IN RE HARDIN COUNTY, OHIO

RCRA (3008) Appeal No. 93-1

FINAL DECISION AND ORDER

Decided April 12, 1994

Syllabus

U.S. EPA Region V appeals from an order denying the Region leave to amend a complaint to charge Hardin County, Ohio, with violations of State and Federal hazardous waste regulations promulgated under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928. The proposed amended complaint avers that Hardin County disposed of wastewater treatment sludges containing hazardous waste in 1983-1987 without a RCRA permit or interim status. The sludges were deemed hazardous waste by virtue of the identical State and federal RCRA "mixture rules," which provide that certain mixtures of hazardous and non-hazardous waste must be managed as hazardous waste.

This is the second appeal in this case. Region V previously appealed an order dismissing the original complaint, which alleged only violations based on the federal mixture rule. The Presiding Officer dismissed the original complaint in light of the invalidation of the federal mixture rule in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). In doing so, the Presiding Officer held that the D.C. Circuit declared the mixture rule void *ab initio*, rejecting the Region's argument that invalidation applied only prospectively. On appeal, the Board concluded that the status of the federal mixture rule might not be determinative, because if disposal occurred during the time the State of Ohio was authorized to administer its RCRA program, only the State mixture rule was applicable. Because the record was unclear as to precisely when the disposal occurred, the Board remanded the case for determination of the dates of disposal. *Hardin County, OH*, RCRA (3008) Appeal No. 92-1 (EAB, Nov. 6, 1992).

On remand, the parties stipulated that disposal occurred during periods when Ohio was authorized to administer its RCRA program, and during periods when Ohio was not authorized. The Region moved to amend the complaint to add allegations based on the State mixture rule. The Presiding Officer denied the amendment as futile, affirming his initial order, and concluding that under applicable regulations and Agency guidance, the State mixture rule could not be enforced by the Region.

Held: The decision of the Presiding Officer is affirmed. First, the Board concludes that the D.C. Circuit in *Shell Oil* intended for invalidation of the federal mixture rule to apply *ab initio*. Thus, there was no federal mixture rule in effect during the time Hardin County allegedly disposed of hazardous waste. Second, the Board concludes that the State mixture rule is unenforceable by the Region, because under Agency enforcement guidance the State rule is "broader in scope" than the federal RCRA program without a mixture rule, and thus exceeds the scope of EPA's enforcement authority. Accordingly, the Region's complaint must be dismissed with prejudice.

Before Environmental Appeals Judges Nancy B. Firestone, Ronald L. McCallum, and Edward E. Reich.

PER CURIAM:

I. *INTRODUCTION*

U.S. EPA Region V appeals from an order of the Presiding Officer denying Region V's motion to amend a complaint charging Hardin County with illegally disposing of hazardous waste without a permit or interim status under § 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928. The case was before the Presiding Officer on remand by the Board following the Region's appeal from the Presiding Officer's initial order dismissing the complaint. *In re Hardin County, Ohio*, RCRA (3008) Appeal No. 92-1 (EAB, Nov. 6, 1992) (Remand Order). On remand, Region V sought leave to amend the complaint to allege violations of Ohio hazardous waste regulations. The Presiding Officer denied the proposed amendment as futile, because he found that the Agency lacks the authority to enforce the Ohio regulation at issue. In addition, the Presiding Officer affirmed his initial order dismissing the complaint because the federal regulation upon which the original allegations were based was invalidated by the U.S. Court of Appeals for the D.C. Circuit in *Shell Oil Co. v. EPA*, 950 F.2d 741 (D.C. Cir. 1991). For the reasons explained below, the decision of the Presiding Officer is affirmed.

II. *BACKGROUND*

A. *The Initial Appeal*

The facts underlying Region V's complaint and the procedural background of this case are set forth in the Board's Remand Order. Briefly, in June 1989 Region V filed a complaint alleging that Hardin County accepted certain wastewater treatment sludges from Occidental Chemical Corporation for disposal in Hardin County's Kenton, Ohio, landfill from November 1983 until August 1987. Region V alleged that the sludges contained hazardous wastes listed in Subpart D of 40 C.F.R. Part 261 (Identification and Listing of Hazardous Waste), and that the sludges therefore constituted RCRA regulated hazardous waste by virtue of the "mixture rule" found at 40 C.F.R. § 261.3(a)(2).[1] The mixture rule is part of the

[1] The listed hazardous wastes alleged to be part of the sludge mixture were U188 (phenol), F003 (spent acetone solvent), and U122 (formaldehyde). These wastes allegedly became part of Occidental's wastewater sludge after being discharged into Occidental's wastewater treatment facility. The Presiding Officer ruled in January 1991 that the formaldehyde discharges were within the de minimis losses exception to the mixture rule, 40 C.F.R. § 261.3(a)(2)(iv)(D). *Order Denying Motion for Leave to File Amended Complaint*, at 2 n.1 (May 27, 1993).

regulatory definition of hazardous waste, set forth as follows:

> § 261.3 Definition of hazardous waste.
>
> (a) *A solid waste, as defined in § 261.2, is a hazardous waste if*:
>
> (1) It is not excluded from regulation as a hazardous waste under § 261.4(b); and
>
> (2) It meets any of the following criteria:
>
> (i) It is listed in Subpart D and has not been excluded from the lists in Subpart D under §§ 260.20 and 260.22 of this Chapter.
>
> (ii) *It is a mixture of solid waste and one or more hazardous wastes listed in Subpart D and has not been excluded from this paragraph under §§ 260.20 and 260.22 of this Chapter.*
>
> (iii) It exhibits any of the characteristics of hazardous waste identified in Subpart C.

40 C.F.R. § 261.3(a) (emphasis added).[2] As can be seen from this language, there are three basic components to the definition of hazardous waste: so-called listed waste, characteristic waste, and certain waste mixtures. Under the mixture rule, if non-hazardous solid waste is combined with one or more hazardous wastes listed in Subpart D of the regulations, the entirety of the resulting waste mixture is regulated as hazardous waste. *Id.* The original complaint alleged only violations of the federal RCRA regulations.

