9/30/93

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

In the Matter of	:	
	:	
WHELAND FOUNDRY	:	**DOCKET NO. RCRA-IV-89-25-R**
	:	
	:	Judge Greene
Respondent	:	
	:	

Resource Conservation and Recovery Act ["RCRA"] Section 3008(a)(1) [42 U.S.C. § 6928(a)(1)]; Section 3001(b)(3)(A)(i) [42 U.S.C. § 6921(b)(3)(A)(i)]; 40 C.F.R. § 261.4(b)(4); TN 1200-1-11-.02(1)(d)3(ii)(I):

1. Where fly ash from fossil fuel combustion was exempted from regulation as hazardous waste by RCRA Section 3001(b)(3)(A)(i) and applicable state and federal regulations, respondent did not violate RCRA and applicable regulations by not obtaining interim status or a permit in connection with disposal of fly ash at its facility, and by not operating its facility in conformance with RCRA.

2. RCRA Section 3001(b)(3)(A)(i) exempts fly ash from fossil fuel combustion in clear, unambiguous language, as do applicable federal and state regulations. It would have been a matter of the greatest simplicity to restrict the scope of the section to utilities, had Congress so intended. Likewise, it would have been simple to draw the implementing regulations to limit the fossil fuel exemption to utilities, had that been intended.

3. Where statutory language is clear and unambiguous, resort will not be made to legislative history or other collateral material in aid of construction.

Appearances:

Ramiro Llado, Esquire, Assistant Regional Counsel, Hazardous Waste Law Branch, Office of the Regional Counsel, 345 Courtland Street, N.E., Atlanta, Georgia 30365, **for complainant**;

Douglas E. Peck, Esquire, and Hugh J. Moore, Jr., 1100 American National Bank Building, Chattanooga, Tennessee 37402, **for respondent**.

DECISION AND ORDER

This matter arises under Section 3008(a)(1) of the Resource Conservation and Recovery Act ("RCRA" or "the Act"), 42 U.S.C. § 6928(a)(1), which provides for the assessment of civil penalties for "any past or current violation" of the hazardous waste management provisions of the Act and provides further for the issuance of orders to require compliance with such provisions.[1]

A complaint and compliance order issued by complainant in this matter charged respondent with owning and operating a landfill used for the disposal of hazardous waste -- fly ash generated in respondent's foundry operation -- without a permit and without having achieved "interim status,[2]" in violation of Tennessee Rule [TR] 1200-1-11.07(2)(c), 40 C.F.R. 270.10(f), and Sections 3005 and

---

[1] Section 3008(a)(1) provides in pertinent portion that ". . . . (E)xcept as provided in paragraph (2), whenever on the basis of any information the Administrator determines that any person has violated or is in violation of any requirement of this subchapter, the Administrator may issue an order assessing a civil penalty for any past or current violation, requiring compliance immediately or within a specified time period, or both . . . ."

[2] I. e. statutory authority to operate while the application is pending. TR 1200-1-11-.07(3) and Section 3005(e) of RCRA, 42 U.S.C. § 6925(e) provide that an owner or operator of a facility shall be treated as having been issued a permit (having achieved "interim status") pending final administrative disposition of its permit application provided that (1) the facility was in existence on November 19, 1980; (2) the requirements of TR 1200-1-11-.03 and Section 3010(a) of RCRA [42 U.S.C. § 6930(a)] concerning notification of hazardous waste activity have been complied with, and (3) that application for a permit has been made. See **Stipulated Findings of Fact** 7, at 20-21, **infra.**

3010 of the Act [42 U.S.C. §§ 6925 and 6930].[3] The complaint alleges fourteen additional violations based upon an April 18, 1989, inspection which revealed other particulars in which the facility was not being managed in compliance with the Act and applicable regulations.[4] A civil penalty in the amount of $74,500 is sought for the alleged violations.[5]

Respondent asserts that fly ash was specifically excluded from regulation as a hazardous waste under the Act [Section 3001(b)(3)(A)(i), (ii), and (iii)], as well as under federal regulations [40 C.F.R. § 261.4(b)(4)] and regulations promulgated by the State of Tennessee at TR 1200-1-11-.02(1)(d)3(ii)(I) pursuant to RCRA and the Tennessee Hazardous Waste Management Act. Accordingly, respondent argues, it was not necessary to obtain interim status or a permit to dispose of fly ash in its landfill, nor was it required that the facility be otherwise managed in compliance with RCRA.[6] Respondent argues that it was entitled to rely upon the interpretation of the State of Tennessee Department

---

[3] **Complaint** at 5, ¶ 16.

[4] **Complaint** at 5-8, ¶ 17(a)-(n).

[5] See complainant's **Brief in Support of Findings of Fact, Proposed Conclusions of Law and Order**, at 2. Originally the complaint proposed a penalty of $159,265 for the failure to obtain a permit and related violations, including financial assurance for closure, post closure, and liability insurance. However, after respondent established its ability to self-insure to complainant's satisfaction, the "economic benefit" (for lack of insurance) portion ($87,765) of the proposed penalty was withdrawn. **Stipulated Finding of Fact 30**, at 29, **infra**.

[6] Respondent states, and complainant does not dispute, that at all times the facility was operated in accordance with applicable Tennessee solid waste regulations.

of Health and Environment ["TDHE"] that fly ash was exempt from regulation as hazardous waste.

The parties were unable to settle this matter and have submitted it for decision on briefs and documents filed with the briefs. Extensive stipulations of fact entered into by the parties have been adopted herein.[7] In addition to the facts, the parties stipulated that three issues should be resolved in connection with the submission of the matter for decision: (1) whether respondent's reliance upon the State of Tennessee's former interpretation of the "fossil fuel exemption" constitutes a defense against the imposition of penalties by the U. S. Environmental Agency [EPA]; (2) whether EPA's interpretation of the fossil fuel exemption is correct; and (3) whether the civil monetary penalty proposed by EPA is reasonable.[8] For the reasons set out below, it is held that respondent did not violate the Act and applicable regulations as charged, since the clear and unambiguous language of section 3001 (b)(3)(A)(i) of the Act [42 U.S.C. § 6921(b)(3)(A)(i)] exempts fly ash generated primarily in the combustion of fossil fuels from regulation under Subchapter III (Hazardous Waste Management) of RCRA without limitation as to source. It is further determined that

---

[7] The stipulated facts, 1-37, are adopted verbatim (except for the last sentence of findings 16, 18, 20, and 25, wherein the word "veracity" has been changed to "correctness") and are set out at 19-31, **infra** (Findings of Facts As Stipulated by the Parties). Respondent requested the finding of several additional facts. These are adopted and set forth as Additional Findings of Fact 1-4 at 31, **infra**.

