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United States v. Power Eng'g Co., 125 F. Supp. 2d 1050 (D. Colo. 2000)

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clear, given the new permit limit and the transfer of the facility and the permit, that the court could not reasonably expect Tosco would violate its permit in the future. Relying on *Friends of the Earth v. Laidlaw Environmental Services, Inc.*, the court determined post-complaint events might moot claims for civil penalties. The court still had to determine whether, in this case, civil penalties would deter future violations. CBE alleged civil penalties would deter Tosco from future CWA violations because the company operated other refineries managed by the same staff that assisted Tosco in efforts to comply with the Avon refinery permit. The court disagreed with CBE, and noted, that given the structure and procedural requirements of the CWA, CBE could not rely on allegations of violations at other Tosco facilities to demonstrate civil penalties would deter Tosco from future violations.

The court granted Tosco's motion for summary judgment after noting the revision of the permit's limit, the sale of the facility, and the transfer of the permit made absolutely clear that one could not reasonably expect Tosco's permit violation to recur. Thus, the court held no prospect civil penalties would deter future violations.

M. Elizabeth Lokey

United States v. Power Eng'g Co., 125 F. Supp. 2d 1050 (D. Colo. 2000) (granting United States' motion for partial summary judgment and denying defendant facility operator's motion for partial summary judgment, noting: (1) EPA "overfiling" was not inappropriate under the circumstances; (2) United States' suit was not barred by res judicata or laches; and (3) defendant, as a facility operator, was required to post financial assurances).

Beginning in 1968, Richard Lilienthal operated an electroplating business in Denver, Colorado under the name Power Engineering Co. ("PEC"). The processes employed by PEC produced thirteen waste streams containing more than 1000 kilograms of waste per month. The materials present in these streams included a number of toxic substances as identified by the Resource Conservation and Recovery Act ("RCRA"), including hexavalent chromium.

RCRA authorizes Colorado to administer hazardous waste programs and monitor production and treatment facilities to insure compliance with RCRA's effluent standards. The Colorado Department of Public Health and the Environment ("CDPHE") oversees the program. In 1986, PEC notified CDPHE that its operations were generating certain hazardous wastes but failed to indicate its discharge of hexavalent chromium. In 1992, CDPHE discovered these releases had contaminated groundwater on and outside of PEC's property. About one year later, PEC informed CDPHE that in addition to the wastes it had initially reported, PEC was emitting five additional hazardous wastes.

CDPHE served PEC with a compliance order demanding that their operation conform to federal and local regulations. When PEC failed to meet the terms of the order, CDPHE sued in Colorado state court. Although CDPHE had authority to demand financial assurances for remediation from PEC in the proceeding, it declined to seek them. Because CDPHE failed to obtain financial assurances from PEC, the federal Environmental Protection Agency ("EPA") instituted its own suit in the federal courts against PEC and Lilienthal individually.

PEC moved for partial summary judgment in response to EPA's complaint. PEC argued the EPA had engaged in unlawful "overfiling" and that the doctrine of res judicata precluded the action. PEC's overfiling argument relied primarily on *Harmon Industry, Inc. v. Browner.* In *Harmon,* the Eighth Circuit found an EPA enforcement action to be improper because a state action against the same defendant regarding the same matter was pending when the EPA brought suit. The Eighth Circuit maintained that under the RCRA, "the Federal Government can initiate an action . . . only if . . . the authorized state fails to initiate an enforcement action." The Eighth Circuit therefore dismissed the government's claim.

In response to PEC's overfiling argument, the district court concluded the Eighth Circuit incorrectly decided *Harmon.* The district court asserted that courts cannot preclude an EPA enforcement action merely because an authorized state has also sought judicial enforcement of a regulation. The court noted the Eighth Circuit's interpretation was flawed because under its reasoning, all EPA enforcement actions would be precluded in cases where a state filed suit regardless of whether the EPA's cause of action duplicates the state action. In accordance with its RCRA interpretation, the district court determined RCRA did not prohibit the EPA action against PEC.

The district court also denied PEC's motion for partial summary judgment on the issue of res judicata. The court ruled the doctrine did not apply because the EPA did not exercise the requisite control over CDPHE in the state court action and the EPA action was a fully independent action.

PEC also advanced a number of defenses in response to EPA's motion for partial summary judgment: (1) the financial assurances sought by the EPA were not required because PEC was no longer in violation of RCRA; (2) the progress PEC had made in cleaning up contaminated soil and water precluded the imposition of an injunction; and (3) the doctrine of laches barred the EPA's action. Lilienthal also argued independently that for the purposes of applicable Colorado regulations, he was not an owner of the PEC facility.

The court first addressed whether demanding financial assurances from PEC would be proper. Noting that "[n]othing within RCRA's 'cradle-to-grave' regulatory scheme indicates that owners and eperators [sic] of hazardous waste facilities are exempt from providing financial assurance requirements before remediation," the court held the EPA was permitted to obtain financial assurances from PEC.

Under the ruling, EPA could obtain such assurances for past RCRA violations regardless of whether PEC was acting in violation of the statute at the time EPA filed its complaint.

The court also found PEC's "tremendous progress" argument unpersuasive. PEC believed that because it had taken substantial steps toward remediating the contaminated soils and groundwater, the EPA could not establish irreparable injury occurred necessary to warrant an injunction. The court first noted that because PEC had not provided the financial assurances demanded by the EPA, PEC was in current violation of RCRA. Citing Tenth Circuit authority, the court found that "[w]hen the evidence shows that the defendants are engaged in . . . practices prohibited by statute . . . irreparable harm to the plaintiffs need not be shown."

PEC's laches argument rested on the premise that because the government did not act against PEC at an earlier time, the EPA had abandoned its right to do so. Recognizing an exception to the laches doctrine exists where the government seeks to protect a public interest, PEC opined that the EPA's suit served a government, rather than a public interest. Rejecting this assertion, the court reasoned that if PEC were not to provide remediation costs, the government would be forced to do so; these costs in turn would be passed to the public. Because a public interest was therefore at stake, PEC's laches argument could not stand.

Lilienthal individually asserted the final response to EPA's motion for partial summary judgment. Lilienthal argued he was not in fact the operator of the PEC facility. The court disposed of this argument by simply applying the wording of Colorado regulations to pertinent facts regarding Lilienthal's holdings. At the time the EPA brought its action, Lilienthal was president of PEC and owned over half its stock. According to PEC employee testimony, Lilienthal also made all the relevant decisions regarding PEC's environmental compliance. The court recognized other courts have used different tests to determine whether to consider an individual as an operator for RCRA purposes. However, the court declined to decide which test courts should apply since Lilienthal would be considered an operator under each of them.

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Burke v. U.S. Envtl. Prot. Agency, 127 F. Supp. 2d 235 (D.D.C. 2001) (granting summary judgment motion in favor of the Environmental Protection Agency where a violator of a discharge permit questioned the agency's decision to debar him from business with the government).

From 1989 to 1998, Burke was the president and sole shareholder of ACMAR Regional Landfill, Inc. ("ACMAR"), which owned and operated ACMAR Regional Landfill ("the landfill") located in