Subsequent to the evidentiary hearing on the original complaint, but before the Presiding Officer issued an initial decision, the D.C. Circuit declared the federal mixture rule invalid in *Shell Oil Co. v. EPA*, 950 F.2d 741. The court held that the Agency had failed to give fair notice of the adoption of the mixture rule, stating that "the mixture

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[2] Unless otherwise specifically noted, the original version of 40 C.F.R. § 261.3, promulgated at 45 Fed. Reg. 33,119-33,120 (May 19, 1980), will be used and quoted throughout this decision, since it is considerably shorter than the current version, making it easier to read, and the subsequent additions and changes that have been made to it are not material to this case. The reader is nevertheless alerted to the fact that the location of the mixture rule is slightly different in the two versions, with the original version appearing at § 261.3(a)(2)(ii) and the current version appearing at § 261.3(a)(2)(iv).

rule was neither implicit in nor a `logical outgrowth' of the proposed regulations." *Id.* at 752. It therefore "set aside," "vacate[d]," and "remanded" the rule to the Agency, with the suggestion that the Agency might wish to reenact the rule on an interim basis under the "good cause" exemption of the Administrative Procedure Act, 5 U.S.C. § 553(b)(3)(B). *Id.*[3]

In light of the *Shell Oil* decision, the Presiding Officer ordered the parties to show cause why the complaint should not be dismissed because it was premised on an invalid federal regulation. In response to the show cause order, Region V argued that the D.C. Circuit's invalidation of the mixture rule was intended to have only prospective effect, and did not affect enforcement actions based on alleged violations involving the mixture rule that occurred prior to the *Shell Oil* decision. The Presiding Officer rejected the Region's argument, concluding that *Shell Oil* rendered the federal mixture rule void *ab initio*, and therefore the mixture rule could not provide a basis for liability during the period of disposal at issue. Region V appealed the dismissal to the Environmental Appeals Board.

On appeal, Region V again contended that the D.C. Circuit's invalidation of the mixture rule was intended to apply prospectively only, and therefore the complaint could not be dismissed on the basis of the *Shell Oil* decision. Following briefing and oral argument, the Board issued its Remand Order. Based on the record before the Board, it appeared to the Board that some or all of the violations charged in the complaint occurred during a period when Ohio had interim authorization to administer its hazardous waste program.[4] Remand Order at 5. For violations occurring during the period of State authorization, only the Ohio hazardous waste regulations could have been relied upon as a basis for Hardin County's liability. *Id.* at 4-5. The Board concluded that it was not appropriate to address *Shell Oil* on the basis of the record then before it, because *Shell Oil* might not be determinative if the federal mixture rule was not implicated in the case. *Id.* at 6. Thus, the Board remanded the case and directed the Presiding Officer to reopen the record in order to determine the specific dates of the alleged violations. *Id.*

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[3] The Agency repromulgated the mixture and derived-from rules on an interim basis in March 1992. 57 Fed. Reg. 7628 (Mar. 3, 1992).

[4] Ohio had Phase I authorization to administer its hazardous waste program in lieu of the federal program from July 1983 until January 1986, when authorization expired. Authorization was renewed in June 1989.

B. *The Decision on Remand*

On remand, the parties stipulated that most of the shipments of sludge containing phenol and the shipments of sludge containing spent acetone were accepted for disposal by Hardin County during the period when Ohio had interim authorization to administer its hazardous waste program. The parties further stipulated that shipments of sludge containing formaldehyde occurred both during the period when Ohio had interim authorization, and during the period when Ohio was not authorized. *Order Denying Motion to Amend* at 3-4.

Following these stipulations, Region V sought leave to amend its complaint to allege violations of Ohio hazardous waste regulations, as well as federal regulations. The proposed amended complaint was identical to the original complaint, except for the citations to Ohio hazardous waste rules. The parties agreed that the Ohio mixture rule in effect during the period of disposal at issue was identical to the federal mixture rule then in effect. *See* Ohio Admin. Code § 3745-51-03(A)(2)(e).

While acknowledging that amendments to pleadings are ordinarily liberally granted,[5] the Presiding Officer concluded that Region V's proposed amended complaint fell within the "futility" exception to the general rule. As to charges in the complaint that were premised solely on the federal mixture rule (violations during periods when Ohio did not have interim authorization), the Presiding Officer found "no sound reason" not to affirm his initial order dismissing Region V's complaint because *Shell Oil* invalidated the federal mixture rule *ab initio*. *Order Denying Motion to Amend* at 14. As to charges premised on the State RCRA regulations, the Presiding Officer concluded that even if the Ohio mixture rule survived invalidation of the federal rule, the scope of the Ohio mixture rule was such that under applicable federal regulations and Agency guidance the Ohio mixture rule could not be enforced by Region V.

The Presiding Officer observed that RCRA § 3009 authorizes States to impose hazardous waste regulations that are "more stringent" than the federal program,[6] and that "the distinction between state RCRA regulations or requirements which are more stringent than the federal

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[5] *E.g. Foman v. Davis*, 371 U.S. 178 (1962); *In re Asbestos Specialists, Inc.*, TSCA Appeal No. 92-3 (EAB, Oct. 6, 1992); *In re Port of Oakland and Great Lakes Dredge and Dock Co.*, MPRSA Appeal No. 91-1 (EAB, Aug. 5, 1992).

[6] Section 3009 provides, *inter alia*: "Nothing in this chapter shall be construed to prohibit any State or political subdivision thereof from imposing any requirements, including those for site selection, which are more stringent than those imposed by such [federal] regulations."

regulations and * * * state programs having a greater scope of coverage, which are not part of the approved federal program," is based on 40 C.F.R. § 271.1. That regulation provides as follows:

> (i) Except as provided in § 271.4, nothing in this subpart precludes a State from:
>
> (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;
>
> (2) Operating a program with a greater scope of coverage than that required under this subpart. *Where an approved State program has a greater scope of coverage than required by Federal law, the additional coverage is not part of the Federally approved program.*

40 C.F.R. § 271.1(i) (emphasis added).

The Presiding Officer considered Region V's contention that EPA has traditionally interpreted RCRA § 3009 as authorizing the Agency to enforce State hazardous waste regulations that are "more stringent" but not "broader in scope" than the federal rules. For this proposition, the Region relied on 40 C.F.R. § 271.1(i) and two internal Agency guidance documents: a March 15, 1982 memorandum by William A. Sullivan, Jr., entitled "EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulations" (the Sullivan Memo); and a May 21, 1984 memorandum by Lee M. Thomas entitled "Determining Whether State Hazardous Waste Management Requirements are Broader in Scope or More Stringent than the Federal Program" (the Thomas Memo).