[8] See complainant's **Brief in Support of Findings of Fact, Proposed Conclusions of Law and Order**, at 4.

in the circumstances here, respondent's reliance upon the State's former interpretation would have constituted a defense to the imposition of penalties had liability been found; and that EPA's interpretation of the applicable language as being limited to utilities is not supported by the clear language of the Act and EPA's own (and the State's) implementing regulations.

The record discloses that respondent operates three grey iron foundries which make castings primarily for brake parts for the automotive, truck, and trailer industries[9]. Scrap metal and limestone are melted in the foundries' cupolas (furnaces) using coke as fuel.[10] Fly ash (or "baghouse dust") is a waste product of this process and is collected in baghouse collectors. The fly ash is produced from the burning of coke, limestone, and scrap metal.[11] More than 95 per cent of the material burned (charged) in the cupolas is coke. The fly ash is thus a product of the combustion of this fuel. Respondent analyzed the fly ash on several occasions for cadmium and lead. Results obtained in most of the analyses indicated that concentration limits for cadmium and lead set forth in the hazardous waste regulations had in fact been exceeded.[12] Wastes which exceed the concentration limits for cadmium and lead are hazardous and are designated D006 and D008, respectively, in

---

[9] **Brief of Respondent**, at 1.

[10] **Complaint** at 3, ¶ 5.

[11] **Stipulated Finding of Fact 3**, at 20, **infra**.

[12] **Stipulated Finding of Fact 4**, at 20, **infra**.

state and federal regulations.[13] Consequently, respondent's fossil fuel-derived fly ash (roughly thirty tons per day between 1980 and 1990[14]) would be regulated hazardous waste owing to the presence of these heavy metals unless the exemption claimed herein does in fact apply.

The "fossil fuel exemption," or "Bevill amendment," was included in the 1980 amendments to RCRA. Briefly stated, it provides that fly ash and certain other wastes "generated primarily from the combustion of coal or other fossil fuels shall be subject only to regulation under other applicable provisions of the Federal or state law in lieu of this subchapter [i. e. the hazardous waste provisions]" until after a study is completed and certain regulations promulgated. Following the 1980 passage of these amendments, affected industries made their own determinations initially as to whether they fell within the exemption.[15] Respondent determined that the exemption applied to its operation, and filed appropriate forms with the Tennessee Department of Health and Environment ["TDHE"] in February, 1981.[16] TDHE also considered

---

[13] **Id.** See also TR 1200-1-11-.02(3)(e); 40 C.F.R. § 261.24; Table 1 of TR 1200-1-11-.02; and Table 1 of 40 C.F.R. § 261.24; see also **Complaint** at 3, ¶ 7.

[14] **Stipulated Finding of Fact 36**, at 30-31, **infra.**

[15] **Stipulated Finding of Fact 11.** "Initial determination of the applicability of any exemption was to be made by the generator of the waste."

[16] Respondent complied with the requirements of the state regulation, which provided for notice even for exempt waste, and filed the required state notice on February 24, 1981. **Stipulated Finding of Fact 12.**

fly ash as exempt. In July, 1984, EPA announced its view that the exemption in the Act and federal regulations applied only to the utility industry, although it is admitted that neither RCRA nor the corresponding regulation says this in so many words. For about six weeks, between July 25, 1984 and September 6, 1984, TDHE followed EPA's lead and took the position that the exclusion was limited to the utility industry.[17] Then, upon receiving a letter dated August 16, 1984, from EPA headquarters, TDHE retracted its briefly held view. The letter in question, from the Director of EPA's Waste Management and Economics Division, refers to the "fossil fuel exemption" as follows:

> . . . . [T]his section codifies a Congressional exemption that was enacted in the 1980 RCRA Amendments. The amendment (see RCRA Sec. 3001(b)(3)(A)(i)) removes fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels from control under RCRA Subtitle C until at least six months after a study under RCRA Section 8002(n) is submitted to Congress . . . .
>
> While EPA's study under RCRA Section 8002(n) to date has concentrated on waste generated by coal fired electric utility power plants, **the Congressional exemption is not limited to these plants, in our opinion.** Fly ash, bottom ash, slag, and flue gas dust . . . would also be exempted temporarily from RCRA Subtitle C Control.[18] [Emphasis supplied]

Thereupon, TDHE wrote to respondent (September 6, 1984) that its [TDHE's] July, 1984, position had been

---

[17] **Complaint** at 4, ¶ 8.

[18] **Document 4** attached to **Brief of Respondent.** See also **Stipulated Finding of Fact 15**, at 24, **infra.**

> . . . . supported by guidance from EPA Region IV. This letter will acknowledge that [TDHE] is reversing its position to that which was originally stated to Wheland Foundry which acknowledges that the above referenced exemption does apply to the baghouse dust generated by the company. This position is consistent with the August 16, 1984, interpretation by the E.P.A. Headquarters (a copy is enclosed).[19]

TDHE in effect made its September 6, 1984, position -- that fly ash was excluded from RCRA regulations pursuant to TR 1200-1-11-.02(1)(d)(3)(ii)(I) [40 CFR 261.4(b)(4)] retroactive to July, 1984.[20]

Over a period of several years, TDHE continued to reject EPA's interpretation that the fossil fuel exemption was limited to utilities. Respondent, although it learned of EPA's subsequent reversal of position, believed itself entitled to rely upon the state's interpretation as long as the State of Tennessee had authority to enforce its own hazardous waste program in place of RCRA. Some six years later, however, on March 19, 1990, TDHE changed its position and acceeded to EPA's view. Wheland complied shortly thereafter, in conformance with a schedule specified by TDHE.[21]

The principal issue of liability must be determined by

---

[19] **Document 5** attached to **Brief of Respondent.**

[20] **See complaint** at 4, ¶ 9.

