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1986

6-9-1986

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Citation Information

Griffith, Richard L., "Colorado's Hazardous Waste Program: Current Activities and Issues" (1986). *Getting a Handle on Hazardous Waste Control (Summer Conference, June 9-10)*. <https://scholar.law.colorado.edu/getting-handle-on-hazardous-waste-control/5>

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Richard L. Griffith, *Colorado's Hazardous Waste Program: Current Activities and Issues*, in GETTING A HANDLE ON HAZARDOUS WASTE CONTROL (Natural Res. Law Ctr., Univ. of Colo. Sch. of Law 1986).

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COLORADO'S HAZARDOUS WASTE PROGRAM:

CURRENT ACTIVITIES AND ISSUES

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Getting a Handle on Hazardous Waste Control
Natural Resources Law Center Summer Program
University of Colorado School of Law
June 9-10, 1986

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I. STATE HAZARDOUS WASTE AGENCIES AND STATUTES

A. The Waste Management Division of the Colorado Department of Health ("Department" or "state") is the hazardous waste enforcement and permitting agency of the state. Hazardous waste rules are developed by the Committee on Hazardous Waste Regulation which has nine members appointed by the governor, including three representing commercial enterprises engaged in hazardous waste management, two members of local government, and three members of the public at large (section 25-15-302, C.R.S. (1982)). The rules are adopted by the Colorado Board of Health.

B. The Colorado Hazardous Waste Act ("CHWA") consists of three parts: Part 1 primarily containing definitions (sections 25-15-101 to 104, C.R.S. (1982)); Part 2 regulating the siting of hazardous waste disposal facilities (sections 25-15-200.1 to 220, C.R.S. (1982)), and Part 3 containing the Resource Conservation and Recovery Act ("RCRA") requirements (sections 25-15-301 to 313, C.R.S. (1982)). The Part 2 siting regulations are at 6 CCR 1007-2, and the Part 3 regulations (which are virtually identical to EPA's RCRA rules) are at 6 CCR 1007-3.

II. THE DUAL RCRA PROGRAM UNDER THE STATE'S AUTHORIZATION AND THE HAZARDOUS AND SOLID WASTE ACT OF 1984.

A. On November 2, 1984, by EPA authorization the state became the primary authority in Colorado for the enforcement of hazardous waste (42 U.S.C. sec. 6926(b)). However, on November 8, 1984 the President signed into law the Hazardous and Solid Waste Act of 1984 ("HSWA") which amended RCRA and granted EPA authority to enforce certain new requirements independently of the state (Pub. L. 98-616 (1984); 42 U.S.C. sec. 6926(g)(1)).

B. The state has adopted EPA's Codification Rule (50 Fed. Reg. 28702 (July 15, 1985)) implementing HSWA, but it will not become effective until the state is authorized or has a cooperative agreement with EPA to implement it. The state plans to apply to EPA for authorization in June 1986.

C. EPA's Joint Permitting Policy. EPA's policy is that Part B permits should be issued simultaneously by authorized states and by EPA under HSWA. There is no statutory prohibition against the state issuing its Part B at a different time. As a practical matter, EPA has been cooperating in allowing the state to take the lead in implementing the Codifi-

cation Rule in permit application reviews.

III. ENFORCEMENT MECHANISMS

A. Warning Letters.

Warning letters are used for de minimus violations. Warning letters state the alleged violation and threaten to take formal enforcement action if compliance is not achieved within a certain time. No sanctions follow from failing to comply with a warning letter.

B. Compliance Orders.

1. Compliance orders may be issued by the Department to a violator ordering compliance within a certain time (section 25-15-308(2), C.R.S. (1982)). The violator is subject to up to \$25,000 per day in civil penalties for violation of a compliance order (section 25-15-309, C.R.S. (1982)). Compliance orders have been the most frequently used enforcement mechanism and should continue to be.