The Presiding Officer noted that the Sullivan Memo explains the Agency's position that while State regulations having a greater scope of coverage than the federal program are not part of the federally-approved program and therefore may not be enforced by EPA, State regulations which are simply "more stringent" than their federal program counterparts are part of the federally-approved program and may be enforced by EPA. The Thomas Memo sets forth a two-part test for determining whether State regulations are "broader in scope" than the federal program and therefore unenforceable by EPA: (1) Whether the State requirement increases the size of the regulated community beyond that of the federal program and, if a requirement does *not* increase the size of the regulated community, (2) Whether the State

requirement has a direct counterpart in the federal program. *See* Thomas Memo at 2.

The Presiding Officer concluded that even if the Agency may enforce more stringent State requirements, the Ohio mixture rule was actually "broader in scope" than the federal program because it *both* (1) increased the size of the regulated community, and (2) lacked a direct counterpart in the federal program.

Based on his analysis of the scope of the Ohio mixture rule, and his earlier ruling concerning the retroactive effect of *Shell Oil*, the Presiding Officer concluded that Region V could not prevail on the federal or State law claims alleged in the proposed amended complaint, and denied leave to amend the complaint as futile.

C. *Summary of the Arguments on Appeal*

1. *Region V's Position*

Incorporating the arguments it made in the first appeal, Region V contends that *Shell Oil* operates prospectively only and thus does not bar the Region from pursuing its claims based on violations occurring prior to the D.C. Circuit's invalidation of the federal mixture rule; therefore, Region V argues that the Presiding Officer erred in dismissing its claims based on the federal mixture rule.[7] As to the Ohio mixture rule at issue as a result of the remand, Region V contends that the rule may be enforced by EPA as a "more stringent" requirement of State law. Region V's specific arguments in that regard may be summarized as follows: (1) The logical implication of allowing States to impose requirements that are more stringent than the federal minimum requirements is that the more stringent requirements become part of the federally-approved program and are thus enforceable by the Region. (2) The Ohio mixture rule does not expand the size of the regulated community by including new wastes, for at base the Ohio mixture rule merely addresses the management of waste mixtures that contain a waste component already deemed hazardous by virtue of its federal RCRA listing. The Agency's so-called "continuing jurisdiction" and "contained-in" policies, which survived the federal mixture rule's invalidation, allegedly establish ongoing jurisdiction over listed wastes contained in waste mixtures. In the Region's view, the mixture rule only "clarified" the point at which waste exits RCRA regulation. In essence, the Region contends that selected portions of 40 C.F.R. § 261.3 survived invalidation of the mixture rule in *Shell Oil*, and that those

[7] The arguments presented by the Region in this case are also the views of EPA's Office of Enforcement, which has been substantially involved in this litigation.

provisions have a regulatory effect comparable to an explicit mixture rule. (3) The federal hazardous waste listings, coupled with the "continuing jurisdiction" and "contained-in" rules, provide the direct federal counterpart to the State mixture rule. The Region therefore contends that the Presiding Officer erred in denying leave to amend the complaint, because the proposed amendment would not be futile.

2. *Hardin County's Position*

Hardin County again contends that *Shell Oil* applies retroactively to render the federal mixture rule unenforceable, and that the Presiding Officer therefore did not err in dismissing Region V's federal claims. Hardin County also argues that the Region lacks the authority to enforce the Ohio mixture rule. Hardin County's specific arguments may be summarized as follows: (1) "More stringent" state regulations are not "requirements" of RCRA that are enforceable by the Region, for the Region's concurrent jurisdiction extends only to enforcement of the minimum standards mandated by RCRA. (2) Because *Shell Oil* rendered the mixture rule void *ab initio*, the Ohio mixture rule lacks a federal counterpart. Agency pronouncements to the effect that certain wastes would escape regulation without a mixture rule support this conclusion, and contradict any argument that the Ohio mixture rule has a federal counterpart. (3) The Ohio mixture rule also enlarges the size of the regulated community, because the rule regulates more waste than could be regulated under any federal theory of "continuing jurisdiction."

III. *DISCUSSION*

A. *Invalidation of Mixture Rule*

The Board in its Remand Order declined to address whether the D.C. Circuit's decision in *Shell Oil*, "vacating" the federal mixture rule on procedural grounds, should apply to causes of action arising prior to *Shell Oil*. That issue is now squarely before the Board, both because Region V seeks to reinstate its federal claims for the brief period of time when the federal rule would have applied to the waste disposal at issue, and because the status of the federal rule is critical to determining the enforceability of the State mixture rule.

The Board notes at the outset that every tribunal identified by the Board that has directly considered whether *Shell Oil* invalidated the mixture rule prospectively only, including a U.S. Court of Appeals, has concluded otherwise. *See United States v. Goodner Brothers Aircraft, Inc.*, 966 F.2d 380 (8th Cir. 1992); *see also* Report and Recommendation, *United States v. Recticel Foam Corp.*, CR No. 2-92-78 (E.D. Tenn., Aug. 10, 1993)

(unpublished); *United States v. Marine Shale Processors, Inc.*, No. 90-1240 (E.D. La., Nov. 3, 1993) (unpublished); *In re Amoco Oil Co.*, RCRA No. III-225 (ALJ, Sept. 15, 1993) (Transcript of Rulings on Motions for Accelerated Decision and Motion to Dismiss at 7-8).[8] The Board has not been given any sound basis for rejecting these decisions, and therefore we conclude that the D.C. Circuit in *Shell Oil* intended to void the federal mixture rule *ab initio*, thus rendering the rule of no force and effect during the period of waste disposal at issue in this case.[9] First, we concur with the analysis set forth in *Goodner Brothers* to the effect that "vacate" means to render void:

> We reject the government's interpretation [that *Shell Oil* applies prospectively] because it is inconsistent with the language in *Shell Oil* that specifically pronounces that the rule is "vacated" and "set aside." The District of Columbia Circuit has previously noted in another case that "[t]o `vacate,' as the parties should well know, means `to annul; to cancel or rescind; to declare, to make, or to render, void; to defeat; to deprive of force; to make of no authority or validity; to set aside.'" *Action on Smoking & Health v. C.A.B.*, 713 F.2d 795, 797 (D.C. Cir. 1983) (citations omitted).

