UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
The Beaumont Company,	)	**Docket No. RCRA-III-238**
	)	
Respondent	)	

ORDER GRANTING IN PART MOTION
FOR ACCELERATED DECISION

The complaint in this proceeding under § 3008 of the Solid Waste Disposal Act, as amended (RCRA), 42 U.S.C. § 6928, issued February 4, 1992, charged Respondent, The Beaumont Company, with violations of the Act, and, as applicable, West Virginia Hazardous Waste Regulations (WVHWR) or federal regulations issued under the Hazardous and Solid Waste Act Amendments of 1984 (HSWA).[1/] Specifically, the complaint alleged (Count I) that from at least May 17, 1989, until August 9, 1990, Beaumont generated hazardous waste at its facility without complying with EPA identification number requirements; Count II, that from May 17, 1989, until November 4, 1991, Beaumont stored hazardous waste at its facility without submitting a notification of hazardous waste storage activity; Count III, that from at least

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[1/] West Virginia was granted final authorization to administer its hazardous waste program on May 29, 1986 (51 Fed. Reg. 17739, May 15, 1986). The authorization does not extend to HSWA requirements.

June 30, 1988, to September 21, 1991, Beaumont disposed of a combination of hydrofluoric acid spillage, overflows and hosings at its facility without determining whether such wastes were hazardous; and Counts IV through X, that from at least August 15, 1989, until November 4, 1991, Beaumont operated a hazardous waste storage facility without a permit, without having a contingency plan, without requiring its personnel to complete training in hazardous waste management, without inspecting its hazardous waste container storage area, without having a written closure plan and financial assurance for closure, and without testing its waste to determine if it is restricted from land disposal. For these alleged violations, it was proposed to assess Beaumont a penalty totaling $1,278,400.

Beaumont answered, denying that the principal regulatory obligations asserted in the complaint applied to it, alleging mitigating and extenuating circumstances, objecting to the amount of the proposed penalty, and requested a hearing.

Under date of April 3, 1992, Beaumont submitted a motion for an accelerated decision dismissing the complaint based on principles of res judicata and collateral estoppel, because RCRA § 3006 prohibits "overfilings" by EPA and because EPA failed to comply with the notice provisions of "RCRA" § 3008.

Beaumont's res judicata and collateral estoppel arguments are based upon an order, issued by the West Virginia Water Resources Board on August 9, 1991 (Beaumont Glass Company v. J. Edward Hamrick, III, Director, Division of Natural Resources,

Appeal No. 456), wherein the Board found that Beaumont had "violated 47 CSR 35 § 4.1, 47 CSR 35 § 6.3.2 and .3, and 47 CSR 35 § 8, by failing to notify the State of hazardous waste activities on site; failing to properly label and mark drums containing hazardous waste despite instructions to do so; and storing hazardous waste without a permit in excess of 90 days." For these violations, the Board imposed upon Beaumont a penalty of $2,000. The reduction in the penalty was in recognition of Beaumont's good faith efforts to remedy the violations after replacement of a prior general manager and was conditional upon Beaumont removing all drums and performing additional monitoring and soil removal by September 11, 1991.

The mentioned order had its genesis in an undated "Notice of Civil Administrative Penalty" from the WVDNR, apparently received by Beaumont on May 29, 1990, wherein Beaumont was notified that it was in violation of WVHWR for failure to notify DNR of its hazardous waste activities, failure to label drums of hazardous waste as such[2/] and storage of hazardous waste without a permit. A penalty of $5,600 was proposed, consisting of $3,300 for the first alleged violation and $2,300 for the second alleged violation. No penalty was proposed for the storage of hazardous waste without a permit. In a letter from the Director, DNR, dated November 8, 1990 (not in the file

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[2/] At the time of a DNR inspection on April 27, 1990, there were 30 drums of hazardous waste of which six were not labeled. It is not clear how many of the drums were improperly or incompletely labeled.

available to the ALJ), Beaumont was informed that the Director's final decision was to reduce the proposed penalty by $1,376 to $4,224, because of Beaumont's "good faith effort made in promptly complying with activity notification requirements." Beaumont appealed this penalty assessment to the Water Resources Board, which heard the appeal on March 12, 1991, and issued the order quoted in part above.

Beaumont asserts that the proceeding before the Board was adversarial in nature and that the Board's opinion and order constitutes a final judgment on the merits (Brief In Support of Motion For Accelerated Decision at 6). Relying on West Virginia law, Beaumont argues that the Board is a hearing body and that its decisions are entitled to be given res judicata and collateral estoppel effect.[3/] Beaumont points out that res judicata has been applied to administrative actions where an agency is acting in its judicial capacity and that the same principles of judicial efficiency which justify the application of collateral estoppel in judicial proceedings justify its application in quasi-judicial proceedings (Brief at 8). Because the Board was acting in its judicial capacity, and the parties had a full and fair opportunity to litigate the matters in

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[3/] Because a federal court must give a state court judgment (assuming the Board's order qualifies as such) the same preclusive effect the judgment would have in courts of the state which rendered the judgment, this issue is controlled by West Virginia law. U.S. EPA v. Environmental Waste Control, Inc., 710 F.Supp. 1172 (N.D. Ind. 1989), affirmed on other grounds 917 F.2d 327 (7th Cir. 1990), cert denied 499 U.S. 975 (1991).

dispute, Beaumont asserts that consistent with the legislative purpose in creating the Board, its decisions are entitled to be given res judicata and collateral estoppel effect.

Recognizing that, in order for the principles of res judicata or collateral estoppel to apply, the parties in the present case must be identical to those in the former litigation or sufficiently in privity with them as to give them a common interest in the outcome thereof, Beaumont contends that requirement has been satisfied here (Brief at 9, 10). Beaumont argues that EPA was in privity with DNR with regard to the enforcement of RCRA, noting that West Virginia was authorized to administer its hazardous waste program in lieu of the federal program and that RCRA § 3006(d) provides that any action taken by a State under an authorized hazardous waste program shall have the same force and effect as action taken by the Administrator of EPA. Moreover, Beaumont argues that EPA and DNR had a common interest in the outcome of the appeal before the Board.

