

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY  
BEFORE THE ADMINISTRATOR

IN THE MATTER OF

R.R. DONNELLEY & SONS COMPANY,                      Docket No. V-W-004-95

Respondent

**RULINGS ON MOTIONS FOR ACCELERATED DECISION**

On January 18, 1995, the United States Environmental Protection Agency, Region 5 ("EPA" or "Complainant"), filed an administrative complaint under Section 3008(a)(1) of the Resource Conservation and Recovery Act (RCRA), 42 U.S.C. § 6928 (a) (1). Counts I and II alleged that R.R. Donnelley & Sons Company, a commercial printing company with a facility located in Warsaw, Indiana, ("Donnelley" or "Respondent") violated certain RCRA land disposal and storage requirements for waste that Respondent generates at its facility, which falls under the F006 hazardous waste listing in 40 C.F.R. § 261.31(a), governing wastewater treatment sludges from electroplating operations.<sup>1</sup> Respondent served its answer on February 10, 1995, denying that waste from its operations met the F006 listing.

On April 28, 1995 Complainant filed a motion for an accelerated decision on the scope of the F006 listing in 40 C.F.R. § 261.31(a). Respondent submitted a response in opposition to Complainant's motion, and filed a cross-motion for accelerated decision seeking dismissal of the Complaint. Complainant then served a reply and opposition to Respondent's cross-motion for accelerated decision. In that reply, Complainant also sought an accelerated decision that no genuine issue of material fact existed regarding its allegation that Respondent conducts electroplating operations. The pleading cycle concluded with additional replies by both parties, on September 15, 1995.

The undersigned was redesignated as the Administrative Law Judge presiding over this proceeding in an order dated March 6, 1996.

Background

Respondent, the largest commercial printing concern in the United States, operates a printing facility in Warsaw, Indiana. One of the processes that Respondent uses in its operations is gravure cylinder preparation. Gravure cylinder preparation is the pre-press preparation of cylinders for use in gravure printing, an engraving process. Although many variations exist, gravure cylinder preparation typically consists of a steel base cylinder which is coated with copper. After preparatory cleaning and treatment, images are etched or engraved into the cylinder, and ink can then be transferred to paper from the etched or engraved image area in a rotary press. To increase press life, chrome is electrodeposited on the cylinder. When a press run is complete, used gravure cylinders are reclaimed by mechanically stripping off the chrome plating, grinding the etched copper smooth, and then depositing a new layer of copper onto the cylinder.<sup>2</sup> (Complainant's Motion, Ex. E. at 27-29, 54.) Waste, containing concentrations of nickel, chromium and other constituents, is generated from the upgrading and repairing of the cylinders.

The Complaint alleges that between June 1992 and May 1993, Respondent transported three shipments of wastewater treatment sludge from its gravure cylinder preparation process to Cyprus Miami Mining Corporation in Claypool, Arizona. Complainant contends that these land disposal shipments violated 40 C.F.R. § 268.7 (a) (1), (a) (7) by failing to have a land disposal restriction notification with each manifest and by failing to retain on-site a copy of all notifications for at least five years from the date the waste was sent off - site for treatment (Count I). Also, before those shipments occurred, the Complaint alleges that Respondent Stored F006 hazardous waste at its facility for more than 90 days in violation of 40 C.F.R. § 268.50 (a) (1), and without complying with RCRA's generator storage requirements located at 40 C.F.R. 262.34, and 40 C.F.R. Parts 264 and 265 (Count II).

The crux of the controversy between the parties is whether or not the waste generated from Respondent's gravure cylinder preparation operations are within the scope of the F006 hazardous waste listing in 40 C.F.R. § 261.31(a), regulating wastewater treatment sludges from electroplating operations. The parties acknowledge that the term "electroplating operations" is undefined in both RCRA and its implementing regulations. To discover whether or not the F006 listing may apply to Respondent's gravure cylinder preparation operations, a review of the regulatory history is necessary.

