1/30/91

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

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

ORDER ON MOTION FOR RECONSIDERATION

Under date of October 19, 1990, Hardin County filed a motion for reconsideration of an order, issued on October 11, 1990, which denied its motion for an accelerated decision.[1/] In the instant action, the County is charged with operation of a hazardous waste disposal facility (landfill) without a permit in violation of section 3005 of the Act and 40 CFR § 270.1. Wastes received at the landfill during the period November 30, 1983, to August 7, 1987, included sludges from an Occidental Chemical Corporation (OCC) facility in Kenton, Ohio. The sludges allegedly included U188 (phenol), U122 (formaldehyde), and F003 (spent acetone solvent). Complainant contends that the sludges

---

[1/] The motion was filed with the permission of the ALJ which was granted in a telecon with counsel on or about October 17, 1990. For this reason, Complainant's objections to the filing of the motion are not well founded.

were rendered hazardous wastes by virtue of the "mixture rule," 40 CFR § 261.3(a)(2)(iv).[2/]

Circumstances by which the mentioned chemicals came to be in the OCC sludges included a spill on November 30, 1983, of approximately 11,000 pounds of commercially pure grade phenol which was routed to Surface Impoundment No. 1 (caustic pond) at the OCC facility.[3/] In 1984, 2,000 pounds of spent acetone solvent were discharged to Surface Impoundment No. 1 at the OCC facility. Additionally, in excess of 15,000 pounds of commercially pure grade formaldehyde are discharged annually to Surface Impoundment No. 2 (clear pond) at the OCC facility.[4/]

I. Phenol Spill

In its motion for an accelerated decision, Hardin County contended that the 1983 phenol spill did not render resulting

---

[2/] Because phenol and formaldehyde are used as raw materials in the production of resins, these chemicals are normally present in wastewaters at the OCC facility. These wastewaters are not, however, RCRA hazardous wastes because they are manufacturing process wastes containing substances listed in section 261.33 which have not been listed in sections 261.31 or 261.32.

[3/] According to Complainant, this event determined the status of the landfill as a hazardous waste disposal facility and 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 CFR § 270.10(e)(ii)).

[4/] The 15,000 pound figure is an OCC estimate based on assumed losses of 0.1% of 15,000,000 pounds of formaldehyde processed annually at the facility. Based on an assumed operating rate of 24 hours a day, 360 days a year, engineers for RMT, Inc., a consulting firm employed by the County, calculated an expected annual formaldehyde loss of 25,155 pounds.

sludges hazardous, because the material was "beneficially used" and thus exempted from regulation by 40 CFR § 261.6 (1983). The "beneficial use" argument was based on evidence (an affidavit of Jerry Ice, Supervisor of Environment and Health for OCC) that the spilled phenol was used to maintain feed loadings to the wastewater (biological) treatment plant. According to the County, the caustic pond and the wastewater treatment plant are separate units. The County's evidence further showed that the OCC wastewater treatment plant was designed for a phenol feed rate of approximately 1,000 pounds per day and during the period the spilled phenol was available, phenol distillate, which would otherwise have been used to maintain the requisite feed loading, was not added to the wastewater treatment plant. The County acknowledged that the spilled phenol may have been regulated as a hazardous waste while it was stored in the caustic pond prior to being metered into the treatment plant feed, but argued that it ceased being regulated as a hazardous waste as soon as it was fed into the treatment plant. The County further argued that any resulting sludge was also exempted from regulation by section 261.6.

In concluding that the County had not shown it was entitled to the exemption for beneficial use of the spilled phenol under former section 261.6, the October 11 order pointed out that the caustic pond was used for the storage and/or treatment of wastes and that routing the spilled phenol thereto must be deemed prima facie to have been for the purpose of disposal. Moreover, the

order emphasized that the circumstances of the spill had not been established and that, if the spilled phenol was mixed with dirt or other debris, the presumption that disposal was intended was strengthened, if not made conclusive, citing the preamble to "Interpretive Issues," 45 Fed. Reg. 78540 (November 25, 1980). Moving for reconsideration, the County argues that the central question is whether the material was used rather than being discarded and, because the undisputed evidence shows the spilled phenol was used, its entitlement to an accelerated decision irresistibly follows.

