UNITED STATES OF AMERICA
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN THE MATTER OF:	**)**	
	)	
STRONG STEEL PRODUCTS, LLC,	**)**	**Docket No. CAA-5-2003-0009**
	)	
Respondent	**)**	

ORDER ON RESPONDENT'S MOTION TO RECONSIDER
ORDER ON MOTION TO DISMISS

I. Background

The Administrative Complaint in this matter, as amended, charges Respondent with two counts of violating the Clean Air Act (CAA) (42 U.S.C. § 7401 *et seq*.), by failing to comply with the regulations governing the proper evacuation of ozone depleting refrigerants prior to disposal of small appliances, motor vehicle air conditioners (MVACs) and/or MVAC-like appliances. On August 5, 2004, Respondent moved to dismiss the Complaint for lack of subject matter jurisdiction, due to the alleged failure of Complainant, EPA Region 5, to obtain a valid waiver of the jurisdictional limitation on instituting administrative actions set forth in Section 113(d) of the CAA (42 U.S.C. § 7413(d)). One of the three arguments presented by Respondent in support of dismissal was that the Region 5 Delegation of Authority 7-6-A provided that a jurisdictional waiver required the "review and concurrence of the Regional Counsel," and that the Regional Counsel did not review and concur in the waiver determination. Complainant opposed the Motion to Dismiss and filed a Cross Motion for Accelerated Decision on August 23, 2004, arguing that it had obtained a valid waiver under CAA § 113(d). After due consideration, on November 22, 2004, the undersigned issued an Order denying Respondent's Motion to Dismiss and granting Complainant's Cross Motion for Accelerated Decision (Order) on the issue of the CAA §113(d) waiver .

On February 4, 2005, Respondent submitted a Motion to Reconsider the Order, as to which, to date, no response has been received from Complainant. However, in view of the fact that the hearing of this case is scheduled to commence in two weeks, the volume of other motions that have been just recently filed in this matter by the parties, and the outcome of this Order, it is hereby deemed unnecessary to wait for a response from Complainant before ruling on the Motion.

II. Standard for Reconsideration

The Consolidated Rules of Practice, 40 C.F.R. Part 22 (Rules) do not provide for reconsideration of an interlocutory order, but they do provide for reconsideration of a final order of the Environmental Appeals Board (EAB). The standard for ruling on a motion to reconsider an interlocutory order should be at least as strict as the EAB's standard for reconsidering a final decision. *See, Oklahoma Metal Processing, Inc.,* EPA Docket No. TSCA-VI-659C, 1997 EPA ALJ LEXIS 16 * 2 (ALJ, Order Denying Motion for Reconsideration, June 4, 1997)(requiring a motion for reconsideration of an interlocutory order not only to meet the EAB's standard for reconsideration under 40 C.F.R. § 22.32, but also to demonstrate that a variance from the rules, which do not provide for reconsideration of ALJ orders and decisions, will further the public interest); *Ray & Jeanette Veldhuis*, EPA Docket No. CWA–9-99-0008, 2002 EPA ALJ LEXIS 47 * 7 (ALJ, Order Denying Motion to Reopen Hearing, Aug. 13, 2002)("assuming that a motion for reconsideration from an initial decision may be brought properly before an administrative law judge, such motion would be subject to the same standard of review as that of the EAB").

The Rules provide that a motion for reconsideration of a final decision of the EAB "must set forth the matters claimed to have been erroneously decided and the nature of the alleged errors." 40 C.F.R. § 22.32. The Preamble discussion of the 1999 amendments to the Rules describes the intent of reconsideration as follows:

> The purpose of § 22.32 is to provide a mechanism to bring to the EAB's attention a manifest error, such as a simple oversight, or a mistake of law or fact, or a change in the applicable law. *See, In the Matter of Cypress Aviation, Inc.*, 4 E.A.D. 390, 392 (EAB 1992). The motion for reconsideration is not intended as a forum for rearguing positions already considered or raising new arguments that could have been made before.