2. There is no administrative procedure provided by statute for enforcing or contesting a compliance order. The Department has developed an informal procedure. An informal conference is provided for the

violator to explain defenses or mitigating circumstances. Following the informal conference, a letter is sent to the violator confirming, modifying, or withdrawing the compliance order. Civil penalties are sought in most cases, and an offer to settle for compliance and a proposed civil penalty will be made in a separate letter following the conference. It is anticipated that most compliance orders will be settled through an administrative consent agreement.

C. Civil Penalties.

1. Only state district courts may impose civil penalties (section 25-15-309, C.R.S. (1982)). To avoid unnecessary litigation, the Department is currently making settlement offers for civil penalties prior to filing actions. EPA is considering requiring states to have administrative civil penalty authority (51 Fed. Reg. 502 (January 6, 1986)).

2. Civil penalties for the purposes of proposed settlements are calculated based on the EPA "Final RCRA Civil Penalty Policy" (May 8, 1984). (Note: The policy will not necessarily be followed for litigation purposes.) The EPA policy establishes a matrix of "potential for harm" and "extent of deviation from regulatory requirement" which for each

violation sets the base penalty from \$100 to \$25,000. For continuing egregious violations, the base penalty will be multiplied by the number of days of violation. The base penalty may be subject to adjustment based on the economic benefits of noncompliance, good faith efforts to comply, the degree of willfulness and/or negligence in the violation, the history of noncompliance, and the ability to pay.

3. Injunctive Relief. The Department may seek judicial injunctive relief in lieu of or concurrent with the issuance of a compliance order (see section 25-15-308(2), C.R.S. (1982)). Injunctive relief would be sought in lieu of a compliance order under circumstances requiring preliminary injunctive relief, for example, to prevent an immediate harm to public health or the environment.

IV. INSPECTION PRIORITIES

The frequency of inspections by types of hazardous waste facilities is generally as follows:

A. Currently, the highest priority for inspections is dictated by HSWA which provides that by November 8, 1985, land disposal facilities were to

have certified to EPA that they were in compliance with all applicable ground water monitoring requirements (42 U.S.C. sec. 6925(e)(3)). Failure to so certify or to be in compliance results in a loss of interim status and authority to operate. The EPA and the state are jointly conducting the inspections for compliance with ground water monitoring requirements.

B. All facilities subject to ground water monitoring requirements are inspected at least once per year, but many are inspected every 6 months.

C. A treatment, storage or disposal facility with no ground water monitoring is inspected at least once per year.

D. Major generators of hazardous wastes (those generating over 1,000 kilograms per month) are the next priority.

E. Small quantity generators and large transporters of hazardous waste are the next priority.

F. Citizen complaints are evaluated on an ad hoc basis.

V. ENFORCEMENT AND SETTLEMENT POLICIES AND ISSUES

A. Is EPA's failure to take enforcement

action prior to state authorization a mitigating factor in civil penalties? Maybe. Cf. United States v. Amoco Oil Co., 580 F. Supp. 1042, 1050 (D. Mo. 1984) (holding that EPA's delay of four and one half years in bringing an action under the Clean Water Act was not banned by equitable principles but that the delay might have some bearing on the amount of penalties); but cf. Martin Marietta Consent Order.

B. Administrative Consent Agreements versus Judicial Consent Decrees. The Department's unwritten policy is that settlements of compliance orders requiring significant compliance actions by the violator will be settled by the filing of a complaint and a consent decree in a state district court. Administrative consent agreements will be used where the settlement involves no significant compliance schedule. The advantages of a consent decree are that judicial sanctions are readily available to insure compliance, e.g., contempt proceedings, and the court is a forum for dispute resolution. Consent Decrees may include provisions for stipulated civil penalties for future violations.

C. An unresolved issue is whether a violator may seek preenforcement judicial review of compliance

orders. Under similar circumstances, at least one case under RCRA has held that there is no preenforcement right of review of an EPA order to monitor for hazardous wastes even though a failure to comply with the order could subject a company to civil penalties (E.I. Du Pont de Nemours and Company v. Daggett, 610 F. Supp. 260 (D.N.Y. 1985)).

