5/27/93

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 DENYING MOTION FOR LEAVE TO FILE AMENDED COMPLAINT

By an Order, dated July 10, 1992, the complaint in this proceeding under section 3008 of the Solid Waste Disposal Act, as amended by the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928, was dismissed with prejudice upon the ground that the decision in Shell Oil Company v. EPA, 950 F.2d 741 (D.C. Cir. 1981), invalidating the "mixture rule" (40 CFR § 261.3(a)(2)(iv)) for noncompliance with notice and comment provisions of the Administrative Procedure Act (APA), rendered the mixture rule, upon which the complaint was based, void ab initio. The gravamen of the complaint, issued on June 13, 1989, was that the County, which operated a landfill and, during the period November 30, 1983, until August 7, 1987, accepted sludges from an Occidental Chemical Corporation (OCC) facility in Kenton, Ohio, was operating a facility for the treatment, storage or disposal (TSD) of hazardous waste without a permit or having achieved interim status in violation of RCRA §§ 3005 and 3010 and 40 CFR Part 270. Sludges from the OCC facility accepted at the County's landfill were

allegedly hazardous, because, inter alia, 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.[1/]

The complaint alleged that from July 15, 1983, until January 31, 1986, the State of Ohio had Phase I interim authorization to administer its hazardous waste program in lieu of the federal program. The mentioned state authorization expired on January 31, 1986, and was not renewed until June 28, 1989, when Ohio was granted final authorization to operate its hazardous waste program (Order Dismissing Complaint, note 1).

Upon the Agency's appeal of the Order Dismissing Complaint, the Environmental Appeals Board (EAB) remanded the matter for further proceedings, holding that the record was not clear as to when the shipments from OCC containing hazardous waste were accepted at the County's landfill and that, accordingly, it could not be determined whether the federal or the Ohio mixture rule was applicable, Hardin County, OH, RCRA (3008) Appeal No. 92-1 (EAB,

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[1/] In connection with pre-hearing motions, the County submitted evidence that annual losses of formaldehyde at OCC could exceed 25,000 pounds. These discharges were, nevertheless, held to be within the de minimis losses exception to the mixture rule, 40 CFR § 261.3(a)(2)(iv)(D) (Order on Motion for Reconsideration, January 30, 1991).

November 6, 1992). Acknowledging that the complaint did not allege any violations of Ohio hazardous waste regulations, the EAB held that it was error to dismiss the complaint based on Shell Oil, because that decision would not be determinative "if the federal mixture rule is not implicated in this case."[2]

The parties have stipulated that most of the shipments of sludge from OCC which contained phenol introduced into OCC's wastewater treatment plant at its Kenton, Ohio, facility shortly after [the phenol spill on] November 30, 1983, and which contained acetone introduced into OCC's same wastewater treatment plant in 1984, which were accepted at the Hardin County landfill, were accepted during the period when the State of Ohio had interim authorization to administer and enforce a hazardous waste program in lieu of the federal hazardous waste program (Stipulation, dated March 17, 1993). In a Joint Stipulation, dated April 5, 1993, the parties stipulated that shipments of sludge from OCC to the Hardin County landfill which allegedly contained formaldehyde introduced into OCC's wastewater treatment plant at its Kenton, Ohio, facility occurred during periods in which Ohio EPA was authorized to

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[2] Slip opinion at 6. The EAB observed (note 8 at 7) that inasmuch as the Ohio mixture rule (Ohio Adm. Code § 3745-51-03(A)(2)(e)) was identical to the federal rule, and the County had conceded at oral argument that its evidentiary presentation would have been no different under the Ohio rule, Complainant's failure to cite Ohio regulations was harmless error. On the County's motion for reconsideration, the EAB made it clear that the Remand Order was neither an amendment of the complaint to allege violations of Ohio regulations nor a directive to the ALJ to allow such an amendment (Order Denying Reconsideration, February 4, 1993).

administer its hazardous waste program in lieu of the federal hazardous waste program and during the period in which Ohio EPA was not so authorized.

