UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of

OHMSTEDE MACHINE WORKS, INC.

Respondent

Docket No. RCRA VI-437-H

Resource Conservation and Recovery Act: 40 CFR §261.3(a)(2)(iv)(C);

Exclusion of mixture of solid and hazardous waste from regulation as hazardous waste where generator was able to demonstrate, on the particular facts of this case, that the mixture consisted of wastewater the discharge of which is subject to regulation under Section 402 of the Clean Water Act and heat exchanger bundle cleaning sludge from the petroleum refining industry (EPA Hazardous Waste No. K050).

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Rene P. Lavenant, Jr., Esquire, Fulbright & Jaworski, Bank of the Southwest Building, Houston, Texas 77002, for the Respondent.

Before: J. F. Greene, Administrative Law Judge.

Decided December 13, 1985

Respondent herein moved for "accelerated adjudication" pursuant to 40 CFR §22.20 on the ground that the material facts alleged in the complaint, in which respondent had been charged with numerous violations of the Resource Conservation and Recovery Act [RCRA], 42 U.S.C. §6901, the Texas Solid Waste Disposal Act [SWDA] and regulations promulgated thereunder at Title 31 of the Texas Administrative Code [TAC], are not in dispute. 1/ What is disputed, and has been the subject of oral argument and extensive briefing owing to the importance and novelty of the questions raised, is whether respondent's business, specifically the material produced as a result of the cleaning of heat exchanger bundles, is subject to regulation under Section 3008 (42 USC §6928) of RCRA. In addition to its argument that the material resulting from the cleaning process is exempted under several of the regulations and that, in any case, the material is not hazardous, respondent asserts that the U. S. Environmental Protection Agency does not have authority to enforce the Texas Solid Waste Disposal Act.

I.

Taking the last question first, respondent points out that it does not claim that "all federal enforcement authority has been assigned to the States," leaving the U. S. EPA without enforcement authority in connection with the federal statute. On the contrary, it says, "Congress authorized the States to

1/ The complaint alleges, inter alia, that "Respondent is a generator and an operator of a hazardous waste facility, used for the storage and disposal of hazardous waste . . . ." and that "(R)espondent is a generator and an owner and operator of a facility which stores and disposes of hazardous industrial solid waste . . . ."

adopt and enforce parallel legislation and reserved to the EPA the right to act where a State failed to do so . . .", Respondent's brief at p. 23 - 24. Respondent's argument is that U. S. EPA may not enforce the Texas Act:

> There is no national interest which would justify federal intrusion into purely domestic matters of State law enforcement and there is no evidence of a Congressional intent to authorize the EPA to meddle in areas which Congress was careful not to pre-empt with federal regulation. To the extent that Ohmstede has complied with the requirements of RCRA and EPA's validly promulgated regulations . . . Region VI has no authority to ask more . . . (A)ny enforcement of federal law and federal encroachment in matters solely the concern of the States would involve important principles of constitutional law 2/

Careful examination of the provisions of RCRA suggests that the real question raised is something like "Whose law is this, anyway?". It is apparent that the statutory scheme involves specific federal pre-emption of enforcement in the areas of solid and hazardous waste management, with a sort of "grant-back" of enforcement authority to be made by the Administrator of the U. S. EPA, under certain circumstances, to the States. The circumstances under which any State will be authorized by U. S. EPA to administer its own program, leaving aside the interim provisions 3/ of Section 3006(c), 42 USC §6926(c), are where the State program (1) is equivalent to the federal program, (2) is consistent with federal or State

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2/ Brief at page 23.

3/ Pursuant to which temporary authority can be granted if the State program is "substantially equivalent," (emphasis added).

programs applicable in other States, and (3) provides "adequate enforcement of compliance with the requirements of this subtitle," [i. e. Subtitle C, Hazardous Waste Management, §3001-3019]." The provisions of §3006(e), 42 U.S.C. §6926(e), under which the Administrator must withdraw authorization of a State program under certain circumstances, and those of §3008(a)(3), 42 U.S.C. §6928(a)(3), whereby a federal compliance order may include suspension of a State permit issued pursuant to an authorized State program, reinforce the view that the law being enforced by a State under a U.S. EPA authorized State program is essentially federal law. 4/ U. S. EPA clearly has authority to enforce these State laws, after notice is given [§3008(a)(2); 42 USC §6928(a)(2)], to the point of suspending a State permit issued pursuant to (federally specified) "State law". 5/

