7/10/92

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of	)	
	)	
Hardin County, OH	)	Docket No. RCRA-V-W-89-R-29
c/o Hardin County	)	
Commissioners,	)	
	)	
Respondent	)	

ORDER DISMISSING COMPLAINT

The Complaint, Findings of Violation and Compliance Order, issued under section 3008 of the Solid Waste Disposal Act, as amended, Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928, on June 13. 1989, charged Respondent, Hardin County, with the disposal of hazardous waste without a permit or interim status in violation of §§ 3005 and 3010 of the Act and applicable regulations, 40 C.F.R. Part 270.[1/] Prior to 1980 and until it ceased accepting wastes on March 30, 1990, Hardin County owned and operated a landfill at Kenton, Ohio. Wastes received at the landfill during the period November 30, 1983, until August 7, 1987, included sludges from an Occidental Chemical Corporation (OCC)

[1/] The U.S. EPA directly enforced the federal hazardous waste program in the State of Ohio from January 31, 1986, when Ohio's authorization to administer a State hazardous waste program in lieu of the federal program expired, until shortly after the complaint was filed. Ohio was granted final authorization to operate its hazardous waste program on June 28, 1989. 54 Fed. Reg. 27173; 40 C.F.R. § 272.1800. Because the program in effect at the time of filing the complaint was the federal program, and the parties have not contended otherwise, federal law and regulations are considered to govern this proceeding.

facility at Kenton, Ohio. The Hardin County landfill was not a RCRA permitted facility and did not, at any time, attain interim status to receive and dispose of hazardous waste.

The complaint alleged that on November 30, 1983, a spill of approximately 11,000 pounds of commercially pure grade phenol (U188) occurred at the OCC facility and was directly routed to the caustic pond, Surface Impoundment No. 1. In 1984, 2000 pounds of spent acetone solvent (F003) were discharged to Surface Impoundment No. 1 by OCC. Additionally, at least 15,000 pounds of commercially pure grade formaldehyde (U122) are discharged annually by OCC to the clear pond, Surface Impoundment No. 2. Discharges of the mentioned wastes allegedly rendered the resulting sludges hazardous pursuant to the mixture rule, 40 C.F.R. § 261.3(a)(2)(iv)[2/] and, according to the complaint, the County was obligated, but failed to file a Notification of Hazardous Waste Activity and a Part A permit application on or before December 30, 1983 (40 C.F.R. §§ 270.10(e) and 70)).

The County was ordered, inter alia, to cease all treatment, storage or disposal of hazardous waste, to file closure and post-closure plans complying with 40 C.F.R. § 265.110 and to file a

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[2/] The mixture rule, which is cited in the complaint (¶ 10), is part of the regulation defining hazardous waste, 40 C.F.R. § 261.3 (1983) and states as follows:

> **(a) A solid waste, as defined in § 261.2, is a hazardous waste if:**
> **. . . .**
> **(iv) 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 . . . .**

groundwater quality assessment plan and schedule meeting the requirements of 40 C.F.R. § 265.93(d)(3).[3/] It was proposed to assess the County a penalty of $45,000.

The County answered, denying the Agency's jurisdiction, denying the applicability of the statutes and regulations to it, denying that the materials referred to in the complaint were hazardous wastes, asserting that, in any event, the materials were excluded or exempted from RCRA regulation, contesting the appropriateness of any penalty, and requested a hearing.

In prehearing motions, the OCC formaldehyde discharges, although seemingly large in absolute terms, were held to be within the de minimis losses exception to the mixture rule, 40 C.F.R § 261.3(a)(2)(iv)(D) (Order On Motion For Reconsideration, January 30, 1991). The County's contention that the phenol spill at OCC on November 30, 1983, did not render resulting sludges hazardous, because the materials were "beneficially used" and thus exempted from regulation by 40 C.F.R. § 261.6 (1983) was held to be a matter requiring a hearing for resolution. Additionally, a hearing was held to be required concerning the County's contention that, inasmuch as the spent acetone solvent (F003) was a listed hazardous waste solely because of the characteristic of ignitability and because the spent acetone was no longer ignitable

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[3/] **The County alleges that compliance with RCRA regulations would increase the cost of closure by an amount ranging from $473,000 to $879,000.**

after mixing with other liquids in the caustic pond, the exception to the mixture rule at 40 C.F.R. § 261.3(a)(2)(iii) was applicable.