Beaumont points out that another element generally required in order for the doctrines of res judicata and collateral estoppel to apply is that the issues presented in the prior adjudication be identical to those presented in the subsequent action. According to Beaumont, this is sometimes determined by considering whether the same operative facts give rise to each action or whether a right, question or fact distinctly put in issue and directly determined is involved in each action (Brief

at 10, 11). Beaumont emphasizes that it appealed to the Board the final decision of the DNR which found the following violations: 1) failure to notify of hazardous waste activities at the site in violation of Title 47, 35 WVCSR § 4.1; 2) failure to label drums containing hazardous waste as such in violation of Title 47, 35 WVCSR § 6.3.2, and 3) storage of hazardous waste without a permit in violation of Title 47, 35 WVCSR § 8. Beaumont notes that these are the same regulatory citations [and violations] alleged in the letter from DNR, dated November 8, 1990, and that WVHWR and DNR inspections are cited as the bases for EPA's complaint. It is argued that for EPA now to be able to divorce itself from this interrelationship with West Virginia would be unconscionable and contrary to the principles of res judicata and collateral estoppel (Brief at 13).

According to Beaumont, all of the alleged facts and issues in EPA's complaint were actually litigated in the Board proceeding (Brief at 14). The Agency's complaint alleges violations relating to identification, notification, soil sampling and analysis, failure to arrange for transfer of drummed soil in a timely fashion and what Beaumont refers to as "cascading" violations, resulting from the failure to arrange for [disposal] of hazardous waste in a timely fashion, thereby becoming a storage facility.

Additionally, Beaumont alleges that EPA's action is barred, because it failed to give the State notice as required by RCRA

§ 3008(a)(2).[4/] Beaumont also relies on a memorandum from the Deputy Administrator, dated May 19, 1986, Subject: "Guidance on RCRA Overfiling," which provides in pertinent part that: "(r)egions should make every effort to assure that there has been thorough consultation with the state before overfiling."[5/] Beaumont says that it has no information from which to conclude that EPA gave adequate notice to the State of West Virginia and urges that this action be dismissed, unless Complainant provides proof of adequate notice [of this action] as required by RCRA § 3008 (Brief at 16).

[4/] RCRA § 3008(a)(2) provides:

> (2) In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 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.

[5/] The Deputy Administrator's memorandum provides in part:

> Regions should make every effort to assure that there has been thorough consultation with the state before overfiling. If the Regional enforcement office has concerns about whether the relief requested and penalties to be assessed by the state comport with EPA's oversight policies on enforcement response and penalty amount, these concerns should be made known to the state before the state matter proceeds to judgment or settlement. It should be emphasized that coordination and cooperation with the states in advance of issuance of compliance orders regarding the appropriateness of the terms of those orders will eliminate many of the instances where overfilings are necessary.

Beaumont argues that RCRA § 3006(d) prohibits "overfilings" and requests that this action be dismissed with prejudice.[6/]

Complainant's Opposition

Opposing the motion, Complainant states that: 1) RCRA § 3006(d) does not prohibit EPA from taking an enforcement action in an authorized state; 2) that EPA is not barred from taking an enforcement action pursuant to RCRA § 3008(a) in an authorized state by res judicata and/or collateral estoppel; and 3) that EPA satisfied RCRA § 3008(a) by providing prior notice of this action to the State of West Virginia through its Division of Natural Resources (Complainant's Response In Opposition To Respondent's Motion For Accelerated Decision, "Opposition," dated April 30, 1992, at 1).

Complainant says that it is well established that RCRA § 3008 empowers EPA to take enforcement action in any state, which has been authorized to administer its own hazardous waste program under § 3006, for violations of any requirement of the authorized state program (Opposition at 2). For this proposition, Complainant cites, among others, Wyckoff v. EPA, 796 F.2d 1197 (9th Cir. 1986); U.S. v. Environmental Waste

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[6/] Brief at 16-19. RCRA § 3006(d) provides:

(d) Effect of State permit

Any action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter.

Control, Inc., supra note 3; In re CID-Chemical Waste Management of Illinois, Inc., RCRA (3008) Appeal No. 87-11 (CJO, August 18, 1988) and In re Martin Electronics, RCRA (3008) Appeal No. 86-1 (CJO, June 22, 1987).

In accordance with § 3008(a)(2) and the cited authorities, Complainant says that there are only two prerequisites to EPA enforcement in an authorized state, i.e., a finding of violation and notice to the state [that EPA is taking or contemplating enforcement action for the violations found] (Brief at 3, 4). Complainant cites and relies on an opinion of the General Counsel of EPA, dated May 9, 1986, Subject: "Effect on EPA Enforcement of Enforcement Action Taken by State With Approved RCRA Program," which concluded that the only prerequisites to EPA enforcement action in an authorized state were those set out in § 3008(a)(2), i.e., a finding of violation and notice to the state, and whether EPA commenced action notwithstanding that the state had taken action on the same violations was solely a matter of EPA's prosecutorial discretion. The General Counsel relied on the "plain language" of RCRA § 3008(a), on legislative history, S.Rep. No. 988, 94th Cong. 2d Sess. 17 (June 25, 1976), indicating an intent to draw on similar provisions of the FWPCA and Clean Air Act in allocating responsibilities between EPA and the states under § 3008 and upon cases under the Clean Air and Clean Water Acts. He expressly rejected the notion that § 3006(d) (supra note 6), was any limitation on the Administrator's RCRA enforcement authority.