Goodner Brothers, 966 F.2d at 385 (footnote omitted).

The Board also takes note of the fact that the D.C. Circuit *summarily* rejected the government's request to "clarify" that *Shell Oil* applied only prospectively. *See Shell Oil Co. v. E.P.A.*, No. 80-1532, *et al.* (D.C. Cir., Mar. 5, 1992) (Order Denying Motion for Clarification). Certainly, if the court agreed with the Region that its decision was being misinterpreted, it could have taken that opportunity to correct any misinterpretation.[10] When com-

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[8] The Agency offered as additional authority on this point an unpublished decision in *United States v. Bethlehem Steel Corp.*, Civil Action No. H90-326 (N.D. Ind., Aug. 30, 1993), but the District Court in that case did not decide whether invalidation of the mixture rule rendered Bethlehem's waste non-hazardous for the offenses charged. The court refers to *Shell Oil* only to discuss the points at which the defendant could legitimately claim knowledge that its wastes were no longer subject to regulation for purposes of mitigating the penalty imposed.

[9] The Board agrees with the Region's contention, made during the initial appeal of this case, that the issue is not whether the D.C. Circuit in *Shell Oil* announced a rule of law that should be applied retroactively, but whether the particular *remedy* ordered by the court was intended to have retroactive effect.

[10] While the Region has asserted that denial of a motion for clarification is analogous to a denial of a petition for certiorari by the U.S. Supreme Court and thus is to be given no substantive weight, it has cited no support for this contention. Complainant's Brief at 9, n.7 (Aug. 3, 1992).

bined with the language of *Shell Oil*, which contradicts the Region's position, it is fair to say that the court's refusal to clarify was scarcely meant to lend any support to the Region's theory that the remedy announced by the court applied prospectively only.

The Board believes that the foregoing facts and circumstances suggest unmistakably that the D.C. Circuit intended in *Shell Oil* to void the federal mixture rule *ab initio*. Thus, the Presiding Officer did not err in dismissing the complaint to the extent it was founded on violations of RCRA involving waste deemed hazardous by virtue of the federal mixture rule.

B. *Enforceability of Ohio's Mixture Rule*

As noted in the Board's Remand Order, for violations alleged to have occurred when Ohio was authorized to implement its RCRA program, only the State regulations, operating in lieu of the federal regulations, can provide a basis for liability.[11] Of those State regulations, the Region claims authority pursuant to RCRA § 3008 to enforce those that have a counterpart in the federal regulations, including State regulations that are "more stringent" applications of the federal counterparts. The principal limitation on the Region's authority to enforce State regulations is imposed by regulation, which is further interpreted and refined by the Agency's own internal guidance memoranda. Basically, the limitation curbs Agency enforcement of State hazardous waste regulations that are "broader in scope" than the federal program, as opposed to only being more stringent. *See* 40 C.F.R. § 271.1 (quoted *supra*). Applying the Agency's own guidance to the Ohio mixture rule, the Board concludes that the State rule is "broader in scope" than the federal hazardous waste program without a mixture rule, and is therefore unenforceable by the Region.[12]

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[11] The Presiding Officer recognized that there is some question as to whether the Ohio mixture rule survived invalidation of the federal mixture rule. *Order Denying Motion to Amend* at 11, n.6. The Presiding Officer noted that an Ohio court struck down a State regulation under the Clean Air Act because EPA later repudiated the scientific basis for the rule. *Id.* (citing *Swan Super Cleaners v. Tyler*, 549 N.E. 2d 526 (Ohio Ct. App. 1988)). He questioned whether the same rationale would apply when the federal regulation was struck down on *procedural* grounds. Because we conclude that wastes deemed hazardous by virtue of the State mixture rule are beyond the Agency's enforcement authority, it is unnecessary to decide whether the State rule survived invalidation of the federal rule, and we assume its validity for the purposes of our analysis. Our decision does not address the Ohio mixture rule.

[12] Because we conclude that the Ohio mixture rule may not be enforced by the Region because it is "broader in scope" than the federal program, it is unnecessary for us to address Hardin County's argument that EPA also lacks authority to enforce State hazardous waste regulations that are simply "more stringent" than the federal requirements.

The Thomas Memo instructs the Agency that "[t]o determine whether a particular requirement or provision of a State program is 'broader in scope' (and therefore *not* a part of the authorized program)," two questions should be answered sequentially. Thomas Memo at 2. The first question, and accompanying explanation, are quoted below:

> (1) *Does imposition of the State requirement increase the size of the regulated community beyond that of the Federal Program?*
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> A State requirement that *does* increase the size of the regulated community is more 'extensive,' not more stringent, and is an aspect of the State program which goes beyond the scope of the Federally-approved program. Examples of requirements that are broader in scope include:
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> * * * * * * *
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> • listing of wastes which are not in the federal universe of wastes.

Id. (emphasis in original).

The Region answers this question in the negative, arguing that retroactive invalidation of the federal mixture rule would not mean that the size of the regulated community under the Ohio mixture rule is greater than the size of the regulated community under the federal program. It asserts that the Ohio mixture rule merely addresses waste mixtures that, despite invalidation of the federal mixture rule, are nevertheless deemed hazardous under the federal program by reason of the continued presence of listed waste as a component of the waste mixtures. In the Region's view, a listed waste continues to remain a hazardous waste under federal law even when mixed with non-hazardous solid waste. In accordance with this reasoning, the size of the regulated community, either under the Ohio program with a mixture rule or under a federal program without such a rule, is fundamentally the same. In both instances, the Region asserts that the size of the regulated community is dictated by the presence of the listed waste in the mixture rather than by the existence of a separate regulatory provision characterizing the mixture as hazardous waste.