A hearing on this matter was held in Columbus, Ohio during the period April 23-25, 1991. The matter has been fully briefed and is ready for decision.

In Shell Oil Company v. EPA, 950 F.2d 741 (D.C. Cir. 1991), the mixture rule was invalidated for noncompliance with the notice and comment rule-making requirements of the Administrative Procedure Act (APA), 5 U.S.C. § 553.[4/] Noting this fact and that the complaint was based solely on the "mixture rule," the ALJ, by an order, dated February 10, 1992, directed Complainant to show cause, if any there be, why the complaint should not be dismissed.

Complainant filed a response to the order, dated March 5, 1992 (Response) as well as a supplement to its response to that order, dated April 1, 1992 (Supplement), arguing that the Shell Oil decision was intended by the D.C. Circuit to apply prospectively only. EPA points out certain language in the Shell Oil opinion in support of its position: "We did not stay the rules [from the inception of the litigation], however, which have remained in effect" (950 F.2d at 746); "In light of the dangers that may be posed by a discontinuity in the regulation of hazardous wastes, . . . the agency may wish to consider reenacting the rules, in whole or in part, on an interim basis under the 'good cause' exemption of 5 U.S.C. § 553(b)(3)(B) . . . ." (950 F.2d at 752). A logical

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[4/] The "derived-from" rule, 40 C.F.R. § 261.3(c)(2)(i), was also invalidated in that case on the same grounds.

argument is constructed by EPA from this dicta, that in order for the interim rule to avoid any such discontinuity the rules must have been in continuous effect; if the rules were void ab initio, the interim rule would not prevent a discontinuity.

Complainant adds that this administrative forum does not have jurisdiction to decide the degree of invalidation of the mixture rule.[5/] Complainant points out that the mixture rule was reinstated on February 18, 1992 (57 Fed. Reg. 7628, March 3, 1992) as an interim final rule, pursuant to the Court's suggestion, which "warrants against dismissal" (Supplement at 3). Complainant acknowledges, however, that the reinstatement has prospective effect only. On March 5, 1992, the Court denied EPA's motion that Shell Oil be clarified to make it clear that the ruling applies prospectively only. Comparing that ruling to a denial of a writ of certiorari by the Supreme Court, Complainant argues that this was not an opinion on the merits of whether the decision was intended to be retroactive.

[5/] Response at 2. It is the ALJ's function in this proceeding to interpret the law, including the Shell Oil decision, and thereby to determine which is the appropriate rule to apply here: the mixture rule or the relevant federal hazardous waste regulations minus the mixture rule, on account of its invalidation. The question is whether the Shell Oil decision applies "retroactively," meaning it applies to cases regardless of when the cause of action arose, or "nonretroactively," also called "selective" or "modified prospectivity," which means the new decision is applied to the parties before the court and future cases, but is not applied to cases arising on facts predating the decision. This question, being one of interpretation of existing law, is properly before the ALJ.

Emphasizing that federal courts have the authority to leave administrative rules or decisions in place even if not promulgated in accordance with all of the requirements of the APA, and citing several cases in which that authority was exercised, Complainant asserts that a court may also invalidate a rule prospectively only. Complainant urges that exercise of such equitable power is especially appropriate in the environmental context, and that limitation of the Shell Oil decision to prospective application satisfies the three factor test set forth in Chevron Oil Co. v. Huson, 404 U.S. 97 (1971).