[21] Prior to 1990, respondent disposed of its fly ash in its own landfill, which was not in compliance with RCRA regulations, in reliance upon the position taken by TDHE.

examining the language of the statute and the implementing regulation.

Sections 3001(b)(3)(A)(i), (ii), and (iii) of the 1980 RCRA amendments [42 U.S.C. § 6921(b)(3)(A)(i), (ii), and (iii)], known as the "Bevill Amendment" or the "fossil fuel exemption," provide as follows:

> § 6921. **Identification and listing of hazardous waste.**
>
> . . . .
>
> (b) Identification and listing
>
> (3)(A) Notwithstanding the provisions of paragraph (1) of this subsection, **each waste listed below** shall . . . be subject only to regulation under other applicable provisions of Federal or State law in lieu of this subchapter until at least six months after the date of submission of the applicable study required to be conducted under subsection (f), (n), (o), or (p) of section 6982 of this title and after promulgation of regulations in accordance with subchapter (C):
>
> (i) **Fly ash waste**, bottom ash waste, slag waste, and flue gas emission control waste **generated primarily from the combustion of coal or other fossil fuels.**
>
> (ii) Solid waste from the extraction, beneficiation, and processing of ores and minerals, including phosphate rock and overburden from the mining of uranium ore.
>
> (iii) Cement kiln dust waste.
>
> [Emphasis supplied]

EPA's implementing regulation at 40 C.F.R. § 261.4, **Exclusions**, provides:

(b) **Solid wastes which are not hazardous waste**

The following are not hazardous wastes:

. . . . (4) Fly ash waste, bottom ash waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels.[22]

Thus, under RCRA § 3001(b)(3)(A)(i), fly ash waste, bottom ash waste, slag waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels are exempted from regulation as hazardous waste pending the events specified in subsection (3)(A) of the section. Pursuant to 40 C.F.R. § 261.4, fly ash waste, bottom ash waste, and flue gas emission control waste generated primarily from the combustion of coal or other fossil fuels are not hazardous wastes. No mention is made either in section 3001 or section 261.4, which was promulgated by EPA to implement section 3001(b)(3)(A)(i) that the exemption is limited to combustion waste generated by utilities. Complainant's view that the exemption applies to utilities only is based upon legislative history, material published in the Federal Register, and agency policy documents.

The language of the statute is clear and unambiguous. If the "fossil fuel exemption" had originally been intended to be

---

[22] The corresponding Tennessee Rule, TR 1200-1-11-.02(1)(d)3(ii)(I), "differs from the federal regulation only in that under the federal regulation covered wastes are excluded from the definition of hazardous waste, while under the state rule covered wastes are exempted from all regulation except minimal reporting and notification rules." **Brief of Respondent** at 3, footnote 2.

restricted to utilities, it would have been a matter of the greatest simplicity for Congress to have said so. It is not reasonable to suppose that a limitation of the scope and importance urged here was intended but somehow was not stated. It cannot have escaped notice that fossil fuel combustion is not limited to the utility industry. No resort to legislative history is made, in the absence of extraordinary circumstances, where there is no ambiguity or uncertainty as to meaning. The rules of statutory construction do not provide for the application of legislative history to explain clear language. Where a violation subjects a respondent to civil or criminal sanctions, regulations cannot be construed to mean what was intended but was not adequately expressed.[23] As a matter of public policy, it would appear to be short-sighted to require members of the regulated community to conduct their affairs in accordance with obviously insupportable interpretations of statutory and regulatory provisions.

Complainant argues that EPA's interpretation was set forth in the Federal Register and that respondent is bound by the contents of the Federal Register. It is true that respondent is charged with notice of the contents of the Federal Register. Here, however, such contents would only have informed respondent of EPA's view of the exemption language. But respondent's defense is not that it was not aware of EPA's interpretation. Rather, the defense is that EPA's current interpretation is clearly incorrect

---

[23] Diamond Roofing Co. v. OSHRC, 528 F. 2d 645, 649 (5th Cir. 1976), where the language of the regulation created an ambiguity.

and that respondent was entitled to rely upon the State's (correct) interpretation[24], [25]. Neither the Federal Register nor the existence of published EPA policy documents changes the situation. In the former case, there is no ambiguity or notice issue to be resolved by reference to it. In the latter case, agency policy documents cannot overturn clear, unambiguous statutory language and equally clear, unambiguous regulations written by the agency itself to implement that language. If the principles of statutory construction were otherwise, it would never matter what the Congress and the regulations had said. Upholding complainant's view of the language in question would amount to nothing less than amending to the statute. The case for the fossil fuel exemption meaning "utilities only" to EPA would have been stronger had such a restriction been written into the implementing regulation. Given the opportunity, EPA chose not to or failed to do so. If anything, the regulation goes further by stating that fly ash (without limitation as to source) is not hazardous waste, while RCRA § 3001(b)(3)(A)() merely exempts it from regulation pending certain developments.

---

[24] Respondent says at one point that the issue is reliance, but then goes on to take complainant to task for citing cases where a defendant was held liable although it had relied upon a state interpretation that was incorrect. Reliance is therefore not the issue, at least before March 19, 1990.

[25] Complainant refers to respondent's having chosen to be guided by what complainant views as the "least expensive" interpretation of the language. While that may be so, respondent's choice was also consistent with the clear wording of the Act, the federal regulations, the State regulation, and with the interpretation of the State agency to whose authority respondent was subject.

Complainant argues the language of Section 6929, which specifies that "upon the effective date of the regulations under this subchapter . . . no State . . . may impose any requirement less stringent than those **authorized by this subchapter** respecting the same material as governed by such regulations.[26]" [Emphasis added]. Here, however, the requirement (exemption) is authorized by the plain words of the subchapter itself -- not a less stringent state requirement. The state based its interpretation squarely upon the clear words of section 3001. No requirement less stringent that which is authorized under the Act was imposed by the state. Complainant's argument really suggests that no requirement less stringent than any interpretation espoused at any given moment by EPA may be imposed.

