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Colorado District Court Strengthens EPA's Enforcement Ability For Hazardous Waste Violations

In United States v. Power Engineering Company, a Colorado district court granted a major victory to the Environmental Protection Agency (EPA) by establishing its right to overfile state enforcement actions initiated under the Resource Conservation and Recovery Act (RCRA).

Under RCRA, a state can apply for authorization to administer its own hazardous waste program, provided the program is consistent with federal standards. The Colorado Department of Public Health and the Environment (CDPHE) is so authorized by EPA and may administer and enforce its own hazardous waste program. Under the auspices of its program, CDPHE inspected Power Engineering Company, a metal refinishing/chrome electroplating business, and found that Power Engineering had been treating, storing, and disposing of hazardous wastes without a proper permit, leading to groundwater contamination. CDPHE then issued a series of orders requiring Power Engineering to comply with state regulations; when it did not, the state assessed civil penalties in excess of $1 million.

CDPHE brought suit in Colorado state court to enforce these compliance orders and penalties, and a Colorado state court held that the compliance orders were enforceable as a matter of law. In addition to these remedies, however, RCRA contains financial assurance requirements to ensure safe closure of hazardous waste facilities, but CDPHE did not demand these assurances.

2. Overfiling occurs when EPA brings an enforcement action after a state agency begins one on the same matter. Id. at 1054.
5. Id. at 1052-53.
6. Id. at 1053.
7. Before obtaining a permit, hazardous waste producers must provide financial assurances evidencing financial responsibility. This is because of the large expense
from Power Engineering as part of the penalties assessed. EPA therefore notified CDPHE that if the state agency did not enforce the financial assurances requirements, EPA would initiate its own action against Power Engineering. CDPHE failed to act and consequently EPA, spurred by Power Engineering's chief shareholder's claims that he intended to liquidate Power Engineering without complying with CDPHE's orders, filed suit.

Power Engineering challenged the validity of EPA's suit and moved for summary judgment, relying on the recent decision in Harmon Industries, Inc. v. Browner, which declared invalid EPA's practice of filing actions against RCRA violators after a state agency has already done so. Harmon, decided by the Eighth Circuit just one year earlier, held that RCRA gave primary enforcement power to the states, not the federal government, and prohibited overfiling by EPA in a state which had been authorized to implement its own program.

The Power Engineering court, however, rejected Harmon's holding as an incorrect interpretation of RCRA and conducted its own statutory analysis.

First, the court analyzed the language in Section 6926 authorizing each state "to carry out [its] program in lieu of the federal program." EPA argued in Harmon that this language establishes state, rather than federal, regulations as the governing law in a particular state, but does not mean that a state's enforcement actions replace federal enforcement. The Harmon court found, however, that the administration and enforcement of a state's program are "inexorably intertwined," and thus a state's program supplants the federal program in all respects, including enforcement.

The Power Engineering court disagreed with Harmon's assertion, however, finding that the plain meaning of RCRA indicates that the administration and enforcement of a state's

associated with safe closure of hazardous waste facilities and the likelihood that a facility may need to be cleaned many years after a company has ceased operating at that facility. 42 U.S.C. § 6924(a)(6) (1994); 40 C.F.R. § 265.140 (2001).

8. Power Engineering, 125 F. Supp. 2d at 1053.
9. Id.
10. Id. at 1054.
11. 191 F.3d 894 (8th Cir. 1999).
12. Id. at 902.
15. Harmon, 191 F.3d at 898.
16. Id. at 899.
hazardous waste program are not "inexorably intertwined." The court reasoned that since Section 6926 addresses state administration and enforcement of state regulations and Section 6928 refers to federal enforcement of these regulations, the very structure of RCRA separates the enforcement and administration of state programs. Additionally, the court noted that RCRA addresses the administration of state authorized programs and the enforcement of state regulations in separate clauses, further proving Congress' intent to separate administration and enforcement. The court concluded that since the statute's plain meaning is that enforcement and administration are not intertwined, "in lieu of" does not mean that a state's enforcement bars federal enforcement.