D I S C U S S I O N

The October 11 order pointed out that commercially pure grade phenol is a hazardous waste only when discarded or intended to be discarded (40 CFR § 261.33) and that the fact the spilled phenol was routed to the caustic pond where other wastes are stored and/or treated required the conclusion the discharge was prima facie for the purpose of disposal. Citing language in the preamble to "Interpretive Issues" (45 Fed. Reg. 78540), the order further pointed out that circumstances of the spill had not been established, but if the spilled phenol was mixed with dirt or other debris, the presumption disposal was intended was practically conclusive. This being so, the County's contention the spilled phenol was beneficially used seemingly hinges on OCC's intent.

In the preamble to the initial hazardous waste regulations (45 Fed. Reg. 33091, May 19, 1980), the Agency noted that

excluding wastes that are used, re-used, recycled or reclaimed from the Subtitle C system would make the regulatory program largely unworkable and create a major regulatory loophole not intended by the Act. Further, making the determination of whether a waste was subject to Subtitle C requirements dependent on the intent of the person handling it, would make the Act difficult to enforce and theoretically allow wastes to move in and out of the regulatory system depending on what the person then handling the waste planned to do with it. With these thoughts in mind, the exemption, 40 CFR § 261.6(a) (1980), for hazardous wastes used, re-used, recycled or reclaimed applied to listed wastes only while actually being recycled. Sludges and hazardous wastes listed in Subpart D were subject to the regulatory requirements while transported or stored prior to re-use or recycling by the exception to section 261.6(a) in section 261.6(b).[5/] In discussing this section, the Agency stated that it was deferring regulation of the actual use and re-use of hazardous waste and hazardous waste recycling and reclamation activities, but made it clear that the deferral was limited to

---

[5/] The County's complaint (Memorandum at 12) concerning the October 11 order's citing of the mentioned "Interpretive Issues" regulation (45 Fed. Reg. 78540) for the proposition that "wastes listed in Subpart D" in section 261.6(b) were intended to refer only to wastes listed in sections 261.31 and 261.32, and not wastes in section 261.33, prior to the actual amendment thereof, (48 Fed. Reg. 2532, January 20, 1983), is not understood, because, unless the exception in section 261.6(b) is so limited, the County's beneficial use argument obviously fails.

bona fide "legitimate" and "beneficial" uses and recycling of hazardous wastes.[6/]

While the County's evidence that only sludge from the wastewater treatment plant was shipped to the landfill is noted, there was sludge in the caustic pond[7/] as well as in the wastewater treatment plant. Moreover, for all that appears commercially pure grade phenol was not normally discharged to the caustic pond in order to maintain phenol loadings to the wastewater treatment plant. These facts plus considerations in the cited preamble to the regulations, lean against ready acceptance of the County's contention it is entitled to judgment

---

[6/] See 45 Fed, Reg. 33093 (May 19, 1980) providing:

> This temporary deferral, it should be noted, is confined to bona fide "legitimate" and "beneficial" uses and recycling of hazardous wastes. Sham uses and recovery or reclamation activities--e.g., "landfilling" or "land reclamation" which is actually disposal and burning organic wastes that have little or no heat value in industrial boilers under the guise of energy recovery--are not within its scope and, if conducted in violation of Subtitle C requirements, will be subject to enforcement under Section 3008 of RCRA. In enforcing this provision, EPA will be particularly suspicious of use, and reclamation operations which were not conducted prior to the publication of these regulations.

[7/] Although the County asserts (Memorandum at 8) that "(n)o sludge was produced from the caustic pond," Mr. Ice states (affidavit at para. 10) that when the caustic pond was emptied during the period December 1988 through March 1989, accumulated sludge was shipped to a hazardous waste incinerator.

in its favor.[8/] In any event, doubts as to the facts are to be resolved in favor of the nonmoving party. Moreover, even if the requirements for an accelerated decision appear to have been met, entry of such a decision under Rule 22.20 is discretionary. In short, the ALJ can always elect to hear the evidence.

O R D E R

Having reconsidered the order of October 11 insofar as it denied the County's motion for an accelerated decision on the issue of beneficial use of the spilled phenol, the order is affirmed.