- F006 Regulatory History

In Section 3001 of RCRA, Congress authorized EPA to issue regulations for solid waste that must be managed as hazardous waste. The F006 listing in Section 261.31 was part of EPA's first phase of implementing this directive. It first appeared in interim final form on May 19, 1980. 45 Fed. Reg. 33084. The preamble provided that only a general methodology used to support listings would be described because detailed justification for the listings was provided in specific background documents. Id. at 33112-13. EPA explained that its authority to list classes of wastes generically was fully in accord with Congressional intent under Section 3001 of RCRA, so long as those class listings exhibited a uniformity of hazard, and were sufficiently specific to enable generators to determine if their wastestreams were included within the listing. Id. at 33114. As originally promulgated, Section 261.31, hazardous waste from non-specific sources, identified the F006 listing as "wastewater treatment sludges from electroplating operations." Id. at 33123.

After public comments were received, EPA determined that the interim final F006 listing was overbroad because it included electroplating processes, mainly in the iron and steel industry, that did not generate those hazardous constituents of concern. 45 Fed. Reg. 74884, 74887 (November 12, 1980) . Accordingly, the interim final rule was modified to include certain exclusions for wastes generated by several electroplating processes in the iron and steel industry. The final F006 listing of generic hazardous wastes from non-specific sources, under 40 CFR §261.31(a), as it still appears today, thus reads as follows:

Wastewater treatment sludges from electroplating operations except from the following processes: (1) Sulfuric acid anodizing of aluminum; (2) tin plating on carbon steel; (3) zinc plating (segregated basis) on carbon steel; (4) aluminum or zinc-aluminum plating on carbon steel; (5) cleaning/stripping associated with tin, zinc and aluminum plating on carbon steel; and (6) chemical etching and milling of aluminum.

As mentioned above, the rule itself does not include a definition of "electroplating" or "electroplating operations."

The background documents to the F006 listing provide guidance on the meaning of "electroplating operations." In the background document accompanying the final listing, the Process Description reads as follows:

Electroplating, as defined in this document, includes a wide range of production processes which utilize a large number of raw materials. Production processes include common and precious metals electroplating, anodizing,

chemical conversion coating (i.e., coloring, chromating, phosphating and immersion plating), electroless plating, chemical etching and milling and printed circuit board manufacturing. (Complainant's Motion, Ex. B, p. 107.)

The paragraph continues by further describing the process and uses of electroplating. Electroplating typically involves the application of a thin surface coating to a metal by means of electrode decomposition in order to provide corrosion protection, increased wear resistance, or for decorative purposes.<sup>3</sup>

The final background document also included a section addressing comments on the interim final listing. In response to a comment that this listing included processes which were not part of EPA's original F006 proposal, EPA responded as follows:

"Although the term 'electroplating' was not specifically defined either by the listing or appropriate background document, the term was defined by the Agency under regulations promulgated by the Effluent Guidelines Division (EGD). It has been Agency policy to use the same definitions for the same terms throughout the Agency to avoid confusion among the regulated community. Only when the Agency intentionally defines terms differently would the Agency believe it has an obligation to inquire whether a listing description -- in this case "electroplating wastewater treatment sludges"-- encompassed the same processes as those defined under the EGD regulatory listing." (Id. at 135-136).

Thus, the same processes defined as "electroplating" in EGD's regulations would be covered by the F006 listing.

On December 2, 1986, EPA published an interpretive rule to clarify its view on the scope of the F006 listing. 51 Fed. Reg. 43350. In discussing the prior history of the F006 listing, EPA explained that, as mentioned in the final background document, it intended "electroplating operations" to cover the same processes as included in EGD's pretreatment standards for the electroplating point source category. These processes included common and precious metals electroplating, anodizing, chemical conversion coating, electroless plating, chemical etching and milling, and printed circuit board manufacturing. Id. However, the Agency reconsidered its interpretation of the F006 listing because some of these processes were omitted from the final rule's promulgation. Due to this absence, EPA announced that the F006 listing only covered wastewater treatment sludges from common and precious metals electroplating, anodizing,

chemical etching and milling, and cleaning and stripping when associated with these processes. Id. at 43351.

As stated in the final background document and reiterated in the interpretive rule, EPA intended "electroplating operations" in the F006 listing to cover the same processes defined in EGD's regulations for the electroplating point source category. This cross-reference to EGD's regulations is the source of the difficulty in determining the scope of the F006 listing. The problem is that the EGD's regulations exclude the printing and publishing industry generally from the electroplating point source category, and specifically exclude wastewater from gravure cylinder preparation from pretreatment standards.