D. Are closure plans issued by EPA prior to state authorization enforceable by the state? The CHWA provides that RCRA permits issued by EPA are effective as a matter of state law (Section 25-15-303(3), C.R.S. (1982)). By analogy, the state's position is that EPA closure plans are effective and enforceable under state law.

E. May EPA file a separate enforcement action from the state's for the same violations?

EPA has authority duplicative of the state's to file RCRA enforcement actions (section 3008 of RCRA, 42 U.S.C. sec. 6928). In one notable administrative decision by EPA, it was held that EPA could not take enforcement action for RCRA violations in the face of a reasonable and appropriate enforcement action for the same violations by an authorized state (In the Matter of: BKK Corporation, Docket No.

IX-84-001(5-10-85)). (See U.S. v. ITT Rayonier, 627 F.2d 996 (9th Cir. 1980) (holding under principles of res judicata that EPA was barred from relitigating a state court decision in a discharge permit enforcement action brought by a state authorized under Clean Water Act)).

The state and EPA are currently negotiating an enforcement agreement which would allow EPA to take enforcement action if the state failed to in a "timely and appropriate" manner, e.g., by failing to issue a compliance order within 120 days after a determination of a high priority violation.

F. Ground water Corrective Action Requirements for Closure of Land Disposal Facilities. As a result of HSWA, many landfills and surface impoundments are closing. The state interprets the interim status closure performance standard at 6 CCR 1007-3, sec. 265.111 (40 C.F.R. 265.111) to require ground water corrective action.

G. Relationship between State Corrective Action Requirements and CERCLA Section 106 Orders. The CERCLA National Contingency Plan ("NCP") expressly exempts removal and remedial actions done pursuant to CERCLA 106 orders from state and local permit require-

ments (40 C.F.R. 300.65 and 300.68). This creates a potential conflict between state corrective action requirements and an EPA 106 Order issued to a RCRA facility. An example is the Martin Marietta Waterton facility which has entered a section 106 Consent Agreement with EPA and is negotiating a consent order with the state requiring corrective action. Probable resolution in the state agreement is to leave the issue of preemption open for future litigation. The state has filed for judicial review of the NCP preemption provisions.

H. Parallel Civil and Criminal Enforcement.

The state is generally not filing criminal actions at this time. However, the National Enforcement Investigation Center ("NEIC"), a branch of the EPA based in Lakewood, has investigated and prosecuted in conjunction with the U.S. Attorney General several criminal actions. NEIC currently has 15 to 20 hazardous waste cases in Colorado under investigation. The state's general policy on parallel civil and criminal enforcement is that civil enforcement may proceed concurrently. EPA policy discourages parallel proceedings because of the potential for creating affirmative defenses, such as Fifth Amendment violations (See

"Policy and Procedures on Parallel Proceedings at the Environmental Protection Agency," Courtney M. Price (January 23, 1984)).

I. State Enforcement at Federal Facilities.

RCRA waives sovereign immunity from state enforcement at federal facilities. 42 U.S.C. sec. 6961. The state's policy is to enforce against federal facilities in the same manner as against private. The Department of Justice's position is that states may not obtain civil penalties from federal agencies.

J. Bankruptcy.

1. With the number of bankruptcy petitions being filed in Denver as high as 80 per day (in February 1986), bankruptcy law is becoming a subspecialty of environmental law. The most common issue is who, if anyone, is responsible for environmental compliance during the pendency of the proceeding.

2. The state does not have a "Superfund" to pay for the cleanup of abandoned or bankrupt facilities. Therefore, in bankruptcy cases, the state is and will be proceeding against any arguably liable persons and any available assets, including trustees, the debtor, the debtor's officers and directors, lessor-owners of facilities, secured creditors, and

secured and unsecured assets.