II. Formaldehyde Losses

The County contends that formaldehyde losses at the OCC facility, which are estimated to range from 15,000 to 25,000 pounds annually, did not render sludges in the wastewater treatment plant hazardous, because the wastewater discharges are subject to regulation under the Clean Water Act and because the losses are normal raw material handling losses within the de minimis rule, 40 CFR § 261.3(a)(2)(iv)(D). In this regard, the County's evidence showed that the numbers of piping, joints, flanges, valves, etc. at the facility were within industry standards for the chemicals involved and were well maintained.

Notwithstanding the fact that formaldehyde losses in absolute terms seemed large, the October 11 order concluded that the losses could be within the de minimis exemption, if it be

---

[8/] It is worthy of note that the Director of the OEPA apparently summarily rejected similar arguments by OCC.

assumed the formaldehyde mixture was wastewater subject to regulation under the Clean Water Act. Because a trial on other issues appeared to be necessary, a ruling to that effect was deferred.

Moving for reconsideration, the County argues that judgment on an issue on which it is entitled to an accelerated decision should not be deferred merely because a trial may be necessary on other issues. To eliminate any doubts that influent to the OCC wastewater treatment plant was subject to regulation under the CWA, the County has attached a copy of the NPDES permit issued to OCC by EPA.

In its opposition to the motion, Complainant refers to a formaldehyde spill of an undetermined quantity at the OCC facility on May 28, 1966, which was disclosed by OCC in response to an EPA section 3007 information request. OCC indicated that spilled formaldehyde was pumped to trailers for use in production and that contaminated soil was sent to a secured landfill. Complainant says it is developing a further information request to identify past and present OCC employees with knowledge of the spill. The County argues that this spill is not relevant, because there is no evidence that the spilled formaldehyde or any portion or residue thereof entered the wastewater treatment plant.

O R D E R

On reconsideration, it is concluded that formaldehyde losses at the OCC facility are within the de minimis exemption set forth

in 40 CFR § 261.3(a)(2)(iv)(D) and the County's motion for an accelerated decision on that issue is granted.

III. Spent Acetone Solvent

In 1984, 2,000 pounds (four 55-gallon drums) of spent acetone solvent were discharged to the caustic pond at the OCC facility in a very short time interval. Acknowledging, as it must, that spent acetone is a listed hazardous waste (F003), the County contends that acetone is listed solely because of the characteristic of ignitability and that, because the acetone after mixing with other liquids in the caustic pond is no longer ignitable under the test in 40 CFR § 261.21(a)(1) (flash point of less than 140°F), the acetone qualifies for the exception to the mixture rule in 40 CFR § 261.3(a)(2)(iii). That is, the waste was a mixture of a solid waste and a hazardous waste that was listed in Subpart D solely because it exhibits one or more characteristics of hazardous waste identified in Subpart C and the resultant mixture no longer exhibits any characteristic of hazardous waste identified in Subpart C.

The October 11 order concluded that, because spent acetone is a hazardous waste from nonspecific sources (F003) which had not been excluded from regulation under sections 260.20 and 260.22, the operative question was when the acetone became spent or ready to be discarded, i.e., when it first met the listing description in Subpart D (section 261.3(b)(1)), rather than whether it was ignitable after being mixed or diluted by other

wastes in the caustic pond.[9/] The order pointed out that any other conclusion would make circumvention of the regulation by mixing or dilution a simple matter.

Moving for reconsideration, the County argues that the interpretation adopted by the order is erroneous, because it would render the exemptions in sections 261.3(a)(2)(iii) and (iv) mere surplusage. Pointing out that section 261.3(a) specifies when a solid waste is a hazardous waste, while section 261.3(b) specifies when a solid waste becomes a hazardous waste, the County asserts that, in order to give effect to the exemptions contained in sections 261.3(a)(iii) and (iv), sections 261.3(b)(1) and (2) must be read as defining the time at which hazardous waste status attaches to wastes which are defined as hazardous wastes by section 261.3(a), and thus applying only to mixtures which are not exempted from the definition of what is a hazardous waste in sections 261.3(a)(2)(iii) and (iv).[10/]

The County says that the concern expressed in the order to the effect that a literal reading of section 261.3(a)(2)(iii) would permit ready circumvention of the regulation by dilution or

---

[9/] Asserting that section 261.3(b)(1) is not applicable, the County argues that the acetone and wastewater mixture at issue here does not meet the description for any listed waste. Be that as it may, the spent acetone solvent clearly meets the description for an F003 waste.