That hazardous waste management since the passage of RCRA is by no means "solely the concern of the States," or "purely domestic [State] matter" that Congress was "careful not to pre-empt with federal regulation", may be seen from §1002, 42 USC §6901, Congressional Findings, and from §1003, 42 U.S.C. §6903, Objectives and National Policy:

> The Congress finds with respect to solid waste --
>
> . . . (4) that while the collection and disposal of solid wastes should continue to be primarily the function of State, regional and local agencies, the problems of waste disposal as set forth above have become a matter national in scope and in concern and necessitate Federal action ... to provide for proper economical solid waste disposal practices. (Emphasis added).

4/ This is not to say that the State becomes a mere federal agent, since it does as a formal matter pass its own federally specified legislation.

5/ This is not a discussion of whether the U. S. EPA may enforce the State law where (a) the State has been authorized to enforce its own (equivalent) hazardous waste program, and (b) has done so with respect to a particular defendant in a "reasonable and appropriate" manner, after which the U. S. EPA began its own action for the same alleged violations; see BKK Corporation, Docket No. IX-84-0012.

> The objectives of this Act are to promote the protection of health and environment and to conserve valuable material and energy resources by -- . . . (3) prohibiting future open dumping on the land and requiring the conversion of existing open dumps to facilities which do not pose a danger to the environment or to health; (4) assuring that hazardous waste management practices are conducted in a manner which protect human health and the environment; (5) requiring that hazardous waste be properly managed in the first instance thereby reducing the need for corrective action at a future date;
>
> (b) National Policy. -- The Congress hereby declares it to be the national policy of the United States that, wherever feasible, the generation of hazardous waste is to be reduced or eliminated as expeditiously as possible. . . .

In essence, the regulatory schema under RCRA provides for virtually concurrent enforcement of federal law by U. S. EPA and by those States which can qualify by producing an equivalent program. While the statutory plan is referred to as "a viable Federal-State partnership to carry out the purposes of the Act," 42 U.S.C. §6902(a)(7), State ability to give legislative expression to its own ideas about hazardous waste management, if they should differ from the federal Act, is clearly pre-empted. And, it should be noted, it is the specific purposes of the federal Act that the partnership described at §1003(a)(7) is supposed to carry out.

II.

Regarding the claimed exemptions from regulation, respondent argues that the product which results from the cleaning of heat exchanger bundles is excepted

from regulation as hazardous waste by each of four different provisions of 40 CFR Part 261. 5/ The material produced by the cleaning process is known as heat exchanger bundle sludge. A sand and water slurry is used to dislodge accumulated residues from the cooling- water side of heat exchanger coils; the sludge then settles out or is filtered out from the sand and water. The water is recycled. 6/

Heat exchanger bundle sludge is listed as a hazardous waste in 40 CFR Part 261 at Subpart D, Lists of Hazardous Wastes, as "Industry and EPA Hazardous Waste" number K050. K050 appears in the Subpart D lists of hazardous wastes because it is "toxic waste." 7/ Further on, Appendix VII of Part 261 specifies that the "hazardous constituent" that caused K050 to be listed as a "hazardous [toxic] waste" is hexavalent chromium.

The "mixture rule" at 40 CFR 261.3(a)(k2)(iii) contains an exception to one of the definitions of hazardous waste:

> (a) a solid waste . . . is a hazardous waste if:
>
> . . . (2) it meets any of the following criteria:

5/ The claimed exceptions are:

1. 40 CFR 261.3 (a)(2)(iii), the "mixtures" exception;
2. 40 CFR 261.7(a)(1), the "empty container" exception;
3. 40 CFR 261.3(a)(2)(IV)(D), exception for de minimus losses of discarded chemical products;
4. Express exclusion of the material in question under 40 CFR 261.3(a)(2)(iv)(C).

6/ Respondent has a Clean Water Act permit for its facility (respondent's reply brief, Exhibit A).

7/ See 40 CFR 261.32, Hazardous Waste from Specific Sources, in the Hazardous Code Column.

