UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Brenntag Great Lakes LLC,	)	
(f/k/a MILSOLV Minnesota Corporation)	)	**Docket No. RCRA-05-2002-0001**
	)	
Respondent	)	

ORDER ON CROSS-MOTIONS FOR ACCELERATED DECISION

Background

On December 31, 2001, the United States Environmental Protection Agency ("EPA") filed a complaint against MILSOLV Minnesota Corporation, now known as Brenntag Great Lakes LLC, ("Brenntag"), under Section 3008 of the Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6928. The Complaint alleges that EPA has authorized the State of Minnesota "to administer a hazardous waste program in lieu of the Federal government's base RCRA program." The sole count of the Complaint alleges that Respondent failed to obtain a hazardous waste facility permit prior to the storage and treatment of hazardous waste and thus violated Minnesota Regulation § 7001.0520, Subpart 1, Item A. Compl. at ¶¶ 10, 13, 15, 36. The purported waste at issue is isopropanol, which EPA alleges is a hazardous waste due to its ignitability characteristic. EPA seeks a civil penalty in the amount of $358,678, as well as a compliance order in accordance with Minnesota's hazardous waste regulations.

Brenntag challenges EPA's authority to bring a complaint enforcing the Minnesota regulations, arguing that the Agency lacks subject-matter jurisdiction. Brenntag also raises a "useful product" defense, challenging EPA's designation of the isopropanol material in question as a hazardous waste. In the alternative, Brenntag argues that even if the material is hazardous waste, there is no violation because it falls under the Minnesota regulations' exclusion for by-products of hazardous waste.

Both parties have now brought motions for accelerated decision, *i.e.* summary judgment, pursuant to 40 C.F.R. 22.20(a). For the reasons set forth below, Brenntag's jurisdictional argument is rejected and both motions for accelerated decision are *denied.*

Discussion

I. EPA's Authority to Enforce the Minnesota Regulations

RCRA sets forth a "cradle to grave" system for management of waste. *United States v. Marine Shale Processors,* 81 F.3d 1361, 1367 (5th Cir. 1996). Subchapter III of RCRA establishes minimum national standards for managing hazardous waste, but state governments may create a more stringent program. RCRA § 3009, 42 U.S.C. § 6929. In that regard, a state may carry out its own hazardous waste program "in lieu of" the Federal program, if EPA approves the state program. RCRA § 3006(b), 42 U.S.C. § 6926(b). Furthermore, RCRA provides that EPA shall approve a state program *unless*: (1) it is not equivalent to the Federal program, (2) it is not consistent with either the Federal or state programs applicable in other states, or (3) it does not provide adequate enforcement of compliance. *Id.*

The first part of Brenntag's motion for accelerated decision raises the issue of subject-matter jurisdiction. Respondent submits that the United States Environmental Protection Agency does not have the authority to enforce the State of Minnesota's hazardous waste regulations. In other words, Brenntag argues that RCRA does not authorize EPA to enforce state law. As noted earlier, Brenntag's jurisdictional argument is rejected.

Briefly, the jurisdictional argument advanced by Brenntag arises in the following context. EPA promulgated a regulation pursuant to Section 3006 of RCRA authorizing Minnesota to carry out a RCRA-compliant hazardous waste program. 40 C.F.R. § 272.1201. There is no dispute that Minnesota authorities thereafter requested EPA to enforce these Minnesota regulations.[1] Accordingly, EPA filed the Complaint against Respondent pursuant to Section 3008, subchapter III, of RCRA, 42 U.S.C. § 6928, alleging that respondent violated Minnesota regulations by storing isopropanol, a hazardous waste, without having obtained the appropriate state permit.

Section 3008 states that EPA may seek a civil penalty and compliance order for violation of "any requirement under this subchapter." It is the meaning of the phrase "any requirement under this subchapter," appearing in Section 3008, which is the center of the dispute. Brenntag contends that the phrase means that EPA may only enforce violations of the Federal hazardous waste

---

[1] Notably, the affidavit of Brenntag employee Kim Kuck, which was added by Respondent, states that Minnesota referred this case to EPA for enforcement.

> Ultimately, instead of proceeding, itself, with an enforcement action against Milsolv, MPCA [Minnesota Pollution Control Agency] referred this matter to USEPA Region 5 for enforcement, and in December 2001, USEPA filed an administrative complaint against Milsolv alleging that Milsolv had violated one hazardous waste regulation, the same Minnesota regulation cited by MPCA in its November 1999 Notice of Violation.