The court also dismissed Harmon's interpretation of Section 6926(d), which states, "Any action taken by a State . . . shall have the same force and effect as action taken by the Administrator." Harmon disregarded the heading "Effect of State Permit" above this language and construed "same force and effect" to mean that a state's actions displace federal action in both permit issuance and enforcement. In doing so, the court noted that the statute refers to "any action," and that it would be inconsistent to give the "same force and effect" to the issuance of permits but not their enforcement. The Power Engineering court declined to follow this reasoning and held that reference to "any action" in the section on state permits creates ambiguity in the statute. As a result, the court looked to the section title to resolve this ambiguity. The court concluded that the title "Effect of State permit" limits the scope of Section 6926(d) to the permitting process, reasoning that this finding was not peculiar since it clarifies to regulated industries that a state permit satisfies federal requirements, and only one permit is necessary.

17. Power Engineering, 125 F. Supp. 2d at 1059.
18. Id.
19. Id.; 42 U.S.C. § 6926(b) (1994) (A state "is authorized to carry out such program in lieu of the Federal program under this subchapter in such State and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste" (emphasis added)).
22. Harmon, 191 F.3d at 900.
23. Id.
25. Id. at 1060-61.
26. Id. at 1060.
By rejecting Harmon's interpretation of "in lieu of" and "same force and effect," the court chipped away at the basis for Harmon's holding—that the plain meaning of RCRA prohibits EPA's overfiling. Harmon had alternatively reasoned that RCRA is ambiguous and looked to the legislative history to reach the same determination that state programs operate in place of the federal program. Nonetheless, Power Engineering rejected this rationale and found that the Harmon court should have given more deference to EPA's interpretation of the statute - that RCRA's only restriction on overfiling is the requirement in Section 6928(a)(2) that notice be given to a state agency that has already initiated an enforcement action. Since Congress explicitly restricted citizen suits once state or federal action has been taken but did not also restrict EPA's overfiling power, the Power Engineering court suggested that Congress did not intend to do so. Based also on the text of the statute, which states that hazardous waste disposal is a problem of national "scope and . . . concern," the court held that EPA's interpretation of the statute was not contrary to the will of Congress.

This holding gives EPA substantial power to ensure that hazardous waste violations do not go unchecked by states reluctant to punish profitable industries. If Power Engineering and not Harmon is widely accepted, EPA, by removing incentives for businesses to relocate to more lenient states, will be able to ensure that all businesses comply with federal standards. The threat of overfiling by EPA will lead to uniformity among the states in hazardous waste regulations and raise industry to a higher national standard of compliance.

Additionally, this decision could allow EPA to supervise state agency actions without withdrawing authorization for the state's entire program. Under Harmon, if EPA wished to bring its own enforcement action against a violator, it had to first rescind the state's authorization under RCRA, even if the state had satisfactorily enforced regulations in the past. This is inefficient and would defeat the purpose of RCRA. Power Engineering allows

27. Harmon, 191 F.3d at 901.
29. Power Engineering, 125 F. Supp. 2d at 1061.
33. Power Engineering, 125 F. Supp. 2d at 1064.
authorized states to continue to enforce their regulations even if EPA chooses to initiate an action against a specific company in that state.

The decision has possible negative outcomes as well. In the past, hazardous waste violators self-reported their violations to state agencies in return for lesser penalties, a practice that does not seem likely to continue under Power Engineering unless EPA agrees to reward self-reporting. The end of self-reporting would mean a decrease in the number of hazardous waste violations identified, since EPA has limited resources to investigate potential hazardous waste violations. Additionally, authorized state agencies may find it more difficult and time-consuming to reach a settlement with industry violators because violators will want to assure that the state settlement forecloses any future action by EPA, making it harder to collect penalties and thus finance further enforcement actions.

It remains to be seen, however, how other circuits will interpret RCRA and the effect the Power Engineering decision will have on EPA overfiling nationwide. A number of overfiling cases have been brought both in administrative proceedings and in other circuits. Ultimately, whether these courts decide to follow Power Engineering's reasoning will have an effect on the enforcement of hazardous waste standards across the country.

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