[10/] The only exception, however, from the provisions of section 261.3(b), specifying when a solid waste becomes a hazardous waste is section 261.3(a)(1), which refers to the exclusions in section 261.4.

mixing is misplaced, because section 260.10 defines treatment as including mixing of a listed waste with another material to render it non-hazardous. Accordingly, the County argues that the dumping or disposal of the spent acetone into the caustic pond was clearly a regulated activity.

Complainant does not dispute the County's interpretation of the regulation, but points out that ignitability tests relied upon by the County were performed on a mixture of acetone and water rather than the wastewater and acetone mixture which contributed to treatment plant sludge disposed of at the Hardin County landfill. Additionally, Complainant points to information from OCC that other ignitable wastes, including methanol (U154), spent methanol (F003), dimethylamine (U092) and xylene (U239), were discharged to the wastewater treatment plant. At a minimum, Complainant says there is a genuine issue of material fact as to whether the acetone and wastewater mixture exhibited the characteristic of ignitability.

D I S C U S S I O N

The interpretation of 40 CFR § 261.3 adopted in the October 11 order, i.e., that the spent acetone solvent--a listed hazardous waste (F003)--remained a hazardous waste unless excluded from the lists in accordance with 4 CFR §§ 260.20 and 260.22, is supported by Figure 2, 40 CFR Part 260, App. I. Figure 2 deals with the definition of hazardous waste and indicates that a solid waste listed in Part 261, Subpart D, which has not been excluded from the lists in Subpart D or section 261.3 in

accordance with sections 260.20 and 260.22 is a hazardous waste. Figure 2 further indicates that the question of whether the listed waste or a mixture thereof exhibits any of the characteristics in Subpart C is not reached unless the waste has been excluded from the lists in Subpart D or section 261.3 in accordance with sections 260.20 and 260.22.

The foregoing indicates there is room for doubt whether section 261.3(a)(2)(iii) is to be read literally in that it makes no difference how the listed waste or wastes become a mixture with other solid waste.[11/] Cf. River Cement Company, RCRA (3008) 83-9 (Final Order, February 4, 1985) (River Cement's interpretation of ambiguous regulation, 40 CFR § 261.2(b) (1980), acknowledged to be reasonable, rejected because it would allow ready circumvention of hazardous waste incineration regulation). While the County's assertion that OCC's action in dumping the spent acetone into the caustic pond was a regulated activity, because the mentioned activity meets the definition of treatment in section 260.10, is recognized, the fact remains that acceptance of the County's position allows the conversion of a

---

[11/] The October 11 order overlooked section 260.3 providing that the singular includes the plural and vice versa and thus the order's reliance on "waste" in section 261.3(a)(2)(iii) being in the singular was misplaced. The stated rationale for section 261.3(a)(2)(iii) is, however, that the mixture could be tested to determine whether it exhibited the characteristics of hazardous waste (46 Fed. Reg. 56588) and, it seems logical that the more wastes there are in the mixture, the more difficult or onerous the testing would be.

listed hazardous waste into an unregulated waste without compliance with procedures in sections 260.20 and 260.22.

It is noted that the preamble to the regulation (46 Fed. Reg. 56582) which adopted the exception to the mixture rule in section 261.3(a)(2)(iii) (October 11 order at note 26) does not include language such as that for "Mixtures of Wastewater and Hazardous Waste From Non-Specific Sources Listed in 40 CFR 261.31," which makes it clear that the basis of the exception is the concept that listed hazardous wastes, e.g., spent solvents, are frequently discharged into wastewaters in relatively small quantities as a convenient and practical way of managing such wastes and that the resulting mixtures are appropriately treated in wastewater treatment facilities subject to regulation under the CWA.[12/] Nevertheless, there is no exception in section

---

[12/] See 46 Fed. Reg. 56584 providing in pertinent part:

