

Tenth Circuit Upholds the EPA's Right to Overfile under RCRA

In the most recent case to adjudicate the issue of overfiling, *United States v. Power Engineering Co.*,¹ the Tenth Circuit Court of Appeals upheld the right of the Environmental Protection Agency (EPA) to file actions duplicating state suits under the Resource Conservation and Recovery Act² (RCRA).

The EPA bears the responsibility of effectuating the provisions of RCRA. Nevertheless, as with many other federal environmental statutes, the EPA can delegate implementation and enforcement of RCRA to individual states. To receive RCRA authorization, a state hazardous waste program must meet federal standards. In theory, the EPA can revoke authorization of states that fail to adequately enforce RCRA standards. However, given the EPA's lack of resources, the agency depends on states to share the enforcement burden. Therefore, the EPA rarely revokes state authorization.³ Instead, the EPA tends to rely on alternate methods of enforcing RCRA, such as overfiling.

Overfiling occurs when the EPA initiates a federal enforcement action against a polluter— even though a state has already begun enforcement proceedings against the same polluter for the same environmental violation.⁴ Overfiling ensures that polluters do not avoid complying with RCRA due to inadequate enforcement by lenient state agencies. Nevertheless, overfiling also decreases the incentives for polluters to settle with state agencies, since they may be subject to further enforcement action if the EPA disagrees with the terms of the state settlement. The EPA has used overfiling sparingly because the agency does not want to disrupt good working relationships with state agencies.

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1. 303 F.3d 1232 (10th Cir. 2002).

2. 42 U.S.C. §§ 6901–6992k (2003).

3. See Angela Dempsey, *Overfiling: Can the EPA Pursue a Case Where the State Has Taken Enforcement Action? What Courts Have Done Since Harmon*, 76 FLA. B.J. 36, 36 n.2 (Mar. 2002).

4. Joel A. Mintz, Comment, *Enforcement "Overfiling" in the Federal Courts: Some Thoughts on the Post-Harmon Cases*, 21 VA. ENVTL. L.J. 425, 426 (2003).

Before the recent flurry of cases, however, neither state nor federal officials questioned the statutory authority of the EPA to overfile.⁵

In a case of first impression in the federal courts, in 1999 the Eighth Circuit rejected the EPA's ability to overfile in *Harmon Industries, Inc. v. Browner*.⁶ The court held that the EPA can initiate an enforcement action *only if* the EPA withdraws state authorization or if the state has not filed its own action.⁷ Since the decision in *Harmon*, several other courts have considered the overfiling issue.⁸ All of them decided to uphold the right of the EPA to overfile, thereby disagreeing with the reasoning of *Harmon* Court. In deciding *Power Engineering*, the Tenth Circuit concurred with this line of cases, upholding the EPA's right to overfile.

Power Engineering Company is a metal refinishing and chrome electroplating operation in Denver, Colorado. Each month, Power Engineering produces over 1000 kilograms of hazardous waste, including arsenic, lead, mercury, and chromium. In 1993, the Colorado Department of Public Health and Environment (CDPHE) learned that Power Engineering was treating, storing, and disposing of hazardous waste without a permit. Among other violations, the company had been dumping hexavalent chromium into the Platte River.⁹

As a state agency authorized under RCRA, CDPHE commenced enforcement actions against Power Engineering. Power Engineering refused to comply with the state agency orders, so CDPHE brought suit in state court to force compliance and assess civil penalties of \$1.13 million.¹⁰ At this point, the EPA believed that the sole shareholder of Power Engineering was planning to insulate his assets or declare bankruptcy.¹¹ The EPA therefore requested that CDPHE require financial assurances as part of the agency's final order and informed CDPHE of its intent to commence its own action if CDPHE did not require assurances.¹² When CDPHE failed to require assurances, the EPA initiated its own suit against Power Engineering.¹³

5. *Id.* at 426-27.

6. 191 F.3d 894, 896 (8th Cir. 1999).

7. *Id.* at 899; *Power Engineering*, 303 F.3d at 1236.

