

**UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY**

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:)
)
KEENHOLD ASSOCIATES, ET AL.,) **DOCKET NO. TSCA-03-2007-0084**
)
RESPONDENTS.)

**ORDER TO SHOW CAUSE AND
ORDER GRANTING MOTION FOR EXTENSION**

By Order dated September 10, 2007, the five Respondents were required to file their Prehearing Exchanges on or before October 12, 2007. To date, none of the Respondents has complied with that Order. As a result, by Motion dated October 12, 2007, Complainant moved for an extension of time to file its rebuttal prehearing exchange now due on October 26, 2007. Further, the Motion notes that Respondents' joint counsel withdrew its appearance by Notice dated October 1, 2007 and that Complainant was subsequently notified that the corporate Respondent, Keenhold Associates, had filed for bankruptcy.

Court records accessed by the undersigned indicates that the corporate Respondent, Keenhold Associates, through counsel, filed a Petition for Bankruptcy under Chapter 11 of the Bankruptcy Code (11 U.S.C. §362(b)(4)) with the U.S. Bankruptcy Court for the Eastern District of Pennsylvania on September 18, 2007 (case no. 0721594). Court records for that jurisdiction do not reflect any bankruptcy filing by the four named individual Respondents.

While section 362(a) of the Bankruptcy Code generally stays the commencement or continuation of a proceeding against the debtor that could have been commenced prior to filing of the bankruptcy petition, excepted from the stay is "the commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental unit's police or regulatory power." 11 U.S.C. §§ 362(a)(1), (b)(4). It is well established that an administrative penalty proceeding seeking entry of a judgment for past violations of environmental regulations is within EPA's regulatory power to enforce environmental laws and is therefore *not stayed* by Respondent's filing of a bankruptcy petition. *See, Patrick J. Neman*, 5 E.A.D. 450, 454 n. 1 (EAB 1994)(holding that the filing of a petition for bankruptcy during the pendency of this enforcement action has no effect on the status of the action) *citing United States v. Nicolet, Inc.*, 857 F.2d 202, 209 (3rd Cir. 1988)(exemptions to automatic stay provision allow EPA to assess civil penalties for violations of environmental statutes), *Standard Tank Cleaning Corp.*, 3 E.A.D. 642, 646 (CJO 1991)("[T]he mere entry of a money judgment in proceedings to enforce environmental statutes and regulations is not affected by the automatic stay provision."), *Fisher-Calo Chemicals and Solvents Corp.*, 2 E.A.D. 301 (Adm'r 1987) *rev. denied*, 1987 EPA App. LEXIS 9 (EPA App. 1987)(same). It is only the collection of any monetary judgment resulting from the administrative enforcement proceeding that is subject to the stay provisions of the

bankruptcy code. *Neman*, 5 E.A.D. at 454 n. 1, citing *United States v. Jones & Laughlin Steel Corp.*, 804 F.2d 348, 350-351 (6th Cir. 1986)(If EPA proceeding is for enforcement (as opposed to assessment) of money judgment, filing of Chapter 11 petition operates to stay the proceeding.) *See also, Kovacs v. Ohio*, 717 F.2d 984, 988 (6th Cir. 1983), *aff'd* 469 U.S. 274 (1985), *In re James H. Crockett*, 204 Bankr. 705, 1997 Bankr. Lexis 99 (Bankr. W.D. Tex., Jan. 27, 1997).¹

Section 22.17(a) of the Consolidated Rules of Practice Governing The Administrative Assessment of Penalties (40 C.F.R. §22.17(a)) provides that a party may be found in default for failing to comply with the information exchange requirement of section 22.19(a) or an order of the Presiding Officer. "Default by respondent constitutes . . . an admission of all facts alleged in the complaint and a waiver of respondent's right to contest such factual allegations." 40 C.F.R. § 22.17(a). Further the Rules provide that upon default, "[t]he relief proposed in the complaint or the motion for default shall be ordered unless the requested relief is clearly inconsistent with the record of the proceeding or the Act." 40 C.F.R. § 22.17(c).

Therefore, the Respondents, jointly and/or severally, are hereby ORDERED to show good cause on or before October 31, 2007 why they failed to submit their prehearing exchanges as required by the Prehearing Order and why a Default should not be entered against them.

It is further Ordered that the Motion for Extension of Time to File Complainant's Rebuttal Prehearing Exchange is hereby **GRANTED** and Complainant shall have 14 days from each Respondent filing its Prehearing Exchange, if any are so filed, to file its rebuttal thereto.

Dated: October 16, 2007
Washington, D.C.

Susan L. Biro
Chief Administrative Law Judge

¹ Moreover, it is noted that filing for Chapter 11 bankruptcy, in itself, is not specific evidence that a Respondent cannot pay *any* penalty and it, standing alone, is not sufficient to rebut affirmative evidence submitted by the Agency demonstrating ability to pay. *See, Bituma-Stor, Inc.*, EPA Dkt. No. EPCRA-7-99-0045, 2001 EPA ALJ LEXIS 16 *54 (EPA ALJ 2001) (EPA need not "specifically and separately prove that a respondent has the funds necessary to pay a proposed penalty before a penalty can be assessed" as the issue "is not whether the respondent can, in fact, pay a penalty, but whether a penalty is appropriate") *citing New Waterbury, Ltd.*, 5 E.A.D. 529, 538 (EAB, Oct. 20, 1994). Thus, while Respondent's ability to pay is a factor to be considered in determining the appropriateness of the proposed penalty, bankruptcy is not a bar to the imposition of a penalty. *Bituma-Stor*, 2001 EPA ALJ LEXIS 16 at *54 *citing Britton Construction Co.*, 8 E.A.D. 261, 292 n. 21 (EAB 1999)("the specter of bankruptcy is not necessarily a reason to avoid assessing a penalty.").