UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
THE ADMINISTRATOR

MEMORANDUM

SUBJECT: Guidance on RCRA Overfiling

FROM: A. James Barnes
Deputy Administrator

TO: Regional Administrators, Regions I-X
Assistant Administrator, OSWER
Assistant Administrator, OECM
General Counsel

In several recent administrative enforcement cases, EPA has been required to address the issue of EPA's authority to "overfile" under RCRA--that is, to file an enforcement action when a state has acted to enforce the same requirements. Because the administrative decisions did not conclusively resolve the point, I asked the General Counsel for an opinion on the issue.

In response, the General Counsel recently issued an opinion concluding generally that RCRA itself imposes no legal restrictions on overfiling, but that the Administrator may adopt appropriate policies limiting the circumstances under which EPA may overfile, or recommend overfiling to the Department of Justice. A copy of that opinion is attached.

I have also asked the Agency's staff offices concerned with RCRA enforcement to determine, in consultation with our Regional offices and states administering authorized RCRA programs, whether there is a need for additional guidance on overfiling. That effort is now underway. Unless and until additional guidance is issued, Regional decisions on overfiling under RCRA are to be governed by this memorandum and existing guidance on the subject.

Regions should continue to overfile RCRA enforcement actions when the state fails to take timely and appropriate action. Overfiling should be employed in cases where the state's action is clearly inadequate. In determining whether an action is inadequate, the Regions should look to the June 26, 1984 guidance document entitled "Implementing the State/Federal Partnership in

Enforcement: State/Federal Enforcement Agreements" and the "Enforcement Response Policy," issued December 21, 1984 for further assistance.

Regions should make every effort to assure that there has been thorough consultation with the state before overfiling. If the Regional enforcement office has concerns about whether the relief requested and penalties to be assessed by the state comport with EPA's oversight policies on enforcement response and penalty amount, these concerns should be made known to the state before the state matter proceeds to judgment or settlement. It should be emphasized that coordination and cooperation with the states in advance of issuance of compliance orders regarding the appropriateness of the terms of those orders will eliminate many of the instances where overfilings are necessary.

In order to assure that full consideration has been given to these actions, and their potential effects on Federal/State relations, the Region's senior managers--i.e., Waste Division Director and Regional Counsel (or higher level, if desired)--should review and approve these cases for filing.

Attachment

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

OFFICE OF
GENERAL COUNSEL

MEMORANDUM

SUBJECT: Effect on EPA Enforcement of Enforcement Action Taken By State With Approved RCRA Program

FROM: Francis S. Blake
General Counsel (A-130)

TO: Lee M. Thomas
Administrator

Question

If a state takes enforcement action under an approved RCRA program, does RCRA bar a subsequent federal action to remedy the same violations? Does the answer hinge on whether the state action was timely or appropriate?

Answer

RCRA allows the Administrator to exercise complete prosecutorial discretion in deciding whether to commence federal enforcement when a state has taken action. The contrary reading -- that RCRA bars such actions -- is unsupported by the statute and legislative history. Such a reading would bar any federal action when the state had enforced, regardless of the timeliness or appropriateness of the state action.

Introduction

On May 10, 1985, an EPA Judicial Officer entered a final order in the matter of BKK Corporation, Docket No. IX-84-0012 (RCRA (3008) 84-5). That order dismissed an administrative enforcement action brought by EPA Region IX against the corporation for violations of various provisions of the Resource Conservation and Recovery Act (RCRA), on the basis that RCRA barred a federal action if a State had taken "timely and appropriate" enforcement action. On petition for reconsideration filed by several EPA staff offices, the Administrator, on

October 28, 1985, dismissed the complaint, but ruled that the earlier BKK decision would "have no precedential effect." Decision on Reconsideration at 4.