The foregoing analysis is rooted in the Region's application of so-called "continuing jurisdiction" principles, which are embodied in the

same regulation that established the mixture rule, 40 C.F.R. § 261.3. According to the Region, these principles establish that a listed hazardous waste (unless formally delisted pursuant to rulemaking procedures at 40 C.F.R. §§ 260.20 and 260.22) continues to remain hazardous by definition even when mixed with a non-hazardous solid waste. As a consequence, the resulting mixture is virtually indistinguishable for regulatory purposes from a waste mixture deemed hazardous pursuant to the mixture rule. The Region extracts these principles from the following paragraphs of 40 C.F.R. § 261.3 (as well as in the companion Ohio regulations):

> § 261.3 Definition of hazardous waste.
>
> * * * * * * *
>
> (c) *Unless and until it meets the criteria of paragraph (d):*
>
> *(1) A hazardous waste will remain a hazardous waste.*
>
> * * * * * * *
>
> (d) *Any solid waste described in paragraph (c) of this section is not a hazardous waste if it meets the following criteria:*
>
> (1) In the case of any solid waste, it does not exhibit any of the characteristics of hazardous waste identified in Subpart C.
>
> (2) *In the case of a waste which* is a listed waste under Subpart D, *contains a waste listed under Subpart D* or is derived from a waste listed in Subpart D, *it also has been excluded from paragraph (c) under §§ 260.20 and 260.22 of this Chapter.*

40 C.F.R. §§ 261.3(c) & (d) (emphasis added); *see also* Ohio Admin. Code §§ 3745-51-03(C)(1) & (D)(2). Brief in Support of Complainant's Appeal at 10-11. The Region refers to the foregoing rules, §§ 261.3(c) & (d)(2), as the "continuing jurisdiction" rule and the "contained-in" rule, respectively, and argues that they are unaffected by the decision in *Shell Oil*, since the court did not specifically address either rule in its decision invalidating the mixture rule.

In support of its view that the foregoing considerations are controlling, the Region also points to the fact that the continuing jurisdiction principles have received judicial sanction in *Chemical Waste Management, Inc. v. E.P.A.*, 869 F.2d 1526 (D.C. Cir. 1989), where the court upheld EPA's mandate that soils and other environmental media contaminated with hazardous waste must themselves be treated as hazardous waste.[13] The Region successfully argued to the court that various regulations promulgated in 1980—including, specifically, the continuing jurisdiction and contained-in rules, as well as the mixture rule itself—establish the regulatory principle that a waste, once deemed hazardous, would ordinarily be presumed to retain its hazardous character. Although the court specifically declined to decide whether the foregoing regulations actually "*compelled*" the conclusion that soil or groundwater contaminated with hazardous waste was itself a hazardous waste, 869 F.2d at 1540 (emphasis in original), it nevertheless concluded that the Agency's position was a reasonable interpretation of its rules and therefore should be sustained, observing that:

> [T]he agency's rule on contaminated soil is part of a coherent regulatory framework. It is one application of a general principle, consistently adhered to, that a hazardous waste does not lose its hazardous character simply because it changes form or is combined with other substances.

869 F.2d at 1539.

The Region rounds out its arguments with one further point, concerning the minor role that the mixture rule plays under the Agency's analysis of the regulatory scheme. Given that acceptance of the Region's analysis means that its ability to regulate waste mixtures is essentially undiminished even though *Shell Oil* declared the mixture rule a dead letter, the obvious question arises: Was the mixture rule written with any valid purpose in mind or is it mere surplusage? In answer, the Region explains that the mixture rule serves a narrow but legitimate purpose, its basic function being to "clarify" when a listed hazardous waste ceases to be subject to regulation. The rule does this by specifying "delisting" (pursuant to rulemaking procedures at 40 C.F.R. §§ 260.20 and 260.22) as the defining event for determining when the Region's jurisdiction over listed waste terminates. Until that event oc-

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[13] Because environmental media such as soil and groundwater are not considered by themselves to be a form of solid waste, mixing them with a listed hazardous waste does not produce a waste mixture within the meaning of the mixture rule. *Chemical Waste Management, Inc. v. U.S.E.P.A.*, 869 F.2d at 1538 n.14; 1539.

curs, listed waste in a waste mixture (as well as the non-hazardous component of the mixture) remains subject to regulation as hazardous waste. Without the mixture rule to provide this element of clarification, the Region argues that "there is the possibility that the waste could exit [the regulatory scheme] at a point other than delisting." Oral Argument Transcript at 9 (Dec. 8, 1993). Neutralization of the listed hazardous waste or separation of the listed waste from the non-hazardous waste were cited as examples of such a possibility. *Id.* at 9, 11, 36-37. According to the Region, the resulting lack of clarity that could result from not having delisting specified as the point of exit from regulatory coverage might lead to needless litigation, which is otherwise easily avoided by having a mixture rule.

We are not persuaded that the principles and interpretations advanced by the Region can be employed to achieve the Region's goal of exercising enforcement jurisdiction over the waste mixtures accepted for disposal at Hardin County's landfill. It is our view that as a result of the *Shell Oil* decision the size of the regulated community under the Ohio mixture rule is larger than the size of the regulated community under the surviving provisions of the federal hazardous waste program. Consequently, the Agency's own guidance dictates the dismissal of this proceeding.[14] Although all members of the Board agree with this holding, our reasoning differs. Accordingly, our separate views are set forth below following the conclusion of this *per curiam* opinion.

