EC-G-1998-377

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
ENFORCEMENT AND
COMPLIANCE ASSURANCE

SEP 30 1997

MEMORANDUM

SUBJECT: Guidance on EPA Participation in Bankruptcy Cases

FROM: Steven A. Herman
Assistant Administrator

TO: Addressees listed below

This memorandum transmits guidance entitled "EPA Participation in Bankruptcy Cases." This guidance supersedes the "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties," OSWER Directive #9832.7 (May 24, 1984) and the "Revised Hazardous Waste Bankruptcy Guidance," OSWER Directive #9832.8 (May 23, 1986).

This guidance identifies the factors to be considered by EPA in determining whether to participate in a bankruptcy case, including whether to pursue collection of costs or penalties against debtors who have liability under CERCLA or other environmental statutes.

This guidance was prepared with the assistance of EPA's National Bankruptcy Lead Region Work Group and the Department of Justice. If you have questions about this guidance, you may contact Andrea Madigan of Region IV, chair of the bankruptcy work group, at (404) 562-9518.

Attachment

Addressees:

Regional Counsel, Regions I-X, EPA
Director, Office of Site Remediation & Restoration, Region I, EPA
Director, Emergency & Remedial Response Division, Region II, EPA
Director, Hazardous Waste Management Division, Regions III & IX, EPA
Director, Waste Management Division, Region IV, EPA
Director, Superfund Divisions, Regions V, VI & VII, EPA
Assistant Regional Administrator, Office of Ecosystems Protection and Remediation, Region VIII, EPA
Director, Environmental Cleanup Office, Region X, EPA

cc: Work Group Members
Barry Breen, OSRE
Eric Schaeffer, ORE
Linda Boornazian, OSRE
Sandra Connors, OSRE
Charles Breece, OSRE
Lori Boughton, OSRE
Joel Gross, DOJ
Assistant Section Chiefs, Environmental Enforcement Section, DOJ
Alan Tennenbaum, DOJ
Earl Salo, OGC

EPA PARTICIPATION IN BANKRUPTCY CASES

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EPA PARTICIPATION IN BANKRUPTCY CASES

I. Introduction.

This guidance is issued to assist the Regions in evaluating how to respond when a potentially responsible party or the owner or operator of a regulated facility files for bankruptcy.[1]

This guidance supersedes the "Guidance Regarding CERCLA Enforcement Against Bankrupt Parties," OSWER Directive #9832.7 (May 24, 1984) and the "Revised Hazardous Waste Bankruptcy Guidance," OSWER Directive #9832.8 (May 23, 1986).

II. Purpose and Scope of Guidance.

It is not always appropriate for the Agency to file a claim for cost recovery or penalties or to otherwise participate in a bankruptcy case. The purpose of this guidance is to identify the factors to be considered by EPA in determining whether to participate in a bankruptcy case, including whether to pursue collection of costs or penalties against debtors who have liability under the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) or other environmental statutes. This guidance also addresses issues in bankruptcy cases relating to the abandonment of contaminated property, cleanup activities under CERCLA on property included in the bankruptcy estate, and the impact of the automatic stay on different types of administrative and judicial enforcement activities.

This guidance does not address or otherwise change procedures relating to the referral of bankruptcy matters to the Department of Justice. Requests for filing proofs of claim or other participation before a Bankruptcy Court are made by referral to the Department of Justice. Requests should be made as far in advance of any deadline as possible.

Issues that arise when a regulated entity or a potentially responsible party files or has filed for bankruptcy are complex. In many instances, applicable law is unsettled or may vary depending upon the judicial court of appeals circuit. This guidance is based upon the state of the law as it now exists; an independent case by case analysis should be undertaken with respect to any bankruptcy issues that arise in future cases.

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[1] For an overview of the Bankruptcy Code as it relates to enforcement, cost recovery, and other actions under environmental statutes, see "A Bankruptcy Primer for the Regional Attorney" issued by EPA's National Bankruptcy Lead Region Work Group in February 1994.

III. When to File a Proof of Claim in a Bankruptcy Case.

In evaluating whether to proceed with the filing of a proof of claim for liability arising under environmental laws and regulations, the following factors should be considered:[2]

A. Potential for Recovery.

In deciding whether to file a proof of claim, the potential for recovering payment on the claim should be considered. This involves an analysis of the amount and priority of EPA's claim in relation to the assets and liabilities of the bankruptcy estate.