Under date of April 22, 1993, Complainant served a Motion for Leave to File Amended Complaint, Findings of Violation and Compliance Order so as to allege violations of Ohio hazardous waste regulations, Ohio Administrative Code (OAC) Rule 3745-50 et seq., as well as federal regulations. The proposed amended complaint recites that from July 15, 1983, until January 31, 1986, the State of Ohio had Phase I interim authorization to administer a hazardous waste program in lieu of the federal program pursuant to Section 3006 of RCRA. The complaint further recites that Ohio's Phase I authorization expired on January 31, 1986, and that, thereafter, U.S. EPA enforced the federal hazardous waste program in the State of Ohio. On June 30, 1989, the State of Ohio was granted final authorization to administer its hazardous waste program in lieu of the federal program, 54 Fed. Reg. 27170 (1989). As a result, facilities in Ohio qualifying for interim status under RCRA section 3005(e) are now regulated under OAC Rule 3745-50 et seq., rather than federal regulations in 40 CFR Part 265. The proposed complaint alleges that notice to the State pursuant to RCRA section 3008(a) has been provided.

Paragraph 10 of the proposed amended complaint alleges that discharge of U188 and F003 wastes to the OCC wastewater treatment system during the period February 1, 1986, through June 29, 1989, rendered the wastewater treatment sludge hazardous pursuant to 40

CFR § 261.3(a)(2)(iv). Paragraph 11 alleges that discharge of U188, F003 and U122 wastes to the OCC wastewater treatment system during the period November 30, 1983, through January 31, 1986, and from June 30, 1989, to the present, rendered the wastewater treatment sludge hazardous pursuant to OAC Rule 3745-51-03(A)(2)(e). Sludges containing listed hazardous wastes from OCC, that is, U188, F003 and U122, were allegedly disposed of at the Hardin County landfill from November 30, 1983, to August 7, 1987. The County allegedly failed to comply with Interim Status Standards for Owners and Operators of Hazardous Waste Treatment, Storage and Disposal Facilities as required by RCRA section 3004 and 40 CFR Part 265 from February 1, 1986, through June 29, 1989, and as required by OAC Rules 3745-65 through 3745-69 from November 30, 1983, through January 31, 1986, and from June 30, 1989, to the present. The Compliance Order, except for the fact it cited OAC rules, was identical to that in the initial complaint as was the amount ($45,000) of the proposed penalty.

In a memorandum in support of its motion for leave to file an amended complaint, Complainant points out that the parties have stipulated that Ohio regulations were controlling when most of the offending shipments of sludge [from OCC] were accepted at the Hardin County landfill, that in remanding this matter, the EAB noted that the Ohio mixture rule, OAC § 3745-51-03(A)(2)(e), is identical to the federal mixture rule and that, inasmuch as the County had conceded at oral argument that its evidentiary presentation would have been no different under Ohio regulations,

failure of the complaint to cite Ohio regulations was harmless error insofar as the evidentiary phase of the proceeding is concerned (Memorandum at 1, 2). Complainant notes that state regulations in a state authorized to administer its own hazardous waste program, no less than federal regulations, are requirements of RCRA Subtitle C and thus enforceable by U.S. EPA. Complainant quotes 40 CFR § 271.1(i) and asserts that EPA has the authority to enforce Ohio's mixture rule which is more stringent, but not broader in scope than federal regulations.[3]

According to Complainant, EPA has traditionally interpreted RCRA section 3009 to authorize U.S. EPA to enforce state regulations which are "more stringent" than federal regulations. For this assertion, Complainant relies upon a Memorandum entitled "EPA Enforcement of RCRA-Authorized State Hazardous Waste Laws and Regulations," dated March 15, 1982, by William A. Sullivan, Jr., Enforcement Counsel (Sullivan Memorandum). The Sullivan Memorandum states, inter alia, that state program requirements which are

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[3] Memorandum at 4. The cited regulation (40 CFR § 271.1(i)) provides:

> (i) Except as provided in § 271.4, nothing in this subpart precludes a State from:
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> (1) Adopting or enforcing requirements which are more stringent or more extensive than those required under this subpart;
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> (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.