The Chief Judicial Officer (CJO) has adopted the General Counsel's reasoning (In re Martin Electronics, supra). In that case, the ALJ had dismissed portions of an EPA complaint alleging violations of RCRA groundwater monitoring regulations, adopting the CJO's reasoning In re BKK Corporation, RCRA (3008) Appeal No. 84-5 (Final Order, May 10, 1985), wherein it was held that the RCRA statutory scheme, which provides that an authorized state program operates in lieu of the federal program and which includes § 3006(d), precludes the Agency from instituting enforcement action for violations for which a state, authorized to administer its own hazardous waste program, had taken reasonable and appropriate enforcement action.[7/] In vacating the ALJ's decision, the CJO discussed res judicata and collateral estoppel, pointing out that in order for these doctrines to apply, the estopped party must have been a party to or in privity with a party to the prior litigation, and expressly holding that EPA was not in privity with the state agency in that instance.[8/]

[7/] Upon the Region's petition for reconsideration, the Administrator vacated the CJO's decision in BKK, holding that it was to have no precedential effect (Order on Petition for Reconsideration, October 23, 1985). The CJO's decision in BKK precipitated and was the focus of the General Counsel's opinion discussed above.

[8/] In re Martin Electronics, supra, slip opinion at 8, 9, note 8. Beaumont points out that Martin Electronics was decided on other grounds and that the CJO's discussion in the foregoing respects is dicta (Response, dated May 13, 1992, at 9, 10). Moreover, there is some confusion as to the precise facts, because the opinion states that prior to EPA's commencement of

(continued...)

Complainant cites and relies on the memorandum from the Deputy Administrator, dated May 19, 1986, entitled "Guidance on RCRA Overfiling" (supra note 5). Complainant also cites the Agency's Enforcement Response Policy, December 1987, which provides that it is EPA's policy to take enforcement action in authorized states when "(1) the state asks EPA to do so and provides justification based on unique case specific circumstances; (2) the State fails to take timely or appropriate action; (3) the State is not authorized to take the action; or (4) a case could establish a legal precedent."

Complainant refers to the rule that when faced with a question of statutory construction, great deference is given to the interpretation of the statute by the officers or agency charged with its administration[9/] and asserts that the ALJ need not look to the facts of this case to find that EPA has the right to bring this enforcement action. If such facts are needed, however, Complainant says that its determination to overfile was based on several factors:

[8/](...continued)
this action, the State of Florida initiated administrative action to enforce its groundwater monitoring requirements against MEI (Id. at 3), and at another point that ". . .there was no complaint, no hearing, no opportunity to litigate, no findings or admission of liability by MEI. . . ." (Id. at 8, note 8).

[9/] For this proposition, Complainant cites EPA v. Nat'l Crushed Stone Ass'n, 449 U.S. 64 (1980). Beaumont points out that the actual quote includes the phrase "problem of statutory construction" (Response at 5).

> . . . (1) the State of West Virginia through its Division of Natural Resources ("WVDNR") agreed that EPA should do so; (2) the State's previous action was not timely and appropriate because (a) it was inadequate to compel a rapid return to compliance, (b) Respondent continued to violate RCRA despite the existence of two state administrative orders, and (c) EPA's complaint alleges continuing violations of RCRA and violations in addition to those previously addressed by the WVDNR; and (3) EPA's interest in national enforcement consistency differed from the state interests. (Opposition at 8).

Complainant's assertion that the State of West Virginia, through its DNR, agreed that EPA should initiate enforcement action against Beaumont is based on a series of phone conversations between representatives of EPA and representatives of the DNR, specifically Mr. Carroll Cather, then Acting Enforcement Unit Leader, Waste Management Section, DNR (Opposition at 8, 9). An affidavit by Larry Falkin, Chief of the RCRA State Enforcement Section, EPA Region III, dated April 24, 1992, states, inter alia, that in or about mid-September 1991, he participated in a telephone conversation with Janemarie Newton-Freiheiter, an environmental protection specialist in his section, to Mr. Cather in which it was agreed that The Beaumont Company would be the subject of an EPA enforcement investigation. Mr. Falkin refers to several other telephone conversations with Mr. Cather during the period late September 1991 through January 1992 in which The Beaumont Company was mentioned and Mr. Cather was informed that EPA

intended to issue an enforcement action against The Beaumont Company.

Ms. Janemarie K. Newton-Freiheiter states that in or about the week of September 20, 1991, she made a telephone call to Mr. Cather to discuss, inter alia, which enforcement actions WVDNR wished to be responsible for pursuing and which enforcement actions WVDNR wished EPA to pursue (affidavit, dated April 23, 1992). She further states that Mr. Cather clearly identified The Beaumont Company as a facility where WVDNR preferred that EPA conduct enforcement action investigations. Mr. Cather acknowledges the mentioned telephone calls, acknowledges that The Beaumont Company was prominent on the non-notifier list provided the WVDNR Waste Management Section by EPA, acknowledges that he was aware that EPA was contemplating enforcement action against The Beaumont Company prior to EPA undertaking such action, but states that communication between EPA and DNR, Waste Management Section was not maintained at all times and at all levels of authority, and that he was not fully informed of the extent of the enforcement initiatives which were to be taken (affidavit, dated April 24, 1992).

Beaumont's Response

In a response, dated April 13, 1992, Beaumont reiterated its position that West Virginia law should be applied to the common law principles [res judicata and collateral estoppel] which are the principal bases of its motion; that the

"additional violations" alleged herein, which Complainant contends preclude application of the doctrines of res judicata and collateral estoppel, are "cascading violations" which result from the same nucleus of operative fact involved in the matter litigated before the West Virginia Water Resource Board; and that Complainant has cited no legal authority or decision for its assertion that a finding of significant federal government involvement in the prior litigation is a prerequisite to a determination that EPA is precluded from pursuing the instant action (Id. at 2-4).