This opinion examines the effect of state enforcement on EPA enforcement under RCRA. As the exchange of pleadings in the BKK matter makes clear, EPA staff agreed with the industry respondent that EPA should generally not take civil enforcement action if a state has taken timely and appropriate enforcement action, but contended that this was a policy matter, not a requirement of statutory or case law. The dispute is not a trivial one. As we show below, if RCRA limits federal enforcement based on prior state enforcement, it would be difficult to confine those limits to cases where the state action is timely and appropriate. It is our opinion that EPA's decisions whether to defer to prior state enforcement are a matter of enforcement discretion and policy, not statutory requirements.

Below, we examine RCRA, other relevant statutes, the legislative history, and judicial decisions bearing on the effect of enforcement by approved RCRA states.

Discussion

A. Relevant Statutory Provisions

The starting point in analyzing the Administrator's enforcement powers under RCRA is the language of the statute. Section 3008(a)(1) authorizes the Administrator, except as provided in Section 3008(a)(2), to take an enforcement action whenever he determines that anyone has violated a Subtitle C requirement. 1/ Section 3008(a)(2) states:

> In the case of a violation of any requirement of this subtitle where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 3006, the Administrator shall give notice to the State in which such violation has

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1/ After a state program has been approved, it operates "in lieu of the Federal program . . . ." Section 3006(b). The requirements of an authorized state program are considered Subtitle C requirements.

> occurred prior to issuing an order or commencing a civil action. 2/

Section 3008(a)(3) provides that EPA's enforcement action may include revocation of a state-issued RCRA permit.

On the face of the statute, the only prerequisite to an EPA enforcement action in an authorized state is a finding that a violation of the authorized state program has occurred or is occurring and that notice of EPA's intent to take action has been provided to the state. Once EPA fulfills the Section 3008(a) requirements, it may issue an administrative order requiring compliance with applicable Subtitle C requirements, impose administrative penalties, suspend or revoke the violator's RCRA permit (whether issued by EPA or the state), and seek judicial relief in federal district court.

It has been argued, however, that Section 3006 of the Act somehow restricts EPA's enforcement authority. Section 3006 governs "Authorized State Hazardous Waste Programs," and Section 3006(d) provides:

> (d) Effect of State Permit. -
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> Any 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 under this subtitle.

This provision was the principal statutory basis for the Judicial Officer's May 10, 1985 decision. He read it as limiting the otherwise broad federal enforcement power under Section 3008 and concluded that under the statute EPA can only overfile when a state's action was untimely or inadequate. We believe that this reading of the statute is erroneous. First, the "timely and appropriate" qualifications that the Judicial Officer relied on simply cannot be found in the text of Section 3006(d). To read Section 3006(d) as applying to state enforcement actions thus raises serious problems. If any enforcement action taken by the state has the same force and effect as an EPA enforcement action, EPA would never be able to take an enforcement action regardless of the inadequacy of a state action. A settlement

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2/ Prior to 1980, EPA was required to provide states with 30 days' prior notice. The 30 day waiting period was deleted in 1980, Solid Waste Disposal Act Amendments of 1980, Pub. L. No. 96-482, § 13, 94 Stat. 2234, 94 Stat. 2339-30, and now EPA need only provide "notice."

or judgment binding on the state would, under this reading, also bind EPA under principles of res judicata. See, e.g., Brown v. Felsen, 442 U.S. 127, 131 (1979) (final judgment on merits bars further claims by parties or their privies based on the same cause of action); Montana v. United States, 440 U.S. 147, 153 (1979). It is unlikely that Congress would have buried such an important limit on federal enforcement powers in Section 3006(d), a provision concerning state permits.

On its face, Section 3006(d) does not address federal enforcement powers. Section 3006 is entitled, "Authorized State Hazardous Waste Programs." Section 3006(d) itself is entitled "Effect of State Permit." Its principal purpose is plainly to assure not only that a state will have authority to issue permits, but also that those permits have the same effect, and are enforceable to the same extent, as if they had been issued by EPA.