Affidavit of Kim S. Kuck, at ¶28, as App. III to Resp. Motion for Accelerated Decision.

provisions set forth in subchapter III of RCRA and the Federal regulations promulgated thereunder. EPA contends that pursuant to Section 3006 of RCRA, 42 U.S.C. § 6926, it has the authority to enforce state hazardous waste programs that are Federally-approved.

To resolve this dispute, we turn to the language of the Resource Conservation and Recovery Act, specifically Sections 3006 and 3008. Both sections are contained within subchapter III of RCRA, titled, "Hazardous Waste Management." Section 3006 sets forth the procedures by which EPA may authorize a state hazardous waste program "in lieu of" the Federal program. 42 U.S.C. § 6926(a). It also creates procedures for the withdrawal of that approval, but only after EPA first notifies the State and makes public, in writing, the reasons for withdrawal, and conducts a public hearing. 42 U.S.C. § 6926(e). Section 3008 grants EPA the authority to enforce violations of "any requirement of this subchapter." 42 U.S.C. § 6928(a). In particular, Section 3008 allows EPA to issue an order assessing a civil penalty whenever it "determines that any person has violated or is in violation of any requirement of this subchapter." 42 U.S.C. § 6928(a)(1).

As noted, pursuant to regulation, EPA has authorized the State of Minnesota to enact a RCRA hazardous waste program in lieu of the Federal program. The answer to whether EPA can enforce these state regulations lies in the language of Section 3008(a)(2). That section provides:

> In the case of a violation of any requirement of this subchapter where such violation occurs in a State which is authorized to carry out a hazardous waste program under section 6926 of this title, the Administrator shall give notice to the State in which such violation has occurred prior to issuing an order or commencing a civil action under this section.

42 U.S.C. § 6928(a)(2).

The provisions of Section 3008(a)(2) are quite clear. They provide that when a State, like Minnesota, enacts its own hazardous waste program which is approved by EPA, the Federal government must give the State notice before taking enforcement action. A fair reading of these statutory provisions is that such Federal enforcement action is based upon a particular state's hazardous waste regulations which, by law, take the place of the Federal hazardous waste regulations.

This statutory scheme makes perfect sense. This is not a situation where the Federal government happens upon certain state hazardous waste regulations that it likes and decides that a party not in compliance with these appealing state regulations should be prosecuted. That is the headline by which Brenntag seeks to explain this case: "Federal government enforces state law." The fact of the matter is that in this particular case, EPA is enforcing the provisions of the Resource Conservation and Recovery Act. It just so happens that the subchapter III provisions dealing with hazardous waste were adopted by the State of Minnesota. These provisions were accepted by EPA to take the place of the Federally-adopted provisions because, at a minimum, they provide the same

level of protection to the environment and to human health. In sum, what EPA is enforcing in this case are RCRA provisions.

In addition, the provisions of Section 3008(a)(3) lend further support to the proposition that EPA has subject-matter jurisdiction to maintain the present action. In that regard, Section 3008(a)(3) in part provides:

> Any order issued pursuant to this subsection may include a suspension or revocation of any permit issued by the Administrator *or a State under this subchapter* and shall state with reasonable specificity the nature of the violation. Any penalty assessed in the order shall not exceed $25,000 per day of noncompliance of each violation of a requirement of this subchapter."

42 U.S.C. § 6928(a)(3) (*emphasis added*).

Section 3008(a)(3) shows that what Congress had in mind was that the Federal government would have the authority under RCRA to seek civil sanctions for a violation of "State" hazardous waste regulations issued under subchapter III. Thus, the provisions of Sections 3008(a)(2) and 3008(a) (3) fit neatly together and provide EPA with the statutory authority to enforce the Minnesota regulations at issue in this case.

This reading of the statute has been reached by several courts. For example, in *Marine Shale Processors,* 81 F.3d 1361 (5th Cir. 1996), the Fifth Circuit commented:

> RCRA expressly allowed states to impose regulations more stringent than those outlined in the federal floor. 42 U.S.C. § 6929. 42 U.S.C. § 6928(a) [RCRA § 3008(a)] gave EPA the power to enforce the substance of an approved state's program against private parties in that state.

81 F.3d at 1367. In addition, the case of *United States v. T & S Brass & Bronze Works, Inc.* upheld the authority of EPA to enforce state programs.

> The South Carolina financial responsibility regulations became effective in July, 1983. Under RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2), these regulations may be enforced by the Federal government as well as the state. *United States v. Conservation Chemical Co. of Illinois*, 660 F. Supp. 1236, 1244-45 (N.D. Ind. 1987).

