argument, for it does not identify what property interest is at stake and no such interest is otherwise apparent. With issuance of this final Agency order denying Fisher-Calo's permit application, its interim status is automatically terminated pursuant to RCRA §3005(e). However, loss of interim status does not represent a loss or claim against a property interest, for "interim status" does not constitute property; interim status is merely a privilege to operate pending compliance

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12/ Viewed from another perspective RCRA permit proceedings represent Agency efforts to compel compliance with RCRA and its implementing regulations, thereby preventing violation of these environmental protection laws.

by the permit applicant with RCRA's requirements for obtaining a permit. In fact, interim status is not even a permit. 40 CFR §124.2 ("Permit does not include RCRA interim status. . . ."); Northside Sanitary Landfill, Inc. v. Thomas, No. 85-2119, slip opinion at 24, n. 5 (7th Cir. October 23, 1986).

U.S. v. Professional Sales Corp., No. 85-C-5791, slip opinion (N.D. Ill, December 16, 1985), involved a Federal Bankruptcy Court's stay under 11 U.S.C. §105 (a §105 stay) of an EPA action terminating the interim status of a hazardous waste facility for various violations of RCRA and its implementing regulations. In vacating the stay the district court reviewing the matter stated:

> Here, the EPA's termination of interim status does not involve the taking of any tangible property from the debtor, nor has the EPA sought to bring an enforcement action which would compel PSC to expend funds in compliance. The termination in no way interferes with the bankruptcy court's exclusive jurisdiction over the debtor's property.
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> . . . As noted in Pension Benefit Guaranty Corp. v. Braniff Airways, Inc., 700 F.2d 935, 942 n.5 (5th Cir. 1983), "whatever vitality the 'threat to assets' theory may have, it is inapplicable where . . . the very existence of the 'asset' depends on the regulatory activity in question." (holding that FAA landing slots are not property of the estate). Even assuming that the RCRA interim status is an asset of PSC's estate, a point contested by the government, that status is subject to the continuing jurisdiction of the EPA, and is conditional on continued compliance with statutory and regulatory requirements which PSC has failed to meet. To uphold a §105 stay under these circumstances would allow PSC to operate the facility as a hazardous waste site despite noncompliance with RCRA. Neither the Bankruptcy code nor the RCRA

> is intended to promote such preferential treatment for Chapter 11 debtors. [Citations omitted.] (Professional Services Corp. at 23, 24.)

Although Professional Services Corporation involved a §105 stay, which is different from an automatic stay under §362(a), [13/] I see no reason why the court's rationale in refusing to uphold the §105 stay in Professional Services is not, by analogy, available to refute Fisher-Calo's contention that based upon a "threat to its assets" this final Agency order is subject to automatic stay under §362(a).

For all the foregoing reasons Fisher-Calo's claim that this permit proceeding involves a taking of its property or assets, and accordingly does not fall within §362(b)(4)'s exemption, is rejected.

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13 §105 grants bankruptcy courts the power to issue orders necessary or appropriate to carry out the provisions of Chapter 11, including injunctions or stays. A §105 stay is issued within the discretion of the bankruptcy court rather than being automatic as is the case with §362(a) stays.

§362(b)(4)'s exemption is applicable only to automatic stays under §362(a) but not to discretionary stays under §105. In Professional Services Corp., the bankrupt conceded that Agency action terminating its interim status fell within §362(b)(4)'s exemption and accordingly was not subject to automatic stay under §362(a). Of significance to the instant case is the following statement by the court.

> In this case, PSC properly conceded that the EPA's revocation of interim status, as an action to protect the public health and safety, was entitled to the §362(b)(4) exemption. (Professional Services Corp. at 21, note 6.)

Fisher-Calo's Claim that §362(b)(4)'s Exemption is Applicable Only to Proceedings to Avert Imminent and Substantial Endangerment

Fisher-Calo also claims that §362(b)(4)'s exemption only applies to those RCRA proceedings convened before the Agency for the purpose of averting "imminent and substantial endangerment of an actual or threatened release of a hazardous substance" and that this permit proceeding does not fall within that category. Fisher-Calo's Reply pp. 5, 6. I disagree with this reading of the exemption: Fisher-Calo reads §362(b)(4) much too narrowly.

The legislative history of §362(b)(4) clearly states that the exemption applies to all governmental proceedings designed "to protect the public health and safety" 1978 U.S. Code Cong. & Ad. News at 6513 (remarks of Sen. DeConcini).[14/] There is no mention that the threat to health or safety must be imminent or substantial before §362(b)(4)'s exemption will apply.

Similarly, the House and Senate Reports on bankruptcy laws contain the following statement:

> Where a governmental unit is suing a debtor to prevent or stop violation of environmental protection [laws], consumer protection [laws], safety [laws], or similar policies or regulatory laws, . . . the action or proceeding is

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14/ The portion of the legislative history cited above goes on to state that the exemption does not apply to governmental proceedings "to protect a [government agency's] pecuniary interest in the debtor's property or estate."

> not stayed under automatic stay. H.R. Rep. No. 95-595, p. 343 (1977); S. Rep. No. 95-989, p. 52 (1978).

Again, there is no mention that violation of environmental protection laws (or any of the other categories of laws mentioned for that matter) must result in imminent or substantial endangerment to the environment before the exemption will apply. Accordingly, this claim of Fisher-Calo also must be rejected.

Any other claims of Fisher-Calo not specifically addressed herein have nevertheless been fully considered and been found not to warrant review.

For all the foregoing reasons §362(a)'s automatic stay provision is not applicable to this proceeding. Fisher-Calo's petition for review of Region V's decision denying Fisher-Calo's RCRA permit application is denied.

So ordered.

Lee M. Thomas
Administrator

Dated: Jan. 7, 1987