64 Fed. Reg. 40138, 40168 (July 23, 1999). The EAB stated, in *Southern Timber Products*, 3 E.A.D. 880, 889 (EAB 1992), that "reconsideration of a Final Decision is justified by an intervening change in the controlling law, new evidence, or the need to correct a clear error or prevent manifest injustice."[1] The EAB therein quoted an earlier decision of the appellate tribunal, *City of Detroit*, TSCA Appeal No. 89-5 (CJO Feb. 20, 1991), slip op. n. 18 at 2, which stated:

> A motion for reconsideration should not be regarded as an opportunity to reargue the case in a more convincing fashion. It should only be used to bring to the attention of this office clearly erroneous factual or legal conclusions. Reconsideration is normally appropriate only when this office has obviously overlooked or misapprehended the law or facts or the position of one of the

[1] New evidence would not be an appropriate basis for reconsideration of an initial decision, because the Rules provide for a motion to reopen the hearing to address new evidence. 40 C.F.R. § 22.28.

parties.

The standard enunciated by the EAB is similar to that used by Federal trial courts under Federal Rule of Civil Procedure 60(b), with which courts may grant relief from judgment for, *inter alia,* "obvious errors of law, apparent on the record." *Van Skiver v. United States,* 952 F.2d 1241, 1244 (10th Cir. 1991), *cert. denied,* 506 U.S. 828 (1992), *citing, Alvestad v. Monsanto Co.*, 671 F.2d 908, 912-13 (5th Cir.), *cert. denied,* 459 U.S. 1070 (1982). Motions for reconsideration are not for presenting the same issues ruled upon by the court, either expressly or by reasonable implication. *United States v. Midwest Suspension & Brake,* 803 F. Supp. 1267, 1269 (E.D. Mich 1992), *aff'd,* 49 F.3d 1197 (6th Cir. 1995). However, some courts have stated that a motion for reconsideration is appropriate where the court has mistakenly decided issues outside of those the parties presented for determination. *United States v. MPM Contractors, Inc.,* 767 F. Supp. 231 (D. Kan. 1990); *Above the Belt, Inc. v. Mel Bohannan Roofing, Inc.*, 99 F.R.D. 99, 101 (E.D. Va. 1983).

Thus, Respondent's Motion to Reconsider may be granted where there is "an obvious error of law" or "clear error" has been shown, or perhaps where there is merely "a mistake of law or fact." In this case, Respondent is correct that the parties did not present arguments as to whether the Regional Counsel was *required to* (as compared to whether the Counsel did or did not) review and concur in the CAA § 113(d) waiver determination. However, an interlocutory order need not be reconsidered merely on the basis that an issue was decided that was not presented by the parties. Reconsideration of an interlocutory order may be granted, if at all, only if the issue was erroneously or mistakenly decided, and not merely where there are grounds for a different opinion.

III. Discussion

Region 5 Delegation 7-6-A, Paragraph 3.a. states as follows:

> Exercise of these authorities [including the CAA waiver determination] is subject to review and concurrence by the Regional Counsel.

Complainant's Response to Motion to Dismiss, Exhibit 3.

In regard to this provision, Complainant's position, as stated in its response to Respondent's Motion to Dismiss and Cross-Motion for Accelerated Decision, was that a Section Chief within the Office of Regional Counsel had authority delegated from the Regional Counsel to concur in CAA § 113(d) waiver determinations, and that the Section Chief had exercised this authority, as evidenced by his initials on the Concurrence Sheet for the Complaint and by his statement in a Declaration.

In this Tribunal's Order on the parties' cross-motions, it was held that the provision on the waiver determination authority, expressed in Paragraph 3.a of the Delegation, does not

mandate that the Regional Counsel actually review and document concurrence for the waiver determination to be valid. The Order stated:

