UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

IN RE	)	
	)	RCRA-84-45-R
MARTIN ELECTRONICS, INC.	)	
	)	
Respondent	)	

DECISION ON MOTION TO RECONSIDER

In its Initial Decision dated June 21, 1985, the Court, inter alia, dismissed that portion of EPA's Complaint which dealt with the groundwater monitoring violation. The basis of that action was a recent decision of the Administrator in the case of In Re: BKK Corp. issued on May 10, 1985. That decision upheld an initial decision of ALJ Spencer Nissen who had dismissed a complaint issued by Region IX of EPA. The basis for Judge Nissen's ruling was that the Agency was precluded from bringing an action against the Respondent in the face of timely and appropriate enforcement, for the same offense, brought by the State of California.

In a pre-trial motion, Martin Electronics, Inc., (MEI) filed a motion to dismiss the Complaint on the basis of Judge Nissen's decision, which at that time was on appeal to the Administrator. This Court, for a variety of reasons, not the least of which was that the decision did not represent final Agency action, denied the motion.

Following the Hearing on this matter and prior to the issuance of an Initial Decision, the Administrator issued its final order upholding Judge Nissen's decision. Based upon that ruling, this Court dismissed the groundwater monitoring portion of the Complaint, since the State of Florida had, prior to EPA's Complaint, brought an administrative enforcement action against MEI for the same violation and had entered into a consent order with MEI which resulted in the installation and operation of an acceptable groundwater monitoring system. As part of the consent agreement, the State levied an administrative cost against MEI in the sum of $107.00.

Upon reading my Initial Decision in this case, the Agency filed a motion to re-open and reconsider. The basis for the motion was that the Agency felt that it did not have a fair opportunity to address the BKK decision in the Hearing or its post-hearing briefs since it felt the Court had disposed of that issue in its prehearing order.

Subsequent to the Agency's motion to re-open, a motion to reconsider BKK was made to the Administrator by Region IX, the Office of General Counsel, and EPA Headquarters' enforcement staff. In the face of that action, the Agency filed a motion to stay all proceedings in the MEI case until the Administrator ruled on this new motion. A stay was issued.

On October 23, 1985, the Administrator personally issued his decision on the motion to reconsider. That decision or "non-decision" as some have dubbed it, ruled that:

1. The original complaint against BKK would be dismissed;
2. Judge Nissen's initial decision was vacated;
3. The Chief Judicial Officer's final decision was vacated; and
4. The petition for reconsideration was also dismissed.

In making this novel ruling the Administrator held that the "debate" inherent in the case should be broadened and made less formal, since the "strictures of formal adjudicatory proceedings seem ill-suited to the type of debate I envision as being necessary to fully air the very important issues raised here." He also ruled that the holdings in the now vacated BKK case shall have no precedential effect. The time, place and nature of the "dabate" envisioned by the Administrator is unknown.

In the instant case, this Court ruled that the action taken by the State of Florida was timely and appropriate. No one seriously contests the timeliness of Florida's actions. The issue of its appropriateness is the focal point of the debate. This element of the equation is only questioned by the Agency as to the size of the monetary portion of the State's efforts. EPA was seeking almost $48,000.00 for the groundwatering monitoring violation, and Florida only sought $107.00. The Agency argues that the wide gulf between these two numbers renders the State's action inappropriate, thus permitting EPA's parallel enforcement action. The disparity between these two numbers was discussed at length in this Court's Initial Decision. It concluded that when viewed within the framework of EPA's own policy statements on this quesiton, Florida's cost assessment was appropriate. This was because under Florida law, the State lacks the authority to levy cvil penalties in cases where following the issuance of an administrative order, the parties voluntarily execute a consent agreement, as was done in this case. In those instances, the State is limited to the recovery of administrative costs. (See § 17-1.58(2) of Florida's Administrative Code.)

In its motion to re-open and reconsider, the Agency provided several policy statements of the Agency as well as documents showing that the State of Florida could have sought civil penalties of up to $50,000.00 per day for violations of its laws and regulations. The Court has no reason to doubt the

accuracy of the statement concerning what the State had the authority to do. Three of the policy statements included and upon which the Agency heavily relies ante-date the issuance of the Agency's Complaint and, in my judgement, carry little or no weight in justifying its prior issuance of the Complaint.

As pointed out in my Initial Decision, MEI had for several years prior to the bringing of the Complaint by EPA, been dealing exclusively with the State of Florida, a situation clearly mandated by the authority that EPA had previously delegated to the State. At no time prior to the issuance of the Complaint did MEI have any inkling of EPA's interest in the case. In fact, the groundwater monitoring system about which EPA complains had been installed by MEI prior to EPA's joint state inspection and was fully operational shortly thereafter. Additionally, EPA knew that the State was entering into a consent agreement with MEI shortly prior to its execution and dictated certain of its terms as a condition of EPA's approval thereof. It should be noted that legally no EPA approval was required, but the State wanted to be sure that the Federal Agency had no objections to its terms prior to execution. An action clearly in harmony with the intent of the Act and the sought-for notion of Federalstate cooperation in enforcing RCRA. This philosophy was highlighted by the Administrator in his ruling on the petition for reconsideration, supra. As I read his decision, the need to protect and preserve this spirit of cooperation formed the primary impetus for his ultimate and unusual decision. On page 3 of his decision the Administrator stated that:

> "In particular, the absence of state representatives from this forum is troubling, for their views are obviously important, if not crucial, in a state/federal system in which the overwhelming majority of enforcement actions are to be initiated by the states."

