**UNITED STATES ENVIRONMENTAL PROTECTION AGENCY**
**BEFORE THE ADMINISTRATOR**

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| **IN THE MATTER OF** | **)** | |
| | **)** | |
| **CONDEA VISTA COMPANY** | **)** | **Docket No. RCRA-6-00-017** |
| | **)** | |
| **Respondent** | **)** | |

## ORDER DENYING MOTION FOR ACCELERATED DECISION

## INTRODUCTION

By motion dated January 17, 2001, CONDEA Vista Company (Respondent) filed a motion for accelerated decision (Motion) with respect to Counts II, III, V, VII, and IX of the Complaint. The Director of the Compliance Assurance and Enforcement Division, United States Environmental Protection Agency, Region 6 (Complainant) filed a response opposing Respondent's motion. On February 2, 2001, Respondent filed a "Reply Memorandum" dated February 19, 2001, in answer to Complainant's pleading. For the reasons set forth below, Respondent's motion shall be *denied*.[1]

## BACKGROUND AND DISCUSSION

On August 17, 2001, Complainant issued its "COMPLAINT, COMPLIANCE ORDER, AND NOTICE OF OPPORTUNITY FOR HEARING" in CONDEA Vista pursuant to Section 3008(a) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928(a), as amended by the Hazardous and Solid Waste Amendments of 1984 (HSWA). Specifically, the Complaint charges the following:

Count I. Disposal of hazardous waste without a permit in violation of LAC 33:V.305 and LAC 33:V.501 [40 C.F.R. §§ 270.1 and 270.101].[2]

Count II. Failure to make adequate hazardous waste determination for the ASU sludge in

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[1] The question of whether or not this proceeding should be consolidated with *Georgia Gulf Lake Charles, LLC*, Docket No. RCRA-6-00-018, and related matters shall be the subject of a separate order.

[2] "LAC" refers to the State of Louisiana's Hazardous Waste Regulations.

violation of LAC 33:V.1103 [40 C.F.R. § 262.11].

Count III. Failure to prepare hazardous waste manifests for off-site shipments of ASU Sludge in violation of LAC 33:V.1107 [40 C.F.R. § 262.20(a)].

Count IV. Failure to properly complete Hazardous Waste Manifest in violation of LAC 33:V1107.B [40 C.F.R. 262.20(a)].

Count V. Operating a hazardous waste storage unit without a permit or interim status as a result of failing to meet the exemption requirements of LAC 33:V.1109.E [40 C.F.R. § 262.34(a)] - Wet Air Oxidation System Feed Tanks.

Count VI. Operating a hazardous waste storage unit without a permit or interim status as a result of failing to meet the exemption requirements of LAC 33:V.1109.E [40 C.F.R. § 262.34(a)].

Count VII. Operating a hazardous waste storage unit without a permit or interim status as a result of failing to meet the exemption requirements of LAC 33:V.1109E [40 C.F.R. § 262.34(a)] - Tank-413.

Count VIII. Failure to make adequate hazardous waste determination for off-site shipments in violation of LAC 33:V.1103 [40 C.F.R. § 262.11].

Count IX. Treatment of hazardous waste without a permit in violation of LAC 33:V.305 and LAC 33:V.501 [40 C.F.R. §§ 270.1 and 270.10].

Turning to the Respondent's Motion, Respondent asserts that, with respect to Counts II, III, V, VII, and IX, EPA is barred from (1) ordering Respondent to comply with RCRA and (2) from seeking civil penalties from Respondent for alleged failures to comply with RCRA. As support for its contentions, Respondent asserts that it has already resolved the underlying issues through a consent agreement with the State of Louisiana's Department of Environmental Quality (LDEQ), which has a hazardous waste program authorized under RCRA, and, it is alleged, RCRA provides that actions of an authorized state agency have "the same force and effect" as actions by EPA. In a similar vein, Respondent argues that EPA's compliance order and penalty assessment are barred by res judicata because of the consent agreement between Respondent and LDEQ. Respondent cites *Harmon Industries, Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1998), *aff'd, Harmon Industries, Inc. v. Browner*, 19 F.3d 894 (8th Cir. 1999) as support for its arguments. In response, Complainant argues, among other things, that *Harmon* does not apply outside of the 8th Circuit, and that, in any event, res judicata does not apply to the case at hand.

Following the issuance by the 8th Circuit of *Harmon*, the Environmental Appeals Board of the EPA (EAB) on January 18, 2001, issued *In re Bil-Dry Corporation*, 2001 WL 59296 (E.P.A.) wherein the EAB stated, among other things:

Most recently, in *In re Harmon Electronics, Inc.*, we stated that:

