Litigation Update: Harmon and Progeny: Dual Enforcement Sovereigns: Federal and State

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I . Harmon Industries, Inc. v. Browner, 191 F.3d 894 (8th Cir. 1999).

Often referred to as the "overfiling" issue, but really is broader, and is now raised by defendants whenever 2 sovereigns are proceeding against defendant for same violations arising out of the same nucleus of operative facts.

8th Circuit panel decided the case on Sept 16, 1999; EPA petition for rehearing en banc, joined by 5 states as amicus curiae (NY, CA, CT, LA, IA); denied on January 24, 2000, with 2 judges stating they would have granted a rehearing. U.S. did not seek certiorari, so the 8th Circuit decision stands.

Holding: RCRA bars EPA from seeking RCRA civil penalties in authorized states unless the state fails to initiate action or EPA withdraws the state's authorization. The court based its holding on the language in 3006(b) of RCRA, which provides that authorized state programs operate "in lieu of" the federal program and that "any action" taken by an authorized state shall have the "same force and effect" as action taken by the EPA Administrator.

The Harmon court also pointed to 3006(a) - entitled "Effect of a Permit" - which provides that "[a]ny action taken by a State under a hazardous waste program authorized under this section shall have the same force and effect as action taken by the Administrator."

EPA takes the position that Harmon was wrongly decided; that it applies only in the 8th Circuit, and even then only to RCRA cases where an authorized state has initiated action.

The Harmon court ignored other, contradictory, provisions in RCRA (e.g., 3007(d)) (requiring EPA to inspect hazardous waste facilities operated by states) and 3008(a)(2) (requiring EPA to notify a state prior to initiating enforcement action).

The provisions the court cited as determinative on the issue are not as clear as the court seems to think. The Section 3006(b) "in lieu of" language address what regulations apply in an authorized state - (the answer is that state regulations apply) - and not who can enforce those regulations. Similarly, the 3006(d) language addresses what its title implies: the "effect of a permit."

The Harmon court also erred in applying the doctrine of res judicata to preclude federal action. Res judicata bars an action when:

(1) a final judgment or decree has been rendered on the merits by a court of competent jurisdiction;
(2) concerning the same claim or cause of action as that now asserted;
(3) between the same parties as are in the current action or their privies."

With respect to the third prong, the Harmon court found privity between the state and federal sovereigns because the state was authorized, and not based on any analysis of EPA's actual role in the Missouri court action. The general rule to establish privity is to see whether the one party maintained a "laboring oar" in the other party's proceeding. The Harmon court applied the "laboring oar" test too early in the process.

II. Affect on State Enforcement: "Reverse Harmon"

In U.S. v. Smithfield Foods Inc., 191 F. 3d 516 (4th Cir. 1999) the 4th Circuit awarded EPA injunctive relief and $12 million in penalties. The state court then dismissed similar pending state water enforcement claims, citing Harmon, finding that EPA and the state were in privity and that the state was therefore barred from pursuing its claims. Treacy v. Smithfield Foods Inc., No. 97-80, bench ruling (Va. Cir. Ct., Isle of Wight County). This case is now before the Virginia Supreme Court; the United States filed an amicus brief in support of the state's position in that action on Oct. 3, 2000. Incidently, Smithfield Foods also petitioned for cert. regarding the federal ($12 million) case. The U.S. Supreme Court denied cert. on Oct 2, 2000.

III. Applicability in the Criminal Context

With U.S. v. Elias, 30 Envtl. L. Rep. 20,558, 2000 WL 1099977 (D. Idaho 2000), Harmon expanded into the criminal arena. The defendant hazardous waste operator was convicted of:

1 federal count of knowing endangerment (3008(e)), and
2 federal counts of illegally disposing hazardous cyanide waste (3008(d))

Defendant Elias sought to dismiss the 3 counts. The district court rejected the Harmon argument with respect to count 1, holding that the federal government does not lose authority to enforce hazardous waste laws even after the states is authorized, since there was no analogous provision in the state program. But the court initially dismissed the two illegal disposal counts, stating such counts must be enforced using the State's analogous enforcement authorities and sanctions (which the feds had not cited).