We must now judge the appropriateness of Florida's action in the context of the Administrator's express position and the specific facts of this case.

It is true that under its laws and regulations, the State of Florida had several options as to how it could proceed against MEI. It could have brought an action in Court to compel MEI to install the groundwater monitoring system and sought a substantial penalty. In view of the cost and time involved in that choice and given that its primary concern was to get the system installed and operating, it chose to use the administrative process, with its concomitant inability to obtain a large civil penalty. This choice on the part of Florida was apparently a wise one. Seeing that the State wished only to seek compliance and was not concerned with levying a large fine, a consent agreement was quickly consummated. MEI immediately installed the system. The record does not reveal that EPA, at any time during these negotiations, advised the State of Florida that it did not consider its course of action appropriate. Actually, its actions certainly implied that it agreed with what the state was doing. The Agency obviously never told MEI that it was considering bringing its own enforcement action for the same violation.

As discussed in my Initial Decision, EPA pursuant to Federal law, advised the State of Florida that it was going to bring the instant action. This occured subsequent to the execution of the consent order between Florida and MEI. Unlike the situation which the Administrator found to be so crucial in the BKK case, i.e., the lack of State input, in this case the State of Florida expressed its disagreement with EPA's proposed action in letters to the Agency. In fact, it specifically sought an opportunity to discuss the matter with EPA prior to the bringing of the Federal action, thus providing the "debate" forum which the Administrator ruled is so vitally important. The Agency chose to rebuff this overture and proceed with its action.

My understanding of the Agency's concern with the original BKK decision was that they did not object to the "policy" result thereof, i.e., that EPA

should stay its hand in the face of reasonable and appropriate enforcement action by an authorized state, but it did oppose a reading of RCRA that would make that policy mandatory as a matter of law. Just why the EPA wants to retain the authority to take duplicative action in the face of reasonable and appropriate enforcement by an authorized state is a mystery to me, especially in light of the importance which the Administrator expressly places on maintaining cordial state-Federal relationships.

In any event, while the Administrator has ruled that the Judicial Officer's decision is to have no precedential effect, one is not precluded from understanding the logic inherent therein and independently adopting it as one's own. As the Administrator points out in his opinion, ultimately the position of one of the parties to this controversy may ultimately prevail. The mechanism for this resolution which the Administrator envisions is not described, but one would assume that it must certainly involve input form the several sovereign states, the credibility of whose RCRA programs is clearly at stake. In this case, we have already heard from the involved State. They did not like it.

The ruling in my Initial Decision was based to a large extent on the language of the Agency's own policy statements, rather than that of the statute. I have seen nothing in the exhibits proffered by the Agency which would cause me to alter my conclusion that, in this case, the State's actions were both timely and appropriate. Obviously, the amount of the penalty is not as high as that sought by EPA. However, Florida apparently weighed the benefits of obtaining prompt resolution of the environmental problems which existed against the benefit of seeking a large money judgement, which a Court may not have given them in any case. Congress envisioned that those closest to the problem should have the right to weight its options and choose that

course of action most likely to result in the desired goal. There is nothing in this record to suggest that the State of Florida "caved in" on an important environmental issue to a recalcitrant and consistent violator. In fact, the record shows the opposite.

Obviously, the enforcement strategy adopted by one segment of government will not always be identical to that which another may choose. That does not mean that one is right and the other is wrong; it merely says that there is usually more than one viable approach to solving a problem.

If the Agency wishes to retain the unfettered authority to bring enforcement actions in the face of reasonable and appropriate state action, it should clearly say so in its policy document and regulations. So far it has not done so and I doubt that it ever will. It knows the reception such an action would produce among the states.

Reasonable men can always disagree on whether or not a particular state's action is timely and appropriate. This fact should provide the Agency with enough flexibility in which to exercise its prosecutorial discretion in such a way as not to foreclose any sensible options. It occurs to me that if this issue should arise in the future, a more reasonable approach would be for the EPA and the state to discuss, in advance, the appropriateness of the state's proposed enforcement strategy and if EPA's concerns are not adequately addressed, it should inform the state that it intends to pursue its own enforcement action. Then, at least, every one knows the ground rules up-front rather than the EPA unilaterally second-guessing the efficacy of the state's action, after the fact.

CONCLUSION

For the reasons expressed herein and in my Initial Decision, the Agency's motion for reconsideration is denied.

DATED: January 14, 1986

Thomas B. Yost
Administrative Law Judge

CERTIFICATION OF SERVICE

I hereby certify that the original of the foregoing Decision on Motion to Reconsider along with the original of all documents filed in this matter were served on the Hearing Clerk (A-110), U.S. Environmental Protection Agency, 401 "M" Street, S.W., Washington, D.C. 20460 (service by certified mail return receipt requested); and that true and correct copies were served on: Jeffrey F. Peck, Esquire, Martin Electronics, Inc., 5721 Dragon Way, Cincinnati, Ohio 45227; and Martin S. Seltzer, Esquire, Porter, Wright, Morris & Arthur, 37 West Broad Street, Columbus, Ohio 43215 (service by certified mail return receipt requested); and Craig Campbell, Esquire, U.S. Environmental Protection Agency, Region IV, 345 Courtland Street, Atlanta, Georgia 30365 (service by hand-delivery).

Dated in Atlanta, Georgia this 15th day of January 1986.

Sandra A. Beck
Legal Assistant to Judge Yost