> We need not dwell for long on this statutory argument. It is well settled that, even when the authorized State has taken action, RCRA nevertheless authorizes the Agency to take its own action. *Harmon* has not offered any persuasive reasons to reopen this well-established reading of the statute, and we decline to do so. [FN17] 7 E.A.D. 1, 9-10 (EAB 1997), *rev'd*, *Harmon Indus., Inc. v. Browner*, 19 F. Supp. 2d 988 (W.D. Mo. 1988), *aff'd*, 19 F.3d. 894 (8th Cir. 1999).
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> We recognize, of course, that the Eighth Circuit, in deciding an appeal of the District Court's *Harmon* decision, took the contrary view. *See Harmon Indus., Inc. v. Browner*, 191 F.3rd 894 (8th Cir. 1999). "That decision, while controlling precedent within . . . [the 8th] . . . Circuit, is not controlling here . . . . *See Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp 457, 460-61 (E.D. Pa. 1972) (finding that decisions in other circuits or other districts are entitled to serious consideration, but are not binding); *Thompson v. Calmar S.S. Corp.*, 216 F. Supp 234, 237 (E.D. Pa. 1963) ( holding that federal District Court is not bound by decision of Court of Appeals for another circuit), *aff'd*, 331 F.2d 657 (3d Cir. 1964), *cert. denied*, 379 U.S. 913. [FN18] In the wake of the Eighth Circuit's *Harmon* decision, EPA's General Counsel has reaffirmed that while *Harmon* is final and is binding on EPA in that particular case, the Agency would not adopt the Eighth Circuit's interpretation of RCRA nationwide. [FN19]

FN17. In a footnote accompanying this statement, we elaborated as follows:

> This issue received in-depth consideration by EPA as early as 1986, when EPA's General Counsel rendered a legal opinion that addressed the same arguments that Harmon is raising now and concluded that RCRA authorizes the Agency to bring an action in an authorized State even if the State has already prosecuted the same respondent for the same violations. Memorandum entitled: "Effect on EPA Enforcement of Enforcement Action Taken by State With Approved RCRA Program" from Francis S. Blake, General Counsel, to Lee M. Thomas, Administrator (May 9, 1986) ("Blake Memorandum"). Since that time, numerous Agency decisions have affirmed this position. *See, e.g., In re Gordon Redd Lumber Co.*, 5 E.A.D. 301, 308 (EAB 1994) ("Nevertheless, under the

statute, even if the State brings an enforcement action for violations of the State's program, the Agency retains authority to bring its own enforcement action for such violations."); *In re Southern Timber Prod., Inc.*, 3 E.A.D. 371, 378 (JO 1990) ("The Agency has long interpreted RCRA as authorizing a federal enforcement action in an authorized State even where the State has 'acted' in some limited fashion. * * * [N]othing in the statute precludes federal enforcement to secure an adequate penalty."); *In re Martin Electronics*, 2 E.A.D. 381, 385 (CJO 1987) ("[E]ven if a State's enforcement action is adequate, such State action provides no legal basis for prohibiting EPA from seeking penalties for the same RCRA violation. EPA's decision to defer to prior State action is a matter of enforcement discretion and policy."). In addition, the regulations implementing RCRA clearly contemplate federal enforcement when the parallel action of an authorized State results in an inadequate penalty. *See* 40 C.F.R. § 271.16(c). ("Note: To the extent the State judgments or settlement provide penalties in amounts which EPA believes to be substantially inadequate in comparison to the amounts which EPA would require under similar facts, EPA, when authorized by the applicable statute, may commence separate actions for penalties."). Finally, the Agency's authority to bring an action, even after State action for the same violation, has also been upheld at the judicial level. *See, e.g., EPA v. Environmental Waste Control, Inc.*, 710 F. Supp. 1172, 1186 (N.D. Ind. 1989), *aff'd*, 917 F.2d 327 (7th Cir. 1990), *cert. denied*, 499 U.S. 975 (1991).

FN18. We note that in *U.S. v. Power Engineering Co*., the U.S. District Court for the District of Colorado expressly declined to follow the Eighth Circuit's *Harmon* decision, concluding that "the [Eighth Circuit's] *Harmon* decision incorrectly interprets the RCRA." No. CIV.A.97-B-1654, 2000 WL 1909372, at * 15 (D. Colo., Nov. 24, 2000).

FN19. Letter from Gary S. Guzy to Congressman David M. McIntosh at 3 (May 22, 2000).

The instant case arises in the Fifth Circuit and *Harmon* was decided in the Eighth Circuit. Accordingly, *Harmon* is not binding in this proceeding.

## CONCLUSION

In light of the above, the consent agreement between Respondent and LDEQ is not a bar to EPA's Complaint against Respondent for Counts II, III, V, VII, and IX. Accordingly, Respondent's Motion for Accelerated Decision is denied

Charles E. Bullock
Administrative Law Judge

Dated: May 16, 2001
Washington D.C.

**IN THE MATTER OF CONDEA VISTA COMPANY**, Respondent
Docket No. RCRA-6-00-017

## CERTIFICATE OF SERVICE

I certify that the foregoing Order Denying Motion for Accelerated Decision, dated May 16, 2001, was sent in the following manner to the addressees listed below:

**Original and Copy by EPA Pouch Mail to:**

Ms. Lorena Vaughn
Regional Hearing Clerk
U.S. Environmental Protection
Agency, Region 6
1445 Ross Avenue, Suite 1200
Dallas, TX 75202-2733

**Copy by EPA Pouch Mail to Counsel for Complainant:**

Gloria Moran, Esquire
Assistant Regional Counsel
U.S. Environmental Protection
Agency, Region 6
1445 Ross Avenue
Dallas, TX 75202-2733

**Copy by Regular Mail to Counsel for CONDEA Vista Co.**

Maureen N. Harbourt, Esquire
KEAN, MILLER, HAWTHORNE, D'ARMOND,
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_____
Marion Walzel
Legal Assistant

Dated: May 16, 2001