IV. *CONCLUSION*

The Board understands that the Agency desires to preserve enforcement actions that were pending at the time the mixture rule was invalidated in *Shell Oil*.[15] Nevertheless, as a matter of sound jurisprudence, the Region cannot continue to pursue a cause of action against Hardin County on the grounds advanced by the Region. The Agency was on notice for the 10-year pendency of the *Shell Oil* litigation that

[14] In accordance with the Thomas Memo, if the State requirement fails the first part of the test (*i.e.*, increases the size of the regulated community), then the requirement is "broader in scope" than the federal program and it is unnecessary to determine whether the State rule also has a "direct federal counterpart." Nevertheless, this prong of the test is also briefly addressed in the opinions that follow.

[15] The preamble to the repromulgation of the mixture rule suggests that the Agency had identified over 100 federal administrative, civil, and criminal enforcement cases premised in whole or in part on the mixture and derived-from rules that were "currently pending or recently concluded" at the time of repromulgation. 57 Fed. Reg. 7628, 7630.

the mixture rule might be vacated on procedural grounds. It therefore knew that there was a risk of a potential enforcement gap. In addition, the Board believes that any actual impact caused by a brief enforcement gap is likely to be relatively minor, because the regulated community has largely operated under the assumption that the mixture rule was in effect for the history of the hazardous waste program prior to *Shell Oil*, and the rule was repromulgated within a few months of the D.C. Circuit's decision. Moreover, our decision in no way addresses the enforceability of the Ohio mixture rule by the State of Ohio, or any obligations Hardin County may have under that rule.

The decision of the Presiding Officer is affirmed, and the Region's complaint is dismissed with prejudice.

So ordered.

Opinion of Judges Firestone and Reich with respect to Part III.B.:

We conclude that the Ohio mixture rule is broader in scope than the federal program without a mixture rule, because the Ohio mixture rule regulates more wastes than are otherwise regulated under the federal program without a mixture rule. As discussed in more detail below, under the mixture rule the non-hazardous component of a mixture containing a listed waste remains subject to RCRA regulation until formal delisting of the waste—regardless of whether the waste mixture is neutralized or the hazardous components are separated from the non-hazardous components. The same cannot be said of the Agency's "continuing jurisdiction" or "contained-in" rules. Thus, because the mixture rule is broader in scope in any event, it is unnecessary for us to decide whether the Agency's "continuing jurisdiction" or "contained-in" rules might allow it to regulate some combinations of hazardous and non-hazardous material.

The *Shell Oil* decision does not, on its face, contain any discussion about either the "continuing jurisdiction" or "contained-in" rules, and those are not the theories upon which the Region's complaint in this case is premised.[16] However, we should note that the Agency's previous statements on the necessity for the mixture rule and the effect of its invalidation appear to contradict the Region's present claim that the

[16] Counsel for Hardin County indicated that had EPA premised its complaint on a "continuing jurisdiction" or "contained-in" theory, rather than the mixture rule, it would have mounted a different evidentiary defense. Brief in Opposition to Notice of Appeal at 17, n.6.

rule was only necessary to "clarify" existing regulatory theories embodied in the "continuing jurisdiction" and "contained-in" rules.

The Agency acknowledged in promulgating the original mixture rule that the rule was "necessary to close a major loophole" in Subtitle C. 45 Fed. Reg. at 33,066, 33,095 (May 17, 1980). The preamble to the original rule explained that without such a rule, hazardous waste generators could escape regulation entirely by mixing listed wastes with non-hazardous wastes, stating that:

> *We know of no other effective regulatory mechanism for dealing with waste mixtures containing listed hazardous wastes.*

Id. (emphasis added). In re-promulgating the mixture rule following *Shell Oil*, the Agency again stated:

> The Agency promulgated these rules to close a potentially major loophole in the hazardous waste management system. Without a "mixture" rule, generators of hazardous waste could perhaps evade regulatory requirements by mixing hazardous waste with non-hazardous waste and claiming that the mixture was no longer hazardous, even though it poses environmental hazards.

57 Fed. Reg. 7628, 7629 (Mar. 3, 1992). The Agency also stated:

> If the "mixture" and "derived-from" rules were no longer in effect, many facilities that currently require RCRA permits *would no longer need them.*

Id. at 7630 (emphasis added).

Even in arguing before this Board, counsel for EPA's Office of Enforcement stated that retroactive application of the *Shell Oil* decision would mean "that those parties who were fortunate enough not to have their violations fully prosecuted yet *will effectively not have been regulated.*" Oral Argument Transcript at 16 (Sept. 30, 1992) (emphasis added).

The Region now argues that these statements only meant to emphasize the more difficult enforcement burden it would have in regulating these mixtures in the absence of an explicit "mixture rule." Oral Argument Transcript at 13-15 (Dec. 8, 1993). However, stating that

many previously-regulated facilities "would no longer need" RCRA permits or would "effectively not have been regulated" seems more consistent with a conclusion that the mixture rule governed the universe of regulated facilities rather than only *clarifying* when a facility was no longer subject to regulation. In any event, since the *Shell Oil* decision is not explicit on the effect, if any, of the "contained-in" and "continuing jurisdiction" rules on waste mixtures and our ultimate decision does not turn on this point, we need not and do not reach any final decision on this issue.

We agree with Hardin County that the Ohio mixture rule subjects more wastes to regulation than the federal program without a mixture rule. The Region acknowledges in its brief that the mixture rule "brings the non-hazardous portion of the waste into Subtitle C." Brief in Support of Complainant's Appeal at 10. Further, the Region states that "the mixture rule is a *rule of inclusion*—all waste mixed with hazardous waste becomes hazardous itself, even if it were later separated from the initial hazardous components and retained no hazardous constituents." *Id.* at 15 (emphasis added). The Region concedes, however, that if only the "contained-in" and "continuing jurisdiction" rules applied to a mixture, the non-hazardous portion of a separated mixture would no longer be regulated. *Id.* at 8-9.

In these circumstances, we conclude that the Ohio mixture rule is broader in scope than the federal program. The Thomas Memo includes as an example of a "broader in scope" regulation the "listing of wastes which are not in the Federal universe of wastes." Thomas Memo at 2. A State rule that clearly defines "hazardous waste" to include certain non-hazardous wastes not encompassed within the federal regulatory definition of "hazardous waste" certainly fits within this example.