1. Amount and Priority of EPA's Claim. In analyzing the potential for recovery, the amount and priority of EPA's claim should be considered. Under the Bankruptcy Code, claims are organized into classes and paid in accordance with the bankruptcy priority scheme.[3] Generally, classes of claims that have a higher priority must be paid in full before any payment is made to creditors holding claims of a lower priority.[4] Within each class of claims, if there are insufficient funds to pay all claims in full, payment is pro rata.

Environmental claims are likely to fall into one of the following categories:

Secured claims. If EPA perfected a CERCLA lien prior to the bankruptcy filing against property owned by the debtor, the

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[2] It is important to distinguish an EPA claim for reimbursement of response costs or for penalties from the Agency's injunctive authority to issue cleanup orders. Only "debts" which are liabilities on a "claim" may be discharged in bankruptcy. The obligations imposed by a cleanup order issued to an owner of contaminated property which orders the respondent to cease threatened or ongoing pollution are not dischargeable claims in bankruptcy. See State of Ohio v. Kovacs, 469 U.S. 274, 284-5 (1985); United States v. LTV Corporation (In re Chateaugay), 944 F.2d 997, 1008 (2nd Cir. 1991); In re CMC Heartland Partners, 966 F.2d 1143, 1146-47 (7th Cir. 1992); In re Torwico Electronics, Inc., 8 F.3d 146, 148 (3rd Cir. 1993); In re Motel Investments, Inc., 172 Bankr. 105 (Bankr. M.D. Fla. 1994).

[3] The priority scheme is set forth in 11 U.S.C. §507.

[4] Under Chapter 11, certain priority claims can be paid over time under a plan of reorganization. See 11 U.S.C §1129.

Agency may have a secured claim.[5] EPA may also have a secured claim if it obtained a judgment against the debtor and perfected a judgment lien against property of the debtor prior to the bankruptcy filing.[6] In addition, EPA may have a secured claim to the extent that such claim is subject to a setoff against a claim of a debtor against EPA or another agency of the United States.[7] Secured claims will be paid in bankruptcy to the extent of the value of the collateral securing such claim. If the amount of the claim exceeds the value of the collateral, the deficiency will be treated as an unsecured claim.

Administrative expense claims. Response costs incurred by EPA after the bankruptcy filing to clean up property owned or operated by the debtor during the bankruptcy case, or property at which the debtor's wastes were disposed of or transported to for disposal during the bankruptcy case, may qualify as administrative expenses having priority and paid before general unsecured claims.[8]

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[5] Section 107(l) of CERCLA provides that all costs and damages that are recoverable from a liable party under CERCLA constitute a lien in favor of the United States against real property owned by such liable party that was subject to or affected by a removal or remedial action. For information on how to perfect a CERCLA lien, see EPA's "Guidance on Federal Superfund Liens", OSWER Directive No. 9832.12 (September 22, 1987) and "Supplemental Guidance on Federal Superfund Liens", OSWER Directive No. 9832.12-1a (July 29, 1993).

[6] Once the debtor files for bankruptcy, any act to create, perfect, or enforce a lien against property of the bankruptcy estate is prohibited by the automatic stay of Section 362(a)(4) of the Bankruptcy Code. Any act to create, perfect, or enforce a lien against property of the debtor is likewise prohibited to the extent that such lien secures a claim that arose prior to the bankruptcy filing. See Section 362(a)(5) of the Bankruptcy Code.

[7] Section 506 of the Bankruptcy Code.

[8] Section 503(b)(1)(A) of the Bankruptcy Code defines administrative expenses to include the "actual, necessary costs and expenses of preserving the estate." Section 507(a) of the Bankruptcy Code grants first priority to the payment of administrative expenses. For cases holding that response costs incurred post-petition to cleanup property of the estate are entitled to administrative priority see Pennsylvania v. Conroy, 24 F.3d 568 (3rd. 1994); In re Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993); In re Chateaugay Corp., 944 F.2d 997 (2nd Cir. 1991); In re Smith Douglass, Inc., 856 F.2d 12 (4th Cir. 1988).