> The words "subject to" does [sic] not mandate action (review and concurrence), but indicates a potential for action, *i.e.*, that the Regional Counsel *may* review and concur in the exercise of delegated authority. The common meaning of "subject to" is "*likely* to be conditioned, affected or modified in some indicated way: having a contingent relation to something and usually dependent on such relation for final form, validity or significance." Webster's Third New International Dictionary at 2275 (unabridged, 2002)(emphasis added). The definition does not indicate that "subject to" means the same as "invalid without." This conclusion is supported by the contrasting mandatory words in the following Paragraph 3.b., that OECA "must concur" in any waiver determination. If EPA intended to *require* Regional Counsel to review and concur, Paragraph 1.a could easily have been drafted with the same phrasing as Paragraph 1.b. This conclusion is also supported by the words "subject to any determination made by the Deputy Administrator . . ." in Paragraph 3.d, in which the term "any" emphasizes that there is only a *potential* for a determination by the Deputy Administrator to affect an exercise of the delegated authority. Accordingly, the lack of evidence that the Regional Counsel in fact concurred in the CAA § 113(d) waiver, or delegated authority to Mr. Nelson to concur in the waiver determination, does not invalidate the waiver determination and thus is not fatal to jurisdiction.

A. Whether Complainant made a binding admission as to Region 5's Delegation 7-6-A

Respondent points out in its Motion to Reconsider that neither party had briefed the issue of the meaning of "subject to," as Complainant agreed in its legal memoranda opposing the Motion to Dismiss that the Regional Counsel *must* review and concur in the waiver determination under CAA § 113(d) for it to be valid. Respondent argues that this express agreement on the part of Complainant as to the interpretation of the language in the Delegation is a judicial admission and is binding on this Tribunal. Furthermore, Respondent argues, EPA Region 5 personnel wrote and are responsible for implementing the Delegation, therefore this Tribunal "should not disregard Region 5's own carefully considered interpretation and substitute its own contrary meaning." Motion to Reconsider at 4.

In support of this argument, Respondent cites to *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 680 (7th Cir. 2001) and *City of Troy v. Papadelis*, 572 N.W.2d 246, 249-250 (Mich App. 1997). In *McCaskill*, a party conceded that an arbitration agreement was unenforceable if construed to limit the opposing party's ability to recover attorney's fees. Respondent cites to one of the three judges' opinions in the case, which deems the concession to be a binding admission. The concurring opinion, however, points out the error of giving preclusive effect to a *legal* rather than a *factual* statement, and states that because the concession is a legal opinion, it is not a judicial admission binding on the court. *McCaskill*, 298 F.3d at 680 (concurring

opinion). In *City of Troy*, a party's stipulation that its nursery operation was a legal nonconforming use was held binding upon the parties. However, the court made clear that the stipulation was an issue of fact: "Prior to trial, the parties stipulated to certain facts, including that the greenhouse nursery was a legal nonconforming use . . . ." *City of Troy*, 572 N.W.2d at 248.

The judicial admissions doctrine is limited to admissions of fact and does not extend to questions of law. *New Image Labs Inc., v. Stephan Co.,* 34 Fed. Appx. 338, 342, 2002 U.S. App. LEXIS 7878 (9th Cir. April 29, 2002). A counsel's legal conclusions are not binding as judicial admissions. *Glick v. White Motor Co.,* 458 F.2d 1287, 1291 (3rd Cir. 1972). As stated by the Court of Appeals for the Fourth Circuit:

> The doctrine of judicial admissions has never been applied to counsel's statement of his conception of the legal theory of the case. When counsel speaks of legal principles, as he conceives them and thinks applicable, he makes no judicial admission and sets up no estoppel which would prevent the court from applying to the facts disclosed by the proof, the proper legal principles as the court understands them. A party's misconception of the legal theory of his case does not work a forfeiture of his legal rights.

New Amsterdam Casualty Co. v. Waller, 323 F.2d 20, 24-25 (4th Cir. 1963), *cert. denied,* 376 U.S. 963 (1964). The interpretation of the language in the Region 5 Delegation is a question of law to be decided by this Tribunal. *See, Ball v. National Capital Reciprocal Insurance Co.,* Civ. No. 03-2100, 2005 U.S. App. LEXIS 1379 (4th Cir., Jan. 27, 2005)(the interpretation of an unambiguous insurance contract is a question of law for the court, and therefore the judicial admissions doctrine does not apply). Thus, the judicial admissions doctrine does not apply to Complainant's statements that the Regional Counsel was required to review and concur in the waiver determination.