In order to illustrate this point, counsel for Hardin County at the oral argument of this case offered the following example of the way in which the mixture rule subjects more wastes to regulation than a regulatory scheme without a mixture rule. Counsel offered as an example a listed hazardous waste (K087) that becomes solidified and rock-like at freezing temperatures, pieces of which are placed in a container of non-hazardous solid waste such as ordinary plant trash. Under the mixture rule, the entire contents of the trash container are deemed "hazardous" until delisting, regardless whether the chunks of hazardous waste are subsequently removed. Even if the hazardous waste chunks are removed, the plant is required to manage the remaining non-hazardous trash as a hazardous waste. Without the mixture rule, the plant trash would cease to be regulated upon removal of the haz-

ardous waste chunks. *See* Oral Argument Transcript at 32 (Dec. 8, 1993). Importantly, counsel for EPA's Office of Enforcement did not object to the validity of this example.

We believe that the above example cogently illustrates the way in which the State mixture rule regulates more wastes than are regulated by a federal program without a mixture rule. We recognize that the waste at issue in this case arises in a more complicated factual context, because the Occidental waste was a wastewater treatment sludge from which any hazardous constituents could not be easily separated. Nevertheless, the question before us is not whether the waste at issue in this case might be regulated under another theory, but whether the Region can enforce a State mixture rule that is broader in scope than the federal program. We conclude that the Ohio mixture rule is broader in scope because it subjects Hardin County to ongoing hazardous waste management requirements for a class of waste for which "no other effective regulatory mechanism" exists in the federal scheme. The Ohio mixture rule thus regulates a larger community and more waste than a federal program without a mixture rule, and is therefore unenforceable by the Region.

In accordance with the Thomas Memo, if the State requirement fails the first part of the test (*i.e.*, increases the size of the regulated community), then the requirement is "broader in scope" than the federal program and it is unnecessary to determine whether the State rule also has a "direct federal counterpart." Although we conclude that the Ohio mixture rule is clearly broader in scope than the federal program, it is useful to briefly address the second part of the test, given the Region's extensive reliance on the "framework principles" of "continuing jurisdiction" and the "contained-in" rule embodied in 40 C.F.R. § 261.3(c) & (d)(2). *See* Oral Argument Transcript at 6 (Dec. 8, 1993).

The Region contends that the federal counterpart to the Ohio mixture rule is the original listing of the hazardous waste components as hazardous, coupled with the concepts of "continuing jurisdiction" and the "contained-in" rule embodied in 40 C.F.R. §§ 261.3(c) & (d)(2). The Region argues that "it is not necessary to establish that a rule substantially similar to the mixture rule exists in the federal program in order to show that there is a direct counterpart." Brief in Support of Complainant's Appeal at 17. We believe that the Region's claim strains the meaning of the uncomplicated phrase "*direct* federal counterpart." Clearly, the federal hazardous waste lists are "direct federal counterparts" of the identical State hazardous waste lists, and the cited hazardous waste regulations, 40 C.F.R. §§ 261.3(c) & (d)(2), are "direct federal counterparts" of the identical State regulations, Ohio Admin. Code §§

3745-51-03(C)(1) & (D)(2). However, to hold that federal hazardous waste lists and regulations, having specific State regulatory counterparts, are also "direct federal counterparts" of a State hazardous waste definition (the mixture rule) that is not part of the federal program would appear to strain beyond its limits the phrase "direct federal counterpart."[17]

Accordingly, we believe, based on the arguments presented in this case, that the better view is that in the absence of a federal rule, the State mixture rule has no direct federal counterpart that would regulate the wastes accepted for disposal by Hardin County.[18]

For the foregoing reasons, we conclude that the Region cannot enforce the Ohio mixture rule against Hardin County, and that the complaint in this case must be dismissed with prejudice.

Opinion of Judge McCallum with respect to Part III.B.:

It is the Region's view that following *Shell Oil* it can still "continue to regulate listed hazardous waste after the point of mixture, so long as the waste mixture * * * continues to contain the listed hazardous waste." Tr. at 7. Since as a practical matter it may be assumed that most waste mixtures are not capable of being separated into their pre-mixture components, the Region's view means that even though the non-hazardous portion of such a waste mixture would not be deemed a hazardous waste following *Shell Oil*,[19] the mixture as a whole must be handled in the same fundamental way as if the federal mixture rule were still in effect.[20] To sustain its position, the Region seeks to per-

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[17] Further, as noted above, we seriously question the Region's contention that 40 C.F.R. §§ 261.3(c) & (d)(2) (the "continuing jurisdiction" and "contained-in" rules) have a regulatory function analogous to the mixture rule, *for wastes of the type accepted for disposal by Hardin County.*

[18] We do not mean to suggest that all commingling of hazardous and non-hazardous material escaped RCRA regulation during the brief period when no federal mixture rule was in effect. For example, where the hazardous waste portion continued to fall within another definition of 40 C.F.R. § 261.3(a) (*i.e.* it clearly continued to meet the listing description for which it was originally deemed hazardous), it may still have been subject to regulation.

[19] Under the mixture rule, the non-hazardous component of a waste mixture is subject to ongoing regulation because the entirety of the waste mixture is deemed hazardous. 40 C.F.R. § 261.3(a)(2)(ii). The Agency states that the ongoing regulation of the non-hazardous component is only "incidental" to the regulation of the listed hazardous waste. Brief in Support of Complainant's Appeal at 11.

[20] Counsel for Hardin County hypothesized at oral argument that if the original components of a waste mixture could be separated, the non-hazardous component would not be subject to regulation under the federal scheme without a mixture rule, whereas it would continue to be subject to regulation under the Ohio mixture rule. Because under this hypothetical set of facts the Ohio

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suade us that the court merely struck down particular words (the "mixture rule" definition) in § 261.3 while leaving the Agency free to use the surviving words (the continuing jurisdiction and contained-in rules) to exercise jurisdiction over these same waste mixtures. For the reasons stated below, I am not persuaded that the principles of continuing jurisdiction can be employed to achieve the Agency's goal of exercising enforcement jurisdiction over such waste mixtures.

