IN THE MATTER OF CYPRESS AVIATION, INC.

RCRA (3008) Appeal No. 91–6

ORDER DENYING RECONSIDERATION

Decided November 17, 1992

Syllabus

The City of Lakeland seeks reconsideration of an initial decision holding it and Cypress Aviation, Inc., liable for failing to analyze and properly dispose of F002 wastes. Cypress Aviation seeks to join that motion. The motions are not timely under 40 C.F.R. § 22.32, but the Agency will consider them under its inherent power to reconsider an Agency action because the parties were diligent in pursuing their claims. The motion for reconsideration is based upon the invalidation of the mixture and derived-from rules in *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (D.C. Cir. 1991). While reconsideration may be appropriate when there has been a change in the determination of the applicable law, *Shell Oil* does not represent such a change because the rules invalidated by *Shell Oil* are not implicated in this matter. Accordingly, the motions are denied.

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

Opinion of the Board by Judge McCallum:

Before the Environmental Appeals Board is a motion for reconsideration filed by the City of Lakeland, Florida ("Lakeland") and a request to join it filed by Cypress Aviation, Inc. ("Cypress Aviation"). The motion for reconsideration is based upon *Shell Oil Co.* v. *EPA*, 950 F.2d 741 (D.C. Cir. 1991), which invalidated the "mixture" and "derived-from" rules that defined certain types of hazardous wastes subject to the Resource Conservation and Recovery Act, 42 U.S.C. §§ 6901 *et seq.* For the reasons set forth below, both motions are denied.

BACKGROUND

Lakeland owned and Cypress Aviation operated an aircraft painting and paint stripping facility. The paint stripping process generated F002 waste. In an initial decision served on the parties on October

1, 1991, Administrative Law Judge Gerald Harwood found Lakeland and Cypress Aviation liable for failing to analyze and properly dispose of F002 waste under 40 C.F.R. Part 268. The presiding officer assessed civil penalties of $12,500 and $25,000 against Lakeland and Cypress Aviation, respectively.

Lakeland did not appeal the presiding officer's initial decision, and, by operation of 40 C.F.R. § 22.27(c), the initial decision became the Agency's final order applicable to Lakeland on November 15, 1991. On January 8, 1992, approximately one month after *Shell Oil* was decided, Lakeland filed a motion for reconsideration with the presiding officer.[1] Lakeland argues that reconsideration is warranted because *Shell Oil* "invalidated two rule provisions central to the agency's claim against the respondents, to wit: the mixture rule set forth at 40 C.F.R. § 261.3(a)(2)(2i) [sic] and the 'derived-from' rule set forth at 40 C.F.R. § 261.3(c)(2)." Motion to Reconsider Final Order, at 1.[2]

On January 16, 1992, Cypress Aviation filed a motion with the presiding officer to join Lakeland's motion for reconsideration.[3] The presiding officer certified Lakeland's and Cypress Aviation's motions to the Chief Judicial Officer[4] for processing pursuant to 40 C.F.R. § 22.32 on January 27, 1992.

Region IV responded to these motions on February 4, 1992.[5] The Region argues that the motion to reconsider is untimely and, in the alternative, that it should be denied because the *Shell Oil* holding does not affect the violations established in this case.

[1] At the time Lakeland filed its motion for reconsideration in January 1992, section 22.32 of the rules did not specify with whom the motion should be filed. Effective March 1, 1992, section 22.32 provides that "[m]otions for reconsideration * * * shall be directed to * * * the Environmental Appeals Board." 57 Fed. Reg. 5321 (Feb. 13, 1992).

[2] The current version of the mixture rule is located at 40 C.F.R. § 261.3(a)(2)(iv).

[3] Previously, Cypress Aviation's appeal from the presiding officer's initial decision was dismissed as untimely. *In re Cypress Aviation, Inc.*, RCRA (3008) Appeal No. 91–6 (CJO, Order Dismissing Notice of Appeal, Jan. 8, 1992). This dismissal, which coincidentally occurred on the same day Lakeland filed its motion for reconsideration, constituted the Agency's final order applicable to Cypress Aviation. *See* 40 C.F.R. § 22.31.

[4] Effective March 1, 1992, the position of Chief Judicial Officer was abolished and all pending cases, including this case, were transferred to the Environmental Appeals Board. 57 Fed. Reg. 5321 (Feb. 13, 1992).

[5] On September 1, 1992, Cypress Aviation filed a motion seeking, among other things, the Region's response to the pending motions, which the Region had already provided on February 4, 1992. Apparently, Cypress Aviation did not receive the Region's response because of a change of address that was not reflected in the record.

ANALYSIS

Region IV argues that Lakeland's motion for reconsideration should be dismissed on the ground that it is untimely under 40 C.F.R. § 22.32, which applies to motions for reconsideration of final orders. The Region also argues that Cypress Aviation should not be allowed to join an untimely motion.