681 F. Supp. 314, 317 n.3. (D.S.C. 1988). Moreover, in *CID-Chemical Waste Management of Illinois, Inc.,* 2 E.A.D. 613 (CJO 1988), the EPA's Chief Judicial Officer ("CJO") offered an

analysis of the statutory language and design of RCRA, as well as the legislative history, and reached the conclusion that EPA has the authority to enforce Federally-approved state programs.[2]

The holding in the Eighth Circuit's *Harmon* case, cited by Respondent, does not command a contrary interpretation to the above analysis. *See Harmon Indus., Inc. v. Browner,* 191 F.3d 894 (8th Cir. 1999). *Harmon* concerned an "overfiling" situation in which the Federal government imposed a final civil penalty order against a violator in contradiction to an earlier settlement the violator had reached with state authorities. *Id.* at 897-98. In holding that the plain language of RCRA prohibited EPA from bringing its subsequent enforcement action, *Harmon* relied, *inter alia,* on RCRA's commandment that any action taken by a state under an authorized program "shall have the same force and effect" as an action taken by EPA. *Id.* at 899-900, *quoting,* RCRA § 3006(d), 42 U.S.C. § 6926(d). Accordingly, EPA could not reverse the state's decision to not impose a civil penalty on the violator.

Harmon is distinguishable from the case at hand. Unlike *Harmon,* this case does not involve "overfiling" of competing enforcement actions. It was in that situation *Harmon* concluded, that when separate sovereigns institute two separate enforcement actions, those actions can cause "vastly different and potentially contradictory results." *Id.* at 902. In the case at bar, EPA is not attempting to contradict the actions of the state. Instead, it is undisputed that the state *asked* the Federal government to enforce this case and gave them the materials to prosecute the case. Affidavit of Kim S. Kuck, at ¶28. Furthermore, there is no assertion that the state has reached a prior settlement agreement with respondent as to the same incident of violation alleged in the complaint. Trying to show that RCRA only authorized EPA to enforce the requirements expressly listed in RCRA, Respondent relies on the following quote in *Harmon*: "Section 6928(a)(2) [RCRA § 3008(a)(2)] permits the EPA to enforce the hazardous waste laws contained *in the RCRA* if the agency gives written notice to the state." *Id.* at 899 (*emphasis added*). That quote, however, does not provide clear support for Respondent's interpretation of the statute. Accordingly, *Harmon* does not control the present case.

Nevertheless, Respondent contends that "requirements under this subchapter" solely refers to requirements set by the Federal program, as opposed to the state program. For instance, Section 3006 uses phrases such as "Federal program under this subchapter" and "action taken by the [EPA] Administrator under this subchapter" when discussing the Federal program, but that section does not use the phrase "under this subchapter" when discussing the state programs. *See* 42 U.S.C. § 6926(b), (c), (d). Elsewhere, Section 3006 refers to state programs as being administered or enforced "in accordance with requirements of this section" rather than in accordance with the requirements of the subchapter. 42 U.S.C. § 6926(e). Despite this, the undersigned believes that

---

[2] The Environmental Appeals Board has followed the CJO's decision in *CID-Chemical Waste Management*: *e.g., In re Bil-Dry Corp.,* 2001 EPA App. LEXIS 1, *supra,* at *6 n.2; *In re Rybond, Inc.,* 6 E.A.D. 614, 616 n.1 (EAB 1996).

the most accurate reading of the statute provides EPA with authority to enforce the Federally-approved state program rather than requiring it to rely solely on Federal regulations.[3]

As a final point, the Court addresses the case of *United States Department of Energy v. Ohio,* which Respondent construes as preventing EPA from enforcing state law. 503 U.S. 607 (1992). The *Ohio* case concerned whether the Federal government had waived its sovereign immunity from punitive fines brought under state law programs that had supplanted Federal law. It held that the waiver of sovereign immunity in Section 6001 of RCRA did not explicitly waive immunity from punitive fines, under the specialized rules of interpretation governing sovereign immunity waivers. *Id.* at 627-68. The state in that case had also argued that the waiver "of penalties arising under Federal law" was meant to include a waiver of penalties prescribed by state statutes approved by EPA and supplanting the Clean Water Act. *Id.* at 624-25. The Supreme Court held that the plain language of the phrase "arising under Federal law" did not include state law. *Id.* at 625. In contrast to *Ohio,* Section 3008 of RCRA, which authorizes Federal enforcement of "any requirement of this subchapter" does not use the term "arising under Federal law" nor is it a waiver of sovereign immunity. Accordingly, the *Ohio* case is not on point.[4]