By contrast, if Congress had meant to limit federal enforcement power, we would expect them to do this in the enforcement provision, Section 3008. This expectation is confirmed by the analogous provision in the Safe Drinking Water Act. In Section 1423, 3/ Congress specifically required EPA to

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3/ Section 1423 provides in part that:

(a)(1) Whenever the Administrator finds during a period during which a State has primary enforcement responsibility for underground water sources (within the meaning of section 300h-1(b)(3) of this title or section 300h-4(c) of this title) that any person who is subject to a requirement of an applicable underground injection control program in such State is violating such requirement, he shall so notify the State and the person violating such requirement. If the Administrator finds such failure to comply extends beyond the thirtieth day after the date of such notice, he shall give public notice of such finding and request the State to report within 15 days after the date of such public notice as to the steps being taken to bring such person into compliance with such requirement (including reasons for anticipated steps to be taken to bring such person into compliance with such requirement and for any failure to take steps to bring such person into compliance with such requirement). If--

> (A) such failure to comply extends beyond the sixtieth day after the date of the notice given pursuant to the first sentence of this paragraph, and

Footnote continued on next page

make a finding that a state abused its enforcement discretion prior to commencement of federal enforcement. Congress certainly would have provided similar language in the later enacted RCRA had it chosen to impose a similar requirement. 4/

It has also been suggested that Sections 3006(b) and (c) implicitly limit EPA's authority under Section 3008. Section 3006(c) provides in pertinent part that "the Administrator shall, if the evidence submitted shows the existing State program to be substantially equivalent to the Federal program under this subtitle, grant an interim authorization to the State to carry out such program in lieu of the Federal program pursuant to this subtitle . . . ." Section 3006(b) similarly provides that on final authorization, the state "is authorized to carry out such programs in lieu of the Federal program . . . ." Some have contended that these provisions mean that once a state is authorized it exercises its enforcement authority in lieu of EPA.

The notion that the "in lieu of" language bars federal enforcement cannot be squared with the plain language of Section 3008(a)(2), which requires the Administrator to notify an approved state "prior to issuing an order or commencing a civil action . . . ." This language has no meaning if the Administrator's enforcement powers terminate upon interim or final authorization.

Footnote 3 continued

> (B)(i) the State fails to submit the report requested by the Administrator within the time period prescribed by the preceding sentence, or
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> (ii) the State submits such report within such period but the Administrator, after considering the report, determines that by failing to take necessary steps to bring such person into compliance by such sixtieth day the State abused its discretion in carrying out primary enforcement responsibility for underground water sources,

the Administrator may commence a civil action under subsection (b)(1) of this section. (emphasis added)

4/ See also Clean Water Act, Section 402(h), which bars the Administrator from seeking a sewer hookup ban in an enforcement action against a municipality in a state with an approved NPDES program if the state has "commenced appropriate enforcement action . . . ." See also n. 8 and associated text, infra.

In any event, in context the "in lieu of" language evidently refers to the state's implementation of the authorized state program in lieu of the federal hazardous waste program, not to whether the state or EPA may enforce the state program in a particular case. Sections 3006(b) and (c) allow the state to issue RCRA permits instead of EPA and to substitute its regulatory and permitting program for that of EPA. Without these provisions, the regulated community would have been subject to both state and federal requirements -- with them, the regulated community does not have to comply with the federal requirements in those areas for which the state has been granted authorization. 5/

B. The Legislative History and Case Law

While the language and structure of the statute support unfettered federal enforcement power in authorized states, different passages in the legislative history point in different and inconsistent directions. The House Report states that "the Administrator is not prohibited from acting in those cases where the states fail to act . . . ." House Committee on Interstate and Foreign Commerce Report 94-1461 (Sept. 9, 1976) at 31, U.S. Code Cong. and Admin. News, 94th Cong. 2d Sess. (1976) at 6261. This language certainly suggests some sort of limitation on federal enforcement power when a state has acted. 6/

The Senate Report, by contrast, indicates an intent to draw "on the similar provisions of the Clean Air Act of 1970 and the Federal Water Pollution Control Act of 1972" in allocating responsibilities between EPA and the states under Section 3008. S. Rep. No. 988, 94th Cong, 2d Sess. 17 (1976). To understand what the Senate Committee meant, we must examine those laws and how the courts have interpreted them.