Section 22.32 provides that motions for reconsideration shall be filed within ten days after service of the final order. If this were the only source of the Agency's authority to reconsider its actions, we would agree that Lakeland's motion is untimely as it was received more than ten days after the date the initial decision became a final order as to Lakeland.[6] Administrative agencies, however, have an inherent authority to reconsider their decisions within a reasonably short period of time after they are rendered. *Bookman* v. *United States,* 453 F.2d 1263, 1265 (Ct. Cl. 1972).[7] Although Lakeland and Cypress Aviation missed the regulatory deadline for filing a motion for reconsideration, they have been reasonably diligent in pursuing their claims as the following chronology indicates: the initial decision, served on October 1, 1991, became final as to Lakeland on November 15, 1991; *Shell Oil* was decided on December 6, 1991, and Lakeland filed its motion for reconsideration approximately one month thereafter; and Cypress Aviation filed its request to join Lakeland's motion one week later. Therefore, we reject the Region's contention that the motions should be denied because they did not meet the ten-day deadline in section 22.32 of the rules.

In general, the power of reconsideration may be invoked to correct an error, such as an oversight, or a mistake of law or fact, or to review a change in the applicable law. *See, e.g., In re City of Detroit,* TSCA Appeal No. 89–5 (CJO, Order on Motion for Reconsideration, July 9, 1991) (and cases cited therein). Here, Lakeland and Cypress Aviation contend that the invalidation of the "mixture" rule in *Shell Oil* is a change in the law that requires reconsideration of this case. Specifically, Lakeland and Cypress Aviation argue that in light of *Shell Oil,* the wastes they failed to analyze and properly dispose of are not hazardous, and therefore the conduct for which they were found liable is no longer prohibited.

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[6] Lakeland seeks review of an order that became final as to it on November 15, 1991, and its motion for reconsideration was received on January 8, 1992.

[7] This is consistent with the principle that when justice requires, an administrative agency can set aside rules intended to regulate the Agency's conduct of its internal procedures, such as the ten-day filing period for motions for reconsideration. *See American Farm Lines* v. *Black Ball Freight Service,* 397 U.S. 532 (1970).

In *Shell Oil*, the court invalidated the "mixture" and "derived-from" rules found in the regulation defining hazardous wastes, 40 C.F.R. § 261.3.[8] These rules, in sum, provide that hazardous wastes include mixtures of solid wastes with hazardous wastes specifically listed in the regulations, and solid waste generated from the treatment, storage and disposal of hazardous wastes.

Lakeland's motion for reconsideration asserts that these two rules are "central to the agency's claim" against it. Our reading of the initial decision leads us to a contrary conclusion. The initial decision makes no reference to the "derived-from" rule, and only a passing reference to the "mixture" rule, *see* Initial Decision, at 4 n.8. As discussed below, the latter reference is unnecessary to the determination that the wastes involved in this case are hazardous.

The presiding officer referred to the wastes Lakeland and Cypress Aviation failed to analyze and properly dispose of as a "waste mixture."[9] The "waste mixture" resulted from paint stripping operations, and consisted of wastewater, dissolved paint, paint chips, and spent solvent (the paint stripper). The spent solvent originally contained more than 10%, and as much as 62–67%, methylene chloride. No evidence was presented to refute this. *See* Initial Decision at 5.

As the presiding officer concluded, the presence of the spent solvent makes the "waste mixture" an F002 hazardous waste under § 261.31. *See* Initial Decision at 4–5. This section specifies that F002 wastes include "all spent solvent mixtures/blends containing, before use, a total of ten percent or more (by volume) of [methylene chloride] * * *." In essence, the definition of F002 wastes by its own terms renders some "spent solvent mixtures" hazardous wastes. The *Shell Oil* mandate did not affect this provision.[10]

Thus, the *Shell Oil* decision has no bearing on the violations at issue in this case. Lakeland and Cypress Aviation have failed to demonstrate that reconsideration is warranted due to a change

[8] The EPA accepted an invitation by the Court in *Shell Oil* to reissue the rules on an interim basis in order to avoid discontinuity in the regulatory program. *See* 57 Fed. Reg. 7628 (Mar. 3, 1992); *Shell Oil*, 950 F.2d at 752.

[9] The use of the phrase "waste mixture" does not itself implicate the "mixture" rule.

[10] In other words, the *Shell Oil* mandate affected only the portions of § 261.3 that contain the "mixture" and "derived-from" rules, and did not affect the portion of § 261.3 that defines hazardous waste as wastes specifically listed in § 261.31.

in the applicable law, and therefore, Lakeland's motion for reconsideration, and Cypress Aviation's request to join such motion, are hereby denied.[11]

So ordered.

[11] Cypress Aviation's September 1, 1992 motion requesting leave to file a reply brief and requesting an oral argument is also hereby denied. In that motion, Cypress Aviation also requested a stay of the initial decision pending judicial review of this final Agency action. Because judicial review proceedings are not pending (and may never be) this request is denied.