II. Accelerated Decision Is Not Appropriate

The sole count of the Complaint charges Respondent with failure to obtain a hazardous waste facility permit, prior to the storage and treatment of hazardous waste, in violation of Minnesota Regulation 7001.0520, Subp. 1, Item A. This count alleges that, under Minnesota Regulation 7045.1025, the isopropanol at Respondent's facility is a solid waste that exhibits the characteristic of ignitability, has the U.S. EPA hazardous waste number D001, and is subject to further regulation under Minnesota Regulations 7001 and 7045 *et seq.* It continues that, under Minnesota Regulation 7001.0520, Subp. 1, Item A, no person may treat, store, or dispose of hazardous waste without obtaining a hazardous waste facility permit. It further alleges that the isopropanol is not a by-product, but a spent material that has been used and as a result of being used has become contaminated by physical or chemical impurities and can no longer serve the purpose for which it was produced. Compl. at ¶ 39. Elsewhere in the Complaint, EPA alleges that the isopropanol is

---

[3] As the Court has engaged in an independent interpretation of the statute, rather than merely deferring to Complainant's interpretation, it is not necessary to address whether the *Chevron* doctrine of deference to EPA's interpretations is applicable.

[4] As a final matter regarding jurisdiction, RCRA instructs EPA to "give notice" to a state before issuing an order or commencing a civil action, when the state still has a Federally-authorized program in place. RCRA § 3008(a)(2), 42 U.S.C. § 6928(a)(2). In the case at bar, requiring EPA to give some sort of official notice to the state would be a pointless exercise, as it was the state who asked EPA to enforce the case. *See* Affidavit of Kim S. Kuck, at ¶28, as App. III to "Respondent's Motion for Accelerated Decision . . . and . . . Response to Complainant's Motion for Accelerated Decision." Obviously, state authorities already knew that EPA would be bringing the enforcement action in their state.

"waste" as defined in the Minnesota regulations, as well as the Federal regulations. Compl. at ¶¶ 10, 13, 15.

Brenntag raises several defenses to liability. The first of its defenses is that the isopropanol in question is not a waste because it is a "useful product." Ans. at ¶ 26, and at 6-8. In the alternative, Brenntag argues that even if the isopropanol in question constitutes a hazardous waste, it is expressly excluded from regulation as a by-product of a hazardous waste that is being reclaimed. *Id.* at 7-8. These propositions form the basis for Brenntag's motion for accelerated decision. EPA's basis for accelerated decision is that the isopropanol material is hazardous waste because it is spent material.

While both parties claim that they are entitled to accelerated decision, "Summary judgment is inappropriate when contradictory inferences may be drawn from the evidence." *Rodgers Corp. v. Environmental Protection Agency,* 275 F.3d 1096, 1103 (D.C. Cir. 2002). Furthermore, a "movant is entitled to an accelerated decision only if it presents 'evidence that is so strong and persuasive that no reasonable [factfinder] is free to disregard it.'" *Id., quoting, In re BWX Tech., Inc.,* RCRA (3008) Appeal No. 97-5, 2000 EPA App. LEXIS 13, at *38-39 (EAB, Apr. 5, 2000), 9 E.A.D. ___.

A. Whether the Material Is "Waste"

Against the above standard for accelerated decision, we first address the issue as to the usefulness of a product. In the RCRA case, *Environmental Waste Control, Inc.,* the Environmental Appeals Board ("EAB") examined whether used oil was a "useful product" within the context of analyzing the exemption from waste for "materials . . . shown to be recycled by being . . . [u]sed or reused as ingredients in an industrial process to make a product, provided the materials are not being reclaimed . . . ." 5 E.A.D. 264, 279-80 (EAB 1994), *analyzing,* 40 C.F.R. § 261.2(e). Ultimately, the matter was decided based on the provisions in the applicable regulation in that case. Consistent with that, this Court turns to the regulations at issue in this case.

In that regard, EPA contends that the isopropanol material at issue is "spent material," and accordingly it is "waste" under Minnesota law. Compl. at ¶ 39. The State of Minnesota defines "hazardous waste" as "any refuse, sludge, or *other waste materials* in solid, semisolid, liquid or contained gaseous form . . . ." Minn. Stat. 116.06, Subd. 11 (*emphasis added*). It defines "other waste material" as:

> any solid, liquid, semisolid, or gaseous material, resulting from industrial, commercial, mining, or agricultural operations, or from community operations, and which
>
> A. is discarded or is being accumulated, stored, or physically, chemically or biologically treated prior to being discarded; or
>
> B. is recycled or is accumulated, stored or treated prior to being recycled; or
>
> C. is a *spent material or by-product*.