General unsecured claims. Cleanup costs that are not secured and that do not qualify as an administrative expense constitute a general unsecured claim and are paid only after all secured and priority claims are paid in full or otherwise satisfied.

Penalties. Penalties assessed under environmental laws for violations that occurred prior to the bankruptcy filing are subordinated in Chapter 7 cases and paid only after all other general unsecured claims are paid in full. Pre-petition environmental penalties are subordinated in Chapter 7 cases even if they have been reduced to judgment and secured by a perfected judgment lien.[9] Pre-petition penalties in many Chapter 11 reorganization cases are treated as non-subordinated general unsecured claims in recognition of the fact that such claims are not likely to be subordinated where the debtor is reorganizing.[10] Penalties that arise post-petition from the debtor's continued operation of its business, may be treated as administrative expenses and paid as a priority claim.[11]

Accordingly, first priority administrative claims, such as a claim for post-petition penalties or for response costs incurred post-petition, are more likely to be paid than general unsecured claims. A claim under CERCLA for reimbursement of all past and future response costs may constitute the largest general unsecured claim and would, therefore, receive a high proportion of the available funds in a pro rata distribution. Recovery on a pre-petition penalty claim could be remote in light of the low priority afforded this type of claim.

2. Assets and Liabilities of the Bankruptcy Estate.

The other factor in evaluating the likelihood of recovery is the amount, if any, of funds available for distribution in the bankruptcy case and the priority and amount of other claims against the bankruptcy estate. In a no-asset Chapter 7 case, there are no funds available for distribution and no possibility of recovery; there is no need to file a proof of claim in such cases.

In bankruptcy cases where there are assets, evaluating the amount of funds that may be recovered for the benefit of

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[9] See Section 726(a) of the Bankruptcy Code.

[10] See Schultz Broadway Inn v. United States, 912 F.2d 230, 233 (8th Cir. 1992).

[11] See In re Hemingway Transport, Inc., supra; In re Chateauqay Corp., supra; In re N.P. Mining Co., 963 F. 2d 1449 (11th Cir. 1992).

creditors and the amount and priority of other creditors' claims may not be possible until late in the bankruptcy case and after the deadline for filing a proof of claim. While the debtor's bankruptcy schedules list assets and liabilities, they are sometimes misleading. Values assigned to assets are sometimes speculative. The equity in property subject to a lien could be unrecoverable if such property cannot be sold in a timely manner. Intangible assets such as preference claims and fraudulent transfer claims are sometimes unscheduled. Accounts receivable can be difficult to collect or subject to bona fide dispute. Proofs of claim filed by other creditors may be subject to bona fide dispute. It should be recognized, therefore, that the likelihood of recovery is sometimes speculative and subject to change.

B. Impact on Agency Resources.

Once a proof of claim is filed, EPA must be prepared to substantiate the claim before the bankruptcy court on a potentially accelerated schedule. In addition, EPA may have to respond to discovery requests and develop expert testimony on the estimate of future response costs on relatively short notice. The need to allocate resources for such matters should be measured against the potential gain in filing a claim. For example, in a CERCLA case where there are other viable PRPs, or where other viable PRPs are already committed to undertake the cleanup pursuant to an administrative order or consent decree, the resources needed to pursue a claim in bankruptcy against a debtor PRP may outweigh any anticipated return. Further, in CERCLA cases where the Agency has not yet selected a remedy, the resources needed to establish the likely remedy, and the estimated cost of such remedy before the bankruptcy court may outweigh any anticipated return.

C. Fairness to Other Liable Parties.

The decision to forego filing a proof of claim need not be based solely upon EPA's ability to recover costs from other liable parties. The interests of justice or other policy considerations may also be considered. For example, private cost recovery claims for future response costs are treated as contingent claims for contribution and are disallowed in bankruptcy pursuant to 11 U.S.C §502(e)(1). Therefore, other PRPs may be foreclosed from recovering any portion of the debtor's fair share of the cleanup costs. In such a case, the Region may elect to proceed with the filing of a claim against the debtor PRP.[12]

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[12] Even if EPA elects not to file a proof of claim, Section 501 of the Bankruptcy Code may permit the debtor, trustee, or a co-PRP to file a claim on behalf of the Agency. See In re

D. Other Considerations.

All the factors that are taken into account in deciding whether to take enforcement action in a non-bankruptcy case should also be considered, such as the culpability of the debtor, the strength of the evidence against the debtor, the deterrence value of such action, the precedential value of such action and the interests of justice and equity.