8. *See, e.g.*, *United States v. Power Eng'g Co.*, 125 F. Supp. 2d 1050 (D. Colo. 2000), *aff'd*, 303 F.3d 1232 (10th Cir. 2002); *United States v. Flanagan*, 126 F. Supp. 2d 1284 (C.D. Cal. 2000); *United States v. Murphy Oil USA, Inc.*, 143 F. Supp. 2d 1054 (W.D. Wis. 2001); *United States v. Elias*, 269 F.3d 1003 (9th Cir. 2001).

9. *Power Engineering*, 303 F.3d at 1235.

10. *Id.*

11. *Power Engineering*, 125 F. Supp. 2d at 1053.

12. *Power Engineering*, 303 F.3d at 1235-36. Because hazardous waste cleanup is expensive and often occurs many years in the future when the responsible party is no longer available, RCRA requires assurances of financial responsibility from permit applicants. 42 U.S.C. § 6924(a)(6) (2003); 40 C.F.R. § 265.140 (2003).

13. *Power Engineering*, 125 F. Supp. 2d at 1053.

Both Power Engineering and the EPA filed motions for summary judgment in district court.¹⁴ Relying on *Harmon*, Power Engineering argued that RCRA and res judicata barred the EPA's suit.¹⁵ In 2000, the district court issued its ruling, which rejected Power Engineering's argument, granted the EPA summary judgment, and ordered Power Engineering to provide financial assurances of over \$2 million.¹⁶

Power Engineering appealed to the Tenth Circuit, arguing that the district court erred in not following *Harmon*. The court considered both the statutory interpretation argument and the doctrine of res judicata.¹⁷

First, the court addressed the permissibility of overfiling under RCRA by utilizing the *Chevron* standard of deferential review.¹⁸ Finding the statute ambiguous, the court deferred to the EPA's interpretation.¹⁹

The court agreed with the EPA's interpretation that RCRA's notice and citizen suit provisions support overfiling. The notice requirement in Section 6928(a)(2) is the only statutory prerequisite for the EPA enforcement actions.²⁰ The citizen suit provision prohibits citizen suits when the EPA or a state has commenced an enforcement action.²¹ According to the EPA, Congress must have intended to allow overfiling because no similar prohibition exists for federal enforcement actions.²²

The court then considered Power Engineering's interpretation of RCRA. Power Engineering relied on Section 6926(b) on authorization of state programs, which states that, "[s]uch State is authorized to carry out such program in lieu of the Federal program . . . and to issue and enforce permits for the storage, treatment, or disposal of hazardous waste"²³ The court rejected Power Engineering's view that "program" refers to enforcement authority. Instead, the court found the term ambiguous, and held that the wording of the section supported the EPA's interpretation.²⁴ According to the EPA, the section only provides for state *permitting*

14. *Id.* at 1054.

15. *Id.* at 1055.

16. *Id.* at 1054.

17. *Power Engineering*, 303 F.3d at 1236–41.

18. *Id.* at 1236–37. The Supreme Court established a test for questions of agency interpretation of a statute in *Chevron U.S.A., Inc. v. Natural Resource Defense Counsel, Inc.*, 467 U.S. 837 (1984). The first question is whether "Congress has spoken directly to the precise question at issue." *Id.* at 842. If the intent of Congress is clear the agency must defer to that interpretation. *Id.* at 842–43. If the statute is ambiguous, the court must defer to the agency's interpretation as long as it is reasonable. *Id.* at 843.

19. *Power Engineering*, 303 F.3d at 1237.

20. 42 U.S.C. § 6928(a)(2) (2003) ("In the case of a violation . . . where such violation occurs in a State which is authorized to carry out a hazardous waste program . . . , the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action").

21. 42 U.S.C. § 6972(b)(1).

22. *Power Engineering*, 303 F.3d at 1237.

23. *Id.*; 42 U.S.C. § 6926(b).