greater in scope of coverage than the federally-approved program are not part of the federally-approved program, because that portion of the state program does not have a counterpart in the federal program and does not become a requirement of Subtitle C (Id. at 5, 6). The Memorandum goes on to provide, however, that there is a distinction between portions of a state program which are "broader in scope" of coverage and those which are "more stringent" than the federal program and that, because the latter usually are covered by similar provisions of the federal program, these "more stringent" provisions become part of the approved state program and are thus enforceable by EPA.[4/]

Complainant says that EPA uses two criteria in distinguishing regulations which are "more stringent" from those which are "broader in scope" than federal requirements, i.e.: "(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."[5/]

[4/] The Memorandum observes that this result was apparently intended by Congress when, in section 3009, it authorized states to develop more stringent programs, and, at the same time, authorized EPA to enforce those programs under section 3008(a)(2). This observation overlooks or ignores the fact that the "more stringent" authorization was added to the Act by the so-called "Bumpers Amendment," Public Law 96-482 (October 21, 1980).

[5/] Memorandum by Lee M. Thomas, then Assistant Administrator for Solid Waste and Emergency Response, Subject: "Determining Whether State Hazardous Waste Management Requirements are Broader in Scope or More Stringent than the Federal Program," dated May 21, 1984 (PIG-84-1).

As to (1) above, Complainant asserts that the scope of the regulated community is determined by the listing of the hazardous waste, not by the regulations which govern how long that listed waste remains hazardous (Memorandum at 5). According to Complainant, the regulated community at issue are those persons managing U188, F003 and U122 listed hazardous wastes and the Ohio mixture rule does not extend the hazardous waste program to "new" wastes. Complainant alleges that the mixture rule merely clarifies that the hazardous waste component of a mixture remains subject to regulation and that, absent the federal mixture rule, the same would still be subject to Subtitle C management under the authorized state program due to its listing. Therefore, Complainant continues, the mixture rule clarifies that a specific procedure (delisting) is required in order for a listed hazardous waste to cease to be considered hazardous. Because it merely clarifies the specific procedure for "exiting" Subtitle C, Complainant argues that the mixture rule does not regulate additional wastes (Memorandum at 6).

Turning to the second component of the requirement for a state program to be more stringent, Complainant says that the direct state program counterpart to the federal regulatory program is the original listing of the waste as hazardous. Complainant points out that the state and federal listings for U188, F003 and U122 are the same and repeats the argument that, in the absence of a federal mixture rule, the state rule simply clarifies the procedures which determine when the same listed waste ceases to be regulated under

RCRA. If the Ohio and federal listings of hazardous wastes are the same, it is difficult to envisage how the federal counterpart to the Ohio mixture rule can be the listing of the hazardous waste. Nevertheless, under Complainant's view, the Ohio mixture rule is a more stringent requirement, because it assertedly makes clear that the only exit from RCRA Subtitle C coverage is delisting.

Complainant asserts that amendment of the complaint will allow EPA to seek full redress for the violations identified in the complaint and asks that its motion to amend the complaint be granted.

Hardin County's Opposition

Under date of May 6, 1993, Hardin County served its opposition to Complainant's motion, "Respondent Hardin County's Response in Opposition to Complainant's Motion for Leave to File Amended Complaint, Findings of Violation and Compliance Order" (Opposition). The County argues that the motion should be denied as the proposed amendment would be futile, firstly, because the Order Dismissing Complaint correctly held that the decision in Shell Oil Co. v. United States, 950 F.2d 741 (D.C. Cir. 1991), voiding the federal mixture rule (40 CFR § 261.3(a)(2)(iv)), should be applied retroactively and secondly, because the Agency lacks authority to enforce the Ohio mixture rule for those shipments of sludge accepted by the County during the period in which the State of Ohio administered an authorized RCRA program (Opposition at 1, 2). Therefore, the County urges that, to the extent the violations

allegedly committed by the County occurred during the period in which the State was not authorized and the federal mixture rule purportedly applied, the ALJ should confirm the Order Dismissing Complaint, because the federal mixture rule did not exist during the relevant period. The County characterizes Complainant's arguments that it may enforce state-authorized RCRA requirements in excess of the minimum standards required by the Act as "disingenuous" and says that the Agency has not provided any support therefor.