As it did in its initial brief in support of its motion for an accelerated decision, Beaumont relies principally on § 3006(d) (supra note 6), asserts that Congress has directly spoken to the precise question at issue and points out that an administrative interpretation of a statute contrary to its plain language is not entitled to deference (Response at 6). Beaumont quotes at length from the legislative history of RCRA (H.Rep. No. 1491, 94th Cong. 2d Sess. 31 and 32 (September 9, 1976), reprinted 1976 U.S. Code Cong. & Adm. News 6269) under a section entitled "Enforcement" to the effect that the Administrator can act in a state that does not meet the minimum federal

requirements and where the state fails to act.[10/] Additionally, Beaumont quotes from a section of the cited House Report entitled "Retention of State Authority" (U.S. Code Cong. & Adm. News, supra, at 6269-70) to the effect that ". . . if the state program is not equivalent after it is authorized, the Administrator, after notice and opportunity for the state to have a hearing, is authorized to enforce the federal minimum standards relating to such hazardous waste program in such state. Further, the Administrator, after giving the appropriate notice to a state that is authorized to implement the state hazardous waste program, that violations of this Act are occurring and the state failing to take action against such

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[10/] Response at 7. The cited section of the House Report provides in pertinent part:

> Enforcement
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> * * *
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> The Committee justification for the penalties section is to permit a broad variety of mechanisms so as to stop the illegal disposal of hazardous wastes. This legislation permits the states to take the lead in the enforcement of the hazardous wastes laws. However, there is enough flexibility in the act to permit the Administrator, in situations where a state is not implementing a hazardous waste program, to actually implement and enforce the hazardous waste program against violators in a state that does not meet the federal minimum requirements. Although the Administrator is required to give notice of violations of this title to the states with authorized state hazardous waste programs[,] the Administrator is not prohibited from acting in those cases where the state fails to act, or from withdrawing approval of the state hazardous waste plan and implementing the federal hazardous waste program pursuant to title III of this act.

violations, is authorized to take appropriate action against those persons in such state not in compliance with the hazardous waste title."

Beaumont emphasizes that the quoted language reinforces the "plain and clear" language of RCRA §§ 3006, 3008 and 3009, that is, EPA can act if the state fails to act or after EPA withdraws authorization of a state program (Response at 8, 9). Conversely, Beaumont says that EPA has no authority to act, if an authorized state acts relative to the same matter.

Attacking the reasoning of the General Counsel's opinion (ante at 8, 9), Beaumont says that there is no conflict between §§ 3006(d) and 3008(a)(2), because EPA's powers do not terminate upon interim or final authorization under the plain language of the statute. Rather, EPA can act if the authorized state fails to do so and EPA can withdraw [the state's] authorization (Response at 11). Additionally, Beaumont asserts that enforcement policies and minimum federal requirements can and should be addressed in the MOA between the state and EPA and thus its motion does not turn on the question of whether the State's action was appropriate.

While contending that the adequacy of the State's action is irrelevant to the motion, Beaumont alleges that Complainant's characterization of West Virginia's action ignore the fact that the Water Resources Board heard live testimony and lowered the penalty (Response at 12). Moreover, Beaumont alleges that a complete labor strike forced a shutdown of its handblown glass

business and has precluded any commercial activity since September 1991. According to Beaumont, Complainant does not appear to understand the primary essential facts relating to the DNR and EPA actions despite its alleged consultation with DNR. For example, Beaumont states that there were 30 drums at the time of the DNR inspection on April 27, 1990, of which six were not labeled (Response at 12, 13). Beaumont says that all of the material contained in the drums resulted from DNR directed excavation of soil beneath the frosting/etching room at its facility. Three more drums were filled with materials related to the excavation effort (gloves, equipment, etc.) resulting in the total of 33 drums referred to by Complainant. Beaumont alleges that the penalty assessed by the Board has been paid, the drums have been removed and that a plan for "further action" has been offered to the DNR, but has not yet been acted upon by DNR.[11/]

Beaumont reiterates its contention that Complainant has failed to show that it gave appropriate notice of this action to WVDNR prior to commencing it and that this failure warrants dismissal of the complaint (Response at 14, 15).

Complainant responded by filing a motion to strike or alternatively, that it be granted leave to file a reply (Motions, dated May 21, 1992).

[11/] Beaumont alleges that the strike terminated on or about March 10, 1992, and that the drums were removed from the facility on March 24, 1992, and properly disposed of off-site (Amended Answer at 25).

D I S C U S S I O N

A. Res Judicata - Collateral Estoppel

Over a decade ago, the ALJ in BKK supra opined "(n)o reason is apparent why the quoted provision (RCRA § 3006(d), supra note 6) doesn't mean exactly what it says" (Initial Decision at 27). That statement was made in the context of addressing and accepting an argument that EPA was precluded from bringing an enforcement action for violations included in a settlement agreement BKK had entered into with the California Department of Health Services at a time when the State of California had interim authorization to administer its own hazardous waste program pursuant to RCRA § 3006(c). As indicated (ante at 10), the Chief Judicial Officer upheld dismissal of the complaint in BKK and upon the Region's motion for reconsideration, the Administrator vacated the CJO's decision. Since 1986, the Agency's policy on "overfiling" has been governed by the Deputy Administrator's memorandum "Guidance on RCRA Overfiling," dated May 19, 1986, which in turn is based on the General Counsel's opinion that the only restrictions on the Administrator's RCRA enforcement authority were those found in § 3008(a)(1) & (2), i.e., a finding of violation and notice to the state in which the violation occurred.

The General Counsel's opinion is based upon the "plain language" of § 3008(a)(1) & (2); upon the conclusion that if any action taken by a state has the same force and effect as an EPA

enforcement action, EPA would never be able to take an enforcement action regardless of the inadequacy of a state action; upon the expectation that any such limitation on federal enforcement powers would be found in § 3008; upon the conclusion that § 3006(d) applied only to state permits and was for the purpose of assuring not only that the state would have authority to issue permits, but that those permits have the same effect, and are enforceable to the same extent, as permits issued by EPA, and upon legislative history and case law. For reasons hereinafter appearing, the General Counsel's opinion is flawed and will not withstand analysis.