Accordingly, unless well established principles of statutory interpretation are simply to be cast aside in order to reach a result which complainant understandably wishes the Congress had arrived at -- but which it did not arrive at -- no other conclusion is possible. Indeed, it might be added that seldom does an administrative tribunal have the opportunity to construe language as plain as that found here both in the statute and the implementing regulation.

It is also necessary to consider whether it would be fair in this case to penalize with a holding of liability a respondent which had operated in good faith, openly, pursuant to an interpretation made by a State government to which enforcement

---

[26] Emphasis supplied.

authority had been delegated and whose interpretations presumably bound the regulated community in other hazardous waste matters.[27] It is noted that the State refused to reverse its position despite repeated efforts by EPA to induce a reversal. Complainant urges that respondent was obligated to consult EPA with respect to the interpretation of the exemption, but does not deny that respondent did in fact contact EPA in connection with its course of action and was referred by EPA to TDHE. TDHE then reiterated its conclusion that "baghouse dust was considered exempt.[28]"

Complainant's view that respondent nevertheless remained accountable to EPA after EPA disagreed with the State, despite having delegated the hazardous waste program to it, goes against the purpose of the delegation and every reasonable reading of its terms.[29] No contrary authority comes to mind. Respondent did comply with the view of the authority which it had every reason to

---

[27] As respondent notes, the Act provides that "(A)ny action taken by a State under a hazardous waste program authority under this section it have the same force and effect as action by the Administrator under this subchapter." 42 U.S.C. S 6926(a), Section 3006(d) of RCRA.

[28] In a letter dated March 15, 1988, EPA notified respondent that the "emissions from your facility were EP Toxic and therefore subject to regulation under RCRA." The letter also stated: "If you have any questions, please contact Mr. Tom Tiesler" [at THDE]. Respondent did contact TDHE, an inspection of the facility by TDHE followed shortly thereafter, and, in a report dated June 30, 1998, TDHE stated that "no violations of the regulations promulgated under the authority of the Tennessee Hazardous Waste Management Act were noted." The report also stated: "At the time of the inspection, the baghouse dust was considered exempt from the Regulations (except for notification) by TR 1200-1-11-.02(1)(d)(3)(ii)(I)."

[29] See, for example, 42 U.S.C. s 6926(a).

suppose was the governing authority in its case[30], at least until EPA rescinded its delegation,[31] and which had taken a position based upon the clear language of the amendment.[32]

Quite apart from the clear language of the statute, members of

---

[30] See Section 6926(a), **Effect of State Permit:**.which provides that:

> 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.

[31] See, for example, 42 U.S.C. § 6926(a), which permits the EPA Administrator to withdraw a State's authorization to administer and enforce a hazardous waste program for failure to conform to the requirements of the Act. Indeed, respondent's brief alludes to hints from EPA Region IV that TDHE's authorization to operate its program would be revoked if the disagreement as to the exemption were not resolved.

In August, 1985, TDHE proposed amending the language of the exemption so as to permit the State to accede to EPA's interpretation. An EPA representative appeared before the Tennessee Solid Waste Disposal Control Board, where the proposed change was discussed at length. According to respondent, the Board was not persuaded that EPA's interpretation was correct, and voted not to change the regulations. The Board further decided not to require TDHE to change its interpretation of the exemption until EPA's interpretation was "validated 'in the proper forum.'" **Brief of Respondent** at 5; **Respondent's Document 14** at 1.

Respondent's Document 14, a letter dated October 11, 1985, from TDHE to EPA Region IV, states that

> . . . . [L]ike us, the Board expressed the belief that your Agency's interpretation . . . <u>is not consistent</u> with the exclusion as it is worded in the State and Federal regulations. . . [U]nless and until it has withstood challenge in court, we simply cannot agree with your Agency's opinion that the referenced exclusion does not apply to the combustion wastes generated [by respondent]. [Emphasis original]

[32] See respondent's document 14, TDHE letter of October 11, 1985, set out in note 31, **infra**.

the regulated community should not be "whipsawed" between the two authorities, or penalized because the delegating authority and the delegatee could not agree.

Complainant admits on brief that, ten days after TDHE changed its position to agree with EPA, respondent stated that it was complying with the new interpretation of the "fossil fuel exemption." None of the cases cited for mitigation are applicable here because there is simply no way respondent can be held accountable for complying with valid State interpretations and the schedule for compliance imposed upon respondent until such time as that valid State interpretation was changed. When it was changed, on March 19, 1990, respondent complied according to the schedule set out by TDHE.

Complainant makes the remarkable argument that as soon as respondent became aware of EPA's position, it should have come into compliance. In a proposed conclusion of law, complainant would punish respondent for not immediately agreeing to comply, and urges a $74,500 penalty and an order which treats respondent's fly ash landfill as a RCRA facility subject to unspecified costs for inspection, monitoring, and closure. In a civil forfeiture case, "only the most extraordinary showing of contrary intentions[33]" in the legislative history will justify departure from the clear language of a statute, and it is respondent's right to challenge

---

[33] **United States v. Albertini**, 472 U. S. 675 (1984) at 680, quoting **Garcia v. United States**, 469 U.S. 70, 75 (1984). While these were criminal cases, the same principle applies to civil forfeiture matters.

complainant's interpretation in a hearing. Moreover, until such time as respondent was required by the State of Tennessee to treat its waste, it was not obligated to accede to EPA's interpretation.

Clearly it would not be fair to impose a penalty in these circumstances, even had liability been found. Fairness does not permit imposition of penalties where respondent's operations were conducted pursuant to the interpretation of a valid State authority that the material was exempt from regulation and where the State's position was clearly supported by the language of the statute.[34]

Last, it is noted that the publication of the so called "Third Third" Land Ban Regulations, effective August 8, 1990, requires fly ash to be treated before it may be deposited in a landfill. Compliance with these regulations removes the material from the definition of hazardous waste. Complainant does not deny that, since August 8, 1990, respondent has disposed of no cupola baghouse dust which meets the definition of hazardous waste under the Act, and, in fact, that respondent was in compliance well before the end of the 180 day period provided by TDHE for compliance with the new interpretation after March 19, 1990.