Minn. R. 7045.0020, Subp. 63 (*emphasis added*). "Spent material" is:

> material that has been used and as a result of contamination can no longer serve the purpose for which it was produced without processing.

Minn. Rule 7045.0020, Subp. 84b. The Federal regulations have an identical definition for "spent material." *See* 40 C.F.R. § 261.1(c)(1).

For reasons that follow, there is a dispute of material fact as to whether the isopropanol material is "spent material" and thus hazardous waste. The parties present a complex and contradictory portrayal of the creation of the isopropanol material. For instance, the affidavits submitted by EPA characterize the material as "waste." Aff. of Sharrow; Aff. of Karnowski. The Karnowski affidavit states that the "Isopropanol waste" was contaminated at the 3M facility during the production of an intermediate product of inert glass fibers. Aff. of Karnowski, at ¶ 9. It describes the 3M production line as using water to wash glass fibers and remove a starch binder and then rinsing the glass fibers with isopropanol, to remove the fibers, water "and other contaminants." *Id.* The Sharrow affidavit describes the material as "spent material" in light of the following procedure: the aqueous isopropanol is used to remove water from inert glass fibers; the glass fibers are washed with water in a tank a couple of times to remove starch binder; then, the water is drained; next, the isopropanol is added to remove residual water caught in the glass fibers; finally, the aqueous isopropanol is then pumped out and a second isopropanol rinse is performed. Aff. of Sharrow, at ¶¶ 17-18.

In contrast, Brenntag describes the creation of the isopropanol material as merely adding ingredients to make a useful "product" instead of adding contaminants. The Schulze affidavit states that there were no glass fibers in the isopropyl alcohol "product" (*i.e.,* "IPA product") because 3M pumped the aqueous isopropanol through a filter as it was being removed and separately produced in the manufacturing process. Aff. of Schulze, at ¶ 3. It emphasizes that the companies involved in creating the "IPA product" never found anything in that "product" other than approximately 80% isopropyl alcohol and 20% water. Aff. of Schulze, at ¶ 3 and Ex. 1; Aff. of Patton, at ¶ 10 and Ex. 7; Aff. of Kuck, at ¶¶ 8, 12, 15-16.

From the above conflicting descriptions, this case has disputed material facts, as well as mixed issues of fact and law, on the core issue here as to whether the isopropanol is hazardous waste.

B. The By-Product Defense

Next is Brenntag's alternative defense, that even if the material is hazardous waste, Minnesota law exempts "by-products" from permit requirements. Brenntag argues that the material is a "by-product" that is hazardous only because it exhibits a characteristic hazardous waste that is being reclaimed. As such, Brenntag contends that it was expressly excluded from the requirement to obtain a hazardous waste facility permit before it processed the aqueous isopropanol. Respondent

cites to Minnesota Rule 7001.0520, Subp. 2, item G (1999) and Minnesota Rule 7045.0125, Subp. 6, item A (1999).

Regarding the by-product defense, Minnesota defines "by-product" as

> a material that is *not one of the primary products of a production process and is not solely or separately produced by the production process.* Examples are process residues such as slags or distillation column bottoms."

Minn. R. 7045.0020, Subp. 6b (*emphasis added*). Kim Kuck, the former Operations Manager for MILSOLV (now Brenntag), states that MILSOLV, with the advice of an environmental consulting firm, concluded that the material was a by-product. Aff. of Kuck, at ¶ 29, *citing to,* Resp. Ex. 16. In contradiction, Diane Sharrow, who is an environmental scientist and a Senior RCRA Inspector with EPA, signed an affidavit stating that the "isopropanol waste" is not a "by-product," based on responses to information requests that the material could no longer serve the purpose for which it was produced. Aff. of Sharrow, at ¶ 8. *Accord* Aff. of Karnowski, at ¶ 12, and attached Ex. D (May 27, 2000 letter from 3M, addressed to Sharrow). Therefore, there is also a dispute of material fact as to Respondent's by-product defense.

The cross-motions for accelerated decision and the parties' supporting arguments underscore the critical need for the development of the record in this case. Accordingly, the motions for accelerated decision filed by EPA and by Brenntag are **DENIED.**

_____
Carl C. Charneski
Administrative Law Judge

Issued: December 19, 2002
Washington, D.C.