Initially, the Effluent Guidelines Division ("EGD") divided the electroplating point source category into several subcategories. Under the industry categorization section, which explained in detail the seven subcategories, it was stated:

For the purposes of this document, the printing and publishing industry..... are specifically excluded from this subcategorization even though they do perform similar operations. (Development Document for Existing Source Pretreatment Standards for the Electroplating Point Source Category, August 1979).

In the preamble to the final rule, EPA again cited this exclusion. However, the following sentence stated that future electroplating point source category regulations were expected to cover electroplating operations in the printing industry also. 44 Fed. Reg. 52590, 52591 (September 7, 1979). The pretreatment standards for the electroplating point source category set forth the subcategories of electroplating operations in 40 C.F.R. Part 413. An exclusion from these standards for gravure cylinder preparation was listed in 40 C.F.R. § 413.01(c), in accord with the Agency's stated intent to exclude printing operations. Id. at 52618. This exclusion has been maintained continuously to this day.

Although EPA engaged in further categorization of point sources, and rulemaking for additional pretreatment and effluent standards, it has never removed the exemption for gravure cylinder preparation. The new metal finishing point source category was created in order to regulate electroplating and other metal finishing processes within the same plant. The effect was to shift most electroplaters to the metal finishing point source category, governed by 40 C.F.R. Part 433. 48 Fed. Reg. 32462, 32464 (July 15, 1983). The exemption of

gravure cylinder preparation from pretreatment standards was reconfirmed in a Federal Register

clarification notice published on November 7, 1986 (51 FR 40420). The EPA stated that it had not specifically studied treatment technologies for gravure cylinder preparation. The exclusion for gravure cylinder preparation has remained in these regulations, and is currently located at 40 C.F.R. § 433.10(c)(1).

- Straus Letter

On April 27, 1987, Edgar R. Santiago, who had the title of Environmental and Safety Engineer with Donnelley, wrote a letter addressed to Matthew Straus, of the EPA's Office of Solid Waste. Mr. Santiago requested clarification of the December 2, 1986 interpretive rule with regard to the omission of the words "electroplating operations" in the initial clause of the defining paragraph in the rule. Mr. Santiago was concerned that this omission had the effect of including processes utilized throughout the printing industry within the scope of the F006 listing. He cited the reference in the Background Document on F006 to the EGD's definition of "electroplating operations" that specifically excluded the printing industry from pretreatment standards.

Mr. Straus, Chief of the Waste Characterization Branch, Office of Solid Waste and Emergency Response, responded in a letter dated May 22, 1987. Mr. Straus responded specifically to Mr. Santiago's concerns as follows:

"In your letter you imply that certain printing industry processes are not included in the F006 listing because they were exempted from the Effluent Guidelines Division's requirements for pretreatment standards for the electroplating point source category. We disagree with your interpretation. Neither the F006 listing background document, nor the August 1979 Development Electroplating Point Source Category referenced therein, exclude the printing industry from the definition of electroplating operations. That is, while the Office of Water may have elected not to require the printing industry to meet the electroplating pretreatment standards, that action does not exclude from the F006 listing any electroplating wastewater treatment sludges that may be generated by the printing industry."

The parties have not presented any facts with their motions indicating any follow-up correspondence or actions with respect to the Straus letter.

## DISCUSSION

The EPA Rules of Practice, at 40 C.F.R. § 22.20(a), authorize the ALJ to render an accelerated decision where no genuine issue of material fact exists, and a party is entitled to judgment as a matter of law, as to all or any part of a proceeding. Both Complainant's and Respondent's accelerated decision motions first seek a determination on whether or not the scope of the F006 listing can cover gravure cylinder preparation. This question requires an interpretation of the applicable regulations and is thus a question of law ripe for resolution by accelerated decision. The question of whether Respondent was afforded fair notice of the Agency's interpretation of the F006 listing is also a question of law appropriate for resolution by accelerated decision.