IV. Abandonment.

Section 554 of the Bankruptcy Code, 11 U.S.C §554, provides that upon the request of the trustee or other party in interest, the bankruptcy court may allow abandonment of property of the estate when the property is "burdensome" or "of inconsequential value and benefit to the estate". The power to abandon property is not unlimited and may not be allowed in contravention of a state statute or regulation that is reasonably designed to protect the public health or safety from identified hazards.[13]

If abandonment is allowed, the property is no longer property of the estate and it is abandoned to the debtor and any other party with an interest in property; in essence, the property assumes its pre-bankruptcy status. If abandonment of

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Hemingway Transport, Inc., 993 F.2d 915 (1st Cir. 1993).

[13] In Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986), the Supreme Court established that the trustee's abandonment power is limited and may not be exercised in contravention of laws designed to protect the public health or safety. The Court went on to note that this exception to the trustee's abandonment power is narrow and does not encompass a speculative or indeterminate future violation of such laws that may stem from abandonment and that the abandonment power is not to be fettered by laws or regulation not reasonably calculated to protect the public health or safety from imminent and identifiable harm. Since the Midlantic decision, a number of courts have addressed the issue of when abandonment of contaminated property may be allowed. While no uniform standard has as yet emerged from these cases, courts generally consider the nature of the environmental threat, and the amount of money available to the estate to fund any cleanup in determining whether abandonment should be allowed. See, In re Smith-Douglass, Inc., 856 F.2d 12 (4th Cir, 1988); In re Wall Tube & Metal Products Co., 831 F.2d 118 (6th Cir. 1987); In re FCX, 96 Bankr. 49 (Bankr. E.D.N.C. 1989); In re Peerless Plating Co., 70 Bankr. 943 (Bankr. W.D. Mich 1987); In re Anthony Ferrante & Sons, Inc., 119 Bankr. 45 (D. N.J. 1990); In re Franklin Signal Corp., 65 Bankr. 298 (D. Minn. 1986).

contaminated property is allowed, the trustee or debtor may contend that response costs incurred after the abandonment no longer have administrative priority status under 11 U.S.C. §507, because the cleanup was not necessary to "preserve property of the estate."

Section 554 provides that property of the estate may be abandoned only after notice and a hearing. Usually, creditors and other parties in interest are served with a notice that identifies the property sought to be abandoned. However, notice that a debtor or trustee may seek to abandon unspecified property at the Section 341 meeting may be included in the notice for such meeting.[14] In such instances, EPA may consider requesting the trustee or debtor to identify, prior to the Section 341 meeting, all property that may be abandoned so that the Agency can determine whether to take any action regarding the proposed abandonment.

In evaluating whether to oppose a motion to abandon contaminated property filed by a trustee or other party in interest in a bankruptcy case, the following factors should be considered:

A. Whether There Are Unencumbered Assets in the Bankruptcy Estate that Could Be Used to Fund Response Actions.

In a bankruptcy case with few or no unencumbered assets, it is unlikely that there would be sufficient funds in the bankruptcy estate to finance a cleanup of the contaminated property. In such cases there may be no reason to oppose a motion for abandonment. In cases where there are some funds in the estate but not enough to pay for all cleanup costs, it may be appropriate to ask the bankruptcy court to condition the abandonment upon the trustee undertaking certain tasks such as maintenance of site security or performing a discrete portion of the cleanup necessary to protect public health or the environment.[15] Even if the estate has limited assets, EPA may consider negotiating conditions upon which the Agency would not

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[14] See In re Southern International Co., 165 Bankr. 815 (Bankr. E.D. Va. 1994).

[15] See, e.g., In re FCX, Inc., 96 Bankr. 49 (Bankr. E.D.N.C. 1989) (as a condition to allowing the debtor to abandon contaminated property, the court required the debtor to set aside $250,000 to pay for cleanup of the abandoned property as an administrative expense); In re Franklin Signal Corp., 65 Bankr. 268 (Bankr. D. Minn 1986) (prior to abandonment, the trustee was required to investigate the presence of hazardous substances on property and inform federal and state environmental agencies of the results and any intent to abandon).

oppose the proposed abandonment, such as EPA's access to the contaminated property, that the abandonment is without prejudice to the priority of EPA's claim against the estate, or that the abandonment is without prejudice to EPA's right to file a lien against the contaminated property after the abandonment is approved.