> . . . (iii) it is a mixture of solid waste and a hazardous waste that is listed in Subpart D solely because it exhibits one or more of the characteristics 8/ of hazardous waste identified in Subpart C, unless the resultant mixture no longer exhibits any of the characteristics of hazardous waste identified in Subpart C. (Emphasis added).

Respondent argues that this exception (". . . unless the resultant mixture no longer exhibits any characteristics of hazardous waste identified in Subpart C" -- and respondent says its bundle sludge does not exhibit toxicity) was intended to apply to situations where the separation of the hazardous constituent (in this instance, hexavalent chromium) from the nonhazardous material is impossible, or where the process of delisting the mixture from the hazardous waste list is burdensome. Respondent's argument is premised upon the belief that K050, heat exchanger bundle cleaning sludge, was listed in Subpart D because or solely because it exhibits a characteristic of hazardous waste identified in Subpart C (in this instance, EP toxicity). However, while it is clear that the "mixture" exception would indeed simplify matters where delisting or separating out the hazardous constituent is impractical, it is also clear that K050 was not listed in Subpart D because it exhibited EP toxicity or any other Subpart C characteristic, but because hexavalent chromium is toxic. 9/ Additionally, even if the Subpart D listing had been the sole result of EP toxicity rather than toxicity, respondent would still have to demonstrate that its bundle cleaning sludge is not, or is no longer, toxic, since counsel for the complainant has not agreed to the "accuracy or authenticity" of respondent's test results (complainant's brief, pp. 3-4).

8/ I. e. ignitability (§261.21), corrosivity (§261.22), reactivity (§261.23), and "EP toxicity" (§261.23).

9/ See 40 CFR §261.30(b), the Hazard codes. The listing basis for K050 is "(T)", not "(E)".

Respondent must show, in order to fall within the exemption provided by the "empty container" rule, 40 CFR 261.7 10/ that the heat exchangers are "containers," as that term is defined at §260.10, and, if they are, that they are "empty" as defined at §261.7(b).

"Container" is defined as "any portable device in which a material is stored, transported, treated, disposed of, or otherwise handled," 40 CFR §260.10.

"Portable" is defined as "that (which) can be carried," and "easily carried or moved, especially by hand (a portable TV)" by Webster's New World Dictionary, College Edition, 1974; and as "capable of being easily carried" by the Winston Senior Dictionary, 1972; as "capable of being carried or moved about" from the Latin verb portare (to carry) by Webster's New College Dictionary, 1979; and as "capable of being carried easily, or conveniently trnasported, light or manageable enough to be readily moved" by Webster's Third New International (Unabridged) Dictionary, 1967. It is apparent from commonly consulted dictionaries 11/ that "portable" suggests that the containers referred to in §261.7(a) can be carried or moved easily.

10/ 40 CFR §261.7 provides that

> (a)(1) any hazardous waste remaining in ... an empty container ... as defined in ¶(b) of this section is not subject to regulation . . . .

11/ Which purport to list definitions and common usage: "In the arrangement of definitions, the rule has been, with very few exceptions, to list first the meaning which is now most commonly and immediately attached to the word defined," The Winston Senior Dictionary, at p. iv.

Exhibit 1, attached to the transcript of oral argument, pictures several heat exchangers, heat exchanger tube bundles, and an exchanger shell. All are large and appear to be very heavy. Two are shown mounted on the flat bed of a Mack truck which bears the respondent's name. Although it is possible to find a definition of "portable" that encompasses the size and weight of such heat exchangers 12/ it does not seem reasonable to attach this far less usual meaning to the definition of "container" at §260.10. If §260.10 referred to everything that could be moved by any method, and to objects as large as the exchangers shown chained to the respondent's truck, the "empty container" rule would exempt virtually everything except, perhaps, holes in the ground. Further, while it may be that not all heat exchangers are so large, obviously many of them are, and, as such, they are not "portable", or "containers".

The other "mixture rule" [at 40 CFR 261.3(a)(2)(iv)(D)] contains an exemption where:

> (iv) . . . . the generator [of hazardous waste] can demonstrate that the mixture [of solid waste and one or more hazardous wastes listed in Subpart D, Lists of Hazardous Wastes] consists of wastewater the discharge of which is subject to regulation under either §402 or §307(b) of the Clean Water Act . . . and
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> (D) A discarded commercial chemical product, or chemical intermediate listed in §261.33, arising from de minimis losses of these materials from manufacturing operations in which these materials are used as raw materials or are produced in the manufacturing process.