### Permissibility of EPA's Interpretation

Generally, an agency's own interpretation of its regulation will be given deference if it is logically consistent with the language of the regulation and serves a permissible regulatory function. General Electric Co. v. E.P.A., 53 F.3d 1324, 1327 (D.C. Cir. 1995) . This is especially so where a highly technical statutory scheme is implemented by an even more complex and comprehensive regulatory scheme. (Id). However, such a degree of deference need not be extended by the ALJ at this juncture where the Agency interpretation is only that of program staff as one party to an enforcement proceeding, and is not the final Agency action reviewable by the courts. If the Agency's interpretation is upheld, it must still be found to provide adequate fair notice of the required conduct in order for civil penalties to be imposed on a respondent. General Electric, supra, at 1329.

The initial focus in interpreting any regulation must be the language of the regulation itself. Here, 40 CFR §261.31 states that "the following solid wastes are listed hazardous wastes from non-specific sources. ." F006 is then listed as "wastewater treatment sludges from electroplating operations" with certain exceptions (See full quotation on page 3 above.). The exceptions do not include the printing industry or gravure cylinder preparation. The purpose of these generic listings at §261.31 is broad -- to regulate hazardous wastes from "non-specific" sources. Within the four corners of the language of the regulation, the Respondent's gravure cylinder preparation, provided it produces wastewater sludges from electroplating operations, is covered. The EPA's interpretation is certainly consistent with the regulatory language and statutory purpose.

There is no evidence to contradict the EPA's assertions that the Office of Solid Waste did not intend to exclude wastewater sludges from the printing industry's electroplating operations from the F006 listing. Hence, EPA's interpretation is found permissible and will be upheld if it provided fair notice to Respondent.

#### Fair Notice Prior-to the Straus Letter

The EPA, however, has only itself to blame for the problems with notice to the Respondent and the printing industry in general. EPA has never refuted in any official rulemaking its reference to the definition of "electroplating operations" in the EGD's regulations, which specifically exclude the printing industry and gravure cylinder preparation. EPA argues that the exclusion of these processes from pretreatment standards was based on lack of sufficient study and not a finding that they did not constitute "electroplating operations." This is hardly obvious, however, to the reader of the EGD's development documents and the regulations themselves, 40 C. F.R. §§413. 01 (c) 433. 10 (c) (1). The language straightforwardly exempts the printing industry and gravure cylinder preparation. The reference to the EGD's exemption was seemingly reaffirmed in the 1986 interpretive rule.

It is also unavailing for the EPA to point to the statements in the preamble to the electroplating point source pretreatment standards. The Agency there stated that, although currently excluded, future regulations were expected to cover similar electroplating operations in the printing industry (44 FR 52590-91, Sept. 7, 1979). In view of the fact that the printing industry remains exempt to this day, this statement can only be considered speculative. It also falls short of including gravure cylinder preparation within any definition of "electroplating operations."

It would be equally logical to conclude that EPA was unable, in the intervening 17 years, to find sufficient hazard in the effluent from gravure cylinder preparation to justify promulgation of pretreatment and wastewater standards. If the wastewater itself is not regulated as a pollutant of concern, why should the wastewater sludge be considered hazardous? In any event, Respondent cannot be charged with undertaking an exhaustive and intricate analysis of the Agency's regulatory actions and motivations, including drawing analogies or distinctions between two parallel regulatory programs. This is apparently a situation where the implications of one program division's reliance on another program's definitions and regulations had unintended consequences. The Respondent should not be required to be a bureaucratic mind reader. Respondent

was entitled to rely on a published reference and definition that on its face excluded its operations from the EGD's regulations, and, in turn, from the F006 listing.

This conclusion is not altered by the fact that the reference to the definition excluding the printing industry was found in the background document rather than the regulation itself. In In re U.S. Nameplate Co., 2 EAD 147(1986), the EPA sought to impose a civil penalty on a generator of chemical etching wastes for failure to obtain a RCRA permit for those wastes under F006. The F006 listing at that time contained no reference to chemical etching. The Federal Register publication had cited the background document for more detailed descriptions. The Chief Judicial Officer held that the reliance on the background documents for including chemical etching as within the scope of the F006 listing did not provide sufficient notice to the respondent that its operations were included in the listing, and dismissed the charges. Here, however, the Respondent is relying on a statement in the background document, of which it had notice, as a shield against liability. In addition, the reference to the EGD's definition of the scope of electroplating operations was repeated in an officially published interpretive rule on December 2, 1986 (51 FR 43350).