1. Case Law Under the Clean Air Act

Section 113(a)(1) of the CAA authorizes the Administrator to order compliance or bring a civil enforcement action for

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5/ The result is not affected by the provision of Section 3006(b) that specifically authorizes a state with final authorization to "enforce permits . . . ." Section 3008 rules out a reading that this was meant to deprive EPA of its enforcement powers.

6/ When the House Report discussed EPA's power to act "where the states fail to act," it may have been referring to the then-applicable requirement that EPA wait 30 days after notifying an approved state before commencing enforcement action. That requirement, as noted above (n. 2, supra) was deleted in 1980.

violation of a SIP. 42 U.S.C. § 7413(a)(1). The only prerequisite to filing suit in district court is that EPA must notify the alleged violator and the state thirty days prior to bringing a civil action. Prior to the 1970 CAA Amendments, federal enforcement was permitted only where the violation resulted from "the failure of a state to take reasonable action to enforce such standards." Air Quality Act of 1967, 81 Stat. 485, 493. However, Congress chose to delete this limitation on federal enforcement actions during consideration of the 1970 amendments. See generally A Legislative History of the Clean Air Act Amendments of 1970, U.S. Senate Committee on Public Works, 93d Cong. 2d Sess. 113, 133, 146, 163 (1974).

Defendants accused of SIP violations have argued that federal enforcement actions for SIP violations should be stayed or dismissed on the grounds that such actions would relitigate issues already decided in a prior state proceeding or would duplicate a contemporaneous state enforcement action. The courts which have considered such challenges have rejected that view on the grounds that the only prerequisites to suit are those set out in the statute: notice to the alleged violator and a lapse of thirty days. 7/ The statutory language and legislative history do not otherwise limit EPA's ability to bring an enforcement action when there is or was a parallel state proceeding. See, e.g., United States v. SCM Corp., 615 F. Supp. 411, 416 (D. Md. 1985) (existence of state administrative consent order did not bar EPA action seeking civil penalties and injunctive relief for SIP violations); United States v. Lehigh Portland Cement Co., No. C 84-3030, slip op. at 6 (N.D. Iowa Dec. 12, 1984) (state consent order did not preclude subsequent EPA action for SIP violation); United States v. Chevron, U.S.A., Inc., No. EP-80-CA-265, slip op. at 3 (W.D. Tex. June 10, 1981) (pending state lawsuit which had imposed temporary injunction for SIP violation did not bar EPA suit for permanent injunction and civil penalties). Cf. United States v. Harford Sands, Inc., 575 F. Supp. 733, 735 (D. Md. 1983) (state agreement on compliance schedule does not bar federal action under CAA § 113(a)(3)).

The recent decision in United States v. SCM Corp., 615 F. Supp. 411 (D. Md. 1985), explains how state enforcement actions are taken into account under Section 113(a)(1). Notwithstanding the existence of a state enforcement action,

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7/ Defendants in suits brought under Section 113(a)(1) have also urged the courts to stay or dismiss these actions under the doctrine of Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). The Colorado River doctrine, as clarified in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S. Ct. 927 (1983), gives the federal

EPA has the right to press in federal court its claims regarding the issue of defendant's liability and what penalties are appropriate for the violations. Id. at 418. The court reasoned that if a state enforcement action were to preclude federal action to enjoin or punish the same violation, a state could nullify the federal enforcement scheme by adopting and using a state enforcement scheme providing for minimal penalties. Allegations of the sufficiency of state action may be taken into account when the court considers the appropriateness of relief but do not affect liability under federal law or preclude the court from hearing a case on its merits. Id. at 419. The court's reasoning in SCM, supra, applies equally to RCRA enforcement.