3. The filing of a bankruptcy petition generally operates as an automatic stay of the commencement or continuation of a judicial, administrative or other proceeding against the debtor (11 U.S.C. sec. 362(a)). However, the filing of a bankruptcy petition does not operate as a stay of the "commencement or continuation of an action or proceeding by a governmental unit to enforce such governmental units' police or regulatory power" (11 U.S.C. sec. 362(b)(4)), or "of the enforcement of a judgment, other than a money judgment, obtained in an action or proceeding by a governmental unit to enforce such governmental units', police or regulatory power" (11 U.S.C. sec. 362(b)(5)). The Supreme Court held in 1985 that where a state appointed receiver sought money from a debtor in bankruptcy to pay for cleanup costs, that such was a "debt" or "liability on a claim" which was subject to discharge. Ohio v. Kovacs, 105 S. Ct. 705 (1985). Kovacs cited with approval the case of Penn Terra, Ltd. v. Department of Environmental Resources, 733 F.2d 267, 274 (3d Cir. 1984) which held that a state suit seeking injunctive relief to prevent environmental harm is generally excepted from the automatic

stay.

4. Bankruptcy trustees are obliged to comply with state law and regulations (28 U.S.C. sec. 959(b)). That is the basis for the state to argue that a trustee must comply with environmental statutes and regulations.

5. Mid-Atlantic National Bank v. New Jersey Department of Environmental Protection, 54 U.S.L.W. 4138 (Jan. 28, 1986) held that a trustee in bankruptcy could not abandon property on which was stored deteriorating drums of hazardous waste in contravention of a state statute or regulation that was reasonably designed to protect the public health or safety from identified hazards. That holding superseded the Bankruptcy Code provision that a trustee may abandon property of the estate that is "burdensome to the estate" (11 U.S.C. sec. 554).

6. Can cleanup or environmental compliance costs be paid for out of secured assets? The Third Circuit suggests that it is not an unconstitutional taking to use proceeds normally targeted for the satisfaction of a secured creditor's lien to comply with hazardous waste disposal requirements; however, a federal district court has held the opposite (Matter

of Quanta Resources Corp., 739 F.2d 912, 922 n. 11 (3rd Cir. 1984)); In re T.P. Long Chemical, Inc., 45 B.R. 278 (D. Ohio 1985)). (See section 506(c) of the Bankruptcy Code, 11 U.S.C. sec. 506(c) (states that the trustee may recover from secured property the reasonable and necessary costs of preserving and disposing of such property to the extent of any benefit to the holder of the secured claim)).

VI. STATE ENFORCEMENT OF CERCLA

A. Sections 25-16-101 to 201, C.R.S. (1985) authorize the Department to participate in CERCLA by entering cooperative agreements with the federal government to perform remedial and response actions at CERCLA sites. CERCLA requires the state to provide 10 percent of the costs of remedial action at a site, although 50 percent state matching funds are required for sites owned by a state or local government. The State Act provides for a solid waste user fee imposed upon the users of municipal landfills which will provide at least a portion of the state matching funds.

B. The state has currently entered into a cooperative agreement with EPA to assist in the technical review of proposed remedial actions but has not

entered into agreements to provide the matching funds for actual remedial action. Legislation (S.B. 110) designed to give the state sufficient authority to be the "lead agency" and direct remedial action at CERCLA sites was introduced and defeated in the 1986 session of the Colorado General Assembly. The primary authority in S.B. 110 was the authority to issue administrative orders to potentially responsible parties requiring clean-up, similar to EPA's authority under section 106 of CERCLA (42 U.S.C. sec. 6906).

C. Sections 107 and 112 of CERCLA (42 U.S.C. secs. 9607 and 9612) authorize the state to sue responsible parties for damages to natural resources and for the response costs of performing remedial actions. The state has filed seven such actions, including three against mineral milling and refining operations, three against mining operations, and against the Rocky Mountain Arsenal.

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