No issue is or can be taken with the conclusion that the "plain language" of § 3008 on its face authorizes the instant action. The plain language rule, however, is applicable to § 3006, including § 3006(d), as well as to § 3008. Although entitled "Effect of State permit," the broad and "plain" language of § 3006(d) "(a)ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator under this subchapter" is clearly not limited to permits. The legislative history (House Report 94-1491 at 58, U.S. Code Cong. and Administrative News at 6296) reflects that § 306, which became § 3006, was entitled, as is § 3006, "Authorized State Hazardous Waste Permit Program(s)," and provides no support for the conclusion that § 3006(d) is limited to state permits rather

than permit programs.[12/] Moreover, it is well settled that, while subtitle headings may provide an indication of Congressional interest, such headings cannot limit the plain meaning of the [statutory] text.[13/] Here, there is no ambiguity in the text of § 3006(d) and reference to the legislative history makes it likely that the word "program" was omitted from the heading "Effect of State permit" simply because it would be surplusage in view of the title of § 3006.

The General Counsel's conclusion, based on the heading, that § 3006(d) applied only to state permits and was for the purpose of assuring not only that the state would have authority to issue permits, but that those permits have the same effect, and are enforceable to the same extent as to permits issued by the Administrator overlooks or ignores § 3006(b) providing in pertinent part that upon [authorization by the Administrator]: "(s)uch State is authorized to carry out such program in lieu of the Federal program under this subchapter in such state and to

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[12/] The cited legislative history differs only slightly from the language of § 3006(d) providing "Subsection (d) provides that any action taken by a state under the hazardous waste program authorized by this section shall have the same force and effect as if the action was taken by the Administrator."

[13/] See, e.g., Habib v. Raytheon, 616 F.2d 1204 (D.C. Cir. 1980) (heading of statute not controlling where it contradicts plain meaning of words of law, particularly where error is easily explained by reference to legislative history) and Scarborough v. Office of Personnel Management, 723 F.2d 801 (11th Cir. 1984) (section headings cannot limit plain meaning of text and may be utilized to interpret a statute, if at all, only where statute is ambiguous).

issue and enforce permits for the storage, treatment, or disposal of hazardous waste. . . ." (emphasis supplied) Because the quoted language clearly provides that an authorized state may carry out its program in "lieu of the federal program and to issue and enforce permits," § 3006(d) is surplusage, if it has the limited effect posited by the General Counsel.

The General Counsel is, of course, correct that if any action taken by the state has the same force and effect as an EPA enforcement action, EPA would never be able to take enforcement action regardless of the inadequacy of a state action. The "timely and appropriate" language appearing in BKK is clearly a qualification not contained in § 3006(d), but rather was derived from the MOA between California and EPA. As Beaumont points out, however, there is no conflict between § 3006 and 3008, EPA can act where the state fails to act, and EPA's remedy for a state's failure or refusal to administer and enforce a hazardous waste program in accordance with the Act is withdrawal of the state's authorization pursuant to § 3006(e).[14/]

[14/] Section 3006(e) provides:

(e) Withdrawal of authorization

> Whenever the Administrator determines after public hearing that a State is not administering and enforcing a program authorized under this section in accordance with requirements of this section, he shall so notify the State and, if appropriate corrective action is not taken within a reasonable time, not to exceed ninety days, the Administrator shall withdraw authorization of such program and establish a Federal

(continued...)

Because §§ 3006(d) and 3008(a) are in Subtitle C (Subchapter III of Chapter 82, 42 U.S.C.), the General Counsel's expectation that any such limitation on the Administrator's enforcement authority [as § 3006(d) plainly is] would be found in § 3008 is simply irrelevant. Moreover, as Beaumont emphasizes, legislative history under a section entitled "Enforcement" (supra note 10) provides in effect that the Administrator can act "in a state that does not meet the federal minimum requirements" or where "the state fails to act."

As we have seen, legislative history (House Report 94-1491) squarely supports the plain language and meaning of § 3006(d). In a gross understatement, the General Counsel concedes that "different passages in the legislative history point in different and inconsistent directions" (Opinion at 6). He cites a Senate Report (S. Rep. No. 988, 94th Cong. 2d Sess. 17 (June 25, 1976)), for the proposition that Congress intended to draw on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972 in allocating responsibilities between EPA and the states under Section 3008. This proposition is rejected: firstly, because it is contrary to the plain language of § 3006(d) and secondly, because Senate bill S. 2150 was passed in lieu of the House bill after amending

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[14/](...continued)
program pursuant to this subchapter. The Administrator shall not withdraw authorization of any such program unless he shall first have notified the State, and made public, in writing, the reasons for such withdrawal.

its language to contain the text of the House bill (U.S. Code Cong. & Adm. News (1976) at 6238). Accordingly, House Report No. 94-1491 is the relevant legislative history. Because neither the Clean Water Act nor the Clean Air Act contains a provision similar to RCRA § 3006(d), case law under these statutes is not controlling.

As Beaumont points out, an interpretation of a statute contrary to its plain language is not entitled to deference. See, among others, City of Chicago v. Environmental Defense Fund, _____ U.S. _____, 114 S.Ct. 1588, 62 Law Week 4283 (1994). Accordingly, EPA's interpretation that § 3006(d) is limited to permits, rather than applying broadly to permit programs as the text provides, is rejected. Having concluded that the text of § 3006 and the relevant legislative history clearly and unequivocally supports Beaumont's position, it is necessary to address the effect of that conclusion.

As indicated (ante at 2), Beaumont was cited by the West Virginia DNR (notice apparently served May 29, 1990) for violations of West Virginia hazardous waste regulations, sometimes referred to as Code of State Regulations (CSR), specifically, failure to notify DNR of hazardous waste activities at the site in violation of Title 47, 35 WVCSR § 4.1, failure to label drums containing hazardous waste as such in violation of Title 47, 35 WVCSR § 6.3.3 and storage of hazardous waste without a permit in violation of Title 47, 35 WVCSR § 8. Upon Beaumont's appeal and after a hearing at which testimony

was taken and full briefing, the West Virginia Water Resources Board found, utilizing only inconsequential changes in language, the violations alleged in the mentioned notice and assessed Beaumont a penalty of $2,000.