It is concluded that respondent did not violate the Act and applicable regulations as charged in the complaint. Further, in this case, reliance upon the State of Tennessee's authority to

---

[34] There may well be cases in which the State's interpretation is so clearly wrong, given particular statutory/regulatory provisions, that reliance upon such an interpretation would not preclude the assessment of a civil penalties. This is not such a case.

enforce its own hazardous waste program might well have constituted a defense against a finding of liability here, and would have been a defense against the imposition of penalties both before and after March 19, 1990, when the State acceded to EPA's interpretation of the exemption.[35] Having reached this conclusion, it is not necessary to address the question of whether as a general proposition reliance upon an authorized state's position may in any given instance constitute a defense as to liability (as opposed to imposition of a civil penalty for a finding of liability). It is unavoidable that much would depend upon what position was taken and what the basis for it was. It is possible to imagine instances of reliance upon a state authority which would not be reasonable and would not preclude a finding of liability. Here it is sufficient to hold that the language of Section 3001(b)(3)(A)(i) and 40 C.F.R. § 261.4(b)(4) is so clear and unambiguous that respondent cannot be held liable for failing to achieve interim status/permit and for not operating its facility in accordance with RCRA. In view of these conclusions, it is not necessary to reach the question of whether the civil monetary penalty proposed by EPA in the complaint is reasonable. Since it has been determined that respondent's fly ash waste was exempt from regulation as hazardous waste, it follows that respondent was not required to manage its facility in

---

[35] Complainant argues at one point that the State's ultimate decision to agree with EPA means that EPA's interpretation was "right" all along. The record, however, does not show why the decision was made or what the reason may have been. Given the clear belief on the part of TDHE over a period of years that the exemption was not limited to utilities, this argument cannot be given serious consideration.

and federal regulations, and is not liable for failure to do so. Therefore, the charges recited in paragraph 17 of the complaint[36], which are based upon an April, 1989, inspection, must also fail.

FINDINGS OF FACTS AS STIPULATED BY THE PARTIES

The following facts stipulated by the parties are adopted verbatim[37] as Findings of Fact.

1. Wheland is a corporation doing business in the State of Tennessee and is a "person" as defined in Section 1004(15) of RCRA, 42 U.S.C. § 6903(15).

2. Wheland owns and operates a business located at 2800 South Broad Street, Chattanooga, Tennessee. Wheland also owns and operates a landfill located on a parcel of land bounded by West 36th Street, St. Elmo Avenue, and the Southern Railroad tracks. This landfill is known as the St. Elmo Avenue landfill (herein referred to as "landfill").

3. Wheland's business and the St. Elmo Avenue landfill are both a "facility" as the term is defined in TR 1200-1-11-.01(2)(a)

---

[36] Failure to use a manifest for every off-site shipment of a hazardous waste, failure to limit or prevent entrance to the facility, failure to inspect the facility to avoid releases of hazardous waste constituents to the environment; failure to provide training on hazardous waste management procedures; failure to operate and maintain the facility to minimize the possibility of accidents resulting in a release of hazardous waste constituents into the environment, failure to keep an operating record, failure to implement a groundwater monitoring program, and failures to demonstrate financial responsibility.

[37] See note 6, at 4 **supra**.

(40 C.F.R. 260.10). At the business facility, Wheland operates three foundries which process scrap metal into gray iron castings for the manufacture of vehicles' brake parts such as drums and rotors. In the melting process, coke, scrap metals and limestone are charged into a cupola and then the coke is ignited with gas. The cupola emissions from this melting process are controlled at the baghouse collectors. The material collected at the baghouse collectors is known as fly ash.

4. On several occasions, Wheland analyzed its fly ash, or dust (herein referred to as "fly ash"), collected at the baghouse collectors using the Extraction Procedure Toxicity ("EP Tox") test for cadmium and lead. The results obtained in most of these analyses have exceeded the EP Tox limits for cadmium and lead which are set out in Table I of TR 1200-11-.02 (40 C.F.R. § 261.24, Table I). Pursuant to TR 1200-1-11-.02(3)(e) (40 C.F.R. § 261.24) wastes that exceed the Table I concentration limits for cadmium and lead are hazardous wastes which have been assigned the codes D006 and D008, respectively. Wheland claims that due to the fossil fuel exemption these wastes are not classified as hazardous wastes by federal regulations, and are classifed as an exempted hazardous waste by Tennessee regulations.

5. On July 16, 1981, the State of Tennessee was granted Phase I interim authorizaton to operate a hazardous waste program in lieu of Phase I of the federal hazardous waste program in its jurisdiction pursuant to Section 3006(c) of RCRA, 42 U.S. C. § 6926(c). Pursuant to Section 3006(d) of RCRA, 42 U.S.C. § 6926(d),

"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." However, pursuant to RCRA Section 3009 no state may impose any requirement less stringent than those authorized under Subtitle C of RCRA. Through RCRA Section 3008(a)(2), Congress vested EPA with the authority to take formal enforcement action in states with an authorized RCRA program.

6. Pursuant to TR 1200-1-11-.07(1) and Section 3005, 42 U.S.C. § 6925, any person who owns or operates a facility for the treatment, storage or disposal of hazardous waste must have a permit to operate and cannot operate without such permit. The regulations governing the issuance of such permits became effective on November 19, 1980, and are codified in TR 1200-1-11-.07 [40 C.F.R. 270]. The regulations which establish the standards for the management of hazardous waste are found at TR 1200-1-11-.01 thru .10 (40 CFR 260 thru 270) respectively.

7. TR 1200-1-11-.07(3) and Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), provide that an owner or operator of a facility shall be treated as having been issued a permit pending final administrative disposition of his/her/its permit application provided that: (1) the facility was in existence on November 19, 1980, (2) the requirements of TR 1200-1-11-.03 and Section 3010(a) of RCRA, 42 U.S.C. § 6930(a), concerning notification of hazardous waste activity has been complied with, and (3) application for a permit has been made. This statutory authority to operate is known as

interim status.