2. Case Law Under the Clean Water Act

The Clean Water Act, in contrast to RCRA, gives the Administrator two options: under Section 309(a)(1), 33 U.S.C. §1319(a)(1), he may notify the alleged violator and the state of an alleged violation and issue a compliance order or bring a civil action under Section 309(b) if the state has not "commenced appropriate enforcement action" after the thirtieth day; or, pursuant to Section 309(a)(3), 33 U.S.C. § 1319(a)(3), he may

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Footnote 7 continued from previous page

courts discretion to stay or dismiss an action involving the contemporaneous exercise of concurrent state and federal jurisdiction. Colorado River identified a number of prudential factors to be considered, including the timing of the actions, the convenience of the forums, and the need to avoid piecemeal litigation. 424 U.S. at 818-819. Cone Memorial Hospital required two additional factors to be taken into consideration: whether federal law provides the rule of decision on the merits, and whether the state court proceeding will adequately protect the parties' interests. Id. at 941, 942. The Court emphasized that only exceptional circumstances could justify a refusal to exercise federal jurisdiction. Hence, the party invoking the doctrine must demonstrate, beyond "any substantial doubt," the existence of parallel state-court litigation that will adequately achieve the complete and prompt resolution of the issues pending in federal court. See id. at 943. The court in United States v. SCM Corp., 615 F. Supp. 411 (D. Md. 1985), noted that in a case brought under Section 113(a)(1), it would be improper to apply the Colorado River doctrine where the state action had already been concluded or where EPA seeks relief not sought or obtained in the state action. 615 F. Supp. at 417, 418. See also United States v. Lehigh Portland Cement, No. C 84-3030, slip op. at 8 (N.D. Iowa Dec. 12, 1984) (rejecting argument for stay).

proceed directly against the alleged violator under Section 309(b) without giving notice. 8/

In United States v. ITT Rayonier, Inc., 627 F.2d 996, 1001 (9th Cir. 1980), the court recognized EPA's ability to bring an action under Section 309(a)(1) notwithstanding the existence of a state enforcement proceeding. Noting the references in the legislative history to "dual" or "concurrent" enforcement authority, the court determined that enforcement actions for effluent limitations violations could have been filed in both state and federal courts. See also Aminoil, U.S.A., Inc. v. California State Water Resources Control Board, 674 F.2d 1227, 1230 (9th Cir. 1982); United States v. Cargill, 508 F. Supp. 734, 740 (D. Del. 1981). 9/

Aminoil, which held that EPA could not be joined as a party to a suit filed in state court for review of a state order defining a certain area as a "wetlands," acknowledged that the statutory provision for concurrent state and federal jurisdiction could force a defendant to relitigate the wetlands issue at the federal level after the state administrative

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8/ The Clean Water Act thus differs from RCRA in that notice under Section 309(a)(1) is not a condition precedent to federal enforcement. See United States v. City of Colorado Springs, 455 F. Supp. 1364, 1366-67 (D. Colo. 1978) (decision to proceed unilaterally under Section 309(a)(3) is within sound discretion of Administrator). In addition, EPA enforcement action under Section 309(a)(1) is expressly limited to cases in which the state has not "commenced appropriate enforcement action." Hence, if EPA chooses to notify under 309(a)(1), that provision, unlike Section 3008(b) of RCRA, contemplates that EPA will wait for the state to initiate appropriate enforcement action in the first instance. See Colorado Springs, 455 F. Supp. at 1366 (comparing Section 309(a)(1) with 309(a)(3)).