Count II of the Agency's complaint herein alleges that from at least August 15, 1989, until at least November 4, 1991, Beaumont violated WVHWR § 4.2.f (40 CFR § 262.12(a)) by failing to file a notification form for the hazardous waste storage activities at the facility.[15/] Count IV of the complaint alleges that from at least August 15, 1989, until at least November 4, 1991, Beaumont violated WVHWR § 11.1 (40 CFR § 270.1(c)) by operating a storage facility without having a permit. As indicated previously, Count III of the complaint herein alleges that from at least June 30, 1988, until September 21, 1991, Beaumont disposed of a combination of hydrofluoric acid spillage, overflows and hosings at its facility without determining whether such wastes were hazardous in violation of WVHWR § 6.1.1 (40 CFR § 262.11) and Counts V through IX allege that from at least August 15, 1989, until November 4, 1991, Beaumont operated a hazardous waste storage facility without having a contingency plan, without requiring

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[15/] The reference to WVHWR § 4.2.g should be to 47 CSR 35 § 4.2.7 which, in common with 40 CFR § 262.12, relates to EPA identification numbers. Inasmuch as Count I clearly alleges failure to comply with EPA identification number requirements, it is concluded that Count II is intended to allege a failure to file a notification of hazardous waste activity as required by RCRA § 3010 (42 U.S.C. § 6930, 40 CFR § 270.1(b), 47 CSR 35 § 4.1.1).

its personnel to complete training in hazardous waste management, without inspecting its hazardous waste container storage area and without having a written closure plan and financial assurance for closure. Count X alleged that from at least June 30, 1988, until September 21, 1991, Beaumont violated 40 CFR § 268.7(a) by failing to test its waste or use knowledge of the waste to determine if the waste is restricted from land disposal.

Counts II and IV of EPA's complaint, which allege, respectively, that from May 17, 1989, until November 4, 1991, Beaumont stored hazardous waste at its facility without submitting a notification of hazardous waste activity and that from August 15, 1989, until November 14, 1991, Beaumont operated a hazardous waste storage facility without a permit are identical to issues which were appealed to, and decided by, the West Virginia Water Resources Board (Beaumont Glass Company, Appeal No. 456, supra). The question of whether the Board's orders are entitled to be given preclusive effect under res judicata and collateral estoppel principles is controlled by West Virginia law, Environmental Waste Control (supra note 3). It is concluded that West Virginia courts would accord final and unappealed orders of the Board of Water Resources preclusive effect under the doctrines of res judicata and collateral estoppel. See Mellon-Stuart Company and Kirby Electric Service, Inc. v. Hall, et al., 178 W.Va. 291, 359 S.E.2d 124 (W.Va. 1987) (res judicata or collateral estoppel effect accorded matters

litigated in West Virginia Court of Claims, because it acted in a judicial capacity even though it was not technically speaking a court). The court pointed out that the factors to be considered in determining whether res judicata and collateral estoppel may be applied to the determination of a hearing body are whether the body acts in a judicial capacity, whether the parties were afforded a full and fair opportunity to litigate the matters in dispute, and whether applying the doctrines is consistent with the express or implied policy in the legislation which created the body. All of these facts are applicable to the order of the West Virginia Water Resources Board at issue here.[16/]

As the Supreme Court has noted: "(a) fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata is that a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies" (Montana v. United States, 440 U.S. 147 (1979) at 153), quoting Southern Pacific R.Co. v. United States, 168 U.S. 1 (1897). The court explained that "(u)nder res judicata, a final judgment on

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16/ The West Virginia Water Resources Board, now known as the Environmental Quality Board (West Virginia Code § 22-18-20), is required to conduct hearings in a fair and impartial manner and to transcribe testimony (Contested Cases, West Virginia Code § 29-A-5-1). Additionally, the Board is authorized to issue subpoenas and to judicially notice facts. These powers, among others, are fully consistent with according its decisions res judicata and collateral estoppel effect.

the merits bars further claims by parties or their privies based on the same cause of action" while "(u)nder collateral estoppel, once an issue is actually and necessarily determined by a court of competent jurisdiction, that determination is conclusive in subsequent suits based on a different cause of action involving a party to the prior litigation" (Id.). Application of these doctrines is, of course, not limited to determinations made by courts, but applies as well to determinations of administrative bodies. United States v. Utah Construction and Mining Company, 384 U.S. 394, 16 L.Ed. 2d 642 (1966) and Mellon-Stuart Co. and Kirby Electric Service, Inc., supra.

At issue in Environmental Waste Control, Inc. (EWC), supra, cited by Complainant, was an "agreed administrative order" or consent decree entered into between EWC and the Indiana Department of Environmental Management, Indiana having been granted authorization to administer its own hazardous waste program in lieu of the federal program pursuant to RCRA § 3006. Although the court was at some pains to note that consent decrees are not treated as judicial decrees for all purposes, it, nevertheless, did not award any relief to either EPA or the intervenors for violations included in the consent decree occurring prior to the date thereof (710 F.Supp. at 1197-1200). Accordingly, Environmental Waste Control simply does not support the position advanced by Complainant herein, e.g., that it may disregard the proceedings before the West Virginia Water Resources Board and bring an enforcement action for the very

same violations adjudicated in that proceeding. Moreover, the court, while recognizing that one claiming the benefit of collateral estoppel must show that the later litigation is between the same parties or involves nonparties that are subject to the binding effect or benefit of the first action, held that it need not decide whether the Indiana Department of Environmental Management was the "virtual representative" of either EPA or the environmental intervenors, because the issue was controlled by Indiana law and Indiana had not modified in any manner the traditional rule requiring identity of parties for collateral estoppel purposes. The court suggested, however, that EPA might be deemed a party to the state administrative action by virtue of RCRA § 3006(d) and that "(a)rguably, the Indiana agency acted as EPA's legal representative as a matter of law" (Id. 1201). Because EPA alleged violations [HSWA] outside the state agency's jurisdiction or that occurred after the agreed administrative order, it was unnecessary for the court to resolve that issue.