8. Wheland did not submit to EPA a Part A permit application for the Wheland's landfill where it was disposing of its fly ash. Wheland alleges that pursuant to TDHE's former interpretation of the fossil fuel exemption, under the federal regulation it was not generating a hazardous waste, and, therefore, the interim status regulations are inapplicable. Wheland alleges that it was not required to submit a Part A permit application to EPA.

9. EPA alleges that the fossil fuel exemption does not apply to Wheland, and, therefore, Wheland failed to achieve interim status. According to EPA, Wheland should have submitted the Part A of its permit application on or before November 19, 1980, and failure to achieve interim status or obtain a permit constitutes a violation of TR 1200-1-11-.07(2)(b), 40 CFR § 270.10(e), and Sections 3005 and 3010 of RCRA, 42 U.S.C. §§ 6925 and 6930.

10. If EPA's interpretation of the fossil fuel exemption is correct, and if Wheland was not justified in its reliance on TDHE's former interpretation of this exemption, Wheland failed to achieve interim status under Section 3005(e) of RCRA, 42 U.S.C. § 6925(e), and, therefore, its landfill is a hazardous waste management facility subject to all of TR 1200-1-11-.05 and 40 C.F.R. § 265 which contain requirements applicable to owners and operators of hazardous waste management facilities which have achieved interim status and to those owners and operators that failed to notify and/or submit a Part A of a permit application.

11. Compliance with hazardous waste regulations is self-implementing. Initial determination of the applicability of any exemption was to be made by the generator of the waste. Wheland made the determination that the exemption set forth in TR 1200-1-11-.02(1)(d)3(ii)(I) [40 C.F.R. 261.4(b)(4)] applied to its fly ash, and thus provided no notice to EPA. This exemption is referred to as the "fossil fuel exemption." EPA's position has always been that the fossil fuel exemption does not apply to the fly ash generated by Wheland. TDHE did not adopt EPA's interpretation of the exemption until March 19, 1990. Until March 19, 1990, Wheland has consistently complied with the state's RCRA regulations that apply to waste exempted under the fossil fuel exclusion.

12. Compliance with the applicable Tennessee regulations required filing a notice even for exempt wastes. Wheland filed the required state notice on February 24, 1981, designating its cupola baghouse "fly ash" an exempt hazardous waste, citing the fossil fuel exemption.

13. Since February 1981, Wheland has consistently filed the required state notice indicating the generation of a waste which is exempt under TR 1200-1-11-.02(1)(d)3(ii)(I).

14. In a letter dated July 25, 1984, Mr. Tom Tiesler, Director, Division of Solid Waste Management, TDHE notified Wheland that its fly ash was a hazardous waste, required to be managed as such.

15. In a letter dated August 16, 1984, Mr. John P. Lehman,

Director, Waste Management and Economics Division, EPA Headquarters, notified Mr. Tiesler, TDHE, that the fossil fuel exemption was not limited to coal-fired electric utilities power plants.

16. In a letter dated September 6, 1984, Mr. Tiesler, TDHE, notified Wheland that the fly ash was excluded from RCRA regulation pursuant to TR 1200-1-11-.02(1)9d)3(ii)(I) [40 C.F.R. 261.4(b)(4)]. With regard to this document, EPA admits that it is an authentic document from the State of Tennessee and that it represents Tennessee's former position regarding the applicability of the "fossil fuel exemption" to Wheland's fly ash. However, EPA does not stipulate to the correctness of Tennessee's former interpretation of such exemption.

17. In a letter dated December 29, 1984, EPA Region IV notified Mr. Tiesler, TDHE, that the exclusion granted to Wheland's fly ash does not apply to foundries. Enclosed with the letter was a memorandum dated November 20, 1984, signed by Mr. John H. Skinner, EPA's Headquarters Director of the Office of Solid Waste. In the memorandum, Mr. Skinner stated that Mr. Tiesler should not rely on the August 16, 1984 (Lehman's letter) as a final interpretation of the "Fossil Fuel Exemption." Wheland was not copied on this letter.

18. In a letter dated February 7, 1985, Mr. Steve Baxter, Environmental Consultant, TDHE, again confirmed to Wheland that TDHE "considers this waste exempt from the management requirements . . . of the Rules Governing Hazardous Waste Management in

Tennessee, except for the notification requirement." Wheland has continued to comply with this notification requirement by filing the required state reports. With regards to this document, EPA admits that it is an authentic document from the State of Tennessee and that it represents Tennessee's former position regarding the applicability of the "fossil fuel exemption" to Wheland's fly ash. However, EPA does not stipulate the correctness of Tennessee's former interpretation of this exemption.

19. In a notice dated August 1, 1985, Mr. Dwight Hinch, Manager, Planning Section, TDHE, proposed an amendement to TR 1200-1-11-.02(1)(d)3(ii)(I). Paragraph 10 of the explanation for this change states: "This is intended to be consistent with EPA's interpretation of the similar RCRA exclusion." TDHE felt that it would be unable to adopt EPA's interpretation without adopting this revised wording.

20. In a letter dated September 11, 1985, Mr. Tiesler confirmed the existing disagreement between Region IV and TDHE, and noted that TDHE does not "understand the basis for your agency's position on this issue." EPA admits that this letter is an authentic document from the State of Tennessee and that it represents Tennessee's fromer position regarding the applicability of the "fossil fuel exemption" to Wheland's fly ash. However, EPA does not stipulate to the correctness of Tennessee's former interpretation of such exemption.

21. At a meeting of the Tennessee Solid Waste Disposal Control Board held on October 2, 1985, Mr. Bill Gallagher, EPA

Region IV, asked the Board and TDHE to either amend the fossil fuel exemption in the state regulation or adopt Region IV's interpretation of the exemption and to take enforcement action against the foundries in Chattanooga, Tennessee or that EPA will take the action. The Board refused to revise its regulation or adopt Region IV's interpretation. Representatives from Wheland Foundry were present during the meeting and heard EPA's position with respect to the inapplicability of the fossil fuel exemption to fly ash from foundries such as Wheland's and the Board's refusal to adopt EPA's position or amend Tennessee's Regulation.

