

10/15/94

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE ADMINISTRATOR

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

CERTIFICATION FOR INTERLOCUTORY APPEAL

Under date of October 31, 1994, Complainant moved for certification of an interlocutory appeal, pursuant to Rule 22.29(b) of the Consolidated Rules of Practice (40 CFR Part 22), from an order, dated October 20, 1994, which granted in part Beaumont's motion for an accelerated decision.

Complainant interprets the order as holding (1) that EPA lacks authority under RCRA §§ 3006 and 3008 to enforce RCRA requirements in states with EPA-authorized hazardous waste management programs unless the state has failed to act or EPA has withdrawn the state's authority to administer its own hazardous waste program; and (2) that EPA is precluded by § 3006 and principles of res judicata and collateral estoppel from initiating an enforcement action in a state having an EPA-authorized hazardous waste management program with respect to any issues which were the subject of a prior state adjudication. Complainant argues that the October 20 order is contrary to the statutory scheme, legislative history, and inappropriately discounts longstanding EPA interpretation, guidance

and policy. Complainant contends that all of the requirements for certification under § 22.29(b) have been met and urges that the October 20 order be certified to the EAB forthwith.*

Beaumont, through counsel, served a memorandum in opposition to Complainant's motion on December 2, 1994, asserting, inter alia, that the issues involved in the October 20 order are not subject to a substantial difference of opinion nor is it obvious that immediate review will materially advance [disposition] of the litigation. Beaumont says that the October 20 order is based on well established principles of res judicata and collateral estoppel and contrary to Complainant's arguments, is neither novel nor revolutionary. Moreover, Beaumont avers that Complainant's characterization of the differences of opinion as "vibrant" (motion at 11) cannot legitimize a reading of a statute contrary to its plain statutory text and legislative history. According to Beaumont, differences of opinion as to the validity of the October 20 order are lacking in substance.

Beaumont characterizes Complainant's argument under § 22.29(b)(2)(i), i.e., that an immediate appeal will materially

* Rule 22.29(b) provides:

(b) Availability of interlocutory appeal. The Presiding Officer may certify any ruling for appeal to the Environmental Appeals Board when (1) the order or ruling involves an important question of law or policy concerning which there is substantial grounds for difference of opinion, and (2) either (i) an immediate appeal from the order or ruling will materially advance the ultimate termination of the proceeding, or (ii) review after the final order is issued will be inadequate or ineffective.

advance the ultimate termination of the litigation, as being based on the proposition that, because of the magnitude of the claimed penalty and the impact of the precedent, settlement is unlikely [absent such an appeal]. Beaumont asserts that Rule 22.29(b) should not be used to give Complainant leverage in settlement negotiations and that, while the possibility [exists] that an affirmance of the October 20 order would facilitate a settlement, a decision reversing that order would discourage settlement from Respondent's perspective. According to Beaumont, if this case has the importance ascribed to it by Complainant, costly litigation would appear to be inevitable.

Beaumont rejects Complainant's apparent contention that the October 20 order, if allowed to stand, will wreak havoc on the federal-state relationship in implementing, administering and enforcing hazardous waste laws, asserting that, if the Agency's overfiling policy has prompted the potential for numerous administrative and judicial challenges, the blame lies with the policy not the October 20 order. Complainant's argument in this regard was in support of its alternate contention that review after the final order was issued would be inadequate or ineffective.

The October 20 order was primarily based on res judicata and collateral estoppel principles and the broad interpretation of the order advanced by Complainant in its motion for certification, i.e., that the order holds that EPA lacks authority under RCRA §§ 3006 and 3008 to enforce RCRA requirements in states with EPA-authorized hazardous waste programs, unless the state has failed to

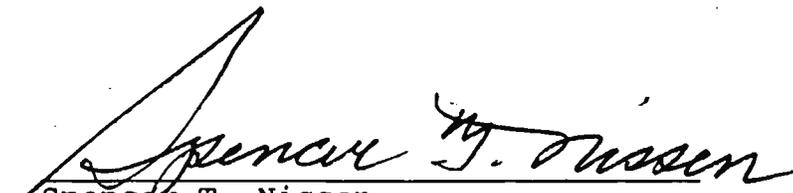
act or the state's authority to administer its own hazardous waste program has been withdrawn, need not be adopted to sustain the order. Although for reasons set forth in the October 20 order, I am firmly convinced that the 1986 General Counsel's opinion, upon which the Agency's overfiling policy is based, is erroneous, that opinion has guided EPA overfiling policy for over eight years. This fact tends to support the view that there are substantial grounds for difference of opinion as to the conclusions reached in the October 20 order. Moreover, although I agree with Beaumont that Complainant has exaggerated the importance and scope of the October 20 order, the order conflicts with EPA policy on overfiling. It is concluded that Complainant's motion satisfies the first requirement for certification, i.e., the order involves an important question of law or policy upon which there are substantial grounds for difference of opinion.

More problematic is whether Complainant has satisfied the second requirement for certification, i.e., an immediate appeal will materially advance the ultimate termination of the proceeding, or, alternatively, review after the final order [initial decision] is issued will be inadequate or ineffective. Beaumont appears to acknowledge that a decision upholding the October 20 order might materially advance ultimate disposition of the litigation, but argues that a decision reversing the order would have the opposite effect. It is concluded, however, that a decision which sets forth the controlling law may have the effect of materially advancing the ultimate termination of the proceeding within the meaning of Rule

22.29(b)(2)(i), even if it does not lead to a settlement. This is because the legal issues will be settled and, even if a hearing is necessary, the parties' attention can be focused on the significant factual issues.

It is concluded that the October 20 order satisfies the requirements of Rule 22.29(b) for certification of an interlocutory appeal and the order is so certified.

Dated this 15th day of December 1994.


Spencer T. Nissen
Administrative Law Judge

Enclosures:

1. Beaumont's Motion For Accelerated Decision, April 3, 1992
2. Complainant's Opposition, dated April 30, 1992
3. Beaumont's Response, dated May 13, 1992
4. Order Granting In Part Motion For Accelerated Decision, dated October 20, 1994.
5. Complainant's Motion For Certification Of Interlocutory Appeal, dated October 31, 1994
6. Beaumont's Memorandum In Opposition, dated December 2, 1994