The County filed a reply, served April 30, 1992 (Reply) to Complainant's submissions pursuant to the order to show cause, pointing out that the mixture rule was vacated in Shell Oil, meaning that it is void ab initio. The County asserts that the limitation of a court's decision to prospective effect only, contrary to the general rule of retroactive effect, is not commonly made, and is not equitably warranted here. Cases cited by Complainant in support of its argument that federal courts may leave invalid rules in place are distinguished on the basis that the rules in those cases were merely remanded, and not vacated. Moreover, the County argues that the fact the Shell Oil court did not reach the substantive statutory arguments presented by industry against the mixture and derived-from rules, and the denial of EPA's motion for clarification indicate that the court intended the ruling to be retroactive. Finally, the County maintains that the

Chevron Oil test is inapposite and that even if it is applied, Complainant has not met the test's criteria for nonretroactivity.

D I S C U S S I O N

Because the complaint is premised entirely on the invalidated federal mixture rule, 40 C.F.R. § 261.3(a)(2)(iv) (complaint ¶ 10), a decision in favor of the County on the issue of the retroactivity of Shell Oil, supra, requires dismissal of the complaint.

The County's contention that the Court's decision in Shell Oil to vacate the mixture operates retroactively to render it void ab initio is supported by a recent ruling by the Eighth Circuit in United States v. Goodner Brothers Aircraft, Inc., No. 91-2466 (8th Cir. June 4, 1992).[6/] The court found that the invalidation of the mixture rule in Shell Oil applied retroactively, stating, "(a) regulation not promulgated pursuant to the proper notice and comment procedures has no 'force or effect of law' and therefore is void ab initio." Id., slip op. at 3, citing Chrysler Corp. v. Brown, 441 U.S. 281, 313 (1979). The Shell Oil court in plain language vacated, set aside and remanded the mixture and derived-from rules to the Agency, 950 F.2d at 752, 765. The Eighth Circuit in Goodner emphasized the significance of the word "vacate," and

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[6/] It is recognized that Goodner is a criminal case, and that retroactivity of new rules as applied to criminal defendants could include special considerations not applicable in the civil context. However, it is persuasive authority on the issues presented here, especially because the relevant authorities relied upon by that court in its decision are civil cases, and the new ruling at issue is not a criminal law matter.

cited the District of Columbia Circuit's definition, as stated in Action on Smoking & Health v. C.A.B., 713 F.2d 795, 797 (D.C. Cir. 1988): "to '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.'" (citations omitted).[7/]

The Goodner court addresses and rejects Complainant's argument here with respect to the interpretation of the Shell Oil decision, namely, the Court's concern with the "dangers that may be posed by a discontinuity in the regulation of hazardous wastes" (950 F.2d at 752). Such "discontinuity" does not necessarily refer to EPA's ability to rely upon the mixture rule for the purpose of enforcement, as EPA argues. Rather, it is better interpreted as the absence of guidance to industry handling wastes classified as hazardous under the invalidated mixture and derived-from rules, from the date of the decision invalidating the rules until new rules replace them. The dangers of such a lapse in guidance is described in the preamble to the reinstated mixture rule, 57 Fed. Reg. at 7629-30.

The court's statement that during the ten year pendency of the Shell Oil litigation, it "did not stay the rules . . . which have remained in effect" (950 F.2d at 746), also does not establish that the invalidation applies prospectively only. A court's denial of a motion to stay the rules is not a decision, or a forecast of the

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[7/] Similarly, to "set aside" means "[t]o reverse, vacate, cancel, annul, or revoke . . . ." Black's Law Dictionary at 713 (Abridged 5th ed. 1973).

court's final decision, on the merits of whether the rules are invalid. Such a denial means that the rules were enforceable prior to the court's final decision. However, upon issuance of the final decision, the rules became unenforceable not only for any future actions, but also for pending enforcement actions (those without final disposition), under the general rule of retroactivity. See, Courtney v. Canyon T.V., 899 F.2d 845 (9th Cir. 1990) (a Supreme Court decision applies retroactively to cases pending at the time it was decided); McKnight v. General Motors Corp., 908 F.2d 104, 110 (7th Cir. 1990), rehearing denied, cert. denied, 111 S.Ct. 1306; James B. Beam Distilling Co. v. Georgia, 501 U.S. ____, 111 S.Ct. 2489, 115 L.Ed. 2d 481, 488 (1991) (a decision which is made retroactive applies "both to the parties before the court and to all others by and against whom claims may be pressed, consistent with res judicata and procedural barriers such as statutes of limitations").