24. *Power Engineering*, 303 F.3d at 1237.

requirements— not enforcement authority— to replace federal requirements after state authorization. The court agreed with the EPA's interpretation, and noted that if "in lieu of" referred to entire program, including enforcement, the second clause of Section 6926(b) would be superfluous.²⁵

In concurring with the EPA's interpretation of the scope of "in lieu of," the court rejected *Harmon*'s view that "the administration and enforcement of the program are inexorably intertwined."²⁶ The court further noted that even if it were to agree that administration and enforcement were inexorably intertwined, the *Harmon* conclusion — that the EPA must withdraw authorization in order to commence suit — requires "harmonizing" two different sections of RCRA.²⁷ Conversely, the EPA's interpretation comports with the text of the statute and does not requiring harmonizing.

The court also rejected Power Engineering's second statutory interpretation argument.²⁸ Section 6926(d), under the heading "Effect of a State permit," states that, "any action taken by a State under a hazardous waste program . . . shall have the same force and effect as action taken by the Administrator . . ."²⁹ Both Power Engineering and the *Harmon* Court construed this section broadly to apply to any action including enforcement.³⁰ The *Power Engineering* Court rejected this interpretation, and held that the "same force and effect" mandate should be limited to the section and subsection, which address authorization and do not mention enforcement.³¹ The court found it reasonable that RCRA "prevents the EPA from denying the effect of a state permit, [but] does not prevent the EPA from taking action when a violation occurs."³²

Finally, the court rejected Power Engineering's interpretation of the citizen suit provision.³³ Section 6972(b) provides that no citizen suit can be brought if "the Administrator or State" is pursuing a claim.³⁴ Power Engineering argued that if Congress intended to allow overfiling, the section would read "and/or" instead of "or."³⁵ The court rejected this distinction as vague, and held that the section, as currently written, would

25. *Id.* at 1238.

26. *Id.* (quoting *Harmon Indus., Inc. v. Browner*, 191 F.3d 894, 899 (8th Cir. 1999)).

27. *Id.*

28. *Id.* at 1239.

29. 42 U.S.C. § 6926(d) (2003).

30. *Power Engineering*, 303 F.3d at 1239.

31. *Id.*

32. *Id.*

33. *Id.* at 1240.

34. *Id.*; 42 U.S.C. § 6972(b)(1).

35. *Power Engineering*, 303 F.3d at 1240.

prevent a citizen suit if a previous suit had been filed by the state, the EPA, or both.³⁶

After rejecting the reasoning for Power Engineering's construction of RCRA, the court applied the *Chevron* analysis to find RCRA ambiguous on the issue of overfiling and therefore deferred to the EPA's reasonable interpretation.³⁷

The doctrine of res judicata holds that "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action."³⁸ The court held that res judicata was not a bar because the EPA was not in privity with CDPHE.³⁹ To be in privity, the EPA must have assumed control over the previous litigation by pulling a "laboring oar" in that suit.⁴⁰ The court rejected the argument that delegation of authority through state authorization represents a "laboring oar."⁴¹ Lastly, the court distinguished *Harmon*'s res judicata analysis based on the *Harmon* Court's different interpretation of the relationship between the state and the EPA under RCRA.⁴²

In upholding the authority of the EPA to overfile in state enforcement actions, the Tenth Circuit created a split of authority with the *Harmon* decision in the Eighth Circuit. The Supreme Court denied Power Engineering's petition for writ of certiorari on May 5, 2003.⁴³ Without a resolution from the Supreme Court, lower courts will likely continue the legal debate over the EPA's right to overfile.

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36. *Id.*

37. *Id.* See *supra* note 18 for a summary of *Chevron* analysis.

38. *Id.* (quoting *Montana v. United States*, 440 U.S. 147, 153 (1979)).

39. *Power Engineering*, 303 F.3d at 1241.

40. *Id.* "To bind the United States when it is not formally a party, it must have a laboring oar in a controversy." *Id.* (quoting *Drummond v. United States*, 324 U.S. 316, 318 (1945)).

41. *Id.*

42. *Id.*

43. *Power Engineering Co. v. United States*, 123 S.Ct. 1929 (U.S. May 5, 2003) (No. 02-1086).