9/ In United States v. Cargill, 508 F. Supp. 734, 740 (D. Del. 1981), the court approved the filing of a federal enforcement action under Section 309(a) of the Clean Water Act after a parallel state filing, but suggested in dicta that such an action could be brought only if after "notification the state has not commenced appropriate enforcement action . . . ." Clean Water Act, Section 309(a)(1), quoted in United States v. Cargill, supra. (Emphasis in original). RCRA contains no language similar to Section 309(a)(1) of the Clean Water Act requiring EPA to defer to "appropriate" state enforcement. Moreover, the Cargill court did not discuss Section 309(a)(3), which separately authorizes federal enforcement but contains no limiting language. Finally, in its discussion on the merits, the court relied on abstention doctrines, not the limitations in Section 309(a)(1).

agencies and courts had reached a decision. 674 F.2d at 1233. The court observed, however, that EPA involvement in the state enforcement action could interfere with the Agency's obligation to independently exercise its supervisory authority under Section 309(a)(1). Id. at 1236.

Although Rayonier and Cargill either dismissed or stayed EPA's enforcement actions, the restrictions those cases place on EPA enforcement action do not arise out of any statutory restriction on federal enforcement power. Rayonier dismissed the EPA action on res judicata grounds, reasoning that the central issue in the case, which involved the construction of a state-issued permit, had previously been litigated in a state enforcement action and a final determination on the merits had been reached in state court. 627 F.2d at 1002. As the Ninth Circuit noted in Aminoil, the issues presented in Rayonier "may be sui generis," in particular because the decision depended upon a finding that, in the peculiar circumstances of that case, EPA and the state agency were in privity. 674 F.2d at 1236. And Cargill held that a limited stay was warranted under the Colorado River 10/ doctrine, giving great weight to the consideration that the federal action had caused the defendant to halt its pollution control efforts. 508 F. Supp. at 749-50.

D. Conclusion

As we have shown, if either Section 3006(d) or the "in lieu of" language in Sections 3006(b) and (c) were read to apply to state enforcement actions, any action taken by the state must preclude EPA enforcement action for the same violation, regardless of the adequacy of the state action. In contrast to provisions of other statutes, such as Section 1423 of the Safe

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10/ Colorado River Water Conservation District v. United States, 424 U.S. 800 (1976). See supra n. 7. The Supreme Court's subsequent decision in Moses H. Cone Memorial Hospital v. Mercury Construction Corp., 103 S.Ct. 924 (1983), calls Cargill into question. Cone stressed that because a stay is as much a refusal to exercise federal jurisdiction as a dismissal, it would be an abuse of discretion for a federal court to grant either a stay or a dismissal unless there is no substantial doubt that the state court will adequately address the merits of the dispute. 103 S. Ct. at 943. Relying on Cone, the court in United States v. SCM refused to follow Cargill, reasoning that EPA should not be deprived of its right to seek a determination of liability and additional penalties under federal law. 615 F. Supp. at 418. See also United States v. Lehigh Portland Cement, slip op. at 8 (Cargill does not apply in CAA case where EPA was seeking to augment defendant's pollution control measures).

Drinking Water Act (Administrator may act if he determines that state abused its discretion) or Section 309(a)(1) of the Clean Water Act (EPA must act if state has not taken "appropriate" action), Section 3008(a)(2) of RCRA does not provide for any limitations on EPA's enforcement power. On the other hand, if such limitations are read into Sections 3006(b), (c), and (d), there would be no statutory basis for lifting the prohibition on EPA enforcement when the State's action is untimely or inappropriate, a result that would be so inconsistent with Congress's approach to similar issues in other environmental statutes that it should not be inferred without conclusive evidence of legislative intent.

Thus, we conclude that the only prerequisites to EPA enforcement action in an authorized state are those set out in Section 3008(a)(2): a finding of violation and notice. This reading is supported by the language of section 3008(a)(2) itself, by the structure of RCRA, and by the case law construing comparable provisions of the Clean Air Act and Clean Water Act.

It should be emphasized that the issue addressed in this opinion concerns the statutory constraints on federal enforcement. We believe that it is entirely appropriate and consistent with RCRA for EPA, as a matter of discretion, to avoid taking civil enforcement action if a state has taken timely and appropriate enforcement action.