B. Nature of Environmental Threat.

Consideration should be given to the nature and extent of the environmental problems posed by the site. In opposing an abandonment motion, EPA should be prepared to present evidence about the environmental conditions at the site and the threat that they pose to public health and safety. Consideration should also be given to whether abandonment would constitute a release under applicable state law or whether the site is subject to a pre-petition state or federal cleanup order.[16]

C. Need for Access to Conduct Future Cleanup Activities.

It is important to consider the need of EPA for access to contaminated property in order to conduct future cleanup activities. Without a court order allowing EPA access to abandoned property, there may be no one to contact to obtain access once the property is abandoned to a debtor that is nothing more than a corporate shell. EPA has been able to obtain a court order allowing such access as a condition to the court's approval the proposed abandonment.[17]

V. Cleanup Activities Under CERCLA on Property Included in the Bankruptcy Estate.

When EPA is conducting a cleanup of property that is owned by a debtor in bankruptcy, there are issues that merit special attention. In cases where a trustee has been appointed, it is the trustee rather than the debtor who has the authority to grant access.[18] It is not necessary for the trustee to obtain approval

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[16] See Pennsylvania v. Conroy, 24 F.3d 568 (3rd Cir. 1994) and In re Motel Investments, Inc., 172 Bankr. 105 (Bankr. M.D. Fla. 1994).

[17] See In re Mowbray Engineering Co., 67 Bankr. 34 (Bankr. M.D. Ala. 1986).

[18] A trustee is appointed in every Chapter 7 case. 11 U.S.C. §701. In Chapter 11, the debtor usually retains possession and control of its assets as a debtor in possession. 11 U.S.C §1107. A trustee may be appointed in a Chapter 11 case only if a party in interest establishes cause, such as fraud or gross mismanagement, or that such appointment would be in the

of the bankruptcy court before granting access to EPA. However, sometimes trustees are unfamiliar with CERCLA and EPA's access authority and may be initially hesitant to grant access. The regional counsel bankruptcy contact should contact the trustee, provide appropriate information about Superfund and EPA's access authority, and seek to establish a good working relationship with the trustee. If the trustee continues to deny access, EPA regional counsel should consult with DOJ to obtain access through an order or a warrant as appropriate.

EPA should keep the trustee informed about cleanup activities. If there is personal property at the site that is contaminated and must be disposed of or destroyed in the course of the cleanup, or is in the way and must be removed, EPA should so advise the trustee. If there are unresolved conflicts between EPA's obligation to take appropriate action to protect human health and the environment and the trustee's obligation to protect and preserve assets of the bankruptcy estate, regional counsel should be consulted, and regional counsel may want to consult DOJ. Potentially valuable property, such as equipment, or tanks or drums of saleable chemicals, should not be removed without such consultation so that any potential claim by the trustee or creditors that such removal violates the bankruptcy automatic stay, 11 U.S.C. §362(a)(3), can be evaluated.

VI. Impact of the Automatic Stay on Administrative and Judicial Proceedings.

Section 362(a) of the Bankruptcy Code, 11 U.S.C. §362(b), provides for a broad stay of litigation, lien enforcement and certain other actions which would affect or interfere with the bankruptcy process. This stay arises automatically upon the filing of the bankruptcy petition and applies in all bankruptcy cases. The automatic stay is a fundamental part of the bankruptcy process intended to protect the status quo during the pendency of the bankruptcy case.

There are certain exceptions to the automatic stay which are set forth in Section 362(b). Actions by a governmental unit to enforce its police or regulatory powers and the enforcement of non-monetary judgments obtained by a governmental unit to enforce its police or regulatory powers are excepted and, therefore, are not automatically stayed at the commencement of a bankruptcy case. However, attempts to enforce monetary judgments, perfect liens, or to obtain possession or control over property of the estate do not fall within this exception and are subject to the automatic stay. See 11 U.S.C. §362(b)(4),(5).

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best interest of creditors. 11 U.S.C. §1104.

It is important to understand what types of enforcement activities are prohibited by the automatic stay. It is equally important to understand what types of enforcement activities are not stayed.