12/ Webster's New International Dictionary, 1906, gives one definition of "portable" as "capable of being transported though belonging to a class of objects usually unmovable; as a portable bed, desk, engine ... a portable house ...".

Read with §261.33 referred to in (D) above 13/, it is clear that the words "commercial chemical product" and "chemical intermediate" refer to the chemicals listed in §261.33; in order to be eligible for the "de minimis" exemption, therefore, the material must at least appear in the lists at §261.33(e) and (f). Moreover the "comment" following §261.33(d) assists substantially in interpreting the phrases "commercial chemical product" and "chemical intermediate":

> Comment: The phrase 'commercial chemical product or manufacturing chemical intermediate having the generic name listed in . . .' refers to a chemical substance which is manufactured or formulated for commercial or manufacturing use which consists of the commercially pure grade of the chemical, any technical grades of the chemical that are produced or marketed, and all formulations in which the chemical is the sole active ingredient.
>
> It does not refer to a material, such as a manufacturing process waste, that contains any of the substances listed in paragraphs (e) or (f). . . . .

Since the material in question here, heat exchanger bundle cleaning sludge, is not listed in §261.33, and since it is not a "commercial chemical product" as that phrase is interpreted in the comment to §261.33(d), this exemption to the presumption of hazardous waste does not apply.

13/ §261.33 reads, in pertinent part, that

> The following material or items are hazardous waste if and when they are discarded or intended to be discarded:
>
> (a) any commercial chemical product or manufacturing chemical intermediate having the generic name listed in paragraph (e) or (f) of this section.

Respondent relies heavily upon the specific exclusion from regulation of K050 (heat exchanger bundle sludge from the pertoleum refining industry) where the generator can demonstrate that the mixture consists of K050 and wastewater the discharge of which is subject to regulation under either §402 or §307(b) of the Clean Water Act. §261.3(a)(2)(iv)(C) provides:

> (iv) . . . however the following mixtures of solid wastes and hazardous wastes listed in Subpart D are not hazardous wastes if the generator can demonstrate that the mixture consists of wastewater the discharge of which is subject to regulation under either §402 or §307(b) of the Clean Water Act . . . and
>
> (C) . . . heat exchanger bundle cleaning sludge from the petroleum refining industry (EPA Hazardous Waste No. K050); . . .

Respondent's facility operates under a Clean Water Act §402 permit (Exhibit A to respondent's reply brief).

It can be seen that, on its face, K050 is excluded from regulation. It is not a hazardous waste, provided that it is generated in a facility where the discharge of waste water is regulated, as respondent's is. Nevertheless, the complainant argues that it was the intent of the regulation that only when K050 is actually removed at an oil refinery does the exclusion from regulation apply. This is because, according to the complainant, in granting the exclusion the EPA relied upon data from four oil refineries (which were said to be "representative", 46 Federal Register 56583, note 2) where the volume of water was considered sufficient to dilute the chromium to acceptable levels. Therefore, despite clear and unambiguous language in which the only conditions set forth in the regulation are that the material must be K050 and that the wastewater must

regulated under §307(b) or §402 of the Clean Water Act, the complainant takes the position that the exclusion is not applicable to the K050 removed by the respondent, and that the respondent's remedy is another delisting procedure for the K050 it removes. 14/ The complainant does not maintain that the respondent's mixture is not diluted to the same extent as it would be in a refinery:

> . . . What it says is that Headquarters did not have . . . the information indicating that Ohmstede's waste was diluted to that great a degree; and if Ohmstede does dilute its waste to that degree, what it needs to do is file a delisting petition. . . .

Moreover, if and when the respondent should decide to file such a petition, it would be required to test for 90 to 95 constituents:

> . . . .(T)he Region has supplied Ohmstede with a list of 90 to 95 constituents which will be required to be tested . . . in order for this type of waste [respondent's K050] to be shown to be nonhazardous. (TR pp. 39-40).

14/ The respondent removes heat exchanger bundle cleaning sludge from the petroleum refining industry, just as the petroleum refining industry removes heat exchanger bundle cleaning sludge, when it chooses to remove the sludge at the refinery rather than sending the exchangers out to be cleaned by, for example, the respondent. The respondent also removes bundle cleaning sludge from heat exchangers used in other industries, but only bundle cleaning sludge from the petroleum refining industry is K050.