In response to the U.S.'s motion for reconsideration, the court on April 26, 2000, reinstated the convictions on the 2 disposal counts, but based on reasoning that neither party argued. The court concluded that the more stringent federal penalties are not supplanted by the state's program and that therefore federal penalties were appropriate. The feds should have cited to state law, but this the failure to do so was harmless error (since analogous).

[Defendant was ultimately sentenced to pay $6 million in restitution and to serve 17 years in prison.]

Defendant appealed to the 9th circuit - the briefing process is completed, and oral argument is not yet scheduled.

See Jonesi, Gary, "Environmental Enforcement Becomes Federalism's Hazardous Battleground," 31 BNA Environmental Reporter 896 (May 5, 1999).

IV. Applicability in Non-RCRA Context

A. U.S. v. LTV Steel, 119 F. Supp.2d 827, 2000 WL 1531589 (N.D. Ohio) (Sept. 20, 2000)

The court rejected Harmon's applicability to a Clean Air Act case.

LTV sought partial summary judgment that EPA's count regarding opacity violations at LTVs furnace was precluded because LTV had settled those violations with the City of Cleveland. The district court looked at the language of the air act and analyzed the res judicata arguments, just as the Harmon court had done, but with the opposite result.

The court stated that the language of the enforcement section - §113(e)- actually anticipates overfiling. The act states that "in determining the amount of any penalty to be assessed under this section * * * the court shall take into consideration * * * payment by the violator of penalties previously assessed for the same violation." 42 U.S.C. § 7413. The court did express some doubt, in footnote 5, about "the propriety of dual enforcement in the civil penalty context," but concluded that "it is up to Congress to decide that question. Dual enforcement helps ensure effective enforcement without the need to publicly declare the state in derogation of its enforcement duties or displace the state entirely in the enforcement scheme* * *. While the need to 'respond to two masters' is never pleasant, penalties paid to one enforcement arm may be used to offset those otherwise payable to another."

On the res judicata argument, the court found that LTV had not proved prong (2) (same claim or cause of action) or (3) (privity).

The City of Cleveland's settlement was premised on an alleged violations of local law while the federal enforcement action was promised upon "wholly different body of law * * *, rendering it a wholly different claim or cause of action from the one LTV settled with the City of Cleveland."

The court also did not find the feds and the city to be in privity. The U.S. had no "laboring oar" in the city's action. A general identity of interests is not sufficient. Privity cannot be "premised solely on the fact that two parties desire the same effect - in this case, cessation of toxic air emission." The court looked instead for "such things as

whether the United States orders another party to file a lawsuit or, in this case, issue a notice of violation, pays the attorney's fees, reviews the complaint or notice, files an amicus brief, directs an appeal or the abandonment of that appeal or actually engages in settlement negotiations." [citing Montana v. U.S., 440 U.S. at 155]. The court granted the U.S.'s motion for partial summary judgment and denied LTV's motion for partial summary judgment on the same issue.

LTV has not filed an appeal.

B. U.S. v. City of Youngstown, 109 F.Supp.2d 739 (N.D. Ohio 2000)

The court rejected Harmon's applicability to a Clean Water Act case on June 28, 2000.

The United States and the State of Ohio filed a Clean Water Act action for section 301 and 402 CSO and SSO violations. Youngstown sought summary judgment, arguing U.S. EPA was precluded from bringing an enforcement case because EPA had approved the State of Ohio to administer the NPDES permit program in Ohio, and Ohio had commenced its own enforcement action.

The court, citing to Southern Ohio Coal v. Office of Surface Mining, 20 F. 3d 1418 (1994), found that the 6th Circuit had already made it clear that "U.S. EPA's retains independent enforcement authority in primacy states" based on the language of section 402. 402(i) is entitled "Federal Enforcement Not Limited" and reads "Nothing in this section shall be construed to limit the authority of the Administrator to take action pursuant to section [309] of the title."

The court also found that Harmon was flatly "inapposite," since the Clean Water Act does not contain the "in lieu of" or "same force and effect" language found in RCRA. Indeed, 402(i) contains language that "compels the opposite conclusion" from the Harmon court's decision.