A. Regulatory Compliance and Enforcement Actions.

While a company may continue to operate its business during a Chapter 11 reorganization proceeding, the Bankruptcy Code does not excuse such a company from its obligation to comply with environmental laws and regulations.[19] Environmental enforcement actions seeking injunctive relief against companies in bankruptcy are generally excepted from the automatic stay pursuant to the "police power" exemption of 11 U.S.C. §362(b)(4), (5).[20] Administrative or judicial proceedings to fix the amount of a penalty or establish the amount of cost recovery owed are also exempt from the automatic stay.[21] Note, however, that once a

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[19] 28 U.S.C. §959(b) provides ". . . a trustee, receiver or manager appointed in any cause pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." See State of Ohio v Kovacs, 469 US 274, 285 (1985) ("we do not question that anyone in possession of the site . . . must comply with the environmental laws and regulations of the State of Ohio. Plainly, that person or firm may not maintain a nuisance, pollute the waters of the State, or refuse to remove the source of such conditions."); Midlantic National Bank v. New Jersey Department of Environmental Protection, 474 U.S. 494 (1986) ("Congress did not intend for the Bankruptcy Code to preempt all state laws that otherwise constrain the exercise of a trustee's powers.")

[20] See In re Commonwealth Oil Refining Co., 805 F.2d 1175 (5th Cir. 1986) (RCRA §3008(a) compliance order issued by EPA not stayed by virtue of 11 U.S.C. §362(a) even though compliance with order would require debtor to spend money); United States v. Jones & Laughlin Steel Corp., 804 F.2d 348 (6th Cir. 1986) (proceeding to modify consent decree relating to debtor's violations of Clean Water Act and Clean Air Act not stayed by bankruptcy filing). See also In re Torwico Electronics, Inc., F.3d 146 (3rd Cir. 1993), cert. denied, 114 S. Ct. 1576 (1994).

[21] Board of Governors of the Federal Reserve System v. Corp. Financial, Inc., 502 U.S. 32 (1991); In re Commerce Oil Co., 847 F.2d 291 (6th Cir. 1988); United States v. Nicolet, Inc., 857 F.2d 202 (3rd Cir. 1988); City of New York v. Exxon Corp., 932 F. 2d 1020 (2d Cir. 1991).

penalty is assessed or a judgment is obtained, the automatic stay prohibits collection activities other than through the bankruptcy process.

Accordingly, enforcement actions seeking injunctive relief and/or the assessment of a penalty against operating facilities for non-compliance with applicable environmental laws and regulations should not ordinarily be delayed or postponed due to the filing of a bankruptcy petition involving the facility's owner or operator.[22] However, debtors may contend that an action for injunctive relief that will inevitably cost money is an attempt to enforce a money judgment that is not excepted from the automatic stay. Therefore, it is important to consult with legal counsel on this issue before proceeding.

B. Issuing Cleanup Orders Against Debtors or Trustees.

The automatic stay prohibits most debt collection activities. EPA's injunctive authority to issue orders for the cleanup of contaminated property[23] is distinguished from the Agency's claim as a creditor for reimbursement of response costs and is not prohibited by the automatic stay.[24] However, the debtor or trustee may contend that compliance with a cleanup order will cost money and, therefore, is an attempt to enforce a money judgment that is not excepted from the automatic stay. In addition, the enforcement of such orders may involve litigation before the bankruptcy court on an accelerated time schedule. Accordingly, regional counsel should be consulted before such orders are issued, and the regional attorney may want to confer with DOJ.

C. Information Gathering.

There are numerous statutory authorities under which EPA may seek information from a variety of parties, including Section 104(e) of CERCLA, 42 U.S.C. §9604(e), Section 3007 of RCRA, 42

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[22] In cases where the Agency is seeking to assess a penalty, it has the option of either commencing the administrative or judicial proceeding that would be appropriate absent the bankruptcy, or filing a proof of claim with the bankruptcy court in the amount the Agency believes is appropriate under the applicable environmental statute or penalty policy.

[23] EPA has the authority to issue orders requiring cleanup activities under several environmental statutes including CERCLA §§ 104 and 106, RCRA §§ 3008, 3013, and 7003, and CWA §311. The bankruptcy analysis set forth above would generally apply to orders issued under any of these authorities.