22. In a letter dated October 11, 1985, Mr. Tiesler, TDHE, again notified Region IV that TDHE could not accept Region IV's interpretation of the regulation, "unless and until it has withstood challenge in court." This letter established that EPA's position was that the "fossil fuel combusion waste exclusion" did not apply to Wheland's fly ash. Mr. Hugh J. Moore, Jr., attorney for Wheland Foundry was copied with the letter.

23. On May 12, 1987, an EPA contractor collected one fly ash sample from each one of the three baghouse stations at Wheland and one from its landfill where this material is disposed of. Analytical results showed that two of the baghouse samples and the landfill sample exceeded the EPA Tox limits for cadmium and lead.

24. In a letter dated March 15, 1988, EPA notified Wheland that the "emissions from your facility were EP Toxic and therefore subject to regulation under RCRA." The letter also stated: "If you have any questions, please contact Mr. Tom Tiesler." Mr. Tiesler

was TDHE's Director of the Division of Solid Waste Management. Wheland contacted TDHE and an inspection of its facility by TDHE followed shortly thereafter.

25. On June 21, 1988, Mr. Guy Moose, TDHE, conducted an inspection of Wheland's facility. In a report dated June 30, 1988, Mr. Moose stated that "no violations of the regulations promulgated under the authority of the **Tennessee Hazardous Waste Management Act** were noted." The report also stated, "At the time of the inspection, the baghouse dust was considered exempt from the Regulations (except for notification) by TR 1200-1-11-.02(1)(d)3(ii)(I)." This report was copied to Mr. Doyle Brittain, EPA Region IV. With regard to this document, EPA admits that the report is an authentic document from the State of Tennessee and that it represents Tennessee's former position regarding the applicability of the "fossil fuel exemption" to Wheland's fly ash. However, EPA does not stipulate the correctness of Tennessee's former interpretation of the exemption.

26. In a letter dated November 10, 1988, EPA Region IV notified TDHE that EPA had recently settled three cases in Alabama dealing with fly ash and that EPA was expecting TDHE to take formal enforcement action against Wheland. TDHE did not take such action, apparently because the validity of Region IV's interpretation had not been challenged in court, but instead was accepted as part of a pre-trial agreed settlement.

27. In response to Region IV's request for action, TDHE again proposed to amend its regulations so that it could reach the

interpretation adopted by EPA. This amendement was proposed by TDHE in early January, 1989. TDHE's explanation for the proposed amendment was that it "would enable the state to interpret this rule the same as EPA." Following a meeting on February 6, 1989, with representatives of several parties potentially affected by this change, Mr. Dwight Hinch, former TDHE Technical Coordinator, further revised the proposed amendement to TR 1200-1-11-.02(1)(d)3(ii)(I) including language from EPA's proposed regulations for boilers and industrial furnaces.

28. In a letter dated may 18, 1989, Region IV again stated its position that the exemption "applies to utility industries and not foundries." Region IV receommended that TDHE should not revise TR 1200-1-11-.02(1)(d)3(ii)(I) using the language from EPA's proposed regulations for industrial furnaces and boilers "until such time as EPA's draft proposed regulation is promulgated in final form." These regulations have not yet been promulgated.

29. At a meeting of the Tennessee Solid Waste Disposal Control Board (Board) held on June 7, 1989, Mr. Doyle Brittain of EPA Region IV presented, as requested by TDHE, to the Board EPA's position with regards to the Bevill exclusion and foundry fly ash. In his presentation, Mr. Brittain stated that the proposed amendement to the state fossil fuel exemption "would be acceptable to EPA." Mr. Brittain also stated that "EPA believes that the existing rule is adequate; it is the State interpretation of that rule that needs to be changed." The minutes of the Board meeting state that "The Board suggested that the "Division" (TDHE, Division

of Solid Waste Management) interpret the regulation as they see appropriate and if the occasion arises for the Board to interpret this regulation in the course of their designated duties, then they will." With the exception of the period of time covered from July 25, 1984 to September 6, 1984, TDHE interpreted the fossil fuel exemption as exempting Wheland's fly ash from the requirements imposed on hazardous waste until March 19, 1990.

30. In a complaint dated June 19, 1989, EPA asserted various violations of state and EPA regulations related to the handling of Wheland's fly ash, dated back to 1980. A penalty of $159,255 was proposed. After Wheland demonstrated its ability to be self-insured, meeting various requirements set forth in the regulations, the proposed penalty was reduced to $74,500.00.

31. In a letter dated march 19, 1990, TDHE officially notified Wheland Foundry that the fly ash from Wheland's cupola baghouse is not covered by the fossil fuel exclusion (Bevill Amendments), therefore, it is subject to all RCRA requirements.

32. On several occasions Wheland engaged in settlement negotiations with EPA. In those negotiations, Wheland proposed that EPA accept a time schedule for compliance by treating the fly ash. A specific timetable was forwarded to TDHE and copied to EPA. However, in a proposed Consent Order sent to Wheland's attorney on March 16, 1990, and in a letter dated April 27, 1990, EPA declined to accept the timetable by requesting that Wheland immediately cease disposing of untreated fly ash in a non-RCRA landfill.

33. In a letter dated March 28, 1990, signed by Mr. Hugh J.

Moore, Esq., and addressed to Mr. Robert Wayne Lee, Esq., Wheland notified EPA that Wheland agreed with Tennessee to regulate the fly ash as a hazardous waste.

34. On March 19, 1990, TDHE requested from Wheland a plan to achieve compliance with TDHE's revised interpretation of the fly ash exclusion. Wheland responded by making submissions to TDHE on April 4, 1990, and May 15, 1990.