V. Recent Developments

A. U.S. v. Power Engineering Company, __F. Supp. 2d__, 200 WL 1909372 (D. Colo.)

On November 24, 2000, the court rejected the 8th Circuit's analysis in Harmon.

Defendant treated, stored and disposed of a number of hazardous wastes without a permit or interim status. In 1996, the Colorado Department of Public Health and Environment (CDPHE) issued a Final Administrative Compliance Order (ACO) to Defendant. After Defendant ignored the requirements of this Order, CDPHE issued an Administrative Penalty Order (APO). Defendant failed to comply with the APO. Finally, CDPHE brought suit in state court. The Colorado state court held that the ACO and APO were enforceable as a matter of law. In its ACO, CDPHE did not demand Defendant to post

financial assurance in accordance with RCRA. Hence, Plaintiff gave CDPHE notice that it would seek its own enforcement action if CDPHE did not enforce all the requirements of RCRA. On August 1, 1997, Plaintiff filed a complaint in the district court.

Power Engineering and Harmon analyze the relationship b/w RCRA §§ 3006(b), 3006(d) and 3008(a)(2).

Statutory Interpretation Issues

- Harmon holds that RCRA § 3006(b) reveals a Congressional intent ("in lieu of" language) for an authorized state program to supplant a federal program because the administration and enforcement of the state regulations are "inexorably intertwined." Hence the EPA can only "overfile" if it provides the state notice of its intent to file a suit and then the authorized state fails to initiate an enforcement action or the EPA withdraws authorization.

- Power Engineering holds that the "in lieu of" language at RCRA § 3006(b) does not modify the second clause, which speaks of enforcement. Hence, to hold that the state program usurps the federal program for both administrative and enforcement activities would make the second clause superfluous.

- Based on the Power Engineering court's findings that administrative and enforcement activities are not inexorably intertwined, it also concluded that 3008(a)(2)'s notice requirement can be read to reinforce the primacy of a state's enforcement rights under RCRA and allow EPA to institute enforcement actions. This is because the intent behind the notice requirement is to avoid duplicative actions.

- Power Engineering also found that Section 3006(d)'s "same force and effect" language only applied to permits instead of enforcement matters.

- The court indicated that if Congress intended to prohibit EPA from filing an enforcement action after a state has already filed, it could have used similar language as found in the citizen suit provisions found in RCRA § 7002. Since Congress did not use this language, the laws of statutory construction maintain that the omission was intentional.

Legislative History

- The Power Engineering court relied upon Chevron for the principle that courts should defer to EPA's construction of RCRA and its regulations. EPA has consistently maintained that it can bring an enforcement action without withdrawing an authorized state's RCRA program.

- The court relied upon the language in a note to 40 C.F.R. § 271.16(c) and 40 C.F.R. § 271.19 to demonstrate that EPA consistently interpreted RCRA and its regulations to

provide it with the authority to overfile.

- The defendant cited legislative history to support their contention that when a program is delegated to the states enforcement should not be conducted by the federal government. The court noted that defendant took the legislative history out of context and the testimony lacked the force of law. Other pieces of legislative history relied upon by defendants did not persuade the court that EPA is prevented from filing an enforcement action once notice is given.

Res Judicata

- The court employed the "laboring oar" analysis and found that EPA had not assumed control over any portion of the litigation brought by CDPHE and, therefore, was allowed to bring a separate action in federal court.

B. U.S. v. Flanagan, __ F. Supp.2d __, 2000 WL 1874224 (C.D. Cal. 2000)

This is another criminal case (recall Elias), this time in California, an authorized state. The indictments charged 3 counts of violating RCRA 3008(d), knowingly treating and storing hazardous wastes as defined in 40 C.F.R. 261.23 without a permit issued by U.S. EPA. Defendants sought to dismiss the counts, claiming 1) the court lacked federal subject matter jurisdiction after state authorization ans 2) in the alternative, the indictments should have cited state (not federal) regulations.