Furthermore, while the Delegation may have been drafted by EPA Region 5 personnel, the interpretation of the Delegation in motion pleadings in a particular case by a Region 5 attorney (counsel for Complainant), is not binding or persuasive on this Tribunal under principles of *Skidmore v. Swift & Co.,* 323 U.S. 134, 140 (1944)(for guidance interpreting a statute, courts may properly resort to an agency interpretation contained in a policy statement, guidance document, or informal ruling or opinion, according it weight depending on the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier pronouncements, and all those factors which give it power to persuade.). Therefore, this Tribunal is not bound in its decisions by the position of counsel for Complainant as to the interpretation of language in the Delegation.

B. Whether there was a mistake of law in the Order

Respondent argues that the modification of language from the prior version of Region 5 Delegation 7-6-A supports its interpretation of the meaning of the language in the current version. The prior version of Region 5 Delegation 7-6-A dated May 15, 1992, stated, "Exercise of this authority is subject to review and *consultation* with the Regional Counsel." Respondent's Motion to Reconsider, Exhibit C (Region 5 Delegation 7-6-A ¶ I(D)(1)(May 15, 1992)(emphasis added). Respondent argues that the amendment of the language to "review and *concurrence* by Regional Counsel" in the current version dated February 4, 2000, makes clear that Regional Counsel *must* review and concur for a waiver determination to be valid. In support of this argument, Respondent cites the rule of construction that a change in statutory language creates a presumption of a change in meaning or intent. If "subject to review and concurrence" did not mean that review and concurrence was mandatory, Respondent argues, it would not be substantively any different from the 1992 version. Region 5 would not have spent the time to change the word "consultation" to "concurrence" without intending to change the meaning.

Respondent also asserts that the interpretation in this Tribunal's prior Order of the phrase "subject to review and concurrence of Regional Counsel" is contrary to the plain meaning of the language, and that it is not supported by judicial case law, citing *Erickson v. Aetna Health Plans of California, Inc.*, 84 Cal. Rptr.2d 76, 83 (Cal. Dist. Ct. App. 1999)("subject to" means "conditioned upon, limited by, or subordinate to;" a dispute "subordinate to" binding arbitration means the arbitration is mandatory, not optional, considering the policy of construing contracts in favor of arbitration); *George v. Farmers Insurance Company of Washington*, 23 P.2d 552, 558 (Wash. Ct. App. 2001)("subject to registration" means the vehicle owner must register the vehicle, not that the vehicle could be used in such a way that registration would be required); *State ex rel. Nagel v. Stafford*, 34 P.2d 372, 379 (Mont. 1934)(appointment "subject to confirmation by the senate"means that it is not effective until the condition, confirmation, is complied with); *Makemson v. Dillon*, 171 P. 673, 676 (N.M. 1918)("subject to approval" means the Secretary of Interior shall investigate and pass upon and render judgment); *Royal Dairy Products Co. v. Spokane Dairy Products Co.*, 225 P. 412, 426 (Wash. 1924)(an order taken "subject to confirmation" is not a contract until confirmed); *Lykes Bros. Steamship Co. Inc. v. Pena*, 1993 WL 786964 *3 (D.D.C. 1993)(regulation providing that final determination not to disclose a record is "subject to" concurrence, was held not to apply to a decision to disclose a record).

Respondent further argues that the language "subject to review and concurrence" must be given its plain meaning. Respondent claims that making "review and concurrence" optional would render the limitation superfluous, so the Region 5 Air and Radiation Division (ARD) Director could simply choose not to notify Regional Counsel of the authorities in the Delegation, *i.e.*, issuing and withdrawing complaints, negotiations, settlements and waiver determinations.

Respondent is correct that the words "Exercise of these authorities [to the ARD Director] is subject to review and concurrence by the Regional Counsel" mandates action on the part of a person. However, Respondent's arguments overlook the issue of *which* person is bound to act. Respondent believes that the words mean that (1) the ARD Director, in exercising her authority

to make a waiver determination, is bound to notify Regional Counsel, *and* (2) that the Regional Counsel is bound to review and concur in the waiver determination, in order for it to be valid.