The general rule of retroactivity is virtually the same as the principle that in general, cases are decided in accordance with the law as it exists at the time of the decision. Reshal Associates, Inc. v. Long Grove Trading Co., 754 F.Supp. 1226, 1239 (N.D. Ill. 1990), citing Goodman v. Lukens Steel Co., 482 U.S. 656, 662 (1987); Faries v. Director, Office of Worker's Compensation Program, 909 F.2d 170, 176 (6th Cir. 1990) (a court must apply the judicial doctrine which is in effect at the time it renders its decision, unless manifest injustice results, or there exists legislative history or a statutory directive to the contrary);

Bradley v. School Board of City of Richmond, 416 U.S. 696, 711 (1974). The law currently in effect is that the mixture rule is invalid. Of course, EPA has instated the mixture rule, 57 Fed. Reg. 7628, but its effect can only be prospective, as EPA concedes (Supplement at 3), and thus cannot apply to actions brought before its enactment.[8/]

Further supporting the interpretation of Shell Oil as applying retroactively, as noted by the Eighth Circuit in Goodner as well as the County, the Shell Oil court did not reach the substantive argument against the mixture and derived-from rules. The reason the Court did not reach that issue is that the rules were vacated and thus did not apply to the petitioners (industry), which means that the vacatur was applied retroactively to the litigants in that case: "(a)s we vacate [the mixture and derived-from rules] on procedural grounds, we do not reach petitioners' argument that the mixture and derived-from rules unlawfully expand the EPA's jurisdiction under Subtitle C of RCRA." 950 F.2d at 752. That conclusion is buttressed by the fact that the court did not expressly reserve the question of retroactivity, as noted by the Goodner court.

Finally, the denial of EPA's motion for clarification that the ruling applies prospectively only, supports the County's position. Complainant's argument that the denial of the motion for

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[8/] In the preamble to the reissued mixture rule, the Agency opined that the Shell Oil decision was not intended to be retroactive. This statement was made prior to the Court's denial of EPA's motion for clarification and is not persuasive.

clarification is similar to the Supreme Court's denial of certiorari and thus not a decision on the issue of retroactivity is rejected.[9/] In sum, it is clear that the D.C. Circuit intended the invalidation of the mixture rule to apply retroactively.

The next question is whether under equitable principles the Shell Oil decision should not operate retroactively here. The test set forth by the Supreme Court, and urged by EPA in this case as well as in Goodner, is the three factor analysis in Chevron Oil v. Huson, supra, as follows:

> First, the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed. Second . . . [the court must] "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation." Finally, we have weighed the inequity imposed by retroactive operation . . . .

Chevron Oil, 404 U.S. at 106-07 (citation omitted). EPA, as the party seeking to avoid retroactive application, bears the burden of persuasion. Juzwin v. Asbestos Corp., 900 F.2d 686, 693 (3rd Cir. 1990). While it is true that Shell Oil invalidated a rule which EPA had been enforcing for more than ten years, the decision did not establish any new rule of law, but simply affirmed a well settled principle, i.e., a regulation, which was not promulgated in

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[9/] The Supreme Court merely issues a statement that certiorari is denied. In contrast, the Shell Oil court denied the motion for clarification "[u]pon consideration of respondent's motion for clarification, the responses thereto the reply. . . ." Shell Oil Co. v. EPA, No. 80-1532 (D.C. Cir. March 5, 1992).

accordance with notice and comment requirements of the APA, is void.