It is clear that the Agency considered, and relied heavily upon, data supplied by the American Petroleum Institute from four refineries, and that this data suggested that bundle cleaning sludge is "often mixed with large volumes of wastewater as a result of reasonable and efficient waste management practices, without significantly increasing the resulting concentration of hexavalent chromium in the wastewater," 46 Federal Register 56583. However, there were other reasons, as well, not specifically related to the volume of refinery wastewater, for granting the exclusion for K050. These included factors such as "attenation (of the chromium) before reaching environmental receptors" as a result of adsorbtion to soil or degradation and that "almost all of the chromium" would be reduced to the relatively nontoxic trivalent form by agents in the raw wastewater, 46 Federal Register 56586. This statement is followed by specific information as to the quantity of sulfides in the untreated wastewater of two large refineries, based upon a letter from Exxon Company (see note 36 at p. 56586). Further,

> (A)lthough the total environmental loading of chromium in petroleum refinery wastewaters resulting from heat exchanger bundle cleaning sludges is not inconsiderable (about 1300 kkg/year) [footnote to data from four refineries omitted], the fact that it is almost completely trivalent, and is present in low concentrations in those wastewaters, justifies exempting them from the mixture rule at 40 CFR 261.3(a)(2).

These statements from the rulemaking by no means imply, nor do any others after careful reading, that the removal of K050 in any location other than an oil refinery would not fall within the exclusion. They suggest, equally as well, that the K050 itself, when the wastewater is regulated under the Clean

Water Act, is not sufficiently hazardous to warrant application of the mixture rule. Similarly, the general summary of the Agency's reasons for making the exclusion for K050 do not alert the regulated community that K050 removed in any location other than a refinery is not exempted:

> At this time, in §261.3(2)(iv)(C) of today's amendment, the Agency has decided to grant API's request to exclude from the mixture rule wastewater mixtures that are hazardous only because they contain EPA Hazardous Waste No. K050 (Heat exchanger bundle cleaning sludge from the petroleum refining industry) and which are treated in a facility subject to regulation under Section 402 or Section 307(b) of the Clean Water Act. 15/

Counsel for the complainant notes the statement in each volume of the Code of Federal Regulations which reminds that the Code and the Federal Register "must be used together to determine the latest version of any given rule." This, however, refers only to the latest text of a regulation, since the annual publication of Code volumes lags behind revisions made by agencies, but that is not the point here. Here, the respondent is charged with notice of an intention not expressed in the regulation, and not clearly articulated in the rationale for the exclusion. Federal government regulations have only words, not intentions that are not set forth. Those words must alert the regulated community before it can be charged with notice of the regulations. Common sense suggests that

15/ Id., at 56585. This is not to say that the Agency did not rely upon refinery data. It clearly did so, but this does not, by itself, adequately suggest to a respondent which removes refinery bundle sludge, that it may not rely upon the exclusion.

before a rule can be applied fairly to a member of the regulated community to whom, in its face, it does not apply, more notice than has been provided in the November, 1981, rulemaking must be given. U.S. v. Merrill, cited by the complainant, does not contradict this.

It has been noted that the respondent's cleaning and repair business also includes cleaning heat exchangers that do not come from the petroleum refining industry. The resulting waste, which is not K050 because it is not petroleum refining industry bundle cleaning sludge, may or may not be identical in composition to K050. This question need not be addressed since, as the complainant points out, it has never alleged that the respondent has any waste other than K050 at its facility (complainant's reply brief at p. 13, footnote 25).

The parties have agreed that there is no dispute as to the material facts in this matter; the complainant agrees, with only a clarification or two, that the respondent accurately states those facts in its motion. That motion, the complainant's response, and other relevant documents of record demonstrate that there are no genuine issues of material fact in this case. Accordingly, the question of the applicability of 40 CFR §261.3(a)(2)(iv)(C) having been determined in the respondent's favor, it is entitled to judgment as a matter of law (40 CFR §20.22). It is hereby ORDERED That the complaint be, and it is hereby, dismissed.

J. F. Greene
Administrative Law Judge

December 13, 1985
Washington, D.C.