Hardin County asserts that EPA's enforcement authority does not extend to "more stringent" requirements enacted by states pursuant to RCRA § 6929, the "retention of state authority section," which implicates significant federalism concerns and that the Ohio mixture rule is unenforceable under the very internal guidance memoranda cited by EPA. Additionally, the County alleges that, despite the statement in the complaint that "notice to the State" pursuant to section 3008(a) of RCRA has been provided, Complainant failed to give such a notice prior to issuing the proposed amendment complaint charging violations of Ohio regulations, that this requirement is jurisdictional and cannot be cured at this late date and that this failure is by itself sufficient reason for denying the motion for leave to amend (Opposition at 3).

As support for its contention that the Agency may not enforce "more stringent" state requirements, the County emphasizes the language of RCRA section 3009 which expressly authorizes states to

impose more stringent requirements than those promulgated by the Administrator and the language of section 3008(a) authorizing the Administrator to enforce "requirements of this subtitle" and argues that federal enforcement authority extends only to the minimum standards established by federal regulations or the equivalent state requirements.[6] According to the County, concurrent jurisdiction has not been extended under RCRA section 3008(a)(2) to the more stringent requirements enacted by the various states, because these "ceilings" are not required and, hence, cannot be considered requirements of the statute (Opposition at 9). The County points to the language of 40 CFR § 271.1(i)(1) (supra note 3) and argues that the deliberate reference to a state "adopting" or "enforcing" necessarily excludes the Agency and thus forestalls any attempt by EPA to assert concurrent jurisdiction.

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[6] Opposition at 6-11. The County notes that Complainant's attempt to rely on the Ohio mixture rule may be pointless, because invalidation of the federal mixture rule also invalidated the Ohio rule. The case cited, Swan Super Cleaners v. Tyler, 549 N.E.2d 526 (Ohio Ct. App. 1988), involved a regulation issued by the Ohio EPA under the Clean Air Act limiting emissions of perchlorethlylene from dry cleaning facilities and the court held that, because the U.S. EPA had repudiated the scientific basis for the regulation, the regulation was unreasonable and unlawful. It is not clear that the rationale of that decision would extend to the situation here, where the federal regulation was invalidated on procedural grounds. Cf. Equidae Partners v. Oklahoma State Dept. of Health, No. 91-C-532, EPA Adm. Law Reporter, Vol. I, at 75 (Dist. Ct. Okla. January 16, 1992), where Oklahoma incorporated federal hazardous waste regulations into state law by reference, summary judgment was granted on plaintiff's motion that lead concentrate was only hazardous by virtue of "derived from" rule, which was vacated in Shell Oil, and thus Oklahoma rule was also invalid. It is understood that this decision is now on appeal to the Oklahoma Supreme Court.

Hardin County says that RCRA and its legislative history make clear that Congress intended to allow states to adopt more stringent standards than the statutory minimum, and to enforce those standards, while at the same time restricting the Agency to enforcement of the statutory minimums, either directly or as an equivalent or substantially equivalent state requirement. The County argues that any other conclusions would raise serious federalism concerns which were not discussed by Congress.

Even if EPA's purported distinction between "more stringent" and "broader in scope" is taken seriously, the County asserts that vacatur of the federal mixture rule must mean that the Ohio mixture rule has no federal counterpart and thus enlarges the scope of the regulated community (Opposition at 11-14). The County points out that when the mixture rule was issued in 1980, the Agency stated "(w)ithout such a rule, generators could evade Subtitle C requirements by simply commingling listed wastes with nonhazardous solid waste," 45 Fed. Reg. 33095 (1980), and that this was the consistent position of the Agency in defending the mixture rule before the D.C. Circuit in Shell Oil (Opposition, Attachment 1). The Department of Justice also adopted this position in its brief to the Eighth Circuit in U.S. v. Goodner Bros. Aircraft, Inc., 966 F.2d 380 (8th Cir. 1992).[7] It should also be noted that in the cited Federal Register, the Agency acknowledged that the mixture rule had no direct counterpart in the proposed regulations.