In West Virginia, however, the strict requirement of identity of parties is no longer necessary in order to apply the doctrine of collateral estoppel and enforce a judgment against another. See Galonos, et al. v. National Steel Corp., et al., 178 W.Va. 193, 358 S.E.2d 452 (W. Va. 1987) and Conley, et al. v. Spillers, 171 W.Va. 584, 301 S.E.2d 216 (W.Va. 1983). In accordance with the court's suggestion in Environmental Waste Control, it is concluded that, by virtue of RCRA § 3006(d), DNR

was EPA's representative as a matter of law in the proceeding before the West Virginia Water Resources Board and that Complainant is collaterally estopped from re-litigating issues determined by the Board's order.

Collateral estoppel, of course, applies only to issues actually litigated and determined, in this instance failing to notify the State of hazardous waste activities at the site and storage of hazardous waste in excess of 90 days without a permit. Although Complainant contends that the Board's jurisdiction was limited to violations discovered during the inspection on April 27, 1990 [and inspections prior thereto?], the Board's findings include reference to inspections as late as November 1, 1990, and a specific finding that the notification [of hazardous waste activity] from Beaumont was received by DNR on September 4, 1990 (Id. at 7). Accordingly, Count II of the Agency's complaint, which alleges failure to file a notification of hazardous waste activity, will be dismissed.

While Count I, which alleges failure to comply with EPA identification number requirements, was not a charge expressly made by DNR, the Board's findings state that Beaumont was informed of the procedure to obtain "provisional" ID numbers and that the provisional ID number granted on April 30, 1990, expired before Beaumont finalized the shipment of hazardous waste off-site (Id. 4, 5, & 7). Moreover, WV 47 CSR 35 § 8, cited in the DNR "Notice of Civil Administrative Penalty," includes a requirement that the facility owner or operator must

apply to EPA for an EPA identification number (§ 8.2.2). Count I of the complaint will be dismissed.

Count III of the complaint, which alleges failure to determine if wastes are hazardous, although not expressly charged by DNR or found by the Board, is seemingly necessarily encompassed therein. Additionally, the requirement for a general waste analysis is included in WV 47 CSR 35 § 8.2.4. Count III will be dismissed.

Count IV of the Agency's complaint alleges operation of a hazardous waste storage facility without a permit from at least August 15, 1989, until November 4, 1991. The DNR notice expressly alleged and the Board found that Beaumont violated 47 CSR 35 § 8 by storing hazardous waste without a permit in excess of 90 days. The violation found by the Board, however, extended no later than the order issued by DNR on February 21, 1991, which resulted from an inspection on November 1, 1990, finding continuing violations regarding the storage of hazardous waste without a permit. Inasmuch as there is no evidence or allegation that Beaumont ever obtained a permit for the storage of hazardous waste and it appears that Beaumont did not remove the hazardous waste being stored at its facility until long after the inspection and DNR order cited in the Board's findings, it is obvious that EPA's complaint covers violations subsequent to those found by the Board. Accordingly, the Board's order is no bar to the Agency's complaint insofar as it includes such violations. See Environmental Waste Control,

supra. International Paper Company, RCRA (3008) Appeal No. 90-3, Final Decision (CJO, March 28, 1991), cited by Beaumont, is not to the contrary, as the decision makes clear that the region was not precluded from pursuing either continuing or entirely new violations after a CAFO was signed (slip opinion at 15, note 18). Count IV of the complaint will be dismissed to the extent it alleges violations prior to February 21, 1991. The motion to dismiss will be denied to the extent the complaint alleges violations after that date.

Counts V through IX of EPA's complaint, i.e., operation of a hazardous waste storage facility without a contingency plan, without requiring its personnel to complete training in hazardous waste management, without inspecting its hazardous waste container storage area, without having a written closure plan and without financial assurance for closure, are what Beaumont refers to as "cascading violations," because these regulatory requirements all stem from the storage of hazardous waste in excess of 90 days without an extension. In view thereof and because these regulatory requirements are all contained in WV 47 CSR 35 § 8 cited in the Board's order, it is concluded that these counts were implicitly tried before the Water Resources Board. Beaumont's motion to dismiss will be granted to the extent EPA's complaint alleges violations occurring before February 21, 1991, and denied to the extent it alleges violations of the mentioned regulations occurring after that date.

Count X alleges a violation of a HSWA requirement (40 CFR § 268.7(a)), which was not within the authorization granted to the State of West Virginia. Accordingly, neither res judicata nor collateral estoppel are applicable and Beaumont's motion to dismiss this count will be denied.

B. Notice

As indicated (ante at 6, 7), Beaumont contends that EPA did not give the State of West Virginia adequate notice of this action as required by RCRA § 3008(a)(2) (supra note 4) and that, consequently, this action should be dismissed for that reason. Beaumont cites and relies on legislative history (House Report No. 1491, ante at 15) which indicates that § 3008(a)(2) should be read as requiring "appropriate" notice to the state.

For its part, Complainant relies on oral notice conveyed to Mr. Carroll Cather of DNR in a series of telephone conversations (ante at 12, 13). While there is no doubt that Mr. Cather was aware that EPA was contemplating enforcement action against Beaumont, his affidavit does not support Complainant's assertion that DNR requested EPA to take such action.[17/]

[17/] According to Beaumont, Maria Fakadej, the Assistant Attorney General who represented DNR before the Water Resources Board, was aware of the strike and was not requiring any further activity at the site until the strike was resolved (Amended answer at 25, 26). If this is accurate, it is highly unlikely that the State would have requested EPA to initiate this enforcement action.