In summary to this point, it is found that the EPA's interpretation of the F006 listing as including the printing industry and any electroplating wastewater sludge from gravure cylinder preparation, is a permissible and valid interpretation. However, the Agency failed to refute the apparent exclusion of the printing industry (and gravure cylinder preparation) from the F006 listing by reference to the EGD's pretreatment regulations. This resulted in insufficient notice to Respondent that its operations could be covered by the listing, at least until the time of the Straus letter in May 1987.

#### Notice After the Straus Letter

The promulgation of the December 2, 1986 interpretive rule led Respondent's Environmental and Safety Engineer, Edgar R. Santiago, to contact the EPA for a clarification. The interpretive rule did reaffirm that: "As explained in the Listing Background Document for F006, the Agency identified the listing for 'electroplating operations' to cover the same processes as was [sic] included under the Effluent Guidelines Division's pretreatment standards for the electroplating point source category." (51 FR 43350) . However the rule did not explicitly mention the printing industry, and instead explained that the F006 listing was considered to be "inclusive of wastewater treatment sludges from

only the following processes: (1) Common and precious metals electroplating . . . ; (2) anodizing . . . ; (3) chemical etching and milling . . . ; and (4) cleaning and stripping . . ." This led Mr. Santiago to state in his letter to Mr. Straus that the new definition could be construed to cover processes used in the printing industry, such as cleaning and stripping, although the printing industry was excluded under the EGD's regulations.

Mr. Straus replied in no uncertain terms that he disagreed with Donnelley's interpretation. He stated quite clearly that the EGD's exclusion of the printing industry from pretreatment standards did not mean that any wastewater treatment sludges generated by the printing industry were excluded from the F006 listing (See full quotation above at page 7.). This letter can only be considered an actual pre-enforcement notice of the Agency's interpretation. (See General Electric, supra, 53 F3d 1329).

As Respondent asserts, the Straus letter does not specifically address gravure cylinder preparation or the factual definition of "electroplating operations." Hence those potential factual issues remain with respect to Respondent's operations and are discussed below. The letter does however clearly set forth the purely legal Agency interpretation that the printing industry is not entitled to a blanket exemption from the F006 listing by virtue of the background document's reference to the EGD's definition of "electroplating operations" and, in turn, the EGD's regulations' exclusion of the printing industry and gravure cylinder preparation from pretreatment standards.

Although there was apparently some difficulty in retrieving the Santiago - Straus correspondence from its files<sup>4</sup>, Respondent has not raised any facts showing the letter was ineffective in providing notice to the company of EPA's interpretation. Respondent argues that the letter was insufficient since EPA's interpretation was not officially promulgated as a rule. Certainly it would have been preferable had EPA promulgated another interpretive rule clarifying that any electroplating wastewater sludges generated by the printing industry were not exempt from the F006 listing by virtue of the exclusion of that industry from the EGD's pretreatment standards. After all, the EPA had just been informed that the largest commercial printing concern in the country did in fact believe it was exempt from the F006 listing for that reason.

One might expect that there would have been at least some follow-up to this correspondence by the parties considering the importance and broad applicability of the issue; yet none appears in the record. On the record presented with these cross-motions it must be concluded that the Straus letter

constituted a previolation contact with a regulated party that provided sufficient notice of the Agency's permissible interpretation to support a finding of liability. (See General Electric Co., supra, at 1329). Since the letter was received well before the 1992 and 1993 shipments of wastes alleged in the Complaint, Respondent may be found liable for the alleged violations. The circumstances surrounding Respondent's actual notice of the EPA's interpretation may, however, be raised at the hearing on the issue of the amount of any penalty.<sup>5</sup>

#### Remaining Factual Issues

Complainant has also moved for an accelerated decision finding that Respondent conducts electroplating operations that generate wastewater treatment sludge. As discussed above, Respondent is potentially liable for the alleged violations of RCRA for improperly managing hazardous waste generated from its Warsaw, Indiana facility. Respondent's ultimate liability still depends however on factual findings concerning whether Respondent's gravure cylinder preparation constitutes "electroplating operations" that generated wastewater treatment sludges as alleged in the Complaint.