[24] See footnotes 2, 15.

U.S.C. §6927, Section 308 of the Clean Water Act, 33 U.S.C. §1318, and Section 114 of the Clean Air Act, 42 U.S.C. §7414. The automatic stay in bankruptcy does not apply to or otherwise prohibit EPA from issuing information request letters under these authorities. Nonetheless, it is important to recognize that financial information regarding the debtor is included in documents filed with the clerk of the bankruptcy court. The bankruptcy schedules and statement of affairs, which every debtor is required to file under penalty of perjury, list the debtor's assets and liabilities and include additional information about the debtor and its business operations. These documents are publicly available and can be obtained from the bankruptcy court.

It is also important to recognize that the Bankruptcy Code and Bankruptcy Rules provide additional methods of obtaining information about a debtor. Section 343 of the Bankruptcy Code requires the debtor to attend the first meeting of creditors and to submit to examination under oath at such meeting. In addition, under Bankruptcy Rule 2004, the bankruptcy court may allow the examination of any entity relating to the acts, conduct or property or to the liabilities or financial condition of the debtor, or to any matter that may affect the administration of the bankruptcy estate.

In Chapter 7 cases, the trustee should be able to provide access to the debtor's operating records. However, the Chapter 7 trustee will probably not have extensive knowledge regarding the debtor's waste management practices.

D. Issuing General or Special Notice Letters Under CERCLA.

To the extent that a notice letter simply advises a party that EPA believes that it may have liability for cleanup of a site and offers the debtor or trustee an opportunity to engage in settlement discussions, it would not violate the automatic stay to send such a letter to a debtor or trustee in bankruptcy. However, a demand for payment, which is often included in a notice letter, may be alleged to be an act to collect payment of a pre-petition debt and, therefore, may be prohibited by the automatic stay. Accordingly, it is preferable to eliminate the demand for payment in any notice letter sent to a debtor or bankruptcy trustee.

It is important to recognize that any settlement must be approved by the bankruptcy court after notice and hearing. This factor must be taken into account in establishing settlement deadlines. It is unlikely that a bankruptcy settlement will coincide with special notice procedures of CERCLA § 122. Accordingly, the impact of the bankruptcy should be considered before issuing a notice letter to a debtor or trustee to determine whether a notice letter is appropriate or otherwise worthwhile.

E. CERCLA Liens.

Any act to create, perfect, or enforce a lien against property of the debtor may violate the automatic stay.[25] Accordingly, EPA should not attempt to perfect its lien under Section 107(l) of CERCLA where the owner of the subject property is in bankruptcy.

Violations of the automatic stay may be punishable by a contempt judgment.[26] Accordingly, the regional counsel bankruptcy contact should be consulted on any matters that may raise automatic stay issues, and the regional attorney may want to confer with DOJ.

VII. Other Bankruptcy Issues.

While this guidance is focused primarily toward more commonly recurring bankruptcy matters, it is important to recognize that there are other issues that may arise requiring EPA to become involved in a bankruptcy proceeding. Such actions may include but are not limited to: (1) objecting to a plan of reorganization that purports to discharge or impair future environmental claims with respect to property owned by the reorganized debtor; (2) objecting to a proposal to sell property of the debtor free and clear of EPA's legal rights against the purchaser of such property; (3) objecting to an improper attempt to impair or release EPA's rights against a non-debtor; (4) objecting to improper exemptions claimed by an individual debtor; (5) responding to fraudulent conveyances or preferences actions; (6) seeking the appointment of a trustee or an examiner to take over and/or investigate the affairs of a Chapter 11 debtor; (7) objecting to discharge based upon a debtor's willful and malicious conduct, fraud, or failure to provide appropriate notice to EPA; (8) filing of an involuntary bankruptcy petition by the United States; and (9) the filing of and/or voting on a plan of reorganization.

In those instances where EPA wishes to take legal action against a party that went through a bankruptcy, the Agency should consider whether such action was discharged, barred, or otherwise impacted by such prior bankruptcy.

VIII. Use of this Guidance.

This guidance is not a rule and does not create any legal obligations. The extent to which EPA applies this guidance will depend upon the facts of each case.

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[25] See Section 362(a)(5) of the Bankruptcy Code.

[26] 28 U.S.C. §1481.