The EAB has recently addressed the notice requirement of § 3008(a)(2), holding, inter alia, that under the Consolidated Rules of Practice (40 CFR Part 22) it is not necessary for the complaint to allege that EPA gave prior notice to the state in accordance with § 3008(a)(2);[18/] that, although the purpose of the notice requirement was to promote a federal/state comity or "partnership" in which EPA showed "deference" to the State as the primary enforcement authority of the State's RCRA program, it was unnecessary for EPA to give the state a "right of first refusal" before EPA could proceed with an enforcement action against a violator; and that, accordingly, there was no necessity for a second notice to the State, where, after receipt of notice of EPA's proposed action and prior to the initiation of the EPA action, the State took an additional enforcement action. In re Gordon Redd Lumber Company, RCRA (3008) Appeal No. 91-4 (EAB, June 9, 1994), slip opinion at 9-18.[19/] The EAB held that the notice to the State in Gordon Redd satisfied the requirements of the statute, even though it did not specifically

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[18/] The complaint herein alleges that West Virginia was given prior notice of the issuance of the complaint through its Department of Natural Resources.

[19/] The requirement that the states be provided notice 30 days in advance of the proposed EPA action was deleted from § 3008 by the Solid Waste Disposal Act Amendments of 1980 (P.L. No. 96-482, 94 Stat. 2234). The EAB stated that prior to 1980, if the violator cured the alleged violation within the 30-day period, EPA would be barred from filing the action. Gordon Redd, supra, slip opinion at 14, note 15.

identify all of the violations ultimately included in the Agency's complaint.

In contrast to the facts in Gordon Redd where notice to the State was in writing, Complainant here relies on oral notice. The court in Environmental Waste Control, supra, addressed the notice requirement of the "Citizens' suits" provision, RCRA § 7002 (42 U.S.C. § 6972). That section essentially prohibits the institution of a citizen's suit pursuant to § 7002(a) prior to the expiration of 60 days after the plaintiff has given notice of the alleged violation to the Administrator, the State in which the alleged violation occurs and the alleged violator.[20/] The requirement that the notice be given 60 days in advance is not applicable to violations of Subtitle C, Hazardous Waste Management (§ 7002(b)(1)). Violations of hazardous waste regulations were at issue in Environmental Waste Control and, because the notice could be given as little as one day or even one hour prior to filing suit, the court refused to treat the notice requirement as jurisdictional (710 F.Supp. at 1190). Alternatively, however, the court held that adequate notice was given, holding that the relevant inquiry was whether the requisite parties had "notice-in-fact" of the alleged violations

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[20/] Environmental Waste Control was decided prior to the Supreme Court's decision that compliance with the 60-day notice requirement of RCRA § 7002 was mandatory, Hallstrom v. Tillamook County, 493 U.S. 20 (1989).

(Id.). Although the court referred to cases holding, in similar situations, that constructive notice and oral notice were insufficient, it is concluded that West Virginia had "notice-in-fact" of the alleged violations and that this notice satisfied the requirements of § 3008(a)(2). Beaumont's motion insofar as it is based upon failure to give the state adequate notice of this action will be denied.

C. Complainant's Motion To Strike

Complainant's motion to strike Beaumont's response to Complainant's opposition to the motion for an accelerated decision is based upon the absence of authorization for such a response in Consolidated Rule 22.16 entitled "Motions." Alternatively, Complainant has moved that it be allowed to file a reply.

While it is true that the EAB has struck replies to responses to motions upon the ground that the Rules of Practice make no provision for filing such documents,[21/] the Board was acting under Rule 22.30, entitled "Appeal from or review of initial decision," which provides in pertinent part at Rule 22.30(a)(2) ". . . Reply briefs shall be limited to the scope of the appeal brief. Further briefs shall be filed only with the permission of the Environmental Appeals Board." Inasmuch as Rule 22.16 does not contain a similar provision, it is concluded

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[21/] In re Hardin County, Ohio, RCRA (3008) Appeal No. 92-1, Order Denying Reconsideration (EAB, February 4, 1993).

that acceptance and consideration of Beaumont's response is solely within the ALJ's discretion. Because I have found Beaumont's response to be helpful, the motion to strike will be denied.

Complainant's motion that it be permitted to file a reply will also be denied, because I have considered enough argument and because it is normal practice that a party having the affirmative of an issue be permitted to open and close.

O R D E R

Beaumont's motion for accelerated decision dismissing the complaint is granted in part and denied in part as follows:

1. Counts I, II and III of the complaint are dismissed with prejudice.
2. Counts IV through IX of the complaint are dismissed to the extent that violations are alleged which occurred prior to February 21, 1991.
3. Beaumont's motion to dismiss Counts IV through IX to the extent violations are alleged which occurred subsequent to February 21, 1991, is denied.

4. Beaumont's motion to dismiss Count X is denied.

5. Complainant's motion to strike Beaumont's response to Complainant's opposition to the motion for an accelerated decision is denied.

6. Complainant's motion that it be permitted to file a reply to Beaumont's response is denied.

Dated this 20th day of October 1994.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION**, dated October 20, 1994, in re: The Beaumont Company, Dkt. No. RCRA-III-238, was mailed to the Regional Hearing Clerk, Reg. III, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: October 20, 1994

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A M E N D E D

CERTIFICATE OF SERVICE

This amended certificate of service certifies that a copy of the **ORDER GRANTING IN PART MOTION FOR ACCELERATED DECISION**, dated October 20, 1994, in re: The Beaumont Company, Dkt. No. RCRA-III-238, was mailed to Respondent at the address below and a copy of this amended certificate of service only was mailed to the Regional Hearing Clerk, Reg. III and to Complainant (see list of addressees).

Helen F. Handon
Legal Staff Assistant

DATE: October 25, 1994

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