The limitation (of Region 5 Delegation 7-6-A Paragraph 3.a) or condition, is a limitation on the exercise of the ARD Director's authority, not an affirmative requirement imposed on the Regional Counsel. The ARD Director's exercise of authority is "subject to" or "subordinate to" the Regional Counsel, not *vice versa*. The ARD Director is thus bound to provide for the review and concurrence of the Regional Counsel, that is, to provide an *opportunity* for Regional Counsel to review and concur. The Regional Counsel is then entitled to review and concur, but is not *obliged* to review and concur. The Regional Counsel may forgo his entitlement to review and concur, and this would not invalidate the exercise of the ARD Director's authority, within the meaning of the Delegation. The limitation of Paragraph 3.a of the Delegation as worded would thus allow Regional Counsel discretion to forgo his personal review of certain actions of the ARD Director. Such relinquishment could be evidenced by written memorandum, informal assignment to his subordinate, or allowing a time limit to expire without action.

Respondent's argument regarding the difference in language between the former and current versions of the Delegation is not persuasive. The modification of language from "subject to review and consultation" to "subject to review and concurrence" clearly indicates that under the former language the ARD Director was bound to offer the CAA § 113(d) waiver for review and consultation with the Regional Counsel, and that the Director *could* proceed with the waiver determination *even if* the Regional Counsel objected, *i.e.*, affirmatively did not concur, in it. Under the current version, the ARD Director is bound to offer the CAA § 113(d) waiver to the Regional Counsel for review, but *cannot* proceed if he objects to it. This difference in meaning accounts for the modification in language.

Of course, there are other situations where there is no possibility of forgoing action. The cases cited by Respondent include some of these situations, such as a vehicle "subject to registration," appointments "subject to confirmation" or items "subject to approval," where one person is bound to offer to another for registration, confirmation or approval, and the person which registers, confirms or approves is also bound to act because in practice he has no option to forgo registration, confirmation or approval.

However, there are many situations, even referenced among the cases cited by Respondent, where action may be only potential. A contract term providing that a dispute is "subject to binding arbitration" does not necessarily mean that for every dispute that arises, arbitration must occur; as the court acknowledges, "a member may, in lieu of proceeding to arbitration, merely forgo further review and accept the proposed resolution of the grievance panel." Respondent's Motion to Reconsider, Exhibit H (*Erickson*, 84 Cal. Rptr. 2d at 83). Where a city council is authorized to make changes in streets "subject to" the approval of the mayor, "the changes cannot be made until the mayor has acted, *or the time within which he is permitted to act has elapsed."* R's Motion for Reconsideration, Exhibit J (*Stafford*, 34 P.2d at 379) (emphasis added). While a contract "subject to the approval of the Quartermaster-General" means that his approval is a condition precedent to the legal effect of the contract, "the failure of

the Quartermaster-General to act within a reasonable time would have the legal effect to validate the contract." *Darragh v. United States*, 33 Ct. Cl. 377, 1800 WL 2082 (Ct. Cl. 1898).

There are also many instances in which the words "subject to" obviously mean only a potential for action. For example, a legislative bill "subject to veto" by the President does not mean that the bill must be vetoed by the President. A provision "subject to change" does not mean that a change is inevitable. A complaint "subject to dismissal" does not mean that the complaint will be dismissed. A facility "subject to enforcement" by a government entity does not mean that the government must initiate enforcement action against it. A document "subject to disclosure" does not mean that the document unconditionally must be disclosed. The EAB has referred to certain permits "subject to" its review, which review is not unconditional but only occurs potentially: when a petition for review is filed. *See, Hawaii Electric Light Co., Inc.,* 8 E.A.D. 66 n. 1 (EAB 1998)(a PSD permit is "subject to review by the [Environmental Appeals] Board" pursuant to 40 C.F.R. § 124.19, which provides that within 30 days of issuance of a permit decision, a petition may be filed to review any condition of the permit decision). And finally, a decision "subject to judicial review" does not mean that the decision will be reviewed.

Thus, an ARD Director's waiver determination "subject to" the Regional Counsel's review (and concurrence) does not mean that the waiver determination must be reviewed and affirmatively concurred in by the Regional Counsel. Therefore, Respondent has not established that the Order contains a mistake of law.

Accordingly, the Respondent's Motion for Reconsideration is **DENIED.**

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Susan L. Biro
Chief Administrative Law Judge

Dated: February 15, 2005
Washington, D.C.