> A. Mixtures of Wastewater and Hazardous Waste From Non-Specific Sources Listed in 40 CFR 261.31
>
> The Agency believes that, of the hazardous wastes listed in § 261.31, only the spent solvents need be covered by today's amendment because these are the only wastes in § 261.31 that seldom are principal wastestreams, and often are discharged in small quantities into wastewaters as a practical way of managing them. Most of the other wastes listed in § 261.31 are principal wastestreams generated in manufacturing operations, and typically would be introduced into wastewaters in relatively large quantities.
>
> Spent solvents are generated in a great many manufacturing and allied operations such as degreasing, maintenance, extraction, purification and constituent application procedures. (The same substances may also be used in a manufacturing process as chemical

(continued...)

261.3(a)(2)(iii) or the preamble thereto for mixtures resulting from the intentional disposal of hazardous waste.[13/] It is therefore concluded that the fact the spent acetone solvent may

---

[12/](...continued)
reactants or process intermediates, and, when so used, are not considered to be spent solvents.) It is not always possible to collect and segregate spent solvents (e.g., various spills or incidental losses from degreasing or maintenance operations); those materials often drain or are washed into wastewater sewer systems. Also, it is often practical and resonable (sic) to discharge the small quantities of spent solvent generated in diverse and separate manufacturing and allied operations into the nearest sewer connected to the wastewater treatment system. These small quantities of spent solvent are conveniently managed by and treated in the chemical or biological wastewater treatment system.

* * * *.

[13/] Although there is some indication in the preamble that the exceptions to the mixture rule were limited to mixtures resulting from normal manufacturing or laboratory operations, this is considered not to alter the above conclusion. See 46 Fed. Reg. 56582-583 providing in pertinent part:

> * * * Strict application of the mixture rule would cause to be hazardous waste a mixture of large volumes of non-hazardous wastewater and the relatively small amounts of listed hazardous wastes which are introduced into the wastewater as a result of normal manufacturing operations or on-site laboratory operations. Resulting wastewater treatment sludges would likewise be hazardous wastes under § 261.3(c)(2). In many cases, however, these relatively small amounts of listed hazardous wastes are likely to be greatly diluted in the wastewater, so that the resulting mixture is not hazardous. In addition, hazardous constituents of the listed hazardous wastes may adsorb to soil, degrade or otherwise attenuate during the course of wastewater treatment, further reducing the potential hazardousness of the mixture. A presumption of hazardousness is not warranted in these situations.

have been discharged to the caustic pond for the purpose of disposal is not controlling.

It does not follow, however, that the County has established its claim to an accelerated decision in its favor on this issue. This is because there is an issue of material fact as to whether flash point tests on an acetone and water mixture, relied upon to establish that the spent acetone and wastewater mixtures was not ignitable, accurately predict the ignitability of the spent acetone and wastewater mixture present in the caustic pond at the time of the discharge.

O R D E R

Upon reconsideration, the denial of the County's motion for an accelerated decision on the issue of the spent acetone and wastewater mixture constituting a hazardous waste is affirmed.

C O N C L U S I O N

The October 11 order is affirmed in part and modified in part as indicated above. The parties will file prehearing exchanges on or before February 22, 1991.

Dated this 30th day of January 1991.

Spencer T. Nissen
Administrative Law Judge

CERTIFICATE OF SERVICE

This is to certify that the original of this **ORDER ON MOTION FOR RECONSIDERATION**, dated January 30, 1991, in re: Hardin County, Ohio, c/o Hardin County Commissioners, Dkt. No. RCRA-V-W-89-R-29, was mailed to the Regional Hearing Clerk, Reg. V, and a copy was mailed to Respondent and Complainant (see list of addressees).

Helen F. Handon
Secretary

DATE: January 30, 1991

ADDRESSEES:

Philip C. Schillawski, Esq.
Squire, Sanders & Dempsey
1300 Huntington Center
41 S. High Street
Columbus, OH 43215

Brett L. Warning, Esq.
Assistant Regional Counsel
Office of Regional Counsel
U.S. EPA, Reg. V
230 South Dearborn Street
Chicago, IL 60604

Ms. Beverely Shorty
Regional Hearing Clerk
U.S. EPA, Region V
230 South Dearborn Street
Chicago, IL 60604