The court found the word "program" in 3006(b) to be ambiguous, in that it was unclear whether the enforcement provisions are part of the "program" that operates in lieu of the "federal program." Consistent with the First Circuit's U.S. v. MacDonald & Watson Waste Oil Co., 933 F.2d 35 (1st Cir.1991) decision, the court found that "RCRA as a whole" and the legislative history supports the federal position. The court also found Harmon "clearly inapposite." "Had the State of California previously prosecuted Defendants criminally for the same conduct alleged in the indictment, [Harmon] might have been applicable by analogy– as California did not, it is not." The court also states: "[p]ut simply, [Harmon] is not about if, but about when, the United States can bring a civil enforcement action in federal court after it had authorized a state program."

The court also is "unpersuaded by the reasoning of the opinion in Elias," although strangely the court seems to be citing mainly to the district court's opinion prior to the revision upon reconsideration.

The court did acknowledge a "only one flaw" in the indictment: it should have alleged failure to obtain a state (rather than federal) RCRA permit. However, the court found that the indictment was "sufficient as it makes clear that Defendants are charged with storing and treating of hazardous waste without governmental authorization." The court therefore denied the Defendants' motion to dismiss.

C. In re Bil-Dry Corporation (Environmental Appeals Board, RCRA (3008), Appeal No 98-4, January 18, 2001) See http://www.epa.gov/boarddec/disk11/bildry.pdf

The Environmental Appeals Board (EAB) held that Harmon did not apply to a Pennsylvania RCRA case. The EAB primarily employed a fact-based analysis to differentiate the two cases.

Both U.S. EPA Region III (Region III) and the Pennsylvania Department of Environmental Protection (PADEP) conducted inspections at Appellant Bil-Dry's Philadelphia site during 1995 and 1996. Both Region III and PADEP inspectors found rusty drums throughout the site. Subsequent testing revealed that the materials in the drums exhibited characteristics of hazardous waste.

On May 30, 1996, PADEP sent a notice of violation (NOV) to Bil-Dry citing 14 potential violations of Pennsylvania's Solid Waste Management Act (SWMA). The NOV did not impose any obligations on Bil-Dry, suggested that Bil-Dry submit a report addressing the potential violations, and provided Bil-Dry an opportunity to voluntarily comply with the SWMA.

On September 30, 1996, Region III issued a nine-count administrative complaint alleging that Bil-Dry was in violation of RCRA Subtitle C, the associated regulations at 40 C.F.R. Parts 260-271, and several of Pennsylvania's Hazardous Waste Management regulations. Prior to issuing the complaint, Region III notified PADEP of its intention to initiate an enforcement action against Bil-Dry as required by RCRA § 3008(a)(2).

On October 8, 1998, the Presiding Officer (ALJ) found Bil-Dry liable on all nine counts. The ALJ held that the District Court Harmon decision (the 8th Circuit had not yet issued its opinion) contradicted the unambiguous language of RCRA, RCRA's legislative history, and a long line of judicial and administrative rulings. The Presiding Officer also held that Harmon was not controlling in Bil-Dry and that Region III was fully authorized to initiate an enforcement action.

On appeal to the EAB, Bil-Dry raised four arguments, including one based on the Harmon decisions. Bil-Dry contended that Region III did not have authorization to initiate an enforcement action against Bil-Dry because PADEP had authorization from EPA to administer Pennsylvania's RCRA program. Bil-Dry also argued that Region III was not authorized to act unless PADEP failed to act and that PADEP should have initiated the enforcement action rather than Region III. Bil-Dry contended that the Presiding Officer erred in holding that Region III could bring an enforcement action against Bil-Dry when PADEP had already issued an NOV to Bil-Dry.

The EAB held that Harmon did not apply in the 3rd Circuit. It also said that EPA's General Counsel had issued an opinion that while Harmon applied in the 8th Circuit, EPA would not follow Harmon elsewhere.

The EAB then launched into the fact-based part of its determination. Unlike Harmon, in Bil-Dry the state did not bring an enforcement action against the appellant. The EAB found that PADEP's NOV did not constitute an enforcement action in that the NOV was merely a notice to Bil-Dry and was written in discretionary language. The NOV also expressly mentioned PADEP's right to file an enforcement action at a later date.

Unlike Harmon, in Bil-Dry the state agreed that EPA should assume the lead enforcement role against the appellant pursuant to the RCRA § 3008(a)(2) notice. PADEP even assisted Region III with its enforcement action rather than proceeding independently.