The Goodner court declined to apply the Chevron Oil test in light of the Supreme Court's decision in James B. Beam Distilling Co. v. Georgia, 501 U.S. _____, 111 S.Ct. 2489, 115 L.Ed 2d 481 (1991), a civil case which held that a Supreme Court ruling that a state statute violated the commerce clause applies retroactively to litigants in other cases. The Court in that case limited the applicability of the Chevron Oil test, noting that retroactivity of a decision is "overwhelmingly the norm." 115 L.Ed 2d at 488. The Court states the limitation as follows:

> Nor . . . are litigants to be distinguished for choice-of-law purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. . . . To this extent, our decision here does limit the possible applications of the Chevron Oil analysis . .. . Because the rejection of modified prospectivity precludes retroactive application of a new rule to some litigants when it is not applied to others, the Chevron Oil test cannot determine the choice of law by relying on the equities of the particular case. . . . Once retroactive application is chosen for any assertedly new rule, it is chosen for all others who might seek its prospective application. The applicability of rules of law are not to be switched on and off according to individual hardship . . . . Of course, the generalized enquiry permits litigants to assert, and courts to consider, the equitable and reliance interests of parties absent but similarly situated. Conversely, nothing we say here precludes consideration of individual equities when deciding remedial issues in particular cases.

115 L.Ed 2d at 493.

Under that limitation, the Shell Oil court's retroactive application of the vacatur to the litigants in that case determines the application of the vacatur here. The invalidation of the

mixture rule applies to the benefit of the County here, as it did of the defendants in Goodner.

Any remedial issues that EPA asserts are not applicable here, in light of the fact that it is the same party, EPA, who is requesting relief from retroactivity in Shell Oil, Goodner, and the case at hand, and thus no individual equities exist with respect to Complainant.

Furthermore, in terms of any reliance interests, EPA was on notice during the ten-year pendency of the Shell Oil litigation of the possible procedural infirmity of the mixture rule. That time period includes the time the alleged violations here occurred and the date the EPA filed the complaint. Thus EPA cannot claim to have reasonably relied on the mixture rule, at least for purposes of this proceeding.

Applying the Chevron Oil analysis as an alternative basis for this decision, EPA would not meet the first prong of the test due to the fact that it knew firsthand, as party to the Shell Oil case, of the uncertain state of the mixture rule. See, Juzwin v. Asbestos Corp., 900 F.2d at 693-4 (where declaration of a state statute as unconstitutional was the ruling to which the Chevron Oil test was applied, the first factor of that test was not met because plaintiffs did not establish that their reliance on the statute was reasonable in light of the uncertain state of the law; when the plaintiff's cause of action accrued, the statute had been challenged but not struck down before the Supreme Court). Of course, EPA will not be heard to deny awareness of the "well-

established rule that administrative rules found to be in violation of the APA are void and ineffective" (Alaniz v. Office of Personnel Management, 728 F.2d 1460, 1469 (Fed. Cir. 1984); City of New York v. Diamond, 379 F. Supp. 503, 516 (S.D.N.Y 1974)), that there is a presumption that vacatur of a regulation is to be applied retroactively (American Gas Association v. FERC, 888 F.2d 136, 150 (D.C. Cir. 1990)), and that only in certain circumstances may a court permit the invalid rule to remain in effect.

It is concluded that Complainant has not demonstrated that the Shell Oil decision invalidating the mixture applies only prospectively. The mixture rule was void during the time periods relevant to this proceeding, under the rule of retroactivity, thus rendering the claims in the complaint unenforceable. Accordingly, the complaint will be dismissed with prejudice.

O R D E R

The complaint is DISMISSED with prejudice.[10/]

Dated this 10th day of July 1992.

Spencer T. Nissen
Administrative Law Judge

[10/] Because this decision to dismiss is issued as to all of the claims in this proceeding, this decision constitutes an initial decision (40 C.F.R. § 22.20(b)), and shall become the final order of the Environmental Appeals Board within forty-five (45) days after its service upon the parties and without further proceedings unless an appeal to the Environmental Appeals Board is taken or the Board elects, sua sponte, to review it. See 57 Fed. Reg. 5320 (February 13, 1992).