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[7] (Opposition, Attachment 2). The Supreme Court has denied certiorari in Goodner, 113 S.Ct. 967 (1993).

Accordingly, the County says that Complainant's argument that the only effect of the mixture rule is to make it clear that the only exit from RCRA coverage for listed wastes is "delisting" is contrary to the Agency's own contemporaneous interpretation of its own rule (Opposition at 12). Therefore, the County argues that Complainant's argument is not entitled to deference, that the Ohio mixture rule enlarges the regulated community, has no direct federal counterpart and, assuming its validity, is unenforceable by EPA even under the Agency's own guidance.

D I S C U S S I O N

The general rule is that amendments to pleadings will be liberally granted where the ends of justice will be thereby served and no prejudice to the opposing party results. See 3 Moore's Federal Practice, ¶ 15.08 and Foman v. Davis, 371 U.S. 178 (1962). This is especially true in administrative proceedings, as the EAB has stated that "[it] adheres to the generally accepted principle that 'administrative pleadings' are liberally construed and easily amended, and that permission to amend a complaint will ordinarily be freely granted." In The Matter of Port of Oakland and Great Lakes Dredge and Dock Company, MPRSA Appeal No. 91-1 (EAB, August 5, 1992), slip opinion at 41. Having stated the general rule thusly, the EAB, nevertheless, upheld denial of a motion to amend made after the conclusion of the hearing, because additional counts in the proposed amended complaint were not proven. See also In The Matter of AZS Corporation, Docket No. TSCA-90-H-23 (Order

Denying in Part Motion to Amend Complaint, March 18, 1993) (where motion to amend complaint to include additional parties-respondent was based on piercing the corporate veil and facts alleged were clearly inadequate for that purpose, motion was denied as futile). For the reasons hereinafter appearing, Complainant's motion for leave to file an amended complaint so as to allege violations of Ohio hazardous waste regulations will be denied for the same reason.

Because no sound reason has been advanced for a contrary holding, the order of July 10, 1992, dismissing the complaint as to alleged violations of federal hazardous waste regulations will be affirmed.

Although, as pointed out (supra note 6), there is a substantial question as to whether the Ohio mixture rule, OAC § 3745-51-03(a)(2)(e), which is identical to the federal rule, 40 CFR § 261.3(a)(2)(iv), survived invalidation of the federal rule, this decision assumes the validity of the Ohio rule.

The distinction between state RCRA regulations or requirements which are more stringent than the federal regulations and, thus, according to the Agency, enforceable by EPA and those state programs having a greater scope of coverage, which are not part of the approved federal program, is grounded in the regulation, 40 CFR § 271.1(i) (supra note 3). The County's assertion (ante at 11) that the language "nothing in this subpart precludes a State from adopting or enforcing. ." clearly excludes enforcement by EPA is valid on its face. The Agency's position, however, is based on the

negative implication arising from the fact state programs with a greater scope of coverage than the federal program are expressly excluded from the federally approved program, while no similar exclusion is provided for more stringent state programs. It is at least questionable whether this section will withstand the construction the Agency places upon it, however, because as originally proposed, 40 CFR § 123.1(g) (44 Fed. Reg. 32918, June 7, 1979), the provision was an implementation of the Clean Water Act. While it is true that when the Consolidated Permit Regulations were proposed (44 Fed. Reg. 34244, June 14, 1979), the provision, proposed 40 CFR § 123.1(f) was expanded to include RCRA, the preamble explains that the approach of the statutes authorizing programs covered by this Part is that the federal government should set minimum standards, with any state being given the freedom to impose any more stringent approach it deems appropriate.[8/] This

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[8/] See 44 Fed. Reg. 34257 (June 14, 1979) providing in pertinent part:

> The approach of the statutes authorizing the programs covered by this Part is that the Federal government should set minimum standards, with any State being given the freedom to impose any more stringent approach it deems appropriate. The only exception to this is in the hazardous waste program where Congress determined that the need for consistency between the State outweighs any one State's interest in hazardous waste regulation. This exception has been narrowly construed and is discussed further in the preamble discussion of Subpart B.
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> State programs are developed and implemented under State law. While this Part sets minimum requirements for State programs, it generally does not require that State authorities be worded or structured the same as the applicable Federal authorities. Nonetheless, the Agency

(continued...)

background affords scant support to the Agency's position that "more stringent" state requirements become part of the federally approved RCRA program and are thus enforceable by EPA. Moreover, as we have seen (supra note 4) the so-called "Bumpers Amendment" expressly authorizing more stringent state regulations was not included in RCRA until October 21, 1980. The scanty legislative history of the provision is susceptible to the interpretation it was designed to remove any question of federal jurisdiction as to more stringent state siting standards for hazardous waste facilities.[9/]

[8/](...continued)
encourages States to incorporate by reference, to the extent allowable under State law, Federal requirements, especially those which are technical in nature.

[9/] Senator Bumpers is quoted, 125 Cong. Rec., June 4, 1979, at 13248, as follows:

> * * * The act [RCRA] provides States with a framework for implementing hazardous waste treatment and disposal programs. However, it is inadequate in that it does not give States the opportunity to set standards more stringent than those provided by Federal authorities in establishing sites for waste disposal facilities. My amendment to the Solid Waste Disposal Act corrects this deficiency by allowing the States to adopt standards more stringent than the Federal standards when selecting sites for the disposal of hazardous waste materials.
>
> In my State, a site for the disposal of hazardous waste, near the community of Hope, Ark., may meet Federal standards and, thus, qualify as a location for a hazardous waste facility. I believe the States should be allowed to adopt standards more stringent than Federal standards, in order to adequately protect the citizens of our States.

(continued...)

Be the foregoing as it may, Complainant's position doesn't pass muster under the Agency guidance it claims to follow. This is because, as the County points out, the mixture rule, as interpreted by the Agency at the time of its promulgation, clearly increased the size of the regulated community. If generators could evade Subtitle C requirements by simply commingling listed wastes with nonhazardous wastes (ante at 12), it is obvious that the mixture rule increases the size of the regulated community. Indeed, in this very case, Complainant relies on the Federal and Ohio mixture rules as a basis for asserting jurisdiction over the County's landfill, which, on the facts alleged, would not otherwise be subject to RCRA jurisdiction. It is recognized that in repromulgating the "mixture" and "derived from" rules (57 Fed. Reg. 7628, March 3, 1992), the Agency emphasized that some of such wastes would be covered by existing rules absent the reinstatement.[10/] Wastes referred to, however, appear to be

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[9/](...continued)

> Mr. President, I am not going to belabor the point. My amendment is a very simple one: It simply provides that States may have more stringent standards than the Federal standards. The law now provides that State laws may not be less stringent, and this would be an addendum to that section of the act.

[10/] See 57 Fed. Reg. 7629 providing in part:

> The Agency acknowledges that some "mixture" and "derived-from" wastes would still be covered under existing regulations. An interpretation of the regulations under which the slightest mixing or management rendered a listed waste non-hazardous would clearly be unreasonable. Nevertheless, if the rules were

(continued...)

primarily land disposal restricted (LDR) wastes, which are not at issue here.[11/]

Even if, contrary to the foregoing analysis, the mixture rule is regarded as not expanding the size of the regulated community, invalidation of the federal mixture rule means that there is no direct federal counterpart of the Ohio rule, the Ohio rule is thus

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[10/] (...continued)
no longer in effect, the possibility of confusion and erroneous waste classifications would surely increase, resulting in greater potential for harm to human health and the environment.