35. Wheland, since at least November 1980, and up to August 8, 1990:

> a. disposed of untreated fly ash at an off-site, non-RCRA regulated landfill owned and operated by Wheland Foundry.
>
> b. did not prepare manifests for off-site shipments of waste (fly ash), did not prevent entry of unauthorized personnel or livestock onto the active portion of the landfill, did not perform daily inspections of the landfill, did not maintain an operating log for the landfill, did not provide training on waste management procedures, did not operate the landfill to minimize the unplanned sudden or non-sudden release of waste, did not install a run-on/run-off control system for the landfill, and did not survey its hazardous waste management landfill cell; and
>
> c. has not implemented for the landfill a groundwater monitoring program consistent with RCRA regulations; has not developed a closure plan, post-closure plan, and cost estimate for closure and post-closure of the landfill, and has not submitted financial assurance instruments to cover the cost of closure and post-closure of the landfill consistent with the RCRA regulations.

36. Wheland, since at least November 1980, and up to August 8, 1990, generated an average of twenty to thirty tons of untreated fly ash per operating day.

37. On or about August 8, 1990, Wheland started treating the fly ash. According to sampling performed by Wheland the treated fly ash does not exceed any of the EP Tox limits.

ADDITIONAL FINDINGS OF FACT

1. On May 15, 1990, Wheland submitted a groundwater monitoring plan for the St. Elmo Avenue landfill to TDHE. Pursuant to the TDHE-approved compliance schedule contained in Wheland's April 4, 1990 submission to TDHE, Wheland was required to deliver its landfill closure plan by March 1, 1991.

2. Wheland's groundwater monitoring plan meets the requirements of TR 1200-1-11.05(6) and 40 C.F.R. 265 Subpart F.

3. Wheland's St. Elmo Avenue landfill has been used for the disposal of both hazardous and non-hazardous waste. Portions of the landfill, including those areas sold by Wheland to third parties, do not appear to contain hazardous waste.

4. RCRA landfill closure and post-closure requirements apply only to hazardous waste landfills. The closure and post-closure requirements applicable to non-hazardous waste landfills in Tennessee are the TDHE solid waste regulations.

5. Respondent's fly ash is generated primarily from the combustion of fossil fuels.

CONCLUSIONS OF LAW

1. Respondent is a corporation doing business in the State of Tennessee and is a "person" as defined in Section

1004(15) of RCRA, 42 U.S.C. § 6903(15).

2. Respondent's business at 2800 South Broad Street, Chattanooga, Tennessee and its West 36th Street/St. Elmo Avenue/Southern Railroad tracks landfill are both facilities, as the term "facility" as defined in TR 1200-1-11-.01(2) (a), 40 CFR 260.10.

3. RCRA section 3001(b)(3)(A)(1) exempts fly ash, without limitation as to the type of business from which it originates, fly ash resulting primarily from the combustion of coal or other fossil fuels pending certain developments. Consequently, respondent did not violate TR 1200-1-11-.07(2)(c) and 40 C.F.R. § 270.10(f) and sections 3005 and 3010 or RCRA as charged by failing to obtain interim status or a permit to operate its facility.

4. The Tennessee Department of Health and Environment (TDHE) was granted Phase I interim authorization to operate a hazardous waste program in lieu of Phase I of the federal program on July 16, 1981, and continued to operate an authorized program since that date through and including the date upon which this matter was submitted for decision.

5. Pursuant to Section 3006(d) of RCRA, 42 U.S.C. § 6926(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." Consequently, at all relevant

times herein, respondent was subject to the jurisdiction of TDHE in connection with the operation of its facility insofar as that involved hazardous waste.

6. The State of Tennessee was given notice of this action.[38]

7. Section 3001(b)(3)(A)(i) of the Act exempts fly ash generated primarily from the combustion of coal or other fossil fuels from regulation under Subchapter III of RCRA. TR 1200-1-11-.02(1)(d)3(ii)(I) exempts fly ash from regulation as a hazardous waste except that notice must be given to the state, which respondent gave in a timely manner. 40 CFR 261.4(b)(4) excludes fly ash generated primarily from the combustion of coal or other fossil fuels from the category of "hazardous wastes".

8. Until March 19, 1990, respondent had complied with applicable Tennessee exempted waste regulations by notifying TDHE of the generation of an exempted waste.

9. TDHE's interpretation of the exemption provisions of the Act and the regulations before March 19, 1990, followed the clear and unambiguous language of the statute and regulations. EPA's interpretation relies upon collateral material.

10. On the facts and statutory provisions in this case, respondent's reliance upon statements from TDHE, which was administering the delegated authority to operate the state program in lieu of the federal program, would

---

[38] Complaint, at 1, ¶ 2.

preclude imposition of penalties if liability had been found for the violations charged in the complaint. Subsequent to March 19, 1990, respondent was following a schedule of compliance imposed by TDHE.

11. TDHE personnel gave respondent 180 days to comply with the revised interpretation of the exemption by implementing a cupola baghouse dust treatment system. This system was in operation by August 8, 1990, within the 180-day deadline. (No cupola baghouse dust generated by respondent since August 9, 1990, has been a hazardous waste under wither TDHE or federal regulations). Consequently, respondent could not be held liable for violations charged in the complaint which may have continued after March 19, 1990.

12. Respondent did not violate RCRA or applicable regulations as charged in the complaint, since the fly ash generated in its foundries was exempted from regulation as a hazardous waste under Subchapter III of RCRA.

13. Since respondent was not required to comply with RCRA with respect to fly ash generated from the combustion of fossil fuels until the State of Tennessee changed its position as to the meaning of the exemption on March 19, 1990, no penalties may be assessed for failure to comply with RCRA and applicable regulations in connection with the management of fly ash before that date. Accordingly, since all of the charges of the complaint date from a period before March, 1990, the complaint must be

dismissed.

14. In the circumstances of this case, respondent's reliance upon and compliance with state authorities in connection with the management of its fly ash also constitutes a defense to the charges recited in the complaint, which all predate March, 1990.

15. The above holding is limited to the circumstances of this case, where the statutory and regulatory language is clear and unambiguous, where the state agency which had delegated authority to enforce the state program considered the statutory language not to be susceptible to another interpretation, and where the restriction contended for by complainant depends entirely upon collateral material for viability.

ORDER

Accordingly, the complaint herein shall be, and it is hereby, dismissed with prejudice.

J. F. Greene
Administrative Law Judge

Dated: September 30 1993
Washington, D. C.