The parties have each submitted affidavits by expert witnesses that address the nature of Respondent's gravure cylinder preparation operations.<sup>6</sup> A review of those affidavits indicates that genuine issues of material fact remain as to whether Respondent's processes constitute electroplating operations that generate wastewater sludge. For example, Mr. Kalina, Respondent's expert, states that the dechroming process is done without electric power, contrary to the facts alleged by Mr. Lowry. Respondent also claims its actual electrodeposition of chromium on the cylinders does not generate any wastewater or sludge since it is a closed system. The parties also offer differing interpretations of the analytical results of Respondent's sludge.

These factual matters will have to be explored at an evidentiary hearing, with cross-examination, in order to elucidate the precise steps in Respondent's gravure cylinder preparation and to determine whether the process generated the wastewater treatment sludge that is the subject of the Complaint. The working definition for "electroplating operations" within the meaning of F006 remains somewhat at issue as well, and will also be addressed through the hearing process. Complainant will of course bear the burden of proving that Respondent generated F006 wastes and improperly managed them as alleged in the Complaint.

#### Summary of Rulings

1. Complainant's motion for accelerated decision on the scope of the F006 listing is granted. As of the date of its receipt of the Straus letter in May 1987, Respondent was on notice of the EPA's permissible interpretation that the F006 listing covered any wastewater sludges from electroplating operations generated by Respondent's gravure cylinder preparation.

2. Respondent's motion for accelerated decision dismissing the Complaint is denied.

3. There remains a genuine issue of material fact concerning whether Respondent's gravure cylinder preparation processes constitute "electroplating operations" that generate wastewater treatment sludges as alleged in the Complaint.

4. Complainant's motion to strike defenses and Respondent's motion to strike portions of Complainant's response will not be specifically addressed. They may be considered denied except to the extent they may have been addressed in the body of these rulings.

Further Proceedings

This matter is now ready to be set for the filing of prehearing exchanges, followed by the scheduling of the evidentiary hearing. A Prehearing Order will be issued shortly establishing a schedule for these further proceedings.

Andrew S. Pearlstein  
Administrative Law Judge

Dated: December 16, 1996  
Washington, D.C.

In the Matter of R.R Donnelley & Sons Company, Respondent

Docket No. V-W-004-95

CERTIFICATE OF SERVICE

I certify that the foregoing **Ruling on Motions For Accelerated Decision**, dated December 16, 1996, was sent this day in the following manner to the addresses below:

Original by Regular Mail to:

Jodi Swanson-Wilson  
Regional Hearing Clerk  
U.S. EPA  
77 West Jackson Boulevard  
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Copy by Regular Mail to:

Attorney for Complainant:

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Maria Whiting  
Legal Staff Assistant

Dated: December 16, 1996

<sup>1</sup> Counts III and IV were dismissed in an order dated August 29, in response to Complainant's unopposed motion seeking this dismissal on August 23.

<sup>2</sup> This is a general industry description taken from the background documents attached to Complainant's motion, and does not find or imply that Respondent conducts "electroplating operations" within the meaning of the F006 listing.

<sup>3</sup> "Electroplate" is defined in the dictionary as "to cover or coat with a thin layer of metal by electrodeposition." Webster's II New Riverside University Dictionary, 1988.

<sup>4</sup> See letter from Monica A. Roth, Esq., an attorney for Donnelley to Monica Smyth, Esq. of the EPA, dated September 9, 1994, in Complainant's motion, Exhibit A.

<sup>5</sup> Under RCRA §3008(a)(3), the amount of any civil penalty is to be determined by taking into account the seriousness of the violation and any good faith efforts of the respondent to comply with applicable requirements.

<sup>6</sup> See Affidavit and Supplemental Affidavit of Dale G. Kalina, submitted with Respondent's motion and response; and Affidavit of Joe H. Lowry, Ph.D., submitted with Complainant's response.