For example, if the "mixture" and "derived-from" rules were not in effect, some wastes might be mistakenly classified as non-hazardous and disposed of in a municipal landfill or unregulated industrial landfill. EPA could find it extremely difficult to track these disposals, so that any environmental problems they caused might be exacerbated by delay and could ultimately require more costly cleanups. It is true that the current land disposal restrictions (LDR) program would require treatment and tracking of certain mixed and derived-from wastes, since the LDR restrictions apply at the point of a waste's generation (see 55 Fed. Reg. at 22651-52, June 1, 1990). Likewise, the prohibition on dilution as a substitute for adequate treatment likewise normally applies at the point of generation (see 40 CFR 268.3(a)). As a result, those wastes restricted from land disposal which clearly meet the listing description at the point of generation would still be subject to the treatment standards of RCRA at 40 CFR part 268 (as well as the waste analysis, tracking and recordkeeping requirements associated with that program) even if the wastes were later mixed with other wastes, or, in some cases, even if subsequently managed (see 55 Fed. Reg. 22661).

[11/] Cf. In the Matter of Chem-Met Services, Inc., Docket No. RCRA-V-W-011-92 (Order Denying Motion To Dismiss and/or For Accelerated Decision, February 23, 1993), wherein factual issues in connection with the Agency's position LDR applied at the point of generation were held to preclude granting a motion to dismiss based primarily on Shell Oil Co.

"broader in scope" than the federal rule and may not be enforced by the Agency under the express provisions of 40 CFR § 271.1. The Ohio (OAC §§ 3745-51-11 through 51-33) and EPA hazardous waste listings (40 CFR Part 261, Subparts C & D) being identical, these listings are obviously counterparts of one another. Complainant's contention that the federal counterpart of the Ohio mixture is the original listing of hazardous waste is erroneous and is rejected. As we have seen (ante at 12), the Agency, in promulgating the mixture rule, acknowledged that it had no direct counterpart in the proposed regulations. This assertion cuts sharply against Complainant's present contention, which, for all that appears, is an afterthought adopted solely for this and similar litigation.

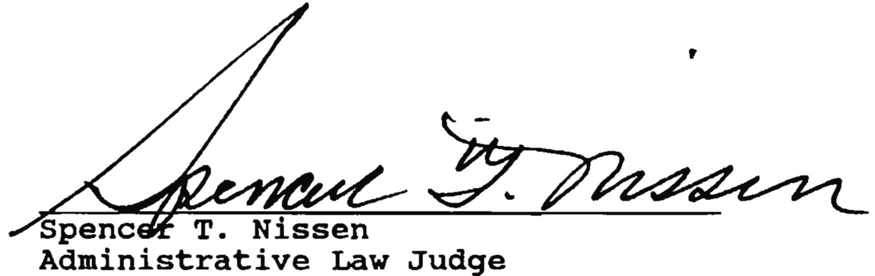
In view of the foregoing, it is concluded that Complainant cannot prevail, even if the complaint were amended as proposed to allege violations of Ohio hazardous waste regulations. The proposed amendment will, therefore, be denied as futile.[12/]

[12/] While this conclusion makes it unnecessary to address the County's contention that the proposed amendment should be denied for lack of compliance with the notice to the state requirement (RCRA § 3008(a)(2)), no reason is apparent why this deficiency, if it is one, could not be cured by simply sending a copy of the proposed amended complaint, which, until leave to file is granted, is merely a proposal, to the State of Ohio.

ORDER

The Order, dated July 10, 1992, dismissing the complaint as to alleged violations of federal hazardous waste regulations is affirmed. The Motion for Leave to File Amended Complaint so as to allege violations of Ohio hazardous waste regulations is denied as such an amendment would be futile.

Dated this 27th day of May 1993.



Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

In accordance with Section 22.27(a) of the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties I do hereby certify that the foregoing Order Denying Motion For Leave To File Amended Complaint was filed in re Hardin County, OH; Docket No. RCRA-V-W-89-R-29 and copies of the same were mailed to the following by Certified Mail- Return Receipt Requested:

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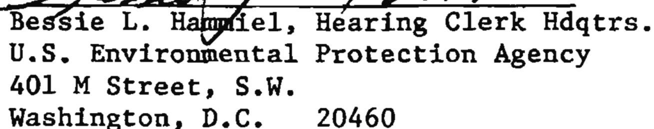

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Dated: June 9, 1993