Foremost in my thinking is that the Region in fashioning its arguments has wholly lost sight of the D.C. Circuit's holding in *Shell Oil*, which was to declare that the Agency had not succeeded in promulgating a rule that would confer jurisdiction over waste mixtures composed of listed waste and non-hazardous solid waste. The Region also fails to recognize that in striking down the mixture rule the court was striking down more than language that simply governs "just how long that waste mixture continues to be regulated * * *." Tr. at 8. I read the court's decision as striking down a rule that attempted to invest the Agency with jurisdiction over waste mixtures composed of listed hazardous waste and non-hazardous solid waste. The court held, *inter alia*, that the mixture rule, *which forms part of the regulatory definition of hazardous waste*, had "no counterpart[] in and [was] not a logical outgrowth of, the proposed regulations." *Shell Oil* at 747 (emphasis added). It refused to accept EPA's contention that the mixture rule "merely clarifie[d] the intent behind the proposal that listed wastes remain hazardous until delisted," and thus could be promulgated in the final rule without prior notice and opportunity to comment. *Id.* at 749. Significantly, as pertains to the Agency's "continuing jurisdiction" arguments in the instant proceeding, the court also specifically found that the proposal *did not* suggest a regulatory system that "might imply inclusion of a waste until it is formally removed from the list." *Id* at 752.[21]

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mixture rule would have a broader reach than the federal program operating without a federal mixture rule, counsel for Hardin County argued that the Ohio mixture rule would be broader in scope than the federal program. *See* Tr. at 31-35 (Dec. 8, 1993). I do not disagree with the logic of Hardin County's argument but I nevertheless question whether the number of situations where waste mixtures are divisible into their original components is large enough to merit giving much weight to this analysis. Certainly, no one is contending that the mixtures at issue in this proceeding are amenable to such a separation process. Moreover, there is no evidence in the record of wastes being divisible. Under such circumstances, it strikes me as dangerous to give decisive effect to what is nothing more than an argument of counsel based on a hypothetical situation. Certainly, to my mind, the failure of the Region's counsel to raise a specific objection to the argument is no basis for regarding the Region's silence on this point as an important concession or admission against interest.

[21] The court explained that the proposal instead placed "emphasis on characteristics," which "suggested that if a waste did not exhibit the nine characteristics originally proposed, it need not be regulated as hazardous." *Id.*

I therefore categorically reject any notion that the court and the petitioners in *Shell Oil* were only concerned about a rule that purports to define when a regulated mixture is no longer a regulated mixture, rather than a rule that prescribes the Agency's jurisdiction to regulate such mixtures in the first instance. It is highly doubtful that either the court or the petitioners would have tarried long on such a secondary issue.[22] Rather, it is plain beyond peradventure that, by invalidating the mixture rule, the court was declaring that the Agency had not succeeded in promulgating a rule that would confer jurisdiction over mixtures of hazardous and non-hazardous waste. The Agency cannot salvage its jurisdiction over waste mixtures through patchwork regulatory interpretation that has exactly the same practical effect as the invalidated rule.

My conclusion is further buttressed by the contradictions in the Agency's statements regarding the impact and purpose of the mixture rule. For example, the Agency acknowledged in promulgating the original mixture rule that the rule was "necessary to close a major loophole" in Subtitle C. 45 Fed. Reg. at 33,066, 33,095 (May 17, 1980). The preamble to the original rule explained that without such a rule, hazardous waste generators could escape regulation entirely by mixing listed wastes with non-hazardous wastes. *Id.* In repromulgating the mixture rule following *Shell Oil*, the Agency again stated:

> The Agency promulgated these rules to close a potentially major loophole in the hazardous waste management system. Without a "mixture" rule, generators of hazardous waste could perhaps evade regulatory requirements by mixing hazardous waste with non-hazardous waste and claiming that the mixture was no longer hazardous, even though it poses environmental hazards.

57 Fed. Reg. 7628, 7629 (Mar. 3, 1992).

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[22] It must be recognized that the petitioners in *Shell Oil* were seeking to overturn the mixture rule on the merits as well as on procedural grounds. Although the court limited its ruling to the procedural aspects of the petitioners' challenge, and did not thereby give any indication of its views on the substantive aspects of the rule, the court was obviously thinking that it had invalidated a rule that prescribes the Agency's jurisdiction over waste mixtures, for it expressed concern that its ruling might cause "a discontinuity in the regulation of hazardous wastes" and took the unusual step of recommending that the Agency consider repromulgating the rule on an interim basis under the good cause exemption to the notice and comment requirements of the Administrative Procedure Act. *Id.*

Moreover, the preamble to the original mixture rule makes clear that the mixture rule was intended to regulate a class of wastes that was not otherwise subject to regulation:

> *We know of no other effective regulatory mechanism for dealing with waste mixtures containing listed hazardous wastes.*

45 Fed. Reg. 33,066, 33,095 (emphasis added). I conclude, therefore, that the Agency's claim that the mixture rule only clarifies the duration of the Agency's jurisdiction over waste mixtures is at odds with preamble language decreeing the rule a regulatory necessity. In my opinion the mixture rule, by its unambiguous terms, defines a specific class of hazardous waste (*i.e.*, waste mixtures) and does not simply establish an ancillary test for determining the length of time a particular waste remains in that class.

Because the Ohio mixture rule plainly confers jurisdiction over a class of wastes that, by reason of *Shell Oil*, was not subject to regulation under the federal scheme at the time disposal occurred, the Ohio mixture rule expands the size of the regulated community and thus fails the first part of the two part test set forth in the Thomas memo. Consequently, under the Agency's own guidance, the rule is broader in scope than the federal program, and unenforceable by the Region.

Although this conclusion makes it unnecessary to apply the second part of the test—*i.e.*, by determining whether the State rule also has a "direct federal counterpart"—I note that in this case the two parts of the test are largely indistinguishable: by rejecting the Agency's argument that the surviving portions of the Agency's definition of hazardous waste function as a regulatory analog to the Ohio mixture rule, I also conclude that the Ohio mixture rule lacks a "direct federal counterpart."